

Block.one investors try, try again for final OK on \$22 million class settlement

 [reuters.com/legal/government/column-blockone-investors-try-try-again-final-ok-22-million-class-settlement-2024-05-29](https://www.reuters.com/legal/government/column-blockone-investors-try-try-again-final-ok-22-million-class-settlement-2024-05-29)

Alison Frankel

A picture illustration shows U.S. 100 dollar bank notes taken in Tokyo August 2, 2011.
REUTERS/Yuriko Nakao (JAPAN - Tags: BUSINESS POLITICS) Purchase Licensing Rights
[↗](#), opens new tab

May 29 (Reuters) - How do you catch the attention of a busy federal judge who has seemingly lost interest in your proposed class action settlement?

That's the conundrum facing Grant & Eisenhofer, which represents a class of investors who contend they were misled about crypto tokens issued by blockchain company Block.one back in 2017.

Last May, after three years of litigation and the rejection of an initial \$27 million settlement proposal, plaintiffs lawyers finally persuaded U.S. District Judge Lewis Kaplan of Manhattan to grant preliminary approval of a revised \$22 million deal for investors who bought tokens in U.S. transactions. (Block.one agreed to the settlement but continued to deny wrongdoing.) As I told you at the time, the revised settlement seemed to be a rare win for investors alleging fraud claims against a token issuer.

If only things were that easy.

In July 2023, after notices went out to hundreds of thousands of potential class members, Grant & Eisenhofer moved for final approval [↗](#), opens new tab of the deal, as well as \$5.5 million in attorneys fees [↗](#), opens new tab.

Kaplan scheduled a final approval hearing for September 2023 — but abruptly canceled it without explanation on the day it was supposed to take place.

Two months later — in between overseeing the prosecution of former FTX CEO Sam Bankman-Fried and the second civil trial of writer E. Jean Carroll's defamation claims against former U.S. President Donald Trump — Kaplan issued an order [↗](#), opens new tab directing Grant & Eisenhofer and Block.one's lawyers from Davis Polk & Wardwell to submit a spreadsheet detailing the alleged losses of each of the 277 investors who had submitted a claim to administrators of the \$22 million settlement fund.

Davis Polk and Grant & Eisenhofer emailed a joint letter to Kaplan's chambers on Nov. 22, attaching a spreadsheet with the information the judge had requested.

Claimants' losses, they explained, totaled about \$8.5 million, far less than the \$16 million that would remain in the settlement fund after the subtraction of legal fees and expenses. But class members were entitled to another \$6 million or so in interest, Grant & Eisenhofer said. That would leave about \$2 million in the settlement fund. Plaintiffs' lawyers proposed distributing the leftover money on a pro rata basis to class members who had submitted valid claims.

Kaplan apparently did not receive the letter.

In a terse one-page order [\[link\]](#), opens new tab in February, the judge denied Grant & Eisenhofer's motion for final approval of the settlement. Kaplan said he'd ordered the parties to provide him with additional information about claimants' losses and they hadn't supplied that information.

Grant & Eisenhofer lawyers rushed to reassure [\[link\]](#), opens new tab Kaplan that they had, in fact, sent him the data soon after he asked for it. The lawyers offered apologies if their letter had somehow not reached the judge back in November — but also asked him to reconsider his rejection of the deal. For good measure, they attached the spreadsheets they'd first emailed to Kaplan's chambers in November.

Kaplan did not respond, according to the docket.

A couple of days later, Grant & Eisenhofer sent the judge another letter with updated information on the claims process. The number of claims, the firm said, was up to 296, with alleged losses totaling \$9.6 million.

Kaplan did not respond, according to the docket.

In March, Grant & Eisenhofer formally moved for reconsideration [\[link\]](#), opens new tab, pointing out that Kaplan's sole reason for denying final approval was the parties' purported failure to respond to his demand for detailed information about class members' claims. In reality, the motion said, the judge had "overlooked" the letter providing exactly the information he sought.

Kaplan, once again, did not respond.

So last week, Grant & Eisenhofer filed a renewed motion [\[link\]](#), opens new tab for final approval of the settlement and the firm's request for attorneys' fees, reminding Kaplan of the backstory behind his order denying the previous motion. In essence, the filing said that the claims process is complete and \$22 million (plus interest) is sitting in a bank account awaiting Kaplan's green light for distribution to investors.

As of midafternoon on Wednesday, the judge had not docketed any acknowledgement of the latest motion.

I emailed lawyers from Grant & Eisenhofer and Davis Polk about the stalled settlement but didn't hear back. Block.one also did not respond to my query.

A \$22 million securities settlement certainly isn't the highest-profile matter on Kaplan's docket. On Tuesday, for instance, the judge sentenced former FTX executive Ryan Salame to 90 months in prison for his role in an illegal campaign donation scheme.

It's also true that only a relative handful of Block.one token purchasers filed claims to recover the money they lost when they bought crypto tokens issued by the company.

Nevertheless, a couple hundred class members stand to get back everything they lost, plus interest. The settlement received preliminary approval a year ago and the claims process is complete.

Kaplan's final assessment of the deal is the only thing standing between those investors and a \$22 million payout — or, if the judge rejects the final settlement, between Block.one and the return of a \$2 million settlement fund.

At the very least, both sides deserve to know whether the judge intends to issue a ruling on the merits of the deal.

Read more:

Block.one's revived \$22 mln settlement could be template for crypto class actions

Crypto investors' class settlement with Block.one killed by N.Y. judge

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

Our Standards: The Thomson Reuters Trust Principles. [↗](#), opens new tab

Opinions expressed are those of the author. They do not reflect the views of Reuters News, which, under the Trust Principles, is committed to integrity, independence, and freedom from bias.

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.

- 
- 

Charge Enterprises Leaders Sued Over Fraud Tied to Adviser Deals

By Martina Barash

Documents

-  [Docket](#)
-  [Complaint](#)
-  [Charge Enterprises Inc.](#)

-
- **COURT:** S.D.N.Y.
 - **TRACK DOCKETS:** [No. 1:24-cv-04056](#)

Bloomberg Law News 2024-05-30T11:27:1497521638-04:00

Charge Enterprises Leaders Sued Over Fraud Tied to Adviser Deals

By Martina Barash 2024-05-29T09:20:13000-04:00

- **COURT:** S.D.N.Y.
- **TRACK DOCKETS:** [No. 1:24-cv-04056](#)

Charge Enterprises Inc. executives failed to disclose their difficulty in getting the now-bankrupt EV infrastructure company's investment consultant to return \$14 million before loans came due, an investor says in a proposed class action.

The executives communicated frequently with Kenneth Orr, a principal of the consulting firm, about returning the funds for six months without telling investors, shareholder David Finkelstein says. He filed his complaint Tuesday in the US District Court for the Southern District of New York.

Orr founded Charge's predecessor companies and was an 80% shareholder until his position as a consultant raised red flags with NASDAQ and the Securities and Exchange Commission, Finkelstein says.

Orr's firm, Korr Acquisitions Group, Inc., ultimately returned about \$5 million, according to the complaint.

As late as Nov. 8, 2023, Charge made positive public statements about its liquidity despite a Nov. 19 debt repayment deadline, Finkelstein says. The company filed for Chapter 11 bankruptcy on March 7, he says. At the time Charge blamed its bankruptcy largely on its dealings with Korr and its former chairman Orr.

Finkelstein seeks to represent a class of those who purchased Charge stock between Dec. 15, 2021 and Feb. 28, 2024, inclusive. He seeks compensatory damages on his securities fraud claims.

Charge didn't immediately respond to an emailed request for comment on behalf of the individual defendants.

Rolnick Kramer Sadighi LLP represents Finkelstein.

The case is Finkelstein v. Fox , S.D.N.Y., No. 1:24-cv-04056, complaint 5/28/24 .

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

To contact the editor responsible for this story: Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Athenex Officers Beat Investors' Fraud Claims for FDA Drug Trial

By Tre'Vaughn Howard

Documents

 [Docket](#)

 [Order](#)

-
- District court adopts magistrate judge's recommendation
 - Judge: Allegations are insufficient for securities violations

Bloomberg Law News 2024-05-30T11:25:49655620794-04:00

Athenex Officers Beat Investors' Fraud Claims for FDA Drug Trial

By Tre'Vaughn Howard 2024-05-29T17:11:01000-04:00

- District court adopts magistrate judge's recommendation
- Judge: Allegations are insufficient for securities violations

Athenex Inc. investors, who say the company misled them about the likelihood of a metastatic breast cancer drug trial receiving US Food and Drug Administration approval, can't proceed with their class action, a federal judge said.

After the FDA sent a letter stating its concerns about patient safety and that the company's application wasn't ready for approval, Athenex's stock price dropped from \$12.10 on Friday, Feb. 26, 2021, to \$5.46 on Monday, March 1, 2021, when the company announced the FDA's decision. Investors filed a securities class action two days later. The individual defendants also filed a suggestion of Chapter 11 bankruptcy for Athenex Inc. in May 2023.

In September, Magistrate Judge H. Kenneth Schroeder Jr. issued a report, recommending that the claims against individual defendants, including several officers and executives, should be dismissed.

The investors didn't plausibly allege sufficient facts to bring claims under the Securities Exchange Act of 1934 against the officers and executives of the company, said Judge Lawrence J. Vilaro of the US District Court for the Western District of New York. Vilaro granted a dismissal of claims against the individual defendants, adopting Schroeder's recommendation.

Athenex lost \$620 million of market capitalization in a single day—or an approximate 55% drop in share value—after the FDA issued its letter determining the drug, Oraxol, wasn't ready for approval, Vilaro said.

Investors alleged the company's use of an "abbreviated" approval pathway, and changes to a phase 3 trial rendered optimistic statements about the likelihood of the drug's approval as misleading, Vilaro said.

Objecting to the magistrate judge's recommendation, lead plaintiff John McKenzie raised three issues: he said the defendants' statements about an agreement between Athenex and the FDA were misrepresented because the FDA ultimately rejected the new drug application; he claimed the defendants made "actionable statements" by touting Phase 3 trial results and omitting risks to get FDA approval; and he also argued that confidential witnesses' assertions establish those officers had engaged in wrongful conduct and establish the defendants' scienter.

Vilaro determined the claims under Section 10(b) and Rule 10b-5 of the Exchange Act, which dictates it's unlawful to make untrue statements or omit facts in connection with the sale of securities, couldn't survive because McKenzie didn't allege sufficient facts "creating an inference of scienter" that showed the four defendants had the motive and opportunity to commit fraud.

Vilaro also said McKenzie didn't provide strong circumstantial evidence of conscious misbehavior by the Athenex officers, which would have supported McKenzie's assertion that the Private Securities Litigation Reform Act had been violated.

Specifically, McKenzie didn't provide enough support that Athenex's director's financial connection to the clinical research organization wasn't more than just a general business motive, especially since nothing ever materialized because any financial gain would've been dependent on the success of the phase 3 trial, Vilaro said.

McKenzie didn't show the four defendants' exhibited recklessness, because the three confidential witnesses' assertions' were insufficient— none of them actually shed light on any alleged agreement between the FDA and Athenex, Vilaro said.

"Moreover, the allegations made by [the confidential witnesses] include only their own professional opinions...not communications that address what the individual defendants knew," Vilaro wrote.

McKenzie's Section 20(a) claims against the individual defendants were also dismissed because the Section 10(b) claims of conscious misbehavior were thrown out. Section 20(a) imposes joint liability for people who control or assist violators of the Exchange Act.

Vilaro denied McKenzie leave to amend the complaint, citing that he had more than two years to address the deficiencies in it.

Block & Leviton LLP represents the plaintiffs. Aurelian Law PLLC and BakerHostetler LLP represent Athenex.

The case is In re Athenex Inc. Sec. Litig. , W.D.N.Y., No. 1:21-cv-00337, 5/28/24 .

To contact the reporter on this story: Tre'Vaughn Howard at thoward@bloombergindustry.com

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

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Forescout Investors Get Class Certification in Deal Delay Suit

By Quinn Wilson

Documents

 [Order](#)

 [Docket](#)

-
- Fraud-on-the-market theory showed a common liability theory
 - Plaintiffs also showed way to measure damages across class

Bloomberg Law News 2024-05-30T11:26:49628627949-04:00

Forescout Investors Get Class Certification in Deal Delay Suit

By Quinn Wilson 2024-05-29T19:54:36000-04:00

- Fraud-on-the-market theory showed a common liability theory
- Plaintiffs also showed way to measure damages across class

Forescout Technologies Inc. investors, who accuse the firm of not disclosing risks that could derail a merger, satisfied the requirements to proceed as a class, a federal judge said.

Judge Susan Illston , of the US District Court for the Northern District of California, rejected in a Tuesday order Forescout's contentions that the investors and their claims lacked sufficient predominance, typicality and adequacy to proceed as a class.

Meitav Tachlit Mutual Funds Ltd. and Glazer Enhanced Fund LP were appointed lead plaintiffs in the case. And, the class is defined as all persons and entities who purchased or otherwise acquired Forescout common stock between May 9 or 10, 2019 and May 15, 2020, Illston said.

The investors brought their claims in two separate lawsuits in 2019 and 2020. They accused the firm of knowing its sales productivity, pipeline, and deal delay problems could have put a private equity firm's acquisition of Forescout in jeopardy but not disclosing that information. The suits were consolidated in 2021.

After being initially dismissed in 2021, the Ninth Circuit reversed that decision, reviving the plaintiffs' claims regarding statements Forescout made in 2019 and in a 2020 press release, Illston said.

Forescout argued that the plaintiffs failed to identify a liability theory and common methodology that will reliably measure damages on a class-wide basis, failing to satisfy Federal Rule of Civil Procedure 23(b)(3). It also argued the plaintiffs failed to satisfy Rule 23(a)'s typicality and adequacy requirements.

But Illston disagreed, saying the investors adequately outlined a fraud-on-the-market liability theory and also sufficiently put forth a class-wide damages model. She said that she doesn't need to evaluate the merits of the class' liability theory at this juncture in the proceedings.

Forescout contended that Meitav and Glazer were atypical and inadequate because they did not rely on the firm's alleged misstatements. But Illston said she was unable to evaluate this argument at the class certification stage and it will have to wait until the merits portion of the case.

Illston also rejected Forescout's argument that Glazer and Meitav Mutual were in conflict and, therefore, couldn't represent the class.

"Any potential conflict is too speculative to decline to certify the class at the outset," Illston said.

Illston appointed Pomerantz LLP and Abraham Fruchter & Twersky LLP as co-class counsel.

Pomerantz LLP and Abraham Fruchter & Twersky LLP represent the class. Ropes & Gray LLP and Wilson Sonsini Goodrich & Rosati PC represent Forescout.

The case is Sayce v. Forescout Technologies, Inc. , 2024 BL 181122, N.D. Cal., No. 3:20-cv-00076, 5/28/24 .

To contact the reporter on this story: Quinn Wilson in Washington at qwilson@bloombergindustry.com

To contact the editors responsible for this story: Adam Ramirez at aramirez@bloombergindustry.com; Martina Stewart at mstewart@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Bloomberg Law News 2024-05-30T11:39:5916649251-04:00

Skillz Esports SPAC Lawsuit Advances Against Hollywood Veterans

By Mike Leonard 2024-05-30T10:24:52000-04:00

- Case targets architects of esports platform's blank-check deal
- Part of a wave of investor lawsuits challenging SPAC mergers

A group of entertainment industry insiders lost their bid Wednesday to end litigation challenging the blank-check transaction they engineered to take online gaming platform [Skillz Inc.](#) public.

Shareholder claims against CBS Entertainment ex-president Jeff Sagansky, former MGM Studios chairman Harry Sloan, and other architects of the merger between Skillz and a special purpose acquisition company will move forward after a Delaware judge, Vice Chancellor Paul A. Fioravanti Jr., found them sufficient.

The same group previously designed a similar listing involving sports betting giant DraftKings Inc.

The lawsuit, [filed in 2022](#), also targets Eagle Equity Partners II LLC, the entity they formed to sponsor the business combination. The proposed class action says Sagansky, Sloan, and the others were driven by lopsided incentives to dupe the SPAC's investors into approving the transaction because they knew they'd get a windfall from even a bad deal.



The dispute is part of a wave of shareholder cases in Delaware's Chancery Court taking aim at a standard feature of blank-check transactions: "founder shares" costing fractions of a penny that soar in value by a factor of thousands if a merger is completed. The founder shares given to insiders become worthless if no transaction is found, if investors vote one down, or if they exercise their right to cash out.

Blank-check mergers, known as de-SPACs, have receded from a boom in 2020 and 2021. The transactions allow private companies to bypass traditional initial public offerings, but they have often been followed by underperformance in the open market.

Read More: [Billionaire SPAC Kings Get Taken to Court After Boom Goes Bust](#)

The lawsuit involving Skillz says the transaction's backers did virtually no due diligence into the esports platform's exaggerated claims about its technical capabilities because, thanks to their founder shares, they were set to make a fortune on the deal no matter what.

The company's shares plummeted after the transaction, from the SPAC's \$10 IPO price to less than \$1, leaving investors holding a "penny stock," the suit says.

The investor leading the litigation, Darcy Lien, is represented by Bernstein Litowitz Berger & Grossmann LLP, Robbins LLP, and Morris Kandinov LLP. The deal's sponsors are represented by Richards, Layton & Finger PA and White & Case LLP.

The case is [Lien v. Eagle Equity Partners II LLC](#) , Del. Ch., No. 2022-0972, 5/29/24 .

To contact the reporter on this story: Mike Leonard in Washington at mleonard@bloomberglaw.com

To contact the editors responsible for this story: Drew Singer at dsinger@bloombergindustry.com; Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com

Related Articles

[Billionaire SPAC Kings Get Taken to Court After Boom Goes Bust](#)

[SPAC Mania's Ugly End Yields \\$46 Billion of Investor Losses](#)

[Skillz eSports Investor Sues Hollywood Veterans Behind SPAC Deal](#)

IT Company Sellers Get Acquisition Securities Claims Revived

By Shweta Watwe

Documents

 [Opinion](#)

 [Docket](#)

-
- District court didn't draw inferences for the correct party
 - Sellers provided evidence to make cause of loss a fact issue

Bloomberg Law News 2024-05-30T11:26:21764377722-04:00

IT Company Sellers Get Acquisition Securities Claims Revived

By Shweta Watwe 2024-05-29T19:47:40000-04:00

- District court didn't draw inferences for the correct party
- Sellers provided evidence to make cause of loss a fact issue

The acquirers of IT services company Red River Solutions LLC were wrongly awarded summary judgment on claims alleging that \$2 million in post-acquisition ownership share valuation was wiped out because those buyers failed to disclose their CFO wasn't sticking around, a federal appeals court said Wednesday.

The district court erred by failing to construe inferences in favor of the nonmoving party, the sellers, whose "cascading" gaps in facts created a genuine dispute over whether the sellers had met the material loss causation element for their claims, the US Court of Appeals for the Fifth Circuit said in a per curiam opinion. The court noted it hadn't previously dealt with loss causation in a private market context yet.

Red River's owners sold the company to Atherio Inc. in 2013. Part of the deal included a \$1.5 million future payment and \$2 million in Atherio ownership units. When the deal was signed, the sellers didn't know Atherio's CFO had resigned before closing.

Shortly after the acquisition, Atherio's executives failed to raise enough capital for its investment goals and the company defaulted on loans. The executives could no longer pay the \$1.5 million and the ownership units became worthless.

"The law is fairly clear on loss causation in the public-market context, but this fraud case arose in the private market," the Fifth Circuit said. In this context, there was no truth that caused a stock price change "and, without the subsequent public market drop, we cannot graft our public market loss causation analysis directly onto private market loss causation."

The court applied a test from a Third Circuit case that requires plaintiff to show a misstatement was a substantial factor in causing an economic loss.

The Fifth Circuit pointed to three emails from the resigning CFO stating that Atherio hadn't planned for owning companies like Red River, that investors pulling out because after learning about the resignation, and that the CFO could put together proposals for future bank loans.

Taken together the emails could lead to a reasonable conclusion that "Atherio was not effectively managed, had a lessened chance of success, and that two investors backed out, all due to Farb's resignation," the court said. Specifically, the emails showed that if the CFO had been in place as promised, "Atherio would have been better positioned to fundraise" and execute a strategic plan.

Viewing that evidence in the sellers' favor, they showed that "at least some of Atherio's devaluation" was because of the CFO's resignation.

The sellers didn't distinguish how other business risks caused damage when compared to the resignation, "but that is exactly why summary judgment is not appropriate," the Fifth Circuit said. "It is the factfinder's role—not ours—to sort out who is right."

Judge Priscilla Richman dissented from the portion of the opinion and said the sellers failed to provide evidence that the investors who backed out didn't actually invest. She said the majority wrongly inferred that the potential investors didn't invest and that the conclusion that a moving party must provide evidence negating an element of the plaintiffs' claim was "flatly wrong."

Judges Patrick E. Higginbotham and Don R. Willet comprised the majority.

The plaintiffs were represented by Clark Hill PLC.

The defendants were represented by Ryan Law LLP and Hallett & Perrin PC.

The case is Cory v. Stewart , 5th Cir., No. 19-10622, 5/29/24 .

To contact the reporter on this story: Shweta Watwe in Washington at swatwe@bloombergindustry.com

To contact the editor responsible for this story: Amy Lee Rosen at arosen@bloombergindustry.com

Contingency fees: 'Key To The Courthouse' or to a \$3.5 Million Bugatti?

 legalnewsline.com/stories/660052654-contingency-fees-key-to-the-courthouse-or-to-a-3-5-million-bugatti

May 30, 2024

Las Vegas attorney Steven Dimopoulos (Pictured Front) | Steven Dimopoulos | Instagram

Trial lawyers fighting a proposed 20% cap on contingency fees in Nevada say it will cut off access to justice because attorneys won't be able to earn enough to cover their costs.

Las Vegas attorney Steven Dimopoulos may be the poster child for why such claims are overblown. Check out his Instagram feed: Between boasts about his courtroom prowess are photos of his expensive tastes, including a \$493,000 Richard Mille 17-01 Tourbillon, \$5,000 bottles of French burgundy and a pair of blondes climbing into a \$3.5 million Bugatti Chiron bearing the vanity license plate "LAWSUIT."

"How many blondes can you fit in a Bugatti?" Dimopoulos asks in the Instagram post, which drew more than 600,000 likes.

To hear trial lawyers talk about Proposition 22, the fee cap backed by Uber and the retail and trucking industry will practically put lawyers like Dimopoulos out of business. Nevada Justice Association President Jason Mills told the *Las Vegas Review-Journal* Proposition 2 "could make it harder for everyday folks in Nevada to get competent representation."

In a failed lawsuit to block the proposition from going to voters, a trial-lawyer created group argued lawyers have to charge "the industry average rate of 33% to 40% just to stay afloat."

"A contingency fee is the only way that ordinary people can go toe-to-toe with companies like Uber and vindicate their rights," wrote Washington superlawyer Deepak Gupta, who represented Uber Sexual Assault Survivors for Legal Accountability and the Nevada Justice Association in their lawsuit. "It is their only 'key to the courthouse.'"

Carson City Judge James T. Russell was mildly sympathetic to some of the trial lawyers' arguments but ultimately rejected their suit in a May 10 ruling allowing the Prop. 22 process to proceed. Lawyers are now expected to mount a vigorous public-relations campaign to defeat the measure at the polls, probably featuring the same talking points as in their lawsuit, including the claim plaintiff attorneys can't stay in business for a 20% fee.

The claim doesn't fit the facts in Nevada, however, where trial lawyers have plenty of money to finance political campaigns— \$856,000 to state lawmakers in the last cycle, according to *The Daily Indy*, with a single lawyer-backed political action committee representing the third largest single donor after the Relators and MGM Resorts International. Law firms Lewis

Roca and Kaempfer Crowell gave some \$137,000 between the two of them. Dimopoulos has given more than \$26,000 to Nevada candidates since 2018, according to Followthemoney.org.

Boasting about jackpot verdicts is a trial-lawyer advertising strategy because it encourages potential clients to think they will win big, too. On his website, Dimopoulos claims he wins "Bigger Settlements. Faster Settlements." He also includes links to articles about how he sued a Bugatti dealer to buy rapper Post Malone's Chiron, claiming the dealer broke a deal to purchase the 1,500-horsepower supercar for \$3.5 million in cash.

Clearly, Steve Dimopoulos knows his audience, and he must be confident they don't care about his fees. Nevada voters may feel differently when Prop. 22 makes it to the polls.

ORGANIZATIONS IN THIS STORY

Nevada Legislature

Judges did not 'rubberstamp' fees in \$2.7 bln Blue Cross deal, US Supreme Court told

 [reuters.com/legal/legalindustry/judges-did-not-rubberstamp-fees-27-bln-blue-cross-deal-us-supreme-court-told-2024-05-30](https://www.reuters.com/legal/legalindustry/judges-did-not-rubberstamp-fees-27-bln-blue-cross-deal-us-supreme-court-told-2024-05-30)

Mike Scarcella

A general view of the United States Supreme Court in Washington, U.S., May 3, 2020.
REUTERS/Will Dunham/File Photo Purchase Licensing Rights , opens new tab

May 30 (Reuters) - A U.S. appeals court did not "rubberstamp" a \$667 million fee award for the attorneys behind a \$2.7 billion antitrust class action settlement with Blue Cross Blue Shield, the class lawyers told the U.S. Supreme Court on Wednesday.

Attorneys for a class of 100 million Blue Cross subscribers urged , opens new tab the justices to turn down a challenge to the legal fees and a broader attack on the merits of the 2020 settlement. An appeals court last year upheld the settlement and fees.

Health insurance subscribers in the decade-long case accused Blue Cross Blue Shield Association and others of unlawfully agreeing not to compete with one another. Class members alleged they paid higher insurance costs as part of the conspiracy.

Blue Cross denied the claims in agreeing to settle the Alabama federal court class action. Its lawyers on Wednesday also asked the justices , opens new tab to affirm the settlement. Blue Cross did not take a position on the legal fees, which would be deducted from the \$2.7 billion settlement amount.

Attorneys for the plaintiffs, including Charles Cooper of Cooper & Kirk, had no immediate comment.

The settlement objector who filed the Supreme Court petition claimed the fee should be no more than \$194 million, which was the "lodestar" amount, or the number of hours the lawyers said they worked multiplied by a prevailing hourly rate.

Cooper told the Supreme Court that a trial judge's use of a different method, called "percentage of the fund," was not improper. The fee was 23.47% of the settlement, within a "range of reasonableness" of 20% to 25%, an appeals court found.

"If the district court had been inclined to reflexively approve the petition simply because it fell under a 25% benchmark, it could have cited that undisputed fact and called it a day," the class attorneys said.

They said the trial judge conducted a "searching analysis" before issuing its fee award. The class attorneys also said their "colossal litigation effort" justified the amount.

The cases are Home Depot v. Blue Cross Blue Shield Association, U.S. Supreme Court, No. 23-1063, and David G. Behenna v. Blue Cross Blue Shield Association, same court, No. 23-1163.

Read more:

US Supreme Court urged to strike lawyers' \$667 mln fee in Blue Cross case

Blue Cross loses bid to block damages in long-running antitrust case

\$2.7 bln Blue Cross antitrust settlement upheld by US appeals court

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

Reporting by Mike Scarcella

Class Action Hits Google Over Collecting Disability Data From California Drivers

According to the complaint, Google's actions violate the California Invasion of Privacy Act and the Driver's Privacy Protection Act.

May 30, 2024 at 10:13 AM

Big Data



Kat Black

What You Need to Know

- Users of the California Department of Motor Vehicles website have accused Google of unlawfully obtaining their disability information from the DMV website.
- The complaint was filed on behalf of all people who used the California DMV website to apply for, renew or check the status of their disability parking placards online.
- The case follows in the wake of a flood of privacy lawsuits against Google.

Customers of the California Department of Motor Vehicles have launched a class action against Google, claiming that it illegally mined their disability information from the DMV website.

The plaintiffs, represented by Baron & Budd and Don Bivens, filed a [complaint](#) on Friday in the U.S. District Court for the Northern District of California, San Jose Division.

This complaint was surfaced with the help of [Law.com Radar](#).

The complaint in *Wilson v. Google* alleges that Google used its data collection services, Google Analytics and DoubleClick tags, to harvest users' personal information from the DMV website after they applied for, renewed or checked the status of their disability parking placards online. Websites use Google Analytics and DoubleClick tags to track user behavior and generate reports on their businesses based on visitor data.

“At no time did Google or the DMV disclose to Plaintiff or Class Members that Google was tracking the activities of individuals accessing the DMV website, obtaining their personal information from motor vehicle records, or learning the contents of their communications with the DMV,” the plaintiffs’ attorneys wrote. “Google then uses the personal information and data to generate revenue from the advertising and marketing services that Google sells to businesses and individuals.”

Baron & Budd did not respond to requests for comment, and Bivens declined to comment at this time.

According to the complaint, Google’s actions violate the California Invasion of Privacy Act and the Driver’s Privacy Protection Act. The DPPA was introduced in 1994 to protect the privacy of data contained in motor vehicle records, including disability information, and provides a civil cause of action against violators.

“(S)uch personal information was obtained ‘knowingly’ under the DPPA because Google specifically designed Google Analytics and DoubleClick to collect information wherever it is installed and suggested that website owners install it in ways that maximize the data collected thereby,” the complaint states.

Plaintiffs are seeking statutory penalties and punitive damages.

The case marks the latest in a barrage of privacy complaints against Google, which settled a \$5 billion proposed class action accusing the company of falsely advertising the protections granted by the private browsing feature “incognito mode” in April.

A Google spokesperson said that websites or apps own and control the data they collect through Google Analytics and that Google Analytics’ Health Insurance Portability and Accountability Act policy prohibits customers from using the product in a way that might result in the collection of protected health information.

Equifax hit with antitrust class action over work verification services

 [reuters.com/legal/litigation/equifax-hit-with-antitrust-class-action-over-work-verification-services-2024-05-29](https://www.reuters.com/legal/litigation/equifax-hit-with-antitrust-class-action-over-work-verification-services-2024-05-29)

Mike Scarcella

Credit reporting company Equifax Inc. corporate offices are pictured in Atlanta, Georgia, U.S., September 8, 2017. REUTERS/Tami Chappell Purchase Licensing Rights , opens new tab

May 29 (Reuters) - Data analytics giant Equifax (EFX.N) , opens new tab has been accused by a pair of home mortgage lenders of monopolizing the market for electronic income and employment verification services, leading to higher prices.

Greystone Mortgage and First Financial Lending filed the proposed class action , opens new tab in Philadelphia federal court on Tuesday, alleging Equifax had a “stranglehold” over a verification process that is a critical part of consumer finance.

Lenders, property managers and others rely on their quick ability to electronically verify an applicant’s income and employment for mortgages, car loans and rental apartment agreements, according to the lawsuit. Manually calling employers can be slow.

The lawsuit alleged Equifax, through its Equifax Workforce Solutions unit, has violated antitrust law through exclusive contracts and buying up would-be competitors. The industry domination, according to the lawsuit, has allowed Equifax to charge for its services “far higher than a competitive market would bear.”

Atlanta-based Equifax and lawyers for the plaintiffs did not immediately respond to requests for comment.

The case was brought on behalf of a proposed class of at least tens of thousands of purchasers of Equifax’s income and employment services.

The lawsuit said income and employment verification increasingly has driven revenue for Equifax, which is best-known for providing credit history reports. The lawsuit said profit from its verification business was now nearly \$2 billion annually.

Equifax’s multiyear, exclusive agreements with payroll software providers and large employers have denied competitors’ access to essential data inputs, “making it impossible for rivals to build databases of sufficient size and scale,” the lawsuit claimed.

Equifax “spent billions of dollars acquiring companies that might present a risk of competition to its monopoly,” the plaintiffs said.

The lawsuit demanded unspecified monetary damages, and it seeks an injunction to stop Equifax's alleged anti-competitive practices.

The case is Greystone Mortgage Inc and First Financial Lending LLC v. Equifax Workforce Solutions LLC and Equifax Inc, U.S. District Court for the Eastern District of Pennsylvania, No. 2:24-cv-02260.

For plaintiffs: Katie Beran and Brian Ratner of Hausfeld; Bruce Gerstein and David Rochelson of Garwin Gerstein & Fisher; and Joshua Grabar of Grabar Law Office

For defendant: No appearance yet

Read more:

Credit bureaus can't bar NJ law requiring foreign language reports, US judge rules
FICO loses bid to dismiss antitrust claims over credit-scoring market

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

Reporting by Mike Scarcella

Our Standards: The Thomson Reuters Trust Principles. [↗](#), opens new tab

ESG, DEI, and the Supreme Court's College Admissions Decision

K [dandodiary.com/2024/05/articles/esg/esg-dei-and-the-supreme-courts-college-admissions-decision](https://www.dandodiary.com/2024/05/articles/esg/esg-dei-and-the-supreme-courts-college-admissions-decision/)

May 28, 2024



By Kevin LaCroix on May 28, 2024
Posted in ESG



There is no doubt that, as I have previously noted on this site, the conversation about ESG has changed over time, particularly as ESG has faced a political backlash. These changes not only concern ESG itself but each of its three constituent

pillars – and while ESG discussions frequently focus on the “E” pillar, and in particular on climate change, the changes in the ESG conversation also concern the “S” pillar as well. Of the recent changes surrounding the Social component of ESG, arguably none is more important than the U.S. Supreme Court’s 2023 decision in *Students for Fair Admissions v. Harvard College*, in which the Court ruled that race-based policies should not be used in university admissions. In a May 23, 2024, Law360 article entitled “The State of Play in DEI and ESG One Year After Harvard Ruling” (here), attorneys from the Crowell & Moring law firm review the ways that the Supreme Court’s decision in the *Harvard* case have changed the dialog surrounding Diversity, Equity and Inclusion (DEI) and ESG.

In the United States, at least, the “S” in ESG typically refers to DEI-related initiatives. DEI efforts received a substantial boost in response to social unrest following the May 2020 death of George Floyd. However, long before these events, conservative groups opposed the use of race-based considerations, and in particular, going all the way back to the seventies, challenged consideration of racial factors in college admissions. The U.S. Supreme Court, in a line of cases going back to 1978, had held that universities could consider an applicant’s race as a factor in admissions. However, the *Harvard College* case struck down the use of racial considerations in admissions decisions.

In the wake of the Court’s decision in the *Harvard* case, many observers tried to note that *the Harvard College* decision involved a collegiate educational context and did not on its own necessarily apply to other contexts, such as the private corporate world. However, other commentators contended that the *Harvard College* decision meant the end of the “diversity industry.”

According to the *Law360* memo's authors, in the year since the Court's *Harvard College* decision, there has been a "dizzying tailspin of various legal actions," particularly involving conservative states' attorneys general, who have tried to use the Court's decision to "attack corporate diversity, equity, and inclusion plans."

For example, just days after the Supreme Court issued its opinion in the *Harvard College* case, a group of 13 Republican state attorneys general sent a letter to the CEOs of Fortune 100 companies, citing the Court's decision and warning of "serious legal consequences" over race-based employment preferences and diversity policies. The letter also asserted that DEI plans are discriminatory and create illegal quotas. In addition, in late August 2023, a group of five Republican state attorneys general sent a separate public letter to the managing partners of AmLaw 100 law firms, arguing that the *Harvard College* decision requires the firms to refrain from discrimination based on race.

In a related development that underscores the extent of the struggle to interpret the implications of the *Harvard College* decision for ongoing corporate DEI efforts, just a week after the Republican AG letter to the corporate CEOs, a group of 21 Democratic state attorneys general sent their own letter to the Fortune 100 CEOs, in which the Democratic AGs argued that the *Harvard College* decision "does not directly address or govern the behavior or the initiatives of private sector businesses," and contending further that DEI efforts remain legal.

Interestingly, while the AGs launched these various letters (and others that the *Law360* article describes further), up until now at least, the state attorneys general "have not directly brought DEI-related lawsuits." There could of course be ongoing state AG investigations that we don't know about, as any investigations would remain confidential until a complaint is filed.

However, even though the state AGs have not yet launched DEI-related lawsuits, the flurry of activity and letter-writing campaigns mean, according to the memo's authors, that "corporations are experiencing a chilling effect given risk concerns surrounding DEI and ESG initiatives." These issues, the authors write, "remain politically fraught and top-of-mind for state enforcers." The authors "expect to see DEI and ESG issues remain at the forefront, particularly as we head into the election season." Moreover, they write, "we would not be surprised to learn of ongoing attorney general investigations, which may lead to complaints in the coming months."

Discussion

As I have noted elsewhere, many companies, faced with the ESG backlash and seeking to avoid controversy, have toned down their ESG messaging, in a development that has been called "greenhushing." The same considerations may be in effect when it comes to corporate

responses to developments following the Court's college admissions decision. Companies, the authors write, are "experiencing a chilling effect given risk concerns" and so may be less assertive in promoting DEI initiatives. At a minimum, the developments following the Court's college admission decision have changed the dialog around DEI issues, as is true of ESG issues generally.

It seems likely that, as with ESG generally, it will be also be with DEI, in that the underlying issues and concerns will not go away, but rather that the vocabulary and tone of the conversation will change.

What may be of greater concern is the authors' unanswered question – that is, whether we will see DEI-targeted investigations and even litigation as developments continue. Clearly, politicians who believe they can make political capital out of agitating on these issues will continue to do so. It remains to be seen in the months ahead whether the politicians – and private litigants as well– will target companies based on their DEI initiatives, as a continuing part of the ESG backlash.

Microsoft AI Subsidiary Can't Shake California Privacy Suit

By Ufonobong Umanah 2024-05-29T20:41:47000-04:00

- Chase customers alleged Nuance recorded them without consent
- Plaintiffs sufficiently alleged Nuance is third party to calls

A Microsoft AI subsidiary failed to get most of a proposed privacy class action dismissed after a federal magistrate judge said the plaintiffs sufficiently alleged the company was a third party to recorded conversations with Chase Bank.

The plaintiffs alleged that Nuance Communications' software, Gatekeeper, violates the California Invasion of Privacy Act when it uses, without permission, the biometric data of customers to create an "audible 'fingerprint'" with the goal of helping companies make "intelligent authentication and fraud risk assessments."

The privacy law replaced a one-party consent regime in California in 1967, with the goal of protecting residents from new technologies that may eavesdrop on private conversations, Magistrate Judge [Donna M. Ryu](#), of the US District Court for the Northern District of California, explained.

The complaint sufficiently alleged that Nuance was analyzing the substance of the Chase customers' conversations, stating claims under Section 631 of CIPA, Ryu said.

But, the plaintiffs will have a chance to amend after the court dismissed their Section 637.3 claim because they didn't sufficiently allege that Gatekeeper's recordings are used to determine the truth or falsity of statements made which is prohibited under the statute.

Microsoft itself wasn't named as a defendant in the consolidated amended class action complaint.

The complaint alleges that Gatekeeper creates a voice print—the audible fingerprint—to identify whether a caller is truthful about their identity. It alleges "businesses can license Gatekeeper and integrate it into their call centers to verify callers' identities," according to Ryu.

The plaintiffs thus allege Nuance turns personal biometric data into a product for a corporate client,

and retains that information for "" a significant period of time." They further allege that they had no way of knowing otherwise confidential communications with Chase would be recorded by a third party.

For a proposed class of California residents "who had their voice prints, voice stress patterns, or other elements of their conversation recorded and examined by Nuance without first obtaining prior written consent," the complaint asserts claims under Sections 631 and 632 of the state's penal code—respectively wiretapping and "eavesdropping on or recording confidential communications"—which survived Nuance's motion to dismiss.

Under both Section 631 and the eavesdropping prong of 632, the plaintiffs must allege they didn't consent to Nuance's conduct, and that Nuance is a third party, Ryu said. The plaintiffs also assert three theories of liability under 631, and Nuance argued that for two of those theories, they failed to allege it intercepted the content of any conversation "for any purpose other than providing the information to Chase."

Nuance misstated the test for those separate theories of liability, Ryu said. "The statutory language prohibits the use of intercepted communications 'in any manner, or for any purpose.'" The material that Nuance allegedly collected "is clearly content, not just 'characteristics' of communications," for purposes of the CIPA, Ryu also said.

Ryu said that there's a factual dispute regarding consent that makes dismissal inappropriate. Even if the Deposit Account Agreements of the customers were incorporated by reference—Ryu ruled they weren't—the plaintiffs argued that the documents only disclose that Chase may record voices. Neither it nor the privacy policy disclosed that third parties may record, they argue.

As to whether Nuance is a third party under the statute, Ryu said that the question boils down to whether Nuance's software was merely a tool that Chase deployed, or whether Nuance was hired as an independent third party allegedly recording the calls for its own purposes.

"There is a split in the Ninth Circuit on the standard used to define a third party," Ryu said, but she wrote Nuance qualifies as one where the allegations, "at the very least" support the reasonable inference that "Nuance can use consumers' voice prints to improve its own products and services," going beyond providing a benefit to Chase.

Nuance's motion to dismiss the claims under Sections 631 and 632 was therefore denied.

Ryu asked the plaintiffs to more specifically allege how Nuance “uses its Chase database of voice prints for other clients,” since they have leave the amend the complaint as to Section 637.3.

Bursor & Fisher PA and Edelson PC represent the plaintiffs and the proposed class. Jenner and Block LLP represents Nuance.

The case is [Turner v. Nuance Commc'ns, Inc.](#) , 2024 BL 181136, N.D. Cal., No. 22-cv-05827, 5/28/24

.

To contact the reporter on this story: Ufonobong Umanah in Washington at uumanah@bloombergindustry.com

To contact the editor responsible for this story: Martina Stewart at mstewart@bloombergindustry.com

California attorney general seeks to enforce plastics probe subpoenas in court

[reuters.com/legal/government/california-attorney-general-seeks-enforce-plastics-probe-subpoenas-court-2024-05-29](https://www.reuters.com/legal/government/california-attorney-general-seeks-enforce-plastics-probe-subpoenas-court-2024-05-29)

Clark Mindock



California Attorney General Rob Bonta, at lectern and flanked by staff, announces an antitrust lawsuit against Amazon.com Inc during a news conference in San Francisco, California, U.S. September 14, 2022. REUTERS/Paresh Dave/File Photo Purchase Licensing Rights [↗](#), opens new tab

May 29 (Reuters) - California Attorney General Rob Bonta has asked a state court to enforce subpoenas against plastics industry groups as part of his ongoing probe into the plastic pollution problem the state has called a crisis, days after the groups sued him to avoid complying with those demands.

Bonta, a Democrat, filed two petitions in a Sacramento state court on Tuesday against the American Chemistry Council and the Plastics Industry Association, saying the groups have refused, without adequate legal justification, to provide the state with documents related to the industry's advocacy for plastics recycling.

The probe, launched in 2022, is looking into what the state alleges is a decades-long campaign of deception by the fossil fuel and petrochemical industries to convince the public that recycling can solve the plastic pollution problem even though most plastic cannot be recycled.

The sought-after documents include historical records that Bonta said may show the extent of the industry's knowledge about the environmental harms from plastic waste. Additionally, they include records related to the industry's efforts to market plastics as recyclable even though very little plastic is recycled in practice, according to the petitions.

The two groups sued Bonta last week over the subpoenas, arguing they had already provided some documents on things like public newsletters and public remarks about "advanced recycling" technology, which uses a process called pyrolysis to turn hard-to-recycle plastic into fuel.

The groups said they withheld internal documents with confidential industry data and communications related to public policy and advocacy matters. The subpoenas would violate their right to free speech by forcing them to reveal internal communications, they said.

Plastics Industry Association CEO Matt Seaholm said in a statement on Wednesday that the group is committed to protecting its members' rights, and said the plastics industry provides useful products that can be recycled.

A spokesperson for the American Chemistry Council didn't immediately respond to a request for comment.

Two years after launching the investigation, Bonta said last month that his office would decide whether to sue Exxon, a key focus of the investigation, by the summer.

More than 90% of plastic waste globally ends up in landfills or is incinerated, according to a landmark study published in Science Advances. The U.S. recycling rate has never gone higher than 9%, according to the Environmental Protection Agency.

A Reuters investigation found that advanced recycling projects worldwide had faced numerous delays and failures even as companies touted their success.

The cases are California v. The Plastics Industry Association and California v. The American Chemistry Council, Superior Court of the State of California in Sacramento County, Nos. Not immediately available.

For the state: Attorney General Rob Bonta; and Daniel Olivas and Ed Ochoa of the California Department of Justice

For the industry groups: not yet available

Nissan warns owners of older vehicles not to drive them due to risk of exploding air bag inflators

 [courthousenews.com/nissan-warns-owners-of-older-vehicles-not-to-drive-them-due-to-risk-of-exploding-air-bag-inflators](https://www.courthousenews.com/nissan-warns-owners-of-older-vehicles-not-to-drive-them-due-to-risk-of-exploding-air-bag-inflators)

Associated Press

DETROIT (AP) — Nissan is urging the owners of about 84,000 older vehicles to stop driving them because their Takata air bag inflators have an increased risk of exploding in a crash and hurling dangerous metal fragments.

Wednesday's urgent request comes after one person in a Nissan was killed by an exploding front-passenger inflator, and as many as 58 people were injured since 2015.

“Due to the age of the vehicles equipped with defective Takata air bag inflators, there is an increased risk the inflator could explode during an air bag deployment, propelling sharp metal fragments which can cause serious injury or death,” Nissan said in a statement.

Nissan said the “do not drive” warning covers certain 2002 through 2006 Sentra small cars, as well as some 2002 through 2004 Pathfinder SUVs, and 2002 and 2003 Infiniti QX4 SUVs. Owners can find out if their vehicles are affected by going to nissanusa.com/takata-airbag-recall or infinitiusa.com/takata-airbag-recall and keying in their 17-digit vehicle identification number.

The company says owners should contact their dealer to set up an appointment to have inflators replaced for free. Nissan also is offering free towing to dealers, and in some locations mobile service and loaner cars are available.

“Even minor crashes can result in exploding Takata air bags that can kill or produce life-altering, gruesome injuries,” the U.S. National Highway Traffic Safety Administration said in a statement. “Older model year vehicles put their occupants at higher risk, as the age of the air bag is one of the contributing factors.”

Nissan originally recalled 736,422 of the vehicles in 2020 to replace the Takata inflators. The company said around 84,000 remain unrepaired and are believed to still be in use.

Nissan said it has made numerous attempts to reach the owners with unrepaired Takata inflators.

The death was reported to NHTSA in 2018, the company said. The person killed was in a 2006 Sentra, according to Nissan.

The death is one of 27 in the U.S. caused by the faulty inflators, which used volatile ammonium nitrate to create a small explosion to inflate air bags in a crash. The chemical can deteriorate over time when exposed to high temperatures and humidity. It can explode with too much force, blowing apart a metal canister and spewing shrapnel. More than 400 people in the U.S. have been hurt.

Worldwide at least 35 people have been killed by Takata inflators in Malaysia, Australia and the U.S.

Potential for a dangerous malfunction led to the largest series of auto recalls in U.S. history, with at least 67 million Takata inflators involved. The U.S. government says many have not been repaired. About 100 million inflators have been recalled worldwide. The exploding air bags sent Takata into bankruptcy.

Honda, Ford, BMW, Toyota and Stellantis and Mazda have issued similar “do not drive” warnings for some of their vehicles equipped with Takata inflators.

By TOM KRISHER AP Auto Writer

Categories / Business, Consumers

Subscribe to Closing Arguments

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

Bloomberg Law News 2024-05-30T11:57:57282215587-04:00

Companies Rethink Insider Trading Policies After Novel SEC Win

By Matthew Bultman 2024-05-30T05:00:43000-04:00

- Some companies eyeing narrow bans to limit legal exposure
- Corporate policies can affect courts' take on 'shadow trading'

Most S&P 500 companies write rules to stop employees from using confidential information to trade other businesses' stock, but some are now thinking about scaling back their bans to avoid exposing their executives to new legal troubles.

That's perhaps one unintended consequence for the Securities and Exchange Commission following its [win](#) in the first-ever trial over "shadow trading," some lawyers say.

A key part of the SEC's case against a former biopharma executive, Matthew Panuwat, was that his company's policies prohibited him from buying any public company's stock based on his insider knowledge about his own employer's pending deal.

The Wall Street regulator's victory, likely to eventually reach a federal appeals court, is forcing companies to take a second look at their own insider trading policies. Some have expanded those policies to explicitly address shadow trading, according to a Bloomberg Law search. Others are considering narrowing their prohibitions, hoping to limit employees' exposure.

"Companies across the board are taking the Panuwat verdict seriously," said Edward Imperatore, a Morrison & Foerster LLP partner and former federal prosecutor.

The [case](#) also raises questions about how much influence companies' policies have on insider trading law, which can result in civil and criminal penalties. Congress has never defined insider trading, leaving regulators and courts to sketch out its contours.

Trading Bans

Panuwat, who worked at mid-cap biotech company Medivation Inc., bought call options in rival Incyte Corp. in 2016, minutes after learning that Pfizer Inc. planned to acquire his employer, the SEC said. Panuwat thought the Pfizer deal would make Incyte a more valuable acquisition target, and made more than \$107,000 from the trades, the agency said.

Arguing Panuwat had a duty to avoid trading on news of Pfizer's planned acquisition, the SEC pointed to, among other things, Medivation's own employee policy, which prohibited using inside information about Medivation to buy or sell stock of any publicly-traded company.

Such broadly written policies aren't unique.

As of December 2023, more than 60% of S&P 500 companies prohibited trading of any other company's stock based on material, nonpublic information, research by Geeyoung Min, a law professor at Michigan State, shows. Relatively few were limited just to banning trades in the employer's stock.

Companies can be liable for insider trading by their employees, and may have viewed the broad language as a way to minimize potential liability, Min said. If regulators or prosecutors came knocking, companies could argue their policies went beyond what was required.

The *Panuwat* case "changed the whole dynamic," Min said.

'Unintended Consequence'

It's not clear the SEC would've sued Panuwat had his trades not been prohibited by the company's policy, some lawyers said. Now, some companies are considering narrowing their policies, wary of exposing their employees to similar liability.

"From the SEC's perspective, that is perhaps an unintended consequence of the Panuwat case," Imperatore said.

But other companies have already moved in the opposite direction, underscoring the difficult decisions firms face.

At least some insider trading policies now include the term “shadow trading” and reference the *Panuwat* case, a Bloomberg Law review of company disclosures found.

One small biotech company’s [policy](#) posted this year describes shadow trading as an “emerging” legal theory, and prohibits workers from trading in the securities of companies in the same “industry segment.”

A New York investment company’s [policy](#) spells out a pending acquisition scenario similar to *Panuwat*’s and makes clear employees can’t invest in a competitor viewed as “economically linked” whose stock would likely rise when the investment company’s deal is announced.

Lawyers who urge companies to explicitly restrict shadow trading in their policies note there may have been other reasons *Panuwat* found himself in hot water: the SEC also argued he had a duty to avoid trading on the merger news, even absent Medivation’s policy, because the company entrusted him with confidential information.

“The SEC and the Department of Justice always view these facts with the benefit of hindsight,” said Tami Stark, a White & Case LLP partner and former SEC enforcement attorney. “It’s often better to take a conservative position when making those judgment calls.”

Company Discretion

The SEC has maintained the *Panuwat* case is a straightforward example of insider trading.

Following the verdict last month, the agency’s director of enforcement, Gurbir Grewal, said “there was nothing novel about this matter, and the jury agreed: this was insider trading, pure and simple.” Grewal at industry conferences has also pushed back on suggestions the SEC is broadening its approach to insider trading.

But many legal scholars and lawyers see it differently. *Panuwat* in court filings argued no one thought his actions were illegal until the SEC brought the civil lawsuit against him.

The case is also raising questions about how much courts should defer to companies’ own policies on insider trading. Before trial, the district judge permitted the SEC’s case to proceed in part because a

jury could find Panuwat breached Medivation's policy.

Under that logic, whether a person's trade is illegal may depend on what's in their employer's insider trading policy, legal scholars said.

"That does seem to give companies too much discretion to make a special law for themselves and themselves only," said Columbia law professor John Coffee, whose specialties include securities regulation and white collar crime. "The criminal law doesn't like the idea of different scopes depending upon the decision of the corporate issuer."

Panuwat is expected to appeal the decision to the US Court of Appeals for the Ninth Circuit.

It's unclear how aggressively the SEC will pursue its shadow trading theory in the meantime, and whether criminal prosecutors will take it up. There are also questions about whether shareholders may try to employ it in private litigation.

While attorneys believe the SEC is emboldened by the *Panuwat* verdict, Coffee said the case might've gotten more attention than the agency anticipated.

"In that light, they may be very cautious in how often they use it," he said.

To contact the reporter on this story: Matthew Bultman in New York at mbultman@bloombergindustry.com

To contact the editor responsible for this story: Michael Smallberg at msmallberg@bloombergindustry.com; Maria Chutchian at mchutchian@bloombergindustry.com

Explainer: Legal hurdles loom over Tesla's bid to revive Musk's record pay

 [reuters.com/business/autos-transportation/legal-hurdles-loom-over-teslas-bid-revive-musks-record-pay-2024-05-30](https://www.reuters.com/business/autos-transportation/legal-hurdles-loom-over-teslas-bid-revive-musks-record-pay-2024-05-30)

Tom Hals

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 Purchase Licensing Rights , opens new tab

WILMINGTON, Delaware, May 30 (Reuters) - Tesla shareholders will vote on June 13 to ratify Elon Musk's \$56 billion pay package, which a Delaware judge voided in January because she found he improperly controlled the process. They will also be asked to approve moving the company's legal home to Texas from Delaware.

Below is a look at the potential legal fight standing in the way of Musk's pay day.

WHAT IMPACT WILL THE SHAREHOLDER VOTE HAVE?

If shareholders reject the move to Texas and Musk's pay, it will vindicate the court's ruling that described Musk's pay as "unfathomable," and would be a stinging defeat for a board that critics say is dominated by Musk.

If shareholders vote to pay Musk, it will likely set off another legal challenge. Where that challenge takes place might depend on the vote to move Tesla's legal home to Texas.

IF TESLA BECOMES A TEXAS CORPORATION

Lawyers for Richard Tornetta, the shareholder who sued in Delaware in 2018 over Musk's pay, have said in court filings they fear the shareholder vote is a bid to use a Texas court to undo the January ruling.

For her part, the judge in Delaware, Chancellor Kathaleen McCormick, said on May 28 she was assured by Tesla's attorneys the company will not litigate any dispute over the shareholder vote outside Delaware.

IF TESLA REMAINS A DELAWARE CORPORATION

The judge in Delaware still has to decide how much to award to Tornetta's legal team as a fee payable by Tesla before Musk and Tesla can appeal. The shareholder legal team requested \$6 billion. A hearing is scheduled for July 8.

Tesla's legal team has said a vote ratifying Musk's pay would materially affect the Delaware proceedings, although they did not explain how. If the pay package is ratified at the shareholder meeting, it will almost certainly be challenged by shareholders opposed to it.

McCormick could include such a challenge in the ongoing Musk pay case or create a new lawsuit. If it were a new case, that would allow Tesla and Musk to appeal the January ruling to the Delaware Supreme Court while the Court of Chancery sorted out challenges to the shareholder vote, which could take months or even years.

TESLA'S NOVEL USE OF A RATIFICATION VOTE

Tesla's ratification vote is based on Delaware law that is meant to allow companies to clean up technical defects in corporate transactions, like sales of stock that were not properly authorized. The company described its approach as "novel" in its proxy filing.

No one has filed a legal challenge, but Charles Elson, a former University of Delaware professor who specialized in corporate governance, said in a court filing that ratification cannot be used as Tesla is applying it - to correct a breach of fiduciary duty by a board.

CHALLENGE TO THE VOTE

Tesla shareholders could also challenge the vote, citing Musk's efforts to sway voting. Musk on May 18 responded "yes" to a post on X that said if Musk gets the 25% equity stake he has demanded along with incorporating the company in Texas and his 2018 pay package reinstated, then AI and robotics stay with Tesla.

The company filed Musk's response with the Securities and Exchange Commission as proxy material.

Musk's veiled threat to take AI from Tesla if he does not get his pay may be a potential violation of corporate law, which prohibits directors and officers from taking business opportunities for themselves that belong to the company.

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 Tom Hals in Wilmington, Delaware Editing by Chris Reese

Our Standards: The Thomson Reuters Trust Principles. [↗](#), opens new tab

Tom Hals
Thomson Reuters

Tom Hals is an award-winning reporter with 25 years of experience working in Asia, Europe and the United States. Since 2009 he has covered legal issues and high-stakes court battles, ranging from challenges to pandemic policies to Elon Musk's campaign to end his deal for Twitter.

Musk, Morgan Stanley 'Hid' Twitter Stock Buying, Suit Says (1)

By Kurt Wagner2024-05-30T11:39:26814-04:00

Elon Musk, who secretly acquired a major stake in Twitter Inc. in early 2022 before eventually buying it, did so with the help of a Morgan Stanley wealth manager who advised the billionaire on how to avoid alerting the broader market, according to a shareholder lawsuit.

The unidentified employee offered Musk and his business manager, **Jared Birchall**, regular updates on “trading strategies to avoid public detection” and “‘money saved’ by hiding these trades from the market,” according to an amended version of the 2022 suit filed Tuesday in Manhattan federal court.

An Oklahoma public pension fund claims Musk’s delay in disclosing his ownership of more than 5% of the social media company artificially kept its share price down. The billionaire was able to acquire more than 9% of Twitter without triggering a major stock price hike, which eventually happened once his ownership stake became public, according to the complaint.

Musk argued last year that the suit should be thrown out because it has no legal merit and is merely an attempt to “harness the spectacle” around him and his \$44 billion acquisition of the platform, which he has rebranded as X. A judge ruled in September that some claims in the case could proceed.

Musk’s stock purchases are also the subject of an investigation by the US Securities and Exchange Commission. He has agreed to sit for a five-hour deposition at one of the SEC’s offices as part of that case.

Read More: Musk Says Twitter Shareholder Suit Exploiting His ‘Spectacle’

Musk didn’t respond to a request for comment. Birchall, who is chief executive officer of Musk’s neurotechnology startup Neuralink Corp., also didn’t respond to a request for comment.

A spokesperson for Morgan Stanley said the firm “is not a defendant in this lawsuit.”

On several occasions, the Morgan Stanley employee working with Musk advised him to seek outside

counsel on whether he needed to disclose his stock purchases. Birchall assured the Morgan Stanley employee that Musk was getting legal advice, but that never actually happened, the lawsuit alleges.

Musk ended up acquiring a multibillion-dollar stake in Twitter without the company knowing about it and quickly agreed to join Twitter's board after going public with his investment. But in April 2022, Musk decided to try and buy the company instead. He later tried to renege on the purchase, but was sued by Twitter and ultimately completed the acquisition in October 2022.

Read More: Elon Musk's Empire Is Under Threat as Tesla Spirals

Musk has used Morgan Stanley for many of his business efforts over the years. **Michael Grimes**, a managing director at Morgan Stanley, was known to have been heavily involved in Musk's Twitter deal.

The suit alleges that Morgan Stanley earned almost \$1.5 million in commissions just for executing Musk's "secret Twitter stock acquisition scheme."

The case is Oklahoma Firefighters Pension and Retirement System v. Musk, 22-cv-03026, US District Court, Southern District of New York (Manhattan).

(Updates with comment from Morgan Stanley in seventh paragraph.)

To contact the reporter on this story:

Kurt Wagner in San Francisco at kwagner71@bloomberg.net

To contact the editors responsible for this story:

Jillian Ward at jward56@bloomberg.net

Peter Blumberg, Nick Turner

© 2024 Bloomberg L.P. All rights reserved. Used with permission.

Quinn Emanuel Avoids Sanctions In Elon Musk Defamation Case

A abovethelaw.com/2024/05/quinn-emanuel-avoids-sanctions-in-elon-musk-defamation-case/

Joe Patrice

May 30, 2024

Biglaw

Let's see if any lessons were learned.

By Joe Patrice

on May 30, 2024 at 10:45 AM

The judge overseeing a defamation case against Elon Musk has denied every party's request for sanctions, hopefully sending everyone back to the case appropriately chastened by the experience.

Time will tell.

Musk publicly tied a California student to a neo-Nazi fight, suggesting on social media that it was "a probable false flag" operation. At his deposition in the Texas case, Musk's attorney, Quinn Emanuel's Alex Spiro, repeatedly belittled the case and launched a string of speaking objections prompting a motion for sanctions. The plaintiff also noted that Spiro hadn't even been admitted *pro hac vice*, a move that's mostly a formality, but that the plaintiff claimed spoke to Spiro messing up a number of local rules. In response, Quinn Emanuel cross-moved for sanctions and proposed using time travel to retroactively admit Spiro to cure an issue with the pleadings.

The sanctions motion always represented a moon shot for the plaintiff, but, as we noted at the time, "using a deposition to denigrate the plaintiff's case and the attorneys involved is a breach of professional decorum regardless of the specific Texas rules." Musk's interest in "hardcore" lawyering ended up dragging the whole case into petty motion practice and left an embarrassing video deposition.

The judge seemed uninterested in anyone's complaints, denying the motion for sanctions and the cross-motion for sanctions, granting all the *pro hac* motions, and overruling all of Musk's objections while also denying the motion to dismiss.

Will this bring down the temperature in the case... or will the hardcore come out again?

Sponsored

Earlier: Is Elon Musk About To Get Quinn Emanuel Sanctioned?

Quinn Emanuel Proposes Using Time Travel To Avoid Sanctions Motion In Elon Musk Case

Joe Patrice is a senior editor at Above the Law and co-host of Thinking Like A Lawyer. Feel free to email any tips, questions, or comments. Follow him on Twitter if you're interested in law, politics, and a healthy dose of college sports news. Joe also serves as a Managing Director at RPN Executive Search.

Topics

Alex Spiro, Biglaw, Elon Musk, Quinn Emanuel, Technology

Elon Musk lawyer Spiro avoids sanctions as defamation lawsuit proceeds

 [reuters.com/legal/legalindustry/elon-musk-lawyer-alex-spiro-beats-sanctions-bid-defamation-lawsuit-2024-05-29](https://www.reuters.com/legal/legalindustry/elon-musk-lawyer-alex-spiro-beats-sanctions-bid-defamation-lawsuit-2024-05-29)

David Thomas

Alex Spiro, attorney for Elon Musk arrives to attend a securities-fraud trial brought by shareholders at federal court in San Francisco, California, U.S. January 20, 2023.

REUTERS/Peter DaSilva Purchase Licensing Rights , opens new tab

May 29 (Reuters) - A Texas judge on Wednesday allowed , opens new tab a defamation lawsuit to move ahead against Elon Musk, but rejected a request to sanction the billionaire entrepreneur's prominent longtime attorney Alex Spiro.

Judge Maria Cantu Hexsel denied a motion to dismiss the Travis County lawsuit, which was brought last year by plaintiff Benjamin Brody. Musk had argued that the case violated a state law meant to deter lawsuits aimed at punishing defendants for speaking out on public issues.

"Despite facing this challenge at the outset of the case, we prevailed," Brody's lawyer Mark Bankston wrote in a post on Musk's social media platform X.

Brody sued Musk after Musk falsely implied in a post on X that Brody had participated in a right-wing street brawl in Oregon. Musk, who denies defaming Brody, sat for a virtual deposition in March.

Spiro participated in the deposition despite not being licensed to practice law in Texas and lacking the court's explicit approval to represent Musk in the case, Brody's lawyers complained last month.

As part of their sanctions request, Brody asked for legal fees and a ruling that would block Spiro from appearing in the case. The judge on Wednesday rejected the sanctions bid and said Spiro could represent Musk.

A spokesperson for Spiro and his law firm Quinn Emanuel Urquhart & Sullivan declined to comment on Wednesday's decision. The firm previously called Brody's sanctions request "meritless."

Spiro and his firm had denied violating any court rules and called the sanctions request "gamesmanship." They said Spiro had "reasonably" expected that his pending request to appear in the case would be approved, even if the firm "should have been more diligent" about seeking a ruling on the submission.

Both Brody and Musk's lawyers accused each other of being unprofessional and disruptive during the March deposition.

Spiro has long been a top lawyer for Musk, representing him in court cases involving the U.S. Securities and Exchange Commission and other matters.

The case is Brody v. Musk, District Court of Travis County, No. D-1-GN-23-006883.

For plaintiff: Mark Bankston of Farrar & Ball

For defendant: John Bash of Quinn Emanuel Urquhart & Sullivan

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

Our Standards: The Thomson Reuters Trust Principles. [↗](#), opens new tab

David Thomas
Thomson Reuters

David Thomas reports on the business of law, including law firm strategy, hiring, mergers and litigation. He is based out of Chicago. He can be reached at d.thomas@thomsonreuters.com and on Twitter [@DaveThomas5150](https://twitter.com/DaveThomas5150).

Page Printed From:

<https://www.law.com/2024/05/29/elon-musk-lawyer-avoids-sanction-granted-admittance-in-defamation-case/>



NOT FOR REPRINT
NEWS

Elon Musk Lawyer Avoids Sanction, Granted Admittance in Defamation Case

Judge Maria Cantu Hexsel denied sanctions motions hurled by both sides of the Elon Musk defamation case, and denied Musk's motion to dismiss the lawsuit.

May 29, 2024 at 05:43 PM

Civil Rights



Adolfo Pesquera



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

What You Need to Know

- A Travis County judge denied motions for sanctions brought by attorneys on either side of an Elon Musk defamation case.
- The plaintiff's attorney alleged Musk's New York attorney Alex Spiro violated ethics rules during a deposition and should not be admitted in Texas.
- Quinn Emanuel attorney Spiro blamed the plaintiff's attorney's behavior and questioning for a contentious hearing.

A Texas jurist, Travis County 459th District Court Judge Maria Cantu Hexsel, denied motions for sanctions brought by opposing counsel in the Elon Musk defamation lawsuit.

In addition, Quinn Emanuel Urquhart & Sullivan attorneys Alex Spiro and Cory D. Struble were granted admission for pro hac vice related to Musk’s defense representation.

Spiro and Struble are based in Quinn Emanuel’s New York office, and they applied for admittance in Texas Jan. 5 and April 5, respectively.

Spiro is known for handling high-profile celebrity cases. He is defense counsel for actor Alec Baldwin, who faces a manslaughter charge related to an accidental shooting death on a movie production set.

Normally, a court granting admittance to out-of-state attorneys would be a routine matter, but Mark Bankston of Farrar & Ball, counsel for plaintiff Benjamin Brody, threw up a roadblock in April with a motion for sanctions that included a request to deny admittance to Spiro.

Related story: [Quinn Emanuel Partner Faces Sanctions Hearing in Elon Musk Defamation Suit](#)

The plaintiff motion was based on an allegation that Spiro was representing Musk during a deposition without having first been granted admittance. In addition, Bankston alleged Spiro acted unethically and was so disruptive during the deposition that the plaintiff was denied an effective deposition.

In turn, Quinn Emanuel filed its own motion for sanctions, alleging it was Bankston’s behavior that made the deposition so contentious.

Related story: [Tit for Tat: Attorneys Want Opposing Counsel Penalized](#)

Hexsel held a hearing on the various motions Wednesday, and [in a two-page order](#) that did not provide analysis ruled to deny the plaintiff’s motion for sanctions, and the defendants’ cross-motion for sanctions.

Bankston did not immediately reply to a request for comment.

Hexsel also denied Musk’s motion to dismiss Brody’s lawsuit. Musk claimed his conduct was protected speech under the Texas Citizens Participation Act.

Musk was sued because he made comments on X, formerly Twitter, allegedly giving the impression Brody was an “unmasked brawler” who participated in a street brawl on behalf of a neo-Nazi group.

In fact, Brody was a bystander caught on camera during a June 2023 melee between two far-right extremist groups during a Portland, Oregon, Pride parade.

RELATED STORIES

[Tit for Tat: Attorneys Want Opposing Counsel Penalized](#)

[Quinn Emanuel Partner Faces Sanctions Hearing in Elon Musk Defamation Suit](#)

NOT FOR REPRINT

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

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

By Mike Leonard

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

Bloomberg Law News 2024-05-30T09:45:59273239311-04:00

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.

To contact the reporter on this story: Mike Leonard in Washington at mleonard@bloomberglaw.com

To contact the editor responsible for this story: Rob Tricchinelli at rtricchinelli@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

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

<https://www.wsj.com/business/autos/tesla-glass-lewis-elon-musk-pay-package-d50b63df>

BUSINESS | AUTOS

Tesla Blasts Glass Lewis's Report Urging Against Musk's Pay Package

Electric-vehicle maker says proxy firm 'omits key considerations, uses faulty logic, and relies on speculation and hypotheticals'

By [Steven Russolillo](#) [Follow](#)

Updated May 30, 2024 9:01 am ET



Tesla shareholders will vote on Elon Musk's pay package, recently valued at \$46 billion, on June 13.

PHOTO: GONZALO FUENTES/REUTERS

Tesla **TSLA 0.27% ▲** issued a scathing rebuttal to Glass Lewis after the proxy-advisory firm days earlier advised shareholders to vote against CEO Elon Musk's multibillion-dollar pay package.

In a letter that the electric vehicle maker titled "What Glass Lewis Got Wrong About Tesla," the company said the proxy firm "omits key considerations, uses faulty logic, and relies on speculation and hypotheticals." Tesla reiterated that shareholders should vote next month for Musk's compensation package and approve the company's plan to incorporate in Texas.

“Tesla believes it should abide by its commitment to Elon as Elon delivered on this commitment to Tesla,” the company said in its letter dated Wednesday. “A deal is a deal. That is the fair and ethical thing to do.”

Shareholders will vote at the company’s June 13 annual meeting on Musk’s pay package, recently valued at \$46 billion, and other proposals, including moving the company’s incorporation to Texas.

Musk’s compensation, originally approved by Tesla shareholders in 2018, 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.

Glass Lewis, in a 71-page report issued over the weekend, told shareholders that Musk’s proposed compensation could dilute their existing holdings in Tesla. The firm said the pay package was excessive and noted it would concentrate Musk’s ownership, making him the largest shareholder “by a healthy margin.”

Proxy advisers’ recommendations can influence shareholder votes, as institutional shareholders look to them for advice. Glass Lewis had advised against voting for the pay package in 2018, and said most of its concerns remain for this year’s version, too.

“The excessive size of the award, both on a pure dollar basis and in terms of the dilutive effect upon exercise, remains very much top of mind,” the analysis said. “The company’s provided rationale does little to combat these concerns given their proportionate magnitude.”

For the pay package to be approved by shareholders, a majority of shares voted must support it, excluding Musk’s roughly 13% stake and a much smaller stake owned by his brother.

Musk has come under scrutiny for his close relationship with members of the Tesla board. Multiple directors have deep personal and financial ties to the billionaire entrepreneur. Some shareholders have questioned the independence of the board members charged with overseeing Musk.

In the Tesla letter, the company outlined nine passages from the Glass Lewis report and offered a rebuttal to each of them. This included the proxy firm’s

concerns about Musk's time commitments. In addition to Tesla, he runs five other companies including social-media platform X; rocket and satellite company SpaceX; artificial-intelligence company, xAI; brain implant startup Neuralink; and his tunneling venture, The Boring Co.

"This concern simply ignores the facts," Tesla said. "Tesla created over \$735 billion of market value for stockholders from 2018 to 2023 because Elon helped Tesla achieve performance targets that were regarded by many as extremely difficult or impossible."

Tesla added: "Stockholders should care enormously about value creation...and not about whether Elon's perceived 'focus' was strong enough."

Write to Steven Russolillo at Steven.Russolillo@wsj.com

Videos

Buy Side from WSJ

Expert recommendations on products and services, independent from The Wall Street Journal newsroom.



SHOPPING HOLIDAYS

The 21 Best Deals to Shop Online Right Now

<https://x.com/AnnMLipton/status/1796230211463172121>



@annmlipton@esq.social @AnnMLipton · 41m

...

See here's the thing about Tesla's criticism of Glass Lewis's recommendation:
sec.gov/Archives/edgar...

1

2

11

832



@annmlipton@esq.social @AnnMLipton · 41m

...

I haven't seen GL's report - it's confidential, bc it charges people for that stuff, so that's understandable. But based on public reporting, I take it that: (1) GL recommended against a Texas move due to uncertainty, and (2) previously GL has been fine w/ Texas moves.

1

3

157



@annmlipton@esq.social @AnnMLipton · 41m

...

So Tesla accuses of GL of inconsistency. Which is formally correct! Which may prompt the question, why?

1

1

143



@annmlipton@esq.social @AnnMLipton · 41m

...

Well, one possibility is Texas has changed. AG Ken Paxton is a culture warrior and I have no doubt he'd do things like sue to revoke the charter of companies that, say, recognized the rights of gay employees (see comments to blog post lawprofessors.typepad.com/business_law/2...)

1

1

4

154



@annmlipton@esq.social @AnnMLipton · 41m

...

Additionally, Texas has new business courts but even assuming they ever find judges, the judges are subject to 2-yr terms - meaning they may be beholden to the political establishment.

1

4

144



@annmlipton@esq.social @AnnMLipton · 41m

...

But another possibility is the GL's recommendation didn't change bc of Texas, but because of Tesla. This is not a reincorporation - in legal vernacular - on a "clear day." Tesla is seeking it in the wake of several high profile losses -

1

1

5

223





@annmlipton@esq.social @AnnMLipton · 42m

...

including a loss to Musk personally that has nothing to do with Tesla (Twitter - which he admitted he bought bc he knew he'd lose the case).

So whatever formal reasons are being offered for reincorporation - and they are incredibly thin - they ring especially hollow



@annmlipton@esq.social @AnnMLipton · 42m

...

in light of the circumstances surrounding this move at this time. And that's why GL recommended against the move.



@annmlipton@esq.social @AnnMLipton · 42m

...

But if GL says so directly, it's accusing Tesla of filing a false proxy, and a spec comm who acted in bad faith. GL doesn't want to say that but I'm just a spectator so I will: That's the implication.



@annmlipton@esq.social @AnnMLipton · 42m

...

And this is what I was talking about in my earlier thread - how much of this can a Delaware court consider? We shall see.



@annmlipton@esq.social @AnnMLipton · May 15

Replying to @AnnMLipton

Still, if you have to note one thing, again: here's the proxy, compared to Musk's tweet before the Tormetta decision. Does it sound like ratifying the comp package will somehow spare Tesla the cost of a new package going forward? But that's the justification the board offers.

Potentially Avoids Other Costs. The Special Compensation Award is not ratified, then Tesla may not plan with Mr. Musk in order to motivate him to... a new plan would likely take substantial time... that led to the 2018 CEO Performance Award. A... Mr. Musk to agree to the terms and amount. Although... consciously did not negotiate (or renegotiate) with... from its interview with him that, for Mr. Musk to a... similar magnitude to the 2018 CEO Performance...) concluded that there is a risk that a new compensation dilution effect as the 2018 CEO Performance... (cash). It would likely result in a very large... inc... shareholders vote against me vs for me.

Elon Musk

I'd note that the Tesla board is great. The reason for no new compensation plan* is that we are still waiting for a decision in... are compensation case. The trial for that was held in 2022... has yet to be made.

compensation plan in quotes, because, from my standpoint... arily about ensuring the right amount of voting influence at

e 25%, it means I am influential, but can be overridden (if tw... inc... shareholders vote against me vs for me.

Subscribe

...arily about ensuring the right amount of voting influence at
> concluded that there is a risk that a new comp
milar dilution effect as the 2018 CEO Performance 25%, it means I am influential, but can be overridden if tw
cash). It would likely result in a very large, Inc shareholdes vote against me vs for me.
pense. For illustrative purposes, the Company
ittee that a new grant of 300 million fully vested, or lower, the for/against ratio to override me makes a take
hat Mr. Musk had before the *Tornetta* Opinion - is interests too easy.
ge in excess of \$25 billion, depending on certa
nalysis, any replacement compensation plan w
the 2018 CEO Performance Award to avoid a
hat is greater than the reversal of the 2018 chr
the possibility that
15 Jun 15/2024 - 1.8M Views

2 1 4 246



@annmlipton@esq.social @AnnMLipton · 9m

Okay, I have now seen the actual GL report. And it does mention Tesla-specific concerns, i.e., that it has frequently been a litigation target in Delaware. And it doesn't directly say this move is in response to losses- instead, it says that might be a "perception" of such

1 1 105



@annmlipton@esq.social

@AnnMLipton

resulting in more litigation. Which, again, I get to say - is GL's way of outsourcing the obvious implication - this proposal is a bad faith attempt to express Musk's ire, and escape fiduciary review via a court system perceived to be more favorable to Tesla's managers.

10:20 AM · May 30, 2024 · 45 Views

1 1 1



Post your reply

Reply



Alkali @alkali19 · 4m

Is there a recommendation on the compensation vote?

1 1 1

Seeking Ratification Now Potentially Avoids Other Costs. The Special Committee also noted that if the 2018 CEO Performance Award is not ratified, then Tesla may need to negotiate a replacement compensation plan with Mr. Musk in order to motivate him to devote his time and energy to Tesla. Negotiating a new plan would likely take substantial time in light of the criticisms in *Tornetta* of the process that led to the 2018 CEO Performance Award. And any new plan would, of course, require Mr. Musk to agree to the terms and amount. Although the Special Committee expressly and consciously did not negotiate (or renegotiate) with Mr. Musk about his compensation, it expects from its interview with him that, for Mr. Musk to agree to it, any new plan would need to be of a similar magnitude to the 2018 CEO Performance Award.

The Special Committee also concluded that there is a risk that a new compensation plan would thus have a substantially similar dilution effect as the 2018 CEO Performance Award (assuming it is equity-based rather than cash). It would likely result in a very large, incremental accounting charge for compensation expense. For illustrative purposes, the Company's accounting team informed the Special Committee that a new grant of 300 million fully vested options — functionally equivalent to what Mr. Musk had before the *Tornetta* Opinion — would potentially result in an accounting charge in excess of \$25 billion, depending on certain timing and valuation factors. According to their analysis, any replacement compensation plan would likely have to be less than 10% of the size of the 2018 CEO Performance Award to avoid a new accounting charge for compensation expense that is greater than the reversal of the 2018 charge. The Special Committee also considered the possibility that



Elon Musk  
@elonmusk

Subscribe

I should note that the Tesla board is great. The reason for no new “compensation plan” is that we are still waiting for a decision in my Delaware compensation case. The trial for that was held in 2022, but a verdict has yet to be made.

I put “compensation plan” in quotes, because, from my standpoint, this is primarily about ensuring the right amount of voting influence at Tesla.

If I have 25%, it means I am influential, but can be overridden if twice as many shareholders vote against me vs for me.

At 15% or lower, the for/against ratio to override me makes a takeover by dubious interests too easy.

I would be fine with a dual class voting structure to achieve this, but am told it is impossible to achieve post-IPO in Delaware.

5:16 PM · Jan 15, 2024 · 1.8M Views

**Bloomberg
Law**[Request a Demo](#)[Login](#)[Securities Law News](#)

May 29, 2024, 4:19 PM PDT

Tesla's Pay Package for Musk Opposed by Calpers CEO (Correct)

By Chester Dawson

Bloomberg Law News 2024-05-30T09:45:35283530984-04:00

Tesla's Pay Package for Musk Opposed by Calpers CEO (Correct)

By Chester Dawson2024-05-29T19:19:47263-04:00

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 a Calpers spokesperson said it also opposed when it was originally crafted in 2018. Shareholder adviser Glass Lewis & Co. similarly has 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.

(Corrects third paragraph reference to Calpers vote on pay package in 2018, which it opposed.)

--With assistance from **Dana Hull**.

To contact the reporter on this story:

Chester Dawson in Southfield at cdawson54@bloomberg.net

To contact the editors responsible for this story:

Richard Clough at rclough9@bloomberg.net

Ryan Beene, Lindsay Blakely

© 2024 Bloomberg L.P. All rights reserved. Used with permission.

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Bloomberg Law News 2024-05-30T11:55:51167692344-04:00

Elon Musk Agrees to Testify in SEC Probe of Twitter Acquisition

By Steve Stroth2024-05-30T11:07:27978-04:00

Elon Musk will testify in the US Securities and Exchange Commission's probe of the billionaire's 2022 acquisition of the social-media platform once known as Twitter.

Musk agreed to sit for a five-hour deposition at one of the SEC's offices, dropping his plan to appeal a court decision forcing him to comply with a government subpoena, according to a filing Thursday in federal court in San Francisco. The regulator is seeking information about Musk's purchases of Twitter stock and statements he made about his investments before his \$44 billion purchase of the social-media platform.

To contact the reporter on this story:

Jef Feeley in Wilmington, Delaware at jfeeley@bloomberg.net

To contact the editors responsible for this story:

Misyrlena Egkolfopoulou at megkolfopoul@bloomberg.net

Steve Stroth

© 2024 Bloomberg L.P. All rights reserved. Used with permission.

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

<https://www.wsj.com/politics/donald-trump-elon-musk-alliance-d1fe43e3>

Inside Donald Trump and Elon Musk's Growing Alliance

By *Emily Glazer* [Follow](#), *Robbie Whelan* [Follow](#), *Alex Leary* [Follow](#),
Cara Lombardo [Follow](#) and *Dana Mattioli* [Follow](#)

Updated May 29, 2024 12:06 pm ET

Donald Trump and Elon Musk have discussed a possible advisory role for the Tesla leader should the presumptive Republican nominee reclaim the White House, the latest sign that the once-frosty relationship between the two men has thawed.

The role hasn't been fully hammered out and might not happen, people familiar with the talks said, but the two men discussed ways to give Musk formal input and influence over policies related to border security and the economy, both issues on which Musk has grown more vocal.

Musk, along with the billionaire investor Nelson Peltz, has also briefed Trump on a plan they have developed to invest in a data-driven project to prevent voter fraud, according to some of the people. Peltz and Musk also told Trump of an influence campaign in elite circles that is already under way, in which Musk and his political allies host gatherings of powerful business leaders across the country to try to convince them not to support President Biden's re-election campaign.

As recently as two years ago, Trump and Musk were publicly trading insults. But in recent months, the two men are developing a friendly rapport and talk on the phone several times a month as the election nears, the people familiar with their talks said.

The pair have held discussions on immigration, technology and science, including the U.S. Space Force. Their views and interests have grown more aligned, the people said, with Musk calling Trump directly on his cellphone.

Trump has told Musk, one of the world's wealthiest people, he wants to find a way to get him more involved if he wins in November.

Musk—who has a long history of flouting convention in the business world—has signaled he isn't interested in simply writing a check to a super PAC, which can accept unlimited amounts of money from donors and is a popular way for the billionaire class to support candidates. Instead, he has elected to use his clout in elite business and technology circles to help defeat Biden by galvanizing the support of influential allies.



Investor Nelson Peltz and Elon Musk, seen in February, have briefed Donald Trump on a planned data-driven project to prevent voter fraud, people familiar with the talks say. PHOTO: BAUER-GRIFFIN/FILMMAGIC/GETTY IMAGES

Musk has told associates that he is motivated by anxieties over the direction of the country. Among other things, Musk has railed against what he calls the “woke mind virus,” a catchall for liberal policies including diversity, equity and inclusion programs that conservatives say create divisions.

Musk didn't respond to requests for comment.

The former president, for his part, is impressed with Musk's wealth and has embraced the rightward turn of the Tesla CEO's politics. Musk has said his politics are “fairly moderate” and donated smaller amounts to Democrats and Republicans in past years, according to Federal Election Commission filings. His politics publicly shifted in May 2022, when he tweeted he would vote Republican because Democrats had “become the party of division & hate, so I can no longer support them.”

Brian Hughes, a spokesman for the Trump campaign, said: “President Trump will be the only voice of what role an individual plays in his presidency.”

Palm Beach meetup

The discussion around the advisory role and voting project took place at a March gathering at Montsorrel, Peltz's sprawling oceanfront estate in Palm Beach, Fla., with a group of wealthy and powerful friends, some of the people familiar with the discussions said. The New York Times earlier reported the meeting had occurred, but details of the discussions haven't been previously disclosed.

As guests nibbled on a Sunday morning breakfast of eggs, bacon and fresh fruit served by Peltz's household staff, Peltz, Trump and Musk held forth on the November elections, criticizing Biden's stewardship of the country, the people said.

It was a family affair. Musk and his young son X, who often joins him at events, were part of a group that also included Trump and his 18-year-old son, Barron. Musk and Peltz know each other in part through Peltz's son Diesel, a tech entrepreneur who is friendly with Musk. Diesel Peltz was at the breakfast as well.

The potential administration advisory gig for Musk would likely be in the mold of the role previously held by Isaac Perlmutter, the former Marvel chairman and confidant to both Peltz and Trump, one of the people said.



President Donald Trump in 2017 shook hands with Isaac Perlmutter, then an adviser and confidant. PHOTO: BRENDAN SMIALOWSKI/AFP/GETTY IMAGES

During the Trump presidency, Perlmutter was positioned at the Department of Veterans Affairs in an advisory capacity, along with two other members of Trump's Mar-a-Lago compound in Florida: a Palm Beach doctor and an attorney. The three spoke to the agency's

staff and weighed in on a range of matters, including budgets, mental-health initiatives, software procurement and overhauling the VA's record-keeping systems.

Musk served on White House business advisory groups during Trump's term as president but resigned from them in 2017 after disagreeing with Trump's decision to pull the U.S. out of the Paris climate accord.

Trump made billionaire investor Carl Icahn, an old business acquaintance, a special adviser to the president on overhauling federal regulations in 2016. When he was named to the post, Icahn had already been helping Trump vet candidates for top posts at the Securities and Exchange Commission and Environmental Protection Agency.

The position wasn't an official government job, meaning Icahn didn't get paid but also didn't have to give up his business dealings.

Icahn resigned from the post less than a year later after drawing criticism for potential conflicts of interest with his investments. He has kept a distance from Trump and Washington since.

Musk and Peltz have told acquaintances they are working on a data-driven project to ensure votes are fairly counted, echoing Trump's accusations of widespread fraud in the 2020 election. Trump's own attorney general, Bill Barr, has rejected those claims about the 2020 election. Trump's campaign and its allies lost dozens of lawsuits challenging the results.

Musk and Peltz described the initiative to Trump in the March meeting, according to a person familiar with that discussion. More details about the antifraud effort couldn't be learned.



President Donald Trump greeted attendees at a White House meeting of business leaders in 2017. On the left is Elon Musk. PHOTO: PABLO MARTINEZ MONSIVAIS/ASSOCIATED PRESS

Musk's business interests

Recent talks between the two men have covered some of Musk's companies, including the X social-media platform; Tesla, the electric-vehicle maker; and rocket and satellite launcher SpaceX, people familiar with the discussions have said.

Tesla, the world's most-valuable automaker and Musk's only public company, has seen its share price fall and recently recorded its lowest profit in years. Musk and Trump have discussed the electric-vehicle industry and EV tax credits, according to people close to Trump.

Trump has maintained a tough posture against EVs on the campaign trail. He has criticized how the vehicles need recharging for longer trips and has called for tariffs on those made in Mexico, saying it hurts the U.S. auto industry.

Musk has publicly criticized EV subsidies, which Tesla has benefited from, and recently spoke out against tariffs on Chinese electric vehicles and other parts.

Musk has asked Trump to return to posting more actively on X, especially using the "Spaces" live audio feature, people close to Trump said. Trump dominated the platform when it was known as Twitter, boasting more than 88 million followers at one point.

But Trump, who is eager to protect his Truth Social platform that launched in 2022, has only posted on X once since being reinstated to the platform after Musk bought it. Truth Social is owned by the publicly traded Trump Media & Technology Group, which has a market value close to \$9 billion.

In conversations with people close to Trump, Musk has been noncommittal on an endorsement, people familiar with the discussions said. Publicly, Musk has made clear his displeasure with Biden but has stopped short of endorsing Trump.

Dinner parties

Musk plans to continue organizing for his anti-Biden cause among an elite group of business leaders whom he counts as friends, people familiar with the plans said.

In April, Musk co-hosted a secret dinner of around a dozen business leaders in Los Angeles. The guests included Peltz; venture capitalist Peter Thiel; former Treasury Secretary Steven Mnuchin; and media mogul Rupert Murdoch, chairman emeritus of News Corp, which owns The Wall Street Journal, according to people familiar with the matter. The gathering was earlier reported by the news outlet Puck.



David Sacks, seen in 2018, is co-hosting a coming fundraiser for Trump in San Francisco. PHOTO: ALEX FLYNN/BLOOMBERG NEWS

The group convened at entrepreneur and investor David Sacks's 11,000-square-foot modern farmhouse atop the Hollywood Hills. Musk and Sacks worked together years ago on PayPal.

The discussion at times centered on how attendees could give money to Trump outside of public view. In February, Trump's supporters launched a new super PAC called Right For America to help re-elect the former president. The first major donor to the group was Perlmutter, the former Marvel executive. Sacks is co-hosting a coming fundraiser for Trump in San Francisco.

Musk, Peltz and other Trump backers are planning to continue hosting more salon-style dinners and gatherings across the country targeting wealthy, powerful people in business, a person familiar with the matter said. The idea is more about emphasizing what Musk and Peltz see as Biden's shortcomings than trumpeting Trump himself, this person said.

—Alexa Corse contributed to this article.

Write to Emily Glazer at Emily.Glazer@wsj.com, Robbie Whelan at robbie.whelan@wsj.com, Alex Leary at alex.leary@wsj.com, Cara Lombardo at cara.lombardo@wsj.com and Dana

Exxon Investors Rebuff Bid for Disclosure on Plastics Market (1)

By Clara Hudson

- Shareholder bid focused on single use plastics markets
- Exxon faces additional friction with investors on climate

Bloomberg Law News 2024-05-30T09:46:20430026607-04:00

Exxon Investors Rebuff Bid for Disclosure on Plastics Market (1)

By Clara Hudson 2024-05-29T11:24:15000-04:00

- Shareholder bid focused on single use plastics markets
- Exxon faces additional friction with investors on climate

Exxon Mobil Corp. investors on Wednesday voted against a proposal asking the energy giant to take a closer look at its plans for plastics production amid calls to reduce plastic waste.

The proposal, submitted by United Church Funds, a religious investment group, asked the Houston-based company for a report on how a significant reduction in virgin plastic demand would impact its business, including data on its polymer production for single use plastic markets. The proposal received 21% of investor support.

The run-up to the shareholder meeting was unusually fraught because of a separate stand-off between Exxon and some investors over a climate-related proposal that was ultimately withdrawn. Exxon sued shareholder activists Arjuna Capital and Follow This earlier this year to remove their proposal, which had asked the company to speed up its greenhouse gas emissions reductions.

The Texas lawsuit sparked broader shareholder defection, for example from the California Public Employees' Retirement System, which voted against Exxon's board of directors and its CEO Darren Woods and encouraged other investors to do the same. Exxon's slate of board directors was approved at the meeting.

Wednesday's votes show investors believe "we are on the right track by overwhelmingly re-electing our directors and soundly defeating all four proposals that would have hampered our ability to create long-term value by providing the world with the energy and products it needs while investing billions to reduce carbon emissions," Exxon said in an email.

The oil giant's lawsuit against its shareholders is unusual because companies typically ask the US Securities and Exchange Commission to block proposals from going to a shareholder vote rather than heading straight for the courts. The Amsterdam-based Follow This is no longer a defendant in the case.

Meanwhile, the plastics proposal and another environment-related bid that did not pass, asking for a report on how energy transitions will impact workers, made it onto Exxon's ballot.

The plastics proposal said: "In response to the plastic pollution crisis and the necessity of reducing plastic production, countries and major packaging brands are beginning to drive reductions in plastic use. This will affect the plastic production supply chain."

The bid said Exxon's efforts to reduce plastic waste "fail to address the potential for regulatory restrictions or a significant disruption in demand for virgin plastic, which could result in stranded assets."

In its proxy statement, Exxon said "the proponent ignores the work we are doing to address the plastic waste challenge." The company also said single use plastic bans in certain locations don't "have a substantive impact on our business" because they're focused on items such as straws, cutlery, and takeaway containers.

The company said it's "expanding the types of plastics that can be recycled through our advanced recycling process and investing in the underlying waste management supply chain for sorting of waste plastics."

Pay Equity

Another proposal, brought by Broz Family Investments, asked Exxon to put together a report on both the quantitative median and adjusted pay gaps across race and gender, as well as to address risks to the company's reputation and recruitment. Adjusted gaps assess whether employees are paid the same for similar roles. The proposal received 20% of investor support.

"Exxon Mobil does not report quantitative unadjusted or adjusted pay gaps," the proposal said. "About 50 percent of the 100 largest US employers currently report adjusted gaps, and an increasing number of companies disclose unadjusted gaps to address the structural bias women and minorities face regarding job opportunity and pay."

"This proposal assumes that ExxonMobil has a problem where it does not," the company said in its proxy statement, adding that "the metrics proposed do not comprehend the variability in cultures, laws, and economies of the nearly 60 countries where we operate."

Investor Suit Continues

Exxon is moving forward with its shareholder lawsuit despite Arjuna and Follow This withdrawing their proposals. The company said it's continuing to pursue legal action because the investors could resubmit a substantially similar proposal in the future on their own or with other activists.

Arjuna said in court filings that the lawsuit isn't necessary because the proposal has been withdrawn, and both Arjuna and Follow This "have agreed not to resubmit the proposal or present it at any future Exxon shareholder meeting."

The oil giant in court filings cited a concern that investors can "hijack the shareholder proposal process to advance their social causes with serial filings each year at the expense of investors who focus on generating returns."

The oil giant said it has received 141 shareholder proposals since 2014 (an average of about 14 per year) compared to "the fewer than three proposals received annually by the average S&P 500 company that receives any proposals at all."

Exxon CEO Woods defended the lawsuit during Wednesday's meeting. "When we see a process that was designed to give investors access to directors, management, and fellow investors to share their views being abused by a coalition of activists masquerading as shareholders, we're obliged to speak up and take action," he said.

The lawsuit has caused concern in the investor activist community, some of which have warned that the suit could set a dangerous precedent for future climate proposals. Aside from CalPERS, New York City Comptroller Brad Lander and California Treasurer Fiona Ma are among those who had urged investors to vote against certain Exxon directors.

(Updated in paragraph five and paragraph 19 with comment from Exxon)

To contact the reporter on this story: Clara Hudson in Washington at chudson@bloombergindustry.com

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

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Tensions over climate change, activist investors spark controversy at Exxon shareholder meeting

 [courthousenews.com/tensions-over-climate-change-activist-investors-spark-controversy-at-exxon-shareholder-meeting](https://www.courthousenews.com/tensions-over-climate-change-activist-investors-spark-controversy-at-exxon-shareholder-meeting)

Kirk McDaniel

Two activist investor groups tried to get Exxon to further reduce emissions, prompting Exxon to sue its own shareholders. At a shareholder meeting on Wednesday, CEO Darren Woods cast the groups as "activists masquerading as shareholders."

(CN) — ExxonMobil investors resoundingly reelected the company's board of directors at an annual shareholder meeting on Wednesday amid growing concerns about the company's handling of activist shareholders.

The reelection of the 12-member board came as some shareholders cast protest votes against some or all of the nominees. Among those shareholders are the New York State Common Retirement Fund, Norway's sovereign wealth fund and the California Public Employees' Retirement System (CalPERS), the nation's largest private pension fund.

Those shareholders were protesting Exxon's lawsuit against two activist investors, U.S.-based investment firm Arjuna Capital and Dutch-based nonprofit Follow This.

Those investors sought to bring a proposal to accelerate the company's reduction of emissions. Exxon responded in January by suing them in federal court in Texas.

In its suit, the oil giant sought to obtain a declaration that it could exclude the proposal — and yet even after the two shareholder groups withdrew their proposal, Exxon has persisted with its litigation. The company is seeking legal fees and broadly challenging rules by the Securities and Exchange Commission that allowed the activist shareholders to bring their proposal in the first place.

In an interview on CNBC on Wednesday morning, CalPERS CEO Marcie Frost said the group planned on voting against all 12 board nominees over what she said was a failure to represent shareholders by allowing the lawsuit to proceed.

"If you limit the ownership rights and the discussion topics with a company, we see that as a fiduciary risk," Frost said.

While Arjuna and Follow This were not mentioned by name at the shareholder meeting, the controversy the two groups sparked was nonetheless on full display.

Four proposals were put to a vote on issues such as the production of virgin plastics, gender/racial pay data and workers who have been affected by facility closures due to the transition away from fossil fuels.

All sought to increase reporting from the company on such issues. Meanwhile, the fourth and final proposal would have forced the company to “revisit” executive pay incentives for reducing greenhouse gas emissions.

Exxon CEO Darren Woods called for shareholders to vote down the proposals. Along with the rest of the board, he argued the measures would hurt returns for investors.

That message won out, as all four proposals were voted down. None received more than 21% of the vote.

Before the votes were cast, Woods gave a brief statement regarding shareholder democracy at the company.

“We see a process that was designed to give investors access to directors, management and fellow investors to share their views being abused by a coalition of activists masquerading as shareholders,” Woods said. “We’re obliged to speak up and take action. For shareholder democracy to thrive, abuses of the process must be addressed.”

With the annual shareholder meeting behind it, Exxon has for now succeeded in warding off efforts to limit the company’s growth and greenhouse gas output. If the company continues its winning streak by prevailing in the federal court case, it may be able to block what it sees as nuisance proposals in the future.

Follow @KirkReportsNews
Categories / Business, Energy, Financial

Subscribe to Closing Arguments

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

Highlighting Exxon suit, investors urge firms to keep shareholder spats out of court

 [reuters.com/sustainability/highlighting-exxon-suit-investors-urge-firms-keep-shareholder-spats-out-court-2024-05-28](https://www.reuters.com/sustainability/highlighting-exxon-suit-investors-urge-firms-keep-shareholder-spats-out-court-2024-05-28)

Reuters

The logo of Exxon Mobil Corporation is shown on a monitor above the floor of the New York Stock Exchange in New York, December 30, 2015. REUTERS/Lucas Jackson/File Photo
[Purchase Licensing Rights](#) , opens new tab

AMSTERDAM, May 28 (Reuters) - A group of around 40 large European and American institutional investors on Tuesday urged companies to refrain from taking shareholders to court over disagreements relating to their proposals.

The group, which represents \$4.8 trillion in assets under management, highlighted the lawsuit filed by Exxon Mobil (XOM.N) , opens new tab against two activist groups, in which the oil company seeks to bar their climate resolution.

They said long-term investors would suffer if companies increasingly seek the judgment of a court for settling disagreements on shareholder proposals.

"We are concerned that these actions will deter the filing of proposals concerning the sustainability issues that are material to the performance of our equity and fixed income portfolios", the investors said.

"We want to protect the right of shareholders to use their vote to decide for themselves when a proposal, sustainability-related or otherwise, is in their best interests and that of their stakeholders."

Among the group are pension investors APG, PGGM and insurer NN Group (NN.AS) , opens new tab from the Netherlands, Nordic banks Nordea (NDAOG.UL) and Swedbank (SWEDa.ST) , opens new tab, and a range of other investors from across Europe and the U.S.

The group backed a similar call to companies made by the U.S. Council of Institutional Investors in February to let the Securities and Exchange Commission (SEC) be the arbiter in case of disagreements over shareholder resolutions.

Get weekly news and analysis on the U.S. elections and how it matters to the world with the newsletter On the Campaign Trail. [Sign up here.](#)

Reporting by Bart Meijer; Editing by Jan Harvey

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

Page Printed From:
https://www.law.com/nationallawjournal/2024/05/29/exxonmobil-argues-co-defendants-settlement-barred-claims-that-yielded-725m-benzene-verdict/?kw=ExxonMobil%20Argues%20Co-Defendant%27s%20Settlement%20Barred%20Claims%20That%20Yielded%20%24725M%20Benzene%20Verdict&utm_position=3&utm_source=email&utm_medium=enl&utm_campaign=morningupda



NOT FOR REPRINT
NEWS

ExxonMobil Argues Co-Defendant's Settlement Barred Claims That Yielded \$725M Benzene Verdict

The company asserted in a recent post-trial brief that the plaintiffs were not entitled to recover against ExxonMobil at all because they had already been compensated by another defendant for their injuries.

May 29, 2024 at 05:00 PM

Toxic Torts



Aleeza Furman
Litigation Reporter



The original version of this story was published on [The Legal Intelligencer](#)

What You Need to Know

- ExxonMobil is asking a Philadelphia judge to override a \$725.5 million benzene verdict.
- A jury had awarded the verdict to a man who claimed he developed acute myeloid leukemia as a result of his exposure to benzene-containing Mobil-brand gasoline.
- ExxonMobil argued that the plaintiff's claims were barred because he already received compensation for his injuries from a different defendant.

ExxonMobil is asking a Philadelphia judge to override a [\\$725.5 million](#) benzene verdict that the company alleged is “legally and constitutionally impermissible, factually unsupported and manifestly irrational.”

The company asserted in a recent post-trial brief that the plaintiffs were not entitled to recover against ExxonMobil at all because they had already been compensated by another defendant for their injuries.

“With that compensation in hand, plaintiffs are barred under the well-established one injury/one recovery rule from seeking further recovery from ExxonMobil (let alone a windfall recovery of \$725.5 million),” the defendant argued in its May 20 [filing](#).

Plaintiff Paul Gill had claimed he developed acute myeloid leukemia as a result of his exposure to benzene-containing Mobil-brand gasoline made and distributed by ExxonMobil. He contended that the company knew its products contained benzene and knew benzene was carcinogenic, but concealed its knowledge of the chemical’s health risks.

In a May 9 verdict, a Philadelphia jury awarded Gill \$725 million in compensatory noneconomic damages, plus \$500,000 to his wife for loss of consortium. The jury found ExxonMobil to be 100% liable for the plaintiffs’ harm.

Gill had initially named 14 different defendants in his suit, including the company that had supplied the Mobil gasoline he worked with: Root Oil Co. Inc. Prior to trial, Gill reached a settlement with Root Oil terminating his claims that Root Oil's products caused him injury.

But ExxonMobil—represented by Dickie, McCamey & Chilcote and Maron Marvel Bradley Anderson & Tardy—contended that Root Oil was not the only party released from liability through that settlement. The company argued that, because the resolved claims dealt with the same injuries and product central to the claims against ExxonMobil, the claims against ExxonMobil were also discharged.

ExxonMobil asserted that it could not be held liable for the plaintiff’s injuries and asked the trial judge, Judge Carmella Jacquinto of the Philadelphia Court of Common Pleas, to grant judgment notwithstanding the verdict.

The defendant also argued for judgment notwithstanding the verdict on the separate grounds that the plaintiffs failed to properly support their product defect and failure to warn claims. The company asserted that the plaintiffs “deployed a bait-and-switch tactic” by only offering testimony about the capacity of benzene—rather than gasoline—to cause injury.

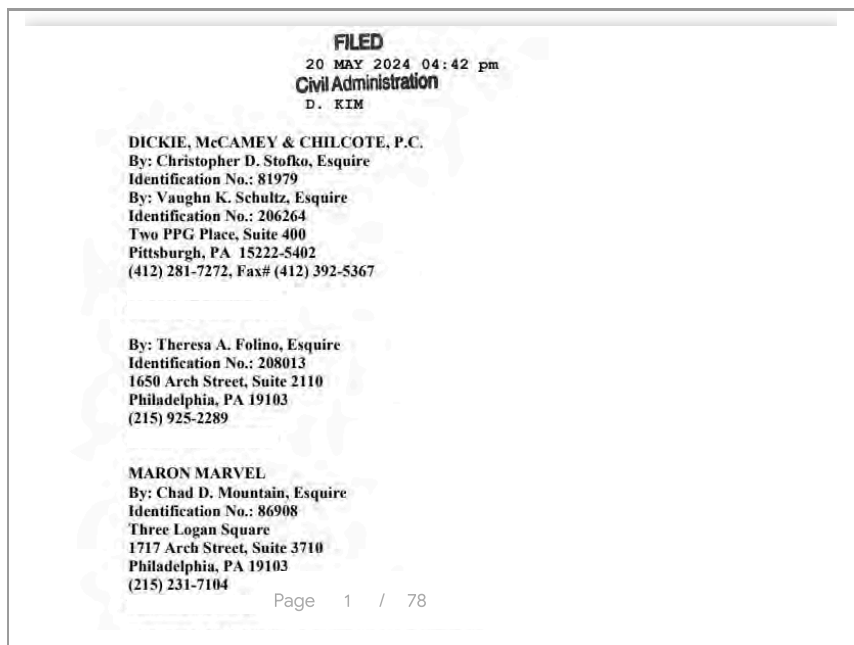
The company alternatively sought a new trial or reduction of the verdict. It called the verdict “unprecedented,” claiming that “a nationwide canvas of verdicts in factually similar cases did not reveal any awards even approaching \$725 million.”

In an emailed statement, an ExxonMobil spokesperson said, “We plan to exhaust all available appeals and are confident an appellate court will see the verdict for what it is.”

Gill was represented at trial by Locks Law Firm partner Andrew DuPont and Waters Kraus Paul & Siegel partners Patrick Wigle and Rajeev Mittal. Solo practitioner Howard Bashman and a group of Kline & Specter lawyers led by Charles Becker have stepped in to assist with the post-trial proceedings in the case, which is captioned *Gill v. ExxonMobil*.

Bashman and Becker said in a joint statement, “The Gills’ upcoming brief in opposition to ExxonMobil’s motion for post-trial relief will demonstrate that the attentive jury in this case rendered a verdict that was well-supported by the evidence and that Judge Jaquinto’s rulings that ExxonMobil says were wrong were appropriate in every respect.”

Read the Brief:



RELATED STORIES

Phila. Jury Hits ExxonMobil With \$725.5M Verdict Over Carcinogen in Gasoline



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



FEDERAL LEGAL NEWS

Courts & Litigation

Expert Columns

Latest Stories

Events

SPECIAL COVERAGE

Special Reports

Special Supplements

SURVEYS & RANKINGS

The NLJ 500

NATIONAL LAW JOURNAL

Current Issue

Contact

Sitemap

NOT FOR REPRINT

Meta Investors Reject Scrutinizing Risk of AI Misinformation (2)

By Clara Hudson

- Shareholder proposals focus on AI's potential social impact
- Warner Bros. Discovery and Netflix face similar bids

Bloomberg Law News 2024-05-30T09:46:41802313416-04:00

Meta Investors Reject Scrutinizing Risk of AI Misinformation (2)

By Clara Hudson 2024-05-29T13:49:37000-04:00

- Shareholder proposals focus on AI's potential social impact
- Warner Bros. Discovery and Netflix face similar bids

Meta Platforms Inc. investors on Wednesday voted against proposals urging the social media giant to examine how artificial intelligence-fueled misinformation or AI-driven advertising could harm its bottom line and its users.

One of the unsuccessful bids raised concerns about generative AI amplifying misinformation and disinformation on Meta's platforms, which include Facebook and Instagram. This poses "serious threats to the company, human rights, and democratic processes," the proposal from impact investment firm Arjuna Capital stated. The proposal received backing from 17% of the investor vote.

A separate proposal from Mercy Investment Services asked for a report looking into how Facebook's use of artificial intelligence for targeted advertising could harm users. The proposal received 14% support in the investor vote.

"Meta deploys artificial intelligence tools to enable the delivery of targeted advertisements," the bid said. "These algorithmic decision-making systems determine what individual users see, resulting in and exacerbating systemic discrimination and other human rights violations."

The proposals at Meta are part of a wider investor push urging companies to examine their AI policies and how the technology could potentially hurt employees, the public, and the financial performance of the businesses themselves.

Amazon, Apple and Microsoft faced AI proposals at their annual meetings over the past several months, none of which passed. The proposal at Apple secured 37.5% of investor support in February, which is a strong result for a first-time shareholder proposal.

Investors at Alphabet, Warner Bros. Discovery, and Netflix are next up to vote on AI proposals.

Natasha Lamb, a managing partner at Arjuna Capital, said after the Meta meeting that the vote result was “significant” considering that shareholder proposals can’t achieve a majority vote because of Mark Zuckerberg’s control of the company’s voting power.

“Generative AI presents immense risk and immense opportunity and today’s vote makes it clear that investors want to see Meta get it right,” she said.

Lydia Kuykendal, director of shareholder advocacy at Mercy Investment Services, said after the meeting: “Until we have equal votes for equal shares, we will continue to see the company fail to manage risks related to AI, human rights, and other fundamental issues.”

Companies including Meta are highlighting AI as part of their long-term business plans. “AI sits at the very heart of our work across Meta,” the company said in its proxy statement. The tech giant’s new Meta AI feature is a digital assistant that can answer user questions and generate images. Meta has even released AI-powered smart glasses with Ray-Ban.

Meta did not immediately respond to a request for comment.

The company faced eight other shareholder proposals that did not pass at the meeting, spanning topics from child safety to human rights.

Arjuna sought an annual report elaborating on AI’s potential to damage Meta’s operations and finances, as well as how the company’s use of the technology could harm the general public.

Meta said in its proxy statement that this was unnecessary because it has already “made significant investments in our safety and security efforts to combat misinformation and disinformation, including content policies and enforcement, AI tools, and partnerships.”

Meta also said it’s developed tools to help people understand when content has been created using its AI feature, and is working to help identify other AI-generated content on its apps.

In response to the proposal from Mercy Investment Services, Meta said: “We believe the best advertising experiences are personalized and are committed to mitigating risks related to targeted advertising.”

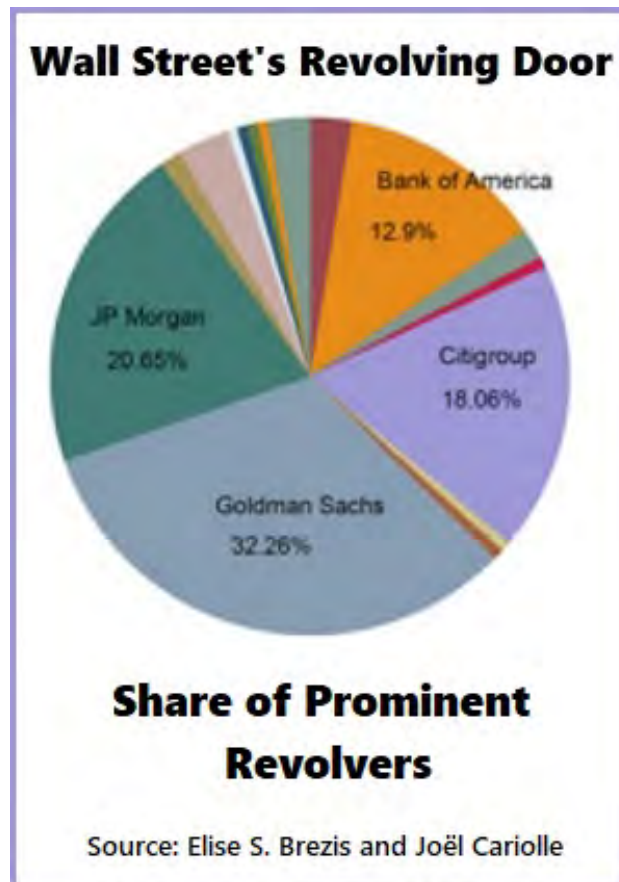
(Updated in paragraph ten with comment from Mercy Investment Services)

To contact the reporter on this story: Clara Hudson in Washington at chudson@bloombergindustry.com

To contact the editors responsible for this story: Amelia Gruber Cohn at agrubercohn@bloombergindustry.com; Andrea Vittorio at avittorio@bloombergindustry.com

Academic Study Provides Hard Numbers to the Sick, Revolving Door Culture at Goldman Sachs, JPMorgan and Citigroup

 wallstreetonparade.com/2024/05/academic-study-provides-hard-numbers-to-the-sick-revolving-door-culture-at-goldman-sachs-jpmorgan-and-citigroup



By Pam Martens and Russ Martens: May 30, 2024 ~

On January 18, 2019 the Cambridge University Press published a stunning research paper from the Journal of Institutional Economics. The paper provides the hard numbers to support the thesis that federal banking and securities regulators have arrived at a deep understanding and acceptance that the more connections they acquire while working in government and the more prominent their position becomes – the fatter their future paycheck will be once they make the leap to a megabank on Wall Street.

The authors call what the “public servants” are selling to their prospective Wall Street employers “bureaucratic capital.” The authors then provide the hard data in the chart below, showing that Goldman Sachs, JPMorgan, and Citigroup are light years ahead of their peers in monetizing public service to fatten their own bottom lines and create an influence network.

(The structure of that influence network, minus the child sex trafficking, is not all that dissimilar to what Jeffrey Epstein was operating with the assistance of the largest U.S. bank, JPMorgan Chase.)

The brilliant study is by Dr. Elise S. Brezis, Professor of Economics at Bar-Ilan University in Israel, who received her PhD in Economics from MIT; and Dr. Joël Cariolle, Research Officer at the Foundation for Studies and Research on International Development (FERDI) in France. Dr. Cariolle received his PhD from the University of Clermont Auvergne in France.

The authors write:

“Looking at the revolving door in the 20 biggest US diversified banks, we identified 304 revolvers, among which 155 are considered as prominent. These revolvers have undertaken 384 revolving door movements between public and private positions and vice versa, mostly undertaken between 1960 and 2015, corresponding to a total of 2,256 years of experience in public office.”

The chart above from the study shows that of the 155 public servants who had risen to “prominent” positions, Goldman Sachs captured 50 of those or 32 percent; JPMorgan had captured 20.65 percent; while Citigroup had captured 18 percent.

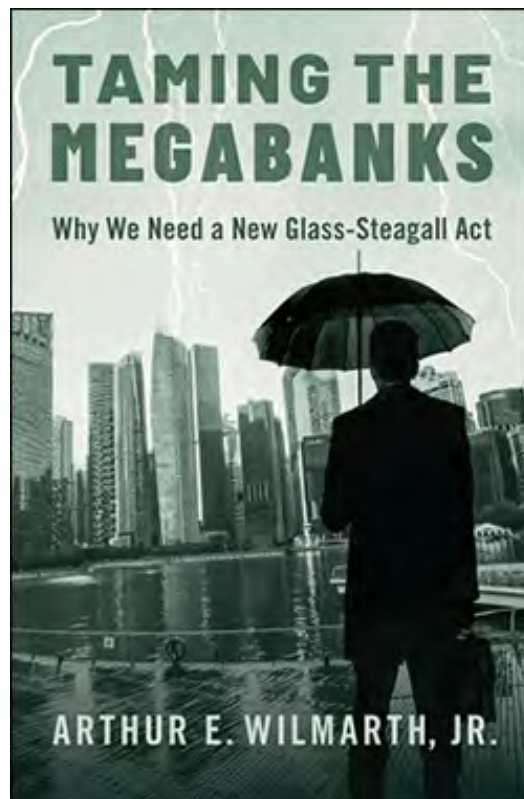
To understand how the revolving doors at the Wall Street megabanks swing in both directions, we recommend our January 2020 article: Goldman Sachs: The Vampire Squid’s Alum Control Two Fed Banks, the U.S. Treasury, the European Central Bank and the Bank of England.

To further understand how no amount of public outrage can stop the swinging of Wall Street’s revolving door, consider that the Cleveland Fed has just named a female exec, Beth Hammack, who spent the last three decades at Goldman Sachs, to be its new president, notwithstanding the fact that a former Vice Chairman of Goldman Sachs created the worst trading scandal in the Fed’s 111-year history just three years ago and has been in the headlines ever since. (See our report earlier this month: Goldman Sachs Shines Up Its Swamp Creature Reputation by Rehiring Robert Kaplan as Vice Chairman – the Guy Who Traded Like a Hedge Fund Kingpin While President of the Dallas Fed.)

And to appreciate just how enormously lucrative rising to a prominent position in government can turn out to be, consider how Robert Rubin went from Co-Chairman of Goldman Sachs to join President Bill Clinton’s administration in 1993, rising to the position of U.S. Treasury Secretary in January 1995. Four years later, after Rubin helped in *repealing* one of the most important pieces of banking legislation in history – the Glass Steagall Act of 1933 – Rubin went straight to join the primary beneficiary of that repeal, Citigroup. Over the next decade of sitting on Citigroup’s Board, Rubin amassed \$120 million in compensation.

When Rubin exited Citigroup in 2009, it was in the midst of receiving the largest bailout in U.S. banking history; its stock price had collapsed, eventually trading at 99 cents in March of 2009.

There are numerous eyewitness accounts to support the thesis of the Brezis and Cariolle research paper. When James Kidney, a 25-year veteran trial attorney at the Securities and Exchange Commission retired in 2014, he set off pandemonium inside the SEC when the speech he delivered at his retirement party went viral. Kidney blamed the demoralization at the agency on its revolving door to Wall Street. The best SEC lawyers, according to Kidney, “see no place to go in the agency and eventually decide they are just going to get their own ticket to a law firm or corporate job punched.”



What every engaged American should read after digesting the Brezis and Cariolle research paper, is the seminal book on the history of the making of these megabanks on Wall Street. That book is Law Professor Arthur Wilmarth Jr.'s *Taming the Megabanks: Why We Need a New Glass-Steagall Act*. Wilmarth offers the following (and much more) on the revolving door and its attendant evils at the megabanks:

“The revolving door between Washington and Wall Street, in combination with extensive social connections between regulators and industry leaders, promoted a form of ‘cultural’ or ‘cognitive’ capture, in which regulators deferred to the views of industry leaders regarding the best ways to draft, interpret, and implement financial regulations.”

That's been very good for minting billionaires like Sandy Weill at Citigroup and Jamie Dimon at JPMorgan Chase. For the American people – not so much.

The Revolving Door in the Top 20 U.S. Diversified Banks

Banks, ranked by revenue	Proxy 1	Proxy 2				Proxy 3	Proxy 4
	Revolvers	Total movements	Public-to-bank	Bank-to-public	Two-sided	Prominent revolvers	years in public offices
JP Morgan	62	82	50	27	5	32	436
Bank of America	29	36	22	12	2	20	227
Citigroup	55	71	41	25	5	28	401
Wells Fargo	12	12	10	2	0	4	87
Goldman Sachs	81	102	50	45	7	50	698
Morgan Stanley	15	18	9	8	1	5	75
American Express	14	15	9	5	0	4	75
Capitale 1 Financial	8	13	7	4	2	1	48
US Bancorp	1	1	0	1	0	1	3
Bank of NY Mellon	6	7	4	3	0	3	35
PNC Fin. Services	7	8	5	3	0	1	53
State Street Corp	2	2	1	1	0	0	3
BB&T Corp	1	2	1	1	0	0	7
Ally Financial	0	0	0	0	0	0	0
Discover Fin. Services	2	2	1	1	0	1	29
Suntrust Bank	4	6	4	2	0	1	26
Fifth Third Bancorp	1	1	1	0	0	1	26
Regions Financial	2	2	2	0	0	1	18
M&T Bank	2	4	2	2	0	2	9
Northern trust	0	0	0	0	0	0	0
Total	304	384	219	142	22	155	2256

Source: Elise S. Brezis and Joël Cariolle

Mike Lynch Downplays 'Disaster' Email at His US Fraud Trial (1)

By Rachel Graf

- Jury shown messages about startup's troubles before sale to HP
- Lynch describes CFO's dire concerns as typical hand-wringing

Bloomberg Law News 2024-05-30T11:24:55729151151-04:00

Mike Lynch Downplays 'Disaster' Email at His US Fraud Trial (1)

By Rachel Graf2024-05-30T03:30:00000-04:00

- Jury shown messages about startup's troubles before sale to HP
- Lynch describes CFO's dire concerns as typical hand-wringing

UK tech tycoon **Mike Lynch** downplayed the concerns of the finance chief at his software startup as he sought to defend himself against criminal charges that he duped Hewlett Packard Co. into buying the company for \$11 billion 13 years ago.

On Wednesday in San Francisco federal court, Lynch was shown messages from prior to the sale between him and **Sushovan Hussain**, the former chief financial officer at Autonomy Corp. who was convicted of fraud in 2018 and sentenced to five years in prison. Hussain raised various issues about the business with Lynch in the emails from 2009 to 2011, including that Europe was a "disaster" during the first quarter of 2009.



Mike Lynch

Photographer: Loren Elliott/Bloomberg

Lynch dismissed the comments as typical hand-wringing from the finance chief.

"As you'll see from Mr. Hussain, he tends to live quarters much like a coach of the football team so you tend to get quite lively language from him," Lynch testified.

Lynch lost a London civil trial in 2022 over the ill-fated acquisition of Autonomy and HP is seeking \$4 billion in damages, though the UK judge has said he'll likely award "substantially less." Now, Lynch is fighting a criminal case in the US that carries a maximum sentence of 25 years in prison for the most serious charge.

The jury spent the first nine weeks of the trial watching the government present evidence through dozens of witnesses and various documents, emails and recordings. Starting last week, Lynch took the stand in his own defense — rare in white-collar fraud trials. He has claimed ignorance of some of the wrongdoing attributed to him and denied other allegations.

Read More: Mike Lynch Rejects Blame for Merger Gone Bad at US Trial

Lynch has testified that Autonomy was "highly profitable" ahead of the HP deal. He said Wednesday that the third quarter of 2009, around when Hussain again voiced concerns about Europe, turned out to be a "record quarter."

During cross examination, Lynch was confronted with an email from Hussain in December 2010 telling him, "as I guessed, revenue fell away completely." Lynch responded that, rather than expressing concern about the business, Hussain was complaining that he couldn't trust his sales managers' predictions.

Prosecutors also displayed emails from over a decade ago alerting Lynch that deals with Eli Lilly & Co. and the US Department of the Interior weren't moving forward.

Lynch testified that sometimes deals ultimately close even after companies initially say no.

The trial is now in its final stretch, with closing arguments and jury deliberations expected next week.

The case is US v. Lynch, 18-cr-00577, US District Court, Northern District of California (San Francisco).

(Updates with Lynch testimony)

To contact the reporter on this story:

Rachel Graf in San Francisco at rgraf27@bloomberg.net

To contact the editors responsible for this story:

Misyrlena Egkolfopoulou at megkolfopoul@bloomberg.net

Peter Blumberg, Angela Moon

© 2024 Bloomberg L.P. All rights reserved. Used with permission.

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Page Printed From:

https://www.law.com/therecorder/2024/05/29/autonomy-ceo-denies-misleading-hp-says-its-own-blunders-made-11b-buyout-a-flop/?kw=Autonomy%20CEO%20Denies%20Misleading%20HP%2C%20Says%20Its%20Own%20Blunders%20Made%20%2411B%20Buyout%20a%20Flop&utm_position=4&utm_source=email&utm_medium=



NOT FOR REPRINT

NEWS

Autonomy CEO Denies Misleading HP, Says Its Own Blunders Made \$11B Buyout a Flop

After HP fired CEO Leo Apotheker, there "was total chaos and paralysis for weeks," former Autonomy CEO Michael Lynch testified Tuesday. "There was no transition plan, no handing over of the Autonomy plan. It was back to square one."

May 29, 2024 at 12:26 PM

White Collar Crime



Maria Dinzeo



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

Former Autonomy CEO Michael Lynch, standing trial in San Francisco on charges he used accounting trickery to dupe Hewlett-Packard into buying his company for \$11 billion in 2011, testified Tuesday that he actually would have preferred to keep it independent.

Prosecutors say the British tech tycoon orchestrated what they call the biggest fraud in Silicon Valley history through a range of tactics, including padding Autonomy revenues and issuing false and misleading annual reports.

But on Tuesday, the 58-year-old Lynch told the jury that he launched the sale process that led to the deal with HP because the threat loomed that a hostile bidder would emerge for his Cambridge, England-based company.

Lynch, who in his early 2000s heyday drew comparisons to Bill Gates, said that under U.K. law it would be nearly impossible for his company to turn away a lucrative, hostile offer.

The company was an attractive takeover target at the time because of tech-industry excitement over its signature software—a search engine and data management platform called IDOL that was capable of extracting meaning from vast amounts of unstructured data.

"I didn't want to sell Autonomy," said Lynch, who co-founded the business in 1996. "We still had much of our story to go. I was completely convinced that unstructured information would take over.

"And I was also convinced that the kind of small language model that IDOL was would eventually become large language models, like what we see with the GPTs of the world. I didn't need the money but wanted to see this through. I had no choice."

In a meeting with legendary tech investment banker Frank Quattrone, Lynch agreed to put Autonomy on the market, and he soon met with potentially interested parties—including Leo Apotheker, HP's CEO at the time, and Mark Hurd, Oracle's CEO at the time.

Lynch testified that he never intended to defraud HP. He said that he hadn't known that, a short time before agreeing to buy Autonomy, an internal HP board presentation had shown forecasts valuing Autonomy at \$17 billion, with the potential to be worth much more once the two firms combined.

"I would have been shocked if I'd seen that," Lynch said. The market valued the company at \$6.9 billion at the time, a valuation even Lynch thought was aggressive.

"If I had known that, I would have a lot of questions. You're kind of setting things up for failure. Everything has to work perfectly to get that kind of synergy," Lynch said.

But prosecutors say Lynch was the driving force behind Autonomy's over-valuation. He and his vice president of finance, Stephen Chamberlain, are each charged with 14 counts of wire fraud and one count of conspiracy to defraud HP. (Read [earlier coverage of the trial here](#).)

Lynch is separately charged with an additional count of securities fraud for signing off on a news release on the merger that the prosecutors say contained representations about Autonomy's financial performance that Lynch knew were false.

The trial has thrown the spotlight back onto what's widely viewed as one of the most disastrous mergers in tech history, Within one year of closing, HP had written off \$8.8 billion of Autonomy's value.

Prosecutors say Autonomy used a range of accounting tricks to make Autonomy appear more successful than it was. For instance, they say it mischaracterized low-end hardware sales that included little to no software as IDOL sales.

They also allege that Autonomy misrepresented those transactions as license sales, and sold software to resellers at a discount and then recorded that as a sale even though no customer had yet bought it.

Lynch projected confidence on the stand, calmly disputing [earlier testimony from one of his former top salesmen](#), Harald Collet, who had said Lynch gave him "talking points" on how to lie to investors.

He said Collet appeared to have been confused about certain terms, noting that under International Financial Reporting Standards, principles used in the UK, a "royalty" is akin to a license. He also said he barely had any contact with Collet.

In fact, Lynch said he delegated much of the minutiae of running the company to his underlings, including Chief Financial Officer Sushovan Hussain, whom a jury [found guilty of wire fraud](#) in 2018.

Lynch, whose direct testimony spanned two days, testified last week that there were a variety of things he just wasn’t “good at,” like sales negotiations or accounting.

“You know, there are 24 hours in a day, and you can only be in one place at a time, so everything is about working out what you can delegate and what you can get done by other people,” Lynch said.

“You know, some things you’re just not good at. I can write pretty good code even now, but I can’t sell for toffy. So I got someone who is good at selling.”

He said he relied on General Counsel Andrew Kanter “for everything else” that kept the company running, “making sure the rent got paid, all those things that a chief operating officer does,” Lynch said. “To me “[it was] a little bit like the light switch. You just want all that stuff to work, don’t really need to know too much about it.”

Lynch said he played no part in the so-called reseller deals, and had no idea that Stouffer Egan, the CEO of Autonomy’s U.S. division, had improperly backdated contracts with several resellers to allow Autonomy to prematurely recognize revenue.

As a result, Lynch said, it came as a shock when Brent Hogenson, the company’s U.S.-based CFO, sent him an email in June 2010 raising some accounting concerns.

Hogenson said that, while reviewing Autonomy’s finances across its business units in the U.S., he had become “concerned that Autonomy may have engaged in multiple material transactions with resellers of our software where the available information suggests that we may have misstated revenue and income within our reported financial statements in 2008, 09 and Q1 2010.”

Lynch said he consulted with Kanter on how to respon and contacted Autonomy’s outside auditors at Deloitte. In addition, he called Hogenson. “The first question I asked was, ‘Are you happy talking to me?’ I asked if he was also happy for Andy to be involved and he said he was. I asked him if there was anyone he didn’t want to talk to and he said Mr. Hussain and Mr. Egan,” Lynch said.

Lynch said that, although he thought Hogenson “got the wrong end of the stick,” he nonetheless sent him all of the information Autonomy’s audit committee had on the transactions that Hogenson had questioned.

Lynch said he was surprised when Hogenson later emailed Deloitte directly.

“I thought we had given him great information, so I was very surprised,” Lynch said. Hogenson’s inquiry led to an investigation by Deloitte, which ultimately produced a report that cleared Autonomy of wrongdoing. Lynch said Hogenson’s subsequent firing had nothing to do with his whistleblower claims.

Lynch said that by 2011, he had begun to “step back from the business a bit,” having read a quote along the lines of “no man ever regrets that he spent much time with his children.” So Lynch said he started “doing more family things” with his two daughters, as well as serving on the BBC’s board of directors, and as a scientific adviser to the U.K.’s prime minister.

He said he also was thinking more strategically about the future of his company. While he said Autonomy “was trying not to get acquired,” Lynch also said he was open to selling the company if HP was willing to pay “a knockout price.”

But he said HP completely botched the deal announcement, calling it “a complete mess.”

Somehow, the news was leaked and HP’s stock cratered,” Lynch said. “It was a very peculiar day. The HP board basically panicked and decided to fire Leo ultimately.”

He said that made him deeply worried, because the success of the acquisition hinged on Apotheker’s “transformational plan” for HP to become a big player in the software business.

“What happened after Leo was fired was total chaos and paralysis for weeks,” Lynch said. “There was no transition plan, no handing over of the Autonomy plan. It was back to square one.”

China Weighs Record Fine for PwC Over Evergrande Audit Work (1)

By Bloomberg News

- PwC may need to suspend offices as part of penalties
- China authorities have vowed to crack down on financial crime

Bloomberg Law News 2024-05-30T11:28:29259884713-04:00

China Weighs Record Fine for PwC Over Evergrande Audit Work (1)

By Bloomberg News2024-05-30T03:12:15821-04:00

- PwC may need to suspend offices as part of penalties
- China authorities have vowed to crack down on financial crime

China is poised to impose a record fine on PricewaterhouseCoopers LLP and suspend some of the global auditor's local operations over its role in one of the nation's biggest alleged financial fraud cases, according to people familiar with the matter.

The Ministry of Finance may announce the penalties on PwC as soon as this week over its auditing work for China Evergrande Group, said the people, asking not to be identified discussing a private matter. PwC faces a fine of at least 1 billion yuan (\$138 million), the people said. That would exceed the previous record fine for an accounting firm, the 212 million yuan handed out to Deloitte Touche Tohmatsu Ltd. in 2023.

Part of the penalties could also include a halt of operations at some of PwC's mainland offices, the people said, adding the decision isn't final and the specifics could be subject to change.

The MoF and PwC didn't immediately respond to Bloomberg requests for comments.

PwC has been under the spotlight after China launched one of the biggest investigations of financial fraud in history involving developer Evergrande. Authorities earlier this year levied a 4.18 billion yuan fine against the once high-flying real estate firm and said the company's main unit, Hengda, overstated its revenue by 564 billion yuan in the two years through 2020.

The penalty will damage PwC's reputation and "adversely affect the public confidence in accounting," said **Pingyang Gao**, a professor in accounting and law from HKU Business School. "I wouldn't be surprised if the share of the auditing market by those global franchise in China would shrink."

PwC already lost a handful of Chinese clients in May alone, adding to a list of more than a dozen firms it has stopped auditing in the country in the last two years. China Taiping Insurance Holdings Co., China Merchants Bank Co. and People's Insurance Company (Group) of China Ltd. were among them.

The penalties come as President Xi Jinping has increased focus on tackling financial risks and crime to stabilize the world's second largest economy. At a Politburo meeting on Monday, Xi instructed the financial regulators and local governments to implement new rules and make sure financial oversight has "teeth."

PricewaterhouseCoopers Zhong Tian LLP, a Shanghai-registered firm that is part of PwC's global network, was Hengda's auditor during the period in question. The firm served as Evergrande's auditor for more than a decade until it resigned in January 2023 due to what the developer said were audit-related disagreements.

Among the Big Four accounting firms, PwC was one of the most commonly used by Chinese real estate firms listed in Hong Kong, according to data compiled by Bloomberg. It audited the books of some of the nation's largest developers, including Country Garden Holdings Co. and Sunac China Holdings Ltd., before they also defaulted on their debt.

PwC's mainland Chinese arm, with more than 1,600 certified accountants, reported revenue of 7.9 billion yuan (\$1.1 billion) in 2022, making it the top earner among more than 9,000 local rivals, according to official data. Still, that's a fraction of its global revenue of \$50.3 billion during the year.

PwC has run into trouble in other jurisdictions. In Hong Kong, the city's Financial Reporting Council said in 2022 that it was looking into Evergrande's financial statements for 2020 and expanding an investigation of an audit carried out by PwC.

The company earlier pledged to boost governance controls in Australia over questions of a serious conflict of interest in leaking government tax plans to its clients. Its UK network was also fined £5.6 million for failures in auditing Babcock International Group Plc.

(Adds comment in sixth paragraph.)

To contact Bloomberg News staff for this story:

John Liu in Beijing at jliu42@bloomberg.net

To contact the editors responsible for this story:

Jonas Bergman at jbergman@bloomberg.net

Ozy Media CEO Was Victim of Co-Founder's Betrayal, Defense Says

By Matthew Bultman

Documents

 [Docket](#)

-
- Carlos Watson on trial for conspiracy charges in New York
 - Prosecutors argue case is about lies to get rich, famous

Bloomberg Law News 2024-05-30T11:25:20958334248-04:00

Ozy Media CEO Was Victim of Co-Founder's Betrayal, Defense Says

By Matthew Bultman 2024-05-29T16:25:07000-04:00

- Carlos Watson on trial for conspiracy charges in New York
- Prosecutors argue case is about lies to get rich, famous

A lawyer for downfallen Ozy Media Inc. CEO Carlos Watson previewed his defense in a conspiracy case brought by federal prosecutors in New York, telling jurors Watson was betrayed by the "crooked" co-founder of the media startup.

Watson's trial got underway Wednesday in the US District Court for the Eastern District of New York, where he is accused of conspiring to defraud investors out of tens of millions of dollars. Ozy Media is also facing conspiracy charges.

During opening statements, Watson's lawyer, Ronald Sullivan, pointed the finger at Ozy's former chief operating officer, Samir Rao, who has already pleaded guilty to federal charges. He said Watson was in the dark about Rao's conduct.

"This is a case about a crooked co-founder named Samir Rao who lied, undermined, and betrayed Carlos Watson," Sullivan, a professor at Harvard Law School, said.

Watson was arrested in February 2023 and charged with conspiracy to commit securities fraud and wire fraud. He's also charged with aggravated identity theft.

Prosecutors allege Watson was calling the shots for a "secret inner circle" at Ozy Media that tried to bring in more money by deceiving investors and lenders. There was "one brazen lie on top of another," including allegedly forging contracts and impersonating outside executives, Assistant US Attorney Dylan Stern said.

Ozy's former chief of staff, Suzee Han, has also pleaded guilty.

"This is a case about lies," Stern said. "Lies to get rich. Lies to get famous."

'Entrepreneurial Bug'

Ozy was once a high-flying startup, billing itself as a "modern media company." It was sent into a tailspin after then-New York Times columnist Ben Smith reported that Rao impersonated a YouTube executive during a February 2021 call with Goldman Sachs Group Inc.

Watson said Rao suffered a mental health crisis, but prosecutors argue Watson was in the room when the call occurred and was texting Rao directions on what to say.

Shannon Frison, an attorney for Ozy, portrayed Rao as being in over his head as the company ballooned to almost \$325 million in revenue by 2020, up from about \$8 million in 2016. That led to mistakes by Rao "that the government now calls a conspiracy," Frison said.

Sullivan said Watson came from humble beginnings, then went on to earn degrees at Harvard and later Stanford Law School before catching the "entrepreneurial bug." Watson and his family put \$20 million of their own money into Ozy Media, Sullivan said.

Sullivan argued Rao, who will testify at trial, was the "inside man" at Ozy Media, handling the company's accounting, while Watson was its public face. Rao cut a "sweetheart deal" with prosecutors and is lying about Watson to save himself, Sullivan said.

"Carlos Watson did not make misrepresentations to investors," Sullivan said. "He represented what he thought in good faith their revenue was."

The trial is expected to last several weeks.

The case is USA v. Watson , E.D.N.Y., No. 23-cr-00082, opening arguments held 5/29/24 .

To contact the reporter on this story: Matthew Bultman in New York at mbultman@bloombergindustry.com

To contact the editor responsible for this story: Michael Smallberg at msmallberg@bloombergindustry.com

Ozy Media founders who impersonated YouTube exec lied about finances to scam investors, feds say as trial opens

 [courthousenews.com/ozy-media-founders-who-impersonated-youtube-exec-lied-about-finances-to-scam-investors-feds-say-as-trial-opens](https://www.courthousenews.com/ozy-media-founders-who-impersonated-youtube-exec-lied-about-finances-to-scam-investors-feds-say-as-trial-opens)

Government attorneys focused on a 2021 incident in which co-founder Samir Rao impersonated a YouTube executive to try and dupe Goldman Sachs executives into investing in Ozy Media.

Nika Schoonover / May 29, 2024

MANHATTAN (CN) — Ozy Media founder Carlos Watson spearheaded a scheme to scam investors out of tens of millions of dollars and conspired with his co-founder to impersonate leaders of other media groups, prosecutors said during opening arguments Wednesday in Brooklyn federal court.

Prosecutors brought a criminal indictment against Watson and Ozy Media last year under accusations the company lied to investors about finances, business relationships and fundraising. Watson and the defunct media company face charges for conspiracies to commit wire fraud and security fraud, as well as aggravated identity theft.

“This is a case about lies. Lies to get rich, lies to get famous,” Assistant U.S. Attorney Dylan Stern said Wednesday.

Roughly 25 observers, including members of Watson’s family, filled the relatively small courtroom in downtown Brooklyn. Several FBI agents involved in the case sat on the other side of the gallery, and legal interns and public observers filled the remaining seats.

Watson, a Harvard graduate who earned a law degree from Stanford University, says he started Ozy to build a “new” version of media that created innovative multimedia content. From the media company’s inception in 2013 to its closure nearly a decade later, the company created television shows, podcasts and newsletters. Between 2016 and 2018, it also hosted an annual event in Central Park, Ozy Fest, which featured A-list musicians, comedians and public figures. Joe Biden, Ru Paul and Malcolm Gladwell attended in 2017; Hillary Clinton and Common headlined the following year.

Samir Rao, Ozy’s former chief operating officer, and Suzee Han, onetime chief of staff, are cooperating with the government after separately pleading guilty to charges last year. The pair were also named alongside Watson in a separate lawsuit filed by the U.S. Securities and Exchange Commission.

At the center of the government's case is a conference call from 2021 in which Rao snuck onto a conference call with Goldman Sachs by posing as an executive at YouTube. In the meeting, which was first reported by The New York Times, Rao used a voice alteration service during the call to dupe Goldman employees.

Prosecutors say Watson devised that plan along with Rao in order to manipulate Goldman executives into investing in Ozy Media. When Goldman executives asked to learn more about Ozy's revenue stream, prosecutors say Watson made up a story that YouTube was interested in buying the rights to Ozy's "The Carlos Watson Show."

To further convince them of this supposed deal with YouTube, Watson worked with Rao to impersonate the YouTube executive to secure the Goldman investment. On top of altering his voice, Rao created a fake email using the executive's name. He was being directed by Watson, who was in the room at the time of the call, according to prosecutors.

"Watson personally stood to make millions of dollars from the deal," Stern said. "All the while impersonating a man who had no idea his identity had been stolen."

The government also says the executives, led by Watson, misrepresented Ozy's financial results and funding to investors and forged contracts to try to get a bank loan for a second season of an Ozy television show.

Watson claims he was simply the victim of Rao's grave betrayal and had no knowledge of any forged contracts or impersonations until it was too late.

"This case is about lies. But it's not the lies of Ozy Media or Carlos Watson," Shannon Frison, an attorney for Ozy Media, said Wednesday. "They are the lies of Samir Rao. There is no 'they' in the conduct that Mr. Rao took."

Ronald Sullivan, one of Watson's attorneys, shared a similar sentiment.

"This is a case about a crooked co-founder named Samir Rao who lied, who undermined and who betrayed Carlos Watson," Sullivan said. "It really is a simple case."

According to Sullivan, Rao was entirely in charge of the financial side of Ozy Media operations while Watson mainly handled content management. As such, Sullivan argued that Watson had no knowledge of lies to investors about the state of Ozy Media's finances and said Rao was in a unique position to add false numbers into the company's books.

Decked in a navy blue suit and a dark green tie, Watson perked up during Sullivan's opening statements and nodded along as he spoke.

Sullivan added that Rao had admitted to his culpability in the YouTube executive impersonation incident, pointing to a letter he wrote to his attorney after it happened.

"In that letter, he said it was an absurd, stupid thing to do," Sullivan said.

Instead, Sullivan said during openings, Watson was shocked when he entered the room and noticed Rao using a voice alteration software.

"He comes into this conversation and it's a live train wreck going on," Sullivan said.

Apart from signaling to Rao to get off the call, Sullivan said there was nothing Watson could do.

Rebuffing the government's portrayal of Ozy Media as a company that failed to meet its financial goals and repeatedly covered up its finances to make up the difference, Watson maintains it was a passion project that started with his family.

"Ozy was about family. As a company, it was literally created in Ms. Rose Watson's kitchen, Carlos Watson's mother," Frison said.

She added that, over the years, Watson's family invested about \$20 million in the media company. His family has also been a consistent presence at various court proceedings as trial approached and sat in the front rows during opening arguments.

In the last hour of the day, Rao took the stand and said he conspired with Watson and Han to lie to possible investors from 2018 to 2021.

"Suzee, Carlos and I lied to investors, a number of them, and provided them false information with the intent of getting them to invest money in our company," Rao said.

He said they lied about Ozy's revenue, profit earnings, audience data and various other details regarding business operations in order to secure investments.

"We lied about those things because we wanted to give those investors a sense that our company was doing better than it actually was, that it was a more valuable company than it actually was and, therefore, it was more deserving of their investment," Rao said.

Rao added that he worked directly with Watson to devise lies to tell investors.

"He was the person I committed these crimes with. He was the one who either suggested or in some cases approved the actions that we took and he's the person I did these crimes with, along with Suzee Han," Rao said.

Watson was arrested by federal agents last year at the Hotel NH Collection in Manhattan. He has pleaded not guilty to all charges against him. If convicted, he could face up to 37 years in prison.

Follow @NikaSchoonover



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

Chancery Sends Momentus De-SPAC Claims Toward Trial

By **Jeff Montgomery**

Law360 (May 29, 2024, 8:42 PM EDT) -- A Delaware vice chancellor refused to dismiss any counts Wednesday in a suit filed by investors in the special purpose acquisition company that took commercial space venture Momentus Inc. public in August 2021, with the court noting that the case will be judged on plaintiff friendly entire fairness standards.

In a teleconference bench ruling, Vice Chancellor Paul A. Fioravanti sent four breach of fiduciary duty counts and an unjust enrichment count into further discovery, after dismissing only a few of those named from some of the five counts overall.

The vice chancellor said he declined to "slice and dice" at this stage fiduciary duty claims, and noted that the complaint alleged that "unspecified" Kirkland & Ellis LLP partners held a stake in the \$1.2 billion deal lined up by special purpose acquisition company Stable Road Acquisition Corp. The connections were allegedly not fully disclosed.

Vice Chancellor Fioravanti pointed to a different, earlier SPAC complaint targeting Pattern Energy Group Inc.'s \$6.1 billion take public deal, settled for \$100 million in April, with \$26 million earmarked for attorney fees. Litigation in Pattern, the vice chancellor noted, included a finding that directors "must disclose fully and fairly all material facts within their control on request."

Vice Chancellor Morgan T. Zurn's Pattern rulings also denied dismissal claims against directors in Pattern for the "independent basis that they failed to correct allegedly false and misleading statements despite having the opportunity to do so."

Stockholders in the Momentus case, Vice Chancellor Fioravanti said, separately alleged facts supporting a rational inference that Stable Road officers named in the suit "harbored self-interest adverse to stockholder interests, and acted to advance the interests of parties from whom they could not act independently or acted in bad faith."

During dismissal arguments on Feb. 1, Kelly L. Tucker of Grant & Eisenhofer PA, counsel to the plaintiffs, said of the suit that those named "don't actually challenge plaintiffs' allegations of unfair process or unfair price, because they don't challenge plaintiffs' allegations that net cash per share wasn't disclosed and that it was material."

Vice Chancellor Fioravanti pointed to an "absence of minutes" showing that meetings occurred, despite an affirmative duty to document them.

"Given the lack of minutes and reasonable inference that the meetings never occurred," there was a reasonable inference that "each director knew the proxy was misleading," the vice chancellor said, with failure to correct the fault constituting bad faith.

Representatives for the parties didn't immediately respond to a Law360 request for comment.

Stable Road Acquisition Corp. stockholders Patricia Shirley and Christopher Dylan Spears filed the proposed class action in November 2022, naming as defendants the SPAC's sponsor, SRC-NI Holdings LLC, Momentus CEO and Chairman John C. Rood and a host of officers and directors of both Stable Road and Momentus.

Other suits followed, with the consolidated version alleging that Stable Road's directors, officers and controlling stockholders misled shareholders about the amount of due diligence the SPAC did on Momentus, withheld information about problems with Momentus' technology and future prospects, and failed to fully disclose financial interests behind the deal.

A U.S. Securities and Exchange Commission order and complaint found multiple misrepresentations or omitted facts in solicitation materials on the merger published and filed with the agency, according to the consolidated complaint.

Momentus was founded by Mikhail Kokorich, described in the complaint as "a Russian national with opaque ties to Russian military and intelligence." The U.S. Department of Defense was concerned enough to oppose the deal unless Kokorich bowed out, according to the suit.

Momentous, meanwhile, "had never successfully tested its technology in space as claimed," the SEC found, with Momentus' financial projections predicting "immediate, explosive revenue growth" found to be highly misleading.

Founding investors still made millions on the deal, while public SPAC investors and common stockholders saw their shares plummet from more than \$11 to 50-cents currently.

Shareholders Patricia Shirley and Christopher Dylan Spears are represented by Kelly L. Tucker and Jason M. Avellino of Grant & Eisenhofer PA, Lee Squitieri of Squitieri & Fearon LLP, Fletcher Moore and Justin Kuehn of Moore Kuehn PLLC and Michael Klausner.

Shareholder Alexander Lora is represented by Gregory V. Varallo, Glenn R. McGillivray, Jeroen van Kwawegen and Maria Nudelman of Bernstein Litowitz Berger & Grossmann LLP, and D. Seamus Kaskela and Adrienne Bell of Kaskela Law LLC.

Shareholder James Burk is represented by Stephen E. Jenkins, Richard D. Heins and Tiffany Geyer Lydon of Ashby & Geddes PA, and Donald J. Enright, Brian Stewart and Noah R. Gemma of Levi & Korsinsky LLP.

SRC-NI Holdings LLC and certain officers or directors are represented by Rudolf Koch, Matthew D. Perri and Andrew L. Milam of Richards Layton & Finger PA and Stefan Atkinson, Amanda Lamothe-Cadet, Austin C. Norris and Brad Masters of Kirkland & Ellis LLP.

The case is *In re Momentus Inc. Stockholders Litigation*, case number 2022-1023, in the Court of Chancery of the State of Delaware.

--Additional reporting by Rose Krebs, Leslie Pappas and Benjamin Horney. Editing by Alex Hubbard.



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

Chancery Pins Down Musk, Tesla On Pay Bid, Del. Jurisdiction

By **Jeff Montgomery**

Law360 (May 29, 2024, 4:55 PM EDT) -- Delaware's chancellor has nailed Elon Musk, Tesla Inc. and their counsel to assurances that the company won't flee state corporate law jurisdiction and a potentially massive stockholder attorney fee dispute by rushing votes on a struck-down, \$56 billion compensation plan for Musk and proposed reincorporation in Texas.

In a Tuesday letter to the parties, Chancellor Kathaleen St. J. McCormick cited Tesla's responses that followed a trio of stockholder motions aimed at protecting rights after the court's Jan. 30 invalidation of Musk's \$56 billion, multi-year stock-based compensation proposal.

The compensation lawsuit led by investor Richard J. Tornetta has been churning in the Chancery Court since mid-2018. One day after the invalidation, Musk called for a vote at an annual stockholder meeting on reincorporating in Texas, purportedly beyond the Chancery Court's reach, as well as a new vote on the pay plan.

Stockholders responded weeks later with motions for orders sequestering and awarding a stock-based attorney fee potentially in the billions, as well as an anti-suit injunction barring Tesla from litigating the issue in any other court, including in Texas.

Earlier this month, after the stockholder motions surfaced, Tesla told the chancellor it will not argue that the Jan. 30 order is unenforceable or that the claims can be argued outside of Delaware, among other assurances.

"If I have interpreted the defendants' position incorrectly," Chancellor McCormick cautioned, "then defense counsel — as officers of the court — are duty-bound to correct it. In the meantime, the defendants' statements give me great comfort. Based on the defendants' representations, I am denying plaintiffs' motion without prejudice to re-raise the requests" on the anti-suit injunction and fee sequestration order "if events warrant."

Chancellor McCormick's dynamic interactions in the case followed by about six weeks an even rarer letter sent to the Delaware State Bar Association, citing concerns about legislation that would amend the state's General Corporation Law in response to recent court rulings.

"The [legislative] proposal has moved forward at a pace that forecloses meaningful deliberation and input from diverse viewpoints. It reflects the broadest set of substantive amendments since the 1960s. It is controversial," said Chancellor McCormick, who penned two of the three decisions that became the focus of much the DSBA's corporation law section's bill.

Noting that she wrote only on her own behalf, the chancellor said the measure "preempts the Delaware Supreme Court's opportunity to act as the final arbiter of Delaware law, striking at two cases still being litigated before the Court of Chancery."

Counsel for the stockholders and Tesla did not immediately respond to requests for comment. The company's annual meeting is scheduled for June 13, with voting on Musk's compensation package already under way.

The issue was complicated in April by what the chancellor described as a "plot twist," with Tesla directors calling on April 17 for ratification during the company's June 13 annual meeting of Musk's

compensation under "Delaware common law or statutory law." Also recommended was a reincorporation in Texas and adoption of that state's new business courts as Tesla's exclusive forum for governance issues.

Three Delaware law firms joined Tesla's counsel team a day later, according to the chancellor, with the court subsequently notifying the chancellor that the vote "would materially impact" the Jan. 30 ruling on pay and the "substance and status" of the fee petition, slated for a July 8 hearing.

In response, attorneys for the stockholders filed a motion for an expedited anti-suit injunction, a motion for sequestration of Tesla shares and a constructive trust on behalf of the stockholder attorneys — as well as a motion to implement the court's Jan. 30 order and award costs.

Chancellor McCormick wrote that she interpreted Tesla's actions as meaning that "neither Tesla nor any of the individual defendants have any current intention of engaging in the conduct about which the plaintiff is concerned," including claiming that the Jan. 30 order is unenforceable.

Tesla Inc. is represented by Rudolf Koch, John D. Hendershot, Kevin M. Gallagher and Andrew L. Milam of Richards Layton & Finger PA, William M. Lafferty, Susan W. Waesco, Ryan D. Stottmann, Miranda N. Gilbert and Jacob M. Perrone of Morris Nichols Arsht & Tunnell LLP, John L. Reed, Ronald N. Brown, Caleb G. Johnson and Daniel P. Klusman of DLA Piper US, Catherine A. Gaul and Randall J. Teti of Ashby & Geddes PA, and Brian T. Frawley, Matthew A. Schwarts and Matthew L. Strand of Sullivan & Cromwell LLP.

Musk, Robyn M. Denholm, Antonio J. Gracias, James Murdoch, Linda Johnson Rice, Brad W. Buss and Ira Ehrenpreis are represented by David E. Ross, Garrett B. Moritz and Thomas Mandracchia of Ross Aronstam & Moritz LLP and Evan R. Chesler, Daniel Slifkin and Vanessa A. Lavelly of Cravath Swaine & Moore LLP.

Tornetta is represented by Jeroen van Kwawegen, Gregory V. Varallo and Glenn R. McGillivray of Bernstein Litowitz Berger & Grossmann LLP, Jeremy S. Friedman, Spencer M. Oster and David F.E. Tejtzel of Friedman Oster & Tejtzel PLLC, and Peter B. Andrews, Craig J. Springer, David M. Sborz, Andrew J. Peach and Jackson E. Warren of Andrews & Springer LLC.

The case is Richard J. Tornetta et al. v. Elon Musk et al., case number 2018-0408, in the Court of Chancery of the State of Delaware.

--Editing by Philip Shea.



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

Robinhood Reaches Deal To End 'Meme Stock' Investor Suit

By **Katryna Perera**

Law360 (May 29, 2024, 5:38 PM EDT) -- Robinhood Markets Inc. told a Florida federal judge Tuesday that it has reached a settlement with investors to resolve a suit over the trading platform's suspension of so-called meme stock purchases, saying it anticipates finalizing the deal within the next two weeks.

Details of the **settlement** were not available Wednesday. The deal comes roughly one month after the investors **lost their renewed bid for class certification**.

In the most recent version of the investors' complaint, from January 2023, they allege that Robinhood's "selective denial of access to [its] technology for more than a week wiped out tens of billions of dollars of investors' equity."

The plaintiffs had sought certification of a class of investors who, on Jan. 27, 2021, held certain shares of nine "meme stock" companies — the day before Robinhood restricted trading in shares of those stocks — and who sold their shares of those companies between Jan. 28 and Feb. 4, 2021, when the company announced that it was lifting trading restrictions.

The term meme stock refers generally to shares of companies that experience unusual trading volume on the strength of retail investor interest on social media sites such as Reddit. Prominent meme stocks include shares of video game retailer GameStop Corp. and movie theater chain AMC Entertainment Holdings Inc.

The investors' securities fraud claims are one part of closely watched multidistrict litigation stemming from the surge in meme stock trading and its subsequent fallout. Parts of the litigation involve state law claims, antitrust claims and claims against other brokers.

The case is In re: January 2021 Short Squeeze Trading Litigation, case number 1:21-md-02989, in the U.S. District Court for the Southern District of Florida.

--Editing by Kelly Duncan.

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

Del. Needs To Urgently Pass Post-Moelis Corporate Law Bill

By **Lawrence Hamermesh** (May 29, 2024, 5:17 PM EDT)

Every once in a while, the normally placid and uncontroversial process of modifying the Delaware General Corporation Law to address evolving market realities generates heated attention.

When Delaware adopted its so-called anti-takeover statute in 1988, for example, proponents of the new phenomenon of hostile tender offers predicted that Delaware's statute would sound the death knell of corporate takeovers.

As it turned out, however, corporate takeovers have been alive and well ever since.

This is apparently another year of controversy and predictions of doom. This time the attention centers on **proposed amendments** to DGCL Section 122 that validate corporate power to enter into agreements granting stockholders significant governance rights.



Lawrence Hamermesh

These amendments respond to the Delaware Court of Chancery's Feb. 23 decision in *West Palm Beach Firefighters' Pension v. Moelis & Co.*, which **invalidated** a stockholder agreement giving the corporate founder the right to require, among other things, that the board of directors recommend the election of his director nominees.

The proposed amendments validate such agreements as a general matter, but leave the courts with the ability to invalidate any such agreement if its adoption or use violates the directors' fiduciary duty.

The proposed amendments address a now-pervasive problem: The Moelis decision called into question what it acknowledged has been market practice, creating confusion and uncertainty for untold numbers of Delaware corporations and their executives, employees, investors and advisers.

In the Moelis case itself, the invalidated provisions were fully disclosed when the company went public 10 years ago, and went unchallenged until recently. Moreover, a 2021 article by Gabriel Rautenberg in the *Yale Journal of Regulation* finds that similar provisions exist in 15% of recent initial public offerings.[1]

These provisions are also a mainstay of contemporary venture capital investment — they even appear in a collection of corporate forms from the National Venture Capital Association that are used as the basis for a significant portion of venture financings every year.

In all of these situations, planners have relied in good faith on a broader understanding of corporate capacity than the court applied in Moelis — an interpretation that was consistent with the Chancery Court's 2007 *Sample v. Morgan* decision upholding an agreement in which the corporation agreed to give a new investor veto power, for five years, over board action to issue new stock.

The proposed amendments to the DGCL respond to the Moelis opinion's sweeping questioning of such market practice, which includes governance agreements that have been the basis for long-standing investments in both public and private companies.

That opinion therefore wisely recognized that legislative action could usefully clarify whether agreements of the sort it invalidated were legally proper: The court said that "the General Assembly could enact a provision stating what stockholder agreements can do."

And that's exactly what should happen: The proposed amendments to Section 122 are vastly superior in predictability and clarity compared to the state of affairs prevailing under the current statute, as interpreted by the Chancery.

The uncertainties exposed by the Moelis decision are too widespread to be left to case-by-case evaluation, and too disruptive to fester for a year or more without legislative guidance.

The need for such guidance is urgent, and the Delaware State Bar Association and its constituent groups should be commended, not condemned, for quickly and carefully preparing and presenting the draft amendments to the Delaware General Assembly that allow it to act before the current legislative session ends on June 30.

Even an article by Sarath Sanga and Gabriel Rautenberg in the *Harvard Law School Forum of Corporate Governance* critical of the proposed amendments acknowledged that "[c]orporations need guidance, and both the Delaware legislature and the Council of the Corporation Law Section are the right institutions to provide it." [2]

Nevertheless, the proposed amendments have drawn a lot of criticism that characterizes them as a frontal attack on the core principle of Delaware corporate law that it is the board of directors that manages the business and affairs of the corporation.

This criticism misses an essential point: The amendments simply allow Delaware corporations to enter into shareholder agreements that include governance arrangements that unquestionably can be included in the corporation's certificate of incorporation.

In the Moelis opinion itself, the court recognized this; it also recognized that the governance rights it invalidated could have been adopted by the board of directors alone, i.e., without stockholder approval, via the power to issue so-called blank check stock — a power held by most publicly traded corporations.

The proposed amendments would simply enable the corporation to grant such rights in an agreement with one or more stockholders, instead of amending the certificate of incorporation or issuing blank check stock containing those rights.

There are many other more detailed criticisms of the proposed DGCL amendments, and a full response would weigh down this piece with lots of background and verbiage.

One particular apparently intended slur, however, requires confrontation: Specifically, it has been charged that the proposed DGCL amendments are the result of so-called interest-group politics. Guilty as charged. This legislation was drafted by lawyers who, like many of us in Delaware, have benefited from the economic engine of Delaware business formation.

The "interest" of that "interest group" stems from the recognition that those benefits depend on the preservation of the efficient and predictable system of corporate governance afforded by a regularly updated statute and hard-working, sophisticated judges.

When a court decision, however well-reasoned, upsets that efficiency and predictability, as the Moelis case has, it is the obligation of the stewards of Delaware's corporate law — ultimately the General Assembly — to restore them as promptly and fully as possible.

Inevitably, maintaining the DGCL means reacting to decisions from Delaware's respected judiciary that show that the needs of modern corporations and capital markets are no longer being met by a statute whose origins date to the 19th century.

These changes do not constitute criticisms of the drafters of the prior statutory provisions or of the courts that interpreted them, but instead reflect the evolving needs of all modern stakeholders in Delaware's system of corporate laws, from entrepreneurs and financiers to corporate directors, officers, and employees.

If the past is any guide, the General Assembly will act responsibly and quickly to adopt the proposed amendments, and Delaware will once again have demonstrated the resilience and reliability of its corporate law, and avoided putting at risk the continued faith in and use of the legal framework we offer.

Lawrence A. Hamermesh is professor emeritus and the former Ruby R. Vale Professor of Corporate and Business Law at Widener University Delaware Law School.

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

[1] https://openyls.law.yale.edu/bitstream/handle/20.500.13051/8341/08._Rauterberg_Article._Final._1124_1181.pdf?sequence=2&isAllowed=y.

[2] <https://corpgov.law.harvard.edu/2024/04/05/proposed-amendments-to-dgcl-on-stockholder-contracting-would-create-more-problems-than-they-purportedly-solve/>.

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



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

9th Circ. Rejects Objections To \$23M Monsanto Roundup Deal

By **Mike Curley**

Law360 (May 29, 2024, 6:18 PM EDT) -- The Ninth Circuit on Wednesday affirmed a district court's approval of a \$23 million MDL settlement to resolve claims that Monsanto failed to warn buyers of the carcinogens in its Roundup weed killer, finding there was no indication of collusion as argued by Missouri-based objectors.

In a five-page **opinion**, a three-judge panel said U.S. District Judge Vince Chhabria carefully considered objections made by the Missouri plaintiffs and made reasonable factual findings that there was no evidence that the deal was reached through untoward means, and that the compensation rates for plaintiffs appeared fair and adequate.

The panel further noted that the district court also corrected mistakes in how the plaintiffs sought to calculate attorney fees and cut the requested fees nearly in half, while also ordering that additional funds go to class members rather than Monsanto.

The appeal is part of consumer litigation filed in 2020 over claims that Monsanto falsely advertised and promoted its Roundup products by failing to disclose that its active ingredient, glyphosate, could cause cancer or other health problems. In response, the agrochemical giant, owned by Bayer AG, denied that its products cause cancer or that it failed to disclose any dangers.

The **settlement** will see \$23 million awarded to class plaintiffs on their advertising claims that Monsanto omitted warnings about carcinogens in its Roundup products.

Under the deal, Monsanto agreed to create a fund of \$23 million to \$45 million that would reimburse consumers who submit a valid claim for roughly 20% of the average price they paid for Roundup products.

Judge Chhabria ultimately approved the deal over the Missouri plaintiffs' objections, while **cutting** the class counsel's requested \$11.25 million in fees down to \$5.75 million.

The objectors from Missouri argued in front of the Ninth Circuit **two weeks ago** that the settlement would see class members get a fraction of what they could get from a successful Missouri state litigation.

In Wednesday's opinion, the panel wrote that the district court considered these objections in detail, and reasonably concluded that the Missouri case was not in a better bargaining position, while the MDL settlement was aimed at a broader class of purchasers.

In addition, the panel wrote that the Missouri case had similar strengths and weaknesses compared to the MDL's class, with a similar methodology for calculating damages.

Finally, the panel rejected the argument that the class and Monsanto could not "duck behind the mediator," noting that the district court did not rely on the use of a mediator when approving the settlement, and in fact the declaration of a U.S. magistrate judge saying there were no signs of collusion would only support, not detract from, the district court's approval of the deal.

In a statement Wednesday, Bayer noted this settlement is separate from the product liability claims concerning Roundup.

"We are pleased with the court's decision to uphold the final approval of the settlement agreement, which contains no admission of liability or wrongdoing, and brings this litigation to a successful close," the company said. "As stated by the court, 'the district court considered objectors' concerns at several stages of the litigation' and found that 'the settlement was fair, adequate and reasonable.'"

Representatives for the other parties could not immediately be reached for comment Wednesday.

U.S. Circuit Judges Ronald M. Gould, Norman Randy Smith and Salvador Mendoza sat on the panel for the Ninth Circuit.

The Missouri class of objectors is represented by Kasey Allen Youngentob of Stueve Siegel Hanson LLP.

The lead plaintiffs are represented by Gillian Leigh Wade of Milstein Jackson Fairchild & Wade LLP.

Monsanto is represented by John Rosenthal of Winston & Strawn LLP.

The case is Scott Gilmore et al. v. Monsanto Co., case number 23-15611, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Dorothy Atkins and Bonnie Eslinger. Editing by Janice Carter Brown.

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

Visa, Mastercard Consumers Ink \$197.5M ATM Antitrust Deal

By **Lauren Berg**

Law360 (May 29, 2024, 9:39 PM EDT) -- A pair of Visa and Mastercard consumers asked a Washington, D.C., federal judge Wednesday to greenlight a \$197.5 million class settlement that would resolve claims that the credit card companies conspired with major banks to fix ATM access fees.



Mastercard and Visa, which are accused of essentially setting a price floor for all ATM access fees throughout the country, reached an agreement with consumers May 2. (AP Photo/Mark Lennihan, File)

In a **motion for preliminary approval**, plaintiffs Andrew Mackmin and Sam Osborn told the court that the proposed deal is an "excellent result" for the settlement class and, along with the **\$66.74 million deal** the consumers reached with Bank of America and other financial institutions in 2020, would mark the end of the nearly **13-year-old litigation**.

The settlement class's total recovery of \$264.24 million between the two settlements represents between 23.1% and 38.2% of the maximum single damages they might have recovered at trial, the motion states.

"This is an exceptional rate of recovery, particularly for antitrust class actions, falling comfortably 'within the range of reasonableness' warranting preliminary approval," the plaintiffs said. "Were this case to proceed to trial, the settlement class could receive substantially less, or even nothing, despite more than a decade of litigation."

"The settlement, by contrast, will deliver immediate and assured relief," they added.

In the latest version of the suit, from 2015, the plaintiffs claimed that the financial companies, including Visa, Mastercard, Bank of America, Chase Bank and Wells Fargo, made "unlawful agreements [that] effectively set a price floor for all ATM access fees throughout the country, and deprive consumers of the benefits of natural price competition."

"Plaintiffs bring this action on behalf of themselves and others who have paid artificially inflated, supra-competitive ATM access fees to the bank defendants," the suit states.

In October 2020, the consumers told the court they had reached the \$66.7 million settlement with the bank defendants, including payments of \$26.42 million from Bank of America, \$20.82 million from Wells Fargo and \$19.5 million from Chase, which the customers described as an excellent result for the proposed class.

Then, in March 2022, settlement class counsel at Hagens Berman Sobol Shapiro LLP, Quinn Emanuel Urquhart & Sullivan LLP and Mehri & Skalet PLLC asked for more than **\$20 million in fees** for the more than 30,500 hours they had invested in the litigation at that point. On top of that, they asked for \$10 million worth of litigation expenses.

An objecting class member later that month **slammed** the "mind-boggling" fee request, saying it would allow "free-riding class counsel to divert nearly half of every dollar from funds generated by settling class claims." But following a May 2022 **fairness hearing**, U.S. District Judge Richard J. Leon granted final approval of the deal and **approved** the \$20 million fee request that August.

In their motion for preliminary approval of the Visa and Mastercard settlement on Wednesday, the consumers said that following an all-day mediation session in March that resulted in a term sheet, the parties worked out the proposed settlement on May 2.

"Plaintiffs have a strong case and the Settlement value reflects that," the motion states, noting that their damages expert calculated a "low" estimate of \$691.9 million, a "middle-range" estimate of \$858.8 million and a "high" estimate of \$1.14 billion.

"Obtaining \$197.5 million from the network defendants, and \$264.24 million overall, is particularly noteworthy given the attendant risks of continued litigation," it states. "While plaintiffs believe their case is strong, 'complex antitrust litigation is rife with uncertainties, risks and delays.'"

The class' co-lead counsel at Hagens Berman, Quinn Emanuel and Mehri & Skalet also plan to seek attorney fees of up to 33% — or about \$65 million — of the settlement fund, according to the motion.

The settlement class is defined as those who "paid an unreimbursed ATM access fee directly to any bank defendant or alleged bank co-conspirator for a foreign ATM transaction using an ATM card issued by a financial institution in the U.S. to withdraw cash at an ATM located in the U.S. at any time from Oct. 1, 2007 to the date of the preliminary approval order," according to the motion.

The plaintiffs estimate that the class could be as large as 175 million to 215 million individuals.

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

The consumers are represented by Steve W. Berman, Ben Harrington and Benjamin J. Siegel of Hagens Berman Sobol Shapiro LLP, Adam B. Wolfson and Viola Trebicka of Quinn Emanuel Urquhart & Sullivan LLP and Steven A. Skalet of Mehri & Skalet PLLC.

Visa is represented by Matthew Eisenstein and Rosemary Szanyi of Arnold & Porter Kaye Scholer LLP.

Mastercard is represented by Mitchell D. Webber of Paul Weiss Rifkind Wharton & Garrison LLP.

The case is Andrew Mackmin et al. v. Visa Inc. et al., case number 1:11-cv-01831, in the U.S. District Court for the District of Columbia.

--Additional reporting by Christopher Cole and Dorothy Atkins. Editing by Alanna Weissman.



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

Barilla Pasta Buyers Win Class Cert. In Italy Labeling Suit

By **Gina Kim**

Law360 (May 29, 2024, 5:49 PM EDT) -- A California federal judge on Tuesday certified a class action alleging Barilla falsely labels its pasta as being made in Italy after she rejected the company's argument the class is insufficiently defined since it removed the challenged representation in 2022, finding a well-defined class can include those who suffered no injury.

In a 20-page ruling issued May 28, U.S. Magistrate Judge Donna M. Ryu granted Matthew Sinatro and Jessica Prost's motion for class certification in their lawsuit against Barilla America Inc., which is accused of tricking shoppers over its trademarked phrase "Italy's #1 Brand of Pasta" on the labels of some of its pasta products.

The plaintiffs brought claims under California's False Advertising and Unfair Competition laws, warranty breach, and unjust enrichment, and sought to certify a class of Golden State customers who bought the products containing the challenged representation, with the class period running from June 11, 2018, to the present.

Barilla opposed certification, contending that the proposed class wasn't properly defined and arguing it has since removed that claim from the labels of 34 out of 54 pasta products in October 2022. Since the changes were made, it'd be difficult to see which customers were injured by the challenged conduct, Barilla had said.

"Barilla's argument is meritless," Judge Ryu wrote in her Tuesday order. "Barilla fails to cite controlling law, namely **Briseno v. ConAgra Foods** 🍷 which was decided after Barilla's cited cases. In *Briseno*, the Ninth Circuit held that there is no separate 'administrative feasibility' requirement for class certification, using that term to refer to what the defendant and district court called 'ascertainability.'"

The proposed class definition isn't overbroad as it's restricted to those who bought the pasta products that contained the challenged statement before any changes were made, Judge Ryu said.

"Additionally, the Ninth Circuit has observed that 'even a well-defined class may inevitably contain some individuals who have suffered no harm as a result of defendants' unlawful conduct,' but this fact does not defeat class certification," Tuesday's order said.

Tuesday's order granting certification comes **a year and a half after** Judge Ryu largely denied Barilla's motion to dismiss the proposed class action accusing that Barilla's claim "Italy's #1 Brand of Pasta" is misleading to reasonable consumers and tricks them into thinking the products are made in Italy or with ingredients sourced from the country.

The plaintiffs alleged that Barilla reinforces this false claim regarding the products' origin and ingredients by evoking the colors of Italy's flag surrounding the challenged claim. However, contrary to the label, the pasta products aren't made in Italy nor with ingredients made in Italy, the customers alleged, but are made in Iowa and New York.

Judge Ryu's Oct. 2022 order noted that the customers plausibly alleged that the challenged claims backed a reasonable inference that the products are made in Italy and from ingredients sourced from Italy. The customers also demonstrated Article III standing since they allege a plausible economy injury, the judge said, since the plaintiffs both expressly maintained they wouldn't have bought the

pasta had they known the claim was false.

According to the judge's Tuesday ruling, certification is also warranted since the class meets the requirements for numerosity, commonality, typicality and adequacy. Furthermore, the plaintiffs have provided evidence that Barilla knew of the value that shoppers place on products associated with Italy, given the defendant's marketing tactics.

The judge appointed Prost and Sinatro as class representatives and their attorneys at the Clarkson Law Firm PC as class counsel, finding no conflict of interest and that they would represent the class's interests adequately.

Judge Ryu rejected Barilla's argument that Prost wouldn't be a proper class representative since she knows someone working at Clarkson Law Firm and had contacted one of the partners about the case because of that relationship.

"Barilla does not explain how these circumstances implicate a conflict of interest between Prost and the putative class members," the order said.

Representatives for Barilla did not immediately return inquiries seeking comment Wednesday.

Plaintiffs' counsel Katherine A. Bruce of Clarkson Law Firm PC issued the following statement to Law360 late Wednesday afternoon: "We are honored to receive court approval to represent all California consumers in holding Barilla accountable for its deceptive marketing practices. Truth in advertising is critical to a marketplace that is fair to consumers and competitors. Consumers should not have to pay for empty promises and misleading marketing gimmicks."

The shoppers are represented by Ryan J. Clarkson, Shirleen M. Clarkson, Katherine A. Bruce and Alan Gudino of Clarkson Law Firm PC.

Barilla is represented by Erik Swanholt, Laura Moedano and Kelsey C. Boehm of Foley & Lardner LLP.

The case is Matthew Sinatro et al. v. Barilla America Inc., case number 4:22-cv-03460, in the U.S. District Court for the Northern District of California.

--Editing by Jay Jackson Jr.

Update: This article has been updated with a statement from the plaintiffs' counsel.



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

Forescout Investors Win Class Cert. Over Tanked Sale

By **Sydney Price**

Law360 (May 29, 2024, 9:08 PM EDT) -- A California federal judge agreed to certify a class of shareholders of cybersecurity company Forescout who allege the company deceived investors ahead of a sale that ultimately fell apart, marking the latest win for plaintiffs who previously saw the case dismissed with prejudice three years ago.

U.S. District Judge Susan Illston said Tuesday that the suit's two lead plaintiffs — Meitav Tachlit Mutual Funds Ltd. and Glazer Funds — have sufficiently shown the numerosity, commonality, typicality and adequacy requirements of class certification.

The suit, which was revived by the Ninth Circuit last year, alleges Forescout's stock price declined nearly 24% when Forescout disclosed on May 18, 2020, that Advent International Corp. was refusing to proceed with a previously announced merger agreement to acquire Forescout for \$33 per share. Forescout's former CEO Michael DeCesare and former Chief Financial Officer Christopher Harms are also defendants.

In their motion against class certification, the defendants argued that the investors do not meet the predominance requirement. To meet the predominance requirement the plaintiffs must show that their damages were the result of the defendant's actions that created the legal liability under the proposed damages model. The defendants argue that events like the announcement of the merger and the COVID-19 pandemic may explain the alleged stock drops, and the investors do not present an acceptable way of isolating confounding events.

But Judge Illston said the investors have adequately disclosed a class-wide damages model sufficient to meet the predominance element. The method proposed by the investors is based on an economic valuation analyzing the extent to which disclosures correcting the alleged misrepresentations caused the price of Forescout stock to decline, according to the order.

The defendants also challenged the investors' claim they satisfied the typicality and adequacy requirements for class certification. In their opposition, they said plaintiff Glazer's supplemental discovery "strongly suggests" that Glazer was not misled to invest by the alleged misstatements.

"To what extent Glazer relied on the alleged misstatements is best left for the fact finder to resolve on the merits," Judge Illston said.

The class certified on Tuesday includes those who purchased or otherwise acquired Forescout common stock between May 9 or 10, 2019, and May 15, 2020. In their briefing, the parties appear to dispute whether the class period should start on May 9, 2019, or May 10, 2019, but at a hearing earlier this month, the parties said they could resolve this dispute on their own, the order states.

The suit was consolidated with a similar suit in July 2020 and co-lead plaintiffs Meitav and Glazer Funds filed a consolidated amended complaint in December 2020. It was dismissed in March 2021, and dismissed again without leave to amend in October 2021. The plaintiffs appealed most of the decision, and in March 2023, the Ninth Circuit affirmed certain claims and reversed and remanded others.

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

The investors are represented by Omar Jafri, Patrick Dahlstrom, Brian P. O'Connell, Genc Arifi, Jeremy A. Lieberman and J. Alexander Hood II of Pomerantz LLP and Jeffrey S. Abraham, Michael

Jason Klein and Patrice L. Bishop of Abraham Fruchter & Twersky LLP.

DeCesare and Harms are represented by Ignacio E. Salceda, Diane M. Walters and Rebecca L. Epstein of Wilson Sonsini Goodrich & Rosati PC.

Forescout is represented by Amy Jane Longo, Mark S. Gaioni, Anne Johnson Palmer, Peter L. Welsh, C. Thomas Brown and Charles D. Zagnoli of Ropes & Gray LLP.

The case is Sayce v. Forescout Technologies Inc. et al., case number 3:20-cv-00076, in the U.S. District Court for the Northern District of California.

--Editing by Emily Kokoll.

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



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

Mercedes-Benz Fights Class Cert In Takata Airbag MDL

By **Carolina Bolado**

Law360, Miami (May 29, 2024, 5:33 PM EDT) -- Attorneys for Mercedes-Benz on Wednesday urged the judge overseeing the multidistrict litigation over allegedly defective Takata airbags to deny consumers' bid for class certification, arguing that the evidence is clear the company didn't know of any defects in the airbags before a recall was issued.

In a hearing in Miami, Mercedes-Benz USA LLC attorney Troy Yoshino said his client did not know about the allegedly faulty inflators in the Takata airbags because the company is just a distributor and only learned of potential defects when Takata issued a recall.

Yoshino told U.S. District Judge Federico Moreno that even the plaintiffs' experts agreed that they would not expect a distributor like MBUSA to have information about parts like airbag inflators in vehicles.

Peter Prieto, who is lead counsel for the plaintiffs, told the court that the question of what MBUSA knew before the recall is a "classic summary judgment issue" that was not relevant to the class certification issue.

"The argument is not that the knowledge is different depending on class member," Prieto said. "All the knowledge is based on one party, which is the defendant, so it's the defendant's knowledge that applies to all the class members."

But Judge Moreno — who noted that the MDL had dragged on for nine years already — said he could consider summary judgment first, especially since discovery has already been taken. The judge gave the parties a deadline of July 12 to file any motions for summary judgment and said he would try to rule on them soon after that.

The parties were in court on Wednesday on an order from Judge Moreno asking MBUSA to show why he should not maintain consistent rulings with the orders he issued last year granting class certification in favor of plaintiffs against Chrysler manufacturer FCA US LLC and General Motors LLC.

But Eric Knapp, who also represents MBUSA, said the company is materially different from those automakers because there is proof they did know of potential defects in the airbag inflators before the recall. Knapp said the plaintiffs had also failed to show that the alleged defect is present in the same way in all of the class vehicles, as they did no testing on MBUSA vehicles.

"Simply doing a recall does not suffice as classwide proof of knowledge," Knapp said.

The claims are part of the many lawsuits that sprang up in the wake of the worldwide recalls of Takata-made airbags, which are linked to 19 deaths in the United States, according to the U.S. National Highway Traffic Safety Administration. The lawsuits were later folded into an MDL for pre-trial purposes before Judge Moreno in the Southern District of Florida.

Last month, the Eleventh Circuit declined to take up appeals of four rulings by Judge Moreno that dismissed various claims against Daimler AG and ended all claims brought under the laws of 14 specific states.

But the appeals court said Judge Moreno had erred in allowing the plaintiffs to appeal the non-final

orders. The Eleventh Circuit noted that discovery is complete and few claims remain in the MDL, which means an interlocutory appeal would streamline little in the case.

The plaintiffs also did not show a pressing need for the immediate appeal, according to the Eleventh Circuit.

Several automakers have settled in the intervening years to escape the MDL. Volkswagen and Audi sealed the deal on a \$42 million settlement in mid-2022. Before that, Ford agreed to pay \$300 million; Honda inked a \$605 million deal; Nissan settled for \$98 million; and Toyota, Subaru, Mazda and BMW collectively agreed to \$553.6 million to exit the litigation back in May 2017.

Takata pled guilty to wire fraud in 2017, which came with a \$1 billion penalty, including restitution; it went bankrupt later that year.

The plaintiffs are represented by Peter Prieto, Aaron S. Podhurst, Stephen F. Rosenthal and Matthew P. Weinshall of Podhurst Orseck PA, Lewis S. "Mike" Eidson and Curtis Bradley Miner of Colson Hicks Eidson, Todd A. Smith of Smith Lacie LLP, David Boies, Motty Shulman and Stephen N. Zack of Boies Schiller & Flexner LLP, Elizabeth Cabraser and David Stelling of Lieff Cabraser Heimann & Bernstein LLP, James E. Cecchi of Carella Byrne Cecchi Olstein Brody & Agnello PC and Roland Tellis, David Fernandes, Mark Pifko and J. Burton LeBlanc of Baron & Budd PC.

Mercedes-Benz USA is represented by Troy M. Yoshino, Eric J. Knapp and Jeff Wilkerson of Winston & Strawn LLP and Raoul G. Cantero and Jaime A. Bianchi of White & Case LLP.

The MDL is In re: Takata Airbag Products Liability Litigation, case number 1:15-md-02599, both in the U.S. District Court for the Southern District of Florida.

--Additional reporting by Jonathan Capriel. Editing by Emily Kokoll.

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