

Apple, Investors Get First Nod for \$490M Securities Settlement

By Quinn Wilson

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- \$122.5 million in attorneys fees; \$73,000 to lead plaintiff

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Apple, Investors Get First Nod for \$490M Securities Settlement

By Quinn Wilson 2024-06-04T19:32:46000-04:00

- Judge: Settlement is adequate resolution in lieu of costly trial
- \$122.5 million in attorneys fees; \$73,000 to lead plaintiff

A \$490 million settlement between Apple Inc. and a class of investors received initial approval from a federal district court, bringing the company a step closer to resolving the sprawling litigation over allegedly misleading statements about sales prospects.

Judge Yvonne Gonzalez Rogers granted preliminarily approval to the third-largest securities class-action recovery in the US District Court for the Northern District of California on Monday. Rogers described the agreement as a “fair, adequate, and reasonable” resolution. The suit relates to allegations that Chief Executive Officer Tim Cook made misleading comments in 2018 about declining demand for iPhones in China, she wrote in her order.

The investors alleged Cook made false statements about the company’s business in China, causing Apple stock to trade at artificially inflated prices. But in January 2019, Cook said in a letter to investors that Apple would miss its earnings guidance by up to \$9 billion, causing its stock price to decline from \$157.92 to \$142.19 per share.

After she raised concerns about the investors’ motion for preliminary approval at a May hearing, the plaintiffs submitted sufficient supplemental material to justify the initial nod, Rogers said.

“Proceeding to trial would have been costly; recovery was not guaranteed; and there was the possibility of protracted appeals,” Rogers said. “The settlement occurred only after four years extensive litigation.”

The settlement fund will provide up to \$122.5 million in attorneys fees and no more than \$3 million in litigation costs, plus interest on its fees and expenses generated for amounts that are held in escrow during the settlement process, the order said. A \$3.6 million portion of the fund will cover administration costs.

As much as \$73,000 will be paid to lead plaintiff Administering Authority of the Norfolk Pension Fund, the order said. The same amount will be paid to the former lead plaintiff as well as a municipal retirement system as an incentive award in exchange for a general release of all claims.

The remaining funds will be paid out to class members with valid claims. The funds will be calculated based on the "potential amount" of artificial inflation in Apple's publicly traded securities that was caused by the defendant's "alleged false and misleading statements and material omissions," Rogers said.

The class is composed of investors who purchased or otherwise acquired publicly trade securities of Apple including those who purchased Apple call options or sold put options during the period from Nov. 2, 2018, through Jan. 2, 2019, the order said.

Robbins Geller Rudman & Dowd LLP represents the lead plaintiff and the class. Labaton Keller Sucharow LLP represents Employees' Retirement System of the State of Rhode Island. Orrick, Herrington & Sutcliffe LLP and Paul Weiss Rifkind Wharton & Garrison LLP represent the defendants.

The case is In re Apple Inc. Sec. Litig. , N.D. Cal., 4:19-cv-02033, 6/3/24 .

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Critical Mass With Law.com's Amanda Bronstad: \$260M Talc Verdict Adds to J&J's Trial Troubles, Ozempic MDL Marches Ahead After Judge Dies

June 05, 2024 at 08:08 AM

Critical Mass



Amanda Bronstad
staff reporter



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

This week: Dean Omar, the same Dallas plaintiffs' firm that won a \$45 million mesothelioma talc verdict less than two months ago, scored a \$260 million jury award on Monday. The May 17 death of U.S. District Judge Gene Pratter leaves a big question: What will happen to the Ozempic MDL? Find out who got appointed to lead lawsuits over a 2023 data breach of Perry Johnson & Associates.

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

Dean Omar: 'We're Going to Keep Trying Them'

Oops, they did it again.

Dean Omar scored a \$260 million talcum powder verdict on Monday, less than two months after winning a \$45 million award against Johnson & Johnson. The Dallas-based firm represents plaintiffs alleging Johnson & Johnson's baby powder caused their mesothelioma—and it's far from done. After winning the first trial since Johnson & Johnson's failed bankruptcies in Chicago's Cook County Circuit Court, and Monday's verdict in Oregon's Multnomah County Circuit Court, the firm is set to start another trial on Wednesday in Dallas County District Court.

Johnson & Johnson, meanwhile, focused this week on its planned third bankruptcy proposal, announced last month. It would provide \$6.48 billion to plaintiffs alleging its baby powder caused their ovarian or other gynecological cancers. Voting begins this week on the plan, which Johnson & Johnson called "one of the largest settlements in any mass tort proceeding."

The plan received the backing of numerous plaintiffs' firms, including Keller Postman, which on Monday said it would encourage its clients to support—even those jointly represented by Beasley Allen, a stalwart critic of Johnson & Johnson's bankruptcy efforts.

Johnson & Johnson has used a disqualification motion and [potential subpoenas](#) to shut down Beasley Allen's opposition.

Back in court, Gibson Dunn and King & Spalding are set to battle Dean Omar in its third talc trial. [Ben Adams](#) (Dean Omar) told me two associates at his firm would be leading the trial: [Sam Iola](#) and [Aaron Chapman](#).

Adams said his firm has more trials lined up in Connecticut, South Carolina and New Jersey, adding:

"We're very interested in settling individual cases based on individual merits and individual value, but Johnson & Johnson refuses to do that. We're going to keep trying them until they do the right thing."

Will the Ozempic MDL Stay in Pennsylvania? Maybe.

Lawyers in the multidistrict litigation over Ozempic and related diabetes drugs, used for weight loss, [are moving ahead](#) despite the sudden May 17 death of the judge. The death of U.S. District Judge Gene Pratter, 75, has left the future of the litigation uncertain, but her [April 26](#) and [May 8](#) orders appointing a plaintiffs' leadership team have helped lawyers continue to work on the cases.

So, how does a new MDL judge get selected? The U.S. Judicial Panel on Multidistrict Litigation [on Feb. 2 sent the cases to Pratter](#), who was in the Eastern District of Pennsylvania, because that's near the headquarters of defendant Novo Nordisk in Plainfield, New Jersey.

Novo Nordisk attorney [Loren Brown](#) (DLA Piper) had argued for the Middle District of North Carolina or the Southern District of California—specifically, U.S. District Judge Anthony Battaglia, who oversaw the multidistrict litigation over incretin-based therapies. The therapies are diabetes drugs made by defendants including Novo Nordisk.

I reached out to [Andrew Bradt](#) (University of California Berkeley School of Law), associate reporter to the Advisory Committee on Civil Rules of the Justice Conference of the United States. He told me:

"The asbestos MDL passed to a second judge in the ED Pa, but I don't know whether that was mandated by the panel or not. With this MDL being so new, I wouldn't think there would be the same reasons for keeping the case in the same court, but I don't know for sure."

Who Got the Work?

A federal judge on Tuesday appointed 12 lawyers to lead the multidistrict litigation over a 2023 data breach that hit **Perry Johnson & Associates Inc.**, which provides medical transcription services to healthcare facilities. [James Pizzirusso](#) (Hausfeld), [Stuart Davidson](#) (Robbins Geller) and [Jean Martin](#) (Morgan & Morgan) will serve as co-lead counsel, with [Israel David](#) (Israel David LLC) as liaison counsel. U.S. District Judge Rachel Kovner, in the Eastern District of New York, then appointed specific lawyers for each of the eight defendants.

Here's what else is happening:

Breach Bankruptcy? A federal judge in California [heard oral arguments](#) on leadership appointments in the multidistrict litigation over the **23andMe** data breach. More than a dozen lawyers from competing groups argued before U.S. District Judge Edward Chen at a San Francisco hearing. Many raised concerns that 23andMe, which released its annual report last month, was facing imminent bankruptcy.

Fortnite Addiction: [More than a dozen lawsuits](#) alleged that video games like Fortnite and Call of Duty addicted kids and young adults. Tina Bullock (Bullock Law Group), recently split from Bullock Ward Mason partner [Danielle Ward Mason](#) (Singleton Schreiber), filed most of the lawsuits, which name the game developers as well as the manufacturers

of the consoles, such as **Microsoft's Xbox** and **Sony's PlayStation**. The **U.S. Judicial Panel on Multidistrict Litigation** heard arguments on May 30 about whether to coordinate the cases.

Zantac Revived: A Delaware Superior Court judge refused to toss experts in 75,000 lawsuits filed over Zantac in Delaware state courts. The May 31 order permitted 10 plaintiffs' experts in cases alleging the recalled heartburn medication caused 10 different cancers, five of which were not part of a 2022 ruling in the multidistrict litigation over Zantac. In that ruling, **U.S. District Judge Robin Rosenberg**, of the **Southern District of Florida**, tossed all five plaintiffs' experts, effectively ending the federal docket. The Delaware decision also refused to exclude one defense expert.

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

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FTX seeks to stop outside litigation against insiders, VC firms

 [reuters.com/legal/ftx-seeks-stop-outside-litigation-against-insiders-vc-firms-2024-06-04](https://www.reuters.com/legal/ftx-seeks-stop-outside-litigation-against-insiders-vc-firms-2024-06-04)

Dietrich Knauth

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

NEW YORK, June 4 (Reuters) - FTX on Tuesday asked a U.S. judge to stop outside litigation against company insiders and venture capital firms accused of playing a role in the bankrupt crypto exchange's collapse, saying the lawsuits undermine FTX's own effort to repay customers.

The lawsuits, including class action complaints filed by FTX customers, could eat into an estimated \$16 billion recovery that the company intends to pay customers in its bankruptcy, FTX said in court documents filed Tuesday in federal court in Miami.

The class action litigation recently resumed after being placed on pause during the criminal trial of FTX founder Sam Bankman-Fried. He was sentenced in March to 25 years in prison for stealing from FTX customers and using their funds to prop up his own risky investments. Plaintiffs in the class action lawsuits are seeking to take control of assets seized by federal prosecutors, litigate claims already being pursued by FTX, and charge 33% in attorneys' fees on recoveries that the class action lawyers had no role in obtaining, according to FTX.

FTX said that the class action lawyers were trying to pocket up to \$400 million in legal fees "despite having to date provided next to no monetary benefit" for FTX customers and other victims.

Adam Moskowitz, a lead lawyer for the plaintiffs, said he looked forward to U.S. Judge K. Michael Moore's review of all of his clients' settlements and pending claims, including a fraud lawsuit filed against Sullivan & Cromwell, the law firm managing FTX's bankruptcy.

"Our goal is to provide relief for all FTX victims and we appreciate all parties that are helping our efforts," Moskowitz said.

FTX, which filed for bankruptcy in November 2022, recently announced that it will repay customers more than 100% of what they are owed – with the major caveat that it would evaluate customer claims based on much-lower cryptocurrency prices from November 2022, when it filed for bankruptcy.

FTX has gathered as much as \$16 billion to repay customers by selling assets and filing lawsuits to claw back money paid by FTX before it collapsed.

FTX in Tuesday's court filing said that settlements in the class action threatened to wipe out the company's legal claims against insiders that have pleaded guilty or been convicted of crimes, including Caroline Ellison, Gary Wang, and Nishad Singh, and interfere with its efforts to claw back funds from investment firms.

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

Reporting by Dietrich Knauth; Editing by David Gregorio

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Pharma Companies Say Decongestant Deception Claims Are Preempted

By Shweta Watwe 2024-06-04T18:16:50000-04:00

- 2023 FDA advisory panel said main ingredient was ineffective
- Nearly 100 false-ad consumer class actions consolidated

Pharmaceutical companies including Johnson & Johnson Consumer Inc., Procter & Gamble Co., and RB Health US LLC are urging a federal judge to dismiss consumers' consolidated complaint alleging the companies knew nasal decongestants were ineffective but sold them anyway.

Federal regulations preempt the consumers' deceptive marketing claims, and their requested relief would violate the Food and Drug Administration's label requirements, the companies argue in their motion to dismiss the consolidated complaint filed Monday in the US District Court for the Eastern District of New York.

The consumers are trying to use state false advertising and deception statutes to hold the pharmaceutical companies liable for "selling FDA-approved medicine, for an FDA-approved purpose, with FDA-regulated labeling," the companies argue.

The consolidated litigation encompasses nearly 100 proposed class actions from consumers who say they overpaid for cold medicines containing phenylephrine, the main component in over-the-counter treatments like Sudafed and Nyquil. The lawsuits began trickling in shortly after an FDA advisory panel [said](#) oral phenylephrine doesn't treat nasal congestion in September 2023.

The companies have known since at least 2016 that the phenylephrine is ineffective, but continued to market their products as useful decongestants to sell more products, according to the consumers. They say they overpaid for the products and seek damages.

But no consumers say the medicines fail to comply with FDA requirements, and the FDA hasn't changed or proposed changes to the label requirements for nasal decongestants, the companies say.

They say the federal Food, Drug, and Cosmetics Act preempts all of the consumers' claims because

the consumers are trying to “force” the companies to “delete FDA-authorized or FDA-required statements or to add language flatly inconsistent with” established requirements.

Additionally, allowing the consumers’ claims to proceed “would clear the way for juries to second-guess the FDA’s efficacy judgments,” and manufacturers and consumers would no longer be able to “rely on the FDA’s decisions,” the companies argue. “The FDCA was intended to avoid this result.”

The companies also say claims brought under the Racketeered Influenced and Corrupt Organizations Act should be dismissed because the consumers don’t have standing for them. The consumers didn’t purchase products from any of the named RICO defendants, and the FDCA precludes using the RICO statute to attack the FDA’s efficacy decisions, the companies say.

Johnson & Johnson is represented by O’Melveny & Myers LLP. Procter & Gamble is represented by Covington & Burling LLP. RB Health US LLC is represented by Hogan Lovells US LLP. The consumers are represented by Douglas & London PC, Aylstock Witkin Kreis Overholtz PLLC, Bradley/Grombacher LLP, Carella Byrne Cecchi Brody & Agnello PC, DiCello Levitt LLP, Fegan Scott LLC, Lieff Cabraser Heimann & Bernstein LLP, Seeger Weiss LLP, The Sultz Law Group PC, and Wagstaff & Cartmell.

The case is [In re Oral Phenylephrine Mktg. and Sales Practs. Litig.](#) , E.D.N.Y., No. 1:23-md-03089, 6/3/24 .

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[Cold-Medicine Deception Lawsuits Sent to New York Federal Court](#)

[Common Nasal Decongestant Doesn't Work, FDA Advisers Say \(1\)](#)

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[Motion to Dismiss](#)

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Humana Accused of Misleading Investors About Post-Covid Costs

By Matthew Bultman

- **COURT:** D. Del.
- **TRACK DOCKET:** No. [1:24-cv-00655](#)

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Humana Accused of Misleading Investors About Post-Covid Costs

By Matthew Bultman 2024-06-04T13:20:21000-04:00

- **COURT:** D. Del.
- **TRACK DOCKET:** No. [1:24-cv-00655](#)

Humana Inc. was sued by an investor who alleges the health insurer downplayed the risk of pent-up demand for health-care procedures, especially as concerns about Covid-19 abated.

Humana faced higher costs as demand for medical services surged following the pandemic, despite executives' repeated assurances it wasn't a concern, the complaint, filed Monday in the US District Court for the District of Delaware, said.

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

Many people put off elective procedures during the Covid-19 pandemic. Investors started learning about profitability pressures due to pent-up demand in June 2023, when UnitedHealth Group Inc. reported higher levels of outpatient care activity, according to the complaint.

The news caused the stock of other health insurers, including Humana, to plunge.

Louisville, Ky.-based Humana's stock continued to slide with a series of disappointing news over the next several months, the complaint said. By late January, the stock was around \$355 per share, down from over \$512 in June 2023.

During a January investor call, the suit said, Humana's chief financial officer didn't answer why "the elevated level of medical costs had not been communicated to investors in a timelier fashion."

The proposed class action seeks to represent anyone who bought Humana stock between from late July 2022 to January 2024.

Kessler Topaz Meltzer & Check LLP and Bernstein Litowitz Berger & Grossmann LLP represent the investor.

The case is Iron Workers Local 401 Annuity Fund v. Humana Inc. , D. Del., No. 24-cv-00655, 6/3/24 .

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Coty Directors Dodge Shareholder's Challenges to CEO's Salary

By Bernie Pazanowski 2024-06-05T10:49:57000-04:00

- Shareholder didn't show proxy statement caused economic loss
- Didn't show that making demand on board would've been futile

A Coty Inc. shareholder's suit challenging the compensation paid to the company's chief executive officer and a proxy statement describing it was dismissed by a federal court.

Cathy Buch brought two claims, alleging the Delaware-based beauty products company violated the Securities Exchange Act of 1934 regarding allegedly deficient compensation-related disclosures in its public filings, as well as a shareholder derivative claim alleging breach of fiduciary duty by Coty's board in setting compensation.

Buch neither established that she suffered an economic loss because of alleged misstatements in the proxy statement, nor that it would have been futile to bring her concerns to the board of directors before filing her suit, Judge Dale E. Ho said Tuesday for the US District Court for the Southern District of New York.

In September 2023, Coty's board solicited its shareholders' proxies to vote at its annual meeting in November. The statement asked the shareholders to vote "on a non-binding advisory basis" to approve the pay of its CEO, Sue Nabi.

The proxy statement outlined Nabi's compensation for 2021 through 2023, which included performance-related shares and bonuses. Buch said the total package exceeded \$900 million, but Ho said that it was closer to \$437 million. The proxy statement listed a ratio of CEO compensation to median employee compensation as 3,769 to one, and noted the compensation for 12 of its competitors in the beauty products market.

Buch claimed that the proxy statement had deficient disclosures in violation of the Securities Exchange Act and also brought a derivative claim, alleging that the board breached its fiduciary duty when it set Nabi's compensation going forward—she will have a base salary of three million Euros, a

possibility of a cash bonus of 200% of her salary, and performance-based incentives, including Coty stock, Ho said.

To prove her claim under the Exchange Act, Buch was required to show a loss caused by the proxy statement, Ho said. But her complaint said that the proxy statement “did not cause economic loss,” so her claim must be dismissed, he said.

Buch said that loss causation wasn't a requirement for her claim because she wasn't seeking damages, and only requested an injunction nullifying the shareholder vote. But the requirement that a shareholder show loss causation isn't limited to instances where they're seeking money damages, Ho said.

Under Delaware law, Buch's derivative claim was required to show that she attempted to obtain her desired action from the board or that doing so would have been futile, Ho said.

Buch failed to sufficiently allege that a majority of the board would face substantial liability as a result of her claim or that the board members acted in bad faith, Ho said.

He also said that Nabi's compensation, standing alone, “is not so extreme so as to rebut the presumption of good faith.” The amount of Nabi's compensation is large, but was within the board's discretion to set, he said, dismissing the derivative claim.

Barrack, Rodos & Bacine represented Buch. Skadden, Arps, Slate, Meagher & Flom LLP represented Coty and its board.

The case is [Buch v. Larregui](#) , 2024 BL 190180, S.D.N.Y., No. 23 Civ. 8854 (DEH), 6/4/24 .

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Judge Grants Skadden Client Coty Inc.'s Motion to Dismiss Shareholder Lawsuit Over Executive Comp.

“However, it is black letter law that the board of directors of a Delaware corporation—not individual shareholders—determines executive compensation.”

June 04, 2024 at 06:28 PM

Securities Litigation

By Jane Wester | June 04, 2024 at 06:28 PM

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

U.S. District Judge Dale E. Ho of the Southern District of New York on Tuesday granted a beauty product company’s motion to dismiss a lawsuit filed by a shareholder who objected to the company’s executive compensation practices and alleged deficiencies in related disclosures.

Skadden, Arps, Slate, Meagher & Flom partners Scott Musoff, Lauren Aguiar and Paul Lockwood represent the defendants, Coty Inc., whose brands include Covergirl, Philosophy and Sally Hansen, and its board of directors.

Through her attorneys at Barrack, Rodos & Bacine, plaintiff shareholder Cathy Buch alleged that Coty offered “excessive remuneration” to its CEO Sue Nabi.

“As Shakespeare put it, wasteful and ridiculous excess,” Buch’s attorneys wrote in their amended complaint.

The Skadden team acknowledged that “Coty’s CEO, one of the most successful CEOs in the beauty industry, is highly compensated.”

“However, it is black letter law that the board of directors of a Delaware corporation—not individual shareholders—determines executive compensation,” they wrote.

They argued that Buch failed to “sufficiently allege—under the applicable heightened pleading standard—that the Proxy contains any misleading statement or material omission.”

“It is fundamental Delaware law that a shareholder may not usurp the authority of the board without first meeting exacting pleading requirements,” the Skadden attorneys wrote. “Specifically, a shareholder must either make a demand on the board, or plead with particularity that making such a demand would be futile. Plaintiff here has done neither. The jumbled and illogical string of accusations involving Ms. Nabi’s compensation is not tethered to any legal entitlement to relief.”

Ho dismissed Buch’s Exchange Act claim for failure to plead loss causation and dismissed her derivative claim for failure to “failure to make a demand on the Individual Defendants, or to plead facts establishing the futility of such a demand.”

“Because Plaintiff admits that the Proxy Statement did not cause her any economic loss, her Exchange Act claim is dismissed,” Ho wrote. “Plaintiff’s arguments to the contrary fail. In substance, she argues that loss causation is not a required element of her claim, because she does not seek to recover damages and instead seeks injunctive relief to nullify the shareholder vote.”

On the derivative claim, Ho found that Buch failed to establish bad faith.

“The Amended Complaint alleges that Nabi’s compensation was set without proper disclosure to shareholders and is excessive to such an extent that bad faith must be assumed ... This is insufficient to establish bad faith,” he wrote.

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Novel securities fraud trial involving former Ontrak CEO begins

DJ [dailyjournal.com/articles/379039-novel-securities-fraud-trial-involving-former-ontrak-ceo-begins](https://www.dailyjournal.com/articles/379039-novel-securities-fraud-trial-involving-former-ontrak-ceo-begins)

Securities

Share

Jun. 5, 2024

The case is the first time the Department of Justice has brought criminal insider trading charges solely based on an executive's fraudulent filing of Rule 10b5-1 plans.

Jury selection commenced Tuesday in a novel securities fraud case against a former Santa Monica healthcare CEO accused of using nonpublic information to operate an insider trading scheme to avoid millions of dollars in losses resulting from the termination of a contract with the company's largest health insurance client.

It is the first time the Department of Justice has brought criminal insider trading charges solely based on an executive's fraudulent filing of Rule 10b5-1 plans, which was designed by the U.S. Securities and Exchange Commission in 2000 to prevent such charges.

Under the Securities Exchange Act, Rule 10b5-1 trading plans were adopted in circumstances where, subject to certain conditions, the trade was pursuant to a binding contract or a written plan adopted when the trader was not aware of material nonpublic information. In 2022, the SEC amended the rule and applied related disclosure requirements to enhance investor protections concerning insider trading.

Last year, the government charged Terren Peizer, the founder and former CEO of Ontrak Inc., on claims he operated an insider trading scheme to avoid millions of dollars in losses prior to its loss of a contract with Cigna in 2021 - the company's biggest client at the time. Assistant U.S. Attorneys Ali Moghaddas, Matthew S. Reilly and Della G. Sentilles accused Peizer of falsely certifying two 10b5-1 trading plans while in possession of material nonpublic information concerning Ontrak's deteriorating relationship with Cigna. He sold approximately \$20 million of his company's stock to avoid around \$12.5 million in losses.

He was charged with two counts of securities fraud and one count of criminal forfeiture. *U.S. v. Peizer*, 2:23-cr-00089 (C.D. Cal., filed Feb. 24, 2023).

Jury selection in the case began at 8:30 a.m. and lasted until the late afternoon.

The judge and attorneys excused several jurors who said they would have issues separating personal biases with law enforcement agencies, including the government attorneys prosecuting the case. An FBI agent who investigated Peizer is expected to testify during the trial.

One exchange between Moghaddas and a potential juror, later excused, who said he was once in a position where he was in possession of nonpublic information for a company ended with the prosecutor asking if he had ever used that information with the intent to invest. The potential juror said, "No. That's illegal," as the audience in the gallery and Moghaddas laughed.

The case will be on recess Wednesday and resume with opening witness testimony on Thursday.

Peizer is represented by David K. Willingham, a partner at King & Spalding LLP, who moved to dismiss the case on grounds that U.S. District Judge Dale S. Fisher should take judicial notice of Ontrak's SEC filings and determine that the information in the indictment had already been publicly disclosed. Willingham also argued the indictment failed to adequately allege Peizer's intent and possession of nonpublic information.

However, the judge ruled the court could not consider evidence that did not appear on the indictment and the prosecutors' allegations were specific enough to keep the case alive and go to trial.

According to the indictment, the government accused Peizer knew Ontrak was about to lose its contract with Cigna and sold his share of the company's stock prior to publicly disclosing the termination.

Days after Peizer filed his second 10b5-1 plan in August 2021, Ontrak publicly announced that its relationship with Cigna ended and Ontrack's stock price fell approximately 44 percent.

From May to August 2021, the prosecutors claimed Peizer used this scheme to intentionally defraud and mislead Ontrak's shareholders and investors.

The trial could last up to three weeks.

#379039

Top Shot NFT Creator to Pay \$4 Million to End Securities Suit

By Matthew Bultman

- Lawsuit alleged NBA Top Shot Moments NFTs are securities
- Judge previously denied Dapper Labs' request to dismiss

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Top Shot NFT Creator to Pay \$4 Million to End Securities Suit

By Matthew Bultman 2024-06-04T11:12:14000-04:00

- Lawsuit alleged NBA Top Shot Moments NFTs are securities
- Judge previously denied Dapper Labs' request to dismiss

The creator of the National Basketball Association's Top Shot NFTs has agreed to pay \$4 million to settle a lawsuit accusing it of selling unregistered securities.

Purchasers of Dapper Labs Inc.'s nonfungible tokens asked a federal judge to approve the settlement in a filing Monday in the US District Court for the Southern District of New York. They said the settlement represented a "highly favorable result."

The lawsuit, filed in 2021, alleged Top Shot Moments—video clips of highlights from NBA games—were securities and should've been registered.

Judge Victor Marrero in February 2023 denied Dapper's request to dismiss the case, finding the plaintiffs adequately alleged the NFTs are securities. Marrero said his decision appeared to be the first to address whether NFTs can be securities.

The Securities and Exchange Commission, which has been aggressive in its efforts to police crypto markets under Chair Gary Gensler, brought its first enforcement action over NFTs months later, settling a case with a Los Angeles media and entertainment company.

Dapper in a statement reiterated its position that Top Shot Moments aren't securities under federal law, but said the settlement provides clarity that will "pave the way for continued growth and innovation."

The plaintiffs' lawyers at The Rosen Law Firm PA said in court filings they intend to seek attorneys' fees up to one-third of the settlement, or \$1.33 million.

Paul Hastings LLP represents Dapper.

The case is Friel v. Dapper Labs, Inc. , S.D.N.Y., No. 21-cv-05837, motion filed 6/3/24 .

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Coinbase Flouts California, Florida Securities Laws, Suit Says

By Isaiah Poritz

- **COURT:** N.D. Cal.
- **TRACK DOCKET:** [No. 3:24-cv-03350](#)

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Coinbase Flouts California, Florida Securities Laws, Suit Says

By Isaiah Poritz 2024-06-04T19:33:29000-04:00

- **COURT:** N.D. Cal.
- **TRACK DOCKET:** [No. 3:24-cv-03350](#)

Coinbase Global Inc. was hit with a class action on Tuesday accusing the cryptocurrency exchange platform of violating state laws requiring the company to register as a securities business.

The complaint filed in the US District Court for the Northern District of California on Tuesday said the crypto company has admitted to acting as a securities broker while failing to properly register as one under California and Florida law.

The suit brought by a trio of Coinbase users who invested in cryptocurrencies on the platform said the San Francisco-based company's user agreement and public press releases that it sells and manages securities in the form of digital assets.

"Coinbase cannot act like a traditional broker/dealer and a traditional prime broker while at the same time pretending to be outside of the coverage of the laws of California and Florida," which require securities businesses to be registered with the Securities Exchange Commission or similar state agencies, the complaint said.

Coinbase is still facing a high-profile lawsuit from the SEC which also accused the company of violating securities laws.

The company didn't immediately return a request for comment.

Coinbase has argued that trading digital assets does not qualify as an “investment contract” under a long-standing Supreme Court test used to determine whether assets should be classified as securities.

The case is *Carter v. Coinbase Global Inc.*, N.D. Cal., No. 3:24-cv-03350, 6/4/24 .

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A defendant's guide to the plaintiffs' trial playbook: strategies and countermeasures

 [reuters.com/legal/legalindustry/defendants-guide-plaintiffs-trial-playbook-strategies-countermeasures-2024-06-04](https://www.reuters.com/legal/legalindustry/defendants-guide-plaintiffs-trial-playbook-strategies-countermeasures-2024-06-04)

Kate Davis, Noah Becker

An empty courtroom is seen at the New York State Supreme Court in Manhattan, New York City, U.S., August 21, 2020. REUTERS/Andrew Kelly Purchase Licensing Rights , opens new tab

June 04, 2024 - Litigation, like sports, sees successful tactics replicated. We outline two common plaintiffs' strategies and defense countermeasures, which have particular application in product-liability actions and mass torts.

Stacking preference trials

In certain jurisdictions, plaintiffs can expedite trial proceedings. For instance, in California, plaintiffs under the age of 14 or over the age of 70, subject to specific conditions, are entitled to a preference trial. The court is required to schedule trial within 120 days from granting the motion. Cal. Code Civ. Proc. § 36(a)(1) & (2); (f).

California is not alone. Nevada allows plaintiffs over 70 to request an expedited trial, which is scheduled 120 days from the hearing of a preference motion. Nev. Rev. Stat. Ann. § 16.025(1); (3)(a). In Illinois, substantially interested plaintiffs who are at least 67 are "entitled" to preference trials "within one year of the hearing of the motion." 735 ILCS 5/2-1007.1(a).

While preference trials are not new, their use to increase settlement pressure by "stacking" multiple trials on a compressed timeframe is becoming commonplace. Collapsing all aspects of the pre-trial process into a 120-day schedule presents significant advantages for plaintiffs and acute challenges for defendants.

Notably, in working up the first case for trial, plaintiffs take most or all the company discovery they will need for future trials. Defendants, on the other hand, must start discovery anew with every individual plaintiff. In a complicated product-liability action, this could require review of thousands of pages of medical records, depositions of numerous healthcare providers, and multiple individualized expert opinions.

Defendants are not entirely without recourse. Recourse may be found in the rules of evidence and procedure, in litigation-management practices, and even the Constitution.

First, in some procedural postures, preference trials may not be compulsory. For example, actions consolidated pursuant to California's Judicial Council Coordination Proceeding ("JCCP") are governed by the schedules provided under the JCCP. See *Isaak v. Sup. Ct.*, 73

Cal. App. 5th 792 (Cal Ct. App. 2022) review denied (Mar. 23, 2022).

If either party is pursuing consolidation of a JCCP, defendants should seek to include potential preference cases within the JCCP and the schedule established therein.

Additionally, plaintiffs may not simply be able to reuse the same evidence in every proceeding. For example, California does not permit the use of discovery deposition testimony in subsequent proceedings even where the party opposing its use was present at the previous deposition, absent a finding that the motive and interest to cross-examine the deponent was similar to that at trial. See *Berroteran v. Super. Ct.*, 505 P.3d 601 (Cal. 2022); but see Nev. R. Civ. P. 32(a)(8) ("A deposition lawfully taken ... in any federal-or-state-court action may be used in a later action involving the same subject matter between the same parties ... to the same extent as if taken in the later action.").

Illinois permits parties to take two different types of deposition: a discovery deposition or an evidence deposition. IL. R. S. CT. Rule 202. There are restrictions on the use of the former as "discovery depositions generally are not admissible at trial." *Browning v. Advoc. Health & Hosp. Corp.*, 2023 IL App (1st) 221430, ¶ 52, appeal denied, 226 N.E.3d 17 (Ill. 2024). However, these hearsay arguments are not always available and can come at the expense of exposing a witness to multiple depositions.

Constitutional Due Process rights may also provide a defense against unreasonable trial schedules. For example, in *Roe v. Superior Court*, the California Court of Appeal recognized that "the due process implications" of the preference trial "have not yet been decided" and "it may not be possible to bring the matter to trial within the technical limits" of the preference statute. *Roe v. Super. Ct.*, 224 Cal. App. 3d 642, 644 n.2 (Cal. Ct. App. 4th Dist. 1990).

Neither Nevada nor Illinois have addressed the federal constitutional issue, though the preference statute in Illinois has been upheld in the face of other state constitutional challenges. See *Davidson v. Davidson*, 612 N.E. 2d 71 (App. Ct. Ill. 1993).

Finally, where preference trials are unavoidable, defendants should consider using a tried-and-true practice — the virtual law firm. By employing multiple trial teams across different firms, defendants can maximize their ability to tailor discovery to each plaintiff's claim and offset some of the pressure caused by stacked preference trials.

Breaking plaintiff's expert causation chain

Another practice we see with greater frequency is layering of experts to obscure weaknesses in plaintiffs' scientific proof. When plaintiffs cannot find a single expert to opine that defendant's product caused the plaintiff's injury, plaintiffs often resort to sequencing one expert after another to form a chain leading from general causation to damages. The chain often looks something like this:

- The first expert provides a high-level opinion that some component of the product (rather than the product itself) can cause injury. This is often an epidemiological opinion based on literature studying different exposure doses, duration, methods, and even outcomes. The opinion provides a general-causation opinion of sorts but is untethered to the specific-causation opinion.
- The next expert, often a toxicologist, acts as a bridge between the general-causation expert and the case-specific expert. The expert purports to assess and quantify plaintiff's exposure to the component.
- Finally, the third expert is instructed to assume the correctness of the first two experts' opinions on general causation and exposure. Based on that assumption, the expert then rules out all other possible causes of plaintiff's injury except for defendant's product.

This practice is distinct from the practice of doubling up on redundant experts to maintain optionality for trial or persuade with sheer quantity. These daisy-chained experts are each insufficient to meet plaintiff's burden and must rise or fall together — if one expert's testimony is excluded, the entire causation argument falls apart.

Defendants can exploit this by phasing expert discovery to allow the court the chance to scrutinize each link individually as well as the nexus connecting them. When plaintiffs' science is weak, addressing general causation early can be particularly effective. Success on general causation can be case and even MDL-ending. Notably, since 2015, defendants have succeeded in their general causation challenges in at least seven MDLs.

Leveraging the interdependence of plaintiff's experts can also be an effective strategy. Areas of disagreement, typically fodder for cross examination, take on new significance when the validity of one expert's conclusions hinges on the reliability of another's.

For example, the chain may be vulnerable where the specific-causation expert does not adopt or act upon the general-causation expert's opinion in their day job, or, where the case-specific expert disavows the methodology of the general-causation expert such as drawing medical conclusions about humans from the animal studies. The interconnectedness of these experts can be exploited to attack the admissibility of their testimony.

While the strategies discussed above will continue to proliferate, understanding plaintiffs' tactics and employing strategic defenses can protect defendants' interests.

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Firms Must Update M&A Playbooks to Address Generative AI Risks

By Sarah Schaedler, Daniel Healow, and Zac Padgett2024-06-05T04:31:02000-04:00

- *Orrick attorneys say generative AI impacts M&A deals*
- *Companies must consider risks during every step of the process*

Generative artificial intelligence has evolved so quickly that many companies haven't had time to adjust. Now acquirers and sellers of businesses need to update their M&A playbooks to address AI legal risks in enterprise environments.

Such changes are relevant for acquisitions of companies that offer AI-powered products and companies using AI solutions internally.

Buyers now routinely include AI-specific representations in purchase agreements. For sellers, this means preparing for detailed AI-specific diligence, the extent of which may be new to sell-side deal teams.

To properly address the new AI workstream in mergers and acquisitions, buyers and sellers must consider appropriate inquiry and risk mitigation measures at each stage of the deal.

Pre-Kickoff

Inventory of AI and applicable terms. Many companies don't maintain a complete, up-to-date inventory of the AI development, usage, and distribution among their teams. Sellers should establish one, as well as tracking any applicable contractual terms. Sellers can reduce concerns in diligence by presenting clear and organized descriptions of the company's use of AI.

Responsible use policies and oversight. Another core diligence consideration is whether the seller has a responsible use policy and a cross-functional AI governance structure within their company. Each is necessary to effectively surface AI use by individuals within the organization.

Even if a seller expects limited to no AI usage within the organization, sellers should pause before making broad statements to buyers that such considerations aren't applicable.

Buyers want to see that sellers are actively managing new technology risks and have appropriate visibility into the workflows of the organization. Sellers can show this by implementing appropriate personnel obligations and procedures, which will later support the accuracy of AI-related representations and warranties.

Purchase Agreements

Buyers are enhancing traditional IP representations and adding new AI representations that focus on core considerations in the context of AI, such as: training data; compliance with laws and contractual commitments; confidentiality terms and data use restrictions with third parties, including vendors; and the adoption and compliance with internal policies, governance processes, and impact assessments.

One example of this broader trend is the National Venture Capital Association's updates to its form Stock Purchase Agreement in late 2023, which added specific representations concerning generative AI technologies.

Even if certain AI-targeted terms somewhat overlap with customary agreement provisions, their inclusion forces sellers to—at minimum—make targeted disclosures and assess specific risks arising from their adoption of AI.

Post-Closing Integration

Updating AI use policies and practices. Once a transaction is complete, buyers should integrate an acquired business into buyer's broader AI management and oversight framework while accounting for the target company's specifics.

Business acquisitions may change the scope of applicable AI regulations for a company. The EU AI Act, for example, will also apply to businesses outside of the EU that are placing on the market or putting into service AI systems or general-purpose AI models in the EU (with certain limited exceptions).

Buyers must consider appropriate updates to their own AI risk profile on a regular cadence as their business evolves. They should prepare to respond to heightened AI due diligence conducted by lenders, acquirers in an exit, and other potential partners.

Updating customer and supplier terms. A comprehensive, cross-functional review will ensure internal stakeholders have the appropriate balance of rights and risk allocation under such agreements going forward. This is especially true when buyers intend to use the data of an acquired business in new ways or shift the business' customers or suppliers onto the buyer's own forms.

Buyers must ensure both the acquired business and legacy business have the rights from customers that they need to pursue the combined companies' AI goals. They should also scope the rights of vendors—especially concerning use of confidential information or personal data held by the company—to match contractual commitments and standards.

Takeaways

The increasing prevalence of products and services featuring AI technologies means buyers and sellers must each consider the impact such innovations will have in a deal process.

AI-related issues are relevant during a deal's entire lifecycle. All parties need to research and discuss such issues early to avoid last-minute transaction delays.

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

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Live Nation and Ticketmaster Slammed With 4 Data Breach Class Actions Following DOJ Lawsuit

Plaintiffs in four class actions filed in the Central District of California alleged that Live Nation and its subsidiary Ticketmaster failed to protect users' private information after a cyberattack.

June 05, 2024 at 09:35 AM



Kat Black



What You Need to Know

- A data breach caused by a cyberattack compromised the personal data of 560 million Ticketmaster customers.
- Ticketmaster and parent company Live Nation are now the target of four data breach class action lawsuits in the Central District of California.
- Ticketmaster and Live Nation were both sued for antitrust violations by the DOJ in May.

Ticketmaster and parent company Live Nation have been hit with four data breach class actions in California just two weeks after being sued by the U.S. Department of Justice.

Two suits—[Ryan v. Ticketmaster](#) and [Getman v. Ticketmaster](#)—were filed last Thursday and Friday, respectively. The plaintiffs in *Ryan* are represented by Clarkson Law Firm and the plaintiffs in *Getman* are represented by Clarkson Law Firm and Sterlington.

On Monday, two new complaints—[Moledina v. Live Nation Entertainment](#) and [Caballero v. Ticketmaster](#)—were also submitted by Kazerouni Law Group and Robinson Calcagnie (representing the plaintiffs in *Moledina*) and Chimicles Schwartz Kriner & Donaldson-Smith, Carey Danis & Lowe and Lavelly & Singer (representing the plaintiffs in *Caballero*).

Plaintiffs in all four class actions, which were filed in the Central District of California, alleged that Live Nation failed to protect the private information of Ticketmaster users after a massive cyberattack led by the hacking group ShinyHunters.

The leak affected 560 million consumers in total and exposed such details as names, addresses, email addresses, telephone numbers, and credit card information.

“As of the date of this filing, Defendants have offered no assurance that the sensitive and private information that was accessed in the Data Breach has been recovered or destroyed,” attorneys for the plaintiffs in *Caballero* wrote.

Live Nation, an entertainment giant headquartered in Beverly Hills, acquired ticket sale and distribution platform Ticketmaster in 2010. Ticketmaster came under national scrutiny in 2022, when enraged Taylor Swift fans sued the company for antitrust violations after the scramble to purchase tickets for the singer’s “Eras” tour led to unprecedented wait times, website crashes and ticket cancellations.

Both companies were targeted on May 23 in a landmark antitrust lawsuit by the DOJ and 30 state and district attorneys general, which claimed that they monopolized the U.S. live events industry.

“It is time to break up Live Nation-Ticketmaster,” Attorney General Merrick Garland said in a DOJ [news release](#).

Live Nation and Ticketmaster did not immediately respond to requests for comment.

Ryan Clarkson, the managing partner of Clarkson Law Firm and an attorney in the *Ryan v. Ticketmaster* case, said that the data breach “underscores the importance of the government’s attempt to break up the company’s monopoly.”

“The sweeping scope of impacted consumers makes this one of the largest data breaches in history,” he said. “When companies face no competition, they’re disincentivized to deliver the best product or service—in this case, by failing to protect highly sensitive data in its possession that is now for sale on the dark web. Consumers are rightfully outraged.”

RELATED STORIES

[Ticketmaster, Live Nation Hit With Ticket Buyers' Class Action Hours After DOJ Antitrust Suit](#)

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NEWS

Phila. Judge Slashes \$1.8B Off of \$2.25B Roundup Verdict

The plaintiff's lawyers said they "believe the reduction of the jury's verdict is a departure from established Pennsylvania law that we plan to appeal, seeking reinstatement of the full measure of compensatory and punitive damages."

June 05, 2024 at 12:17 PM

Mass Torts



Aleeza Furman
Litigation Reporter



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

What You Need to Know

- A Philadelphia judge reduced a \$2.25 billion Roundup verdict to \$404 million.
- The molded verdict still remains among the highest reached in the Roundup litigation.
- Both sides said they plan to seek an appeal.

The largest verdict to come out of the Roundup litigation has been slashed by more than 80%.

Judge Susan Schulman of the Philadelphia Court of Common Pleas on Tuesday reduced the \$2.25 billion verdict awarded January in *McKivison v. Monsanto* to \$404 million.

"We are pleased that Judge Schulman—like many other judges before her—overruled all of Monsanto's attempts to derail the clear message behind the jury's verdict—namely that Roundup causes cancer and Monsanto is liable for its reckless conduct," Kline & Specter's Thomas Kline and Arnold & Itkin's Jason Itkin, who represented plaintiff John McKivison, said in a statement.

"However," they continued, "we also believe the reduction of the jury's verdict is a departure from established Pennsylvania law that we plan to appeal, seeking reinstatement of the full measure of compensatory and punitive damages."

The original verdict awarded \$250 million compensatory damages and \$2 billion punitive damages to McKivison for his claims that Monsanto's Roundup weedkiller caused him to develop non-Hodgkin lymphoma.

Monsanto contended that the verdict was the result of dozens of erroneous rulings from the judge, of which many related to what evidence was and was not permitted. The company additionally argued that both the compensatory and punitive damages awards were excessive.

The defendant—represented at trial by McDermott Will & Emery and Nelson Mullins Riley & Scarborough—asserted in its post-trial motion that, “while Monsanto is sympathetic to plaintiff’s unfortunate diagnosis, the jury’s astronomical compensatory damages award is shocking beyond belief and not supported by the evidence.”

Monsanto asserted that the punitive damages award was improper on several grounds, including that it had already paid millions of dollars in punitive damages arising from other cases over the same conduct in *McKivison*.

Schulman’s order, which was not accompanied by an opinion, denied Monsanto’s request for a new trial or judgment notwithstanding the verdict but remitted the compensatory damage to \$50 million and the punitive damages to \$350 million. Schulman also granted the plaintiff’s motion for \$4.3 million in delay damages.

Even with the grant of remittitur, the molded *McKivison* verdict is higher than all but one of the original [verdicts](#) that have so far been handed up in Roundup trials—the exception being a \$2 billion verdict out of California in 2019 that was later reduced to \$86.7 million.

“While the court’s decision reduces the unconstitutionally excessive damage award, we still disagree with the ruling on the liability verdict, as the trial was marred by significant and reversible errors that misled and inflamed the jury,” a Monsanto spokesperson said in a statement. The spokesperson said Monsanto will be seeking an appeal.

“These errors reinforce the urgent need for legislative reform to clarify that compliance with labels required under federal law is sufficient to meet all state warning requirements,” the spokesperson contended.

The spokesperson added: “Otherwise, we risk more verdicts and excessive awards for a product that has consistently been found to be safe by regulatory bodies worldwide that will encumber funds that should be used for research and development to field new crop protection tools and help feed the world sustainably.”

RELATED STORIES

Monsanto Claims Dozens of Bad Rulings Led to \$2.25B Roundup Verdict

Philadelphia Jury Hits Monsanto With \$2.25B Roundup Verdict

Tracking Monsanto’s Roundup Verdicts Across the US

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US judges split over litigation funder Burford's role in Sysco cases

 [reuters.com/legal/litigation/us-judges-split-over-litigation-funder-burfords-role-sysco-cases-2024-06-04](https://www.reuters.com/legal/litigation/us-judges-split-over-litigation-funder-burfords-role-sysco-cases-2024-06-04)

Mike Scarcella

A Sysco sign is shown outside one of their distribution centers in Poway, California, U.S. February 6, 2017. REUTERS/Mike Blake Purchase Licensing Rights , opens new tab

- Burford Capital denied substitution for Sysco in Minnesota
- Chicago court earlier ruled for Burford in related case

June 4 (Reuters) - Two federal judges have issued contradictory rulings on whether litigation funding firm Burford Capital (BURF.L) , opens new tab can take over as the plaintiff in lawsuits brought by its financing client Sysco (SYY.N) , opens new tab.

In the latest order , opens new tab, U.S. District Judge Tunheim in Minnesota on Monday upheld a magistrate's February decision requiring food distribution giant Sysco to remain the plaintiff in antitrust lawsuits it filed accusing pork and beef suppliers of overcharges.

Tunheim's order contrasted with a decision by a Chicago federal judge in March that said Burford unit Carina Ventures could be substituted as the plaintiff in another Sysco antitrust lawsuit accusing chicken processors of fixing prices.

The cases have been closely watched by the litigation funding industry, which provides financing to clients in exchange for a part of any settlement or other judgment. Burford had spent \$140 million since 2019 supporting Sysco's antitrust cases, court documents show.

Burford on Monday said it was reviewing the Minnesota decision and did not have further comment. Sysco declined to comment.

The wrangling over substitution surfaced after Sysco wanted to settle some of its claims at amounts Burford considered too low. Burford won an arbitration order barring Sysco from settling its cases.

Burford and Sysco resolved their dispute, and Sysco voluntarily transferred its claims to Burford's newly created unit Carina.

Meat suppliers fought the substitution effort, however, arguing that putting the funding company in charge went against public policy that favored litigants settling cases on their own terms.

In the earlier Chicago ruling, U.S. District Judge Thomas Durkin said it "generally was not his place" to "interfere with sophisticated parties' business decisions."

Tunheim, however, said in Monday's Minnesota order that granting substitution could harm antitrust cases around the country. "Sysco and Burford's conduct is precisely the kind of conduct of which courts are wary," the judge wrote.

Sysco's cases in Illinois and Minnesota are in different federal appellate circuits, which could lead to a broader split on the issue if the decisions are appealed.

The cases are *In re: Pork Industry Litigation*, U.S. District Court for the District of Minnesota, No. 0:18-cv-01776, and *In re: Cattle and Beef Antitrust Litigation*, same court, No. 0:22-md-03031.

For Sysco: Christopher Wilson of Baker Botts

For Carina: Derek Ho of Kellogg, Hansen, Todd, Figel & Frederick; Scott Gant of Boies Schiller Flexner; and Christopher Seeger of Seeger Weiss

Read more:

[Litigation funder Burford wins bid to take over Sysco chicken antitrust cases](#)

[Litigation funder Burford fights order denying bid to take over Sysco cases](#)

[Burford litigation funder's Carina Ventures sues US turkey suppliers in antitrust case](#)

[Sysco's plan to cede antitrust claims to Burford entity draws opposition](#)

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Reporting by Mike Scarcella

Meta Fails to Wield Section 230 to Fully Block Scam Ads Suit

By Isaiah Poritz 2024-06-04T15:27:31000-04:00

- Contractual promise isn't covered by tech immunity law
- Judge asks appeals court to revisit scope of Section 230

Instagram and Facebook owner [Meta Platforms Inc.](#) was unable to fully escape a lawsuit from users who fell victim to scam ads after the Ninth Circuit on Tuesday found the company isn't completely protected by the tech industry's immunity shield.

A three-judge panel for the country's largest federal appeals court ruled the social media giant's alleged failure to meet contractual obligations to remove harmful scam ads isn't protected by Section 230 of the Communications Decency Act.

It's the latest court opinion to take aim at the controversial 1996 federal law that provides broad immunity to internet platforms facing lawsuits stemming from user-generated content.

Social media platforms for decades have wielded Section 230 to escape lawsuits, arguing they're not responsible for third-party content published on their platforms. But in recent years plaintiffs attorneys have had some success in advancing cases over youth social media addiction and child sexual exploitation.

Judge [Ryan D. Nelson](#), a Trump appointee who wrote the majority opinion on Tuesday, argued in a separate concurrence that the US Court of Appeals for the Ninth Circuit should revisit its historically expansive Section 230 precedent.

The existing law gives "functional immunity to internet companies, even when they are aware (or should be aware) of unlawful content on their websites," he wrote in the concurrence. "In a world ever evolving and with artificial intelligence raising the specter of lawless," the appeals court should consider whether its existing precedent has "created perverse effects," Nelson said.

Ads from China

The proposed class action stemmed from a pair of Meta users who gave money to fraudulent vendors based in China after seeing ads for toys and a car assembly kit on Meta's social media platforms.

The users argued that Meta's terms of service agreement created a contractual obligation for the company to remove scam advertisements, but the company actually aggressively solicits scammers in China.

The trial court dismissed the suit under Section 230 in 2021.

Nelson's majority opinion partially reversed the lower court, finding that Meta's promise to prevent scam ads isn't covered by Section 230 because "it became bound by a contractual duty separate from its status as a publisher."

However, he said, the users' claims based on negligence and unjust enrichment are barred by Section 230 because they seek to hold Meta liable as a publisher.

Judge [Jacqueline H. Nguyen](#) and Sixth Circuit Judge [Eugene E. Siler](#), sitting by designation, also joined the opinion.

Attorneys for both parties didn't immediately return requests for comment.

Levi & Korsinsky LLP represents the users. Gibson Dunn & Crutcher LLP represents Meta.

The case is [Calise v. Meta Platforms Inc.](#) , 9th Cir., No. 22-15910, 6/4/24 .

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Sutter Health's antitrust victory overturned by 9th Circuit panel

DJ [dailyjournal.com/articles/379037-sutter-health-s-antitrust-victory-overturned-by-9th-circuit-panel](https://www.dailyjournal.com/articles/379037-sutter-health-s-antitrust-victory-overturned-by-9th-circuit-panel)

Antitrust & Trade Reg.,

9th U.S. Circuit Court of Appeals

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Jun. 5, 2024

Sutter Health's antitrust victory overturned by 9th Circuit panel

The panel ruled that U.S. Magistrate Judge Laurel D. Beeler of San Francisco failed to instruct the jury to determine whether Sutter's policies were motivated by an anticompetitive purpose and incorrectly excluded any evidence before 2006.

A divided 9th U.S. Circuit Court of Appeals panel on Tuesday reversed a major defense win for health care giant Sutter Health in an antitrust class action because of the trial judge's "prejudicial" jury instructions and exclusion of key evidence.

9th Circuit Judge Lucy H. Koh, an appointee of President Joe Biden, granted a new trial after ruling that U.S. Magistrate Judge Laurel D. Beeler of San Francisco failed to instruct the jury to determine whether Sutter's policies were motivated by an anticompetitive purpose and incorrectly excluded any evidence before 2006.

"As a means of determining anticompetitive effect, however, anticompetitive purpose is one of several relevant factors that a trier of fact may consider," Koh wrote. "Here, the jury was not instructed that it could consider anticompetitive purpose. This was error."

She agreed with arguments by Constantine Cannon LLP partner Matthew L. Cantor that U.S. Magistrate Judge Laurel D. Beeler's errors prevented the jury, which ruled for Sutter Health following a 2022 trial, from hearing all the evidence. *Sidibe v. Sutter Health*, 2024 DJDAR 4812 (9th Circ., filed April 28, 2022).

Plaintiffs sued Sutter Health in 2012, alleging the company used its market power to pressure health insurance companies into "all-or-nothing" contracts, engaging in unlawful tying in violation of the state Cartwright Act and causing families and businesses, the plaintiffs in the class action, to overpay by \$411 million for health care services.

The two key issues were Beeler's decision to exclude evidence prior to Jan. 1, 2006 and a jury instruction striking the word "purpose" from "anticompetitive purpose."

Koh wrote that Beeler "excluded documents all based on the same fundamental error: failing to appreciate that pre-2006 evidence was highly relevant to both Plaintiffs' tying and unreasonable course of conduct claims."

A Sutter Health spokesperson did not announce that the company would seek en banc review from the full 9th Circuit but a company statement suggested that was likely.

"Sutter Health is disappointed by today's divided appellate ruling overturning a unanimous jury verdict in our favor finding Sutter did not violate antitrust laws," wrote Angeline Sheets, a senior director of external communications with the health care company.

"Sutter Health intends to pursue all avenues to overturn the erroneous decision, as guided by our commitment to caring for our patients and continuing to provide them with high-quality, connected, and affordable care," she added.

Cantor, in a phone interview, hailed the decision. Beeler "didn't tell the jury they could make any findings about an anticompetitive purpose," he said. Of the decision to eliminate pre-2006 evidence, "it essentially cut off half the story."

9th Circuit Judge Patrick J. Bumatay, an appointee of President Donald Trump, dissented.

He argued that the majority decision eliminates a judge's discretion to set "reasonable limits on admissible evidence.

"So broad is the district court's discretion in this context that, to my knowledge, no federal circuit court has ordered a retrial based on the setting of a reasonable evidence cutoff date," Bumatay wrote. "We are now the first."

He also argued that Koh - joined by 9th Circuit Judge Roopali H. Desai, a Biden appointee - also crafted a new antitrust rule in its decision on the anticompetitive purpose jury instruction.

"The majority states that rule-of-reason cases require consideration of the defendant's anticompetitive purpose and any jury instruction that does not directly mandate its consideration is reversible error," Bumatay wrote.

Jones Day and Bartko LLP represented Sutter Health.

The state attorney general's office filed an amicus brief siding with the plaintiffs. California agreed to settle its own antitrust case against Sutter Health in 2019 after the hospital chain agreed to pay \$575 million and abide by a series of restrictions to stop overcharging customers in Northern California. *People v. Sutter Health*, CGC-18-565398 (San Francisco Co. Sup. Ct., filed March 29, 2018).

#379037

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Bloomberg Law News 2024-06-05T13:58:5153705246-04:00

Sutter Heath Confronts Antitrust Suit After Verdict Reversal (2)

By Katie Arcieri 2024-06-04T13:49:24000-04:00

- Ninth Circuit says court failed to properly instruct jury
- Jury had returned a 2022 verdict in favor of Sutter

Sutter Health will face antitrust claims in a yearslong class action alleging the company used its market power to force insurers in California to pay more for services after the Ninth Circuit reversed a 2022 jury verdict.

A majority panel for the US Court of Appeals for the Ninth Circuit said in a Tuesday [order](#) that a district court erred by failing to instruct the jury to consider Sutter's "anticompetitive purpose" and by excluding evidence of Sutter's conduct before 2006, five years before the specific contracts that individual and business plaintiffs alleged caused them harm were negotiated and took effect.

"The excluded evidence concerned the inception, Sutter's stated purpose, and effects of the conduct challenged during the trial," the Ninth Circuit said.

"These errors were prejudicial, so we reverse," the majority panel said.

The order marks a significant loss for Sutter Health, which two years ago [defeated](#) the antitrust class action when jurors sided with the health-care system and rejected claims that it tied purchasers into all-or-nothing plans and violated California's unfair business practices act.

"Sutter Health is disappointed by today's divided appellate ruling overturning a unanimous jury verdict in our favor finding Sutter did not violate antitrust laws," a company spokesperson said in a statement. "Sutter Health intends to pursue all avenues to overturn the erroneous decision, as guided by our commitment to caring for our patients and continuing to provide them with high-quality, connected, and affordable care."

Individual and business plaintiffs in 2012 [sued](#) Sutter Health, a Sacramento, Calif.,-based company that runs acute-care hospitals in the state, claiming the system illegally required health plans to use all Sutter providers and affiliated physicians' groups—or else have zero access to any of them.

The plaintiffs also claimed that Sutter's exclusive dealing arrangements required them to obtain all of their medical care through Sutter providers and forced them to pay more for premiums.

The plaintiffs are represented by firms including Constantine Cannon LLP. Sutter is represented by firms including Jones Day and Bartko LLP.

The case [Sidibe v. Sutter Health](#) , 9th Cir., No. 22-15634, 6/4/24 .

(Updates June 4 story with statement from Sutter Health in sixth paragraph.)

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US judicial panel approves rule governing federal mass torts

 [reuters.com/legal/litigation/us-judicial-panel-approves-rule-governing-federal-mass-torts-2024-06-04](https://www.reuters.com/legal/litigation/us-judicial-panel-approves-rule-governing-federal-mass-torts-2024-06-04)

Nate Raymond

A bronze statue titled "Justice Delayed, Justice Denied" depicting a figure of Justice is seen on the Albert V. Bryan United States Courthouse in Alexandria, Virginia, U.S., September 1, 2020. REUTERS/Andrew Kelly Purchase Licensing Rights , opens new tab

June 4 (Reuters) - A U.S. judicial panel on Tuesday approved the first-ever rule designed to govern federal mass torts cases and provide judges an initial roadmap to follow when assigned to hear hundreds or thousands of lawsuits against companies.

The U.S. Judicial Conference's Committee on Rules of Practice and Procedure during a meeting in Washington, D.C., voted in favor of a rule that would give judges guidance on how to conduct early case management when they begin overseeing federal multidistrict litigation (MDLs).

MDLs, which often involve cases alleging that a company's drug or other product injured consumers, have grown significantly in recent years and comprise 71.3% of the federal civil caseload as of the end of the 2023 fiscal year, according to the defense-oriented group Lawyers for Civil Justice.

The rule has been under consideration since 2017, with defense lawyers and companies that frequently face litigation over injuries blamed on their products like Johnson & Johnson and Bayer urging for major changes to weed out meritless cases.

The ultimate rule, though, is a "modest rule, quite frankly, given what the initial proposals were," said U.S. District Judge John Bates, a D.C. judge who chairs the committee. But he called it an "outstanding" rule that had his full support.

"Congratulations are extended to the end of a seven-year period of coming up with a rule," he said.

The rule says judges should schedule initial hearings to develop case management plans once they are assigned cases by the Judicial Panel on Multidistrict Litigation, and encourages the appointment of plaintiffs' leadership counsel.

The new Rule 16.1 of the Federal Rules of Civil Procedure also calls for parties to exchange information early on about the principal factual and legal issues in the MDL and factual bases for their claims and defenses.

Alex Dahl, the general counsel for Lawyers for Civil Justice, in a statement said the rule will "focus courts and parties on ensuring that the claims in an MDL actually belong in the proceeding, and will do so early on."

Defense lawyers had pushed for a process to require each plaintiff early in a case to establish they have factual support for most basic elements of their claims, to weed out cases early in the litigation.

But judicial policymakers stressed a need to maintain flexibility for when, not whether, judges should require plaintiffs to provide such information. Much of the rule amounts to non-binding guidance for judges, who retain discretion to manage MDLs.

The rule now goes to the Judicial Conference, which is expected to consider it during its September meeting. If approved, it would be transmitted to the U.S. Supreme Court, which would then submit it to Congress. Barring Congress moving to disapprove it, the rule would take effect Dec. 1, 2025.

Read more:

US judicial panel approves first rule to govern federal mass torts

Defense lawyers, drugmakers urge U.S. judiciary to toughen mass tort rule

US judicial panel proposes rule to overhaul federal mass torts

J&J, 3M among companies seeking 'basic due diligence' in multidistrict litigation

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Reporting by Nate Raymond in Boston; Editing by Daniel Wiessner

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

Nate Raymond
Thomson Reuters

Nate Raymond reports on the federal judiciary and litigation. He can be reached at nate.raymond@thomsonreuters.com.

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Labaton Keller Sucharow Launches in London

 [labaton.com/news-insights/labaton-keller-sucharow-launches-in-london](https://www.labaton.com/news-insights/labaton-keller-sucharow-launches-in-london)

NEW YORK — Labaton Keller Sucharow LLP is pleased to announce the opening of its London office, marking a significant milestone in the Firm's expansion. Led by Partner Jamie Hanley, a UK-qualified lawyer with more than 30 years of experience working with trade unions, including his recent role as General Counsel at the GMB Trade Union, the London office is poised to offer unparalleled legal services to clients across the United Kingdom, Europe, and beyond.

Commenting on the office launch, Labaton's Chairman, Christopher J. Keller, stated, "Our new London office, and its stellar talent, is the next phase of Labaton's growth strategy. The Firm is well-positioned to address the dynamic needs of our diverse client base."

"Our Securities Litigation Practice has unmatched breadth and depth. Jamie's decision to join the Firm reflects the strength of our platform and the confidence in our culture," remarked Managing Partner Jonathan Gardner.

Labaton's London office will provide a wide range of services, including comprehensive global portfolio monitoring, U.S. and non-U.S. securities litigation, and corporate governance and shareholder rights litigation. Strategically positioned, the office will cater to institutional investor clients located throughout the United Kingdom and Europe, as well as clients in the United States, United Kingdom, and Europe who are involved in non-U.S. securities litigation.

"Labaton has a longstanding presence in the United Kingdom and Europe representing some of the most influential institutional investors," noted Eric J. Belfi, Senior Partner and Head of Client Development. "I am excited to contribute to the growth of our newest office, which will further strengthen our commitment to exceptional client service."

The London office will work closely with attorneys in Labaton's New York and Delaware offices, strengthening the Firm's capability to provide complete and seamless legal services to clients.

"Establishing Labaton's first office outside the U.S. is an extraordinary opportunity," remarked Jamie Hanley. "I am privileged to join the Labaton partnership during this pivotal moment for the Firm."

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Legal Profession Blog

lawprofessors.typepad.com/legal_profession/2024/05/a-hearing-report-befoe-the-massachusetts-board-of-bar-overseers-proposes-this-matter-arises-out-of-the-fee-petition-submitte.html

Tuesday, May 28, 2024

Oh Sweet Blindness

A Hearing Report majority in a matter before the Massachusetts Board of Bar Overseers proposes a six-month suspension over a dissent favoring two years.

The fighting issue involved the Respondent's contention that he had not carefully read a fee petition he had signed under oath.

The issue was uncovered in reporting of The Boston Globe.

This matter arises out of the fee petition submitted by the class action counsel in the State Street Bank litigation (the "Class Action"), captioned as Arkansas Teacher Retirement System v. State Street Bank and Trust Co., civil action 11-cv-10230-MLW, in the U.S. District Court for the District of Massachusetts. The Class Action case arose from alleged overcharges of clients by State Street Bank and Trust Co. ("State Street" or the "Bank") through hidden mark-ups and the use of foreign exchange transactions. The law firm in which the respondent, Garrett J. Bradley, was then a partner represented the plaintiff class as co-counsel with other firms.

On November 30, 2021, bar counsel filed a petition for discipline against Bradley. An amended petition for discipline was filed on December 27, 2021. The amended petition for discipline charged that the respondent's declaration in support of his law firm's motion for the award of attorneys' fees and expenses (Ex. 8) in the Class Action, which he signed under oath, contained knowingly false statements of fact and therefore was a violation of Fed. R. Civ. P. 11. If, instead, the respondent had failed to read his declaration, bar counsel charged that the respondent violated Mass. R. Prof. C. 1.3 (lack of diligence). To the extent that he knowingly made the false statements and failed to correct them or take other remedial measures in a timely manner, the amended petition charged that he violated rules 3.3(a)(1), 3.3(a)(3), 3.4(c), 8.4(c), 8.4(d) and 8.4(h). To the extent that he failed to inform the District Court in an ex parte hearing of all material facts known to him that would enable the court to make an informed decision with respect to the lodestar cross-check method of the fee-approval process, the amended petition charged that the respondent violated Mass. R. Prof. C. 3.3(d).

Majority conclusions

The majority of the committee finds that had the respondent read the declaration carefully, he would have been aware that some or all the above statements were not accurate or, in the context of the proceeding, at least misleading. However, the majority of the committee credits his testimony that he did not read the declaration carefully enough to understand what he was signing was not accurate or was misleading. Bar counsel failed to introduce any evidence to the contrary...

The respondent admitted that he failed to do anything to verify the accuracy of the information contained in his declaration. (Tr. 84-85). Although the respondent testified that he relied on those who prepared the declaration to ensure that it was accurate, he agreed that, as the signer of the document and Thornton's managing partner, "the buck stops with me. It's my mistake." (Tr. 86). We find that the respondent was therefore responsible for any errors in the declaration he signed and submitted to the District Court.

As a result

Relying on the truthfulness of the sworn declarations provided by the respondent and other counsel, the District Court approved the \$75,000,000 fee request.

The respondent testified that, as a result of a Boston Globe investigation, he became aware, sometime between November 2 and November 10, 2016, that the firms of Labaton and Lieff Cabraser had also included, in aggregate, all the Staff Attorneys on their firms' fee declarations. He therefore compared the three Exhibit As of the three firms side-by-side and saw the duplication. (Tr. 101-105; Ex. 16).¹² The respondent said that he "saw right away that there [were] the same names with different rates at different firms, and [he] knew that something wasn't right." (Tr. 103).

On November 10, 2016 (about a week after the District Court issued an order approving the \$75,000,000 fee award), a Labaton attorney informed the District Court by a letter ("the Labaton Letter") that inquiries from the media had caused class counsel to realize that they had inadvertently double-counted the hours of the Staff Attorneys. (Ex. 16 at p.1 ¶1). Labaton submitted this letter on behalf of itself, the Thornton firm, and Lieff Cabraser to explain this particular error. (Id.) This error inflated what had been represented to be their collective lodestar by more than 9,300 hours and more than \$4,000,000. (Ex. 16; Ex. 1, Timeline at 002; Ex. 42C).

When the respondent compared the Thornton "Exhibit A" to his declaration against the others in November 2016, he must also have observed his declaration's exhibit identifies these individuals (plus Michael Bradley) with the designation for their "Status" as "SA". That stands for "Staff Attorney." Neither Exhibit A nor the body of the declaration states any of these individuals actually were employed by or contracted to one of the other lead class counsel and that the Thornton firm at most reimbursed one or the other firm for some or all of

the expenses associated with these lawyers. To the contrary, the body of the declaration states the persons on Exhibit A either were or had been employed by (or contracted to) Thornton such that it was responsible for their compensation and accordingly could “claim” the value of their time in its lodestar calculation. Respondent failed to correct these misrepresentations in November 2016.

Finding

Given the respondent’s testimony and the contemporaneous Labaton Letter submitted to the District Court on behalf of Labaton, the Thornton firm, and Lieff Cabraser, the majority of the committee credits the respondent’s testimony concerning how the cost-sharing arrangement worked in connection with the Staff Attorneys. Bar counsel introduced no evidence, at least that was made clear to the majority of the committee, demonstrating the representation in the letter from Lead Counsel to that effect was not accurate. That does not, however, excuse the respondent’s declaration represented to (or was understood by) the District Court as affirming the identified attorneys were “employees” of the Thornton firm. Whatever were the details of the cost-sharing arrangement, none of these people were employees of the Thornton firm.

After further revelations by The Boston Globe, a special master was appointed

Thornton and the other class counsel agreed to the appointment of Judge Rosen as master. (Ex. 42G). After an extensive investigation, Judge Rosen filed, on May 14, 2018, a 377- page “Report and Recommendations.” (Ex. 42K). After receiving the master’s report and recommendations, the court vacated the original \$75,000,000 fee award. (Ex. 42I).

In June 2019, the District Court conducted a three-day evidentiary hearing on objections to the report that had been filed by Thornton and other Class Counsel. (Ex. 42K). Following this hearing, the District Court reduced the original fee award from approximately \$75,000,000 to \$60,000,000 and reallocated the amount each of the participating law firms would receive of that reduced total. (Ex. 42L)

Sanction

the majority of the hearing committee credits the respondent’s testimony that he did not knowingly make a misrepresentation of fact to the Federal Court because he did not read his declaration in its entirety before signing it. Accordingly, while he violated rules 3.3(a)(3), 3.3(d) and 8.4(d) and (h), he did not violate rules 3.3(a)(1) and 8.4(c), the latter to the extent that it was not intentional misrepresentation, but negligent misrepresentation, thus warranting a lesser sanction.

The majority recommends a six-month suspension.

Dissent

A majority of my colleagues on this hearing committee credit the respondent's testimony that he did not read his sworn "declaration" in its entirety before signing it. However, I find this credibility determination to be inconsistent with the evidence in this case. Under our case law, a naked, unsupported credibility determination will not suffice, especially if it is inconsistent with other evidence. Therefore, I must respectfully disagree with the majority's decision in this matter.

Oath sworn

Here, the respondent signed the declaration and "declare[d] under penalty of perjury that the foregoing is true and correct." (Ex. 8 at A-000157). Perforce, like Diviacchi, the respondent is held to have had actual knowledge and, therefore, knowingly made a false statement of fact to the federal court.

Further, I do not credit the respondent's testimony that he did not read all of his declaration supporting the motion to award attorneys' fees and expenses. (Ex. 8). The sworn declaration is two double-spaced pages of text (the other two pages are a caption and a signature line), so any reasonable attorney—particularly a managing partner—who was even mildly interested in the firm's support for a request for a multi-million-dollar fee that his firm was seeking to be awarded, would have read it. I also note that the respondent was announced in early September 2016 as Thornton's new managing partner. (Ex. 1, Timeline). Less than two weeks later, he signed the declaration. (Ex. 8). I do not believe that one of the respondent's first acts as managing partner of his firm would be to sign a short affidavit, where his firm sought a multi-million-dollar fee, without reading all of it. I, therefore, do not credit that the respondent did not read the entirety of the two pages of content.

If not, willful blindness

To me, this case presents classic willful blindness. Among other things, the respondent knew the fee petition would include hourly rates when he knew his firm had never charged a client by the hour and when he assisted in the fabrication of a \$500/hour rate for his brother, which he knew was not Michael's usual hourly rate. This is actual knowledge, even without reading the entirety of the sworn declaration. He could have read it but did not; it was not so lengthy or complicated that it would have been entirely unreasonable for him to do so. Therefore, assuming arguendo, the respondent did not read it, but he did so, knowing it contained false information that would be submitted to the Court. In sum: (1) if the respondent did not read the declaration, that constituted willful blindness and a lack of diligence; (2) even if he did not read it, he had reason to know it contained false information because he knew it listed his brother as an employee and a "usual hourly rate" that he knew his brother had never

charged; and (3) I do not believe he did not read it, because it is unreasonable not to have done so, given the brevity and importance of the declaration and his having sworn to it under oath.

Since willful blindness is the equivalent of actual knowledge, it follows ineluctably that the respondent knowingly engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. He told the federal court that twenty-three people who did not work at his firm were employees, and he submitted an array of false “usual hourly rates,” including that for his brother Michael, which the respondent himself helped to fabricate. As in *Diviacchi*, *supra*, and other cases, this conduct violated Mass. R. Prof. C. 8.4(c).

Sanction dissent

Given that willful blindness is the equivalent of actual knowledge, and in light of the other rules violations and the factors in aggravation, I see nothing to justify a downward departure from the presumptive sanction of a two-year suspension.

Respondent formerly served in the Massachusetts House of Representatives as assistant majority leader. (Mike Frisch)

Plaintiff firm accused of compiling frivolous mass arbitration claims to extort multimillion-dollar settlements

 legalnewsline.com/stories/660334250-plaintiff-firm-accused-of-compiling-frivolous-mass-arbitration-claims-to-extort-multimillion-dollar-settlements

June 5, 2024

Keller Postman founding partner Ashley Keller | <https://www.kellerpostman.com/>

WASHINGTON (Legal Newsline) - Fox Broadcasting's Tubi unit has sued Keller Postman, accusing the law firm of filing thousands of fraudulent arbitration claims in an effort to extort a \$71 million settlement.

Keller Postman used Instagram ads, YouTube videos and other advertising to recruit nearly 24,000 clients who filed arbitration demands against Tubi for offering targeted ads based on their age, sex and other demographic data, Tubi said. The firm's business strategy is to swamp companies with mass arbitration so they will pay a quick settlement instead of \$2,000 or more per claimant in arbitration fees – in Tubi's case, some \$48 million.

"Normally a lawyer does not benefit from bringing a frivolous claim, but Keller Postman does: Frivolous or not, Keller Postman gambles that a company will pay a global settlement with all claimants that allows Keller Postman to profit greatly, all to make the claims go away to avoid paying the arbitration fees," Tubi said in the lawsuit filed in federal court in Washington D.C.

Keller Postman boasts on its website that its clients "turn the arbitration game against the companies that harm them," using "the latest technology to pursue thousands of arbitration claims all at once."

Tubi accused Keller Postman of deliberately neglecting to collect basic information from its clients, however. A third of the claims have emails that don't correspond to any Tubi customers, the company said, 11% never received streaming ads and many others claim they received service in states where Tubi doesn't operate.

Tubi also accused Keller Postman of violating ethics rules by advising its clients to ignore a contractual requirement to provide basic information before filing arbitration claims.

Keller Postman managing partner Warren Postman, in an emailed statement, said "Tubi is pursuing a frivolous claim as a desperate tactic to evade liability for its discriminatory advertising practices."

Tubi “imposed an arbitration agreement on its customers to eliminate consumers’ rights to efficient dispute resolution through class action,” he said. “But when a large number of consumers pursued arbitration under that agreement, Tubi tried to enforce unconscionable and unenforceable pre-conditions to arbitration and refused to proceed according to the terms of its own agreement.”

Keller Postman, like most plaintiff firms, opposes arbitration in favor of class actions, which can provide more lucrative fees and involve less work for the lawyers who file them. A 2015 report by the Consumer Financial Protection Bureau, however, found that settled class actions between 2010 and 2013 delivered around \$32 per consumer while the lawyers took in \$425 million in fees. The much smaller number of arbitrations that went to a decision delivered an average of \$5,389 per consumer. Class actions also took about twice as long to resolve as arbitrations, according to that study.

Some law firms turned to mass arbitration because of the clauses in many arbitration agreements – added to prevent courts from finding such agreements unconscionable – requiring companies to pay arbitration fees up front. Mass arbitration places stricter ethical requirements on plaintiff lawyers, however, since they represent thousands of individual clients each entitled to advice on their particular case and whether to accept or reject a settlement offer.

Tubi says Keller Postman has ignored those requirements, using the very targeted ad technology it accuses Tubi of abusing to recruit clients it then presents with take-it-or-leave-it settlement offers. The law firm has been sued several times by disgruntled clients as well as companies accusing it of abusing the arbitration process.

In this case, Tubi says, the threat of imposing hefty arbitration fees went away after JAMS, the leading arbitration service, changed its rules on May 1 to streamline mass arbitration. That change lowered the up-front fee in mass arbitration to \$7,500, no matter how many claims are filed. Tubi still seeks money for tortious interference in its agreements with customers and legal fees.

The claims against Tubi follow a California court ruling allowing Facebook users to sue over targeted ads they claim discriminate against them by not offering certain products including insurance.

In its lawsuit against Keller Postman, Tubi says the law firm uses an affiliate firm, Troxel Law, to recruit clients. Until recently, Tubi says, Troxel Law had a Better Business Bureau A+ rating logo on its website when the firm’s actual grade is F from client complaints about failing to provide services promised in its ads.

Lawyer's 'Twilight Zone' font irks US appeals court in typeface takedown

 [reuters.com/legal/government/lawyers-twilight-zone-font-irks-us-appeals-court-typeface-takedown-2024-06-04](https://www.reuters.com/legal/government/lawyers-twilight-zone-font-irks-us-appeals-court-typeface-takedown-2024-06-04)

Mike Scarcella

REUTERS/John Adkisson Purchase Licensing Rights , opens new tab

June 4 (Reuters) - Chicago lawyer Jason Epstein said he's practiced law for more than 25 years without a complaint about his favorite font, Bernhard Modern, or “mod” as he calls it.

“To me it’s far more legible” than others, Epstein said on Tuesday, speaking to Reuters after a federal appeals court took him to task in a published opinion , opens new tab for submitting a brief in the typeface.

Bernhard Modern is “suited to movie posters and used in the title sequence of the Twilight Zone TV show,” wrote Circuit Judge Frank Easterbrook of the 7th U.S. Circuit Court of Appeals.

Writing in Palatino Linotype, Easterbrook warned against display faces that “wear out judicial eyes after just a few pages and make understanding harder.”

“We hope that Bernhard Modern has made its last appearance in an appellate brief,” the Monday ruling said.

State and federal courts across the country all have their own practice rules or guidance. There are rules for word counts and filing deadlines. There are rules about excessive footnotes and obscure acronyms. The Chicago-based 7th Circuit's own typography guidance , opens new tab runs seven pages.

Easterbrook's opinion, now part of that canon, made a splash in legal circles on social media. In a post on X, Arizona Court of Appeals Judge Jennifer Perkins said the 7th Circuit's new guidance on fonts will be “required reading for clerks in my chambers.”

In 2021, the D.C. Circuit caused a minor stir when it updated , opens new tab its handbook to discourage the use of Garamond, often used by the U.S. Justice Department’s civil appellate staff. Some department briefs now feature Century Schoolbook, which is what the U.S. Supreme Court employs for its rulings.

The video player is currently playing an ad. You can skip the ad in 5 sec with a mouse or keyboard

Garamond, according to the D.C. Circuit, “appears smaller” than other typefaces that are easier to read.

The 7th Circuit, meanwhile, may not have seen the last of Bernhard Modern. Epstein lost the appeal in his case, a discrimination matter, and now must decide whether to ask the court to reconsider.

He told Reuters he would follow the court's guidance and "use the most legible face available to you."

"If Bernhard Mod is still the easiest to read, I would be compelled to use it," Epstein said.

Read more:

US judiciary walks away from proposal to bar midnight court filings

D.C. judge scolds Meta lawyers for brief with 'excessive footnotes'

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Reporting by Mike Scarcella

<https://x.com/cleantechfacts/status/1798376203591823703>



Dave Anderson
@cleantechfacts

...

FirstEnergy wants @PUCOhio to consolidate for hearing issues related to the utility's multi-million House Bill 6 bribery schemes from multiple cases so it can avoid having to answer tough questions at multiple hearings dis.puc.state.oh.us/DocumentRecord...

CONCLUSION

The Ohio Utilities respectfully propose to proceed as follows in the Political and Charitable Spending Review Proceeding (Case No. 20-1502-EL-RDR), Rider Proceeding (Case Nos. 17-2474-EL-RDR and 20-1629-ED-RDR), and Corporate Separation Proceeding (Case No. 17-0974-EL-UNC):

- The ALJs should consolidate for hearing: (1) the issues in the Political and Charitable Spending Review docket; (2) the issues in the consolidated Rider dockets; and (3) the H.B.6-related issues in the Corporate Separation docket; and
- The ALJs should maintain a separate Corporate Separation proceeding to address the issues identified in the SAGE and Daymark audit reports, which do not concern H.B.6, as well as any other non-H.B.6 issues the parties raise concerning corporate separation rules. The ALJs should issue an order establishing a briefing schedule to address those audit report issues, and any other non-H.B.6 related issues concerning claimed corporate separation rule violations the parties raise. The ALJs should plan to resolve those issues based on the parties' briefs.

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FirstEnergy is also trying to get PUCO to separate HB 6 issues from broader and serious issues resulting from its years of misuse of ratepayer money for lobbying, sports sponsorships, donations, advertising and expenses that do not belong in regulated utility rates.



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No regulator should allow FirstEnergy to get away with treating its HB 6 schemes + misuse of ratepayer \$ for political influence as separate issues. Years of shady accounting at FirstEnergy resulted in millions in ratepayer mischarges related to HB 6



Dallas Needs a Stock Exchange

Published: Wed Jun 05 12:18:41 EDT 2024

By Matt Levine

(Bloomberg Opinion) --

Equities in Dallas

Naively, you might think that a stock exchange is a place where people meet to trade stocks, and that everyone would want to meet where everyone else meets. If everybody is trading stocks under one particular buttonwood tree in lower Manhattan, and you would prefer to trade stocks under an elm tree in midtown, you can go to some other traders and say “hey isn’t this elm tree nice and shady, let’s trade there,” but it will be hard to get any of them to move. They have stock to sell, and they want to sell it where the buyers are; they have stock to buy, and they want to buy it where the sellers are. Even if your elm tree offers better shade and lower fees, they’ll be inclined to stick with the buttonwood. Liquidity begets liquidity, and it is hard for a small upstart exchange to compete with the incumbents.

But the actual US equity market in 2024 doesn’t really work like that. There are more than a dozen stock exchanges, plus various other trading venues, and all of them are actually computers. So if you are a stock trader, your calculation is not “I’m going to walk over to one particular place and stand there trading stocks all day, so it’d better be the place with the most people.” Your calculation is more like “I am going to connect my computer to 37 other computers, all of which will sell me stock, and trade on all of them simultaneously.” The default approach is to connect to many different trading venues and send each order to whichever venue has the best price at any particular second.

And this is not just a matter of convenient computer technology; it is also fostered by US regulation. The US has a “national market system” that links together all of the exchanges and that more or less requires brokers to do a trade on whichever exchange offers the best price. So if you have an upstart stock exchange, and it is approved by the US Securities and Exchange Commission to be a “national securities exchange,” all the traders will connect to your exchange, and if you have the best price for one stock at 10:17 on Wednesday morning, the trade will happen on your exchange. In the naive simple meet-under-the-tree system, offering a little bit of liquidity is no good: Everyone will prefer to meet at the place that offers a lot of liquidity. In the national market system, you can run a perfectly viable business offering a little bit of liquidity.

Probably that’s not anyone’s goal. Probably most people who want to start exchanges think that their

exchange idea is the best one and that it will in time become a big player and displace the big incumbents, the New York Stock Exchange and Nasdaq.¹ But the point is that you *can* start small and try to grow, so a lot of people give it a go. We are in a bit of a golden age of stock-exchange experimentation.

Because if you're starting an exchange, you probably do need some value proposition beyond "we're a computer where you can trade stocks." You need a story to attract investors and attention and ultimately traders. So we have talked about IEX, the Investors' Exchange, whose initial proposition was something like "we will protect long-term investors from evil high-frequency traders, and Michael Lewis wrote a book about us." We have talked about LTSE, the Long-Term Stock Exchange, whose proposition was something like "we will protect public-company chief executive officers from the short-term demands of public investors." We have talked about MEMX, the Members' Exchange, whose proposition was something like "we will be owned by high-frequency traders and charge them lower fees for trading." I am being a bit reductive with those descriptions, and I don't want to pretend that they always exactly *work out* — over time, a lot of these exchanges seem to drop their distinctive ideas and just become computers where you can trade stocks — but the point is that you need some sort of marketing story to get started. And then once you get started, you're just connected to the system like everyone else.

And now here's TXSE, the Texas Stock Exchange, whose proposition seems to be some combination of "we will protect public companies from woke," "we will charge lower fees for listing exchange-traded funds,"² and "our computers are in Texas"³:

A group backed by Wall Street heavyweights BlackRock and Citadel Securities is planning to start a new national stock exchange in Texas, aiming to take on what they see as onerous regulation at the New York Stock Exchange and Nasdaq.

The Texas Stock Exchange, which has raised approximately \$120 million from individuals and large investment firms, plans to file registration documents with the Securities and Exchange Commission later this year, CEO James Lee told The Wall Street Journal. The goal is to begin facilitating trades in 2025 and host its first listing in 2026.

The exchange is aiming to tap in to disaffection with increasing compliance costs at Nasdaq and NYSE and newer rules like one setting targets for board diversity at Nasdaq. Backers of the TXSE, as it is known, pledge it will be more CEO-friendly. ...

"Dallas has become one of, if not the most, dominant financial centers in the country, if not the world," Lee said.

For months, talk has been swirling in trading communities about an upstart, "anti-woke"

exchange launching in Texas. Lee says the exchange is apolitical.

TXSE will be entirely electronic, but it plans to have a physical presence in downtown Dallas, said Lee, a Texan who has worked in finance and trading for around three decades. The exchange plans to compete for primary and dual listings. The TXSE also hopes to attract listings of exchange-traded products.

It is honestly a weird feature of US equity markets that a lot of corporate governance rules are set by stock exchanges' listing standards.⁴ If you want your stock to trade publicly, you list it on an exchange (mainly NYSE or Nasdaq). Your stock *trades* on every exchange — it's a national market system, everyone can buy and sell every stock everywhere — but it is *listed* on one of them. You pay fees to your listing exchange, the listing exchange has an outsized role in trading the stock (doing the opening and closing auctions, etc.), and you have to follow the exchange's rules about shareholder voting, independent directors, board diversity, etc.

Those rules are probably somewhat driven by market demand: Exchange listing standards are in part a way for investors to coordinate and solve collective action problems; the exchanges make rules that require companies to do what most investors want. But they're not *entirely* market-driven, and it's always possible that Nasdaq cares more about board diversity than a lot of investors do. So you can start a new exchange and attract listings from companies that want to be public but don't want to have diverse boards.

Or, I mean, that's one story! My impression is that it is *relatively* easy to start a new stock exchange and *attract trading*, because every trader connects to every exchange. It seems much harder to *attract listings*, because going public is a big fraught scary undertaking for a company; you want it to go well, and that means listing on an exchange with a lot of experience and name recognition. LTSE has been around since 2017 and has been an official national stock exchange since 2019; like TXSE, it was started with the purpose of being more CEO-friendly in its listing standards. Its "Listed Companies" web page lists two companies. It's an uphill fight to attract listings. But in the meantime you can be a computer that trades stocks. In Texas.

NeuBase

NeuBase Therapeutics Inc. is, or was, "a preclinical-stage biopharmaceutical company developing a modular peptide nucleic acid ('PNA') antisense oligo ('PATrOL') platform to address genetic diseases with a single, cohesive approach." It didn't work. It has been a public company since 2019,⁵ and its market capitalization peaked at around \$250 million in 2021, but it never cured any diseases or earned any revenue, and last August it announced it was giving up and "would halt further development of the Company's programs."

That was bad for the stock price: NeuBase's market cap fell to about \$2 million on the announcement and drifted down to about \$1.4 million by May 10; after that it was delisted from the Nasdaq and stopped trading. It makes sense that the company would not be worth much: It was a bet on a biopharmaceutical idea, and it didn't work out.

On the other hand, NeuBase isn't *worthless*. It has a bunch of cash and no real debt, and it gave up on its plans before it ran out of money. There's not *that* much money left; in April it estimated "between approximately \$0.5 million and \$2.5 million."⁶ NeuBase would like to give the money back to its shareholders. It works out to between 13 and 67 cents per share, or it did in April; it's probably less now. It's not amazing, but it's something, and after all it *is* the shareholders' money. They own the company, so they get whatever cash is left.

Except they don't just *get* it. The way it works is that NeuBase would like to go out of business properly, by dissolving the company under Delaware law. The company dissolves, it has no further business or assets or liabilities or corporate existence, and as its last act on Earth it sends each shareholder a check for 13 cents or whatever.⁷

To do that, though, NeuBase needs a shareholder vote. Specifically, Delaware law requires that a majority of its shares of stock vote in favor of dissolution. If a majority of shares vote yes, then everyone gets the 13 cents and NeuBase disappears. If not, then NeuBase hangs around, an empty company with no business, no traded stock, and just a dwindling pile of cash.

You see where this is going, right? Who do you think owns shares of a basically defunct delisted speculative biopharmaceutical company? Bloomberg's holders list starts with the company's former chief executive officer, who's got about 6.1%. A few hedge funds own small stakes, or did as of their last 13F filings, but Bloomberg's total holders list adds up to just 27.9% of the stock. Most of the stock is owned by retail investors. Retail investors do not vote. In particular, a retail investor who bought into a hot biopharma company back when it was developing a promising gene editing platform is not now going to vote on a proposal to dissolve the company and get back 13 cents. Every retail investor has better things to do than vote on dissolving NeuBase.

So poor NeuBase is in limbo. It sent shareholders a proxy statement explaining that it wanted to dissolve and give them the money back and asking them to vote. Then it held a shareholder vote on May 13, the day it was delisted from Nasdaq, and got about 1.25 million shares to vote in favor of dissolution. About 94% of the shares that voted were in favor, but that comes to only about 33% of the total shares outstanding, so it's not enough to dissolve the company. It tried again on May 22 and got about 1.29 million votes, still not nearly enough.

So it is trying some nonsense. The Pittsburgh Business Times reports:

That led the company to try a different tack. The June 26 meeting will have an important difference from the previous two: The board gave a member one share of Series A Preferred Stock, which in a U.S. Securities and Exchange filing NeuBase said should be enough with the other shares voting to dissolve the company.

“The Series A Preferred Stock is designed to ensure that a majority of the outstanding voting power of the company’s capital stock is cast on the dissolution proposal,” the company said in an SEC filing late Monday.

Here is the revised proxy statement for the June 26 special meeting, and here is last week’s announcement of the preferred stock issuance. Delaware law requires that dissolution be approved by “a majority of the outstanding stock of the corporation entitled to vote thereon,” and NeuBase couldn’t get a majority of its common stock to vote. So it issued one share of preferred stock, for \$1, to a friendly holder (a board member).

The preferred stock has almost no economic rights — it entitles the board member to receive \$0.01 on a dissolution of the company, or 99% less than he paid for it — but it does have 3.75 million *votes*.⁸ It is required to use those votes to vote for any proposal that gets a majority of the common shares *that vote*. If NeuBase gets the same results in June as it did in May — roughly two-thirds of the shares don’t vote at all, but an overwhelming majority of the other one-third vote in favor of dissolution — then the preferred stock will vote in favor of dissolution, and that, plus those common votes, will be “a majority of the outstanding stock of the corporation entitled to vote thereon,” the proposal will pass, and everyone will get to go home. With their 13 cents.

We have talked about this *kind* of thing before, and I can never resist these stories. They are sometimes called “blank-check preferred” stories: Most public companies authorize their board of directors to issue preferred stock with any rights that the board wants, and at some point boards realized that this could allow them to tweak shareholder voting requirements. The most famous case was AMC Entertainment Holdings Inc.’s APEs, which AMC used to get authorization to issue more shares, but we’ve also discussed Tilray Brands Inc. and Soligenix Inc., which also tried to use blank-check preferred to get shareholder approval from indifferent shareholders,⁹ and Purple Innovation Inc., which had a weirder plan. I wrote about the APEs that, “if you are a meme-stock company with a retail-focused investor-relations function, you have to solve the problem of voting”: Retail shareholders tend not to vote, which is a problem if you are a company with a lot of retail investors and need them to vote.

Just giving one of your directors a single super-duper-voting share is a very crude solution! It’s the sort of thing that doesn’t always work and can get you sued: *Obviously*, if you sell *a majority of your shareholder voting rights* to one director for *a dollar*, and then that director uses all those votes to do stuff that shareholders disagree with, they are going to sue and a judge is going to shut it down. But

here it seems fine? The choice is between giving the shareholders 13 cents and giving them nothing (and filing for bankruptcy when the money runs out). The shareholders *don't care about that choice*, so they don't vote. But the directors want to give them something, so they have resorted to this.

Money laundering

Loosely speaking, money laundering consists of taking some pile of “dirty” money —suspiciously large bags of cash that you earned from doing crime, traditionally, or in the modern age money or cryptocurrency that you stole online — and moving it through some steps until it looks like you earned it from a legitimate business and can pay taxes on it, deposit it in a bank and use it to buy securities or real estate. There are various classic methods; here is Patrick McKenzie on the subject, and here's Saul Goodman.

All of this is hard and specialized, and there's no particular reason to think that the skills that make you a good drug dealer or computer hacker or extortionist would also make you a good money launderer. You'd expect there to be an ecosystem of money launderers, specialists who take the proceeds from other crimes and turn them into clean money. You could imagine doing this on an agency basis — “I will clean this money for you in exchange for 20% of it” — but it might be simpler to do it on a principal basis. If you have a money laundry — say, a legitimate business with flexible accounting that you control — you might just go to criminals and say “hey I'll buy your dirty money from you at 80 cents on the dollar.” If you can turn it into clean money, you make 20 cents.¹⁰

It seems sort of obvious that this could be a market with a lot of interest on both sides. Criminals have dirty money that they would like to launder; handing off that risk and expense for 20 or 30 cents on the dollar is a good trade. And there are probably some number of legitimate-ish-but-not-especially-squeamish businesspeople who'd be happy to buy a dollar for 70 or 80 cents. You could set up an exchange! On the Dark Web or whatever, let legitimate businesses buy crime proceeds at a discount. Probably use crypto.

Oh man is that a real thing! CNBC reports:

The chief financial officer of conservative global news outlet The Epoch Times has been arrested and charged with leading a yearslong scheme to launder at least \$67 million in illicit funds, federal prosecutors said Monday.

The scheme — which involved cryptocurrency, tens of thousands of prepaid debit cards, fraudulently obtained unemployment insurance benefits and stolen personal information — fueled a massive increase in The Epoch Times' reported annual revenue, prosecutors alleged.

Here is the Justice Department press release:

From at least in or about 2020, through in or about May 2024, GUAN, while working as the Chief Financial Officer of a multinational media company headquartered in New York, New York (the “Media Company”), conspired with others to participate in a sprawling, transnational scheme to launder at least approximately \$67 million of illegally obtained funds to bank accounts in the names of the Media Company and related entities (together, with the Media Company, the “Media Entities”). In furtherance of the money laundering conspiracy, GUAN managed, among other teams, the Media Company’s “Make Money Online” team (the “MMO Team”), which was located in a particular foreign office of the Media Company. Under GUAN’s management, members of the MMO Team and others used cryptocurrency to knowingly purchase tens of millions of dollars in crime proceeds, including proceeds of fraudulently obtained unemployment insurance benefits, that had been loaded onto tens of thousands of prepaid debit cards. The crime proceeds were generally purchased by the scheme participants, including members of the MMO Team and others working with them, using a particular cryptocurrency platform, at discounted rates of approximately 70 to 80 cents per dollar, and in exchange for cryptocurrency.

Once the crime proceeds were purchased, the MMO Team and other participants in the scheme used stolen personal identification information to open accounts, including prepaid debit card accounts, cryptocurrency accounts, and bank accounts, that were used to transfer the crime proceeds into bank accounts associated with the Media Entities. After the crime proceeds reached those bank accounts, they were often further laundered through other bank accounts held by the Media Entities, GUAN’s personal bank accounts, and through GUAN’s personal cryptocurrency accounts.

In or around the same time the money laundering scheme began, the Media Company’s internal financial accounting reflected an increased annual revenue over the previous year of approximately 410%—from approximately \$15 million to approximately \$62 million. When banks asked GUAN about the increase in transactions entering the bank accounts of the Media Entities, GUAN lied, including to two U.S.-based banks, and claimed that the increase in funds came from donations.

I suppose if you run a multinational media company, you get a lot of your revenue from individual subscribers. You don’t have a ton of marginal costs from delivering your web content to extra customers, so it’s not suspicious if the revenue goes straight to the bottom line. And you can’t really be expected to do know-your-customer checks on each subscriber, so if a lot of your subscriptions are taken out using stolen identities, well, maybe that can’t be traced to you. Possibly a decent business for money laundering?

Though honestly on these allegations it doesn't seem like the Make Money Online team was very good at money laundering? The indictment notes:

From in or about September 2021 through in or about October 2021, GUAN received over 1,700 automated emails from Bank-2 alerting him that at least one of the Media Entities' Bank Accounts was receiving a high volume of transactions per hour from the same IP address, indicating that the transactions were made from the same location, inconsistent with individual subscription payments or donations.

The whole point is to make the money look like it came from legitimate transactions! That requires more effort than just sending yourself \$10 every second from the same IP address.

SEC Salt Lake

As a general matter, if the US Securities and Exchange Commission thinks that you committed fraud, and it goes after you for fraud, and it wins, it will probably fine you, and there's a decent chance that it will shut down your business. On the other hand, if the SEC goes after you for fraud, and *you* win, it is extremely unlikely that you will fine the SEC, and there's almost no chance that you will shut down the SEC. Securities enforcement doesn't work like that. It is asymmetric. A fraud action is existential for the company accused of fraud, but not for the SEC.

Except this one time:

The U.S. Securities and Exchange Commission said Tuesday it is closing its Salt Lake City regional office later this year, citing "significant attrition" among office staff. ...

The announcement capped a tumultuous few months at the Salt Lake City office in connection to its failed enforcement action against cryptocurrency platform Digital Licensing, also known as Debt Box.

The decision to close the office was related to, but not solely the result of, the SEC's failure in the Debt Box case, according to people familiar with the matter.

Last August, the Salt Lake City office obtained a temporary asset freeze and restraining order and brought its enforcement action against Debt Box. The agency accused the company and its principals of defrauding investors of at least \$49 million, according to an SEC complaint filed in the U.S. District Court for the District of Utah last July.

Judge Robert Shelby in November expressed concerns that SEC lawyers in the Salt Lake City office made materially false and misleading representations to obtain the temporary

restraining order against Debt Box. The next month, SEC enforcement director Gurbir Grewal apologized in a court filing and the agency in January filed a motion to dismiss the case.

Shelby in March sanctioned the agency for bad faith conduct and ordered it to pay the company's legal fees totaling \$1.8 million. In an 80-page court filing, Shelby said the SEC abused its authority in the case against Debt Box. The judge last week dismissed the case.

I mean! Kind of fair? The SEC is in the business of punishing people who lie to obtain money. If the SEC went around lying to obtain money, that *is* bad.

Private funds

Speaking of existential risk for the SEC:

A federal appeals court struck down the US Securities and Exchange Commission's rules requiring hedge funds and private equity firms to detail quarterly fees and expenses to investors, a significant setback for the regulator.

The US Fifth Circuit Court of Appeals in New Orleans on Wednesday sided with the private funds industry, which argued that the agency overstepped its authority and that rules weren't necessary for the "highly sophisticated" investors that pour money into private funds.

We live in an unusually *volatile* time for US national business regulations. The regulators — particularly the SEC and the Federal Trade Commission — are unusually aggressive about pushing new and expansive theories of regulation. And the courts — particularly the Fifth Circuit — are unusually aggressive about finding new and expansive theories for *striking down* regulation. Every industry is simultaneously more and less regulated than it has been historically: The regulators issue more rules and enforcement actions, but sometimes courts pop up to say "actually no it is unconstitutional for there to be any rules at all."

Here, traditionally, private funds were *private*; the disclosures that hedge funds and private equity funds had to provide to their sophisticated institutional limited investors were determined by the *contracts* between the funds and the investors. The general assumption of the law — not strictly true, but reasonable — was that the institutional investors were capable of negotiating and evaluating the disclosures that they got, and if they didn't care about audited financial statements that was their call. The current SEC was uneasy with that regime, so it passed new rules regulating the disclosures and fees and conflicts and behavior of private funds. At the time, I characterized the SEC's view like this:

Private investment funds are large and important, their clients are often socially important institutions (pension funds etc.), the SEC's job is to protect those clients, and so the SEC should have more comprehensive rules about private funds' practices. Those private funds should have to give their clients standardized regular financial disclosures, like public funds do; there should be rules restricting their conflicts of interest and fees and generally protecting their clients. The rules would be *less* restrictive than the rules for public mutual funds, because the private investors are more sophisticated, but they'd be similar in kind. The SEC's job is to protect all investors, and if private equity investors aren't doing a good job of protecting themselves the SEC will.

That was, I think, a very aggressive interpretation of the SEC's mandate. Meanwhile, I wrote in 2022 about another case in which the Fifth Circuit ruled that the SEC was unconstitutional? I mean, that overstates the situation, but the Fifth Circuit did take a pretty aggressive view of the constitutional limits on the SEC's power. I wrote:

It used to be accepted as a routine matter that the SEC could make rules under a very broad grant of power from Congress to regulate securities markets in the public interest. I am not sure that is true anymore.

Yeah, it's not.

Things happen

SEC Hedge Fund Fee Disclosure Rule Struck Down by US Court. U.S. Prosecutors Probe Global Hacking-for-Hire Operation. The bankruptcy court in the Southern District of Texas is wild. Americans Have More Investment Income Than Ever Before. Fund Managers Poised to Embark on ESG Purge Sparked by EU Rules. Private Equity Puts Brakes on Healthcare Roll-Ups After Government Scrutiny. X CEO Linda Yaccarino Loses Top Lieutenant. Why the UK's Richest Plumber Regrets Selling Out to KKR. Ozy's Rao Details Posing as YouTube Official to Win Goldman Investment. Buy Greg Jensen's island.

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1. A nuance here is that the big exchange operators tend to run multiple venues, and if you are starting a second exchange your goal is probably not to displace the first: Your goal is to offer some different trading mechanics or fee structure or listing standards, so that your trading or listing customers can get an optimized experience.
2. I am guessing at that one. But TXSE's press release emphasizes that it "will provide a venue to trade and list public companies and the growing universe of exchange-traded products," so it is competing for ETP listings, and BlackRock is an investor. It would make sense for a smallish exchange with no volume to compete for ETF listings on price.
3. Arguably Michael Lewis also wrote a book about that.
4. Also: index inclusion criteria.
5. In 2019 it merged with a public shell company that had previously been used for various other businesses, some of them pharmaceutical businesses, so it has a longer history than that, but as NeuBase it dates to 2019.
6. That was from a proxy in connection with a failed vote; since then, it notes, "we will continue to incur expenses that will reduce the amount available for distribution, including expenses of complying with public company reporting requirements and paying our service providers, among others." So probably less now.
7. An alternative would be to just send each shareholder a *dividend* for \$0.13 and *not* dissolve, just hang around forever as an empty company, but you can see why that would be bad. What if you discover some liability? What if you have legal bills? Do you have to keep paying auditors to send financial statements to shareholders? You can't keep around a company with \$0 of cash; you have to dissolve it.
8. Technically it has *zero* votes, except that it's allowed to vote "at any meeting of stockholders of the Corporation at which the liquidation and dissolution of the Corporation is submitted to a vote." And then it "shall entitle the holder thereof, as such, to cast a number of votes equal to the number of shares of Common Stock outstanding on the record date for determining the stockholders entitled to vote at such Dissolution Meeting." As far as I can tell there are 3,751,590 shares of common stock outstanding, giving the preferred share 3,751,590 votes.
9. After AMC, Delaware amended its corporate law to make it a bit easier to authorize more shares, so that companies like AMC would not have to go through similar hoops. But the majority-of-all-shares voting requirement still applies to dissolutions, and honestly it probably should. You don't want a company to disappear unless the shareholders agree.

10. Though part of money laundering is often *paying taxes* on the money — turning untaxed drug-sale proceeds into clean taxable gambling winnings or coin-op laundry revenue — so you might want to bid more like 50 cents. Oh boy is this not any sort of advice.

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Matt Levine's Money Stuff: Musk Chose Who Got Chips

By Matt Levine

Opinion

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Matt Levine's Money Stuff: Musk Chose Who Got Chips

By Matt Levine 2024-06-04T14:31:05502-04:00

Oh Elon

If you are the chief executive officer and controlling shareholder of two different companies, each with different minority shareholders and employees, and they both use the same essential scarce inputs, and the sole supplier of those inputs calls you up and says "we are backed up and can only meet the needs of one of your companies, which one should get the inputs and which should go without," what should you do?

The extremely obvious answer is that you should not be the CEO and controlling shareholder of two different companies that compete for the same inputs! There is not a *good* answer! You can't, like, put this problem into the Good Governance Machine and have it come out clean. The problem is that you have a fiduciary obligation to the shareholders of one company to put their interests first, and you have a fiduciary obligation to the shareholders of the other company to put their interests first, and you cannot do both. This is why one person is not usually the CEO of two different companies that compete with each other, and, when someone is, people get mad at him all the time.

Elon Musk is the CEO and controlling shareholder of like six different companies, many of which are to varying degrees in the artificial intelligence business, so *of course* everyone is mad at him all the time. CNBC reports today:

Elon Musk claims he can grow Tesla into "a leader in AI & robotics," an ambition that he's said will require a lot of pricey processors from Nvidia to build up its infrastructure.

On Tesla's first-quarter earnings call in April, Musk said the electric vehicle company will increase the number of active H100s — Nvidia's flagship artificial intelligence chip — from 35,000 to 85,000 by the end of this year. He also wrote in a post on X a few days later that Tesla would spend \$10 billion this year "in combined training and inference AI."

But emails written by Nvidia senior staff and widely shared inside the company suggest that Musk presented an exaggerated picture of Tesla's procurement to shareholders. Correspondence from Nvidia staffers also indicates that Musk diverted a sizable shipment of AI processors that had been reserved for Tesla to his social media company X, formerly known as Twitter.

Tesla shares slipped as much as 1% on the news Tuesday morning.

By ordering Nvidia to let privately held X jump the line ahead of Tesla, Musk pushed back the automaker's receipt of more than \$500 million in graphics processing units, or GPUs, by months, likely adding to delays in setting up the supercomputers Tesla says it needs to develop autonomous vehicles and humanoid robots.

I love the timing here: Musk is asking Tesla's shareholders to vote, *next week*, to approve an 11-figure compensation package for him for all the good work he has done running Tesla.

Do you think this story helps him or hurts him? Like, on the one hand, if I were a Tesla shareholder, I might be kind of mad about this, and be less inclined to give him his money.

On the other hand, the more or less explicit rationale for giving him the money is "if you don't give him the money, he's going to focus less on Tesla and prioritize his other companies instead." I suppose that, last week, Tesla shareholders might have found that threat somewhat vague: How much damage could he really do by spending a bit less time on Tesla? Might his attention be *bad* for Tesla, a mature car company, at this point? Might it do *better* with less inspired but more normal management? And now the threat is a bit more concrete: It's "say goodbye to your AI chips if Musk loses interest."

By the way, I'm sure someone has some ideas for the Good Governance Machine that could make this work. Like: You set up a special committee of independent Tesla directors, you set up a special committee of independent X directors, the two committees get in a room together with Musk, he says "hey there are this many chips, you guys work out who gets them," he leaves, the committees each meet and figure out how much they want the chips, then they negotiate and cut a deal (whoever wants them more pays the other company for priority, or they share, or Tesla gets the chips in exchange for training X's large language models on parked Teslas, or whatever), and then they go back to Musk with the deal and he approves whatever they come up with. There is a widespread sense that you can wash any sort of governance problem through special committees, though people tend to believe that *less* about Elon Musk companies.

Also this process sort of doesn't make sense here, or with Elon Musk generally. He's a hard-charging visionary entrepreneur! His *thing* is making bold decisions about what to prioritize! Here, he has decided that his website for complaining on the internet needs artificial intelligence capabilities more urgently than his self-driving car company does. He's not going to delegate a momentous decision like that to a committee of independent directors; that's the sort of decisive action under real-world constraints that people want to put in the hands of Elon Musk. It's just that he's not deciding between two *projects* or *divisions* at one company, where everyone benefits from his decision. He's deciding between two companies, and one of them will lose out.

Oh Sam

Meanwhile, I don't know what the right governance answer is here:

As the chief executive and co-founder of OpenAI, [Sam Altman] oversees an artificial-intelligence startup valued at \$86 billion that is spearheading a technological revolution. He owns no stake in the ChatGPT developer, saying he doesn't want the seductions of wealth to corrupt the safe development of artificial intelligence, and makes a yearly salary of just \$65,000.

Less publicly, Altman is one of Silicon Valley's most prolific and aggressive individual investors, managing a sprawling investment empire that is becoming a direct beneficiary of OpenAI's success. The holdings he controls were worth at least \$2.8 billion as of early this year, according to company filings and Wall Street Journal reporting. Much of the portfolio isn't widely known. ...

A growing number of Altman's startups do business with OpenAI itself, either as customers or major business partners. The arrangement puts Altman on both sides of deals, creating a mounting list of potential conflicts in which he could personally benefit from OpenAI's work.

OpenAI is in talks for a deal with Helion, a nuclear-energy startup that is chaired by Altman, in which it would buy vast quantities of electricity to provide power for data centers. ...

Last month, OpenAI announced a partnership with Reddit in which it would pay to bring the messaging site's content to ChatGPT and other AI products. Altman and entities he controls own 7.6% of Reddit, making him the third-largest outside shareholder, and he briefly served as its CEO in 2014. ...

Altman's more recent investments have focused on companies that aim to capitalize on the artificial intelligence boom being driven by OpenAI. Apex Security, in which Altman invested an undisclosed amount last summer, aims to sell cybersecurity software to companies using AI products such as ChatGPT. He also invested an undisclosed amount in Exowatt, a startup tackling the clean-energy needs of big data centers used by AI companies.

Part of the answer is the usual special committee stuff: Altman recuses himself from negotiations between his companies, he discloses everything to the OpenAI board of directors, etc. That's probably true: It seems like the value to Altman here comes more from spotting the opportunities to work with OpenAI than it does from detailed price negotiations. He can let someone else handle the negotiations.

Also maybe this *is* good governance? Lurking in the background of OpenAI is the idea that it is a nonprofit organization working to build artificial general intelligence for the good of all of humanity. If you believe that, then of course (1) OpenAI should not be ruthlessly maximizing shareholder value and (2) its CEO should not own any equity or get rich off of it. Nobody *quite* believes it: OpenAI has things that look like shares; its employees and venture capitalists and Microsoft look like shareholders; it has what looks to all the world like an \$86 billion valuation; Altman is rich. But maybe “our CEO will work for us for free, but he can profit from related outside opportunities” *is* the right way to structure that sort of pseudo-nonprofit? Maybe OpenAI wants to give Altman incentives to develop artificial intelligence for the benefit of all of humanity, and the more ways he can find to benefit personally from OpenAI — as a customer and supplier and business partner and user of the technology, but *not* as CEO or shareholder — the closer he will come to achieving that goal.

Bad kitty?

Is Keith Gill, the meme-stock influencer known as Roaring Kitty, doing market manipulation? He does seem to be (1) buying GameStop Corp. stock and call options, (2) posting weird stuff online that makes people buy the stock and (3) profiting. Those are things you would do if you were manipulating GameStop stock.

On the other hand, manipulation requires some sort of deceptive intent, and there doesn't seem to be any evidence of that. His weird online posts don't contain any *lies*, in part because almost none of them contain any factual assertions at all; they're just movie clips and cartoons and stuff. (One Reddit post lists his purported ownership of GameStop, which is *definitely* a factual assertion and clearly moved the stock, but I assume it is true.) I suppose that if he were posting, causing GameStop to rally, and then *dumping* his stock, that *might* look like a sort of deception, but there's no evidence of that either; as far as I can tell, he likes the stock and keeps plowing his profits back into it.

So if you asked *me* whether Roaring Kitty is breaking any rules with his GameStop posting and trading, I would say “probably not.” Further evidence could change my mind, but right now it looks fine.

But I am just a columnist on the internet, that is not legal advice, and I have absolutely no skin in the game. You could ask other people, who might have more constraints on their answers. For instance, the US Securities and Exchange Commission has an interest in preventing market manipulation, and I expect it has pondered Gill's actions. But the SEC has only two possible answers to this question :

1. “We think we can, with a high degree of likelihood, prove in court that this is market manipulation,” or
- 2. “We do not think that we can prove in court that this is market manipulation.”

Answer 2 encompasses both “this is entirely innocent and in fact we love it” and “we hate this and think it's clearly illegal, but the risk of losing at trial is too high.” The SEC's bar for *actually bringing a case* is pretty high, and it probably lets slide some amount of stuff that it thinks is bad.

Morgan Stanley's set of possible answers is different, though. The Wall Street Journal reports:

E*Trade is considering telling meme-stock leader Keith Gill he can no longer use its platform after growing concerned about potential stock manipulation around his recent purchases of GameStop options, according to people familiar with the matter. ...

At E*Trade and its owner Morgan Stanley, [Gill's] power created concerns he can pump up a stock for his own benefit. Their debate includes whether his actions amounted to manipulation and whether or not the firm is willing to risk drawing the attention of his meme army by removing him, according to people familiar with their internal discussions. ...

The Securities and Exchange Commission has also been reviewing trading in GameStop call options around the time of Gill's social-media posts, according to people familiar with the agency's efforts. The options trades sparked internal discussions at the SEC over whether they could be considered manipulation, one of these people said. It couldn't be determined whether the SEC was reviewing Gill specifically. ...

Morgan Stanley employees ... saw he had purchased call options before [Gill's May 12] tweet, the people said. A call option gives a trader the right to buy the stock by a certain date at a stated price. At least some of those options expired that week, one of the people said. That meant Gill's trades likely generated profits thanks to the stock move his tweet generated.

Morgan Stanley's global financial-crimes unit and external counsel began discussing whether Gill's actions were legal and whether the firm should cancel his E*Trade account, the people said.

Ordinarily, if you are Morgan Stanley and your global financial-crimes unit is having discussions with outside counsel about whether a *retail client's trades are illegal*, you have a very strong incentive to cancel his account. You can just do that! You're allowed to close his account! Even if you're not *sure* that he's manipulating the market, why take the risk? If it turns out that he is, then *you* will look bad. The SEC might say that you saw the red flags in his account and didn't do anything about them, and you might get in trouble. Meanwhile this is one retail trader; a big one, sure, but he's probably not generating all *that* much revenue for you by making big zero-commission trades. What is the incentive to keep him around?

That is, ordinarily, the SEC is the last line of defense against egregious cases, but the brokers are the first line of defense against borderline cases. If you look *kind of* like you *might* be doing market manipulation, the SEC might not bring a case, but it might hope that your broker will quietly shut you down.

Here, of course, the calculation is different:

Some Morgan Stanley employees have been concerned that closing Gill's account could result in the firm losing E*Trade clients, the people said. Gill's messages have been able to command a large following, one reason GameStop and other meme stocks have soared. Morgan Stanley employees have worried what would happen if Gill posted on social media that he had been ditched by E*Trade and whether that might prompt many people to shut down their E*Trade accounts in solidarity, the people said.

He's not *really* just one retail trader; he's the voice of a movement, and if E*Trade shut him down they might lose a lot of customers. So they need a really good reason to act.

I suspect that's true of the SEC, too, by the way. Gill's posting and trading are not just ambiguous; they are also extremely popular and politically charged. If the SEC tries to shut him down, there are going to be angry letters and tweets and congressional hearings. If it's going to stop this, the SEC had better be sure that it's right.

Down 99%

Last week, the US stock market transitioned from T+2 to T+1 settlement. Before, if you bought stock on the stock exchange on Monday, you actually got the shares and delivered the cash on Wednesday. Now, if you buy stock on the stock exchange on Monday, you get the shares and deliver the cash on Tuesday. There are various processes that have to happen between trade and settlement (finding or recalling stock borrow, converting foreign currencies, etc.), and people were nervous that something would break when the settlement time was shortened, but so far things seem to have worked fine. There has even been talk of eventually moving to a shorter T+0 settlement cycle, where trades settle later the same day.

That said, here's one more process that sometimes has to happen between trading and settlement:

A glitch during a software update early Monday led the New York Stock Exchange to erroneously halt trading on about 40 stocks and display odd trades showing a 99% drop in companies including Warren Buffett's Berkshire Hathaway Inc.

The disruption — the third episode to hit US markets in the past week — was resolved after roughly 45 minutes when the Consolidated Tape Association, whose systems are operated by a NYSE subsidiary, reverted to a backup data center running a different software version. ...

About a dozen trades in Berkshire Class A shares went off at \$185.10 around 9:50 a.m. The stock closed Friday at \$627,400. NYSE said any trade between 9:50 and 9:51 at or below \$603,718.30 will be canceled. NuScale Power Corp. had a similar glitch, with trades that printed at about 99% below the prior price.

Every once in a while, a stock exchange will print a bunch of trades that are "clearly erroneous," and will then come to its senses, decide that the trades were wrong, and cancel them. If you cancel trades between trade and settlement, that can be a mess — what happens to people who bought Berkshire at \$185.10 and immediately sold at \$604,000? — but it is more or less possible. If you try to cancel them after the money has moved, though, that's harder. A shorter settlement window might make these glitches more dangerous.

Of course, it is sort of dumb to have the glitches in the first place. If a stock exchange has criteria like "a trade that is more than X% below the last trade is clearly erroneous and should be canceled," then it should probably code that rule into its matching engine and *prevent the trades from happening*, rather than coding the rule into its rule book and canceling them after the fact. I suppose the less time there is between trade and settlement, the more reason there is to do that.

Synthetic PIK

I wrote yesterday about “synthetic PIK” private credit deals. In a PIK (payment in kind) loan, a company borrows money and can pay interest in the form of more debt: You borrow \$100 with an interest rate of 10%; you don't pay cash interest, but after the first year, you owe \$110, then \$121, etc. In a synthetic PIK loan, the company borrows money and pays interest in *cash*, but it *gets* the cash by *borrowing* it from the lender: You borrow \$100, in the first year you pay \$10 cash interest, you borrow the \$10 from the same lender, so at the end of the first year you owe \$110, etc. The interest payments are funded with a delayed-draw term loan: You sign the extra loan at the same time as the regular loan, and then draw on it over time to make the interest payments.

Why? Why go through the circularity of borrowing more money to pay cash, instead of just adding it to the tab? One rationale is that the private credit funds that make these loans get some of their financing from banks, and the banks limit the amount of PIK debt they can do (because it's risky), so this is a way around that. I wrote:

The private credit fund doesn't care: Paying interest in the form of more debt, or paying interest in cash while simultaneously borrowing more, are exactly identical transactions as far as its credit risk is concerned. What matters is that the private credit fund has some contract with somebody else that says “we promise not to do too many PIK deals,” and a synthetic PIK deal is not *technically* a PIK deal. ... The somebody else, specifically, is the banks.

Well, a reader emailed to point out that there's another somebody else:

Most private credit funds collect management fees based on invested LP [*limited partner*] capital. Traditionally, if an investment was accruing PIK interest, they'd only get management fees paid on the initial principal amount funded with LP capital and not the accreted PIK portion. Now that they are funding it with DDTL [*a delayed draw term loan*], they get to collect a management fee on that piece that is funded to pay the interest. So, the LPs are paying a management fee for as long as the DDTL drawn loan is outstanding (perhaps a couple of years?) to pay themselves one quarter's worth of interest and are concurrently increasing their invested capital exposure to that specific deal.

If a private credit fund does a \$100 PIK loan with 10% interest, after a year the borrower owes \$110 and the fund can charge fees on \$100 of capital. If it does the same loan as a synthetic PIK, after a year the borrower owes \$110 and the fund can charge fees on \$110 of capital.

Everything is seating charts

Here is a delightful Financial Times article about Peter Orszag, the newish chief executive officer of Lazard Inc., featuring various employee gripes. Some of them are about the tension between Orszag's focus on “attributable revenue” (how much money does each individual banker bring in) and his push for “collegiality” and teamwork, including this double blind item:

Another recently departed Lazard banker told the FT about a prominent banker who, he said, had snatched credit for a fee from him, an act he described as “unconscionable.”

I'm sure he knows who he is. Other gripes, though, are about seating charts:

Lazard is also converting some of its dedicated conference room floor 64 stories above 30 Rockefeller Plaza into a fine dining space where all the firm's rainmakers can woo the glitterati.

The 64th floor at 30 Rockefeller has, however, become its own flashpoint.

Orszag has taken a large personal office on that level even as every other Lazard banker sits on the floors below. ...

“Having him sit up there gives the impression that he is, literally and figuratively, above us,” said one managing director.

It is perhaps relevant that Orszag is an economist, diplomat and celebrity, not a longtime mergers-and-acquisitions banker. (“We have plenty of bankers focused on individual transactions,” says Lazard's chief operating officer. “The CEO of Lazard should focus on setting our strategy, building our stature and connectivity, and leading our people.”) In the old model, an investment bank was a partnership; someone had to run the firm, but that person was just a senior partner, a first among equals, who sat with the rest of the partners and did the same sort of work. In the new model, an investment bank is a normal corporation and it is run by a CEO. There's no particular need for him to work on the same floor as the bankers. But their feelings are hurt when he doesn't.

Galaxy violin token

“Novogratz's Galaxy Tokenizes a 316-Year-Old Violin to Back Loan,” it says here, and I was ... relieved? disappointed? surprised? ... to learn that they did *not* set the violin on fire:

Billionaire Michael Novogratz's Galaxy Digital Holdings LP is broadening its lending business to wealthy clients. The latest deal: a multimillion-dollar loan backed by a violin that was once owned by Russian Empress Catherine the Great.

Galaxy lent the funds to Yat Siu, co-founder of Animoca Brands, who bought the 1708 Stradivarius violin last year in an auction at a valuation of more than \$9 million, according to Galaxy and Siu.

Galaxy will hold both the tokenized version of the instrument in the form of a nonfungible token, and the violin itself, as collateral against the loan. Galaxy and Siu declined to comment on the exact terms or size of the loan, except to say that it was “in the millions.” The violin will be held by a custodian in Hong Kong and both parties will be required to sign off on it being removed from there.

Okay. So: He bought an expensive violin. They loaned him some money, collateralized by the violin, which is held by a third-party custodian. Also, look over there, a token! I don't know what the “tokenization” adds to anything, though there's this:

Siu said he eventually wants to allow others to buy a claim on the tokenized violin through a process known as fractionalization, though he added that there are no current plans or agreement to do so.

One day, though.

Things happen

Short Sellers in Danger of Extinction After Crushing Stock Gains. Stock Pickers Defy Wall Street Norm to Risk It All on a Few Bets. Spotify Shares Jump on Price Hikes. Lars Windhorst faces arrest warrant over missed court hearing. “[Former Pirates infielder Tucupita Marcano] only won 4.3% of all of his MLB-related bets overall.” Startup Brings New Hope to the Pursuit of Reviving Frozen Bodies.

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- 1. I am being a bit loose. Musk is not officially the CEO of X Corp., though let's not kid ourselves about who runs it. And he has only like 13% of Tesla Inc.'s stock, though he is probably a “controlling shareholder” there as a legal matter.
- 2. This requires X to have a board, with independent directors representing the minority shareholders.
- 3. Bloomberg notes that “Musk obliquely confirmed CNBC's reporting on redirecting Nvidia's GPUs to X and xAI, writing on his social media service Tuesday that ‘Tesla had no place to send the Nvidia chips to turn them on, so they would have just sat in a warehouse.’” Maybe the committees would have reached the same result.
- 4. I'm exaggerating a little here, because CNBC goes on to note that the chips going to X might **really** be going to xAI, Musk's **separate** company for doing general AI stuff: “X and xAI are tightly intertwined. In a post on X in November, Musk wrote, ‘X Corp investors will own 25% of xAI.’ Additionally, xAI uses some capacity in X data centers to run some of its training and inference for the large language models behind its chatbot, called Grok, CNBC has learned.”
- 5. As I pointed out yesterday, he owns a ton of GameStop call options that expire on June 21; he **can't** hold those indefinitely. But it does seem as if his trading strategy has involved buying short-dated call options, selling them at a profit and rolling the profits into more call options, which is perhaps not quite a “buy and hold” strategy, but which is certainly not a “pump and dump” either. Also, I asked yesterday where Gill got the money to buy something like \$175 million worth of GameStop stock and options, and the consensus seems to be that he made a lot of money trading GameStop options last month and rolled his profits into his current position. (Luke Kawa writes that “doing some quick math shows how difficult it is to ascribe of all of those would-be gains to last month's frenzy in shares of GameStop,” but maybe you can get there.)
- 6. Except, I suppose, that as a columnist on the internet, more nonsense is always good for me.
- 7. I'm being a little loose, because **right now** the SEC's answer is presumably “we're looking into it.” The SEC has a fairly leisurely amount of time to ponder the question, and can do some investigating, before

deciding one way or another.

- 8. E*Trade charges fees of 50 or 65 cents per options contract. Also of course it makes money on payment for order flow. I suppose if I were E*Trade I'd be a *little* tempted to sell Keith Gill's order flow separately from the rest of the retail flow. People would pay a *lot* of money for Keith Gill's order flow! Probably there's some legal problem with doing that though.
- 9. Or: You can pay 10% cash interest, or choose to instead capitalize 11% — often the PIK rate is higher than the cash rate.

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<https://www.wsj.com/business/the-case-against-elon-musks-46-billion-pay-deal-0ca32282>

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The Case Against Elon Musk's \$46 Billion Pay Deal

Tesla's board is asking shareholders to approve a substantial dilution of their stakes for no good reason

By [Stephen Wilmot](#) [Follow](#)

June 5, 2024 5:30 am ET



Elon Musk already owns \$72 billion worth of Tesla shares. PHOTO: GONZALO FUENTES/REUTERS

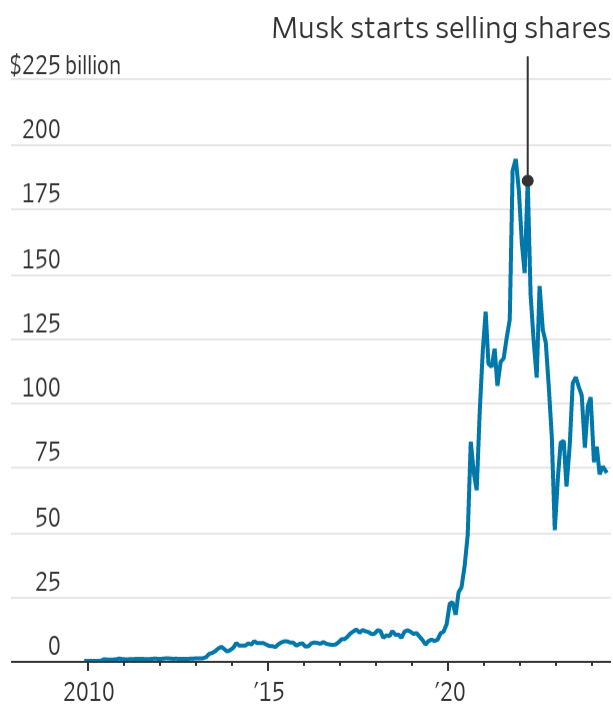
If this column had a vote, which it doesn't, it would cast it against Elon Musk's gargantuan pay deal at Tesla's TSLA **0.00%** ▲ coming annual general meeting.

Worth \$46 billion at the latest share price, the chief executive's contested 2018 packet is disproportionate in every way. It is almost 300 times as much as what America's best-paid CEO for 2023 earned (\$162 million). It is also more than twice the annual free cash flows Tesla has generated in its entire existence, including expectations for this year (\$22.5 billion). And, crucially for shareholders, who would pay for it through the dilution of their holdings, it is about 8% of the company's market value (\$557 billion).

Why would they vote for such an outcome?

One argument is that Musk did a fantastic job and deserves to be compensated for it. As the biggest beneficiary of Tesla's meteoric stock-market rise in 2020 and 2021, though, he was—so fantastically that he became the world's richest man for a while. The roughly 505 million shares he already owned at the end of 2017, before the stock-option plan now in question was on the table, increased in value by \$171 billion by the time he started selling some in April 2022 to pay for Twitter, since rebranded as X.

Value of Elon Musk's Tesla shares



Source: FactSet

A more reasonable point is that the 2018 plan was dependent on Musk hitting market-value milestones that seemed fanciful at the time; denying it after the fact because the crazy bet paid off reflects hindsight bias. This explains why some longtime Tesla shareholders such as Scottish fund manager Baillie Gifford, which voted for the deal back in 2018, have said they will support it again. Agreeing to something you don't think will happen and then changing your position when it does isn't a good look.

But getting caught up in the convoluted back story also seems like a trap. Not every shareholder was around in 2018. Since Tesla, responding to a successful legal challenge against the original deal, has asked investors to vote on it again with the benefit of hindsight, it would be insane not to use that hindsight.

Finally, there is the question of keeping Musk motivated. The mercurial CEO tweeted in January that he felt "uncomfortable" growing Tesla "to be a leader in AI & robotics" with less than 25% of the voting rights and threatened to "build products" outside of Tesla. He recently raised \$6 billion for his generative AI startup, xAI, at a \$24 billion valuation.

However, the threats ring somewhat hollow given that Musk still owns \$72 billion worth of Tesla shares. That is a large proportion of his net wealth, even if his stake in SpaceX may now be comparable following the recent decline in Tesla's stock. Also, Tesla has already invested massively in AI and generates huge amounts of visual data for AI training. Musk couldn't easily jump ship.

The coming vote is hardly the final word in the matter of the CEO's pay. It is no more than a tactic Tesla is using to challenge the Delaware court ruling that in January voided the 2018 compensation plan. The legal games will continue whatever the outcome.

Take another step back and the spectacle of Tesla's board, led by Chairwoman Robyn Denholm, trying to whip up support for Musk's pay only highlights the corporate-governance problem that led to the deal's dismissal in court: the domination of Tesla's board by the CEO it is supposed to oversee. Put another way, Musk runs Tesla like a family business.

This isn't always a bad thing: Family businesses have impressive stock-market records in developed markets, precisely because they have strong leaders with "skin in the game" like Musk. But corporate governance does exist for a reason, which is to protect minority shareholders from being exploited by powerful insiders. This seems like a case in point: Musk seemingly wants to take money from Tesla's minorities to fund projects such as X and xAI.

With Tesla's board under Musk's thumb, shareholders have nobody to look after their interests but themselves.

Write to Stephen Wilmot at stephen.wilmot@wsj.com

Videos

Bloomberg Law News 2024-06-05T14:36:58320520716-04:00

Short Seller Targets Japan's Lasertec After Its Epic Rally (2)

By Momoka Yokoyama and Yasutaka Tamura2024-06-05T07:21:04266-04:00

- Scorpion Capital Partners questions accounting practices
- Analysts express surprise that Lasertec faces short seller

Activist short-seller Scorpion Capital Partners took aim at Lasertec Corp. — one of the hottest tech stocks in Japan in recent years — alleging questionable accounting practices.

Lasertec denied the allegations in a statement released after market close. The stock, which opened lower on Wednesday before the news, ended 7.5% lower on heavy volume.

The supplier to Intel Corp. and Taiwan Semiconductor Manufacturing Co. has been the best performer on the Nikkei 225 Stock Average over the past five years, surging more than 1,700% as it rode the global chip boom and as foreign investors piled in to Japan's stock market.

"The report is unexpected," said **Kazuyoshi Saito**, senior analyst at Iwai Cosmo Securities Co. "It doesn't seem like a company that would engage in accounting irregularities."

Targeting by short-sellers has been rare in Japan, and has drawn mixed results. Carson Block, the founder of Muddy Waters Capital LLC, targeted a Japanese firm in 2016 for the first time with a report on motor-maker Nidec Corp. The shares dropped as much as 5.9% that day before wiping out most of the declines by the close.

"In Japan the market won't just accept short-seller reports if there isn't a track record in the country," said **Masatoshi Kikuchi**, pan-Asian chief equity strategist at Mizuho Securities Co. in Tokyo. Investors would want the short-seller to build its reputation with two or three successful cases, he said.

Short Sellers Fear Extinction in a Relentless Stock Market Rally

Some of Scorpion's allegations seem like "random speculation," said **Mio Kato**, an analyst at LightStream Research. "I don't think there is anything nefarious going on with Lasertec but some

dissatisfaction from customers and growing pains with what is new technology for a relatively small company wouldn't be the least bit surprising.”

US-based Scorpion has previously targeted non-Japanese companies including Harmony Biosciences Holdings Inc. and Twist Bioscience Corp.

Short sellers borrow shares and sell them, hoping to profit by buying them back later at a lower price. Supporters say the research makes markets more efficient and keeps misbehaving corporate managers in check, while opponents argue the methods often resemble market manipulation.

(Adds comment from Lasertec in second paragraph)

--With assistance from **Yuki Furukawa**, **Abhishek Vishnoi** and **Winnie Hsu**.

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RTX to Resolve US Probe Into Charges for Missile Contracts

By Sabrina Willmer, Kiel Porter and Chris Strohm

- Deal would settle four-year DOJ probe on contract pricing
- RTX disclosed it has set aside \$306 million to cover penalties

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RTX to Resolve US Probe Into Charges for Missile Contracts

By Sabrina Willmer, Kiel Porter and Chris Strohm2024-06-04T08:00:00002-04:00

- Deal would settle four-year DOJ probe on contract pricing
- RTX disclosed it has set aside \$306 million to cover penalties

RTX Corp. is in the late stages of a deal to settle a criminal investigation by the US government into pricing for missile and defense services, according to people with knowledge of the matter.

The resolution is expected to be finalized as soon as this summer and will conclude an investigation started by the Justice Department's criminal fraud section with the US attorney's office in Massachusetts almost four years ago into pricing of various missile and defense contracts, said the people, who asked not to be identified because the information is private.

In April, RTX disclosed it had set aside \$306 million to cover potential penalties, \$16 million more than was previously reported to shareholders more than two years ago.

RTX is expected to settle the case at the same time it resolves a separate corruption probe by the Eastern District of New York into possible improper payments by Raytheon involving contracts with certain Middle East countries, according to one of the people familiar. The company hasn't been able to determine the financial impact of that investigation. But it told shareholders that both probes are unlikely to have a "material adverse effect" on its "operations, financial condition or liquidity." RTX has also disclosed the US Securities and Exchange Commission is conducting a parallel corruption probe.

RTX said it has been cooperating to resolve allegations of defective pricing involving a limited number of government contracts from over a decade ago. "We continue to actively engage with the Department of Justice to resolve this matter," according to a company statement. The company said it has a rigorous anti-corruption compliance program in the April disclosure.

A Justice Department spokesperson declined to comment.

The deal would represent one of the first big corporate criminal settlements of the year for the Justice Department's fraud section, which has been touting its efforts to crack down on white collar crime. It also comes as RTX and other major defense contractors have faced a backlash over the prices they charge US taxpayers to supply weapons. Last year, US lawmakers urged Defense Secretary Lloyd Austin to investigate "price gouging" by the companies following a CBS News investigation.

"These companies have abused the trust government has placed in them, exploiting their position as sole suppliers for certain items to increase prices far above inflation or any reasonable profit margin," wrote five US senators.

RTX is a major supplier of weapons to the Defense Department and is heavily reliant on US taxpayers for business. The federal government paid the company \$32 billion last year for aerospace and defense products, which accounted for 46% of its total net sales across its three business units, according to a regulatory filing. The investigation involves the company's Raytheon unit — the missiles, defense and space division.

RTX changed its name from Raytheon Technologies in 2023.

Defective pricing is when a company provides the government with inaccurate pricing data ahead of a contract that can lead to US taxpayers being overcharged for work.

The Justice Department began investigating Raytheon in October 2020 when it sent a subpoena to the company asking for information about financial accounting, internal controls and cost reporting since 2009, according to regulatory filings. The probe looked into pricing claims made by Raytheon for missiles and defense contracts entered into between 2011 and 2013 as well as one from 2017, the filings show.

--With assistance from **Patricia Hurtado**.

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Elizabeth Wasserman

Wirecard AG**Top lawyer of ex-Wirecard boss walks away after money runs out**

Markus Braun under mounting pressure as trial of Germany's largest corporate fraud continues



Markus Braun, pictured in 2019. He was forced to let go of his top defence lawyer because of lack of funds © Reuters

Olaf Storbeck in Frankfurt 3 HOURS AGO



Former Wirecard boss Markus Braun was forced to let go of his top defence lawyer because of lack of funds, in a major setback for the businessman accused of orchestrating Germany's largest corporate fraud.

Alfred Dierlamm, one of Germany's most prominent white-collar crime lawyers, walked away from the high-profile mandate last month after the funds of Braun's directors and officers insurance ran out and the former Wirecard chief was unable to pay him directly.

The Wiesbaden-based lawyer, who represented Braun before [Wirecard](#)'s collapse in 2020, said he informed the court in late May about his resignation. In a letter to the court seen by the Financial Times, he stressed that the decision was entirely triggered by "financial considerations".

[Braun](#), who has been in custody since July 2020, recently lost a series of civil lawsuits against his D&O insurance when the latter refused to pay after an initial tranche was released.

Wirecard, which at its peak was valued at €24bn, filed for insolvency in June 2020 after disclosing that half of its revenue and €1.9bn in corporate cash did not exist. Braun has been charged with fraud, breach of trust, account rigging and market manipulation. If found guilty, he could be sentenced to up to 15 years in jail. He has denied wrongdoing.

While Braun had been a billionaire during Wirecard's heyday, most of his fortune was tied up in now-worthless shares of the payment company. His remaining wealth has been seized by the court at the behest of Wirecard's administrator and his family office, which managed his assets, filed for insolvency earlier this year.

The trial against Braun and two other former Wirecard managers began in December 2022 and is expected to run well into next year. It will continue despite Dierlamm's departure, as the court appointed a government-paid lawyer who will remain in charge and be backed by two additional state-funded lawyers.

Since the collapse of Wirecard, Dierlamm and his legal team had immersed themselves in the complex accounting scandal, digging through a plethora of documents and payment flows between Wirecard subsidiaries and external partner companies.

They accused Munich prosecutors of not properly investigating the case, ignoring key evidence and relying on a problematic chief witness. Dierlamm tried to prove that Wirecard funds had been siphoned off by the company's second-in-command Jan Marsalek and others without Braun's knowledge.

However, during the trial Markus Födisch, the judge presiding over the case, has challenged these arguments repeatedly. Earlier this year he released former Wirecard manager Oliver Bellenhaus, who has turned chief witness, from custody, in a move seen as a sign of confidence in his testimony that heavily implicated Braun.

Braun could come under more pressure if the third defendant, Wirecard's former head of accounting Stephan von Erffa, breaks his silence. His lawyers have upheld similar arguments as Dierlamm. But Födisch indicated that a multiyear jail term could be reduced if von Erffa decided to come clean. Erffa's lawyers are in talks with the court about a deal.

Die Zeit first reported Dierlamm's resignation.



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On 2nd Bite, Apple Investors Get Initial OK For \$490M Deal

By **Katryna Perera**

Law360 (June 4, 2024, 9:45 PM EDT) -- A California federal judge has given the first OK to a \$490 million settlement that will resolve claims that Apple misled investors about iPhone sales in China, saying the deal is fair and reasonable, and a better alternative than further litigation, after criticizing the deal during its initial bid for approval and ordering changes.

U.S. District Judge Yvonne Gonzalez Rogers issued an **order** on Monday saying further litigation in the suit would have been lengthy and difficult.

"Proceeding to trial would have been costly; recovery was not guaranteed; and there was the possibility of protracted appeals. The settlement occurred only after four years extensive litigation including the certification of a class, modification of a class, a motion for summary judgment, extensive discovery, and the retention of expert witnesses by both sides," the order stated. "Here, 'the case is complex and likely to be expensive and lengthy to try,' and therefore 'favors the settlement.'"

The certified settlement class includes all individuals who purchased or acquired Apple Inc. shares, call options or put options between Nov. 2, 2018, and Jan. 2, 2019, according to the order.

Under the settlement terms, lead counsel from Robbins Geller Rudman & Dowd LLP plans to seek \$122 million in attorney fees, which represents roughly 25% of the settlement fund, and no more than \$3 million in litigation costs. The order also stated that a service award of no more than \$73,000 may be paid to lead plaintiff, the Norfolk County Council as Administering Authority of the Norfolk Pension Fund.

Judge Gonzalez Rogers' approval came after she criticized the proposed deal last month and ordered the parties to make certain changes.

Specifically, the court wanted to see revisions of certain release definitions in the settlement documents and required several changes to the language in the settlement notice the pension fund would send to members of the certified Apple investor class.

The judge also told the parties to cut settlement notice language saying that any mail prospective claimants send to the claims administrator would need a postmark stating the date that a letter was mailed. The judge noted that in January, the U.S. Postal Service discontinued postmarks for hard-copy mail.

And the court cited Ninth Circuit guidance stating that putative class members needed 35 days to opt out or object to the settlement deal and as much time to respond to the request for attorney fees and costs.

In late May, the investors told the court they had made the necessary revisions and asked Judge Gonzalez Rogers **to reconsider approval** of the deal.

The settlement will end claims Apple and its executives failed to disclose that the "trade war" between the United States and China was taking a toll on demand for iPhones in what is considered one of the company's most important markets.

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

The investors are represented by Shawn A. Williams, Daniel J. Pfefferbaum, Kenneth J. Black, Hadiya K. Deshmukh, Jacob G. Gelman, Mark Solomon, Ellen Gusikoff Stewart and Jason A. Forge of Robbins Geller Rudman & Dowd LLP, Carol C. Villegas of Labaton Keller Sucharow LLP, and Thomas C. Michaud of Vanoverbeke Michaud & Timmony PC.

Apple and its executives are represented by James N. Kramer, Alexander K. Talarides and Tristan K. Allen of Orrick Herrington & Sutcliffe LLP, and Daniel J. Kramer, Walter F. Brown Jr. and Meredith R. Dearborn of Paul Weiss Rifkind Wharton & Garrison LLP.

The case is In re: Apple Inc. Securities Litigation, case number 4:19-cv-02033, in the U.S. District Court for the Northern District of California.

--Additional reporting by Emilie Ruscoe. Editing by Kristen Becker.

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Biotech RenovaCare Can't Beat Investors' Stock Promo Suit

By **Katryna Perera**

Law360 (June 4, 2024, 10:05 PM EDT) -- A New Jersey federal judge has ruled that investors in biotechnology company RenovaCare Inc. failed to prove their case against firms they accused of profiting from a scheme to pump up the company's shares, but otherwise allowed their claims to proceed against the maker of skin burn treatments and a few of its executives.

In a 59-page **opinion** on Monday, U.S. District Judge Brian R. Martinotti dismissed claims against Treadstone LLC and Blackbriar Ltd. — each of which allegedly received ill-gotten gains from a pump-and-dump scheme of RenovaCare stock. The investors claimed the two companies derived the benefits from participation in the alleged scheme by their owner, Jeetenderjit Singh Sidhu.

But Judge Martinotti said the suit contains no factual allegations supporting primary liability for either entity and noted that the investors concede that they "do not allege substantive wrongdoing" by either entity.

The current version of the suit is a consolidation of proposed class actions and a U.S. Securities and Exchange Commission complaint that were filed in 2021, alleging that RenovaCare's interim CEO, Harmel Rayat, solicited online financial publishing company StreetAuthority to run a promotional campaign aimed at raising the company's stock price.

On Monday, the judge also dismissed from the suit Capitol Information Group Inc., which bought certain assets from StreetAuthority after the scheme allegedly took place. The judge said the investors did not sufficiently plead that CIG is liable for alleged securities fraud violations committed by StreetAuthority.com.

"Plaintiffs have failed to properly allege any exceptions to the general rule of successor liability. Instead, plaintiffs rely on 'mere conclusory statements' which do not set forth a plausible claim for successor liability against CIG. Therefore, the court finds a basis to dismiss plaintiffs' claims against CIG," the motion says.

The rest of the investors' suit against RenovaCare, Rayat and other top brass of the company was largely kept intact. The judge did throw out one claim against Jatinder Bhogal that said he was the "maker" of some of RenovaCare's allegedly issued false statements.

Judge Martinotti said the investors sufficiently pleaded that Rayat, not Bhogal, was the "maker" of some alleged false statements issued in a January 2018 press release that purportedly led to the discovery of the stock promotion scheme.

"Plaintiffs allege the following facts relevant to the January 2018 press release: 'Rayat was instrumental in drafting and disseminating RenovaCare's press release' ... RenovaCare's CEO followed Rayat's instructions and forwarded Rayat's final draft of the press release to the investor relations consultant," the motion states. "Based on these allegations, Rayat was clearly the person with ultimate authority over the January 2018 press release and controlled its 'content and whether and how to communicate it.'"

According to the SEC, Rayat gave false information to StreetAuthority about "the efficacy of RenovaCare's experimental burn-wound healing medical device called the 'SkinGun,'" edited the publisher's promotional materials, advised it on distributing the promotion, and arranged to pay

StreetAuthority with RenovaCare funds through third parties.

When OTC Markets Group Inc. demanded in January 2018 that RenovaCare publicly disclose its involvement in the promotion, Rayat and the company put out a press release denying any role in the promotion, according to the complaint.

Investors claim RenovaCare failed to disclose that the company was engaged in the promotional campaign and that, after the SEC announced its complaint, the company's stock price fell nearly 25% over three consecutive trading sessions to close at \$2 per share on June 2, 2021.

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

The investors are represented by Reed R. Kathrein, Lucas E. Gilmore, Steve W. Berman and Nathan Emmons of Hagens Berman Sobol Shapiro LLP, by Murielle S. Walsh and Jeremy A. Lieberman of Pomerantz LLP and by Bruce D. Greenberg of Lite DePalma Greenberg & Afanador LLC.

RenovaCare, Harmel Rayat and Jatinder Bhogal are represented by Joseph Dever, Tamar Wise and Connor Rowinski of Cozen O'Connor.

Capitol Information Group is represented by Michael J. Rinaldi, Ryan F. Monahan and Bryan N. Shapiro of Duane Morris LLP.

Jeetenderjit Singh Sidhu, Treadstone Financial Group LLC and Blackbriar Asset Management Ltd. are represented by Craig Carpenito, Andrew Michaelson, Mateo de la Torre and Alexander B. McLamb of King & Spalding LLP.

The case is In Re RenovaCare Inc. Securities Litigation, case number 2:21-cv-13766, in the U.S. District Court for the District of New Jersey.

–Additional reporting by Bill Wichert. Editing by Peter Rozovsky.

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Matterport Hit With Investor Suit Over \$1.6B CoStar Deal Docs

By **Sydney Price**

Law360 (June 4, 2024, 7:33 PM EDT) -- An investor of 3D building imaging company Matterport is attempting to prevent the company's proposed merger with real estate analytics company CoStar Group Inc., saying Matterport's deficient registration statement fails to show how the transaction will benefit public shareholders.

Matterport is a spatial data company that focuses on digitization and datafication, according to investor Andrew Rose's suit filed in California federal court on Monday. CoStar agreed to acquire Matterport in April in a \$1.6 billion cash and stock transaction, the suit states.

Rose alleges Matterport and its five directors violated the Exchange Act by filing a misleading and incomplete registration statement. The registration statement does not state why the company failed to explore strategic alternatives to the exclusivity period it entered with CoStar, nor does it disclose certain information about confidentiality agreements between Matterport and CoStar, or the full scope of communications regarding post-transaction employment of some Matterpoint executives, Rose claims.

"The misrepresentations and omissions in the registration statement are material to plaintiff, and plaintiff will be deprived of his entitlement to decide whether to vote his shares in favor of the proposed transaction on the basis of complete information if such misrepresentations and omissions are not corrected prior to the stockholder vote regarding the proposed transaction," the suit states.

The suit says that some options owned by Matterport's insiders are subject to accelerated vesting and conversion into merger consideration. Additionally, certain executives are entitled to severance packages — often referred to as "golden parachute" packages — entitling them to millions of dollars not shared by common stockholders, according to the suit.

The registration statement also omits certain line items used by management to calculate financial projections, the suit alleges. Matterport's financial adviser Qatalyst Partners LP relied upon the information to issue its fairness opinion, and without accurate projection data for Matterport, shareholders cannot properly evaluate its true worth, the suit says.

"The descriptions fail to include necessary underlying data, support for conclusions, or the existence of, or basis for, underlying assumptions," the suit states. "Without this information, one cannot replicate the analyses, confirm the valuations or evaluate the fairness opinions."

Rose seeks an order enjoining the defendants from closing the merger and requiring them to disclose to shareholders all material financial information allegedly omitted from the registration statement.

Counsel for Rose and a representative of Matterport did not immediately respond to requests for comment on Tuesday.

Rose is represented by Evan J. Smith and Ryan P. Cardona of Brodsky & Smith LLC.

Counsel information for Matterport and the individual defendants was not immediately available on Tuesday.

The case is *Rose v. Matterport Inc. et al.*, case number 5:24-cv-03313, in the U.S. District Court for

the Northern District of California.

--Editing by Marygrace Anderson.

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Chancery Pauses Meta Suit While Calif., Texas Cases Continue

By **Jeff Montgomery**

Law360 (June 4, 2024, 7:46 PM EDT) -- Delaware's Chancery Court on Tuesday paused a derivative suit seeking potentially massive damages from Meta Platforms Inc.'s leaders for failing to eliminate pedophilia, human trafficking and child exploitation content from its social media sites, pending resolution of direct damages suits in Texas and California.

Vice Chancellor J. Travis cited past rulings for pausing the Delaware case, noting former Chief Justice Leo E. Strine said in a 2011 ruling that "one cannot even rationally determine what the potential derivative liability is until the direct liability the corporation faces is determined."

Delayed for now are "caremark" claims seeking damages from corporate directors and key officers for harm suffered by a corporation because of failures of duties, including oversight, loyalty and care.

In Meta's case, the vice chancellor observed further harm to the company is threatened in *Jane Doe v. Facebook Inc.* in Harris County District Court, Texas, and portions of the multidistrict case **In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation** in the U.S. District Court for the Northern District of California.

Attorneys for Meta argued in March that the vice chancellor should toss or pause a derivative suit in Delaware by the Employees' Retirement System of the State of Rhode Island, two funds of Kiwi Investment Management and Cleveland Bakers and Teamsters Pension Fund.

The four funds' March 2023 suit accused the company's leadership and board of allowing "rampant and systemic" sex trafficking, human trafficking and child exploitation to flourish on Facebook and Instagram. According to the company, those sued failed to take the necessary steps to root out the "predatory criminal activity" thriving on the social media platform.

"This court 'routinely stays caremark claims that seek to shift losses from the corporation to the defendant fiduciaries' when the losses are tied to underlying litigation," Vice Chancellor Laster said.

As a condition of the stay, the vice chancellor ordered Meta to provide an update on the Texas and California cases every 90 days and when any "significant" case development or change occurs, including dismissal of claims or cases.

Additionally, documents produced by those sued in Texas and California must be relayed by Meta to the stockholders in the Delaware case.

In March, attorneys for Meta argued during a dismissal hearing that the stockholder suit failed to show the social media enterprise "utterly failed" to address pedophilia, human trafficking and child sexual exploitation and had failed to show corporate harm.

Acknowledging that the allegations focus on "horrible situations," the company's counsel pointed to Meta's removal of 16,000 "problematic" groups and millions of issues, with a team of 40,000 working on user safety and security.

Ohio Public Employees Retirement System and PFA Pension Forsikringsaktieselskab, which serves clients in Denmark, entered the case on Tuesday as interested parties.

The shareholders are represented by Christine M. Mackintosh, Rebecca A. Musarra, Edward M. Lilly and Barbara J. Hart of Grant & Eisenhofer PA and William S. Norton, Meredith B. Weatherby and Serena Hallowell of Motley Rice LLC.

Interested parties Ohio Public Employees Retirement System and PFA Pension Forsikringsaktieselskab are represented by Gregory V. Varallo, John Rizio-Hamilton, Hannah Ross, Jeroen van Kwawegen and Caitlin C. Bozman of Bernstein Litowitz Berger & Grossmann LLP.

Meta and its executives are represented by Charles S. Duggan and Paulina Perlin of Davis Polk & Wardwell LLP and David E. Ross, R. Garrett Rice, Holly E. Newell and Thomas C. Mandracchia of Ross Aronstam & Moritz LLP.

The case is Employees' Retirement System of the State of Rhode Island et al. v. Mark Zuckerberg et al., case number 2023-0304, in the Court of Chancery of the State of Delaware.

--Additional reporting by Hailey Konnath. Editing by Drashti Mehta.

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2 Firms Tapped To Lead Barclays Investor Suit

By **Sydney Price**

Law360 (June 4, 2024, 6:51 PM EDT) -- Kaplan Fox & Kilsheimer LLP and Sperling & Slater LLC have been appointed to co-lead an investor suit accusing Barclays PLC of over-issuing \$17 billion of securities.

U.S. District Judge Lewis J. Liman determined Monday that short-seller Michael Puchtler, who filed the suit in March, will be the most adequate lead plaintiff, after the only other competing movant withdrew his motion May 29.

Puchtler claims he lost \$197,563 due to a "massive and sustained rise" in price of certain notes caused by Barclays' failure to disclose its illegal overissuance of unregistered securities.

According to the **complaint**, it took weeks for Barclays to make the disclosure that it violated securities laws' registration requirements by selling in excess of its stated shelf registration capacity.

The case is Puchtler v. Barclays PLC et al., case number 1:24-cv-01872, in the U.S. District Court for the Southern District of New York.

--Editing by Kelly Duncan.

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Atty May Face Suspension In State Street Billing Row

By **Brian Dowling**

Law360 (June 3, 2024, 3:04 PM EDT) -- A Massachusetts disciplinary committee has recommended a six-month suspension for the former managing partner of Thornton Law Firm LLP for his alleged neglect in signing an inflated attorney fees declaration in a class action against State Street.

Two members of a Massachusetts Board of Bar Overseers hearing committee recommended that Garrett J. Bradley be sidelined for half a year because the declaration he submitted to a Boston federal judge at the closing of the class action included rates that inflated the firm's fee for the case, according to the May 20 order.

The majority's proposed sanction is lighter than the two-year suspension requested by the bar counsel due to its acceptance of Bradley's testimony that he saw the declaration as largely boilerplate language and signed it without reading it.

"The majority of the committee does not find that he knew — at the time he signed the declaration and allowed it to be filed on behalf of his firm — that anything in his declaration was not accurate," committee chair Dustin F. Hecker and member Christine Kingston wrote for the majority.

The majority's recommendation for a six-month suspension next goes before the Board of Bar Overseers, which will decide what sanction to recommend for the Supreme Judicial Court to impose.

Counsel for Bradley declined to comment when reached Monday. Representatives for the Board of Bar Overseers were not immediately available for comment.

Thornton, Labaton Sucharow LLP and Lieff Cabraser Heimann & Bernstein LLP were awarded \$75 million in fees in 2016 from State Street Corp.'s \$300 million settlement of claims that it cheated its customers out of millions by manipulating exchange rates on foreign exchange trades.

Allegations of **double-billing and inflated hourly rates** for counsel sparked a thorough review by the federal court — including the appointment of a special master — and concluded with the eight-figure fee award being slashed by \$15 million.

A partner and co-counsel in the case, Bradley on Sept. 14, 2016, approved the firm's calculation of its legal services and costs that would go along with documents from the two other firms for the court to calculate the lodestar amount.

But Thornton's papers included inaccurate hourly rates and claimed attorney Michael Bradley — Garrett Bradley's brother — was a Thornton employee who billed \$500 per hour, when he was neither employed by the firm nor billed that much. Garrett Bradley later testified the errors were a "stupid mistake."

In a dissent from the majority decision, committee member Richard Mackenzie said Bradley should face the presumptive two-year suspension for attorneys who knowingly make a false statement to a court under oath.

Mackenzie wrote that Bradley's testimony denying that he read the document isn't enough to establish that he never read and didn't know the false representations contained in the declaration, which Bradley had certified was "true and correct."

"Any reasonable attorney — particularly a managing partner — who was even mildly interested in the

firm's support for a request for a multi-million-dollar fee that his firm was seeking to be awarded, would have read it," the dissent said.

The declaration also coincided with Bradley's elevation to managing partner of Thornton about two weeks prior, Mackenzie noted.

"I do not believe that one of the respondent's first acts as managing partner of his firm would be to sign a short affidavit, where his firm sought a multi-million-dollar fee, without reading all of it," the dissent said. "I, therefore, do not credit that the respondent did not read the entirety of the two pages of content."

The majority decision found Bradley violated professional rules requiring reasonable diligence and committed misconduct that is prejudicial to the administration of justice and adversely reflects on his fitness to practice law. The committee also found he failed to inform the court of all relevant material facts at an ex parte hearing.

The Office of Bar Counsel is represented by its own Robert M. Daniszewski.

Bradley is represented by George Vien of Donnelly Conroy & Gelhaar LLP.

The case is In re Matter of Garrett J. Bradley, case number 629240, before the Massachusetts Board of Bar Overseers.

--Editing by Patrick Reagan.



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Class Attys Get \$7M Of \$21M BofA Wire Fee Settlement

By **Ryan Harroff**

Law360 (June 4, 2024, 6:19 PM EDT) -- A North Carolina federal judge gave an early nod Tuesday to a \$21 million settlement between Bank of America NA and the proposed class of its customers who accused it of slapping \$15 "junk fees" on their incoming wire transfers, with \$7 million of the deal going to class counsel.

U.S. District Judge Max O. Cogburn Jr. of the Western District of North Carolina granted preliminary approval to the deal that the financial institution and the proposed class of customers led by Aaron Aseltine **presented to the court** in late May. Class counsel from Kopelowitz Ostrow PA, KalieGold PLLC and The Van Winkle Law Firm will receive \$7 million in fees from the \$21 million pot, according to the parties' agreement.

The settlement class, which was certified for the purposes of **the deal** in Judge Cogburn's Tuesday order, consists of all Bank of America account holders in the United States who paid an incoming wire transfer fee and were not refunded for it during the class period. That class period runs from March 8, 2019, through Aug. 31, 2023.

Aseltine first brought the suit in April 2023 after he allegedly was charged an incoming wire transfer fee without having the opportunity to review that fee and decide whether he wanted to accept the transfer. The suit says Bank of America promises its customers full transparency on all fees charged to their accounts but that the financial institution engaged in an elaborate scheme to "obscure, mislead and hide" the wire transfer fees.

Under the terms of the preliminarily approved settlement agreement between Bank of America and Aseltine's class, the class members who are still the financial institution's customers will get an automatic distribution deposited in their accounts while former account holders will receive a check in the mail with their portion of the total settlement fund.

Judge Cogburn also scheduled a final approval hearing for the settlement on Oct. 21. Class members who may wish to object to the terms of the deal have until 30 days before then to air their concerns to the court and any who want to opt out of the agreement must do so by the same deadline, according to the order.

The order also sets a deadline of 45 days before the final approval hearing for Aseltine to file a motion for final approval of the settlement agreement.

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

The class is represented by Jonathan M. Streisfeld of Kopelowitz Ostrow PA, Sophia Gold of KalieGold PLLC, and David Wilkerson of The Van Winkle Law Firm.

Bank of America is represented by Bradley R. Kutrow of McGuireWoods LLP, and Laura A. Stoll, Laura G. Brys, and Viona J. Harris of Goodwin Procter LLP.

The case is Aaron Aseltine v. Bank of America N.A., case number 3:23-cv-00235, in the US District Court for the Western District of North Carolina.

--Additional reporting by Gina Kim and Katryna Perera. Editing by Emily Kokoll.



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Fintech Execs Face Another Suit Over CEO's Stock Ownership

By **Sydney Price**

Law360 (June 4, 2024, 10:34 PM EDT) -- Insiders at blockchain-based financial services company Future FinTech Group Inc. were hit with a shareholder derivative suit on Tuesday alleging they concealed that the company's CEO had inflated stock prices, which was revealed to the public when the U.S. Securities and Exchange Commission filed a lawsuit against him.

According to shareholder Eric Duquette's **suit filed** in New Jersey federal court, Future FinTech CEO Shanchun Huang intentionally purchased company stock prior to becoming CEO in March 2020 in order to artificially propel the stock price. Huang was attempting to keep the company's shares higher than \$1 per share as the company faced delisting for failing to meet the Nasdaq stock exchange's minimum price requirements, the SEC had alleged, Duquette noted in his suit.

In addition to Huang, Future FinTech's Chief Financial Officer Ming Yi, former CFO Jing Chen and four directors are named as defendants in the derivative suit for their alleged participation in the scheme to prop up the company's stock price.

The suit's relevant period begins March 10, 2020, the day Future FinTech announced Huang as its new CEO. The complaint alleges the statements issued that day by the company were false and misleading. Future FinTech and its executives touted Huang's experience and leadership qualities without disclosing he was manipulating the company's stock at that time, Duquette said.

The suit references several other statements issued by Future FinTech that allegedly omitted relevant information about the defendants' wrongdoing. For example, in March 2021, Future FinTech and Huang filed an initial insider holdings report that did not disclose Huang already held company stock when he became CEO.

The company's shares remained artificially inflated until earlier this year when the **SEC filed a suit** against Huang on Jan. 11, Duquette said. The SEC claimed Huang used an offshore account to purchase Future FinTech shares in the months leading up to his CEO appointment. After becoming CEO, Huang repeatedly failed to make required public filings with the SEC about his Future FinTech share ownership, the SEC alleged.

Duquette said shares of Future FinTech fell following the SEC's announcement of its suit, declining more than 20% to close at \$1.02 per share on Jan. 12.

Duquette's complaint also notes Future FinTech is facing a **securities class action** in New Jersey federal court and that the company has already been damaged financially due to the defendants' actions.

The derivative suit accuses the defendants of violating the Exchange Act, breaching their fiduciary duties and unjust enrichment.

Counsel for Duquette and a representative of Future FinTech did not respond to requests for comment Tuesday.

Duquette is represented by Vikrant Pawar of Pawar Law Group PC.

Counsel information for Future FinTech and the individual defendants was not available Tuesday.

The case is Duquette v. Huang et al., case number 2:24-cv-06668, in the U.S. District Court for the District of New Jersey.

--Editing by Lakshna Mehta.

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Judiciary Panel Clears 1st MDL Rule, Eyes 'Mouthpiece' Amici

By **Jeff Overley**

Law360 (June 4, 2024, 11:55 PM EDT) -- Top rulemaking gatekeepers for the federal judiciary Tuesday capped off seven years of strife in the defense and plaintiffs bars by backing a milestone measure aimed at optimizing multidistrict litigation, and then promptly greenlighted an entirely different war of words over new efforts to ferret out amicus briefs from "paid mouthpieces" masquerading as independent experts.

The Rulemaking Road for MDLs

The effort to craft a rule for management of multidistrict litigation may span nearly a decade by the time it concludes.

2017

MDL Subcommittee of the Advisory Committee on Civil Rules is established.

April 2018

Subcommittee issues first report to full committee.

November 2018

Subcommittee meets and identifies "winnowing unsupportable claims" as key area of focus.

March 2023

Full committee advances a draft MDL rule.

June 2023

Judicial Conference Standing Committee approves draft rule's publication.

August 2023

Draft rule is published in Federal Register.

February 2024

Six-month public comment period concludes.

April 9, 2024

Advisory committee approves a revised version of the rule.

June 4, 2024

The Committee on Rules of Practice and Procedure, also known as the Standing Committee, gave final approval to the rule.

May 1, 2025

Target deadline for adoption by U.S. Supreme Court and transmittal to Congress.

Dec. 1, 2025

Rule takes effect if requisite approvals occur, absent congressional action.

Source: Advisory Committee on Civil Rules; Law360 reporting.

The dual developments occurred at the Judicial Conference's main policy panel, which stamped its approval on **the first rule governing MDLs** — vast sets of comparable cases often alleging harm from products or practices — and separately endorsed publication of a proposal to require greater transparency and court permission for appellate amicus briefs.

With respect to MDLs, the panel — known as the Committee on Rules of Practice and Procedure, or simply the Standing Committee — unanimously gave final approval to Federal Rule of Civil Procedure 16.1, which started taking shape in 2017 and repeatedly evolved amid intense acrimony.

"A number of people have contributed to the long, hard work on 16.1," U.S. District Judge Robin L. Rosenberg, who chairs the Advisory Committee on Civil Rules and **famously obliterated a major MDL** involving the heartburn drug Zantac, said at Tuesday's meeting. "We heard from attorneys and others on both sides of the V, and from mass torts and class action attorneys, [and] each had their own positions and ideas."

Those positions and ideas ultimately came together into a largely optional guide for MDL management, and lawyers for both corporations and consumers characterized it Tuesday as a sensible compromise.

"I am impressed by the balance the committee tried to strike," Elizabeth J. Cabraser of Lief Cabraser Heimann & Bernstein LLP, a panel member and one of the plaintiffs bar's top attorneys for MDLs, said at Tuesday's meeting. "I don't think it could ever be perfect ... but I think it's sufficient in terms of trying to be flexible."

Sue Steinman, senior policy director at the American Association for Justice, which advocates for trial lawyers, echoed that comment, telling Law360 that the rule "prioritizes important MDL management issues," and that the AAJ "applauds the balance of flexibility and structure provided by Rule 16.1."

The rule's structure is essentially a template for how judges and lawyers can efficiently organize MDLs and steer them toward bellwether trials, settlements or both, depending on the circumstances. It recommends an initial management plan, advises parties to consider appointing leadership counsel, and urges the early creation of a report describing "how and when the parties will exchange information about the factual bases for their claims and defenses."

The information exchange provision was a major focus of the defense bar, which has portrayed MDLs — which often contain thousands of lawsuits — as **increasingly plagued by meritless claims** that piggyback on potentially legitimate cases in hopes of scoring a slice of settlements before facing scrutiny.

"There has been and will continue to be significant debate about the details of the [rule]," Kimberly Branscome, a partner at Paul Weiss Rifkind Wharton & Garrison LLP, told Law360 after Tuesday's meeting in Washington, D.C. "However, a [rule] specifically governing MDLs will be a key step forward in helping judges and practitioners navigate the complex landscape of mass torts."

Shook Hardy & Bacon LLP managing partner Phil Goldberg, who watched Tuesday's proceedings, told Law360 in a Tuesday interview that the outcome will facilitate early analysis under Federal Rule of Civil Procedure 11(b), which forces plaintiffs counsel to certify their "factual contentions have evidentiary support or ... will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."

"It's something that is important to us, and important to making sure that MDLs can focus on real claims affecting real people, and are not going to be places where claims are stockpiled regardless of whether they can even support the fact that they use the product or have the injury that the MDL is dealing with," Goldberg said.

Big business and BigLaw have fought vigorously to shape the MDL rule, with the campaign largely led by Lawyers for Civil Justice, which counts dozens of multibillion-dollar corporations and powerhouse law firms among its members.

Alex Dahl, general counsel of Lawyers for Civil Justice, reacted favorably to Tuesday's vote, saying in a statement that "if employed appropriately, the new rule will prevent meritless claims from being asserted in the first place and also give courts a new management tool for addressing any such claims that are filed."

Although the rule still requires approval by the Judicial Conference and the U.S. Supreme Court, Tuesday's vote all but ensures its adoption. And while it's not set to take effect until December 2025, its influence might be felt before it's officially on the books.

"There's no reason to wait for official adoption for MDL judges to look at this and be guided by it and make decisions as a result of this rule," Goldberg said.

As the Standing Committee on Tuesday steered the Rule 16.1 saga toward its final destination, it also hit the accelerator on a brand-new policymaking adventure. At issue are proposed amendments to Federal Rule of Appellate Procedure 29, which deals with the content and form of amicus briefs from individuals or organizations that want to share perspective on a case.

Many of the proposed amendments would require new or different disclosure of financial links, such as whether counsel or a litigant contributed 25% or more of an amicus filer's revenue, or whether someone earmarked dollars specifically to bankroll a brief. A committee note accompanying the proposal did not mince words about the impetus.

"Earmarked contributions run the risk that the amicus is being used as a paid mouthpiece by the contributor," the note said, adding that courts have an interest in "evaluating whether an amicus is serving as a mouthpiece for a party, thereby evading limits imposed on parties in our adversary system and misleading the court about the independence of an amicus."

Other aspects of the proposal would require nongovernmental parties to obtain a judge's permission before filing a friend-of-the-court brief. That idea generated widespread criticism at Tuesday's meeting from panelists who voiced worries about harming civic participation, straining overburdened courts and putting everyone through a pointless permission process.

"Even if [a brief] is not helpful at all, a lot of times, you just let it in, because it's a way for people to express their views to the court, which I think is a very important part of the openness of our process," U.S. Circuit Judge Patricia A. Millett of the D.C. Circuit, one of the proposal's most strident critics on Tuesday, said at the meeting.

That view was seconded by U.S. Circuit Judge William J. Kayatta Jr. of the First Circuit, who said, "I share the concerns of Judge Millett. ... I don't see why we're having a requirement that people seek leave for something that's essentially going to be automatically granted all the time anyhow."

Panel member Louis A. Chaiten of Jones Day also pointed out that the U.S. Supreme Court, in a policy that took effect in 2023, **eliminated the consent duty** for amicus filings.

"I do think it's a little odd that this rule is going against the precedent that the Supreme Court set in their revision last year to allow amicus briefs without consent or motion," Chaiten said.

U.S. Circuit Judge Jay S. Bybee of the Ninth Circuit, who chairs the Advisory Committee on Appellate Rules, nonetheless encouraged panelists to authorize the proposal's publication, while also acknowledging that the associated public comment period is likely to be boisterous.

"It is clear that our proposal is going to generate a lot of public controversy," Judge Bybee said Tuesday. "[But] we're at that Goldilocks moment in which we have to decide whether we've gone too far, haven't gone far enough, or whether it's just right. And we think that we need to hear from the public."

After the panelists accepted Judge Bybee's recommendation, Lawrence S. Ebner of the Atlantic Legal Foundation, which frequently files amicus briefs, quickly validated the judge's prediction, telling Law360 that the leave requirement would "create uncertainty that may deter preparation of amicus briefs that otherwise would facilitate appellate decision-making."

"At a time when the federal judicial system needs to be more, not less, transparent, requiring a motion for leave is an inexplicable step backwards," Ebner said.

--Editing by Michael Watanabe.



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HP Fraud Charges Against Ex-Autonomy Execs Head To Jury

By **Bonnie Eslinger**

Law360 (June 4, 2024, 9:25 PM EDT) -- Closing arguments wrapped Tuesday in a California federal criminal trial over claims that former Autonomy CEO Michael Lynch and ex-finance vice president Stephen Chamberlain duped HP into overpaying billions for the British tech company, with Chamberlain's lawyer saying his client did his job "in good faith," which, in the court's eyes, is a "complete defense."

The closing arguments began Monday and conclude an **11-week trial** over accusations that Lynch and Chamberlain worked together with others at the British software company to deceive HP about Autonomy's business and financial health in the years leading up to the Silicon Valley giant's purchase of the British software company for \$11.7 billion in 2011.

Lynch and Chamberlain are each facing 15 felony counts of fraud and conspiracy that could send them to prison for more than 20 years. The trial follows the 2018 conviction of former Autonomy Chief Financial Officer Sushovan Hussain on related federal charges. He was **sentenced** to five years in prison and ordered to pay \$4 million in fines.

On Tuesday, Chamberlain's lawyer underscored that even witnesses called by the government said on the stand they felt Autonomy's former finance vice president was hardworking and honest.

Chamberlain performed his job "in good faith," said Gary Lincenberg of Bird Marella Rhow Lincenberg Dooks & Nessim LLP. "And the court instructed you that good faith is a complete defense,"

Prior to the closing arguments, U.S. District Judge Charles R. Breyer instructed jurors that a person who acts on an honestly held belief is not punishable, even if that belief turns out to be wrong.

"An honest mistake in judgment or an error in management does not rise to the level of intent to defraud," Judge Breyer said.

Prosecutor Robert Leach told jurors during his closing argument on Monday that the evidence presented by the government at trial "leaves no reasonable doubt that the defendants' false and misleading statements were material to HP and its decision to buy Autonomy."

Lynch was at the top, controlling the conspiracy, but there were others involved, Leach said, including Hussain and Autonomy's former U.K.-based **general counsel Andrew Kanter**. Chamberlain's job was to lie to the auditors and help Hussain manage Autonomy's earnings and meet revenue goals, the prosecutor said.

On Tuesday, Chamberlain's lawyers said his client was not at the same level as the others and wasn't involved in the negotiations that led to the HP deal, announced in August 2011.

"You even heard that Mr. Chamberlain didn't even know that this sale to HP was going to take place until the end of July," Lincenberg said.

Hussain was Chamberlain's boss, Lincenberg said.

"You know, there's this boogeyman in this courtroom because the chief financial officer is not in this court," the lawyer for Chamberlain said. "The chief financial officer is the one who's signing the

documents, the one who signed the management representation letters, and making these decisions."

Chamberlain, his lawyer said, made no misrepresentations to HP and his work largely involved deals and documents that were handed to him.

"You've got Steve Chamberlain sitting here in Cambridge, the end of the quarter comes, they're dealing with numbers and documents that are flying in," Lincenberg said. "You heard about all these company names. For Mr. Chamberlain, these are items on a spreadsheet as they come in."

The defense lawyer also reminded jurors that several government witnesses were testifying under deals struck with the U.S. Department of Justice.

"They have cooperation agreements, which kind of means they don't get charged for anything," Lincenberg said. "But we're still holding [that] over your head if you commit perjury."

The government has also claimed that Chamberlain was involved in backdating sales so they could be squeezed into the revenue total for a prior quarter.

Those allegations are not only untrue, but they're immaterial, Lincenberg said.

"We're dealing with sales in 2009 and whether or not that \$2 million of revenue on a deal came in Q3 or Q2?" Chamberlain's lawyer said. "Remember, there's no dispute that this revenue came in. Who from HP is suggesting that that's pertinent?"

Further, the government's only proven instance of backdating didn't involve Chamberlain, Lincenberg said. That came from the former head of Autonomy's sales in the United States Stouffer Egan, who took the stand as a cooperating witness for the government. Egan testified that he concealed the backdating from Chamberlain's Cambridge finance team, Lincenberg reminded jurors.

The government's case is that Lynch and Chamberlain conspired with others at Autonomy to deceive HP by making false or misleading statements from 2009 to 2011 about Autonomy's sales, revenue, profits, expenses and organic growth. The statements came in the form of Autonomy's quarterly releases and annual reports, along with written communications and conversations between the parties during the diligence process, the government said. Misrepresentations were also made about the extent of Autonomy's low-margin hardware sales and the company's revenue sources, which included **inappropriate transactions** that overvalued Autonomy, prosecutors said.

On Tuesday, a different lawyer for the government, Assistant U.S. Attorney Adam Reeves got the final word before jurors began their deliberations.

"Aided by Steve Chamberlain, Michael Lynch led a conspiracy that falsified Autonomy's financial statements again and again," Reeves said. "The defendants acted with criminal intent because they lied to the auditors, the market, and HP's executives about Autonomy's products and performance."

They did it for the money, Reeves said, noting that both men profited when HP bought their Autonomy stock.

"They flaunted Autonomy's false growth story and walked away with millions of dollars," Reeves said. "And that's a crime."

During his closing argument on Monday, a lawyer for Lynch said the propriety of the deals the government put before jurors were mostly matters of accounting interpretation and added that his client had no motive to defraud HP.

"Mike was a wealthy man before HP came along" Lynch's lawyer said. "He didn't need HP, and he didn't need their money."

The jury began their deliberations in the afternoon; they are expected to continue Wednesday.

During the trial, Lynch **took the stand** in his own defense, testifying for three days and telling jurors

that he didn't defraud HP. Chamberlain **chose not** to testify.

The Autonomy case is one of the largest fraud prosecutions ever brought by the U.S. Department of Justice, federal prosecutors told a U.K. court during **extradition proceedings**.

The government is represented by Robert S. Leach, Adam A. Reeves and Kristina N. Green of the U.S. Attorney's Office for the Northern District of California, and Zachary Abrahamson of the U.S. Department of Justice's Antitrust Division.

Michael Lynch is represented by Christopher J. Morvillo, Celeste Koeleveld and Daniel S. Silver of Clifford Chance LLP, and Jonathan M. Baum, Reid H. Weingarten, Brian M. Heberlig, Michelle L. Levin, Nicholas P. Silverman and Drew C. Harris of Steptoe LLP.

Stephen Chamberlain is represented by Gary S. Lincenberg, Ray S. Seilie and Michael C. Landman of Bird Marella Rhow Lincenberg Dooks & Nessim LLP.

The case is U.S. v. Mike Lynch et al., case number 3:18-cr-00577, in the U.S. District Court for the Northern District of California.

--Additional reporting by Dorothy Atkins, Richard Crump and Christopher Crosby. Editing by Michael Watanabe.

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