Live Nation slapped with class-action suit after DOJ investigation

washingtonexaminer.com/news/justice/3017084/live-nation-slapped-class-action-suit-doj-investigation

May 24, 2024

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Live Nation is now facing a class-action suit seeking damages after a previous lawsuit from the Department of Justice was announced this week.

Law firms Robbins Geller Rudman Dowd and Israel David filed their suit in Manhattan federal court late Thursday after the DOJ's investigation into Live Nation went public and hours after Attorney General Merrick Garland confirmed in a press conference that the department was suing the company. Attorneys are seeking $5 million in damages for previous clients of Ticketmaster.

This comes over 10 years after Ticketmaster paid each of its customers as much as $25 in credit toward future purchases as part of a class action settlement from 2011. In 2003, the company faced allegations of overcharging customers and opted to settle rather than take the matter to court.

The *Washington Examiner* reached the involved law firms for comment.

Now Live Nation stands accused of violating Section 2 of the Sherman Act due to allegations of acquiring competing event promoters and forcing venues and artists alike into exclusionary contracts for as long as 10 years in some cases. Garland claimed it controls 80% of ticket sales to major concert venues, has contracts with 400 entertainers, and owns or controls 60% of amphitheaters. As a result, Garland said, "It is time to break it up."

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Live Nation pointed to its 1.4% annual net profit as a reason it does not consider itself a monopoly in a statement to the *Washington Examiner*. The lawsuit, according to the company, will only serve as a “PR win for the DOJ in the short term” and forgot that the Obama administration approved of Live Nation’s acquisition of Ticketmaster at the time.

Its executive vice president, Dan Wall, warned that the lawsuit will not lower prices or fees as prices are set by artists and fees are determined by venues. He claimed Ticketmaster’s market share has declined since 2010, which is proof it is not a monopoly.

Washington Examiner

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Jun. 6, 2024

Terren Peizer's case marks the first time the Department of Justice has sought criminal insider trading charges against an executive solely based on their fraudulent filing of 10b5-1 trading plans.

Willingham

LOS ANGELES - Ontrak Inc. founder and former CEO Terren Peizer intended to sell his share of the company due to approximately one million expiring stock warrants months before executives at Cigna - Ontrak's largest health insurance client at the time - raised financial concerns to him and later terminated their contract with the company, his attorney told a jury during opening statements late Tuesday afternoon.

King & Spalding LLP partner David K. Willingham also told jurors that despite the government's contention that Peizer used undisclosed insider information regarding Cigna's termination plans to avoid more than $12 million in losses, Peizer sought legal advice from multiple attorneys and compliance from the company's financial officer who authorized the filing of two Rule 10b5-1 trading plans within what he was told were the legal limits of the law.

"The actual trading plans themselves show that the government's theory that he would dump his stock into the market to avoid a problem, that he was fearful of what was happening with Cigna, just doesn't make sense," Willingham said. "You will hear he wanted to trade for reasons that had nothing to do with Cigna. ... You'll also learn that he could not just exercise those warrants and sell the stock right away. Because Ontrak is a publicly traded company, its employees, or even people who were the founders, can't sell stock whenever they want to. They have to wait for Ontrak to open what is called a 'trading window,' which the compliance officer opens and allows people to trade at the company. You will learn Ontrak opened this trading window right after quarterly filings, which are public disclosures with the SEC every quarter."

However, U.S. Attorney Della G. Sentilles told jurors evidence including text messages would show Peizer knew his company's relationship with Cigna was doomed and that he rushed to sell his share of the company "in a last-ditch effort" to avoid another stock plunge following Ontrak's previous announcement that its relationship with insurer Aetna would be ending.

"The defendant was the company's largest shareholder and personally lost millions in the value of his stocks. With Cigna, the defendant was not about to let history repeat itself. He was not going to just sit back and lose millions of dollars again. So, what did he do? He decided to sell more than $20 million of his Ontrak stock," Sentilles said. "The evidence will show that defendant sold his stock while knowing important information that the rest of the public did not know. ... This is a case about the defendant using inside information about his company, information the public did not know, in order to save himself millions upon millions of dollars."

Piezer's securities fraud indictment marks the first time the Department of Justice has sought criminal insider trading charges against an executive solely based on their fraudulent filing of Rule 10b5-1 trading plans, which was designed by the SEC in 2000 and amended in 2022 to protect executives from such charges.

Last year, the government accused Peizer of using material nonpublic information concerning Ontrak's deteriorating relationship with Cigna to sell over 6,000 shares worth more than $20 million of his company's stock, in violation of the Securities Exchange Act. The 10b5-1 plans were filed in May and August 2021. Days after Peizer filed the August plan, Ontrak publicly announced that it had cut ties with Cigna, which led the government to believe Peizer was trying to gain an unfair advantage in the stock market. *U.S. v. Peizer, 2:23-cr-00089* (C.D. Cal., filed Feb. 24, 2023).

However, Willingham told jurors Peizer acted in good faith because although Cigna executives began to raise concerns about the cost of contract services, those conversations did not start until months after he raised concerns to the company in January 2021 about planning for the expiring stock warrants he had. Willingham said Peizer was of the belief that Cigna's executives would renew the contract and was "surprised" when they decided not to.

"When Cigna complained a little bit about the upfront cost of the program, it looked to Ontrak that they were just angling for a better deal," Willingham said. "In response, Ontrak made a proposal to Cigna that it was willing to guarantee a [Return on Investment]. And because Ontrak had many ways to cut costs and Cigna was responsive to those proposals, Ontrak believed that Cigna would continue the relationship..."

During the government's opening, Sentilles claimed Peizer's good faith defense was untrue and said trial evidence would show he understood his company's relationship with Cigna was "falling apart" based on the prospect of Cigna patients no longer being sent to the company and text messages that detailed Peizer being "fixated" on how to salvage the relationship.

"Defendant thought things were so bad, that there are text messages where he compares Ontrak - his own company - to a baby losing its hair in chemotherapy. The writing is on the wall," Sentilles said.

However, Willingham said Peizer using emotion in response to the possibility of his company losing its biggest insurance client was a normal human reaction anybody in his position would have to consider.

"It's common sense to address the client's concerns and needs to make proposals to them, and frankly, it's a little human to express anxiety while you're going through that process. But ladies and gentlemen, fears and the anxiety of text messages to employees about what might happen are not facts."

The trial is expected to last approximately three weeks. Witness testimony will begin Thursday.

If convicted, Peizer, who is 64 years old, faces up to 65 years in prison on two counts of securities fraud for insider trading and one count of engaging in a securities fraud scheme.

#379052

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Securities Law News

June 5, 2024, 12:09 PM PDT; Updated: June 5, 2024, 1:25 PM PDT

Warburg, GTCR, Sotera Leaders Hit With Insider Trading Case (1)

By Mike Leonard

Documents

- Complaint
- Docket
- Judge: Vice Chancellor Paul A. Fioravanti Jr.
- Company: Sotera Health Co.
- Company: Warburg Pincus LLC
- Company: GTCR LLC

- **COURT:** Del. Ch.
- **TRACK DOCKET:** No. 2024-0579

Bloomberg Law News 2024-06-06T12:10:55523794662-04:00

Warburg, GTCR, Sotera Leaders Hit With Insider Trading Case (1)

By Mike Leonard 2024-06-05T15:09:23000-04:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** No. 2024-0579

Sotera Health Co.'s senior leaders and private equity backers sold $675 million in stock at prices inflated by their scheme to conceal the toxicity of a chemical made by a subsidiary, according to a lawsuit made public Wednesday.

The shareholder suit, filed in Delaware, targets Sotera's board, its top executives, and affiliates of Warburg Pincus LLC and GTCR LLC, which it says together own about 52% of the business as of April. Company leaders fought for decades to keep a lid on the carcinogenic and neurotoxic nature of ethylene oxide—a manufacturing agent produced by Sterigenics US LLC that's also used to sterilize medical equipment—while taking illegal safety shortcuts, the newly unsealed filing says.

Sotera's shares crashed 50% in three days to $7.32, reflecting a market capitalization loss of roughly $2 billion, after a jury in 2022 awarded $363 million to an Illinois woman living near a Sterigenics plant who blamed her breast cancer on ethylene oxide exposure. But Warburg, GTCR, and top corporate officers dumped 25 million shares for $27 apiece before the verdict thrust the risks into public view, according to the 139-page court complaint.

"Sotera's facilities had wantonly, knowingly, and recklessly released EtO into the atmosphere in and around residential communities for years, while knowing of the severe risks," the lawsuit says. "Rather than providing the market with correct information, the insider selling defendants used their knowledge of Sotera's material and nonpublic information to sell their holdings while the company's stock was artificially inflated."

A spokesperson for Sotera said in a statement Wednesday that the company remains "committed to our core values, one of which is integrity, and remain confident in the safety of our operations and the breadth and depth of our disclosures."

"The recently filed derivative lawsuit, like the inspection demands that preceded it and the stockholder securities class action, raises issues regarding the company's management and disclosure of risks relating to ethylene oxide that the company has disclosed and discussed in its prior public filings," according to the statement.

Warburg Pincus and GTCR declined to comment.

The suit in Delaware's Chancery Court—originally filed under seal May 30—echoes a proposed securities fraud class action pending in a federal court in Cleveland. According to the new shareholder complaint, Sotera's executives and sponsors are responsible for the significant liability it faces stemming not just from the securities case but from 25 additional lawsuits in Illinois, along with hundreds of personal injury and property devaluation disputes pending in Georgia.

In addition to being hit with a $363 million jury verdict, Sterigenics has paid $408 million to settle other toxic exposure claims in Illinois and $35 million to settle 78 of the Georgia cases.

The Delaware case involves shareholder derivative claims, which are technically brought on a corporation's behalf against its leaders. Damages in derivative cases are typically paid into a company's coffers by its officers, its directors, its controlling stockholders, or their insurers.

The investors leading the new lawsuit, Carmine Randazzo and Anthony Franchi, are represented by Farnan LLP, Levi & Korsinsky LLP, Schubert Jonckheer & Kolbe LLP, and Robbins LLP. Sotera, its executives, Warburg Pincus, and GTCR haven't yet made court appearances.

The case is Randazzo v. Petras , Del. Ch., No. 2024-0579, complaint unsealed 6/5/24 .

(Updates story with statement from Sotera in paragraphs five and six.)

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ANALYSIS

A Couple of Interesting Points From the US Chamber's Latest Research on 'Nuclear' Verdicts

Oriana Senatore, senior vice president of research and strategic development at the U.S. Chamber Institute for Legal Reform, spoke about the newly released report during a webcast sponsored by Tyson & Mendes.

June 06, 2024 at 07:30 AM

Ross Todd
Editor/columnist

The U.S. Chamber Institute for Legal Reform late last month released a new report on so-called "nuclear" verdicts—those with damages awards of more than $10 million. The report pulled together data from 1,288 verdicts from Jan. 1, 2013, and Dec. 31, 2022, in wrongful death and personal injury cases.

The overall trend lines are pretty much what regular readers of the Litigation Daily would expect. Aside from a dip during the early days of the pandemic, the Chamber sees a rise in both the number and size of these verdicts. The median nuclear verdict in product liability cases, in particular, hit a new high of $36 million in 2022—a 50% rise from the first year in the study. The study found 2022 also set a new record for the number of "mega" nuclear verdicts—those with more than $100 million—with more than 20. Although the 2023 numbers have yet to be finalized, the report indicates that the record for "mega" verdicts appears to have broken again last year.

All that's pretty much as expected. So, what stands out among the Chamber's numbers?

Oriana Senatore, senior vice president of research and strategic development at the Institute for Legal Reform, teased out some additional numbers during a webcast yesterday sponsored by insurance defense firm **Tyson & Mendes**. Senatore said that it probably would surprise no one in the audience that nuclear verdicts in state court outnumber those in federal court. But the actual ratio—9 state court $10 million-plus verdicts for every one in federal court—caught her attention.

"I knew it would be the majority, but nine out of 10 is a pretty serious majority," she said. "I think it just proves the point with data of what we already all sort of know—that is the plaintiffs bar does get an advantage in more favorable state courts."

And which courts might those be?

Senatore said that California, Florida, Texas and New York account for nearly half of all nuclear verdicts in the dataset. And while those states are populous, she pointed out that they only account for one-third of the country's population. (Florida, New York and California landed at numbers one, two and eight respectively in the number of nuclear verdicts per 100,000 residents.)

Punitives?

According to the Chamber's data, punitive damages did play a significant role in the "mega" cases. The 14 cases that crossed the billion-dollar mark during the period, the report notes, were all made up of mostly punitive damages.

But for those cases below the $100 million threshold, the Chamber reported that compensatory damages accounted for the vast majority of awards—74% for those cases during the 10-year period in question.

"Plaintiffs lawyers obviously know how to push the boundaries of non-economic damages award," Senatore said. "They can make really creative arguments there."

On this particular point, **Bob Tyson** of Tyson & Mendes noted that in most policies in most states, insurance carriers don't cover punitive damages. "So it's like you almost lose interest [in punitive damages] from a carrier's point of view," he said. "But the reality is [when] 74% of the damages is entirely compensatory, that's important. That's going to get people to look and listen."

NEWS

Another Dean Omar Talc Trial Opens in Dallas, Two Days After $260M Verdict

'For more than 50 years, people have studied whether there's a connection between baby powder, and its talc, and mesothelioma,' Johnson & Johnson attorney Collin Cox told jurors on Wednesday, according to Courtroom View Network's livestream. 'There isn't.'

June 06, 2024 at 05:00 AM

Toxic Torts

Amanda Bronstad
staff reporter

What You Need to Know

- Plaintiff Jerry Newton, diagnosed with mesothelioma in 2019, used Johnson & Johnson's baby powder for four decades.
- The trial is Dean Omar's third against Johnson & Johnson: On April 19, jurors awarded $45 million, and, on Monday, the firm won a $260 million verdict.
- Cox, a Houston partner at Gibson, Dunn & Crutcher, told jurors that Newton had other asbestos exposures and a family history of cancer.

Dallas plaintiffs' firm Dean Omar Branham Shirley opened a new trial against Johnson & Johnson on Wednesday in Texas, two days after winning a $260 million talcum powder verdict in Oregon.

Dean Omar associate Aaron Chapman told jurors in Dallas County District Court that his client, Jerry Newton, diagnosed with mesothelioma in 2019, was exposed to asbestos after four decades of using Johnson & Johnson's baby powder.

“Jerry used Johnson & Johnson because his mother gave it to him. That's what his mother used,” Chapman told jurors in his opening statement, according to Courtroom View Network's livestream of the trial. “Every single morning, he used it as his deodorant. This was his routine.”

Newton, who lives in Canyon Lake with his wife of more than 50 years, applied Johnson & Johnson's baby powder under his arms and in his groin and shoes, since he was 14 years old, he said. Chapman insisted that Newton, who sold medical equipment for a living, never worked in a factory or a mill.

"He didn't even use other talc products," he said. "It is just Johnson & Johnson's. It is just baby powder."

But Collin Cox, who represents Johnson & Johnson, told jurors that Newton worked on U.S. military bases and handled products with asbestos as a repair serviceman, according to Courtroom View Network's livestream. He also has a family history of cancer, Cox said.

"There are times when you just can't explain what caused cancer," Cox, a Houston partner at Gibson, Dunn & Crutcher, said. "For more than 50 years, people have studied whether there's a connection between baby powder and its talc and mesothelioma. There isn't."

He said not one of the many doctors who treated Chapman has said his mesothelioma was caused by using Johnson & Johnson's baby powder.

The trial is the firm's third against Johnson & Johnson since the second of two talc bankruptcies was dismissed last year. On April 19, Dean Omar won a $45 million jury award in Chicago's Cook Circuit Court in the first post-bankruptcy mesothelioma trial against Johnson & Johnson.

The Oregon jury's verdict, which included $200 million in punitive damages, followed a month of trial in a case brought by Kyung Lee, diagnosed with mesothelioma after decades of being exposed to Johnson & Johnson's baby powder.

The Illinois case, which did not allow punitive damages, involved Theresa Garcia, a mother of six kids who died in 2020 after lifelong use of Johnson & Johnson's baby powder and other products.

Partners Jessica Dean and Benjamin Adams handled the first two trials, but Chapman and another associate, Sam Iola, are handling the Dallas case.

Adams said the firm has more trials planned, including one on June 25 in Connecticut and one on Aug. 5 in South Carolina.

Dean Omar's mesothelioma trials come as Johnson & Johnson, after two failed Chapter 11 talc cases, is pushing a proposed "prepackaged" bankruptcy plan that would provide $6.48 billion to ovarian cancer victims.

Johnson & Johnson has had more success in post-bankruptcy ovarian cancer trials, both in Florida, in which juries this year returned a defense verdict in one case while another ended in a mistrial.

On Tuesday, Johnson & Johnson announced a "next phase" of its proposed bankruptcy plan: voting begins this week.

On May 22, six plaintiffs' firms filed a class action against J&J and its subsidiaries and executives over its "fraudulent transfers," such as the "Texas two-step" merger used to file the bankruptcies, which plaintiffs' lawyers insist has limited compensation to ovarian cancer and mesothelioma victims.

Apple judge's document demands could delay Epic antitrust ruling

reuters.com/legal/transactional/apple-judges-document-demands-could-delay-epic-antitrust-ruling-2024-06-05

Mike Scarcella

An Apple logo is pictured in an Apple store in Paris, France, March 6, 2024. REUTERS/Gonzalo Fuentes Purchase Licensing Rights, opens new tab

- U.S. judge wants to see corporate records
- Apple estimates three months to produce material

June 5 (Reuters) - A decision on whether Apple (AAPL.O), opens new tab breached a U.S. judge's order governing its App Store may have to wait several months, after the tech giant was ordered to hand over internal records as part of a lawsuit by “Fortnite” maker Epic Games.
At a hearing in the case on Wednesday, a lawyer for Apple told U.S. District Judge Yvonne Gonzalez Rogers in Oakland that three months was a “fair estimate” for how long it would take the iPhone maker to produce the corporate records.

Rogers convened a series of hearings beginning last month to assess Apple’s compliance with her 2021 injunction, which required the Cupertino, California-based company to give developers more power to steer app users to payment options outside of Apple’s ecosystem.

Epic has argued Apple violated the order, and should be held in contempt. Apple has denied any wrongdoing.
Rogers' eventual decision could force Apple to undertake a revamping of its current App Store policies.

Apple and Epic had no immediate comment on Wednesday.

In most instances, Apple charges developers a 30% commission on users' purchases inside an app. Following Rogers' injunction, it began allowing developers to include links to outside payment options, but developers are still required to pay a commission of 27% on such purchases.

Apple executives have defended the 27% commission during the hearings. But Rogers questioned how Apple arrived at that number, and she complained at a hearing last week that the company had not fully disclosed relevant internal records.

An attorney for Apple, Mark Perry, said the company disclosed notes, emails, Slack messages and other materials related to the commission. But that did not satisfy the judge.

“I want all of Apple's documents relative to its decisionmaking process with respect to the issues in front of the court — all of them. All. If there is a concern, then be overly broad,” Rogers said.

Rogers said on Wednesday she would meet again with the attorneys in the case next week. “Hopefully, we’ll have a much clearer idea of where we’re going on this,” she said.

The case is Epic Games Inc v Apple Inc, U.S. District Court, Northern District of California, No. 20-05640.

For Epic: Gary Bornstein and Yonatan Even of Cravath, Swaine & Moore

For Apple: Mark Perry of Weil, Gotshal & Manges; and Cynthia Richman of Gibson, Dunn & Crutcher

Read more:

Apple faces skeptical judge in App Store antitrust case
Apple exec Schiller defends App Store changes in Epic Games case
Epic Games says Apple violated App Store injunction, seeks contempt order
Get a quick look at the days breaking legal news and analysis from The Afternoon Docket newsletter. Sign up here.

Las Vegas hotels face appeal in customers' price-fixing lawsuit

reuters.com/legal/government/las-vegas-hotels-face-appeal-customers-price-fixing-lawsuit-2024-06-05

Mike Scarcella

An exterior view Wynn hotel-casino in Las Vegas, Nevada, U.S., February 7, 2018. REUTERS/Steve Marcus Purchase Licensing Rights , opens new tab

June 5 (Reuters) - A closely-watched consumer class action accusing major Las Vegas hotels of sharing price information to artificially boost the price of room rentals is headed back to court, after the plaintiffs on Tuesday appealed a judge's decision to toss the case.

WHY IT’S IMPORTANT

The lawsuit, Gibson v. Cendyn, was dismissed in May for a second time on the grounds that the plaintiffs had not shown Wynn Resorts, Caesars, Treasure Island and other hotel operators made any pact to fix room rates.

The appeal to the 9th U.S. Circuit Court of Appeals will set up a closely watched fight in the case, part of a wave of antitrust lawsuits targeting companies' use of third-party software platforms and advanced algorithms to set prices.

The hotels in the Vegas case denied any wrongdoing.

CONTEXT

None of the other pending algorithmic price-fixing cases testing the scope of U.S. antitrust law have reached an appeals court.

The consumers in the Las Vegas case alleged that the hotels pooled data using Cendyn revenue management software to illegally coordinate their room prices. The hotels countered that they never formed any agreements with each other, and that the software only offered recommendations.

The U.S. Justice Department has called the algorithmic pricing cases a new “frontier” for price-fixing. In dismissing the case, Chief U.S. District Judge Miranda Du called it relied on a "relatively novel antitrust theory."

BY THE NUMBERS

The plaintiffs' lawyers estimated there are tens of thousands, if not hundreds of thousands, of would-be class members in the Vegas hotels case.

WHAT'S NEXT

The San Francisco-based appeals court will take submissions from both sides and from interest groups that are not directly involved in the case. A three-judge panel will hear arguments, with a decision likely sometime in 2025.

NEWS

Panel Sends AT&T Data Breach Lawsuits to Texas Judge Ada Brown

In a Wednesday order, the U.S. Judicial Panel on Multidistrict Litigation assigned U.S. District Judge Ada Brown of the Northern District of Texas to oversee the AT&T data breach docket.

June 05, 2024 at 05:06 PM

Cybersecurity

Amanda Bronstad
staff reporter

What You Need to Know

- More than 50 class actions have been filed over AT&T Inc.'s data breach, which impacted 73 million current and former customers.
- The panel cited AT&T's headquarters in Dallas, where witnesses and evidence will be found, among the reasons to send the cases to that district.
- Brown, an African American and Native American 2019 nominee of former President Donald Trump, has not yet overseen an MDL.

A federal judicial panel ordered the transfer of more than 50 class actions brought over AT&T Inc.'s data breach to Texas.

In a Wednesday order, the U.S. Judicial Panel on Multidistrict Litigation assigned U.S. District Judge Ada Brown of the Northern District of Texas to oversee the AT&T data breach docket. The panel cited AT&T's headquarters in Dallas, where witnesses and evidence will be found, among the reasons.

"Most of the related actions are pending there, and defendants and many plaintiffs support this district as their first or second choice for the transferee venue," wrote the panel's chairwoman, Karen Caldwell.

Brown, an African American and Native American 2019 nominee of former President Donald Trump, is a "skilled jurist" who "has not yet had the opportunity to preside over an MDL," the panel wrote.

On March 30, AT&T announced a breach that impacted 73 million current and former customers, whose personal information, such as Social Security numbers, ended up on the dark web. In court papers, AT&T attorney Gilbert Keteltas, of Baker & Hostetler in Washington, D.C., argued for the Northern District of Texas, where Brown already is overseeing the majority of the lawsuits.

James Pizzirusso, of Hausfeld in Washington, D.C., had moved to coordinate the lawsuits into multidistrict litigation, also favoring the Northern District of Texas. In a May 2 filing, he noted that Brown, who consolidated many of the actions on April 22, “has already shown that she will move the case expeditiously and efficiently.”

“We are pleased that the JPML agreed with us to centralize the AT&T data breach cases in front of Judge Ada Brown in the Northern District of Texas,” he told Law.com. “As the panel recognized, she is a skilled and capable jurist who will be overseeing her first MDL. We look forward to moving the litigation forward in her court.”

While most other plaintiffs’ lawyers agreed with Texas, some pushed for other districts such as the Northern District of Georgia, where AT&T Mobility is based.

In a supplemental filing, AT&T disputed the significance of its AT&T Mobility division to the breach, noting that less than 5% of those hacked were wireless customers.

“Indeed, although AT&T Mobility is headquartered in Atlanta, it is merely part of AT&T, and AT&T’s key leadership—including marketing, finance, sales and distribution, the organization that builds the wireless network, and customer operations, which has certain incident response and breach remediation responsibilities—are all located in Dallas, not Atlanta,” Keteltas wrote in a May 2 filing.

The panel’s order comes one day after AT&T suffered a massive outage that prevented many customers across the nation from completing calls. Service was restored, but the outage came four months after a larger disruption that lasted 12 hours.

ALM | LAW.COM

NEWS

'Cradle to Grave': Children's Clothing Company Carter's Sued in Digital Privacy Class Action

A new proposed class action against children's clothing retailer Carter's argues that the company violated California Penal Code § 638.51, known as California's "Trap and Trace Law," through its partnership with TikTok.

June 06, 2024 at 09:36 AM

E-Commerce

Kat Black

What You Need to Know

- Children's clothing company Carter's faces a new digital privacy class action targeting its partnership with TikTok.
- The Carter's website uses TikTok software to collect consumer data.
- The complaint alleges that the software deanonymizes consumers' private information without their consent and is one of a number of recently filed

Children's apparel retailer Carter's has been accused in a new digital privacy proposed class action of violating California's Invasion of Privacy Act (CIPA) by partnering with TikTok to install "trap and trace" software on its website.

Carter's, which is based in Atlanta, uses TikTok's Automatic Advanced Matching software to collect data such as "location, source, and identity" about the consumers that visit its website, skiphop.com.

The complaint, filed by Tauler Smith attorneys, alleges that Carter's "deployed a de-anonymization process to identify Plaintiff using electronic impulses generated from Plaintiff's device."

The complaint was surfaced by Law.com/Radar.

"Put simply, the TikTok Software collects as much data as it can about an otherwise anonymous visitor to the Website and matches it with existing data TikTok has acquired and accumulated about hundreds of millions of Americans," wrote attorneys for the plaintiff.

Carter's did not immediately respond to a request for comment.

The lawsuit estimates the number of class members is “well into the thousands.” The plaintiff is seeking statutory and punitive damages.

Robert Tauler from Tauler Smith called TikTok’s operations “particularly sinister.”

“The advancement of technology and websites to track individuals has grown exponentially in the last three years,” he said. “TikTok is able to gather information about individuals and, obviously, their families and their filial relations. And they gather this information on virtually every American, whether they have a TikTok account or not. So if you’re on Carter’s shopping for something for a toddler … they’re going to find out if it’s your toddler, and then they’re going to create a profile or that person and start tracking them – ‘from the cradle to the grave’ [are] the words the Ninth Circuit has used for this sort of thing.”

The sentiments articulated in the complaint, which claims that the Carter’s website “is collaborating with the Chinese government to obtain their phone number and other identifying information,” reflect broader concerns about TikTok’s alleged threat to U.S. national security.

In April, President Joe Biden signed into law a measure ordering TikTok’s parent, Beijing-based ByteDance, to divest the social media company within a year or risk a ban in the United States. In response, TikTok and ByteDance sued the U.S. government in May.

The lawsuit targeting Carter’s argues that the company violated California Penal Code § 638.51, known as California’s “Trap and Trace Law,” through its partnership with TikTok. A “trap and trace” device is described by California Penal Code § 638.50(c). as “a device or process that captures the incoming electronic or other impulses that identify the originating number or other dialing, routing, addressing, or signaling information reasonably likely to identify the source of a wire or electronic communication, but not the contents of a communication.”

Tauler said that his firm has filed 20-30 “trap and trace” class actions over the past three to four months.

“I think the ability of companies to track you in this way is fundamentally wrong, fundamentally an invasion of privacy,” he said. ”It’s corporate surveillance.”

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

Bloomberg Law News 2024-06-06T10:57:52057554462-04:00

Brown Rudnick Lawyer’s $1,500 Rate in PFAS Bankruptcy Rejected

By James Nani 2024-06-05T17:32:32000-04:00

- **Bankruptcy judge nixes move to bump fees from $1,000 an hour**
- Fee requests of all firms in case will be reviewed, judge says

A Brown Rudnick LLP attorney’s request to increase his hourly fees by 50% for representing unsecured creditors of fire protection manufacturer Kidde-Fenwal Inc. was denied by a Delaware bankruptcy judge.

Judge Laurie Selber Silverstein rejected the proposed fee hike to $1,500 from $1,000 per hour for Brown Rudnick partner Gerard T. Cicero at a Wednesday hearing, calling the request “beyond.” Such an increase wouldn’t have been acceptable to her clients when she was in private practice, Silverstein said.

“I had no client who would’ve ever permitted me under any circumstance to have raised my hourly rate by 50%,” Silverstein said.

Brown Rudnick is representing Kidde-Fenwal’s unsecured creditors committee, which has its bills paid by the company.

The fire detection and suppression company filed for Chapter 11 in May 2023, blaming its bankruptcy on more than 4,400 lawsuits that named it as a defendant over its production of firefighting foam with per- and polyfluoroalkyl substances, or PFAS, which have been linked to health issues.

All the parties in the case “should be paying attention” to attorneys’ fees, Silverstein said, instructing Brown Rudnick to go back to its client to discuss an appropriate increase.

“And if they come back at $1,500, I’m not going to approve it regardless,” Silverstein said. “I don’t think a client who was paying the bill directly would permit that kind of increase. We will be looking at the increases of all the firms.”

Silverstein otherwise said she would approve Brown Rudnick's application for compensation, subject to future exceptions. The firm sought about $2.9 million in compensation from November through January, according to its application. That includes $27,300 for Cicero's work at $1,500 an hour, though several others attorneys charged higher rates, including a $2,250-an-hour rate for partner David Molton.

Brown Rudnick will resubmit the fee request with more information justifying the higher rate, firm partner Cathrine M. Castaldi told Silverstein at the hearing.

Cicero via email said he was unable to comment.

Top hourly rates of $2,375 are being charged by partners for Kidde-Fenwal bankruptcy counsel Sullivan & Cromwell LLP, according to court filings.

The case is Kidde-Fenwal, Inc. , Bankr. D. Del., No. 23-10638, hearing 6/5/24 .

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Chemours Hires New CFO in Latest Shakeup From Accounting Probe

By Nicola M. White 2024-06-05T17:14:00000-04:00

Chemours Co. appointed a new chief financial officer on Wednesday, almost four months after the Teflon maker sidelined three executives as it launched an investigation into its accounting.

Shane Hostetter, former CFO of Quaker Chemical Corp., will take on the role on July 1. He also will serve as the company's principal accounting officer, the company said in a securities filing.

Hostetter replaces ex-CFO Jonathan Lock, who resigned in April after Chemours suspended him plus the company's CEO and controller in late February while announcing an internal investigation. The US Securities and Exchange Commission and the Department of Justice also are probing the chemical company's accounting practices, according to an earlier filing from the company. Former Chemours CEO Mark Newman resigned on March 22.

- Chemours executives have been accused of delaying payments to vendors and speeding up bill collections to manipulate the company's free cash flow targets, according to details the company revealed in March. The accounting moves pumped up metrics the company used to set cash and stock bonus payouts, Chemours said at the time.
- Similar actions, though "to a lesser extent," were taken in the fourth quarter of 2022, according to the company's annual 10-K financial report.
- Hostetter will earn a base salary of $600,000, a signing bonus of $50,000, and a target annual bonus opportunity of 75% of his annual base salary, the company said. He'll also receive a target long-term incentive award opportunity of $1 million.

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CFO JOURNAL

Chemours Hires New Finance Chief in Wake of Accounting Scandal

Shane Hostetter will join the chemical company next month from Quaker Houghton. His appointment follows the suspension of three Chemours leaders early this year.

By Jennifer Williams and Colin Kellaher

June 5, 2024 3:24 pm ET

Chemours reported its first-quarter results in April, and its belated fourth-quarter results in March.

PHOTO: ANP/ZUMA PRESS

Chemical company Chemours named a new finance chief after suspending three top leaders earlier this year amid an accounting probe.

Shane Hostetter will join the Wilmington, Del.-based company on July 1 from Quaker Houghton, where he has been chief financial officer since April 2021. In his 13 years at the maker of industrial process fluids, Hostetter held various other senior-level finance roles, including chief accounting officer and global controller.

Matt Abbott, who has served as Chemours interim finance chief since February, will resume his prior role of senior vice president and chief enterprise transformation officer, the company said.

As CFO, Hostetter will receive an annual base salary of $600,000 as well as a $50,000 signing bonus, the company said. He'll also be eligible for an annual bonus with a target of 75% of his base pay.

Hostetter's appointment comes after Teflon-maker Chemours in late February put Chief Executive Mark Newman, Chief Financial Officer Jonathan Lock and Chief Accounting Officer Camela Wisel on administrative leave and delayed its audited financial filings. The move came amid an internal audit into the company's bookkeeping, compensation and ethics-hotline reports.

Chemours in March said the probe, which was sparked by an anonymous complaint to the company's ethics hotline, found that the executives took steps to delay payments to some vendors during the fourth quarter of 2023 into the first quarter of 2024. The executives additionally sped up the collection of receivables, the company said.

The company's audit committee found that the three leaders "engaged in these efforts in part to meet free cash flow targets that the company had communicated publicly, and which also would be part of a key metric for determining incentive compensation."

The findings of the internal review didn't result in any material misstatements of financial statements or disclosures, Chemours said in March, additionally disclosing that it had received requests for information from regulators and federal prosecutors. In April, the company said CFO Lock was leaving without any severance compensation. Newman resigned from the company in March.

Chemours reported lower profits in the first quarter as its Teflon segment continued to weigh on sales. Net income fell 64%, to $52 million, compared with a year earlier. Revenue also dropped, to $1.35 billion from $1.54 billion in the prior-year period. Corporate expenses for the quarter were $55 million, up $10 million from a year earlier. This accounted for roughly $14 million in costs during the quarter from the internal review, Abbott told analysts last month, adding that those costs were expected to continue into the second quarter.

"We are devoting substantial resources towards the implementation of enhanced procedures and internal controls over financial reporting," the interim CFO said. The company reported its first-quarter results just over a month after posting the delayed fourth-quarter earnings.

Write to Jennifer Williams at jennifer.williams@wsj.com and Colin Kellaher at colin.kellaher@wsj.com

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Tesla’s Shareholders Should Get to Decide Musk’s Compensation

By Zohar Goshen2024-06-06T04:30:57000-04:00

- *Columbia Law’s Zohar Goshen previews decision on Elon Musk pay*
- *Shareholders should be able to ratify Tesla CEO’s pay package*

The Delaware Chancery Court’s decision in January to nullify Elon Musk’s $55 billion compensation package leaves the CEO of Tesla Inc. without any compensation for six years. Even knowing that, Tesla is allowing its stockholders to ratify Musk’s 2018 pay package at its annual meeting on June 13.

Seeking such ratification isn’t just permitted under established Delaware law—it’s a sensible path forward. Shareholders should have say in decisions affecting their investment, including executive compensation.

Musk’s options weren’t worth $55 billion when Tesla announced his compensation plan on Jan. 23, 2018, or when 73% of Tesla’s independent shareholders approved it that March. To earn his pay, Musk had to increase Tesla’s market value from $59 billion to $650 billion within 10 years—a goal so outrageous that some called it a publicity stunt.

After the plan was adopted, the company posted record losses and struggled with Model 3 production targets. Shareholder Richard Tornetta sued in Delaware in June 2018.

By June 2019, Tesla’s shares dropped as low as $12. During this time, Musk received no guaranteed compensation.

The Delaware lawsuit alleged Tesla’s board breached its fiduciary duty by awarding Musk this incentive-based compensation plan. By the time of the 2022 trial, Musk had already reached the final milestone under the plan. The case was litigated only after Tesla became more valuable than General Motors, Ford, Toyota, Mercedes-Benz, Volkswagen, Honda, Nissan, and Hyundai combined.

The essence of the claim was that Musk was a controlling shareholder of Tesla, which subjected his compensation to a higher standard of judicial review unless it was negotiated by independent directors and approved by a vote of unaffiliated shareholders.

Even though the financial details were fully disclosed, the Delaware court concluded Tesla failed to satisfy the procedural hurdles because Musk influenced the committee and information about the conflicts wasn’t fully disclosed to shareholders.

In the wake of the decision, Tesla formed a new special committee and is now asking its shareholders to ratify Musk’s original compensation package with full disclosure of all the court-identified flaws.

Some scholars have argued that awarding Musk compensation for services already rendered isn’t permitted under Delaware law because it amounts to a gift and a waste of corporate assets. I disagree.

Under Delaware law, waste—which shareholders can’t ratify—is “a transfer of corporate assets that serves no corporate purpose; or for which no consideration at all is received.”

This requires a showing that the corporation entered into a transaction and received consideration “so inadequate that no person of ordinary, sound business judgment would deem it worth what [was] paid.” It is rarely accepted by Delaware courts, but a few examples stand out.

In 2018, a Delaware court concluded that CBS’ decision to pay its controlling shareholder Sumner Redstone $13 million after he was deemed incapacitated likely constituted waste—this was obviously a gift, with no rational business purpose.

Musk’s situation is clearly different. The court’s finding that Tesla failed to properly approve the compensation package in 2018 doesn’t mean that Musk isn’t entitled to any compensation for the last six years of service. Musk logged thousands of hours at the helm of Tesla and increased its market value ten-fold. The only question is what he deserved to be paid.

Once we ask this question, the package is no longer a gift or waste. Rather, it is well within the authority of the shareholder-owners to decide the value, especially when considering their need to motivate Musk for the future.

But can Tesla’s shareholders ratify the same package that was deemed excessive by the court? The answer is also yes—Delaware courts offer great deference to decisions embraced by independent directors and minority shareholders, the latter who are the owners and real parties in interest.

It would be strange to conclude that a majority of Tesla's stockholders, including some very large and sophisticated institutions, lack "ordinary, sound business judgment" on the question of how much Musk should be paid as their CEO.

Delaware law is designed to protect minority shareholders during negotiations with a controller. In this case, Musk has already provided the services and met the milestones set forth in the compensation agreement, and he is now at the mercy of the shareholders. The negotiation power is fully in the shareholders' hands.

The argument that Tesla's stockholders can't ratify Musk's pay package essentially contends that once an error in the approval process is made, the question of how much Tesla's CEO should be compensated is now forever out of the hands of the company's stockholder-owners and solely in the purview of Delaware courts.

This result would be contrary to the spirit and substance of Delaware law, which defers to the informed decision-making of disinterested shareholders whenever possible.

The case is Tornetta v. Musk , Del. Ch., 310 A.3d 430, Opinion 1/30/24 .

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The Consumer Financial Protection Bureau Is Making Enemies in All the Right Places

wallstreetonparade.com/2024/06/the-consumer-financial-protection-bureau-is-making-enemies-in-all-the-right-places

By Pam Martens and Russ Martens: June 6, 2024 ~

Fresh off a big win at the U.S. Supreme Court on May 16, the Consumer Financial Protection Bureau (CFPB) is wasting no time in its heady pursuit of financial bad actors preying on the little guy.

On Monday, the federal agency announced it was creating a public registry to help law enforcement, investors and the public check the history of repeat offenders in finance. The CFPB already offers consumers who have been victimized by a financial firm the ability to file a public complaint with the CFPB. The agency then quickly demands a written response from the alleged wrongdoer. Repeat offenders dislike the fact that these complaints go into a permanent database at the CFPB, which can be mined by the public, reporters, attorneys and prosecutors looking for patterns of fraud. (For how *Wall Street On Parade* put that complaint database to good use, read our report: The Apple Credit Card Provided through Goldman Sachs Has Created a Living Hell According to Consumer Complaints.)

On Tuesday, the CFPB released a circular letting financial firms know that if they sneak deceptive and/or illegal terms into the fine print of their consumer contracts they risk getting an enforcement action from the CFPB. One example cited was the Truth in Lending Act, which prohibits fine print in mortgage contracts that purport to force homeowners into mandatory arbitration (claiming to remove the option of a court proceeding) to deal with a mortgage dispute.

The Supreme Court case in May, where the independent funding of the CFPB was under attack by multiple forces hostile to a gutsy federal consumer protection agency, was just the latest in a long series of attempts to kill the CFPB since its creation under the Dodd-Frank financial reform legislation of 2010.

Back in 2015, a political front group called the American Action Network launched a $500,000 ad campaign against the CFPB during the Republican presidential debate. The campaign outrageously attempted to cast the CFPB as a *communist* organization. One ad featured giant banners hanging from a front wall with the faces of then CFPB Director, Richard Cordray, and Senator Elizabeth Warren, who had been instrumental in creating the agency — in a nod to Soviet dictator images.

The advertisement was a masterpiece of misinformation, overtly suggesting that the job of the CFPB is to deny car loans and mortgages to regular folks seeking credit. The agency, in fact, has zero involvement with approving credit applications. Its job is to root out and punish financial institutions that are ripping off customers. Just four months before the ad campaign was unveiled, the recidivist bank, Citigroup, was ordered by the CFPB to reimburse an estimated $700 million to 7 million of its credit card customers for deceptive marketing and billing for services that were never provided.

The mysterious American Action Network (AAN) behind the deceptive ad campaign is a dark money group that has battled at the Federal Election Commission and in federal courts to keep its dark money donors a secret from the American people. Citizens for Responsibility and Ethics in Washington (CREW) has been fighting to open AAN's dark secrets to some public sunshine for more than a decade.

In a brief filed with the Court of Appeals for the District of Columbia on July 28, 2023, CREW wrote as follows:

"Over the past thirteen years, AAN has spent more than $150 million to influence federal elections while depriving Americans of knowledge about '[t]he sources of [their] candidate's financial support'… AAN's patronage, which only grows, has placed benefitted officials 'in the pocket' of the 'moneyed interests' that they know fund AAN while evading public accountability."

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Del. Justices Uphold Chancery's Toss Of Auto Parts Deal Suit

By **Jeff Montgomery**

Law360 (June 5, 2024, 6:05 PM EDT) -- Delaware's Supreme Court has refused to reverse the Court of Chancery's 2023 dismissal of a stockholder suit accusing Chicago-based factory and automotive parts venture Distribution Solutions Group Inc. of failing to disclose conflicts surrounding and costs of a three-way merger in late 2021.

Justice N. Christopher Griffiths, writing for the full court on Tuesday, said the justices accepted Vice Chancellor J. Travis Laster's finding that the company secured business judgment protections for its decisions by deferring to an independent special board committee and an approval vote by a majority of the independent minority directors.

The derivative suit, led in the appeal by stockholder Jeffrey Edelman, accused DSG controller and chairman John Bryan King and others, as well as affiliates King Capital Equity and King-controlled Luther King Capital Management Corp., of lining up the all-stock deal to head off the collapse of two King Capital Management affiliates, TestEquity LLC and GexPro Services.

According to the stockholder suit, the deal closed one month before TestEquity, which was losing $10 million per year, faced a $120 million debt maturity. GexPro was likewise "teetering on the verge of failing to satisfy its debt obligations," stockholders argued, with the merger shifting the acquired companies' burdens to previously less-stressed minority shareholders.

Stockholders who sued alleged that the disclosures were inadequate, barring the defense from invoking business judgment deference under tests established in Chancery Court's 2013 decision in Kahn v. M&F Worldwide Corp.

Vice Chancellor Laster described the contested transaction as one in which "there are two portfolio companies that you own more of, and those portfolio companies are struggling, so you can merge those entities with a firm that you own less of, and thereby give the unaffiliated investors the privilege of sharing those losses and burdens, which benefits you in turn."

In his ruling by telephone from the bench on Sept. 19, Vice Chancellor Laster found that "There's really no debate that the transaction was properly conditioned on a majority of the minority vote."

Although those who sued alleged that the disclosures to minority stockholders were inadequate and "hence MFW can't apply," the vice chancellor wrote: "I've reviewed the disclosures and considered the plaintiffs' claims, and to my mind, it's not reasonably conceivable" that those who sued could be correct.

"The question is: Were those protections properly put in place?" Vice Chancellor Laster said. "Here, it appears to me that both aspects of MFW were properly set up and that the plaintiffs haven't alleged facts raising a reasonably conceivable question about those issues."

The stockholders told the Supreme Court during arguments in May, in part, that the judgment standard "shifts to business judgment review if — and only if — the conflicted controller transaction satisfies all six requirements set forth in MFW, including the requirement of a fully informed minority vote."

Those who sued argued that "merely adhering to one requirement (either approval by an independent special committee or by a fully informed majority of the minority) should suffice to shift the standard" to business judgment deference, the challenger's Supreme Court brief said. "This is not the current law in Delaware."

Vice Chancellor Laster said in his ruling that "The premise of MFW is that the controller has to self-disable up front. The controller can't self-disable mid-stream through the process."

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

Jeffrey Edelman is represented by Stephen E. Jenkins and Tiffany Geyer Lydon of Ashby & Geddes and Donald J. Enright and Noah R. Gemma of Levi & Korsinsky LLP.

John Bryan King, LKCM Headwater Investments II LP, and the other deal parties and individuals are represented by Robert L. Burns, Alexander M. Krischik and Nicholas F. Mastria of Richards Layton & Finger PA, Howard S. Suskin, Gabriel K. Gillett and Jacob P. Wentzel of Jenner & Block LLP, David E. Ross, S. Michael Sirkin and Roger S. Stronach of Ross Aronstam & Moritz LLP and Brian J. Massengill and Matthew C. Sostrin of Mayer Brown LLP.

The case is Jeffrey Edelman v. John Bryan King, et al., case number 388,2023, in the Supreme Court of the State of Delaware.

The Delaweare Court of Chancery case under appeal is 2022-0886.

--Editing by Peter Rozovsky.

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Hertz Hit With Shareholder Suit Over Costs Tied To EVs

By **Emilie Ruscoe**

Law360 (June 5, 2024, 6:58 PM EDT) -- Car rental giant Hertz Global Holdings Inc. and two Hertz executives are facing a proposed investor class action in Florida federal court alleging the company hurt investors by overhyping demand for electric cars only later to announce a nearly $200 million hit to earnings as it worked to offload electric vehicles.

In a complaint filed Friday in Fort Myers, Florida, plaintiff Edward M. Doller took aim at Hertz, its former CEO Stephen M. Scherr and its Chief Financial Officer Alexandra Brooks with claims that the company hurt investors after announcing "significant" losses amid moves to downsize its fleet, including its electric cars.

Doller claimed that in January, as the company announced plans to sell off about 20,000 electric vehicles from its U.S. fleet "to better balance supply against expected demand of EVs," it saw trading prices fall about 4% to close just under $9.

Hertz shares further fell nearly 20%, to under $4.70, in April after the company announced that it fell well short of its financial guidance during the first quarter of its 2024 fiscal year, seeing earnings before interest, taxes, depreciation and amortization come in at a loss of $567 million, the complaint said.

During Hertz's April earnings call, Brooks called the company's losses "disappointing and unacceptable" and said a "key driver" of the financial hit was heightened depreciation reducing the fair value of certain vehicles in its fleet, according to the complaint.

She noted that the company added a $195 million write-down to its balance sheets to "recognize a fair value adjustment for [electric vehicles] remaining in our inventory at quarter-end, and to recognize losses on those units sold," Doller said.

Representatives for the company also noted in April that over the past quarter, the company decided to up the number of electric vehicles it aimed to sell off in 2024 from 10,000 to 30,000, telling investors they'd seen profit after costs decline faster for electric vehicles than for internal combustion engine cars in the Hertz fleet.

The about-face on electric vehicles came after Hertz said in 2021 that it was seeing "skyrocketing" demand for electric vehicles, prompting the company to plan "a significant investment" in electric cars to become North America's largest electric vehicle rental fleet.

The proposed class would include those who purchased Hertz shares between Apr. 27, 2023, when the company touted its "continued investments in the business, particularly in the areas of technology and electrification," and Apr. 24, 2024.

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

Doller is represented by Jeremy A. Lieberman and J. Alexander Hood II of Pomerantz LLP and Jayne A. Goldstein and Nathan C. Zipperian of Miller Shah LLP.

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

The case is Doller v. Hertz Global Holdings Inc. et al., case number 2:24-cv-00513, in the U.S. District Court for the Middle District of Florida.

--Editing by Jay Jackson Jr.

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StarTek Controller Sued In Del. After Public-Share Buyout

By **Jeff Montgomery**

Law360 (June 5, 2024, 9:17 PM EDT) -- Two public stockholders of global customer experience outsourcing consultant StarTek Inc. sued four company directors and its private equity controller in Delaware's Court of Chancery on Wednesday, alleging an unfair and conflicted $4.30-per-share buyout of the company's remaining public shares.

In the complaint, attorneys for the shareholders pointed to possible intentional efforts to drive down the price of the company's stock before the transaction to benefit the controller, private equity firm Capital Square Partners Pte Ltd., as well as neglect and rejection of procedural protections for public, minority shareholders.

"CSP clearly took advantage of Star Tek's discounted trading price at the expense of the company's unaffiliated stockholders," the complaint said. "Each member of the class, including plaintiffs, has been damaged as a direct result of defendants' actions."

At the center of the case are StarTek's public minority investors and the company itself, described as an enterprise focused on combining people, technology and data "to deliver customer experience excellence for leading brands."

Named in the suit are five individuals, including four StarTek directors, with close ties to CSP, as well as CSP itself.

According to the complaint, although the CSP-controlled business formed a purportedly independent committee, its members had close ties to the controller, while StarTek itself included heavy representation from CSP, including on StarTek's board.

Before closing, CSP held about 55.9% of StarTek's common stock. When announced, the deal for the balance of the public, minority stake in the business was described as having a $217 million total enterprise value and $174 million equity value.

"At the time of the buyout, CSP unmistakably controlled StarTek and its board of directors, standing on both sides of the buyout. It typified a classic, conflicted controller transaction," the complaint said.

But the company failed to take steps to protect the interests of minority stockholders in order to qualify the transaction for Delaware court deference to company business judgment on contested deals, rather than more plaintiff- or stockholder-friendly "entire fairness" standards. Among the so-called "cleansing" provisions: approval of transaction terms by an independent, special committee and approval by a fully informed majority vote of unconflicted, minority investors.

CSP fell short on all counts, according to the complaint, arguing that StarTek's special committee was only permitted to consider a potential transaction with CSP and precluded from exploring other "strategic alternatives," even if superior to a CSP offer of $4.30 per share that the suit alleged significantly undervalued the business.

StarTek's board included two founding members of CSP, as well as others with ties to CSP. The four-member special committee itself, the complaint said, included two members with "disabling conflicts of interest resulting from substantial, long-term professional relationships" with executives within

CSP.

CSP executives, the complaint said, produced management forecasts for the deal not in the ordinary course of business, "but at a time when CSP was attempting to negotiate" with the StarTek special committee.

"Not only does this impugn the legitimacy of the management forecasts and the special committee process, but the implied per-share values" were calculated using tainted management numbers, the suit said.

"Even a cursory look at the management forecasts shows that they were likely intentionally depressed," the complaint said. While the global market in which StarTek operated was projected to grow at 5.8% annually, CSP's process produced projected five-year revenue growth at 1.5%, 2.6%, 3.8%, 3.8% and 3.9%.

CSP, the complaint said, started the acquisition process in December 2021 with a non-binding proposal to acquire all StarTek shares not already held for $5.40. The number would fall to as low as $3.80 in July 2023 before moving part-way back to late 2021 levels.

Counsel for the parties did not immediately respond to a request for comment.

Stockholder Michael Popper is represented by Carmella P. Keener of Cooch and Taylor PA and Carl L. Stine and Antoinette A. Adesanya of Wolf Popper LLP.

Stockholder Jeffrey Edelman is represented by Stephen E. Jenkins and Tiffany Geyer Lydon of Ashby & Geddes PA and Donald J. Enright and Jordan A. Cafritz of Levi & Korsinsky LLP.

Counsel information for CSP was not immediately available.

The case is Michael Popper and Jeffrey Edelman v. Sanjay Chakrabarty, et al., case number 2024-0587, in the Court of Chancery of the State of Delaware.

--Editing by Kelly Duncan.

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Truth Social Investors Want Fla. Suit Paused For Del. Claims

By **Carolina Bolado**

Law360 (June 5, 2024, 5:24 PM EDT) -- Two early investors in Donald Trump's Truth Social media company urged a Florida judge on Wednesday to pause the company's suit trying to claim their shares while a first-filed suit in Delaware is pending, arguing that the company is forum shopping in an attempt to get around an unfavorable Delaware Chancery Court order.

In a Zoom hearing before Twelfth Judicial Circuit Judge Stephen Walker, Wesley Moss and Andrew Litinsky, who own Trump Media & Technology Group Corp. shares through United Atlantic Ventures LLC, told the court that TMTG did not challenge jurisdiction in UAV's suit in Delaware and even complied with a March 15 order stating that UAV owns a 8.6% stake in TMTG.

"TMTG obeyed that order," Christopher Clark, who represents UAV, Moss and Litinsky, said. "They deposited our shares with the transfer agent and didn't appeal it."

Instead, he said, TMTG filed a lawsuit in Sarasota, Florida, to reclaim their equity stake.

"They chose to litigate this in Delaware until they got an order they didn't like," Clark said.

The original Chancery Court suit alleged that TMTG Corp., which was 90% owned by Trump, was on the verge of issuing millions of new shares to Trump and his family before it merged with special-purpose acquisition company Digital World Acquisition Corp. and took Truth Social public.

The dispute was tangled further when, on March 24, two days after Digital World shareholders approved the merger, the new TMTG filed a complaint against UAV, Moss and Litinsky in Florida, accusing them of multiple breaches of fiduciary duty leading up to the deal and seeking to claw back the value of their TMTG shares.

Moss and Litinsky **have since asked** the Chancery Court in Delaware for a contempt ruling against TMTG that would bar Truth Social from challenging UAV's equity ownership of the shares.

On Wednesday, Clark pointed to Vice Chancellor Sam Glasscock III's comments during a hearing on April 1, in which he said he was "somewhat dumbfounded" to learn of the Florida lawsuit, which the judge said would effectively negate his March 15 order.

But Samuel Salario, who represents TMTG, told the court that the two lawsuits are distinct, as the Delaware lawsuit is not about the services agreement between the parties or the alleged fiduciary misconduct by Moss and Litinsky. It wasn't until after TMTG filed the Florida action that UAV filed an amended complaint in Delaware adding claims related to the services agreement, Salario said.

"A stay would turn the priority principle on its head," Salario said.

He added that UAV is based in Florida and the services agreement, which formed TMTG and established the company's capital structure, includes a Florida choice of law provision and a Florida forum selection clause.

To that, Clark responded that the two warring parties are both Delaware corporations, and the services agreement requires a venue in Palm Beach County, Florida, not Sarasota.

Judge Walker said he would take the matter under advisement and issue a written order later on.

United Atlantic Ventures, Moss and Litinsky are represented by Christopher J. Clark and Benjamin A. Butzin-Dozier of Clark Smith Villazor LLP, and Thomas F. Icard Jr. and Tyler J. Brown of Icard Merrill Cullis Timm Furen & Ginsburg PA.

TMTG is represented by Samuel J. Salario Jr., Jason B. Gonzalez, Raymond F. Treadwell, Michael C. Kelley and Caitlin N. Emling of Lawson Huck Gonzalez PLLC.

The case is Trump Media & Technology Group Corp. v. United Atlantic Ventures LLC et al., case number 2024 CA 001545, in the Twelfth Judicial Circuit Court of the State of Florida.

--Additional reporting by Jeff Montgomery. Editing by Lakshna Mehta.

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Axos Says Money Market Account Suit Should Be Arbitrated

By **Katryna Perera**

Law360 (June 5, 2024, 8:32 PM EDT) -- Axos Bank has urged a California federal judge to either toss or force into arbitration a proposed class action alleging it reclassified customers' high-yield money market accounts into lower-yield investment accounts without informing them, saying federal law allows banks to offer accounts with variable rates that the bank can change at its discretion.

In a dismissal **motion** on Tuesday, the bank said plaintiff Joseph Pliszka "got precisely what he was offered" on the UFB Direct money market account he opened last year and that nothing in his deposit agreement with Axos or on the bank's website promised the annual percentage yield rates he is now seeking.

UFB is a division of Axos Bank offering online banking services, including high-yield FDIC-insured deposit accounts. Pliszka **alleges** Axos, doing business as UFB, "surreptitiously" reclassified customers' high-yield money market accounts into lower-yield "legacy" accounts while simultaneously creating a series of new, identical accounts with competitive rates without notice to customers.

However, the bank pushed back on Tuesday, saying federal law allows it to offer customers a range of accounts and services with varying interest rates.

"This is common in the banking industry — banks offer different account types with different perks, and there is nothing wrongful about it. In fact, federal law expressly authorizes banks to set the interest rates that account holders earn on their accounts, as well as the corresponding annual percentage yields," the motion said.

"Under federal law, banks can provide 'variable' rate accounts, where the rate 'may' change each day, at the bank's 'discretion.' And when banks change rates, they do not violate contract law, tort law, or state statutory law," the motion said.

Axos further argued the court should not even reach the merits of the case since the dispute is governed by updated agreements Pliszka holds with the bank that include binding arbitration provisions.

According to the motion, Pliszka agreed to two agreements updated before he filed suit.

"Plaintiff received and opened the email notifying him of the modified agreements, notifying him that continued use of his account would constitute acceptance of the new agreements, and providing him an opportunity to opt-out of the new arbitration provision," the motion said. "Following receipt of that email, plaintiff continued to use his account after the effective date and did not opt out of the new arbitration provision. As a result, he is bound by the updated agreements and the arbitration provisions contained therein."

If the court does not send the suit to arbitration, it should be dismissed since UFB and Axos have discretion under federal law to change the APY on a customer's account as often as daily, the motion said.

"UFB's discretion, as permitted by federal law, is absolute and unfettered. As a result, UFB's conduct in exercising such unilateral discretion cannot be a breach of the implied covenant of good faith and fair dealing," the motion states.

According to the motion, Pliszka alleges Axos' website advertisements were false and misleading because they implied UFB would either always provide the highest rate offered on any account at any time or provide a rate that varied with the federal funds rate.

Axos said Tuesday this interpretation of the advertisements is "unreasonable." There are no advertisements or language on the website stating that the money market accounts would always provide the highest rate, the bank said.

"Instead, UFB advertised a rate 'up to' a certain amount, and then expressly stated that the rate was variable, with rates being set at UFB's discretion," the motion said. "No reasonable person could conclude from those advertisements that UFB was promising to vary the rate always, or that it would do so in a manner that always provided plaintiff the highest rate."

According to the motion, the advertisements also do not state that the rates will vary in accordance with federal funds rate and are consistent with the account agreements.

"The advertisements do not even mention the federal funds rate. Rather, the advertisements promised that an account holder would get 'up to' a specified rate (which plaintiff did), and that the rate could change at UFB's discretion," the motion said.

Further, Pliszka cannot claim UFB had a duty to disclose it was offering different rates to different accounts since there is no such requirement under federal law, according to the motion.

Counsel for Pliszka told Law360 on Wednesday that they are reviewing Axos' motion and plan to oppose it. Counsel for Axos did not immediately respond to requests for comment Wednesday.

Pliszka is represented by Philip M. Black and Chet B. Waldman of Wolf Popper LLP.

Axos Bank is represented by Polly Towill and Jay T. Ramsey of Sheppard Mullin Richter & Hampton LLP.

The case is Pliszka v. Axos Bank, case number 3:24-cv-00445, in the U.S. District Court for the Southern District of California.

--Editing by Drashti Mehta.

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Massive NFL Sunday Ticket Antitrust Trial Kicks Off In LA

By **Craig Clough**

Law360 (June 5, 2024, 10:02 PM EDT) -- The California federal trial in a multibillion-dollar antitrust suit against the NFL by Sunday Ticket subscribers kicked off Wednesday with the seating of eight jurors and two alternates, after some potential jurors were eliminated for expressing strong views on former NFL quarterback Colin Kaepernick, player concussions and the league's significant wealth.

The long-running case was brought by a class of NFL fans who purchased the NFL Sunday Ticket package through DirecTV, and another class of businesses such as bars and restaurants that purchased the package. Both are challenging the exclusivity agreement the NFL has with DirecTV for Sunday Ticket.

A handful of jurors questioned by U.S. District Judge Philip Gutierrez were eliminated for cause after expressing their view of the NFL as a greedy organization, while the league used at least one of its peremptory challenges to dismisses a juror who expressed concern over players suffering from chronic traumatic encephalopathy, or CTE, which is a traumatic brain injury some former players have been diagnosed with after death believed to be caused by concussions.

One of the most interesting exchanges of the day occurred when a juror who appeared to be a male in his 30s was asked by the judge about an answer on his questionnaire regarding his strong views about Kaepernick, who caused controversy years ago when he chose to take a knee during some national anthems to protest police brutality against Black Americans.

It was unclear from his answer on the form how he felt about Kaepernick, but when asked, he told the judge he "sent a scathing email to the NFL and said I would never watch or support it again."

"I think the act of kneeling during the national anthem is un-American, and it was un-American for nothing to have been done to Mr. Kaepernick," he continued.

When the jurors were on a break, Judge Gutierrez told the attorneys he was going to strike the juror for cause, but William Christopher Carmody of Susman Godfrey LLP, who represents the plaintiffs, said the juror should be considered because he thought he said he could be fair in the case. The judge disagreed.

"I thought he could be rehabilitated until he started writing scathing letters to the NFL," the judge said.

Some members of the jury pool were eliminated before they were ever brought into the courtroom, based on their answers on a juror questionnaire on the case. Judge Gutierrez struck some because they appeared to be class members or for potential bias in the case, including one who expressed negative views on NFL Commissioner Roger Goodell.

Near the end of the day, eight jurors and two alternates were seated for the trial, with opening statements scheduled for Thursday morning.

The class action features two sets of plaintiffs: one of at least 2.4 million residential subscribers who purchased the Sunday Ticket package after June 17, 2011, and another of at least 48,000 bars, restaurants and other establishments that subscribed during the same period.

DirecTV and the NFL have been fighting those antitrust allegations for the better part of a decade. In late 2015, more than 20 lawsuits from bars, restaurants and fans were centralized into multidistrict litigation. The classes are seeking **more than $6 billion** in damages, which could also be trebled under antitrust law.

In their suit, the subscribers claim that DirecTV can charge higher prices because it doesn't have competition for airing football broadcasts. They have also argued that, without the deal with the NFL to sell rights collectively, each football team would be motivated to distribute its games nationally via cable, satellite or internet channels at competitive prices.

An initial bid to throw out the case came to a head in 2020, when the U.S. Supreme Court declined to review a Ninth Circuit decision that revived the suit. In 2021, Judge Gutierrez moved the claims against DirecTV into arbitration, but the case against the NFL remained in court. The subscribers **won class certification** in early 2023.

In the class certification ruling, Judge Gutierrez cast some doubt on the NFL's assertions that it is not flouting antitrust laws, and did so again in January when he denied the NFL's request for **summary judgment** on the subscribers' Sherman Act claims, ruling both Section 1 and Section 2 allegations would proceed toward trial.

Following that ruling, the NFL and plaintiffs jockeyed for position over what **evidence** could be presented at the trial, with Judge Gutierrez ruling the NFL could not describe its Sunday Ticket broadcast package as a **"luxury,"** and that the NFL defendants can't say anything to imply that the litigation is **"attorney-driven"** or bring evidence related to how the subscribers met their attorneys and became part of the litigation.

Other pretrial action focused on how much of the NFL's history of being **faulted for antitrust violations** could be presented to a jury.

The plaintiffs are represented by Marc M. Seltzer, Kalpana Srinivasan, Amanda Bonn, William C. Carmody, Seth Ard, Tyler Finn and Ian M. Gore of Susman Godfrey LLP, Scott Martin, Sathya S. Gosselin, Christopher L. Lebsock, Samuel Maida and Farhad Mirzadeh of Hausfeld LLP, and Howard Langer, Edward Diver, Peter Leckman and Kevin Trainer of Langer Grogan & Diver PC.

The NFL and individual NFL clubs are represented by Rakesh N. Kilaru, Beth A. Wilkinson, Brian L. Stekloff, Max J. Warren, Anastasia M. Pastan and Jeremy S. Barber of Wilkinson Stekloff LLP, and Neema T. Sahni, Gregg H. Levy, Derek Ludwin and John S. Playforth of Covington & Burling LLP.

The case is In re: National Football League's "Sunday Ticket" Antitrust Litigation, case number 2:15-ml-02668, in the U.S. District Court for the Central District of California.

--Additional reporting by Alex Lawson and Nadia Dreid. Editing by Adam LoBelia.

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Camp Lejeune Plaintiffs Must Specify Water Caused Illnesses

By **Emily Field**

Law360 (June 5, 2024, 5:02 PM EDT) -- The North Carolina federal court overseeing the Camp Lejeune contaminated-water litigation said Wednesday that former residents of the Marine base need to show that their illnesses were caused specifically and generally by exposure to the tainted water.

Judges in the Eastern District of North Carolina denied the plaintiffs' request to have a looser standard of causation to show that their illnesses were caused by the water, instead saying that the Camp Lejeune Justice Act of 2022 requires them to show that that their diseases were caused by exposure to the water.

"Congress could have written the CLJA differently. Rather than require claimants to establish that his or her harm was 'caused by exposure to the water at Camp Lejeune,' ... it could have required claimants to establish that they suffer from harm 'of a type that can be caused' by exposure to the water at Camp Lejeune," the judges said in their **order**. "It did not do so."

Former residents of the base have filed about 227,300 claims with the U.S. Department of the Navy and more than 1,700 claims in North Carolina federal court, according to the order.

In March, the plaintiffs had argued that there should be a **looser standard** for causation, given that it had been decades since some veterans had been first exposed to the water, and that the government had dragged its feet on the evidence.

It's because of the government's own delays that evidence linking exposure to the water to the plaintiffs' diseases is either old or unavailable, the veterans and their families said in support of their motion for partial summary judgment. Witnesses have also died, and the medical history for plaintiffs who died a long time ago may also be unavailable, which is why Congress didn't intend that they have to prove that their specific diseases were caused by the tainted water as the government has argued, they said.

The CLJA lifted barriers for veterans and their families to pursue damages from the government over water contamination at the base between Aug. 1, 1953, and Dec. 31, 1987.

The act provides more flexibility for people who lived around the U.S. Marine Corps base between 1953 and 1987 — when the water system was replaced — to sue the government. However, according to the veterans, the federal government waited 10 years, until the statute of limitations ran out, to publish tests that showed contaminated water.

The claims seek to link 40 diseases such as bladder and kidney cancer to the water at Camp Lejeune, which contained high levels of chlorinated solvents and other contaminants.

The government argued in February that the veterans need to show that their illnesses were specifically caused by their exposure, not just that they spent 30 days at the base and have an illness that can be caused by exposure.

The veterans also pointed out that U.S. District Judge James C. Dever III, one of the judges assigned to the litigation, said during a hearing last year that trying every case in the litigation at the usual pace would take longer than the span of the Roman Empire.

"Specific causation and exposure testimony will require numerous expert witnesses, multiple additional reports for each plaintiff and additional Daubert hearings, vastly more discovery into medical records, and exponentially longer trials," the veterans said. "Bench trials before this court on general causation (under the CLJA's unique standard), statutory exposure, and damages can be condensed into short, but fair, trials providing consistency and certainty that will aid global resolution."

Representatives for the government and the veterans didn't immediately respond to requests for comment on Tuesday.

The veterans and families are represented by J. Edward Bell of the Bell Legal Group PLLC, Zina Bash of Keller Postman LLC, Elizabeth J. Cabraser of Lieff Cabraser Heimann & Bernstein LLP, W. Michael Dowling of The Dowling Firm PLLC, Robin L. Greenwald of Weitz & Luxenberg PC, James A. Roberts III of Lewis & Roberts PLLC, and Mona Lisa Wallace of Wallace & Graham PA.

The government is represented by Adam Bain and Haroon Anwar of the U.S. Department of Justice's Civil Division.

The case is Camp Lejeune Water Litigation v. U.S., case number 7:23-cv-00897, in the U.S. District Court for the Eastern District of North Carolina.

--Editing by Adam LoBelia.
