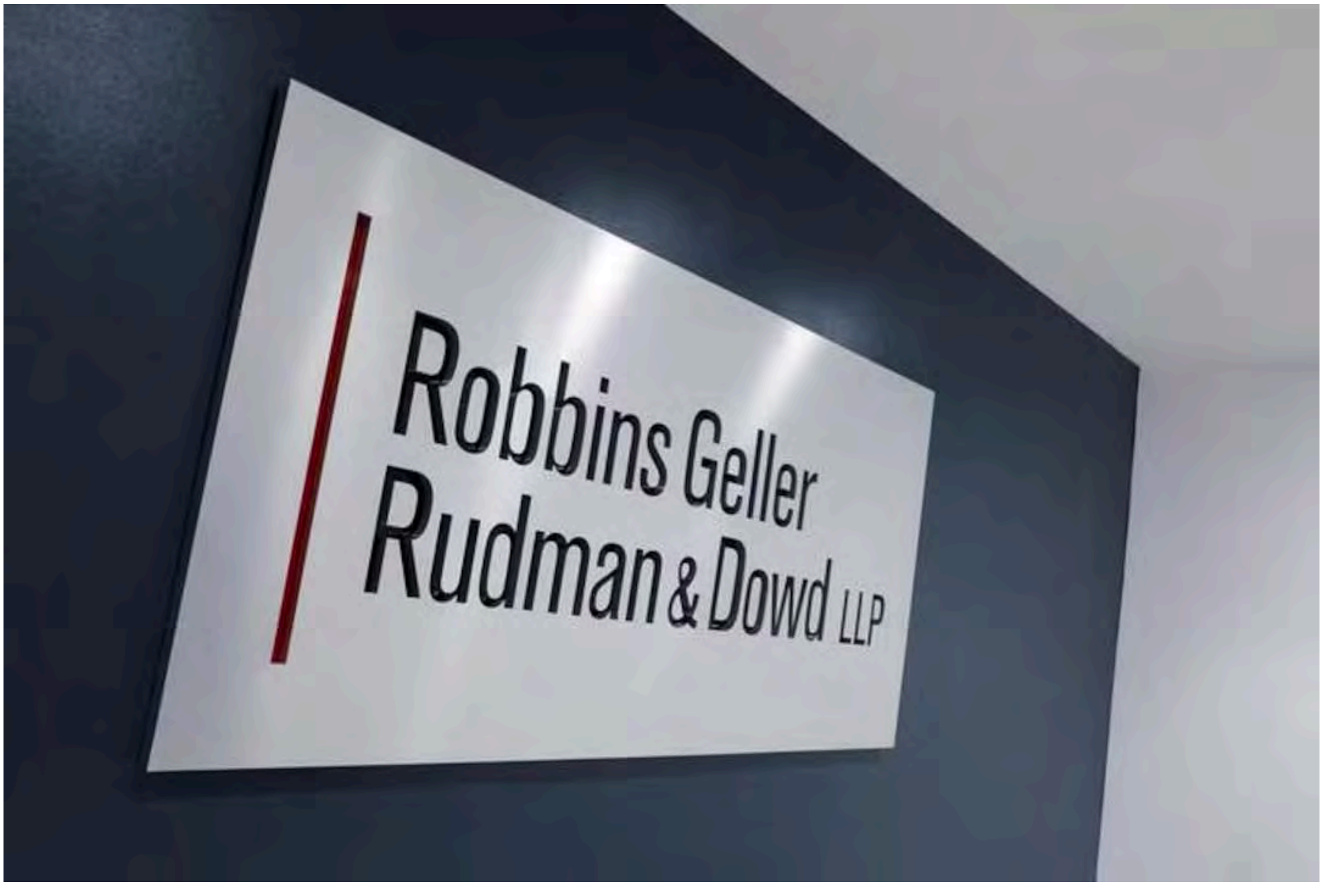
How law firm Robbins Geller won $434 mln post-dismissal settlement with Under Armour

reuters.com/legal/government/column-how-law-firm-robbins-geller-won-434-mln-post-dismissal-settlement-with-2024-06-25

Alison Frankel



Signage is seen at the law firm of Robbins Geller Rudman & Dowd LLP in their legal offices in Manhattan, New York City, New York, U.S., May 24, 2021. REUTERS/Andrew Kelly
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June 25 (Reuters) - Does the outcome of a securities class action hinge on which shareholder firm is handling the case?

Not most of the time, according to the latest draft of an article, opens new tab for the NYU Law & Economics Research Paper Series.
In Paying for Performance? Attorneys Fees in Securities Fraud Class Actions, opens new tab, law professors Adam Pritchard of the University of Michigan, Stephen Choi of New York University and Jessica Erickson of the University of Richmond analyzed outcomes in nearly 2,500 securities class actions filed between 2005 and 2018 to find out if 15 top-tier shareholder firms — defined as law firms whose settlement averages exceeded $30 million — obtained better results for shareholders.

After controlling for the quality of the cases by considering objective factors such as parallel government investigations, accounting restatements and competition for appointment as lead plaintiff, the study authors found that top-tier firms pour vastly more time and money into their cases — but don't achieve markedly different results in most of them.

The only band of cases in which Pritchard, Choi and Erickson observed better outcomes for top-tier firms was in those against companies with market capitalizations between $2.4 billion and $14.4 billion.

The professors said they could not definitely explain why top-tier firms outperform their counterparts in these cases but not in cases against small or very large companies. They hypothesized that well-capitalized plaintiffs' firms can afford to invest their own time and money in midsized cases while lower-tier firms — which can afford to litigate against small companies and might be able to attract outside funding for cases against the biggest defendants — can't invest as much as top firms in cases against midsized defendants.

I had the study's conclusions in mind when I read the news last Friday of Under Armour's agreement to pay $434 million to settle a shareholder class action alleging that the sports apparel company misled investors about demand for its products in 2015 and 2016. The class action deal, which follows Under Armour's $9 million settlement with the U.S. Securities and Exchange Commission in 2021, came less than a month before the company was slated to go to trial.

By any measure, the settlement is eye-popping for a company with a market cap of $3 billion.

And it's important to remember that the outcome was anything but a foregone conclusion in 2017, when lead counsel from Robbins Geller Rudman & Dowd launched the case in federal court in Baltimore, or in 2019, when the class action was dismissed without leave to amend.

You won't be surprised to hear that Robbins Geller considers the case to be proof of its added value to clients.

Start with Robbins Geller's handling of the 2019 dismissal. While its appeal was underway at the 4th U.S. Circuit Court of Appeals, The Wall Street Journal disclosed a previously unreported government investigation of Under Armour's revenue recognition practices.

The article sparked new class actions, but Robbins Geller believed it could also change the fate of its case. So the firm attempted a highly unusual procedural maneuver, asking the Baltimore federal judge who had tossed the class action case, U.S. District Judge Robert Bennett, to issue an indicative opinion that said he would revive the original case if it were remanded to him by the 4th Circuit.

Trial team leader Robert Henssler told me he'd never before asked a trial court for an indicative ruling but followed the advice of the firm's appellate specialists.

The stratagem paid off, opens new tab: Bennett issued the indicative opinion and the 4th Circuit remanded the case. Robbins Geller's client, a Scottish pension fund, remained lead plaintiff and the firm filed an amended complaint citing the newly disclosed government investigation.

Over the next four years, Robbins Geller defeated Under Armour's renewed dismissal motion; won class certification; and, last February, convinced Bennett to deny, opens new tab the company's motion for summary judgment.

The two sides were haggling over a prospective jury verdict form when Under Armour agreed to the $434 million settlement — setting a new record, name partner Darren Robbins told me, for settlement of a previously dismissed shareholder class action. (The old record, again according to Robbins, was a $350 million settlement with Alphabet (GOOGL.O), opens new tab in February 2024, in another Robbins Geller case.)

Under Armour declined to comment via an email from lead counsel James Wareham of Fried Frank Harris Shriver & Jacobson.

Robbins and partner Michael Dowd said Under Armour's defense of their case shows the fundamental fallacy of the idea that law firms are more or less interchangeable. When the class seemed headed for trial, the company brought in superstar lawyers from Kramer Levin Naftalis & Frankel and Paul, Weiss, Rifkind, Wharton & Garrison — "not just anyone who hangs up a shingle," Dowd said.

He and Robbins said the same differentiation is true on the plaintiffs' side, regardless of the conclusions drawn by Pritchard, Choi and Erickson.

In an interview, Michigan professor Pritchard said he regards the Under Armour settlement — which he described as "a home-run result" for Robbins Geller — as anecdotal validation of the study he co-authored.

Under Armour's market capitalization was about $8.6 billion when Robbins Geller first filed a class action in early 2017. That puts the case squarely in the narrow band of class actions in which Pritchard and his co-authors found that top-tier firms did, in fact, achieve better results, probably because of their higher investment of time and upfront money.

In Pritchard's estimation, the lesson of the Under Armour settlement is that institutional investors — like the Scottish pension fund that led this case — should take market capitalization into account when they're hiring law firms to pursue shareholder class actions.

When I mentioned that to Robbins, he waved it away as "pointy-headed stuff."

“All I know,” Robbins said, “is that we as a firm are committed to vindicating the rights of defrauded shareholders.”

Read more:

Under Armour to pay $434 million to settle lawsuit over sales disclosures
Under Armour shareholders can sue over sales disclosures — judge
Under Armour to pay $9 million to settle SEC charges
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Alison Frankel
Thomson Reuters

Alison Frankel has covered high-stakes commercial litigation as a columnist for Reuters since 2011. A Dartmouth college graduate, she has worked as a journalist in New York covering the legal industry and the law for more than three decades. Before joining Reuters, she was a writer and editor at The American Lawyer. Frankel is the author of Double Eagle: The Epic Story of the World’s Most Valuable Coin.

Bloomberg Law News 2024-06-26T12:00:36501261108-04:00

Denner, Sarissa Will Pay $40 Million to End Bioverativ Deal Case

By Mike Leonard 2024-06-26T10:46:01000-04:00

- Would resolve claims that Denner manipulated $12 billion sale
- Sanofi to pay $84 million to end case against Bioverativ board

Sarissa Capital Management LP and founder Alex Denner have agreed to pay $40 million to end insider trading litigation tied to Sanofi SA's $11.6 billion acquisition of Bioverativ Inc.

The proposed settlement, which requires court approval, would resolve claims that Denner exploited his position as a Bioverativ board member to manipulate the deal process, making $50 million on shares he'd bought six months earlier for well below the sale price. The billionaire hedge funder—a protege of legendary activist investor Carl Icahn—continues to deny any wrongdoing.

Sanofi affiliates previously agreed to pay $84 million to settle parallel claims against Bioverativ's former board members, although the French drug giant wasn't named as a defendant. The shareholder lawsuit in Delaware's Chancery Court said the directors helped engineer the transaction out of a desire for future board seats connected to "Team Denner."

The proposed class action, filed in late 2020, said Denner bought huge amounts of Bioverativ stock at a per-share price in the mid-$50s after Sanofi told him it would consider acquiring the company for around $90 a share. The activist investor had previously steered Bioverativ's 2017 spinoff from Biogen Inc.

Denner allegedly kept quiet for six months to get around regulations requiring corporate insiders to disgorge short-swing profits, a rule meant to curb insider trading. He then pushed a single-bidder process—yielding a sale price of $105 a share—that gave him a windfall despite falling nearly a third below Bioverativ's internal value projections of $150, the suit said.

The new accord, disclosed Tuesday, comes about six months after a judge hit Sarissa and Denner with punitive legal sanctions—including adverse inferences that would have crippled their defense—for destroying text messages. The judge, Vice Chancellor J. Travis Laster, initially let the case move forward in 2022.

The settlement filing says Denner, Sarissa, and Sanofi "shall cause their respective portions of the settlement amount" to be paid into escrow. The language appears to refer to the pharmaceutical company's separate $84 million agreement, although it wasn't clear if Sanofi will also pay part of the $40 million sum.

The investor leading the litigation, Stewart Goldstein, is represented by Prickett, Jones & Elliott PA, Robbins Geller Rudman & Dowd LLP, Cooch & Taylor PA, and Johnson Fistel LLP. Denner and Sarissa are represented by Ashby & Geddes PA and Willkie Farr & Gallagher LLP. Sanofi is represented by Weil, Gotshal & Manges LLP.

The case is Goldstein V. Denner , Del. Ch., No. 2020-1061, settlement filed 6/25/24 .

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PICTURED: Jessica Shinnefield, Spencer Burkholz, Darren Robbins PHOTO CREDIT: Thomas Kurtz

Securities Fraud

Darren J. Robbins, Spencer A. Burkholz, Jessica T. Shinnefield, Debra J. Wyman, Laurie L. Largent, Christopher D. Stewart, Hillary B. Stakem, J. Marco Janoski Gray

Before Envision Healthcare Corp. filed for bankruptcy a little over a year ago, it made a substantial portion of its profits by hitting hospital patients with surprise "balance" bills for out-of-network emergency room services performed by the many emergency medicine practices it had acquired, according to securities lawyers at Robbins Geller Rudman & Dowd.

"What they do, it's a setup," said Darren Robbins. Envision and other companies like it would buy emergency room practices and then keep them or take them out of many insurance networks. As a result patients "labor under the misperception that [they are] in network," he said.

Then, added his partner Jessica Shinnefield, the company would bill the patient's insurance company for the services at a high rate, of which the insurer likely would agree to only pay a portion. "And then Envision would bill the patient directly for that missing [amount]."

"That's the engine of growth," said Spencer Burkholz, another partner. In the early 2010s, Envision was increasing its revenues by double digits, he said. But then, consumers began complaining. Florida, among other states, adopted legislation to curtail surprise billing and out-of-network practices. By spring 2016, analysts start asking questions of the company's management.

The company responded that only about 20% of its revenues came from those practices.

In fact, "it was more like 75%," Shinnefield said. "The market was very unaware that a big part of its revenue was generated from these practices that were unsustainable."

And then, in 2017, "everything started to fall apart," Berkholz said. The New York Times reported on a study from Yale exposing surprise billing. Congress began to investigate. The company's share price began to slide. And Robbins Geller filed suit on behalf of two labor union pension trust funds alleging securities fraud. In re Envision Healthcare Corp. Sec. Litig., 3:17-cv-01112 (M.D. Tenn., filed Aug. 4, 2017).

Soon after the suit was filed, the company reported an earnings target missed and the end of rapid growth. "The stock goes down 40%," Berkholz said. "So, a $75 stock is now basically $25 by the end of the class period in the spring of 2018."

In 2019, Congress enacted the No Suprises Act to stop surprise billing nationwide. In 2020, the pandemic began. And in May 2023, Envision filed for bankruptcy.

Then in September, the plaintiffs' attorneys announced they had reached a $177.5 million settlement with Envision. "This recovery ... in connection with a bankrupt company is pretty extraordinary," Robbins said. In fact, it is the second largest securities settlement ever in the Middle District of Tennessee, which sees a high percentage of such cases involving medical companies, he said.

At the time, the attorneys were about six months from trial. They had gone through 400,000 documents and conducted 46 depositions, Shinnefield said.

Robbins credits the unusual success to his and his partners' experience and trial-readiness in investor-rights litigation. "We have a small group of trial teams, which are kind of like Navy Seals," he said. "They get dropped into these cases, and they prepare for battle."

"It's the ability to field that trial team that offers a viable threat at trial," he said. "It takes a long time, but the ability to be ready to be out on the field to try the case is what makes the difference. And that's what made the difference here."

-- Don DeBenedictis

#379449

Why the Sackler Shield Is at Risk in Supreme Court: QuickTake

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The US Supreme Court will soon decide the fate of a $6 billion settlement between members of the Sackler family and their bankrupt drugmaker Purdue Pharma LP, which profited from the sale of the painkiller OxyContin.

Justices are considering a Biden administration challenge to scuttle the agreement. Members of the Sackler family, some of whom together own the company but unlike Purdue are not in bankruptcy, have agreed to fund the drugmaker's plan for compensating opioid victims and governments. In exchange, the Sacklers would be released from all pending and future civil lawsuits alleging Purdue and its sale of OxyContin helped fuel the nation's addiction crisis.

The Supreme Court is, for the first time, weighing the legal mechanism used to facilitate that agreement. These mechanisms, called non-consensual third party releases, have become a common feature in bankruptcies filed under Chapter 11 of the US Bankruptcy Code, in which a company can continue operating but must work out a plan to repay its debts. If the $6 billion settlement is rejected, bankruptcy experts have predicted it will result in a major shift in how troubled companies use Chapter 11 to end mass litigation over dangerous products, or how religious organizations settle sex abuse lawsuits. Here's a primer on the situation.

How did the settlement come about?

Purdue filed Chapter 11 in September 2019. In 2020, Sackler family members agreed to pay the Justice Department $225 million to settle civil claims while Purdue pleaded guilty to three federal felonies related to its marketing of OxyContin. Meanwhile, Purdue's bankruptcy advisers formulated a plan to resolve its Chapter 11 case with input from government authorities and lawyers representing opioid victims. The $6 billion Sackler settlement the Supreme Court is considering is part of the broader plan Purdue and its stakeholders formulated. A New York bankruptcy judge approved the settlement in 2021, but the deal got tied up in appeals courts. The Supreme Court decided to take the case in August 2023.

Does Purdue Pharma still exist?

Yes. Purdue has continued to operate and sell opioids during its Chapter 11 case. However, members of the Sackler family who own Purdue are no longer involved with the business and the company has been operating under a strict injunction negotiated by the Justice Department, states attorneys generals and other officials.

What happened to the Sackler family?

Members of the Sackler family, who have never faced criminal charges related to Purdue or OxyContin, support the bankruptcy settlement. In court papers, the Sackler family has said that they "emphatically dispute all allegations of wrongdoing against them" and that the settlement averts costly and time-consuming civil litigation that may not succeed. Outside of court, the Sacklers — who were well known in philanthropic circles — have faced public scorn and have had their name removed from museums.

Why is the settlement controversial?

The settlement would force all opioid victims to take the deal and give up potential claims against the Sacklers — even if they don't want the deal or would rather take their chances with a jury. Congress permitted these types of settlements decades ago in bankruptcies related to asbestos and, over time, lawyers and bankruptcy judges reasoned they could be expanded to cover other corporate wrongdoing.

Federal appeals courts are split over whether the linchpin of these agreements, provisions called non-consensual third party releases, are legal. These types of releases essentially extend the benefit of Chapter 11 to cap liabilities to parties that haven't filed bankruptcy themselves, in exchange for cash or other consideration.

William Harrington, who as a US Trustee is an officer of the Justice Department unit responsible for overseeing bankruptcy cases, is challenging the settlement and has argued bankruptcy judges lack the power to insulate the Sacklers from lawsuits.

Where else have these settlements been used?

Similar agreements using non-consensual third party releases have been used to end mass litigation over dangerous products and waves of sex abuse lawsuits brought against Catholic dioceses, the Boy Scouts of America and USA Gymnastics.

Do opioid victims support the settlement?

The settlement has broad support from opioid victims who voted on Purdue's bankruptcy plan, state authorities and other stakeholders. Other opioid victims and some bankruptcy scholars oppose the deal and the prospect of freeing Sackler family members from lawsuits.

Settlement proponents have argued the deal provides victims with more money than they would obtain in a lawsuit against the Sacklers while nothing in the agreement prevents state authorities from pursuing criminal charges.

However, the Biden administration's top courtroom lawyer, Solicitor General Elizabeth Prelogar, said in a November court filing that forcing Purdue's owners back to the civil justice system could result in their paying more than the $6 billion currently offered.

How often does the Supreme Court get involved in bankruptcy cases?

The Supreme Court usually hears a handful of bankruptcy cases each term. They are usually resolved with little fanfare, unlike fights over abortion, voting, gun rights and other higher profile disputes.

Bankruptcy law often cuts across the Supreme Court's normal liberal and conservative idealogical lines. The justices signaled a likely divide over the settlement when the court heard arguments in December, drawing skeptical questions from liberal justices Elena Kagan and Ketanji Brown Jackson and conservative Neil Gorsuch but support from conservative Brett Kavanaugh.

Industry groups and some bankruptcy scholars have said prohibiting these types of deals would result in corporations paying victims less money overall because global settlements would become out of reach. A small number of holdouts must sometimes be forced to take these deals so bankrupt companies' limited assets are distributed fairly and quickly, they argue. Critics argue Purdue's settlement and similar deals go too far by stripping victims of their right to a jury trial and overstep the power Congress gave bankruptcy courts to settle debt.

What will happen if the settlement is overturned?

Purdue has said the challenge imperils a proposal to transform the business into a new public benefit corporation that would develop and distribute medications that reverse overdoses and treat opioid addiction. The company also said in a court filing that it's likely to liquidate if the settlement is overturned. A Purdue creditor committee said if the settlement unravels, almost all victims and other creditors "would be left with substantially less (if anything) years later (if ever)."

What will happen if the settlement is approved?

If justices approve the settlement, Purdue would enact its plan to transform into a new company called Knoa Pharma which would operate with no involvement from the Sacklers. The drugmaker would also be cleared to start compensating opioid victims under the terms of the settlement. Knoa Pharma would operate with a corporate monitor and under an injunction that restricts the promotion of opioid products.

NEWS

Milberg Files Data Breach Suits Against North Carolina-Based Truist Bank

On May 10, Financial Business and Consumer Solutions began sending the affected plaintiffs a notice letter which said "an unauthorized third party gained access to a small number of Truist employee accounts."

June 26, 2024 at 09:50 AM

Cybersecurity

Mason Lawlor

Truist Bank was hit with two federal class actions last week arising from a data breach that occurred in October 2023, alleging the bank failed to prevent the exposure of individuals' personal identifying information.

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

Both lawsuits, *Stephen Ruffin v. Truist Bank* and *Marshall Boyd v. Truist Bank*, were filed by attorneys with Milberg Coleman Bryson Phillips Grossman in the U.S. District Court for the Western District of North Carolina. Truist, headquartered in Charlotte, North Carolina, allegedly did not follow standard security procedures to prevent a third party from obtaining access to employee accounts.

Scott Harris, a senior partner at Milberg Coleman's Raleigh, North Carolina office, was joined on the *Ruffin* filing by David K. Lietz, also a senior partner based out of the Washington, D.C., office. Harris was joined on the *Boyd* filing by Jeff Ostrow, managing partner of Kopelowitz Ostrow Ferguson Weiselberg Gilbert in Fort Lauderdale, Florida.

On May 10, Financial Business and Consumer Solutions began sending the affected plaintiffs a notice letter which said "an unauthorized third party gained access to a small number of Truist employee accounts." The plaintiffs' complaint asserts Truist did not include the identity of the cybercriminals, the date they detected the breach, the root cause of the breach, the vulnerabilities exposed by the breach and the steps taken to ensure another did not occur.

"This 'disclosure' amounts to no real disclosure at all, as it fails to inform, with any degree of specificity, [the plaintiff] and [the Class Members] of the Data Breach's critical facts," the Ruffin complaint said. "Without these details, [the plaintiff's and Class Members'] ability to mitigate the harms resulting from the Data Breach is severely diminished."

Furthermore, Ruffin claims that he was informed by Google that his personal identifying information had been disseminated on the dark web.

“Plaintiff further believes that the PII of Class Members was subsequently sold on the dark web following the Data Breach, as that is the *modus operandi* of cybercriminals that commit cyber-attacks of this type,” the complaint said.

Boyd claims that his identity is now at risk because of Truist’s alleged negligent conduct.

Truist allegedly did not install training and awareness programs as recommended by the U.S. government, as well as configuring firewalls to stop potentially malicious IP addresses.

Plaintiffs sued under the Federal Trade Commission Act or 1914 and Gramm-Leach-Bliley Act, requiring financial institutions to explain their information-sharing procedures to their customers and to safeguard their sensitive data.

Neither Harris nor Ostrow could be reached immediately for comment.

Counsel has not yet appeared for Truist Bank.

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Securities Law News
June 25, 2024, 9:06 AM PDT

Astra Space Targeted Over Take-Private Buyout by Founder Group

By Mike Leonard

- **COURT:** Del. Ch.
- **TRACK DOCKET:** No. 2024-0680

Bloomberg Law News 2024-06-26T11:01:54708811952-04:00

Astra Space Targeted Over Take-Private Buyout by Founder Group

By Mike Leonard 2024-06-25T12:06:42000-04:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** No. 2024-0680

Shareholders are suing Astra Space Inc. over concerns that its planned take-private sale to a consortium led by its founders would shortchange public investors in the struggling space startup.

The buyout for $0.50 a share—less than Astra's trading price when it was signed—appears to undervalue the company, likely because it was negotiated by board members facing another case that the sale to co-founders Chris Kemp and Adam London would effectively end, according to the court complaint filed Monday.

The lawsuit in Delaware's Chancery Court stops short of alleging outright wrongdoing. It seeks internal documents from Astra under a law giving investors broad access to corporate records if they credibly suspect self-dealing or other conflicts of interest. Records cases often reflect an attempt to drum up fiduciary breach claims for future litigation.

Astra didn't immediately respond to a request for comment Tuesday.

The investors leading the case, Jonathan Horner and Michael Krene, are represented by Kahn Swick & Foti LLC. Astra hasn't yet made a court appearance.

The case is Horner v. Astra Space Inc. , Del. Ch., No. 2024-0680, complaint filed 6/24/24 .

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

Bloomberg Law News 2024-06-26T12:06:1810925011-04:00

GSX Must Defend Claims That Use of Bots Caused Stock Drop

By Peter Hayes 2024-06-26T10:28:04000-04:00

- Confidential witnesses reported ‘large-scale use of bots’
- Plaintiffs say stock price dropped by eight billion dollars

GSX Techedu Inc. and its top leaders lost a bid to dismiss an investor lawsuit accusing the internet-based educational platform of fabricating its student enrollment numbers to inflate revenue.

The complaint has sufficient “allegations that a very large percentage of the Company’s enrolled students were, in fact, bots"—such that its publicly-announced student enrollment numbers weren’t only false, but materially so, Judge Michael E. Farbiarz of the US District Court for the District of New Jersey said, ruling on a motion to dismiss.

"[C]onfidential witnesses paint an unmistakable picture of allegedly systematic and large-scale use of bots by the Company to generate fake student enrollments,” Farbiarz said. “By and large, the confidential witness allegations do not need to be discounted. They must generally be accepted at face value,” he said.

And a published third-party report that analyzed company-supplied data concluded that more than 70% of the GSX’s students “were, in fact, bots,” he said. The court rejected GSX’s argument that the report was flawed because the sample size was too small.

The complaint also sufficiently alleges that the company’s revenue statements “were false, because they allegedly reflected ‘revenue’ that was not, in fact, bona fide revenue,” Farbiarz said.

And the plaintiffs have sufficiently pled scienter—that the company and its executives acted with a guilty mind, Farbiarz said. “The Defendants made statements, the gist of which were that no systematic revenue or student enrollment inflation was taking place … even though they had been provided with detailed information that directly suggested precisely the opposite conclusion,” he said.

Finally, the complaint makes a sufficient showing of loss causation, by alleging that the company’s share price fell “nearly 30% by almost eight billion dollars, in a single day” when “the truth about

GSX's fraud emerged," Farbiarz said.

The plaintiffs only need to allege that the stock price "significantly" fell, and that the price drop "was caused to a sufficient extent by information becoming known that revealed the truth about something the company had previously said," Farbiarz said, citing a 2005 US Supreme Court ruling.

The court, however, trimmed some allegations based on statements made in the spring of 2020.

GSX provides K–12 educational and after-school tutoring courses online in China.

The complaint alleges that the company paid for large numbers of bots to pose as students, and to attend company classes. The company publicly reported the bots' attendance, as if the bots were real students attending company classes, the plaintiffs allege.

The company secretly used its own money to pay the phony students' enrollment fees and then publicly reported those fees as revenue, the complaint alleges. This inflated revenue stream made the company more enticing to potential investors, the plaintiffs allege. When the truth about these false statements was eventually revealed, it caused the stock price to fall, they say.

The suit was previously dismissed by a different judge with leave to amend.

Pomerantz LLP, The Rosen Law Firm PA, and Hao Law Firm represent the investors. Skadden, Arps, Slate, Meagher & Flom LLP and Robinson Miller LLC represent GSX.

The case is Zequi Wu v. GSX Techedu Inc. , 2024 BL 216377, D.N.J., No. 20-4457, 6/25/24 .

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Securities Law News
June 25, 2024, 10:55 AM PDT

Pride Mobility Calls Cash in Stock Plan Reasonable Amid Lawsuit

By Jacklyn Wille

- Suits say large cash holdings unfit for retirement savers
- Conservative hedge is appropriate in stock plan, company says

Bloomberg Law News 2024-06-26T11:03:27629476368-04:00

Pride Mobility Calls Cash in Stock Plan Reasonable Amid Lawsuit

By Jacklyn Wille 2024-06-25T13:55:13000-04:00

- Suits say large cash holdings unfit for retirement savers
- Conservative hedge is appropriate in stock plan, company says

A lawsuit saying Pride Mobility Products Corp. mismanaged its employee stock ownership plan by overinvesting in cash is fatally flawed because this strategy falls within a “range of reasonableness,” the company said in a court filing.

Employee stock plans are riskier than traditional diversified retirement plans because they invest primarily in the single, illiquid stock of an employer, Pride said in a motion to dismiss filed Monday. This built-in risk, which is authorized by Congress, requires ESOP fiduciaries to be “especially careful” to avoid further increasing the risks borne by plan participants, the company said.

Pride defended its decision to keep about a quarter of its ESOP assets in conservative, short-term investments as fitting “squarely within this command to be careful.”

“The Pride Mobility ESOP remained invested 70% to 77% in the illiquid, undiversified stock of the employer Pride Mobility; thus, this conservative investment strategy provides liquidity and hedges the risk of what is still an aggressive, equity-heavy, and otherwise undiversified and illiquid investment,” the company said.

The proposed class action, filed in May in the US District Court for the Middle District of Pennsylvania, says Pride breached its duties under the Employee Retirement Income Security Act by investing too much of its ESOP assets in cash equivalents and ultra short-term bonds that returned only about 1% per year. These low-yield vehicles, which the workers challenge as unsuitable for long-term retirement savings, caused the plan to lose out on as much as $3.3 million since 2018, according to the lawsuit.

A handful of employers have been sued over this strategy in the past few months, including Aluminum Precision Products, Aerotech Inc., and Wilson Electric Services Corp. Attorneys say these cases could force courts to grapple with the differences between traditional retirement plans and ESOPs, which are aimed at giving workers an ownership stake in their companies.

Pride's motion also seeks dismissal based on lack of standing. The two former employees leading the litigation withdrew from the ESOP and thus can't challenge investments made after they cashed out, the company said.

The case is assigned to Judge Karoline Mehalchick.

Jackson Lewis PC and Burke Vullo Reilly Roberts represent Pride. Engstrom Lee LLC and Rosenthal Firm represent the former employees.

The case is Tufano v. Pride Mobility Prods. Corp. , M.D. Pa., No. 3:24-cv-00765, motion to dismiss 6/24/24 .

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'Big Tobacco's' big falter in vaping trend

DJ dailyjournal.com/articles/379442

PICTURED: Sarah R. London, Lieff Cabraser Heimann & Bernstein, LLP PHOTO CREDIT: Justin Stewart

Products Liability

Elizabeth J. Cabraser, Sarah London, Lieff Cabraser Heimann & Bernstein; Dena C. Sharp, Girard Sharp LLP

Cigarette smoking was on the decline as the 21st century began -- but then came a modern twist on big tobacco's marketing efforts as vaping introduced exotic flavors like mango and crème brûlée, touted by social media influencers in highly successful campaigns to addict youth to nicotine.

Elizabeth J. Cabraser knew just what to do because she had seen it all before. Her firm, Lieff Cabraser Heimann & Bernstein, LLP, was a leader in the $206 billion national tobacco settlement in 1998 and a series of successful spinoff case settlements in Florida that netted plaintiffs hundreds of millions of dollars.

So, her firm and three others joined forces, sued principal players in the vaping industry and, in 2023, added a $235 million settlement from tobacco giant Altria Group Inc., formerly Philip Morris, to the $1.7 billion obtained earlier from vaping leader Juul Labs Inc. for a total of nearly $2 billion. Altria holds a $13 billion stake in Juul. In re: Juul Labs Inc. Marketing , Sales Practices and Products Liability Litigation, 19-md-02913 (N.D. Cal., filed Oct. 2, 2019).

She knew the fight would be tough. "Tobacco companies essentially do not settle," she said, noting that her firm had been involved in two prior exceptions to that truism. Now it was time to apply similar skills and tenacity to the vaping phenomenon.

Joined as co-lead counsel in the historic multidistrict litigation were Dena C. Sharp of Girard Sharp LLP and Lieff Cabraser's Sarah R. London, plus Dean N. Kawamoto of Keller Rohrback LLP in Seattle and a New York lawyer, Ellen Relkin of Weitz & Luxenberg PC. Representing Altria were lawyers from Wilkinson Stekloff LLP and Arnold & Porter Kaye Scholer LLP.

The team members are all litigators experienced in complex civil cases from firms with strong backgrounds in targeting addictive products such as tobacco and opioids. Girard Sharp co-founder Daniel C. Girard is a former Lieff Cabraser partner. Keller Rohrback and

Weitz & Luxenberg both worked on the opioid cases that successfully employed a public nuisance theory that proved useful in the Juul case. London was a key litigator in the Florida tobacco cases.

Commented Sharp: "It was truly a privilege to work on behalf of our clients in the Juul MDL under the wise oversight of Judge [William H.] Orrick. The team of lawyers in the case was unmatched, and exemplified the kind of collaboration and innovation that make us proud to do the work we do. We are honored to have had the opportunity to make meaningful and historic recoveries for our clients and those harmed and injured by Juul, and look forward to the continued decline of vaping and nicotine use in our society."

Added London: "To call this global settlement with Altria momentous is an understatement. Unprecedented in speed of attainment, scope, and impact, it will provide extraordinary and truly meaningful relief for youth, parents, and governmental organizations nationwide in a comprehensive resolution that avoids the delay of further trial and possible appeals, bringing closure to litigation brought on behalf of children, teens, young adults, parents, schools, health departments, and really, on behalf of everyone across the nation."

--John Roemer

#379442

Nearly half a billion recovered for California wildfire victims

DJ dailyjournal.com/articles/379444

PICTURED: Patrick McNicholas and Brandon Castor PHOTO CREDIT: Justin Stewart

Mass torts; Various Wildfire Litigation

Various Wildfire Litigation

The wildfires that have plagued California since 2017 have burned millions of acres, destroyed tens of thousands of structures and harmed many thousands of people. Civil litigation against the state's electrical utilities has produced billions in settlements for victims, including the $13.5 billion fund from Pacific Gas & Electric set up from its bankruptcy in 2019.

The most important product of all the wildfire litigation and thousands of settlements is how they "positively effectuate a change in our client's life," said fire plaintiff's attorney Patrick McNicholas. "It's not a perfect resolution, but by and large most clients, as a result of their individual resolutions, can move on with their lives economically, emotionally and psychologically."

McNicholas said he and his mass tort firm McNicholas & McNicholas are among the handful of law firms with the most clients from the wildfires. They have represented about 15,000 clients so far, he said, and last year alone, they achieved settlements totaling close to a half-billion dollars.

But he is quick to point out that several other attorneys and law firms are doing similar work. In particular, he singled out Frank Pitre of Cotchett Pitre & McCarthy and Michael A. Kelly of Walkup Melodia Kelly, especially for their work on the 2017 and 2018 fires.

Beyond the financial help for fire victims the settlements provide, the other vital result of the litigation is that "the utilities now have to pay attention to preventing wildfires," McNicholas said. "It's become more expensive for them to allow the fires to occur ... so now they're doing things, for example, like hardening their [power] lines, clearing the lines of vegetation and beginning to underground a lot of the high voltage lines, which is a huge benefit to the entire state."

Global warming and poor brush clearing by the state and individual landowners doubtless were factors in how fast the fires spread, said Brandon Castor, another attorney with the McNicholas firm. But overall, "the causes of these fires tend to be one and the same," he said. "The public utilities have either underfunded vegetation management departments, or they just don't utilize them."

The firm obtained close to $200 million in settlements for victims of 2017 fires -- $175.7 million related to the North Bay Complex fires and $10.7 million from the Thomas Fire. From fires in 2018, the firm brought in settlements totaling about $248.5 million for victims of the Camp Fires, which destroyed the town of Paradise, plus another $26.2 million from the Woolsey Fire.

The firm also obtained about $25 million in settlements for victims of the Dixie Fire in 2021, which was the largest single fire in California history. Castor said the firm represents almost 5,000 clients from that fire. McNicholas served as co-lead plaintiffs' counsel in the litigation. Price v. Pacific Gas and Electric Co., CGC-21-597072 (S.F. Super. Ct., filed Dec. 10, 2021).

He also is lead counsel in litigation against Southern California Edison and the LA's DWP over 2017's Creek fire. Aguilar v. Los Angeles Department of Water and Power, 18STCV03092 (L.A. Super. Ct., filed Oct. 31, 2018). A trial is scheduled for October.

Fire victims won't have to pay state taxes on their settlements under a series of bills adopted by the Legislature beginning in 2022. McNicholas said Pitre and Kelly spearheaded some of that legislation.

McNicholas worked to pass AB 1054, which created a fund to ensure victims of several utility-caused fires are compensated in case the utilities cannot. The three utilities covered by the fund provide the money. "Currently, there's about $25 billion in that fund," he said.

-- Don DeBenedictis

#379444

'Junk science:' SF federal judge tosses expert analysis often cited to support Roundup cancer lawsuits

norcalrecord.com/stories/661301786-junk-science-sf-federal-judge-tosses-expert-analysis-often-cited-to-support-roundup-cancer-lawsuits

June 26, 2024

Roundup herbicide | Roundup.com

Calling it "junk science," a California federal judge has tossed out in one case a key study that has underpinned many of the thousands of lawsuits filed against Monsanto that claim the key ingredient in its Roundup weedkiller causes cancer.

On June 20, U.S. District Court Vince Chhabria granted Monsanto's motion to exclude the testimony and supposed research findings of Luoping Zhang, a toxicology professor at the University of California Berkeley, from the evidence presented by plaintiffs attorneys on behalf of plaintiff Angelo Bulone.

At the same time, Chhabria granted summary judgment to Monsanto in the case, appearing to end Bulone's lawsuit.

Judge Vince Chhabria of the U.S. District Court for California's Northern District | ce9.uscourts.gov/

In his ruling, Chhabria blasted the plaintiffs for attempting to use a so-called "meta-analysis" of others' work as a stand-in for scientific research that actually establishes a link between using products containing the herbicide generically known as glyphosate - the active ingredient in Roundup and similar weedkillers - and a particular kind of cancer.

"There are several issues with her (Zhang's) opinion, each of which is an independent ground for exclusion," Chhabria wrote in his decision. "First, Zhang's meta-analysis is junk science. It has deep methodological problems..."

Bulone, of South Carolina, filed suit against Monsanto and other defendants in December 2019 in Georgetown County, South Carolina, Court of Common Pleas.

The lawsuit was filed by attorney Theile B. McVey and others from the firms of Kassel McVey, of Columbia, South Carolina, and Fears Nachawati PLLC, of Dallas, Texas.

According to the lawsuit, Bulone was diagnosed with a cancer known as chronic lymphocytic leukemia in 1995. In the lawsuit, Bulone blamed that cancer on exposure to glyphosate from 1988-1991, when he allegedly used weedkillers containing the herbicide made by Monsanto, while he owned and operated the Wedgefiled Plantation Golf Country Club in South Carolina.

According to the complaint, Bulone would "ride in the back of a golf cart with a handheld sprayer, spraying every inch of the golf course" with Roundup for "three hours a day, 25 days a month, every month of the year from 1988 to 1991."

According to the complaint, Bulone allegedly first learned in 2019 that his cancer could be connected to using Roundup.

Bulone's lawsuit was roughly similar to thousands of other legal claims against Monsanto landing in courts across the country in recent years, accusing the agrichemical giant of allegedly causing cancer in people using their weedkiller and similar products containing glyphosate.

Thousands of those claims have been centered in federal court in San Francisco.

According to an estimate from the website Drugwatch, there are still 4,285 Roundup cancer lawsuits still pending in a so-called multi district litigation grouped by the federal courts in the Northern District of California, under the watch of Judge Chhabria.

Litigation, however, has continued in other jurisdictions, as well, at times resulting in headline-grabbing verdicts worth hundreds of millions of dollars or more.

In San Diego County, for instance, a Superior Court judge slashed a verdict lodged by a jury against Monsanto over alleged Roundup-caused cancer from $332 million to $28 million.

In California, juries have ordered Monsanto to pay almost $2.4 billion in damages over Roundup exposure claims.

In Philadelphia, a jury ordered Monsanto to pay $2.2 billion in one trial, while other verdicts in that city's notoriously plaintiff-friendly courts have ranged from $3.5 million to $175 million each.

All of these trials have come after Monsanto, now under the ownership of Bayer, agreed in 2020 to pay $11 billion to settle most claims related to Roundup exposure.

However, four years after that settlement, and as juries continue to award big paydays to plaintiffs, in the Bulone case, Judge Chhabria has declared a key study relied upon by plaintiffs' lawyers targeting Monsanto in the Roundup action to be "junk," because it does not demonstrate the clear link between Roundup exposure and non-Hodgkin lymphoma that plaintiffs have asserted repeatedly in their thousands of lawsuits.

Zhang's report, published in 2019, purported to be a "meta-analysis" of six other epidemiological studies "of varying sizes, methods, and quality," Chhabria wrote. Zhang's study claimed to focus on people examined within those six other studies who "had been exposed to more glyphosate" and thus "would be more likely to show an increased risk of" non-Hodgkin lymphoma (NHL).

In San Francisco federal court, Bulone's lawyers introduced Zhang's publications and testimony to support their "general causation" claims, linking Roundup to Bulone's cancer.

Monsanto assailed that study, asserting Zhang's actual work product doesn't match her claims within the study. They petitioned Chhabria to exclude Zhang and her work from the plaintiff's case.

Chhabria agreed, saying Zhang's "meta-analysis" was too flawed to allow it to be used as evidence under federal court evidence rules.

The judge noted that only half of the studies Zhang used distinguished among study participants based on their level of Roundup exposure, presenting a "fundamental problem ... that her meta-analysis was not reliably performed."

The meta-analysis, Chhabria said, "ends up mixing different types of studies and different types of data in a way that ultimately seems hard to justify."

"... The study methodologically de-emphasizes high-quality data that would tend to reduce the 'meta-risk ratio,' while using the full datasets from most of the lower-quality studies," Chhabria wrote.

He noted Zhang's analysis also did not properly account for Roundup users' potential exposure to other herbicides and insecticides, which they may have used along with glyphosate.

Zhang's analysis, the judge said, "slices and dices the available epidemiological evidence" to produce allegedly misleading results.

"In short, the meta-analysis restricts itself to a more or less arbitrary subset of the epidemiological data points," Chhabria write. "And it does so in a way that seems likely to exacerbate, rather than ameliorate, problems with confounding. Even on its own terms, it is junk science."

The judge further criticized plaintiffs and Zhang for attempting to substitute a meta-analysis for a "reliable general causation opinion" founded on a scientific case control study. The judge noted Zhang's work "doesn't seem to offer the necessary conclusion about general causation" to uphold a claim like Bulone's against Monsanto.

"... Saying there is a 'compelling link' or an 'association' isn’t the same as saying that Roundup is capable of causing NHL in humans — which is what a plaintiff’s general causation evidence must enable the jury to conclude," Chhabria wrote.

And the judge rejected Bulone's lawyers' assertion that the judge is impermissibly substituting his "judgment about the quality of the meta-analysis for the judgment of the scientific community." They pointed to the fact that Zhang's analysis was "peer-reviewed" by other scientists prior to publication and "has been cited many times" by other scientists.

But Chhabria said, "These points can't make the study's glaring methodological flaws disappear."

"It’s true that the meta-analysis was published in a peer-reviewed journal and prepared before Zhang got personally involved in any Roundup cases (although the paper seems so results-driven that one could be forgiven for doubting that its authors were really thinking 'independently' of the nationwide litigation).

"But while those facts are entitled to consideration, they don’t mean that blind deference to Zhang is appropriate. There are a vast number of peer-reviewed journals out there. Pre-publication editorial peer review, just by itself, is far from a guarantee of scientific reliability," the judge said.

"...In short, simply intoning that a paper was peerreviewed and that it was (apparently) produced before the author was thinking about getting involved in litigation isn’t enough to compensate for methodological problems as glaring as those described here. And it certainly isn’t enough to show that Zhang’s paper can support a reliable general causation opinion," Chhabria said.

Saying his ruling removed any possibility of Bulone presenting "general causation" expert testimony to back his claims, Chhabria granted judgment to Monsanto and ended Bulone's case.

Bulone has been most recently represented by attorneys Gibbs Henderson, Erin Wood and John Raggio, of the Nachawati Law Group, of Dallas.

Monsanto has been represented in the action by attorneys Linda C. Hsu, K. Lee Marshall and Jed P. White, of the firm of Bryan Cave Leighton Paisner, of San Francisco and Santa Monica; Michael X. Imbroscio, of Covington & Burling, of Washington, D.C.; Brian L. Stekloff and Rakesh Kilaru, of the firm of Wilkinson Stekloff, of Washington, D.C.; and Eric G. Lasker, of Hollingsworth LLP, of Washington, D.C.

Connecticut firefighters sue DuPont, 3M, Honeywell over allegedly contaminated gear

reuters.com/legal/connecticut-firefighters-sue-dupont-3m-honeywell-over-allegedly-contaminated-2024-06-25

Jonathan Stempel

Item 1 of 3 The logo for DuPont de Nemours, Inc. is seen on the trading floor at the New York Stock Exchange (NYSE) in Manhattan, New York City, U.S., August 3, 2021. REUTERS/Andrew Kelly/File Photo

[1/3]The logo for DuPont de Nemours, Inc. is seen on the trading floor at the New York Stock Exchange (NYSE) in Manhattan, New York City, U.S., August 3, 2021. REUTERS/Andrew Kelly/File Photo Purchase Licensing Rights, opens new tab

June 25 (Reuters) - DuPont (DD.N), opens new tab, 3M (MMM.N), opens new tab, Honeywell (HON.O), opens new tab and 16 other defendants were sued on Tuesday by Connecticut firefighters who said their protective gear was contaminated by toxic "forever chemicals" linked to cancer.
Lawyers for the plaintiffs said they believed the proposed class action filed in the New Haven, Connecticut federal court is the first to exclusively target firefighter gear containing per- and polyfluoroalkyl substances, or PFAS.

The Uniformed Professional Fire Fighters Association of Connecticut, five other unions and five firefighters sued on behalf of firefighters across the state, including cities such as Hartford and Stamford.

They said jackets, pants and other "turnout gear" leeched PFAS into firefighters through their skin, ingestion and inhalation, and that more PFAS is absorbed as temperatures rise and sweat builds up.

The plaintiffs said that led to "subclinical cellular changes in their bodies which put them at increased risk of developing adverse health conditions," justifying at least $5 million of damages for violations of Connecticut product liability law.

DuPont and 3M produced PFAS used in the protective gear, while a Honeywell subsidiary was among the gear's sellers, and failed to warn of the risks, the complaint said.

In a statement, DuPont said the lawsuit was without merit, and that "we look forward to vigorously defending our record of safety, health and environmental stewardship."

DuPont also said it has never manufactured PFOA and PFOS, which are two types of PFAS that the plaintiffs alleged were used in their gear.

Neither 3M nor Honeywell immediately responded to requests for comment.

PFAS are found in hundreds of consumer and commercial products including cosmetics, non-stick pans and stain-resistant clothing.

They earned the sobriquet "forever chemicals" because they do not break down easily in the human body or environment.

PFAS have been linked to negative health effects, opens new tab including higher cholesterol, low birth weights and reduced antibody response to vaccines, as well as kidney and testicular cancer.
Last year, DuPont, 3M and two other companies reached more than $11 billion of settlements to resolve claims that firefighting foam and other products containing their PFAS polluted drinking water. None admitted wrongdoing.
The case is Uniformed Professional Fire Fighters Association of Connecticut et al v 3M Co et al, U.S. District Court, District of Connecticut, No. 24-01101.

Reporting by Jonathan Stempel in New York Editing by Bill Berkrot

Bloomberg Law News 2024-06-26T12:15:05698398592-04:00

You Can’t Repel Muddy Waters With Weak Credibility: Chris Hughes

By Chris Hughes 2024-06-26T02:51:22102-04:00

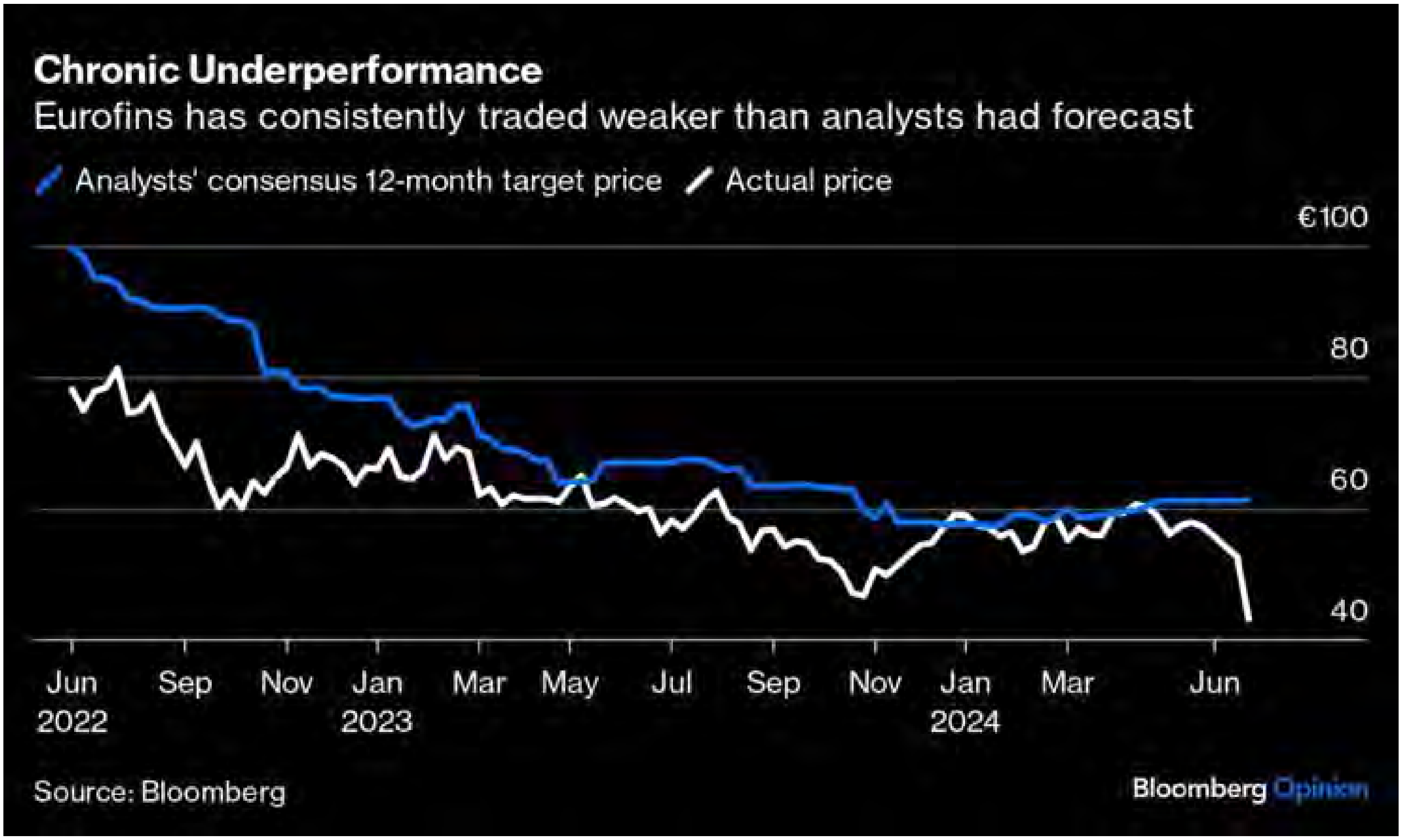
Battles between short sellers and their targets are typically a test of credibility. The market reaction to Muddy Waters Research’s attack on Eurofins Scientific SE suggests the target here is short of this commodity.

Addressing the renowned short seller’s claims will require something more substantial than the initial rebuttal posted on Tuesday.

Eurofins offers testing services to the pharmaceutical, food and personal care industries among many others. Co-founder, Chairman and Chief Executive Officer Gilles Martin dominates the shareholder register. He has relations on the board.

This is a complex empire, with 62,000 staff spanning 1,000 companies in 62 countries. Auditor Deloitte’s own assessment in the last annual report warns of risks arising from Eurofins’ decentralized and sprawling structure, with new subsidiaries added every year. This increases “the number and magnitude of risks of material misstatements as well as the size and complexity of the audit.” A red rag to short sellers.

Eurofins is no stranger to conflict. In 2018, the company got into a row with an analyst at Morgan Stanley over his bearish research. A full-blown short seller attack from hedge fund ShadowFall Capital & Research LLP came in late 2019, prompting a strong rebuttal. The pandemic appeared to render the criticism moot, with a surge in demand for testing services prompting the shares to treble in value. The stock later surrendered its gains and has come full circle.



Enter Muddy Waters. Its wide-ranging attack on Monday has two points in particular relating to the financials. First, the short seller sees a risk that auditors could double-count cash swept up from operating companies to parent entities, leading to potential overstatement. The concern stems from the accounts of Spanish subsidiaries. Cash funneled centrally becomes a "receivable" debt owed to the operating company registered under "cash and cash equivalents." Bringing cash balances together isn't unusual, but Muddy Waters fears the receivable could be mistaken for actual cash.

Secondly, the short seller says Eurofins' sales are "possibly too-good-to-be-true" because revenue per head is so much higher than peers. Profits and other asset values could be overstated.

In addition, Muddy Waters questions the company's real estate sales to Martin, who then leases back the properties to Eurofins. The short seller suggests property valuations were low and the rents generous, citing high loan-to-value mortgages on the properties. More broadly, it says governance and controls aren't good enough for a constituent of Paris's CAC 40 index.

Eurofins calls the report's allegations "either inaccurate, irrelevant, biased and/or misleading." It says its cash is "systematically audited...based on bank confirmations and other controls." The recent decision to redeem a maturing €448 million bond early shows the strength of the cash position.

As for the high revenue per head, Eurofins says this reflects the nature of its business mix within the testing, inspection and certification industry. Hence its work is less labor intensive and more profitable than some peers, while statutory audits cover “nearly 100%” of external sales. Independent directors ensure real estate transactions are done at arm’s length.

Analysts at Jefferies Financial Group Inc. say the main angles of the Muddy Waters report are largely not new. Yet the market clearly still has serious doubts. Eurofins shares have recovered slightly but are down 13% from Friday’s close.

While the issues flagged by Muddy Waters were indeed subject to oversight by auditors and directors, investors appear to be asking themselves whether the job was done properly.

Eurofins changed auditor in 2019. Nevertheless, it may take a clean bill of health from a one-time special audit to assuage market doubts. Bringing an additional heavyweight non-executive onto the board would surely help too.

A further issue, as Jefferies suggests, is that this episode may be reigniting the debate around the preexisting bear case for the company — the sustainability of revenue growth, the challenge of margin expansion.

But another factor is credibility. The company presents its headline results with flattering adjustments. While these are transparently laid out, they scarcely help create an impression of conservatism. Eurofins recalculates its organic growth for the number of working days in the period, a practice not widespread elsewhere. Costs of starting up new operations are broken out when some would argue they are just part of running the business.

“Separately disclosed items” jumped both absolutely and as a percentage of operating profit last year, analysts at Citigroup Inc. point out. “It is not completely clear how the list of entities classified as start-ups or acquisitions is determined,” they add.

Maybe the more detailed rebuttal Eurofins is working on will settle matters. But Martin shouldn’t be surprised the market is putting the onus on the company to demonstrate the short seller is wrong.

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Securities Law News
June 25, 2024, 8:12 AM PDT; Updated: June 25, 2024, 2:27 PM PDT

Koch-Tied Group Hits SEC's Climate Disclosure Rules in Court (1)

By Andrew Ramonas

Documents

- Americans for Prosperity Foundation brief
- Republican lawmakers brief
- Florida and Kansas brief
- Advancing American Freedom brief

- Rules are 'masquerading' as investor protections, group says
- Eighth Circuit sought amicus briefs endorsing legal challenges

Bloomberg Law News 2024-06-26T11:00:53826780658-04:00

Koch-Tied Group Hits SEC's Climate Disclosure Rules in Court (1)

By Andrew Ramonas 2024-06-25T11:12:39000-04:00

- Rules are 'masquerading' as investor protections, group says
- Eighth Circuit sought amicus briefs endorsing legal challenges

A libertarian advocacy organization affiliated with petrochemicals billionaire Charles Koch has urged the Eighth Circuit to toss the SEC's corporate emissions disclosure requirements, saying they advance social and energy policy goals without protecting investors.

The Securities and Exchange Commission sidestepped Congress to unlawfully direct companies to report their greenhouse gas emissions and make other climate disclosures, the Americans for Prosperity Foundation told the US Court of Appeals for the Eighth Circuit Monday. Koch and his late brother, David, helped establish the foundation.

The Americans for Prosperity Foundation amicus brief is one of at least a dozen filed with the Eighth Circuit, which set Monday as the deadline for outside groups that didn't bring lawsuits over the March rules to submit documents backing legal challenges. Conservative organizations, business groups, Republican lawmakers, and others also submitted amicus briefs in support of the cases.

The US Chamber of Commerce, 25 Republican state attorneys general and other conservative and business interests have sued the SEC over the regulations, saying the agency broke securities laws and disregarded limits on agencies' rulemaking power, among other claims. The SEC paused implementation of the rules in April amid the lawsuits.

"The SEC's climate regulation masquerading as an investor-protection rule must not be allowed to stand," the Americans for Prosperity Foundation said in its filing.

An SEC spokesperson declined to comment on Tuesday. The agency has said it will "vigorously" defend the rules.

Lawsuit Supporters

Sens. Tim Scott of South Carolina, Marco Rubio of Florida, Ted Cruz of Texas and more than 30 other Republican lawmakers made similar claims as the Americans for Prosperity Foundation in their amicus brief, saying the regulations will harm investors.

Scott, the top Republican on the Senate Banking Committee, which oversees the SEC, has introduced legislation that would prevent the agency from implementing its climate rules.

Republican attorneys general Ashley Moody of Florida and Kris Kobach of Kansas also argued in their brief that the SEC's rules failed to help investors, placing the regulations outside the bounds of federal securities laws. Kansas and Florida were the only two states with Republican attorneys general who didn't sue the SEC over the rules. But Moody and Kobach's Republican predecessor, Derek Schmidt, had pushed the SEC to abandon the regulations in 2022.

"The government seeks to leverage unrelated regulatory authority to address environmental issues through the back door," Moody and Kobach said in their brief. "The SEC Rule on review is an application of that unlawful strategy."

The National Association of Manufacturers and Business Roundtable, as well as various right-leaning organizations led by former Vice President Mike Pence's Advancing American Freedom, submitted amicus briefs too.

Advancing American Freedom, which Pence founded in 2021 as a political advocacy group, said in its filing that the SEC is engaging in climate regulation, which is beyond its power to facilitate financial disclosures.

"The agency is officiously, and oafishly, inserting itself into the area of environmental regulation, threatening not only the constitutional branches and their respective powers but the liberties for which they exist," Advancing American Freedom said in its brief.

The SEC has until Aug. 5 to respond to the climate rule opponents in court.

The lead case is Iowa v. SEC , 8th Cir., No. 24-1522, amicus briefs filed 6/24/24 .

(Updates with additional background throughout)

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'Hard to get your head around': Finance expert hits Truth Social as possible campaign scam

rawstory.com/trump-truth-social-2668611531

Travis Gettys June 26, 2024

This photo illustration shows an image of former President Donald Trump reflected in a phone screen displaying the Truth Social app, in Washington, D.C., on Monday, Feb. 21, 2022. - STEFANI REYNOLDS/AFP/Getty Images North America/TNS

Share prices for Donald Trump's social media company are plummeting, and CNBC's finance reporter Andrew Ross Sorkin suggested the presumptive Republican nominee might cash out before the election to fund his campaign.

Trump Media is officially valued at $6 billion, but experts including LinkedIn co-founder Reid Hoffman believe it's worth only a fraction of that. Hoffman has suggested around $40 million.

And Sorkin told MSNBC's "Morning Joe" that very little about the company makes much sense to him financially.

"I think it's still somewhat inexplicable, and I would agree with Reed Hoffman – it's $6 billion when you are creating $4 million in revenue – we're not talking about profit, the company loses a lot of money, it's hard to understand how the numbers add up," Sorkin said.

Truth Social has been a roller coaster ride on the markets lately, with a huge plunge in value since Trump was convicted of 34 criminal charges involving business fraud.

But in the last few days, its value has started to climb again.

"The stock has fallen off – it's off about 50 percent from its all-time highs," Sorkin said.

"After [Trump's] conviction, it dropped 30 percent, then as you mentioned yesterday up about 8.5 percent, this after a 36 percent rally just in the past couple of days. You try to understand what's happened even in the past couple days, and you look online to try to see what the conversation is. There is some sense that maybe if the former president were to win, and that's a little bit of the bet by at least some of the folks who are investing in this company, that if he were to win and use this as his platform, that it would explode and work.

"Having said that, it's hard to see how that would be the case. Truth Social has been around now for quite some time and has not gained the kind of followers that you would think, even during this election period where people are trying to follow the election unto itself, and you would imagine might even want to follow what the former president has to say on Truth Social. A lot of what is said to the extent he says it on Truth Social ends up on X or other media platforms, anyway. It's hard to get your head around."

He added, "One very important point about this, he owns a big stake in this but has not been able to sell his shares. Those shares he will be able to sell in September, which he may end up using to help facilitate and fund his campaign.

"There's another argument, which we talked about on this broadcast, which is really maybe Trump supporters are effectively using this as a financing vehicle, if you will, for the campaign itself."

Watch the video below or at this link.

Watch Video At: https://youtu.be/jFUYlTEnwmo

06 26 2024 09 26 38youtu.be

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Sarissa Capital, Founder Settle Bioverativ Suit In Del. For $40M

By **Leslie A. Pappas**

Law360 (June 25, 2024, 8:53 PM EDT) -- Remaining parties in a Delaware Court of Chancery class action over the $11.6 billion sale of biotech venture Bioverativ Inc. to Sanofi Inc. in 2018 have agreed to settle their outstanding claims for $40 million in cash, according to a stipulation filed with the court Tuesday.

Plaintiff shareholder Stewart N. Goldstein and the remaining defendants in the case — former Bioverativ board member Alexander J. Denner, his hedge fund Sarissa Capital Management LP and several of its affiliated funds — agreed with nonparties Sanofi and Bioverativ to resolve the litigation without any admission of wrongdoing, the stipulation said.

Under terms of the settlement, the "defendants and the Sanofi parties" will pay their portion of the $40 million into a settlement fund within 10 days after the court approves the deal, the stipulation said. Plaintiff's counsel will seek a fee of up to 30% of the settlement amount — or $12 million — and expenses of up to $900,000, according to the stipulation.

The settlement announced Tuesday came after parties had fully briefed their case and were slated to go to trial at the end of April.

The case stems from a merger agreement announced in January 2018 in which Bioverativ agreed to be acquired by Sanofi SA for $105 per share. The merger closed in March 2018.

Goldstein filed his verified class action in December 2020 against multiple Bioverativ directors and officers, including Denner and his hedge fund entities, alleging they'd breached their fiduciary duties to stockholders in connection with the merger. Goldstein also lodged insider trading claims against Denner and the Sarissa entities.

Vice Chancellor J. Travis Laster **denied some of the motions to dismiss** the case in May 2022 and followed up **a month later with a decision** that the insider trading claims against Denner and his hedge fund would move forward.

Most of the officers and directors in the case announced in April 2023 that they reached a partial settlement, agreeing to resolve certain claims **in exchange for $84 million**.

The court **approved the partial settlement** in September, leaving limited claims against Denner and Sarissa Capital outstanding.

As the remainder of the case headed toward trial, Goldstein **called for sanctions** against Denner and Sarissa in November for alleged spoliation of evidence, and the court **imposed sanctions in January**.

Defendants sought to appeal the sanctions ruling to the Delaware Supreme Court, but on March 14, the state's high court refused the defendants' interlocutory appeal, the stipulation filed Tuesday said.

Former U.S. District Judge Layn R. Phillips of the Western District of Oklahoma, who had been serving as a mediator, recommended April 22 that the parties settle the case for $40 million, the stipulation said. The parties agreed, and the trial was postponed.

None of the parties responded immediately to Law360's requests for comment Tuesday.

The stockholders are represented by Randall J. Baron, A. Rick Atwood and Christopher H. Lyons of Robbins Geller Rudman & Dowd LLP, Brett Middleton of Johnson Fistel LLP, Kevin H. Davenport, John G. Day, Jason W. Rigby and Kirsten M. Valania of Pricket Jones & Elliott PA and R. Bruce McNew of Cooch & Taylor PA.

Denner and the Sarissa defendants are represented by Tariq Mundiya, Sameer Advani, Richard Li and M. Annie Houghton-Larsen of Willkie Farr & Gallagher LLP and Stephen E. Jenkins and Richard D. Heins of Ashby & Geddes.

Sanofi and Bioverativ are represented by John A. Neuwirth and Stefania D. Venezia of Weil Gotshal & Manges LLP.

The case is Stewart N. Goldstein et al. v. Alexander J. Denner et al., case number 2020-1061, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery. Editing by Janice Carter Brown.

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Chancery OKs $71M Premier Deal, $14M Four-Firm Fee

By **Leslie A. Pappas**

Law360 (June 25, 2024, 4:45 PM EDT) -- Shareholder attorneys led by Friedlander & Gorris who negotiated a $71 million settlement to end derivative Delaware Chancery Court litigation with healthcare-purchasing giant Premier Inc. will get $14 million for their efforts, the total fee award they sought.

At a web-based hearing Tuesday morning, Delaware Vice Chancellor J. Travis Laster approved the proposed settlement and the requested fee award, calling $71 million a "fair and reasonable" result for a "complex case," and the $14 million award appropriate for litigation that raised "serious and reasonable claims."

The settlement ends two years of derivative litigation from shareholders represented by Friedlander & Gorris PA, Robbins Geller Rudman & Dowd LLP, Shobe & Shobe LLP, and VanOverbeke Michaud & Timmony PC.

The City of Warren General Employees Retirement System sued the board and top officers of the health care group-purchasing giant in March 2022, challenging a corporate restructuring in 2020 that eliminated the company's dual-class structure and included a $473.5 million termination payment on tax receivable agreements with certain holders of Class B stock.

Headquartered in Charlotte, North Carolina, Premier went public in 2013 with two classes of stock: Class A stock, which was publicly traded; and Class B stock, which was held exclusively by healthcare companies affiliated with Premier directors and other pre-IPO investors.

The TRAs, which were negotiated with Premier directors and insiders just before the company went public, required the company to make cash payments to certain Class B stockholders whenever the company took advantage of certain types of tax savings from deferred tax assets.

The 2020 restructuring eliminated that liability for the company via a one-time early payout that terminated the tax receivable agreements. But shareholders asserted that the tax assets were worth $225 million less than what the company paid for them.

In their complaint, revised in May, **shareholders questioned** why the board used a 1.15% discount rate to calculate the TRA payout, rather than a 10% discount rate, which had been used several years earlier when the board negotiated a separate TRA buyout with one of its largest members, the Greater New York Hospital Association.

If the case had gone to trial, the board would have had to justify the "low" 1.15% rate, Vice Chancellor Laster said at the hearing Tuesday. "If there's any number that jumps out in the case, it's that one," he said.

Shareholders obtained books and records from the company and investigated for about a year and a half before filing the 75-page complaint in March 2022, Jeffrey M. Gorris of Friedlander & Gorris PA, an attorney for the shareholders, told the court at the hearing Thursday.

The tax receivable agreements "are simple at the basic level, but the nuances get pretty complicated," he said. Proving the case would have been "challenging," he said.

Defendants never filed a motion to dismiss. Shareholders decided to go into mediation mid-way through the case after weighing the risks of ongoing litigation, Gorris told the court.

"We thought mediation would be a good idea," Gorris said. "We got a feel from the defendants that they had a very different view of the case than we did."

William Lafferty of Morris Nichols Arsht & Tunnell LLP, an attorney for some of the company's directors, told the court Tuesday that the litigation was "hard fought all the way."

If the case had gone to trial, defendants could have shown that the transaction was fair, but the company nevertheless decided that settling the case would be a better use of time and energy, Lafferty said.

"This company wanted to move forward with its business and without litigation overhang," Lafferty said. "Settling this litigation and moving forward was the right thing for this company."

Although mediations in June and October did not result in a settlement, the parties continued talking afterward and on Nov. 29 agreed to settle the action for a $71 million cash payment.

Parties **announced the settlement in February**, saying the directors' and officers' insurance carriers would pay the entire settlement amount.

City of Warren General Employees Retirement System is represented by Joel Friedlander, Jeffrey M. Gorris, and Christopher M. Foulds of Friedlander & Gorris PA, Randall J. Baron and Benny C. Goodman III of Robbins Geller Rudman & Dowd LLP, Gladriel Shobe and Jarrod Shobe of Shobe & Shobe LLP, and Thomas C. Michaud of VanOverbeke Michaud & Timmony PC.

Premier Inc. is represented by Steven S. Scholes, Ashley R. Altschuler, Harrison S. Carpenter, and Kevin M. Regan of McDermott Will & Emery LLP.

Certain director defendants are represented by William M. Lafferty, Thomas W. Briggs Jr., and Matthew R. Clark of Morris Nichols Arsht & Tunnell LLP.

The special committee defendants are represented by Gregory P. Williams, Blake Rohrbacher, Kevin M. Gallagher, Matthew W. Murphy, Nicole M. Henry and Andrew L. Milam of Richards Layton & Finger PA.

The case is City of Warren General Employees Retirement System v. Michael Alkire, et al., case number 2022-0207, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery. Editing by Peter Rozovsky.

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Plaintiffs Firms Appealing $2.1B Fee Order In Opioid Case

By **Emily Field**

Law360 (June 25, 2024, 4:49 PM EDT) -- Motley Rice LLC, Weisman Kennedy & Berris Co. LPA, Stranch Jennings & Garvey PLLC, Crueger Dickinson LLP, Goldstein & Russell PC, Kelley & Ferraro LLP, Spangenberg Shibley & Liber LLP and Meyers & Flowers LLC are appealing $2.13 billion in attorney fees stemming from opioid settlements awarded earlier this month.

The firms filed one-page notices of appeal before a June 21 deadline set by U.S. District Judge Dan Aaron Polster in the Northern District of Ohio, who has been overseeing the litigation over the opioid crisis. The **fees** were determined by a panel that reviewed applications entered by firms that represented the plaintiffs, largely local governments, in the litigation.

The fees come from deals struck with Janssen, AmerisourceBergen Corp., McKesson Corp., Cardinal Health Inc., Teva Pharmaceuticals, Allergan, CVS, Walgreens and Walmart. The companies were sued for causing the opioid crisis by downplaying the risks and oversupplying the narcotics.

In 2021, Judge Polster capped contingent attorney fees at 15%, saying the cap was needed to make sure more money goes to the plaintiffs. According to the fee panel's recommendation, Motley Rice, for example, should come away with 18.6% of the fee funds, or roughly $396 million, an amount it is challenging.

The case is In re: National Prescription Opiate Litigation, case number 1:17-md-02804, in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Hailey Konnath. Editing by Janice Carter Brown.

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Cummins Brass Face Investor Suit For $2B Clean Air Act Deal

By **Sydney Price**

Law360 (June 25, 2024, 9:49 PM EDT) -- Executives and directors of engine manufacturer Cummins Inc. have been hit with a shareholder derivative suit accusing them of concealing the company's use of unlawful emissions control devices in certain engines, which eventually resulted in a record $1.68 billion fine against the company and more than $326 million in related payments.

According to the suit filed by shareholder Joshua Ingersoll in Indiana federal court Monday, Cummins touted its adherence to the Clean Air Act and other regulatory emissions standards for years. However, the company was actually using so-called defeat devices, also known as auxiliary emission control devices, to allow Dodge Ram-branded truck engines to bypass emissions tests, violating the CAA.

In addition to nominal defendant Cummins, the suit's individual defendants include CEO Jennifer Rumsey, Chief Financial Officer Mark A. Smith, former CEO Norman T. Linebarger and several current and former directors.

The suit alleges that Cummins has knowingly violated federal and state environmental laws since at least 1998, when the U.S. Environmental Protection Agency disclosed that Cummins and some other diesel engine manufacturers were deliberately manipulating nonconforming engines using defeat devices.

The suit's relevant period begins April 30, 2019, the day Cummins filed its first-quarter financial results with the U.S. Securities and Exchange Commission. According to the complaint, the filing contained only "vague" risk disclosures.

The disclosures in the filing, as well as several other filings over the past five years, allude to investigations into Cummins' emissions certification process. However, they failed to disclose that the company was continuing to produce engines for Dodge Ram 2500 and 3500 trucks with unlawful emission control devices, the complaint claims.

The truth emerged, the suit alleges, on Dec. 22, 2023, when Cummins revealed that it would pay a **$1.68 billion fine** to settle the U.S. Department of Justice's claims that Cummins had violated the Clean Air Act and California's Clean Air Act for 10 years by manipulating the engines on Ram trucks. The settlement said that $1.48 billion in penalties would be paid to the federal government, and $164 million to California's air pollution regulator, the California Air Resources Board.

U.S. Attorney General Merrick Garland said at the time the fine was "the largest civil penalty [the DOJ has] ever secured under the [CAA], and the second-largest environmental penalty ever secured," according to the complaint.

Additionally, Cummins will spend more than $326 million to fund federal and California emission mitigation projects and the recall program for the affected trucks under the settlement. A federal judge signed off on the federal and state consent decrees in April.

The company disclosed the price it would pay on Dec. 22, when it said it "expects to record a charge of approximately $2.04 billion in the fourth quarter of 2023 to resolve these claims and related matters."

Cummins' stock price fell $7.01 per share, or about 3%, to close at $236.99 per share on Dec. 22, 2023, according to the complaint.

The suit accuses the defendants of breaching their fiduciary duties, violating the Securities Act and wasting corporate assets.

The complaint also notes that Cummins is facing a **shareholder suit** in California federal court over claims that investors were damaged by share declines associated with Cummins' DOJ settlement announcement.

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

Ingersoll is represented by Scott D. Gilchrist of Cohen & Malad LLP and Michael I. Fistel Jr. of Johnson Fistel LLP.

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

The case is Ingersoll v. Linebarger et al., case number 1:24-cv-01073, in the U.S. District Court for the Southern District of Indiana.

--Additional reporting by Linda Chiem. Editing by Jay Jackson Jr.

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Archer Aviation SPAC Deal Blasted As 'Sham' In Chancery Suit

By **Jeff Montgomery**

Law360 (June 25, 2024, 10:31 PM EDT) -- Investors in a blank check company that took vertical takeoff-and-landing aircraft startup Archer Aviation Inc. public in 2021 have accused the venture, controlled by interests of billionaire Ken Moelis, of deceptively hyping its progress and prospects, according to a new Delaware Court of Chancery complaint.

The eight-count suit filed by stockholder Josh Wortman characterized premerger pitches for Archer's electric-powered, wing-and-rotor "Midnight" air taxi as a "sham," saying the company released misleading footage of the aircraft's first "hover" a few feet off the ground in late 2021 while touting imminent distances of 60 miles and speeds up to 150 mph.

According to the complaint, filed Monday, the footage was released after the go-public merger of special purpose acquisition company Atlas Crest Investment Corp. with Archer Aviation Operating Corp. at a purported $1.7 billion value on Sept. 16, 2021.

In the run-up to the closing, public stockholders could choose to cash out at $10 per share or stick with the newly public company. Nearly half the blank check company's shares, 24.2 million, were redeemed, while 25.8 million stayed on and lost ground.

"When faced with the choice of whether to redeem Atlas stock, a reasonable stockholder would have found it important that Legacy Archer's lead prototype was nowhere near being ready for actual test flights and that just hovering a few feet off the ground for less than a minute would be a huge milestone that took two years of work," the complaint said.

Those who held on, the complaint said, saw their shares tumble to less than $3 on Jan. 25, 2022, down from the $10 paid to those who redeemed pre-deal. The performance, the suit said, confirmed that the merger "was nowhere close to being entirely fair."

Early private investors with the biggest stake in taking the VTOL "tilt-rotor" startup public, the suit said, included Moelis, who is Atlas' chairman, and the company's controller, financial adviser Moelis & Co. LLC. Also at the center of the deal was Moelis & Co. Group LP, which had an indirect interest in founder shares and private placement warrants and, through Moelis interests, stood to gain more than $30 million in fees.

The suit accused Atlas of misleading stockholders about material financial information, conflicts of interest and litigation and a settlement with another potential developer of vertical takeoff and landing aircraft. Those involved also were accused of concealing a recommendation to vote against the 2021 merger by Institutional Shareholder Services, while touting a favorable recommendation from Glass Lewis.

Projections pointing to mass production of the Midnight aircraft, the suit said, "were wildly and knowingly misleading," and allegedly geared toward preserving cash for the "cash-intensive aircraft design."

"The projected timeline for test flying the aircraft prototype was so wildly misleading that Archer resorted to 'sleight-of-hand' video editing ploys to create the guise of meaningful progress," the suit said.

Signs of trouble emerged before the closing, including the target company's call for a "strategic reset" of transaction terms that would reduce the pre-deal company's assumed enterprise value by more than a third.

On Feb. 2, 2024, the complaint said, Archer filed a Form 10-K with the U.S. Securities and Exchange Commission that disclosed company losses in the hundreds of millions yearly. It also included a development status outlook that "calls into question whether Archer still even pretends to be developing eVTOL aircraft capable of flying 150 mph at distances of up to 60 miles."

The complaint cited as revealing recent reports by Grizzly Research LLC, which publishes due diligence findings on publicly traded companies, that questioned outlooks for Archer's aircraft.

Grizzly concluded that the most optimistic timeline for the commercial launch of its Midnight VTOL aircraft "is not next year, it is 4-5 years at the earliest, or most likely 2028 or beyond."

Those named in the suit include SPAC sponsor Atlas Crest Investment LLC, whose sole managing member is Moelis, along with five other directors, pre- and post-closing Archer, and its two top officers.

Alleged in the suit are breaches of fiduciary duty by Moelis' "control group" and the company's directors and officers, aiding and abetting breaches and unjust enrichment by Moelis LLC and Moelis & Co. Group and Archer, and aiding and abetting and unjust enrichment against pre-deal or "legacy" parties.

Moelis & Co. declined comment. Archer did not immediately respond to a request for comment.

Stockholder Josh Wortman and the proposed class are represented by Blake A. Bennett and Carmella P. Keener of Cooch & Taylor PA and Donald J. Enright and Noah R. Gemma of Levi & Korsinsky LLP.

Counsel for the defendants was not immediately available.

The case is Josh Wortman et al. v. Atlas Crest Investment LLC et al., case number 2024-0665, in the Court of Chancery of the State of Delaware.

--Editing by Jay Jackson Jr.

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Chancery Tentatively OKs $15.5M Lordstown SPAC Suit Deal

By **Jeff Montgomery**

Law360 (June 25, 2024, 8:18 PM EDT) -- A $15.5 million class settlement for a stockholder suit that challenged the special-purpose acquisition company deal that took Lordstown Motors Inc. public won tentative Delaware Court of Chancery approval Tuesday, conditioned on confirmation of one expense claim.

Vice Chancellor Lori W. Will said the cash recovery that attorneys secured for stockholders was "particularly notable" given the complexity of the case, conducted against the backdrop of Lordstown's Chapter 11 bankruptcy, a securities class action and other litigation.

Under the terms in Chancery Court, counsel for the stockholders will receive 22.5% of the net settlement fund, or nearly $3.4 million, and reimbursement for nearly $430,000 in litigation expenses.

"On balance, the 22.5% that plaintiffs seek seems perfectly fair to me, and appropriate," Vice Chancellor Will said. "The expenses are relatively high for a case at that stage, but that's largely because of an approximately $271,000 expense for bankruptcy counsel."

The Delaware Court of Chancery suit was filed in December 2021 by two former stockholders of the SPAC, DiamondPeak, which was formed in 2018 in order to pursue a take-public deal. Named in the suit were DiamondPeak CEO David Hamamoto, four other former members of the DiamondPeak board, DiamondPeak's sponsoring entity, and two of its former directors.

All were accused of breaching their fiduciary duties to stockholders, in part through failure to fully disclose details regarding Lordstown and its electric truck production and by putting their own interests first in the deal.

"The core allegation was, the fiduciaries knew or should have known that the proxy misrepresented the timing of the Endurance [electric pickup truck] production and the expected number of purchase orders," the vice chancellor said. Those omissions allegedly deterred stockholders from making informed decisions about cashing out before the take-public deal closed or holding on in what became a downhill ride.

By June 2023, among other legal entanglements, the now-public Lordstown sought Chapter 11 protection, aiming for a strategic asset sale while pursuing an 11-count **bankruptcy adversary suit** alleging billions in damages against partner Foxconn EV Technology Inc., its Taiwan-based parent Hon Hai Precision Industry Co., and others.

Despite the risks, class attorneys were able to secure a Chapter 11 claim carveout for class interests in the SPAC suit.

"We believe the settlement is quite strong," said Thomas G. James of Bernstein Litowitz Berger & Grossmann LLP, counsel to the class.

Terms of the settlement call for $12 million of the $15.5 million settlement amount in the Court of Chancery to be paid by insurance, with an additional $3.5 million to be paid subject to bankruptcy court indemnification suits or by defendants in the Chancery case.

Also approved were $5,000 financial incentive awards for co-lead plaintiffs Benjamin Hebert and Atri Amin.

"I don't reflexively approve financial incentive awards, but I think they're fair and reasonable in this case," Vice Chancellor Will said.

Prior to a de-SPAC take-private closing, Lordstown's predecessors lined up an acquisition of General Motors' 6.2 million-square-foot assembly plant in Lordstown, Ohio, one of the largest in North America, along with its workforce.

In late 2021, facing financial and production difficulties, the company partnered with Foxconn under terms that included an asset purchase agreement for the plant. As difficulties mounted for Lordstown, a joint venture agreement with Foxconn followed that included Foxconn's purchase of the manufacturing site.

In March 2021, before the filing of the Chancery Court suit, Hindenburg Research issued a report that nonbinding letters of intent for purchase of Endurance pickups were "fiction, and production targets declared for the truck in the second have of 2021 were "unattainable," a brief on the settlement tentatively approved on Tuesday said.

The Hindenburg Research action was followed by a U.S. Securities and Exchange Commission inquiry and formation of a company special committee, with Lordstown's chief executive and chief financial officer resigning soon after release of the special committee's findings and a company acknowledgment that it "lacked sufficient funds to begin commercial production and risked no longer functioning as a going concern," the fee brief said.

The SEC probe resulted in a $25 million settlement for the benefit of stockholders who were allegedly drawn in by false assurances that the company had secured tens of thousands of preorders for electric trucks that it didn't even have the parts to build.

Counsel for Lordstown did not comment on the settlement at the hearing.

The shareholders are represented by Gregory V. Varallo, Glenn R. McGillivray, Jeroen van Kwawegen, Thomas G. James and Margaret Sanborn-Lowing of Bernstein Litowitz Berger & Grossmann LLP, Gustavo F. Bruckner, Samuel J. Adams and Ankita Sangwan of Pomerantz LLP and D. Seamus Kaskela and Adrienne Bell of Kaskela Law LLC

Lordstown is represented by Raymond J. DiCamillo, Kevin M. Gallagher, Alexander M. Krischik, Edmond S. Kim and Nicholas F. Mastria of Richards Layton & Finger PA and Laura Kabler Oswell and Jacob M. Croke of Sullivan & Cromwell LLP.

The consolidated case is In re Lordstown Motors Corp. Stockholders Litigation, case number 2021-1066-LWW, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jessica Corso. Editing by Linda Voorhis.

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Rocket Co. Shareholders Sue For Info On Take-Private Deal

By **Alyssa Aquino**

Law360 (June 25, 2024, 6:31 PM EDT) -- Two Astra Space Inc. shareholders sued the satellite launch company seeking records concerning a take-private deal that has valued company stock at a discount, voicing suspicions that the merger was approved to squeeze out minority shareholders.

Jonathan Horner and Michael Krene told the Delaware Chancery Court they wanted internal records to understand the decision-making behind **the deal**, which they said was stripped of important shareholder protections in favor of closing.

"There is a credible basis to suspect that — following years of value destruction overseen by the Company's management and members of the Board, which exposed these same individuals to pending derivative liability — [Chris Kemp and Adam London] seek to squeeze out minority shareholders at a significant discount to the valuation the Company entered public markets less than three years ago," the shareholders said in **a lawsuit** filed Monday.

Astra is a California-based satellite launch company that, through a $2.1 billion go-public merger in 2021, became the first space launch company to be listed on the Nasdaq. But less than three years after going public, company founders, Kemp and London, struck a deal in March to buy their company back for $0.50 a share, less than the company's then-$0.86 market price.

That stock valuation was highlighted multiple times in Horner and Krene's lawsuit, as well as other deal provisions that they considered suspect, including that the transaction didn't need to be approved by a majority of the minority shareholders.

Horner and Krene also noted that, while the deal was being explored, the special committee tasked with obtaining financing for the company had authorized Kemp, London and several others to enter into agreements and arrangements to further the deal, subject to committee approval.

The duo questioned the board's motives, suggesting that some members may have pursued and approved the deal out of their own self-interest. Members of the approving special committee are facing a separate shareholder suit in California federal court over the earlier, 2021 go-public deal, Horner and Krene said, pointing out that the committee has used the pending take-private deal to attempt to ditch the case.

To better understand the deal, the shareholders requested the minutes of any board meeting where the merger and other financing alternatives were being discussed, the take-private proposal and any derivative litigation involving the company.

"Plaintiffs wish to investigate the events leading to, and the process that resulted in, the merger to determine, among other things, whether wrongdoing occurred and whether suit should correspondingly be brought," the shareholders said.

They acknowledged that the company was cooperating with a separate documents request, and that they have all agreed to pause document production until the merger closes. As that process unwinds, they are filing suit to preserve their rights, the shareholders said.

Representatives for Astra and the suing shareholders didn't respond to Tuesday requests for comment.

Astra is represented by Christopher P. Quinn and Michael J. Palestina of Kahn Swick & Foti LLC.

Counsel information for Astra isn't available.

The case is Horner et al. v. Astra Space, case number 2024-0680, in the Court of Chancery of the State of Delaware.

--Editing by Emily Kokoll.

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Coffee Chain Dutch Bros Beats Investor Suit For Good

By **Katryna Perera**

Law360 (June 25, 2024, 9:51 PM EDT) -- A New York federal judge has dismissed with prejudice a suit alleging drive-through coffee chain Dutch Bros and two of its executives weren't honest with investors about the impact inflation was having on the company after its 2021 initial public offering, saying the shareholders have failed to plead any actionable misstatements or omissions.

U.S. District Judge Paul A. Engelmayer issued an **opinion and order** on Monday saying all 26 purportedly false or misleading statements identified in the complaint are either protected by the safe harbor provision of the Private Securities Litigation Reform Act of 1995 or are non-actionable statements of opinion or puffery.

The suit was launched in 2023 by Dutch Bros investor Jerry Peacock, who claimed that in early 2022, the company, CEO Jonathan Ricci and Chief Financial Officer Charles Jemley confidently predicted that financial results for the first quarter of the year would be positive. But the company announced a net loss in May, pushing down trading prices for the company's shares by $9.26, or 26.9%, to $25.11, the suit said.

Lead plaintiff Douglas Rein filed the operative amended complaint last August, claiming that when Dutch Bros went public in September 2021, "skyrocketing inflation and commodities costs were wreaking havoc on the U.S. and world economies." But when the defendants announced the company's financial results for that quarter, "they unexpectedly and falsely assured the market that the company was not being meaningfully impacted by these macroeconomic pressures and that margins would remain healthy moving forward," according to the suit.

Rein claimed the company and executives continued to disclaim any impact from inflation until May 2022, when they "shocked the market by revealing ... that rising inflation and commodities prices had decimated the company's projected earnings and margins in the first quarter of 2022, despite their earlier reassurances two-thirds of the way through that quarter that this would not be the case."

Dutch Bros moved for dismissal in September, calling the complaint "a study in impermissible fraud-by-hindsight pleading."

"No one has a crystal ball," it said, arguing it had been forthcoming about the impact that inflation headwinds were having on the company's business, which ultimately led to the "significant unanticipated escalation in the costs of certain commodities and an adverse change in sales trajectory" the company announced in May.

In his Monday order, Judge Engelmayer said Dutch Bros was correct in its argument that the complaint does not contain any actionable misstatements or omissions and fails to adequately plead scienter, or knowledge of wrongdoing.

Rein alleged that Ricci and Jemley acted with scienter because they had a financial motive to artificially inflate the company's share price, which the suit claimed could be shown through the quantity and timing of their stock sales during the proposed class period.

However, Judge Engelmayer disagreed on Monday, saying Ricci and Jemley only sold "modest" amounts of their shares, "well below the proportion of a defendant's holdings which has been held sufficient to give rise to an inference of fraudulent intent."

An inference of scienter also does not follow from the timing of their sales, the judge said, since the trades were made "long before the company's struggles coping with inflation crystallized."

Judge Engelmayer also rejected Rein's claim that scienter is shown through Ricci and Jemley's high-level positions within Dutch Bros, saying the complaint lacks specific allegations to support this theory and does not specify what information, if any, the defendants held as a result of their positions at the time of the challenged statements.

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

Rein and the class are represented by Kim E. Miller, Lewis S. Kahn and Craig J. Geraci Jr. of Kahn Swick & Foti LLC.

Dutch Bros, Ricci and Jemley are represented by Aric H. Wu and Patrick Gibbs of Cooley LLP.

The case is Douglas Rein v. Dutch Bros Inc. et al, case number 1:23-cv-01794, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Emilie Ruscoe. Editing by Alanna Weissman.

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NY Judge Rejects Visa, Mastercard Fee Deal

By **Lauraann Wood**

Law360 (June 25, 2024, 8:29 PM EDT) -- A New York federal judge handling multidistrict litigation over Visa and Mastercard merchant fees rejected a proposed settlement for equitable relief and recommended a case from Grubhub be sent back to Illinois, making good on a suggestion she shared at a previous hearing.

U.S. District Judge Margo Brodie entered the separate orders about two weeks after she first signaled that she would **"likely not approve"** the proposed deal, under which Visa and Mastercard would have slashed their merchant fees by about $30 billion, and that she'd suggest the Judicial Panel on Multidistrict Litigation send Grubhub's case back to Illinois for trial.

Judge Brodie sealed her preliminary settlement order while the parties work to propose redactions for a public copy by Friday. In her public **remand order**, she agreed with Grubhub's argument that its case should go back to the Northern District of Illinois for a damages trial since the consolidated pretrial proceedings have accomplished their intended goal.

No motions are pending from or against Grubhub, discovery on Grubhub's damages has finished, and all pending summary judgment motions have been resolved, so the Grubhub plaintiffs "are entitled to remand so that their damages claims can proceed," Judge Brodie said.

A representative for Visa repeated the same disappointment the company shared when the judge first signaled her rejection, telling Law360 on Tuesday it was disappointed with her comments and continues to believe the settlement "was the appropriate resolution resulting from lengthy and thoughtful discussions with the merchant class."

A Mastercard representative told Law360 on Tuesday that the company remains disappointed by the development and will pursue its options to ensure the matter is properly resolved.

"We believe the settlement presented a fair resolution of this long-standing dispute, most notably by giving business owners more flexibility in how they manage their card acceptance activities," the representative continued.

Judge Brodie's settlement rejection was cheered by Sens. Richard Durbin, D-Ill., and Roger Marshall, R-Kan., who led a bipartisan effort last year for the Credit Card Competition Act, which sought to help restaurants cut back on the cost of processing credit card transactions.

The senators said in a written statement Tuesday that they're pleased Judge Brodie rejected the proposed deal, "which we felt only temporarily provided concessions negotiated by a few lawyers behind closed doors."

"We are hopeful that Visa and Mastercard will now negotiate a settlement that truly benefits our merchants and small businesses," they said.

Industry group Retail Industry Leaders Association also celebrated the preliminary settlement rejection Tuesday, saying the credit card payment market "has been broken for decades" and that leading retailers "are grateful that Judge Brodie saw through the façade of the proposed settlement and understood that it would not provide the meaningful change that is needed to correct the competitive imbalance in the interchange ecosystem."

Counsel for Grubhub and the class didn't immediately respond Tuesday to a request for comment.

Visa and Mastercard struck **the deal** with merchants in March, agreeing to reduce fees significantly over the next few years and eliminate restrictions on steering customers to cheaper payment options. Specifically, Visa and Mastercard agreed to roll back credit card processing fees and remove restrictions that prevent merchants from adjusting prices and discounts based on the cost of accepting different credit cards.

The dispute goes back nearly 20 years. Since 2005, Mastercard and Visa have been battling multidistrict litigation alleging they and several banks — including Barclays and JPMorgan Chase & Co. — conspired to maintain a set of rules that allowed the credit card companies to overcharge merchants whenever customers used their cards.

Grubhub was among other major retailers, such as Target and Barnes & Noble, that said Judge Brodie should reject the deal because it wasn't fair to anyone except the credit card companies. Another group of retailers, led by 7-Eleven, said the deal would just codify an illegal price-fixing agreement.

Visa and Mastercard argued that Grubhub's case should have remained in the MDL to avoid inconsistent rulings on some remaining issues around its case, such as potential supplemental expert examination. But Judge Brodie said Visa and Mastercard failed to explain why that possibility cuts against a remand, and the companies don't dispute that all material proceedings have concluded in the food delivery platform's case.

The possibility of inconsistent judgments is also not enough to keep Grubhub's case consolidated, she said. The argument seems based partly on the proposed settlement being approved, but it was denied, "which likely renders many of defendants' concerns moot," she said in the remand order.

Regardless, Grubhub will remain part of the class and be bound by the MDL court's orders and judgments whether its case remains in New York or goes back to Illinois, the judge said.

The credit card companies' remand opposition also seems to assume Grubhub will violate an MDL court order, and with the Northern District of Illinois' permission, Judge Brodie said. Those assumptions are "far too tenuous" to deny Grubhub's remand request, she said.

The settling merchants are represented by Steve Shadowen of Hilliard & Shadowen LLP, Robert Eisler of Grant & Eisenhofer PA, Linda Nussbaum of Nussbaum Law Group PC, and Michael Freed of Freed Kanner London & Millen LLC.

Visa is represented by Arnold & Porter, and Holwell Shuster & Goldberg LLP.

Mastercard is represented by Paul Weiss Rifkind Wharton & Garrison LLP.

The cases are In re: Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, case number 1:05-md-01720, and GrubHub Holdings Inc. et al. v. Visa Inc. et al., case number 19-cv-6555, in the U.S. District Court for the Eastern District of New York.

--Additional reporting by Hailey Konnath and Matthew Perlman. Editing by Adam LoBelia.

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Advance Auto Parts Hit With 4 Data Breach Suits

By **Ryan Harroff**

Law360 (June 25, 2024, 2:18 PM EDT) -- Advance Auto Parts Inc. has been hit with four proposed class action complaints over a recent data breach that one suit says exposed more than 1 million people's private information, some of which has purportedly already gone up for sale on the dark web.

Charles McGee, Emmanuel Chaidez, Dylan Joseph Dragone and Don Smith each filed their own proposed class action Monday in the Eastern District of North Carolina claiming Advance Auto Parts failed to properly safeguard their personal information, information that McGee's suit says "can be used to commit myriad of financial crimes" now that it has been exposed. The breach in question was a hacking incident targeting the company's third-party cloud database where data on current and former employees as well as job applicants was stored, the suits say.

Smith's suit says more than 1 million people's data was exposed as a result of the hacking incident and Chaidez and Dragone's complaints each say the information of 358,000 current and former employees of Advance Auto Parts got leaked in the breach.

All four complaints accuse Advance Auto Parts of negligence, breach of implied contract and unjust enrichment arising from its purportedly lacking data security practices. McGee and Dragone's suits also lay out claims for declaratory and injunctive relief on behalf of themselves and their proposed classes, while Chaidez and Smith also seek such relief without listing it as a separate claim.

McGee, Chaidez, Dragone and Smith each seek to represent a proposed class consisting of all those whose personally identifiable information was exposed by the breach, including those who received notice of the breach from Advance Auto Parts. According to the suits, the company has not done enough to remedy the proposed class members' alleged injuries.

"Defendant has only offered 24 months of inadequate identity monitoring services, despite plaintiff and class members being at risk of identity theft and fraud for the remainder of their lifetimes," McGee and Smith's complaints both say, each adding that the company also put the onus on the proposed class members to opt in to those monitoring services instead of automatically enrolling them. Chaidez and Dragone's complaints also made similar points asserting that the credit monitoring is not enough.

Each of the suits seeks compensatory and punitive damages with interest, attorney fees and injunctive relief compelling Advance Auto Parts to take better care of the personal data it is entrusted with and also to pay for credit monitoring services beyond the 24 months it has already offered. McGee's suit also asks the court to make Advance Auto Parts destroy the information it has on the proposed class members "unless defendant can provide to the court reasonable justification for the retention and use of such information."

Counsel for McGee, Chaidez, Dragone and Smith and representatives for Advance Auto Parts did not immediately respond to requests for comment Tuesday.

McGee, Chaidez, Dragone and Smith are represented by Scott C. Harris of Milberg Coleman Bryson Phillips Grossman PLLC.

McGee is also represented by Gary M. Klinger of Milberg Coleman Bryson Phillips Grossman PLLC and Bryan L. Bleichner and Philip J. Krzeski of Chestnut Cambronne PA.

Chaidez is also represented by Jeff Ostrow of Kopelowitz Ostrow PA.

Dragone is also represented by Joseph M. Lyon of The Lyon Firm.

Smith is also represented by Terence R. Coates of Markovits Stock & Demarco LLC.

Counsel information for Advance Auto Parts was not immediately available Tuesday.

The cases are McGee v. Advance Auto Parts Inc., case number 5:24-cv-00352, Chaidez v. Advance Auto Parts Inc., case number 5:24-cv-00354, Dragone v. Advance Auto Parts Inc., case number 5:24-cv-00357, and Smith v. Advance Auto Parts Inc., case number 5:24-cv-00356, all in the U.S. District Court for the Eastern District of North Carolina.

--Editing by Stephen Berg.

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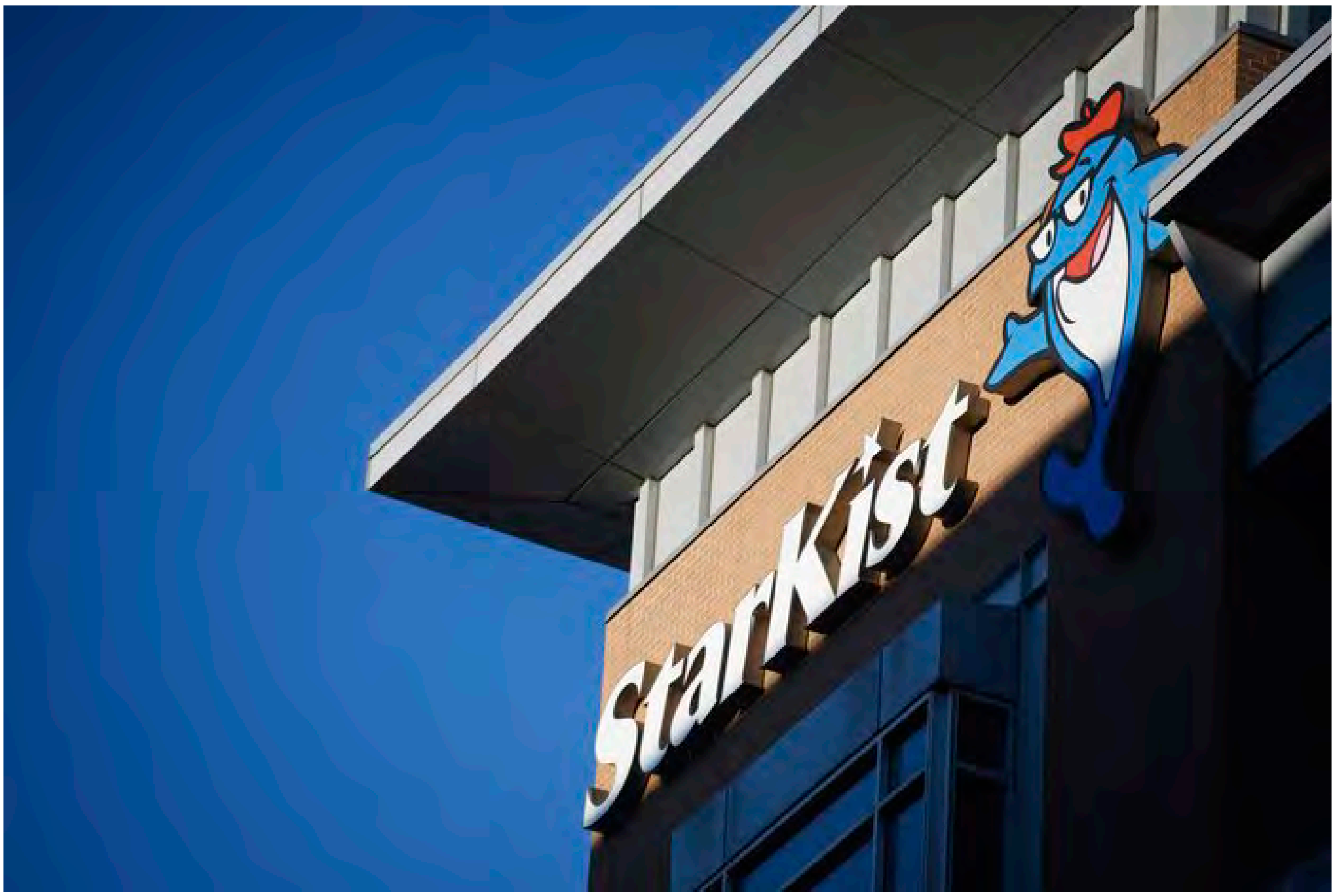
Tuna Buyers Settle $1B Price-Fixing Claims Before July Trial

By **Lauren Berg**

Law360 (June 25, 2024, 10:56 PM EDT) -- Tuna buyers seeking $1 billion in damages over allegations that StarKist, its parent company and a private investment firm that put money into Bumble Bee Foods conspired to hike the price of the tinned fish have reached settlements just ahead of trial, according to a California federal judge's order Tuesday.



StarKist, its parent company Dongwon Industries Co. Ltd. and British private equity firm Lion Capital have reached a settlement with direct purchaser and end payer plaintiffs who alleged the companies conspired to hike the price of canned tuna. (Stephanie Strasburg/Pittsburgh Post-Gazette via AP, File)

Following a series of discussions, direct purchaser and end payor plaintiffs resolved their allegations against StarKist, its parent company Dongwon Industries Co. Ltd. and British private equity firm Lion Capital, according to an **order** confirming the settlements filed by U.S. Magistrate Judge Michael S. Berg.

Judge Berg told the plaintiffs to file their motions for preliminary approval by July 25, or they will be required to appear for a settlement disposition conference on Aug. 1, the order states.

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

The buyers, whose cases were set to go to trial on July 15, revealed last month in pretrial briefs that the damages they were after **could top $1 billion** if the court were to treble them as they've requested.

Direct purchasers of the allegedly price-inflated fish were asking for about $90 million in damages, while the consumer plaintiffs — the ones who actually bought the tuna from the stores — sought $224.4 million in damages, numbers they wanted to see trebled. Neither amount factored in interest or attorney fees and costs, according to their brief.

The buyers said there were only three matters left to be tried: the scope of the conspiracy and who participated in it, damages, and whether StarKist, Dongwon and Lion Capital are liable.

However, StarKist said in its own pretrial brief that the only reason the matter was heading for trial and hadn't been settled is because "plaintiffs are overreaching."

The tuna giant has settled over 100 other actions and would have settled this one too, it said, except that the tuna buyers asked it to pay for unaffected products and alleged price-fixing that happened a year and a half after the period StarKist has admitted liability for.

It also said the buyers were asking for too much money and unfairly want the shareholders to be found liable.

"These four factual issues should be the primary focus of the upcoming trial because they define the scope of the conspiracy and the damages flowing from it," StarKist said, adding that the plaintiffs wanted to use the company's prior guilty pleas "to make the jury decide the case based on guilt-by-association (for the shareholders) or to inflame the jury into punishing StarKist for a period and for products far beyond those referred to in the guilty pleas."

That's why the tuna company said it had asked the court **to prevent the buyers** from mentioning StarKist's guilty plea to the jury.

StarKist pled guilty to participating in a scheme to inflate the price of packaged seafood in 2018, the result of a U.S. Department of Justice deep dive into the industry that also netted a **guilty plea** from Bumble Bee Foods.

Civil suits began piling up in 2015 after news spread that the Justice Department was probing the seafood industry. Around the same time, Thai Union Group, parent company of Chicken of the Sea, scrapped a plan to buy Bumble Bee after the deal came under antitrust scrutiny.

All three tuna behemoths ended up battling scores of suits in multidistrict litigation that was **consolidated in California** federal court and have cut millions of dollars in deals to escape some of those suits.

The direct purchaser plaintiffs are represented by Christopher L. Lebsock, Michael P. Lehmann and Erika A. Inwald of Hausfeld LLP.

The end payor plaintiffs are represented by Betsy C. Manifold, Rachele R. Byrd, Alex J. Tramontano, Mark C. Rifkin and Thomas H. Burt of Wolf Haldenstein Adler Freeman & Herz LLP.

StarKist and Dongwon are represented by Alfred C. Pfeiffer, Christopher S. Yates, Belinda S. Lee, Jason M. Ohta and Ashley M. Bauer of Latham & Watkins LLP.

Lion Capital is represented by Adam S. Paris, Brandon T. Wallace and Paul H. Lazarow of Sullivan & Cromwell LLP.

The case is In Re: Packaged Seafood Products Antitrust Litigation, case number 3:15-md-02670, in the U.S. District Court for the Southern District of California.

--Additional reporting by Nadia Dreid, Ali Sullivan and Cara Bayles. Editing by Emily Kokoll.

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Conn. Firefighters Sue Over PFAS In Protective Gear

By **Madeline Lyskawa**

Law360 (June 25, 2024, 8:01 PM EDT) -- Connecticut firefighters slapped 3M, DuPont and 17 others with a proposed class action on Tuesday, alleging they have been exposed to dangerous levels of per- and polyfluoroalkyl substances, or PFAS, contained in their protective gear manufactured and sold by the companies.

According to the Uniformed Professional Fire Fighters Association and five firefighter unions, the firefighters' bodies have absorbed the toxic chemicals contained in their protective clothing and other equipment through their skin, particularly when they sweat, as well as through ingesting and inhaling the chemicals.

"The defendants knew the equipment, materials and chemicals to be unsafe, but represented the opposite, and they failed to warn the firefighters or the public of specific, substantial risks to human health, profiting immensely from their actions," Jennifer Sclar of Silver Golub & Teitell LLP, an attorney representing the firefighters, said in a Tuesday press release.

Through the litigation, the firefighters association and unions said they are seeking compensatory and punitive damages, as well as an order requiring the companies to cease manufacturing protective gear containing PFAS and contribute to the creation of a diagnostic medical testing program and medical monitoring protocol aimed at monitoring the plaintiffs' health and diagnosing any ailments resulting from PFAS exposure at an early stage.

The firefighters are represented by Ian W. Sloss, Jennifer Sclar and Kate Sayed of Silver Golub & Teitell LLP.

Counsel information for the defendants was not immediately available.

The case is Uniformed Professional Fire Fighters Association of Connecticut et al. v. 3M Company et al., case number 3:24-cv-01101, in the U.S. District Court for the District of Connecticut.

--Editing by Vaqas Asghar.