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Prudential's \$35 Million Shareholder Settlement Gets Final Nod

By Peter Hayes 2024-06-14T10:10:11000-04:00

- Settlement amount includes \$8.75 million in attorneys' fees
- Case was dismissed but revived by the Third Circuit in 2023

Prudential Financial Inc. will pay \$35 million to settle a securities class action alleging a company executive made misleading statements about the insurer's life insurance reserves, under an agreement approved by a federal judge in New Jersey.

Judge [Stanley R. Chesler](#) of the US District Court for the District of New Jersey granted final approval of the [agreement](#) Thursday and dismissed the case with prejudice. The agreement includes an [award](#) of attorneys' fees set at 25% of the settlement amount—or \$8.75 million, and \$121,454 in litigation expenses.

The court, on March 20, 2020, appointed the City of Warren Police and Fire Retirement System as lead plaintiff and Robbins Geller Rudman & Dowd LLP as lead counsel.

The pension fund entered into the agreement on behalf of itself and the settlement class, defined as “all Persons who purchased Prudential common stock between June 5, 2019 and August 2, 2019.”

Prudential announced in July 2019 that it would have to supplement its death benefit reserves by \$208 million, reducing its profit by \$25 million per quarter.

The pension fund sued on behalf of a proposed shareholder class, alleging Prudential's stock price dropped dramatically after the announcement.

Chesler [dismissed](#) the suit on Dec. 29, 2020, finding the allegations “conclusory.”

But, the US Court of Appeals for the Third Circuit [reinstated](#) the case on June 13, 2023, finding it was reasonable to infer that the chief financial officer's statements were untrue.

Chesler [preliminarily](#) approved the settlement on March 8, 2024.

Prudential's \$35 Million Shareholder Settlement Gets Final Nod

Walsh Pizzi O'Reilly Falanga LLP represents Prudential.

The case is [In re Prudential Fin. Inc. Sec. Litig.](#) , D.N.J., No. 19-cv-20839, 6/13/24 .

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Musk's xAI Is Taking Value From Tesla, Shareholder Suit Says

By Mike Vilensky

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-0646](#)

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Musk's xAI Is Taking Value From Tesla, Shareholder Suit Says

By Mike Vilensky 2024-06-13T17:43:23000-04:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-0646](#)

Elon Musk's move to launch and run artificial intelligence startup xAI is a conflict of interest with his role at Tesla Inc. that's draining Tesla of talent, resources, and financial gain, a shareholder derivative lawsuit filed Thursday claims.

"The notion that the CEO of a major, publicly-traded Delaware corporation could—with the evident approval of his board—start a competing company, and then divert talent and resources from his corporation to the startup, is preposterous," the complaint says.

The Cleveland Bakers and Teamsters Pension Fund and other Tesla shareholders filed the complaint in Delaware's Chancery Court against Musk and Tesla board members, bringing claims of fiduciary breach and unjust enrichment.

The lawsuit joins a growing list of lawsuits the Tesla chief executive faces—particularly as Musk moves to incorporate Tesla in Texas rather than Delaware, the state of corporate litigation.

The Ohio-based pension fund's suit is the first to take direct aim at Musk's role in xAI.

Musk launched his AI startup in 2023 as a competitor to OpenAI, which he co-founded and later left. He has since publicly feuded with OpenAI's CEO Sam Altman over the dangers of AI and sued the company before withdrawing the legal action on Wednesday.

The shareholders allege Musk's development of an AI company outside of Tesla is partly tied to controversy over his pay at Tesla. The complaint points to Musk's statements that he wanted to build Tesla's AI capacities before he began a separate AI company.

The complaint points to a 2024 Musk post on X: "I am uncomfortable growing Tesla to be a leader in AI & robotics without having ~25% voting control . . . Unless that is the case, I would prefer to build products outside of Tesla."

"In other words, Musk publicly threatened that he would divert corporate opportunities away from Tesla unless Tesla gave him substantial additional equity," the complaint says, adding that the X post was followed by a dip in Tesla stock.

After the Court of Chancery vacated Musk's \$55 billion pay package, "his desire to increase his voting power to 25% or greater in the near-term was effectively foreclosed," the complaint says. He responded by ramping up operations at xAI, the shareholders allege.

The suit comes as the board voted in favor of approving the Musk compensation package a Delaware judge voided.

"Musk's diminished interest in Tesla frustrated him and apparently affected his commitment to develop AI products inside of Tesla," the complaint alleges.

Musk stated that Tesla needed more Nvidia H100 GPUs than Nvidia had available for sale, but after establishing xAI, Musk directed Nvidia to redirect GPUs from Tesla to xAI, the complaint says.

Musk also poached a former Tesla employee, Ethan Knight, who had led Tesla's computer vision team, to work for the AI startup, the complaint says, as Musk "pillaged talent" from Tesla to boost xAI.

"Tesla and xAI are clear competitors," the complaint says.

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

Musk is also using information owned by Tesla to pitch investors on xAI while failing to pay Tesla for its "significant contributions" to xAI's growth, the shareholders say. "Musk has already or intends to have xAI harvest data from Tesla without appropriately compensating Tesla," the complaint alleges.

"Musk is creating enormous value at xAI—potentially worth hundreds of billions of dollars in the near future—at Tesla's expense," the complaint says.

Tesla's board has failed to protect the interests of stockholders in the face of xAI's growth, the complaint says.

The shareholders are asking the court to disgorge Musk's equity stake in xAI to Tesla, impose a constructive trust over Musk's interest in xAI, declare that Musk and Tesla board members have breached their duties, and award Tesla damages sustained as a result of the breaches.

Grant & Eisenhofer PA represents the shareholders.

The case is Cleveland Bakers and Teamsters Pension Fund v. Musk , Del. Ch., No. 2024-0646, complaint filed 6/13/24 .

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Securities Law News

June 13, 2024, 2:40 PM PDT

Tesla Shareholders Sue Musk in Delaware While They Still Can (1)

By Jef Feeley

- Carmaker may not be as easy a target if it moves to Texas
- Multiple complaints accuse billionaire of betraying company

Bloomberg Law News 2024-06-14T10:27:29751812663-04:00

Tesla Shareholders Sue Musk in Delaware While They Still Can (1)

By Jef Feeley2024-06-13T17:40:06914-04:00

- Carmaker may not be as easy a target if it moves to Texas
- Multiple complaints accuse billionaire of betraying company

Elon Musk's bid to leave Delaware, the state of corporate litigation, is drawing a flurry of lawsuits from Tesla Inc. shareholders before the company escapes to Texas.

At least three suits accusing Musk of various forms of mismanagement have landed in Delaware Chancery Court in the last week. They arrived just before the billionaire entrepreneur persuaded shareholders at Tesla's annual meeting Thursday to back proposals to revive his \$56 billion pay package and reincorporate the electric-car maker in the company-friendly Lone Star state.

In one lawsuit, the world's third-richest person was blasted for allegedly trying to force investors into voting for the Texas move and his pay package with threats about shifting artificial intelligence assets away from Tesla. In another, he was called out by a shareholder who said he diverted Tesla resources in his 2022 effort to acquire Twitter Inc. On Thursday a third suit alleged that he's betraying Tesla to build his artificial intelligence startup.

Musk has long been both a magnet for and instigator of lawsuits — and he tends to litigate aggressively. Rarely does he settle or drop cases, as he did this week with a suit he filed claiming that OpenAI reneged on its founding mission from when he was an early backer.

But if Tesla goes to Texas — leaving Musk with no corporate presence in Delaware, as all of his other companies are also incorporated elsewhere — it could get harder to blame the carmaker and its leadership for malfeasance. Texas is in the process of setting up a new business-court system that some legal experts believe would be more friendly to corporate titans such as Musk.

Musk has threatened to pull Tesla out of Delaware ever since the chancery court's chief judge issued a ruling in January voiding the record-setting executive-compensation plan that Tesla's board approved for Musk in 2018. The judge ruled that the board had conflicts of interest and that Tesla failed to properly disclose the plan's details.

Read More: Elon Musk's Pile of Lawsuits Runs From Autopilot to Toxic Speech

The shareholder vote in favor of the pay package and the move to Texas signaled confidence in Musk's leadership despite slumping sales and a precipitous drop in the stock price. The announcement of the results didn't disclose the breakdown of votes, but Musk had said earlier in a social media post that the proposals were winning approval "by wide margins."

In the latest suit, an Ohio-based pension fund invested in Tesla claims that Musk's creation of his own artificial-intelligence company called x.AI and the diversion of AI resources from the carmaker amounts to "brazen disloyalty" and a violation of Tesla's "Code of Conduct."

The company's board has turned eye to Musk plundering resources from Tesla and diverting them to AI and creating "billions in AI-related value at a company other than Tesla," according to the complaint filed by the Cleveland Bakers and Teamsters Pension Fund.

Read More: Musk's xAI Hires Away Tesla Engineers in 'War' for Talent

Tesla didn't immediately respond to an email seeking comment on the suit.

x.AI has become a prominent part of Musk's universe of companies over the past year, and recently raised \$6 billion in new funding that valued the company at \$24 billion. xAI's core product, an "anti-woke" chatbot called Grok, has been integrated into Musk's social network, X, formerly known as Twitter, which is also providing training data for the chatbot in the form of user posts.

The new case is Cleveland Bakers and Teamsters Pension Fund v. Musk, 2024-0646, Delaware Chancery Court (Wilmington).

(Updates with shareholder annual meeting vote results)

--With assistance from **Kurt Wagner**.

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Tesla Inc

Elon Musk takes victory lap after 77% of Tesla shareholder votes back his \$56bn pay

Company reveals clear majority of investors back stock options and Texas move



Elon Musk: 'We have the most awesome shareholder base of any public company . . . We are not just opening a new chapter for Tesla, we are starting a new book.' © Ebrahim Noroozi/AP

Stephen Morris in San Francisco and **Sujeet Indap** in New York 2 HOURS AGO



Tesla revealed on Friday that chief Elon Musk had secured an emphatic victory in shareholder votes on his \$56bn pay package and a proposal to move the company's domicile from Delaware to Texas.

Musk's package of stock options — the largest in US history — was reapproved by 77 per cent of votes cast at Tesla's annual meeting in Austin on Thursday, according to a regulatory filing. Excluding shares owned by Musk and his brother Kimbal, the figure was 72 per cent.

The plan to reincorporate in Texas won the backing of 63 per cent of votes cast. The margins of victory surprised even those inside the company. Chair Robyn Denholm had compared the task to climbing "[Mount Everest](#)" during a frantic months-long campaign.

The results are a significant boost for Musk as he seeks to reassert control over Tesla. The votes became a referendum on his mercurial leadership, in particular his plans to recast Tesla as an artificial intelligence and robotics company.

The reaffirmation of his pay will also strengthen the company's hand as it attempts to overturn a January decision by a Delaware court to void the 2018 package of stock options over concerns about its value and the independence of the board.

Musk opted not to be magnanimous in victory. Early on Friday morning he [posted](#) on X a photo of a cake he said he planned to send to Delaware as a “parting gift”. It was decorated with the words “Vox Populi, Vox Dei” in icing, meaning “the voice of the people is the voice of God”.



Sending this cake to Delaware as a parting gift 🍰
pic.twitter.com/uLKE7LDSCW

— Elon Musk (@elonmusk) [June 14, 2024](#)

While the vote does not supersede the court's decision, the ratification could prove instrumental in persuading the judge to reverse or amend her stance. Musk's grip on the company would be tightened, boosting the chief executive's stake to more than 20 per cent from his current 13 per cent.

The day before, as the polls closed at 4pm in Austin, [Musk](#) emerged on stage to address a rapturous crowd chanting his name, jumping up and down in celebration in front of a blue and pink neon sign in the shape of Texas.

“Hot damn, I love you guys,” he said to the audience of carefully-selected retail investors. “We have the most awesome shareholder base of any public company . . . We are not just opening a new chapter for Tesla, we are starting a new book.”

The jubilant CEO cracked jokes, noting during his speech “what do you know, it's 4:20pm”, harking back to a [2018 tweet](#) about taking Tesla private at \$420 a share. Many interpreted the price as a reference to 4/20; April 20 is a day celebrated by marijuana smokers.

Tesla moved quickly to leave the state. On Friday, Denholm said in a [letter to shareholders](#) that she had already filed the paperwork to reincorporate in Texas. The chair added the “decisive approval by our stockholders confirms our commitment to the [pay] deal” and “we intend to put it back in front of the court in Delaware to ensure that your voices . . . are heard”.

The next stage of the saga is a hearing in Delaware early next month, when the judge, Kathaleen McCormick, will consider a [\\$5.2bn fee request](#) made by the lawyers that successfully nullified the pay package. After her ruling, Tesla can appeal the pay decision to the Delaware Supreme Court.

Greg Varallo, lead attorney for the plaintiff, said: “We believe that the ratification vote that Elon demanded and coerced is deeply flawed as a matter of law, legally ineffective and does not impact our case. We will respond to any arguments raised in due course.”

Key to Tesla’s success in the vote was persuading Vanguard, its largest shareholder with a 7.3 per cent stake, to [flip its stance](#) on pay, having opposed it in 2018.

While conceding that the share grant was a “substantial outlier” to any other in corporate history, Vanguard said “the unique circumstance of evaluating the plan retroactively eliminated our concerns”.

The \$9.3tn asset manager said it had changed its position after meeting Musk and Tesla directors. It concluded that “the strong alignment of executive pay with shareholder returns since 2018 and the benefits the board asserted related to the motivational value for the CEO in preserving the original deal” were enough to justify its shift.

BlackRock, the second-biggest, also supported both resolutions. BlackRock declined to comment.

Additional reporting by Will Schmitt and Patrick Temple-West in New York

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Business Law Prof Blog

lawprofessors.typepad.com/business_law/2024/06/tesla-takes-get-em-while-theyre-hot.html

Thursday, June 13, 2024

Tesla takes, get 'em while they're hot!

By Ann Lipton

Whenever I talk about Elon Musk and corporate governance, an objection is raised to the effect of, "Isn't Musk sui generis? Can we really take any lessons from him?"

It's a fair question, but if Musk is sui generis, there is no meaning in any of this, and that's no fun at all. So, for the purposes of this post, I'm putting it aside.

Take One: What a supreme failure of the SEC

I'm sorry, I have to start here. Sometime in the middle of the night (I was asleep), Elon Musk tweeted an extremely informal spreadsheet screenshot of the purported shareholder vote, and for the next *several hours* – including during actual trading – *no one knew if he was telling the truth*. I spoke to reporters, which is a thing I do now whenever Musk is in the news (i.e., on days that end in "y"), and they were simply not sure whether to take the tweet seriously. Initial headlines read "Elon Musk says" rather than "The vote is."

It is *unacceptable* that the CEO of an S&P 500 company could publicly release extremely material information and have the entire world spend multiple hours wondering *if he was just kidding*.

I can only assume the tweet was not, in fact, reviewed by the Twitter Sitter, even though Musk lost on all his attempts to challenge his settlement.

If the SEC cannot ensure the basic accuracy of something as simple as a report of the results of a shareholder vote on one of the most widely traded, publicly watched companies in history, what are we even doing here? The phrase "You had one job" takes on new meaning.

Take Two: What is the value of fiduciary litigation?

The debate has long raged over whether fiduciary litigation brings any actual benefit to shareholders. You can ask about that in specific cases – are these all nuisance suits that only benefit the attorneys? – and you can also ask more broadly, i.e., maybe having the *system* of fiduciary litigation *in general* keeps directors on the straight and narrow, and ultimately contributes to shareholder wealth systemically.

Notwithstanding Tesla's assertions to the contrary, I think it's fair to say most spectators associated a move to Texas with a *reduction* in fiduciary litigation, or at least, successful litigation. Partly, this is just a mood, i.e., the expectation that Texas judges presiding over cases involving Texas employer Elon Musk, under the watchful eye of Musk's good friend Greg Abbott, are more likely to rule in Tesla's favor. But it's also potentially built into Texas law, which *may* be interpreted as requiring plaintiffs to clear a higher bar for showing a lack of board independence.

So what does it mean, that shareholders – especially institutional shareholders – voted to reincorporate?

Well, one story is, they agree that fiduciary litigation is rent-seeking, contrary to shareholder interests, and does nothing more than distract boards from doing their actual jobs. In this story, Tesla's shareholders voted to limit the nuisances that threatened the ability of Elon Musk to run the company as he sees fit – in a manner that would ultimately maximize the benefits to Tesla shareholders. In other words, fiduciary litigation is *too powerful*, in that it inhibits too much managerial flexibility by imposing inappropriate one-size-fits-all standards.

But another story is that shareholders were, in fact, coerced, in the sense that they believed defying Musk's wishes would cause him to violate his fiduciary duties to Tesla by redirecting its resources to his private companies. But if *that's* the story, you have to *also* believe that shareholders thought there was *no remedy* for that kind of breach. After all, even though there are new complaints against Musk alleging that he misappropriated Tesla resources and opportunities, at the end of the day, no court can literally stand over him 24/7 and *make* him develop AI. So under *that* view, fiduciary litigation is *too weak* to protect shareholder interests.

Either way, though, the conclusion might be that fiduciary litigation – be it too strong or too weak – doesn't add value to shareholders.

(A third story, incidentally, is that shareholders are okay with Musk *not* maximizing Tesla's value, if he's saving humanity or taking us to Mars or whatever, and so they'll willingly hand over Tesla assets for that project. Which is actually really interesting and not entirely without evidentiary support, but would seem to come more from retail than institutions.)

Take Three: What does this mean for the proposed DGCL amendments?

I've previously blogged about proposed amendments to the DGCL (prior posts [here](#), [here](#), [here](#), [here](#), and [here](#)). None of those amendments are directly relevant to Musk (except in the very abstract way that they would authorize a shareholder agreement to substitute for the kind of dual-class recapitalization currently prohibited by listing rules). But there is a *theme* here, and it's that Delaware has become *too strict* in terms of limiting the flexibility of

insiders, managers, and large investors. And the Texas move, especially if it heralds additional flight, could be read as confirming that perception. If so, that might weigh in favor of the proposed amendments – or at least, tempering at the Delaware Supreme Court level.

But a corollary to *that* is – and now we're really veering off Musk and into the DGCL proposals – what is the larger political picture? Delaware may *claim* that its law is shaped by balancing the interests of shareholders and managers, but it's possible that shareholders in fact have very little interest or influence (here's a paper discussing the lack of institutional investor bargaining power re: private equity; and in general, the fact that investors were so willing to invest in Chinese VIEs despite increasing warnings by the SEC regarding the lack of shareholder protections tells me something, anyway, about how much attention investors actually pay to governance rights ex ante).

If *that's* true, why does Delaware provide any protections for shareholders at all? Well, one answer is – Delaware operates in competition with the SEC, which provides mandatory investor protection. And so, Delaware strategically protects investors *just enough* to keep the SEC and Congress off its turf. And corporate managers understand that dynamic, and even tolerate it, in tacit collusion with Delaware, to ward off federal intervention.

But what does the world look like when federal intervention is *off* the table, perhaps because we have a court that will strike down any move the SEC makes? Maybe it looks very much like this world, where Delaware leaps at the chance to eliminate investor voice.

Take Four: How easy is it to escape Delaware's protections via reincorporation?

This is obviously the main issue in *TripAdvisor*, but I can't help considering the issue in light of the woes of – yes, Paramount. Because according to news reports, a big stumbling block in Shari Redstone's attempt to sell her stake is that (1) she wants to receive more consideration than the public shareholders but (2) she fears the liability would follow. That liability comes from *Delaware* law. Take Nevada, for instance. It seems Nevada would give a free pass to controller transactions, absent evidence of intentional misconduct, fraud, or knowing violation of law, and it does not seem as though a simple conflict of interest rises to that level.

So, can we imagine a world where Shari Redstone uses her controlling stake to force a reincorporation to Nevada, and *then* sells the company on her terms? I can imagine it, sure, and the lesson here is how *difficult* it is for states to maintain different standards so long as managers can choose the law to govern their affairs.

Of course, if you truly believe that the market will police all of this, then, maybe you think that, in the future, shareholders of Delaware companies will demand charter protections against reincorporation without disinterested shareholder approval.

Or, maybe, contra what I said in Take Three, you believe investors will *pay less* for their stakes if they do not have governance rights. Which is exactly what this paper demonstrates regarding firms backed by PE that go public with shareholder agreements in place. Except the dollar figures still appear to be so high that PE firms are *willing to make that sacrifice* in order to retain the private benefits of control. I'd argue – as I said previously – that since the financial power associated with control translates into *political power*, we have an explanation for why PE firms would make that trade. And that really is about much more than the market reaching an appropriate discount for appropriation risk; that is a problem for the Rest of Us.

Take Five: Superstar CEOs

There's been a lot of talk about them but, in Tesla's case, there's a really specific issue on the table. What if, Tesla is just a car company? What if, Tesla's current market valuation is entirely untethered from its actual potential – under the direction of Musk or anyone else? What if the only reason for its stratospheric valuation is because Musk has a PT Barnum like ability to convince people of a mythical future that will never come to pass?

I am a lawyer, I'm not a financial analyst, and I'm not going to weigh in on whether that's *correct*. I am safe in saying, however, that there's certainly a contingent of relatively informed people who feel that way (though certainly not everyone).

Indulge me, for a moment, in a thought experiment. If the critics are right, that puts Tesla's investors in a bind. Elon Musk may be mismanaging the company, in the sense of diverting resources to his private firms and stocking the board with his bestest buddies and doing whatever he's doing while high, but there is no solution via *traditional* channels. Any activist move to oust him and install *better* governance will still result in a *drop* in stock price to reflect Tesla's *true* potential. Current shareholders are benefitting, in other words, from misplaced confidence. (Cf James Spindler on why existing shareholders prefer securities fraud). That means, they cannot risk instilling any kind of discipline at all.

If that's true, then we are back to where we started. Because if there's one *other* thing the securities laws are intended to do, beyond ensure the basic accuracy of public material information, it's to keep stock prices at least relatively tethered to corporate fundamental value, so as to ensure efficient capital allocation. And for whatever reason (Elon Musk personally, the difficulty with policing projections of future performance, the irrationality of retail, take your pick), that process has entirely *failed* in the case of Tesla. And we are now witnessing the downstream effects.

Exclusive: Vanguard vote switch helped pass Tesla CEO Elon Musk's \$56 billion pay package

 [reuters.com/business/autos-transportation/vanguard-vote-switch-helped-pass-tesla-ceo-elon-musks-56-billion-pay-package-2024-06-14](https://www.reuters.com/business/autos-transportation/vanguard-vote-switch-helped-pass-tesla-ceo-elon-musks-56-billion-pay-package-2024-06-14)

Ross Kerber

Elon Musk attends the Breakthrough Prize awards in Los Angeles, California, U.S., April 13, 2024. REUTERS/Mario Anzuoni/File Photo Purchase Licensing Rights , opens new tab

- Vanguard voted in favor of package, citing Tesla's performance
- Fund manger had voted against the arrangement in 2018
- Vanguard owns 7% of Tesla, biggest shareholder after Musk

June 14 (Reuters) - Tesla's (TSLA.O) , opens new tab largest outside investor Vanguard said it voted in favor of CEO Elon Musk's \$56 billion pay package, citing the company's performance, contributing to the passage of the record-setting arrangement on Thursday. In a note seen by Reuters, Vanguard said it had voted against Musk's compensation package when it was first approved by shareholders in 2018 because of its potential size, which might not have been justified by performance.

But "given the strong alignment of executive pay with shareholder returns since 2018 and the benefits the board asserted related to the motivational value for the CEO in preserving the original deal," Vanguard-advised funds voted for the ratification at Tesla's annual meeting, according to the note.

On Friday, the note will be made available on Vanguard's website to the fund manager's more than 50 million investors.

Vanguard had 232 million Tesla shares as of March 31, or about 7% of the company, second only to the 13% stake held by Musk. While certain externally-managed Vanguard funds vote separately, a Vanguard spokesman said the note's descriptions covered the majority of its funds.

Musk's pay was invalidated by a Delaware judge in January, leading to Thursday's vote. Top proxy advisers and various big investors had lined up against the compensation on concerns including that it was too much money.

Tesla had looked to its big retail shareholder base to help approve Musk's pay and other items including re-electing two directors and shifting the company's incorporation to Texas. But Vanguard, which has total assets of about \$9 trillion, and other big index fund managers were always likely to be key to the vote. Representatives of Vanguard rivals BlackRock

(BLK.N) [opens new tab](#) and State Street (STT.N) [opens new tab](#) declined to comment about their votes on Thursday.

Tesla on Thursday did not disclose exact voting tallies, which are expected to be revealed in coming days.

In its note, Vanguard said while Musk's pay was "a substantial outlier" among CEOs, Tesla's shareholder return was in the 98th percentile of all Russell 3000 companies from 2018 through 2023. "There are few companies that have created as much absolute market value appreciation as Tesla," Vanguard said.

Tesla's performance has sagged in more recent periods including a share price decline of 26.5% so far this year against stiffer competition with other electric vehicle makers. Vanguard's note did not address the current performance. The stock closed up 2.9% on Thursday.

Vanguard also said its funds backed the proposal to move Tesla's incorporation to Texas since "we did not note material differences in shareholder rights between the state of Delaware and the state of Texas."

Thursday's approval does not resolve a lawsuit on Musk's pay package in a Delaware court, which some legal experts think could stretch out for months.

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Reporting by Ross Kerber; Editing by Jamie Freed

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Ross Kerber is U.S. Sustainable Business Correspondent for Reuters News, a beat he created to cover investors' growing concern for environmental, social and governance (ESG) issues, and the response from executives and policymakers. Ross joined Reuters in 2009 after a decade at The Boston Globe and has written on topics including proxy voting by the largest asset managers, the corporate response to social movements like Black Lives Matter, and the backlash to ESG efforts by conservatives. He writes the weekly Reuters Sustainable Finance Newsletter.

Matt Levine's Money Stuff: Elon Says He Got His Money

By Matt Levine 2024-06-13T13:52:08143-04:00

Happy Tesla vote day

Tesla Inc. is asking its shareholders to vote today on two questions:

- 1. Should Elon Musk get back the gigantic pile of options that Tesla granted him in 2018, and that a Delaware judge clawed back earlier this year?
- 2. Should Tesla move its state of incorporation from Delaware to Texas, so no Delaware judge can ever do this again?

The shareholder meeting starts at 4:30 p.m. New York time, but basically everyone votes electronically before the meeting, and as of this morning it appeared to be over:

Tesla Inc. shares jumped in early trading after Elon Musk said shareholders voted “by wide margins” in favor of re-approving his compensation package and moving the company’s state of incorporation to Texas.

The chief executive officer posted about the voting results on X, the social media site he owns, hours before Tesla’s annual meeting Thursday in Austin, sharing two charts suggesting the proposals had been approved. Tesla shares jumped as much as 7.2% before the start of regular trading.

Here’s [Musk’s tweet](#) (sorry, X post), saying that “Both Tesla shareholder resolutions are currently passing by wide margins,” with little Excel graphs showing almost 1.4 billion shares voted for Musk’s pay and more than 2 billion shares voted for the move to Texas. Tesla [requires](#) a majority of the votes cast to approve the pay package, and a majority of the [3.2 billion shares outstanding](#) to approve the move to Texas; it seems to have hit both of those targets.

Now, these are not official results, and shareholders can change their vote any time before the

meeting this afternoon, so the proposals could still fail. And if that happens, that tweet is going to lead to the funniest securities fraud lawsuit in Elon Musk's long career of generating funny securities fraud lawsuits with tweets. But my assumption is that Musk is telling the truth about the vote, and that both proposals will pass.

Anyway, the vote is later today, so we should know the official results by tomorrow. There is unlikely to be an emergency Money Stuff tomorrow unless there's an emergency, but in the history of Money Stuff Elon Musk is by far the biggest [generator of emergencies](#), so never say never. And we plan to discuss the results on the [Money Stuff podcast](#) tomorrow.

Assuming Tesla wins, though: Now what? I don't know; both of these proposals are somewhat ambiguous.

Texas

The Texas one is simpler. Delaware corporations are legally allowed to move their incorporation to another state, with the approval of the board of directors and a majority of the shareholders. Tesla's board approved the move to Texas, this is the shareholder vote to authorize it, and if a majority of the shares vote yes then it should just happen. "If our stockholders approve the Texas Redomestication, we anticipate that the Texas Redomestication will become effective as soon as practicable following the 2024 Annual Meeting," [says Tesla](#).

But you never know! Tesla goes on to add: "Nonetheless, we may face legal challenges to the Texas Redomestication, including, among others, stockholder challenges under Delaware law, seeking to prevent the Texas Redomestication." We have talked about this possibility before. The theory is roughly: "Delaware law protects minority shareholders from the whimsical acts of controlling shareholders like Elon Musk. In particular, it just protected the shareholders from that \$56 billion pay package. Now Elon Musk, Tesla's controlling shareholder, is trying to move the company to Texas to have free rein to pay himself more money. Delaware law must protect minority shareholders from that outcome. Therefore, Delaware law must *prevent Tesla from reincorporating in Texas*."

This theory strikes me as hilarious, unlikely, but also logically consistent; I don't think you can entirely rule it out. When we first discussed it, though, we were awaiting a ruling in a lawsuit trying to block TripAdvisor Inc.'s reincorporation from Delaware to Nevada. Since then, the Delaware Court of Chancery [blessed TripAdvisor's move](#), saying that "even on the facts alleged, it is not reasonably

conceivable that the court would enjoin the company from leaving.” So Tesla probably *will* get sued (in Delaware) over moving to Texas, but a Delaware court probably won’t stop it from moving.

What should you make of this? I think the standard view of the situation is something like this: Delaware has reasonably predictable corporate law that tends to protect the rights of minority shareholders against the whims of controlling shareholders like Musk. And Elon Musk is exactly the sort of bundle of conflicts that Delaware law is designed to protect against. Practically every story about Elon Musk has the form “Elon Musk controls six companies, each with different minority shareholders, and he treats those companies as his personal property.” He shifts [employees](#) and resources and projects and computer chips among the companies without oversight. He borrows money from one company to finance another. He [asks his employees to have his children](#). This is not a man who respects corporate formalities or the rights of minority shareholders, and this is not a board of directors that is keen on telling him no.

And so Musk, as Tesla’s controlling shareholder, did a whimsical thing that was arguably bad for minority shareholders (pay himself a ton of money), and Delaware stopped him. So Musk and Tesla decided to leave for Texas so they can do their whimsical stuff without Delaware interference. And, apparently, shareholders think that was a good idea.

Why? Here are three possibilities:

- 1. Maybe Texas corporate law protects minority shareholders in roughly the same way that Delaware law does, so this is not a big deal. Maybe the move to Texas has nothing to do with Musk’s pay package or his desire for control; perhaps it’s a pure coincidence. Tesla’s proxy statement, I wrote in April, “goes out of its way to say, no, we’re *not* just moving to Texas so we can pay Musk more, what ever gave you that idea.” And Institutional Shareholder Services, the proxy advisory firm, [recommended in favor](#) of the move to Texas because “it is not readily apparent that the rights of shareholders would be materially harmed.” Texas’s business law is less developed and predictable than Delaware law, but the results in any particular case would probably be mostly similar.
- 2. Maybe Delaware law is [too protective of minority shareholders](#). Shareholders did, after all, approve Musk’s giant pay package in 2018, and he then went and created hundreds of billions of dollars of value for them. And then one disgruntled shareholder sued to get the money back, and won, and caused chaos and angst and a possible \$5.6 billion legal bill. Maybe that’s bad! Maybe “corporate chief executive officers and big shareholders should be allowed to do whatever they want” is the wrong rule — you need some corporate law — but Delaware goes too far in the other direction. Shareholders who bought Tesla when it was a \$60 billion company and watched Elon Musk take it to

(briefly) a \$1.2 trillion company might not *want* to be protected from his whimsy, and they might think that Delaware puts the interests of disgruntled small-shareholder plaintiffs above those of normal economically motivated shareholders.

- 3. Maybe Elon Musk is a special case, and shareholders rationally want him to be allowed to do whatever he wants. Maybe most investors want most companies to be subject to reasonably strict legal oversight, but investors in *Musk's* companies just want to roll the dice on his whims. They get adventure, uncertainty, danger, and usually huge economic returns. Musk has argued on television that, if he wants to take drugs, that is *ipso facto* good for shareholders: "From an investor standpoint, if there is something I'm taking, I should keep taking it." The "something" in that sentence is ketamine, but it works for anything. "From an investor standpoint, if there's \$56 billion I'm taking, I should keep taking it." The Elon Musk thesis is, ultimately, "Elon Musk is a weird dude in a way that makes him good at making cars and rockets and stuff, and bad at corporate formalities." If you think that — and I think most investors in Musk's companies *do* think that, and *should* — then staying in Delaware will only hold him back.

The difference between No. 2 and No. 3 is: Will other companies follow Tesla to Texas? Is having (perhaps) a bit less protection for disgruntled shareholders *good* for other shareholders? Or is that mostly true in the special case of Musk?

The money

The effect of the pay package vote, meanwhile, is considerably more uncertain. Tesla's theory goes like this :

- 1. Tesla's board and shareholders approved Musk's pay package in 2018.
- 2. In 2024, a Delaware judge found that the shareholder approval was flawed: In 2018, the shareholders were not fully informed about the board's conflicts of interest, so their vote didn't work.
- 3. Tesla can *fix* those flaws by holding another, fully informed vote. This is that vote.
- 4. If it wins *this* vote, then the flaws are fixed, and the pay package that Tesla's board gave to Musk in 2018 pops back into effect.

I find this theory pretty reasonable, actually, but every article I read about it is skeptical. Bloomberg News:

The June 13 vote has more symbolic weight than legal power. Shareholder approval may help Tesla with an appeal or a rehearing in a new case, but it cannot overturn Chancery Court Judge Kathaleen St. Jude McCormick's January ruling, some legal scholars say.

"People think this is like a direct democracy — that if they vote yes to re-ratify Elon's pay plan that it will fix what Chancellor McCormick did," said Christina Sautter, a law professor at Southern Methodist University in Dallas. "But this is unprecedented."

Nobody thinks that just winning this vote automatically reinstates Musk's options package, the way winning the Texas vote more or less automatically moves Tesla to Texas. Winning this vote gives Tesla's lawyers some better arguments — to the Delaware judge who originally tried the case, to the Delaware appeals court, to a Texas court in a month when it moves there — that Musk should keep his pay package, but it is not automatic.

A few problems. One is: The judge struck down the original 2018 shareholder vote because, she ruled, it was not fully informed. Of course the shareholders knew everything about the *economic terms* of Musk's pay package, which were all fully and clearly disclosed in the proxy. But, the judge ruled, Tesla's board of directors was too much in the pocket of Musk, and Tesla did not fully disclose those conflicts to the shareholders.

This struck me as kind of a weird complaint — again, the shareholders knowingly approved the economic terms — but, fine. It is reasonably easy to fix on a re-vote: You just disclose the conflicts. The easiest way to do this is probably to *attach the judge's opinion to the proxy statement*, which Tesla did: Now the judge can't complain that the conflicts she found weren't disclosed.

But those were the conflicts she found in the 2018 pay process. What if there are new ones? Here is an article on "[The Elephant in Tesla's Boardroom](#)," by Lucian Bebchuk and Robert Jackson, arguing that Musk's threat to do his artificial intelligence projects at his other companies (and not Tesla) is what is driving the board to try to bring back this pay package:

What can Tesla's board do about Musk's threat? To begin, stockholders should know whether the board's request for a vote is motivated by the threat—and what, if anything, the board plans to do about Musk's threat if he attempts to carry it out. Instead, all investors know is that the board is bringing to a vote a proposal to give Musk a sizable voting stake.

Strikingly, the board hasn't conditioned holding the vote on Musk withdrawing his threat or committing

not to carry it out if stockholders vote to approve. The proxy statement Tesla sent to investors in advance of the coming vote is completely silent about the threat. The proxy does not try to allay investor concerns about Musk's threat by, say, telling stockholders how the board would address it if necessary. Indeed, the proxy offers no assessment of the threat—and no guidance as to how it should affect the choices stockholders will have to make when casting votes.

My point here is not about whether this is true, or whether it would be bad if it's true. My point is just that if you are a disgruntled shareholder, you can sue Tesla and say that *this* shareholder vote wasn't fully informed, because Tesla's proxy doesn't fully discuss Musk's plans to do AI at his other companies if he loses the vote. (Or his actual decision to send Nvidia chips to X Corp. rather than Tesla. Or what the board did or didn't do in response.) That's not even a bad argument! It's possible that the 2024 proxy does a *worse* job of disclosing Elon Musk's control of the pay process and conflicts of interest than the 2018 one did. It fixes all the problems of the 2018 one, but adds new and bigger problems.

Another problem is accounting. In 2018, Tesla gave Musk a giant pile of options, all struck at the money: The exercise price of the options was equal to the stock price at the time of the grant. Then the stock price went up 10 or 20-fold, and now the options are worth tons of money. That was the point: The options were meant to motivate him to push up the stock price, and he did that.

But now of course the options are very in the money. And giving Musk *new* in-the-money options would be very bad. Giving an executive at-the-money options gets good tax and accounting treatment, because it is a motivational tool; the options don't pay out unless he increases the stock price. Giving him a giant slug of options that are already in the money is disfavored. At the Wall Street Journal, [Theo Francis reports](#):

If Tesla wins shareholder support for reviving Elon Musk's 2018 pay package at its annual meeting this week, it raises a \$25 billion question: Will the company's profit take a big hit?

Tesla says no. The electric-car manufacturer already booked the cost of the original award, so it argues that reinstating the same pay package shouldn't add any expense. Others say that approach doesn't reflect the facts: A court found the original award was adopted improperly, and any reinstatement amounts to giving Musk the stock options anew—a far costlier proposition given the run-up in Tesla's shares.

The price tag on any re-evaluation of the award could surpass \$25 billion, at least on paper. That

amount is 10 times what Tesla originally reported and more than the company's last two years of pretax profits combined, said Shivaram Rajgopal, a Columbia University accounting professor who studies executive pay.

"Tesla will have to book that number as compensation expense," Rajgopal said.

I don't know. But *giving him the options again* would be bad, for Tesla's accounting and for Musk's taxation. *Saying he had them all along* — ratifying the original grant and reversing the judge's decision to undo it — would be better.

One more thing. Sometimes I feel like I dreamed this, but I am pretty sure that, in January, *before* the judge struck down Musk's option package, back when he still owned those options and had a 13% stake in Tesla, Musk was going around on X saying that he would need *another* 11-digit pay package to keep his focus on Tesla. He had a big stake in Tesla, he *sold it down to buy Twitter*, and he wanted Tesla to top him up again with tens of billions of dollars' worth of options to keep him motivated. Then his *existing* 11-digit pay package was struck down, the new one was kind of forgotten, and Tesla had to mobilize to get him those options back. I think we can more or less say it was successful. Now what? Do we move on to the next pile of options? Possibly in Texas?

Wells Fargo!

In 2016, Wells Fargo & Co. got in trouble for opening fake accounts. What happened was that Wells Fargo's senior management had decided that it wanted its branch employees to cross-sell products, to push each checking customer to open up a savings account and a credit card and sign up for online banking and maybe get a mortgage, because this would deepen the bank's relationship with the customer and ultimately lead to more revenue. But instead of hiring and training employees who would holistically assess each customer's needs and suggest suitable products, Wells Fargo had "strict quotas regulating the number of daily 'solutions' that its bankers must reach," and its managers would "constantly hound, berate, demean and threaten employees to meet these unreachable quotas."

And so the employees, rather than working with each customer to build a suite of products that met the customer's needs and deepened her relationship with the bank, would just go and open a bunch of fake accounts. They'd sign the customer up for online banking and a credit card and a savings account *without her knowledge*, because then they could check off their quotas and move on. This

was bad. Wells Fargo paid a lot of fines and went through a lot of public rending of garments.

The problem, it seemed to me, was that Wells Fargo — a giant company with thousands of employees — was stuck managing its employees by crude metrics (how many “solutions” they opened) rather than with a nuanced understanding of the business and their contributions to it. I wrote at the time:

Two basic principles of management, and regulation, and life, are:

1. You get what you measure.
2. The thing that you measure will get gamed.

Really that's just one principle: You get what you measure, but *only exactly* what you measure. There's no guarantee that you'll get the more general good thing that you thought you were approximately measuring. If you want hard workers and measure hours worked, you'll get a lot of workers surfing the internet until midnight.

You want a lot of products opened, you get a lot of products opened, but in a bad way. It's a case of [Goodhart's law](#): “When a measure becomes a target, it ceases to be a good measure.”

Wells Fargo is the absolute poster child for Goodhart's law. Here is the dumbest possible version:

Wells Fargo & Co. fired more than a dozen employees last month after investigating claims that they were faking work.

The staffers, all in the firm's wealth- and investment-management unit, were “discharged after review of allegations involving simulation of keyboard activity creating impression of active work,” according to disclosures filed with the Financial Industry Regulatory Authority.

“Wells Fargo holds employees to the highest standards and does not tolerate unethical behavior,” a company spokesperson said in a statement.

Devices and software to imitate employee activity, sometimes known as “mouse movers” or “mouse jigglers,” took off during the pandemic-spurred work-from-home era, with people swapping tips for

using them on social-media sites Reddit and TikTok. Such gadgets are available on Amazon.com for less than \$20.

Ahahaha come on. You want a lot of mouse movement, you get a lot of mouse movement, but in a bad way. Imagine deciding how to measure and manage the productivity and value added of your wealth and investment management employees while they are working from home. What might you measure?

- 1. These people manage portfolios. You could measure their investment return, or return against a benchmark, or their alpha after adjusting for various market, sector and style factors. You could measure how many assets they attract and retain, or how much they generate in fees.
- 2. These people deal with clients. You could measure how many clients they bring in, or how many client assets. You could survey the clients and grade the employees based on customer satisfaction. You could even, crudely, have some metric like “call three clients every day,” and make sure they do that.
- 3. These people sit at computers. You could *monitor their computers to make sure that they're moving the mouse at least once every five minutes for eight hours a day.*

Which of those do you think is the best proxy for, like, contributions to Wells Fargo's return on equity? Which is the simplest to measure? Which is the simplest to game?

QIS

I have occasionally, as a writer about finance and a former equity derivatives banker, made fun of structured notes. A structured note is essentially a package sold by a bank to private wealth customers consisting of:

- 1. Some option or set of options on one or more stocks, indexes, commodities or what have you;
- 2. An unsecured bond of the bank; and
- 3. A big fee for the bank.

“If you want those options,” I used to think, “you should just buy the options directly; you don’t want the bank’s unsecured credit risk and you certainly don’t want to pay the fee.” But over time I have been talked out of that purist position. In fact, it is not always easy to buy the particular options in the quantity that you want, and your trading costs might be higher than the bank’s. But also, what the bank is doing in building the structured note is finding an *appealing* collection of options, one with a good clear story, so that instead of going out and piecing together a complicated portfolio of options you just get a thing that is like “the return on the S&P 500 Index over the next year, but it can’t go down.” You are paying the fee for simplicity, for a way to very directly implement some intuitive thesis rather than mucking about in the guts of derivatives markets.

This is true more broadly: Banks market all sorts of expensive, crude, one-size-fits-all versions of complex bespoke trades that you could do yourself. If you are an expert in the business of doing them yourself, you should. But if you are even slightly a tourist in the area — even if you are an expert in doing *other* complex bespoke trades yourself, but you want to do a quick trade in a new asset class — you might reasonably shrug and buy the crude thing that the bank is selling. The thing that the bank is *really* selling is convenience.

Bloomberg’s Justina Lee reports:

Once hostile to the copycat products being churned out by big banks, hedge funds are becoming a major driver of the boom in what are known as quantitative investment strategies, or QIS.

These tools take popular systematic trades and typically turn them into swaps or structured notes, creating a quick and cheap way to gain exposure. They’ve long drawn fire from asset managers for being pale imitations of the sophisticated strategies they replicate, which were often developed in academia and pioneered over decades by the likes of AQR Capital Management and Dimensional Fund Advisors.

Yet money managers are increasingly giving in to the sheer convenience of QIS. ...

Uses vary, but in a typical case a fixed-income team at a multi-strategy hedge fund might trade stock options with QIS. Or a firm that’s never done commodities might utilize them to quickly add some exposure to raw materials.

“To multi-pod type of hedge funds, QIS is a cheap way for them to get access to an asset class” where a team doesn’t have trading capabilities, said Arnaud Jobert, the co-head of global strategic

indices at JPMorgan Chase & Co., which runs a notional \$85 billion in the business.

You're paying some fees to the bank, but those fees might be lower than the cost of hiring a trader to do it yourself.

SRT repo

I wrote yesterday about banks lending money to finance synthetic risk transfer trades: A bank will have a bunch of loans, it will sell the credit risk of those loans to some hedge fund, and the hedge fund will borrow money (in the repo market) from another bank to finance part of its purchase. I gave a schematic capital structure of the trade, suggesting that the hedge fund bears the first loss on the trade and the financing bank bears the second loss. (The original bank takes the third loss.) At least two people wrote in to complain that that is a little *too* schematic: The financing bank only bears the second loss if (1) loan defaults eat through more than all of the hedge fund's equity in the trade *and* (2) the hedge fund doesn't pay the bank back with its other money. That is, the bank is unlikely to give the hedge fund nonrecourse financing on this trade. Also, as I said in a footnote, the financing bank is presumably marking the position to market and calling for margin if the underlying loans deteriorate, meaning that in practice it will not bear any loss unless things go really wrong.

So my schematic version overstates the risk to the banking system of this financing: Even if the SRT goes bad, the financing bank is unlikely to lose much money. But it's not impossible, and in particular, it's a worrying sort of *systemic* risk. If all the SRTs go bad at once, hedge funds that do a lot of SRT trades really might not be able to pay back their repo lenders, and at exactly the worst time.

Corporate chess

I have mentioned a few times the stylized fact that Susquehanna International Group employs a guy whose essential contribution to the business is that he can flip a fair coin and have it land on heads 55% of the time. "Prop trading firms have a surprisingly robust demand for skilled coin flippers," I once wrote. Coin flipping, and particularly *having an edge* in coin flipping, illustrates something deep in the nature of quantitative trading, and having a guy around to provide that illustration is obscurely valuable.

I guess chess is a little like that too? If you are a certain sort of intellectual workplace — a quant

trading firm, say, or a big tech company — you will want to recruit the sort of people who are impressed by chess skill: people who are good at chess themselves, or people who are good at math and logical reasoning and understand chess as a sort of conventional proxy for those skills. If you have enough talented quantitative employees, probably a few of them will be good at chess. But to attract more, it might help to have a strong grandmaster lying around. The grandmaster doesn't necessarily have to do much trading or coding or whatever; you can just trot her out as a recruiting prop. "Oh that firm has great chess players, it must be a good place for me to work" is a thought process that will occur in some of the employees you want, and the cost of employing a [chess grandmaster](#) is probably a lot lower than the cost of employing a good quantitative trader.

In somewhat related news, here is a Wall Street Journal story about [the FIDE World Corporate Chess Championship](#):

Teams from Goldman, Google, Deutsche Bank and BlackRock, among others, are vying not for prize money, but to be recognized by chess's world governing body as the "smartest company in the world." ...

Squads are also allowed to bring one nonemployee. So just like corporate softball, where it isn't unusual for teams to show up with someone who arouses suspicion by mashing the ball like Aaron Judge, corporate chess has ringers. And the king of the ringers this year is an American named Sam Shankland.

Not only is he a grandmaster, Shankland is also a former U.S. national champion. He has published books on passed pawns and training guides on the Berlin Defense. In other words, this isn't a man who has time for a day job. Being a world-class chess player is his day job. And this weekend, he just happens to be doing it for Susquehanna International Group, a high-speed trading firm.

"Chess is a big part of the culture at SIG," said team captain Ella Papanek, who had previously skippered the chess team at Harvard. "At least 10% of the firm plays chess in some capacity."

Still, when she found that a Susquehanna employee was friends with Shankland, she jumped at the chance to invite him. (Susquehanna said that Shankland isn't being paid.)

Really they should pay him at least as much as they pay the coin flipper.

Still also golf though

I mean [obviously](#):

People who can smash 300-yard drives and sink birdie putts are sought-after hires in finance, consulting, sales and other industries, recruiters say. In the hybrid work era, the business golf outing is back in a big way.

Executive recruiter Shawn Cole says he gets so many requests to find ace golfers that he records candidates' handicaps, an index based on average number of strokes over par, in the information packets he submits to clients. Golf alone can't get you a plum job, he says—but not playing could cost you one.

"I know a guy that literally flies around the world in a private jet loaded with French wine, and he golfs and lands hundred-million-dollar deals," Cole says. ...

A financial adviser at a major Wall Street bank who competes on the amateur circuit told me he completes 90% of his tasks by 10 a.m. because he manages long-term investment plans that change infrequently. The rest of his workday often involves golfing with clients and prospects. He's a member of a private club with a multiyear waiting list, and people jump at the chance to join him on a course they normally can't access.

I suppose in the very long run, as artificial intelligence improves, quant investing might become a job with one hour a day of researching alpha signals and seven hours a day of chess and flipping coins. But for now, private wealth management is one hour a day of investing and seven hours a day of golf.

Things happen

Apple to 'Pay' OpenAI for ChatGPT Through Distribution, Not Cash. Do Kwon's Crypto Firm Agrees to Pay [\\$4.5 Billion Penalty](#) to SEC. The Rise and Fall of a \$600 Million Strip-Mall Tycoon. [Segantii](#) bet against Canada Goose after call with Morgan Stanley. Deadly and Wildly Profitable, Uranium Fever Breaks Out. Chinese Trader's \$20 Million Pile of Russian Copper Goes Missing. G7 strikes 'provisional' deal on \$50bn [loan to Ukraine](#). "[ElectronX](#) plans to offer contracts tied to the hourly price

of electricity.” Private equity firms have amassed [\\$1tn in ‘carry’ fees](#) as taxation debate mounts. Why Bond Markets Are So Spooked by the [French Election](#). European [CLO issuance](#) hits record rate as investors chase yields. Rishi Sunak aide [placed bet on election date](#) days before announcement. “The day was a special one, too; [it was Grimace’s birthday](#).”

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- 1. That discrepancy is a little odd, as it seems to me that moving to Texas is a much bigger deal than approving Musk’s pay, and I would have expected some institutional shareholders to say “I think it’s only fair to give Musk the money he earned, but I want the protections of Delaware law.” But proxy adviser Institutional Shareholder Services did [recommend in favor of the move to Texas](#) (but against the pay package), so it really is plausible that there’s more institutional support for Texas than for the pay package. Also, I am not sure what Musk’s graphs count; [it’s conceivable](#) that the pay graph doesn’t include Musk’s (and his brother’s) own shares, because [the pay package requires](#) the approval of a majority of the non-Musk shares, and this could explain the larger number of votes for Texas (where Musk’s own shares count). My favorite explanation, though, [is](#): “These are the people who agree with Elon that the Chancery Court stole his money and gave it to them, but don’t want to give it back.” You could [rationally conclude](#) that moving to Texas and giving Elon Musk a freer hand with Tesla would be good for the company going forward, but that you’d rather have the billions of dollars of options back.
- 2. “[The most entertaining outcome is the most likely](#),” is Musk’s mantra, and my mantra when it comes to Musk. Before today, I figured the most entertaining outcome would be a too-close-to-call vote, demands for recounts, and a process thrown into chaos. Now the most entertaining outcome would be “he tweets Tesla is winning by wide margins, and then it loses by wide margins, and then he gets sued.” Also I wonder if Musk’s Twitter sitter reviewed this tweet.
- 3. See [section 266](#) of the Delaware General Corporation Law.
- 4. From [the proxy](#): “Delaware common law ratification permits a Delaware corporation to validate a corporate act where the actors that purported to effect it lacked requisite corporate authority to do so. Common law ratification can also extinguish claims for breach of fiduciary duty by authorizing an act that otherwise would constitute a breach. When properly implemented, common law ratification

'reaches back' to validate the challenged act as of its initial enactment. The Company believes that, under the Tornetta Opinion, the 2018 CEO Performance Award is such an act that may be ratified under Delaware common law."

- 5. There's also the fake dinner receipt scandal of 2018.
- 6. Here "stylized fact" means "joke."
- 7. Once when I wrote about this, a reader pointed out that some people can, in certain tightly controlled circumstances, achieve 100% predictability in flipping coins, using post-flip sleight of hand. (Here's [a magician doing it on television](#).) But that is of course not what prop trading firms want. They want pre-flip sleight of hand, for one thing, but also they want probabilistic edge, not certainty.

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Musk Pay Victory Removes Cloud at Tesla, but Fresh Legal Fight Looms

Vote to approve multibillion-dollar pay package makes Musk happy and sets stage for next round of court battle

By [Sean McLain](#) [Follow](#) and [Erin Mulvaney](#) [Follow](#)

Updated June 14, 2024 10:14 am ET

Tesla shareholders' TSLA **-2.48%** ▼ backing of Elon Musk's multibillion-dollar compensation package helps clarify his immediate future atop the world's most valuable automaker. Now the electric-car company has to figure out how to pay him.

Musk and Tesla face legal opposition to the stock-option deal that was passed in 2018, now valued at roughly \$48 billion. The latest vote is also being challenged in court.

The company's board has argued that shareholder support for the plan would resolve concerns raised by the judge who rescinded the original plan, potentially leading the court to reverse its decision. Legal experts say the vote won't automatically change the judge's mind.

For his part, Musk is enjoying the backing shown by Tesla shareholders and is trying to allay fears that he would turn his attention to his other companies—a concern among some shareholders should Musk have lost the vote.

"I just want to start off by saying, 'Hot damn, I love you guys,'" Musk said at the start of his remarks at Tesla's annual shareholder meeting in Texas.

The company said Friday that 72% of the voted shares supported Musk's pay package, excluding shares owned by Musk and his brother, Kimbal. In 2018, 73% of the voted shares backed the plan by that same standard.

Tesla shares rose 0.6% in premarket trading Friday. Before the meeting, the stock closed up 2.9% Thursday as Musk said on X that the vote was passing by a wide margin.

Delaware Chancellor Kathaleen McCormick threw out the original 2018 pay package on concern that Musk had too much influence over the approval process.

Lawyers for Tesla and for Richard Tornetta, the shareholder who filed a lawsuit challenging Musk's compensation, are due to meet in court in early July. The plaintiff's lawyers contend that the pay package should be voided because the board breached its fiduciary duties and that shareholders hadn't been fully informed before the original vote.

"We believe that the ratification vote that Elon demanded and coerced is deeply flawed as a matter of law, legally ineffective and does not impact our case," said Greg Varallo, of Bernstein Litowitz Berger & Grossmann, one of the lawyers representing Tornetta.

"We will respond to any arguments raised in due course."

Legal experts say a renewed show of support for the deal doesn't automatically mean the court will change its decision. More legal jockeying is now expected from both sides, but the exact next steps are difficult to predict because the case in itself is unusual.

"At the high level, it is simply not clear at all what effect, if any, the new vote has on the current case," said Ann Lipton, a law professor at Tulane University.

"Whichever way you slice it, there are strong arguments why it won't simply restore the pay package."

McCormick could take a number of actions in response, Lipton said. She could agree with Tesla that the second vote shows strong shareholder support for Musk's pay and allow the company to reinstate the share deal. She could seek more information about Thursday's vote. She might also deem the vote irrelevant.



A courtroom sketch shows Elon Musk testifying before Delaware Chancellor Kathaleen McCormick in 2022. PHOTO: ELIZABETH WILLIAMS/ASSOCIATED PRESS

Tesla has said it disagrees with McCormick's original ruling and plans to appeal, saying the judge ignored material evidence and interpreted the law incorrectly. Procedurally, before Tesla can file an appeal, the two sides must settle the matter of billions of dollars in legal fees for the plaintiff's attorneys.

Shareholders also voted in favor of a proposal to relocate Tesla's corporate home from Delaware to Texas, where the company has its headquarters and one of its key factories. The measure had been criticized by the plaintiff in the pay dispute as an attempt to short-circuit the legal process in Delaware. Tesla has denied any intent to avoid a judgment in that state.

The company said Friday that the votes approving the move represented about 63% of all the outstanding Tesla shares entitled to vote on the proposal and 84% of the shares that did vote, excluding the stock owned by Musk and his brother.

Tesla's board has said the record compensation deal is necessary to keep Musk engaged at the carmaker as it prepares to invest billions of dollars on artificial intelligence and self-driving cars.

"If Tesla is to retain Elon's attention and motivate him to continue to devote his time, energy, ambition and vision to deliver comparable results in the future, we must stand by our deal," Tesla Chair Robyn Denholm wrote in a letter to shareholders before the vote.



The Tesla Cybertruck on display in May at a Paris technology conference. PHOTO: VINCENT ISORE/IP3/ZUMA PRESS

In a lengthy opinion explaining the decision, McCormick ruled that the size of compensation wasn't warranted and that Musk's "superstar CEO" status meant that the board didn't act independently to arrive at a fair price for shareholders.

If the judge doesn't overturn her decision, the vote could still be useful to Tesla in an appeal, said Zohar Goshen, a law professor at Columbia University who teaches corporate governance. The company could argue that shareholders' approval of the pay package twice showed they weren't being misled by Tesla, Goshen said.

"In this case, there is no question that [Musk] deserves to be paid for six years of work. Shareholders are authorized to decide how much," Goshen said. "You can't easily say it's an irrational decision when you have sophisticated investors supporting it."

Several legal experts said the vote complicates Tesla's legal travails in the short term because it risks spurring new investor challenges.

Last week, another Tesla shareholder, Donald Ball, who owns around 28,000 shares, filed a lawsuit against Tesla, Musk and board members, accusing the Tesla leader of coercing stock owners to support proposals for the pay package and reincorporation in Texas.



Tesla vehicles during the 2022 opening ceremony at a factory in Germany. PHOTO: PATRICK PLEUL/PRESS POOL

The complaint alleged that Musk used strong-arm tactics, such as by saying he might work on artificial intelligence outside Tesla if he didn't own 25% of the carmaker.

Musk's focus on his other ventures has been a concern for some Tesla investors as the company's core business is being hit by slowing sales and cooling demand for electric vehicles.

Those concerns were inflamed recently when Musk confirmed diverting highly sought-after chips from Nvidia used in AI research to X from Tesla. Musk said Tesla had no place to send the Nvidia chips to turn them on, so they would have just sat in a warehouse.

"The idea that he can on a whim just redirect them is just kind of weird," said Jefferies analyst Philippe Houchois.

—Mike Colias contributed to this article.

Write to Sean McLain at sean.mclain@wsj.com and Erin Mulvaney at erin.mulvaney@wsj.com

Videos

Tesla plans to leverage Elon Musk's big pay win in Delaware court battle

 [reuters.com/business/autos-transportation/tesla-ceo-musks-pay-package-garners-support-77-votes-investor-meeting-2024-06-14](https://www.reuters.com/business/autos-transportation/tesla-ceo-musks-pay-package-garners-support-77-votes-investor-meeting-2024-06-14)

Hyunjoo Jin, Ross Kerber, Tom Hals

Tesla and SpaceX's CEO Elon Musk attends the first plenary session on Day 1 of the AI Safety Summit at Bletchley Park in Bletchley, Britain on November 1, 2023. Leon Neal/Pool via REUTERS/File Photo Purchase Licensing Rights , opens new tab

SAN FRANCISCO, June 14 (Reuters) - Tesla (TSLA.O) , opens new tab will use Thursday's strong support for Elon Musk's \$56 billion pay package to try to win over a Delaware judge that invalidated his 2018 agreement, the company's board president said Friday.

The long process to reaffirm the largest-ever corporate pay package ended Thursday, when nearly three-quarters of shareholders - excluding Musk and his brother - voted in favor of the deal, overcoming opposition from a number of institutional investors and proxy advisory firms.

The support was roughly in line with 2018's vote that was invalidated in January by Delaware judge Kathaleen McCormick. The legal fight to recognize Thursday's vote could start on Friday, as the approval does not resolve that lawsuit.

The decisive vote confirms the company's commitment to the 2018 deal, Tesla board chair Robyn Denholm said in a letter to shareholders on Friday. "We intend to put it back in front of the court in Delaware to ensure that your voices as owners of our company are heard," she wrote.

McCormick in January called the package an "unfathomable sum" granted by a conflicted board with close personal and financial ties to CEO Musk.

Vanguard, Tesla's largest shareholder after CEO Musk, voted in favor and played a major role in passing the pay deal after first disapproving it in 2018, a note seen by Reuters showed.

Investors hope the win will help Musk focus his attention more on Tesla, whose shares have slumped as sales of electric vehicles slowed and Musk purchased social media platform Twitter, later renamed X.

Tesla listed several voting thresholds needed to approve Musk's pay package. Under the strictest standard, which excluded the votes of shares held by Musk and his brother Kimbal Musk, it received 72% of votes cast, compared with 73% in 2018 under the same standard.

Under a looser measure of all votes cast, it received 77% support, according to Tesla's filing.

THE LEGAL CASE

Legal experts were split as to whether it would hold sway in the case, which could stretch out for months. Some suggested that the original case's arguments that Tesla's shareholders were not fully aware of how quickly Musk would achieve the 2018 goals was no longer relevant.

"Now that shareholders have voted for it a second time with all of the facts out in the open, the entire crux of the judge's argument becomes invalid," said Natela Shenon, a partner at Grant Shenon in Los Angeles, on Thursday evening.

The filing did not break down the vote based on the type of investor, but it underscored the support that Musk enjoys from retail investors, many of whom are vocal fans of the mercurial billionaire.

"We have the most awesome shareholder base. I mean, it's just incredible," Musk said at a shareholder meeting on Thursday.

Some large investors argued that the package will hurt existing shareholders and that the board still lacks independence.

"Instead of continuing to try to defend it in court, the board should hire a compensation consultant, and renegotiate Musk's incentive plan so that it is appropriate and not dilutive to shareholders," said New York City Comptroller Brad Lander, who oversees the city's public retirement funds.

Musk, who also owns an AI startup, xAI, previously said [he](#) , opens new tab he prefers to build artificial intelligence and robotics products outside of Tesla if he cannot get 25% voting power, which would require the stock compensation.

Denholm has said reinstating the pay package was necessary for "retaining Elon's attention and motivating him."

The proposal to reincorporate Tesla in Texas from Delaware received about 84% of votes, excluding those of board members Elon and Kimbal Musk.

Tesla directors James Murdoch and Kimbal Musk won re-election with the support of 69% and 79% of votes cast, respectively, the filing showed.

Those votes were in line with their previous support rates but lower than average for U.S. corporate directors. Support for directors at Russell 3000 companies has averaged around 95% in recent years, according to shareholder engagement firm Georgeson.

Tesla shares rose 0.9% in early trading on Friday.

Reuters Graphics

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

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Thomson Reuters

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

Musk Shifts Tesla Incorporation to Texas After Investor Vote (1)

By Madlin Mekelburg2024-06-14T09:43:15365-04:00

- Shareholders approved Texas move, Musk pay at annual meeting
- Move unites electric car maker's legal, physical headquarters

Tesla Inc. has officially shifted its incorporation to Texas from Delaware, according to paperwork filed with the Texas secretary of state's office.

The move unites the company's legal home with its physical headquarters, which have been in Austin for years. The paperwork was submitted late Thursday, following a vote by Tesla investors in favor of the departure from Delaware.

Read More: Tesla Investors Get Behind Musk's Fight for \$56 Billion Pay Deal

Elon Musk, Tesla's chief executive officer, initiated the move in January after a Delaware judge voided his roughly \$56 billion compensation package, the largest ever given to a US corporate executive. Shareholders on Thursday also reapproved the pay plan, although the vote does not guarantee he will get his stock options, given the judge's decision.

Musk, the world's richest person, celebrated the move in a social media post, writing that he was sending a cake to Delaware "as a parting gift." It included an image of a cake with red frosting that said "Vox Populi, Vox Dei," Latin for "the voice of the people is the voice of God."

It's the third corporate exit from Delaware by Musk since the pay decision. In February, he moved SpaceX's incorporation to Texas and shifted Neuralink Corp.'s incorporation to Nevada, where his social media company X is incorporated. Tesla's departure took longer because the company is publicly traded.

Musk, 52, already has deep ties in Texas, which has lured other companies by touting its low taxes and light regulatory touch. Tesla moved its physical headquarters to Austin in 2021, after Musk decried Covid restrictions imposed on the company in California. SpaceX already had a huge

footprint in the Republican-led state, where it is building the massive deep-space rocket called Starship.

Read More: Tesla Vote on Musk's Massive Pay Plan: What You Need to Know

In January, Delaware Chancery Court Judge **Kathaleen St. J. McCormick** sided with a shareholder who argued Musk's pay package was improperly awarded. McCormick found that the board was conflicted by ties to Musk and had acted like his "supine servants." Shortly after the judge's decision, Musk blasted the state on social media, writing: "Never incorporate your company in the state of Delaware."

The decision represents the second court setback for Musk in Delaware. In 2022, Musk abandoned his court fight to back out of his \$44 billion offer to buy Twitter Inc. after a series of tough rulings, also by McCormick. Musk renamed the company X and shifted its incorporation from Delaware to Nevada.

(Updates with Musk's social media post.)

--With assistance from **Kara Carlson** and **Dana Hull**.

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Anthony Lin, Peter Jeffrey

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Opinion **Lex**

Tesla shareholders will have no one to blame if things go south

A solid majority has said that they are fine with giving Elon Musk his shares



© REUTERS

2 HOURS AGO



Tesla shareholders cannot say that they were not warned. On Thursday, 72 per cent of non-Musk Tesla shareholders [voted in favour](#) of awarding Elon Musk 304mn shares of the EV maker. That is the identical amount from a 2018 pay grant that was earlier this year invalidated by a Delaware corporate law court.

The court said first that the 73 per cent of shareholders who had approved the deal in 2018 were uninformed about how tight Tesla directors were then with Musk. After that determination, the court said the shares, now worth about \$54bn, was excessively dilutive to other shareholders.

After all that litigation and a new board approval and proxy process, a solid shareholder majority said that they were still fine with giving Musk his shares. The Delaware court theoretically can ignore the most recent vote and proceed with cancelling the grant. But they equally could decide it is not worth overriding shareholder democracy for a second time.

As for Tesla shareholders, they are fully on notice about Musk's various shortcomings as the Tesla CEO: spending time and Tesla shares to buy Twitter, allegedly treating female co-workers inappropriately, threatening to spend his time on side businesses. All the while, the EV sector gets more cut-throat every year. Tesla shares this week are up slightly this week but down 28 per cent for the year.

Tesla shares have fallen this year

Share price, \$



Source: LSEG via markets.ft.com

Courts exist to enforce neutral standards and protect basic minimum rights of minorities. Corporate law has said that judges will not, by practice, second guess decisions of boards and managers unless there is evidence of conflicts of interest.

Companies then try to use shareholder votes to cleanse those conflicts of interest. The puzzle of Musk is that he clearly gets a longer rope from his shareholders and adoring fans than perhaps any other CEO in history.

There apparently are not that many aggrieved shareholders of Tesla left. But they retain their right to sell their shares and refrain from buying any more. That threat, distinct from legal action, typically prompts all other CEOs to behave responsibly lest they destroy shareholder value. Giving CEOs shares is supposed to align those incentives. Musk, with his new shares, seemingly has more incentive than ever to make the Tesla stock price go up.

Tesla shareholders also agreed with Musk to move its incorporation to Texas. The jurisprudence of that nascent venue is so far unclear. But obviously Musk has not enjoyed Tesla being second-guessed (or him being forced to close the Twitter buyout) in Delaware. If it all goes bad, there will be no excuses.

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Global Payments Settles Securities Class Suit for \$3.6 Million

By Martina Barash

- Global allegedly hid acquired company's litigation history
- Court trimmed allegations, allowed claims in recent decision

Bloomberg Law News 2024-06-14T10:30:17753810184-04:00

Global Payments Settles Securities Class Suit for \$3.6 Million

By Martina Barash 2024-06-13T16:09:32000-04:00

- Global allegedly hid acquired company's litigation history
- Court trimmed allegations, allowed claims in recent decision

Global Payments Inc. has agreed to pay \$3.6 million to settle investor claims that a company it had acquired continued to deceptively market memberships to consumers after the merger.

The settlement in the proposed class action merits preliminary approval, the investors told the US District Court for the Northern District of Georgia Wednesday.

With the parties far apart on their assessment of maximum damages, the risks of litigation are high for class members, the investor-plaintiffs said. Their expert estimated the recovery ceiling at about \$97 million, they said. But Global argued the price of its common stock tracked the movement of the S&P 500 Index on two key days in October 2022, meaning that "recoverable damages could be significantly reduced or eliminated," the shareholders said.

Global's investors alleged that Active Network LLC, a specialized payment processor for summer camps and sports competitions, resolved a series of deceptive marketing suits by municipal, state, and private plaintiffs before Global acquired it in 2017.

"Despite the extensive litigation concerning Active's deceptive practices, GPN did not disclose these issues to its investors at the time it acquired Active," the investors said. "In fact, GPN never mentioned to investors that a material portion of Active's revenue depended on tricking consumers."

But reports of surprise subscriptions and charges from consumers allegedly continued. The Consumer Financial Protection Bureau began an investigation, but Global allegedly didn't inform investors about it. After the CFPB filed a lawsuit on Oct. 18, 2022, Global's stock price declined from \$115.00 per share when it opened on Oct. 18 to \$112.67 at closing the following day.

Another stock jolt, from \$112.71 to \$103.00, or 8.6%, occurred on May 1, 2023, when Global announced that its president and CEO would leave and "the concealed regulatory risks relating to Active's deceptive business practices materialized," the investors said.

Judge Leigh Martin May allowed the suit to proceed in a decision March 29, but cut some allegations, including that the leadership announcement change caused the investors' May 1, 2023, losses.

Global hit a 52-week low Thursday morning at \$95.09.

Pomerantz LLP and Lowey Dannenberg PC are lead counsel for the investors. King & Spalding LLP represents Global and Active.

The case is Shafer v. Global Payments, Inc. , N.D. Ga., No. 1:23-cv-00577, motion 6/12/24 .

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Mullen Shareholder to Move Suit Over EV Maker's Reverse Merger

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Class Action

A Mullen Five electric vehicle on display at AutoMobility LA ahead of the Los Angeles Auto Show on Nov. 18, 2021.

Bing Guan/Bloomberg

- Mullen and payment company allegedly misled investors
- EV makers continue to be embroiled in shareholder suits

A Mullen Automotive Inc. shareholder is changing courts in his quest to unravel a 2021 merger between the electric vehicle company's predecessor and a payment technology platform.

Marius Martis didn't give a reason for voluntarily dismissing his lawsuit when he notified the US District Court for the District of New Jersey on Thursday. But his attorney, Lee Squitieri of Squitieri & Fearon LLP, said in an email Friday that Martis is changing venue. He didn't specify where the suit would be re-filed.

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

Martis alleged that directors of Mullen and the payment company, Net Element Inc., solicited the August 2021 vote with misleading public statements. They touted Mullen's predecessor, Mullen Technologies, Inc., as having partnerships, production timelines, and battery technology that it actually lacked, Martis said.

An accompanying vote to divest the Net Element's "extremely valuable" operations for "inadequate consideration" was also unsound, said Martis, who held Net stock before the merger and subsequently owned a stake in Mullen.

Net Element began to consider a sale and other options in May 2020, according to Bloomberg News.

A number of EV startups have gone public through mergers with special purpose acquisition companies or, as with Mullen, reverse mergers—and many have faced considerable difficulties. Investor suits against Rivian Automotive Inc. and Li Auto Inc. in April and May are among the more recent legal developments.

King & Spalding LLP represents Mullen.

The case is Martis v. Michery , D.N.J., No. 2:24-cv-02908, notice 6/13/24 .

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Gemini to Pay \$50 Million to Settle NY Crypto Fraud Claims (1)

By Erik Larson and Ava Benny-Morrison2024-06-14T12:43:36515-04:00

- Attorney General Letitia James sued Gemini Trust in October
- The settlement follows similar action brought against Genesis

Crypto exchange Gemini Trust Co. agreed to pay \$50 million to resolve claims brought by New York's Attorney General accusing the company of defrauding investors.

Attorney General Letitia James sued Gemini in October, accusing the platform of lying to more than 230,000 investors about the risks associated with its investment program, Gemini Earn.

The [settlement](#) announced Friday will see Gemini return about \$50 million of digital assets to investors who were locked out of their accounts when the program collapsed. Gemini will also be banned from operating a crypto lending program in New York, James said.

"Hundred of thousands of people, including at least 29,000 New Yorkers, had their trust broken and their money swindled by Gemini through its bogus Earn program," James said in a [statement](#). "Today's settlement will make defrauded investors whole and should remind cryptocurrency companies that deceiving investors is illegal and will not be tolerated."

Friday's settlement comes after James launched a handful of investigations targeting the crypto industry, including **Barry Silbert's** Digital Currency Group. DCG is the parent company of Genesis Global Holdco LLC, a crypto lender that operated the Earn program with Gemini. Genesis reached a \$2 billion settlement with the Attorney General earlier this year.

James had accused Genesis and DCG of attempting to hide more than \$1 billion in losses following the collapse of crypto hedge fund Three Arrows Capital, allegations the companies have denied.

Genesis suffered heavy losses during the crypto market downturn, primarily after the collapse of Three Arrows and the crypto exchange FTX in 2022.

DCG, which was once valued at \$10 billion, previously disclosed that the company received about

\$575 million in loans from Genesis Global Capital. In a letter to shareholders in November 2022, Silbert, DCG's founder and chief executive officer, referred to a \$1.1 billion promissory note, which he said came about as the parent company stepped in to assume liabilities from Genesis related to the implosion of Three Arrows.

(Updates with background on case.)

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Clearview AI strikes 'unique' deal to end privacy class action

 [reuters.com/legal/litigation/clearview-ai-strikes-unique-deal-end-privacy-class-action-2024-06-13](https://www.reuters.com/legal/litigation/clearview-ai-strikes-unique-deal-end-privacy-class-action-2024-06-13)

Sara Merken

Singapore's President Tony Tan Keng Yam shakes hands with Mexico's President Enrique Pena Nieto after delivering a speech to the media, during an official welcoming ceremony, at the National Palace in Mexico City, Mexico June 10, 2016. REUTERS/Henry Romero
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June 13 (Reuters) - Facial recognition company Clearview AI has agreed to resolve claims that it violated the privacy rights of millions of Americans, reaching an unusual class action settlement based on a theoretical stake in the company's future value.

The proposed agreement [↗](#), opens new tab, filed late Wednesday in Chicago federal court, does not include a specific monetary payout, though lawyers for the plaintiffs estimated that it could be worth at least \$50 million, including up to about \$20 million in anticipated attorney fees.

The case, which accused Clearview of violating an Illinois biometric privacy law, stems from a January 2020 New York Times article describing use of the company's facial recognition tool by law enforcement agencies and private companies. The lawsuit alleged Clearview scraped billions of facial images from the web and sold information without consent. Clearview had denied misconduct.

The proposed settlement, which does not contain an admission of liability, requires approval by U.S. District Judge Sharon Johnson Coleman in Chicago.

Clearview in a separate settlement with the American Civil Liberties Union in May 2022 agreed to stop granting paid or free access to its database of facial images to most private businesses and individuals, and to stop providing its database to government agencies in Illinois for five years.

"Clearview AI is pleased to have reached an agreement in this class action settlement," Jim Thompson, partner at Lynch Thompson, said in an emailed statement.

The lawyers behind Wednesday's proposed settlement acknowledged in their filing that the ACLU deal mooted some of their claims, and said Clearview ended up with "few assets" to compensate a huge class made up of "virtually anyone in the United States whose face appears on the internet."

They said they therefore devised a "unique structure" that bases the eventual settlement fund on multiple options.

If Clearview goes public through an IPO or is liquidated through a merger or sale, the fund would be based on a percentage of the company's value. The filing said Clearview's current enterprise value could be as high as \$225 million, which would yield a \$51.75 million settlement fund.

Alternatively, a court-appointed settlement master up until September 2027 could require Clearview to make a cash payment equal to 17% of its revenue since the settlement approval date. The master could also sell the settlement rights to a third party in order to maximize class recoveries.

The filing said the class lawyers could ask to be awarded as much as 39.1% of the settlement fund in attorney fees.

"This structure both provides meaningful relief to the class and flexibility in how to best realize value from its stake in Clearview," plaintiffs' lawyers from Loevy & Loevy said in the court filing.

Jon Loevy of Loevy & Loevy said in an emailed statement that Clearview "did not have anywhere near the cash to pay fair compensation to the class, so we needed to find a creative solution."

The class members "now get to participate in any profits that are ultimately generated, thereby recapturing to some extent the ownership of their biometrics," he said.

The case is Clearview AI, Inc., Consumer Privacy Litigation

For the plaintiffs: Jon Loevy, Michael Kanovitz and Thomas Hanson of Loevy & Loevy

For Clearview: James Thompson and Daniel Lynch of Lynch Thompson

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Reporting by Sara Merken

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Sara Merken
Thomson Reuters

Sara Merken reports on the business of law, including legal innovation and law firms in New York and nationally.

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Del. judge departs from federal ruling, allows experts to tell jurors Zantac causes cancer

 legalnewsline.com/stories/660641530-del-judge-departs-from-federal-ruling-allows-experts-to-tell-jurors-zantac-causes-cancer

June 14, 2024

State Court



Medinilla | <https://courts.delaware.gov/>

WILMINGTON, Del. (Legal Newsline) - Saying it was not her role to “step into the heart of technical debate between opposing scientists,” a Delaware judge refused to exclude plaintiff expert witnesses vital to some 75,000 lawsuits claiming Zantac causes a variety of cancers.

The ruling by Delaware Superior Court Judge Vivian L. Medinilla conflicts with the finding of a federal judge who dismissed 50,000 similar cases for lack of evidence Zantac causes cancer. An Illinois jury also recently rejected a Zantac cancer claim in the first such case to go to trial.

All of the litigation against Zantac manufacturer GSK and others relies in some part on disputed research by Valisure, a New Haven, Conn. laboratory that filed a petition with the Food and Drug Administration in 2019 claiming Zantac, also known as ranitidine, could degrade into cancer-causing NDMA when exposed to heat. The FDA ordered a recall of ranitidine after the report came out, although the agency later criticized Valisure’s methods and the federal judge specifically found the company’s methods unreliable.

Valisure isn't an expert in the Delaware cases, however, and Judge Medinilla said Delaware law is also looser when it comes to allowing expert witnesses to present their opinions to jurors. Delaware allows experts to change their opinions, doesn't consider statistical significance necessary to prove causation, doesn't recognize a "threshold dose" required to cause disease and doesn't require experts to back up their opinions with epidemiological studies, she said.

"This Court will not inject itself into a dispute over which party has the better science," she wrote in a May 31 opinion.

The judge lightly criticized GSK's sole expert on causation, Dr. William C. Zamboni, but refused plaintiff requests to exclude him. The judge also allowed in all of the challenged plaintiff experts including Emery Pharma, a contract lab that has worked with Valisure. GSK argued Emery's findings that ranitidine could degrade into NDMA should be excluded because it couldn't replicate some of its own results. Delaware rules of evidence allow experts to change their opinions, the judge said.

"This criticism might carry more weight if Emery were somehow prohibited from updating the report," the judge wrote. "But many of (GSK's objections) involve clerical errors; its resolution is fitted for twelve people in the jury box."

The defense framed the question for the experts is whether ranitidine causes cancer, while the plaintiffs said the question was whether NDMA causes cancer. The judge decided the case revolves around the latter, given evidence from Valisure, Emery and others that ranitidine could degrade into NDMA.

The dispute is similar to the one over whether Johnson & Johnson's cosmetic talc causes cancer. A small number of plaintiff experts claim the talc contains asbestos, while J&J maintains those experts are confusing jurors by improperly categorizing harmless talc fibers as asbestos. If judges allow the plaintiff experts in, other medical experts can then testify that asbestos causes cancer, without having to opine on whether plaintiffs could have been exposed to asbestos by using talc.

ORGANIZATIONS IN THIS STORY

Delaware Superior Court

Bloomberg Law News 2024-06-14T13:57:22547927584-04:00

Judge Likely to Reject \$30 Billion Visa, Mastercard Fee Deal (3)

By Paige Smith2024-06-14T13:50:17225-04:00

- Networks, retailers have fought over interchange for decades
- Hearing on deal court approval held in Brooklyn Thursday

A \$30 billion settlement between Visa Inc., Mastercard Inc. and retailers to cap credit-card swipe fees is likely to be rejected by a federal judge in Brooklyn, a setback in the two decade-long litigation.

US District Judge Margo Brodie in Brooklyn, New York said at a hearing Thursday that she probably won't approve the deal, according to a transcript of the hearing. Brodie hasn't officially ruled, but said she would "issue a written decision" in coming days, according to a summary of her comments in court on Thursday.

"My inclination is, and this is how I had started drafting the opinion, is not to accept the settlement," Brodie said. "I don't know what an adequate settlement would be but I do know that I'm troubled by this one, and nothing that I've heard today has changed my mind that, in fact, this settlement should be approved."

Retailers have fought for decades to slash their share of the cost for accepting card payments, also known as interchange fees. Much of those fees are passed on to the banks that issue the cards, including giants like JPMorgan Chase & Co. and Citigroup Inc.

The deal, which was announced in March and subject to court approval, would have let merchants charge consumers extra in transactions involving Visa or Mastercard credit cards. When the agreement was unveiled, the parties said it also would have allowed the use of pricing tactics to steer consumers to lower-cost cards.

"The court's comments strongly suggest that she won't accept the settlement," said **Justin Teresi**, a Bloomberg Intelligence analyst. "While Judge Brodie doesn't seem convinced that larger retailers should be allowed to opt out from the settlement, provisions like changes to digital wallet acceptance rules and some state bans on surcharges likely present real adequacy issues."

Spokespeople for both Visa and Mastercard said the firms were “disappointed” by the developments.

“We believe the settlement presented a fair resolution of this long-standing dispute, most notably by giving business owners more flexibility in how they manage their card acceptance activities,” a representative for Mastercard said in a statement. “We will pursue our options to ensure a proper resolution of this matter.”

Visa’s spokesperson said that “continued engagement between industry and the merchants is the best way forward.”

Read More: Visa, Mastercard Reach \$30 Billion Deal With US Retailers

Swipe fees totaled more than \$172 billion last year, [according](#) to the Merchants Payments Coalition. Reactions were mixed when the settlement was announced in March, with some coalitions of retailers pledging to take a close look and some quickly opposing it.

Visa shares slipped less than 0.7% in early trading in New York, while Mastercard’s stock was little changed. Both companies’ shares have underperformed the S&P 500 Financials Index so far this year.

“It seems that the judge has yet to make a final decision, but if the settlement is rejected, it may force the parties to go back to the drawing board and elongate a final settlement,” **Sanjay Sakhrani**, an analyst at Keefe, Bruyette & Woods, said in a note to clients. “The most obvious assumption would be that the judge doesn’t think this settlement is adequate.”

The Retail Industry Leaders Association, which represents large merchants including Target Corp. and Home Depot Inc., called the settlement a “[mere drop in the bucket](#)” at the time and said its terms need “to be carefully reviewed” to see if they remedy the harm done.

On Thursday, another group praised the judge’s remarks.

“We’re gratified to see that the court recognized how bad this settlement was,” said Doug Kantor, general counsel for the National Association of Convenience Stores.

(Updates with judge's comments at hearing in third paragraph.)

--With assistance from **David Scheer**.

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Visa, Mastercard \$30 billion fee settlement in peril

 [reuters.com/legal/visa-mastercard-30-billion-fee-settlement-peril-2024-06-13](https://www.reuters.com/legal/visa-mastercard-30-billion-fee-settlement-peril-2024-06-13)

Jonathan Stempel

Item 1 of 2 A Mastercard logo is seen on a credit card in this picture illustration August 30, 2017. REUTERS/Thomas White/Illustration/File Photo

[1/2]A Mastercard logo is seen on a credit card in this picture illustration August 30, 2017. REUTERS/Thomas White/Illustration/File Photo [Purchase Licensing Rights](#) , opens new tab

- Judge signals she is unlikely to approve settlement
- Critics see little or no benefit for merchants
- Litigation began in 2005

NEW YORK, June 13 (Reuters) - Visa's (V.N) , opens new tab and Mastercard's (MA.N) , opens new tab proposed \$30 billion antitrust settlement to limit credit and debit card fees for merchants is in peril, after a New York judge signaled she was preparing to reject the accord. U.S. District Judge Margo Brodie in Brooklyn told lawyers for the card networks and objectors at a hearing on Thursday that she will "likely not approve the settlement," according to court records.

She plans to write an opinion explaining her decision and reasoning.

Both card networks said they were disappointed. Mastercard called the settlement a "fair resolution" that gave businesses more flexibility in managing card transactions, and Visa called it an "appropriate resolution" to the nearly 19-year-old case.

The settlement announced on March 26 was intended to resolve most claims in the nationwide litigation, with small businesses comprising more than 90% of the settling merchants.

Businesses have long complained that Visa and Mastercard charge excessive swipe fees, or interchange fees, for processing credit and debt card payments, and illegally bar them from steering customers toward cheaper forms of payment.

Swipe fees totaled \$172 billion , opens new tab in 2023, and have more than doubled in the last decade, according to the Merchants Payments Coalition, which represents retailers, grocers, convenience stores and gas stations.

Under the settlement, the average 1.5% to 3.5% swipe fee would fall by at least 0.04 percentage points for three years. Visa and Mastercard also agreed to cap rates for five years and remove anti-steering provisions.

Objectors included the National Retail Federation, the world's largest retailer trade group.

It called the settlement "manifestly insufficient" and its benefits "meager and temporary," saying it would still let Visa and Mastercard dictate swipe fees, and impose a "virtually limitless" ban on future claims by merchants.

The case is In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, U.S. District Court, Eastern District of New York, No 05-md-01720.

Reporting by Jonathan Stempel in New York; Editing by Diane Craft

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NEWS

Amazon Accused of Monopolizing Audiobook Market in Antitrust Class Action

"Audiobooks are listened to by millions of Americans. We are proud to represent a proposed class of authors who create the content we enjoy and are striving in this case to unwind and undo the harm authors have suffered by amazons' abusive monopoly practices. Taking 60 to 75 percent of sales is outrageous and amazon is able to do so only because of its monopoly power," Reiss' attorney, Steve Berman of Hagens Berman Sobol Shapiro, in Seattle said.

June 14, 2024 at 01:55 PM



Riley Brennan



Amazon.com is accused of monopolizing the audiobook market in an antitrust class action filed in Seattle Thursday, with the suit stemming from the company's alleged market power over authors via its audiobook platform Audible.

This suit was surfaced by [Law.com Radar](#), ALM's source for immediate alerting on just-filed cases in state and federal courts. [Law.com Radar](#) now offers state court coverage nationwide. [Sign up today](#) and be among the first to know about new suits in your region, practice area or client sector.

The [June 13 action](#) was filed by attorneys with Hagens Berman Sobol Shapiro and Sperling & Slater, on behalf of the plaintiff under the pen name, CD Reiss, for a California-based author centering around allegations that Amazon "unlawfully uses exclusivity restrictions to lock up content, starving competing or nascent firms that wish to compete in the marketplace."

The suit alleges that Amazon's "great listen guarantee," which allows users of the defendant's Audible platform to return audiobooks for any reason, compels authors to incur 100% of the cost of returned and exchanged books. The suit also accuses Amazon of expanding its anticompetitive power by entering into exclusive agreements with influential authors, and imposing restrictions that make it undesirable for customers to use other audiobook services.

"By foreclosing competition, Amazon can charge supracompetitive prices to authors for the distribution of their audiobooks. Despite having costs of approximately 5% to 10% of the sales price, Amazon charges independent audiobook authors and rights holders who purchase its distribution services at least 60% of the audiobook's sales price," the complaint said. "And for authors who dare challenge Amazon's dominance by distributing their audiobooks on other sites, Amazon extracts even higher prices—exceeding 75% of the sales price set by Amazon. No matter what authors choose, they are gouged by Amazon's exercise of its monopoly power."

The complaint alleges that Amazon is “a monopolist in domestic audiobooks” and makes up over 60% of all consumer sales via Audible, leaving authors with only one “rational” choice, in order “to avoid the higher supracompetitive price and additional non-price penalties imposed by Amazon should they distribute with retailers that attempt to compete with Amazon.”

“Audiobooks are listened to by millions of Americans. We are proud to represent a proposed class of authors who create the content we enjoy and are striving in this case to unwind and undo the harm authors have suffered by amazons’ abusive monopoly practices. Taking 60 to 75 percent of sales is outrageous and amazon is able to do so only because of its monopoly power,” Reiss’ attorney, Steve Berman of Hagens Berman Sobol Shapiro, in Seattle said.

Amazon did not immediately respond to a request for comment. Counsel have not yet appeared for the defendant.

Because of its market power, the complaint alleges that Amazon can charge supracompetitive fees and foreclose competition from alternative retailers, including failing to allow authors to convert their non-exclusive titles into exclusive ones, which punishes authors for testing the market and experimenting with different sales channels and methods.

“By charging higher distribution fees for non-exclusive titles, burying non-exclusive titles to make them hard for consumers to find, prohibiting preorders and promotions on non-exclusive titles, and prohibiting non-exclusive titles from converting to exclusive, Amazon can credibly threaten to all but wipe out an authors’ earnings on non-exclusive audiobooks on Amazon. Authors rationally choose to accept Amazon exclusivity rather than risk losing most sales through Amazon’s dominant audiobook channel,” the complaint contends.

“Amazon’s anticompetitive behavior towards authors fits within its broader pattern of anticompetitive conduct with respect to audiobooks. To further entrench its monopoly position and prevent competition, and in addition to its various penalties for competitive audiobook distribution, Amazon secures (i) complete exclusivity for many titles; (ii) a window of exclusivity on many new releases, when demand for the audiobook is greatest; and (iii) prohibitions on other competing subscription platforms offering certain “must have” titles as redeemable for credits to their customers. These restrictions further diminish potential competitors’ abilities to enter and effectively compete in the audiobook space.”

The complaint further alleges that these penalties and the company’s high fee for its services result in authors producing fewer audiobooks and investing less in the audiobooks they produce. The plaintiff contends the company’s conduct has affected billions of dollars of sales by authors. The complaint also argues that Amazon’s tactics are unnecessary and that its anticompetitive restrictions have suppressed competition for author’s audiobook distribution.

The complaint brings claims for violation for the Sherman Act-monopolization and attempt to monopolize, and requests a judgment for damages, pre-judgment and post-judgment interest, equitable relief, costs, and attorney fees.

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Ray-Ban Owner Wins Bid to Transfer Antitrust Cases to New York

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Class Action

Ray-Ban logo and glasses are seen at the shopping mall in Krakow, Poland on January 10, 2024.

Photo by Jakub Porzycki/NurPhoto via Getty Images

- The cases allege EssilorLuxottica SA is a monopolist
- A judicial panel granted an order to transfer the cases

A group of lawsuits accusing Ray-Ban and Oakley brand owner EssilorLuxottica SA of anticompetitive conduct that caused consumers to overpay for eyewear will be transferred to a New York court, a federal panel said.

The US Judicial Panel on Multidistrict Litigation on Wednesday signed off on an order to transfer the cases from Minnesota to the US District Court for the Southern District of New York, saying it's a convenient forum for EssilorLuxottica SA and other defendants based in Europe, as well as some defendants located in the US and two of the plaintiffs. EssilorLuxottica SA is based in Paris but also has offices in New York.

Plaintiffs wanted the MDL to be handled in a Minnesota court, but the panel said that the manner in which they coordinated the litigation "does not suggest that the District of Minnesota was chosen for convenience."

The cases are among a series of multidistrict litigation cases that have been transferred in recent days, including a group of tire price-fixing suits to Ohio and suits accusing Apple Inc. of monopolizing smartphone markets that were moved to New Jersey.

Consumers sued last year alleging EssilorLuxottica and other distributors of eyeglasses, sunglasses, and corrective lenses engaged in a scheme to eliminate competitors and use a series of contracts with rivals and third-party retailers to maintain higher prices of popular eyewear brands.

Other defendants in the MDL include Frames for America Inc., EyeMed Vision Care LLC and Vision Source LLC.

EssilorLuxottica SA is represented by Latham & Watkins LLP and Greene Espel PLLP. Plaintiffs are represented by firms including DiCello Levitt LLP and Wolf Haldenstein Adler Freeman & Herz LLP.

The case is In Re Eyewear Antitrust Litigation , S.D.N.Y., 6/12/24 .

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Army of Lawyers Suit Up for Price-Gouging Antitrust Class Actions

"Eleven nearly identical putative class action complaints have been filed against defendants, alleging a conspiracy to constrain the production of shale oil to increase the price of oil products," the oil company defendants said.

June 14, 2024 at 02:24 PM

Antitrust



Adolfo Pesquera



What You Need to Know

- Individual and corporate diesel fuel consumers filed an antitrust class action in New Mexico accusing independent shale producers of conspiring to price gouge.
- The lawsuit is the latest in a series of antitrust class actions against domestic shale oil producers.
- The U.S. District of Nevada is in the process of consolidating related class actions.

A New Mexico law firm representing diesel fuel consumers filed the latest in a series of lawsuits brought against domestic independent shale producers, alleging they conspired to keep prices high.

The antitrust action filed in New Mexico District Court seeks nationwide class action status and seeks damages against eight crude oil producers. The lawsuit was spotted on [Law.com Radar](#).

Named defendants include Permian Resources Corp., Chesapeake Energy Corp., Continental Resources Inc., Diamondback Energy Inc., EOG Resources Inc., Hess Corp., and Occidental Petroleum Corp.

The lawsuit also names Exxon Mobil Corp., based on its recent acquisition of shale producer Pioneer Natural Resources Co.

Santa Fe-based attorneys Jonas Nahoum and Nancy R. Long of Long, Komer & Associates are representing named individual and corporate plaintiffs from Arizona, California, Iowa, Minnesota and Wisconsin and others similarly situated.

Their 151-page complaint that cites causes of action for every state and the District of Columbia.

Other law firms collaborating on [Strump v. Permian Resources Corp.](#) include the Minneapolis, Minnesota-based firms Gustafson Gluek and Zimmerman Reed, and New York-based Taus, Cebulash & Landau.

The proposed class action generally reiterates allegations raised in the District of Nevada lawsuit *Andrew Caplen Installations LLC v. Permian Resources Corp.*, and in the District of New Mexico lawsuit *Foos v. Permian Resources Corp.*

The *Andrew Caplen Installations* case and three others were consolidated Jan. 29 under *Rosenbaum et al v. Permian Resources Corp. et al*, Case No. 2:24cv00103. The cases were assigned to Nevada's Chief Judge Miranda M. Du and referred to Magistrate Judge Maximiliano D. Couvillier III.

Since then, an army of attorneys for law firms across the nation have filed notice of appearance on behalf of the defendants and have challenged the venue.

Also, the defendants on June 4 filed a *motion for an order temporarily staying* all non-transfer related pretrial proceedings "pending the Judicial Panel on Multidistrict Litigation's decision as to whether these actions should be centralized with two other related actions."

"Eleven nearly identical putative class action complaints have been filed against defendants, alleging a conspiracy to constrain the production of shale oil to increase the price of oil products. Nine of those complaints were filed here and the other two were later filed in the District of New Mexico," the defendants' motion states.

The two cases in New Mexico being referred to do not include the *Strump* lawsuit, which was filed nine days after the motion.

The *Strump* lawsuit alleges the independent shale producers collaborated with the Organization of Petroleum Exporting Counties. Beginning in 2017, the producers and OPEN communicated regularly about coordinating their collective crude oil output.

When the COVID-19 pandemic erupted in early 2020, diesel fuel demand dropped quickly, shocking the oil supply chain. By early 2021, the world was emerging from the pandemic and demand rebounded and prices increased steadily. The Russian invasion of Ukraine exacerbated the price increase trend.

Historically, independent shale producers have been "swing producers" that respond to high prices by "racing" and drilling wells as fast as possible to capitalize on upward price swings.

The 2021-2022 demand curve and parallel price jumps represented the kind of market condition that should have motivated the shale producers to increase production, the lawsuit alleges.

"Defendants did not take advantage of these market opportunities. Each defendant limited their domestic shale production growth and, absent mutual promises among one another to restrain production, no defendant would fail to respond to these price signals," the complaint asserts.

In addition to the string of consumer class actions, the alleged price gouging has been under investigation by the Federal Trade Commission, which in May cited "voluminous evidence" that the shale producers and OPEC collaborated to keep oil prices "artificially" high.

The FTC report inspired 23 Democratic senators to send a letter May 30 to Attorney General Merrick Garland and Assistant Attorney General Jonathan Kanter, who heads the Justice Department's Antitrust Division asking for action in light of "serious concerns about alleged collusion and price fixing in the oil industry."

The defense firms in *Rosenbaum* include Vinson & Elkins for Permian Resources; Latham & Watkins for Chesapeake Energy; Proskauer Rose for Continental Resources; Winston & Strawn for Diamondback Energy; Baker Botts for EOG Resources; Holly Driggs and Wachtell, Lipton, Rosen & Katz for Hess Corp.; Kirkland & Ellis and Snell & Wilmer for Occidental Petroleum; Skadden, Arps, Slate, Meagher & Flom, and Gibson, Dunn & Crutcher, and Howard & Howard Attorneys for Pioneer Natural Resources.

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Class Action Claims Major Oil Producers Conspired With OPEC to Drive Up Prices

Meet the Law Firms Behind the Major Gasoline Antitrust Class Action

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Sysco can't scrap its Pilgrim's Pride price-fixing settlements, US judge rules

 [reuters.com/legal/litigation/sysco-cant-scrap-its-pilgrims-pride-price-fixing-settlements-us-judge-rules-2024-06-14](https://www.reuters.com/legal/litigation/sysco-cant-scrap-its-pilgrims-pride-price-fixing-settlements-us-judge-rules-2024-06-14)

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

June 14 (Reuters) - In a setback for litigation finance company Burford Capital (BURF.L) , opens new tab, a judge in Chicago ruled on Friday that national food distributor Sysco (SYN) , opens new tab cannot back out of price-fixing settlements with meat industry giant Pilgrim's Pride (PPC.O) , opens new tab.

U.S. District Judge Thomas Durkin said , opens new tab Sysco's settlement with Pilgrim's Pride was enforceable despite opposition from Burford, which had helped bankroll the litigation and argued that the deal was never finalized.

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The judge said emails between Sysco and Pilgrim's confirmed the accord.

The dispute between Sysco and Pilgrim's Pride has 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 backing Sysco's antitrust cases, court documents show, and had opposed Sysco's decision to settle for amounts that the funder considered to be too low. Burford and Sysco resolved their dispute, and Sysco last year transferred its antitrust claims to Burford's newly created unit Carina.

Sysco on Friday declined to comment. Pilgrim's Pride did not immediately respond to request for comment. The amounts of the settlements, which would resolve claims that Pilgrim's Pride fixed prices for beef, pork and chicken, were not publicly disclosed. Pilgrim's Pride denied the claims.

In a statement, a Burford spokesperson said it was "concerning that the court has today opted to enforce a supposed agreement that the parties clearly never viewed as binding."

The Sysco cases were part of a broader wave of price-fixing claims against Pilgrim's Pride and other leading processors. Other plaintiffs, also including consumers, have reached settlements in some of the cases worth hundreds of millions of dollars.

In Minnesota, JBS USA this month asked a U.S. judge to enforce the terms of Sysco's settlement with the company. Burford had disputed Sysco's settlement with JBS. JBS did not respond to a request for comment.

In the Pilgrim's Pride case, Durkin acknowledged Sysco and Burford did not execute a final signed agreement. But the judge said corporate emails from late 2022 “demonstrate an agreement” between the two sides.

“That is sufficient objective evidence of an agreement to enforce it,” Durkin wrote.

Durkin said his order covers Sysco’s settlement with Pilgrim’s in lawsuits in Illinois and Minnesota. He rejected Burford’s argument he had no power to enforce a “global” settlement involving claims in another state.

The case is *In re Broiler Chicken Antitrust Litigation*, U.S. District Court for the Northern District of Illinois, No. 1:16-cv-08637.

Read more:

[US judges split over litigation funder Burford's role in Sysco cases](#)

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

[Sysco cedes antitrust claims to litigation funder Burford as two sides drop cases](#)

[Litigation funder Burford slams Sysco, as U.S. Chamber steps into court fight](#)

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Moreno blasted rivals over scandal. Now he's welcoming a big player's support

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NewsRoom

6/13/24 Ohio Cap. J. (No Page)

2024 WLNR 9179083

Ohio Capital Journal

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June 13, 2024

Moreno blasted rivals over scandal. Now he's welcoming a big player's support

Marty Schladen

Jun 13, 2024

During the GOP U.S. Senate primary, Cleveland businessman Bernie Moreno went after his opponents over their connections to the biggest bribery and money-laundering scandal in Ohio history.

But now he's welcoming the support of a man who brokered what was perhaps the key relationship in a scheme in which Akron-based FirstEnergy paid \$61 million to purchase a \$1.3 billion bailout that fell on the backs of ratepayers — which is to say everyday Ohioans.

The supporter, Cleveland businessman Tony George, invited a now-convicted lawmaker to travel on FirstEnergy's private jet to Donald Trump's 2017 inaugural, and booked the lawmaker and FirstEnergy executives into the same hotel for days of events in which federal prosecutors say the conspiracy began. George was still communicating with the central players in 2020, when the FBI started making arrests.

When asked to comment on the seeming hypocrisy, Moreno's campaign didn't respond directly. It instead attacked his Democratic opponent, incumbent Sen. Sherrod Brown.

Crooked bailout

A political newcomer, Moreno in March sailed past his more-experienced opponents buoyed by the endorsement of former President Donald Trump.

Moreno was once a harsh Trump critic, calling him a "lunatic" and a "maniac." But as with Ohio Sen. — and vice-presidential hopeful — J.D. Vance, Moreno got into politics and turned into an ardent supporter of Trump, who is now a convicted felon.

Moreno might have experienced a similar conversion when it comes to 2019's corrupt bailout law, House Bill 6.

In a Spectrum News 1 debate on Feb. 19, Moreno went after his Republican opponents, State Sen. Matt Dolan and Secretary of State Frank LaRose.

Dolan in 2019 voted for HB 6, but then later said he supported a full repeal.

LaRose, Ohio's top elections official, provided "private" information to FirstEnergy CEO Chuck Jones during a brutal-but-successful war to stop a repeal of the bailout, according to text messages from Jones that were presented during a criminal trial last year. LaRose at first refused to comment on the messages. Then last July, he said he didn't recall conversations with Jones and others involved in the scandal.

As a result of the bailout conspiracy, former House Speaker Larry Householder, R-Glenford, last year received a 20-year prison sentence and former Ohio Republican Party Chairman Matt Borges was sentenced to five years. Jones and former FirstEnergy Vice President Michael Dowling were charged by state authorities earlier this year.

About 19-and-a-half minutes into February's GOP Senate debate, LaRose attacked Moreno over what LaRose said was Moreno's support for government subsidies of wind and solar energy. Moreno swung back with HB 6, the corrupt bailout law.

"I was against HB 6," Moreno said. "These guys weren't. They're going to have to answer for their involvement in that scandal to a different audience than the one that's here tonight."

Moreno took another swing at Dolan on April 30, when he took to X to say.

"@dolan4ohio was the most helpful member to pass the CROOKED and CORRUPT FirstEnergy Bailout Bill! Matt is a GUARDIAN for the Left Woke Mob and the Swamp but not the people of Ohio," he said.

Support from "Individual B"

That last sentence was an apparent swipe at the Dolan family's ownership of Cleveland's baseball team. In 2021 it changed its name from the Indians to the Guardians in response to Native American protests — to the fury of some of its fans.

But as for Moreno's problems with figures who were involved in the bailout scandal, they appear to extend only to his political opponents — not his supporters.

On May 16, his campaign held a Bourbon With Bernie fundraiser in Mentor. Cleveland businessman Tony George was a host, a privilege for which George paid \$2,500.

In addition to being a Moreno supporter, George has had a long and lucrative relationship with FirstEnergy. Entities linked to George received nearly \$11 million from FirstEnergy over the years, according to a state audit.

Unlike FirstEnergy's two top executives, Gov. Mike DeWine's nominee to the Public Utilities Commission, Householder, Borges and three others, George has not been charged in the conspiracy, and there's been no public indication that state or federal authorities plan to.

But George's role was substantial enough that he was called "Individual B" in FirstEnergy's deferred prosecution agreement — a document in which the utility copped to its culpability for the bribery scandal, along with paying out \$230 million. It lays out Individual B's close relationship with FirstEnergy's top executive and to Householder from the fall of 2016, when Householder was plotting his return to the House and then to regain the speaker's gavel.

During his trial, Householder implausibly testified that during the 2016 World Series, he randomly wandered into the FirstEnergy luxury box at Cleveland's Progressive Field. Raising doubts that his visit was just happenstance, the deferred prosecution agreement includes a message from Jones, the FirstEnergy CEO, to George on Nov. 5, 2016 — just three days after Game 7 of the World Series.

"Pass on to (Householder)," Jones said. "When we were talking on (Wednesday) I told him there was gonna be a sense of urgency (for a bailout) but couldn't tell him all the details. If we don't move on some type of supplant (sic) in (the) first half of 2017 it will be too late. These (nuclear) plants will be shut, sold, or bankrupt. I don't have any contact info for him."

George responded, "He's more than ready to craft something," federal prosecutors said in closing arguments in Householder's trial.

Expensive junket

The following January, George invited Householder — and flew with him, Householder's son and FirstEnergy Vice President Michael Dowling — on the FirstEnergy jet to the Trump inaugural. George also booked Householder and then-CEO Jones into the same DC hotel.

What followed were days of swanky steak dinners and other events during which prosecutors said the bailout scheme was hatched.

FirstEnergy's deferred prosecution agreement, or DPA, says that George continued as a conduit between Householder and Jones until 2020, when Householder was arrested.

Before the feds brought the hammer down, Jones, George and Householder were plotting to change the Ohio Constitution so Householder could continue as speaker for another 16 years. That would have allowed them to continue to increase electricity rates and use the resulting dark money to dominate Ohio government in ways not calculated to benefit ratepayers, or the public at large.

The DPA includes messages between Jones and George on Feb. 28, 2020. Jones referred to Householder as "an expensive friend," but said it would be valuable to keep him in his position of power because, as Householder said, he could "get a lot done in 16 years."

George agreed, saying, "Probably more than 5 previous Speakers combined."

Then, George added, "He will make Ohio great again."

Response

The Moreno campaign this week declined to answer questions about these matters on the record.

It was asked whether Moreno was aware of George's involvement in the HB 6 affair when Moreno accepted George's support. It was also asked if Moreno would return George's money and decline support in the future.

Communications Director Reagan McCarthy responded by asking in an email, "When is Sherrod Brown going to return the donations made to his campaign over the years including when FirstEnergy admitted it was bribing public officials?"

In fact, Brown donated the \$21 million he'd received from FirstEnergy over the years to Ohio food banks within 10 days of Householder's 2020 arrest, according to Federal Election Commission records provided by the Brown campaign.

"While Bernie continues to actively fundraise with key players of the FirstEnergy bribery scandal, days after the FirstEnergy scandal was revealed, the Friends of Sherrod Brown campaign donated FirstEnergy contributions to local food banks across the state," a spokesperson said in an email.

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NewsRoom

Exclusive: Boeing investigates quality problem on undelivered 787s, sources say

 [reuters.com/business/aerospace-defense/boeing-investigates-quality-problem-undelivered-787s-sources-say-2024-06-13](https://www.reuters.com/business/aerospace-defense/boeing-investigates-quality-problem-undelivered-787s-sources-say-2024-06-13)

Tim Hether, David Shepardson, Allison Lampert

Boeing employees assemble 787s inside their main assembly building on their campus in North Charleston, South Carolina, U.S., May 30, 2023. Gavin McIntyre/Pool via REUTERS/File Photo Purchase Licensing Rights , opens new tab

PARIS/WASHINGTON/MONTREAL, June 13 (Reuters) - Boeing (BA.N) , opens new tab is investigating a new quality problem with its 787 Dreamliner after discovering that hundreds of fasteners have been incorrectly installed on the fuselages of some undelivered jets, two people familiar with the matter said.

The latest in a series of manufacturing snags affecting the U.S. planemaker involves incorrect "torquing" or tightening in a Boeing plant of more than 900 fasteners per plane - split equally between both sides of the jet's mid-body, they said.

There is no immediate concern about flight safety but Boeing is working to understand what caused the problem and will decide how much if any rework needs to be done once its investigation is complete, the sources said, asking not to be identified.

Boeing confirmed the checks in response to a Reuters query on Thursday and said it saw limited to no impact on deliveries.

"Our 787 team is checking fasteners in the side-of-body area of some undelivered 787 Dreamliner airplanes to ensure they meet our engineering specifications. The in-service fleet can continue to safely operate," a spokesperson said.

"We are taking the time necessary to ensure all airplanes meet our delivery standards prior to delivery. We are working closely with our customers and the FAA (Federal Aviation Administration) and keeping them updated."

FAA said in a statement that Boeing disclosed it may have "improperly installed fuselage fasteners on some 787" jets. "The FAA is investigating and is working closely with Boeing to determine appropriate actions and to ensure an immediate fix in the production system."

FAA Administrator Mike Whitaker said he would hear from people on site during a previously-planned visit to a Boeing 787 plant in South Carolina on Friday.

Shares of Boeing initially fell 1.7% before paring losses to be flat.

The U.S. planemaker has been under scrutiny from regulators and customers since a January 5 incident in which a smaller 737 MAX operated by Alaska Airlines was forced to make an emergency landing after a fuselage panel blew out mid-flight.

The latest manufacturing flaw was discovered inside the company's South Carolina plant where the 787's lightweight carbon-composite skin is attached to skeletal supports inside the fuselage sections called longerons.

The sources said the affected fasteners had been torqued from the wrong side, using the head instead of the associated nut.

In January, Boeing issued a bulletin to suppliers that laid out practices to ensure bolts are properly torqued following inspections of 737 MAX 9s grounded in the wake of the blowout. Tracking data confirmed that 787 deliveries are continuing, albeit at a slower-than-usual rate in the wake of a previous and unconnected production slowdown. FlightRadar24 said one 787-10 model departed for its European customer on Wednesday.

Airlines are concerned about existing delivery delays, with some buyers estimating average delays of several months.

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Reporting by Tim Hepher in Paris, David Shepardson in Washington and Allison Lampert in Montreal; Editing by Elaine Hardcastle and Nick Zieminski

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NEWS

FTX Examiner Requests Additional Investigation on Sullivan & Cromwell

A court-appointed examiner requested up to \$3 million to investigate the law firm's role in advising Sam Bankman-Fried on his purchase of Robinhood shares, as well as two other issues.

June 13, 2024 at 03:48 PM



Dan Roe
Reporter



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

What You Need to Know

- A court-appointed examiner in the FTX bankruptcy seeks to embark on an additional investigation into Sullivan & Cromwell's prepetition work for the fraudulent cryptocurrency exchange.
- The examiner previously reported that he found no evidence that Sullivan & Cromwell was aware of the fraud during prepetition work.
- A July 17 hearing will determine whether three additional investigations will proceed.

Sullivan & Cromwell may face further inquiry into its prepetition work for FTX, the fraudulent cryptocurrency exchange that the law firm is now representing as debtor counsel in the U.S. Bankruptcy Court for the District of Delaware.

Examiner Robert Cleary of Patterson Belknap Webb & Tyler recommended that he be authorized to undertake three additional investigations into the collapse of FTX, according to a motion he filed in court this week.

Cleary foreshadowed the further investigations in a [report](#) he issued in May on his initial investigation, which found no evidence that Sullivan & Cromwell knew about the fraud at FTX as it worked on 20 matters for the exchange before being tapped as debtor counsel in November 2022.

The first additional investigation would uncover what, if anything, Sullivan & Cromwell knew or should have known about the fraud at FTX as the firm advised FTX founder Sam Bankman-Fried on the purchase of shares of Robinhood, a trading platform. Cleary would also determine whether a potentially disqualifying conflict existed for Sullivan & Cromwell's retention as debtor counsel.

The second investigation would involve the October 2021 sale of LedgerX, a bitcoin options exchange and clearinghouse regulated by the Commodity Futures Trading Commission, to FTX. Sullivan & Cromwell advised FTX US on its \$300 million acquisition of LedgerX, yet FTX US sold the property for just \$50 million in May 2023 after the company declared bankruptcy. Due to the sale price falling well below the purchase price of LedgerX, Cleary asked the court for permission to report on the details of the sale and determine whether the former shareholders of LedgerX may be subject to a clawback complaint.

Finally, a third investigation would attempt to understand the holes in FTX's balance sheet, Cleary wrote. A July 17 hearing will decide whether the investigations go forward; Cleary requested 10 weeks and a budget of up to \$3 million to conduct them.

"If the Court concludes that any points require further review, we will continue to cooperate fully with the Examiner," a Sullivan & Cromwell spokesperson wrote in an email, in which he also reiterated the firm's prior statement on Cleary's initial report: "Sullivan & Cromwell remains confident in our prepetition work for FTX and the commencement of the Chapter 11 cases, and we welcome the Examiner's findings to date rejecting various baseless allegations about our work for FTX."

Cleary's initial report also indicated that Fenwick & West had a "bird's-eye view" of the organization as FTX's primary law firm, noting that Fenwick should have known that FTX's holdings in its own exchange token, FTT, were illiquid and therefore risky. Both Fenwick and Sullivan & Cromwell used auto-deleting messages to communicate with FTX employees and directors, a factor that Cleary said had made it impossible to recover some communications.

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FTX Examiner Clears S&C, Questions Fenwick's Knowledge of Fraud

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NEWS

In \$1B Suit, Nikola Founder Says Legal Chief, Other Execs Fed DOJ False Narrative to Save Themselves

"Never has there been such an egregious case of corporate scapegoating at the expense of shareholders," former Executive Chair Trevor Milton alleges in the complaint.

June 12, 2024 at 11:10 AM

White Collar Crime



Maria Dinzeo



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

The founder of electric truck maker Nikola, convicted last year of defrauding investors about his company's technology, now is suing his legal chief and other insiders, saying they praised him for aggressively promoting the company before turning on him when scrutiny of the business increased.

Trevor Milton, who in December was [sentenced to four years in prison](#), says in the June 6 lawsuit that he relied heavily on Chief Legal Officer Britton Worthen, who also was his personal attorney, to advise him on what he should or shouldn't say on social media and in other public forums about the Phoenix-based company.

More than an attorney, Worthen was a trusted friend and adviser, the suit says. The two men spoke by phone nearly every day and attended the same church, where Worthen was a bishop "with duties similar to those of a pastor, priest or rabbi," [the 86-page complaint states](#).

Milton's case, filed in federal court in Arizona, says Worthen never hesitated to push back when Milton "raised ideas that Worthen thought needed refining from a legal perspective," and Milton "fully expected Worthen to review everything he said and to provide immediate feedback if necessary."

At times, Worthen asked Milton, Nikola's executive chair, to take down a tweet or a video, and Milton would acquiesce because he expected Worthen to stop him from misspeaking. The lawsuit says Worthen indicated at the time that he was regulatory reviewing Milton's statements, but Milton later learned that wasn't the case.

The suit, which seeks more than \$1 billion in damages, also names as defendants former CEO Mark Russell, former Chief Financial Officer Kim Brady, current CEO Stephen Girsky, board Chair Steve Shindler and several current and former board members.

"Never has there been such an egregious case of corporate scapegoating at the expense of shareholders," according to the suit, which was filed by Paul Hastings and the Entekin Law Firm.

"The allegations in convicted felon Trevor Milton's recent filings are imaginary and baseless. As a matter of course since his departure in 2020, Nikola and its officers and directors will vehemently—and successfully—defend themselves against Mr. Milton's continued outrageous conduct," the company said.

Worthen, who remains Nikola's CLO, did not respond to requests for comment from Law.com.

Following a nearly monthlong trial, a jury in October 2022 [found Milton guilty](#) of one count of securities fraud and two counts of wire fraud. The conviction capped a stunning fall from grace for the college-dropout-turned-entrepreneur, who founded Nikola in 2014 and took it public through a special purpose acquisition company merger in June 2020, capitalizing on investor optimism that it would achieve its ambitions of mass-producing hydrogen- and electric-powered semitrucks.

Back then, Nikola, which like electric car maker Tesla is named for Serbian-American electrical engineer Nikola Tesla, was often described as an early stage version of Elon Musk's company. That summer, Nikola's stock market value hit \$28.8 billion, making the company more valuable than Ford.

Today, nearly all that value has evaporated. Nikola shares trade for about 50 cents apiece, leaving the company with a market value of \$665 million.

At Milton's trial, his aggressive promotional tactics took center stage. For example, a hydrogen-powered big rig prototype was seen on a video posted on social media seeming to drive on its own power. Prosecutors also alleged he made misleading statements about Nikola's electric- and hydrogen-powered pickup truck, known as the Badger.

According to the suit, Nikola's leadership team encouraged Milton to be the company's public face, a strategy aimed at drumming up interest in the stock among retail investors.

Milton embraced the role, appearing on such TV outlets as CNBC, CNN and Fox Business, as well as on such podcasts as "Truck Show," "Hitting the Mark" and "Chartcast."

According to the complaint, on June 9, 2020, five days after Nikola went public, Worthen told Milton to "be careful" about how he described the company's progress on the Badger on social media "because, although the two Badger prototypes already were being assembled in June 2020, the prototypes had not yet finished being assembled."

Milton responded, "So legally I'm OK. But I'll be more clear next time," referring to a recent tweet. Worthen replied, "Agree. I knew what you meant."

The lawsuit says Worthen did not advise Milton to remove, clarify or otherwise contextualize the tweet.

Milton regularly sent emails to Worthen and Nikola's public relations team to get clearance for statements he made in news releases, on social media and in interviews and analyst calls, according to the suit, which says other executives were copied on those messages.

Milton said the defendants in his suit were cheering him on. Worthen, for instance, in December 2019 dashed off this text: "Just saw the fox business piece—great job!! Well done my friend."

In the suit, Milton says he now knows some employees did have concerns about comments he made publicly and shared those with other senior executives. But he said that information was not relayed to him.

“The government later alleged that these potentially confusing and ambiguous statements were material misstatements and indicted Mr. Milton for making them—an outcome that would have been avoided if Russell, Brady, or Worthen, or the company had alerted Mr. Milton that his statements should be clarified,” the lawsuit says. “In other words, the company’s executives hid any issues behind Mr. Milton’s back while congratulating him on a job well done and then later scapegoated Mr. Milton and assisted in getting him indicted for those very issues that they never brought to his attention.”

The company’s first months as a public company went well. On Sept. 8, 2020, for instance, Nikola shares rocketed higher when General Motors announced it was taking a \$2 billion stake in the company.

But just two days later, Hindenburg Research, an investment firm specializing in short selling, issued [a damning report](#) that accused Milton of lying about the success of Nikola's trucks and technology and perpetuating an “intricate fraud.”

The report said investors had been snowed, just as they had been by the blood-testing startup Theranos and by Bernie Madoff.

“Every now and then a story comes around that exposes how little the ‘experts’ really know,” the report said.

Nikola brought in Kirkland & Ellis, where then-CEO Russell previously worked, to investigate the claims. It then spent weeks publicly defending Milton and issuing a rebuttal report. Nonetheless, Milton resigned as executive chair, citing his wife’s declining health.

“Mr. Milton believed that he was leaving the company in safe hands,” the lawsuit says. “The last thing Mr. Milton expected was for the Company and the individual defendants, including some of his closest friends and mentors, to turn on him; lie about him, his motives, and his character; and—in an effort to save themselves from liability—serve him up to be indicted for fraud and to lose his liberty, assets, and name, all while destroying the Company’s credibility and shareholder value for no reason.”

In July 2021, the Department of Justice announced criminal charges against Milton. Five months later the company settled a U.S. Securities and Exchange Commission fraud probe by agreeing to pay \$125 million. Under the deal, it did not admit or deny the allegations.

According to Milton’s lawsuit, the company provided to investigators “a narrow, one-sided, and skewed version of reality,” casting Milton as having continued to exaggerate and make false and misleading statements despite “escalating efforts” by insiders to rein him in.

In the suit, Milton alleges that insiders sold investigators a false narrative. He says he views their actions as a monumental betrayal.

“These charges are a case of garbage in, garbage out,” the suit says.

Milton has appealed his conviction. He is free on bail as the appeal plays out.

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Archegos Trial Dredges Up \$2 Trillion Family Office Dispute

By Annie Massa and Lydia Beyoud

- Fund's collapse led to billions of dollars in bank losses
- Two big attempts to limit single family office risks failed

Bloomberg Law News 2024-06-14T10:29:12101604623-04:00

Archegos Trial Dredges Up \$2 Trillion Family Office Dispute

By Annie Massa and Lydia Beyoud2024-06-14T06:00:00000-04:00

- Fund's collapse led to billions of dollars in bank losses
- Two big attempts to limit single family office risks failed

Ralph Hamers, the former chief executive officer of UBS Group AG, looked sullen as he explained how the bank lost hundreds of millions of dollars after the implosion of investment firm Archegos Capital Management.

"Clearly what we will do going forward is demand even more transparency with our clients," Hamers told a CNBC interviewer in April 2021, when he still headed the Swiss bank. "Is there more regulation that we can get, in order to ensure we have complete oversight over the positions our clients have?"

Three years later, those kinds of rules haven't materialized.

Now with Archegos founder **Bill Hwang's** criminal trial underway, sworn testimony is dredging up years-old anxieties over family offices, the type of investment firm he managed. Hwang gathered a \$36 billion fortune, borrowing huge sums from a number of banks including UBS and amassing giant, risky positions in relative secrecy until Archegos unraveled.



Bill Hwang exits federal court in New York on June 5.

Photographer: Alex Kent/Bloomberg

Hwang and his co-defendant, former Chief Financial Officer **Patrick Halligan**, have pleaded not guilty to fraud charges and are in the fifth week of testimony in their trial in lower Manhattan.

Read More: Bathroom Off Limits at Archegos When Key Stocks Were On Move

Family offices have long escaped regulations applied to other types of investment firms. Watchdogs and legislators looked past them, doubting that just one family's wealth could prove consequential for the rest of the market.

Archegos upended that notion.

Leaving \$10 billion of losses in its wake and contributing to the downfall of Credit Suisse, Archegos' demise showed that family offices left unchecked can roil banks and public companies alike. While some new rules took shape after its downfall, they didn't ultimately zero in on this amorphous segment of the investing world.

'Misplaced' Assumption

"It's clear that Congress thought of family offices as being relatively small," said **Tyler Gellasch**, CEO of Healthy Markets Association. "The Archegos collapse suggests that this assumption is now misplaced."

The number of single family offices operating globally number at least 10,000, the majority created in the last 15 years, according to a 2023 report by Ernst & Young. Thousands of these firms exist in the US with more than \$2 trillion under management as of 2020, just before the Archegos collapse.



Scott Becker leaves federal court in New York on May 20.

Photographer: Alex Kent Bloomberg

Of course, there was nothing typical about Archegos. **Scott Becker**, the firm's former risk-management chief, testified in the trial that he committed crimes at the firm "because it was part of my job."

When Archegos faced overwhelming margin calls in March 2021, Hwang suggested reassuring banks by playing up the family office angle, emphasizing "we don't have clients, so we didn't have to worry about investors redeeming from the fund because of negative performance," Becker testified.

Regulatory Scrutiny

Funds managing just one family's fortune don't need to disclose as much as other firms, which regularly open their books to scrutiny from regulators. Though Congress made more investment firms register with the Securities and Exchange Commission as part of the Dodd-Frank reforms following the 2008 financial crisis, the rules specifically exempted family offices.

In the intervening years, family offices got more comfortable with investing risk, hiring talent from hedge funds. In some cases their assets eclipse hedge funds in size. Archegos was formed from the ashes of a hedge fund.

Read More: A \$6 Trillion Family Office World Fights Post-Archegos Crackdown

For a fleeting moment it seemed like the Archegos debacle could change some of the secrecy many family offices enjoy. At least two big reforms gathered steam after it collapsed.

One was the idea that banks should be forced to disclose more about their positions — the kind of change that would have satisfied Hamers' call for additional transparency. The Federal Reserve said it was concerned about banks relying on "incomplete and unverified information" from client funds, in guidance published after Archegos' demise.

"If regulators demanded more public disclosures, that would help banks and market participants better see and manage their risks," Gellasch said. "But it would also likely reduce the leverage and profitability of some funds' strategies."

Another was to subject family offices to more oversight. Democratic Congresswoman Alexandria Ocasio-Cortez of New York championed this approach, introducing a bill in 2021 that would force a subset of family offices to register as investment advisers. The Family Office Regulation Act of 2021 would require those with more than \$750 million in assets to register with the SEC, and publicly report holdings on a quarterly basis, as most other investment firms do.

'Deeply Interconnected'

"Family offices have now grown to the point that they are deeply interconnected with the rest of the financial system," Ocasio-Cortez said in a meeting of the House Committee on Financial Services in 2021, invoking Archegos. "Their activities could affect the stability of our financial markets."

But the bill was never adopted. While large investors with portfolios exceeding \$100 million in US equities are already required to divulge holdings quarterly, many family offices fall below that threshold.



Patrick Halligan, former CFO of Archegos Capital Management.

Photographer: Jeenah Moon/Bloomberg

One overhaul that did occur after Archegos concerned rules for swaps trading, which the SEC finalized in November. Another rule addressing large position disclosures for security-based swaps aimed at preventing fraud and manipulation has yet to be finalized.

That data could potentially help regulators pinpoint epicenters of market turmoil, said Edwin Hu, associate professor at University of Virginia Law School and a former SEC official.

But family offices are likely to remain a black box, Hu said.

In Hwang's trial, Archegos' Becker testified that he told UBS that the fund's position in one stock, Viacom, was about 35% of its equity — when in reality it was more like 84%.

Prosecutors asked ex-UBS risk manager **Bryan Fairbanks** what he would have thought had he known the full scale of Archegos' exposure to a single stock.

"We would've been horrified," Fairbanks testified.

--With assistance from Bob Van Voris.

Stanford's Top Disinformation Research Group Collapses Under Pressure

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By Joseph Menn

(Washington Post) -- The Stanford Internet Observatory, which published some of the most influential analysis on the spread of false information on social media during elections, has shed most of its staff and may shut down amid political and legal attacks that have cast a pall on efforts to study online misinformation.

Just three staffers remain at the Observatory, who will either leave or find roles at Stanford's Cyber Policy Center, which is absorbing what remains of the program, according to eight people familiar with the developments, some of whom spoke on the condition of anonymity to discuss internal matters.

The Election Integrity Partnership, a prominent consortium run by the Observatory and a University of Washington team to identify viral falsehoods about election procedures and outcomes in real time, has updated its webpage to say its work has concluded.

Two ongoing lawsuits and two congressional inquiries into the Observatory have cost Stanford millions of dollars in legal fees, one of the people told The Washington Post. Students and scholars affiliated with the program say they have been worn down by online attacks and harassment, amid the heated political climate for misinformation research, as legislators threaten to cut federal funding to universities studying propaganda.

Alex Stamos, the former Facebook chief security officer who founded the Observatory five years ago, moved into an advisory role in November. Observatory research manager Renee DiResta's contract was not renewed in recent weeks.

The collapse of the five-year-old Observatory is the latest and largest of a series of setbacks to the community of researchers who try to detect propaganda and explain how false narratives are manufactured, gather momentum and become accepted by various groups. It follows Harvard's dismissal of misinformation expert Joan Donovan, who in a December whistleblower complaint alleged the university's close and lucrative ties with Facebook parent Meta led the university to clamp down on her work, which was highly critical of the social media giant's practices.

"The Stanford Internet Observatory has played a critical role in understanding a range of digital harms," said Kate Starbird, who led the University of Washington's work on the Partnership and continues to publish on election misinformation.

Starbird said that while most academic studies of online manipulation look backward from much later, the Observatory's "rapid analysis" helped people around the world understand what they were seeing on platforms as it happened.

Brown University professor Claire Wardle said the Observatory had created innovative methodology and trained the next generation of experts.

"Closing down a lab like this would always be a huge loss, but doing so now, during a year of global elections, makes absolutely no sense," said Wardle, who previously led research at anti-misinformation nonprofit First Draft. "We need universities to use their resources and standing in the community to stand up to criticism and headlines."

Stanford University spokesperson Dee Mostofi said in a statement that much of the Observatory work was continuing under new leadership, "including its critical work on child safety and other online harms, its publication of the Journal of Online Trust and Safety, the Trust and Safety Research Conference, and the Trust and Safety Teaching Consortium."

"Stanford remains deeply concerned about efforts, including lawsuits and congressional investigations, that chill freedom of inquiry and undermine legitimate and much needed academic research - both at Stanford and across academia," Mostofi added.

The study of misinformation has become increasingly controversial, and Stamos, DiResta and Starbird have been besieged by lawsuits, document requests and threats of physical harm. Leading the charge has been Rep. Jim Jordan (R-Ohio), whose House subcommittee alleges the Observatory improperly worked with federal officials and social media companies to violate the free-speech rights of conservatives.

Jordan has demanded reams of documents from Stanford, including records of students discussing social media posts as they volunteered to help the Observatory, and Stamos testified before the House Judiciary Committee for eight hours.

"Free speech wins again!" Jordan posted on X Friday, calling the Observatory part of a "censorship regime."

Donald Trump adviser Stephen Miller's law firm filed a First Amendment lawsuit in May 2023 against the Observatory, Stamos, DiResta and others, which is still pending.

In a joint statement, Stamos and DiResta said their work involved much more than elections, and that they had been unfairly maligned.

"The politically motivated attacks against our research on elections and vaccines have no merit, and the attempts by partisan House committee chairs to suppress First Amendment-protected research are a quintessential example of the weaponization of government," they said.

"We are thankful to Stanford for defending our work, including in front of the U.S. Supreme Court, and are confident that the judicial system will eventually act to protect our speech and the speech of other academics." The high court will rule within weeks on a case known as *Missouri v. Biden*, which includes claims against the Observatory.

The staff cuts were first reported late Thursday by the social media newsletter Platformer.

Stamos founded the Observatory after publicizing that Russia has attempted to influence the 2016 election by sowing division on Facebook, causing a clash with the company's top executives. Special counsel Robert S. Mueller III later cited the Facebook operation in indicting a Kremlin contractor. At Stanford, Stamos and his team deepened his study of influence operations from around the world, including one it traced to the Pentagon.

Stamos told associates he stepped back from leading the Observatory last year in part because the political pressure had taken a toll. Stamos had raised most of the money for the project, and the remaining faculty have not been able to replicate his success, as many philanthropic groups shift their focus on artificial intelligence and other, fresher topics.

Major, time-limited grants from the Hewlett Foundation, Pew Charitable Trusts and others have ended, those organizations confirmed to The Post. No comparable new grants have materialized.

Staff hoped Stanford might step in to fund the group through the momentous November election.

In supporting the project further, the university would have risked alienating conservative donors, Silicon Valley figures, and members of Congress, who have threatened to stop all federal funding for disinformation research or cut back general support.

The Observatory's non-election work has included developing curriculum for teaching college students about how to handle trust and safety issues on social media platforms and launching the first peer-reviewed journal dedicated to that field. It has also investigated rings publishing child sexual exploitation material online and flaws in the U.S. system for reporting it, helping to prepare platforms to handle an influx of computer-generated material.

"We hope that Stanford is willing to support the remainder of the SIO team and serve as a safe home for future research into how the internet is used to cause harm against individuals and our democracy," Stamos and DiResta said in the statement.

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-0- Jun/14/2024 18:20 GMT

Supreme Court's Clarence Thomas took additional trips paid for by benefactor, senator says

 [reuters.com/world/us/supreme-courts-thomas-took-additional-trips-paid-by-benefactor-democrat-says-2024-06-13](https://www.reuters.com/world/us/supreme-courts-thomas-took-additional-trips-paid-by-benefactor-democrat-says-2024-06-13)

John Kruzel

Item 1 of 2 Associate Supreme Court Justice Clarence Thomas arrives for the swearing in ceremony of Judge Neil Gorsuch as an Associate Supreme Court Justice in the Rose Garden of the White House in Washington, U.S., April 10, 2017. REUTERS/Joshua Roberts/ File Photo

[1/2] Associate Supreme Court Justice Clarence Thomas arrives for the swearing in ceremony of Judge Neil Gorsuch as an Associate Supreme Court Justice in the Rose Garden of the White House in Washington, U.S., April 10, 2017. REUTERS/Joshua Roberts/ File Photo [Purchase Licensing Rights](#)  , opens new tab

WASHINGTON, June 13 (Reuters) - U.S. Supreme Court Justice Clarence Thomas took at least three additional trips funded by billionaire benefactor Harlan Crow that the conservative justice failed to disclose, the Democratic chair of the Senate Judiciary Committee said on Thursday.

Crow, a Texas businessman and Republican donor, disclosed details about the justice's travel between 2017 and 2021 in response to a Judiciary Committee vote last November to authorize subpoenas to Crow and Leonard Leo, another influential conservative figure, according to Senator Dick Durbin.

Thomas has previously come under criticism for failing to disclose gifts from Crow. Thomas on June 7 revised his 2019 financial disclosure form to acknowledge that Crow paid for his "food and lodging" at a Bali hotel and at a California club.

But the filing by Thomas failed to disclose that Crow had paid for his travel by private jet related to the Bali and California trips, and an eight-day excursion on a yacht in Indonesia - omissions revealed on Thursday in a redacted document that Durbin's office said contained travel itineraries for which Crow had provided the justice with transportation.

The document shows private jet travel in May 2017 between St. Louis, Montana and Dallas; private jet travel in March 2019 between Washington and Savannah, Georgia; and private jet travel in June 2021 between Washington and San Jose, California.

Crow reached an agreement to provide information requested by the committee dating back seven years, Crow spokesperson Michael Zona said. As a condition of this, the committee agreed to end its probe into Crow, Zona added.

"Despite his serious and continued concerns about the legality and necessity of the inquiry, Mr. Crow engaged in good faith negotiations with the committee from the beginning to resolve the matter," Zona said.

A Supreme Court spokesperson did not immediately respond to a request for comment.

"The Senate Judiciary Committee's ongoing investigation into the Supreme Court's ethical crisis is producing new information - like what we've revealed (Thursday) - and makes it crystal clear that the highest court needs an enforceable code of conduct, because its members continue to choose not to meet the moment," Durbin said.

Under pressure from criticism over ethics, the Supreme Court last November adopted its first code of conduct.

Critics and some congressional Democrats have said the code does not go far enough to promote transparency, continuing to leave decisions to recuse from cases to the justices themselves and providing no mechanism of enforcement.

Reporting by John Kruzel; Editing by Will Dunham



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Prudential Investors Get Final OK On \$35M Settlement

By **Jessica Corso**

Law360 (June 13, 2024, 8:12 PM EDT) -- A New Jersey federal judge on Thursday granted final approval to a \$35 million class action settlement between Prudential Financial Inc. and shareholders who alleged the company hid the risks associated with the purchase of thousands of life insurance policies.

U.S. District Judge Stanley Chesler signed off on a deal **first announced** in February while also granting Cohn Lifland Pearlman Herrmann & Knopf LLP and Seeger Weiss LLP's **request** to take home 25% of the settlement amount, or \$8.75 million, for work performed on behalf of the shareholders.

"The amount of attorney fees awarded hereby are fair and reasonable and are consistent with fee awards approved in cases within the Third Circuit with similar recoveries," Judge Chesler said.

The suit, filed in November 2019, alleged the company overstated its earnings and understated its liabilities when it came to approximately 700,000 life insurance policies Prudential bought from Hartford in 2013 for \$615 million.

Class members in the case were defined as those who purchased Prudential stock between June 5, 2019, and August 2, 2019.

The investors are represented by Peter S. Pearlman of Cohn Lifland Pearlman Herrmann & Knopf LLP and Christopher A. Seeger of Seeger Weiss LLP.

Prudential is represented by Tricia B. O'Reilly and David D. Cramer of Walsh Pizzi O'Reilly Falanga LLP and Maeve L. O'Connor and Susan R. Gittes of Debevoise & Plimpton LLP.

The case is City of Warren Police and Fire Retirement System v. Prudential Financial Inc. et al., case number 2:19-cv-20839, in the U.S. District Court for the District of New Jersey.

--Additional reporting by Donald Morrison. Editing by Drashti Mehta.

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Zoom's \$150M Investor Deal Nears OK, But \$50K Award Iffy

By **Bonnie Eslinger**

Law360 (June 13, 2024, 8:59 PM EDT) -- A California federal judge indicated Thursday that he'll preliminarily approve Zoom's \$150 million deal to end claims it misled investors by stating that it offered end-to-end encryption on its videoconferencing software, but told the plaintiffs' lawyers, "You're going to have to persuade me" to award the lead plaintiff \$50,000.

U.S. District Judge James Donato told the parties during a San Francisco hearing that the settlement looked good at first glance, but he wanted to see more online outreach to the class members via email, social media and through a notice on the Zoom website.

"I'm not granting preliminary approval on that basis today," the judge said. "Everything else is fine."

The judge also asked about the settlement's requested award of up to \$48,750.00 for the lead plaintiff, Adam M. Butt, as reimbursement for costs and expenses related to his representation of the class.

While noting that the award request would come up for approval later, the judge said it had "caught my eye," and that, "I never do more than \$1,500."

A lawyer for the investors, Ellen Gusikoff Stewart of Robbins Geller Rudman & Dowd LLP, said Butt had been very active in the litigation and involved in the settlement negotiations.

"He negotiated a very aggressive fee, and he has been a very interactive, involved lead plaintiff," Stewart said. "He was involved in settlement negotiations. He has been very active in staying up to date on what's going on."

Stewart also told the court that Butt is the chief executive officer of a company.

"So he was giving up his time to represent the class," she said.

Judge Donato said he was not going to compensate Butt based on the fact that he's a CEO.

"If the idea is he's a CEO billing out the equivalent of \$1,000 an hour, that's not going to happen," the judge said. "I'm not compensating based on job classification."

Darren Robbins of Robbins Geller also addressed the court and said that Butt had spent time interviewing numerous law firms before selecting Robbins Geller to be lead counsel in the case.

"He went through a very thorough process, spent dozens of hours talking to law firms, interviewing them," Robbins said.

Judge Donato asked if Butt had been the one to cap the attorneys fees at no more than 18.75% of the settlement amount.

"Unfortunately, he did," Robbins said. "And at times, it was somewhat contentious."

Butt is only seeking reimbursement for a portion of the time he spent on the case and helped the plaintiffs get a remarkable recovery, estimated at about one-third of the amount of recoverable

damages had the investors fully prevailed on the claims.

"To get about a third of the damages is pretty extraordinary," Robbins said.

Judge Donato said he wanted a written filing that explained all that Butt had done.

"You're going to have to persuade me," the judge said, adding the information provided needed to show that Butt participated in more than just attending meetings.

"If you typically charge 25 to 30%, and he got you down to 18.75 and that was his work, I'll take that into account," Judge Donato told the lawyer. "If he did more than just being a wing-man ... during mediation, I'll need to hear about that."

Robbins added that Butt also negotiated to have Zoom put up the settlement fund immediately, which meant that interest on that money is already accruing.

"He got what has now yielded over \$7 million for this class, above the \$150 million," Robbins said. "How did he do that? Because he demanded that the money be put up immediately."

The judge said that is the type of concrete benefit from Butt's participation that should go into the written filing to the court.

Counsel on Thursday did not identify what company Butt leads, and that information is not included in the operative complaint or the motion for preliminary approval. The June 2020 motion to appoint Butt as lead plaintiff in the case states that he has a "substantial financial interest in the relief" having spent more than \$979,000 purchasing 6,261 shares of Zoom securities and suffering approximately \$209,500 in losses as a result of Zoom's alleged misconduct.

The investors **filed suit** in 2020, claiming that Zoom misrepresented its security measures and data privacy protections in its initial public offering documents. According to the shareholders, this became clear after Zoom's videoconferencing service was widely adopted during the early days of the COVID-19 pandemic, and subsequent media reports raised doubts about the company's actual encryption capabilities and customer data management.

In early 2022, Judge Donato **dismissed the majority of the claims** but said Zoom must continue to fight a fraud claim stemming from allegations that it lied to investors about its encryption offerings.

The parties began mediating a few months after that order was handed down, according to the **motion for preliminary approval**, filed in October.

That motion states that the deal covers individuals across the country who purchased or acquired Zoom Video Communications Inc. stock between April 2019 and April 2020. The settlement amount will be distributed to authorized claimants based on the relative size of their claims, and the amount of the payment will depend on how many class members file valid claims and the aggregate value of those claims.

There were roughly 48.7 million shares of Zoom common stock outstanding as of December 2020, according to the motion.

In addition to an attorney fee award of 18.75% of the settlement amount, the proposed deal seeks litigation expenses of up to \$400,000, according to the motion for preliminary approval.

The proposed class is represented by Darren Robbins, Shawn Williams, Ellen Stewart, Patton Johnson and Heather Geiger of Robbins Geller Rudman & Dowd LLP.

Zoom is represented by Patrick Gibbs, Tijana Brien and Craig TenBroeck of Cooley LLP.

The case is In re: Zoom Securities Litigation, case number 3:20-cv-02353, in the U.S. District Court for the Northern District of California.

--Additional reporting by Hailey Konnath. Editing by Dave Trumbore.

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Tesla Investors Sue Over Musk's Extracurricular xAI Diversion

By **Lauren Berg**

Law360 (June 13, 2024, 8:34 PM EDT) -- A union pension fund and two individual investors hit Elon Musk and Tesla's board of directors with a derivative suit Thursday in Delaware Chancery Court over the CEO's breakaway effort to develop a new artificial intelligence venture, xAI, by diverting talent and resources from Tesla's own AI initiative.

The Cleveland Bakers and Teamsters Pension Fund, Daniel Hazen and Michael Giampietro want Musk's equity stake in xAI Corp. disgorged to Tesla Inc., claiming Musk has siphoned value from the electric auto giant by poaching "scarce talent and resources" from Tesla for the new AI venture, according to the 76-page complaint.

For years, Tesla and Musk have touted artificial intelligence as a large part of the company's focus and long-term future, the suit states. But after the Chancery Court in January **struck down** Musk's proposed \$55 billion pay package, Musk has responded by ramping up operations at xAI, which raised \$6 billion in a new round of funding last month, the investors say.

"Through all of this, Musk's fellow directors on the Tesla board of directors have done nothing," the investors contend. "The board has allowed Musk — the CEO and largest stockholder of Tesla — to found and lead another AI company; to plunder resources from Tesla and divert them to xAI; and to create billions in AI-related value at a company other than Tesla."

"Consistent with its long history of obsequiousness to Musk, the Tesla board has utterly failed to even attempt to meet its unyielding fiduciary duty to protect the interests of Tesla and its stockholders in the face of Musk's brazen disloyalty," they add.

In 2015, Musk was one of the investors that helped establish OpenAI as an artificial intelligence research and development center, but as Tesla increased its own focus on AI, Musk's involvement with OpenAI created a conflict, according to the complaint. He initially tried to fix this problem by having Tesla to acquire OpenAI, but his fellow directors at OpenAI rejected this plan, the suit states.

Musk resigned from OpenAI's board in February 2018, and Tesla became more focused on AI, according to the complaint.

But in 2021 and 2022, Musk sold more than \$39 billion worth of his Tesla shares to cover tax payments and help fund his purchase of Twitter, now called X Corp, the complaint states. That caused his holdings in Tesla to fall to 13%, and the CEO said he was "uncomfortable" growing Tesla as an AI company without having at least 25% voting control, the suit states.

Tesla's stock price is closely tied to AI and the company's plans for autonomous vehicles, and Musk's comments led to a stock price drop of about 3%, the investors contend.

In March 2023, Musk founded xAI as a competitor to OpenAI's ChatGPT and Google's Bard chatbot products — as well as Tesla, the investors say. But he used Tesla's engineering and data to catch up with OpenAI and other competitors, which allowed xAI to launch its first chatbot in mere months, the suit adds.

The investors claim Musk also poached talent from Tesla to work at xAI.

And "the Tesla board has done nothing as Musk has diverted value, personnel, data and resources from Tesla to xAI," the investors say. "The board's failure to act constitutes an obvious breach of its members' unyielding fiduciary duty to protect the interests of Tesla and its stockholders."

"Musk is creating enormous value at xAI — potentially worth hundreds of billions of dollars in the near future — at Tesla's expense," they add.

The suit asserts derivative claims for breach of fiduciary duty and unjust enrichment.

It seeks damages that the investors say Tesla has sustained as a result of the breaches of fiduciary duties and unjust enrichment, as well as disgorgement of Musk's equity stake in xAI to Tesla and imposition of a trust over Musk's interest in xAI.

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

Also on Thursday, Tesla's shareholders **voted to reaffirm** Musk's multibillion-dollar pay award and approved moving the company's incorporation from Delaware to Texas.

Estimates of the value of Musk's compensation plan have fallen in recent months, tracking the downward drift of Tesla's shares, with estimates currently around \$47 billion.

The investors are represented by Christine M. Mackintosh, Vivek Upadhyia and William G. Passannante II of Grant & Eisenhofer PA, Thomas Curry, David J. Schwartz, David L. Wales and Adam D. Warden of Saxena White PA, and Brian Schall of The Schall Law Firm.

Counsel information for the defendants was not immediately available.

The case is Cleveland Bakers and Teamsters Pension Fund et al. v. Elon Musk et al., case number 2024-0646, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery and Sarah Jarvis. Editing by Kristen Becker.



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9th Circ. Doubts SPAC Investors Can Sue Lucid Over Merger

By **Dorothy Atkins**

Law360 (June 13, 2024, 7:55 PM EDT) -- A Ninth Circuit panel appeared skeptical Thursday of investors' bid to revive a proposed class action alleging that Lucid duped them into buying stock in a special-purpose acquisition company ahead of the electric-vehicle maker's \$11.75 billion merger, with two of three judges doubting that the SPAC investors have standing to sue.

The judges' comments came during a hearing before a three-judge panel on an appeal by investors who purchased shares of the special-purpose acquisition company Churchill Capital Corp IV, in early 2021 before it merged with Lucid in an **11-figure deal** that closed in July 2021.

The trip to the Ninth Circuit is the latest chapter in a lawsuit that Churchill investors filed in 2021, following the private company's merger with the so-called SPAC — which is designed to raise money to acquire an entity, take it public and generally take over businesses in industries where their executives have expertise.

The investors alleged that Atieva Inc, which does business as Lucid Motors, and its CEO, Peter Rawlinson, coerced them into buying Churchill stock by overstating Lucid's electric-vehicle production forecasts and capabilities, despite knowing at the time that the Lucid factory was not functional.

After the merger was official and trading closed, Lucid announced the company would produce only 577 of its vehicles — dubbed Lucid Airs — in 2021, not 6,000 to 7,000, as it had previously stated, prompting the post-merger stock's price to plummet 49.9%. The suit sought to certify a class of investors who bought the SPAC stock before the merger from Feb. 5, 2021, through Feb. 22, 2021.

In February 2022, Lucid and Rawlinson asked U.S. District Judge Yvonne Gonzalez Rogers to throw out the case, arguing that the SPAC investors lacked standing and failed to point to actionable misrepresentations by the company.

In January 2023, Judge Gonzalez Rogers **rejected** Lucid's arguments on standing, but agreed with the defendants that the investors had failed to offer facts showing that statements by Lucid and its executives were material in their decisions to purchase SPAC stock, and failed to allege that the merger was likely to happen at the time of the purportedly misleading statements.

The investors **appealed**, and during the hearing Thursday, their counsel, Jake Bissell-Linsk of Labaton Keller Sucharow LLP, argued that the trial judge erred by applying a heightened pleading standard and substituting her own judgment for what a reasonable investor would have understood based on the alleged misstatements.

However, all three judges on the panel commented during the hearing that the appellate court is likely bound by the U.S. Supreme Court's 1975 holding in **Blue Chip Stamps v. Manor Drug Stores**, which suggests that the investors had to have bought the stock at issue to have standing to assert a viable securities fraud claim against Lucid.

U.S. Circuit Court Judges Ryan Nelson and Richard C. Tallman told Bissell-Linsk that under Blue Chip, the SPAC investors appear to lack standing to sue Lucid, particularly since the alleged misstatements were based on **rumors** of merger negotiations, and neither Lucid nor the SPAC confirmed or denied that the rumors were true at the time.

"The problem I'm having is that your claim here dealt with misrepresentations concerning Lucid, but the stock actually acquired was in a different company, Churchill," Judge Tallman said.

Bissell-Linsk replied that the "defendants have tried to construct this view that we're doing something odd here," but he argued that the standard in all cases is that the alleged misstatement was material to the purchase, regardless of whether the purchase was made in a SPAC or the private company.

Judge Tallman appeared to disagree.

"I'm still struggling," he said. "It seems to me that the Supreme Court has said that normally rumors with regard to potential mergers and acquisitions that neither company confirmed or denied [are] not material, and therefore you've got to have something more in order to tie the misrepresentation to the purchase or sale of the security."

In light of the Blue Chip holding, Judge Tallman also asked why the court should not assume that a reasonable investor would know that not all merger talks result in a final deal, and that deals may fall through during the due diligence process.

He also said that the investors don't know what Churchill discovered about Lucid during its due diligence process, or whether the SPAC was aware of the vehicle production discrepancies and paid a lower price as a result.

"Why wouldn't an investor appreciate the fact that the acquiring company may have also learned of [Lucid's production] information, maybe at the same time the investors did, but nonetheless decided to go forward with the acquisition while knowing the startup production of the electric vehicle would be delayed significantly?" the judge asked.

Bissell-Linsk acknowledged that it was not certain that the merger would close, but he argued that the issue is irrelevant to the case and the misrepresentation allegations raised by the investors.

"The degree of uncertainty involved is not a gate-keeping question here," he said. "You don't have to believe it was a certainty."

Brian Burnovski of Davis Polk & Wardwell LLP, who represents Lucid and Rawlinson, argued that the trial court got it right in tossing the suit, but he also agreed with the appellate court's suggestion that the SPAC investors never had standing to sue in the first place.

He said that the allegations are based in part on baseless news articles reporting rumors about the parties potentially negotiating a merger, but on no announcement about the merger itself.

"All you have here is rumors about a discussion about a transaction," he said.

Burnovski added that in the Blue Chip decision, the U.S. Supreme Court aimed to address a policy concern regarding vexatious investor litigants, and the court wanted to be careful not to expand the scope of a federal securities fraud claim.

Judge Tallman appeared to agree with Burnovski's arguments, but he also observed that "the only heartburn I have" with Lucid's position is that the SPACs exist solely for the purchase of raising capital to invest in entities like Lucid.

During a short rebuttal argument, Bissell-Linsk urged the court to revive the case, arguing that Lucid's counsel was misreading Blue Chip and the high court's guidance on standing, and case law has made clear there is no such "bright-line rule" regarding standing.

Judge Tallman asked whether the investors think that even though Lucid was a private company, the SPAC somehow served as a proxy for it before the merger.

Bissell-Linsk agreed, saying that was a "reasonable way of looking at it."

At the end of the hearing, the panel took the arguments under consideration.

In December 2021, Lucid **disclosed** that the U.S. Securities and Exchange Commission was investigating the \$11.75 billion merger with Churchill and that the regulator had issued a subpoena for certain documents. In May 2023, Lucid announced in a public filing that the SEC had informed the company it closed its investigation without taking any enforcement action.

U.S. Circuit Court Judges Ryan Nelson, Ronald M. Gould and Richard C. Tallman sat on the panel.

The investors are represented by Jake Bissell-Linsk of Labaton Keller Sucharow LLP.

Lucid and Rawlinson are represented by Brian Burnovski of Davis Polk & Wardwell LLP.

The case is Max Royal LLC et al. v. Atieva Inc. et al., case number 23-16049, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Hailey Konnath and Katryna Perera. Editing by Peter Rozovsky.

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Chegg Directors, Auditor Beat Academic Cheating Lawsuit

By **Jeff Montgomery**

Law360 (June 13, 2024, 5:33 PM EDT) -- Delaware's Court of Chancery has issued a failing grade to a stockholder of online book and study aid giant Chegg Inc. who accused the company of operating as a cheating service for students, dismissing the case for lack of supporting facts.

Vice Chancellor Paul A. Fioravanti, in a 21-page opinion issued Wednesday, rejected stockholder Brian Stansell's allegations that Chegg's directors were required to disclose the company's alleged support for cheating, saying that Chegg's board had no obligation to engage in self-flagellation. Also tossed was a count accusing auditor Deloitte & Touche LLP of aiding and abetting the purported actions.

"Despite having utilized the tools at hand to inspect Chegg's books and records, plaintiff has not referenced a single document or statement by any of the defendants in his complaint to support his assertion that Chegg's 'primary business model' is to facilitate cheating by students," the opinion said.

Stansell filed his Chancery proposed class action in February 2023, more than a year after the launch of other securities and derivative damages class actions targeting the same alleged conduct by Chegg.

The latter cases, which noted the skyrocketing use of Chegg after the COVID-19 pandemic closed classrooms nationwide, were consolidated in the U.S. District Court for the Northern District of California. District Judge P. Casey Pitts in March rejected dismissal of the action on March 4.

In the Delaware case, Vice Chancellor Fioravanti said Stansell "has not referenced a single document or statement" by any of those named in his suit to support his claims. Instead, according to the opinion, Stansell drew on conclusions from public information prior to a 2022 meeting in which four directors were re-elected.

Stansell's suit sought a declaration that a proxy for the company's 2022 annual meeting was misleading, as well as an order for a new election. Although the complaint asserted that the alleged disclosure failures caused "significant damages," during argument on dismissal in February the claim was described as seeking only nominal damages.

The complaint also sought an order directing the board to "take all necessary actions to reform and improve its corporate governance and internal procedures" to protect Chegg and its stockholders, the vice chancellor said in a footnote of his decision.

During oral argument in February, the vice chancellor recalled pressing counsel for Stansell to provide an example of other cases where the court had directed a board, as sought by Stansell, "to take all necessary actions to reform and improve its corporate governance and internal procedures to comply with applicable laws, and to protect Chegg and its stockholders from a repeat of the damaging events" in the complaint.

The vice chancellor said Stansell's counsel replied that, "if I could go back and take that out of the complaint, I would," and later did so.

Stansell's argument, the opinion said, asserted that "some" Chegg customers use the service to cheat and that Chegg services account for a majority of the company's revenues, ultimately

reasoning that its primary business model is to facilitate cheating.

"The gap in logic is evident from his failure to present any allegations or argument about the extent to which the entire customer base uses Chegg services to cheat," the vice chancellor wrote.

"Anecdotal evidence that some customers use Chegg services to cheat is not, by itself, sufficient" to support claims that the company's entire business model is propped up by cheating.

"The company disclosed the nature of its products, and Chegg's products are a tool," the vice chancellor concluded. "Foreseeable misuse thereof was obvious, and plaintiff himself asserts that actual misuse was public knowledge."

In addition to rejecting Stansell's claim that Chegg's directors breached their fiduciary duties by failing to disclose cheating as the company's primary business model, the court also shunned claims that the disclosures should have occurred as part of the company's election of directors and its appointment of an auditor.

A motion for reconsideration of the dismissal rejection is pending in the consolidated federal case in Northern California.

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

Stansell and the proposed class are represented by Kurt M. Heyman and Gillian L. Andrews of Heyman Enerio Gattuso & Hirzel LLP, and Gustavo F. Bruckner, Samuel J. Adams and Ankita Sangwan of Pomerantz LLP.

Chegg's directors are represented by William M. Lafferty, Susan W. Waeso and Emily C. Friedman of Morris Nichols Arsht & Tunnell LLP, and Dean Kristy, Jennifer C. Bretan and Felix S. Lee of Fenwick & West LLP.

Deloitte & Touche is represented by Ethan H. Townsend, Daniel T. Menken and Timothy E. Hoeffner of McDermott Will & Emery LLP.

The case is Stansell v. Rosensweig et al., case number 2023-0180, in the Court of Chancery of the State of Delaware.

The consolidated federal case is Leventhal v. Chegg Inc. et al., case number 5:21-cv-09953, in the U.S. District Court for the Northern District of California.

--Editing by Melissa Treolo.



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Cloud Software Co. Brass Hid Revenue Woes, Suit Says

By **Sydney Price**

Law360 (June 13, 2024, 6:42 PM EDT) -- Insiders of software company Fastly Inc. were hit with a shareholder derivative suit alleging they overstated the company's revenue capabilities following a period of unsustainable customer growth.

According to the suit filed by shareholder Anand Roy in California federal court on Wednesday, Fastly operates a content delivery network, or a network of servers and data centers that content owners, like media companies and e-commerce vendors, pay to use. Some companies use multiple CDNs, but in 2023, several content owners shifted toward using fewer CDNs to simplify operations and increase efficiency, the complaint claims.

Fastly initially benefited from the consolidation trend, but would eventually lose the market share it gained, Roy said.

In addition to nominal defendant Fastly, the suit's individual defendants include CEO Todd Nightingale, Chief Financial Officer Ronald W. Kisling and eight directors.

The relevant period begins on Feb. 15, 2024, the day after Fastly announced fourth-quarter and full-year 2023 earnings. The same day, it also issued full-year 2024 guidance in a range of \$580 million to \$590 million, the suit states.

During an investor call that day, Nightingale told shareholders Fastly's customer growth would fuel revenue growth for "years to come," and the customer growth is diversifying revenue, according to the complaint.

Later that month, Fastly filed an annual report with the U.S. Securities and Exchange Commission that also did not disclose material information regarding its financial prospects, the complaint alleges.

The suit also says several defendants signed a false and misleading proxy statement filed with the SEC on April 24.

"Contrary to the 2024 Proxy Statement's descriptions of the Board's and its committees' risk oversight functions, the Board and its committees were not adequately exercising these functions and were causing or permitting the Company to issue false and misleading statements," the complaint states.

When the company announced its first-quarter 2024 earnings on May 1, Fastly lowered its full-year 2024 revenue guidance to a range of \$555 million to \$565 million, which was below consensus estimates of \$584.62 million for the same period, according to the complaint. Total revenue for the quarter was \$133.5 million, which represents a 14% year-over-year increase and missed consensus estimates by \$350,000, the suit states.

During the investor call that day, Kisling said Fastly is "facing a challenging environment of revenue declines" in its largest customers, which overshadowed the impact of new customer acquisition and product pipeline, according to the complaint.

The next day, Bank of America downgraded Fastly stock to "underperform" from "buy," and cut its price target on the Fastly shares to \$8 from \$18, the suit says.

On the news, Fastly's shares declined \$4.14, or 32%, to close at \$8.79 per share on May 2, according to the complaint.

Additionally, the suit alleges several of the individual defendants, including Nightingale and Kisling, engaged in insider trading, netting proceeds of approximately \$1.4 million.

The derivative suit accuses the defendants of violating the Exchange Act, breaching their fiduciary duties, gross mismanagement, abuse of control, wasting corporate assets and being unjustly enriched.

The complaint also notes Fastly is facing a **securities suit** filed last month in California federal court over its alleged misrepresentations to investors.

Counsel for Roy declined to comment on the derivative suit. Fastly did not immediately respond to requests for comment on Thursday.

Roy is represented by Robert C. Moest and Timothy Brown of The Brown Law Firm PC.

Counsel information for Fastly and the individual defendants was not immediately available on Thursday.

The case is Roy v. Nightingale et al., case number 3:24-cv-03549, in the U.S. District Court for the Northern District of California.

--Editing by Vaqas Asghar.

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Judge OKs RBS, Lloyds Bank and Others' \$1.9M Libor Deal

By **Sydney Price**

Law360 (June 13, 2024, 6:24 PM EDT) -- A New York federal judge has granted preliminary approval to a \$1.9 million deal between lender plaintiffs and several large banks, including the Royal Banks of Scotland, Lloyds, and others, over their alleged role in manipulating the London Interbank Offered Rate.

According to U.S. District Judge Naomi Reice Buchwald's Thursday order issued, a fairness hearing is scheduled for October 17.

The Berkshire Bank and the Government Development Bank of Puerto Rico, known together as the "lender plaintiffs," filed a **motion for preliminary approval** in May, saying the deal was negotiated at arm's length with experienced counsel from Pomerantz LLP. The motion did not state how much lead counsel intends to seek in attorney fees or other litigation costs.

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

The class, certified for the purposes of the settlement, includes all U.S.-based lending institutions that originated, held, owned or purchased loans or held interest in loans with interest rates based upon U.S. dollar Libor, which rates adjusted at any time between Aug. 1, 2007 and May 31, 2010.

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

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

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

--Editing by Drashti Mehta.

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Visa, Mastercard Fee Deal Not 'Likely' To Get Court Approval

By **Hailey Konnath**

Law360 (June 13, 2024, 11:30 PM EDT) -- A New York federal judge said at a hearing Thursday that she will "likely not approve" Mastercard and Visa's proposed settlement in long-running litigation over merchant transaction fees, according to the case docket.



Mastercard and Visa's proposed deal that would slash their merchant fees by approximately \$30 billion will likely not be approved after retailers such as Target, Grubhub and Barnes & Noble have objected. (AP Photo/Mark Lennihan, File)

U.S. District Judge Margo K. Brodie's comment was made during a hearing considering preliminary approval of the deal, under which Visa and Mastercard would slash their merchant fees by approximately \$30 billion. A long list of companies has objected to the settlement, including Grubhub, Target Corp. and Barnes & Noble. Attorneys for Target and Grubhub were among those who argued during Thursday's hearing.

According to the docket entry, "The court will issue a written decision, but informed the parties that it will likely not approve the settlement."

Judge Brodie has also agreed to remand Grubhub's action to the Northern District of Illinois, where its case initially began, per the docket. Grubhub had said in April that it wanted out of the class so it could move forward with its "trial-ready damages claims."

Counsel for the parties didn't immediately respond to requests for comment late Thursday.

Visa and Mastercard **settled** with merchants in March, agreeing to reduce fees significantly over the next few years and eliminate restrictions on steering customers to cheaper payment options. Specifically, Visa and Mastercard have agreed to roll back credit card processing fees and remove restrictions that prevent merchants from adjusting prices and discounts based on the cost of accepting different credit cards.

The dispute goes back nearly 20 years. Since 2005, Mastercard and Visa have been battling multidistrict litigation alleging they and several banks — including Barclays and JPMorgan Chase & Co. — conspired to maintain a set of rules that allowed the credit card companies to overcharge merchants whenever customers used their cards.

More than a decade ago, the credit companies and a handful of banks agreed to pay \$6 billion to put to rest a similar set of claims over interchange fees. However, that deal was axed by the Second Circuit in 2016.

In 2018, merchants reached a new deal with the credit companies worth about \$5.6 billion. Judge Brodie approved that settlement in 2019, and the Second Circuit eventually upheld it.

That agreement was with merchants seeking damages for their losses. The settlement before Judge Brodie now involves Visa and Mastercard and plaintiffs that wanted to see the rules around the merchant fees changed.

In their objections to the latest deal, Target and Grubhub **have argued** that the deal isn't fair to anyone except the credit companies.

"Every aspect of this settlement undermines the normal purpose of class certification — allowing small groups to band together to assert claims against a powerful defendant," Target said in its filing. "This class has instead allowed itself to be used as a tool by powerful defendants to expand and insulate their supracompetitive price-fixing scheme, earning class counsel a potential \$170 million fee in the process."

Another group of retailers **led by 7-Eleven** said the deal would just codify an illegal price-fixing agreement.

"This settlement asks this court to put its imprimatur on supracompetitive credit card interchange rates that Visa and Mastercard, improperly, jointly agreed to with the complicity of the [equitable relief class counsel]," those retailers said.

The settling merchants are represented by Steve Shadowen of Hilliard & Shadowen LLP, Robert Eisler of Grant & Eisenhofer PA, Linda Nussbaum of Nussbaum Law Group PC and Michael Freed of Freed Kanner London & Millen LLC.

The 7-Eleven plaintiffs are represented by Jeffrey I. Shinder, A. Owen Glist, Ankur Kapoor, Taline Sahakian and David A. Scupp of Constantine Cannon LLP.

Grubhub and Target are represented by James A. Wilson, Robert N. Webner, Douglas R. Matthews, Kimberly Weber Herlihy, Alycia N. Broz and Kenneth J. Rubin of Vorys Sater Seymour & Pease LLP. Target is also represented by Kathy Patrick and Barrett Reasoner of Gibbs & Bruns LLP.

Visa Inc. is represented by Arnold & Porter Kaye Scholer LLP and Holwell Shuster & Goldberg LLP.

Mastercard is represented by Paul Weiss Rifkind Wharton & Garrison LLP.

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

--Additional reporting by Jared Foretek, Matthew Perlman and Nadia Dreid. Editing by Michael Watanabe.



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Apple Fights To Ax 'Speculative' iPhone App Antitrust Suit

By **Bonnie Eslinger**

Law360 (June 13, 2024, 11:02 PM EDT) -- Apple urged a California federal judge Thursday to toss a proposed antitrust class action alleging the company illegally prevents iPhones from running web-based apps that don't need to be downloaded, arguing consumers don't have standing to bring the "speculative" litigation since they're not directly injured by Apple's agreements with developers.

U.S. District Judge Richard Seeborg didn't issue a ruling from the bench after Thursday's hearing in San Francisco, saying he'd take the matter under submission and issue a decision later. He asked the parties to direct their arguments on the issue of whether the consumer plaintiffs have a sufficient connection to Apple Inc.'s alleged antitrust conduct to bring a case into court.

"Seems the big battle is ... the antitrust standing question," the judge said. "So, that's what I'm focused on here."

Daniel Swanson of Gibson Dunn & Crutcher LLP, who represents Apple, said the consumers' theory of causation is too indirect and speculative.

"What is striking about this case is the enormously long and convoluted chain of causation that it poses," Swanson said.

The theory starts with the assertion that there's a restraint on developers who create web applications that are accessed via a web browser. The suit claims Apple only allows web browsers to be installed on iPhones if the company's browser engine is used, which does not enable web apps, according to the complaint.

"And so, step one is in the but-for world, browser developers would enter with their own browser engines," Swanson said.

From there, there's a chain of events that would have to take place to get to the consumers' theory of harm — that Apple's rules requiring use of its browser engine inflates iPhone prices, he contended.

"We don't have proximate causation here," he told the court.

The judge asked if the number of links in the chain means antitrust standing can't be shown.

"You need to have enough directness," Swanson said, arguing that the number of steps isn't as important as "you're looking at something that really can't practically be characterized as direct in any way."

In addition to indirectness, the chain of causation is "speculative," he stated.

"Here because of so many links, we're pancaking kind of independent decision after independent decision," Swanson said. "And that ultimately adds up to excessive speculation."

He asserted that another fatal ground for denying standing is that the alleged anti-competitive restraint involves developers in the browser market, which is different from the alleged harm in the smartphone market.

When it was time for the plaintiffs' counsel to argue, Judge Seeborg asked about the causal path that gets to the alleged injury for consumers.

Yavar Bathaee of Bathaee Dunne LLP, who represents the consumers, told the court Apple has created a "barrier to entry" by stipulating that web browsers can only be installed on iPhones if its browser engine is used, which does not enable web apps. That ultimately impacts consumers he said.

"Maybe it restrains people who want to deploy interoperable apps that run on Android and app Apple iOS," Bathaee said.

The judge took aim at the phrasing of the lawyer's point, saying the uncertainty seems "amorphous" and "kind of speculative."

Bathaee said the argument about speculativeness was not something the consumers have to wrestle with at this stage.

Judge Seeborg disagreed.

"The law says it can't be too attenuated," he said.

Bathaee argued that the overcharge in the iPhone market directly results from Apple restraining developers from creating web apps that could be deployed across platforms, both desktop and mobile. All that keeps them from being deployed on the iPhone is Apple's agreement with Google and others.

Bathaee cited the April 2023 Ninth Circuit decision in **Epic Games Inc. v. Apple** , saying a plaintiff must show that the defendant uses its market power to harm competition.

"It is sufficient that the plaintiff prove the defendant's conduct, as matter of economic theory, harms competition — for example that it increases barriers to entry or reduces consumer choice by excluding would-be competitors that would offer differentiated products," Bathaee stated, reading from the ruling.

That's the plaintiffs' theory in the case now before Judge Seeborg, Bathaee explained.

The suit, first **filed in January**, claims that the technology allowing for so-called "progressive web apps" has been around since the late 2010s, but Apple uses the agreements to prevent cross-platform, web-based applications from running on iPhones because it sees the technology as a major threat to the ecosystem and its dominance in the smartphone space.

The agreements require any browser developed for the iPhone to use Apple's browser engine, WebKit, which the suit contends does not support progressive web apps.

In its March **motion to dismiss**, Apple asks the court to dismiss the litigation at the pleading stage, arguing that the plaintiffs lack Article III standing to bring their antitrust claims given their "convoluted," "attenuated and speculative" theory of harm.

The consumers defend their standing to bring the claims in a May response saying the higher prices they have paid are directly linked to the WebKit agreements and the "harm they cause to competition in the smartphone" market.

The consumers say web engines that can run cross-platform apps already exist, pointing to Google's Blink and Mozilla's Gecko. They also contend that new rules in Europe have forced Apple to abandon the WebKit restrictions there, and the company was able to make changes to its operating system promptly in response.

Apple also argues that the claims are time-barred because the developer agreements at issue are from outside the four-year statute of limitations for antitrust claims.

But the buyers assert in their response that their purchases of iPhones all occurred within the limitations period and that their "overcharges" constitute an "overt act" that resets the limitations

period.

The plaintiffs are represented by Yavar Bathaee, Brian J. Dunne, Edward M. Grauman and Andrew C. Wolinsky of Bathaee Dunne LLP.

Apple is represented by Cynthia E. Richman, Daniel G. Swanson and Julian W. Kleinbrodt of Gibson Dunn & Crutcher LLP.

The case is Luisa Bakay et al. v. Apple Inc., case number 3:24-cv-00476, in the U.S. District Court for the Northern District of California.

--Additional reporting by Matthew Perlman, Dorothy Atkins and Bryan Koenig. Editing by Kristen Becker.

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Norfolk Southern Slams Bid To Seal Reports In Derailment Suit

By **Ryan Harroff**

Law360 (June 13, 2024, 6:06 PM EDT) -- Norfolk Southern ripped into a chemical company's bid to seal two expert reports from a former first responder that the railroad sought to file in the multidistrict litigation over last year's derailment and chemical spill in Ohio, saying the chemical firm's arguments are weak and misstate the issues.

Norfolk Southern Railway Co. and Norfolk Southern Corp.'s opposition filing said OxyVinyls LP's Monday effort to seal two reports from Michael Lunsford and redact portions of its brief seeking to exclude those reports from the case entirely is built on a falsehood. OxyVinyls' motion to seal noted that Norfolk Southern had designated Lunsford's reports on its derailment response efforts as "attorneys eyes only," but the rail company said Wednesday that it never opposed filing them publicly.

Norfolk Southern is pressing **third-party claims** contending that OxyVinyls had a role in the East Palestine derailment, as the railroad seeks to avoid exclusive liability for class claims over the derailment it recently **settled for \$600 million**.

"OxyVinyls moves for sealing solely 'on the basis that Norfolk Southern designated these reports as attorneys eyes only,' Norfolk Southern said, quoting OxyVinyl's sealing bid. "This misstates the matter. While it is true that Norfolk Southern designated Mr. Lunsford's reports as attorneys eyes only, Norfolk Southern did so solely because the reports contained material that OxyVinyls had designated as attorneys eyes only. OxyVinyls knows this."

Meanwhile, OxyVinyls has already filed its redacted brief in support of excluding those reports entirely, contending the reports were filed by Norfolk Southern past its deadline to enter evidence.

In its opposition to OxyVinyls' sealing bid, the rail company said OxyVinyls failed to follow proper procedure in addition to the eyes-only designation issue.

"OxyVinyls filed its motion to seal without notifying Norfolk Southern of its intent to file the motion, denying Norfolk Southern the opportunity to challenge this false framing or state that it does not oppose public filing of the reports," the opposition said. "Since that false framing is the sole basis on which OxyVinyls seeks sealing, the motion to seal should be denied on this ground alone."

Norfolk Southern also said the motion to seal is not narrowly tailored enough to be granted. OxyVinyls had also said that there was not a public interest in disclosing the reports at issue publicly before trial, as any admissible reports would be public anyway. The rail company said the chemical firm's public interest argument "falls flat" and is not enough to justify sealing the entire reports.

The court should order OxyVinyls to file an unredacted version of its bid to fully exclude Lunsford's reports, Norfolk Southern argued, and the reports themselves should also be filed publicly.

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

Norfolk Southern is represented by Alan Schoenfeld, Davina Pujari, Christopher Rheinheimer, Albinas Prizgintas and Katherine Mackey of WilmerHale and J. Lawson Johnston, Scott D. Clements, Aaron Ponzo and Paul Roman of Dickie McCamey & Chilcote PC.

OxyVinyls is represented by Kimberly Weber Herlihy and Alycia N. Broz of Vorys Sater Seymour and Pease LLP.

The case is In re: East Palestine Train Derailment, case number 4:23-cv-00242, in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Linda Chiem. Editing by Brian Baresch.

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How 3 Firms Cleared 2 Ex-Autonomy Execs In HP Fraud Case

By **Bonnie Eslinger**

Law360 (June 13, 2024, 2:20 PM EDT) -- A California federal jury's rejection last week of fraud charges against the founder and former finance vice president of British software company Autonomy validated an approach by the defendants' three law firms — Steptoe, Clifford Chance and Bird Marella — to form a "seamless" collaboration throughout the trial, from jury selection to closing arguments.

Autonomy founder Michael Lynch and ex-VP Stephen Chamberlain faced formidable odds when their federal criminal fraud trial kicked off three months ago on allegations that they conned HP into overpaying billions for Autonomy.

Lynch's right-hand man and Chamberlain's boss, ex-Autonomy Chief Financial Officer Sushovan Hussain, had already been **convicted in 2018** by a San Francisco federal jury of fraud and securities charges. And in England, where HP brought a civil case against Autonomy, a London judge ruled in 2022 that Lynch fraudulently inflated the value of his company ahead of **its 2011 sale** to the Silicon Valley tech giant for \$11.7 billion.

Conviction rates for defendants in U.S. federal criminal cases also didn't lean in their favor. Only 290 of some 70,000 defendants in federal criminal cases — about 0.4% — were acquitted at trial in fiscal year 2022, according to a Pew Research Center analysis.

Brian Heberlig, a white collar partner with Steptoe LLP, which represented Lynch alongside Clifford Chance LLP, told Law360 that prior to the trial's March kickoff he printed out news articles that included such "scary statistics" and pinned them to his wall so he'd see them daily as he prepared for court. It was powerful motivation, he said.

"I'm used to long odds, that comes with the territory in our line of work," Heberlig said. "It certainly kept me going."

Eleven weeks after the trial's start, following two days of deliberations, the 12-member jury arrived at a unanimous verdict, clearing both men of **conspiracy and wire fraud counts** that had threatened to put them behind bars for years.

Focusing on the Common Mission

A key to success was the working relationship between counsel for the defendants, which Heberlig called "seamless."

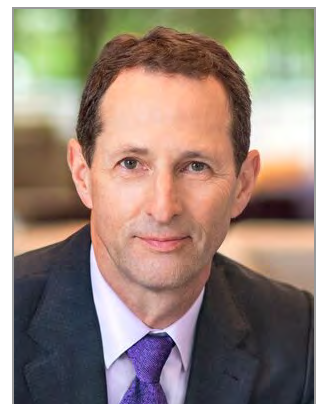
Lynch hired British multinational law firm Clifford Chance and partner Chris Morvillo to represent him in 2012, after HP reported **billions in losses** that it attributed to its acquisition of Autonomy. As U.S. investigators began looking into the matter, Steptoe was also brought on board to help lead that piece of it, Morvillo explained to Law360.



Christopher J. Morvillo



Brian M. Heberlig



Gary S. Lincenberg

Chamberlain's lead lawyer, Gary Lincenberg of Bird Marella Rhow Lincenberg Dooks & Nessim LLP, also touted the cooperative spirit between counsel as a winning move.

"My co-counsel were phenomenal; we worked together very well in a joint defense arrangement for many years," Lincenberg said, adding that it also helped his client "because they had a lot of firepower, a lot more resources."

Aligning to Choose Jurors

Among the areas on which the defense worked closely together was the process of selecting jurors.

"It was part of our strategy," Lincenberg said. "The Lynch team in particular, I think, wanted people with an understanding of tech companies."

The jury that was selected, including the alternates, included a few people who worked in technology, like engineers, as well as an oncologist, a person who worked in investment banking and an **aspiring attorney** about to go to law school, Morvillo said.

"We did our best to try to get people on the jury who were college-educated and seemed like they would be an intelligent bunch who would follow the evidence," Heberlig said. "And we succeeded. It was a great jury."

Distinguishing Their Client's Role

When the trial started, Morvillo said, it was important for the jury to understand how Lynch had a role distinct from others at Autonomy — and also how far away he was from the allegations brought by the government.

"The theme that emerged from the crucible of this ordeal was the role that he played in the company, which was really focusing on the strategy, the big picture, the technology, and not really on things like the accounting and the day-to-day sales practices and business practices," Morvillo said.

Lynch deferred to the executives he appointed to oversee different areas of Autonomy's business, the Clifford Chance partner said.

While the government tried to convince the jury that Chamberlain participated in a plot to defraud HP, his attorney Lincenberg said, he was not part of Autonomy's top circle as Lynch and others were.

"They were also acting in good faith, but they were making the big decisions for the company," the Bird Marella partner said. "I wanted the jury to know there was a big difference."

Learning From Prior Proceedings

The government's case against Hussain, Autonomy's former CFO, added a layer of difficulty for Lynch, Heberlig said.

"It was an enormous challenge," the Steptoe lawyer said. "The government spent the better part of 10 years investigating this case. They'd already tried it once successfully with the CFO, and we knew we were facing much of the same evidence, the same witnesses."

In addition, there was a **lengthy civil trial** in the United Kingdom, which concluded in January 2022 with a London judge ruling that Lynch had **artificially bolstered** the value of his company.

Despite the downsides, those proceedings also provided some advantages to defense counsel for Lynch and Chamberlain in the U.S. trial because there was a record of what the witnesses had said in the various proceedings, Heberlig said.

Morvillo agreed, saying a lot of the documents the government used in the case against his client were also produced in the Hussain case, and also in the civil trial in England.

"One of the benefits of having had several prior proceedings is that you start to learn the main corpus of evidence that the government thought was relevant," the Clifford Chance partner said.

Attacking a Whistleblower's Credibility

One person who didn't testify in the Hussain trial was Brent Hogenson, the former chief financial officer of Autonomy Americas. Jurors in the 2018 trial saw evidence that Hogenson was fired in 2010 after approaching Lynch and Autonomy's auditors at Deloitte with concerns about the company's accounting, but they never heard his testimony.

Morvillo said attorneys for Lynch and Chamberlain made the right decision in calling Hogenson to the stand to question that account.

"I think the specter of Brent Hogenson hovering out there as this whistleblower who was allegedly retaliated against was far more powerful than actually turning on the lights and seeing Brent Hogenson and being able to cross-examine him," Morvillo said.

During his **direct examination**, Hogenson seemed credible and sympathetic, but that all fell apart when the defense began its **cross-examination**, Lynch's lawyer said.

"The guy dissembles, and he stops answering questions the way he spoke with the government, and he starts getting cornered, and either doesn't remember anything anymore, or he's equivocating," Morvillo said. "And his credibility fell apart."

The government built its case around Hogenson and that was a mistake, Heberlig said.

"We did decide we had to attack his credibility," Heberlig said. "When his story fell aside, I think it revealed a real gap in the government's case."

Knowing When to Put Your Client on the Stand

Prior to going to trial, federal prosecutors told the judge overseeing the case that they expected to take about six weeks to present their case; Lynch and Chamberlain said they'd take four combined. So the jurors sworn into service were told that the trial was expected to take about 10 weeks, ending in early June.

But once the trial got going, the government's case **stretched** to over nine weeks, putting time pressure on the defense. With only one alternate juror remaining and a juror with mid-June travel plans, counsel for Lynch and Chamberlain chose their witnesses carefully.

"We were very conscious of the fact that the trial had run long," Heberlig said. "So we tried to be very selective in the witnesses we called."

The **star witness**, of course, was Lynch, who spent a week on the stand.

Having Lynch testify "was maybe the most important tactical decision that we made," Heberlig said.

"Mike is just a really brilliant man, but I think he was portrayed in the trial as sort of a caricature of himself, as this **domineering boss** who ran Autonomy with an iron fist, and that's not just the Mike that we knew," the Steptoe partner said. "I think he was able to humanize himself and was able to make a real connection with the jury, and I found that to be incredibly important."

In the end, Chamberlain's legal team decided **it was not** in their client's best interest to take the stand, Lincenberg said.

"Had my client testified, you know, we would have pushed into another couple of days," the Bird Marella partner said. "But as it worked out, we made our decision not to have Steve testify just based on the fact that we felt really good where the case was at."

That decision was nonetheless complicated by the fact that Lynch had testified.

"You always wonder, how's the jury going to react when one defendant testifies and the other doesn't?" Lincenberg said.

Fortunately for the defense, the jury came back on June 6 with a decision **clearing both men** of all charges.

With their big win notched, attorneys Heberlig, Morvillo and Lincenberg said they're looking forward to a little time off.

Heberlig said the case has been one of the most challenging he's tackled in terms of complexity, the witnesses and the length of trial.

"It was the hardest case I've ever had, and the most satisfying win by far," the Steptoe partner said.

Morvillo said he's been practicing law for 32 years, and he's represented Lynch for one-third of his career.

"I don't think, in 12 years, there's been a month of my life where I didn't spend some amount of time on this case, and for many, many, many, many months it was all I did," Morvillo said. "And so for me, this is a career case. It is something that really, in many ways, defines my experience as a lawyer."

The U.S. government is represented by Adam A. Reeves of the U.S. Attorney's Office for the Northern District of California.

Lynch is represented by Chris Morvillo of Clifford Chance LLP, and Brian Heberlig and Reid Weingarten of Steptoe LLP.

Chamberlain is represented by Gary Lincenberg and Ariel Neuman of Bird Marella Rhow Lincenberg Drooks & Nessim LLP.

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

--Additional reporting by Dorothy Atkins and Max Stendahl. Editing by Marygrace Anderson.



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School Says Declaration Bares Quinn Emanuel Lies In IP Feud

By **Andrew Karpan**

Law360 (June 12, 2024, 9:41 PM EDT) -- Columbia University has told the Federal Circuit that a declaration from a former Norton Lifelock Inc. computer scientist shows that the company's former lawyers at Quinn Emanuel Urquhart & Sullivan LLP are lying about his refusal to testify in the school's decade-long \$600 million patent case in Virginia federal court.

The school asserted in a filing Tuesday that a May declaration by Marc Dacier sinks a Federal Circuit appeal from Quinn Emanuel over a contempt ruling against the firm for its prior representation of the cybersecurity company, which was found to infringe Columbia University patents and ordered to pay more than \$600 million.

Dacier, a French computer scientist, worked until 2014 for Norton Lifelock, which was later rebranded as Gen Digital Inc. Dacier's declaration was attached to Columbia University's **motion** for leave to file a supplemental appendix late Tuesday at the Federal Circuit.

Quinn Emanuel's refusal to produce Dacier was the subject of the lower court's contempt finding. And the scientist told Columbia's lawyers that the firm deliberately did not want him to appear, according to a notice from Columbia that it had communicated with Dacier in April 2022.

"I am no fool and I can see now why the Quinn team has done what they have done over the years, while pretending to 'represent' me," Dacier said, according to the notice, which is attached to Tuesday's filing. "I repeatedly said that, given sufficient notice, I would have been happy to testify at trial to help the judicial process. The Quinn lawyers, however, said that they did not need or want me to do anything."

Columbia says this statement has cooked **the appeal** from the major Los Angeles firm, which is challenging a finding out of Virginia federal court that found the firm engaged in "flagrant acts of misconduct" while representing Norton.

"In short, the declaration disposes of Quinn's appeal," the school's Tuesday filing asserts.

An attorney for Columbia declined to comment on the case, and Gen Digital's current lawyers did not immediately respond to a request for comment.

In response to an email, a Quinn Emanuel spokesman sent an unsigned statement calling the filing "an after-the-fact effort to rewrite the record on appeal before the Federal Circuit."

"The submission is wholly improper, and we intend to oppose it," the statement said.

The BigLaw firm — whose high-profile clients **have included** Elon Musk, Google and the **Winklevoss twins** — has been representing the Norton cybersecurity brand since the start of the patent lawsuit from the school, which dates back to 2013.

This lawsuit deals with allegations that Norton used a malware research project funded by the Defense Advanced Research Projects Agency in the late 2000s to repurpose technology developed by professors at the school's Intrusion Detection Systems Laboratory.

Quinn Emanuel, however, was **swapped out** for Latham & Watkins LLP shortly before the case went

to a Virginia federal jury in 2022. Jurors in Richmond listened to almost 12 days of testimony and deliberated for three days, at one point saying they had reached "**an impasse**," before being warned by U.S. District Judge M. Hannah Lauck to think about making anyone "**endure a second time the strain of a trial**."

Eventually jurors came to a **\$185 million patent infringement verdict**, which has since grown to just **over \$600 million**, — a number that includes over \$20 million in legal fees, attached to "misconduct" from the Quinn lawyers.

Represented now by Latham, Norton is appealing that verdict, and Columbia has yet to respond to those arguments, having until next month to do so. On Tuesday, the school aimed its fire at Quinn Emanuel.

Norton's move to dump Quinn Emanuel followed an **extensive dispute** between the firm and Judge Lauck regarding the firm's efforts to keep Dacier from testifying in the case.

When first called for a deposition, back in 2014, Dacier delivered comments that allegedly ran against the arguments Quinn Emanuel was planning on using to defend against the case. Shortly after, Dacier left Norton and decamped to Saudi Arabia, where he teaches computer science at King Abdullah University of Science and Technology — working now beyond the judicial power of a subpoena.

Sometime after, Dacier ran into Angelos Keromytis, according to a May 2020 declaration from Keromytis, a Georgia Institute of Technology professor who had been involved in the Columbia program and was one of the professors named on the patents at the center of the case.

Dacier was filled with regret, according to Keromytis.

"Dacier told me he was sorry about what Norton had done with the decoy technology that I developed with my former colleague," Keromytis said in testimony attached to Tuesday's filing. "Dacier also said that he was against Norton's decisions with respect to patenting our technology, and that he had not wanted to be involved because he thought what they were doing was wrong."

According to court filings, Columbia then decided it wanted Dacier to testify during the trial, but Quinn Emanuel rejected the request on Dacier's behalf, and eventually to his chagrin.

"I understand that the Quinn lawyers have represented to the court that, at some time after April 2020, I informed them that I changed my mind and was unwilling to testify at trial. This is false. I never changed my mind," Dacier would eventually write.

Questions regarding Quinn Emanuel's representation of Dacier would result in a **contempt ruling** from Judge Lauck, which Quinn Emanuel has appealed.

In that appeal, the firm told Federal Circuit judges **in April** that Dacier "informed Quinn Emanuel that he had decided not to make the long trip to Virginia to testify at trial," and maintained that the firm was representing Dacier since first depositing him in 2014.

As Quinn Emanuel tells it, "once Dacier reconnected with Quinn Emanuel in April 2020, he filed a sworn statement affirming that 'Quinn Emanuel ha[d] represented [him] since June 18, 2014, and continue[d] to represent [him], in connection with the Columbia case.'"

It appeared Dacier had a markedly different view of what he agreed to in 2020.

"I also wish to make clear that my June 17, 2020 declaration does not say that I personally asked or wanted Quinn to represent me. Quinn lawyers wrote the declaration and ... had I been informed that I was not obligated to accept the Quinn lawyers as my personal counsel, I would not have signed the declaration," he wrote in the May declaration.

"When Dacier was informed of what Quinn argued in this appeal ... he agreed to correct the record with the facts," says Columbia.

The patents-at-issue are U.S. Patent Nos. 8,601,322 and 8,074,115.

Columbia is represented by Garrard R. Beeney, Jeffrey B. Wall, Oliver Engebretson-Schooley, Dustin F. Guzor, Alexander N. Gross and Stephen J. Elliott of Sullivan & Cromwell LLP.

Gen Digital is represented by Melissa Arbus Sherry, Michael A. Morin, Gabriel K. Bell, Charles S. Dameron, Margaret A. Upshaw, Ashley N. Finger, Brent T. Murphy, Andrew J. Slottje, Douglas E. Lumish, David K. Callahan and Nicholas Luongo of Latham & Watkins LLP.

Quinn Emanuel is represented by Paul Clement, C. Harker Rhodes IV and Joseph DeMott of Clement & Murphy PLLC.

The case is Trustees of Columbia University in the City of New York v. Gen Digital Inc., case number 24-1243, in the U.S. Court of Appeals for the Federal Circuit.

— Additional reporting by Dani Kass, Lauren Berg and Bonnie Eslinger. Editing by Amy French.

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