

Not bad for government work: Opioid lawyers average almost \$700 per hour

 legalnewsline.com/stories/660725828-not-bad-for-government-work-opioid-lawyers-average-almost-700-per-hour

June 17, 2024

Opioids

Polster | n/a

CLEVELAND (Legal Newsline) - Private lawyers working for state and municipal governments will be paid almost \$700 an hour for their work in negotiating some \$26 billion in settlements with the opioid industry.

A panel formed by U.S. District Judge Dan Aaron Polster recommended a \$2.13 billion payout to 97 law firms who worked on the multidistrict litigation, one of the largest and most complex cases in U.S. history. The so-called common benefit fees – payment for legal work that benefitted all plaintiffs -- represent about 8% of the total recovered by government entities and Indian tribes. Overall plaintiff fees are capped at 15% under an order Judge Polster issued earlier.

The largest slice will go to Motley Rice, which was awarded 15.5% of the fund or \$330 million. The next biggest payout goes to Simmons Hanley, which will receive 10.6%, or \$226 million (it is also being accused of fraud in its asbestos lawsuits). Other firms receiving a significant share of the money are Lanier Law Firm in Houston, \$100 million; and Leiff Cabraser at \$112 million.

All of the fees are subtracted from settlements state, local and tribal governments negotiated with opioid manufacturers and distributors including Amerisource Bergen, Cardinal Health, McKesson and Johnson & Johnson. Lawyers accepted the total fee cap of 15% in exchange for dropping contracts that would have paid them 30% or more.

Most of the contracts were no-bid contingency-fee contracts that government officials described as low-risk, since no fees would be paid unless the plaintiffs won settlements. Every dollar paid to the lawyers is a dollar not available for governments, however. In at least one case, the fee awards violated a Florida law capping fees for all litigation over the same matter at \$50 million. New Mexico Attorney General Raul Torrez also approved a 33% fee, or \$150 million, for Baron & Budd in that state's opioid settlements, triple the national rate.

The law firms were required to keep detailed time sheets and reported working 3.46 million hours, although 387,000 of those hours were either withdrawn by the firms or rejected by the fee panel. The lawyers were awarded \$2.13 billion in fees, meaning they averaged \$694 an hour. Given law-firm economics where junior attorneys typically earn far less than billing rates, much of that average hourly fee will likely flow into the pockets of senior partners.

The rates approved by the fee panel ranged from \$30 an hour for paralegals up to \$1,500 an hour for senior partners on the plaintiffs' executive committee, which included Motley Rice and Simmons Hanly. Lawyers with less than five years of experience still could earn up to \$1,000 an hour.

At the outset of the litigation, Judge Polster set out rules designed to cut down on abuses that are common with class actions, including marking up the services of contract attorneys and document reviewers.

The fee panel said they engaged in a lengthy review process, reviewing time reports for hours that were needlessly duplicative or didn't serve the interests of the entire plaintiff group. Fee panel members interviewed lawyers and asked them to fill out "report cards" as well as submitting essays about the work they performed. Those interviews helped smoke out work that wasn't for the common benefit or actually hurt the interests of the group, the panel said, and identify duplicative hours.

The panel said it uncovered cases where document reviewers reported "grossly excessive time," claimed identical hours for days in a row or submitted identical document review time to two different law firms. Document review is a particularly lucrative business for plaintiff firms, since they can pay reviewers minimal hourly rates and mark them up under court-approved fee orders.

In one particularly scandalous case involving a \$300 million settlement with State Street bank, reporters at the *Boston Globe* revealed law firms led by Labaton "borrowed" low-paid attorneys among themselves and double-counted their hours to increase their payout.

Firms in the opioid MDL were awarded a higher percentage for "skill, value and leadership," and given no credit for preexisting relationships with clients, the fee panel said. The fees finally worked out to a multiplier of 1.25 times the "lodestar," or fee request based on hours submitted.

"It was certainly both art and science to calibrate each applicant's multiplier," the fee panel said.

Opioids Lawyers Offer Investors Piece of \$100 Million-Plus Win

By Emily R. Siegel

Exclusive

- Napoli Shkolnik has previously received funding from Fortress
- Firm has steered settlements with McKesson, CVS, Walgreens

Bloomberg Law News 2024-06-17T09:20:56878974378-04:00

Opioids Lawyers Offer Investors Piece of \$100 Million-Plus Win

By Emily R. Siegel 2024-06-17T05:00:18000-04:00

- Napoli Shkolnik has previously received funding from Fortress
- Firm has steered settlements with McKesson, CVS, Walgreens

A law firm set to earn more than \$100 million for its work on opioids cases is packaging its fees and selling it to investors as a security.

Napoli Shkolnik PLLC is pooling its portion of approximately \$1.3 billion in settlements with major opioid manufacturers and pharmacies, including McKesson, Janssen, CVS and Walgreens, according to a Securities and Exchange Commission filing. The firm declined to comment.

The move is the latest sign of the growing intermingling of law firms and investors. Securitization is an increasingly common tool in litigation finance, a \$15.2 billion industry in which outside funders back lawsuits or invest in yet to be paid settlements, and which has set its sights on large pools of money in mass tort cases.

"It's getting more systematic, the sophistication level is rising and it's bringing in new actors," said Samir Parikh, a law professor at Wake Forest University who studies mass torts financing. "Whether it's good or bad is hard to say. What you could argue is it's weaponizing mass tort litigation that must be terrifying to defendants."

Securities are often used to package auto, credit and other loans for investors. For law firms set to receive shares of large settlements over time, it gives them immediate access to cash while reducing risk.

Some states and counties in the late 90s securitized parts of settlement awards stemming from far-reaching lawsuits against tobacco companies. The details of similar moves by law firms and private companies are often not made public.

Napoli Shkolnik's asset report filing with the SEC offers a rare glimpse of how one of the biggest mass tort law firms is being paid for its work and its plans to monetize future winnings now. The document details at least one of the settlements, when it will be paid out and the law firm's cut.

Fortress Investment Group has backed the firm in a variety of cases, while litigation funder C Cubed Capital Partners is handling the securitization process. C Cubed declined to comment.

Napoli Shkolnik represented plaintiffs accusing drug manufacturers and pharmacies of fueling to the opioid crisis. Its lawyers helped negotiate a combined \$6 billion settlement over years to be paid directly to state and local governments by TEVA and AbbVie. They also represented Ohio's Cuyahoga County, reaching a \$260 million settlement in litigation against McKesson, Cardinal Health, AmerisourceBergen Corp, and Teva, among other cases.

Companies targeted in opioid cases are expected to pay around \$21 billion to resolve the suits.

The SEC document does not state the total amount that the firm expects to receive from the settlements it negotiated. Napoli is getting a 15% cut of annual payments from Janssen, totaling more than \$27 million over a seven-year period. Using the same rate in the other settlements, the firm would be on track to rake in as much as \$126 million over the course of several years.

Mass Tort Investments

Funders in mass tort cases often provide loans to plaintiffs' firms for their entire docket of cases with interest rates that can exceed 20%.

Advocates say the financing helps even the playing field with deep-pocketed corporations.

"People are casting aspersions on this industry as fueling frivolous litigation when there's widespread consensus that opioid manufacturers caused devastation in this country," said Ted Farrell, founder of Litigation Funding Advisers.

Fortress has funded Napoli Shkolnik since 2018 in a variety of cases, according to public filings. That includes "all cases directly or indirectly related to injury or death caused by pharmaceuticals or other medical products, procedures or devices." The most recent lien with the funder was terminated in early April, a few weeks after the C Cubed Capital's securitization filing.

Fortress did not respond to a request for comment.

"It's remarkable and wholly unremarkable," Farrell said of the securitization. "This is a corporate finance entity that has a defined income stream and it is using that income stream to finance its operations."

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EXPERT OPINION

Judges Weigh In On Legal Finance Disclosure

Andrew Cohen and Danielle Cutrona of Burford Capital discuss the hot topic of disclosure of legal finance in litigation, fueled by critics who argue for mandatory disclosure.

June 17, 2024 at 10:00 AM

By Andrew Cohen and Danielle Cutrona | June 17, 2024 at 10:00 AM



The disclosure of legal finance is a topic frequently covered by industry press, in no small part fueled by the scare-mongering of industry critics who argue that disclosure is needed because of hypothetical alarms ranging from the unlikely to the ridiculous. These critics' real if unarticulated issue is that they just don't like litigation and seek to hinder anything, including commercial legal finance, that helps businesses efficiently enforce their rights and pursue their meritorious claims.

Among the arguments for forced disclosure is that it would allow judges to identify conflicts and recuse themselves should they have an interest in a fund involved in matters before their courts.

Given the small number of legal finance companies, the even smaller subset of publicly traded legal finance companies and the vanishingly small probability that a judge would make that investment, the likelihood of such a financial conflict is exceedingly low. US judges are more likely to encounter issues of recusal based on financial interests in a company affected by a case outcome.

It is noteworthy that judges' views on this do not align with those promoting forced disclosure. Judges consistently recognize that the existence of legal funding and the underlying funding agreements should not be subject to discovery or discussion during trial.

Disclosure Can Be Handled *In Camera* When Merited

At an April 15, 2024, conference of the International Legal Finance Association (ILFA), a panel of judges disputed the need for new or special disclosure rules for legal finance, suggesting such rules would do more harm than good.[1]

As the Honorable Robert M. Dow, Jr., Counselor to the Chief Justice, Supreme Court of the United States, and Judge of the United States District Court for the Northern District of Illinois, put it: "In general, as a judge, I would not be inclined to disclose this. I learned all I know from [Magistrate Judge Jeffrey] Cole, who's written probably the most influential opinion in this area, [*Miller UK Ltd. v. Caterpillar Inc.*]."

Judge Dow also commented: "As long as the funder doesn't have control, I don't think [disclosure is] going to be a major issue for judges. And I think judges, at least most of the judges I know who I've discussed this with, are inclined to at least for the first instance, look at [legal finance] *in camera*."

6/17/24, 12:16 PM Judges Weigh In On Legal Finance Disclosure | New York Law Journal
currently a partner at Boies Schiller Flexner, concurred. As Judge Ungaro explained: “We don’t normally inquire in civil cases as to how people are funding their litigation... I think *in camera* review is a reasonable approach to this problem.”

Judge Ungaro summed it up forcefully: “There are all kinds of things that go on in the world that have subtle influences on lawyers and clients, on judges and the resolution of cases. To think that disclosure is going to solve that problem is nonsense.”

Disclosure Should Be Limited

The views expressed by the panelists are consistent with earlier rulings suggesting that if disclosure is considered necessary, it should be limited. As noted above, Judges Dow and Ungaro suggest that judges retain discretion to determine whether review is needed and to limit that disclosure to *in camera* review by the judge, not an adversary in litigation.

This is consistent with the much-cited 2019 order of Judge Dan Polster in *In Re: National Prescription Opiate Litigation*. Disclosure was made *ex parte* and *in camera* to the judge, who specified that the purpose of the disclosure was to confirm that there were no conflicts of interest, and that the funder had no control over the matter. Judge Polster also stated that no further discovery into the litigation finance agreements would be permitted because they are protected as attorney work product.

Other recent rulings reinforce that judges share this view. Rulings by Chief Judge Rodney Gilstrap and Judge Alan D. Albright in Texas have explicitly stated that parties are prohibited from introducing evidence, testimony or arguments related to legal finance. And in *Worldview v. Woodrow* (N.Y. App. Div. 2021), the New York Appellate Division declined to compel disclosure of legal finance, emphasizing that the specifics of the funding agreement were irrelevant to the specific claims or defenses in the case.

The Negative Impact of Disclosure Requirements

Judges’ commentary on the topic of legal finance disclosure suggests not only that they do not think it necessary, but also that it would do harm.

As Judge Dow, who since 2013 has served on the Judicial Conference’s Advisory Committee on Civil Rules, stated: “The concern I had when we were looking at [this on] the Rules Committee was [that] public disclosure of too much really gets into litigation strategy. And it’s not fair to give one side a peek into the other side’s litigation strategy, unless it’s mutual. I don’t think anybody wants to litigate that way.”

The ILFA panel agreed that the presence of funding is not a matter of public interest. As Judge Ungaro explained, in a decision not to require disclosure of funding in a matter involving a whistleblower, “What animated our decision to have an *in camera* review was that we did not believe that how the relator was paying for the litigation was a matter of public interest.”

Our view is consistent with these comments: Only the court should be allowed to examine the facts of funding and to determine whether broader disclosure is warranted. Disclosure should not be an excuse for an adverse party to lead a fishing expedition into its opponent’s finances or to seek to discover privileged information regarding its strategy or case assessment.

Put differently: overly broad disclosure requirements can have damaging consequences for the efficiency of court processes and for litigants. Given the potential harmful consequences of disclosure, the best approach is to not require disclosure and to continue to allow judges to determine what is appropriate on a case-by-case basis.

In other sessions at the ILFA conference, industry leaders noted the inherent imbalance in requiring disclosure for one type of funding—commercial legal finance—but not for all the other types of funding litigants utilize, such as contingency fee arrangements, bank loans, personal loans, financing from investors or self-financing. Interestingly, those calling for disclosure of legal finance are not calling for banks to disclose their security interests over fee receivables in law firms—but those arrangements are just as much “litigation finance” as what specialist finance firms do, and happen in significantly greater volume. If legal finance arrangements are to be disclosed, simple logic dictates that these other forms of financing should also be disclosed.

Judge Ungaro recommended that legal finance providers not only resist the push for blanket disclosure but also ensure that judges understand the value of their capital and expertise. As she put it, “The most important thing to get across to the judiciary and the public as a whole is the social utility of litigation funding, with the expense that’s involved in litigating complex cases to their conclusion. I think it’s very important that everyone appreciate that this is a way of evening the playing field and giving people the opportunity to pursue justice in the courts.”

Andrew Cohen is a director at Burford Capital with the responsibility for assessing and underwriting legal risk as well as for monitoring policy and regulatory issues in the legal finance industry. **Danielle Cutrona** is Burford’s director, Global Public Policy with responsibility for global and domestic public policy efforts, including leading the company’s industry partnerships on policy issues.

ENDNOTE:

1. The panel of judges was moderated by Travis Lenkner and included the Honorable Robert M. Dow, Jr., Counselor to the Chief Justice, Supreme Court of the United States, and Judge of the United States District Court for the Northern District of Illinois; the Honorable Sam Sheldon, former United States Magistrate Judge for the Southern District of Texas and currently a partner at Robbins Geller; and the Honorable Ursula Ungaro, former Judge of the United States District Court for the Southern District of Florida and currently a partner at Boies Schiller Flexner.

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Nvidia Gets Supreme Court Review on Shareholder Crypto Suit

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A sign is posted in front of the Nvidia headquarters on May 10, 2018 in Santa Clara, Calif.

Photographer: Justin Sullivan/Getty Images

June 17, 2024, 6:31 AM PDT

Greg Stohr

The US Supreme Court agreed to use a case over Nvidia Corp.'s crypto-mining revenue to consider making it harder for shareholders to press securities fraud lawsuits.

Nvidia is seeking to stop an investor suit that accuses the company of being deceptive about how dependent it was on revenue from crypto mining before a 2018 market downturn. The justices said Monday they will hear Nvidia's contentions that the complaint lacks enough specificity to go forward.

A ruling favoring Nvidia would give companies new leverage to win early dismissal of shareholder suits and avoid the expense of mounting a full-scale defense. The case centers on the protections Congress gave companies in the 1995 Private Securities Litigation Reform Act.

The court's 2024-25 term now looks to be a pivotal one for the future of shareholder litigation. The court said earlier this month it will consider

a shareholder suit against Meta Platforms Inc. over the data-harvesting scandal involving political consulting firm Cambridge Analytica.

In the newest case, the shareholders say that in 2017 and 2018 Nvidia's Chief Executive **Jensen Huang** hid the fact that record revenue growth was being driven by mining-related sales of the company's flagship GeForce GPU product, rather than by sales for gaming.

The investors say the cryptocurrency market's volatility meant the company was exposed to more risk than it was revealing. The company said in November 2018 that had missed its revenue projections, sending shares tumbling more than 28% over two days.

Huang at the time said a "crypto hangover" was to blame.

"Analysts immediately recognized this as a reversal of NVIDIA's prior reassurances that mining-related demand represented a small portion of revenues," the shareholders told the Supreme Court.

The San Francisco-based 9th US Circuit Court of Appeals said the lawsuit could go forward.

Nvidia argues in its appeal that the shareholders lack the type of internal company documents needed to show that officials knew they were making misleading statements.

“Nothing plaintiffs have cited describes the contents of a single internal communication involving Nvidia’s CEO that in fact addressed the portion of GPUs sold to cryptocurrency miners,” the company argued.

Nvidia in 2020

to pay \$5.5 million to settle related allegations by the Securities and Exchange Commission. The case is Nvidia v. E. Ohman J:or Fonder, 23-970

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<https://x.com/AnnMLipton/status/1802706388952527342>



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...

The Court is coming for the securities laws and I am shook



From reuters.com

7:14 AM · Jun 17, 2024 · 5,359 Views

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@annmlipton@esq.social @AnnMLipton · 3h

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To clarify, this is the second grant to the 9th Circuit regarding what plaintiffs have to plead to get past a motion to dismiss.

[x.com/AnnMLipton/sta...](https://x.com/AnnMLipton/status/1824411111111111111)

Plaintiffs won both cases in CA9, so the SCt is gunning to reverse



@annmlipton@esq.social @AnnMLipton · Jun 12

This is a deeply stupid question for the Court to have granted cert on and it's going to result in a unanimous 5 page opinion that resolves absolutely nothing

supremecourt.gov/DocketPDF/23/2...

The questions presented are:

1. Are risk disclosures false or misleading when they do not disclose that a risk has materialized in the past, even if that past event presents no known risk of ongoing or future business harm?



2



1

970



Andrew Charles Baker @Andrew__Baker · 5h

...

What is the key issue in the case? Can't tell from that summary.



1



217



@annmlipton@esq.social @AnnMLipton · 4h

...

It's pleading falsity and scienter. Pltfs submitted an expert report analyzing the public info so there's a question about whether that's ok, whether particular enough etc. And the Meta case is also pleading so disasters incoming.



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US Supreme Court to hear Nvidia bid to scuttle shareholder lawsuit

 [reuters.com/legal/us-supreme-court-hear-nvidia-bid-scuttle-shareholder-lawsuit-2024-06-17](https://www.reuters.com/legal/us-supreme-court-hear-nvidia-bid-scuttle-shareholder-lawsuit-2024-06-17)

John Kruzel

Item 1 of 2 A smartphone with a displayed NVIDIA logo is placed on a computer motherboard in this illustration taken March 6, 2023. REUTERS/Dado Ruvic/Illustration/File Photo

[1/2]A smartphone with a displayed NVIDIA logo is placed on a computer motherboard in this illustration taken March 6, 2023. REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights , opens new tab

WASHINGTON, June 17 (Reuters) - The U.S. Supreme Court agreed on Monday to hear a bid by Nvidia (NVDA.O) , opens new tab to scuttle a securities fraud lawsuit accusing the artificial intelligence chipmaker of misleading investors about how much of its sales went to the volatile cryptocurrency industry.

The justices took up Nvidia's appeal made after a lower court revived a proposed class action brought by shareholders in California against the company and its CEO Jensen Huang. The suit, led by the Stockholm, Sweden-based investment management firm E. Ohman J:or Fonder AB, seeks unspecified monetary damages.

Santa Clara, California-based Nvidia is a high-flying company that has become one of the biggest beneficiaries of the AI boom, and its market value has surged.

In 2018, Nvidia's chips became popular for cryptomining, a process that involves performing complex math equations in order to secure cryptocurrencies like bitcoin.

The plaintiffs in a 2018 lawsuit accused Nvidia and top company officials of violating a U.S. law called the Securities Exchange Act of 1934 by making statements in 2017 and 2018 that falsely downplayed how much of Nvidia's revenue growth came from crypto-related purchases.

Those omissions misled investors and analysts who were interested in understanding the impact of cryptomining on Nvidia's business, the plaintiffs said.

U.S. District Judge Haywood Gilliam Jr. dismissed the lawsuit in 2021 but the San Francisco-based 9th U.S. Circuit Court of Appeals in a 2-1 ruling subsequently revived it. The 9th Circuit found that the plaintiffs had adequately alleged that Huang made "false or misleading statements and did so knowingly or recklessly," allowing their case to proceed.

Nvidia urged the justices to take up its appeal, arguing that the 9th Circuit's ruling would open the door to "abusive and speculative litigation."

Nvidia in 2022 agreed to pay \$5.5 million to U.S. authorities to settle charges that it did not properly disclose the impact of cryptomining on its gaming business.

The justices agreed on June 10 to hear a similar bid by Meta's (META.O) [link](#), opens new tab Facebook to dismiss a private securities fraud lawsuit accusing the social media platform of misleading investors in 2017 and 2018 about the misuse of its user data by the company and third parties. Facebook appealed after a lower court allowed a shareholder lawsuit led by Amalgamated Bank (AMAL.O) [link](#), opens new tab to proceed.

The Supreme Court will hear the Nvidia and Facebook cases in its next term, which begins in October.

Reporting by John Kruzel; Editing by Will Dunham

Supreme Court Agrees to Take Up Nvidia Securities Suit On Pleading Standards Issues

K [dandodiary.com/2024/06/articles/securities-litigation/supreme-court-agrees-to-take-up-nvidia-securities-suit-on-pleading-standards-issues](https://www.dandodiary.com/2024/06/articles/securities-litigation/supreme-court-agrees-to-take-up-nvidia-securities-suit-on-pleading-standards-issues)

June 17, 2024



By Kevin LaCroix on June 17, 2024
Posted in Securities Litigation



Just days after the U.S. Supreme Court agreed to take up the Facebook/Cambridge Analytica securities case concerning risk factor disclosures (as discussed here), the Court has now agreed to take up yet another securities case, this time in a

case involving Nvidia and involving the standards for pleading scienter and falsity under the PSLRA. The NVIDIA case involves alleged fraud in connection with the company's disclosures concerning its sales of graphics processing units (GPU) to cryptocurrency companies as a component of its overall GPU sales. The specific questions the case presents to the Supreme Court concern what and how a plaintiff must plead when pleading scienter and falsity. Because the case involves the PSLRA's "exacting pleading requirements," the case potentially could prove to be very significant. A copy of the Court's June 17, 2024 Order granting the petition for writ of certiorari can be found [here](#).

Background

Nvidia made GPUs intended for gaming applications. In or about 2017, cryptocurrency companies began using its GPUs for crypto mining operations. Sales of its GPUs reached record levels in 2017 and most of 2018 and the company told investors it was working hard to meet demand. However, when the company learned of excess supply of certain of its GPUs in certain distribution channels, it disclosed the excess supply of the GPUs, its share price declined, and plaintiff shareholders filed securities class action lawsuits against the company and certain of its directors and officers.

In their complaint, the plaintiff shareholders alleged that Jensen Huang, the company's CEO, knowingly understated the extent to which demand for certain of the company's GPUs was being driven by cryptocurrency miners (as opposed to demand from gamers). In their complaint, the plaintiffs did not, for example, cite internal documents reflecting GPU demand by crypto miners as opposed to gamers; rather, plaintiffs relied on an expert witness to

analyze public data about activities of the crypto mining companies, using assumptions about the amount of computing power needed to facilitate the disclosed activities, and from that estimating the number of GPUs needed for the activity and what percentage of those GPUs would have been NVIDIA's. From this "chain of assumptions," the expert purported to determine what percentage of NVIDIA's revenue was derived from crypto miners, the basis on which the plaintiffs alleged that the company's actual dependence on crypto miners differed from the company's disclosures.

The plaintiffs also cited in their complaint statements from confidential witnesses – former employees — that the company had internal reports analyzing GPU sales and usage data. However, none of the former employees described the content of the reports or the data the CEO actually viewed. Instead, the company alleges, the plaintiff "speculates" what the report would have shown.

The District Court granted the defendants motion to dismiss. However, the Ninth Circuit, in a split opinion, written over the dissent of Judge Gabriel Sanchez affirmed in part and reversed in part the lower court's dismissal.

NVIDIA filed a petition for a writ of certiorari to the U.S. Supreme Court. In their petition, NVIDIA said that the case presents two questions:

1. Whether plaintiffs seeking to allege scienter under the PSLRA based on allegations about internal company documents must plead with particularity the contents of those documents.
2. Whether plaintiffs can satisfy the PSLRA's falsity requirement by relying on an expert opinion to substitute for particularized allegations of fact.

In its petition, NVIDIA argued that there is a split between the circuits on both questions. The company argued that five circuits (the Second, Third, Fifth, Seventh, and Tenth) have held that plaintiffs seeking to plead scienter based on internal company documents must plead with particularity the actual contents of those documents, while the First Circuit (and now the Ninth Circuit) allowed plaintiffs to proceed past a motion to dismiss in a securities fraud action based on allegations that internal company reports existed, combined with speculative allegations about what those reports might have said.

The company also contended in its petition that there was a split on the circuits with respect to whether plaintiffs could rely on experts' opinions in pleading falsity. The Second Circuit and the Fifth Circuit have held that a plaintiff's expert opinion could not substitute for particularized factual allegations of falsity, a necessary element of a securities fraud action. The Ninth Circuit's opinion in this case, in relying on an expert opinion to answer the critical question of whether the defendant's statements were false, created a circuit split on this issue as well.

The company noted that on both of the questions, the positions of the Second and Ninth Circuit's views diverged; given the extent to which securities litigation activity is weighted to these circuits, the company argued, the court's consideration of these issues is warranted.

In their opposition to the company's petition, the plaintiffs argued that their complaint was carefully researched and investigated, and indeed served as a "essential supplement" to the SEC's charges against the company on the same allegations. (The company agreed to pay a \$5 million settlement to the SEC on a neither admit-nor-deny basis.) The plaintiffs also argued that the company had mischaracterized their allegations, particularly with respect to the detailed testimony from the confidential witnesses, but also with respect to the content and purposes of the expert report to which they referred in their complaint. The petitioners also argued that there is no circuit split as described by the company.

A number of amicus briefs were filed in connection with the petition, including one by a long list of former SEC officials urging the court to take up the case. As the officials argued in their brief, "the court of appeals stripped the scienter requirement of any significant force and eroded the PSLRA's heightened pleading standard. Under the Ninth Circuit's approach, a plaintiff can plead a Section 10(b) claim through a chain of speculative allegations and assumptions."

In its June 17, 2024, order, the Court granted the company's petition for a writ of certiorari. The case will now be heard during the Court's 2024-2025 term.

Discussion

It is an unusual development for the U.S. Supreme Court to agree to take up a securities case. So it is quite extraordinary that in the space of just a few days, the Court has agree to take up *two* securities cases to be heard in its next term, the Facebook/Cambridge Analytica case and now the NVIDIA case. The presence of these cases on the Court's docket holds significant potential for important securities law developments during the next term.

The NVIDIA case could prove to be particularly important. The case involves the fundamental requirements for pleading securities fraud, including the requirements for pleading two bedrock pleading elements, scienter and falsity. Almost every motion to dismiss in a securities class action lawsuit challenges the sufficiency of the plaintiff's allegations of both scienter and falsity. What the court has to say in the NVIDIA case on these two concerns could be of great significance to future motions to dismiss in securities cases.

While I am sure the plaintiffs are griped that the Court granted cert in this case, the company did make a valid point that it would create quite a mess in the securities litigation arena if there were to be a split between the Second and the Ninth circuits on issues as important as pleading scienter and falsity. The company correctly pointed out in its petition that in fact most of the securities litigation that is filed is filed in either the Second or Ninth Circuits.

Diverging views on key securities issues between these two circuits could be quite disruptive and presents the prospect of diverging outcomes in similar cases simply because of the circuit in which the case was filed.

Indeed, in a particularly interesting aspect of the pleadings filed in connection with the company's petition, Stanford Law Professor Joseph Grundfest, in an amicus brief filed in support of the company's petition, argued that a statistical analysis is possible to support the court's consideration of whether a split between the circuits is sufficiently important to warrant the Court's review of a question. Grundfest argued that given the Second and Ninth Circuit's "market share" predominance in securities litigation, the split between the two Circuits on the questions here particularly justified the Court's taking up the case.

It will in any event be interesting to watch see how this case and the Facebook/Cambridge Analytica case proceed. At a minimum, the next Supreme Court term is sure to be an eventful one in the world of securities class action litigation.

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Drop%20Appeal&utm_source=email&utm_medium=enl&utm_campaign=newsroomupdate&utm_content=20240617&utm_term=nlj&oly_enc_id=



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Supreme Court Takes Up NVIDIA Stock-Drop Appeal

The legal question in the case deals with the pleading standard plaintiffs must meet under the 1995 Private Securities Litigation Reform Act, which was enacted to deter frivolous securities lawsuits.

June 17, 2024 at 11:44 AM

United States Supreme Court



Jimmy Hoover



The U.S. Supreme Court on Monday agreed to hear NVIDIA’s appeal seeking to beat a stock-drop suit filed by investors claiming the tech company made false and misleading statements about the impact of cryptocurrency sales on its business.

The legal question in the case, *NVIDIA Corp. v. E. Ohman J:Or Fonder AB*, deals with the pleading standard plaintiffs must meet under the 1995 Private Securities Litigation Reform Act, which was enacted to deter frivolous securities lawsuits. NVIDIA has argued that the U.S. Court of Appeals for the Ninth Circuit departed from other circuit courts in relaxing the PSLRA’s heightened pleading requirements.

The company urged the Supreme Court to take the case and “ensure that the PSLRA continues to serve as a bulwark against abusive and speculative litigation” in a petition filed by Hogan Lovells’ Neal Katyal and including other attorneys at that firm and Cooley.

The lawsuit against NVIDIA tracks similar allegations the company settled with the U.S. Securities and Exchange Commission for \$5.5 million about its disclosures surrounding one of its most profitable products.

The dispute centers around a stock-drop that occurred after NVIDIA reported low sales and an excess supply of one of its products, a device used in smartphones and computers called a graphics processing unit that increases the speed of rendering graphics. NVIDIA’s “GeForce” GPU had been designed for gamers but became very popular with cryptocurrency miners.

When NVIDIA launched a cryptocurrency-focused GPU known as “The Crypto SKU,” sales of GeForce slumped and eventually the company’s stock price followed suit.

In a lawsuit filed under Section 10(b) of the Securities Exchange Act, plaintiffs claimed NVIDIA CEO Jensen Huang repeatedly and falsely denied to investors that GeForce’s original success had been due to sales to crypto miners. Relying on testimony from former NVIDIA employees, they further claimed Huang had access to data about the crypto sales and thus had the requisite “scienter,” or wrongful intent, required under the PSLRA.

A federal district court dismissed the case after finding the plaintiffs had failed to meet the pleading standard, but the Ninth Circuit revived the case. The appeals court said the plaintiffs had shown “a sufficient likelihood that a very substantial part of NVIDIA’s revenues” were due to crypto sales.

NVIDIA appealed that ruling to the Supreme Court in March, arguing that the Ninth Circuit had created a deep split around the country.

“[S]even circuits are in conflict about the PSLRA’s pleading requirements for alleging scienter based on internal company documents that supposedly contradict public statements,” the company stated in its petition.

In an amicus brief supporting the appeal, former SEC Commissioner Joseph Grundfest stated that the circuit courts implicated by the split of authority cover 86 percent of the market of securities fraud cases.

The plaintiffs have accused NVIDIA of distorting the allegations contained in the complaint to center exclusively on internal sales reports. But they say that courts are required to look “holistically” to all the support for the allegations in the complaint, which included claims about internal meetings and other conversations regarding the monitoring of cryptomining sales data.

“Circuit courts uniformly reject categorical rules when assessing the adequacy of scienter allegations, adhering instead to the fact-based analyses one would expect of courts reviewing allegations holistically,” the plaintiffs stated in their unsuccessful brief in opposition to NVIDIA’s request for Supreme Court review.

The plaintiffs are represented by law firms Kessler Topaz Meltzer & Check and Joseph Hage Aaronson.

The case is docketed as *NVIDIA Corp. v. E. Ohman J:Or Fonder AB*, No. 23-970.

Last Monday, the Supreme Court agreed to hear a similar appeal from Facebook, which is also facing a stock-drop suit over back-to-back controversies related to their data harvesting practices that resulted in a roughly \$200 billion loss to the social media giant’s market capitalization.

That case is docketed as *Facebook v. Amalgamated Bank*, No. 23-980.

Both cases will be heard during the October 2024 Supreme Court term and decided by July 2025. Oral arguments have not been set yet.

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Lamb Weston Investors Sue Potato Company Over Software Claims

By Alexis Waiss

- **COURT:** D. Idaho
- **TRACK DOCKET:** No.1:24-cv-00282-CWD

Bloomberg Law News 2024-06-17T09:28:01326378962-04:00

Lamb Weston Investors Sue Potato Company Over Software Claims

By Alexis Waiss 2024-06-14T15:51:00000-04:00

- **COURT:** D. Idaho
- **TRACK DOCKET:** No.1:24-cv-00282-CWD

Lamb Weston Holdings Inc., a mass frozen potato product distributor, faces a class action alleging it violated federal securities laws by deceiving investors about the viability of its new software system.

Lamb Weston touted in July 2023 that its developing enterprise resource planning system could boost net sales profits to over \$6 billion. But it wasn't until the potato giant announced its 2024 third quarter sales in April when investors were told that software difficulties led to plummeting profits and a 19% drop in share prices, a complaint filed Thursday in a US district court in the District of Idaho said.

The plaintiffs, including the Cleveland Bakers and Teamsters Pension Fund and other investors, claim Lamb Weston "knew of, or recklessly disregarded" obstacles in launching its enterprise resource planning system.

"Despite those issues, Lamb Weston pushed ahead with its implementation of an ERP system that was not ready to go live, knowing that a premature roll-out would have a material negative impact on the Company's business and operations," the plaintiffs said in their complaint.

Failure to disclose those issues manipulated the market and led investors astray, the plaintiffs said.

"The statements concerning its business, operations, and prospects, including its financial guidance for fiscal 2024, lacked a reasonable factual basis," they said.

The closing price of Lamb Weston stock fell from \$101.12 per share on April 2, 2024, the day before the report was released, to \$81.45 per share on April 4, 2024, according to the complaint.

The company also reported losing \$135 million in net sales and \$72 million in net income, with more than half of those losses attributed to unfulfilled orders and accumulated expenses from the ERP system's dysfunction.



Source: Bloomberg LP terminal data.

Lamb Weston's April 4, share price of \$81.53 was the lowest it had been since the company joined the stock market on Nov. 3, 2016, according to Bloomberg terminal data. Shares since releasing its April report have ranged between \$77 and \$90.

The class action also criticizes Lamb Weston for making "materially false and misleading statements and omissions" in conference calls throughout the class period.

The lawsuit especially cites statements from the company's chief financial officer, including a January conference call where she assured the "bumps" the company faced in deploying its software would not have a "material impact" on the distributor's full-year business or operating results.

The ERP software was established to increase automation of the “most important aspects of Lamb Weston’s business operations” including its inventory and order shipments, the complaint said.

The plaintiffs seek to represent a class of those who acquired Lamb Weston shares between July 25, 2023 and April 3, 2024 when the company made public the problems with its ERP system.

The fund seeks compensatory damages for their losses and coverage of their attorneys’ fees.

Lamb Weston didn’t immediately respond to Bloomberg Law’s request for comment.

The case is Cleveland Bakers and Teamsters Pension Fund v. Lamb Weston Holdings, Inc. et al, D. Idaho, 24-CV-282, 6/13/24 .

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Bloomberg Law News 2024-06-17T13:52:42035502119-04:00

Teradata Misled on Cloud Customer Expectations, Investor Says

By Martina Barash 2024-06-17T11:02:37000-04:00

- **COURT:** S.D. Cal.
- **TRACK DOCKET:** [No. 3:24-cv-01034](#)

Teradata Corp.'s expanded business model didn't translate to new recurring customer contracts on the timeline that the cloud data company presented to investors, according to a proposed class action over the stock's steepest fall.

A subset of Teradata's subscription and other recurring revenue depended on "public cloud" contracts, which in turn involved communicating with business units other than prospective customers' information technology departments, Vincent Ostrander says. He filed his complaint June 14 in the US District Court for the Southern District of California.

But company officials didn't take the changed dynamics into account when projecting recurring-revenue growth of 53% to 57% for the public cloud segment and 6% to 8% in total for fiscal year 2023, Ostrander says.

But the results for the year, announced in February 2024, showed the metric at only 48% for public cloud contracts and 6% overall, he says.

A Dec. 7, 2023, executive comment suggesting the possibility of a "low end or slightly below" outcome caused Teradata's stock price to drop 6.2%, and the Feb. 12, 2024, report for the year caused a 22% drop, he said. The latter was the stock's biggest decline, according to data compiled by Bloomberg.



There are hundreds or thousands of members of the proposed class of those who acquired Teradata stock between Feb. 13, 2023, and Feb. 12, 2024, according to the complaint.

Ostrander seeks damages on his securities fraud claims.

Teradata doesn't comment on pending litigation, the company said in response to an emailed request for comment.

Pomerantz LLP represents Ostrander.

The case is [Ostrander v. Teradata Corp.](#) , S.D. Cal., No. 3:24-cv-01034, complaint 6/14/24 .

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Novo mRNA Obesity Deal Prompts Suit Against Omega Board, Backers

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Omega Therapeutics Inc.'s backers at Flagship Pioneering Inc. drew unfair benefits from the company's deal to develop an mRNA-based obesity drug for Novo Nordisk A/S, a newly unsealed lawsuit says.

Flagship, a biotech investment business, exploited its voting control over Omega to impose a 50-50 split of any payout from Novo, despite the central role of Omega's proprietary technology and the secondary importance of Flagship's contributions, according to the court complaint filed by an Omega shareholder.

"The company had the capacity to enter into a similar agreement with Novo Nordisk or others without Flagship's involvement and could have negotiated better deal terms without giving up 50%," the suit says. "Flagship exerted its control and influence over the company and the board to exploit the company's assets for its own gain."

Public sections of the heavily redacted court filing don't specify a connection between the licensing partnership and semaglutide, the blockbuster diabetes and weight loss medication—marketed as Ozempic and Wegovy—that has made Novo Europe's most valuable company. The Danish drugmaker isn't named as a defendant.

Flagship and Omega didn't immediately respond to requests for comment Monday.

According to the lawsuit, the payments from Novo could eventually total hundreds of millions of dollars, an amount that would represent Omega's principal source of income. But Flagship and its affiliates on Omega's board struck a deal that unfairly diverts value to the private equity firm, the suit says.

Large swaths of the 41-page court filing are blacked out, including nearly six straight pages specifying most financial details of the Novo partnership. The complaint was made public June 14 after being filed under seal June 11.

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

The investor leading the litigation, Joel Newman, is represented by Ashby & Geddes PA and Levi & Korsinsky LLP. Flagship, Omega, and its board haven't yet made court appearances.

The case is Newman v. Flagship Pioneering Inc. , Del. Ch., No. 2024-0636, complaint unsealed 6/14/24 .

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Bloomberg Law News 2024-06-17T14:32:15388665816-04:00

Matt Levine's Money Stuff: QXO Doesn't Have Enough Stock

By Matt Levine 2024-06-17T14:12:16989-04:00

QXO

Brad Jacobs [is a successful businessman](#) “who built multibillion-dollar companies in logistics and other sectors through acquisitions.” Last year, he decided that he will next get into the business of rolling up companies that distribute building products. To do this, he started a company called QXO Inc., made himself the chairman and chief executive officer, [picked a team](#), and [funded the company](#) with \$900 million of his own money and \$100 million from outside investors.

Jacobs has done well in the past, and people want to back him, so QXO was a hot enough ticket that last week — just a week after Jacobs put in his own money, and before he acquired any businesses — QXO was able to [raise an additional \\$3.5 billion](#) by selling stock and warrants privately to “certain institutional and accredited investors.” (Bloomberg News reported that the investors include affiliates of the 3G Capital founders and the Walton family, as well as T. Rowe Price.) That deal hasn't closed yet — QXO expects to get the money “early in the third quarter,” so next month or so — but it's a nice start. QXO has raised a roughly \$4.5 billion fund to go out and buy buildings products distributors, and it “is targeting tens of billions of dollars of annual revenue in the next decade through accretive acquisitions and organic growth.”

Often, the way this would work would be that QXO would go buy companies and build a business, and it would deploy a lot of that \$4.5 billion and achieve perhaps billions of dollars of revenue over a few years. Perhaps it would raise more money, or perhaps that initial \$4.5 billion plus organic cash generation would be enough. And eventually QXO would be successful and growing and profitable, and Jacobs and his investors would start thinking about taking it public, so that they could sell their shares to other investors and monetize the business he built, and so that he could use QXO's stock as a currency to acquire even more building products distribution companies.

QXO, however, took things in a slightly different order. When I say that Jacobs “started a company called QXO Inc.” with \$1 billion of his own and his investors' money, that is not quite right. What he actually did was find a teensy public company called SilverSun Technologies Inc., which he bought for \$1 billion and renamed QXO, giving the company an instant public listing.

Even that is not quite right: Jacobs didn't exactly *buy* SilverSun; he and his investors *invested* the \$1 billion in SilverSun in exchange for new stock. They took control of the company, changed the board of directors and management and strategy, and now own about 99.8% of the stock, but SilverSun's previous shareholders stuck around. They didn't get cashed out, and their stock still trades publicly. Or, rather, they *did* get cashed out — QXO/SilverSun will pay the pre-deal SilverSun shareholders a dividend of \$17.4 million, which is roughly equal to SilverSun's entire market capitalization as of last November — but they kept their stock too. And that stock still trades on the Nasdaq.

Which creates a very weird dynamic. QXO is not *really* a public company. It is an investment vehicle for Brad Jacobs to acquire some companies, funded with \$4.5 billion of commitments from him and his private investors. The acquisitions haven't happened yet, and most of that \$4.5 billion of investor money hasn't come in yet. Jacobs and his investors did put in \$1 billion for their stock already, but that stock is locked up for the long term and not available for trading on Nasdaq.

But QXO is *technically* a public company, and there is a little rump of 664,284 shares that do trade publicly. And so if you are a public investor and, like those institutional investors, you like Jacobs' chances as a roller-up of building products distribution businesses, you can go to your retail brokerage and buy QXO shares. But not very many of them. There are only 664,284 available, and they trade in the tens of thousands of shares per day.

This scarcity makes them expensive. Bloomberg tells me that QXO closed on Friday at \$134.21 per share, for a market capitalization of \$89.2 million. That reported market capitalization is just (1) the share price times (2) the 664,284 *public* shares outstanding; it is an accurate accounting of the market capitalization of QXO's tradeable stock. But the implied value of the *company* is much higher, because those public shares are just a tiny sliver of its total capitalization. "On a fully diluted basis," [says QXO](#), taking into account the \$3.5 billion capital raise and the conversion of various convertible preferred shares and warrants, "the Company would have approximately 821.6 million outstanding shares of Common Stock." The public shares are just 0.08% of the total.

That is: If you multiply Friday's \$134.21 closing price by the 821.6 million fully diluted shares, you get a market capitalization for QXO of \$110 billion. Before it has even rolled up any building products distributors! Just a \$4.5 billion pot of cash trading at \$110 billion.

Or to put it another way, QXO sold \$3.5 billion worth of stock, in the deal announced after the close last Thursday, at \$9.14 per share. The stock closed at \$205.40 on Thursday (and \$134.21 on Friday). QXO sold stock to private investors at a *95% discount* to its public trading price. If you were a retail

shareholder buying QXO stock at \$205.40 on Thursday afternoon, you might be annoyed that QXO was selling it to institutions at \$9.14 at the same time.

That's on you, though! What were you doing buying the tiny supply of stock in this not-really-public company? Jacobs and QXO and the big private investors are doing their thing, capitalizing the company to roll up some building products distributors. And then a handful of public investors are blithely trading the public stock, which has almost nothing to do with QXO.

Almost. The basic theory of meme- stock finance suggests that, instead of selling stock to institutions at \$9.14 per share, QXO should be selling stock to retail investors at \$200 per share. Do an at-the-market offering to sell into irrationally exuberant retail demand, instead of selling to institutional investors at the “real” value. One [person on X tweeted](#):

QXO board of directors, if you are unwilling to put out a press release so retail investors can understand your capitalization and what valuation they are putting on your company, then it seems to me as a director of multiple public companies you should immediately begin an ATM offering of up to 10MM shares to add to your war chest to buy something. Clearly selling stock at \$80B valuation and buying companies at a fraction of that will create shareholder value.

But I'm not sure how far that gets you. Again, QXO trades a few tens of thousands of shares per day, and its price is so high because the supply is so low. If QXO tried to sell 10 million shares — 15 times the entire current supply — then presumably that would take a long time and bring down the price. The QXO story is not so much “meme stock” as it is “meme-like effect on a teeny tiny stock.”

Rent card

The basic economics of credit cards go something like this:

- 1. Banks that issue credit cards generally make money from the fees that merchants pay to accept cards. Say those fees are 2%: If you buy a thing for \$100 with a credit card, you pay \$100, the seller gets \$98, and your bank keeps \$2.
- 2. Banks attract customers by rebating them a portion of those fees as “rewards” or “cash back.” Perhaps your bank gives you back \$1 on that transaction, and keeps the other \$1 itself.
- 3. In a competitive market, banks attract customers by rebating them *more than all* of the fees, on

certain types of transactions, with the hope that the customers will like that offer but mostly use the cards for other transactions. “Rebating interchange to earn share of wallet,” [Patrick McKenzie calls it](#): “Say, for example, the card rebates 1.5%, but only for ... bookstores. Any bookstore. For all other transactions, it is 1%. The thing you would love with this offering is to preferentially attract people who are very emotionally invested in being readers and who spends very little of [their] on-this-card wallet on books. The emotional investment in the story the card offers brings the customer in; the blended cost to acquire the customer is closer to [the] 1% industry standard and not to the 1.5% headline number.”

- 4. So a bank might offer, like, “3% cash back on books, 1% on everything else,” and you say “ooh that sounds good,” get the card, and buy \$40 worth of books and \$40,000 of everything else. Then the bank is making money from you: It makes 1% (its 2% fee minus 1% cash back) on most of your transactions, and loses 1% (its 2% fee minus 3% cash back) on a small but emotionally salient minority of them.
- 5. Also of course if you carry a balance, by not paying off your card every month, the bank makes a lot of money by charging you interest.
- 6. Conversely, if you get this card, buy \$40,000 worth of books, and *do all of your other spending on other cards*, the bank is losing a lot of money on you: It loses 1% on every transaction. This is called “adverse selection.”

McKenzie’s bookstore example is somewhat fanciful, and really to stand out many issuers offer big rebates on more typically popular categories like gas, groceries, restaurants, etc. Some category where people think “oh I pay for *that* all the time, that card will really help me.”

But you can take this too far. You don’t want the category to be too good! You don’t want to offer high rewards on a category where your customers *really do* spend all their money. [The Wall Street Journal reports](#):

In 2022, Wells [Fargo & Co.] launched a credit card with Bilt Technologies, a fintech startup with big-name backers including Blackstone and Mastercard. The co-branded card came with a rare perk: Users can pay for rent with it without incurring fees from their landlords while also earning rewards points. More than one million accounts were activated in the first 18 months, many by young adults.

But Wells is losing as much as \$10 million every month on the program as savvy customers flock to the card, according to current and former employees.

Oops. The economics of *the rent transaction itself* are, for the bank, horrific:

There is a reason why credit cards hadn't gained traction in the rent sector until Bilt came along. Most landlords didn't accept them because they refuse to pay card fees that get pocketed by the banks issuing them and often run between 2% and 3%.

Bilt structured the card so landlords won't incur the fees. Wells instead eats much of that.

About six months after the credit card was launched, Wells began paying Bilt a fee of about 0.80% of each rent transaction, even though the bank isn't collecting interchange fees from landlords.

Wells earns interchange fees every time people use the card to pay for anything but rent and splits those fees with Bilt.

It's like a rewards card that pays 0% for everything else, but 3% cash back (sent to your landlord) for rent transactions. If you hear that pitch, think "hey that's a good idea," get the card, and use it mostly to pay for stuff other than rent, it probably works out okay for Wells Fargo. If you also carry a balance, and Wells Fargo gets to charge you a huge interest rate on the balance, it probably works out great.

But ... it's a rent credit card? If you are getting this card, probably you are using it more to pay rent than for anything else? And most people, you know, *budget to pay their rent each month*, which might make them less likely to carry a balance. And in fact:

The bank assumed around 65% of card-purchase volume would be nonrent, generating interchange-fee revenue. The reality is inverted.

Wells expected that around half to three-fourths of dollars charged to the card would carry over from month to month, generating interest charges. The reality ranges between around 15% and 25%.

I suppose there were other attractions:

Some Wells employees thought the proposition was crazy, but the bank needed a win and figured Bilt would garner buzz and help attract younger customers. A deal also presented mortgage cross-selling opportunities. Bilt's cardholders will ultimately want to become homeowners, the thought process at Wells went, and the bank would be well-positioned to give them mortgages.

That hasn't come to pass, and at any rate, Wells has pulled back from mortgage lending.

Ah, well.

Tesla to Texas

One thing that I sometimes think is that the US Securities and Exchange Commission would prefer never to think about Elon Musk again. I assume that the SEC is perfectly fond of a lot of the people it regulates because they are basically cooperative rule-followers, and I assume that the SEC is absolutely *overjoyed* by a lot of scofflaws and fraudsters, because it is very fun for regulators to bring cases against scofflaws. Like when Terra collapsed, I am sure that the SEC had to go around looking sad and angry and saying “we are always unhappy when investors are defrauded, and we will carefully investigate to see what laws were broken,” but in private I bet they were thrilled, because [that case is funny](#).

But Elon Musk is different. Elon Musk is constantly pushing the boundaries of the securities laws, but in complicated ways that are arguably allowed. He's not running around doing funny frauds; he's running around tweeting ambiguous winking things. And he is maximally aggressive, and hires maximally aggressive lawyers, and is politically influential. So Musk will do some weird thing, and people will go to the SEC being like “isn't this illegal,” and the SEC will mutter “I mean *we* think so,” but if they actually bring a case about it it will cost a lot of time and money and be very grinding and unpleasant, and the legal arguments will be difficult and novel, and they might lose, and also everyone who works on the case [will be blackballed](#) from all the law firms that Elon Musk uses. It's a mess.

But *not* bringing the case is also very unsatisfying: It sets bad precedents, undermines the SEC's regulatory program, and leads to people like me going around saying “why on earth did Elon Musk [get away with obviously violating the disclosure rules](#) when he bought Twitter?” The SEC cannot solve the Elon Musk problem by ignoring him, because he keeps doing stuff.

What the SEC would like, I suspect, is for him to keep doing stuff but vanish from their jurisdiction. Taking all his companies private would help, probably, though the SEC does have jurisdiction over private companies and he'd still find ways to enrage them. Moving the companies to Mars would be better. No SEC jurisdiction on Mars. Let the Martian authorities deal with him.

I also think this a little bit about the Delaware Court of Chancery? Like, every 20 minutes, Elon Musk does some weird borderline corporate governance thing, which the board of directors of Tesla Inc. and most of its shareholders love and heartily endorse. But some small shareholder says “wait this is an obvious conflict of interest,” and sues, and then everyone gets hauled into Delaware court for a hard-fought, long-running, contentious, expensive court battle. And the Delaware court is confronted with a mess:

- 1. Musk has done a thing that companies do not normally do, that does not comply with best practices, that no lawyer would advise.
- 2. But is it *actually illegal*? Meh, it is borderline and complicated and novel.
- 3. Most shareholders seem fine with it, and the stock keeps going up.
- 4. Allowing him to do the thing undermines Delaware's promise to provide predictable corporate law that protects minority shareholders.
- 5. Preventing him from doing the thing undermines Delaware's promise to provide predictable corporate law that enhances shareholder value.

So, in 2022, Musk won a long-running Delaware case over a merger between Tesla and SolarCity Corp., another public company that he controlled. That merger was absurdly conflicted — Musk owned two companies and merged them, and Tesla's board basically did whatever he asked, instead of setting up an independent special committee to negotiate the deal — but also shareholders were basically happy. But one disgruntled Tesla shareholder sued, saying that Tesla overpaid for SolarCity to bail out Musk's own investment, and [a judge ultimately found](#) that, uh, Musk probably should have just been more normal :

The process employed by the Tesla Board to negotiate and ultimately recommend the Acquisition was far from perfect. Elon was more involved in the process than a conflicted fiduciary should be. And conflicts among other Tesla Board members were not completely neutralized.

But Tesla's stock was way up since the deal, so no harm no foul:

The preponderance of the evidence reveals that Tesla paid a fair price—SolarCity was, at a minimum, worth what Tesla paid for it, and the Acquisition otherwise was highly beneficial to Tesla. ...

While the synergistic effects of the Acquisition are still unfolding, the astronomic rise in Tesla's stock

price post-Acquisition is noteworthy.

"I cannot help but observe," wrote the judge, "that Elon (and the rest of the Tesla Board members) likely could have avoided this expensive and time-consuming litigation had they just adopted more objectively evident procedural protections." Just be normal! Don't *create* a complicated novel difficult case when you can do things the normal way and have it be fine!

Also in 2022, there was Musk's takeover of Twitter Inc., where he signed a merger agreement, changed his mind, and tried to get out of it with silly arguments. Eventually he gave up and closed the deal, but there was a period when people wondered: What would happen if a Delaware judge ordered him to come up with \$44 billion and close the deal, and he said no? I was making jokes about "Chancery jail," but they were nervous jokes. Delaware's main export, as a state, is predictable merger rules, and Elon Musk does not do well with predictability.

And then there was the dispute over Musk's 2018 pay package, which we have talked about more recently. Earlier this year, a Delaware judge ruled that Musk's 2018 decision to pay himself a huge slice of Tesla options — at one point worth more than \$56 billion — was invalid, that Tesla's board was too controlled by him to make an independent decision about his pay, and that Tesla's shareholders approved it without being fully informed.

I thought this was a weird decision. "There is something awkward," I wrote, "about a judge second-guessing the CEO compensation decisions of the board of directors of a \$600 billion company, even if, yes, it's the board of Tesla." Tesla got a lot of value for that \$56 billion — at its peak its market value was up by \$1 trillion since the pay package was awarded — and the shareholders mostly approved. And last week Tesla put the question to a vote of shareholders again, now fully informed by the judge's objections, and the shareholders again overwhelmingly voted in favor of giving Musk his money.

Still I sympathize with the judge: Musk decided how much to pay himself, it was the largest executive pay package ever, and a completely subservient board of directors said "sure here you go." That's not really ideal corporate governance. Endorsing this pay package would have been a bit troubling. But rejecting it was worse: The decision clearly reduced shareholder value, and was clearly not what a majority of shareholders wanted. The court went a bit too far, protecting shareholders from bad governance in ways that they didn't want and that didn't help them.

Anyway, as we discussed last week, Tesla went back to the shareholders for two votes. One was to

re-approve Musk's 2018 pay package, which they did. And the other was to approve moving Tesla's state of incorporation to Texas, which they did [by an even larger majority](#). "Tesla has submitted all filings to effectuate its conversion into a Texas corporation and can confirm that the Company is now incorporated in Texas," it [announced on Thursday](#).

One obvious takeaway here is that Delaware court overreached, that shareholders rejected Delaware law, and that this is bad for Delaware in the long run. Perhaps now Texas is the more business-friendly place to be. "The Big Loser in Tesla's Shareholder Vote Is Delaware," [writes the Wall Street Journal](#): "By voting to leave the First State, shareholders could be ratifying the view among some that Delaware's shareholder protections have gone too far, some legal experts said."

And I think there's some truth to that. Maybe other companies *will* follow Musk's lead and move out of Delaware, to reduce the risk of shareholder litigation that gives disgruntled small shareholders finicky procedural protections at the cost of reducing value for everyone else. Though maybe not; maybe this is Musk-specific. "Maybe Elon Musk is a special case," I wrote last week, "and shareholders rationally want him to be allowed to do whatever he wants"; shareholders of other companies, not run by Elon Musk, might prefer Delaware's predictability and rules.

Still, I wonder if this comes as a relief to Delaware's courts and lawyers? The problem with Musk's pay package was not just that it was too big or that the board was too conflicted; the problem, for the Delaware Court of Chancery, was that it was *Elon Musk*. If he kept his pay, that would send a message that he is not bound by the normal rules of corporate governance; if he lost it, that would send a message that Delaware is bad for shareholder value. There was no good outcome, though I do think that the judge chose the worse of the two bad possibilities.

But now he's not Delaware's problem! The next time he does some bizarre conflicted thing at Tesla, a disgruntled shareholder can sue, and the brand-new Texas business courts can figure it out! Delaware can get back to its normal job of setting normal corporate rules for normal public companies. Elon Musk will always be an exception to everything, and it's nice to have him somewhere else.

Elsewhere in the Elon Musk news roundup

Two things. One, I mentioned this above, but it really is odd that the SEC hasn't yet brought a case against him for manifestly violating the disclosure rules when he bought Twitter. The [Wall Street](#)

Journal reports:

The Securities and Exchange Commission has been investigating Musk's late disclosure of his purchases of Twitter stock before he took over the company. Excerpts of Musk's testimony provided to the SEC, which came to light last month through a separate lawsuit, suggest Musk and his adviser brushed off compliance with a rule that required him to reveal his ownership once it passed 5% of Twitter's shares.

Musk and his closest adviser on the trades didn't seek legal advice, for instance, about how to follow the rule while building his stake despite the adviser telling the bank that they had, according to a lawsuit in Manhattan federal court brought by the Oklahoma Firefighters Pension and Retirement System against Musk and others. Musk waited to disclose his stake until he owned more than 9% and had an offer to join its board, according to court filings. ...

The testimony could support a claim that Musk violated the rule so he could keep his trading secret and prevent Twitter's share price from rising while he was buying it, lawyers said. The SEC has said in court papers that it is investigating whether Musk committed civil fraud by delaying his disclosure or misleading the market about his plans.

I once estimated that "he saved \$143 million on those purchases by filing his form late," and the rules are just really clear, so I remain puzzled that the SEC hasn't brought a case yet. I suppose they are trying to figure out if he broke the rules intentionally, or just because he didn't care.

Second, we talked a few weeks ago about news reports that Musk redirected a shipment of Nvidia chips from Tesla to X Corp. (formerly Twitter), as his own ambitions for artificial intelligence have increasingly shifted from Tesla to xAI (yet another company he controls). Probably most Tesla shareholders are fine with that, and certainly Tesla's *board* is fine with that; they're fine with whatever Musk does. But it's an obvious conflict of interest, and there it is in the newspaper, so of course [a shareholder sued](#). Last week. In Delaware Chancery Court. "Getting in under the wire before the Texas move," [tweeted](#) law professor Ann Lipton. If I were a Delaware chancellor, I'd be trying to make this case Texas's problem too.

Werewolf

One appeal of cryptocurrency is that it might be a *better* form of currency than traditional currencies.

Cryptocurrencies, the argument goes, can do stuff that traditional currencies can't do: They can be transferred peer to peer without any intermediaries, they can be carried in electronic form without a bank account, they can be "programmable money," they can be elements in smart contracts.

But another appeal is that it might be *worse* than traditional currencies. I am not kidding, and this is not a trivial appeal! It is not hard to imagine use cases in which "currency, but worse" is what you want: You want a currency that is more restricted or more contingent than dollars. Giving your kids an allowance of 10 AllowanceBucks — dollars, but they can only be spent on age-appropriate goods — might be better than giving them an unrestricted \$10. Or part of [the case for central bank digital currencies](#) is that they could have negative interest rates: "dollars, but 1% of them vanish every month." That's worse than a dollar! For you, I mean. But the essential fact of currency is that it represents a claim on somebody else: A dollar in your hands represents an obligation of society to give you \$1 worth of stuff. A slightly worse currency represents a slightly weaker obligation, and sometimes that's what you want. Fine-tuning a financial system might benefit from having some currencies that are *more* powerful and useful than dollars, but also some that are *less* powerful and useful.

Okay fine I'm partially kidding; here's a press release I got:

JUNE 16 - Werewolf Coin, a cryptocurrency that can only be used during the full moon, publicly launched today.

A project by an anonymous artist, Werewolf Coin can be transferred for 24 hours before each full moon and for 24 hours after each full moon. Astronomically, a full moon refers to the moment when the Moon is exactly 180 degrees away from the Sun.

The cryptocurrency can be minted on <https://werewolfco.in>, which also features a lunar calendar.

I cannot think of any actual reason *this* would be better than regular money.

Things happen

Hedge Funds' Secret Weapon to Fight the SEC Lives in Texas. A buyout gone wrong creates fireworks in the [private credit market](#). Activist Starboard Value Has Stake in [Autodesk](#). Deutsche

Bank counting on [investment bank hiring spree](#) to pay off. Archegos Trader's Tough Testimony Wipes Smile From Hwang's Face. The Hottest Investment for Hedge Funds Is [Other Hedge Funds](#). Ukraine urges bondholders to [accept markdown](#) on more than \$20bn of debt. Roaring Kitty's \$262 Million Stirrs Skeptics in Meme Stock Era. Virgin Galactic Sinks After Board Approves Reverse Stock Split. Curve Finance founder [gets liquidated](#) amid sharp drop in CRV token price. 'Poo in the Water': How [Financial Engineering](#) Sullied Britain's Most Famous River.

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- 1. The [math on that](#) is that there were 664,284 shares of SilverSun outstanding before the transaction (adjusting for an 8-for-1 reverse stock split), and the Jacobs group got convertible preferred stock and warrants that convert into 438,014,750 shares, or about 99.85%. Jacobs himself reports an 89.86% ownership; the minority investors get another 10%, and the public pre-deal SilverSun shareholders have the other 0.15%. These numbers don't quite foot to the market cap ratios because the Jacobs group got (1) convertible preferred stock that converts into 197,106,637 shares, and is essentially the same as common stock plus (2) warrants, which have to be exercised separately at strike prices ranging from \$4.566 to \$13.698 per share. In other words, the Jacobs group report owning *more* stock than you'd expect based on a \$1 billion investment, but some of that is stock underlying unexercised warrants.
- 2. See page 23 of [SilverSun's 10-Q](#) for more details. Briefly: The original December deal between Jacobs and SilverSun was that he would take control of SilverSun, and SilverSun would pay a \$2.5 million dividend to its shareholders and also spin out its legacy business to them. Then in April the deal was revised to pay a \$17.4 million dividend and *not* spin out the legacy business. "SilverSun's existing operations will be retained" by QXO, is apparently the plan. Those existing operations [generated \\$1.7 million of net income](#) on \$54.4 million of revenue in 2023: SilverSun is/was a *teeny* company, but unlike a lot of reverse-merger targets it is not a *defunct* one. I couldn't tell you what it does/did, though [the 10-K says](#) that it is "engaged in providing transformational business management applications and technologies and professional consulting services to small and medium size companies, primarily in the manufacturing, distribution and service industries," and is "a value-added reseller of business application software." I guess QXO could keep distributing software

as well as building materials, why not.

- 3. The co-investors are [locked up until 2029](#), and Jacobs presumably would need a registration statement to sell his shares. Also they don't have common shares; they have preferred stock and warrants that can convert into common.
- 4. This is not a good way of doing the math, because a lot of those warrants have exercise prices, so more cash would come in to get to that \$110 billion valuation. It's the right ballpark though.
- 5. Again, slightly off — there are warrants, etc. — but essentially correct. Incidentally that's about a 100% premium to the \$4.566 per share that Jacobs and the initial seed investors got last December: This company is a hot ticket among institutional investors too!
- 6. All of this is oversimplified: The number is not a flat 2% (and that's probably a bit high for most transaction categories), and the fee is split among the issuing bank, the merchant bank, the card network and other intermediaries.
- 7. Unless you default.
- 8. Or else a reference to [one particular bookstore](#).
- 9. He does weird stuff at his private companies too, but no one really sues.
- 10. Because Musk's brother Kimbal was also involved in this case, the judge's opinion calls Elon Musk "Elon" rather than "Musk."
- 11. Ann Lipton [writes](#): "One story is, [Tesla's institutional shareholders] 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."
- 12. The [Journal article](#) goes on: "An alternative, however, is that Musk is simply so important that investors are willing to take a chance on Texas. 'I do think that Elon Musk is this singular figure,' said Renee Zaytsev, a corporate- and securities-law attorney at Boies Schiller Flexner. 'Is Tesla what other companies are looking to, to decide where they're going to incorporate or how they're going to run their governance? Probably not.'"

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NEWS

Court Battle Over Musk's Compensation Is Far From Over, Even After Ratification Vote, Experts Say

The vote doesn't negate the Delaware Chancery Court's decision faulting the process by which Tesla's board originally approved the CEO's pay package.

June 14, 2024 at 03:03 PM

Technology Media and Telecom



Ellen Bardash



The original version of this story was published on [Delaware Business Court Insider](#)

Court-watchers say a vote by Tesla shareholders to ratify Elon Musk’s pay package doesn’t negate the Delaware Chancery Court’s ruling that faulted the process by which Tesla’s board originally approved the package in 2018.

Tesla shareholders voted on Thursday in favor of Musk’s compensation plan, one that Chancellor Kathaleen St. J. McCormick subsequently ordered to be rescinded.

The vote doesn’t negate the Delaware Court of Chancery’s fundamental finding that the process by which Tesla’s board approved the package in 2018 was flawed.

Moreover, they say that if Musk does end up getting the compensation package valued at over \$50 billion reinstated, it won’t be for a while.

“The judge found in fairness analysis that the package was a gift, and under well established Delaware law, you can’t give corporate money away unless there’s unanimous support for it,” said law professor Charles Elson, who is seeking leave to file an amicus brief in the Tornetta case. “She basically said giving that much equity to someone, determined by a non-independent board with no real process, was the real problem, and I don’t see how this really changes that.”

Whether the vote overrides the flaws the court identified is a question that won’t be fully answered until Delaware’s Court of Chancery weighs in in the derivative litigation brought by shareholder Richard Tornetta and the Delaware Supreme Court makes a ruling on appeal.

“This simply doesn’t settle anything,” said Ann Lipton, a professor at Tulane Law School. “What we expect to happen is that Tesla will argue that this cures whatever defects are in the original package, and the Tornetta plaintiff, as well as this [new plaintiff](#), (Donald) Ball, will argue that it actually does not have any ratifying effect.”

Lipton said McCormick will need to decide who’s right on that issue, and the losing side will likely appeal to the Delaware Supreme Court, which could then weigh in both on McCormick’s original post-trial decision and on however she decides the ratification question.

“There’s an argument that it could provide some kind of color for how the Delaware Supreme Court thinks about her earlier ruling and the correctness of her earlier ruling,” Lipton said. “But it’s technically two separate issues. What happened in 2024 cannot reach back in time to change what happened in 2018.”

“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 Bernstein Litowitz Berger & Grossmann partner Greg Varallo, who represents Tornetta in the Chancery case. “We will respond to any arguments raised in due course.”

Also still on the table is the question of the fee award Tornetta’s counsel is seeking: a cut of the Tesla stock rescinded from Musk, valued at over \$5 billion. That’s scheduled to be heard by the court in July, and both Tesla and certain shareholders have objected to the request, arguing it’s based on an overvaluation of the benefit the plaintiff’s win had for shareholders, 73% of whom voted in favor of the pay package in 2018.

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NEWS

'The Preposterous Has Become Reality': Chancery Filings Continue to Target Musk, Tesla Board

Complaints in Delaware court allege that Elon Musk sought to take AI-related projects elsewhere if he could not maintain a 25% equity stake in the electric car manufacturer.

June 13, 2024 at 04:23 PM

Corporate Governance



Ellen Bardash



The original version of this story was published on [Delaware Business Court Insider](#)

Three Tesla shareholders have separately taken legal action against Elon Musk and the company's board within a week, with the latest complaint filed hours before Tesla's annual meeting.

The allegations vary and plaintiffs' counsel doesn't overlap, but all three suits take issue with Musk prioritizing the AI company he owns over Tesla's AI growth and with directors not stepping in. X.AI Corp., which like X Corp. is incorporated in Nevada, was founded in 2023.

The [newest case](#) was filed Thursday by Grant & Eisenhofer, Saxena White and the Schall Law Firm. That complaint states with AI being an area Musk himself has described as having significant growth potential for Tesla, he should be an advocate for Tesla, not for a competing company. Instead, it alleges, he's hired away AI-focused talent from Tesla and pushed back Tesla's getting \$500 million of Nvidia graphics processing units by "ordering Nvidia to let privately held X jump the line."

Earlier this year, the filing claims, after spending years saying Tesla should focus on acquiring the limited AI talent and resources available, Musk adjusted course, stating he'd prefer to work on AI projects outside Tesla without having 25% voting control with the company. When Chancellor Kathaleen St. J. McCormick ordered rescission of Musk's compensation package in January, his beneficial ownership at Tesla was reduced from 21% to 13%.

"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 stated. "No special rules apply to Tesla or Musk. Yet, at Tesla, the preposterous has become reality."

The case is also pursuing claims against Tesla's board members, claiming they had a duty to stop Musk from focusing on X.AI over AI at 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," the complaint stated.

Two days earlier, [another](#) shareholder complaint also raised concerns about Musk putting time and resources toward X.AI instead of AI-focused projects at Tesla, though that case focuses more heavily on making similar complaints about Musk's purchase of the microblogging platform he's rebranded as X. The shareholder plaintiff in that case, also a pension fund, is represented by Prickett, Jones & Elliott and Lieff Cabraser Heimann & Bernstein.

Musk's balance of AI efforts was mentioned in an [additional](#) Chancery lawsuit, filed June 6 by McCollom D'Emilio Smith Uebler and Kaskela Law, that claims Musk was likely to take Tesla's AI and robotics opportunities elsewhere if, after Tesla's annual meeting on June 13, he didn't hold a 25% stake in the company and shareholders didn't approve both ratification of his compensation plan and reincorporation in Texas.

That case asked the court to declare both redomestication and ratification of the compensation plan null and void, stating Tesla didn't properly inform shareholders about the proposals' implications and that both were affected by coercion by Musk.

Tesla announced at its annual meeting that based on preliminary vote results, shareholders have approved both the reinstatement of Musk's compensation plan and redomestication in Texas. The Court of Chancery has not weighed in directly on how the results of those votes might affect the ongoing Delaware litigation.

NOT FOR REPRINT

Tesla kicks off legal fight to reinstate Musk's pay

 [reuters.com/legal/tesla-kicks-off-legal-fight-reinstate-musks-pay-2024-06-17](https://www.reuters.com/legal/tesla-kicks-off-legal-fight-reinstate-musks-pay-2024-06-17)

Tom Hals

Elon Musk, Chief Executive Officer of SpaceX and Tesla and owner of X looks on during the Milken Conference 2024 Global Conference Sessions at The Beverly Hilton in Beverly Hills, California, U.S., May 6, 2024. REUTERS/David Swanson/File Photo Purchase Licensing Rights , opens new tab

WILMINGTON, Delaware, June 17 (Reuters) - Tesla began its fight for legal recognition of a shareholder vote favoring Elon Musk's record compensation, telling a Delaware judge that it "significantly impacts" her ruling voiding the pay, according to a letter made public on Monday.

Tesla wrote to Chancellor Kathaleen McCormick that the parties in the pay package case should now lay out their legal interpretations of Thursday's ratification of Musk's pay, rather than moving ahead with the case on the prior schedule.

"The approval of ratification by Tesla's stockholders significantly impacts the claims and issues in this action, including the court's final judgment," Tesla attorneys told McCormick in the letter, which was filed with the Court of Chancery on Friday.

Greg Varallo, a shareholder attorney in the case against the pay package, said the ratification had "no legal effect" on the case and that he would explain his argument in a brief due Friday.

Tesla has said the ratification process was "novel" and it was unclear if McCormick and the Delaware Supreme Court would accept the result.

Tesla has argued that the ratification has now cured the problems raised in McCormick's ruling in January.

The judge found Musk controlled the 2018 process that led to the pay package and that Tesla concealed key information from shareholders about the ease of the targets the company had to meet for Musk to be paid.

A special committee of its board reviewed the pay package and determine it was in the best interest of shareholders, which Tesla said fixed the problem of Musk's dominance in the process.

The vote was corrected by providing shareholders hundreds of pages of added disclosures, including McCormick's 200-page opinion.

McCormick also has to determine a fee for the shareholder legal team before Tesla can appeal her ruling to the Delaware Supreme Court.

The shareholder's attorneys are seeking around \$5 billion, in the form of Tesla stock as a legal fee and Tesla argued they should be paid around \$13.6 million.

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Reporting by Tom Hals in Wilmington, Delaware, Editing by Franklin Paul

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Tom Hals

Thomson Reuters

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

Judge postpones discovery in lawsuit against Elon Musk and former Twitter executives

DJ [dailyjournal.com/articles/379180-judge-postpones-discovery-in-lawsuit-against-elon-musk-and-former-twitter-executives](https://www.dailyjournal.com/articles/379180-judge-postpones-discovery-in-lawsuit-against-elon-musk-and-former-twitter-executives)

New York Times News Service

A federal judge in San Francisco met with attorneys for Elon Musk and former Twitter executives suing the billionaire for \$128 million in backpay, telling them on Friday that she would stay discovery until deciding on Musk's bid to toss the plaintiffs' equitable relief claim under the Employee Retirement Income Security Act.

On behalf of former Twitter CEO Parag Agrawal and other high-level executives, Sidley Austin LLP partner David L. Anderson filed a lawsuit in March accusing Musk of unlawfully withholding millions of dollars in severance pay after making up fake causes for termination. Anderson, a former U.S. Attorney for the Northern District of California, said Musk wrongfully characterized Twitter paying board-approved fees to the law firms that represented the company during the Tesla founder's acquisition as "gross negligence" and "wrongful misconduct."

Musk's attorneys at Morgan Lewis & Bockius LLP have vigorously denied the claims and said the plaintiffs, which include Twitter's former general counsel and chief financial officer, disagree with an administrative decision regarding employee benefits. *Agrawal et al. v. Musk et al.*, 3:24-cv-01304-MMC (N.D. Cal., filed Mar. 4, 2024).

During Friday's hearing, U.S. District Judge Maxine M. Chesney referred to a 9th U.S. Circuit Court of Appeals ruling in which the court held that ERISA plan administrators had discretionary authority when interpreting plans and that those determinations should only be overturned for an abuse of discretion. The judge wondered if the case law required her to proceed to evaluate whether the benefits were correctly or incorrectly denied. *Abatie v. Alta Health Life Ins. Co.*, 03-55601 (9th Circ., filed Apr. 11, 2003).

As the plaintiffs have alleged procedural irregularities and malicious conduct, Anderson said those factors triggered a de novo review of the case. "Even if we don't get to that level, of course, they inform the skepticism that the court will use in reviewing the discretionary determination," the attorney said.

Chesney did not appear convinced and said the case law seemed straightforward. She told Anderson that a motion on the merits after discovery would be more helpful, and Morgan Lewis partner Christopher J. Boran agreed with the judge's evaluation.

"We think it's crystal clear based upon the language in the planned document that this is an abuse of discretion case. Certainly, plaintiffs are entitled to take some discovery ... but it doesn't affect what standard of review applies," said Boran.

Musk's attorneys have asked the court to dismiss the plaintiffs' claim under Section 510 of ERISA, which prohibits discrimination against beneficiaries of an employee benefit plan for exercising any rights they may be entitled to under the plan. "The claims alleged in Count V ... fail to state a claim because the only relief the plaintiffs seek -- 'equitable surcharge' and 'front pay' -- are not available to them on the facts alleged as a matter of law," Morgan Lewis partner Eric Meckley wrote in the motion, set for hearing on July 19.

During the hearing, Chesney characterized the Section 510 claim as a backup to the plaintiffs' Section 502 claims, which imposes civil penalties for statutory violations. Agreeing with the judge, Boran said the plaintiffs were using the Section 510 claim to expand the discovery parameters.

"We think that the same body of discovery will go to that termination decision which we consider quite improper ... the defendants aren't supposed to just decide that they like their motion and they're not going to give discovery," said Anderson. Denying that the Section 510 allegation was a backup claim, the attorney said his clients could seek equitable relief, including letters of good reason for termination from Musk.

"I don't mean to denigrate it by saying it's a backup [claim], but you know, after devoting four causes of action to severance benefits, that one trailing matter just seemed like there wasn't as much heft to it as the other claims," said Chesney.

#379180

Sunidhi Sridhar

Daily Journal Staff Writer
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Business Law Prof Blog

lawprofessors.typepad.com/business_law/2024/06/i-write-letters.html

Sunday, June 16, 2024

I Write Letters!

By Ann Lipton

Here is the text of a letter I submitted in advance of the Delaware House Judiciary Committee Meeting regarding the proposed amendments to the DGCL:

Dear Chair Griffith:

I write to express my concerns about S.B. 313, and in particular the proposed amendments to Section 122 of the Delaware General Corporation Law (DGCL). I believe the proposed amendments will cause Delaware to lose control over its law.

As proposed, the statute authorizes a shift of corporate governance from the charter to private contracts. Corporate charters are subject to the law of the chartering state, thus, Delaware law. Private stockholder agreements are not necessarily subject to the law of the chartering state. That means other states' laws would govern the interpretation of these contracts, and the appropriate remedies for any breaches.[1]

Additionally, the Federal Arbitration Act (FAA) provides that agreements to arbitrate disputes "shall be valid, irrevocable, and enforceable." [2] In practical effect, the FAA bars states, including state courts, from prohibiting or regulating arbitration agreements, and requires that such agreements be enforced as written. It is likely that the FAA does not apply to corporate charters,[3] which is why Delaware was able to adopt Section 115 of the DGCL, prohibiting corporations from including forum provisions in their charters that would bar access to the Delaware courts.[4]

By contrast, the FAA almost certainly would apply to stockholder agreements. If parties to a stockholder agreement agree to arbitrate disputes, a Delaware court will be required to enforce that provision. Those disputes could easily include questions about the legality of the contract under Delaware law, or whether a stockholder took on fiduciary obligations, and abused them, as a result of the control conferred by the contract.[5] As a result, important questions of Delaware law would be decided by non-Delaware actors, often in confidential proceedings. Arbitration provisions could also bind public stockholders who bring derivative actions on the corporation's behalf.[6] Even stockholders who bring direct actions regarding stockholder agreements, on behalf of themselves rather than the corporate entity, may find themselves bound to arbitrate disputes regarding the agreement.[7]

Moreover, as drafted, the amendments would explicitly permit stockholder agreements to select a forum for disputes outside of Delaware – either in arbitration or another state. Once again, that would mean that other states, or arbitrators, would decide whether the stockholder contract violated Delaware law, and whether the stockholder abused its governance rights under the contract.

Delaware's value to incorporators includes its robust body of caselaw decided by expert Delaware judges. The proposed amendments endanger that value proposition.

Sincerely,

Ann M. Lipton

[1] See generally Ann M. Lipton, *Inside Out (or, One State to Rule Them All): New Challenges to the Internal Affairs Doctrine*, 58 Wake Forest L. 321 (2023); see also *KT4 Partners v. Palantir*, 203 A.3d 738 (Del. 2019) (involving an investor in a Delaware corporation with a stockholder agreement governed by California law).

[2] 9 U.S.C. § 2.

[3] See generally Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 Geo. L.J. 583 (2016).

[4] Del. Code tit. 8, § 115.

[5] See, e.g., *Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC*, No. 11802, 2018 WL 3326693 (Del. Ch. July 6, 2018) (involving such a scenario).

[6] See, e.g., *Ernst & Young, LLP v. Tucker ex rel. HealthSouth Corp.*, 940 So. 2d 269 (Ala. 2006).

[7] See Richard J. Tyler, *Kicking and Screaming: Joinder of Non-signatories in Arbitration Proceedings*, 75 Disp. Resol. J. 111 (2020).

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June 17, 2024, 2:00 AM PDT

This Week in Chancery Court: Hertz, Carlyle Group, SwervePay

By Jennifer Kay and Allie Reed

Bloomberg Law News 2024-06-17T09:23:24839161936-04:00

This Week in Chancery Court: Hertz, Carlyle Group, SwervePay

By Jennifer Kay and Allie Reed 2024-06-17T05:00:15000-04:00

The Delaware Chancery Court will rule this week on Hertz Global Holdings Inc.'s motion to dismiss an investor's lawsuit over \$2.8 billion in stock buybacks.

Delaware courts will be closed Wednesday for the Juneteenth holiday. Here's a look at what else is on the Chancery Court's calendar for the week:

Tuesday: Malt Family Trust v. 777 Partners LLC, Del. Ch., No. 2022-0652, hearing 6/18/24.

At issue: A discretionary trust wants to amend its complaint against investment firm 777 Partners LLC over its alleged breach of fiduciary duties involving an aviation leasing business it acquired. The lawsuit accuses the firm, which had planned to buy the English Premier League's Everton Football Club in a deal that has since collapsed, accuses the firm of breaching its fiduciary duties to the prior owners of the leasing business. Since the initial complaint was filed, the plaintiffs have become aware that 777 Partners and its principals "are operating a massive, Madoff-scale scheme of fraud to the tune of many hundreds of millions of dollars," they wrote in a motion to amend their complaint. The firm said the plaintiffs can't prove with particularized facts that the majority of managers lacked the independence necessary to "have assessed a demand in good faith," according to a brief in support of their motion to dismiss the initial complaint. Vice Chancellor Morgan T. Zurn in November 2023 allowed some of the plaintiffs' claims to move forward.

Court action: A hearing on the plaintiffs' motion to amend will be heard by phone.

Everton FC Buyers Ordered to Face Aviation Leasing Deal Case (2)

Tuesday: In re Swervepay Acquisition LLC, Del. Ch., No. 2021-0447, hearing 6/18/24.

At issue: Swervepay's buyers claim they were defrauded into purchasing the payment processing software company by sellers who misled them about its relationships with customers and vendors. The buyers argue the sellers "conspired to market SwervePay as a business with valuable customer relationships and a compelling pipeline of prospective relationships" in an act of desperation to close the sale, according to a third amended complaint. The sellers, SPOSC Investment Holdings LLC, claim the buyers' fraud-based claims should be dismissed because they're untimely, according to their brief in support of a partial motion to dismiss.

Court action: A hearing on the motion to dismiss will be heard in Wilmington, Del.

Blue Star, New Mountain Sued for Fraud by SwervePay Ex-Leaders

Thursday: Manti Holdings LLC v. The Carlyle Group Inc., Del. Ch., No. 2020-0657, post-trial arguments 6/20/24.

At issue: The Carlyle Group Inc. went to trial in January in a lawsuit that challenged its \$77.5 million sale of anti-counterfeiting company Authentix Inc. to Blue Water Energy LP in 2017. In closing arguments, the investors leading the litigation will argue that the trial demonstrated that a "conflict of interest was driving Carlyle's actions," according to a post-trial brief. The investors had argued that a Carlyle-managed private equity fund acquired a controlling interest in Authentix in 2008, and Carlyle pushed through the 2017 sale in order to liquidate that fund. Carlyle argues the trial showed there was no urgent need for liquidity behind the sale, but there was "ample proof of a desire and ability to hold and sell the company at an optimal time, if such a moment existed, to maximize value," according to a brief.

Court action: Post-trial arguments will be heard in Georgetown, Del.

Carlyle Loses Bid to Dodge \$78 Million Authentix Deal Challenge

Thursday: Chatham Holdings VI LLC v. Hermida, Del. Ch., No. 2023-0037, hearing 6/20/24.

At issue: Blackstone Inc., KKR & Co., and board members at One Call Corp. face investor litigation over claims they had self-dealing reasons for blocking a series of transactions aimed at rescuing the ailing health care company. The lawsuit accused the private equity giants and their board allies of killing debt restructuring efforts proposed by a hedge fund affiliate of Chatham Asset Management LLC, which holds stock in One Call parent company Coral Acquisition Inc. Coral is allegedly controlled by Blackstone and KKR. "The disinterested members of the Board unanimously rejected Chatham's Insider Proposal after receiving advice from top-tier financial and legal professionals about its potential adverse effects on the Company," the defendants argue in a brief supporting their motion to dismiss the case. Chatham calls its restructuring proposal a "classic case of no good deed going unpunished," according to an answering brief.

Court action: Oral arguments on the motion to dismiss will be heard in Wilmington, Del.

Blackstone, KKR Accused of Blocking One Call Corp. Rescue (1)

Thursday: Cascia v. Farmer, Del. Ch., No. 2023-0520, bench ruling 6/20/24.

At issue: A bench ruling is expected on Hertz's effort to escape an investor's lawsuit over the stock buybacks. Shareholder Angelo Cascia said the buybacks "gifted" a majority stake in the car rental giant to its post-bankruptcy private equity backers. Hertz defended them at a hearing in March, saying that while it's true that CK Amarillo LP increased its ownership to over 56% "at least for now" as a result of the buybacks in November 2021 and June 2022, gaining control wasn't a guaranteed result for the private equity fund set up by Certares Management LLC and Kighththead Capital Management LLC.

Court action: Chancellor Kathaleen St. Jude McCormick will deliver a bench ruling via teleconference.

Hertz Defends Stock Buybacks That Gave Private Equity Control

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Sinovac Investor Drops Share Dilution, Board Control Lawsuit

By Martina Barash

Bloomberg Law News 2024-06-17T09:24:31418046502-04:00

Sinovac Investor Drops Share Dilution, Board Control Lawsuit

By Martina Barash 2024-06-14T16:16:34000-04:00

A Sinovac Biotech Ltd. minority stakeholder is voluntarily dismissing a suit against the vaccine maker and its controlling shareholder over the stock's value and the balance of power on the board, according to a federal court filing.

Boston-based Heng Ren Investments LP didn't give its reason for dropping the suit in the parties' filing Thursday with the US District Court for the District of Massachusetts.

Neither Heng Ren's founder and chief investment officer Peter Halesworth nor Sinovac immediately responded to requests for information about the dismissal, including whether a settlement is involved.

- Heng Ren alleged that Weidong Yin—Sinovac's controlling shareholder, chairman, president, and CEO—attempted “to cement his control of the Company by selling 11,800,000 shares at a fire sale price to his friends and affiliates,” diluting the stock value
- An investor seeking to represent a class on similar allegations waited too long to sue Sinovac, Judge Nathaniel M. Gorton of the District of Massachusetts said in September 2023, shortly after another suit was filed in Delaware
- Heng Ren's voluntary dismissal precludes it from re-filing the suit, according to the parties' notice to the court

Beaton & Petersen represented Heng Ren. Latham & Watkins LLP represented Sinovac.

The case is Heng Ren Invs. LP v. Sinovac Biotech Ltd. , D. Mass., No. 1:19-cv-11612, notice 6/13/24 .

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Chinese state-owned firm faces multibillion-dollar judgment in US price-fixing lawsuit

 [reuters.com/legal/litigation/chinese-state-owned-firm-faces-multibillion-dollar-judgment-us-price-fixing-2024-06-14](https://www.reuters.com/legal/litigation/chinese-state-owned-firm-faces-multibillion-dollar-judgment-us-price-fixing-2024-06-14)

Mike Scarcella

Police officers display counterfeit U.S. dollar bills during a news conference in Lima October 14, 2015. The National Police seized \$836,000 in fake bills that had been packed in bags and backpacks destined for the city of New York in the United States, according to a police media release. [REUTERS/Guadalupe Pardo Purchase Licensing Rights](#) , opens new tab

June 14 (Reuters) - Chinese state-owned manufacturing company Irico Group is fighting a potential multibillion-dollar judgment after a court-appointed fact-finder said the company destroyed evidence and flouted a judge's orders in a U.S. price-fixing lawsuit.

Irico Group's attorneys in a Thursday filing , opens new tab in Oakland, California, federal court said such a drastic sanction is not justified and asked U.S. District Judge Jon Tigar to allow the case to go to trial instead.

The plaintiffs in the long-running case accused Irico of participating in a years-long conspiracy to overcharge purchasers of cathode ray tubes once widely used in computer monitors and television screens. The company has denied the claims.

A former federal judge, Vaughn Walker, was appointed in 2013 to oversee disputes about evidence in the sprawling case. Walker in May said Irico intentionally destroyed evidence and flouted court rules, finding that it engaged in "dilatory and egregious litigation misconduct."

He recommended , opens new tab "terminating" sanctions, which would mean Irico would not stand trial and the plaintiffs would win outright.

Irico's Thursday filing disputed Walker's report and recommendations, arguing that it "fails to identify a single instance in which Irico deviated from its standard document-retention practices."

Irico's attorneys and lawyers for the plaintiffs did not respond to requests for comment on Friday.

The Chinese company, represented by international law firm Norton Rose Fulbright, argued that Walker "misunderstood the scope of their responsibilities" to preserve evidence and had "failed to immediately update primitive electronic systems and Chinese-law-compliant document-retention policies to conform to U.S. practice."

Irco is the last remaining defendant in the cathode ray tube litigation, which began in 2007. The North American market was the largest for the devices during the class period, according to the complaint. The plaintiffs alleged a price-fixing conspiracy from 1995 to 2007.

Walker's May report said Irco "has thwarted and evaded its opportunity to defend the case on law and the merits" and that it was not unfair to punish the company with a judgment for the plaintiffs and significant monetary damages.

The case is *In re Cathode Ray Tube (CRT) Antitrust Litigation*, U.S. District Court for the Northern District of California, No. 4:07-cv-05944.

For direct purchaser class: R. Alexander Saveri of Saveri & Saveri, and Steven Benz of Kellogg Hansen Todd Figel & Frederick

For indirect purchaser class: Mario Alioto of Trump Alioto Trump & Prescott; and Joseph Cotchett of Cotchett Pitre & McCarthy

For Irco Group: Jeff Margulies, Kaylee Yang and Geraldine Young of Norton Rose Fulbright

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Amazon accused of audiobook monopoly in author class action

 [reuters.com/legal/litigation/amazon-accused-audiobook-monopoly-author-class-action-2024-06-14](https://www.reuters.com/legal/litigation/amazon-accused-audiobook-monopoly-author-class-action-2024-06-14)

Mike Scarcella

The logo of Amazon is seen at the company's logistics centre in Boves, France, October 6, 2021 REUTERS/Pascal Rossignol/File Photo Purchase Licensing Rights  , opens new tab

June 14 (Reuters) - Amazon.com (AMZN.O)  , opens new tab is facing a proposed class action claiming it has monopolized the retail market for audiobooks, leading authors to overpay for the distribution of their works.

The Seattle federal court lawsuit  , opens new tab from author Christine DeMaio, who publishes under the name CD Reiss, said Amazon is violating U.S. antitrust law by charging higher distribution fees for writers who do not exclusively use the e-commerce giant's platform.

Amazon has used exclusivity agreements "to lock up content," impairing the ability of rivals to compete and affecting billions of dollars in audiobook sales, the lawsuit said.

Amazon did not immediately respond to a request for comment.

The plaintiff's attorney Steve Berman said authors deserved "a fair price for their work and not to be the victims of Amazon's abusive monopoly practices."

Sales of audiobooks have steadily risen in recent years, reaching nearly \$2 billion in 2022, according to the lawsuit.

Amazon in 2008 bought digital audiobooks provider Audible for about \$300 million. The lawsuit called Audible the world's largest audiobook retailer, accounting for more than 60% of domestic purchasing compared with about 20% for Apple.

The lawsuit seeks more than \$5 million in damages and class action status for thousands of authors and rights holders who paid a distribution fee to Amazon of at least 60% on sales. That fee increases to 75% for "non-exclusive" audiobooks that are sold on Amazon and elsewhere, the complaint said.

Berman's law firm Hagens Berman Sobol Shapiro is also leading a consumer antitrust lawsuit accusing Amazon of artificially inflating the price of ebooks on its platform. The U.S. Federal Trade Commission last year accused Amazon of antitrust violations by punishing sellers for offering better prices on other platforms and charging costly fees on merchants. Amazon has denied the claims in the ebook and FTC cases.

The case is CD Reiss v. Amazon.com, U.S. District Court for the Western District of Washington, No. 2:24-cv-00851.

For plaintiff: Steve Berman of Hagens Berman Sobol Shapiro and Phillip Cramer of Sperling & Slater

For defendant: No appearance yet

Read more:

FTC lawsuit over Amazon's Prime program set for June 2025 trial

Amazon fends off US class action over 'guaranteed' delivery window

Amazon fights FTC probe of data safeguards in antitrust lawsuit

Amazon denies duping consumers with 'buy box' product feature

Reporting by Mike Scarcella

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'You Start Lower, You Stay Lower': Apple Hit With Class Action for Gender Bias

Women employees represented by Altshuler Berzon and Cohen Milstein Sellers & Toll, alleged gender-based pay discrimination, biases against women in its performance evaluation system, and maintaining a hostile work environment.

June 14, 2024 at 04:41 PM

Class Actions



Kat Black



What You Need to Know

- Apple was sued on Thursday by female employees for gender-based wage discrimination, creating a hostile work environment, and biased performance evaluations.
- The complaint was led by two Apple employees, Justina Jong and Amina Salgado, and encompasses over 12,000 current and former Apple employees in the state of California.
- Plaintiffs are represented by Altshuler Berzon and Cohen Milstein Sellers & Toll.

Two Apple employees sued the Big Tech giant in a proposed class action on Thursday, alleging gender-based pay discrimination, biases against women in its performance evaluation system, and a hostile work environment.

The [complaint](#), filed by Altshuler Berzon and Cohen Milstein Sellers & Toll in the California Superior Court, County of San Francisco, encompasses more than 12,000 current and former female Apple employees in California.

Jim Finberg, an attorney representing the plaintiffs at Altshuler Berzon, said that over 80 women were interviewed in the course of preparing the claim.

Plaintiffs are seeking declaratory and injunctive relief, wages and compensation owed to them “for work during the Class Period,” and liquidated damages. They claim that Apple’s wage policies violate the California Equal Pay Act, the Fair Employment and Housing Act, and the Unfair Competition Law.

The named representative plaintiffs are Justina Jong and Amina Salgado. According to court papers, Jong is a customer/technical training instructor on Apple’s Worldwide Developer Relations/App Review team and Salgado is currently working on temporary assignment with the People Team as a Development Manager in the AppleCare division.

Prior to 2018, states the complaint, Apple set starting compensation for employees based on their pay at previous jobs—a practice that “perpetuated historic pay disparities between men and women.” Apple’s current policy asks applicants to provide their pay expectations instead, which continues to have a “disparate impact” on women’s starting salaries and sets them up for insurmountable wage gaps for the rest of their employment at the company, the claim argues.

“Raises at Apple perpetuate and widen the gender pay gap because they are based on a percentage of the employees’ existing Apple base salary—so the longer a woman works at Apple, the larger the gap in compensation she receives compared to similarly situated men, even men performing substantially equal or similar work in the same job position,” wrote attorneys for the plaintiffs.

According to the complaint, Jong—who has been employed at Apple since 2013—was “paid less at Apple than men performing substantially similar work” after disclosing her prior pay at the time of hiring. The claim states that she also experienced sexual harassment by another colleague and that Apple subsequently refused her request to transfer to other teams. Salgado, an Apple employee since 2012, received a higher salary in 2023 after she complained to Apple about gender-based pay disparities, but alleges that Apple did not compensate her retroactively for her previous work.

Apple, which is headquartered in Cupertino and maintains a corporate office in San Francisco, declined to comment.

In addition to base pay gaps, the claim asserts that Apple routinely discriminates against women in its performance evaluation metrics, which also impacts their salaries on a long-term basis. Finberg said that supervisors tend to view traits like “assertiveness” favorably in men and unfavorably in women.

“And then they also have this tap-on-the shoulder talent pool, or all-star pool, and that appears to go to the more ‘assertive’ and generally male people who get on a fast track and get higher bonuses,” said Finberg. “So it’s a combination of a discretionary system that’s subject to stereotypes that results in males faring better. So you start lower, you stay lower, and then the gap widens.”

Joseph Sellers, an attorney representing the plaintiffs at Cohen Milstein, said that this case is particularly important because, as an “industry leader,” Apple’s pay protocols provide a “role model” for other companies in the tech industry. He added that pay discrimination is “one of the most undetected forms of bias in the workplace today.”

“First of all, businesses ... generally discourage employees from talking about their pay,” said Sellers. “The National Labor Relations Act actually prohibits employers from blocking employees from talking about their pay. But that hasn’t stopped most employers from making it either difficult, if not impossible for employees to do this.”

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Facebook Wins Biometric Privacy Appeal Over Photos of Nonusers

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A lawsuit alleging that Meta Platforms Inc. collected the biometric information of Illinois residents who didn't have accounts on its Facebook platform in violation of the state's Biometric Information Privacy Act was properly dismissed, a federal appeals court ruled Monday.

Facebook's processing of photographs of nonusers in an attempt to identify consenting users didn't violate BIPA because the face signatures it made of nonusers weren't "biometric identifiers" under the statute's definition, the US Court of Appeals for the Ninth Circuit said.

Plaintiff Clayton Zellmer alleged in the 2018 proposed class action that Meta violated BIPA through its photo-tagging tool, which looks for and identifies people's faces in photographs uploaded to the social media site.

BIPA requires entities that collect biometric information to inform people first, obtain their written consent, and post a publicly available data-retention policy.

Zellmer argued the statute imposed liability for the collection of biometric information from nonusers even when the information couldn't be used to identify someone, and didn't have an exception where the information collected was used only briefly and then deleted.

Judge James Donato of the US District Court for the Northern District of California dismissed the lawsuit in November 2022. Requiring Facebook to identify every person without a Facebook account in Illinois and figure out a way to communicate with them to provide notice and obtain consent would be "patently unreasonable," he said.

The Ninth Circuit affirmed dismissal of Zellmer's claim under section 15(b) of BIPA but rejected Donato's reason for doing so, holding that the statutory language showed clearly that its protections reached nonusers of Facebook.

But because the face signatures couldn't be used to identify nonusers, they didn't constitute biometric identifiers under the act, the court said.

Zellmer's argument that BIPA protects biometric information even if it couldn't be used to identify an individual would improperly read the word "identifier" out of the statute, Judge Ryan D. Nelson said for the court.

The court also affirmed the district court's dismissal of Zellmer's claim under section 15(a) of the act that Facebook failed to provide a written, publicly available policy concerning the retention and destruction of biometric information.

Zellmer lacked standing to bring that claim because he didn't show that he suffered a concrete injury from the lack of a data-retention policy—especially in light of the panel's holding that face signatures weren't biometric identifiers under the act, Nelson said.

Meta previously agreed to pay \$650 million to settle a class action bringing similar biometric-privacy claims on behalf of Facebook users.

Judges Danielle J. Forrest and Gabriel P. Sanchez were on the panel.

Carey Rodriguez LLP and Milian Legal Group represent Zellmer. Gibson Dunn & Crutcher LLP represents Meta.

The case is Zellmer v. Meta Platforms Inc. , 9th Cir., No. 22-16925, 6/17/24 .

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Philadelphia Fights Off K9 Cop Dog-Care Overtime Pay Challenge

Hyundai, Verisk Analytics Sued For Selling Driving-Behavior Data

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Hyundai Motor America and data-broker Verisk Analytics Inc. provided driving-behavior data to auto insurers in violation of state and federal privacy laws, a proposed federal class action filed Friday said.

Plaintiff Howard Miller alleged that Hyundai's "Driving Score" program collected information about drivers' mileage, speed, braking, and acceleration, and disclosed that information to Verisk, which sold it to insurance companies for use in setting premium rates.

Hyundai didn't inform drivers that it was collecting and disclosing their driving-behavior information, and didn't obtain their consent, according to a complaint filed in the US District Court for the Central District of California.

Hyundai and Verisk didn't respond immediately to requests for comment.

The Driving Score program was prominently mentioned in a New York Times story in March on automakers' practice of sharing consumers' driving-behavior data with insurers, the complaint said.

Hyundai suspended the program the day the story appeared, and announced April 24 that it was discontinuing it—a sign, according to the complaint, that Hyundai and Verisk were “relying on lack of driver awareness about their conduct of profiting off customers' personal information.”

Consumers had a reasonable expectation of privacy while driving their vehicles, and the surreptitious collection of their driving-behavior data was a “gross violation” of that privacy expectation, Miller said.

Class members have been harmed in the form of invasion of privacy, loss of control over their personal information, and risk of increased auto-insurance premiums as a result of the data disclosure, the complaint said.

Miller seeks to represent a nationwide class and a California subclass of people whose Hyundai-made cars collected and disclosed their driving-behavior data to Verisk and other third parties.

The complaint brings claims of breach of quasi contract/unjust enrichment and violations of the Wiretap Act, the Fair Credit Reporting Act, the New Jersey Consumer Fraud Act, and the California Invasion of Privacy Act.

Miller is seeking statutory damages, punitive damages, and attorneys' fees and costs.

Wolf Popper LLP represents Miller and the proposed class.

The case is Miller v. Hyundai Motor Am. , C.D. Cal., No. 8:24-cv-01288, complaint filed 6/14/24 .

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Sullivan & Cromwell's Legal Work for Sam Bankman-Fried's Crypto House of Fraud Is Getting a Closer Look in Two Federal Court Cases

 wallstreetonparade.com/2024/06/sullivan-cromwells-legal-work-for-sam-bankman-frieds-crypto-house-of-fraud-is-getting-a-closer-look-in-two-federal-court-cases

By Pam Martens and Russ Martens: June 17, 2024 ~

Last Monday, Robert J. Cleary of law firm Patterson Belknap filed a motion in the bankruptcy proceeding of Sam Bankman-Fried's collapsed fraud, the FTX crypto exchange, seeking to launch three new investigations into legal work done by Sullivan & Cromwell for Bankman-Fried and FTX prior to the collapse of the fraud.

Cleary is the independent examiner appointed by the U.S. Department of Justice's U.S. Trustee, which acts as a watchdog in federal bankruptcy cases. Adding to the embarrassment for Sullivan & Cromwell with the announcement of the new investigations is the fact that Sullivan & Cromwell fought against allowing the U.S. Trustee to appoint an independent examiner after it had maneuvered itself into the position of lead counsel to the FTX bankruptcy proceeding, despite its multitude of conflicts with FTX. The presiding judge in the bankruptcy case, John Dorsey, had sided with Sullivan & Cromwell in the matter.



Ryne Miller, Former Sullivan & Cromwell Partner Who Became General Counsel of FTX.US

The U.S. Trustee was forced to take the issue to the Third Circuit Court of Appeals. On January 19, a sharp rebuke to Sullivan & Cromwell and the judge was handed down. The court wrote in its decision:

“Under the Bankruptcy Court’s interpretation, the appointment of an examiner under either subsection of Section 1104(c) would be subject to a court’s discretion and a judge would have the final say as to whether an investigation was warranted. But this interpretation runs counter to the statute’s plain language and established canons of construction.”

The court added this:

“First, an examiner must be ‘disinterested’... This requirement of disinterest is particularly salient here, where issues of potential conflicts of interest arising from debtor’s counsel serving as pre-petition advisors to FTX have been raised repeatedly....”

The independent examiner’s June 10 motion explains the three new areas it wants to investigate as follows:

“The first recommendation concerns S&C’s representation of Sam Bankman-Fried... in connection with his purchase of the Robinhood Shares...This inquiry would focus on (1) the scope and contours of that representation, and (2) based on that representation, what, if anything, S&C knew or should have known about the FTX Group’s misconduct and/or fraud...

“The second recommendation concerns potential claims against the former shareholders of Ledger Holdings, Inc [parent of LedgerX]...that sold their interests prepetition to West Realm Shires Inc. [a/k/a FTX.US]...This inquiry would (1) seek to determine whether an avoidance action(s) is warranted with respect to unreleased shareholders, and (2) enable the Examiner to report on the underlying details of the prepetition sale of LHI to WRS, which report and findings would be in the public interest...

“The third recommendation concerns the ‘holes’ or balance sheet shortfalls at FTX.US...This inquiry would center on (1) the existence of and the reasons these holes arose at FTX.US, (2) whether the balance sheet holes were the result of commingling of customer or corporate assets, (3) the frequency and magnitude of the holes, and (4) how they were resolved and by whom....”

The independent examiner is asking for 10 weeks and \$3 million to conduct the three new investigations. A hearing on the matter is scheduled for today in the federal bankruptcy court in Delaware before Judge John Dorsey.

The independent examiner had released a preliminary report on May 23, which found no wrongdoing on the part of Sullivan & Cromwell. That report, however, indicated that further investigations would be requested by the independent examiner.

Adding pressure on the independent examiner is the fact that powerful sleuthing into Sullivan & Cromwell’s work on behalf of FTX is being done by law firms representing plaintiffs who are suing Sullivan & Cromwell (S&C) in federal district court in Florida. The plaintiffs write in their complaint:

“For its part, S&C facilitated the scheme to defraud and RICO enterprise by agreeing to provide and providing legal services to FTX US and FTX Trading Ltd...S&C did so knowingly, recklessly, or with willful blindness to the nature of the RICO enterprise but within

the scope of the S&C's employment and in furtherance of the firm's business. In fact, in exchange for S&C's counsel in these matters, FTX paid S&C significant fees."

There is no question that Sullivan & Cromwell's ties to FTX were significant. One of Sullivan & Cromwell's law partners, Ryne Miller, moved to FTX.US and became its General Counsel. Another former Sullivan & Cromwell lawyer, Tim Wilson, became General Counsel for FTX Ventures, the venture capital arm of FTX. Sullivan & Cromwell had previously represented the kingpin of the fraud, Sam Bankman-Fried, who was convicted in November 2023 on seven counts of fraud and conspiracy. The law firm had also previously represented the Head of Engineering at FTX, Nishad Singh, who pled guilty to fraud charges. According to Sullivan & Cromwell's own bankruptcy court declaration, it had been involved in more than 20 legal engagements for FTX before it filed for bankruptcy on November 11, 2022. According to the declaration, the law firm's legal work began 15 months prior to the collapse of the firm.

Among the three areas that the independent examiner is asking to investigate, the LedgerX deal may prove to be particularly problematic. The plaintiffs in the case in federal court in Florida allege the following:

"According to some FTX Insiders, S&C decided to intentionally keep FTX US Derivatives (formerly LedgerX) out of the FTX bankruptcy proceedings, with knowledge that it was in possession of approximately a quarter billion dollars of diverted FTX customer funds from which it could (and has) extracted significant revenue. In fact, from November 2022 to mid-January 2024, S&C's income from matters just related to FTX has surged, exceeding \$180 million—or 10% of the total revenue the 900-lawyer firm publicly stated it collected in all of 2022—with paralegals billing \$595/hr. and partners billing up to \$2,165/hr."

The Florida complaint also raises the following bombshell allegation regarding the LedgerX deal:

"Through its work on the LedgerX acquisition and work in connection with LedgerX (d/b/a FTX US Derivatives) thereafter, S&C was privy to a software audit of the FTX systems, which Mr. Miller and then-CEO of LedgerX, Zach Dexter, oversaw. According to FTX Insiders, Mr. Miller became aware through that audit of the 'back door' in the FTX Platform code that allowed SBF [Sam Bankman-Fried] and his inner circle to embezzle FTX customer funds by funneling them to Alameda [Sam Bankman-Fried's hedge fund], and communicated that fact to his mentors, Messrs. Dietderich and Eitel [lawyers at S&C], and others at S&C."

The Florida case is *Edwin Garrison, et al., v. Sullivan & Cromwell LLP*. It has been filed in the U.S. District Court for the Southern District of Florida. The case number is 1:24-cv-20630. It is part of Multi-District Litigation (MDL) involving FTX.

Sullivan & Cromwell ranks among the oldest law firms in America. It was founded 145 years ago by Algernon Sydney Sullivan and William Nelson Cromwell in the financial district of lower Manhattan. During the Wall Street crisis of the 1930s, Sullivan & Cromwell built a reputation for defending Wall Street firms against shareholder lawsuits and antitrust actions. Sullivan & Cromwell also played a pivotal role in the 2008 financial crisis, the worst since the Great Depression. As Wall Street On Parade previously detailed, the firm's Senior Chair, Rodge Cohen, paved the way for the Fed's unprecedented \$29 trillion bailout of Wall Street banks after their corrupt activities collapsed the U.S. economy in 2008.

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June 17, 2024, 2:00 AM PDT

Archegos Trader's Tough Testimony Wipes Smile From Hwang's Face

By Bob Van Voris and Chris Dolmetsch

- William Tomita has been highly damaging witness against Hwang
- Defense could begin high-stakes cross-examination on Monday

Bloomberg Law News 2024-06-17T09:29:07620938217-04:00

Archegos Trader's Tough Testimony Wipes Smile From Hwang's Face

By Bob Van Voris and Chris Dolmetsch2024-06-17T05:00:00000-04:00

- William Tomita has been highly damaging witness against Hwang
- Defense could begin high-stakes cross-examination on Monday

For most of his trial, Archegos Capital Management founder **Bill Hwang** hasn't looked like a man potentially facing decades in prison. Both inside and outside the courtroom, Hwang is often seen with a placid smile on his face.

That smile faded last week when former Archegos head trader **William Tomita** took the stand as one the prosecution's star witnesses. When Tomita identified him in court, Hwang straightened in his chair with a rueful look.



Bill Hwang exits court in New York on June 10.

Photographer: Jeenah Moon/Bloomberg

In three days on the stand, Tomita has proved to be a highly damaging witness to Hwang. He's given a painstaking account of how Hwang orchestrated trades to goose stocks to certain prices. He's also vividly depicted his former boss as an overbearing micromanager who screamed at his traders when they got out of line.

"I was directed to do so by my former boss," Tomita said of crimes he admitted committing himself, including fraud and market manipulation.

All of which raises the stakes for Hwang's defense team on cross-examination, which could begin as early as Monday. Failing to dent Tomita's credibility would make it very hard for Hwang to secure an acquittal.

But that may be difficult. Much of Tomita's testimony about Hwang's trading was backed up by copious written communications that were shown to the jury. In a number of chat message exchanges, Hwang is shown closely guiding his traders to hit certain prices, changing his target by the minute.



William Tomita

Photographer: Jeenah Moon/Bloomberg

"These happened on a daily basis, these type of trades," Tomita testified, adding that many of these trades were "the opposite" of what a "normal fund" would do. This matches with testimony by prosecution experts that many of Archegos trades made no economic sense except as a means of manipulating share prices.

On an individual level, Tomita has come across differently from other witnesses in the case, starting with his more relaxed style of dress. Rather than a suit, he has generally worn a blazer, T-shirt and New Balance sneakers. He's also avoided market jargon in his testimony or explained financial terminology to the jury himself without prompting.

That could play well with jurors. US District Judge Alvin Hellerstein has frequently asked witnesses to explain things in common language for fear the panel will be overwhelmed by technical concepts.

'How Dare You'

On Friday, Tomita showed a vulnerable side, wiping an eye as he described Hwang yelling at him for discussing parameters of a proposed trading algorithm with the compliance department.

"He started yelling at me, like, 'How dare you go to compliance and do something so stupid,'" Tomita said.

Tomita described Hwang berating one of his traders for being in the bathroom when a stock began to move and discouraging them all from taking breaks. Tomita said Hwang also yelled at traders for failing to meet his price targets or for a variety of other reasons.

Such testimony could make Tomita appear more sympathetic to jurors, but it also highlights the control Hwang had over his traders. Many of these dressings-down took place on the ongoing Zoom call Hwang maintained with them throughout the trading day.

"Sometimes he didn't even need to vocalize because on the Zoom he would just glare, and that glance alone meant we were about to get yelled at or he was annoyed," Tomita said on the stand.

Cooperation Agreement

In his opening statement, **Barry Berke**, Hwang's lead attorney, told jurors that Tomita agreed to testify for the prosecution not because he thought he and Hwang had done anything wrong, but to avoid the possibility of decades in prison.

Tomita has pleaded guilty and is testifying under a cooperation agreement. He testified he faces a maximum of 60 years but hopes he will be able to avoid prison. Defense lawyers frequently try to suggest cooperators will say whatever prosecutors want them to.

"Mr. Tomita did not believe he was doing anything improper in his trading, did not believe he was manipulating the market," Berke said in his opening statement.

Hwang's lawyers will also likely try to recast Tomita's testimony about individual trades to fit with their contention that Archegos built massive positions in companies because Hwang truly believed in their long-term potential.

The prosecution has argued that Hwang changed his approach during the pandemic, and Tomita testified at length about firm's reaction to an October 2020 selloff in GSX Techedu Inc., a Chinese online education company that was one of Archegos' biggest holdings. Tomita said he burned through nearly \$750 million in cash and liquidated holdings in Amazon.com Inc. and other big names to prop up the GSX.

His efforts earned him Hwang's praise for his "Herculean defense." Tomita testified that the GSX trading became a model for the manipulative trading he says took place daily at Archegos before its spectacular collapse in March 2021.

"Gigantic Red Flag"

Hwang was generally off-stage during the first weeks of the trial, as witnesses recounted lies to banks including Credit Suisse Group AG, Jefferies Financial Group, Goldman Sachs Group Inc. and UBS Group AG. Former Archegos risk head **Scott Becker**, the prosecution's other key cooperator, admitted telling many of those lies. But he had relatively little direct contact with Hwang.

On cross-examination, Berke successfully prompted Becker to testify of Hwang, "I don't recall an instance where he explicitly told me to lie."

By contrast, on Friday, Tomita began testifying about strategizing with Hwang to mislead Goldman into becoming an Archegos counterparty in the fall of 2020, when the family office was reaching credit limits at other banks.

They wanted Goldman for its capacity, Tomita said, "but we didn't want to appear desperate."

Together, they agreed to send the bank "dummy names" of stocks it didn't actually plan to trade. The goal was "to mislead or hide the actual names" of stocks like GSX and the company then known as ViacomCBS that Archegos planned to trade, Tomita said.

The real names "would have been a gigantic red flag and they wouldn't have wanted to take Archegos on as a client," he said.

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Crypto Exchange Gemini to Pay \$50 Million in NY Fraud Suit (2)

By Erik Larson and Ava Benny-Morrison

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

Bloomberg Law News 2024-06-17T09:22:10318639315-04:00

Crypto Exchange Gemini to Pay \$50 Million in NY Fraud Suit (2)

By Erik Larson and Ava Benny-Morrison2024-06-14T15:36:14893-04:00

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

A crypto exchange that was accused of lying to hundreds of thousands of customers about the risks tied to a failed investment program agreed to return \$50 million of digital assets to resolve a suit by New York Attorney General Letitia James.

Gemini Trust Co. struck the deal Friday with James, who sued in October over the company's handling of the program, Gemini Earn. It's the latest deal in a series of crypto investigations that included a probe into **Barry Silbert's** Digital Currency Group.

Under the Gemini settlement, digital assets will be returned 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.

Victims "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 probes targeting the crypto industry. Silbert's DCG is the parent company of bankrupt 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.

In February, New York's Department of Financial Services came to a separate agreement with Gemini to return at least \$1.1 billion to customers through the Genesis bankruptcy case. In April, a Gemini-Genesis pact was approved in bankruptcy court, resolving litigation between the companies.

Read More: Genesis Wins Approval on Gemini Pact to Free Earn Users' Assets

In a statement posted on social media, Gemini said that the remaining assets owed to customers following the Earn suspension in 2022 would be made available within 7 days.

"We are excited to deliver this full recovery to you and appreciate your ongoing patience and support," Gemini said in the statement.

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.

DCG, which was once valued at \$10 billion, previously disclosed that it received about \$575 million in loans from Genesis Global Capital. In a letter to shareholders in November 2022, Silbert 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 social media post by Gemini.)

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DOJ ramps up scrutiny of health care investors

 [reuters.com/legal/legalindustry/doj-ramps-up-scrutiny-health-care-investors-2024-06-14](https://www.reuters.com/legal/legalindustry/doj-ramps-up-scrutiny-health-care-investors-2024-06-14)

Jaime Jones, Brenna Jenny, Lauren McBride

The Department of Justice (DOJ) logo is pictured on a wall after a news conference in New York December 5, 2013. REUTERS/Carlo Allegri/File Photo Purchase Licensing Rights , opens new tab

June 14, 2024 - Citing the growing influence of private equity firms and other investors on the delivery of health care, the Department of Justice ("DOJ") has turned its sights on health care investors, including through the widely used health care anti-fraud tool, the federal False Claims Act ("FCA").

In a February 2024 speech at the Federal Bar Association's Qui Tam Conference, the acting head of DOJ's Civil Division Brian M. Boynton identified "investors, such as private equity firms or venture capital firms" as a source of "influence [on] patient care" and warned that DOJ "will not hesitate to pursue them for their roles in defrauding the government." [Hereinafter, Boynton Speech].

Scrutiny from other arms of DOJ, including the Antitrust Division, is ratcheting up in parallel, and health care investors should understand the heightened compliance program expectations they are facing.

FCA enforcement trends against health care investors

DOJ's Civil Division enforces the federal False Claims Act, which imposes liability when anyone "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the government, including to federal health care programs. 31 U.S.C. § 3729(a)(1)(A) , opens new tab. Under the "causes to be presented" prong, DOJ has explained that "if an investor knowingly engages in conduct that causes the submission of false claims, they may subject themselves to liability" under the FCA. See Boynton Speech.

DOJ has entered into about a half-dozen settlements with private equity firms and their portfolio companies over the past half-decade to resolve alleged violations of the FCA. This enforcement activity has been driven by whistleblowers, known as relators, who are allowed to file suit under the FCA and pursue litigation if DOJ declines to take over the case. Relators not only precipitated each settlement but they are actively pursuing other FCA cases following DOJ decisions not to intervene.

To date, DOJ's FCA settlements in this space have all involved private equity firms that had active oversight of the portfolio company accused of committing the alleged misconduct through one or more of the following: executing a management services agreement with the company, appointing members of senior management at the portfolio company, holding seats on the company's Board of Directors, or being the sole owner of the company.

In all but one of the cases, the private equity firm allegedly was aware of the misconduct and — at least in DOJ's view — had the power to stop the misconduct by virtue of its relationship to the portfolio company but failed to do so. Ongoing relator-litigated cases against private equity firms raise similar allegations.

For example, DOJ settled with an electroencephalography (EEG) testing company and its investor for \$15.3 million in 2021. The settlement resolved whistleblower allegations that the EEG company submitted false claims resulting from kickbacks to referring physicians, sought payment for services not rendered, and sought higher reimbursement than was appropriate based on the service provided.

The settlement also resolved allegations that the investor caused the submission of false claims affected by kickback arrangements because the investor allegedly learned of those arrangements during due diligence and then did not remediate them, despite entering into a management agreement with the company and holding two seats on its Board of Directors. See *Alliance and Ancor Holdings Settlement* (July 2021).

There remains relatively little case law testing the viability of DOJ's theory of liability for private equity firms — as is common in the FCA context, the proliferation of settlements and the facts in those settlements' covered conduct drive assessments of risk to private equity firms arising from their portfolio companies' conduct.

Nonetheless, courts have signaled some receptiveness to accepting the theory on the merits. For example, in 2021, the District of Massachusetts in *U.S. ex rel. Martino-Fleming v. South Bay Mental Health Center* denied a motion to dismiss, holding that a private equity firm can be liable under the FCA "where the submission of the claims by another entity was a foreseeable result of the business practice" — a standard that would seemingly result in an even lower threshold for holding private equity firms liable under the FCA than the fact patterns DOJ has alleged to date.

Other DOJ enforcement areas

DOJ is also exploring other theories of liability for investors, including under the Federal Debt Collection Practices Act ("FDCPA"). In a unique 2024 settlement agreement between DOJ and a New Jersey hospital and its investors, the investors agreed to pay \$12 million as restitution to resolve alleged FDCPA violations arising from the alleged FCA violations. See Press Release, Office of Public Affairs, U.S. Dept. of Justice, Jan. 16, 2024.

In particular, DOJ alleged that the hospital manipulated how it claimed Medicare cost outlier payments, thereby receiving and retaining overpayments in violation of the FCA. The government further alleged that the hospital and investors violated the FDCPA when the hospital transferred millions of dollars to the investors without receiving equivalent value in exchange, as a means of trying to avoid repaying federal debts, namely the excessive outlier payments that formed the basis for the FCA allegations. The nontraditional use of the FDCPA in this context highlights DOJ's creativity in pursuing health care investors through novel applications of law.

In addition, DOJ is flexing its enforcement authority under antitrust laws. Richard Mosier, Special Counsel for Private Equity in DOJ's Antitrust Division, noted at the 2024 Antitrust Law Section Spring Meeting that DOJ's Antitrust Division is currently investigating whether private equity firms intentionally withheld information under the Hart-Scott-Rodino Act (HSR Act) from antitrust enforcers reviewing their deals in order to increase the likelihood that their deals would close.

DOJ's renewed focus on ensuring compliance with the HSR Act is further reflected by DOJ's recent creation of a portal, in conjunction with the Department of Health and Human Services (HHS) and the Federal Trade Commission, designed to solicit tips and complaints about anticompetitive practices in the health care sector. "Federal Agencies Launch Portal for Public Reporting of Anticompetitive Practices in Health Care Sector," Office of Public Affairs, Department of Justice (Apr. 18, 2024).

Tips for health care investors

Compliance program expectations for health care investors are evolving. The HHS Office of Inspector General (HHS-OIG) issues compliance program guidance that is often considered by DOJ as setting forth reasonable standards and industry norms.

Last year, HHS-OIG updated its compliance program guidance to specifically recommend that "health care entities, including their investors and governing bodies, should carefully scrutinize their operations and incentive structures to ensure compliance with the Federal fraud and abuse laws." In particular, HHS-OIG warned that "[a]n understanding of the laws applicable to the health care industry and the role of an effective compliance program is particularly important for investors that provide management services or a significant amount of operational oversight for and control in a health care entity."

Investors can expect HHS-OIG, as well as DOJ, to take the position that to be effective, an investor's compliance program should incorporate procedures designed to educate investors on health care regulatory requirements. These procedures can offer protection to investors

during due diligence and on a go forward basis. Investors should also consider how they document their expectations for their portfolio companies' compliance programs, not only at the time of acquisition but throughout the life of a fund's investment.

Another factor to consider is the involvement of fund employees in the management of investments. The greater the involvement of fund employees in management, the greater the risk to investors that the government may hold them liable for the misconduct of their portfolio companies. Investors should think strategically about their risk tolerance when placing fund employees in management positions with portfolio companies. When investors become aware of potential regulatory non-compliance, they should carefully consider any obligations to become involved in remediation. If they become involved, they should document instructions to remediate any problematic activity and ensure refunds are issued where appropriate.

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Insufficient Supervisory Board Competence as a Risk Factor for Banks

 [nakedcapitalism.com/2024/06/insufficient-supervisory-board-competence-as-a-risk-factor-for-banks.html](https://www.nakedcapitalism.com/2024/06/insufficient-supervisory-board-competence-as-a-risk-factor-for-banks.html)

By Lambert Strether

June 17, 2024

Lambert here: Say it's not so!

By Harald Hau, Senior Chair at Swiss Finance Institute, Professor of Economics and Finance at University Of Geneva, Tim-Ole Radach, Student at TU Dresden, and Marcel Thum, Director at IFO Dresden, Professor of Economics at TU Dresden. Originally published at VoxEU.

The Credit Suisse crisis illustrates how poor governance can lead a large bank into a crisis despite compliance with capital requirements. Recent research on supervisory board competence in banks has provided interesting new insights. This column updates an index of supervisory board competence for a sample of German banks and compares their performance in 2023 versus 2008. Although competence measures have improved for most banks, large gaps remain across banks and also between public-sector and private-sector banks. Bank supervisors should systematically measure, track, and report bank board competence and its alignment with a bank's business.

The global banking market is once again experiencing turbulent times. Following two bank failures in the US, Credit Suisse, one of the major European banks, suffered a liquidity crisis in March 2023 after a decade of both poor governance and disappointing performance. In his book on the failure of Credit Suisse, Swiss financial journalist Dirk Schuetz (2023, p. 57) makes the following assessment of the appointments to the Board of Directors in 2015: "Roche boss Severin Schwan was appointed as the new Vice Chairman [of Credit Suisse], a proven pharmaceutical expert without in-depth financial knowledge. Or Silicon Valley entrepreneur Sebastian Thrun: a luminary for self-driving cars but hardly for ailing balance sheets. [...] For the first time in history, probably the wildest of all major global banks was led by two non-bankers – and the banking expertise on the Board of Directors was meagre. And the supervisors from FINMA nodded off all personnel decisions."

Is the lack of financial expertise on the board of Credit Suisse and its ultimate failure a pure coincidence? Or is supervisory board competence an important factor in determining long-term bank risk?

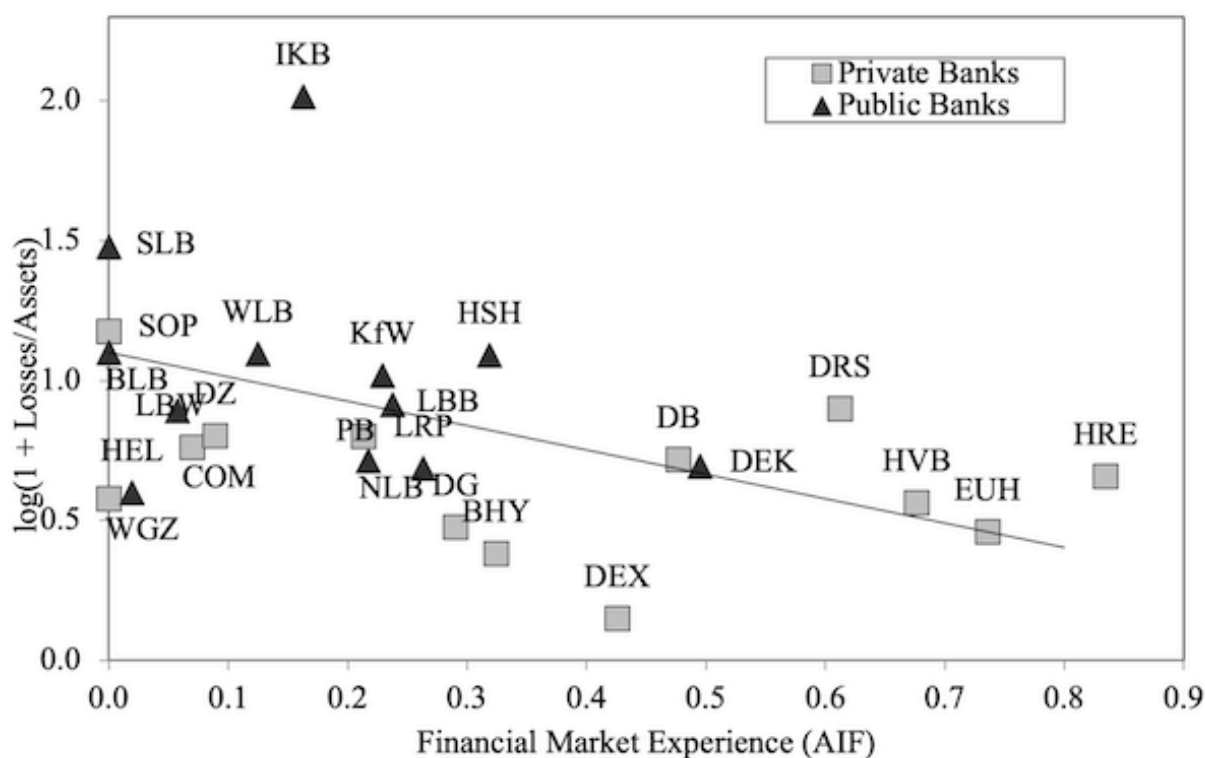
Study Results on the 2007/08 Banking Crisis

From a legal perspective, a competent supervisory board is responsible for ensuring that competent managers on the management board have the day-to-day business under control, that the right incentives are in place at the bank level, and that a business model is

pursued with a sustainable balance between profitability and risk. To fulfil these tasks, however, the members of the supervisory board must also understand the banking business, and particularly the complex products and risks in the global financial markets.

However, banking and financial market expertise is by no means a given. During the financial crisis of 2007/08, we were able to show in a much-cited study that the competencies of the supervisory boards of German banks differed greatly (Hau and Thum 2008, 2009). The more competent the supervisory and administrative boards were, the lower the average losses suffered by a bank during the financial crisis (Figure 1). The differences between private and public-sector banks were striking. The boards of directors of many public-sector banks lacked a deeper understanding of complex financial products, which also explains the disastrous performance of Sachsen LB, Bayern LB, and HSH Nordbank.

Figure 1 Correlation between financial market experience and losses during the 2007/8 financial crisis



Notes: DB = Deutsche Bank, COM = Commerzbank, DRS = Dresdner Bank, DZ = DZ Bank, HVB = HVB Group, HRE = Hypo Real Estate, EUH = Eurohypo, PB = Postbank, DG = Deutsche Genossenschafts-Hypothekenbank, WGZ = WGZ Bank AG Westdeutsche Genossenschafts-Zentralbank, SOP = Sal. Oppenheim jr. & Cie. KGaA, DEX = Dexia Kommunalbank Deutschland AG, BHY = Berlin-Hannoversche Hypothekenbank AG, LBW = LBBW, BLB = Bayern LB, KfW = KfW Bankengruppe, WLB = WestLB, HSH = HSH Nordbank, NLB = Nord LB, HEL = Helaba, LBB = Landesbank Berlin, DEK = Dekabank, LRP

= LRP Landesbank Rheinland-Pfalz, SLB = Sachsen LB, IKB = IKB Deutsche Industriebank AG.

Source: Hau and Thum (2009)

This relationship between competent board supervision and bank performance has been examined in several studies in recent years (e.g. Cuñat and Garicano 2010, Pereira and Filipe 2015, Fernandes et al. 2016a, b, Locatelli et al. 2018, Mizan 2018, Pereira and Filipe 2018, Mavrakana and Psillaki 2019, Ayadi et al. 2019, de Andres et al. 2020, Ellul and Yerramilli 2013, Fernandes and Fich 2023, Kanojia and Priya 2016, Jin and Mamatzakis 2018, Boadi and Osarfo 2019, Al-Matari et al. 2022, Magnis et al. 2023). In summary, the studies across countries and different time periods show that competence on the supervisory board is associated with better bank performance. In view of the complexity of modern banks and financial markets, competent supervision can no longer be carried out comprehensively by individual persons. Supervisory boards must, therefore, have a broad range of expertise and should cover all relevant areas of the banking business (Fernandes et al. 2016a).

Can Board Competence Be Increased through Regulation?

Following the financial crisis in 2007/8, Germany adopted a new legal basis for the appointment of supervisory board members. Since 2009, Section 25d (2) of the German Banking Act requires that the members of the administrative or supervisory board “as a whole must have the knowledge, skills and experience necessary to perform the supervisory function and to assess and monitor the management of the institution or group of institutions or financial holding group, financial holding company or mixed financial holding company.” The Federal Financial Supervisory Authority (BaFin) can check the qualifications and independence of the members of banking supervisory boards, monitor the composition of the supervisory boards and demand transparent reporting from the banking supervisory boards on their activities (risk assessment, compliance, and corporate governance). BaFin also has the power to impose sanctions on bank supervisory boards following the amendment to the German Banking Act.

Was this legislative initiative successful? Or was this reaction to the previous financial crisis merely a political lightning rod that, due to a lack of regulatory implementation (by BaFin), has remained without any real consequences for the actual professional competence of German bank supervisory boards? These questions have prompted us to update the original competence survey from 2009 to 2023. Has there been an improvement – not least thanks to legislation?

As the quality of corporate control by supervisory and administrative boards cannot be observed directly, we use the same indirect measures as for 2008 to examine whether the supervisory boards at least have the necessary skills to monitor managers and update these board competence measures for 2023. We use 14 different biographical criteria for the

monitoring potential in the supervisory boards of banks. The variables capture the educational background (three indicator variables), financial experience (six indicator variables), and management experience (five indicator variables) of a supervisory board member; see Figure 2. Financial experience includes, for example, whether a member has banking experience, whether the member has financial market experience, and whether this experience was acquired recently. For each affirmative answer, we assign one point and sum these to a total value for each board member. The overall competence of the supervisory board is calculated by averaging across all supervisory board members. For each bank, we then create both an overall index and sub-indices for each of the three groups of variables (education, financial market, management).

Figure 2 Indicator variables of supervisory board competence

Source: own calculations.

Not all of the banks examined in Hau and Thum (2009) are still active or operate in the same form. The original sample consisted of 29 German banks with total assets of more than €40 billion in 2007. Five banks have since ceased operations (Hypo Real Estate, WestLB, Sachsen LB, Dexia, Sal. Oppenheim), and seven others have merged with banks already included in the sample. Two banks have changed their name and legal status: HSH Nordbank was privatised as Hamburg Commercial Bank and Berlin-Hannoversche Hypothekenbank AG now trades as Berlin Hyp AG. The current sample thus comprises 17 banks, of which nine are private, and eight are organised under public law. Despite these changes in the last 15 years, the updated sample for 2023 still covers eight of the ten largest banks in Germany in terms of total assets.

Development of Supervisory Board Skills in German Banks

Figures 3, Panels A-D show the supervisory board competencies for each of the banks available in the dataset in the years 2008 and 2023. The first three figures show the sub-indices for education, financial market experience and management competence separately. The fourth figure provides the aggregated overall board competence. The board competence measures for 2008 and 2023 are shown on the horizontal and vertical axes, respectively.

Figure 3 Supervisory board competence, 2008 vs. 2023

Notes: BLB = BayernLB, BH = Berlin Hyp, CB = Commerzbank, DKB = DekaBank, DB = Deutsche Bank, DPB = Deutsche Pfandbriefbank, HCB = Hamburg Commercial Bank, HLB = Helaba, HVB = HypoVereinsbank, IKB = IKB Deutsche Industriebank, KfW = KfW, LBB =

Landesbank Berlin, LBBW = LBBW, NLB = NORD/LB, NRW = NRW.BANK, $\diamond$ = public-sector bank, $\diamond$ = private bank.

Source: own calculations

We highlight the following insights: First, the competence measures have increased slightly for most banks. If board competencies were unchanged, the points would lie on the 45-degree line. As most of the points are above the 45-degree line, the competence measures in all three sub-categories are slightly higher today than in 2008. Overall, however, the gap between the qualified and less qualified supervisory boards remains enormous. Secondly, the ranking of banks is highly persistent over the 15-year period. A rank correlation test rejects the (null) hypothesis that the 2008 and 2023 ranks of banks in terms of overall board competence are independent (with a p-value of 0.07). Higher persistence is particularly noticeable in the case of financial market experience: banks with a relatively high level of financial market experience in 2023 (compared to other banks) were generally also doing well in this indicator in 2008. Thirdly, the boards of directors of public-sector banks lag the supervisory boards of private banks in terms of financial market expertise and management expertise. Although the public-sector banks have slightly improved (as seen by a point just above the 45-degree line), the scores for the public-sector banks in 2023 are still much lower than they were already in 2008. Improvements in board quality for public sector banks have thus been disappointing and suggest that the lessons from 2007/8 have not been learned when it comes to board composition.

Conclusions

The financial crisis of 2007/8, with its high losses by German public banks, motivated our original study on the nexus between bank board competence and financial performance. In the following 15 years, this research question was taken up by numerous other academic studies and replicated for various countries with modifications. The vast majority of the studies examined here found a statistically significant correlation.

In Germany, the idea that board competence matters has also been enshrined in law: Since 2009, supervisory board appointments have had to be approved by BaFin, with candidates required to have the “knowledge, skills and experience” to perform their supervisory function. However, this legal requirement has had little impact in practice. Fifteen years after the major financial crisis of 2007/8, the average quality of supervisory boards has improved only slightly. The quality of public banks, in particular, remains below average and woefully low. What we see is that bank supervisors (like BAFIN) are often reluctant to fulfill a legislative mandate and opportunistically opt for a lax implementation.

What are the policy implications of these empirical findings? There is a strong public interest in more competent supervisory boards, particularly in banks in which the state is the main owner, as the taxpayer is liable here. However, even in the case of large private banks, a

lack of supervisory or administrative board competence often poses a systemic risk to the entire banking system, as the Credit Suisse case impressively demonstrates. We recommend that bank supervisors systematically measure, track, and report bank board competence and its alignment with a bank's business. Moreover, more supervisory accountability is required if existing regulation on board qualifications is to be implemented with the rigor it deserves.

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Teva in talks to settle US lawsuit alleging MS drug kickbacks

 [reuters.com/legal/government/teva-talks-settle-us-lawsuit-alleging-ms-drug-kickbacks-2024-06-17](https://www.reuters.com/legal/government/teva-talks-settle-us-lawsuit-alleging-ms-drug-kickbacks-2024-06-17)

Nate Raymond

The logo of Teva Pharmaceutical Industries is displayed at the company headquarters in Tel Aviv, Israel, February 20, 2024. [REUTERS/Dylan Martinez Purchase Licensing Rights](#) , opens new tab

BOSTON, June 17 (Reuters) - Teva Pharmaceutical Industries Ltd (TEVA.TA) , opens new tab said it is in active talks to settle a U.S. Department of Justice lawsuit alleging it used charities that help cover Medicare patients' out-of-pocket drug costs as a means to pay kickbacks to boost sales of its multiple sclerosis drug Copaxone.

Teva made the disclosure on Sunday in a filing , opens new tab asking the Boston-based 1st U.S. Circuit Court of Appeals to put on hold its appeal set to be heard next month of a key ruling over what the government must prove to establish it violated the False Claims Act.

That law makes it illegal to defraud governmental programs and allows the government and whistleblowers to pursue civil cases seeking to recover taxpayer money paid out based on false claims submitted for payment.

"The parties are actively engaged in settlement negotiations and Teva is optimistic that the parties can reach a resolution, but additional time is needed to do so," Teva's lawyers wrote.

The case is one of two left pending from an industry-wide probe of drugmakers' financial support of patient assistance charities that has resulted in more than \$1 billion in settlements with 12 drugmakers, four charities and one pharmacy.

Teva in court papers had said that it faced triple damages under the False Claims Act of as much as \$10 billion in the Justice Department's lawsuit, which was filed in 2020. It has denied wrongdoing.

Israel-based Teva and the U.S. Attorney's Office in Massachusetts, which has been handling the case, declined to comment on Monday.

Drug companies are prohibited from subsidizing co-payments for patients enrolled in Medicare, the government healthcare program for those aged 65 and older. Companies may donate to non-profits providing co-pay assistance as long as they are independent.

But the government has alleged that various pharmaceutical companies used such charities as a means to improperly pay the co-pay obligations of Medicare patients using their drugs, in violation of the Anti-Kickback Statute.

The lawsuit alleged Teva paid two such charitable foundations, the Chronic Disease Fund and The Assistance Fund, more than \$350 million from 2006 to 2017 to cover co-payments for Copaxone patients, turning the charities into vehicles to pay kickbacks to patients to use the drug.

During that time, Teva quintupled the drug's price to about \$85,000 per year from approximately \$17,000. The drug at that time was Teva's best seller, generating \$3.8 billion in revenues in 2017 alone.

The industry-wide investigation was launched during heightened attention to rising drug prices. Co-pays are partly meant to serve as a check on healthcare expenses by exposing patients to some of a medicine's true cost.

The 1st Circuit had scheduled arguments on July 22 in both the case against Teva and a similar lawsuit filed in 2020 against Regeneron Pharmaceuticals Inc on the issue of what government must prove at trial.

In Teva's case, the company was appealing U.S. District Judge Nathaniel Gorton's decision last year holding the government did not have to prove that specific Medicare payments would not have been made if not for illegal kickbacks.

In Regeneron's case, Chief U.S. District Judge F. Dennis Saylor reached the opposite conclusion. Both judges allowed Teva and Regeneron to pursue appeals now instead of going to trial first given the importance of the question to the litigation.

The case is United States v. Teva Pharmaceuticals USA Inc, 1st U.S. Circuit Court of Appeals, No. 23-1958.

For the government: Daniel Winik of the U.S. Department of Justice

For Teva: Alexandra Shapiro of Shapiro Arato Branch and William Peterson of Morgan, Lewis & Bockius

Read more:

Trial against Teva over kickback claims put on hold amid appeal
U.S. sues Teva over alleged kickbacks for multiple sclerosis drug
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Reporting by Nate Raymond in Boston

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Nate Raymond

US Pensions Vie With Gulf Funds for First Shot at PE Deals (1)

By Marion Halftermeyer

- Competition on deals forces US pensions to shift strategy
- Big US pensions seek co-investments to save costs, gin returns

Bloomberg Law News 2024-06-17T09:29:43002763398-04:00

US Pensions Vie With Gulf Funds for First Shot at PE Deals (1)

By Marion Halftermeyer2024-06-14T18:05:36916-04:00

- Competition on deals forces US pensions to shift strategy
- Big US pensions seek co-investments to save costs, gin returns

It took Scott Chan two years to convince his bosses at the California State Teachers' Retirement System to free up more cash for lucrative investments alongside the world's biggest private equity firms.

In the time it took the Calstrs deputy chief investment officer to build his case, faster and nimbler investors — mostly Middle Eastern sovereign wealth funds — snapped up more than \$38 billion of such deals.

US pension funds, long among the most coveted clients for buyout firms, are rapidly losing ground to deep-pocketed Middle Eastern sovereign wealth funds. That's especially true in deals known as co-investments, where private equity managers tap favored investors to put more money into individual purchases — without the hefty fees. Sovereign wealth funds such as the Abu Dhabi Investment Authority and Mubadala Investment Co. have been seizing on such opportunities, deploying billions to help get private equity deals over the line in recent years.

The increased competition for such deals comes just as they're becoming a more important tool for US pensions to save on management fees and bet on higher returns. That's changing the dynamics of how US pensions invest, public fund executives say. The largest US pensions are cranking into gear, revamping decision-making processes that made them slow to evaluate new investments and increasing allocations to capture more of these deals.

The board of the largest US pension fund, the California Public Employees' Retirement System, or Calpers, has given its investment team permission to make decisions in 48 hours if they need to. At Calstrs, which manages approximately \$338 billion, Chan persuaded the fund's board this year to tweak an existing co-investment program to be more flexible and put more money to work.

"Pensions are trying to move a lot faster now that the big sovereign wealth funds are in the picture," said **Marcus Frampton**, the chief investment officer for the \$78 billion Alaska Permanent Fund. The fund made 50 co-investments in the past decade and last year decided to expand its private equity team to do more of such deals.

Read More: Private Equity Titans Tap Sovereign Wealth to Get Deals Done

US public pensions, managed on behalf of teachers, firefighters and other public-sector workers, have for years invested in private equity funds as a means of generating strong returns with less volatility than in the public equity markets. The aim is to close a funding gap that has left many of them tens of billions short of covering expected retirement benefits.

But the asset class is expensive. Some US pensions spend roughly a half-billion dollars on private equity management fees per year.

In recent years, US pensions have ramped up co-investments to gain exposure to attractive companies in a fund's underlying portfolio, with zero fees to pay. Calpers, which manages about \$490 billion, increased its private equity target allocation to 17%, in part to shift more money into such co-investments. The pension made its biggest yet just last year, investing \$750 million in an undisclosed US buyout deal.

Access to these deals often goes hand in hand with commitments to a private equity firm's next fundraise. Meanwhile, private equity firms benefit from having a partner who can shoulder some of the risk at the outset, rather than fronting it all themselves.

The entry of giant sovereign wealth funds from the Middle East has introduced a complication. US pensions have historically taken weeks or even months to make an investment decision, hamstrung by a cumbersome process involving investment committees, consultant reviews and political battles over the stewardship of retirees' money. By contrast, the likes of ADIA and Saudi Arabia's Public Investment Fund can commit large sums quickly — sometimes in hours.

"We needed to streamline the entire organization's operations to become nimble so that we could compete in the marketplace at anyone's speed and scale," Chan said in an interview with Markets Group in March about the fund's efforts to improve its co-investment strategy. "If we're going to do a co-investment, we have to make sure we respond the same day."

Calstrs saved \$185.5 million in fees in 2022, helping to bolster Chan's case. It now aims to do a co-investment for every fund investment it makes.

Calstrs can provide “quick turnarounds in making co-investment decisions and the ability to take down sizable amounts,” said Mindy Tirapelle, a spokesperson for Calstrs in an emailed response to Bloomberg’s questions about the pension fund’s co-investments.

Calpers declined to comment.



Source: Source: Middle East: SWF Institute, GlobalSWF Rest: filings, websites

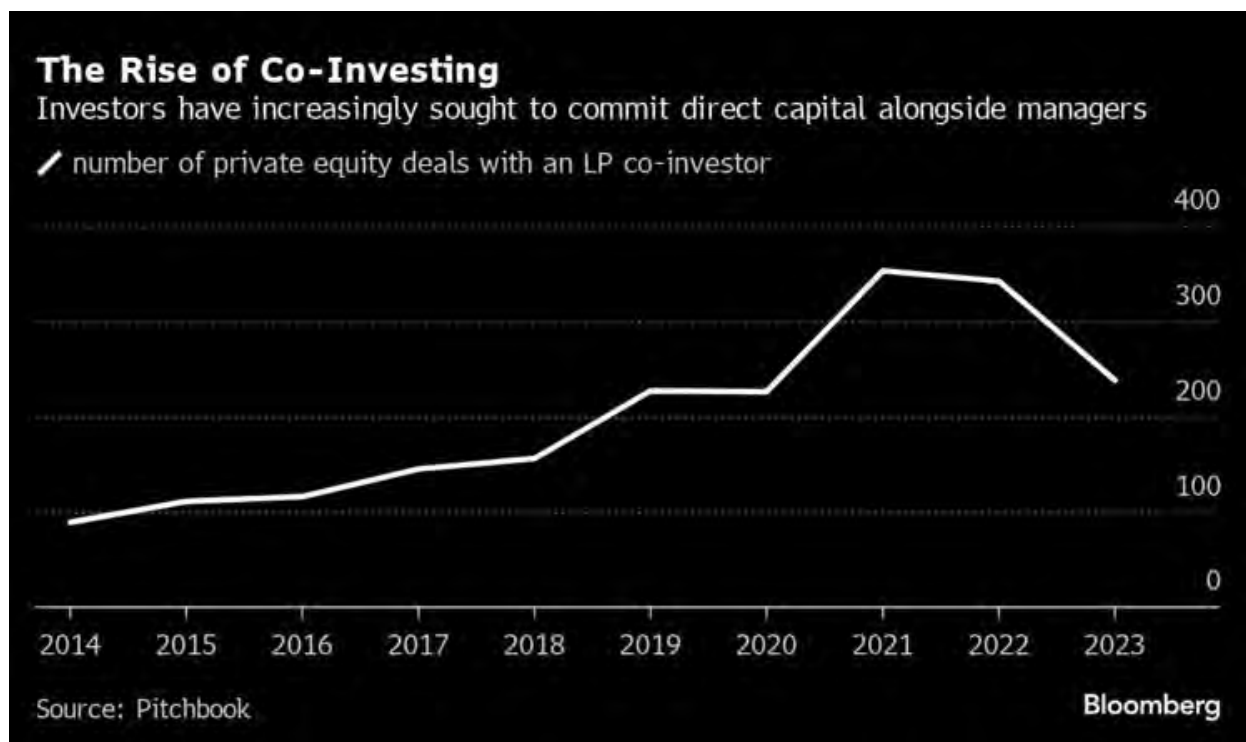
While US pensions aren’t new to co-investing, they’ve typically committed capital at a slower pace and in much smaller amounts than their sovereign wealth peers, which have grown at breakneck speed in recent years.

The 10 largest Middle Eastern sovereign wealth funds manage a collective \$4.5 trillion in assets, edging closer to the amount the 10 biggest public investors in the US, Australia and Canada manage combined. That means they have large investment targets to fulfill, which in turn is pushing some deals into the multibillion-dollar range.

KKR, EQT, and Brookfield all turned to Middle East sovereign wealth funds last year to help fund big-ticket deals. And Apollo Global Management Inc. Chief Executive Officer **Marc Rowan** said in February that the best investors are now in places such as Singapore and the United Arab Emirates.

Read More: Investing Novices Call the Shots for \$4 Trillion at US Pensions

“The first people that get phone calls for some of these deals, especially the bigger deals, are the people that can write a billion-dollar check into one deal,” said Michael Lazorik, the director for private equity principal investments at the roughly \$200 million Teacher Retirement System of Texas. “That’s a small number of people.”



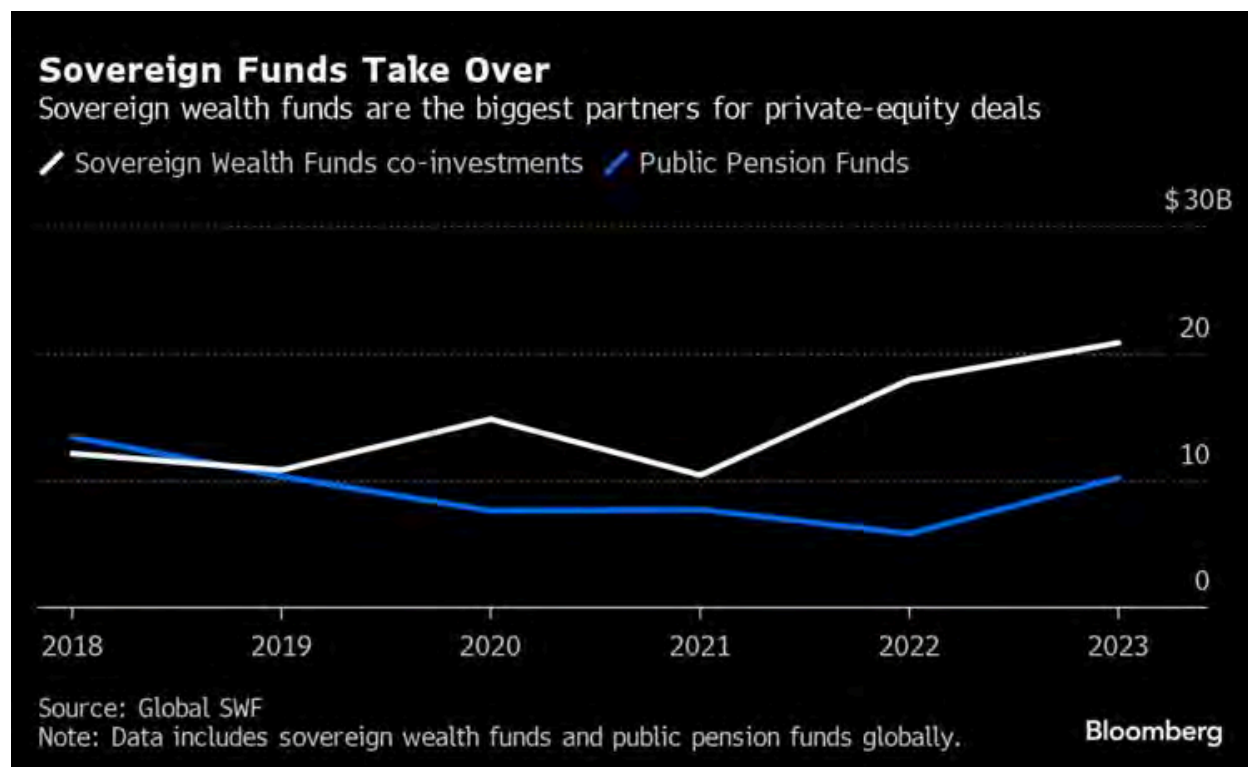
Source: Source: Pitchbook

That means over the past eight years, Lazorik said, investors — also known as limited partners — who could commit to backstopping a deal with 10-figure sums carved out a new tier for themselves. In that time, Gulf countries have pushed through reforms on business policies and made other efforts to diversify their economies away from oil.

Saudi Arabia's Vision 2030 program, launched in 2016, has fueled the kingdom's aggressive investment strategy in companies abroad. Crown Prince Mohammed bin Salman has said he wants to make investments the source of the government's revenue, not oil. Instead of stashing a large share of their oil wealth in safe assets like cash, bank deposits and US debt, the sovereign funds are increasingly funneling money into investments in stocks, real estate, infrastructure and private equity.

The largest now underwrite deals alongside private equity firms and are involved much earlier in the investment process than historically was the case. Canadian and Australian public pension funds, as well as Singapore's sovereign wealth funds GIC and Temasek, have been at the forefront of this type of investing and can keep up with the Middle Eastern players — and in some cases, when a deal gets too big, partner with them.

This has pushed some US pension funds into a so-called second tier. They get phone calls later, after a deal is signed, so that they buy sell-downs, portions of the investments that the larger limited-partners don't want to keep.



Source: Source: Global SWF

Not every buyout firm has relegated US pensions to second place. Some have responded by creating an alternating system for who they offer deal access to first. More often than not, however, it's about finding the money fast and avoiding having too many investors to negotiate deal terms with.

One large pension investor said that some money managers prefer a limited partner that has strict governance, as it forces more questions about a transaction and thereby adds a level of comfort to the viability of the deal itself. Many of the Middle East players are organized to write large tickets, but the speed of such deals leaves less time for due diligence compared to the approach of established limited partners, this person said, citing conversations with investment firms and experiences partnering with those players.

Still, US public pensions, which collectively manage several trillion, have started to tout that they, too, can be nimble and move quickly, and that they're reliable long-term partners. Some of the more sizable ones still compete neck-in-neck with sovereigns on some deals.

"It's very hard to attain a position in a private equity industry as an LP, and it's even more important to maintain that position," Lazorik said. To keep access to co-investments, limited partners often need to make promises of fat commitments in a private equity firm's next fund raise. As both sovereign wealth funds and investment firm fund sizes grow larger, few US players can keep up.

Calstrs says its new policy makes them more competitive against rivals, letting the fund commit to very large deals that other US investors wouldn't be able to do because of allocation constraints. Their eventual goal is to co-lead deals, taking as much as 49% ownership in companies and snagging observer board seats.

The largest US pension funds acknowledge privately that they've been eyeing the growth of sovereign wealth funds for the past decade, and watching how that has influenced their access to investment managers, according to people familiar with their thinking, who asked to remain anonymous discussing strategy that isn't public.

Some of them even see trying to compete with the Middle East funds as a futile exercise.

Calpers invests \$7.5 billion to \$8 billion per year in co-investments, up from just \$3 billion in 2022. This year it decided that it's no longer planning to invest that money with the big-name private equity shops that run the blockbuster deals and garner steep competition with sovereign wealth funds.

Instead, Calpers is shifting its money to smaller managers and deals that can be less competitive. While the pension made that decision primarily to diversify its portfolio, getting meaningful traction with those funds is another benefit. As one person familiar said, Calpers wants to put its money where its tickets mean something.

(Updates with portfolio diversification in final paragraph.)

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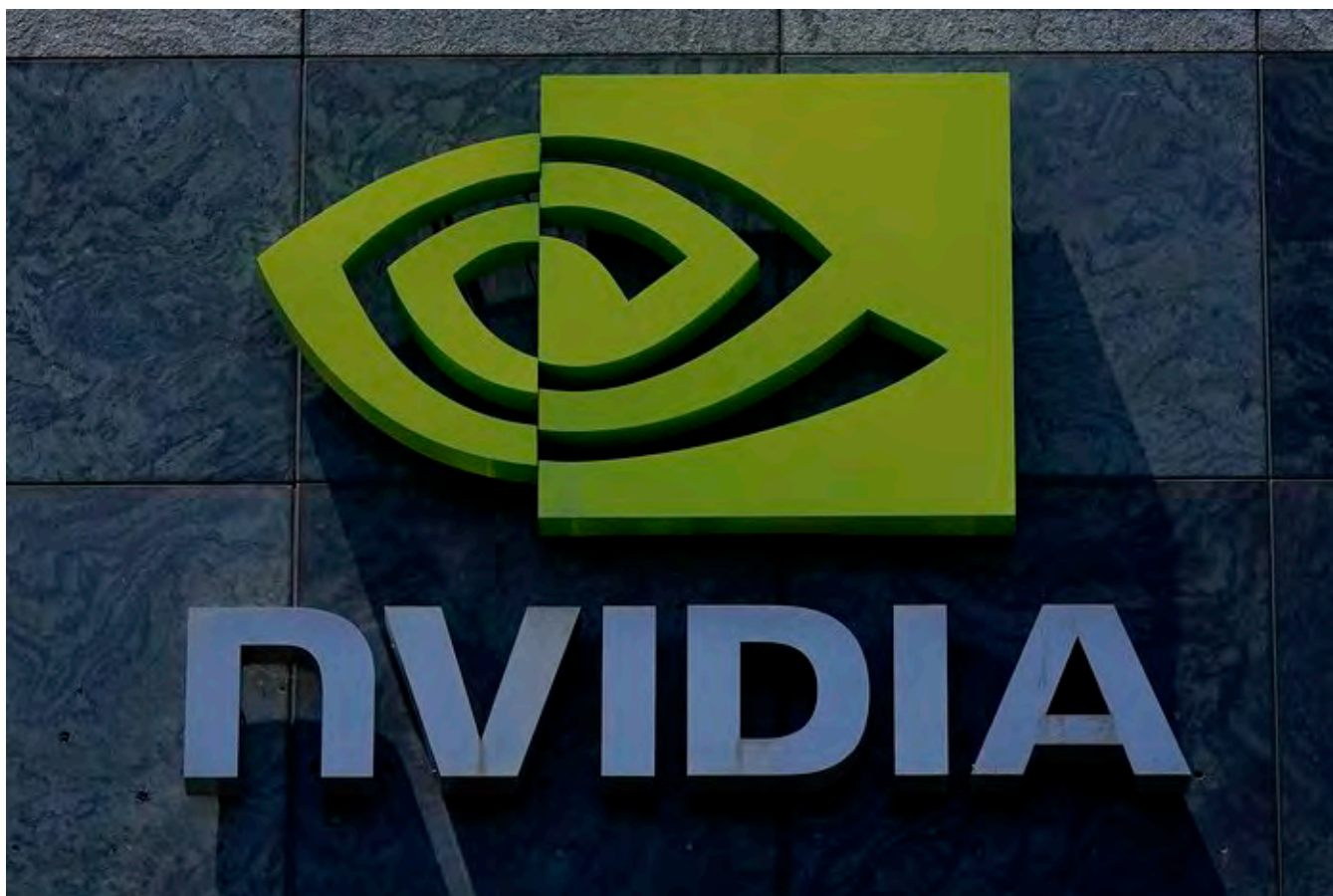
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Justices To Hear Nvidia Case On Securities Pleading Standard

By **Jessica Corso**

Law360 (June 17, 2024, 9:38 AM EDT) -- The U.S. Supreme Court on Monday agreed to hear an appeal of a Ninth Circuit ruling that revived investors' claims over chipmaker Nvidia's crypto mining sales, giving the high court a chance to weigh in on the pleading requirements needed to sustain a shareholder class action.



Nvidia has convinced the U.S. Supreme Court to review a Ninth Circuit decision that revived investors' claims over the chipmaker's crypto mining sales. (AP Photo/Jeff Chiu)

The high court agreed to take up a case that Nvidia says deepened a circuit split over the necessary evidence to plead scienter under the Private Securities Litigation Reform Act of 1995.

The law was passed to protect publicly traded companies from frivolous investor lawsuits by, among other things, putting into place heightened pleading standards.

Nvidia **told the justices** in petitioning for review in March that suing shareholders lacked access to internal company documents that would back up their claim that CEO Jensen Huang knew that the company's 2017 revenue growth was heavily reliant on sales of its flagship product to crypto miners.

Investors said that Huang denied that fact publicly but that it became obvious after crypto prices collapsed in late 2018 and sales of the graphics processing unit product also fell dramatically.

But Nvidia claimed shareholders' lack of knowledge about the content of the internal documents allegedly reviewed by Huang led them to "manufacture data" produced by an expert witness about the information that may have been present in those documents.

The company said that five circuit courts — the Second Circuit, Third Circuit, Fifth Circuit, Seventh Circuit and Tenth Circuit — have ruled as a matter of law that plaintiffs must plead with particularity the actual contents of internal company documents.

Investors, led by Swedish asset management company Öhman Fonder, urged the court not to hear the case, saying there was no merit to Nvidia's claims that the Ninth Circuit decision created or deepened a circuit split.

The complaint provided detailed allegations about the alleged scheme to mask the company's reliance on crypto miner sales, including reports from former employees about Nvidia's internal practices for tracking mining-related sales, according to investors.

They also pointed out that the company **settled similar allegations** with the U.S. Securities and Exchange Commission in 2022 by agreeing to pay \$5.5 million while neither admitting nor denying the regulator's findings against it.

The Ninth Circuit was **split on the case**, with the majority agreeing that investors adequately alleged that Huang acted with scienter — or that he knowingly or recklessly made false or misleading statements — during 2017 and 2018 discussions with investors and analysts when he repeatedly downplayed the significance of the volatile market of cryptocurrency miners on Nvidia's graphics processing unit sales.

U.S. Circuit Court Judge Gabriel P. Sanchez, however, penned a 28-page dissent claiming that, among other things, the complaint did not cite any internal document that would have put Huang on notice that his statements about its GPU sales revenues were false or misleading at the time.

Judge Sanchez said the case did not meet the "exacting" pleading requirements of the PSLRA.

Nvidia and its executives are represented by Neal Katyal, Katherine Wellington, William Havemann, Reedy Swanson and Keenan Roarty of Hogan Lovells US LLP, and John Dwyer, Patrick Gibbs, Samantha Kirby, Kathleen Hartnett, Sarah Lightdale and Patrick Hayden of Cooley LLP.

The investors are represented by Gregory Joseph, Rachel Cherington and Courtney Solomon of Joseph Hage Aaronson LLC, and Matthew Mustokoff and Andrew Zivitz of Kessler Topaz Meltzer & Check LLP.

The case is Nvidia Corp. et al. v. E. Ohman J:Or Fonder AB et al., case number 23-970, in the U.S. Supreme Court.

--Additional reporting by Hailey Konnath and Dorothy Atkins. Editing by Robert Rudinger.

Update: This story has been updated with additional investor counsel information.



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Potato Co.'s Software Rollout Fried Its Revenue, Suit Says

By **Sydney Price**

Law360 (June 14, 2024, 10:06 PM EDT) -- Potato product manufacturer Lamb Weston has been hit with a proposed shareholder class action in Idaho federal court alleging that it concealed from investors information about the botched implementation of software that had been intended to improve the efficiency of the company's operations but ended up costing the company millions in lost sales.

According to the suit filed Thursday by Cleveland Bakers and Teamsters Pension Fund, Lamb Weston announced in July 2023 that it had completed the design of its new enterprise resource planning software, which would replace the company's "antiquated" operating and financial system. However, after months of downplaying rollout concerns, Lamb Weston revealed in April that it had lost \$135 million in sales due to significant challenges with the transition, the **complaint** alleges.

In addition to Lamb Weston, the suit's individual defendants include its CEO Thomas P. Werner and Chief Financial Officer Bernadette M. Madarieta.

The class period begins July 25, 2023, the day Lamb Weston announced the completed design of its new ERP system. The company said the software would increase automation and thus increase efficiency, the suit said.

"The new system was critical to Lamb Weston's operations, as it was designed to manage supplier payments, inventories, warehousing, customer invoicing and order shipments," the suit said.

In the following months, Lamb Weston continued to emphasize that the ERP system would strengthen the company and that its guidance for the 2024 fiscal year accounted for the financial impact of the system's deployment, according to the complaint.

For example, on Jan. 4, 2024, Madarieta told investors on an earnings call that Lamb Weston was only experiencing minor, anticipated problems in implementing the new system and that she did not expect them to have a material impact on full-year business or operating results, according to the suit.

The truth emerged, the suit alleges, on April 4 when Lamb Weston disclosed that the ERP system did not work properly and affected the company's ability to fulfill customer orders. Lamb Weston lost \$135 million in sales during the third quarter of the 2024 fiscal year and reduced its sales guidance for the full fiscal year by \$330 million, at the midpoint.

Following the disclosures, Lamb Weston's shares declined by \$19.59 per share, or 19%, to close at \$81.53 per share on April 4, according to the suit.

The pension fund accuses the defendants of violating the Exchange Act and seeks damages on behalf of the proposed class.

Counsel for the pension fund and a representative of Lamb Weston did not immediately respond to requests for comment on Friday.

Cleveland Bakers and Teamsters Pension Fund is represented by Scott McKay and Nathan Pittman of Nevin Benjamin & McKay LLP, Avi Josefson and Scott R. Foglietta of Bernstein Litowitz Berger &

Grossmann LLP and Frank R. Schirripa of Hach Rose Schirripa & Cheverie LLP.

Counsel information for Lamb Weston and the individual defendants was not immediately available on Friday.

The case is Cleveland Bakers and Teamsters Pension Fund v. Lamb Weston Holdings Inc. et al., case number 1:24-cv-00282, in the U.S. District Court for the District of Idaho.

--Editing by Rich Mills.

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Global Payments Inks \$3.6M Deal Over Fee Disclosure Fallout

By **Emilie Ruscoe**

Law360 (June 14, 2024, 10:33 PM EDT) -- Atlanta-based payment tech company Global Payments Inc. has agreed to pay \$3.6 million as part of a deal to resolve a proposed investor class action tied to allegations that its summer camp payment processor subsidiary allegedly "tricked" consumers into signing up for a program that had fees it didn't properly disclose.

In a Wednesday filing, Global Payments investors William Jeffrey Igoe, David Keating and Mike Shafer asked U.S. District Judge Leigh Martin May to grant preliminary approval to their proposed settlement deal, describing the deal as "a very favorable result" for the proposed class of Global Payments investors.

The investors said that an expert had determined that the maximum recoverable damages in the action was \$97 million, which would mean that their settlement sum would be about 3.7% of class members' potential recoverable damages.

The investors' legal team, comprising attorneys from Pomerantz LLP, Evangelista Worley LLC and Lowey Dannenberg PC, would seek a fee of no more than a third of the settlement fund and would ask for no more than \$100,000 to reimburse certain litigation costs, the filing stated.

If approved, the settlement would end claims that Global Payments failed to disclose that "a material portion of [its subsidiary Active Network LLC]'s revenue depended on tricking consumers" into signing up for its "Active Advantage" discount membership program.

The investor claims point to a complaint against Active brought in October 2022 by the U.S. Consumer Financial Protection Bureau detailing allegations that Active knowingly designing its websites to dupe customers into signing up for purportedly free trial Active Advantage memberships — which automatically turned into paid memberships that would then renew annually unless canceled.

"These practices brought in hundreds of millions of dollars — and thousands of customer complaints — over the years," the Global Payments investors allege in their suit.

The investors point to three stock price declines between 2022 and 2023 as evidence of the alleged harm they faced from the company's practices.

According to the investors' complaint, Global Payments bought Active in 2017, "shortly after Active had resolved the last in a series of legal proceedings and investigations — brought by municipal and state attorneys, as well as private plaintiffs — concerning these deceptive and unlawful practices."

The investors claim that despite those proceedings, Global Payments didn't ever mention to its investors that Active was making a "material portion" of its revenue off of the allegedly deceptive practices.

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

The plaintiffs are represented by Jeremy A. Lieberman and Jonathan Park of Pomerantz LLP; James M. Evangelista of Evangelista Worley LLC; and Vincent Briganti, Andrea Farah and Alesandra Greco of Lowey Dannenberg PC.

The defendants are represented by Michael R. Smith, Benjamin Lee, Peter Starr and Matthew Rosenthal of King & Spalding LLP.

The case is Shafer v. Active Network LLC et al., case number 1:23-cv-00577, in the U.S. District Court for the Northern District of Georgia.

--Editing by Andrew Cohen.

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Chinese Delivery Co. To Settle IPO Class Action For \$4.9M

By **Sydney Price**

Law360 (June 14, 2024, 7:32 PM EDT) -- Chinese grocery vendor Missfresh Ltd. has agreed to settle an investor class action accusing it of making several misleading statements in the months leading up to its initial public offering, including in regulatory filings and to the media, for \$4.9 million.

The parties reached an agreement on April 23, according to Wednesday's settlement notice. The proposed settlement estimates the investors have recovered 1.7% of the maximum damages incurred. The investors have requested the court certify a class for the settlement.

Class counsel intends to seek up to 25% of the settlement in fees, the proposed order said.

According to the settlement notice, continued litigation is risky since several defendants are located in China.

"According to Chinese law, productions of information and data maintained by a company such as Missfresh outside of China must first be reviewed and approved by the necessary Chinese government officials," the motion said. "Not only does this requirement slow down litigation, but it introduces potential risk to protracted litigation."

According to the suit, Missfresh launched its IPO on the Nasdaq Stock Market at \$13 per share in June 2021, but by April 2022, the shares were trading at around \$1 each. On April 29, 2022, Missfresh said it could not timely file its 2021 annual report, that the audit committee of the company's board of directors was conducting an internal review of "certain matters" and that they couldn't file the annual report until the review was complete.

In July 2022, the company said its IPO documents had overstated sales through its online platforms by 11.7% and overstated the company's overall net revenues by 11.4% for the first quarter of 2021.

The suit, filed in July 2022 and amended in December 2022, saw **claims trimmed** in November 2023.

Missfresh argued in its dismissal motion that claims regarding alleged misstatements are not actionable or material since the overstatement of revenue ultimately did not affect the company's bottom line.

However, Judge Rakoff said at the time that accounting misstatements are "sufficiently material" to survive a dismissal motion, and even though the identified misstatements did not affect "peripheral line items," they still impacted Missfresh's core business, which is "the exact type of information that would be important to a reasonable investor."

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

The plaintiffs are represented by Alfred L. Fatale III and Charles Wood of Labaton Keller Sucharow LLP, Phillip Kim, Laurence M. Rosen and Jing Chen of The Rosen Law Firm PA and Brian Schall of The Schall Law Firm.

Missfresh is represented by Scott D. Musoff, Robert A. Fumerton and Michael C. Griffin of Skadden Arps Slate Meagher & Flom LLP.

The case is Chen v. Missfresh Ltd. et al., case number 1:22-cv-09836, in the U.S. District Court for the Southern District of New York.

--Editing by Drashti Mehta.

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Electronics Cos. Fight 'Drastic' \$2B Price-Fixing Default

By **Bonnie Eslinger**

Law360 (June 14, 2024, 11:06 PM EDT) -- Irico Group and a subsidiary on Thursday opposed a special masters report recommending the Chinese electronics companies should be on the hook for over \$2 billion in default judgment in litigation alleging they participated in a cathode ray tube price-fixing conspiracy, telling a California federal court the remedy is "drastic" and unwarranted.

The filing from Irico Group Corp. and Irico Display Devices Co. Ltd. objected to a May **report and recommendation** from special master Vaughn R. Walker to the judge overseeing the litigation that said the years that Irico did not participate in the proceedings and its possible loss of documents have rendered a fair trial "impossible."

The recommendation from the special master is severe: entry of judgment without regard to the merits of the case, based on the questionable theory that the possible loss of evidence stands in the way of resolving the litigation, the companies said.

Irico is the only company remaining in litigation filed in 2007 in the wake of a U.S. Department of Justice criminal probe into price-fixing of cathode ray tubes, or CRTs, electronic components used in TVs and computer monitors. Claims from direct and indirect purchaser plaintiffs against every other defendant, including major electronics companies like LG Electronics, have been settled or otherwise resolved, the report said.

While the special master said he felt that a "fair trial would not be possible in this case," Irico argued that that can't be reconciled with the plaintiffs' assertions years back that there's ample evidence to show the existence of a conspiracy, the harm alleged and Irico's participation.

"Even now, they maintain that their case on the merits is 'strong,'" Irico said, adding that the special master's report also concludes that the plaintiffs have "copious quantities of evidence," much of which directly implicates Irico.

Termination should only be employed when there's no other possible remedy, Irico told the court.

"The R&R contravenes that foundational principle, and it does so in a case assertedly worth many billions of dollars in which the two defendants — Chinese entities, one of which is an instrumentality of China's government — have defended on the ground not only that they did not participate in the alleged conspiracy, but also, inter alia, that their challenged conduct (which took place entirely in China) was affirmatively required by Chinese law," the objection said.

The special masters' report and recommendation says that Irico destroyed evidence to deprive the electronics purchasers of relevant information "but fails to identify a single instance in which Irico deviated from its standard document-retention practices," the objection said.

The worst that could be said is that the two Chinese companies misunderstood the scope of their responsibilities when hit with a U.S. litigation hold and also "failed to immediately update primitive electronic systems and Chinese-law-compliant document-retention policies" to conform to U.S. practice, Irico said.

Those problems don't "warrant the drastic remedy" the special master recommends, it said.

The special master was also incorrect that Irico lied to the court about withdrawing from the case back in 2008 because it believed it was immune from the litigation, Irico said. It also said the special master based that assertion on a document that has been deemed confidential as privileged.

"To the extent those disagreements are not briefed here, it is due to privilege concerns and should not be construed as acceptance of any of the R&R's characterizations," it said.

Walker also wrongly found Irico culpable for its inability to produce for deposition a former employee, Su Xiaohua, "who retired from Irico precisely because Irico was trying to compel him to travel to Macau to be deposed," the objection said.

The deposition request came at the height of the COVID-19 pandemic, and Su resigned because he would have had to travel to Macau for the deposition and then face severe quarantine requirements on return to his home in mainland China, where he cares for his elderly mother.

The special master had no reason to doubt that explanation, Irico said.

"In all events, Mr. Su is at most a tangential witness, and as with the other factors the R&R invokes, loss of access to his testimony does not come close to warranting terminating sanctions," it said.

The special master's report argued that a less drastic punishment, such as monetary sanctions, would not remedy the evidence destruction and long delay, resulting in the loss of witnesses and relevant information.

"A jury instruction to presume that the evidence lost would have been unfavorable to defendants would not be an adequate remedy in light of the vast swaths of missing and highly relevant information that Irico should have preserved and produced," Walker said.

The special master said the plaintiffs had estimated the liability against Irico at \$2.42 billion.

"When the last remaining defendant has thwarted and evaded its opportunity to defend the case on law and the merits, there is no unfairness in the prospect of imposing on that last remaining defendant the full amount of treble damages suffered by the plaintiff classes not otherwise recovered from the defendants that did participate in this litigation," Walker said.

In the report Walker said Su's failure to appear for deposition meant that there is no one left at Irico who was there during the class period who can testify about Irico's participation at competitor meetings.

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

The plaintiffs are represented by lead counsel R. Alexander Saveri, Geoffrey C. Rushing, Matthew D. Heaphy of Saveri & Saveri Inc. and Mario N. Alioto and Lauren C. Capurro of Trump Alioto Trump & Prescott LLP.

Irico is represented by Jeffrey Margulies, Geraldine Young and Kaylee Yang of Norton Rose Fulbright.

The case is MDL No. 1917 In re: Cathode Ray Tube (CRT) Antitrust Litigation, case number 4:07-cv-05944, in the U.S. District Court for the Northern District of California.

--Additional reporting by Bryan Koenig and Nadia Dreid. Editing by Brian Baresch.



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Elon Musk's Court Cases Remain A Live Issue In Delaware

By **Jeff Montgomery**

Law360 (June 14, 2024, 9:09 PM EDT) -- Delaware's courts will continue to assert control over a multibillion-dollar Tesla Inc. legal fee dispute despite the company's rushed effort to reincorporate in Texas and potentially put CEO Elon Musk's massive, multiyear compensation plan beyond the state's reach, those familiar with the case said Friday.

Charles M. Elson, founding director of the University of Delaware's Weinberg Center for Corporate Governance, told Law360 on Friday that Chancellor Kathaleen St. J. McCormick made clear in a May 29 letter that her court would retain oversight of a not-yet-final order voiding Tesla's previous approval of Musk's 10-year pay package, once valued at \$56 billion.

The chancellor also said that Chancery jurisdiction would continue over a stockholder attorney fee petition — due for a July 8 hearing — seeking \$5.6 billion for successfully challenging the pay scheme, plus \$1 million in expenses.

"Despite reincorporation, this [Delaware] court has jurisdiction," Elson said. "I'm sure they'll try to introduce the vote on ratifying the pay [in Texas], but, no. We stated that it stays here, and [Chancellor McCormick] will have to make a judgment, and they can appeal."

Ann M. Lipton told Law360 late Friday that she was unsure Tesla would attempt a parallel action in Texas. Lipton is Tulane University Law School's Michael M. Fleishman associate professor in business law and entrepreneurship, and associate dean for faculty research.

"It would be shockingly aggressive for a Texas court to be willing to consider the issue while it remains a live controversy" in Delaware, she said.

Tesla itself docketed a 65-page brief in Chancellor McCormick's court last week opposing the fee request that never once mentioned Texas, while pointing out that the proposed \$5.6 billion award would be 17 times larger than any other in Delaware history.

"Simply put, redistributing the benefits of the billions in stockholder value created by Tesla and its employees to plaintiff's counsel by making them one of Tesla's largest stockholders would do violence to the equitable and market-based outcomes for which the Delaware courts have been known," the company said in a brief filed on June 7.

In another indication that Musk's and Tesla's liability on the pay issue will continue to be thrashed out in Delaware, the U.S. Chamber of Commerce requested Chancery Court approval on Wednesday to file an amicus brief in support of Tesla's position.

The Chamber said in the request that their brief provides its position on "the unreasonableness of the [attorney] fee request under Delaware law" and that "the fee request is inconsistent with the public policies and desired incentives" under doctrines focused on corporate benefit in representative litigation.

Also joining in opposition to the fee this week was the California Public Employees Retirement System.

Included in the chancellor's boundary-setting letter was the court's understanding that "the

defendants will not argue, based on the lack of an implementing order alone," that the Jan. 30 posttrial opinion voiding Musk's 10-year compensation plan "is unenforceable or lacks legal effect."

Tesla, which commenced reincorporation in Texas on Friday, one day after winning stockholder approval for the move, did not immediately respond to a request for comment on Friday.

The company in a May 7 letter to the court described as "rank speculation" claims that Tesla or others might seek to avoid Chancery Court jurisdiction.

Success on another ratification proposal "will not affect any obligations or liabilities of [Tesla] incurred prior to the conversion or the personal liability of any person incurred prior to the conversion," the company said in the letter, "nor will it affect the choice of law applicable to [Tesla] with respect to matters arising prior to the conversion."

--Editing by Brian Baresch and Melissa Treolo.

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