

Transparency should be the rule in Kentucky pensioners' long-running challenge to hedge funds

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By Al Cross

May 20, 2024

Commentary

Dauids v. Goliath in Franklin Circuit Court



Franklin Circuit Judge Thomas Wingate has recently issued rulings allowing Kentucky pensioners to pursue their lawsuit against some giants of the financial world for alleged breach of fiduciary duty in their handling of investments for Kentucky's public employee pension fund. (Getty images)

The details are still a bit sketchy, but it is clear that attorneys representing the parties in Kentucky's pension litigation will return to Franklin Circuit Court for a hearing in *Tia Taylor, et al. v. KKR & Co, LP, et al.* on Monday after Judge Thomas Wingate gave the green light for the case(s) to proceed.

In a nutshell, the case pits state pensioner *Dauids* against hedge fund/private equity *Goliaths* in an action seeking damages "from some of the biggest names in finances," based on alleged "breaches of fiduciary duty and other bad conduct in the sale and management of custom hedge funds" in relation to the woefully underfunded Kentucky state pension fund.

The playing field has been leveled, at least to some extent, by the pensioners' legal team — led, writes finance and economics authority Yves Smith, “by Michelle Lerach, with her formidable and controversial husband, one-time top securities litigator Bill Lerach.” But for their dogged pursuit of the financial giants — against ostensibly overwhelming odds — the cases might have ended several years ago.

In her blog “Naked Capitalism,” Smith writes: “After yet another long detour from the original case, *Mayberry v. KKR*, first filed in 2017 and now replaced by overlapping new actions, Judge Wingate has finally completed what must have been the painful process of evaluating the merits of a very large number of motions to dismiss.”

“The giant fund managers are almost certain to be most afraid of discovery, since the sharp practices they used with Kentucky Retirement Systems were very likely to have been replicated at other public pension funds.” – Yves Smith, writing in “Naked Capitalism”

On May 1, Judge Wingate “issued orders on the extremely large number of motions to dismiss. The magnitude of that task, plus getting his arms around the very large body of past filings (generated before Franklin Circuit Judge Phillip Shepherd recused himself in 2022) presumably accounted for the substantial delay. The compact orders are well reasoned,” Smith writes. “They seem even more credible by rejecting the idea that the Attorney General could properly represent the Tier 3 plaintiffs, and denying the motions to dismiss of the hugely powerful defendants, KKR, Blackstone, PAAMCO, and private equity kingpins Henry Kravis, George Roberts, Steve Schwarzman, and Tomlinson Hill personally.”

“The stakes here are much higher than the potentially meaty recoveries. Private equity and hedge funds fetishize secrecy because, too often, their conduct will not stand up to scrutiny. The giant fund managers are almost certain to be most afraid of discovery, since the sharp practices they used with Kentucky Retirement Systems were very likely to have been replicated at other public pension funds. Even the limited discovery so far uncovered more misconduct and allowed the plaintiffs to add to their claims,” Smith writes.

Our interest in the culture of secrecy that pervades Kentucky's pension system and the ensuing litigation — aimed, at least in part, at avoiding oversight and accountability — began with coverage in the late, great “Insider Louisville,” by reporter Joe Sonka, of the retirement system's refusal to comply with Senate Bill 2, enacted in 2017. That law required the retirement systems “to improve transparency regarding the administration of the (retirement) systems” by posting on its website the contracts for the investment managers of the Kentucky Retirement Systems (KRS) and the Teachers' Retirement Systems (TRS).

Sonka reported that “nearly 100 contracts have not been posted to the pension plans’ respective websites, and many of those that have been posted are heavily redacted.” The retirement systems deferred to the predictably self-serving investment managers in determining what would and would not be posted — state law notwithstanding.

A few years later, we were outraged by the refusal of the retirement systems, now reconfigured under the Kentucky Public Pension Authority umbrella, to release a copy of a \$1.2 million taxpayer funded Calcaterra Pollack consultant’s report resulting from an investigation of “any improper or illegal activities’ in billions of dollars in hedge fund deals that led to the lawsuits alleging wrongdoing.”

In a scathing opinion, Franklin Circuit Court Judge Phillip Shepherd ordered release of the report. He reasoned:

“A full review of the Calcaterra Pollack report gives rise to questions as to whether the purpose and intent of the report was to fully expose all the relevant facts (and to determine if the KPPA and its employees made mistakes), or if the report was commissioned to cover up or minimize those mistakes in an effort to convince the (attorney general) to not pursue claims that could prove embarrassing to the current or former management of KPPA.”

“The public paid \$1.2 million for this report,” Shepherd ruled, “(t)he public has a right to know its contents and decide if it got what it paid for.”

Secrecy? You bet! And that is why this complex litigation commands our attention.

Plaintiffs/pensioners’ attorneys reacted swiftly to Judge Wingate’s May 1 orders rejecting defendants/financial investment monoliths’ slew of motions to dismiss.

Within days, pensioners’ counsel filed a motion for a hearing before Judge Wingate. Scheduled for 9 a.m. Monday, May 20, that hearing will, we understand, address at least in part pensioners’ motion for open proceedings and open discovery — that thing most vigorously resisted by defendants.

By any measure, Monday’s hearing is the critical next step in determining what direction the litigation will take and to how much the public will be privy.

Our minds return to the Boston Globe/STAT’s successful legal battle to unseal discovery in Kentucky’s Purdue Pharma OxyContin litigation in 2018.

Writing for the appellate panel in a 72-page opinion that resembled a treatise on public access to court records, but that was inexplicably depublished by the Kentucky Supreme Court, Judge Glenn Acree wrote:

“Kentucky’s presumption of public access to court records is broad because ‘every citizen and taxpayer has an interest in the manner in which the government is operated (and to) . . . determine whether public officials are properly fulfilling the functions of their office . . . ‘ Every claim of the Commonwealth against another, including the claim against Purdue, is the property of the people regarding which the public has a legitimate concern. On that basis, the right of access supersedes even the right to privacy (‘right of privacy does not extend to affairs with which the public has a legitimate concern.’”)

With the exception of the Purdue Pharma OxyContin litigation, we can conceive of no public issue in which Kentucky’s citizens and taxpayers have a greater — or more “legitimate” — interest and financial stake than Kentucky’s state pension. This fact clearly militates in favor of openness in the proceedings and records produced in discovery.

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Aramark Spinoff Vestis Hit With Shareholder Suit Over Stock Drop

By Peter Hayes

- **COURT:** N.D. Ga.
- **TRACK DOCKET:** [No. 24-cv-02175](#)

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Aramark Spinoff Vestis Hit With Shareholder Suit Over Stock Drop

By Peter Hayes 2024-05-20T15:05:13000-04:00

- **COURT:** N.D. Ga.
- **TRACK DOCKET:** No. 24-cv-02175

Aramark offshoot Vestis Corp. is facing a proposed securities class action alleging the company made false and misleading statements that cost shareholders more than \$1 billion in value when the company revealed its growth predictions were wrong.

The company failed to disclose that Aramark “underinvested in the business that became Vestis,” and that Vestis “operated with outdated facilities and an underperforming sales force,” which kept it from growing and caused customers to leave, the plaintiff, Plumbers, Pipefitters and Apprentices Local No. 112 Pension Fund alleges.

In September 2023, a month before Vestis began trading as a public company, its corporate officers “painted an overwhelmingly positive picture of the state of the business that would become Vestis,” the complaint alleges.

The company “continued to tout its performance and prospects when reporting its financial results for the first quarter of FY2024,” the fund alleges. The company also reported on Feb. 7, 2024, that it “continues to expect to deliver revenue growth in the range of 4.0 to 4.5% through our focus on providing service excellence to our customers and delivering high-quality growth,” the complaint alleges.

The truth was revealed before markets opened on May 2, 2024, when Vestis issued a press release and announced financial results for its second quarter of FY2024, showing quarterly revenues of \$705 million—a 0.9% increase from a year before, the pension fund says. The company also announced a projected revenue growth for fiscal 2024 in the range of negative 1% to zero, the complaint alleges.

“As investors digested these disclosures, the price of Vestis stock plummeted 45% in a single day, falling from a closing price of \$18.47 per share on May 1, 2024, to a closing price of \$10.16 per share on May 2, 2024,” the pension fund says.

The complaint seeks certification of a class of all persons and entities who purchased Vestis common stock between Oct. 2, 2023, the date on which it became a public company, and May 1, 2024, and suffered damages.

The complaint includes claims under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, and SEC Rule 10b-5. The plaintiffs seek damages, pre-judgment and post-judgment interest, attorneys’ fees, and costs.

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

Aramark is a food service and facilities services provider. Vestis is the spinoff of its uniform services business.

Saxena White P.A. and Lindsey & Lacy PC represent the plaintiffs.

The case is Plumbers, Pipefitters & Apprentices Local No. 112 Pension Fund v. Vestis Corp. , N.D. Ga., No. 24-cv-02175, complaint 5/17/24 .

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Teladoc Misrepresented Unit's Marketing Costs, Investor Says (1)

By Martina Barash

- **COURT:** S.D.N.Y.
- **TRACK DOCKET:** [No. 1:24-cv-03849](#)

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Teladoc Misrepresented Unit's Marketing Costs, Investor Says (1)

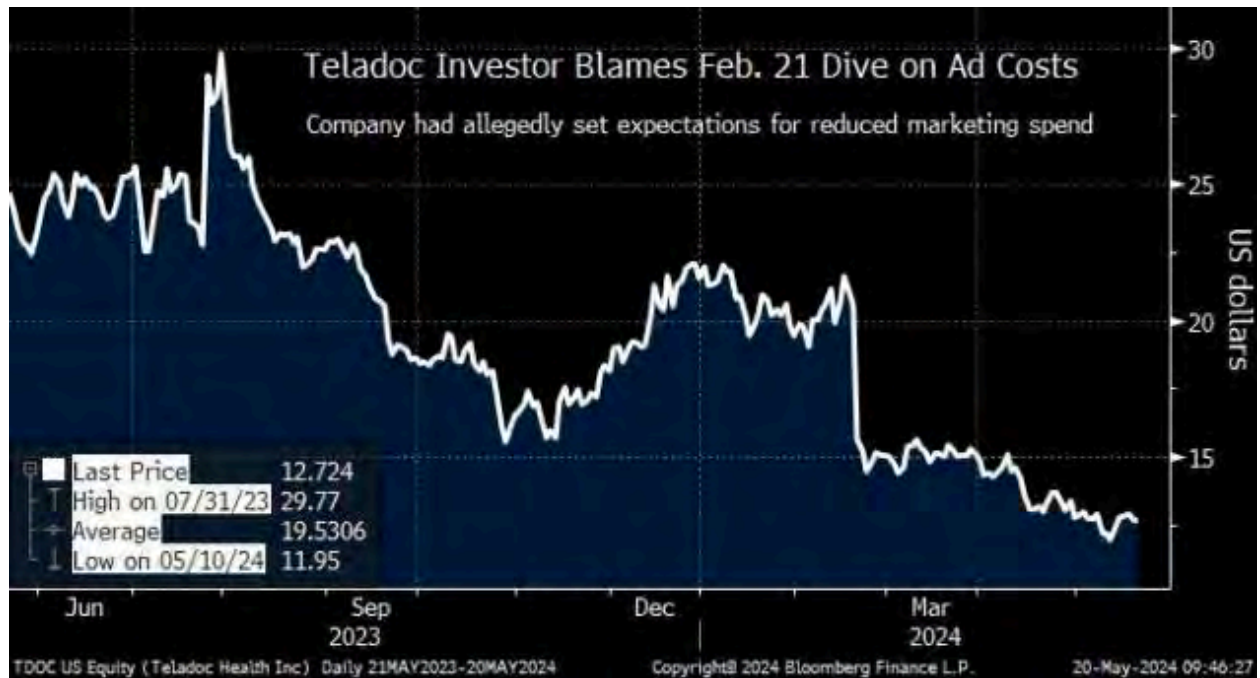
By Martina Barash 2024-05-20T10:04:39000-04:00

- **COURT:** S.D.N.Y.
- **TRACK DOCKET:** [No. 1:24-cv-03849](#)

Teladoc Health Inc. projected lower advertising costs for its BetterHealth online counseling services, keeping stock prices inflated before a disappointing revenue report, an investor alleges in a proposed class action.

The Feb. 20 Form 10-K report caused the company's stock price to fall 24% overnight, shareholder Paul Stary says in his complaint, filed May 17 in the US District Court for the Southern District of New York.

Teladoc's Form 10-K "demonstrated substantially increased advertising costs," Stary says. "In 2023, advertising and marketing spend was \$668,854,000, up from \$623,536,000 in 2022—itself an increase from \$416,726,000 in 2021." The report attributed the increase to higher digital and media advertising costs for BetterHelp, he says.



BetterHelp, Teladoc's largest division, contributed about 42% of overall revenue, the greatest share among segments, according to the complaint.

"BetterHelp revenue fell \$1 million compared to the year prior, and fell about \$10 million from 3Q-2023 to 4Q-2023," Stary said. That kept the company's overall revenue "flat compared to the prior year and down 3% sequentially," he said.

Teladoc is aware of the filing but hasn't been served, it said in an email Monday. "We won't comment on pending litigation other than to say that the company will vigorously defend itself," it said.

In 2021, Teladoc defeated a suit alleging it misled investors about a former executive's relationship with a subordinate.

The proposed class of those who acquired Teladoc stock between Nov. 2, 2022 and Feb. 20, 2024, inclusive, consists of hundred or thousands of members, according to the complaint.

Stary seeks damages on his securities fraud claims.

Levi & Korsinsky LLP represents Stary.

The case is Stary v. Teladoc Health, Inc. , S.D.N.Y., No. 1:24-cv-03849, complaint 5/17/24 .

(Updated with company response in sixth paragraph.)

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Rocket Says 2021 Stock Sale Was Meant to Cover IPO's Shortfall

By Jennifer Kay

- Suit cites weekly financial reports as proof of insider trading
- Claims against Rocket Chairman Dan Gilbert got dismissed

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Rocket Says 2021 Stock Sale Was Meant to Cover IPO's Shortfall

By Jennifer Kay 2024-05-20T15:34:14000-04:00

- Suit cites weekly financial reports as proof of insider trading
- Claims against Rocket Chairman Dan Gilbert got dismissed

Online lender Rocket Cos. Inc. on Monday sought to downplay revenue projections cited in shareholder litigation as evidence of insider trading in a \$500 million stock sale in 2021.

The sale was the result of months of preparation for an additional stock sale to make up a shortfall in capital from Rocket's 2020 initial public offering, Scott Elkins, chief investment officer at Rock Ventures LLC, testified before the Delaware Court of Chancery on the first day of a four-day trial.

A lawsuit claims Rocket's decision to approve the sale of 20.2 million shares of Rocket Class A common stock by majority shareholder Rock Holdings Inc. was based on non-public information that its business was declining to pre-pandemic levels faster than anticipated. Rocket's explanation that the sale facilitated a massive philanthropic contribution to the city of Detroit by founder Dan Gilbert's foundation was untrue, it said.

Gilbert, Rocket's chairman and owner of the NBA's Cleveland Cavaliers, was initially named as a defendant in the litigation, but claims against him were dismissed in January. Rocket said in a pre-trial brief that Gilbert only learned of the sale after it had been completed.

The investors' attorney, Michael Barry of Grant & Eisenhofer, suggested Rocket wanted to tie the stock sale to Gilbert's charitable contributions in Detroit so that it would get a better reaction from the market.

Elkins said the sale had nothing to do with internal financial projections or any confidential information, and the allegations of insider trading were false and “very offensive.”

Jay Farner, then the CEO of both Rocket and Rock Holdings, wanted a share sale price in the mid-\$20s range, and Rocket leapt to accept an offer from Morgan Stanley at \$24.75 a share, Elkins said.

Weekly Reports

The lawsuit—led by a trust holding 75 shares and a meme-stock investor who owns three shares—focuses on detailed, weekly reports about Rocket’s performance and projections for the rest of the year.

Rocket Treasurer Pete Mareskas testified the reports he oversaw were a “guesstimate” intended to monitor budgets, track spending, and provide an up-to-date overview of Rocket’s business.

“They were just my view of what could happen in the business that year,” he said.

He wasn’t asked to provide any information related to the March 2021 stock sale, and any projections around that time showing declines wouldn’t have been identified as a trend because “interest rates change every day,” he said.

The reports were “just good finance hygiene,” but the projections weren’t always reliable, he said.

The investors are also represented by Abraham Fruchter & Twersky, Squitieri & Fearon, Gardy & Notis, and Moore Kuehn. Rocket is represented by Morris, Nichols, Arsht & Tunnell and Sullivan & Cromwell.

In re Rocket Companies Inc. S’holder Derivative Litig., Del. Ch., No. 2021-1021, trial 5/20/24 .

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Hess facing three lawsuits over disclosures in Chevron deal

 [reuters.com/legal/hess-facing-three-lawsuits-over-disclosures-chevron-deal-2024-05-21](https://www.reuters.com/legal/hess-facing-three-lawsuits-over-disclosures-chevron-deal-2024-05-21)

Reuters

Energy

Chevron and Hess logos are seen in this illustration taken, October 23, 2023.

REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights , opens new tab

May 21 (Reuters) - Oil producer Hess (HES.N) , opens new tab on Tuesday said it is currently facing three lawsuits alleging inadequate disclosures over its proposed sale to Chevron (CVX.N) , opens new tab.

Chevron last October offered to acquire Hess in a move to gain a foothold in oil-rich Guyana's lucrative offshore fields. However, the deal has been stalled due to a conflict with Exxon Mobil (XOM.N) , opens new tab and pending regulatory approval by the Federal Trade Commission.

All three lawsuits seek to further delay or block the \$53 billion deal. Hess shareholders are scheduled to vote on May 28 on the deal.

The allegations regarding deficiency in disclosures "are without merit", the company said in a securities filing on Tuesday, but added that it was voluntarily supplementing the proxy statement "to moot plaintiffs' disclosure claims and to avoid nuisance, potential expense and delay".

In addition to these lawsuits, several purported stockholders of Hess have sent demand letters alleging similar deficiencies.

Get a quick look at the days breaking legal news and analysis from The Afternoon Docket newsletter. Sign up here.

Reporting by Mrinalika Roy in Bengaluru; Editing by Vijay Kishore

Our Standards: The Thomson Reuters Trust Principles. , opens new tab

Boston College Retirement Suit Needs Another Trim, Court Told

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- Judge rejected certain theories while greenlighting trial
- Case trim warrants partial decertification, trustees said

Boston College trustees, defending how they managed a pair of retirement plans, are seeking a court order further narrowing the class action ahead of a looming trial tentatively scheduled for July.

The trustees' motion, filed May 17 in the US District Court for the District of Massachusetts, follows an April decision by Judge William G. Young trimming some of the case's legal theories while allowing certain key claims to proceed toward trial.

The trustees want Young to decertify the class of workers challenging the plan's CREF Stock Account investment, saying that the named plaintiffs never invested in this fund and thus lack standing to press the legal theories that remain active after Young's opinion.

Plaintiffs Connie Sellers and Sean Cooper "no longer have any investment-related claims or injury" after the court dismissed their "broad challenges" to the university retirement committee's overall investment monitoring process, the trustees said. By rejecting the plaintiffs' broader investment-related challenges, Young "severed the only connection" they have to the claim challenging the CREF Stock Account, the trustees said.

Boston College is one of more than 20 prominent universities to be accused of mismanaging its retirement plan through high fees and faulty investments since 2016. These cases have spawned nearly \$140 million in settlements, several major appeals court rulings, two trials, and a recent US Supreme Court decision.

Young ruled in April that Sellers and Cooper can argue at trial that college trustees breached their fiduciary duties by failing to consolidate to a single retirement plan recordkeeper and failing to understand key details about the plans' fee levels and potential conflicts of interest. They also raised triable claims over how the trustees monitored certain investments criticized as poor performers, and they showed the plan suffered losses with respect to some of their claims, Young said.

Young also said the trustees followed a "prudent process" for monitoring plan investments, but this isn't enough for them to prevail at summary judgment, because there are factual disputes over whether they should have done more in the face of investment underperformance. The trustees also failed to meet their "heavy burden" of showing that the loss demonstrated by the plaintiffs wasn't caused by their breaches of duty, the judge said.

The case is scheduled to be trial-ready by July 1 and is on the court's trial list for that month, according to a May 8 docket entry.

Goodwin Procter LLP represents the Boston College trustees. Fair Work PC represents the plan participants.

The case is *Sellers v. Trs. of Bos. Coll.*, D. Mass., No. 1:22-cv-10912, motion 5/17/24 .

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Tesla Shareholders Call Musk's Pay Deal an 'Abysmal Failure' (2)

By Dana Hull2024-05-21T09:40:23070-04:00

- Amalgamated Bank, others write open letter on Tesla weaknesses
- Shareholders to vote on Musk pay at June 13 annual meeting

A coalition of Tesla Inc. shareholders is urging its peers to reject the \$56 billion pay package for Chief Executive Officer Elon Musk that the company's board has asked investors to approve again.

Amalgamated Bank, SOC Investment Group and six other signatories that hold a small portion of Tesla stock said Musk is distracted by his commitments to the five other companies he controls and isn't serving the carmaker's best interests. The group also urged shareholders to vote against the reelection of directors **Kimbal Musk** — Elon Musk's brother — and **James Murdoch**.

"Tesla is suffering from a material governance failure which requires our urgent attention and action," the group wrote in a [letter](#) to shareholders on Monday.

Musk's pay package, which shareholders first approved in 2018, granted the CEO equity awards as Tesla's market capitalization increased and as it hit certain operational targets. While the company met all the conditions for Musk to receive the full payout of stock options, a Delaware judge voided the deal in late January, saying it was unfair to shareholders who weren't fully informed of key details.

Tesla's board is putting the pay package to a vote for a second time to prove investors still support the award. It's been urging investors to ratify Musk's pay package and has hired a strategic adviser to boost retail investor participation. The company has scheduled its annual meeting for June 13.

Read More: Tesla Courts Retail Investors for Musk's \$56 Billion Pay Package

Many signatories of Monday's solicitation published a separate open letter to Tesla's board more than a year ago, expressing concerns about Musk's many commitments and asking for a meeting with board chair **Robyn Denholm**. She never responded, the group said.



Musk's decision to buy Twitter, now called X, has "played a material role in Tesla's underperformance," the shareholders said. They note that one of the board's stated reasons for the magnitude of the CEO pay award was to keep Musk focused on the company's long-term success.

"If this was one of the primary reasons for the 2018 pay package, then it has been an abysmal failure, as six years later Musk's outside business commitments have only increased," the shareholders wrote. Musk founded another startup last year, called xAI, that has hired away artificial intelligence specialists from Tesla.

Tesla's shares rose 2.1% at 9:36 a.m. Tuesday in New York. They slumped 30% this year through Monday's close.

Read More: Chaos Reigns Inside Tesla as Workers Await Next Slew of Job Cuts

The coalition of shareholders also raised concerns in their letter about how Tesla's sales have trended and its disappointing first-quarter results.

"Even as Tesla's performance is floundering, the board has yet to ensure that Tesla has a full-time CEO who is adequately focused on the long-term sustainable success of our company," the group

said.

(Updates with share trading in the ninth paragraph.)

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Kelly Gilblom, Craig Trudell

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Tesla's Rolling Cuts Leave Workers Confused and in Constant Anxiety

B [bloomberg.com/news/newsletters/2024-05-21/tesla-s-rolling-cuts-leave-workers-confused-and-in-constant-anxiety](https://www.bloomberg.com/news/newsletters/2024-05-21/tesla-s-rolling-cuts-leave-workers-confused-and-in-constant-anxiety)

Kara Carlson, Dana Hull

By Kara Carlson and Dana Hull

May 21, 2024 at 8:02 AM PDT

Hi, Kara Carlson and Dana Hull here. Welcome to the weekly Work Shift newsletter. Today we are taking you inside the world of Tesla layoffs. If you're coming to us by way of a friend or colleague, please consider signing up.

Quick Hits

- Ukrainian refugees are struggling to find the high-quality jobs in the UK as the labor market cools, visas are expiring and general interest in helping them wanes.
- Indeed plans to cut about 1,000 employees, or roughly 8% of its workforce, the job-search website's second culling in two years as it seeks to simplify its business in a cooling labor market.
- Germany's Bundesbank abandoned plans to add new office buildings to its Frankfurt headquarters as employees avail of its policy to work from home.
- The number of Americans voluntarily working part time hit a record high this year, thanks in part to women — particularly mothers — benefiting from the pandemic-driven rise in flexible work arrangements.

Choosing Part Time

The number of Americans working part time climbed to a record this year

Source: Bureau of Labor Statistics

Postcard from Tesla

Working through a round of layoffs at a company is never easy or fun, but the job cuts at Tesla are proving particularly brutal. We did a deep dive into how current and former workers are managing and found a combination of high anxiety, insomnia and gallows humor with some employees comparing the situation to the Netflix show *Squid Game* and the film *Titanic*.

One of the hardest parts has been the uncertainty. Over a month into Chief Executive Officer Elon Musk's plans to slash at least 10% of the company's workforce, he's not done. This means employees wake up each day wondering if they still have a job. The rolling job cuts are likely to extend through at least June, people familiar with the matter told us.

“It’s difficult to imagine the feeling of walking on eggshells every day at work, uncertain whether or not you’ll be able to pay your bills or feed your family,” Michael Minick, a former Tesla sales representative who was laid off in April, wrote on LinkedIn. “It would be a relief to know that they can breathe and focus on their work, without the gray cloud of uncertainty looming over.”

Some still with the company say Musk has sapped morale by prioritizing a robotaxi over a \$25,000 electric vehicle. They also say a mission that had inspired legions of Musk acolytes has been muddled. The tumult — some of which has been self-inflicted — has contributed to Tesla shares slumping nearly 30% this year as the close of trading on Monday.

The waves of dismissals, which already have hit thousands across departments including sales, human resources and virtually the entire Supercharger division, are expected to gut significant parts of Tesla, which started the year with more than 140,000 employees. Musk has pushed for a 20% reduction in headcount, Bloomberg reported last month.

For more about how the job cuts are playing out and which divisions have been most affected, read the full story [here](#).

Quotable

“We believe that being together, in person, makes us better and helps us to collaborate, innovate and move even faster.”

Donna Morris

Walmart’s Chief People Officer

The retailer is axing hundreds of corporate jobs and asking most remote workers to return to offices.

Ask Work Shift

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Class certified in race bias case against Tesla

DJ [dailyjournal.com/articles/378859-class-certified-in-race-bias-case-against-tesla](https://www.dailyjournal.com/articles/378859-class-certified-in-race-bias-case-against-tesla)

The New York Times

Tesla Inc. cannot dodge claims that the electric vehicle maker fostered a racially hostile environment at its Fremont facility after an Alameda County Superior Court judge granted class certification in one of 46 related cases.

Elon Musk's company is defending similar allegations by the California Civil Rights Department and the U.S. Equal Employment Opportunity Commission. Its attorneys at Reed Smith LLP and Holland & Knight LLP did not respond to an inquiry for comment on Friday's ruling.

"We are thrilled that despite Tesla's many tactics denying any accountability and trying to delay justice, the court saw the common issues presented here, which must be addressed on behalf of all the Black Tesla workers in Fremont -- not piecemeal," said Bryan Schwartz of Bryan Schwartz Law PC, who argued the plaintiffs' class certification motion in March.

According to the complaint, Black employees at Tesla's Fremont plant, referred to as "the plantation," were subjected to racist abuse and graffiti, including being called the n-word. Lead plaintiff Marcus Vaughn said he was fired from Tesla after lodging a formal complaint with human resources.

Early last year, the 1st District Court of Appeal denied the company's bid to send some claims to arbitration, affirming the lower court's decision that the agreement did not apply to times when the plaintiffs were hired through staffing agencies. The California Supreme Court declined to review the case last April.

Tesla's attorneys argued in their opposition to class certification that the allegations were unreliable and attorney-driven and added that individualized cross-examination was essential as each worker's experience is different. *Vaughn et al. v. Tesla Inc.*, RG17882082 (Alameda Super. Ct. filed Nov. 13, 2017).

Since the U.S. Supreme Court clarified class action commonality standards in *Walmart Stores Inc. v. Dukes*, courts uniformly declined to certify classes where the employer's written policy prohibited the conduct, liability depended on the totality of the circumstances, and the many different individuals allegedly engaged in various types of conduct at different times, wrote Reed Smith partner Raymond A. Cardozo.

"Tesla has a diverse and inclusive workforce in which most of its workers are minorities ... Tesla welcomes all, prohibits all forms of discrimination, and Black workers thrive at Tesla," said Cardozo.

Judge Noel Wise, appointed to the bench in 2014, disagreed with the defendant's position. However, she wrote in her order that the court would not certify a class to pursue a class claim for individual liability or damages.

"As a matter of substance, Wal-Mart's analysis of the commonality requirement ... is consistent with established California law ... and that the class mechanism should be used when substantial benefits accrue to the litigants and the courts. Further, Wal-Mart's analysis of the availability of damages is immaterial because the plaintiffs in this case are clearly seeking damages," wrote Wise.

#378859

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Appeals Court Backs Investment Firm on Securities Disclosures

By Tre'Vaughn Howard

- Second Circuit agreed with lower court that case was moot
- Firm had amended disclosures to include allegations against it

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Appeals Court Backs Investment Firm on Securities Disclosures

By Tre'Vaughn Howard 2024-05-20T19:28:04000-04:00

- Second Circuit agreed with lower court that case was moot
- Firm had amended disclosures to include allegations against it

An Israeli company doesn't have a basis to pursue claims against an investment firm that allegedly violated a disclosure requirement of the Securities and Exchange Act, a federal appeals court said Monday.

The US Court of Appeals for the Second Circuit determined that Murchinson Ltd.'s amended Schedule 13D filings rendered Nano Dimension Ltd.'s suit moot. The appeals court held that Murchinson sufficiently informed the public of its factual dispute with Nano over the shares Murchinson secured because the amended filings included Nano's complaint and said the company's allegations were "without merit."

Nano is an Israeli 3D printing and manufacturing company. It asserted that Murchinson—and several associated entities—didn't disclose that they acted as a group when acquiring more than five percent of Nano's American Depositary Shares on the NASDAQ Stock Exchange. Section 13(d) of the Exchange Act requires any group acquiring beneficial ownership of more than five percent of a company's securities to file a Schedule 13D with the Securities and Exchange Commission, according to the per curiam opinion.

In its lawsuit, Nano sought an order directing the firms to disclose their group status on amended schedule 13D filings. Nano also wanted an injunction to stop the firms from acquiring more ADSs or to invalidate their voting power from already purchased ADSs.

After amending their schedule 13D filings, Murchinson sought to dismiss the suit. The district court dismissed the case with prejudice because the alleged Section 13(d) violation had been cured. The lower court concluded that the claims were moot and Nano therefore had no basis for injunctive relief.

Nano challenged the ruling on appeal, arguing the firms' filings didn't satisfy Section 13(d)'s disclosure requirements. Nano also asserted that it's entitled to retroactive injunctive relief, even if the disclosure requirements were met. Specifically, Nano argued the firms' unlawfully purchased ADSs could still be canceled and that the votes the firms had illegally cast before they amended their schedule 13D filing could still be vacated.

The Second Circuit disagreed with all of Nano's assertions. Citing *Avnet Inc. v. Scope Industries*, the appeals court said the lower court properly determined Section 13(d) was satisfied. In *Avnet*, the court held an amended Schedule 13D that includes the complaint and denial of allegations satisfies the disclosure requirement because it sufficiently informed shareholders of the factual dispute.

Nano argued the district court erred by making a factual finding at the motion-to-dismiss stage. The Second Circuit disagreed, finding that the lower court simply made "a threshold observation that Nano and Defendants disputed certain facts about the nature of the relationship between the Defendants" and properly concluded the disclosure requirement had been met.

Murchinson's "amended filings disclosed the possibility of the disputed fact, and we agree with the district court...because the 'informative purpose' of Section 13(d) was satisfied in this case," the Second Circuit said.

Nano also isn't entitled to retroactive injunctive relief because it is seeking to invalidate the firms' votes during a special meeting that only involved the election of two of seven directors. That wouldn't have effected a change in control of the company, the appeals court said.

Judges Joseph F. Bianco, William J. Nardini, and Maria Araújo Kahn comprised the panel.

BraunHagey & Borden LLP represents Nano. Schulte Roth & Zabel LLP and Olshan Frome Wolosky LLP represent Murchinson.

The case is *Nano Dimension Ltd. v. Murchinson Ltd.*, 2d Cir., No. 23-01141, 5/20/24.

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3M Drops Appeals of MDL Judge's Orders as Earplug Pact Firms Up

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XD063OLK000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XD063OLK000000)

3M Co. and service members who sued it over allegedly ineffective combat earplugs have asked the Eleventh Circuit to dismiss the company's request for review of two trial court orders from heated moments of the litigation.

Progress toward finalizing 3M's \$6 billion settlement has obviated the need for the appeals court to weigh in, the parties in one of the cases on appeal said Monday. The matters now before the US Court of Appeals for the Eleventh Circuit stem from multidistrict litigation overseen by Judge M. Casey Rodgers of the US District Court for the Northern District of Florida.

One of the dismissals will take off the table an issue that could recur in other mass tort cases where a company seeks to resolve claims through the bankruptcy process: whether a federal district court can limit, in advance, the arguments a party makes in bankruptcy court on issues that were already resolved in the district court.

More than 293,000 earplug users sued 3M and its Aearo Technologies LLC subsidiary, alleging Aearo's Combat Arms version 2 earplugs were ineffective. The devices were intended to block loud noises while allowing voices to be heard. More than 41,000 claims were dismissed.

Most of the cases were brought by former and current service members in the MDL, while several thousand civilians' suits were pending in Minnesota state court. 3M lost 10 of 16 test cases tried in the MDL, and the juries awarded the plaintiffs a total of about \$265 million in damages for hearing loss and tinnitus.

3M attempted to globally settle the hearing-loss claims through the July 2022 Chapter 11 filing of its Aearo unit, but a bankruptcy court didn't allow that to proceed as the company hoped.

Collateral Attacks

Meanwhile, before the bankruptcy court ruled, Rodgers clashed with 3M over its use of certain arguments there.

Acting on a request by veteran Richard Valle, she prohibited 3M or Aearo from asking the US Bankruptcy Court for the Southern District of Indiana—or other non-appellate courts—to revisit rulings in the personal injury suits. Those rulings included the central question of 3M's

possible immunity as a government contractor, in which a ruling for the maker of Scotch tape, Post-It notes and Nexcare bandages could have wiped out the litigation.

3M's arguments to the bankruptcy court amounted to "an outright rejection of traditional appellate review" of her decisions, she said.

The company's challenge to that ruling was argued before the Eleventh Circuit in June 2023. The judges directed a barrage of questions to both sides.

The second appeal focused on Rodgers' December 2022 sanctions order barring 3M from attempting to pin any portion of blame on Aearo. The service members raised the successor liability issue "from the very start of the litigation—both verbally and in the pleadings—but were met with repeated assurances that 3M alone was the responsible party," she said, accusing the company of a "brazen abuse of the litigation process."

Past the Threshold

3M Co.'s settlement garnered more than 99% claimant participation, surpassing a threshold for finalizing the deal, the company said in March.

The parties dropped appeals of several test trial cases earlier because those cases settled separately, without reference to other claimants' participation.

Keller Postman LLC represented the veterans in the Valle appeal. Aylstock Witkin Kreis & Overholtz PLLC and Ciresi Conlin LLP represented the veterans in the appeal over the sanction against blaming Aearo, called *3M Co v. Aaby*.

Clement & Murphy PLLC represented 3M in both appeals. Additionally, Moore Hill & Westmoreland PA and White & Case LLP represented the company in *Valle*, and Dechert LLP represented it in *Aaby*.

The cases are *In re 3M Combat Arms Earplug Liab. Litig.* , 11th Cir., No. 22-12796, Stipulation for dismissal 5/20/24 and *3M Co. v. Aaby* , 11th Cir., No. 23-90001, joint motion 5/20/24 .

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BASF to pay \$316 million to settle PFAS 'forever chemicals' US lawsuit

 [reuters.com/legal/basf-pay-316-million-settle-pfas-forever-chemicals-us-lawsuit-2024-05-21](https://www.reuters.com/legal/basf-pay-316-million-settle-pfas-forever-chemicals-us-lawsuit-2024-05-21)

Clark Mindock

A general view of the German chemical company, BASF Schwarzheide GmbH in Schwarzheide, Germany, December 10, 2019. REUTERS/Annegret Hilse/File Photo
Purchase Licensing Rights [↗](#), opens new tab

May 21 (Reuters) - German chemical company BASF (BASF.N.DE) [↗](#), opens new tab said on Tuesday it reached a \$316.5 million settlement with some U.S. public water systems that claimed toxic “forever chemicals” in firefighting foam made by the company contaminated their water supplies.

The money provided by the settlement, which must be approved by a federal judge, will help cities, towns and other public water systems remediate contamination of perfluoroalkyl and polyfluoroalkyl substances, or PFAS.

PFAS are a class of chemicals used in thousands of consumer and commercial products, including firefighting foams, non-stick pans and stain-resistant fabrics. They have been tied to cancers and other diseases, and are often called forever chemicals because they do not easily break down in nature or the human body.

BASF said in a statement that the settlement does not constitute an admission of liability or wrongdoing, and that it will seek to recover for the settlement through its numerous insurance policies.

The company said it will pay about \$4 million as part of the settlement in July, and will pay another \$312.5 million in March.

BASF is among nearly two dozen chemical companies that have faced lawsuits brought by water systems over PFAS pollution in sprawling litigation that has been centralized in a South Carolina federal court.

The lawsuits focus on PFAS that contaminated groundwater after being sprayed in firefighting foams at fire houses and airports across the U.S.

In 2023, those lawsuits led to more than \$11 billion in settlements between U.S. water systems and major chemical companies including 3M (MMM.N) [↗](#), opens new tab, Chemours (CC.N) [↗](#), opens new tab, Corteva (CTVA.N) [↗](#), opens new tab and DuPont de Nemours (DD.N) [↗](#), opens new tab. In April, Johnson Controls (JCI.N) [↗](#), opens new tab unit Tyco Fire Products agreed to a \$750 million settlement.

BASF and roughly half a dozen other companies had been tentatively scheduled to go to trial in early 2025.

"This significant agreement is in large part the result of the pressure of upcoming trial cases," attorneys for the water systems at the law firms Douglas & London, Napoli Shkolnik, Baron & Budd and Motley Rice said in a joint statement on Tuesday.

"It acknowledges the scope of the PFAS crisis, and the financial depths required to address a problem of this magnitude," they said.

Beyond the courtroom, PFAS have come under increased regulatory scrutiny in the United States in recent years as well.

In April, the U.S. Environmental Protection Agency set the first national drinking water standards to protect people from the chemicals, and designated a pair of the chemicals as hazardous substances under the nation's Superfund program.

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Reporting by Clark Mindock in New York; Editing by Bill Berkrot

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<https://www.law.com/therecorder/2024/05/20/google-at-the-center-of-a-perfect-storm-of-privacy-litigation/>



NOT FOR REPRINT
NEWS

Google at the Center of a 'Perfect Storm' of Privacy Litigation

Dozens of plaintiffs filed a complaint against Google on April 9 in the Santa Clara County Superior Court of California. They alleged that Google violated the California Consumer Privacy Act by using features like Google Analytics and Google Ad Manager to collect users’ data without their consent, even while browsing the internet in “Incognito mode.”

May 20, 2024 at 07:19 PM



Kat Black



What You Need to Know

- Google has been subjected to a series of online privacy lawsuits related to its private browsing feature, Incognito mode.
- In early April, Incognito users reached a settlement with Google in a historic class action win, but were awarded no damages.
- Plaintiffs seeking monetary relief have now filed an additional privacy complaint against Google.

After settling a massive class action lawsuit at the beginning of April, Google continues to field a torrent of consumer privacy claims.

Dozens of plaintiffs filed a [complaint](#) against Google in April in Santa Clara County Superior Court of California. They alleged that Google violated the California Consumer Privacy Act by using features like Google Analytics and Google Ad Manager to collect users’ data without their consent, even while browsing the internet in “Incognito mode.”

The recent surge of online privacy lawsuits against Google was surfaced by ALM’s [Law.com Radar](#).

“Google has made itself an accountable trove of information so detailed and expansive that George Orwell could never have dreamed it,” wrote plaintiffs’ attorneys at Boies Schiller Flexner and personal injury titan Morgan & Morgan. Boies Schiller Flexner and Morgan & Morgan did not respond to multiple requests for comment.

Plaintiffs argued that Google intentionally misled users about the anonymity conferred by Incognito mode, citing internal documents dating back to 2014—including memos sent to CEO Sundar Pichai—that flag the feature as deceptive.

The complaint was filed on the heels of a class action settlement reached on April 1 in the Northern District of California, [Brown v. Google](#). U.S. District Judge Yvonne Gonzalez Rogers ordered Google to scrub billions of user data records, allow users to block third-party cookies for five years, and clarify the extent of its data collection practices to users on

the Incognito screen. Though the settlement was originally valued at \$5 billion, the court declined to award damages after Google maintained that all requests for monetary relief should be tried on an individual basis.

Florencia Marotta-Wurgler, a professor at NYU School of Law, said that recent antitrust enforcement, the 2018 Cambridge Analytica data scandal and election misinformation concerns have all converged to create a “perfect storm” of online privacy litigation that has battered Google for over a decade.

Google has a long history of violating the terms of its online privacy promises. In 2011, the search giant agreed to a 20-year consent decree with the Federal Trade Commission after its now-defunct social media platform, Google Buzz, was charged with “deceptive tactics.” A year later, the FTC forced Google to pay a \$22.5 million civil penalty to settle claims that it misrepresented its deployment of tracking cookies and targeted ads to Apple’s Safari internet browser users.

Ari Waldman, a Professor at UCI Law, attributes the recent swell of privacy lawsuits against Google to “greater demands on data extraction.”

“We’re not just talking about gathering data to predict whether someone is going to buy a pair of shoes,” he said. “We’re now talking about endlessly hungry artificial intelligence systems and algorithms that need data, and lots of and lots of it ... which means that companies are resorting to all sorts of different tactics to get it.”

The April 9 complaint charged Google on seven counts: violation of the California Invasion of Privacy Act (CIPA), violations of the Comprehensive Computer Data Access and Fraud Act (CDAFA), invasion of privacy, intrusion upon seclusion, and unjust enrichment. Plaintiffs demanded a trial, punitive damages and the restitution of any profits derived from tracking consumer data.

Though online privacy complaints have existed since the dawn of the internet, quantifying the damages that plaintiffs are owed for data collection is still a relatively new frontier, said Marotta-Wurgler.

“It’s very hard to articulate what the economic harm is, and that has led to many cases being dismissed,” she said.

This surge was surfaced by Law.com Radar, which delivers AI-enhanced case summaries and daily case reports from more than 2,200 state and federal courts. [Click here](#) to get started and be first to act on opportunities in your region, practice area or client sector.

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Google cuts mystery check to US in bid to sidestep jury trial

 [reuters.com/legal/government/google-cuts-mystery-check-us-bid-sidestep-jury-trial-2024-05-20](https://www.reuters.com/legal/government/google-cuts-mystery-check-us-bid-sidestep-jury-trial-2024-05-20)

Mike Scarcella

The logo of Google is seen at the Viva Technology conference dedicated to innovation and startups at Porte de Versailles exhibition center in Paris, France, June 14, 2023.

REUTERS/Gonzalo Fuentes Purchase Licensing Rights , opens new tab

May 20 (Reuters) - Alphabet's (GOOGL.O) , opens new tab Google has preemptively paid damages to the U.S. government, an unusual move aimed at avoiding a jury trial in the Justice Department's antitrust lawsuit over its digital advertising business.

Google disclosed , opens new tab the payment, but not the amount, in a court filing last week that said the case should be heard and decided by a judge directly. Without a monetary damages claim, Google argued, the government has no right to a jury trial.

The Justice Department, which has not said if it will accept the payment, declined to comment on the filing. Google asserted that its check, which it said covered its alleged overcharges for online ads, allows it to sidestep a jury trial whether or not the government takes it.

The Justice Department filed the case last year with Virginia and other states, alleging Google was stifling competition for advertising technology. The government has said Google should be forced to sell its ad manager suite.

Google, which has denied the allegations, said in a statement that the Justice Department “manufactured a damages claim at the last minute in an attempt to secure a jury trial.” Without disclosing the size of its payment, Google said that after months of discovery, the Justice Department could only point to estimated damages of less than \$1 million.

The company said the government has said the case is “highly technical” and “outside the everyday knowledge of most prospective jurors.”

The Justice Department will have a chance to respond to Google's arguments before a judge considers the question at a hearing scheduled for June 21 in Alexandria, Virginia, federal court. The trial is set for September, currently before a jury.

Stanford Law School's Mark Lemley told Reuters he was skeptical Google's gambit would prevail. He said a jury could ultimately decide higher damages than whatever Google put forward.

“Antitrust cases regularly go to juries. I think it is a sign that Google is worried about what a jury will do,” Lemley said.

Another legal scholar, Herbert Hovenkamp of the University of Pennsylvania's law school, called Google's move "smart" in a post on X. "Juries are bad at deciding technical cases, and further they do not have the authority to order a breakup," he wrote.

The U.S. Supreme Court ruled in a 2016 case that an offer for "complete relief" did not wipe out a class-action claim. But Google argued its payment is different, because it submitted an actual check and not merely an offer.

Google has faced two antitrust trials in recent months, but only one involved a jury.

In that case, a jury in San Francisco ruled for "Fortnite" maker Epic Games that Google illegally barred competing Android app stores and forced developers to use its payment system for in-app transactions.

In the other case, a Washington, D.C. federal judge is weighing allegations that Google has unlawfully stifled competition for web search. The court heard closing arguments this month but has not ruled.

The case is United States v. Google LLC, U.S. District Court for the Eastern District of Virginia, No. 1:23-cv-00108.

For U.S.: Julia Tarver Wood and Aaron Teitelbaum of the Department of Justice

For Google: Eric Mahr and Andrew Ewalt of Freshfields Bruckhaus Deringer; Kannon Shanmugam and Karen Dunn of Paul, Weiss, Rifkind, Wharton & Garrison; and Daniel Bitton and Bradley Justus of Axinn, Veltrop & Harkrider

Read more:

Google seeks non-jury trial in US ad tech lawsuit, filing says

Google defends app store, fighting Epic Games' bid for major reforms

Google asks court to throw out US advertising case

U.S. targets Google's online ad business monopoly in latest Big Tech lawsuit

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Reporting by Mike Scarcella

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https://x.com/jason_kint/status/1791268703348109317



Jason Kint ✓

@jason_kint

...

Woah.

Google is effectively trying to buy out the United States by tendering a cashier's check for the claimed max damages from screwing industry with adtech market power abuses. US DOJ's adtech antitrust trial seeking to break them up is months away. 1/4

B. Google Has Tendered the United States Complete Relief.

Google has tendered a cashier's check, payable to the United States, for [REDACTED] which is the maximum amount of damages the United States claims in this case, trebled, plus prejudgment interest accrued based on a "hypothetical judgment date" of June 30, 2024. *See* Ex. 14, App. E, Fig. 20. Google has not merely made an unaccepted offer of relief. It has in fact paid the United States every dollar the United States could conceivably hope to recover under the damages calculation of the United States' own expert. Accordingly, the United States' damages claim is moot, and this Court should dismiss that claim for lack of subject-matter jurisdiction. *See Price*, 2016 WL 1089417, at *2 (tender in the form of a cashier's check mooted claim because there was "no legitimate risk of non-payment").

5:45 PM · May 16, 2024 · 1.2M Views

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Jason Kint  @jason_kint · May 16

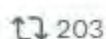
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And then with google's payment, they're trying to get it switched from jury to bench trial. The money is an after thought, what they clearly don't want is a jury of Americans reviewing damning evidence (see Bernanke) which may be harder to appeal leading to structural remedy. 2/4

Seventh Amendment: The Sherman Act does not accord parties a right to a jury trial, and so the DOJ must find a jury-trial right in the Seventh Amendment. But the Seventh Amendment, enshrined in the Bill of Rights, protects *citizens* against the federal government, not the other way around. To determine whether the Seventh Amendment guarantees a party the right to a jury, courts must evaluate how comparable claims would have been tried under English common law when the Bill of Rights was ratified. *Tull v. United States*, 481 U.S. 412, 417 (1987). Blackstone's Commentaries and other historical sources indicate that comparable damages suits brought by the English Crown in 1791 would have been heard by a judge not a jury. At the very least, there is "no established jury practice sufficient to support an argument by analogy" that antitrust damages actions brought by the United States should be tried to a



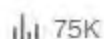
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203



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75K



Jason Kint  @jason_kint · May 16

...

lol, G. The lawsuit is smart for jury as U.S. explained Google's alleged abuse so Americans understand it by comparing G's market power on all sides to wall street. Hell, Google's own executive made this analogy "if Goldman or Citibank owned the NYSE."

A jury will get this. 3/4

page complaint describes a complicated, intricate technology ecosystem, which DOJ has acknowledged to this Court is "highly technical, often abstract, and outside the everyday knowledge of most prospective jurors." Pls.' Mot. for Status Conference, ECF No. 517 at 7-8 ("even by the standards of an antitrust action, this case is unusually complex"). It alleges a sprawling course of conduct, much of which consists of highly technical auction designs that allegedly contribute to antitrust violations—all of which will require the factfinder to review economic analyses and apply nuanced legal standards to technically complex facts. DOJ has

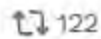


Jason Kint  @jason_kint · May 16

So yeah, good luck with this one, Google. The point of the lawsuit is to break you up. Parallel adtech suits in EDTX and SDNY plus you lost app store suit (to a jury!), a search decision coming late summer and E.U. closing in on adtech, too. Walls closing in. You feel it? 4/4



9



122



984



61K



Jason Kint  @jason_kint · May 16

Here is a link to the motion (storage.courtlistener.com/recap/gov.uscourts/edtx/2023-01/2023-01-24/2023-01-24-00108-0001.pdf) they just filed. And then a thread on this lawsuit from when it was originally filed in January, 2023. 5/4



Jason Kint  @jason_kint · Jan 24, 2023

ok, let's do this. I've now read all 153 pages of United States vs Google filed earlier today. As I've said earlier, Google is royally screwed.

The suit is super well-written building on prior work investigating Google's market power abuse leveraging advertising technologies. /1

[Case 1:23-cv-00108](#) [Document 1](#) [Filed 01/24/23](#) [Page 1 of 153](#)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530



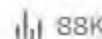
2



78



508



88K





Jason Kint  @jason_kint · May 16

...

ha ha, Google dug up a British constitutional law scholar as their expert on why the Seventh Amendment doesn't allow a jury of Americans to decide if Google screwed over the rest of the advertising industry. 6/4

storage.courtlistener.com/recap/gov.usco...

CONCLUSION

16. Given the weight of this evidence—including the lack of mentions of jury trial in suits by the Crown for damages in the Reports, the significant equity jurisdiction of the Court of Exchequer and the use of non-jury trials in complex cases—there is good reason to conclude that claims brought by the Crown for damages against a subject in a complex case in the eighteenth century would have been heard by a judge and not by a jury.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 15th day of May, 2024.

 20

 83

 563

 43K



John Byrne @John_Byrne_ · May 17

Assuming they fail on the motion, is there interlocutory appeal avenue, which would delay trial potentially for years?



597



Lex @lex_nyc · May 17

The whole point of the 7th amendment, pretty much, was that the crown was picking biased judges to hear its cases to avoid the check that juries provided!



599



Flat Arthur @festival_tyre · May 18

Seems like the check is for less than \$10m based on the context from page 1. If that is the case, then this is a way to settle for less than their own legal fees going to trial. No?

**EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

UNITED STATES, *et al.*

Plaintiffs,

vs.

GOOGLE LLC,

Defendant.

No. 1:23-cv-00108-LMB-JFA

**GOOGLE LLC'S MEMORANDUM IN SUPPORT OF ITS MOTION
TO DISMISS THE UNITED STATES' DAMAGES CLAIM
AS MOOT AND TO STRIKE THE JURY DEMAND**

INTRODUCTION

Civil antitrust cases brought by the United States have historically been tried to the bench—not to a jury. Yet in this case, the Department of Justice (“DOJ”) is asking the Court for a jury trial, breaking with all historical precedent, even though the relief it seeks is overwhelmingly equitable and even though its allegations are, in DOJ’s words, “highly technical, often abstract, and outside the everyday knowledge of most prospective jurors.” *Pts. Mot. for Status Conference*, ECF No. 317 at 7–8 (quoting DOJ counsel). To secure this unusual posture, several weeks before filing the Complaint, on the eve of Christmas 2022, DOJ attorneys scambled around looking for agencies on whose behalf they could seek damages. And while its Complaint initially referenced agency purchases of \$100 million, *First Am. Complaint*, ECF No. 120 (“FAC”) ¶ 278, DOJ has only been able to muster a damages estimate of between [REDACTED] substantially less than Plaintiffs have spent on expert fees alone. *See* Ex. 14, App. E, Fig. 19. These tactics to avoid a bench trial will not work because the law precludes a jury trial in this case for two reasons: first, a sovereign such as the United States has no right to a jury trial under the Seventh Amendment, even for its damages claim;

Bloomberg Law News 2024-05-21T13:33:16744389926-04:00

Bogus 'Made in USA' Claims Flourish. The FTC Is Cracking Down

By Clara Hudson and David Hood 2024-05-21T05:05:12000-04:00

- Agency doled out about \$5.3 million in penalties this year
- Mattress pads, t-shirts, footballs among products scrutinized

Old Southern Brass markets itself as a Florida-based glassware company that proudly honors and serves US veterans with specialty memorabilia such as shot glasses embedded with a copper bullet.

"Nothing says 'Merica like making products right here at home," the company once crowed on its American flag-adorned website.

Except it wasn't practicing what it preached: Old Southern Brass' glassware was made in China, according to the Federal Trade Commission.

The FTC has long been a watchdog against false "Made in USA" claims, but the agency has been ramping up enforcement. Since getting power three years ago to impose new financial penalties, it's targeted violators as varied as tractor company Kubota and a t-shirt maker that sold "FJB" shirts to critics of President Joe Biden.

The trade commission hit homeware giant Williams Sonoma with a record \$3.18 million penalty in April for falsely claiming its Pottery Barn Teen mattress pads were American-made. It was the third such FTC penalty this year, amid a string of at least 51 investigations and enforcements under its enhanced powers, according to agency records.

The heightened focus on the misleading claims coincides with a broader Biden administration push to incentivize companies to expand their US-based manufacturing.

“

Designed for American patriots, first responders, and military veterans who can't get enough of their bold, rich drink of choice. You can count on our made in USA glassware to serve you.”

Old Southern Brass



Photographer: Jonathan Hurtarte/Bloomberg Law

At the same time, American customers are looking to keep money in their communities with their purchases, and they're willing to pay a premium to do it. Some have pushed back on their own against misleading marketing; shoppers proposed a class-action lawsuit against the maker of Reynolds aluminum foil over its Made in America claims.

In other cases, the FTC has arranged refunds for buyers of mislabeled products. Its ultimate goal is to even the marketing playing field for those whose products legitimately qualify as America-made.

“They should be rewarded in the marketplace for that,” Samuel Levine, director of the FTC’s Bureau of Consumer Protection said in an interview with Bloomberg Law. “They can’t realize those rewards if they have to compete with those who cheat.”

Companies are eyeing the agency’s moves, and are turning to attorneys like Robert Freund, an LA-based advertising lawyer, for guidance. Many are still unprepared, he said.

“It’s something that, despite increased regulatory attention, isn’t on the radar of every brand and every marketer,” Freund said. “There are still a lot of blind spots.”

To be marketed as entirely Made in USA, a product must have negligible or no foreign parts, and its final assembly must take place in the US, the FTC says. Even using American flags or making references to US headquarters or factories in promotions could amount to a Made in USA claim, the agency says.

But its definitions leave wiggle room. A company could market barbecue grills made in Nevada as made in the US even if its knobs and tubing—insignificant parts of the overall product—are from Mexico, according to one example cited in FTC guidance. Businesses can also promote products as American-made with a caveat that distinguishes how much of it was made in the US and how much abroad.

“The standards can be difficult to interpret, and there can be some ambiguity,” said Daniel Kaufman, former FTC Bureau of Consumer Protection acting director, now a partner at BakerHostetler.

The FTC’s investigation against Old Southern Brass—which the agency publicly nicknamed “Uncle Sham”—determined that its \$14.99 shot glasses and other products were made in China. The Florida business also misled customers by suggesting it was veteran-operated and would donate 10% of its sales to military service charities, regulators asserted.



Photographer: Jonathan Hurtarte/Bloomberg Law

The agency imposed a \$4.6 million penalty on Old Southern Brass late last year, but later reduced it to \$150,000 because of the “company’s inability to pay,” according to the [FTC’s final order](#).

Representatives of Old Southern Brass declined to comment.

In January, the FTC ordered the US subsidiary of Japan-based tractor maker Kubota to pay \$2 million for falsely labeling thousands of its tractor replacement parts and other agricultural equipment as Made in USA.

Kubota admitted the mislabeling, said it cooperated and that it “regrets that this matter has occurred.”

Many FTC investigations start with tips from competitors, or complaints from individuals left on the agency’s tip line, Levine said. Regulators then scour publicly available records to review a company’s imports and compare them to its marketing claims. Investigators can also subpoena companies for information.

An investigation into the motocross and ATV parts maker Cycra—which touts its products as “proudly designed, developed and manufactured in Lexington, North Carolina”—gained momentum when US Customs and Border Protection agents intercepted some of its shipments from Taiwan. Inside, they found assembled products sporting “Made in USA” labels.

The FTC imposed a \$872,577 judgment in June 2023. Cycra ultimately couldn’t pay the whole amount, [the FTC said](#), but the agency still collected about \$221,000 and will send \$180,000 in refunds to its customers.

Cycra didn’t respond to a request for comment.

Other violators have been spared a civil penalty and escape with what’s called a “closing letter” if they come clean and make amends. That was the case for eXtreme Dog Fence, an electric dog-fence business the FTC in October said had fixed potentially misleading assertions by removing some marketing statements and creating new advertising policies.

The website for the Reading, Pa.-based operation now says its fences are “made at home in the United States of America with imported parts. This means that jobs are created, here at home.”



Photographer: Jonathan Hurtarte/Bloomberg Law

Wilson Sporting Goods Co. got a closing letter, too, after it agreed to update its promotional materials following questions over whether some youth footballs it marketed as American-made were produced in Vietnam. “We are pleased to have resolved this matter in cooperation with the Federal Trade Commission,” the company said in a statement to Bloomberg Law.

The agency has issued at least 24 closing letters since 2022, its records show. FTC Chair Lina Khan

cited its efforts on false Made in America claims during a House hearing this month.

The FTC will “use all available tools to ensure scammers who cheat consumers, honest businesses, and American workers face heavy consequences for their lawbreaking,” she said in written testimony.

Change in Advertising

Freund, the advertising lawyer, said he usually gets questions from clients after the FTC brings cases with record penalties like it has this year.

Businesses are generally ramping up their supply chain tracing to make sure they’re in compliance with the FTC and other regulators, said Clinton Yu, a partner at Barnes & Thornburg who advises businesses on customs and import rules.

They’re also checking their information from suppliers to back up their claims “if the FTC comes knocking,” Yu said.

It’s a message the agency has repeatedly preached.

“Why wait until the FTC or another law enforcer sends a subpoena before setting up an in-house compliance check?” said an April FTC website post about the Williams Sonoma case. “It doesn’t have to be fancy. Pertinent documents in a file folder or on your network are all you may need to back up your claims.”

The graphic features a blue background with a white document from Williams Sonoma. At the top left is the Williams Sonoma logo. The document text includes:

- 1. "Williams Sonoma utilized the procedures upon receipt of the FTC Order." (10/10/23)
- 2. "Williams Sonoma utilized the procedures upon receipt of the FTC Order." (10/10/23)
- 3. "Williams Sonoma utilized the procedures upon receipt of the FTC Order." (10/10/23)
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- 18. "Williams Sonoma utilized the procedures upon receipt of the FTC Order." (10/10/23)
- 19. For example, between April 2022 and August 2023, Defendant advertised certain PBTeen mattress pads as "Crafted in America from domestic and imported materials."
- 20. In numerous instances, those mattress pads were wholly imported from China.
- 21. After learning of these false claims, FTC staff identified six products advertised on Defendant's websites as MUSA without any disclosure that such products contained foreign parts, ingredients, or components; and/or they were processed outside the United States.
- 22. "Williams Sonoma utilized the procedures upon receipt of the FTC Order." (10/10/23)
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Source: FTC

Bloomberg Law

Graphic: Jonathan Hurtarte/Bloomberg Law

But for some businesses, there's far more work to be done, especially if American-made claims are a big part of their image. To be compliant with the FTC's rules, "sometimes they have to rebrand themselves," Yu said.

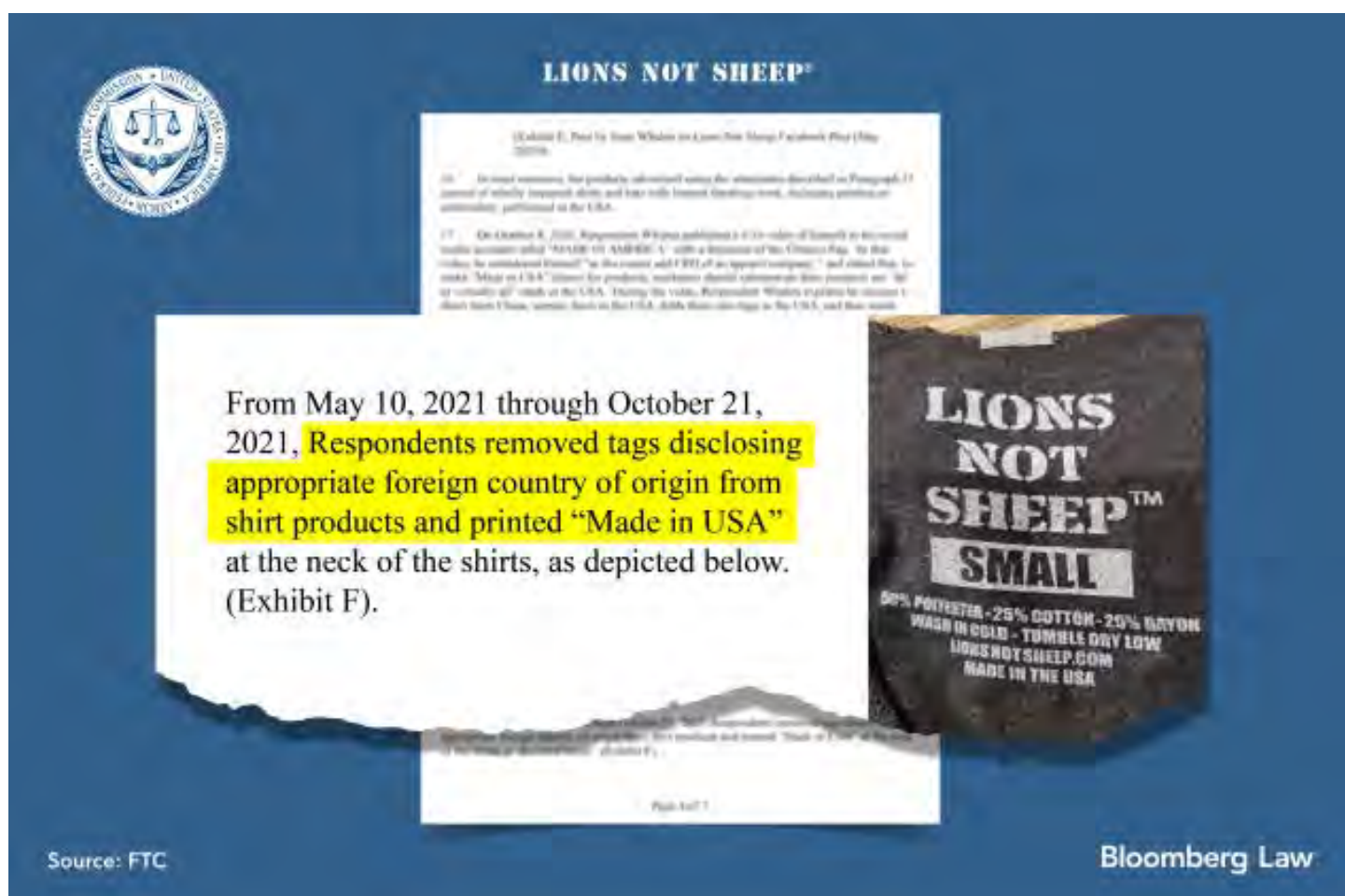
Others remain defiant.

Lions Not Sheep, the t-shirt maker, faced a \$211,355 penalty after an investigation led regulators to an online video in which the company CEO said his business replaced the "Made in China" labels on his shirts with ones that said "Made in USA." Using the money it collected, the FTC sent refunds to almost 12,000 customers.

The company did not reply to requests for comment. In a response posted online, CEO Sean Whalen said his company was targeted because it was selling anti-Biden apparel.

"They want to absolutely nuke and obliterate any conservative company they can," he said.

The FTC declined to comment on his claim.



Graphic: Jonathan Hurtarte/Bloomberg Law

Consumer Sentiment

Getting caught in false Made in America claims also could be a “a publicity nightmare,” said Zlatko Hadzismajlovic, partner at McCarter & English and head of its global trade and export controls practice.

“No one who’s using the Made in USA wording as a competitive advantage wants to be known as someone who’s used it deceptively,” he said.

The backlash can be especially punishing from customers. Two-thirds of American consumers routinely seek out products made in the US, according to a [2023 report](#) from business intelligence company Morning Consult, based on a survey of about 1,000 shoppers. Shoppers want American-

made products for a myriad of reasons, whether that be safety, [patriotism](#), labor rights or environmental concerns.

Sneaker maker New Balance [settled a lawsuit](#) in May with customers who alleged several of its shoes weren't made in the US despite having names like "Made in USA 990v2." Foil giant Reynolds Consumer Products LLC faces a similar claim from shoppers who contend they were duped into paying premium prices for foil wrap that boasted "Made in USA" on its box, but wasn't.

Reynolds did not respond to a request for comment.



Photographer: Jonathan Hurtarte/Bloomberg Law

Online shopping can make it especially tough for consumers to notice when they're being misled about a Made in USA claim, Levine said, because they can't physically inspect the product or its labels. It "makes it easier and more tempting for companies to make deceptive claims," he said.

Sen. Tammy Baldwin (D-Wis.) leads a bipartisan group of lawmakers who've been pushing for stricter country-of-origin and Made in USA disclosure since 2018.

Their bill—called the Country of Origin Labeling Requirement Act, or COOL Act—would require online marketplaces and importers to conspicuously show where the products they sell come from to match the requirements of brick-and-mortar stores. It would also broaden the FTC's authority to penalize violators.

"It makes it easier once we require online retailers to label or to reveal where it's made, and then it helps the fight against the fraudulent knockoffs," Baldwin said in an interview.

The bill cleared the Senate Commerce committee in December. Baldwin said it's likely to be added as a noncontroversial rider to must-pass legislation such as the annual defense spending bill.

Supply Chain Moves

Depending on the industry, there are a host of benefits to making products in the US: There's no geopolitical risk and less forced labor risk, particularly for goods made in China. There are also fewer supply chain disruptions with US-made products, and companies typically have a better handle on inventory and quality control.

For some industries, making goods in America still tends to be more expensive than abroad, but reshoring is "the long game," said Scott Paul, president of the Alliance for American Manufacturing, a partnership between US manufacturers and the United Steelworkers.

"There are still a lot of obstacles that stand in the way, but it's more favorable than it has been for a very long time," he said.

Companies are broadly more interested in reshoring and near-shoring now than in years past, said Lisa Anderson, a supply chain expert at LMA Consulting Group. Executives and board members see supply chain disruptions—from the pandemic uncertainty to the drought in the Panama Canal or disruptions in the Suez Canal—as headaches they'd rather avoid.

"It's definitely getting to be in the back of executives' minds," Anderson said.

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Supreme Court Should Prevent Flood of State Climate Change Torts

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Climate change litigation is again hotly pressing on the US Supreme Court docket. Within the next month, the court is expected to rule whether it will accept for review an October 2023 decision from the Hawaii Supreme Court determining that state courts could be, in essence, regulators of global climate change.

The case is less about climate change than it is about the separation of powers and proper division of authority between the federal and state governments. The Supreme Court should grant the petitions for certiorari and address the challenges raised.

The petitions for certiorari in *Sunoco LP v. City and County of Honolulu* and *Shell PLC v. City and County of Honolulu* were filed by the defendants in February, and the city and county of Honolulu plaintiffs submitted their reply asking the Supreme Court not to hear the case on May 1.

The petitions raise critical questions of constitutional authority—and do so against the backdrop of the heated controversies of climate change being used by the plaintiffs and some courts to claim that crises justify circumventing normal boundaries of constitutional law.

In the underlying *Honolulu* case from which both petitions emerge, the Hawaii Supreme Court upheld a ruling that oil companies can be sued in Hawaii state courts for their alleged contributions to global climate change under novel theories of “public nuisance” and expansions of “consumer deception” legal liability. This is one of a flurry of lawsuits that have been filed against energy companies and others in the past several years, claiming they should be liable for alleged contributions to climate change effects.

The Hawaii Supreme Court rejected a motion to dismiss where defendants argued that federal law displaces or preempts these kinds of lawsuits because a patchwork of state laws shouldn’t be allowed to govern global issues that are already addressed under federal law. The defendants had further argued that issues such as energy policy and sensitive decisions about geopolitical issues of climate change are exclusively within the purview of Congress and federal policymaking authorities.

The February petitions by the losing defendants in the case present questions over whether federal law preempts state-law claims seeking redress for injuries allegedly caused by global climate change.

If the Supreme Court doesn't intervene to grant the petition, it will be open season for similar lawsuits in city and county courtrooms in every state across the US. If the law allows that, then the Supreme Court should grant the petition and say so.

If it doesn't—which seems more likely under our constitutional design—the Supreme Court should grant the petition to stop the onslaught in state courts before it begins.

The framers created a system in which fundamental issues of public policy are committed to the deliberative and elected branches of government—legislatures and executives. They also created a unique system of federalism where the states retained substantial authority, but where critical issues of national or global concern were handled at the national level.

In one of the decisions reaching legal conclusions opposite those of the Hawaii Supreme Court—creating the kind of split that justifies Supreme Court intervention—the US Court of Appeals for the Second Circuit in April 2021 evaluated the merits of a lawsuit brought by the City of New York that raised claims almost identical to those brought by Honolulu.

In rejecting the availability of state tort law in the climate change context, the Second Circuit explained: “Global warming presents a uniquely international problem of national concern. It is therefore not well-suited to the application of state law.” Furthermore, “judicial caution and foreign policy concerns counsel against permitting such claims to proceed under federal common law absent congressional direction. And since no such permission exists, each of the City's claims is barred and its complaint must be dismissed.”

Its conclusion flowed from the Supreme Court's 2011 decision in *AEP v. Connecticut* holding that federal common law is unavailable as a litigation device in this context because it has been properly displaced by the Clean Air Act.

While the *AEP* court didn't address whether the Clean Air Act also preempted state law, that conclusion is a logical extension of its reasoning. Granting the petition in the *Honolulu* case would be an excellent vehicle to confirm that extension.

Besides the Second Circuit, other courts have recently applied the *AEP* rationale to the new wave of climate change cases in direct conflict with the Hawaii Supreme Court, including a Delaware trial court in January.

And the Supreme Court explained in 1987 in *International Paper Co. v. Ouellette* that control of interstate pollution is exclusively a federal matter, especially once Congress has spoken to the issue and made complex policy decisions on how to regulate or not regulate by balancing competing concerns. The court in *Ouellette* stated that it would be extraordinary for Congress to leave open a way for state courts or legislatures through their common law or statutes to undermine that federal balancing and priority setting in our federal interstate pollution statutes.

The Supreme Court has a chance to protect the constitutional limits of the courts by explaining that neither state nor federal courts may invent state or federal law to engage in climate change policymaking. It also can clarify that federalism requires that some issues be available for Congress to claim as exclusively federal—lest a chaotic mix of state approaches risks interfering with an effective, unified process to solve the climate problems the plaintiffs seek to abate.

The cases are *Sunoco LP v. City and County of Honolulu, Hawaii*, U.S., No. 23-947 and *Shell PLC v. City and County of Honolulu, Hawaii*, U.S., No. 23-952 .

This article does not necessarily reflect the opinion of Bloomberg Industry Group, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.

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Exxon Pressure Grows as State Treasurers Oppose Oil Giant's CEO

By Saijel Kishan2024-05-21T13:08:34114-04:00

- The letter says Exxon displays 'disregard for shareowners'
- The company's annual meeting is scheduled for next week

Treasurers from seven US states want investment firms, including BlackRock Inc., to vote against Exxon Mobil Corp. Chief Executive Officer **Darren Woods** at the company's annual shareholder meeting next week.

The treasurers' letter, which was also sent to Goldman Sachs Group Inc., JPMorgan Chase & Co. and 15 other companies, was backed by New York City Comptroller **Brad Lander** and three of the country's biggest pension plans. They're also urging investors to vote against Exxon's lead independent director Joseph Hooley.

Exxon has been facing increasing pressure since it sued two climate-focused investors earlier this year, accusing them of abusing the shareholder-proposal process. When the investors withdrew their resolutions, Exxon opted to continue legal proceedings, asking the courts to provide more clarity on how the US Securities and Exchange Commission interprets its own rules.

"Exxon's actions continue to display disregard for shareowners and their right to have a say in the direction of the company," California State Treasurer Fiona Ma said in [a statement](#) on Tuesday. "I'm proud to join with my colleagues from around the country to help protect this fundamental governance principle and hope these asset managers do the same."

The California Public Employees' Retirement System, the largest state-run public pension fund in the US, said Monday that it will vote against all Exxon directors, saying the oil giant is undermining shareholder rights.

Ma was joined in sending the letter by state treasurers from Oregon, Vermont, Washington, Maryland, Connecticut and Nevada.

Exxon Pressure Grows as State Treasurers Oppose Oil Giant's CEO

Exxon's annual shareholder meeting is scheduled for May 29.

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Matt Levine's Money Stuff: The Companies Work for Themselves

By Matt Levine 2024-05-21T13:40:50545-04:00

McRitchie

One theory is that, because most of the shareholders of most US public companies are diversified investors in lots of companies, each company's managers should work, not to maximize the value of *their* company, but to maximize the value of *all* the companies. If the chief executive officer of a company can do a thing that reduces the value of her company by \$1, but increases the value of her competitors (or suppliers, or customers, or neighbors, or any other publicly traded companies) by \$2, then she should do that. Her shareholders will lose money on her stock but make money on their other stocks, and they will be happy and grateful to her. Maximizing the value of her company's stock, at the expense of the other companies, *harms her shareholders*. She has fiduciary duties to those shareholders, and the way to fulfill those duties is by maximizing the value of their overall portfolio, which is, roughly speaking, the stock market.

This theory:

- makes a certain amount of sense (the shareholders really are largely diversified), and
- is quite *fruitful*. It gives you lots of interesting ideas about the world. Much of ESG (environmental, social and governance) investing can be thought of in these terms: Big diversified investors might care more about the *systemic* effects of their companies (whether they cause climate change, etc.) than they do about their individual performance. Or there is a popular worry that common ownership of all the companies causes antitrust problems, because — if you believe this theory — companies won't want to compete on price in a way that harms their collective bottom line. Or I have half-seriously proposed weird theories about Covid vaccines and Ozempic.

On the other hand this theory is, you know, *wrong*. It just isn't the case that directors and managers of each public company "really" work for the collective set of all public companies, and have duties to

that collective. They work for their individual companies. There are a few ways to tell:

- 1. All the laws and cases and stuff are about duties to the company, not about duties to shareholders' overall portfolios.
- 2. "Corporate managers should maximize the overall value of their shareholders' portfolios" is not a very good guide to behavior. The effects of a CEO's decisions on her competitors and customers and suppliers and complementary businesses and potential future entrants and every other company will be mixed and complex, and a CEO can find a way to justify more or less any action by saying "well this will be good for the market as a whole." Whereas it is relatively easy to measure if a company's own business is doing well.
- 3. Relatedly, the way to maximize overall value might be through competition among companies. Over the long term, what increases the overall value of the stock market is probably innovation, rather than careful slicing of existing entitlements, and competition is a good motivator of innovation.
- 4. The executives are generally *paid* based on *their* company's performance. In particular, they are often paid in *stock* — stock of their company, not index funds. The outside investors of a typical company will be broadly diversified, but the *executives* of that company will have a disproportionate amount of their net worth in that company's stock. If the executives were supposed to work on behalf of the market as a whole, they'd get paid in index funds.

There is probably something to the theory, both as a descriptive matter (do corporate executives sometimes act in the best interests of all of the companies rather than just their company?) and as a normative one (*should* they?). But it captures an interesting weird tension in how the world works; it does not simply *describe* how the world works.

Still the theory is such fun that (1) I can't resist writing about it and (2) some people really believe it and try to make it true. We talked last year about a guy named James McRitchie, who sued Mark Zuckerberg and other directors of Meta Platforms Inc. for caring too much about Meta and not enough about their shareholders' diversified portfolios. The theory was that Zuckerberg owns a huge undiversified slug of Meta stock (because he is its founder!), and the directors work to maximize Meta's value, and they *shouldn't*. Instead, they should be better corporate citizens and consider the effects of Meta's actions on "the global economy," not just its own profits.

I was never clear on exactly what this would mean. (“Media reports make it clear that there are opportunities for the Company to improve its economic impact (and thus the financial position of its diversified stockholders) by investing some of its cash flows in greater security or by changing certain practices in a manner that would reduce those cash flows,” [said the complaint](#), meaning, like, being more worried about the effects of Instagram on teens’ mental health.) But the point was probably not so much to get Meta to change how it operates. The point was to try to get a Delaware court to declare a new theory of corporate governance, one where founder-CEOs who own a lot of stock have a *conflict* of interest with their other shareholders, because the founder-CEOs are concentrated but the other shareholders are diversified.

This was never likely to happen. I wrote at the time:

The lawsuit is not so much a real lawsuit as it is a piece of performance art, or a philosophy paper. It doesn’t really provide a guide for corporate action; it is just an abstract inquiry into what the corporation is for. I love it so much.

As it happens, the judge in the case, Delaware Vice Chancellor Travis Laster, seems to agree with me on both of those points: It’s not a real lawsuit, but he loved it so much. Here is his [April 30 opinion](#), which (1) dismissed the case but (2) spent 102 pages engaged in the arguments:

The “deep architecture” of Delaware corporate law reveals that directors owe firm-specific fiduciary duties. Numerous Delaware Supreme Court authorities rest on that implicit proposition. So does American corporate law generally, which has taken a firm-specific approach since courts first treated directors as fiduciaries during the first half of the nineteenth century.

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

One important point in the opinion is that a lot of Delaware corporate law is about director duties in mergers and acquisitions, and basically none of the M&A cases even mention the idea that directors of the target company should consider the acquiring company’s shareholders:

If sell-side directors had a duty to consider the interests of diversified stockholders, then one might expect the decisions to evaluate whether the directors properly considered factors relevant to

diversified investors. If the acquirer (or topping bidder) were publicly traded, and if the sell-side board had a duty to consider the interests of diversified stockholders, then one would expect courts to consider the extent to which the sell-side directors considered whether the deal would create a positive surplus, regardless of the allocation between the two firms. The takeover premium would not be relevant, because diversified sell-side stockholders could be expected to own shares on the buy side as well. Assuming proportionate ownership, the cost of the premium to the buyer's stockholders would offset the value of the premium to the target stockholders. Courts would ask whether directors considered how successful the combination would be, because diversified stockholders would benefit from productive combinations and suffer harm from unsuccessful ones.

Judicial analysis would change to a similar degree for cash deals, with courts expecting directors to consider the value of the combination to diversified investors. Under the plaintiff's formulation, that would mean considering the value of the combination to the economy. Courts might expect sell-side directors to consider whether the acquirer planned to take on considerable debt to fund the acquisition, because a bankruptcy could cause economic dislocation. Or courts might expect sellside directors to resist or reject combinations resulting in excessive market concentration that could harm the economy by enabling the post-combination entity to extract monopoly rents. ...

Yet there are no indications that courts expect directors to take those or similar factors into account. No cases suggest directors should consider whether a particular outcome would be harmful or beneficial to the economy. Nor do any cases suggest that sell-side directors should consider the transaction from the perspectives of both sellside and buy-side stockholders. Quite the opposite.

Still there is some hope:

Still, there is a way to achieve the plaintiff's desired result. Delaware's governance model is flexible enough to accommodate corporations where directors pursue the interests of diversified investors. The Delaware General Corporation Law (the "DGCL") authorizes private ordering and empowers corporate planners to tailor director duties through provisions in the certificate of incorporation. Using that authority, corporate planners who find the plaintiff's arguments convincing can reorient director duties toward diversified stockholders.

So I guess the next campaign is to try to get companies to write into their charters that they will work on behalf of diversified shareholders.

Endless shrimp

We talked yesterday about the corporate finance angle on Red Lobster's Ultimate Endless Shrimp promotion, but at Slate, Luke Winkie addresses [the labor-relations and nutritional angles](#):

"I had a guy come in with his family. It was a family of five. And he did 16 rounds of shrimp scampi," said James Berke, a 23-year-old in New Jersey, who until very recently worked at a Red Lobster. "He was there for over two hours on a busy Friday night. They had one of my biggest tables. I just had to watch this man eat plates upon plates of the scampi, which isn't even served over pasta. It's shrimp in a garlic-wine butter. It was so gross." ...

Berke's experience serving a man who put away 16 servings over the course of two hours was actually mild compared with some of the other stories I've heard. Josie, 19, who also asked to be anonymous, worked at a (now-shuttered) Kansas City Red Lobster, where she watched a solo diner take down 30 orders of fried shrimp within four hours. According to the nutritional information on Red Lobster's website, that's something like 14,000 calories.

"He was a skinny guy too," Josie said. "I was like, *Where is it all going?*"

But the top thing employees will not miss about Red Lobster are the arguments and confrontations they'd frequently endure when informing customers about the rules that come buoyed to the Endless Shrimp deal. For instance, guests cannot request a box to take their Endless Shrimp home, nor can they share their servings with the rest of the table. (In other words, only one phantasmagoric shrimp binge per person.)

"You had groups coming in expecting to feed their whole family with one order of endless shrimp," Josie said. "I would get screamed at." She already had her share of Cheddar Bay Biscuit battle stories, but the shrimp was something else: "It tops any customer service experience I've had. Some people are just a different type of stupid, and they all wander into Red Lobster."

What we discussed yesterday was the possibility — hinted at in Red Lobster's bankruptcy papers — that the endless shrimp promotion was a way to funnel money from the failing Red Lobster to its controlling shareholder Thai Union Group Pcl, which was also a big supplier. The theory is roughly that, as Red Lobster slid into bankruptcy, Thai Union could not expect to get any value back *as a shareholder*; in fact, it valued its Red Lobster investment at zero by February. But it could salvage a

lot of value *as a supplier*, by selling Red Lobster a lot of shrimp. If Red Lobster paid full price for all those shrimp, that would be profitable for Thai Union as a supplier. And if Red Lobster lost money on every shrimp it bought, that would in theory be bad for Thai Union as a shareholder, but if Thai Union's shares were worthless anyway, it couldn't get any worse. Instead, the money came out of the pocket of Red Lobster's *creditors*, who are now looking into whether there was anything amiss in the endless shrimp decision-making.

In some ways the dynamics are reminiscent of what we used to talk about as “the MoviePass economy.” There, the theory was that venture capitalists wanted to fund businesses that were growing quickly and signing up lots of enthusiastic customers, without particularly caring whether those businesses made money. Startups adapted to those incentives: It is easier to grow quickly and impress your customers if you price your products way below cost, and so startups did. Sometimes this worked, and the startups quickly built big networks of dedicated customers and could rationalize their economics, and sometimes it didn't.

But the point was that, for a while, ordinary people's lifestyles were subsidized by venture capitalists' bets on growth. I once wrote, about competing SoftBank-backed food-delivery services:

In these situations it is instructive to remove a few layers of abstraction and just think about what is actually happening here. At one end, the sovereign wealth fund of Saudi Arabia plows gigantic piles of money into SoftBank's Vision Fund. At the other end, Mexico City's “legendary late-night snack spot El Moro” can have someone “deliver its churros and hot cocoa to takeout customers across the capital” well below cost, subsidized by the Vision Fund. The King of Saudi Arabia is sending hot chocolate to everyone in Mexico City. Here, have this nice hot chocolate, on the King of Saudi Arabia. Modern capitalism is always so much stranger than you expect.

Same here but with shrimp. Here, too, arguably Thai Union was very interested in *volume* and indifferent to *unit economics*. Here arguably the trade was that Thai Union was gifting shrimp to Red Lobster overeaters. Thai Union got paid well for the shrimp, and the customers underpaid for them, and the whole transaction was subsidized — unwillingly — by Red Lobster's creditors.

Her

One thing that I sometimes think is that worries about runaway artificial intelligence are metaphors for worries about (1) [corporate capitalism](#), generally, (2) the corporate governance of OpenAI,

specifically, or (3) Sam Altman, personally. Like Sam Altman is not, as far as I now, a superintelligent evil robot, but some of the fears that people have about superintelligent evil robots seem weirdly similar to their fears about him. We have talked about how the board of directors of OpenAI felt that Altman was lying to them, but he “had been so deft they couldn’t even give a specific example.” His intelligence is too subtle for ordinary humans to understand, and he uses it to overpower them!

Or a lot of people worry about the effect that AI will have on creative work: If computers can become perfect imitators of human writing and speech, if they can generate convincing images and videos, then what will that do to the value of writers and artists and actors and directors? Won’t the computers just imitate and displace actors? Well, maybe, but in any case [Sam Altman will](#):

Days before OpenAI demonstrated its new, flirty voice assistant last week, the actress Scarlett Johansson said, Sam Altman, the company’s chief executive, called her agent and asked that she consider licensing her voice for a virtual assistant.

It was his second request to the actress in the past year, [Ms. Johansson] said in a statement on Monday, adding that the reply both times was no.

Despite those refusals, Ms. Johansson said, OpenAI used a voice that sounded “eerily similar to mine.” She has hired a lawyer and asked OpenAI to stop using a voice it called “Sky.”

OpenAI suspended its release of “Sky” over the weekend. The company said in a blog post on Sunday that “AI voices should not deliberately mimic a celebrity’s distinctive voice — Sky’s voice is not an imitation of Scarlett Johansson but belongs to a different professional actress using her own natural speaking voice.”

For Ms. Johansson, the episode has been a surreal case of life-imitating art. In 2013, she provided the voice for an A.I. system in the Spike Jonze movie “Her.” ...

Last week, Mr. Altman appeared to nod to the similarity between OpenAI’s virtual assistant and the film in a post on X with the single word “her.”

Here’s a long [OpenAI blog post](#) about how they cast voice actors, looking for things like “a voice that feels timeless,” “an approachable voice that inspires trust,” but certainly not “sounds like Scarlett Johansson,” what ever gave you that idea, that’s crazy.

Donations

Here's a trade:

- 1. Start a company to, you know, invent teleportation or whatever.
- 2. Write some financial projections about how much money you will make if you succeed, discount them by an optimistic estimate of your likelihood of success, and decide that your company is worth \$1 billion.
- 3. Donate 10% of the stock of your company to a nonprofit.
- 4. Deduct the \$100 million value of the donation on your taxes.
- 5. Good work, now you never pay taxes again.

To be clear, this is extremely not legal or tax advice. They are [looking for this sort of thing!](#) Anyway [here's a great story](#) about a guy named Gregory Gerami, who came to Florida A&M University "to present a check for more than \$237 million during the university's May 4 graduation ceremony." I mean, a novelty check. Not a check. "The donation to FAMU was revealed to be private stocks in Gerami's company, Batterson Farms Corp." And:

He's maintained that his gift is worth around \$237 million, though he admits no external valuation of the stocks has been conducted yet. ...

Officials have since admitted the stocks may be worthless. ...

Gerami told The Sun News Thursday he didn't watch the meeting, and he feels all the criticism directed toward him is premature since there hasn't been any third-party valuation of the stock. His company is in the process of hiring a qualified appraiser, he said.

"If the valuation supports (the value we reported) of the gift, what will [critics] say?" he asked.

Probably they'll say "why doesn't the school sell the stock for \$237 million then," would be my guess, but who knows.

Incidentally a reader once emailed me to suggest that Donald Trump could monetize his Trump Media & Technology Group stock by donating it to his charitable foundation. At first I was skeptical, but he walked me through the math and I was enlightened. The math is: What loan-to-value ratio would a bank give you in a non-recourse loan against a volatile meme stock you control? Because the IRS will give you 37%.

Things happen

Craig Wright is [apparently](#) not [Satoshi Nakamoto](#). Jamie Dimon Says Succession at JPMorgan Is 'Well on the Way.' FDIC Chairman [Martin Gruenberg to Resign](#) Following Report Detailing Sexual Harassment at Agency. New York lawmakers push to block funds' [sovereign bond litigation](#). Even a Fraud Conviction Won't Keep [Nikola's Founder](#) Away From the Company. A \$10 Billion Real-Estate Fund Is Bleeding Cash and [Running Out of Options](#). Banks Are Now Targeting Some of Private Credit's Riskiest Debt. Shell Investors Back Weaker Emissions Targets at Annual Meeting. Activist investor builds stake in Reckitt after [baby formula verdict](#). States Push Back Against Guaranteed Income With New Bans. How the \$17 Desk Salad Won. France Issues [Scratch-and-Sniff Baguette Postage Stamps](#). 'Gathering of Kyles' [fails](#) to earn Guinness World Record in Texas.

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- 1. Oh, kidding, charitable deductions are limited to [50% of gross income](#) and can only be carried forward for [five years](#), this is very much not tax advice.

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Securities Law News

May 20, 2024, 11:36 AM PDT

It's PhDs Against MBAs in Credit Investing as Quants Jump In

By Caleb Mutua

- Barclays says systematic credit AUM has doubled in past year
- Automated trading gains a foothold as liquidity improves

Bloomberg Law News 2024-05-21T12:15:50412580764-04:00

It's PhDs Against MBAs in Credit Investing as Quants Jump In

By Caleb Mutua2024-05-20T14:36:47940-04:00

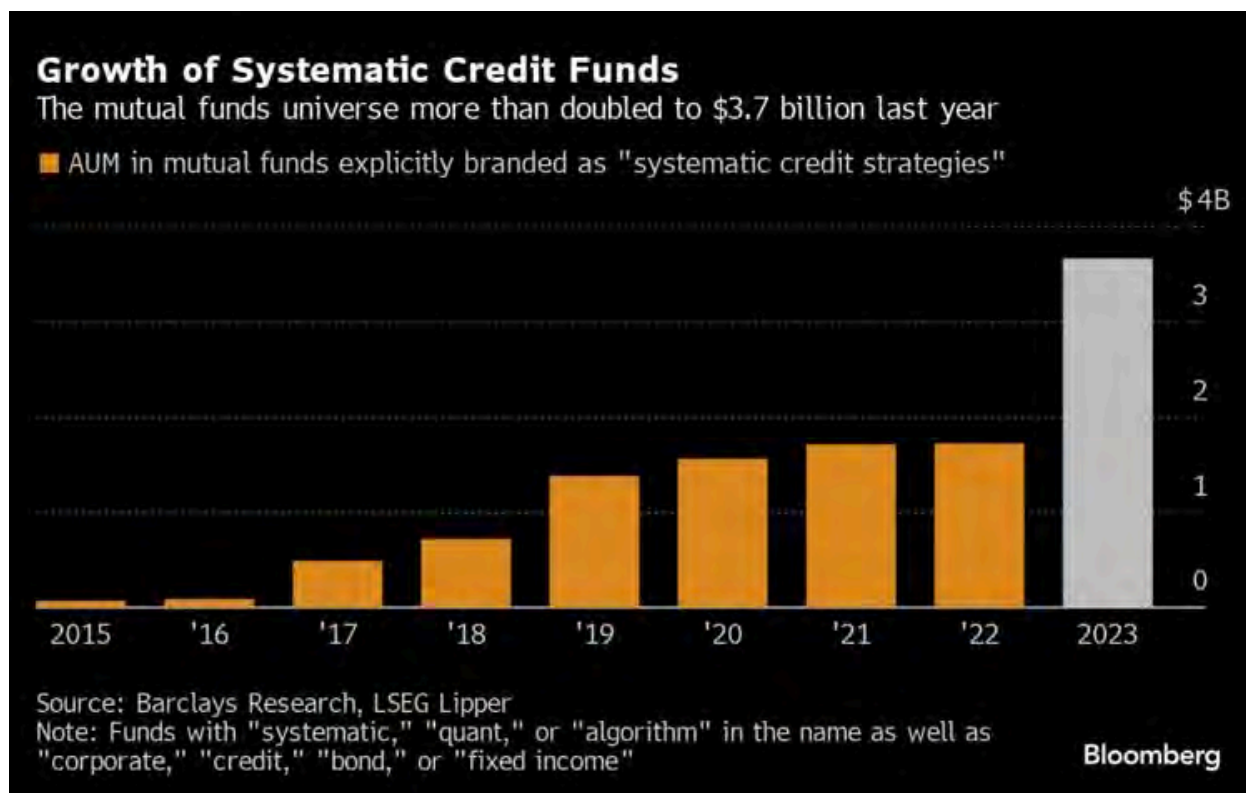
- Barclays says systematic credit AUM has doubled in past year
- Automated trading gains a foothold as liquidity improves

Robot investors are increasingly taking over credit markets.

Systematic money managers, making fast decisions about corporate bonds to buy and sell using complicated algorithms, have seen their assets more than double over the last year by one measure, according to Barclays Plc strategists. By another metric, there could be \$90 billion to \$140 billion of funds in these strategies in US high-grade and junk bond markets.

It's the latest sign of how bonds are trading with growing frequency in credit markets, thanks in part to exchange traded funds. That higher liquidity is allowing innovations that have fueled stock trading for decades, including black-box trading models, to gain more of a foothold in company debt markets as well, according to Barclays.

"The number of funds and the total deployed assets associated with systematic strategies have ballooned recently," Barclays strategists **Andrew Johnson** and **Dominique Toublan** wrote in a note to clients on Friday. "Up until the past few years, systematic strategies occupied a relatively small corner of the credit market. This has been changing rapidly, and the effects on liquidity and price action are already apparent."



The shift is pitting investors with technical PhDs against traditional portfolio managers that have business degrees. Systematic investors use computer models to scan entire markets and select securities that fit their strategies. That allows them to examine much more than fundamental investors, who can only scour through so much data, and also helps them find more obscure opportunities hidden in the market. However, computers may not always be able to pick up nuance in legal documents, listen to tones on earnings calls or follow relevant news in the same manner as humans, the strategists said.

Nonetheless, they expect the systematic swell to continue, as electronic and portfolio trading have become more popular in credit markets, improving liquidity. Roughly \$3.3 trillion of cash volumes were traded electronically last year, with about 16% coming from systematic accounts, Barclays strategists found. Because systematic firms look far and wide for investments, they will probably find opportunities others miss, thereby providing liquidity in obscure corners of the market.

"This breadth-first approach is therefore likely to create demand for bonds in less liquid areas of the market and provide additional price discovery," they wrote.

Traditional asset managers will have to "evolve or risk being left behind," they wrote.

Automated credit trading has been growing for years, particularly among brokers and dealers, but was focused on helping traders buy and sell securities more efficiently. What's different now is that the robots are making more decisions about what securities to buy and sell.

To come up with their assessments, the Barclays team counted all the US mutual funds that have the terms “systematic,” “quant” or “algorithm” along with “corporate,” “credit,” “bond” or “fixed income,” and found that their assets under management had doubled to \$3.7 billion over the past year. They also spoke with Barclays’ algorithmic trading desk to find that one in six electronic requests for quotes come from systematic accounts. They took that material and came up with an estimated range of total AUM.

The strategists had some caveats in their report, noting how difficult it is to assess the size of systematic trading because of how many investors combine quantitative and fundamental strategies. A survey of investors at the Barclays Hedge Fund Symposium found that nearly three-quarters of them favored that “quantamental” approach.

They also outlined risks associated with increased systematic trading, especially the potential for trend-followers creating “herding behavior” around certain names and amplifying volatility. Similarly, factor models that try to build on momentum, search for underpriced bonds or take advantage of bid-ask spreads can cause sharp movements in prices, as can tactical strategies that trade individual bonds.

“Credit investors of all stripes should understand the signals that can bring systematic investors to the market and drive real price action,” the strategists wrote.

(Updates with details about liquidity in sixth and seventh paragraphs. A previous version of this story corrected the volume figures in the sixth paragraph.)

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NOT FOR REPRINT

New York Reaches \$2B Settlement with Bankrupt Crypto Lender Genesis

The settlement resolved a lawsuit James' office filed in state Supreme Court of Manhattan in October and establishes a victims' fund for Genesis' creditors, with the firm neither admitting nor denying the allegations.

May 20, 2024 at 03:55 PM

Cryptocurrency

By Brian Lee | May 20, 2024 at 03:55 PM

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



A settlement for bankrupt cryptocurrency brokerage firm Genesis Global Capital to repay its creditors \$2 billion in cash and digital assets is said to be the largest digital assets agreement in New York history, the state attorney general's office said Monday.

"This historic settlement is a major step toward ensuring the victims who invested in Genesis have a semblance of justice," New York Attorney General Letitia James said in a statement. "Once again, we see the real-world consequences and detrimental losses that can happen because of a lack of oversight and regulation within the cryptocurrency industry. New York investors deserve the peace of mind that comes from a properly regulated marketplace, and that is something my office will always act to achieve."

The settlement resolved a lawsuit James' office filed in state Supreme Court of Manhattan in October, and establishes a victims' fund for Genesis' creditors, with the firm neither admitting or denying the allegations.

Approved on Friday by U.S. Bankruptcy Judge Sean Lane, for the Southern District of New York, the settlement also bans Genesis from operating in New York. Lane also signed off on the firm's reorganization plan.

James' office alleged Genesis defrauded more than 29,000 state residents who had contributed more than \$1.1 billion.

Her office's lawsuit also alleged that Genesis and other defendants hid more than \$1.1 billion in losses from investors that provided digital assets through an investment program called "Gemini Earn."

James' office expanded the lawsuit in February against Genesis, its former chief executive officer, CEO, Soichiro Moro, and Digital Currency Group and its CEO Barry Silbert, for defrauding additional people and institutions of an additional \$2 billion.

Under terms of the settlement, and the AG's lawsuit will continue against the remaining defendants, as well as Genesis' former business partner, Gemini Trust Company.

"Genesis is committed to distributing all available assets to its creditors as a form of restitution," said Genesis' attorney Sean O'Neal of Cleary Gottlieb Steen & Hamilton. "Because of the court's approval of the Chapter 11 plan and the settlement with the New York attorney general, distributions will not be capped at the petition date value."

Genesis’ interim CEO Derar Islim said in a statement: “Our goal throughout this process has been to maximize value for all creditors, and we are gratified that the court approved both our Plan and the NYAG settlement agreement. We look forward to putting the Plan into effect and making distributions as expeditiously as possible.”

Islim noted that under the plan, creditors will receive distributions in kind, to preserve the value in the form of the original assets they loaned as much as possible, rather than being limited to the United States dollar value of the cryptocurrency assets as of the date of the lawsuit. Converting them into cash or other forms of repayment might not reflect the current or future value of the cryptocurrency assets, he said.

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Chancery Preserves Most Of Super Group SPAC Suit

By **Leslie A. Pappas**

Law360 (May 20, 2024, 7:44 PM EDT) -- A shareholder of a blank-check company who's suing its sponsor and top leaders in Delaware's Court of Chancery got the green light Monday to move ahead with most of his proposed class claims related to the SPAC's \$4.75 billion merger with the online sports betting company that runs online casinos Betway and Spin.

In a 50-minute telephone hearing Monday, Delaware Vice Chancellor Lori W. Will ruled that shareholder Dylan Newman had raised "reasonably conceivable" claims against the special purpose acquisition company's sponsor, Sports Entertainment Acquisition Holdings LLC, and four out of five of its co-founders, directors and officers named as defendants.

Newman, a stockholder of Sports Entertainment Acquisition Corp. **filed the suit in May** against Sports Entertainment Acquisition Holdings, co-founder and former CEO John Collins, co-founder and former Chief Financial Officer Eric Grubman, co-founder Chris Shumway, and directors Natara Holloway Branch and Timothy Goodell.

SEAC merged in 2022 with SGHC Ltd., a holding company for sports betting and online gambling business Betway and multibrand online casino Spin, creating a new public company called Super Group Ltd.

SEAC was a blank-check company that a group of former sports executives **formed in 2020** with the aim of merging with a sports and entertainment business.

Newman alleges that the defendants, whose founder shares would become worthless if they didn't get a deal done, issued false and misleading statements about the merger so that public shareholders of the SPAC would vote to approve it.

The proxy statement issued ahead of the deal failed to disclose changes in Dutch and German gambling laws that would "severely harm the company's business," the complaint says.

And it says the proxy also overstated the value of SEAC's shares, saying that they were worth \$10 per share even though they were actually worth less than \$6.72 due to dilution and dissipation of cash.

On Monday, Vice Chancellor Will preserved claims of breaches of fiduciary duty against most of the officers and defendants, finding that Newman had stated a reasonable claim that public stockholders wouldn't have been able to easily calculate the net cash per share from the information in the proxy.

Although the proxy did include the information that shareholders would need to do the calculation, it was scattered throughout a 343-page statement. "A proxy statement shouldn't be a treasure hunt or a game of Clue," she said.

The vice chancellor dismissed all claims against co-founder Shumway, saying he was neither an officer nor a director of the SPAC.

And she dismissed one breach of fiduciary duty claim against Collins because he was not a director.

But she preserved claims of breaches of fiduciary duty against Sports Entertainment Acquisition Holdings and against Collins and Grubman as officers, and she preserved unjust enrichment claims against all defendants except Shumway.

She didn't dismiss the claims against directors Holloway Branch and Goodell but called the allegations "fairly weak" and said it was a "close call" that she would be willing to reconsider in a separate pleading.

None of the parties responded Monday to Law360's request for comment.

Dylan Newman is represented by Brian J. Robbins, Gregory E. Del Gaizo and Mario D. Valdovinos of Robbins LLP, David M. Sborz, Peter B. Andrews, Craig J. Springer, Andrew J. Peach and Jackson E. Warren of Andrews & Springer LLC and Randall J. Baron, Benny C. Goodman III, Erik W. Luedeke, Christopher Lyons and Tayler D. Bolton of Robbins Geller Rudman & Dowd LLP.

The defendants are represented by David B. Hennes, Martin J. Crisp and Sarah M. Samaha of Ropes & Gray LLP and Stephen C. Norman, Jaclyn C. Levy and Ryan M. Ellingson of Potter Anderson & Corroon LLP.

The case is Newman v. Sports Entertainment Acquisition Holdings LLC et al., case number 2023-0538, in the Court of Chancery of the State of Delaware.

--Additional reporting by Katryna Perera. Editing by Brian Baresch.

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Catching Up With Delaware's Chancery Court

By **Leslie A. Pappas**

Law360 (May 20, 2024, 4:21 PM EDT) -- Delaware was full of drama last week, as proposed changes to the state's corporate law statutes raised eyebrows and a professor's friend-of-the-court brief sparked a very unfriendly public exchange. Delaware's court of equity banged the gavel on pipeline and social media disputes, and shareholders filed new suits alleging insider trading, vote bungling, unfair stock buybacks and merger shenanigans. In case you missed any of it, here's the recap of all the top news last week from Delaware's Chancery Court.

Top News

Intrigue surrounding closed-door talks on amendments to Delaware's General Corporation Law picked up last week, as interest grew in a draft proposal that some say could take away corporate policing powers traditionally given to the state's courts.

Drama also swirled in an ongoing case over Tesla Inc. CEO Elon Musk's \$56 billion compensation package, as University of Delaware professor Charles M. Elson **accused** Tesla of trying to bully him. Elson claimed that Tesla had threatened to fire its counsel at Holland & Knight LLP — where the professor occasionally worked as a consultant — if he filed the amicus brief in the Chancery Court shareholder suit.

Tesla pushed back in a letter to Chancellor Kathaleen St. J. McCormick, saying it "categorically" **rejected the allegations**.

The dispute unfolded as another Tesla shareholder **filed a new suit** against the electric vehicle company, accusing its board of failing to investigate reports that Musk had used illicit drugs including ketamine, LSD and cocaine, which influenced social media posts that damaged the company's value.

In the Courtroom

A near record-breaking \$266.7 million fee for stockholder attorneys who negotiated a \$1 billion settlement with Dell Technologies Inc. had Delaware's Supreme Court **raising questions** about how the Chancery Court calculates attorney fee awards for large class action settlements.

Decisions

Vice Chancellor Lori W. Will, ruling from the bench, **declined to enforce a disputed settlement** between ARC Global Investments II LLC — the sponsor of the blank-check company that took Donald Trump's Truth Social public — and a group of ARC investors who had sued to remove its managing member, Patrick Orlando.

Vice Chancellor J. Travis Laster **ordered** the former TransCanada Corp. to pay \$199 million of a potential \$283 million judgment issued in a post-trial ruling last year on amounts owed to former Columbia Pipeline Group Inc. shareholders, citing offsets to the damages award.

Vice Chancellor Morgan T. Zurn **dismissed claims** from BuzzFeed Media Enterprises Inc. against 85 former BuzzFeed Inc. employees who sought to arbitrate a stock options dispute instead of litigating in Chancery, but she preserved the company's claims against six ex-workers who couldn't show evidence of an employment agreement that compelled arbitration.

Vice Chancellor Zurn **also ruled** that a mobile app slot-machine player who lost an arbitration

dispute with the game's operator may not keep the details of the arbitration award confidential.

New Cases

An investor in blank-check company Osprey **alleged** that its directors, officers, and controllers protected their own investments while leaving public investors to suffer losses following a merger with satellite imaging company BlackSky Holdings Inc.

A shareholder at Stitch Fix Inc. alleged that insiders at the online personal styling service **sold \$102 million worth of company stock** while hiding information from the public for nearly 18 months about the company's faltering business prospects.

Stockholders who lost big after a blank-check company took carbon-capture venture LanzaTech NZ Inc. public in a \$1.8 billion reverse-merger in February 2023 **sued for damages**, alleging disclosure failures and other defects prior to closing.

A Cardiff Oncology Inc. stockholder **accused the clinical stage biotech** of failing to properly count "against" votes in decisions that added 2 million shares to the company's limit, and argued that 1.6 million invalid shares issued to directors and officers should be returned.

A shareholder of artificial intelligence-driven software developer C3.ai Inc. **filed a derivative suit** alleging breaches of fiduciary duty and unjust enrichment related to the California company's strategic partnership with Baker Hughes Co.

A shareholder of New York online food-ordering company Olo Inc. **sued** its officers, directors and largest stockholder, alleging that the board had approved a stock buyback program that would hand control of the company to its largest shareholder for no consideration.

Ongoing Disputes

Private investment firm RedBird Capital Partners **urged** Vice Chancellor Sam Glasscock III to strike unauthorized motions by Brookfield Infrastructure Partners seeking dismissal of a RedBird suit to recover a \$150 million escrow included in a \$5.7 billion sale of data centers to Brookfield affiliates last year.

Still Under Seal

A shareholder filed a proposed class action against HighCape Capital LP, several of its shareholders and executives, and Foresite Capital Management LLC, asserting claims of breach of fiduciary duty. The case is Michael Farzad v. HighCape Capital LP, case number 2024-0524.

Two stockholders of WP CityMD Topco LLC filed a class action against New York-headquartered global private equity firm Warburg Pincus LLC, Walgreens Boots Alliance Inc., Village Practice Management Company LLC, and others, raising claims of breaches of fiduciary duty. The case is Faiz Kahn v. Warburg Pincus LLC, case number 2024-0523.

Settlements

Bolt Financial Inc. **agreed to cancel nearly 13.4 million shares** worth \$37.5 million to settle a derivative suit against its board of directors that accused the company's former CEO of purposely defaulting on a \$30 million loan.

Shareholders of a special purpose acquisition company that took a now-bankrupt smart window manufacturer public **reached a tentative agreement to settle** their proposed class action against Cantor Fitzgerald LP and its billionaire chair and CEO Howard Lutnick.

Quotable

"The decision was carefully thought out. Simply because you didn't like the result, to try through the legislature to overrule it is not a good idea." — Charles M. Elson, retired professor of governance at the University of Delaware and founding director of the university's Weinberg Center for Corporate

Governance, **in reference to proposed amendments** to Delaware's General Corporation Law that some say is attempting to overrule a controversial Chancery Court decision in **West Palm Beach Firefighters' Pension v. Moelis & Co.** 

--Additional reporting by Jeff Montgomery, Hailey Konnath, Sydney Price, Alison Knezevich. Editing by Kelly Duncan.

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The Law360 400: Tracking The Largest US Law Firms

By **Sam Bell and Pamela Wilkinson**

Law360 (May 21, 2024, 2:04 PM EDT) -- The legal market expanded more tentatively in 2023 than in previous years amid a slowdown in demand for legal services, especially in transactions, an area that has been sluggish but is expected to quicken in the latter half of the coming year.

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Nevertheless, the largest U.S. law firms by headcount still managed to grow their ranks, expanding at an average rate of 2.2% overall, with the top 50 outpacing the others.

The 50 largest firms grew at an average rate of 2.9% and the 200 largest firms at 2.6% — both several percentage points above the 2.2% overall average — while the 200 firms in the lower half of the ranking grew at 1.4%.

Although law firm hiring has clearly slowed, growth has not stopped but is returning to a pace comparable to that of the years preceding the pandemic. Many BigLaw leaders remain **cautiously optimistic** about prospects for growth.

Kirkland & Ellis LLP has once again earned the title of the biggest U.S. law firm, as it has every year since 2018. Latham & Watkins LLP and Greenberg Traurig LLP placed second and third, just as they have since 2018. Holland & Knight LLP jumped from eighth to fourth after swelling its ranks through a merger with Waller Lansden Dortch & Davis LLP.

And Gibson Dunn & Crutcher LLP broke into the top 10, knocking Lewis Brisbois Bisgaard & Smith LLP down to 11th place. Lewis Brisbois, Sidley Austin LLP, Morgan Lewis & Bockius LLP and Goodwin Procter LLP all saw their headcounts shrink in 2023, while Jones Day saw its headcount grow for the first time in two years.

Mergers accounted for much of the growth at firms of 100 or more attorneys in 2023. But midsize firms are **combining at greater rates** than ever before, so we can expect to see more growth among the firms ranked 201-400 in 2024.

The Law360 400 features the largest U.S.-based law firms and international firms with a U.S. component as measured by domestic attorney headcount.

The Largest U.S. Law Firms

Rank	Law Firm	Total U.S. Attorneys	Total U.S. Partners
1	Kirkland	3,043	1,346

Rank	Law Firm	Total U.S. Attorneys	Total U.S. Partners
2	Latham	2,614	662
3	Greenberg Traurig	2,155	1,105
4	Holland & Knight	2,035	1,061
5	Sidley	1,798	575
6	DLA Piper	1,696	612
7	Morgan Lewis	1,688	700
8	Jones Day	1,647	595
9	Gibson Dunn	1,629	396
10	Goodwin	1,598	539
11	Lewis Brisbois	1,552	932
12	Ropes & Gray	1,465	301
13	Dentons	1,334	723
14	Gordon Rees	1,331	587
15	Skadden	1,327	275
16	K&L Gates	1,265	634
17	Littler	1,245	496
18	Perkins Coie	1,174	495
19	Simpson Thacher	1,163	224
20	Cooley	1,155	327
21	Mayer Brown	1,149	451
22	Covington	1,143	275
23	King & Spalding	1,135	438
24	Troutman Pepper	1,129	468
25	McDermott	1,108	518
26	Foley & Lardner	1,104	495
27	Wilson Elser	1,098	308
28	Hogan Lovells	1,092	384
29	WilmerHale	1,090	253
30	Reed Smith	1,084	430
31	Wilson Sonsini	1,062	280
32	Faegre Drinker	1,060	488
33	BakerHostetler	1,058	497
34	Morgan & Morgan	1,041	139
35	Husch Blackwell	1,018	409
36	Jackson Lewis	1,015	457
37	Fox Rothschild	996	620
38	Arnold & Porter	983	297
39	Sheppard Mullin	978	405
40	Polsinelli	974	547
41	Ogletree	941	398

Rank	Law Firm	Total U.S. Attorneys	Total U.S. Partners
42	Davis Polk	941	153
43	Paul Weiss	938	165
44	Nelson Mullins	937	548
45	Quinn Emanuel	926	244
46	White & Case	926	265
47	McGuireWoods	921	385
48	Winston & Strawn	910	361
49	Debevoise	907	126
50	Alston & Bird	907	368
51	Weil	902	198
52	Seyfarth	874	417
53	Taft	873	490
54	Willkie	861	259
55	Paul Hastings*	849	283
56	Cozen O'Connor	832	501
57	Venable	828	420
58	Hunton Andrews Kurth	819	315
59	Morrison Foerster	815	240
60	Duane Morris	791	390
61	Orrick	788	332
62	Norton Rose Fulbright	782	313
63	Barnes & Thornburg*	770	489
64	Sullivan & Cromwell	754	144
65	Akin	754	261
66	Akerman	748	467
67	Clark Hill	728	298
68	Dinsmore	716	367
69	Dechert	709	233
70	Proskauer	708	238
71	Vinson & Elkins	707	184
72	O'Melveny	685	210
73	Blank Rome	680	347
74	Fried Frank	664	156
75	Baker Donelson	658	314
76	Bradley Arant	653	344
77	Milbank	642	132
78	Haynes Boone	639	268
79	Baker McKenzie	637	309
80	Pillsbury*	637	279
81	Squire Patton Boggs	635	226

Rank	Law Firm	Total U.S. Attorneys	Total U.S. Partners
82	Ballard Spahr	626	231
83	Katten	625	316
84	ArentFox Schiff	617	320
85	Davis Wright Tremaine	612	272
86	Womble Bond	605	329
87	Nixon Peabody	605	272
88	Frost Brown Todd*	600	310
89	Kilpatrick	598	261
90	Cole Scott	596	253
91	Crowell & Moring	591	241
92	Mintz*	589	307
93	Fisher Phillips	586	268
94	Baker Botts	583	214
95	Cleary	583	100
96	Bryan Cave Leighton Paisner	581	241
97	Kutak Rock	567	344
98	Fragomen	566	103
99	Maynard Nexsen*	565	318
100	Locke Lord	564	304
101	Shook Hardy	542	260
102	Dorsey & Whitney	539	280
103	Quarles & Brady*	522	270
104	Jackson Walker	513	303
105	Jenner & Block	511	200
106	Marshall Dennehey	504	271
107	Snell & Wilmer	497	231
108	Fenwick*	496	146
109	Cravath*	485	100
110	Spencer Fane	480	233
111	Hinshaw	479	281
112	Holland & Hart	476	226
113	Buchalter	474	210
114	Quintairos Prieto*	467	211
115	Stinson	453	285
116	Wood Smith	450	152
117	Williams & Connolly	443	121
118	Dickinson Wright*	438	300
119	Goldberg Segalla	433	267
120	Thompson Coburn	433	251
121	Saul Ewing	427	218

Rank	Law Firm	Total U.S. Attorneys	Total U.S. Partners
122	Eversheds Sutherland	419	195
123	Buchanan Ingersoll	409	168
124	Loeb & Loeb	403	220
125	Butler Snow	402	239
126	Benesch	394	186
127	Thompson Hine	390	199
128	McCarter & English	390	230
129	Fredrikson & Byron	387	215
130	Gunderson Dettmer*	385	122
131	Moore & Van Allen	378	166
132	Dykema	376	201
133	Freeman Mathis*	375	178
134	Phelps Dunbar	375	138
135	Bass Berry*	360	166
136	Ice Miller	359	182
137	Lowenstein Sandler*	358	129
138	Cadwalader	358	105
139	Fish & Richardson	355	178
140	Vorys	355	195
141	Hall Booth	352	171
142	Burr & Forman*	350	239
143	Steptoe & Johnson LLP	350	146
144	Epstein Becker Green	343	195
145	Carlton Fields	341	190
146	Kramer Levin	339	110
147	Jones Walker	334	224
148	Michael Best*	333	189
149	Schulte Roth	333	75
150	Steptoe & Johnson PLLC	324	183
151	Stoel Rives	324	168
152	Armstrong Teasdale	322	190
153	Honigman	321	207
154	Foley Hoag	318	142
155	Smith Gambrell*	313	205
156	Day Pitney	313	140
157	Eckert Seamans	308	181
158	Bond Schoeneck	307	159
159	Lathrop GPM*	305	133
160	Bracewell	301	147
161	Vedder Price	299	159

Rank	Law Firm	Total U.S. Attorneys	Total U.S. Partners
162	Knobbe Martens	297	158
163	O'Hagan Meyer*	293	134
164	Cahill Gordon	293	67
165	Shearman*	293	106
166	Gunster	292	173
167	Adams and Reese	290	135
168	FisherBroyles	288	285
169	Manatt	287	172
170	McAngus Goudelock*	284	Could not be determined
171	Kelley Drye	284	117
172	Brownstein Hyatt	284	156
173	Shumaker Loop	283	170
174	Parker Poe*	282	133
175	Offit Kurman	281	212
176	Shutts & Bowen	278	201
177	Wicker Smith	271	104
178	Barclay Damon	266	148
179	Fennemore Craig*	264	177
180	Finnegan	261	109
181	Robinson & Cole	259	137
182	Chapman and Cutler	259	159
183	Wachtell*	257	85
184	Thompson Coe	256	125
185	Wiley	256	111
186	Goulston & Storrs	256	118
187	Cordell & Cordell*	254	25
188	Litchfield Cavo	251	142
189	Kasowitz	251	89
190	Williams Mullen	250	176
191	Winstead	249	144
192	GrayRobinson	247	155
193	Kubicki Draper	246	112
194	Warner Norcross*	246	115
195	Rivkin Radler	245	116
196	Atkinson Andelson	245	106
197	Chartwell Law Offices	238	140
198	Amundsen Davis	235	140
199	Lewis Roca	234	138
200	Best Best & Krieger	233	104
201	Tucker Ellis	233	102

Rank	Law Firm	Total U.S. Attorneys	Total U.S. Partners
202	Susman Godfrey	228	90
203	Pryor Cashman*	226	118
204	Allen Matkins*	224	123
205	Constangy	223	107
206	Morrison Mahoney*	220	140
207	Greenspoon Marder	215	125
208	Balch & Bingham	214	129
209	Hanson Bridgett	213	112
210	Stradley Ronon	213	104
211	Tyson & Mendes	212	56
212	Kaufman Dolowich	212	95
213	Miller Canfield	210	91
214	Choate	210	101
215	Kean Miller	209	88
216	Whiteford	208	111
217	Reinhart Boerner	208	137
218	Kelley Kronenberg	208	111
219	Harris Beach*	207	113
220	Brown Rudnick	206	99
221	Munger Tolles	203	83
222	Hodgson Russ*	198	136
223	Varnum	197	106
224	White and Williams*	196	89
225	Parsons Behle*	195	117
226	Morris Manning	195	92
227	Berry Appleman	195	29
228	Bricker Graydon	193	91
229	Hughes Hubbard	193	64
230	Stevens & Lee*	193	100
231	Procopio Cory	193	96
232	Rimon PC	191	158
233	Godfrey & Kahn*	190	95
234	Arnall Golden*	190	113
235	Patterson Belknap	188	54
236	Dickie McCamey*	188	101
237	Robins Kaplan	187	100
238	Stites & Harbison	185	125
239	Chiesa Shalinian	184	95
240	Cole Schotz	182	112
241	Luks Santaniello*	181	123

Rank	Law Firm	Total U.S. Attorneys	Total U.S. Partners
242	Swift Currie*	181	65
243	Lippes Mathias	178	98
244	Cullen & Dykman	178	99
245	Richards Layton	178	79
246	Kirton McConkie	177	98
247	Miles & Stockbridge	177	102
248	McAfee & Taft	177	103
249	Archer & Greiner	176	108
250	Sandberg Phoenix	174	71
251	Winthrop & Weinstine*	174	82
252	Robbins Geller*	174	90
253	McDonald Hopkins*	173	94
254	Chamberlain Hrdlicka	172	76
255	Robinson Bradshaw	172	88
256	Bowman and Brooke	171	80
257	Roetzel & Andress	171	105
258	Windels Marx	170	69
259	Munsch Hardt	169	98
260	Bodman*	169	111
261	Hinckley Allen*	169	110
262	MG+M The Law Firm	167	82
263	Lane Powell	166	100
264	McGlinchey Stafford*	165	90
265	Burns White	163	91
266	von Briesen	163	112
267	Burke Williams*	162	110
268	Sterne Kessler	162	72
269	Phillips Lytle	162	75
270	Porter Wright	162	111
271	Connell Foley	161	80
272	Wiggin and Dana	161	84
273	Crowley Fleck*	160	Could not be determined
274	McElroy Deutsch*	160	95
275	Stoll Keenon*	159	100
276	Verrill Dana	158	77
277	Hall Render	158	93
278	McNees Wallace	158	81
279	Gibbons	158	94
280	Schwabe Williamson*	158	101
281	Resnick & Louis*	157	91

Rank	Law Firm	Total U.S. Attorneys	Total U.S. Partners
282	Cipriani & Werner*	157	100
283	Stearns Weaver	156	124
284	Taylor English*	156	116
285	Hawkins Parnell*	153	86
286	Boies Schiller*	153	83
287	Pierce Atwood*	153	101
288	Smith Anderson	153	79
289	Bremer Whyte*	153	48
290	Butler Weihmuller*	151	52
291	Post & Schell	151	113
292	Reminger	151	112
293	Miller Nash	150	85
294	Jackson Kelly*	150	84
295	Carr Allison*	148	76
296	Rutan & Tucker	148	94
297	Kelly Hart	148	82
298	Sullivan & Worcester	148	78
299	Sherman & Howard*	148	95
300	Banker Lopez*	147	63
301	Nutter	147	88
302	Davis Graham	146	66
303	FordHarrison	146	88
304	Manning Kass	146	40
305	Shipman & Goodwin	144	74
306	Liskow & Lewis	144	76
307	Miller Johnson*	142	79
308	Foster Garvey	141	83
309	Davis + Gilbert*	141	70
310	Greensfelder Hemker	141	83
311	Cox Castle*	141	85
312	Hahn Loeser	141	81
313	Calfee Halter	141	82
314	Lewis Rice*	141	117
315	Gray Reed	140	61
316	Ulmer & Berne	140	80
317	Howard & Howard*	139	80
318	Swanson Martin	139	98
319	Hall Estill	139	77
320	Potomac Law	139	112
321	Nossaman	138	103

Rank	Law Firm	Total U.S. Attorneys	Total U.S. Partners
322	Vernis & Bowling*	138	74
323	SBSB Eastham*	138	50
324	Messner Reeves	138	70
325	Herrick Feinstein*	138	61
326	Norris McLaughlin*	137	78
327	McCalla Raymer*	136	48
328	Seward & Kissel*	136	62
329	Sills Cummis	135	75
330	Barley Snyder*	134	62
331	Kaufman Borgeest	134	58
332	Keating Muething	134	77
333	DeWitt*	134	98
334	Conroy Simberg*	134	64
335	Bernstein Shur	133	73
336	Spilman Thomas*	133	73
337	Riker Danzig	133	49
338	Neal Gerber*	132	82
339	Butzel Long*	131	88
340	Beveridge & Diamond	131	72
341	Galloway Johnson*	131	56
342	Plunkett Cooney*	130	78
343	Brock & Scott*	129	19
344	Hanna Brophy*	129	28
345	Keker Van Nest	128	41
346	Becker & Poliakoff*	127	80
347	Burns & Levinson*	126	78
348	Morrison Cohen	126	70
349	Hall & Evans*	125	50
350	Abrams Fensterman*	125	65
351	Farella Braun	125	71
352	Miller & Martin*	124	71
353	Porter Hedges	124	73
354	McKool Smith	124	71
355	Dilworth Paxson*	123	78
356	Lydecker LLP*	123	57
357	Lieff Cabraser	122	54
358	Segal McCambridge	122	42
359	Ward and Smith*	120	Could not be determined
360	Leech Tishman*	120	84
361	Weber Gallagher	120	84

Rank	Law Firm	Total U.S. Attorneys	Total U.S. Partners
362	Foley & Mansfield*	119	66
363	Albert & Mackenzie*	119	12
364	Milber Makris*	119	75
365	Hill Ward*	119	77
366	Obermayer Rebmann	119	66
367	Barack Ferrazzano	119	91
368	Thomas J. Henry Injury Attorneys*	119	Could not be determined
369	Lozano Smith	118	47
370	Bressler Amery*	118	68
371	Wolf Greenfield	117	55
372	Crowe & Dunlevy*	117	44
373	Young Conaway*	116	53
374	Wheeler Trigg	116	40
375	Motley Rice*	116	54
376	Linebarger Goggan*	116	Could not be determined
377	Farah & Farah*	115	Could not be determined
378	Kiernan Trebach	115	58
379	Banner Witcoff	115	71
380	Wyrick Robbins*	114	Could not be determined
381	Harter Secrest*	114	52
382	Wyatt Tarrant*	114	77
383	McLane Middleton*	113	57
384	Tarter Krinsky*	112	53
385	Brooks Pierce*	112	72
386	Haynsworth Sinkler	112	71
387	Kellogg Hansen*	111	42
388	Kopka Pinkus*	111	50
389	Mitchell Silberberg	111	74
390	Lewis Thomason	111	63
391	Mullen Coughlin*	111	42
392	Hedrick Gardner*	110	45
393	Pillinger Miller*	109	43
394	Shulman Rogers*	109	53
395	Mandelbaum Barrett	109	59
396	Drummond Woodsum	109	69
397	Schwegman Lundberg	109	78
398	Jeffer Mangels*	109	71

Rank	Law Firm	Total U.S. Attorneys	Total U.S. Partners
399	Babst Calland	109	66
400	Hamilton Miller Birthisel*	109	56

*Firms either declined to provide headcount information or did not respond by the survey deadline. Law360 estimated the headcount data for those firms using the firms' websites.

Methodology: Law360 gathered data from U.S. law firms and vereins or similar structures with a U.S. component, collecting domestic attorney and partner headcount information as of Dec. 31, 2023. Firms based outside the U.S. are not included, and only attorneys based in the 50 states and the District of Columbia were included in the responses. Firms that have shareholders, members or principals in lieu of partners have those numbers listed in the "partner" column.

Firms are ranked by their total number of U.S. attorneys. For firms with identical total U.S. headcounts, Law360 breaks ties by reviewing the percent change in attorney headcount from the previous year or years, if necessary. For the firms where that data is unavailable, Law360 assumes the percent change is zero for the purposes of breaking those ties only.

Ulmer & Berne LLP and Greensfelder Hemker & Gale PC merged effective February 1, 2024. Data for both firms is as of Dec. 31, 2023, premerger.

Shearman & Sterling and Allen & Overy merged effective May 1, 2024. Data for Shearman & Sterling is as of Dec. 31, 2023, premerger.

--Editing by John Campbell. Graphics by Ben Jay.

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iRhythm Brass Face Suit Over FDA's Heart Monitor Inquiry

By **Katryna Perera**

Law360 (May 20, 2024, 6:22 PM EDT) -- Several current and former directors and executives of medical technology company iRhythm are named in a shareholder derivative suit alleging they failed to disclose an inquiry by the Food and Drug Administration that found iRhythm's heavily touted and high-cost real-time heart monitoring device failed to meet the company's claims.

Plaintiff Patrick Ayers filed a **complaint** Friday against iRhythm Technologies Inc. CEO Quentin Blackford, its Chief Financial Officer Brice Bobzien and several other current and former directors and executive officers.

According to the suit, iRhythm develops and manufactures heart-monitoring devices meant to diagnose heart arrhythmias. One of its primary products is a device called Zio AT, which contains a transmittal function that reports arrhythmic events to iRhythm's monitoring labs in real time, which then notify the patient's prescribing physician.

"These types of heart monitors, known as mobile cardiac telemetry monitors or 'real-time' monitors, are approved for high-risk patients because of their ability to provide these near real-time alerts," the complaint states. "Real-time monitors sell for a premium over monitors that do not provide real-time notifications of arrhythmic events."

Ayers says that from January 2022 to the present, iRhythm told investors the Zio AT monitor was one of these real-time monitors meant for high-risk patients, and the company touted the device's growth potential.

"Particularly given the premium selling price associated with devices approved for use by high-risk patients, investors saw tremendous opportunity in Zio AT, based upon the company's representations," Ayers asserts.

But Ayers claims iRhythm misrepresented Zio AT's capabilities and failed to disclose that the U.S. Food and Drug Administration had issued a warning letter stating that the device was not cleared.

"The company had received a warning letter from the FDA concerning Zio AT's deficiencies, including that the device had only been approved for 'long-term monitoring of arrhythmia events for non-critical care patients where real-time monitoring is not needed,'" the complaint contends.

The FDA told the company that Zio AT "is only able to transmit 100 patient-triggered and 500 automatically detected arrhythmia events," and "[t]hus, when the transmission limit is hit, the device can no longer be used for its intended purpose of transmitting patient ECG for reporting," according to the suit.

Ayers says due to this limit, the device had failed to show significant arrhythmias in some patients, leading to at least two reported deaths.

But iRhythm did not inform physicians or patients of the existence of the transmission limit, the complaint states, and according to the FDA warning letter, the company had been aware of these flaws with the device since at least 2017.

According to Ayers, the truth began to emerge in November 2022 when iRhythm CEO Quentin

Blackford stated in a conference call with investors that the company had voluntarily issued a customer advisory notice to its Zio AT customers. It also lowered its Zio AT forecast for the quarter from the 40% growth target it had provided for the past three quarters to just 20%, the suit asserts.

As a result of these disclosures, the price of iRhythm common stock declined by 4.4%, or \$5.60 per share, on Nov. 2, 2022, the complaint states. As the market continued to process this news and analysts cut their price targets, iRhythm's common stock declined by an additional 11.6%, or \$14.07 per share, on Nov. 3, 2023, according to Ayers.

The FDA inquiry wasn't revealed until Nov. 4, 2022, and iRhythm also revealed at that time that the FDA had issued an inspection observation report on Form 483, which is used in cases where an agency investigator observed conditions that are deemed violations of the Federal Food, Drug and Cosmetic Act, Ayers says. On this news, the suit states, iRhythm's stock declined by 2.4%, or \$2.43 per share.

Several months later, in May 2023, iRhythm announced that a month earlier, the U.S. Department of Justice had subpoenaed the company for documents related to some of its products and services. According to Ayers, iRhythm did not reveal "the scope" of the DOJ's request, but he adds that analysts noted that one of iRhythm's competitors had also received a subpoena from the DOJ related to its wearable real-time monitoring product.

"The analysts thus presumed that the DOJ inquiry [into iRhythm] was likely related to Zio AT," he says.

On this news, the suit states, iRhythm stock declined by 6.9%, or \$9.25 per share on May 4, 2023.

According to the complaint, the final disclosure occurred on May 20, 2023, when the company revealed it had received a warning letter from the FDA about issues with the Zio AT device.

"Among other things, the warning letter criticized the company's marketing of the Zio AT as a 'mobile cardiac telemetry monitor' that provides 'near real-time monitoring' and is approved for use in 'high-risk patients' as these representations were false," the suit says. "In truth, the Zio AT device was only approved for non-critical patients and suffered from critical flaws that imperiled high-risk patients."

This revelation caused the price of iRhythm's stock to fall by 6.1%, or \$7.41 per share, according to the suit.

Ayers seeks damages, restitution, attorney fees, and improvements and reforms to iRhythm's corporate governance and internal procedures.

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

Ayers is represented by Gregory M. Nespole, Daniel Tepper, Correy A. Suk and Sidharth Kakkar of Levi & Korsinsky LLP, and Stephen E. Jenkins and Tiffany Geyer Lydon of Ashby & Geddes PA.

Counsel information for the defendants was not immediately available.

The case is Ayers v. iRhythm Technologies Inc. et al., case number 1:24-cv-00593, in the U.S. District Court for the District of Delaware.

--Editing by Kristen Becker.



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Teladoc Faces Suit Over Mental Health Platform's Losses

By **Emilie Ruscoe**

Law360 (May 20, 2024, 10:01 PM EDT) -- Telemedicine giant Teladoc Health Inc. and two of its executives face a proposed investor class action alleging trading prices for Teladoc shares fell after the company disclosed that its flagship mental health counseling platform saw membership and revenue declines despite increased advertising costs.

In a Friday **complaint**, Teladoc investor Paul Stary took aim at the company, its CEO Jason Nathaniail Gorevic and its CFO Mala Murthy with claims that trading prices for Teladoc shares fell by nearly 24% in early February, from over \$20 a share to under \$16 a share, after the company surprised investors with negative news about its revenue amid "substantially increased" advertising expenditures during its 2023 fiscal year.

Stary's complaint said Gorevic blamed the Teladoc's results in February on its BetterHelp mental health platform, the company's largest division and contributor of roughly 42% of its revenue.

Teladoc disclosed in February that BetterHelp lost about 51,000 members between the second and fourth quarter of 2023, leaving it with about 425,000 members, despite spending more on advertising for the counseling platform, Stary said.

In the same 2023 annual report, the company acknowledged that revenue was down by \$1 million year-over-year for BetterHelp and slid by \$10 million between 2023's third and fourth quarters.

Teladoc's total revenues for 2023 were "well below expectations," Stary said, and the company's executives cautioned investors that it expected that the BetterHelp trend would impact its growth in the first half of 2024.

The company also revealed in February that it ended up spending nearly \$669 million on advertising in 2023, an increase of over \$45 million compared to its 2022 advertising costs of nearly \$624 million. In its filings, the company said its higher ad costs were "driven by higher digital and media advertising costs related to BetterHelp."

By contrast, Teladoc's Murthy stated at a November 2022 conference that the company would implement "a sequential pullback in ad spending" for BetterHelp, Stary's complaint said.

"We are essentially looking to the ad prices and deciding where we want to be," Murthy said, according to Stary's complaint.

Murthy said that the company's ad spending pullback was part of Teladoc "returning to essentially the way it used to be pre-COVID."

"That is one of the important drivers of the full year adjusted [earnings before interest, taxes, depreciation, and amortization] that we have guided to," for 2023, Murthy said at the time.

Teladoc, which went public in 2015 with its share prices at \$19, saw its trading prices soar over \$266 amid the global pandemic's lockdowns, social distancing and remote work measures, which were drivers for a widely observed intense demand for telehealth services, including mental health counseling.

On Monday morning, Teladoc shares were trading under \$13, down about \$2 from the end of Stary's proposed class period.

Since January, Teladoc also faces separate proposed class action claims that its website shared sensitive user data with third parties, including Facebook parent company Meta Platforms Inc. The company's response to that suit is due by June 21.

The proposed class includes those who purchased Teladoc shares between Nov. 2, 2022, and Feb. 20, 2024.

On Monday, a representative for Teladoc told Law360, "We won't comment on pending litigation other than to say that the company will vigorously defend itself."

Counsel for Stary did not immediately respond to requests for comment Monday.

Stary is represented by Adam M. Apton of Levi & Korsinsky LLP.

Counsel information for the defendants wasn't immediately available Monday.

The case is Paul Stary v. Teladoc Health Inc. et al., case number 1:24-cv-03849, in the U.S. District Court for the Southern District of New York.

--Editing by Dave Trumbore.

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Alibaba Resists Class Cert. Over Failed Ant Group IPO

By **Katryna Perera**

Law360 (May 20, 2024, 9:58 PM EDT) -- Chinese e-commerce company Alibaba has again urged a New York federal judge not to certify a class of investors who claim they weren't warned about regulatory risks Alibaba faced in the lead-up to a \$34 billion initial public offering of its fintech affiliate, saying the suit's challenged misstatements did not affect Alibaba's stock price.

The company, its CEO Daniel Yong Zhang and former Chief Financial Officer Maggie Wu filed a **brief** on Friday opposing the investors' motion for class certification.

The defendants say the suit's challenged misstatements did not cause an inflation of Alibaba's stock price and that the information the investors claim was fraudulently concealed was actually "widely reported" during the proposed class period.

In the most recent version of the suit, filed in April 2022, investors claim they were damaged in December 2020 when trading prices for Alibaba's American depositary shares fell by over \$34, or about 13%, after Chinese regulators announced a probe into Alibaba's allegedly monopolistic practices.

The investors say the company had ample warning that certain of its business practices were in the crosshairs of regulators, but chose to keep that information from investors as its fintech affiliate, Ant Group, set its sights on going public via the world's largest-ever IPO, aiming to raise a record \$35 billion. The IPO was ultimately canceled.

The proposed class includes those who purchased Alibaba's American depositary shares between July 9, 2020, when the company filed its annual report for 2020 with the U.S. Securities and Exchange Commission, and Dec. 23, 2020, when news broke that Chinese authorities were probing the company for alleged antitrust violations in connection with monopolistic practices.

However, the defendants argue that the suit does not contain any direct evidence of an effect on price because "none of the challenged misstatements are associated with a statistically significant increase in Alibaba's ADS price."

Therefore, a presumption of class-wide reliance is "not appropriate," according to the brief.

The defendants further argue that Alibaba warned investors that its business practices carried "antitrust risk," and that the investors have conceded that a portion of the proposed class traded with the knowledge that Alibaba has signed exclusive agreements with business partners to avoid competition.

"It defies common sense for plaintiffs to invoke a presumption of reliance when they simultaneously concede that a portion of their putative class did not actually 'trade[] in ignorance of the fact' that Alibaba was engaging in exclusivity practices," the brief stated.

Alibaba also urged the court **in January** not to grant certification and made similar arguments.

Alibaba's founder and former CEO, Jack Ma, was **dismissed from the suit** in March 2023. Senior U.S. District Judge George B. Daniels found the complaint didn't lay out any details showing he played "any role" in preparing the allegedly misleading statements.

The court left the fraud claims in place against Alibaba, Zhang and Wu, as well as control person

claims in place against the individual defendants.

The judge trimmed fraud and control person liability claims over alleged misstatements about Ant Group, finding the investors lacked standing to bring those claims.

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

The investors are represented by Kara M. Wolke and Melissa C. Wright of Glancy Prongay & Murray LLP, Jeremy A. Lieberman, Jonathan D. Park and Patrick V. Dahlstrom of Pomerantz LLP, Peretz Bronstein of Bronstein Gewirtz & Grossman LLC, Frank R. Cruz of The Law Offices of Frank R. Cruz, and Lesley Portnoy of The Portnoy Law Firm.

Alibaba, Zhang and Wu are represented by Jonathan K. Youngwood, Stephen P. Blake and Bo Bryan Jin of Simpson Thacher & Bartlett LLP.

The case is In re Alibaba Group Holding Ltd. Securities Litigation, case number 1:20-cv-09568, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Sydney Price and Emilie Ruscoe. Editing by Linda Voorhis.

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Investor Group Wants Slowdown On Del. Corporation Law Bill

By **Jeff Montgomery**

Law360 (May 20, 2024, 8:07 PM EDT) -- Critics of a fast-tracked proposal to amend Delaware's General Corporation Law to give controlling stockholders wider influence or vetoes over some board decisions are urging the state's bar association to tap the brakes, following a Chancery Court decision striking down a Moelis & Co. stockholder agreement as flouting existing law.

In a letter to Delaware State Bar Association President Kate Harmon, Jeffrey P. Mahoney, general counsel for the Council of Institutional Investors, urged the bar to "pause the process to permit a more complete consideration of the critical issues raised by the proposed legislation and their potential impact" on long-term institutional investors.

"The need for a more deliberative approach in this case is underscored by the fact that the proposed legislation appears to contain no limit in terms of how far a shareholder agreement can go in changing a company's corporate governance," Mahoney wrote on May 14.

The letter, shared with Law360 late Friday, arrived as the DSBA and those involved in the bill-drafting process were pushing to complete a wide-ranging set of revisions to the DGCL in time for consideration by Delaware's General Assembly before the June 30 deadline for wrapping up the year's regular session.

Prompting the effort was a high-profile Court of Chancery ruling in February — still subject to Delaware Supreme Court review — that shot down a Moelis & Co. stockholder agreement in the case of West Palm Beach Firefighters' Pension v. Moelis & Co. Two other recent Chancery decisions were cited in the proposed measure as well.

Vice Chancellor J. Travis Laster's February decision in Moelis found, among other points, that the investment bank's concessions to its controller could only be granted through charter amendments rather than pacts and board actions — and even then, they had to adhere to existing law.

The decision was described as rattling the corporate bar at a time when a committee of the Delaware State Bar Association was drawing up the state's nearly annual, omnibus amendment to the Delaware General Corporation Law.

"The fact that this and other potential implications of the proposed legislation exist and have not yet been publicly debated is a powerful indicator that we are not yet at a stage to be considering a legislative change that could have a significant impact on CII members and other shareholders," Mahoney wrote.

The Council of Institutional Investors is a nonprofit, nonpartisan association of U.S. public, corporate and union employee benefit funds; other employee benefit plans; state and local entities charged with investing public assets; and foundations and endowments. It has about \$5 trillion in combined assets under management.

The Moelis controversy emerged in the shadow of Tesla chair Elon Musk's promise to reincorporate in Texas after Delaware Chancellor Kathaleen St. J. McCormick struck down his stock-based pay plan in January.

"In making these points, we acknowledge the proverbial 'elephant in the room' — namely, the current

campaign by Elon Musk to reincorporate his companies in a 'friendlier state' and his encouragement of other companies to do likewise," CII's Mahoney wrote. "We are also aware of the criticism that the [Moelis] opinion has upset certain practices that exist in the marketplace. The council does not find these arguments to be persuasive."

DSBA officials did not immediately respond to Law360's requests for comments.

Among the most recent draft bill amendments was a provision stating some stockholder amendments that are contrary to certificates of incorporation can survive, by way of an exception to a DGCL section that now requires a Delaware court or arbitration forum for claims based on a violation of a duty by a director, officer or stockholder.

"As currently drafted, the proposal would inject grave uncertainty into Delaware corporate law and undermine its coherence, balance and usefulness," Gabriel Rauterberg, a law professor at the University of Michigan, wrote in a letter to the DSBA's executive committee on April 11, shared with Law360 on Friday. He noted the proposals would allow companies to contract with current or former stockholders to take or refrain from taking certain actions.

"No limits are established," in the proposal, Rauterberg wrote in italics, observing that Delaware corporations can already enter shareholder agreements under Delaware law and the obligations of fiduciary duties.

"Yet the commentary to the proposal makes clear that the proposal is designed to overturn the Delaware Chancery Court's decision in *Moelis*, and the holdings of *Moelis* rest on familiar statutory and fiduciary limits to stockholder contracting." As a result, he said, are terms that "must be read as intended to authorize corporations to enter contracts that would otherwise violate the DGCL and fiduciary principles."

Brian J.M. Quinn, a law professor at Boston College Law School, described the proposed amendments in a letter to the DBSA, also shared with Law360, as "premature and ill-considered at the very least."

"In essence, these amendments attempt to resolve conflicts between market practice and the Chancery Court's limitations on market practice in favor of market practice," Quinn wrote. "While it is true that *Moelis*" and other recent court decisions "place an imposition on current market practices, there is no reason to believe that market practices should drive substantive amendments of the corporation law."

Rather, Quinn wrote, "amendments to the corporation law should be guided by an understanding of the public good, incorporating market practices where appropriate without being dictated by them."

Assembling amendments to the DGCL before Delaware's Supreme Court weighs in on *Moelis*, Quinn wrote, "strikes me as extremely premature, exhibiting an undue sense of panic. The world will not end because the Chancery Court has restrained market practice to conform within the limits of the statute."

Anat Alon-Beck, associate professor of law at Case Western Reserve University, said Monday in an email to Law360 there was no need to change the law, while adding that *Moelis* should proceed to the state's Supreme Court.

"Second, [the fact] there is now a new spotlight on jurisdictional competition underscores the significance of state policies, political climates and other considerations that can impact a company's choice of location," Alon-Beck said. "Moreover, a closer examination of the recent [Chancery] rulings offers valuable insights into Delaware law and the competition among states to attract corporations for chartering [incorporation]."

More broadly, Alon-Beck said, the competitive factors driving Delaware's response reflect "an increased recognition of the impact that political and societal factors can have on corporate decision-making and legal frameworks. The evolving landscape highlights an era where political considerations are shaping the direction of corporate law and influencing the choices of businesses regarding their legal homes."



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TD Ameritrade Must Face Most Claims In Fraud Abetting Suit

By **Sydney Price**

Law360 (May 20, 2024, 9:37 PM EDT) -- A Florida federal judge has sustained most of a receiver's lawsuit against TD Ameritrade alleging the broker-dealer was responsible for furthering an alleged \$9.8 million commodity pool fraud scheme.

U.S. District Judge William Matthewman said Friday that the receiver has adequately alleged that TD Ameritrade aided and abetted Rajiv Patel and his company Blueprint LLC's alleged breaches of fiduciary duty under Florida law, acted negligently and was unjustly enriched. Judge Matthewman gave the receiver until May 31 to file an amended complaint to address a dismissed Commodity Exchange Act claim.

Receiver Melanie Damian filed the six-count amended complaint in September on behalf of Kalpana Patel, widow of Rajiv Patel. According to the receiver's suit, the CFTC filed a complaint against Rajiv Patel in January 2022 accusing him of defrauding 16 people out of \$9.8 million through a commodity pool that was supposed to trade commodity futures and options. The suit alleges that instead of trading on behalf of participants, Patel used the money for his own trading activities and personal expenses.

Patel died in January 2022 after the CFTC's complaint was filed, according to the receiver's complaint.

Damian alleged that TD Ameritrade allowed the Patels' account to receive funds from Blueprint investors, and also failed to conduct proper due diligence on members of the joint account, thereby assisting in the scheme. The receiver said TD Ameritrade knowingly accepted wire transfers that violated its banking policies and failed to provide certain disclosures to Kalpana Patel as legally required.

Judge Matthewman said on Friday that at this stage of litigation, the receiver sufficiently shows that TD Ameritrade's alleged involvement with Patel violated Florida law.

"The court finds that, in combination — and at the motion to dismiss stage — receiver's purported eleven instances of actual knowledge are sufficient to allege a cause of action for aiding and abetting a breach of fiduciary duty under Florida law," the order states.

When addressing the receiver's claim for negligence, **TD Ameritrade said** in its motion to dismiss in October that "Mrs. Patel cannot be willfully blind to the activities in her account, personally benefit from the investor's deposits, and then attempt to hold defendants liable for her husband's Ponzi scheme."

But Judge Matthewman said on Friday that the receiver has adequately alleged a cause of action under the negligence claim, and TD Ameritrade does not cite any law to support their argument that they owed no duty to Kalpana Patel.

Judge Matthewman also found that the receiver's unjust enrichment claims against TD Ameritrade can survive. The receiver has alleged that Rajiv Patel and Blueprint made over \$414,000 in commissions and fees through the scheme and that TD Ameritrade knew this and "voluntarily accepted and retained the benefit."

Judge Matthewman dismissed Commodity Exchange Act violation claims against TD Ameritrade. Even

though the receiver has alleged an aiding and abetting claim under Florida law, it has failed to allege TD Ameritrade aided and abetted a CEA violation, he said.

"Receiver essentially alleges that defendants 'willfully and recklessly aided [Mr.] Patel's violations' by omission," the order states. "This is insufficient."

Counsel for Damian declined to comment on Monday. Counsel for TD Ameritrade did not immediately respond to requests for comment.

Damian is represented by Kenneth D. Murena and Kristopher E. Pearson of Damian & Valori LLP.

Ameritrade is represented by Daniel S. Newman, Antonia Irigorri Bernal and Christina P. Lehm of Nelson Mullins Riley & Scarborough LLP.

The case is Damian v. TD Ameritrade Inc. et al., case number 9:23-cv-80503, in the U.S. District Court for the Southern District of Florida.

--Additional reporting by David Minsky. Editing by Jay Jackson Jr.

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Local Governments Seek Sanctions For PBMs In Opioid MDL

By **Mike Curley**

Law360 (May 20, 2024, 6:35 PM EDT) -- Four municipalities are asking an Ohio federal court overseeing the national opioid litigation to sanction pharmacy benefit managers Express Scripts Inc. and OptumRX Inc., saying they've willfully defied the court's order to provide complete responses to discovery requests.

In a **motion** filed Saturday, attorneys for the City of Rochester, New York; Lincoln County, Missouri; Independence, Missouri; and Webb County, Texas said Optum and ESI have still not given proper responses despite the court's April 22 order finding that the prior responses "must be treated as a failure to respond."

In that order, the court compelled the defendants to "fully respond" to the plaintiffs' requests and provide those responses as soon as possible, but no such responses were provided prior to the deadline.

According to the motion, neither company has even claimed they fully responded, and they have in fact indicated that they are still in the process of searching for, or in some cases have not begun to search for, the documents in question, with the responses including language saying they "will" produce them "after" a reasonable search.

"Not only have PBMs failed to produce all responsive documents and information; they have not even tried," the plaintiffs told the court.

Instead, they have given "specious" excuses, such as blaming the minimal responses and incomplete production on recently completed search term negotiation and custodian selection, even though many of the documents are not custodial in nature, according to the motion.

In addition, the plaintiffs argued that custodian selection and search term negotiations are just additional ways for the plaintiffs to be assured the production is complete and that the issues have been outstanding since December.

"These defendants have had five months to produce complete and meaningful responses to the discovery propounded by the plaintiffs and have chosen not to do so," the plaintiffs wrote.

The companies have also failed to respond with specificity, such as by lumping together items when asked to produce a targeted list of separately enumerated requests on their relationships with Purdue Pharma, according to the motion.

The companies have also claimed that the documents were already produced elsewhere in the litigation by citing to the entire production record from another case or generally to the entire MDL production, when few of those documents relate to these specific cases, according to the motion.

The companies are also continuing to make objections that have already been overruled, or otherwise claiming the documents sought are irrelevant or burdensome to track down, the plaintiffs argued, and they are making generalized privilege claims on documents without adequately explaining how the privilege applies.

As sanctions, the plaintiffs asked the court to order the PBM defendants to fully respond to the

requests, including specific statements that all the relevant documents have been produced within 17 days, as well as sworn statements and reports to the special master to identify the documents.

"Granting the requested sanctions will foster the resolution of these cases on the merits based on all the facts — not just the facts the defendants choose to disclose," the plaintiffs argued. "The extra effort required by these sanctions will also provide appropriate punishment for the defendants' violations of this court's orders and will (hopefully deter) future violations."

Representatives for the parties could not immediately be reached for comment Monday.

The municipal governments are represented by Jayne Conroy of Simmons Hanly Conroy, Joseph F. Rice of Motley Rice LLC, Paul T. Farrell Jr. of Farrell & Fuller LLC and Peter H. Weinberger of Spangenberg Shibley & Liber.

The OptumRX defendants are represented by Brian D. Boone, William H. Jordan and Kimberly K. Chemerinsky of Alston & Bird LLP.

The Express Scripts defendants are represented by Mike Lyle, Jonathan G. Cooper and Sage R. Vanden Heuvel of Quinn Emanuel Urquhart & Sullivan LLP.

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

--Editing by Rich Mills.

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McKinsey Can't Nix Pregnant Women's Claims In Opioid MDL

By **Dorothy Atkins**

Law360 (May 20, 2024, 8:53 PM EDT) -- A California federal judge has cut some claims from multidistrict litigation seeking to hold McKinsey & Co. Inc. liable for infant neonatal abstinence syndrome caused by pregnant women's use of opioids, trimming fraud and nuisance-based claims, but allowing conspiracy and aiding-and-abetting claims to proceed against the consulting firm.

In 43-page order, U.S. District Judge Charles Breyer on Thursday handed McKinsey a partial win on its motion to dismiss the latest 10-count complaint filed by plaintiffs who represent infants born with neonatal abstinence syndrome caused by prenatal opioid exposure.

The ruling keeps alive claims by NAS plaintiffs, or women who took opioids while they were pregnant, in a sprawling MDL **initially filed in 2021** that accuses the management consulting firm of fueling the prescription opioid crisis by working with pharmaceutical companies like Purdue Pharma LP, Endo, Mallinckrodt Pharmaceuticals and Johnson & Johnson to push highly addictive opioid drugs for illegitimate uses.

Judge Breyer's decision follows his July 2023 **ruling** in which he threw out the claims with leave to amend after finding that the NAS plaintiffs failed to establish McKinsey owed a duty to the parents and didn't adequately plead that prescribing doctors relied on any purported misrepresentations made by the management consulting firm.

Judge Breyer called McKinsey the "**Don Draper for the industry**" — referring to the fictional character and the protagonist of the hit AMC television series "Mad Men," which chronicles the rise of a Madison Avenue advertising firm in the 1960s — and the judge gave the NAS plaintiffs 21 days to amend their complaint, which they did last August. But in October 2023, McKinsey again asked the court to throw out the allegations, saying, among other arguments, that its marketing activity is shielded by the First Amendment.

The amended complaint, which was filed by 11 mothers on behalf of their children in eight states — California, Colorado, Kentucky, Oklahoma, Nevada, Tennessee, West Virginia and Utah — shifts the NAS plaintiffs' theory of liability from direct liability to theories premised on conspiracy and aiding-and-abetting.

The new complaint contends that even if the company did not directly owe the NAS plaintiffs a legal duty, McKinsey is liable for helping its opioid-maker clients intentionally breach those duties, and women who continued to take opioid prescriptions while pregnant gave birth to children with a variety of health conditions as a result.

In his recent order, Judge Breyer tossed three nuisance-based claims and two fraudulent misrepresentation-based claims, as well as certain allegations asserted by plaintiff Julieann Valdez on behalf of a minor under Nevada law, which requires the alleged conspiracy to be intended to harm, and all claims asserted by Sarah Riley on behalf of a minor, who has since come of age.

Although the judge rejected McKinsey's argument that the NAS plaintiffs failed to plead a right common to the public to state viable public-nuisance claims in nearly all states, the judge agreed with McKinsey that the NAS plaintiffs ultimately failed to allege a "special injury" sufficient to assert their nuisance-based claims.

The judge also concluded that the NAS plaintiffs still have not alleged reliance with particularity required to state viable fraudulent misrepresentation claims, since they can only assume third-party doctors relied on McKinsey's statements.

"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. ... But there is no reason to think that the doctors' reliance on given representation is a matter within McKinsey's knowledge," the order said.

However, the judge allowed the NAS plaintiffs' remaining conspiracy and aiding-and-abetting claims to proceed past the pleading stage, finding that the plaintiffs sufficiently alleged McKinsey unlawfully conspired with drugmakers to boost opioid sales for illegitimate reasons.

"McKinsey and clients clearly had an agreement, and it can easily be inferred that the object of this agreement was to increase the manufacturers' sales of opioids," Judge Breyer stated.

He also rejected McKinsey's free speech defense, noting that the company even concedes the First Amendment can't shield it from aiding-and-abetting and conspiracy claims, and that the allegations have "little if anything to do with core First Amendment activity."

The NAS plaintiffs are the only remaining plaintiffs in the MDL that haven't cut a deal with the consulting firm since the MDL was launched by multiple groups of plaintiffs in June 2021 amid a nationwide legal reckoning for opioid drugmakers, distributors, suppliers and marketers who pushed the highly addictive painkillers over the past two decades.

Before the MDL was launched, McKinsey cut a **\$640 million deal** in February 2021 with attorneys general from all 50 states, and last year, McKinsey announced it had struck a **\$230 million deal** to resolve claims with a group of school districts, cities and counties.

Earlier this year, the company told the court it cut a **\$78 million** deal to resolve claims on behalf of approximately 80,000 third-party payors, which includes private benefit plans, self-insured parties whose operations are handled by third-party administrators, and commercial insurers that provide health and welfare benefits.

And last month, Judge Breyer signed off on McKinsey's **\$39.5 million** nationwide settlement deal that resolves all opioid litigation brought by federally recognized tribes. Approximately 365 tribes participated in the settlement, which was open to all 574 federally recognized tribes whether it had filed litigation against McKinsey, according to their counsel.

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

The NAS plaintiffs are represented by Scott R. Bickford of Martzell Bickford & Centola APC, L. Danté diTrapano and Benjamin D. Adams of Calwell Luce diTrapano PLLC, Calvin C. Fayard Jr. of Fayard & Honeycutt APC, Donald Creadore of The Creadore Law Firm PC, Celeste Brustowicz of Cooper Law Firm LLC, Kevin W. Thompson of Thompson Barney Law Firm and Anthony J. Majestro of Powell & Majestro PLLC. Plaintiffs lead counsel is Elizabeth J. Cabraser of Lieff Cabraser Heimann & Bernstein LLP.

McKinsey is represented by James Bernard and David M. Cheifetz of Hogan Lovells, Mark David McPherson of Goodwin Procter LLP, and Caitlin S. Blythe and Jessica Kaufman of Morrison Foerster LLP.

The MDL is In re: McKinsey & Co. Inc., National Prescription Opiate Consultant Litigation, case number 3:21-md-02996, in the U.S. District Court for the Northern District of California.

--Additional reporting by Joyce Hanson, Henrik Nilsson and Jeff Overley. Editing by Kristen Becker.



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Tesla Must Face Sweeping Race Bias Class Action

By **Amanda Ottaway**

Law360 (May 20, 2024, 7:51 PM EDT) -- Tesla must face a class action by scores of Black workers accusing it of a widespread culture of racial discrimination at its factory in Fremont, California, a state trial court judge has ruled.



A California state judge said workers accusing Tesla of racial discrimination can proceed as a class, which the plaintiffs estimate to include nearly 6,000 workers who self-identify as Black or African American. (Justin Sullivan/Getty Images)

In a nearly **60-page decision Friday**, Alameda County Superior Court Judge Noël Wise partially granted first named plaintiff and fired Tesla worker Marcus Vaughn's motion for class certification. She noted that the plaintiffs have estimated the proposed class comprises nearly 6,000 Tesla workers who self-identified as Black or African American.

Judge Wise greenlighted the group for the purposes of tackling "fact issues" common to all members and for injunctive relief.

"The approximately 500 declarations in support of and in opposition to this motion suggest that over a period of approximately eight years Tesla workers in the Fremont factory heard the n-word and otherwise experienced conditions that might reasonably be characterized as race harassment," the judge wrote.

A trial date is set for Oct. 14, 2024, according to the ruling.

Class members seeking money damages will have to sue separately, and some of them may be bound by arbitration agreements, Judge Wise said.

She certified distinct groups for the fact-determination class and the injunctive relief class, but both comprise Black Tesla workers **on the production floor** at the company's Fremont factory beginning in November 2016.

"The court will consider them separately because in evaluating class certification, the court considers the causes of action alleged and the plaintiffs' theory of recovery," she wrote.

The exact members of the fact-determining class haven't yet been finalized; Judge Wise ordered the parties to work together on creating a list of people who "worked at the Tesla Fremont factory from November 9, 2016, through the date of this order and have self-identified as Black/African-American."

Judge Wise **had telegraphed her final ruling** with a tentative decision in February, in which she said she was likely to grant class certification in the 2017 Fair Employment and Housing Act suit to all Black employees who have worked at the Fremont facility since November 2016.

Judge Wise also noted that the outcomes of other similar lawsuits may have an effect on the Vaughn classes.

In September 2023, the EEOC filed a separate enforcement action alleging widespread racism in the Fremont factory. That case, Equal Employment Opportunity Commission v. Tesla Inc., in the Northern District of California, **is currently in discovery**.

California's bias watchdog, the Civil Rights Department, has also brought similar claims in a two-year-old **enforcement action** that could go to trial this fall.

"Given the current uncertainty about whether the CRD case will proceed on the merits, the court cannot find that the putative class action is redundant of the CRD's law enforcement action," Judge Wise wrote Friday. "The EEOC case was not filed until September 28, 2023, so the court cannot find that the putative class action is redundant of the EEOC's relatively new law enforcement action."

Bryan Schwartz, counsel for the workers, told Law360 on Monday there could still be "a lot of money" in the case, but to get there, "we'll have to file on behalf of the hundreds or thousands of people that we represent."

As far as injunctive relief, he said the class "will seek to ensure that Tesla no longer treats its Black workers this way."

"They will need new policies, practices and procedures, they will need appropriate training, appropriate discipline of wrongdoers, appropriate investigations — all things which are sorely lacking at this point," Schwartz said.

Representatives of Tesla did not immediately respond to a request for comment Monday.

The putative class is represented by Lawrence Organ, Marqui Hood and Cimone Nunley of the California Civil Rights Law Group; Bryan Schwartz, Jennifer Reisch and Jane Beasley Mackie of Bryan Schwartz Law PC; and Matthew C. Helland and Jasjit Mundh of Nichols Kaster PLLP.

Tesla is represented by Raymond A. Cardozo and Tyree P. Jones Jr. of Reed Smith LLP and Sara A. Begley, Thomas E. Hill, Christina T. Tellado and Samuel J. Stone of Holland & Knight LLP.

The case is Vaughn v. Tesla Inc., case number RG17882082, in the Superior Court of the State of California, County of Alameda.

--Editing by Emma Brauer.