

Firms move to lead shareholder litigation against solar power company

 legalnewsline.com/stories/659860914-firms-move-to-lead-shareholder-litigation-against-solar-power-company

May 29, 2024

NASHVILLE, Tenn. (Legal Newsline) - Robbins Geller and Motley Rice have moved quickly in an effort to lead shareholder litigation against a solar power company.

The firms moved May 21 in Nashville, Tenn., federal court to have their client be named lead plaintiff, themselves be named lead counsel and other similar cases to be consolidated. The cases concern Shoals Technologies Group and have sprung up recently.

Saxena White and Stranch, Jennings & Garvey represent the Oklahoma Police Pension and Retirement System, while Robbins Geller and Motley Rice represent Erste Asset Management GmbH.

The suits allege that the defendants made materially false and misleading statements concerning Shoals' electrical balance of system (EBOS) products, related "shrinkback" issues, and cost of revenue.

The lawsuits claim strict liability under the Securities Act of 1933 and fraud-based claims under the Securities Exchange Act of 1934. It is brought on behalf of all persons and entities that purchased Shoals common stock between May 17, 2022, and November 7, 2023.

Shoals is a leading provider of EBOS products for solar power generation, battery storage, and electric vehicle charging infrastructure. The plaintiffs allege that throughout the class period, the defendants misled investors about Shoals' EBOS products by failing to disclose certain information.

Live Nation Slapped with \$5 Billion Consumer Class Action Lawsuit

 [digitalmusicnews.com/2024/05/28/live-nation-consumer-class-action-lawsuit](https://www.digitalmusicnews.com/2024/05/28/live-nation-consumer-class-action-lawsuit)

May 29, 2024



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Photo Credit: Filip Andrejevic

Live Nation and Ticketmaster have been hit with a \$5 billion consumer class action lawsuit in the wake of the DOJ lawsuit to break up the two companies.

In the first lawsuit against Live Nation and Ticketmaster since the US Justice Department sued to break up the two companies last week, a consumer class action lawsuit was filed against the conglomerate in Manhattan federal court on Thursday. The case is seeking \$5 billion in damage on behalf of millions of ticket buyers.

Both the class action lawsuit and the DOJ's filing accuse Live Nation of monopolizing the live events industry by forcing out its rivals and threatening venues that work with Ticketmaster competitors. The class action could be the first of many against Live Nation and Ticketmaster to ride the wave of the government's case against the companies.

On Friday, the case was assigned to US District Judge Arun Subramanian, appointed to the court by President Biden last year after having represented plaintiffs in antitrust lawsuits at law firm Susman Godfrey. The class action plaintiffs are represented by attorneys at Israel David and Robbins Geller Rudman & Dowd.

Though the Justice Department's new case against Live Nation not entirely dissimilar to its 2010 case addressing the company's merger with Ticketmaster, the DOJ stresses that the previous case involved a different antitrust law — Live Nation has since shown "more expansive forms of anti-competitive conduct."

Live Nation has called the government's lawsuit "baseless," asserting that the live events market has "more competition than ever." Lawyers not involved in the case but who have reviewed the government filing said Live Nation could partially base its defense on the fact the Justice Department agreed to sign off on the company's acquisition of Ticketmaster in the first place.

But since the government's signing off on the merger required the companies to adhere to a previously agreed upon set of guidelines, Live Nation's failure to do so seems like reasonable grounds for legal action. That said, antitrust lawyers such as Eric Enson from Crowell & Moring, who is not involved in the lawsuit, said the government's case raises "legal and factual questions about whether a breakup is a legally permissible remedy."

Legal representation for the class action plaintiffs have not immediately responded to media requests for comment.

Merchants Get an Extension to File Monetary Claims in the Big Credit Card Settlement

 [digitaltransactions.net/merchants-get-an-extension-to-file-monetary-claims-in-the-big-credit-card-settlement](https://www.digitaltransactions.net/merchants-get-an-extension-to-file-monetary-claims-in-the-big-credit-card-settlement)

Peter Lucas

Merchants have been granted a 90-day extension to file a monetary claim as part of the settlement of a nearly two-decades-old interchange lawsuit filed against Visa and Mastercard.

Merchants now have until Aug. 30 to file their claims, the court overseeing the settlement has ruled. A **settlement** between Visa and Mastercard, on the one hand, and the merchant community, on the other, was reached in March. As part of the settlement, Visa and Mastercard are setting aside \$5.5 billion in monetary damages to be paid to merchants. The settlement was the largest in antitrust class-action settlement history in the United States, according to the National Retail Federation.

Attorneys representing the merchants argue the extension was necessary to allow merchants time to gather data for their claims. "Claims are trending on pace with expectations. However, this is an extraordinary settlement that goes back 20 years, and given the settlement's size, class size, and the nearly 15-year period it covers, it deserves a longer claims period to ensure that as many eligible merchants as possible have the opportunity to claim their share," says Alexandra "Xan" Bernay, co-Lead Counsel on the case and a partner at Robbins Geller Rudman & Dowd LLP, in an email message. "Many small businesses, in particular, have limited resources so the 90-day deadline extension now gives them more time to take action."

Merchants can file a claim in myriad ways, including swiping a **QR code**, sending a letter received by mail, or sending a claim through the claims portal at <https://www.paymentcardsettlement.com/>.

The court's decision to grant a filing extension is not a surprise, as it is not unusual from an administrative standpoint to grant plaintiffs extra time to file claims for monetary awards, says Doug Kantor, an MPC executive committee member and general counsel for the National Association of Convenience Stores.

The extension is also expected to provide small merchants enough time to file a claim, says Dylan Jeon, senior director, Government relations for the National Retail Federation "With this being one of the largest antitrust settlements, a large volume of claims is expected and



merchants should have the time needed to file a claim,” Jeon says.

Despite the size of the monetary compensation, the more important aspect of the case is the injunctive relief that is expected to cap **credit card interchange rates**. Under the terms of the settlement, Visa and Mastercard agreed not to increase their posted credit card interchange rates, which were effective on Dec. 31, 2023, for at least five years. The networks also agreed to lower their rates by at least four basis points, effective for no fewer than three years.



“Compared to interchange relief, the monetary settlement is a drop in the bucket, especially when you consider how much Visa and Mastercard have overcharged over the years,” Jeon says. “While the settlement brings some relief to merchants, the fear is that when the five years is up, Visa and Mastercard will go back to business as usual. Our main goal is to

bring competition to the market.”

Merchants pay \$100 million annually in swipe fees to Visa and Mastercard, according to the MPC.

Merchants argue one way to bring more competitive network pricing is to pass the **Credit Card Competition Act**, which would require financial institutions with \$100 billion or more in assets to enable at least one network other than Visa or Mastercard for credit card processing.

“Passing the CCCA would help achieve the goal of entering [price] competition into the market by providing merchants with the choice of an alternative network over which to route transactions, such as Discover, American Express, or the debit networks,” Jeon says. “Giving merchants more choice over how transactions are routed can create price competition among networks and spur network innovation.”

Law firm says fake claims were submitted in \$5.6 bln credit card settlement

 [reuters.com/legal/litigation/law-firm-says-fake-claims-were-submitted-56-bln-credit-card-settlement-2024-05-28](https://www.reuters.com/legal/litigation/law-firm-says-fake-claims-were-submitted-56-bln-credit-card-settlement-2024-05-28)

Mike Scarcella



MasterCard and VISA credit cards are seen in this picture illustration taken June 9, 2016. REUTERS/Maxim Zmeyev/Illustration Purchase Licensing Rights [↗](#), opens new tab

May 28 (Reuters) - A U.S. law firm said it unknowingly filed fraudulent claims in a \$5.6 billion antitrust settlement with Visa and Mastercard, telling a judge it was “embarrassed” and would strengthen its review process.

The firm, New York-founded Milberg Coleman Bryson Phillips Grossman, said in a Brooklyn federal court filing [↗](#), opens new tab on Friday that it received paperwork from a “referral” source and then submitted the material to a claims administration company as part of the process for clients to receive money from the settlement.

A class of 12 million retailers in the case accused Visa and Mastercard of improperly fixing credit and debit card fees. The companies denied any wrongdoing in reaching the settlement, which a court upheld last year.

Milberg told attorneys for the class that the firm had withdrawn 30 “proofs of authorization” following an investigation that began in early May. Milberg was not involved in negotiating the settlement but represented clients seeking a piece of the fund.

Milberg and attorneys for the retailer plaintiffs did not immediately respond to requests for comment on Tuesday. Visa and Mastercard also did not immediately respond to similar requests.

A judge on Sunday set a June 6 deadline for class counsel and Milberg to submit more information about the false claims.

U.S. courts have faced mounting questions about false claims being submitted in multimillion-dollar class action settlements.

Milberg in Friday's court filing said the disputed "claims somehow slipped through without detection." The firm said in the filing, jointly submitted with plaintiffs' counsel, that "we are strengthening our internal audit and review procedures so that this will not happen again."

Milberg said it was undertaking an audit of every claim it has submitted to the court. It asked for time to provide the court "a more complete and detailed analysis of all claims submitted by the firm."

The firm said it was "fully cooperating" with attorneys for the class.

Class lawyers said some of the submissions were purportedly from household name multinational companies and that even a " cursory " review showed the filings to be fraudulent.

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

Read more:

Major US retailers blast Mastercard, Visa card fees settlement

US judge orders probe of phony Visa, Mastercard settlement website

Scammers flood US class action settlements with fraudulent claims

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May 28, 2024, 8:19 AM PDT

IQVIA Workers' \$3.5 Million 401(k) Agreement Gets First Approval

By Jacklyn Wille

- Federal judge allowed some claims to advance toward trial
- Workers' lawyer says deal represents 50% of realistic damages

Bloomberg Law News 2024-05-29T09:48:52487443154-04:00**IQVIA Workers' \$3.5 Million 401(k) Agreement Gets First Approval****By Jacklyn Wille 2024-05-28T11:19:18000-04:00**

- Federal judge allowed some claims to advance toward trial
- Workers' lawyer says deal represents 50% of realistic damages

Health-care technology company IQVIA Inc. received initial approval for a \$3.5 million class settlement with workers who said their 401(k) plan offered offered pricey and poorly performing Fidelity target date funds.

The deal, which is slated to benefit a class of employees covered by IQVIA's retirement plan since 2014, comes about three months before the Employee Retirement Income Security Act lawsuit was scheduled to go to trial. The \$3.5 million settlement amount represents about 50% of the "realistically recoverable" damages at trial, an attorney for the workers said in a court filing.

Judge William L. Osteen Jr. of the US District Court for the Middle District of North Carolina granted preliminary approval to the deal in a May 24 order. He also scheduled a Dec. 2 fairness hearing in the case.

The lawsuit was filed in 2020 by former employees of the companies previously known as Quintiles and IMS Health. They say the IQVIA plan offers actively managed mutual funds with "grossly excessive" fees, including a suite of target date funds from Fidelity—which isn't named as a defendant—that allegedly underperform similar passive funds from the same company.

Osteen previously declined to resolve key claims in IQVIA's favor without a trial. He allowed the participants to move forward with claims tied to the plan's Fidelity target date funds and the Columbia Acorn USA Fund, but he blocked them from challenging Prudential's Jennison Mid-Cap Growth Fund or pursuing claims that the company breached its duty of loyalty.

Hundreds of lawsuits challenging retirement plan fees have been filed in federal courts over the past few years, and dozens of employers have agreed to class-wide settlements. Recent deals include those negotiated by Spectrum Health System for \$6 million, Wake Forest University Baptist Medical Center for \$3.8 million, Omnicom Group Inc. for \$2.45 million, VCA Inc. for \$1.5 million, Pactiv Evergreen Services Inc. for \$725,000, and Munson Healthcare for \$600,000.

Goodwin Procter LLP and Brooks, Pierce, McLendon, Humphrey & Leonard LLP represent IQVIA. Miller Shah LLP and Capozzi Adler PC represent the workers.

The case is *Dearing v. IQVIA, Inc.*, M.D.N.C., No. 1:20-cv-00574, 5/24/24 .

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TelexFree Investors Seek Nod for Deal with Attorney's Estate

By Tre'Vaughn Howard

- Parties say settlement meets pre-approval requirements
- Defendants deny liability relating to Ponzi-scheme claims

Bloomberg Law News 2024-05-29T09:45:41802351354-04:00

TelexFree Investors Seek Nod for Deal with Attorney's Estate

By Tre'Vaughn Howard 2024-05-28T19:08:59000-04:00

- Parties say settlement meets pre-approval requirements
- Defendants deny liability relating to Ponzi-scheme claims

A former TelexFree attorney's estate and investors who lost money in the company's multibillion-dollar Ponzi scheme are seeking preliminary approval for a \$3.45 million settlement.

The settlement between Anthony Cellucci—along with four other named plaintiffs—and the estate of Jeffrey A. Babener, a late corporate attorney of TelexFree, has been reached, according to the joint filing in the US District Court for the District of Massachusetts.

The TelexFree scam, which involved about 2 million people, ran from 2012 to 2014. Half of those who lost their investments later sued TelexFree and dozens of defendants, including banks where the scam kept its funds and investments services providers.

TelexFree and its associated business entities declared bankruptcy in April 2014, according to the joint settlement proposal. After lawsuits against TelexFree were filed across the country, the Judicial Panel on Multidistrict Litigation transferred several actions to the District of Massachusetts, where a fifth consolidated amended complaint is pending.

Cellucci added Babener as a defendant in this lawsuit in June 2017. Babener's estate was substituted in his place following his death in 2020. Babener's estate challenged its inclusion, arguing Cellucci's claims against the late attorney didn't survive Babener's death. The district court dismissed all claims against the estate, except for tortious aiding and abetting and civil conspiracy claims.

Babener's professional liability coverage provider, the Oregon Professional Liability Fund, opted to pay the plaintiffs \$3.45 million, but denied Babener committed any wrongdoing in relation to the plaintiffs' claims.

Both parties engaged in mediation with Magistrate Judge David H. Hennessey and say the settlement satisfies requirements to receive pre-approval.

Regarding the attorneys' fees, the plaintiffs' are seeking an award amounting to up to one-third of the settlement fund in light of the action spanning at least 10 years.

Both parties also seek to certify the class, which is defined as all persons who purchased TelexFree AdCentral or AdCentral Family packages and suffered a net loss between January 2012 and April 2014. A net loss is defined as a class member who invested more funds than they withdrew, according to the joint proposal.

The proposed class—which also satisfies the requirements of numerosity and commonality, among others—is identical to classes the district court has already preliminarily approved, the parties said. And according to Exhibit 2 of the settlement agreement, the settlement class includes at least 300 or more potential members.

Fifty-thousand dollars has been allocated by the estate to pay for the costs associated with giving notice to the class, which both parties agree should only be delivered electronically.

The parties also agreed to a confidentiality and non-disparagement clause.

The case is In Re: Telexfree Sec. Litig. , D. Mass., No. 4:14-md-02566, joint motion 5/24/24 .

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<https://x.com/AnnMLipton/status/1795857062481596438>



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By the way as long as we're keeping up with Musk legal shenanigans, a new complaint was filed in Rasella v. Musk - the case by Twitter SH's about failing to disclose his stake - and now Jared Birchall is a defendant.

9:37 AM · May 29, 2024 · 2,699 Views



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I honestly think this case has problems after the Macquarie decision, so the plaintiffs are in a difficult position, but the allegations are colorful:



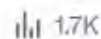
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The legal problem for the pltf's is that the most natural claim is that, by failing to disclose his stake, Musk made a false statement under Section 10(b).



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The legal problem for the pltf's is that the most natural claim is that, by failing to disclose his stake, Musk made a false statement under Section 10(b).

Some courts have held that failure to disclose required info is the equivalent of a false statement.

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But in *Macquarie*, the SCt held that silence, even in the face of a disclosure obligation, is not a false representation:

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So the Rasella plaintiffs are focusing on the concept of a "scheme" to defraud, namely, that by trading while concealing his stake, Musk (and Birchall) didn't simply fail to disclose information; they schemed to deceive the public.



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Whether that'll persuade the court ... we'll see.



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13. [REDACTED] also issued prominent cautions about crossing the 5% threshold. For example, [REDACTED] wrote Birchall “*we should figure how close we want to get to 5% but not exceed, unless.. you want to exceed.*” From early on in Defendants’ scheme, [REDACTED] also repeatedly urged Defendants to seek legal advice concerning their disclosure obligations. For example, [REDACTED] warned Birchall repeatedly to have “attorneys . . . confirm” Musk’s reporting requirements. [REDACTED] also said that he could not provide legal advice and insisted on sending Birchall bright red email disclaimers that Morgan Stanley advisors “*do not provide tax or legal advice.*”

14. In response to these warnings, Birchall falsely assured [REDACTED] that Defendants had sought legal advice and that their trading strategy had been blessed by legal counsel. In the SEC Investigation, [REDACTED] testified that “[Birchall] was *simply very clear to me along the way in several conversations that he was talking to counsel.*” Birchall’s assurances to [REDACTED] were false.

15. Defendants did not seek legal advice concerning Musk’s disclosure obligations. Indeed, in the SEC Investigation, both Musk and Birchall testified unequivocally that they did not get legal advice until *after* Musk’s secret buying spree was completed (*i.e.*, April 1, 2022). Defendants did not seek any such legal advice even though (i) [REDACTED] repeatedly warned Defendants that they should do so; (ii) Musk has virtually unlimited resources to obtain such legal advice; (iii) the facts that, as Musk testified in the SEC Investigation, he “probably work[s] with 20 different law firms in many different arenas” and, as Birchall testified, he had “many times”



B. Defendants Falsely Tell ██████ That Their Secret Trading Strategy Had Been Blessed By Counsel, Which Was A Lie

111. As ██████ later testified to the SEC, Defendants falsely reassured ██████ that their secret buying strategy had been blessed by lawyers. In reality, Defendants had deliberately (or at least severely recklessly) determined not to seek any legal advice concerning their disclosure

obligations until after the market closed on April 1, 2022 (after Musk had built his position in Twitter and spent all the Tesla proceeds). They made this decision despite virtually unlimited resources to seek legal counsel and repeated admonitions from ██████ to do so. Moreover, Defendants did not seek legal advice even though, as Musk testified in the SEC Investigation that he “probably work[s] with 20 different law firms in many different arenas” and, as Birchall testified, there were “many times” that he had “hired an attorney on behalf of Mr. Musk.”

1. ██████ Exhorted Birchall To Seek Counsel And Birchall Assured Him He Had Done So



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1.7K



Judge assured that Tesla won't contest Musk pay ruling outside Delaware

 [reuters.com/legal/judge-assured-that-tesla-wont-contest-musk-pay-ruling-outside-delaware-2024-05-28](https://www.reuters.com/legal/judge-assured-that-tesla-wont-contest-musk-pay-ruling-outside-delaware-2024-05-28)

Reuters

Item 1 of 2 Elon Musk, Chief Executive Officer of SpaceX and Tesla, walks after attending the opening of the 10th World Water Forum in Nusa Dua, Bali, Indonesia, May 20, 2024. REUTERS/Johannes P. Christo/File Photo

[1/2]Elon Musk, Chief Executive Officer of SpaceX and Tesla, walks after attending the opening of the 10th World Water Forum in Nusa Dua, Bali, Indonesia, May 20, 2024. REUTERS/Johannes P. Christo/File Photo [Purchase Licensing Rights](#) , opens new tab

DELAWARE, May 28 (Reuters) - The Delaware judge who voided Elon Musk's record Tesla (TSLA.O) , opens new tab pay package told the parties in the case that she felt assured by the electric vehicle maker that it would not use an upcoming shareholder vote to attack her ruling.

WHY IT'S IMPORTANT

The shareholder legal team who sued over Musk's \$56 billion pay package had asked Chancellor Kathaleen McCormick for orders to prevent their case from being undone in a Texas court.

The company's shareholders vote next month to "ratify" the pay package that McCormick voided and to reincorporate Tesla in Texas.

CONTEXT

The legal team for the shareholder said in a court filing in April that Tesla and Musk might attempt to undo McCormick's ruling in another jurisdiction, like Texas.

Tesla called that "rank speculation" in court papers and said Delaware would retain jurisdiction over the pay dispute, comments that McCormick took as an assurance that the company would not attempt to work around her previous ruling.

KEY QUOTE

"If I have interpreted the defendants' position incorrectly, then defense counsel - as officers of the court - are duty-bound to correct it. In the meantime, the defendants' statements give me great comfort," McCormick said in her seven-page letter.

WHAT'S NEXT

Tesla shareholders vote on June 13 to decide if they still want Musk's pay package and to reincorporate in Texas, where it has its headquarters, from Delaware, where the majority of large publicly traded companies have their legal home.

McCormick must decide if the shareholder's legal team should get the \$6 billion they requested from Tesla as a legal fee before Musk and Tesla can appeal. She has scheduled a hearing for July 8 on the legal fee.

THE RESPONSE

Greg Varallo, an attorney for shareholder Richard Tornetta, declined to comment.

Attorneys for the company did not immediately respond to a request for comment.

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Reporting by Peter Henderson; Editing by Stephen Coates

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Musk Pay Judge Says No Need to Block Him Reopening Case in Texas

By Mike Leonard 2024-05-29T10:07:44000-04:00

- Investor sought order barring attacks on \$56 billion judgment
- Judge declines, for now, citing Musk pledge not to relitigate

The Delaware judge who struck down Elon Musk's \$56 billion pay package has declined to block him from relitigating the case in Texas, but she said she would rethink her ruling if he tries.

Chancellor Kathaleen St. J. McCormick rejected an injunction bid by the investor leading the lawsuit Tuesday, citing pledges by Musk and Tesla Inc. not to "litigate any matter related to this action anywhere but Delaware," even if the company relocates to Texas after a shareholder meeting next month.

"If I have interpreted the defendants' position incorrectly, then defense counsel—as officers of the court—are duty-bound to correct it," she said. "In the meantime, the defendants' statements give me great comfort. Based on the defendants' representations, I am denying the plaintiff's motions, albeit without prejudice."

The decision by McCormick, chief judge of Delaware's Chancery Court, followed about a month after the shareholder who brought the case, Richard Tornetta, first [sought an order](#) barring Musk from trying to attack the judgment in Texas. Tesla's investors will vote June 13—after unusually heavy lobbying by company insiders—on proposals to move the automaker to Texas and ratify another \$56 billion compensation deal.

Tesla's board responded to the motion for an anti-suit injunction by [insisting the company wouldn't](#) use any reincorporation to try to sidestep Delaware's jurisdiction over the dispute. McCormick said Tuesday that she would take Musk and the other directors at their word, for now, but would let Tornetta "re-raise the requests if events warrant."

As part of her brief ruling, the judge also rejected a related request to transform her pay decision into a "final order," a maneuver that would make it more difficult to evade the judgment. Trial-level

proceedings are continuing while McCormick considers a motion for more than \$5 billion in legal fees by Tornetta's counsel.

She also has yet to rule on a motion by legal scholar Charles Elson seeking to weigh in on the potential litigation effect, if any, of an investor vote to ratify Musk's pay package. That request has led to [an acrimonious war of words](#) between Tesla and the retired law professor, who says Musk and the company have tried to bully and threaten him out of participating.

Tornetta is represented by Bernstein Litowitz Berger & Grossmann LLP, Andrews & Springer LLC, and Friedman Oster & Tejtell PLLC. Tesla is represented by Richards, Layton & Finger PA; Morris, Nichols, Arsht & Tunnell LLP; DLA Piper LLP (US); Ashby & Geddes LLP; and Sullivan & Cromwell LLP. Musk and other board members are represented by Ross Aronstam & Moritz LLP and Cravath, Swaine & Moore LLP.

The case is [Tornetta v. Musk](#) , Del. Ch., No. 2018-0408, 5/28/24 .

—With assistance from Jef Feeley.

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Tesla, Legal Scholar Trade Barbs Over Musk Threat Allegations

By Mike Leonard

- Law professor says Tesla, Musk tried to bully him out of case
- He's on a 'media blitz' to affect Musk pay vote, Tesla says

Bloomberg Law News 2024-05-29T09:37:31788254812-04:00

Tesla, Legal Scholar Trade Barbs Over Musk Threat Allegations

By Mike Leonard 2024-05-28T16:11:40000-04:00

- Law professor says Tesla, Musk tried to bully him out of case
- He's on a 'media blitz' to affect Musk pay vote, Tesla says

Tesla Inc. and a legal scholar escalated their war of words over his claim that Elon Musk tried to bully him out of weighing in on the case that invalidated the billionaire's 11-figure compensation deal.

The company and retired University of Delaware professor Charles Elson traded dueling court briefs over his bid to submit a court filing about the potential effect of an investor vote to ratify Musk's \$56 billion pay package at Tesla's annual shareholder meeting next month. The dispute burst into public view May 13, when Elson said he'd resigned a consulting job over what he characterized as "appalling" threats a few days earlier from the automaker and its CEO.

Tesla has urged Chancellor Kathaleen St. J. McCormick to reject the request, saying Elson's proposed friend-of-the-court brief—arguing that Tesla investors can't retroactively validate fiduciary breaches—looks like an attempt to influence the June 13 vote, not an effort to address a live legal issue. Tesla has also said he has a conflict stemming from his affiliation with Holland & Knight LLP, a law firm that has represented the company.

The former law professor is on a "media blitz" aimed at persuading Tesla shareholders to vote down the revised compensation package by convincing them McCormick, chief judge of Delaware's Chancery Court, would reject the maneuver, according to the company's May 22 legal brief.

Elson responded May 23, saying those “vitriolic” arguments reflect a “desperate campaign of invective.” It’s Tesla that has repeatedly said the investor vote is relevant to the litigation, and his role as an expert witness consultant for Holland & Knight is irrelevant under conflict-of-interest rules, according to the court filing.

“The asserted conflict was simply a convenient vehicle for Tesla to do what it has done before: threaten to fire an outside law firm for associating with someone who challenged Elon Musk’s deep-seated belief that he can do whatever he wants whenever he wants,” Elson’s legal brief said.

Media attention to the controversy, moreover, is a “self-inflicted wound,” according to Elson. An academic discussion of Delaware corporate law only attracted wider interest because “Tesla behaved so badly in its attempt to stop it,” he said.

Elson is represented by Grant & Eisenhofer PA and Equity Litigation Group LLP. Tesla is represented by Richards, Layton & Finger PA, Sullivan & Cromwell LLP, DLA Piper LLP (US), and Ashby & Geddes PA.

The case is Tornetta v. Musk , Del. Ch., No. 2018-0408, reply brief filed 5/23/24 .

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Everyone Wants Elon Musk's Attention

Published: Wed May 29 14:10:43 EDT 2024

By Matt Levine

(Bloomberg Opinion) --

Elon Musk attention auction (1)

You could have a model of Elon Musk that is like:

1. He runs a bunch of different companies and owns large stakes in each of them.
2. They all nominally do different things — cars, rockets, tunnels, brain implants, artificial intelligence, complaining on the internet — but there is a lot of overlap. Most of them employ engineers who move somewhat fungibly among companies, and most of them seem to have big plans for artificial intelligence.
3. Each time he comes up with a value-creating idea, he can more or less freely choose which company to implement it at.
4. He is motivated by money.
5. Therefore, he should implement the idea at the company that maximizes its contribution to his net worth.

I am not saying this is a particularly good model. Step 4, in particular, is suspect; Musk seems to have a lot of non-economic motivations.

But let's say this is your model. Now assume that Musk has some really good artificial intelligence idea that can create a lot of value and that can be implemented in any one of his companies. Where should he do it? He should do it wherever it will most increase his net worth. This means maximizing:

- The scale of the company. Doing an idea at a big company will probably have more impact than doing it at a little company; doubling the value of a \$200 billion company is worth more than doubling the value of a \$10 billion company. Plausibly “AI, but put it in a car” could create more value at Tesla Inc. than “AI, but bury it underground” would create at The Boring Co. ¹
- His ownership of the company. Doing an idea at a \$200 billion company where he owns 42% might create more value *for him* than doing it at a \$560 billion company where he owns 13%. ²
- The company's *ability* to do the thing without raising outside capital (and, thus, diluting him). Some of Musk's companies generate cash, others consume it, and you can't move money

freely between them.

- His ability, beyond formal ownership stakes, to extract value from the company. Musk owns a relatively slim 13% of Tesla, but sometimes he goes to Tesla's board of directors and says "hi I would like \$50 billion" and they say "yes here you go," though that mechanism may have stopped working.

And you sort of multiply those numbers together and pick the highest result.

If you are an *investor* in the broad Elon Musk complex, what do you do with this model? Possibly you diversify your bets across all of the Musk companies, as a lot of Musk investors seem to do. Or possibly you try to pick a winner: You try to buy a big stake in the Musk company that you think will attract his best ideas, based on the criteria above.

One odd thing that this means is that you have some incentive to maximize valuation. Ordinarily, if you are an investor in a company, you want to invest at a low valuation, so that you have more upside. But if Elon Musk comes to you to raise money for a venture, and the venture has a valuation of \$5 billion, maybe you should say no: Doubling the value of a \$5 billion company just won't move the needle on Elon Musk's personal wealth, so he has no incentive to pay any attention to a \$5 billion company. Or rather, you should not say no; you should say "sure I'm in but at a \$20 billion valuation," to at least make it somewhat worth his while.

Again, this is all stupid and not a good model of Elon Musk. He has tons of non-economic motivations, and also some track record of taking companies from zero to hundreds of billions of dollars. Still. The Wall Street Journal reports:

Elon Musk's xAI said it raised \$6 billion in its latest fundraising round, as the OpenAI rival looks to invest more in research and development amid fierce competition in the burgeoning sector.

The funding round brings the valuation of the year-old startup to \$24 billion, including the newly raised funds, making it the second-most valuable AI startup outside of OpenAI.

The money will be used to take "xAI's first products to market, build advanced infrastructure and accelerate research and development of future technologies," xAI said.

The round is double the initial target set by Musk's team. Investors had been talking about raising \$3 billion at an \$18 billion valuation, including the new cash, The Wall Street Journal reported last month. Musk's team raised the target in light of strong demand, according to people familiar with the matter.

Investors in the round include brand-name Silicon Valley firms such as Sequoia Capital

and Andreessen Horowitz as well as Valor Equity Partners, Vy Capital, Fidelity Management & Research, and Saudi Prince al-Waleed bin Talal and Kingdom Holding, xAI said on its website late Sunday.

A lot of those names are familiar from Musk's deal to buy Twitter. Maybe they hoped that Musk would do his AI stuff at Twitter/X, but I suppose you have to hedge that bet. Also arguably a fresh \$24 billion startup is a better place to capture Musk's attention than a somewhat troubled social media site with a declining valuation. Arguably this investment is a bet that xAI is likely to be the target of Musk's attention for the next year or two, and the most important asset, in the Elon Musk corporate complex, is Musk's attention.³

Elon Musk attention auction (2)

I really don't know what I would advise here:

Proxy-advisory firm Glass Lewis has advised Tesla shareholders to vote against Elon Musk's multibillion-dollar pay package at the company's meeting next month.

In a 71-page report, Glass Lewis told shareholders that Musk's proposed compensation—recently valued at \$46 billion—could dilute their existing holdings in Tesla. The package would concentrate his ownership, making him the largest shareholder “by a healthy margin.”

Shareholders will vote at the June 13 meeting on Musk's pay package and other proposals, including moving the company's incorporation to Texas, which Glass Lewis also advised against. Proxy advisers' recommendations can influence shareholder votes, as institutional shareholders look to them for advice.

Musk's compensation was originally approved by Tesla shareholders in 2018, but it was struck down by a Delaware court in January because of concerns about the approval process. In the ruling, the judge cited Musk's “extensive ties” with board members and agreed to rescind the package, once valued as much as \$55.8 billion.

Yes: Giving \$46 billion of stock to Elon Musk really would dilute the other shareholders. That's just true. When Tesla initially proposed the pay package in 2018, the tradeoff was “we'll give him \$56 billion of stock if he increases the value of the company by \$600 billion,” which was probably a good deal prospectively. (Shareholders thought so, though Glass Lewis recommended against it at the time.) But now that increase in valuation has *already happened*,⁴ so the judge's ruling gives Tesla shareholders the chance to get it for free. Musk did all the work already, and they don't have to pay him for it! As a strict economic calculation, maybe they should keep the money.

On the other hand, that does seem unfair, which probably will motivate some institutional shareholders to vote to give him the money. But the bigger problem is that if you really do take away this money, that will *definitely* demotivate him. If Tesla's shareholders vote not to give Musk the bag of money that he wants, he will sulk, and his sulking will probably involve working 168-hour weeks at several of his many other companies. Back in January — before his pay package was overturned — he was already saying that he would need more money from Tesla, and that otherwise he would be “uncomfortable growing Tesla to be a leader in AI & robotics.” He could very easily do his AI stuff at xAI, or SpaceX, or his other companies; creating value there rather than at Tesla.

I guess the question is, *can* Tesla win the auction for Musk's attention? It has some advantages:

- It's the company that made him, for a while, the richest person in the world; surely he has some sentimental attachment to it.
- It's still, by a significant margin, his *biggest* company, which means that it has more ability to say “sure here you go here's \$50 billion” than, say, Boring Co. does.
- It's his only public company, which means that it is his most liquid asset: When he needed \$44 billion to buy Twitter Inc., the natural move was to sell and borrow against his Tesla shares, because those were the easiest things to turn into money.

It has some disadvantages:

- It's a public company, so it has more disclosure, more scrutiny, more risk of shareholder lawsuits, and more oversight from judges. If SpaceX had paid Musk \$56 billion, he'd have kept the money, but when Tesla did it a Delaware judge got to intervene to take the money back. Tesla's board is trying to solve this problem by moving Tesla's incorporation to Texas, where the judges will presumably (no one knows!) let Musk do whatever he wants. But that requires a majority vote of all the shareholders, which might be hard to get, and even in Texas Tesla will be subject to more oversight and disclosure than the private companies are.
- He only owns 13% of the stock; if you assume (as he has said) that he'd rather be at 25%, then that means giving him an even more enormous dilutive pay package to keep his attention.
- Because Tesla stock is Musk's most liquid asset, it's the thing he will sell first — to pay taxes, to buy Twitter, to buy whatever else he might want to buy. This creates the risk of perpetual dilution: He gets down to 13%, Tesla gives him \$70 billion of stock to get him back up to 25%, he sells down to 13% again to buy something else, Tesla gives him more stock to get back to 25%, he sells it again, etc.

Elsewhere, here's a story about how “Tesla Harnesses an Influencer Army on \$45 Billion Musk Pay Vote”:

One such Tesla investor-influencer is Yaman Tasdivar (37,600 followers on X), who has

hosted regular meetups on Spaces, the audio chatroom function on X, where participants debate questions such as whether Musk will leave Tesla if the board proposals fail, coaxing one another deeper into the fear that their Tesla investments are at risk. Another is Sawyer Merritt (683,900 followers on X) who posts incremental Tesla news multiple times a day and who garnered a repost from Musk in early May with detailed instructions on how to vote.

[“TeslaBoomerMama X poster Alexandra] Merz, a 58-year-old mother of five and owner of a business consulting firm, has focused in recent days on naming and shaming banks in Europe that don't allow individual shareholders to vote in U.S. proxy elections—a common policy for financial institutions in the region. Last Monday, she posted and reposted 38 times, including instructions on voting at banks in Switzerland, Belgium and Sweden, and condemnation for a bank in the U.K. that reiterated that it doesn't support voting.

That bank “doesn't seem to care to lose customers,” she wrote on X. “Unbelievable.”

Obviously Tesla is the most attractive investment opportunity in the Musk universe *for retail investors*, because it's the only one you can buy on the stock exchange. But for institutions the problem seems harder.

Gamma squeeze

Probably the story of meme stocks goes something like this:

1. Because of social media, retail investors are more able to coordinate with each other to all buy the same stock at the same time.
2. Because it is fun and occasionally lucrative, they do.
3. Some structural feature of the modern stock market gives them *leverage*. The story is not *just* “when a lot of retail investors buy a stock at once, it goes up”; it's “when a lot of retail investors buy a stock at once, *that causes big institutional traders to buy the stock too*, so it goes up.”

Steps 1 and 2 of that story are surely true, and *possibly* sufficient to explain a lot of meme-stock activity. Step 3 is a bit murkier, and not absolutely necessary; it is imaginable that, if enough individuals on Reddit buy a stock, the stock will go up a lot. Still most people seem to believe some form of Step 3. The two main forms are:

- The short squeeze: If a lot of retail investors buy a stock all at once, its price will go up enough that hedge funds who had *shorted* the stock will have to get out of their positions. Those hedge funds will *also* have to buy the stock, and then it will really go up a lot.
- The gamma squeeze: If a lot of retail investors buy *call options* on a stock at once, the options

market makers who sell them the options will have to buy the underlying stock as a hedge for the call options they sold. This will also push up the stock. And the market makers' hedge is *dynamic*, meaning that as the stock goes up they have to buy even more stock to remain properly hedged, in a virtuous cycle that further pushes up the stock.

This is not investment advice, and you should not believe these stories *too* literally; there are no perpetual-motion machines in finance. After the 2021 meme-stock mania, the US Securities and Exchange Commission released a report finding some evidence of gamma squeezes and short squeezes, but not really endorsing either theory. And, again, “everyone bought the stock at once” is at least a theoretically sufficient explanation, without any of these technical factors.

You could also add a third form of retail leverage, which goes something like:

- Everyone noticed, in 2021, that retail investors on Reddit could move stocks. So they updated their models, in various ways, to reflect this. They started paying more attention to social media, trying to buy stocks that retail investors were talking about. And if they were short sellers, they started paying extra-close attention, so that they could *immediately* get out of any short positions that looked like they were becoming meme stocks. The result of this is that, as soon as retail investors start buying a meme stock, fast-money institutions — momentum-tracking hedge funds, social-media-tracking funds, factor-neutral funds, nervous short sellers — will also start buying that stock, and it will go up.

One theory that I have heard about the recent meme-stock aftershock — in which the X account of Keith Gill, the famous GameStop bull known as Roaring Kitty, tweeted some stuff that caused the stock to rally — involves this sort of retail leverage. Gill tweeted, everyone online was like “cool we’re getting the band back together,” some retail investors bought some stock, and tons of professional investors were like “ah this again” and also smashed the buy button. When everyone has internalized the fact that retail investors can move markets, *that makes it more true*.

Anyway here’s a story about Nvidia options:

Nvidia Corp. may not be a classic meme stock, yet when it comes to option trading during the latest leg of the rally, it certainly acts like one.

Call option trading jumped on Tuesday to the fourth-highest notional level with Nvidia shares trading at a record north of \$1,100 apiece. The elevated volume, which on an outright basis was almost double the 20-day average, is especially striking given it was outside of an earnings report for the artificial-intelligence leader. The trading frenzy added fuel to stock market gains in what appeared to be a so-called gamma squeeze.

Thousands of near-worthless call contracts set to expire at the end of this week suddenly

rallied 1000% or more when shares opened sharply higher. This put pressure on option dealer desks who had sold those contracts to adjust their hedges by buying more shares. This creates a feedback loop as the buying drove shares higher, bringing more options into the money and forcing dealers to buy even more shares to stay balanced.

Is Ozempic bad for business?

A fun thesis is “the rise of GLP-1 agonist medications for obesity will lead to crashing global demand for sugar, so you should short sugar futures.” It’s a great story about how the world works: Changing consumer preferences lead to changing demand for commodities, and if the consumer preferences are changed *by a drug*, then (1) that will have an effect on commodity prices and (2) that’s cool and weird.

On the other hand it’s probably not *true*? Or maybe you can tell a story where in 50 years half of the world is on GLP-1 drugs and nobody eats sugar, but that is, you know, a lot of sugar crops from now. Here is a very fun story about how sugar traders have absolutely no interest in this thesis, but it’s so cool that people want to talk about it even though they end each sentence by muttering “... in 2035”:

In a room filled with more than 800 sugar traders, Sally Lyons Wyatt, an executive at consumer researcher Circana, had an important message to deliver: Ozempic is coming for your industry.

“Does it have the ability to be huge in the future?” she asked during her speech at the New York Sugar Dinner earlier this month. “It does.”

Nobody appeared to be paying attention. ...

Sugar traders, used to seeing demand grow as population expands, could be overlooking the next big demand hit. The drugs, which cut cravings, will result in a decline in calorie consumption in the US of 1.5% to 2.5% by 2035, with a drop of as much as 5% in the consumption of sweets such as baked goods, confectionery and soda, Morgan Stanley analysts including Pamela Kaufman said in a report last month. ...

“I’m spending a lot of time thinking about it because I think it could be really important,” said Stephen Geldart, the head of analysis at London-based commodities trader Czarnikow Group Ltd. “Maybe I’m wrong, but if no one else is paying any attention, that’s great. I’m quite happy to do things that no one else is looking at.”

Further down, people boringly say “no obviously this is not an important factor come on”:

Carlos Murilo Barros de Mello, the head of sugar in the Americas at brokerage Hedgepoint Global Markets, said the industry hasn't spent significant time estimating consumption because shifts are "minuscule" relative to production swings.

The impact hasn't been felt yet as "it's still very much further down the line," said Kona Haque, head of research at ED&F Man. "And don't forget, this is still very much an advanced-economy, affluent-society syndrome where people are trying to tackle obesity."

Haque stressed that sugar demand is still growing in emerging markets, where the medications aren't yet being marketed.

But one day!

American Lidar

If you come across a company named "American _____ Corp." (with the relevant product in the blank), what should you assume about how American it is? Three possibilities are:

1. It is very American and patriotic, emphasizing its patriotic bona fides as a marketing strategy.
2. It is a normal amount of American: Companies used to have pretty bland names, and "American Express" or "American Airlines" were once standard ways to name companies that were located in the US.
3. Gotcha! It's controlled by the Chinese military.

I love this:

In December, a new company registered in Michigan: American Lidar. Its planned home would be an easy drive from the big three U.S. automakers.

The company behind American Lidar, and not mentioned in its registration, is China-based lidar maker Hesai Group, which the U.S. has labeled a security concern. ...

A month after it set up American Lidar to be its manufacturing facility in the U.S. heartland, Hesai was added to the Defense Department list that designates companies as Chinese military entities operating in the U.S. Its stock fell 30% in a day after the list was published and hasn't recovered. Almost one-fifth of Hesai's revenue comes from the U.S. ...

A Hesai spokeswoman said the name American Lidar was a placeholder, but the company wanted to communicate that the products would be made and sold in the U.S. Hesai has since paused plans for the American Lidar facility, blaming the fallout from being labeled a Chinese military entity.

Hesai filed a lawsuit this month against the Defense Department, asserting it should be removed from the list because it has no affiliation with any military and isn't controlled by the Chinese government.

It reminds me a little bit of how Saudi Aramco issued bonds through an entity called GreenSaif Pipelines Bidco, and those bonds ended up in an environmental, social and governance index, because the name started with "Green," though it degenerated from there to "Pipelines." There will be *some* people (1) who want to avoid companies allegedly affiliated with the Chinese military but (2) whose due diligence will consist of *looking at the name*. So you might as well put "American" in the name.

Corporate rap

If you are very good at insulting people in rap songs, you can have a lucrative career as a popular rapper. But if you are very good at *praising* people in rap songs and *pretending* that you are insulting them, you can have surprisingly lucrative career "making fun" of chief executive officers at corporate events:

Kelley James ... is a singer and performer whom companies hire for corporate events. He is best known for improvising songs that poke fun at the personal quirks and weak golf games of CEOs and other powerful people. He's ribbed the likes of Tiger Woods and Stephen Curry at golf tournaments, and rapped about fossil fuels for Saudi executives. His highly researched needling earns him hundreds of thousands of dollars a night. ...

When Delta Air Lines hired him to perform at a party for clients at the Masters golf tournament last year, he did a freestyle rap riffing on CEO Ed Bastian's tendency to fly economy and sit in the rear of the aircraft—unlike his 9-pound terrier, Oliver.

"Ed's in back of the plane, we know it's tradition, a man of the people, not many leaders like him, walking through TSA, shaking hands with the pilots, all while his dog goes on vacation and only flies private!" James sang.

Oliver, who recently died at 19 years old, didn't actually fly private, though he did sometimes join Bastian's wife in first class. Bastian loved the bit.

"I don't know if I ever laughed so hard in my life," he says.

"If you want to make fun of my legendary love of cashews, you have at it." There's another anecdote about James roasting Egon Durban for his "habit of using cryptic shorthand while sending text messages, which his employees live in fear of misinterpreting":

“When the Egon text hits the phone you immediately read, praying he'll use the English language but all that you see is a handful of gibberish typed by a toddler in mittens,” James sang. “If you respond wrong, better have your resignation written.”

I bet he gets a lot of mileage out of those bars. Put any two-syllable executive name in there for “Egon” and all the employees at the offsite will be like “ooh got him, he really nailed his brusque texting habit.” He had “nearly \$10 million in revenue” in 2023 from 112 shows.

Things happen

Convertible arbitrage is back. ConocoPhillips to Acquire Marathon Oil in \$17 Billion Deal. Anglo Won't Extend BHP Deadline, Threatening \$49 Billion Bid. ‘Not Gonna Be Pretty.’ Covid-Era Homebuyers Face Huge Rate Jump. Private-Equity Giants Near Settlements With SEC Over Texting Violations. Jefferies Demands Weiss Claw Back \$30 Million in Bonus Payouts. Ex-Pioneer CEO says he was ‘scapegoated’ in Opec collusion case. Goldman Racks Up \$21 Billion for Its Largest Private Credit Pool. Why Dave & Buster's Is Transforming Its Arcades Into Casinos. “Researchers haven't nailed down precisely why more money is associated with more happiness.”

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1. Of course the reverse is also possible. Musk *did* call for a “pause” on AI development a year ago; possibly “AI, but bury it underground” really is the best idea.
2. That is, \$560 billion times 13% is less than \$200 billion times 42%. Bloomberg's RICH function tells me that Musk's Tesla stake is worth a touch more than his SpaceX stake (and that the SpaceX stake is 42%) but that depends on your valuation assumptions; SpaceX is not public.
3. Byrne Hobart calls it a “form of capital arbitrage”: “The goal is to bet on whichever part of [the Musk] constellation will be sucking up resources from the other parts. ... This is the right way to think about the ... valuation of Elon Musk's xAI. It's not the capitalized value of what the company has done so far, or even the value of Elon Musk's fame as a way to differentiate from other AI businesses. But it does make sense as a proxy for the net present value of Tesla,

SpaceX, and Twitter talent that might be quietly repurposed to work on AI instead.”

4. And been partially reversed: Tesla peaked in 2021, and has been below the pay package's \$650 billion valuation target since January.

US seeks records from Tesla in power steering loss probe

 [reuters.com/business/autos-transportation/us-seeks-records-tesla-power-steering-loss-probe-2024-05-29](https://www.reuters.com/business/autos-transportation/us-seeks-records-tesla-power-steering-loss-probe-2024-05-29)

David Shepardson

Model Y cars are pictured during the opening ceremony of the new Tesla Gigafactory for electric cars in Gruenheide, Germany, March 22, 2022. Patrick Pleul/Pool via REUTERS/File Photo Purchase Licensing Rights , opens new tab

WASHINGTON, May 29 (Reuters) - The U.S. National Highway Traffic Safety Administration (NHTSA) said on Wednesday it is seeking records from electric car-maker Tesla (TSLA.O) , opens new tab in its investigation into Model 3 and Model Y vehicles over power steering loss reports.

The auto safety regulator, which upgraded its investigation in February, said in a letter dated Tuesday to Tesla and posted on its website that it wants Tesla's records by July 24 about the steering components.

The request includes Tesla's process for identifying problems and creating solutions for potential defects. The agency also wants to know whether Tesla has made any changes to power steering components or plans any in the next four months.

Tesla did not immediately respond to a request for comment on Wednesday.

The investigation covers about 334,000 Model 3 and Model Y vehicles from the 2023 model year and comes after the agency received 115 reports of loss of steering control.

The agency said the reports include steering or related failures, or steering becoming "stuck," "locked," or "immovable" or requiring high or increased effort. Other reports include "notchy" or "clicky" steering and steering-related error messages or warnings.

NHTSA, which had opened a preliminary evaluation in July 2023 into loss of steering control reports in 280,000 Tesla Model 3 and Y vehicles, said in February it identified a total of 2,388 complaints.

Reuters reported in December that tens of thousands of owners had experienced premature failures of suspension or steering parts since 2016, citing Tesla documents and interviews with customers and former employees.

The Tesla documents showed that the automaker sought to blame drivers for frequent failures of suspension and steering parts it has long known were defective, Reuters reported.

Some Tesla owners reported an inability to turn the steering wheel while others reported an increase in required effort. NHTSA said it is aware of over 50 vehicles allegedly towed as a result of the problem.

Tesla has had nine recalls in the United States for steering and suspension issues since 2018, NHTSA records show.

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

Reporting by David Shepardson; Editing by Rod Nickel

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Tesla's \$56 Billion Pay Package for Musk Opposed by Calpers CEO

By Chester Dawson2024-05-29T10:55:59948-04:00

Calpers, the largest state public pension fund in the US, tentatively plans to vote against a proposed \$56 billion pay package for Tesla Inc. Chief Executive Officer Elon Musk, a sign of opposition from a major investor.

"As of today, minus the conversation that has yet to happen with Tesla, we would not be voting in favor of that proposal," **Marcie Frost**, CEO of the California Public Employees' Retirement System, said Wednesday in an interview with CNBC. "We do not believe that the compensation is commensurate with the performance of the company."

Frost's statement adds to the pushback facing the controversial pay proposal, which Calpers supported when it was originally crafted in 2018. Shareholder adviser Glass Lewis & Co. has also urged Tesla investors to reject the package, citing its "excessive size" and the dilutive effect upon exercise.

Calpers owns roughly 9.5 million Tesla shares, making it among the electric vehicle maker's 30 largest investors, according to data compiled by Bloomberg.

Musk criticized Frost's remarks, saying [in a post](#) on his social media platform X that the pension fund "is breaking their word."

"What she's saying makes no sense, as all the contractual milestones were met," Musk said on the platform, formerly known as Twitter.

A Delaware judge voided Musk's 2018 pay deal earlier this year, saying investors weren't fully informed of key details.

Tesla's board is putting it up for another vote at its annual shareholders meeting on June 13. If it's rejected, Musk has threatened to develop some products outside of Tesla.

Bloomberg Law News 2024-05-29T13:34:41468811238-04:00

Exxon Suit 'Threatens to Silence' Shareholders, Calpers CEO Says

By Marion Halftermeyer2024-05-29T10:59:47709-04:00

Exxon Mobil Corp. may set a dangerous precedent by suing shareholders over a climate-related proposal, according to the head of the California Public Employees' Retirement System, the largest public pension in the US.

The lawsuit "has far more implications than just climate," Calpers Chief Executive Officer **Marcie Frost** said in a Bloomberg Television on Wednesday, the same day Exxon held its annual shareholder meeting. "It could be say on pay, it could be independence of board governors, and governance. This could be a very risky lawsuit to continue with if you're an owner."

At the meeting, Calpers voted against all sitting members of Exxon's board of directors, including Chief Executive Officer **Darren Woods**. The pension has been publicly sparring with Exxon after the oil giant sued two climate-focused investors earlier this year, alleging they abused the shareholder-proposal process.

"We did not take this vote lightly, but the significance of what's at stake can't be understated," Frost said, calling the suit "an absolute governance failure" by the oil giant's board. "Exxon Mobil's lawsuit threatens to silence shareholders everywhere by stripping away both their rights and their role in improving a company's bottom line."

Woods and the Calpers CEO met directly in recent weeks to discuss their views, and Frost asked Exxon to withdraw its lawsuit, she said. But by the end of a "very thorough discussion," it was obvious the two sides wouldn't reach an agreement on the litigation, Frost said.

Exxon opted to continue the legal proceedings even after the shareholders — investment firm Arjuna Capital and Amsterdam-based nonprofit Follow This — withdrew their proposals. Exxon asked the courts to provide more clarity on how the Securities and Exchange Commission interprets its own rules.

Calpers and other environmentally minded shareholders say Exxon's suits will have a chilling effect on investors looking to raise legitimate concerns about climate change and corporate governance. But Exxon says allowing proposals that have repeatedly failed undermines the process. The company said the sponsors of such proposals are activists seeking publicity.

"It's unclear why Calpers is spending their time and energy defending the abuse of a shareholder process by proponents who have publicly stated they have no interest in creating shareholder value," Exxon said in an earlier statement. Those proponents are attempting "to silence the voices of up to 90% of our voting shareholders who have rejected the proposal twice."

Calpers, which manages roughly \$490 billion, owns about 0.2% of Exxon stock, according to data compiled by Bloomberg.

--With assistance from **Kevin Crowley** and **Matthew Miller**.

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Climate lawsuits build as a Latin American court hears largest case ever

 [reuters.com/business/environment/wave-climate-lawsuits-builds-court-hears-largest-case-ever-2024-05-29](https://www.reuters.com/business/environment/wave-climate-lawsuits-builds-court-hears-largest-case-ever-2024-05-29)

Jake Spring

Item 1 of 3 Inter-American Court of Human Rights judges Rodrigo Mudrovitsch, Humberto Sierra and court President Nancy Hernandez attend the opening of the hearings on a landmark climate change case that joins a growing wave of global litigation aimed at pushing countries to step up the fight against climate change in Manaus, Brazil May 27, 2024.

REUTERS/Bruno Kelly/File Photo

[1/3]Inter-American Court of Human Rights judges Rodrigo Mudrovitsch, Humberto Sierra and court President Nancy Hernandez attend the opening of the hearings on a landmark climate change case that joins a growing wave of global litigation aimed at pushing countries to step up the fight against climate... [Purchase Licensing Rights](#) , opens new tab [Read more](#)

SAO PAULO, May 29 (Reuters) - Latin America's human rights court holds a final hearing in Brazil on Wednesday in a case that's part of a global wave of climate litigation, as several international courts prepare first-time opinions on what countries must do to combat climate change.

The rulings could also set off a wave of new litigation brought by citizens, businesses and governments.

Enforcement of such decisions is largely untested, however. A Swiss parliamentary committee last week rejected a ruling for example by a top European court that said Switzerland had violated the human rights of its citizens by not doing enough to prevent climate change.

The Inter-American Court of Human Rights (IACHR), which holds jurisdiction over 20 Latin American and Caribbean countries, hopes to issue its advisory opinion by year's end, top justice Nancy Hernandez Lopez told Reuters. The final hearing on Wednesday is being held in the Amazon rainforest city of Manaus.

Already last week, the international tribunal set up under the U.N. Law of the Seas decided that carbon emissions amount to marine pollution and that countries must go beyond the Paris Agreement [to protect oceans](#) , opens new tab

Next year, the International Court of Justice (ICJ) is expected to have its say and could attempt to draw the earlier court decisions into one global ruling applicable to all U.N. members.

"The reason for (the wave of litigation) is people's deep frustration that their elected representatives are not taking rapid and fair climate action," said Lucy Maxwell, co-director of the nonprofit Climate Litigation Network.

"The climate litigation landscape is really broad and diverse and massively growing."

SETTING PRECEDENTS

While multilateral court opinions apply only to the states under their jurisdiction, they are all grappling with the same central question: Are governments obligated to protect people from climate change? And if so – to what degree?

That question is taking courts into uncharted territory, as there is little legal precedent on climate change. In deliberating, court judges have been reviewing climate science, holding hearings and digging through a tangle of laws, treaties and U.N. proceedings.

That process has made the case before the Inter-American Court the largest to date – with more than 600 participants at hearings held in Brazil and Barbados, as well as 262 written submissions to the court from Indigenous groups, civil society, scientists and one company.

Such inclusivity helps give the court its reputation among the world's most progressive, lawyers said.

By comparison, the International Court of Justice has restricted submissions in its case mostly to countries and authorities like the World Health Organization.

The Latin American court might also borrow arguments from earlier national climate cases, even if they are outside its jurisdiction, said senior lawyer Sophie Marjanac at the legal charity ClientEarth.

"The judges do read each other's opinions," Marjanac said, though whatever influence one ruling has on another might be "more psychological and social than legal."

As such, the Latin American court could influence the ICJ ruling, expected next year.

LEGAL SCOPE

Globally, most past court decisions on climate have focused on countries causing harm by failing to sufficiently cut greenhouse gas emissions, including last month's ruling against Switzerland.

But the opinion from the Inter-American Court could go further by ruling on whether states also must adapt to climate change or pay for damages already caused by climate extremes, Maxwell said.

The court could address protections for environmental defenders, given Latin America accounts for the vast majority [\[1\]](#), opens new tab of such activists who are murdered, said climate litigation expert Joana Setzer at the London School of Economics.

It could also address fossil fuels, the main cause of climate change, or spell out the extent to which countries must regulate polluting companies, said climate justice attorney Nikki Reisch at the Center for International Environmental Law.

WHAT COMES NEXT?

The multinational court decisions, once released, should provide clarity and guidance for national judges hearing climate cases. But they could also touch off a new wave in climate litigation, lawyers and judges told Reuters.

Major differences between international court decisions could trigger fragmentation where climate change rules differ between regions.

For the ICJ to declare that greenhouse gas emissions contribute to harming other countries "would be already a huge victory," given the court's wide jurisdiction, Setzer said.

Following the Inter-American court's decision, the governments under its jurisdiction will need to align their laws with the ruling or risk being sued, said Ciro Brito, a lawyer at Brazil's Instituto Socioambiental, an environmental and Indigenous rights nonprofit in Brazil.

It could give an immediate boost to a handful of legal cases already filed against governments in the region, including one filed by Mexican youths and another demanding more action from Brazil to fight Amazon deforestation.

Globally, Maxwell counted at least 100 cases pending in national courts accusing governments of failing to meet climate obligations, among many more filed against companies and other defendants.

Other lawyers said they were poised to take action once the Inter-American Court issues its opinion.

"We will use this opinion not only to knock on the government's door and say, 'You have to do this,'" said Guilherme Lobo Pecoral, a lawyer for children's rights nonprofit Alana Institute in Brazil.

"We will also knock on judges' doors and say, 'We have this internationally defined obligation and the state isn't following it.'"

Stay up to date on the key companies, data, and decisions in the ESG world with the Reuters Sustainable Finance newsletter. [Sign up here.](#)

Reporting by Jake Spring, Additional reporting by Bruno Kelly in Manaus and Katy Daigle in Washington; Editing by Katy Daigle and Rod Nickel

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Jake Spring

Thomson Reuters

Jake Spring reports primarily on forests, climate diplomacy, carbon markets and climate science. Based in Brazil, his investigative reporting on destruction of the Amazon rainforest under ex-President Jair Bolsonaro won 2021 Best Reporting in Latin America from the Overseas Press Club of America (<https://opcofamerica.org/Awardarchive/the-robert-spiers-benjamin-award-2021/>). His beat reporting on Brazil's environmental destruction won a Covering Climate Now award and was honored by the Society of Environmental Journalists. He joined Reuters in 2014 in China, where he previously worked as editor-in-chief of China Economic Review. He is fluent in Mandarin Chinese and Brazilian Portuguese.

Republican-led states challenge California's climate lawsuit against oil companies

DJ [dailyjournal.com/articles/378942-republican-led-states-challenge-california-s-climate-lawsuit-against-oil-companies](https://www.dailyjournal.com/articles/378942-republican-led-states-challenge-california-s-climate-lawsuit-against-oil-companies)

U.S. Supreme Court,

Litigation & Arbitration,

Environmental & Energy

May 29, 2024

The California attorney general's office argues that the oil companies knew for decades that reliance on fossil fuels would cause catastrophic results, but they suppressed that information from the public and policymakers.

Alabama and a host of other states have filed a bill of complaint with the U.S. Supreme Court seeking to block litigation filed in state court by California and four other states against oil companies for knowingly creating climate harms.

California Attorney General Rob Bonta's lawsuit is pending in San Francisco County Superior Court, while oil companies have argued that these disputes belong in Congress or federal courts.

Alabama Attorney General Steve Marshall and 18 other Republican states have filed a "bill of complaint" asking the U.S. Supreme Court to exercise jurisdiction over the cases because they are an effort by California and other states to control other states.

"Because Plaintiff States face a frontal assault on their sovereignty, they should not be forced to rely on private parties litigating in sister-state courts to vindicate their rights," the Republican attorneys general wrote last week.

The effort may not work unless the justices reverse course on past decisions not to block lawsuits in state court.

California - along with New Jersey, Minnesota, Connecticut and Rhode Island - have filed lawsuits against major oil companies in their own states accusing them of creating climate damage and hiding it from the public. Citing extreme drought and flooding in the state, the

California attorney general's office sued Exxon Mobil Corp., Chevron Corp. and other energy companies last September. *The People of the State of California ex rel. v. Exxon Mobil Corp. et al.*, CGC-23-609134 (San Francisco County Super. Ct., filed Sept. 15, 2023).

"Oil and gas company executives have known for decades that reliance on fossil fuels would cause these catastrophic results, but they suppressed that information from the public and policymakers by actively pushing out disinformation on the topic," wrote Deputy Attorney General Heather M. Lewis. "Their deception caused a delayed societal response to global warming."

The city and county of Honolulu filed a similar complaint against the same oil company defendants, and the Hawaii Supreme Court denied their motion to dismiss it. Oil companies filed a writ of certiorari asking the U.S. Supreme Court to review it. *Sunoco LP v. City and County of Honolulu*, 23A651 (S. Ct., filed Feb. 28, 2024).

Theodore J. Boutrous Jr., a partner with Gibson, Dunn & Crutcher LLP who represents Chevron, agreed with the 19 Republican states seeking review.

"State court litigation is not a constitutionally appropriate route through which to address energy policy and the national and international challenges of climate change," he wrote in an email. "The Hawaii Supreme Court's decision conflicts with well-settled Supreme Court precedent and federal circuit court decisions, including the decision of the U.S. Court of Appeals for the Second Circuit, which held in dismissing a similar New York City lawsuit that 'such a sprawling case is simply beyond the limits of state law.'"

A spokesperson for Alabama Attorney General Steve Marshall, who also filed an amicus brief in the Honolulu case for Republican states, said the states' position violates federalism.

"States have considerable power to regulate emissions within their borders, but California and the other defendant states are seeking to exercise the power to regulate emissions around the globe," he wrote. "Through their suits, the defendant states are seeking to substitute their policy judgments for those of every other state."

"And in doing so, they would apply state law to interstate emissions, an area of the law that is fundamentally federal and can be governed only by federal law," Marshall's spokesperson added.

The California attorney general's office described the 19 Republican states' constitutional theories as "meritless" in a Tuesday statement.

#378942

Corporates Ordered to Report on Climate, ESG as World Heats Up

By Frances Schwartzkopff

Bloomberg Law News 2024-05-29T09:38:10268081927-04:00

Corporates Ordered to Report on Climate, ESG as World Heats Up

By Frances Schwartzkopff2024-05-28T08:15:00000-04:00

Companies across jurisdictions are about to face the same requirements for reporting the impact on their operations of climate change and environmental degradation.

A year after their creation, minimum reporting rules set by the International Sustainability Standards Board have been — or are being — implemented in countries whose combined markets represent around 75% of global capitalization. The figures, which exclude the US, were published on Tuesday by the IFRS Foundation, which oversees ISSB.

Adoption of ISSB standards now covers more than half of global emissions, according to the statement.

The development has the potential to reshape financial analysis and redirect capital as extreme heat waves, droughts and fires lead to mass losses across the globe.

“The introduction of the standards into regulatory frameworks will – for the first time - enable capital markets to assess and price climate and other sustainability-related risks and opportunities appropriately,” IFRS Foundation Trustees Chair **Erkki Liikanen** said in the statement.

Recent signatories include the African Development Bank, which has agreed to work with the IFRS Foundation to help countries in the region to implement the standards. That coincides with China’s publication of draft reporting guidance based on ISSB standards which are expected to become mandatory.

The US, meanwhile, has remained a holdout amid Republican opposition to environmental and social reporting. That’s led the Securities and Exchange Commission to recently issue a stay on final rules for climate disclosures.

The SEC acknowledged “the role of the ISSB Standards and the range of jurisdictions currently considering requirements using the standards,” but “declined at this time to recognize the ISSB Standards for use as an alternative to the SEC’s climate disclosure rules” pending other countries’ full integration of the standards into their national reporting frameworks, the IFRS Foundation said.

The standards were endorsed last year by the International Organization of Securities Commissions — an umbrella group for the world’s national regulators.

In a separate statement, **Jean-Paul Servais**, chair of IOSCO’s board, said focus now must be on helping emerging markets to implement the reporting framework. That includes tighter cooperation with ISSB and also with the World Bank.

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NOT FOR REPRINT

Critical Mass With Law.com's Amanda Bronstad: Class Action Alleges J&J's 'Fraudulent Maneuvers' Compromised Talc Plaintiffs, MDL Panel to Hear GM Privacy Lawsuits

This week: Plaintiffs' firms opposing Johnson & Johnson's latest bankruptcy plan filed a class action over alleged "fraudulent maneuvers." The U.S. Judicial Panel on Multidistrict Litigation hears big cases on May 30, including suits alleging GM sends driver data to insurance firms. Find out who filed the first class action in the wake of the DOJ's antitrust case against Live Nation and Ticketmaster.

May 29, 2024 at 10:02 AM

Critical Mass



Amanda Bronstad
staff reporter



Welcome to Law.com Class Actions: Critical Mass, a weekly briefing for class action and mass tort attorneys.

This week: Plaintiffs' firms opposing Johnson & Johnson's latest \$6.48 billion bankruptcy plan filed a class action over alleged "fraudulent maneuvers," such as the "Texas two-step" merger. The U.S. Judicial Panel on Multidistrict Litigation is set to hear several big cases on May 30, including lawsuits alleging GM sends data on its drivers to insurance firms. Find out who filed the first class action in the wake of the DOJ's antitrust case against Live Nation and Ticketmaster.

I'm **Amanda Bronstad**. Feel free to reach out to me with your input. My email is abronstad@alm.com. Follow me on [LinkedIn](#) or X: [@abronstadlaw](#).

'Side Switching Is Impermissible': Briefs Conclude Talc DQ Hearing

Plaintiffs' firms opposing Johnson & Johnson's latest \$6.48 billion bankruptcy plan filed a class action alleging a series of fraudulent maneuvers, such as the "Texas two-step," prevented their clients from obtaining fair compensation by delaying trials for more than two years.

Here's my story on the May 22 lawsuit filed by Levin Papantonio, Ashcraft & Gerel, Burns Charest, Golomb Legal, Bailey Glasser, and Beasley Allen, which is already facing a disqualification motion from Johnson & Johnson. They represent plaintiffs who allege Johnson & Johnson's baby powder caused their ovarian cancer and mesothelioma.

Who did they sue? They sued Johnson & Johnson and its subsidiaries, including LLT Management, formerly LTL Management, which filed two failed talc bankruptcies, plus eight executives. The suit also identifies five in-house attorneys, each as a "material witness to the facts," including Johnson & Johnson's worldwide vice president of litigation, Erik Haas, who called the class action a "Hail Mary."

What's going on with Beasley Allen? Johnson & Johnson moved to subpoena Beasley Allen, citing a firm client's emails to outside counsel [Jim Murdica](#) (**Barnes & Thornburg**) about the bankruptcy plan. On May 24, Beasley Allen [fired back](#), calling the subpoena demand "nothing less than a full-blown assault on the attorney-client privilege" and accused Murdica of professional misconduct. Meanwhile, after three days of hearings, no judge has ruled yet on Johnson & Johnson's disqualification motion, which centers on principal [Andy Birchfield](#) (**Beasley Allen**)'s partnership with one of its former lawyers, **James Conlan**, to pitch a \$19 billion talc settlement. Both sides submitted briefs this month:

Beasley Allen attorney [Jeffrey Pollock](#) (**Fox Rothschild**) wrote: *"After multiple rounds of briefing and three plenary hearing sessions, J&J does not articulate a single fact, confidence, legal theory, strategy, or mental impression that Beasley Allen (or Andy Birchfield) learned from James Conlan."*

Johnson & Johnson attorney [Stephen Brody](#) (**O'Melveny**) wrote: *"Side switching is impermissible. It is impermissible when attorneys switch sides. It is impermissible when paralegals switch sides. It is impermissible when experts or consultants switch sides. And it is impermissible when the person switching sides is a lawyer who no longer practices law. That is what happened here."*

MDL Hearing: GM Privacy, AT&T Breach and Antitrust Actions

Dozens of class actions allege that **General Motors** [gathered data about drivers](#) without their consent and then sent it to insurance companies, which raised their rates.

The lawsuits, spurred by a [March 11 article](#) in **The New York Times**, target GM, its subsidiary **OnStar** and data broker **Lexis Nexis Risk Solutions Inc.**, but at least one case names **Kia America** and, on March 23, **Law.com Radar** [flagged a related case](#) against **Hyundai Motor America**.

Lawyers have moved to coordinate the GM suits before the **U.S. Judicial Panel on Multidistrict Litigation** at its May 30 hearing in Salt Lake City.

The panel has a lot on its plate. Here's what else is up for possible multidistrict litigation:

- [Dozens of antitrust class actions](#) over replacement tires for passenger vehicles, sugar prices and iPhone's smartphone monopoly. Plaintiffs' lawyers have moved to coordinate the tire cases in New York, which defendants such as **Bridgestone**, **Michelin** and **Goodyear** have supported, but others want Ohio, Michigan or South Carolina. Plaintiffs' lawyers [suing over sugar](#) want their cases in New York, Florida or Minnesota, while the defendants are pushing for Delaware, where a federal judge in 2022 ruled against the **DOJ** in a related antitrust case. And, in cases against **Apple**, plaintiffs' lawyers want California or New Jersey, where the [DOJ's related case](#) is pending. Apple also supports New Jersey.
- Class actions alleging children and young adults got addicted to video games. Defendants include **Microsoft**, **Google**, **Epic Games**, **Nintendo**, **Sony**, **Electronic Arts**, **Roblox** and **Apple**, which has a pending dismissal motion based on Section 230 of the Communications Decency Act. Plaintiffs' attorneys moved to coordinate 10 cases in Missouri or Arkansas, but defendants, citing different facts and arbitration agreements in each case, oppose multidistrict litigation.
- Plaintiffs' lawyers want to send the lawsuits brought over **AT&T's** data breach to Oklahoma, Georgia or Texas, where AT&T is based. AT&T also supports Texas.

Who Got the Work?

[Adam Harris](#) and [Mark Cianci](#) (**Israel David**) and [David Mitchell](#), [Alexandra Bernay](#), [Arthur Shingler](#), [Stuart Davidson](#) and [Mark Dearman](#) (**Robbins Geller**) [filed the first class action](#) hours after the **U.S. Department of Justice** and dozens of states [filed their antitrust case](#) on May 24 against **Live Nation** and its subsidiary, **Ticketmaster**.

Here’s what else is happening:

Sports Settlement: Hagens Berman and Winston & Strawn led a [\\$2.75 billion settlement](#) on May 23 between the **NCAA** and student athletes who sought changes to compensation limits for their names, images and likenesses. The settlement resolved three lawsuits filed in California’s Northern District. Both firms were co-lead class counsel in a related case in which **U.S. Supreme Court** in 2021 [sided with the athletes](#). The settlement could open the door to [new challenges involving Title IX compliance](#).

Zantac Verdict: An [Illinois jury sided with](#) pharmaceutical manufacturers **GlaxoSmithKline** and **Boehringer Ingelheim** in the first **Zantac** verdict in the nation. The May 23 verdict comes as thousands of cases allege the over-the-counter heartburn medication, recalled in 2020 by the **FDA**, caused various forms of cancer. Two years ago, a federal judge in Florida tossed all the plaintiffs’ experts in the Zantac multidistrict litigation, leaving most of the remaining cases in state courts in California, Delaware, Pennsylvania and Illinois. Plaintiffs’ lawyer [Mikal Watts](#) (**Watts Law Firm**) said additional Zantac jury trials are scheduled this year in Illinois, and one is set for next year in Pennsylvania.

Opioid Sanctions? A federal judge in the opioid multidistrict litigation in Ohio ordered lawyers for plaintiffs and defendant pharmacy benefit managers to meet monthly at his Cleveland courthouse, given “they are struggling to work together.” The May 23 order temporarily set aside a pending sanctions motion that **OptumRx** and **Express Scripts**, the pharmacy benefit managers, filed earlier this month against the plaintiffs (after an [unsuccessful sanctions motion](#) against plaintiffs’ firm **Motley Rice**). The judge threatened to impose his own sanctions to “bring obstreperous or vexatious parties in line.” “The court directs the parties to redouble their efforts to work out their differences,” wrote **U.S. District Judge Dan Polster**, who set the first hearing for June 25. “The adversarial process does not need to be antagonistic.”

Thanks for reading Critical Mass! I'll be back next week.

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Whirlpool notes positive online reviews as it fights class action over refrigerators



legalnewsline.com/stories/659860913-whirlpool-notes-positive-online-reviews-as-it-fights-class-action-over-refrigerators

May 29, 2024

Tucker | <https://chimicles.com/>

WILMINGTON, Del. (Legal Newsline) - Whirlpool says the overwhelming majority of customers are happy with their refrigerators as it fights a class action lawsuit claiming the wires in them won't bend and instead crack.

The company on May 21 in Delaware federal court filed a motion to dismiss a lawsuit brought by 14 plaintiffs. The case cites 22 negative online reviews about various issues allegedly all caused by the same wiring problem.

But those 22 come from a pool of more than 20,000 reviews.

"These chosen 22 represent a tiny fraction - 0.067% - of the total consumer reviews incorporated into their pleading," the motion says.

"Several of them post-date some Plaintiffs' purchases, and those that pre-date their purchases were plainly publicly available for Plaintiffs to consider when making their purchase decisions. This is insufficient to plausibly allege Whirlpool possessed knowledge of the systemic 'defect' central to Plaintiffs' claims."

The suit concerns refrigerators under the Whirlpool, Maytag, KitchenAid and Kenmore brands. According to the complaint, these appliances contain faulty wiring which controls key functions such as the ice maker and dispenser, water dispenser and control panel on the doors.

The wires are supposed to bend but are instead prone to break or fray quickly under ordinary use, often shortly after the one-year warranty expires, the suit says. This defect not only renders some functions useless but also poses a safety hazard due to exposed live wires, the suit says.

The lawsuit further claims that Whirlpool has been aware of this issue for at least a decade but continued to sell these defective products without disclosing the problem.

The defect allegedly manifests within two or three years of purchase despite refrigerators usually lasting between 10 to 20 years. The plaintiffs argue that this defect is irreparable as even replacement doors suffer from the same issue.

Whirlpool says its claims about the refrigerators' "reliability" are non-actionable and that the plaintiffs have failed to show they still aren't keeping food cool.

"No Plaintiff actually purchased a replacement door," the motion says. "They simply assume the replacement doors will have the same defect.

"Moreover, five Plaintiffs do not allege they ever even contacted Whirlpool to seek a repair for their refrigerator."

Scott Tucker and other lawyers at Chimicles Schwartz Kriner & Donaldson-Smith are representing the plaintiffs.

ORGANIZATIONS IN THIS STORY

U.S. District Court for the District of Delaware

Bloomberg Law News 2024-05-29T13:01:42790866997-04:00

Activision, Microsoft Merger Will Get Speedy Review in Delaware

By Jennifer Kay 2024-05-29T09:51:06000-04:00

A Swedish state-owned pension fund may join fast-tracked proceedings to review Microsoft Corp. and Activision Blizzard Inc.'s \$69 billion merger, the Delaware Chancery Court has ruled.

Chancellor Kathaleen St. Jude McCormick granted Microsoft and Activision's motion to expedite, along with Sjunde AP-Fonden's motion to intervene, in a teleconference on Tuesday, according to an [order](#).

- Microsoft and Activision have asked McCormick to [uphold](#) the the video game sector's largest-ever merger, even as the Swedish pension fund challenges that deal in a [separate case](#).
- The transaction closed last October following a nearly two-year fight with global antitrust regulators.
- The companies sought to [block](#) involvement from the fund, who [argued](#) they should have sought validation of the merger sooner.

Microsoft and Activision are represented by Young Conaway and Simpson Thacher. Activision is also represented by Skadden, Arps, Slate, Meagher & Flom LLP. The Swedish fund is represented by Prickett, Jones & Elliott and Kessler Topaz.

The case is [In re Activision Blizzard Inc.](#) , Del. Ch., No. 2024-0466, order 5/28/24 .

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

BigLaw firm and client sanctioned nearly \$275K after judge sees 'nasty litigation tactics'

 [abajournal.com/news/article/biglaw-firm-and-client-are-sanctioned-275k-after-judge-sees-nasty-litigation-tactics](https://www.abajournal.com/news/article/biglaw-firm-and-client-are-sanctioned-275k-after-judge-sees-nasty-litigation-tactics)

Law Firms

By Debra Cassens Weiss

May 29, 2024, 10:16 am CDT

A federal judge in Colorado has ordered Seyfarth Shaw and its client, a subsidiary of the Stryker Corp., to pay nearly \$275,000 as an additional sanction for improper discovery tactics. (Image from Shutterstock)

A federal judge in Colorado has ordered Seyfarth Shaw and its client, a subsidiary of the Stryker Corp., to pay nearly \$275,000 as an additional sanction for improper discovery tactics.

Senior U.S. District Judge R. Brooke Jackson of the District of Colorado ordered the sanction to reimburse the Stryker Corp.'s legal opponent for attorney fees stemming from the "volume and antagonistic nature" of discovery.

Seyfarth Shaw and its client are jointly and severally liable for the sanction.

Law360 has the story.

"In this court's judgment," Jackson wrote, "this is a sanction with teeth that addresses the misconduct without being excessively punitive."

Quoting from a prior opinion in the case, Jackson said the Stryker Corp.'s lawyers "turned this case sour with nasty litigation tactics."

The case involved a contract dispute between the Howmedica Osteonics Corp.—the Stryker Corp. subsidiary—and ORP Surgical, a former distributor of the Howmedica Osteonics Corp.'s medical devices.

ORP Surgical, the plaintiff, had sold Stryker's products under contracts governing sales of joint replacements and trauma products used in emergency surgeries after traumatic accidents.

Jackson said the “severe animosity” between the parties was likely partly due to the Stryker Corp.’s “abrupt and unwarranted termination” of the joint contract, “shenanigans surrounding the end of both contracts,” and the Stryker Corp.’s solicitation of ORP Surgical’s former sales reps.

A discovery special master found that the Stryker Corp. failed to preserve text messages and fell short of obligations to completely disclose relevant documents in a timely manner. The special master also found that the Stryker Corp.’s lawyers improperly coached and insufficiently prepared their witnesses.

In May 2022, Jackson ruled for ORP Surgical on breach of contract claims and awarded \$4.7 million.

He also awarded \$2.28 million in attorney fees to ORP Surgical, but that was overturned on appeal in a decision finding that the Stryker Corp. had no duty under the contracts to indemnify the plaintiff for its attorney fees, Law360 explains.

The appeals court returned the case to Jackson to consider whether he would nonetheless award attorney fees as a sanction for the discovery violations. Jackson had already awarded more than \$70,000 as a discovery sanction in November 2022, but he declined to include attorney fees because he had awarded them under the contract.

In his new decision, Jackson awarded about \$345,000 in attorney fees but deducted the \$70,000 already paid.

“I anticipate that neither party will be happy with that result,” he wrote.

A Seyfarth Shaw spokesperson did not immediately respond to the ABA Journal’s emailed request for comment.

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NEWS

'Serious Wrongs': Judge Reports Lawyers to State Bars in \$500M Samsung Case

The judge ordered unredacted versions of his opinion go to the chief disciplinary counsel for the New York and California state bars, "in light of the indefensible conduct" of the attorneys involved in the Samsung patent case.

May 28, 2024 at 05:09 PM

Legal Ethics and Attorney Discipline



Adolfo Pesquera



The original version of this story was published on [Texas Lawyer](#)

What You Need to Know

- A major patent infringement case against Samsung was dismissed after the judge ruled plaintiffs had unclean hands.
- Defense counsel Kirkland showed the court how plaintiffs stole privileged documents and lied to the court.
- A criminal investigation is underway in Korea against two former Samsung attorneys and the U.S. judge reported them to their state bars.

A multi-firm legal team led by Kirkland & Ellis attorneys locked in a major defense win for Samsung Electronics Co. Ltd. in a patent case where plaintiffs sought \$500 million in damages.

U.S. District Judge Rodney Gilstrap of the Eastern District of Texas, in an order entered May 24, found the plaintiffs had unclean hands, and concluded actions of the in-house patent attorneys relied upon by the plaintiffs merited reporting them to the state bars of California and New York for consideration of disciplinary actions.

Staton Techiya LLC and Synergy IP Corp. sued Samsung in 2021 alleging infringement of 14 patents relating to aspects of Samsung’s smartphones and AI assistant app.

The 118-page [findings of fact and conclusions of law](#) chronicles in detail the history of a hard-fought discovery campaign by Kirkland attorneys in collaboration with the law firms Arnold & Porter Kaye Scholer in Washington, D.C., and Gillam & Smith of Tyler.

The judge, Gilstrap, recounts how Samsung, through an internal investigation aided by its defense attorneys, uncovered misconduct by patent owner Techya and its lawyers and agents, misconduct that included secret moles inside Samsung, concealed audio recordings and widespread theft of Samsung’s privileged documents.

At the center of the scheme, according to Gilstrap’s order, was Seungho Ahn, a licensed attorney of the California bar and a former head of Samsung’s IP Center, and Sungil Cho, a licensed attorney of the New York bar and a former in-house patent lawyer on Samsung’s technology and patent analysis team.

The plaintiffs are represented by the law firms Bunsow De Mory in Redwood City, California; King & Spalding in Austin; Bilzin Sumberg in Miami; PV Law in Washington, D.C.; and McKool Smith in Marshall.

“Techiya is surprised and disappointed by the court’s order, and does not believe that the order accurately reflects the evidence presented at the bench trial or the procedural history of the case,” Techiya said in a statement.

“Techiya specifically disputes any finding or suggestion that it had any knowledge of, or was involved with, any alleged bad acts of its former licensee Synergy IP or Synergy IP’s principals. Techiya further does not believe that any such misconduct of its former licensee can, or should, excuse Samsung’s infringement of Techiya’s patents related to Samsung’s earbuds and smartphones.

“Techiya intends to appeal the court’s order in due course. Techiya further directs interested parties to its own post-trial filings for its view of the facts and evidence,” the statement read.

Attorneys for Synergy did not immediately respond to a request for comment.

When Kirkland learned that Ahn was substantially compromised, the defense filed a counterclaim alleging unclean hands and breach of Ahn’s fiduciary duties, Gilstrap notes.

Techiya responded by screening Ahn from the case and arguing there was no foul and no harm because Ahn never had any confidential information and played no role in shaping Techiya’s patent case.

The plaintiffs’ positions turned out to be false, but Techiya and Ahn expended much effort in preventing Samsung and the court, including by destroying and concealing evidence, lying under oath, selectively invoking self-incrimination privileges, violating discovery orders, and pressing countless procedural and evidentiary objections, according to the court records.

“Attorney-client privilege and the right to engage in adversarial litigation free of its subversion are principles that this Court views seriously and which warrant affirmative protection by the courts. Accordingly, this Court is persuaded that these serious wrongs and their proper imputation to Techiya require the patent case be dismissed with prejudice,” Gilstrap said.

The plaintiffs’ case began to unravel in 2023 when Samsung’s investigation revealed suspicious activity suggesting an employee might be aiding Ahn and Cho in their post-Samsung patent enforcement efforts by funneling them information from inside Samsung, Gilstrap said.

On Dec. 27, 2023, Synergy, Ahn and Cho moved to sever and stay Samsung’s counterclaims because “Ahn and Cho were under criminal investigation in the Republic of Korea for some of the same conduct at issue in Samsung’s counterclaims and could not travel to the United States for trial due to a travel ban imposed by Korean authorities,” Gilstrap noted.

Samsung relayed to the U.S. court that the Korean prosecutor presented evidence of documents and audio recordings showing misconduct by Ahn, Cho and their Samsung insider that related to the Techiya case.

In the months that followed, Techiya and Synergy refused to provide any additional discovery, Gilstrap stated. A majority of emails held up in discovery were in the Korean language, but Gilstrap cited the example of on in English between a plaintiff attorney and Ahn that was relevant.

Gilstrap’s bench trial took place March 26-27. At trial, Techiya repeatedly complained that the “late-breaking” production of PV Law’s email to Ahn should be excluded.

“It is incredulous for Techiya to argue that it was prejudiced by its own withholding of highly relevant evidence until the day before trial. Indeed, one of the recipients of the email was Techiya’s lead patent counsel at PV Law, Brad A. Cangro, who sat at counsel’s table throughout trial. Plainly, Mr. Cangro could not have been surprised by this email that he personally received,” Gilstrap said.

In addition to dismissing the claims against Samsung, Gilstrap ordered that unredacted versions of his opinion be provided to the chief disciplinary counsel for the New York and California state bars, “in light of the indefensible conduct of Dr. Ahn and Mr. Cho.”

NOT FOR REPRINT

FTX examiner's report reveals lingering exposure for law firm Fenwick & West

 [reuters.com/legal/transactional/column-ftx-examiners-report-reveals-lingering-exposure-law-firm-fenwick-west-2024-05-28](https://www.reuters.com/legal/transactional/column-ftx-examiners-report-reveals-lingering-exposure-law-firm-fenwick-west-2024-05-28)

Alison Frankel

FTX logo is seen in this illustration taken March 31, 2023. REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights , opens new tab

May 28 (Reuters) - The California law firm that acted as lead outside counsel for crypto exchange FTX until just before its collapse in 2022 remains under investigation in the FTX Chapter 11 bankruptcy, according to a report , opens new tab issued last week by an independent court-appointed examiner.

Fenwick & West was the only law firm “entrusted with a birds-eye view” of what was happening at FTX and its sister hedge fund Alameda Research, according to bankruptcy examiner Robert Cleary of Patterson Belknap Webb & Tyler, who was appointed earlier this year at the behest of federal bankruptcy watchdogs.

Fenwick’s legal work for FTX and Alameda, the Cleary report said, “closely intersected with core aspects of the FTX Group’s improper operations and management,” including the diversion of more than \$2 billion in “founder loans” to FTX insiders as well as efforts by FTX and Alameda executives to hide the close relationship between the exchange and the hedge fund from regulators.

Fenwick said in an email statement that it has and will continue to cooperate with the ongoing investigation described in Cleary's report.

“The examiner’s status report did not include any finding of wrongdoing on Fenwick’s part,” the law firm's statement said. “Fenwick stands behind the integrity of the work we performed on behalf of FTX.”

Cleary’s report referred to Fenwick & West only as Law Firm-1, not by name. But because the examiner noted that lawyers Daniel Friedberg and Can Sun moved from Law Firm-1 to in-house roles at FTX and Alameda, it’s clear that Law Firm-1 is Fenwick & West, where the two attorneys previously worked.

Cleary’s primary job as examiner was to assess whether FTX’s lead bankruptcy lawyers at Sullivan & Cromwell were conflicted because of their work for the exchange in the months before its collapse. As my Reuters colleague Dietrich Knauth reported last week, the examiner concluded that Sullivan & Cromwell bankruptcy lawyers were not complicit in FTX’s fraud.

Cleary concluded that Delaware federal bankruptcy judge John Dorsey acted within his discretion when he approved Sullivan & Cromwell as lead counsel for the bankrupt exchange. The firm has earned more than \$180 million in that role.

The examiner did ask Dorsey to authorize additional investigation of Sullivan & Cromwell's representation of former FTX CEO Sam Bankman-Fried in his \$500 million purchase of Robinhood shares in 2022. Federal prosecutors subsequently accused Bankman-Fried of using misappropriated customer funds to buy his Robinhood stake. (Bankman-Fried was convicted last November in a Manhattan federal jury trial.)

Sullivan & Cromwell said in an email statement that if the court approves any additional investigation of its work on the Bankman-Fried's Robinhood deal, it will cooperate with the examiner. "Sullivan & Cromwell remains confident in our prepetition work for FTX and the commencement of the Chapter 11 cases, and we welcome the examiner's findings to date rejecting various baseless allegations about our work for FTX," the statement said.

In addition to recounting his own findings on Sullivan & Cromwell, Cleary disclosed investigations by FTX bankruptcy lawyers from Quinn Emanuel Urquhart & Sullivan into potential claims against scores of law firms and accountants that worked for the crypto exchange. (The examiner does not appear to have conducted an independent investigation of any of FTX's law firms except for Sullivan & Cromwell.)

Cleary said Quinn found no evidence that most of FTX's outside law firms were aware of misconduct by FTX insiders. But according to his report, Quinn's extensive investigation of Fenwick & West — which included the review of nearly 185,000 documents turned over by the law firm and nearly 70,000 documents Quinn obtained from FTX's internal database — shows Fenwick lawyers were "directly involved" in matters that allegedly helped FTX insiders misappropriate customer money and hide that misconduct.

The examiner also noted that Fenwick and FTX executives used the ephemeral messaging app Signal for many communications. Of the 144 Signal conversations disclosed by Fenwick, only 18 still show actual messages.

Cleary's report does not specifically assert that Fenwick was aware of the insiders' misconduct. And notably, Quinn Emanuel has not filed a complaint in the FTX bankruptcy against Fenwick, which allegedly earned more than \$22 million in legal fees from FTX and Alameda between 2018 and 2022. Quinn has brought lawsuits in FTX's Chapter 11 proceeding against such defendants as Bankman-Fried's parents and FTX's former chief compliance officer, a onetime Fenwick partner.

Cleary's report includes some interesting background on FTX's relationship with Fenwick, which was originally selected to represent the crypto exchange by Bankman-Fried's father, Stanford Law School professor Joseph Bankman. He "maintained unusually close personal

relationships” with Fenwick lawyers, the report said, “which sometimes translated into subsidizing perks for certain [Fenwick] attorneys, such as paying for travel and admittance to sporting events.”

Bankman did not immediately respond to an email query.

Both Fenwick & West and Sullivan & Cromwell have been sued by FTX customers in consolidated litigation in Miami federal court over the exchange’s collapse. Both law firms, as I’ve told you, have moved to dismiss the lawsuits, arguing that FTX customers have offered no credible evidence that they were aware of wrongdoing by Bankman-Fried and other FTX and Alameda insiders.

Lawyers cannot be liable, the firms contend, for providing routine legal services to fraudsters unless the lawyers knew of the fraud.

The allegations discussed in the examiner’s report overlap substantially with claims in the customer lawsuits. A lead lawyer in the customers’ cases, Adam Moskowitz of The Moskowitz Law Firm told me by email that Cleary’s report lends support to his lawsuits.

The examiner “specifically found Fenwick was intricately involved with all of FTX’s core functions and Sullivan specifically gave FTX instructions and advice on how to hide [Bankman-Fried’s] purchase of millions of dollars in Robinhood stock,” Moskowitz said, adding that he’s particularly gratified that Cleary wants to continue investigating Sullivan & Cromwell’s role in Bankman-Fried’s Robinhood stock purchase.

The examiner’s report has no direct impact on the customers’ case, although Fenwick & West can’t be too happy that Cleary aired details about Quinn Emanuel’s Chapter 11 investigation of the firm just as U.S. District Judge Michael Moore of Miami is weighing Fenwick’s motion to dismiss the customers’ lawsuit.

In the next few months, Fenwick should know if its FTX woes are over — or just beginning.

Read more:

FTX bankruptcy lawyers were not complicit in fraud, report finds

FTX law firm Sullivan & Cromwell says crypto customers' lawsuit is 'innuendo masquerading as facts'

FTX lawyers from Fenwick defend ‘routine legal services’ for imploded crypto exchange

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Alison Frankel
Thomson Reuters

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

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Consumer advocates call on FirstEnergy to release internal investigations

[wosu.org/politics-government/2024-05-28/consumer-advocates-call-on-firstenergy-to-release-internal-investigations](https://www.wosu.org/politics-government/2024-05-28/consumer-advocates-call-on-firstenergy-to-release-internal-investigations)

Renee Fox

May 28, 2024

Politics & Government



FirstEnergy Flickr

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FirstEnergy Flickr

Workers replace a sign on FirstEnergy headquarters in Akron.

Advocates for Ohio electric customers are questioning FirstEnergy's commitment to transparency and ethics in the continued wake of the HB 6 nuclear bailout bribery scandal.

The Ohio Consumers' Counsel argues if the company has really changed, it should release its internal investigations into the \$60 million bribery case.

FirstEnergy reports the company has turned over a new leaf by restructuring, changing up leadership and implementing new ethics programs.

The company argues its internal reports should not be a part of the public record, or released in any of the open investigations and cases into the company's behavior during the 2019 scandal.

Listen: The Power Grab Podcast

Ohio Consumers' Counsel Director Maureen Willis said First Energy's refusal to turn over its internal investigations isn't transparent and refutes statements that the company made about its improvements.

"Ohioans, the victims of the FirstEnergy bribery scheme, deserve answers, not just empty words from FirstEnergy that it is 'redoubling' its commitment to 'integrity, openness, and trust,'" she said. "The only redoubling we've seen is a redoubling of FirstEnergy's efforts to

block the release of the internal investigation reports. The reports should be released to the public."

Willis said a recent ruling from a federal judge overseeing a civil case could require FirstEnergy to turn the reports over — but the company is appealing the order. There's also a stay on the discovery elements of the case.

Jennifer Young, manager of corporate communications for FirstEnergy said the company doesn't interpret the ruling the same way.

"We disagree with the OCC's assessment of the district court's decision," she said in an email. She cites a decision from the special master in the case that the documents are privileged or protected information that doesn't have to be turned over.

The OCC does have a different interpretation.

A news release from the OCC said:

"On May 6, 2024, Judge Marbley of the United States District Court, Southern District of Ohio, overruled FirstEnergy Corp.'s objections to the Special Master's decision granting a motion to compel FirstEnergy Corp. to produce materials related to its internal investigations into H.B. 6 related matters... The special master had found that 'FirstEnergy's internal investigation is not entitled to attorney-client privilege or work-product protections.' We agree."

FirstEnergy admitted to bribing state officials in exchange for a \$1 billion bailout that led to the arrest of then-Ohio House Speaker Larry Householder and other lobbyists. Householder was convicted on federal charges and is serving a 20-year sentence.

Two of the executives the company fired, Mike Dowling and Chuck Jones, are facing state charges of participating in a pattern of corrupt activity. They've pleaded not guilty.

Prosecution: Borges played his 'unholy alliance' role in bribery scandal

B [toledoblade.com/local/politics/2024/05/28/borges-bribery-scandal-ohio-prosecution-unholy-alliance-firstenergy-party-chair/stories/20240528095](https://www.toledoblade.com/local/politics/2024/05/28/borges-bribery-scandal-ohio-prosecution-unholy-alliance-firstenergy-party-chair/stories/20240528095)



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Jim Provance

The Blade

jprovance@theblade.com

May 28, 2024

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COLUMBUS — Former Ohio Republican Party Chairman Matt Borges was all-in on a bribery scheme "unprecedented in scope and sophistication," and knew the cash was coming from utility giant FirstEnergy, federal prosecutors have argued in opposing his appeal.

Borges is serving a five-year racketeering conspiracy sentence in federal prison for his role in a \$61 million bribery scheme led by former House Speaker Larry Householder. Householder is serving 20 years.

The scheme began as a means to return Householder as Speaker of the House in 2019 so that he could then maneuver passage of a \$1.3 billion, customer-financed bailout of two nuclear plants then owned by a FirstEnergy subsidiary. The scheme worked right up until the federal indictments came down in 2020.

Borges was a later entry into the conspiracy, but prosecutors contended at trial — and now as he appeals his conviction — that he knew from the beginning what was going on and who was paying the bills.



Jim Provance

Imprisoned Householder now faces state charges in bribery scandal

"After learning the details of Householder's corrupt bargain with FirstEnergy, Borges joined what he called an 'unholy alliance,'" reads the prosecution's brief opposing Borges' appeal. "Borges joked that the seemingly limitless bribe payments were like 'Monopoly money' and said that he too wanted to 'get fat off this.'"

The prosecution contends before the Cincinnati-based U.S. 6th Circuit Court of Appeals that Borges did "get fat off this," personally pocketing \$366,000 from the FirstEnergy pipeline.

The prosecution has contended that Borges used his close connections with Republican state officeholders to try to get their help in derailing a potential voter referendum that could have killed the House Bill 6 bailout law.

Testimony revealed he also paid a \$15,000 bribe to a manager of a referendum petition effort, Tyler Fehrman, to get inside information on the campaign's progress and strategy. Mr. Fehrman went to the FBI, recorded subsequent conversations, and testified for the prosecution.

"Borges knew the money he received was FirstEnergy money flowing to Householder through Generation Now," the prosecution's brief reads. "And he knew why FirstEnergy was paying Householder: because Householder was uniquely positioned as Speaker to ensure that the bailout was preserved — either by defeating the referendum or by passing alternate legislation."

Borges has contended the prosecution failed to prove the criminal elements necessary to secure a conspiracy conviction. Among other things, he contends the prosecution failed to demonstrate that Mr. Fehrman worked directly for Ohioans Against Corporate Bailouts, the committee working to put the bill's repeal on the ballot.

"If Fehrman had been an employee or agent of the ballot campaign [he was not], a prosecution of Borges in the state courts would have exposed him to possible conviction and sentence for a relatively minor misdemeanor offense," his appeal reads. "Instead, the federal government prosecuted Borges for participating in a RICO conspiracy principally based on the accusation that the payment to Fehrman for 'inside information' violated the honest services fraud statute.



Jim Provance

Utilities regulator backs off scandal investigation at Yost's urging

"This flimsy theory of guilt exposed Borges to 'the kind of uncertainty in our laws' that the Constitution does not tolerate," it reads.

Householder has also appealed his conviction, arguing that he has been made a scapegoat for what amounts to politics as usual in Ohio. The prosecution's reply to his arguments is still pending.



Jim Provance

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As Deadly Accidents Piled Up, Bond Investors Got Tough on Pemex

By Carolina Wilson and Scott Squires

- Neuberger Berman, JPMorgan and HSBC demanded changes
- Mexican oil-driller responded with first sustainability plan

Bloomberg Law News 2024-05-29T09:49:18827243319-04:00

As Deadly Accidents Piled Up, Bond Investors Got Tough on Pemex

By Carolina Wilson and Scott Squires2024-05-28T10:53:56783-04:00

- Neuberger Berman, JPMorgan and HSBC demanded changes
- Mexican oil-driller responded with first sustainability plan

Jennifer Gorgoll was feeling the heat. A bond investor at Neuberger Berman Group LLC, Gorgoll had staked out a big position in debt issued by Mexico's state-oil company, Petroleos Mexicanos, and executives at Neuberger were getting nervous.

Pemex's ESG record had deteriorated so much — fatal accidents and toxic spills were piling up and methane emissions were soaring — that it was getting hard for the firm to justify owning the bonds when pressed by clients.

Either Pemex cleaned up its act, they concluded, or they would likely have to unload all their holdings.

So Gorgoll, a long-time Pemex bull, pulled some of the oil giant's top finance officials into a Zoom call and, over the course of an intense 60-minute conversation, pressed them again and again to take environmental, social and governance issues more seriously.

"We hold bonds in size," Gorgoll recalls saying, "this is a very important investment for us and we've been invested in Pemex for a very, very long time. But we made it clear to them that there's consequences to actions and inactions."

Jennifer Gorgoll

Photographer: Alyssa Pointer/Bloomberg

That tough talk was part of an 18-month-long campaign by Pemex creditors — a broad group that ranged from Wall Street firms like JPMorgan Chase & Co. and BlackRock Inc. to boutique investment shops — that would ultimately lead the company to unveil its first-ever sustainability plan in March, according to people who were part of the talks. In a 67-page document, Pemex committed to slash emissions by 50% over the next six years and become net zero by 2050, a stunning reversal for a company that had long ignored concerns about how harmful its oil operations were to the environment.

Some of the actions by creditors were coordinated but, in a sign of how potent the ESG movement has become in the world of finance today, much of the push was a hodge-podge of lobbying efforts that firms initiated on their own.

Even if Pemex fails to deliver on all of its pledges, as some investors fear, its decision to agree to give in to the ESG demands underscores how beholden the company has become to creditors who have lent it a combined \$102 billion, an amount greater than the debt taken on by any other oil producer in the world. If Pemex wants to survive, it will need many of those creditors to roll over their bonds and loans.

The company's ESG committee declined to comment on its engagement with creditors over its sustainability plan.

Financial Support

Doubts about that continued financial support mounted last year, when a series of accidents, including a platform explosion in July that left two dead, led investors to fear the government wouldn't continue backing Pemex. That triggered a selloff that sent the company's bond yields soaring to as high as 12.5%.

"Pemex is at the mercy of credit markets for new funds and refinancing," said **Philip Fielding**, co-head of emerging markets at MacKay Shields LLC who holds Pemex bonds. "It's been suffering from a high tax and interest burden pushing the free cash flow from operations into the red."

At their peak in 2020, the extra yield on Pemex's short-dated bonds ballooned to 9 percentage points over Mexico's sovereign debt, highlighting concerns that the company was too reliant on support from President **Andres Manuel Lopez Obrador**, who has helped the driller with 1.37 trillion pesos (about \$80 billion) in cash injections and tax breaks since coming to office in 2018.

Market jitters have eased of late. Pemex's bond spreads over the sovereign have shrunk to their lowest in at least a year as investors grow more confident presidential candidate **Claudia Sheinbaum** will continue to support the company. The frontrunner in the June 2 presidential elections, Sheinbaum has called for Pemex to refinance bonds ahead of large maturities in 2025. The finance ministry has said it's assessing various options for Pemex and its debt, but will wait to coordinate a strategy with the president-elect.

Read More: Big Pemex Debt Plan Is Far From Imminent, Finance Minister Says

Claudia Sheinbaum during an event with Mexican President Andres Manuel Lopez Obrador, right, at the Pemex refinery in Paraíso, Tabasco State, on July 1, 2022.

Photographer: Alejandro Cegarra/Bloomberg

The bonds have roundly outperformed emerging market corporate debt. While EM corporate bonds have returned about 5% over the past five years, Pemex notes — many of them with high coupons — have returned close to 30%, according to data compiled by Bloomberg as of May 24.

It was those kinds of returns that first got Neuberger's Gorgoll hooked. The 53-year-old began investing in Pemex over 20 years ago, including in private placements and structured oil receivables.

"It was the darling of investment opportunities and we were like, wave it in. We can't get enough of this paper," says Gorgoll, whose firm owns around \$300 million of Pemex debt after cutting holdings over the past two years.

Neuberger escalated its engagement in May 2023, handing the company a whole list of concessions. To Gorgoll's surprise, Pemex sent top financial officers, operations managers and its head of sustainability to the meetings — more representatives than on Neuberger's side.

Chorus of Creditors

There were over half a dozen banks involved in the chorus of creditors ratcheting up the pressure on Pemex, including the likes of HSBC Holdings Plc, Bank of America Corp., Citigroup Inc., Banco Bilbao Vizcaya Argentaria SA and BNP Paribas SA, according to people familiar, who asked not to be named. HSBC, BofA, Citigroup, BBVA and BNP declined to comment, as did JPMorgan and BlackRock.

Banks with open credit lines needed Pemex to have a credible ESG plan to roll over around \$8.3 billion in debt. Other fund managers pressed for basic improvements like sustainability reports in English — not just Spanish — and disclosing emissions targets prominently on Pemex's website, according to the people.

In late 2022, calls for engagement from investors — including the Emerging Markets Investors Alliance, whose members hold some \$13 trillion of assets under management — had grown so strong that the company created its own internal sustainability committee, and by the second quarter of 2023 hired S&P Global Commodity Insights to help write a sustainability plan, according to the people.

A spokesperson for the Emerging Markets Investors Alliance said the organization facilitated dialogue between bondholders and the company and that it did not pressure Pemex into crafting its ESG plan.

Not all firms are sold on this new plan. "It is an uphill battle for the company, given its past reputation issues. It may take more than just marginal improvements on sustainability matters, so Pemex will still be excluded from stricter portfolios," said **Sergey Goncharov**, a money manager at Vontobel Asset Management Inc.

That may change if Sheinbaum wins the election and makes good on her promise to revitalize Pemex with a new focus on clean energy. Her plan would cap its oil production at around 1.8 million barrels a day — an increase from about 1.5 million barrels now — while broadening Pemex's scope to include technologies such as lithium extraction and electric-vehicle infrastructure.

Smoke billows from fire at a Pemex gas pipeline which exploded while under repair by employees of the state oil company after an apparent theft attempt in Nativitas, Tlaxcala State, Nov. 4, 2019.

Photographer: Emanuel Flores/AFP/Getty Images

Read More: Mexico's Sheinbaum Wants Debt-Laden Pemex to Go Green

Still, Gorgoll awakes daily bracing for more grim headlines, a risk that is inevitable with an evolving corporate strategy, she says. Quarterly check-ins are critical.

"It's moving a boat — you can't change this and improve the situation one day to the next," Gorgoll said. "But for the first time in a long time, I feel there's something here we can get our arms around."

(Updates data in 14th paragraph.)

--With assistance from **Michael O'Boyle**.

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American Airlines Plunges After CEO Admits Misjudging Demand

Published: Wed May 29 13:27:18 EDT 2024

- Carrier reduces second-quarter forecast for adjusted earnings
- Stock plunges most since 2020, dragging down rival airlines

By Mary Schlangenstein

(Bloomberg) --

American Airlines Group Inc. slashed profit and revenue expectations as its top executive acknowledged that the carrier misjudged domestic demand heading into the crucial summer travel season.

The problems stemmed in part from a recent shift in the airline's sales strategy that sought to push customers away from booking agencies in favor of buying directly through American. The revelations — along with the abrupt departure of its chief commercial officer — sent the carrier's shares plunging the most in almost four years and heralded changes to its network strategy.

"Our expectation for domestic performance has worsened materially since we provided guidance in April," Chief Executive Officer Robert Isom said Wednesday at an industry conference. The forecast revision "is largely due to a softer domestic environment than we were expecting and our performance within that environment."

The overhaul points to diminished prospects for American ahead of the typically lucrative summer months, which are expected to be among the busiest ever for US carriers. Isom promised to make "considerable changes" to recapture business it ceded to rivals as part of the misguided shift in its retailing strategy.

"American revenue has been underperforming the other full-service carriers and it feels like they cater to more budget flyers and don't pull as much revenue out of the cabin," said George Ferguson, a Bloomberg Intelligence analyst.

WATCH: American Airlines Group Inc. revised its second-quarter profit outlook for adjusted earnings and announced the departure of its Chief Commercial Officer, Vasu Raja. Sid Philip reports.

Source: Bloomberg

Adjusted earnings for American will be \$1 to \$1.15 a share in the second quarter, down from a

previous expectation of as much as \$1.45, according to a regulatory filing late Tuesday. Revenue from each seat flown a mile will drop as much as 6% from a year ago, compared to an earlier forecast of down 1% to 3%. It reduced expectations for operating margin and for non-fuel unit costs.

“The culprit was softer revenue, which handily overwhelmed slightly better cost performance,” Jamie Baker, a JP Morgan analyst, said in a note.

While the revision injects uncertainty into an aviation industry already grappling with geopolitical tensions, scarce supplies of new aircraft and rising costs, analysts said the issues may be specific to American and not necessarily a reflection of softening demand more broadly. Baker noted that there was widespread skepticism after American offered a rosy forecast earlier this year. He also pointed to rival United Airlines Holdings Inc., which reaffirmed its profit forecast minutes after American’s initial disclosure Tuesday.

Alongside the guidance change, American also said Chief Commercial Officer Vasu Raja would step down in June. Stephen Johnson, vice chair and chief strategy officer, will oversee commercial operations while American searches for a permanent successor.

Vasu Raja

Source: American Airlines Group Inc.

Raja, a 20-year company veteran who assumed the commercial role about two years ago, led the company’s move to “modern retailing,” or a push for companies and individual customers to purchase directly from the carrier through its app and website instead of going through a corporate travel manager or online travel agency. The airline’s sales department was cut back as part of the switch.

The shift angered some companies and travel management firms, and Raja acknowledged recently that its growth in managed corporate travel volumes was trailing that at United and Delta.

Isom on Wednesday appeared to fault Raja for the carrier’s recent stumble, saying “we need to reset” in reference to the management change. The airline “moved faster than we should have” on adopting its modern retailing strategy, the CEO said.

Critical bookings that are made close to travel and normally cost more have softened “due in part to changes we have made” in the carrier’s marketing strategy, Isom said. It added too much capacity after misreading summer demand, triggering fare sales and reducing revenue. American’s capacity growth will slow to 3.5% in the second half of the year from just over 8% in the first half, Isom said.

“We are evaluating strategically, holistically and piece by piece,” he said. The airline has to “re-establish our competitiveness among the top network airlines.”

The carrier will work with travel agencies and corporations while continuing to promote direct bookings, and make it easier to do business with the company. “We’ve used a lot of sticks,” Isom said. “We’ve got to put some more carrots in place and make sure that our product is available wherever customers want to buy it.”

American’s shares tumbled 16% Wednesday in New York, the biggest intraday decline since June 2020. Delta Air Lines Inc. fell 1.3% at 12:39 p.m., while Southwest Airlines Co. slid 4.5%. The worries spread to overseas carriers as well: IAG SA, the parent of British Airways, dropped 2.8%, while Deutsche Lufthansa AG declined 2.9% in Frankfurt.

Demand Uncertainty

There are hints that demand is starting to wane on some fronts, including the US domestic market. Airlines in the US and Europe had previously expected fares to surge this summer as expected record demand clashes with constrained aircraft deliveries by Boeing Co. and Pratt & Whitney engine issues grounding hundreds of Airbus SE jets.

Aviation executives are gathering in Dubai in the coming few days for the annual general meeting of the International Air Transport Association, where discussions will center around the challenges and pace of recovery of the industry. Conflict in the Middle East has prompted some leisure travelers to reconsider trips, while forcing airlines to change routes or give up some destinations altogether.

Last week, Ryanair Holdings Plc CEO Michael O’Leary said that European peak summer fares may be flat to modestly higher, despite capacity being constrained, forcing airlines to run promotions and discounts.

The upheaval at American also raises questions about its recent move to focus on Sun Belt hubs as Americans moved away from large cities in the US northeast and west to Texas, Florida and other southern states. American has said its expansive network of regional jets made it best suited to ferry travelers from growing smaller cities to its hubs in Dallas-Fort Worth, Miami, Charlotte and Phoenix.

Isom stood behind the strategy Wednesday, saying, “I haven’t seen anything that suggests the Sun Belt cities aren’t going to continue to be a real economic engine in the United States.”

Still, the changes to its retail strategy could take time to implement, said Helane Becker, a TD Cowen analyst.

“It is apparent that the company’s senior management team believe the plan is not working,” she said in a report. “Hence, the CCO is leaving. We expect it will take at least a year to get back on track.”

(Updates with capacity plans in 13th paragraph)

American Airlines Plunges After CEO Admits Misjudging Demand

--With assistance from Catherine Larkin, Siddharth Philip, Charlotte Ryan and Benedikt Kammel.

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Matterport Ex-CEO Wins \$79 Million In SPAC Stock Lockup Suit

By Mike Vilensky

- Former executive previously won bid to freely sell shares
- Court grants damages for losses incurred by prior restrictions

Bloomberg Law News 2024-05-29T09:39:06345563635-04:00

Matterport Ex-CEO Wins \$79 Million In SPAC Stock Lockup Suit

By Mike Vilensky 2024-05-28T18:49:50000-04:00

- Former executive previously won bid to freely sell shares
- Court grants damages for losses incurred by prior restrictions

Matterport Inc.'s former chief executive was awarded \$79 million in damages Tuesday by a Delaware court after prevailing in a stock dispute with his former company.

Vice Chancellor Lori W. Will, of the Delaware Chancery Court, said in a post-trial decision that the 3D technology company's wrongful application of stock restrictions on ex-CEO William Brown caused Brown to miss out on some \$79 million.

The damages amount "provides Brown recompense for any lost profits he would have obtained had he been free to trade upon receiving his Matterport share," Will said.

The decision stems from Brown's earlier win against the company in a 2021 trial.

Brown accused Matterport's board of trying to foist an unlawful stock "lockup" period on him as it prepared to go public through a special purpose acquisition company, or SPAC. Matterport merged with the SPAC, Gores Holding VI Inc., raising \$345 million in its initial public offering in 2020.

The company had sought to impose a post-deal stock lockup on Brown's ability to sell his shares. Brown sued Matterport in 2021, alleging the lockup was an unlawful trading restriction.

In 2022, Will ruled that Brown's shares were excluded from the lockup because the bylaw relied upon by the company only applied to Matterport shares held "immediately following" the merger. Because Brown wasn't given stock in the combined company until he executed "letters of transmittal" months after the transaction, those shares weren't covered by the bylaw, the judge said.

After the 2022 ruling, Brown sold his shares at roughly \$14 per share, netting about \$80 million.

Damages Computation

In awarding the damages, the Chancery Court rejected Brown's argument that the court should calculate the damages amount using Matterport's all-time high price of \$37 per share—which would have led to an award of some \$134 million.

Instead, the court calculated the damages using the average price of Matterport stock during a "reasonable time" that Brown would have traded if he hadn't been wrongfully bound by the lockup clause—November 2021—when the stock was trading at \$27.92 per share. The court then subtracted the \$80 million in proceeds Brown made after the 2022 court ruling that had freed him to sell his shares.

"The goal is to fairly compensate the injured party for losses incurred while accounting for market fluctuations," Will said.

Christensen & Dougherty LLP, Baker McKenzie LLP, and Doyle Law APC represent Brown. Richards, Layton & Finger PA and Selendy Gay PLLC represent Matterport.

The case is *Brown v. Matterport, Inc.*, Del. Ch., No. 2021-0595, 5/28/24.

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Bloomberg Law News 2024-05-29T09:51:40697677684-04:00

Semler Scientific Surges After Adopting Bitcoin Holding Strategy

By María Paula Mijares Torres2024-05-28T13:16:54033-04:00

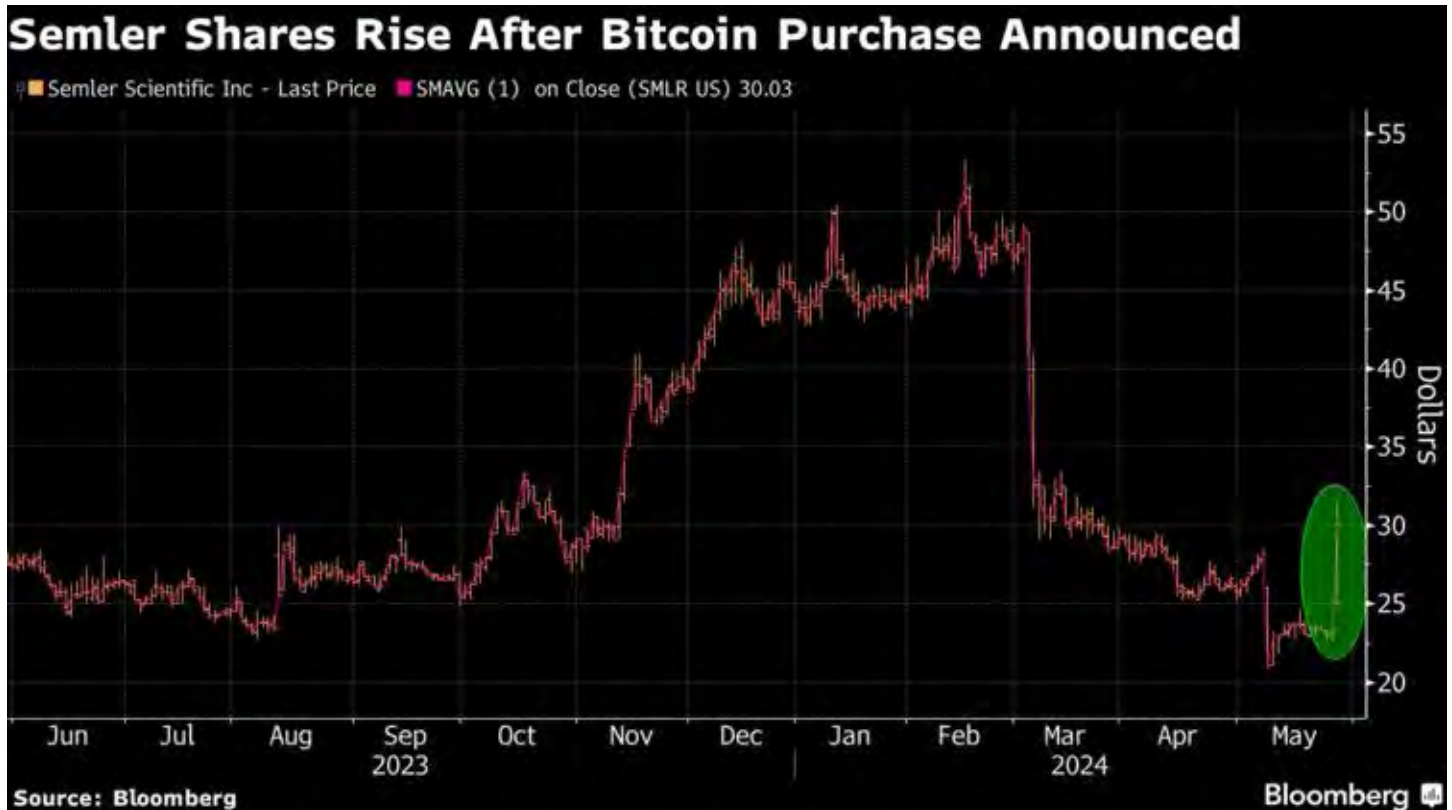
- Medical device maker purchased around \$40 million of Bitcoin
- Shares of Semler jump as much as 36% after announcement

Medical device maker Semler Scientific Inc. said it has adopted Bitcoin as its primary treasury reserve asset, becoming one of the few public companies to follow the controversial approach pioneered by MicroStrategy Inc.

Shares of the San Jose, California-based firm jumped as much 36% to \$31.61, raising its market value to around \$220 million. Prior to Tuesday's rally, the stock had slumped almost 50% so far this year. In a statement, Semler Scientific said it purchased 581 Bitcoin for an aggregate amount of \$40 million, inclusive of fees and expenses.

"Our Bitcoin treasury strategy and purchase of Bitcoin underscore our belief that Bitcoin is a reliable store of value and a compelling investment," said **Eric Semler**, chairman of the company, and head of TCS Capital Management. "We believe it has unique characteristics as a scarce and finite asset that can serve as a reasonable inflation hedge and safe haven amid global instability. We also believe its digital, architectural resilience makes it preferable to gold, which has a market value of approximately 10 times that of Bitcoin."

MicroStrategy co-founder and Chairman Michael Saylor had the enterprise software maker start buying the volatile cryptocurrency in 2020 as a hedge against inflation. The firm's Bitcoin holdings have grown to beyond \$10 billion, with the company using proceeds from cash flow, equity and debt sales to fund purchases. MicroStrategy shares have surged more than 1,300% since it starting buying Bitcoin. A handful of mostly crypto-related companies such as Block Inc. also hold Bitcoin on their balance sheet.



Bloomberg

Semler Scientific's board and senior management were looking for potential uses of cash, including acquisitions, before deciding to acquire the digital asset. "After studying various alternatives, we decided that holding Bitcoin would be the best use of our excess cash," Semler said.

The company had revenue of \$15.9 million for the three months ended March 31, according to its most recent corporate filings. The revenue is primarily from fees charged to customers for use of vascular testing products such as the patented and FDA cleared, QuantaFlo, and from sale of accessories used with these products.

Semler Scientific also had cash, cash equivalents and restricted cash of \$62.9 million of as March 31. Their cash was held in a variety of non-interest bearing bank accounts and Treasury bills. As of March 31, the firm held approximately \$10.5 million of US Treasury bill, \$45.5 million in US government money market fund account and the remaining cash of \$6.9 million held in non-interest bearing bank accounts.

The company says it will continue to focus on its core medical products and services, in addition to its Bitcoin purchase strategy. As Semler Scientific continues to generate revenue and free cash flow from sales of its products, it will continue to evaluate its use of excess cash, the company said.



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Catching Up With Delaware's Chancery Court

By **Leslie A. Pappas**

Law360 (May 28, 2024, 6:43 PM EDT) -- Delaware Court of Chancery watchers shifted their focus last week from the courtroom to Dover's legislative hall, as proposed amendments to Delaware's corporate code were finally introduced to state lawmakers. Hearings, decisions and reversals involved Kraft-Heinz, AMC Entertainment and the merger of cryptocurrency companies BitGo and Galaxy. In case you missed it, here's the latest from Delaware's Chancery Court.

Top News

Despite urging from The Council of Institutional Investors and corporate legal scholars to "**press pause**" on proposed amendments to Delaware's General Corporation Law, Delaware Sen. Bryan Townsend nevertheless **introduced** S.B. 313 late last week — just in time for some long weekend beach reading. As of Tuesday afternoon, the bill was still awaiting consideration in the Senate's Judiciary Committee.

In the Courtroom

In arguments on a motion to dismiss, The Kraft-Heinz Co. **told the court** that an institutional shareholder is not entitled to a "do-over" on an insider trading lawsuit that was dismissed in 2021 because the supposed "new evidence" it offers isn't actually new and wouldn't have made any difference in the case.

Decisions

A stockholder of special acquisition company Sports Entertainment Acquisition Corp. **got the green light** from Vice Chancellor Lori W. Will 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.

At a teleconference, Vice Chancellor Nathan A. Cook **determined** that the warring co-owners of a boutique New York investment adviser would go to trial in September if they failed to resolve their disagreements about whether to dissolve the company.

In a telephonic bench ruling, Vice Chancellor Sam Glasscock III found that a shareholder of a special-purpose acquisition company that merged with Better Therapeutics Inc., a now-defunct medical technology company, **could not amend his year-old proposed class action** because he waited too long to amend the complaint.

But Vice Chancellor Glasscock **declined to rule from the bench** on a preliminary injunction sought by Redbird Capital Partners in a dispute over a Brookfield Infrastructure Partners claim for a \$150 million escrow included in its \$5.7 billion purchase of RedBird data center projects last year.

Delaware's Supreme Court **declared that there will be no sequel** to the drama from common stockholders of AMC Entertainment Holdings Inc. who objected to a class settlement of litigation in the state's Chancery Court, upholding Vice Chancellor Morgan T. Zurn's approval of the deal.

The state's highest court also **reversed the dismissal of a lawsuit** that cryptocurrency wallet provider BitGo Holding Inc. filed against digital assets firm Galaxy Digital Holdings Inc., remanding the dispute over their broken \$1.2 billion merger to Vice Chancellor J. Travis Laster to resolve multiple "ambiguities."

New Cases

A company seeking to develop what it described as the first healthcare futures exchange **sued two former managers** for allegedly pilfering intellectual property and other resources and then launching a competing venture.

A cryptocurrency entrepreneur **accused** the CEO of Puerto Rico-based crypto holding company Immutable Holdings Inc. of making fraudulent misrepresentations to recruit him to serve as president of his blockchain company, then unjustifiably fired him.

A group of fraternity brothers who founded waste management company Noble Environmental Inc. and later sold a venture called Archaea Energy to BP **were hit with a shareholder derivative suit** alleging that the fraternity brothers stole billions of dollars from the company and breached their fiduciary duties to minority shareholders.

Abbott Cooper PLLC and Block & Leviton LLP **filed a series of shareholder lawsuits** that seek to invalidate an "irrevocable resignation requirement" in company bylaws, saying such provisions violate Delaware law.

Fitness brand franchiser Xponential Fitness Inc. **sued its recently resigned CEO**, asking the court to find that the First State's laws, not California's, govern a dispute over the former CEO's right to inspect the company's books and records.

Settlements

Stockholders who **sued** special purpose acquisition company CM Life Sciences Holdings for alleged missing or misleading disclosures related to its take-public merger of clinical data and genomics company Sema4 Holdings told the court that they had tentatively agreed to settle the action, but gave no details.

Quotable

"There is no need for an immediate legislative 'fix,' particularly when there appears to be no consensus that there is a 'problem' that needs fixing." — Council of Institutional Investors, **in a letter** urging the Delaware State Bar Association for "a more deliberative approach" on amendments to Delaware's General Corporation Law.

--Additional reporting by Jeff Montgomery, Katryna Perera, Ben Zigterman, and Sydney Price. Editing by Kelly Duncan.



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Chinese EV Co. Falsely Touted Vehicle Demand, Suit Claims

By **Emilie Ruscoe**

Law360 (May 28, 2024, 2:18 PM EDT) -- China-based electric-vehicle maker Li Auto Inc. and three of its executives are facing a proposed class action faulting the company for allegedly hurting investors after it announced it would fall well short of ambitious production goals in early 2024.

In a complaint filed Thursday in Brooklyn federal court, plaintiff Saqib Chaudhary pointed to the company's February announcement saying it aimed to deliver at least 100,000 vehicles in the first quarter of 2024, which would be a 90% production increase in comparison to the same period a year earlier. Historical market records show that following the company's February production announcement, trading prices for its shares soared as high as \$46 apiece.

But in March, Chaudhary said, the company revised down its production goals to 78,000 vehicles at most, and in May, it told investors that its revenue for the quarter had fallen 46% since the prior quarter. When the company announced its first quarter revenue, the investor said, it saw trading prices slide by nearly 13% from just less than \$25 a share to below \$22 a share.

Chaudhary claimed the company misled investors in February, alleging that it overstated demand for its vehicles and overestimated its own ability to execute the operating strategy it had laid out at the time.

"Accordingly, the company was unlikely to meet its Q1 2024 vehicle deliveries estimate, [and] the foregoing, once revealed, was likely to have a material negative impact on the company's financial condition," the investor said in the suit.

Chaudhary also cited the company's March launch of its first all-electric battery-powered vehicle as a factor compounding the company's operational challenges in the first quarter of its 2024 fiscal year.

The investor noted that on March 21, about three weeks after the launch of its Li Mega vehicle, Li told investors it had "mis-paced" the rollout of the Li Mega, which the company has described as designed for big families.

Specifically, the company said in mid-March, it needed to focus on product validation for the Li Mega, concentrating its sales efforts on what it believed would be the core user group for the vehicle as well as aiming its sales efforts at cities where consumers had strong purchasing power.

The company said it had initially planned sales operations for the Li Mega as if the vehicle were already in the scaling sales phase, which would focus in part on customer acquisition.

A July 2020 initial public offering raised \$1.47 billion for the company and saw its American depositary shares, which trade on the Nasdaq, priced at \$11.50 per share, according to the company.

On Tuesday morning, market records showed Li Auto shares trading around \$20 per share, down from the trading price Chaudhary cited at the end of the proposed class period.

Along with the company, Chaudhary's suit names Li Auto CEO Xiang Li, its Chief Financial Officer Tie Li and its Executive Director Donghui Ma.

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

Chaudhary is represented by Phillip Kim and Laurence M. Rosen of the Rosen Law Firm PA.

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

The case is Chaudhary v. Li Auto Inc et al., case number 1:24-cv-03725, in the U.S. District Court for the Eastern District of New York.

--Editing by Stephen Berg.

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Twitter Investors Seek Cert Over Musk's Backtrack On Buyout

By **Dorothy Atkins**

Law360 (May 28, 2024, 9:11 PM EDT) -- A group of Twitter investors have asked a California federal judge to certify a class over claims Elon Musk fraudulently tweeted about the social media company's alleged bot problem to get out of his \$44 billion acquisition, arguing that the case is "perfectly suited for class certification."

In a **27-page, May 24 motion**, the investors urged U.S. District Judge Charles R. Breyer to certify a class of investors who sold the publicly traded stock or call options, or purchased put options of Twitter Inc., which Musk has since acquired and renamed X Corp., from May 13, 2022, through Oct. 4, 2022, and who they say suffered losses due to Musk's statements.

The class certification bid is the latest development in a proposed class action filed in **October 2022**, alleging the South African billionaire, who has more than 160 million followers on X, violated securities laws by **bad-mouthing the company** on its own platform to tank its stock in order to renegotiate his offer to buy Twitter Inc. for \$54.20 per share, for a total of **\$44 billion**.

Musk's statements at issue were posted in a series of tweets claiming that more than 20% of accounts on the social media site were fake and that he was planning to cancel the merger. Investors claim Musk was contemplating sabotaging the deal because he was facing a margin call on his Tesla stock, which he was planning to use to buy Twitter.

Following Musk's statements, Twitter's stock price tumbled, but Musk eventually agreed to the purchase at the original price after Twitter sued him in Delaware. News that Musk was going through with the deal was followed swiftly by a 15% jump in Twitter's share price, according to the complaint.

Last year, Musk asked the court to throw out the case, arguing that the investors' allegations are riddled "top-to-bottom" with defects. But after holding a hearing on Musk's motion in **October**, Judge Breyer **refused** to toss the case, trimming only some claims while giving the investors another opportunity to amend their lawsuit.

In March, Musk filed a motion for judgment on the pleadings, arguing that the latest rendition of the lawsuit doesn't plead falsity, scienter or other elements required to state a viable securities fraud claim. A hearing on that motion is set for June 21.

In the class certification motion, the investors noted that 60.6 million shares traded weekly throughout the proposed class period, and there were approximately 796 million shares outstanding during the class period. Therefore, the numerosity requirement for class certification has clearly been met, the motion says.

The investors argue in their motion that the proposed class members raise virtually all the same common questions of law or fact, and those common questions predominate and can be decided on a classwide basis.

The common questions include whether Musk's May 13, 2022, tweet that the "Twitter deal [is] temporarily on hold pending details supporting calculation that spam/fake accounts do indeed represent less than 5% of users" contained material misrepresentations and omissions, and whether Musk's May 2022 statements that bogus accounts made up at least 20% of Twitter's users were false and misleading.

"Because absent class members would have to prove nearly identical facts and address nearly identical legal issues if they pursued their claims individually, the proposed class satisfies the commonality requirement of [class certification]," the motion says.

The investors also noted that they're not required to prove classwide damages for class certification, but even so they plan to offer an "out-of-pocket losses" theory of damages.

The four lead plaintiffs — Steve Garrett, Nancy Price, John Garrett and Brian Belgrave — allege that they sold 28,389 shares of Twitter common stock during the proposed class period at artificially deflated prices, and collectively suffered losses of over \$558,000, according to the motion.

The motion asked the court to certify the class, appoint the four named plaintiffs as class representatives and appoint Cotchett Pitre & McCarthy LLP and Bottini & Bottini Inc. as class counsel.

A hearing on the motion for class certification is set for Aug. 2 in San Francisco before Judge Breyer.

Counsel and representatives didn't immediately respond to requests for comment Tuesday.

The shareholders are represented by Joseph W. Cotchett, Mark C. Molumphy, Tyson C. Redenbarger and Gia Jung of Cotchett Pitre & McCarthy LLP, and Francis A. Bottini Jr., Albert Y. Chang and Aaron P. Arnzen of Bottini & Bottini Inc.

Musk is represented by Alex Spiro, Jesse Bernstein, Jonathan E. Feder, Michael T. Lifrak, Joseph C. Sarles and Alex Bergjans of Quinn Emanuel Urquhart & Sullivan LLP.

The case is Giuseppe Pampena et al. v. Elon Musk, case number 3:22-cv-05937, in the U.S. District Court for the Northern District of California.

—Additional reporting by Hailey Konnath. Editing by Michael Watanabe.

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Block.one Investors Renew Push For \$22M Deal Approval

By **Katryna Perera**

Law360 (May 28, 2024, 7:52 PM EDT) -- A class of investors has again asked the court to approve a \$22 million settlement with Block.one over the cryptocurrency company's \$4 billion initial coin offering, following several instances in which the court denied approval of the deal.

Lead plaintiff Crypto Assets Opportunity Fund LLC filed a renewed **motion** Friday for final approval of the settlement reached in March 2023.

The motion states the deal is an "excellent recovery" for the class and is the product of "several rounds" of arms-length negotiations.

"It is fair and reasonable given the substantial risks of continuing the litigation and considering the total amount the class might recover if successful," the motion says. "It comes after an extensive and effective notice program, and has not elicited any objection from class members or anyone else."

The motion also states lead counsel from Grant & Eisenhofer PA intends to ask for a \$5.5 million attorney fee award, approximately 25% of the settlement fund, along with roughly \$81,000 in litigation costs and a \$31,000 service award for the lead plaintiff.

Friday's renewed motion follows the court's previous rejection of the deal and delays. According to the motion, a final fairness hearing was scheduled for September, but the court adjourned the hearing "sine die" the morning of and has yet to reschedule it.

In November, the court issued an order directing the parties to jointly submit a letter providing details for each potential class member, such as the estimated dollar amount they would receive from the settlement and their "recognized loss amount."

The class says they provided the requested information in an email sent to the court on the stated deadline. However, in February, the court issued an order denying final approval of the deal, claiming the parties failed to provide the requested information.

The investors say they filed a motion for reconsideration in March, arguing it's justified since the court overlooked the November submission, which provided the requested information. According to Friday's motion, the motion for reconsideration is still pending.

A \$27 million settlement in the case was also previously **denied** after a New York federal judge questioned the current lead plaintiff's ability to represent the class.

The settlement figure was revised and reduced after the investors shortened the class period, according to court filings.

If approved, the settlement will resolve claims that Block.one violated securities law with its \$4 billion ICO for so-called EOS tokens — its proprietary digital asset — announced in June 2021. The plaintiffs allege the cryptocurrency company sold hundreds of millions of EOS since mid-2017 without registering the tokens with the U.S. Securities and Exchange Commission, as it should have.

Crypto Assets also accused Block.one of misrepresenting how the proceeds from its ICO would be used. Instead of putting the proceeds toward the development of its blockchain technology, Block.one

funneled them to its trading arm in Hong Kong, where its CEO invested them in digital assets and more traditional assets such as government bonds, according to the fund.

These misdeeds caused Block.one's technology to fall substantially short of the company's promises and its token prices to "plummet," according to the suit.

Block.one agreed in 2019 **to pay \$24 million** to settle SEC allegations that its ICO had violated securities laws but did not admit to, or deny the SEC's allegations.

The suit against Block.one is one among a **slew of investor litigation** filed against cryptocurrency companies in April 2020. Block.one **argued November 2020** that the case against it should be dismissed because it was filed too late, and Crypto Assets had not shown that any EOS purchases had taken place in the U.S.

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

The investors are represented by Daniel L. Berger, Caitlin M. Moyna and Vincent J. Pontrello of Grant & Eisenhofer PA, James Koutoulas of Koutoulas Law LLC, J. Samuel Tenenbaum of Bluhm Legal Clinic of the Northwestern Pritzker School of Law and Ievgeniia P. Vatroenko of Ievgeniia P. Vatroenko Esq.

Block.one is represented by Greg D. Andres, Edmund Polubinski III and Neal A. Potischman of Davis Polk & Wardwell LLP and Brian E. Klein, Scott M. Malzahn, Teresa L. Huggins and Jose R. Nuno of Waymaker LLP.

The case is Hong et al. v. Block.One et al., case number 1:20-cv-03829, in the U.S. District Court for the Southern District of New York.

--Editing by Drashti Mehta.



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RBS, Lloyds Bank, Others Ink \$1.9M Libor Settlement

By **Katryna Perera**

Law360 (May 28, 2024, 8:52 PM EDT) -- A group of plaintiffs in the yearslong suit alleging several big banks manipulated the London Interbank Offered Rate, or Libor, have reached a \$1.9 million settlement with the Royal Banks of Scotland, Lloyds Bank and others, bringing the total settlement recovery amount to more than \$780 million.

The Berkshire Bank and The Government Development Bank of Puerto Rico, together known as the "lender plaintiffs," filed a **motion** for preliminary approval on Tuesday, saying the deal was negotiated at arm's length with experienced counsel from Pomerantz LLP, and is fair and reasonable.

The settling defendants include The Royal Bank of Scotland, now known as NatWest Group PLC, the British Bankers Association, Rabobank, Lloyds Bank and Royal Bank of Canada, among others.

The lender plaintiffs say the settlement is appropriate given the expense and complexity of continued litigation.

"It is well recognized that claims involving collusion and price manipulation among industry participants are 'complicated, lengthy, and bitterly fought, as well as costly.' Lender plaintiffs' action is no exception," the motion states. "The complexity and the hard-fought battles in this action involving fraud and civil conspiracy to manipulate LIBOR is reflected in the numerous fully briefed motions and opinions in the case since the original complaint was filed on July 25, 2012."

If a settlement is not approved, the plaintiffs say the case could "consume many more years of the court's resources."

The proposed settlement class includes all U.S.-based lending institutions that originated, held, owned or purchased loans or held interest in loans with interest rates based upon U.S. Dollar LIBOR, which rates adjusted at any time between Aug. 1, 2007 and May 31, 2010. Tuesday's motion argues the class should be certified since it meets all the necessary criteria.

The motion did not state how much lead counsel intends to seek in attorney fees or other litigation costs.

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

Tuesday's deal follows a \$3.5 million settlement **reached in April** in the suit between a group known as the "exchange-based plaintiffs" and several banks, including Credit Suisse and UBS AG. Lloyds Bank and the Royal Bank of Canada were also involved in the April deal.

In October, the court granted nearly **\$22 million to attorneys** from Susman Godfrey LLP and Hausfeld LLP for brokering a **\$90 million settlement deal** in the litigation with MUFG Bank Ltd., the Norinchukin Bank and Société Générale.

Over the course of the litigation, which now dates back nearly 12 years, Barclays has settled the proposed class' claims for \$120 million, Citibank for \$130 million, HSBC for \$100 million and Deutsche Bank for \$240 million.

The relevant cases were launched after financial institutions admitted to submitting skewed data as part of the process of setting Libor rates to benefit them.

Plaintiffs, including bondholders, exchange-based traders and lenders, have brought claims against the banks involved, alleging that they profited to the tune of millions — and potentially billions — of dollars in connection with the scheme.

The lender plaintiffs are represented by Jeremy A. Lieberman and Michael J. Wernke of Pomerantz LLP.

The defendants are represented by King & Spalding LLP, Latham & Watkins, Davis Polk & Wardwell, Meland Budwick PA, Milbank LLP, Herbert Smith Freehills New York LLP, Sidley Austin LLP, Steptoe LLP, Schindler Cohen & Hochman, The Law Office of Steven J. Fink PLLC and Katten Muchin Rosenman LLP.

The case is In Re: Libor-Based Financial Instruments Antitrust Litigation, case number 1:11-md-02262, in the U.S. District Court for the Southern District of New York.

--Editing by Vaqas Asghar.

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5th Circ. Flips Cancer-Drug Maker's Defeat In Hair Loss MDL

By **Mark Payne**

Law360 (May 28, 2024, 7:23 PM EDT) -- The Fifth Circuit has vacated a summary judgment ruling in favor of four women who say two drugmakers failed to warn consumers that their chemotherapy drug could cause hair loss, saying it was impossible for the companies to simultaneously comply with federal and state failure-to-warn laws.

In a 19-page opinion filed on Friday, a three-judge panel overturned a Louisiana federal court's finding that federal law did not preempt the plaintiff's state-level failure-to-warn claims against two cancer drugmakers, Hospira Inc. and Accord Healthcare, Inc., for allegedly failing to quickly change a chemotherapy drug's label to add a warning of permanent hair loss.

The court found that Tina Hickey, Hilda Adams, Gloria, J. Cooper and Carol Woodson didn't have "newly acquired information" showing the two cancer-drug makers' treatments caused permanent hair loss at a more significant rate than the original drug approved by the U.S. Food and Drug Administration.

However, the court also determined the district court didn't take into account the number of "minimal" cases under one study, the Bertrand Abstract, and without including those, the incidence rate of permanent hair loss could be higher, and therefore, there may be a better argument for direct causation. Therefore, that issue was remanded to the lower court.

"Thus, we conclude that these particular defendants did not have newly acquired information showing that PCIA [permanent chemotherapy-induced alopecia] occurred with any greater severity or frequency than before the approval of their drugs, with the possible exception of the Bertrand Abstract," the unanimous panel wrote.

The Fifth Circuit decision gave new life to what one judge called "a very complex situation" when the court heard **oral arguments in March**. That situation stems from the convoluted regulatory pathways that manufacturers must follow under the Food, Drug and Cosmetics Act.

The ruling may mark the first time a federal court has issued an opinion on the FDA's Changes Being Effected regulation that applies to drugmakers seeking approval under a streamlined process known as FDA Rule 505(b)(2), according to attorneys for the drug companies.

The 505(b)(2) process allows manufacturers to market generic versions of already-approved drugs without conducting the same clinical trials. Drugs under 505(b)(2) are not identical to the name-brand drugs but have slight changes that allow manufacturers to rely on existing studies of the approved drug when seeking approval.

Both Accord and Hospira manufacture docetaxel, a generic form of the drug Taxotere, which Sanofi-Aventis made and received FDA approval for in 2011. Hickey and the three other women were fighting an appeal from the drugmakers, which lost their bid for summary judgment in the Louisiana MDL created to handle the hair-loss claim.

The drugmakers told the court in March that the Changes Being Effected regulation — which allows manufacturers to change their drug labels without FDA approval — wasn't available to them between 2011 and 2013 when Hickey took the drug. The companies changed their labels in 2015 after receiving data from Sanofi indicating instances of permanent hair loss in users.

Thus, according to Friday's decision, they couldn't have had the "newly required information" to update their labels via the CBE regulation.

The Fifth Circuit said that the U.S. Supreme Court has not addressed impossibility preemption — when it's impossible to simultaneously comply with federal and state regulation — as it applies to the regulatory pathway 505(b)(2).

However, the circuit court relied on the high court's approach in other cases and under similar regulatory pathways and found that the two companies established impossibility preemption under its analysis.

The Fifth Circuit said the defendants under the FDA regulatory process for new drugs didn't have "newly acquired information" showing higher severity or frequency. However, it did find a potential miscue under the Bertrand Abstract, a 2013 abstract published in the San Antonio Breast Cancer Symposium.

The Bertrand Abstract considered moderate and severe cases when calculating the incident rate of permanent hair loss for patients five years after being treated with FEC — a chemotherapy regimen of fluorouracil, epirubicin, cyclophosphamide and docetaxel.

The Fifth Circuit found the district court didn't account for "minimal" cases and remanded on this point, while leaving open the possibility that under that analysis, it might be sufficient to hold claims against the drugmakers.

"If the analysis of the same shows that it is not sufficient, then these defendants are not liable to these particular plaintiffs on their state law failure-to-warn claims," the panel said.

Hospira said it is pleased with the Fifth Circuit's decision and that the preemption principles applied by the court apply to hundreds of claims in the MDL.

"Rejecting all of plaintiffs' claims that defendants had 'newly acquired information' — with the sole possible exception of one article abstract, which it remanded to the district court for further consideration — the Fifth Circuit's decision facilitates the application of preemption principles to hundreds of claims in the MDL," Hospira said in a statement.

U.S. Circuit Judges Jacques L. Wiener Jr., Catharina Haynes and Stephen A. Higginson sat on the panel for the Fifth Circuit.

Hospira is represented by Richmond Turner Moore and Heidi Kaye Hubbard of Williams & Connolly LLP and John F. Olinde of Chaffe McCall LLP.

Accord is represented by Michael J. Ruttinger, Julie A. Callsen and Chad M. Eggspuehler of Tucker Ellis LLP.

Hickey is represented by Matthew Palmer Lambert of Pendley Baudin & Coffin LLP and Andre M. Mura of Gibbs Law Group LLP.

The case is Hickey v. Hospira, case number 23-30323, in the U.S. Court of Appeals for the Fifth Circuit.

--Additional reporting by Catherine Marfin. Editing by Philip Shea.



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Seeger Weiss Secures Latest Fee Bid In NFL Concussion Case

By **Emily Sawicki**

Law360 (May 28, 2024, 4:42 PM EDT) -- A Pennsylvania federal judge on Tuesday granted Seeger Weiss LLP's latest fee request for close to \$1.9 million in attorney fees and costs for its ongoing work implementing an agreement settling former National Football League players' concussion-linked disability claims.

The total was based on the firm's previously approved lodestar and came out of the pot of fees on which U.S. District Judge Anita B. Brody signed off in 2018, according to her **explanation and order**. The judge approved the firm's latest bid except for one "minor discrepancy" of \$4,400, which she declined, noting it might be attributed to work by an outside expert.

"From this review, I have determined that the time submitted was for work done in advancing the benefit of the class, the work was done with appropriate efficiency, and the fee requests submitted were reasonable," Judge Brody stated. "I have similarly assured myself of the reasonableness of the costs incurred."

Seeger Weiss helped the players secure an uncapped settlement in 2015, resolving multidistrict litigation over the league's alleged actions regarding players' degenerative neurological conditions resulting from their time as professional football players.

In April 2018, Judge Brody approved \$112.5 million in attorney fees to be paid out over the lifespan of the **settlement agreement**. Later that spring, the judge allocated the first \$85.6 million to go toward class counsel immediately following the settlement, with Seeger Weiss earning the **lion's share** — \$51.7 million — for its work as co-lead class counsel in the litigation.

As of February 2023, about \$1.1 billion in awards had been issued to former players out of the settlement, according to data provided by Seeger Weiss.

Attorneys and paralegals for the firm put in more than 2,200 combined billable hours of work in the period covered by the latest payment petitions, June 1, 2020, through Oct. 31, 2022, according to their fee requests.

On Tuesday, Judge Brody said the hourly billing rates she first approved in 2018 — \$758.35 for partners, \$692.50 for counsel and of counsel attorneys, \$486.67 for associates, \$537.50 for contract attorneys and \$260 for paralegals — remain appropriate.

Judge Brody's Tuesday order resolves the firm's sixth and seventh fee petitions, the most recent fee bids entered in the docket.

In November 2022, the firm entered a verified petition for fees and expenses between June 1, 2020, and April 30, 2022, the sixth fee petition following Judge Brody's initial allocation upon settlement. In it, the firm requested about \$1.5 million in fees and expenses.

In March 2023, the firm entered its seventh verified fee petition, covering the period from May 1, 2022, through Oct. 31, 2022, requesting nearly \$400,000 in additional fees and expenses.

During the period, Seeger Weiss partner Christopher A. Seeger was sole class counsel, the judge said. During that time, Seeger and the firm continued to "provide essential services to the class," the

judge said, including protecting class members from predatory lending, supporting appeals and maintaining the settlement website. This also included conducting partnership work with the Korey Stringer Institute at the University of Connecticut and Columbia University's Mailman School of Public Health, in fulfillment of settlement terms directing funding to go toward **educational purposes**.

Seeger Weiss and counsel for the NFL did not immediately respond to requests for comment Tuesday.

Seeger Weiss is represented by its own Christopher Seeger.

The NFL is represented by Brad S. Karp, Bruce Birenboim, Claudia Hammerman and Lynn Bayard of Paul Weiss Rifkind Wharton & Garrison LLP.

The concussion settlement is In re: National Football League Players' Concussion Injury Litigation, case number 2:12-md-02323, in the U.S. District Court for the Eastern District of Pennsylvania.

--Additional reporting by Joe Van Acker, Rick Archer and Ryan Boysen. Editing by Robert Rudinger.

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Chicken Buyers Defend Additional \$37M Atty Fee Ask

By **Lauraann Wood**

Law360 (May 28, 2024, 6:43 PM EDT) -- Direct chicken buyers who have inked more than \$284 million in price-fixing settlements defended their counsel's request for more than \$37 million in what would be their third payout in the massive case, saying the request is consistent with both precedent and past experience.

Addressing questions U.S. District Judge Thomas Durkin raised earlier this month, the direct purchasers **argued Friday** that neither a Seventh Circuit **reversal of end users' fees** nor a fee arrangement relevant only to that section of the massive case should sway him from awarding direct purchasers anything less than what their latest bid for compensation seeks in the case.

If granted, direct purchasers' class counsel fees would be equal to a third of the net settlement pool, according to their brief. That amount is less than class counsel would be entitled to seek under sliding-scale and other fee structures, and it is consistent with fees class counsel has received in similar cases both inside and outside the Seventh Circuit, they argued.

The request also steers clear of auction-related factors the Seventh Circuit told Judge Durkin to consider when it reversed the end users' fee approval last year, the direct purchasers argued.

The appellate court recognized the end users' award might remain the same but ordered Judge Durkin to consider any bids their counsel may have made in auctions around the same time, according to the Friday filing.

Neither of the direct purchasers' co-lead counsel have made any auction bids in cases where they served a court-appointed role between 2010 and 2023, and the fees they have received while serving in court-appointed roles in other antitrust cases "are consistent with and support their one-third fee application in this case," the direct purchasers argued.

And while Judge Durkin asked the direct purchasers to discuss a fee arrangement in a New York banking case involving the end users' class counsel, they said that arrangement is private and they neither have a role in the New York case nor have ever represented the Public School Teacher's Pension and Retirement Fund of Chicago, which entered the arrangement.

Regardless, the banking case is distinguishable "because a single example of a client reaching an attorney fee agreement with another firm in a unique case is not an apt indicator of the market rate for this case," the direct purchasers argued.

The New York case is also distinguishable because some of the banking defendants had just settled similar financial cartel cases, including one for more than \$1.86 billion, the direct purchasers told Judge Durkin. "In stark contrast," no similar protein cartel cases existed when the broiler chicken litigation began, and the highest recovery for a food commodity antitrust case was about \$300 million, they said.

Co-lead class counsel's expectation that they would be able to seek a third of the direct purchasers' recovery "was a driving reason why they took the substantial risk to bring this lawsuit and invest their time and money on a completely contingent basis with no guarantee of recovery," they told Judge Durkin on Friday.

That risk only grew and crystallized over time, with a jury **ultimately rejecting** the direct purchasers' claims at trial, they said. Class counsel's fee request "recognizes the reality that taking a

case all the way to trial is particularly risky and ensures that counsel's interests remain aligned with the class' interests until the conclusion of the case," they argued.

Counsel for the direct purchasers declined to comment on Tuesday, and representatives for the settling defendants didn't immediately respond to a request for comment.

The direct purchasers are looking to add the \$37 million at issue to the **more than \$59 million** in fees and reimbursement class counsel received in 2021 from settlements with Fieldale Farms Corp., Peco Foods Inc., George's Inc., Amick Farms LLC, Pilgrim's Pride Corp. and Tyson Foods Inc., as well as the nearly \$4.5 million they received in litigation expense reimbursement in December **from deals** they struck with Mar-Jac Poultry Inc., Harrison Poultry Inc., Simmons Foods Inc., Mountaire Farms LLC and OK Foods Inc.

They argued earlier this month that the third round of payment is warranted because their lead attorneys expended "**enormous resources**" to pursue the case and successfully litigate complex issues, including at the class certification and **summary judgment** stages. The payment is also appropriate because the attorneys performed a significant amount of heavy-lifting to get the case off the ground and keep it moving forward, the direct purchasers argued.

Private plaintiffs began suing the nation's largest broiler-chicken producers in September 2016, claiming the companies coordinated and limited chicken production to raise prices and exchanged detailed information about capacity, sales volume and other data through statistical research compiler Agri Stats Inc.

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

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

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

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

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

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

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

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

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

--Editing by Philip Shea.



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Consumers, Advertisers Seek Class Cert. Against Meta

By **Nadia Dreid**

Law360 (May 28, 2024, 10:03 PM EDT) -- Advertisers and consumers suing Facebook owner Meta Platforms Inc. over allegations of monopolizing the online social media advertising market and misusing users' data in the process have told the California federal court overseeing their claims that they believe it's time for the proposed classes to be certified.

Both proposed classes filed memorandums Friday making their individual cases for certification in the case that is slated for trial in November.

According to the proposed class of Facebook users, it's an easy decision because the "legal questions before the court on this motion for class certification are narrow and readily answered."

"Three of the class certification factors — numerosity, typicality, and commonality — are not seriously disputed," they told the court. "Facebook may attempt to distract the court with additional matters, but class certification 'is decidedly not an alternative form of summary judgment or an occasion to hold a mini-trial on the merits.'"

Other legal issues like liability and damages are easily decided with evidence common to the class, they said. For example, when it comes to damages, they've proposed \$5 per month per user for the misuse of their data. The proposed class period covers four years, from the end of 2016 to the end of 2020.

"This case is the prototypical case for the class action mechanism. Any class member's individual recovery would be dwarfed by the costs of proving the predominating issues in this litigation," the proposed class said. "No rational person would challenge Facebook, one of the richest companies in the world, to recover this amount in damages. For, indeed, 'only a lunatic or a fanatic sues for \$30.'"

The aggrieved advertisers made a similar argument, saying that "their claims are precisely the sort suitable for classwide treatment."

"Questions such as market definition, market power, and exclusionary conduct will be proven exclusively through common evidence from Meta and third parties," they told the court in their own filing. "These questions are about Meta's conduct and are not answered differently for any of the advertiser plaintiffs or class members."

And injury and damages, the things that could vary from proposed class member to class member, all "present common questions under the methodology proposed by advertiser plaintiffs' experts," the advertisers said.

The suit, which was first filed at the tail end of 2020, accuses Meta of monopolizing online social media advertising. Meta created a "monopoly broth" by making deals with other big internet players to essentially divide up territory, leaving advertisers to comply with their terms or kick rocks, according to the suit.

At the tail end of 2022, their complaint survived a motion to dismiss. Aside from the advertising and consumer actions, Facebook also faced a pair of massive, coordinated enforcement actions from the Federal Trade Commission and 48 attorneys general. The government-led suits were part of a larger push to prevent tech giants from monopolizing their various industries.

The FTC case is also eyeing a 2024 trial date, while the state-led case was dismissed in 2021 and

that dismissal was upheld by the D.C. Circuit in 2023.

The advertisers are represented by Scott + Scott Attorneys at Law LLP, Levin Sedran & Berman LLP, Bathaee Dunne LLP and Ahdoot & Wolfson PC.

The consumers are represented by Hagens Berman Sobol Shapiro LLP and Quinn Emanuel Urquhart & Sullivan LLP.

Meta is represented by WilmerHale.

The case is Maximilian Klein et al. v. Meta Platforms Inc., case number 3:20-cv-08570, in the U.S. District Court for the Northern District of California.

--Editing by Michael Watanabe.

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Chancery Finds Ex-CEO Owed \$79M For Share Lockup Losses

By **Isaac Monterose**

Law360 (May 28, 2024, 10:22 PM EDT) -- The former CEO of a 3D building imaging company is owed more than \$79 million in damages in his share value suit against the company, but not the more than \$141 million he sought, the Delaware Chancery Court ruled Tuesday.

Ex-Matterport Inc. CEO William J. Brown first **sued** in July 2021 after the California-based technology company blocked him from trading his more than 1.3 million shares during the 180-day period after Matterport merged with a special-purpose acquisition company. The court **previously ruled** in January 2022 that Brown should never have been barred from trading his shares, and the ex-CEO subsequently traded his shares for \$80 million, according to Tuesday's opinion. Brown's victory was **affirmed** by the Supreme Court of Delaware in July 2022.

However, after winning that suit, Brown sued again in September 2022 seeking more than \$141 million in damages. He also tried to recover the amount of money he could have gotten if he'd been allowed to trade his shares sooner, the court said.

Brown argued that the highest intermediate price method that was established by the Supreme Court of Delaware's August 2001 decision in **Duncan v. TheraTx** entitles him to at least \$134 million in damages. Brown's calculations are based on the difference between Matterport shares' highest intermediate price during the time he could have traded his shares if not for the restriction and the \$80 million he made from trading those shares in January 2022, the court said.

But Vice Chancellor Lori W. Will rejected Brown's argument that he should be awarded even more damages.

"Unlike in precedent applying Duncan, an extensive record provides a responsible basis to estimate when Brown would have traded absent the lockup," Vice Chancellor Will wrote. "There is also no wrongdoer to fairly construe uncertainty against since Matterport's only offense was adopting a bylaw with a loophole."

"The highest intermediate price framework would unfairly overcompensate Brown and punish Matterport in this unique context," the opinion said.

The ruling calculated Brown's damages by using the average Matterport share price during the time period when he would have been allowed to trade his shares, which was when he asked for and received those shares in November 2021.

To reach the more than \$79 million damages figure, the court weighed factors such as how many shares Brown could have traded daily, how long a "reasonable" trading period could have lasted, and the average Matterport share price on the days that Brown traded his shares.

Additionally, the Vice Chancellor Will tossed Brown's claim alleging that the trading restriction violated the Delaware General Corporation Law, ruling that he couldn't pursue this claim because the trading restriction didn't apply to his shares. The court also tossed Brown's claim alleging that the restriction violated the Delaware Uniform Commercial Code.

The court pointed to its 1982 ruling in **Loretto Literary & Benevolent Institution v. Blue Diamond Coal Co.** in finding that Matterport's decision to deny Brown's request to lift the trade restriction for his

shares was reasonable. According to the court, Matterport genuinely but mistakenly believed that its bylaws restricting share trading applied to Brown's shares.

As for pre- and postjudgment interest, the court refused to award Brown interest on the \$80 million he made in January 2022, but awarded him pre- and postjudgment interest for his \$79 million in damages. The prejudgment interest will accrue from Nov. 22, 2021, the date when Brown could have traded his shares if not for the trade restriction.

Brown's suit isn't the only litigation Matterport is facing in Chancery Court. In February, two shareholders **filed a derivative complaint** accusing the company's top officials of self-dealing and cashing out with \$225 million worth of shares.

On Tuesday, Edward D. Totino, Brown's counsel, said they were still looking over the court's ruling, but that Brown is "grateful for the Vice Chancellor's work on this matter and looks forward to collecting his full damages in this case."

Matterport and its counsel didn't respond to requests for comment.

Brown is represented by Joseph L. Christensen and Meghan M. Dougherty of Christensen & Dougherty LLP, Edward D. Totino and Benjamin W. Turner of Baker McKenzie, and Conal Doyle of Doyle Law APC.

Matterport is represented by Robert L. Burns, Kyle H. Lachmund, and Nicole M. Henry of Richards Layton & Finger PA and Jennifer Selendy, Joshua S. Margolin, and David A. Coon of Selendy Gay PLLC.

The case is William J. Brown v. Matterport Inc., case number 2021-0595, in the Court of Chancery of the State of Delaware.

--Editing by Linda Voorhis.



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Ranchers' Claims Again Tossed From Beef Price-Fixing MDL

By **Hailey Konnath**

Law360 (May 28, 2024, 10:36 PM EDT) -- A Minnesota federal judge has once again thrown out beef price-fixing claims brought by ranchers who raise cattle and calves, ruling Tuesday that the ranchers still haven't clearly established they are directly affected by the alleged scheme.

For the second time, U.S. District Judge John R. Tunheim dismissed the proposed class action by rancher James Specht, though he again did so without prejudice.

Specht's suit sought to represent producers of feeder cattle who indirectly sell cows and calves to companies such as Cargill, JBS, National Beef Packing and Tyson. However, Judge Tunheim **held last August** that the ranchers are too far removed from the defendant companies to go after them in the multidistrict litigation. And their amended complaint fares no better, according to Tuesday's order.

"Because plaintiffs have not clearly demonstrated that they are producers of feeder cattle as that term is understood by the CME Feeder Cattle Index and beef production industry at large, their new allegations fail to establish causation and a direct injury as would be necessary for antitrust standing," Judge Tunheim said.

The CME index, which tracks feeder cattle transactions, defines feeder cattle as those between 700 and 899 pounds "being placed on feed at the feedlot," the judge said. That definition is much narrower than the one the ranchers have posited, and indicates that only ranchers who sell cattle directly to feedlots of a certain weight and frame type are considered producers of feeder cattle by the CME index and the industry at large, Judge Tunheim said.

Only one of the named plaintiffs claims to have sold cattle directly to a feedlot, and even that rancher claims to have only sold a few loads of feeder cattle in the past few years, Judge Tunheim said.

"Thus, the causal connection between defendants' conduct and plaintiffs' harm is still attenuated, as only one named plaintiff could conceivably qualify as a producer of feeder cattle, and even that characterization is a stretch," the judge said. "More substantial allegations regarding plaintiffs' direct-to-feedlot sales could be sufficient, but based on the allegations in the amended complaint the court finds that plaintiffs have not clearly demonstrated that they are producers of feeder cattle."

Additionally, the ranchers still haven't clearly alleged they were targets of the alleged conspiracy, he said. That's a requirement for them to establish antitrust standing, Judge Tunheim said.

The Minnesota MDL was created in June 2022 with the combination of a Connecticut federal lawsuit by Subway Protein Litigation Corp., a Florida federal lawsuit by food service distributor Cheney Brothers Inc. and a New York federal lawsuit by investment company Amory Investments LLC.

The litigation generally accuses JBS, Tyson, Cargill and National Beef of conspiring to constrain the supply of beef products nationwide and artificially inflating their prices. According to the plaintiffs, the companies colluded at trade association conferences and industry events.

The ranchers, who raise calves until they are weaned from their mothers, claimed the packing companies used their collective power to push down the prices for fed cattle.

However, in his August order, Judge Tunheim cast serious doubt on the ranchers' ability to

successfully plead a claim, finding they're "distinct" from indirect beef buyers previously found to have standing to sue in the MDL. The connection between the companies' alleged conduct and the price of cow calves isn't as clearly alleged, he said at the time.

The judge remained unconvinced on Tuesday, noting that the ranchers raise the cattle until they are large enough for finishing at feedlots, the final phase of beef production. The fed cattle are then sold and slaughtered at packing plants operated by the defendant companies, the order said.

In the amended complaint, the ranchers have "rebranded themselves" as producers of feeder cattle, which are eventually sold as "fat" or "fed" cattle, Judge Tunheim said.

"This expansion of plaintiffs from cow-calf ranchers to producers of feeder cattle in effect expands to include all indirect sellers, including cow-calf-entities, ranchers and backgrounders," the judge said.

In addition to their original claims, the ranchers now also claim the companies' prices for fed cattle directly impact the prices they get for selling feeder cattle, the order said. To support that contention, the ranchers compared the CME Feeder Cattle Index to fed cattle prices, claiming there was a correlation between the two.

Judge Tunheim said the ranchers have offered more substantial allegations regarding the traceability of the companies' alleged conduct to the feeder cattle market, but that chain of causation depends on whether they are producers of feeder cattle. The ranchers have yet to establish that they are producers of feeder cattle as "feeder cattle" is understood by the wider industry, he said.

"There are still too many chains in the link between plaintiffs and defendants that make plaintiffs' alleged injury too remote," the judge said.

Judge Tunheim said the ranchers need to offer more substantial allegations that they are indeed producers of feeder cattle. Without that, they haven't plausibly alleged a causal relationship between the alleged conduct and their alleged injury, he said.

Counsel for the rancher and representatives of Cargill, National Beef Packing, Tyson and JBS didn't immediately respond to requests for comment Tuesday.

The plaintiffs are represented by Richard M. Paul III of Paul LLP and Michael Montañó of Guerra LLP.

Cargill is represented by Kosta S. Stojilkovic of Wilkinson Stekloff LLP.

National Beef Packing is represented by Chelsea A. Bollman of Jones Day.

Tyson is represented by Jon B. Jacobs of Perkins Coie LLP.

JBS is represented by Jessica J. Nelson of Spencer Fane.

The case is In re: Cattle and Beef Antitrust Litigation, case number 0:22-md-03031, in the U.S. District Court for the District of Minnesota.

--Additional reporting by Bryan Koenig. Editing by Drashti Mehta.



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Chiquita Ops Chief Says Militant Leader Extorted Company

By **Carolina Bolado**

Law360, West Palm Beach, Fla. (May 28, 2024, 8:36 PM EDT) -- Chiquita's former head of Colombia operations took the stand Tuesday for the second time in a trial over the banana company's funding of right-wing paramilitaries, recounting to jurors how he was summoned to the house of a notorious paramilitary boss to convey what he said were threats on the company's business.

Charles "Buck" Keiser told jurors in West Palm Beach, Florida, that a meeting with Carlos Castaño, who led the right-wing paramilitary group Autodefensas Unidas de Colombia, in 1997 led him to believe that the company needed to begin paying off paramilitaries to ensure that it could continue operating in the Santa Marta and Urabá regions in northern Colombia.

Those payments are at the heart of the trial over the deaths of 10 men killed by the AUC, whose families are among many who sued Chiquita in 2008 on allegations the company is liable for their deaths and whose claims were consolidated in a multidistrict litigation in the Southern District of Florida. The case is the first bellwether case to go to trial in the MDL.

Keiser, who was testifying on behalf of the defense Tuesday, said Castaño called him to a meeting at Castaño's home in Medellín, where the paramilitary leader explained his strategy while flanked by security guards with automatic weapons. Keiser said Castaño told him he knew Chiquita had been forced to make payments to local left-wing guerrilla groups but said that when the AUC arrived in the area, the payments would have to stop.

"It was obvious to me that we had to start paying him," said Keiser, who worked for Chiquita Brands International Inc. for more than 30 years.

Keiser added that as he left the meeting, one of Castaño's guards recognized him. He later realized that the guard was married to the receptionist at Keiser's office, who was in charge of maintaining his calendar.

"Carlos Castaño had total access to my schedule and my family's schedule," he said.

On cross-examination, he admitted that Castaño never explicitly threatened him or demanded a payment but said that was how he interpreted the meeting.

Chiquita's attorneys have argued throughout the trial that the company was being extorted and did not have a choice but to pay off various warring factions in order to maintain its operations during the Colombian civil war.

"There was a lot of killing on one side and the other side, and we were producing bananas in the middle of all this," Keiser said. "We still kept producing bananas."

The extortions, he said, began in 1988, not long after he began his career at Chiquita, when left-wing guerrilla group Fuerzas Armadas Revolucionarias de Colombia, or FARC, demanded \$10,000 from the manager of one of the farms Chiquita had recently purchased. Keiser said the company sought the advice of a risk consultant called Control Risks that specializes in helping companies deal with violence all over the world.

When demands came in, the company made the payments, recording "every peso we paid" using a

color-coded system to ensure that any employees in the accounting department who might sympathize with one side or another would not know where the payments were going, according to Keiser.

Previously, Keiser was **called to the stand** by the plaintiffs and told jurors the company was left with little choice but to make the payments because workers' "lives were at stake."

Jurors also heard from William Tsacalis, a former head of the auditing department at Chiquita who said the "sensitive payments" were made and approved by the operating management, and his role was to make sure that the payments were accounted for and recorded properly.

They also saw videotaped testimony from former farm administrator Humberto Rendón, who testified how his father and 16-year-old brother were killed by FARC after his father refused to let the guerrillas move their cattle over his small cattle farm. He said that farm managers knew which owners were not making the "vacuna" — or vaccine — payments to the guerrilla groups, because those farms would have "incidents."

"The farm owner that did not pay the vacuna, they would cut cables, they would burn down the vehicles where the fruit was transported, they would burn down the packaging areas," Rendón said. "When that would happen, then we would realize, it meant that that banana farm owner was not up to date with his vacunas."

Those who did not pay "simply would not be able to produce bananas in Urabá," he said.

Rendón described a FARC-led massacre at the farm he managed that resulted in the deaths of 25 coworkers. The guerrilla groups had taken an entire bus full of farmworkers as it was leaving for the banana area early in the morning, killed all but one of the bus occupants and set fire to the vehicle, he said. Rendón said he and another farm administrator were the ones who found the bodies and got help for the sole survivor.

The plaintiffs allege that Chiquita paid the AUC nearly \$2 million to protect its interests during the armed conflict. Attorneys representing the families told the jury in **opening statements** last month that Chiquita took advantage of the war situation to buy cheap farmland beginning in the late 1980s as it switched from a banana buying-only operation to one that produced the fruit on its own farms.

Chiquita eventually acquired about 35 farms and more than 10,000 acres of land in the Santa Marta and Urabá regions in northern Colombia. The farms were consolidated under its subsidiary Banadex, through which Chiquita was accused of making the payments to the AUC to protect its interests and clamp down on labor unions starting in 1997.

The company pled guilty in 2007 to federal criminal charges stemming from the payments to the AUC and agreed to pay a \$25 million fine.

The plaintiffs are represented by John Scarola, Victoria Mesa-Estrada and Mariano Garcia of Searcy Denney Scarola Barnhart & Shipley PA, James K. Green of James K. Green PA, Rick Herz, Maryum Jordan, Marissa Vahlsing and Marco Simons of EarthRights International, William J. Wichmann of the Law Offices of William J. Wichmann PA, William R. Scherer of Conrad & Scherer LLP, Agnieszka Fryszman and Leslie M. Kroeger of Cohen Milstein Sellers & Toll PLLC, Jonathan C. Reiter of the Jonathan C. Reiter Law Firm PLLC, Terrence Collingsworth of International Rights Advocates and Gabriela Paola Valentin Diaz.

Chiquita is represented by Michael L. Cioffi, Frank A. Dante, Melissa F. Murphy, Michael A. Stoolman and Serena S. Gopal of Blank Rome LLP.

The case is In re: Chiquita Brands International Inc., Alien Tort Statute and Shareholders Derivative Litigation, case number 0:08-md-01916, in the U.S. District Court for the Southern District of Florida.

--Additional reporting by David Minsky. Editing by Michael Watanabe.



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Autonomy Founder Says HP 'Panicked,' Tried To Unwind Deal

By **Bonnie Eslinger**

Law360 (May 28, 2024, 11:04 PM EDT) -- Autonomy founder Michael Lynch testified Tuesday in a California federal criminal trial over claims he conned HP into overpaying for his company that HP's board "panicked" after news of the acquisition leaked and HP's stock dropped 20%, that HP fired its CEO and that it attempted to back out of the deal.

Lynch and Stephen Chamberlain, Autonomy Corp. PLC's former vice president of finance, are each facing 15 felony counts of fraud and conspiracy that could send them to prison for more than 20 years. Federal prosecutors have additionally slapped Lynch with one securities fraud count, saying he caused HP to make false statements in a press release announcing the acquisition. The trial kicked off **on March 18**.

The government argues that the two executives artificially inflated Autonomy's revenues leading up to the HP acquisition through a series of questionable revenue boosters and undisclosed sales of low-margin hardware that made it appear Autonomy had sustainable financial growth potential. They deny the allegations.

On Tuesday, Lynch returned to the witness stand for a second day of **testifying** in his defense.

His lawyer, Christopher Morvillo of Clifford Chance LLP, walked Lynch through the months leading up to HP purchasing the British software maker in October 2011, including a July lunch in Paris with then-HP CEO Leo Apotheker.

"That was when the conversation started to get more serious about a deal," Lynch told jurors.

Morvillo later showed Lynch an internal HP board document that estimated Autonomy's value at \$17.5 billion.

Lynch said if he had known about that at the time of Autonomy's negotiations with HP, he would have reservations.

"If I'd known that, I'd have had lots of questions because you're kind of setting things up for failure," Lynch said. "Everything has to operate perfectly together for that kind of synergy, the slightest delay or pick up and there's going to be disappointment."

Morvillo also pointed out the size difference between the two companies, underscoring that HP's revenues in 2010 were \$126 billion while Autonomy's that same year were \$870 million.

"Was this a merger of equals?" the lawyer asked. Lynch said no.

By the morning of Aug. 18, 2011, the day HP officially announced it was buying Autonomy, the story had already been leaked and appeared in the press, Lynch said — and HP hadn't even offered him a look at the written announcement prior to the public release, Lynch said.

Further, HP packaged the Autonomy announcement with news that it was considering spinning off the company's personal computer business into a separate company and a disappointing earnings report, Lynch said.

"It was a disastrous day," Lynch said. "The stock fell 20%, which for a company of that size is a lot of value."

Lynch said he was surprised by HP's approach to announcing the acquisition.

"It was a complete mess," Lynch said. "You need to get out in front of the news and explain to everyone why this is a good idea."

Within weeks, Hewlett-Packard's board ousted Apotheker.

"The HP board basically panicked," Lynch said, adding that the firing left him "deeply worried" because Apotheker had held the vision of how to integrate Autonomy into HP.

Instead, the board backed away from that plan.

"It was a complete U-turn," Lynch said.

In the weeks that followed Apotheker's firing, HP didn't move forward with any of the former CEO's plans, Lynch told jurors.

"And then of course, subsequently they came and tried to get out of the [Autonomy] deal, which wasn't possible under UK takeover rules," Lynch said. "So it was a real mess."

Lynch said HP tried to back out before HP had full access to Autonomy's books and records.

Morvillo also asked Lynch to respond to testimony from government witnesses claiming that HP was unaware that Autonomy sold computer hardware prior to the acquisition.

Lynch said there was a lot of information available to HP during the due diligence process, including Autonomy's annual reports, product press releases, and information about clients on Autonomy's website that mentioned hardware.

The former Autonomy CEO also said much has been made of Autonomy's claims that it was a "pure" software company, saying that term was only meant to convey that Autonomy didn't provide software-related services, not that it didn't sell hardware.

"At any point during the due diligence process, did HP ever ask you what percentage of time his revenue came from hardware?" Morvillo asked. Lynch said no.

On Tuesday, Lynch also answered questions about accounting irregularity concerns brought to his attention from Autonomy's U.S. chief financial officer, who was subsequently fired.

Lynch called it a "surprising coincidence" that a payroll scandal was discovered in former CFO Brent Hogenson's department just as he came forward with his whistleblower claims.

Autonomy's auditors at Deloitte **subsequently investigated** Hogenson's claims and found they had no merit, Lynch said.

"Mr. Hogenson didn't have the full picture," Lynch said.

Around the time Hogenson initially raised his concerns, it came to light that members of Autonomy's U.S. payroll team were defrauding the company.

"We hear about this very large payroll fraud, I think a couple of days after Brent's letter, in the UK I heard about it," Lynch said. "It was a surprising coincidence."

Autonomy conducted an investigation into the payroll matter and discovered that accounting clerks had been paying themselves more than they should have been and also paying people who were no longer employed at Autonomy.

"It turned out that it had come to light in early May but for some reason it hadn't really been dealt

with," Lynch said. "About four hours before my email from Brent, it had become more general knowledge in the U.S. office."

Hogenson was given the news of his firing by Autonomy's former general counsel, Joel Scott, who testified in April that Lynch **wanted the financial chief fired**.

Lynch said after the payroll fraud was discovered, the finance department was scrutinized, and other things came to light, including unauthorized payments. In addition, Hogenson got involved in the investigation, even though it was a criminal matter, and wiped data off his computer, Lynch said.

The decision to fire Hogenson was ultimately Scott's, Lynch insisted.

The trial continues Wednesday with Lynch's cross-examination.

A year after HP purchased Autonomy, the Silicon Valley giant announced that it had to write down the value of the company by billions as a result of the alleged fraud.

The trial follows the **2018 conviction** of ex-Autonomy CFO Sushovan Hussain on related charges. He was sentenced to five years in prison and ordered to pay \$4 million in fines.

The government is represented by Robert S. Leach, Adam A. Reeves and Kristina N. Green of the U.S. Attorney's Office for the Northern District of California and Zachary Abrahamson of the U.S. Department of Justice's Antitrust Division.

Michael Lynch is represented by Christopher J. Morvillo, Celeste Koeleveld and Daniel S. Silver of Clifford Chance LLP and Jonathan M. Baum, Reid H. Weingarten, Brian M. Heberlig, Michelle L. Levin, Nicholas P. Silverman and Drew C. Harris of Steptoe LLP.

Stephen Chamberlain is represented by Gary S. Lincenberg, Ray S. Seilie and Michael C. Landman of Bird Marella Rhow Lincenberg Drooks & Nessim LLP.

The case is U.S. v. Mike Lynch et al., case number 3:18-cr-00577, in the U.S. District Court for the Northern District of California.

--Additional reporting by Dorothy Atkins, Richard Crump and Christopher Crosby. Editing by Michael Watanabe.



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Cloud Software Co. Hid Slowing Growth, Investor Suit Says

By **Sydney Price**

Law360 (May 28, 2024, 8:59 PM EDT) -- Software company Fastly Inc. was hit with a proposed shareholder class action alleging it concealed from investors that it would be unable to meet its previously issued financial guidance following a period of unsustainable customer growth.

According to the suit filed by shareholder Ken Kula in California federal court on Friday, Fastly operates a content delivery network, or a network of servers and data centers that content owners, like media companies and e-commerce vendors, pay to use. Some companies use multiple CDNs, but in 2023 several content owners shifted toward using fewer CDNs to simplify operations and increase efficiency, the complaint claims.

Fastly initially benefited from the consolidation trend, but would eventually lose the market share it gained, Kula said.

"[C]ontrary to its representations to investors, Fastly was in fact experiencing a significant deceleration in growth among its largest customers and was losing the increased market share it had gained as a result of the 2023 CDN consolidation trend," Kula said.

The suit alleges that for several weeks earlier this year, the company and its executives knew, but failed to disclose that it was experiencing a deceleration in growth among its largest customers.

In addition to Fastly, its CEO Todd Nightingale and Chief Financial Officer Ronald W. Kisling are individual defendants in the suit.

The class period begins on Feb. 15, 2024, the day after Fastly announced fourth-quarter and full-year 2023 earnings. The same day, it also issued full-year 2024 guidance in a range of \$580 million to \$590 million, the suit states.

During an investor call that day, Nightingale told shareholders Fastly's customer growth would fuel revenue growth for "years to come," and that the customer growth is diversifying revenue, according to the complaint.

Later that month, Fastly filed an annual report with the U.S. Securities and Exchange Commission that also did not disclose material information regarding its financial prospects, the complaint alleges.

But on May 1, when the company announced its first-quarter 2024 earnings, Fastly lowered its full-year 2024 revenue guidance to a range of \$555 million to \$565 million, which was below consensus estimates of \$584.62 million for the same period, according to the complaint. Total revenue for the quarter was \$133.5 million, which represents a 14% year-over-year increase and missed consensus estimates by \$350,000, the suit states.

During the investor call that day, Kisling said Fastly is "facing a challenging environment of revenue declines" in its largest customers, which overshadowed the impact of new customer acquisition and product pipeline, according to the complaint.

The next day, Bank of America downgraded Fastly stock to "underperform" from "buy," and cut its price target on the Fastly shares to \$8 from \$18, the suit says.

On the news, Fastly's shares declined \$4.14, or 32%, to close at \$8.79 per share on May 2, according to the complaint.

The suit claims Fastly and the individual defendants acted with scienter, or actual knowledge, of wrongdoing or reckless disregard, and violated the Securities Exchange Act of 1934. Kula seeks damages with pre- and post-judgment interest.

Counsel for Kula and a representative of Fastly did not immediately respond to requests for comment on Tuesday.

Kula is represented by Jennifer Pafiti, Jeremy A. Lieberman and J. Alexander Hood II of Pomerantz LLP and Brian Schall of The Schall Law Firm.

Counsel information for Fastly and the individual defendants was not immediately available on Tuesday.

The case is Kula v. Fastly Inc. et al., case number 3:24-cv-03170, in the U.S. District Court for the Northern District of California.

--Editing by Emily Kokoll.

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