

VMware Investors Get Class Status on Claims of Faulty Accounting

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Bloomberg Law News



VMware manipulated its revenue accounting as executives engaged in insider trading, an investor class action alleges.

Photographer: Gabby Jones/Bloomberg

Investor claims that VMware Inc. manipulated its revenue accounting as executives engaged in insider trading can proceed on behalf of a class of shareholders, a federal court ruled.

The cloud computing company didn't oppose the investors' request for class certification, according to Judge Edward J. Davila's opinion for the US District Court for the Northern District of California. That's at least the second recent instance of a non-opposed class status request, which is unusual in securities cases.

- The investors allege that VMware misleadingly indicated that it was meeting its revenue expectations for fiscal years 2019 and 2020, and that two executives sold tens of millions of dollars worth of stock during the class period from Aug. 24, 2018, through Feb. 27, 2020
- One of the executives, then-CEO Patrick Gelsinger, is currently CEO of Intel Corp.
- The investors' claims survived a dismissal motion in March 2023

Robbins Geller Rudman & Dowd LLP is lead counsel for the investors. Debevoise & Plimpton LLP represent VMware and the individual defendants.

The case is *Lamartina v. VMware, Inc.*, 2024 BL 225989, N.D. Cal., No. 5:20-cv-02182, 7/2/24 .

To contact the reporter on this story: Martina Barash in Washington at mbarash@bloomberglaw.com

Case study: How Norfolk led \$490m legal victory against Apple

[lgcplus.com/investment/case-study-how-norfolk-led-490m-legal-victory-against-apple-04-07-2024](https://www.lgcplus.com/investment/case-study-how-norfolk-led-490m-legal-victory-against-apple-04-07-2024)

4 July 2024

Norfolk Pension Fund's work with Robbins Geller Rudman & Dowd shows how the Local Government Pension Scheme can lead recovery of money lost to fraud in US, writes Mark Solomon, a partner at Robbins Geller Rudman & Dowd LLP. *Sponsored case study from Robbins Geller Rudman & Dowd.*

Nobody wants to purchase a company's shares at prices fraudulently inflated by misleading statements made by its executives. Like it or not though, all too often corporate executives cross the line and pretend things are great when they are not, or that they are not too bad when they are.

UK pension funds have been blazing a trail as court appointed lead plaintiffs overseeing class action securities fraud cases in the US.

Mark Solomon, a partner at Robbins Geller Rudman & Dowd LLP

To win at trial, a plaintiff needs to prove the defendant made material misrepresentations or omissions; that the statement or the facts omitted were material (ie important) to investors; that the statement or omission of facts was made either knowingly or recklessly; and that the misrepresentation or omission caused plaintiffs economic loss.

, .

The nationality of the investor is irrelevant, and they can sue not just for themselves, but for everyone who purchased shares at the inflated prices. By representing such a 'class' of investors, the claims of all the class members can be aggregated, transforming relatively small cases into ones where hundreds of millions of dollars are at stake

The legal claims in the US that investors own when they suffer losses owing to securities fraud are valuable intangible assets and knowing about them is the first step to maximising any recovery.

Choose US lawyers carefully

The strategy adopted by pension funds and other institutional investors to ensure they are aware of such opportunities is to engage US law firms to monitor their securities portfolios to identify losses attributable to fraud.

Once a suitably qualified firm is identified and the security of the data assured, the monitoring should provide the client with timely alerts both to opportunities to be actively involved in any relevant litigation if the loss is large and also to make claims in cases already resolved if they are entitled to a share.

As with any important service provider, you should vet the choices of US lawyers carefully. In an area where the total damages may amount to hundreds of millions or billions of dollars, otherwise impressive sounding settlements for tens of millions of dollars may enrich the lawyers but represent a terrible result for defrauded investors.

It is particularly important to examine their:

- records
- trial experience (cases cannot be maximised without a highly credible threat of trial)
- size and resources (defendants typically have armies of lawyers; size and strength matter)
- financial capacity (firms that borrowed from the government during covid may not have the most capacity to properly fund multiple cases).

The case

Norfolk Pension Fund's case against Apple, its CEO Tim Cook and chief finance officer Luca Maestri was about a short statement made by Mr Cook in answer to a question from an analyst on 1 November 2018 about "some real deceleration in some of these emerging markets". They specifically asked about the "trajectory for the business" in China.

Mr Cook identified some emerging markets where it was seeing pressure, adding: "In relation to China specifically, I would not put China in that category. Our business in China was very strong last quarter. We grew 16%, which we're very happy with. iPhone, in particular, was very strong double-digit growth there."

Just two months later, Apple made a sudden pre-announcement that it would miss earnings guidance by up to \$9bn. Why? Because of poor performance on weak iPhone sales in China.

What was Apple's principal defence? That Mr Cook had been talking about the prior quarter. Perhaps minds can differ, but I don't know how reasonable they would be. We interpret Mr Cook to have been describing current facts.

Upon the news of the pre-announcement of Apple's miss, the share price dropped 7%-10%.

Class period

Norfolk's portfolio monitoring service with us allowed it to identify its losses, execute a case-specific retainer agreement with my firm, and then seek the lead plaintiff position.

It did not need to expend its resources on the case; the representation has been on a contingent basis with all expenses advanced. As lead plaintiff, Norfolk liaised with my firm, discussed and developed strategies with us, provided documents and testimony and together with us negotiated the ultimate proposed resolution.

We identified the period of wrongdoing – the 'class period' – as 2 November 2018 to 2 January 2019. Norfolk had purchased Apple shares between 14 and 20 November 2018.

Securities fraud can take place in a few seconds and damage investors for days, weeks, months or years depending upon when the truth is disclosed. And securities fraud need not be carefully made up with cunning or guile – it can be the result of a reckless, self-serving utterance not retracted or a sudden white lie.

Responsible owners

Norfolk's legal claim is for the amount Apple shares were inflated when it purchased them. Norfolk, we believe, maximised that asset by resisting four years of intense attempts by Apple to have the case thrown out, during which time thousands of documents were sought and eventually produced, dozens of depositions taken and multiple disputes raised and resolved in court proceedings.

The case was poised for trial to begin in September 2024 when we announced the proposed \$490m settlement at the LGC Investment Seminar in March. The settlement is now going through the court approval process.

Beneficiaries want to see their investments blossom and be repaid when they are ripped off. Investors such as Norfolk Pension Fund have recognised they have the power on occasion, as responsible owners and good stewards, to hold to account those that perpetrate frauds upon their funds and the market even if the misconduct and the proceedings all take place across the Atlantic.

Given the importance of the US as the world's deepest capital market, UK funds will continue to invest heavily there. They can do so knowing they do not have to take being defrauded sitting down.

Business Law Prof Blog

lawprofessors.typepad.com/business_law/2024/07/market-idealism.html

Friday, July 5, 2024

Market idealism

By Ann Lipton

I am perpetually, endlessly amused by how courts navigate the tension between the presumption of market efficiency inherent in the fraud on the market doctrine, and the actual reality that markets may be *generally* efficient, but there are all kinds of blips and imperfections. The Supreme Court acknowledged as much in *Halliburton Co. v. Erica P. John Fund, Inc.*, but it still creates difficulties for the doctrine.

Case in point: *Fagen et al. v. Enviva*, which was just decided in the District of Maryland. Plaintiffs accused Enviva of greenwashing by, among other things, falsely claiming that its wood pellets were sourced from “low value” wood, such as tree trimmings and underbrush, rather than whole trees. When the truth was revealed – partially through a short attack, and then through exposure on a conservation website – Enviva’s stock price dropped.

Enviva defended against the claim by pointing to various public filings where it admitted that its low value wood included some whole trees deemed unsuitable for sawmilling, such as small ones, or ones with defects. Which of course sounds very reasonable, except there’s the pesky stock price drop that accompanied the disclosure. So, on a motion to dismiss, the court held:

Plaintiff’s argument that drops in stock prices suggest *individual* investors’ ignorance of the truth, is irrelevant to the court’s ultimate inquiry about the reasonable investor’s knowledge....even if Mr. Keppler and Mr. Calloway indeed lied that Enviva does not source wood fiber from whole trees, the Category C Statements are immaterial in light of the total mix of information available revealing Enviva’s use of whole trees.

This is hardly the first time a court has held that the beliefs of *actual investors* are irrelevant when gauging injury to the Platonic form of investor whose interests are actually protected by the securities laws, but it is one of the most blatant.

Further on the subject of courts’ willingness to jettison cases on the assumption that publicly disclosed information *must have* offset any lies, there’s *In re Ocugen Securities Litigation*, 2024 WL 1209513 (3d Cir. Mar. 21, 2024), decided a few months ago by the Third Circuit. Ocugen, a pharmaceutical company, contracted with an Indian company to develop

a Covid drug in 2020. It was then alleged to have made several overly optimistic statements about its ability to obtain an FDA Emergency Use Authorization, and its stock dropped when the truth was revealed.

The Third Circuit held that “information about the quality of the Indian COVAXIN study and the FDA’s guidance concerning study protocols and diversity was readily available to any reasonable investor,” and therefore, any false statements were immaterial. In a footnote, the court noted, “to the extent there were questions about whether the study adhered to proper protocols, the amended complaint observes that the issue was reported in the Indian media before the class period even began.” Without further discussion, then, the Third Circuit apparently concluded that pre-class period reports in Indian media are sufficient to offset any misrepresentations to *US* market participants.

Now, to be fair, the Third Circuit was vague about whether its holding was based on *market efficiency*, or whether it was doing a simple *Basic* “total mix of information” analysis. But if the holding was simply about the “total mix,” was the court really saying, on a motion to dismiss, and with no further discussion or analysis, that reports in Indian media are part of the total mix of information available to US traders? And if the holding was efficiency-based, the Third Circuit was certainly assuming a high level of it.

(As a side note, I’ll observe that in 10(b) cases, courts frequently adopt a blanket rule that when the pre-class period statements are *false*, they are not actionable – without much analysis as to why that should be so. See *In re Refco*, 503 F. Supp. 2d 611, 643 n.27 (S.D.N.Y. 2007). Truthful ones, though, are apparently sufficient to offset any lies.).

By contrast, though, let’s look at the Ninth Circuit’s decision in *In re Genius Brands Securities Litigation*, 2024 WL 1804408 (9th Cir. Apr. 5, 2024). There, a television production company lied about the number of times one of its shows aired on Nickelodeon Jr, and the truth was disclosed in a short report. The Ninth Circuit rejected defendants’ argument that the truth was already public on Nickelodeon’s website, because:

The shareholders attached to their complaint several printouts of the webpage on Nickelodeon Jr.'s website that features the broadcast schedule. The printouts covering the week of March 18, 2020, span over twenty-five pages and reflect no fewer than 377 show listings. A shareholder hoping to fact check Genius's March 17 claim that Nickelodeon Jr. aired Rainbow Rangers twenty-six times per week would have no easy time doing so. She would have to go onto Nickelodeon Jr.'s website, find the schedule webpage, sift through hundreds of listings for shows like Bubble Guppies and Team Umizoomi, and tally up the handful of Rainbow Rangers listings.

We also note that the shareholder's task would be considerably more difficult retrospectively because it appears that the Nickelodeon Jr. schedule webpage is updated daily or every other day....

For that reason, the shareholders have plausibly alleged that the truth became known through the Hindenburg Report,

Thus, in *Genius Brands*, the Ninth Circuit displayed much more comfort with a kind of imperfect efficiency, even in a fraud on the market claim.

Lawyers who killed Elon Musk's Tesla payday want \$370,000 per hour

QZ qz.com/tesla-elon-musk-pay-package-legal-fees-delaware-enron-1851580831

William Gavin

July 8, 2024

 Image for article titled The lawyers who killed Elon Musk's \$56 billion Tesla payday want \$370,000 per hour

Photo: boonchai wedmakawand (Getty Images)

The legal team for the shareholder who sued to shut down Tesla CEO Elon Musk's \$56 billion pay package have upped their already record-breaking demands for compensation.

Suggested Reading

Tesla stockholder Richard Tornetta owned nine shares when he sued over Musk's pay package in 2018, beginning a legal battle that ended in January when a Delaware state judge voided the deal. Tornetta is represented by three law firms, including New York-based Bernstein Litowitz Berger & Grossmann.

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Elon Musk's \$55 billion Tesla pay package got struck down as 'deeply flawed'

The team of 37 legal professionals has requested \$7.2 billion in company shares at Tesla's Friday stock price, according to court documents filed in Delaware. That's the equivalent of about \$370,000 per hour worked by the crew of lawyers, associates, and paralegals. Reuters first reported the updated fee request.

That's a massive premium compared to the current record-holder, California-based Coughlin Stoia Geller Rudman & Robbins, which was closed in 2010. The firm won \$688 million in legal fees for its work securing a \$7.2 billion settlement in a securities fraud case over the failure of Enron in 2008.

The largest legal fee ever awarded in Delaware's Chancery Court, where Tornetta's lawsuit was filed, was \$285 million in 2012 for a shareholder lawsuit against Americas Mining Corporation, according to Reuters.

Tornetta's legal team is seeking more than 25 times that fee in the form of 29 million Tesla shares. The firms argue that they worked on contingency for more than five years, meaning that a loss would have meant they earned nothing for their work.

“ [T]he size of the requested award is great because the value of the benefit to Tesla that Plaintiff’s Counsel achieved was massive,” the lawyers wrote in court filings earlier this year.

Musk’s 2018 pay package allowed him to purchase 304 million shares at a little more than \$23 a pop. The January ruling brought Tesla back some 266 million shares reserved for Musk’s stock options.

At Friday’s stock price of \$251.82 a share, those shares would be worth \$67 billion. Tesla stock is trading at about \$256 per share as of Monday morning.

In March, when Tornetta’s lawyers had asked for the equivalent of \$6 billion worth of Tesla stock, Musk called the fees requested “criminal.” Tesla’s lawyers have objected to the payment, writing in court filings that “importantly, undisputed market evidence confirms plaintiff achieved little to no discernible value for Tesla or its stockholders.”

An overwhelming majority of investors last month voted to re-approve Musk’s compensation plan during Tesla’s annual meeting, which the company claims “significantly impacts” the January ruling. More than 8,000 Tesla shareholders have issued letters and objections regarding the fee, including California Public Employees’ Retirement System, which did not vote in favor of Musk’s pay deal.

The judge presiding over the case and who initially ruled in favor of Tornetta, Chancellor Kathaleen McCormick, will hear arguments on Monday over the fees. Once she decides on the legal fees, the judge will deliver a final ruling in the case. From there, if she reinforces her earlier decision, Musk will have 30 days to appeal to the Delaware Supreme Court.

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Musk Pay Judge Faces Tough Call on \$7 Billion Legal Fee Bid (1)

By Jef Feeley2024-07-08T13:46:08370-04:00

- Payment sought by plaintiffs' lawyers may set a US record
- Tesla contends \$13.6 million is enough to compensate attorneys

The judge who voided Elon Musk's record-setting Tesla Inc. pay package must now make another momentous decision — whether the lawyers who took the case to trial should be paid what may be the largest fee in the history of US litigation.

Attorneys from four firms who claimed Musk's 2018 compensation plan for running the electric-vehicle maker was excessive are asking to be awarded 29 million shares of Tesla stock — worth about \$7.3 billion. Musk lawyers oppose that argument, claiming only a tiny fraction of that amount is justified.

On Monday, Delaware Chancery Court Judge [Kathaleen St. J. McCormick](#) heard testimony from experts on both sides, but she isn't expected to issue an immediate order. That's because McCormick must tackle an even bigger issue — whether to reinstate Musk's pay package now that Tesla shareholders have voted overwhelmingly to re-ratify it.

The shareholder proxy vote at Tesla's annual meeting in June doesn't require McCormick to undo her ruling in January that Musk's pay plan was tainted by conflicts of interest among the board members who adopted it. But she has said she will consider the vote at a separate hearing.

"We are in uncharted waters here," said **Larry Hamermesh**, a retired University of Pennsylvania law professor who specializes in Delaware corporate disputes. "There's no clear guidance in the law for a fee like this."

The unprecedented court case has drawn world-wide attention and prompted more than 8,000 Tesla shareholders to send [letters](#) to McCormick sharing their opinions on her pay ruling and the fee request.



Elon Musk

Photographer: Apu Gomes/Getty Images

At the annual meeting, more than 70% of Tesla shareholders backed reinstating Musk's pay plan and moving the company's state of incorporation from Delaware to Texas. Tesla's attorneys contend they've fixed the flaws in Musk's compensation plan and McCormick should rescind her earlier decision.

When McCormick issued her Jan. 30 ruling, the pay plan that was structured to deliver several rounds of options allowing Musk to buy about 304 million shares was worth almost \$56 billion. At Friday's close, the value of the package would be closer to \$69 billion.

Tesla shares lost about a quarter of their value during the first four months of 2024, but have come roaring back in recent weeks. The company reported second-quarter deliveries that beat Wall Street expectations, boosting its market cap and restoring Musk's position as the world's richest person.

The lawyers who challenged the pay plan argue that their unusual request to be compensated in

stock rather than cash benefits Tesla because it doesn't take money off the company's balance sheet.

They also note that they would have gone unpaid if they lost the trial and haven't received any pay for more than six years of work. The suit "would have gone unprosecuted absent plaintiff's counsel's willingness to incur substantial" risk, they said in a court filing.

Investors Benefit

New York University law professor [Robert Jackson](#), testifying for the Tesla investor who successfully sued, told the judge on Monday that shareholders benefited when Musk's pay package was blocked.

Giving Musk so many vested stock options would have diluted holdings of existing investors, Jackson said. And the judge's decision provided Tesla's board with guidance about improving corporate governance and eliminating the conflicts of interest that led to the controversial pay plan, he said.

While it's "challenging to value" such benefits in a financial sense, they are a boon to Tesla shareholders that provides "a positive effect" on its shares, Jackson said.

But [Daniel Fischel](#), a University of Chicago law professor testifying for Musk, said blocking the payout "saved Tesla nothing" and that there was no quantifiable benefit to investors. Fischel said the plaintiff's lawyers were seeking an "unjustified windfall" for their victory in court, while Musk had helped to create Tesla's "economic miracle," which led to an increase in market value of more than \$500 billion.

Cash Alternative

If McCormick doesn't want to approve a stock-based fee award, lawyers for the plaintiff said they'd accept more than [\\$1.4 billion](#) in cash. By comparison, the handful of law firms that spearheaded lawsuits over the US opioid epidemic negotiated for [\\$2.3 billion](#) in legal fees after reaching settlements worth more than \$26 billion with drugmakers, distributors and retailers.

Tesla's legal team says that even if the plaintiffs' lawyers are credited with uncovering flaws in the process by which Musk's pay package was adopted, the billionaire is still owed significant

compensation for his leadership while shares skyrocketed over the last several years. The company's lawyers argued in a court filing that the fee award for their adversaries should be capped at slightly more than \$13.6 million.

A 29-million share payout for the plaintiffs' lawyers would "be 17 times larger than any award in Delaware history and exceed by more than three-fold the University of Delaware's endowment" of [\\$1.78 billion](#), Tesla argued in a court filing, adding that it would also make the plaintiffs' lawyers "the third largest non-institutional owner of Tesla common shares."

Hamermesh said McCormick will need to first resolve whether she rescinds her January ruling before she can set a reasonable fee for the lawyers.

"It would take a lot of brass to say the Tesla shareholder vote is meaningless here," Hamermesh said.

But other legal experts — including retired University of Delaware professor Charles Elson — say McCormick would be within her legal rights to declare the proxy vote is irrelevant. He said she would be justified concluding the pay package was a waste of corporate assets in light of her original findings that the plan was the product of sham negotiations with directors who were not independent of Musk and that shareholders were given misleading and incomplete disclosures about it.

Some Tesla shareholders have expressed outrage at the legal fee request in letters to the judge — which she is ethically bound to ignore.

"It is unfathomable to suggest any financial benefit derived from this case could justify such exorbitant fees for plaintiff attorneys," Liang Guo of Fort Lee, New Jersey, wrote to McCormick.

Brian Lecher of South Carolina voiced a similar sentiment.

"Instead of honoring the wishes of shareholders and rewarding the hard work of the CEO, it seems that the court is rewarding lawyers who did nothing for the company or shareholders."

The case is *Tornetta v. Musk*, 2018-0408, Delaware Chancery Court (Wilmington).

(Updates with testimony from Monday's hearing.)

--With assistance from **Dana Hull**.

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Tesla investors to urge judge to reject record \$7 bln legal fee in Musk pay case

 [reuters.com/technology/tesla-investors-urge-judge-reject-record-7-bln-legal-fee-musk-pay-case-2024-07-08](https://www.reuters.com/technology/tesla-investors-urge-judge-reject-record-7-bln-legal-fee-musk-pay-case-2024-07-08)

Tom Hals

Tesla Inc CEO Elon Musk walks next to a screen showing an image of Tesla Model 3 car during an opening ceremony for Tesla China-made Model Y program in Shanghai, China January 7, 2020. REUTERS/Aly Song//File Photo Purchase Licensing Rights , opens new tab

WILMINGTON, Delaware, July 8 (Reuters) - Tesla shareholders will appear in court on Monday to argue that an unprecedented request for more than \$7 billion in attorneys' fees to be paid by the company is "outlandish," the latest twist in a legal showdown over Musk's \$56 billion pay package.

The record fee request was made by investor Richard Tornetta on behalf of three law firms that represented him, including Bernstein Litowitz Berger & Grossmann. Tornetta owned nine shares of Tesla when he sued over Musk's pay package of stock options in 2018, a legal battle he ultimately won in January when the package was voided.

The fee equals around \$7.2 billion at Tesla's Friday's stock price and amounts to a rate of roughly \$370,000 for every hour worked by the 37 lawyers, associates and paralegals, some of whom normally bill as little as \$275 an hour, according to court documents submitted Tornetta's lawyers.

"The legal fees appear exceedingly disproportionate and outlandish," Nathan Chiu, a Tesla shareholder from New Jersey, wrote to Chancellor Kathaleen McCormick in March, according to a court filing.

Chiu, the California Public Employees' Retirement System and more than 8,000 Tesla stockholders have flooded the Delaware Chancery Court with some 1,500 letters and objections over the fee, according to court documents.

A hearing scheduled for Monday was moved from McCormick's usual courtroom to the largest in the building to accommodate the 47 attorneys from 19 law firms appearing in the case, as well potential stockholders.

Tornetta's lawyers argue they deserve the fee as a cut of the benefit they say they conveyed to Tesla when a judge voided Musk's pay package, which returned to Tesla around 266 million shares reserved for the stock options. That stock would be worth about \$67 billion at Friday's price of \$251.82 per share.

Tornetta's attorneys said it is the largest judgment ever awarded by an American court, excluding punitive damages. They argued they should receive a fee equal to 11% of that judgment, a percentage that is arguably conservative by Delaware legal precedent. They asked to be paid in the form of 29 million Tesla shares.

RECORD FEE REQUEST

While federal courts tend to lower the fee as a percentage of judgments or settlements as they get bigger, Delaware courts have gone the opposite way, awarding a larger percentage as an incentive for attorneys to push for a bigger recovery.

Tornetta's legal team said they would have been justified asking for up to 33% of the value of Musk's pay package.

The fee request vastly outstrips the current record fee in shareholder litigation of \$688 million in an Enron class action, according to Stanford Law School.

The Musk case took a dramatic turn when Tesla shareholders in June voted to ratify Musk's pay, which Tesla has argued corrected the flaws in the 2018 process that McCormick identified in her ruling.

The company argues that Musk's pay package has been restored and that Tornetta's legal victory has been transformed into a loss. As a result, the case conveyed no benefit to Tesla and the shareholder lawyers should receive as little as \$13.6 million, Tesla said.

Some of the shareholders who have opposed the request wrote form letters to the judge, but a few have hired attorneys to file formal objections to the fee, including Amy Steffens, a pilot, and Kurt Panouses, an attorney who specializes in representing lottery winners.

McCormick may take weeks or months to rule. The Delaware Supreme Court is currently considering a \$267 million fee request in a shareholder class action involving Dell Technologies and that decision could provide fee guidance.

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Reporting by Tom Hals in Wilmington, Delaware; Editing by Aurora Ellis

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Tom Hals
Thomson Reuters

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

deal for Twitter.

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Musk suggests late Twitter disclosure was a mistake, seeks to end lawsuit

 [reuters.com/technology/musk-suggests-late-twitter-disclosure-was-mistake-seeks-end-lawsuit-2024-07-05](https://www.reuters.com/technology/musk-suggests-late-twitter-disclosure-was-mistake-seeks-end-lawsuit-2024-07-05)

Jonathan Stempel

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

NEW YORK, July 5 (Reuters) - Elon Musk wants to dismiss a lawsuit by former Twitter shareholders who said he waited too long in early 2022 to reveal his large ownership stake in the social media company, saying "all indications" show his delay was a mistake.

In a late Wednesday night filing in Manhattan federal court, Musk called it implausible to believe he wanted to defraud shareholders who didn't know he had taken a 9.2% Twitter stake, and missed out on big gains because they sold their own stock.

Investors in the proposed class action said Musk and his wealth manager Jared Birchall knew a U.S. Securities and Exchange Commission rule required Musk to disclose by March 24, 2022 he had bought 5% of Twitter, yet waited another 11 days.

The investors said this let Musk buy more shares at cheap prices, saving more than \$200 million. Twitter, now known as X, rose 27% on April 4, 2022 after Musk revealed his 9.2% stake.

Musk is the world's richest person according to Forbes magazine, and runs other companies including electric car maker Tesla (TSLA.O) , opens new tab

In his filing, Musk said he had intended to reveal his Twitter stake at the end of 2022, but disclosed it promptly after realizing he misunderstood the SEC disclosure rule.

"This is not a scheme to defraud," Musk said. "All indications--including those in the pleadings--point to mistake."

Musk also denied the investors' claim that an unnamed Morgan Stanley MS.N banker helped devise a trading strategy to amass Twitter shares without alerting the broader market. Lawyers for the investors, who are led by an Oklahoma public pension fund, did not immediately respond to requests for comment on Friday.

Musk eventually bought San Francisco-based Twitter for \$44 billion in October 2022. The SEC has also probed his Twitter stock purchases.

Last September, U.S. District Judge Andrew Carter refused to dismiss an earlier version of the lawsuit, finding evidence that Musk understood the SEC disclosure and testified about it under oath.

The case is Oklahoma Firefighters Pension and Retirement System v Musk et al, U.S. District Court, Southern District of New York, No. 22-03026.

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Reporting by Jonathan Stempel in New York; Editing by Chizu Nomiya

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This Week in Chancery Court: Musk, Qualtrics, DraftKings (1)

By Jennifer Kay, Allie Reed and Mike Vilensky

Bloomberg Law News 2024-07-08T09:54:04655250268-04:00

This Week in Chancery Court: Musk, Qualtrics, DraftKings (1)

By Jennifer Kay, Allie Reed and Mike Vilensky 2024-07-08T04:45:51000-04:00

A Delaware Chancery Court judge will hear arguments on a request to award billions in Tesla stock to the lawyers who brought the case that voided Elon Musk's \$56 billion pay package.

Here's what else is happening in court this week:

Monday: Tornetta v. Musk, Del. Ch., No. 2018-0408, hearing 7/8/24.

At issue: Chancellor Kathaleen St. J. McCormick will hear arguments about an unusual attorney fee award application: the lawyers for a Tesla Inc. investor who persuaded her to reject Musk's \$56 billion pay package want their legal fees paid in company stock. The shares are worth roughly \$5.6 billion. The company said in a brief that approving such an award would make the investor's lawyers one of Tesla's largest shareholders and "do violence to the equitable and market-based outcomes for which the Delaware courts have been known." The fight over legal fees must be resolved before McCormick finalizes her decision voiding Musk's record-setting compensation award; once the case ends, Musk has 30 days to appeal. Questions arising from Tesla's June 13 stockholders' vote will be addressed at a subsequent hearing, according to a letter from McCormick.

Court action: Oral arguments will be heard in Wilmington, Del.

Tesla Seeks to Delay July Hearing in Battle Over Musk's Pay (1)

Monday: D1 Jasper Holdings LP v. Juul Labs Inc., Del. Ch., No. 2023-1060, post-trial arguments 7/8/24.

At issue: Investment funds sued Juul Labs Inc. in October, seeking to stop it from converting debt into equity on terms allegedly favoring insiders, including hotel billionaire Nick Pritzker, siphoning value out of the vaping company. The parties agreed to a preliminary injunction temporarily halting the proposed debt conversion, pending final resolution of the lawsuit. After a trial in March, Vice Chancellor Nathan A. Cook will hear closing arguments in the case. At trial, Juul director Riaz Valani defended lifelines he and Pritzker threw the vaping company amid its financial turmoil, saying the investments were for the good of the company and not personal gain. The investment funds argue the trial testimony showed that Juul insiders “engaged in multiple maneuvers intended to mask their involvement,” according to a post-trial brief.

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

Juul Labs Director Denies Claims He Benefitted From Bail-Out (1)

Tuesday: In re SwervePay Acquisition LLC, Del. Ch., No. 2021-0447, bench ruling 7/9/2024

At issue: A bench ruling is expected on SPOSC Investment Holdings LLC’s effort to escape fraud-based claims because they’re untimely, according to their brief in support of a partial motion to dismiss. SwervePay’s buyers claim they were defrauded into purchasing the payment processing software company after SPOSC misled them about its relationships with customers and vendors. The buyers argue the sellers “conspired to market SwervePay as a business with valuable customer relationships and a compelling pipeline of prospective relationships” in an act of desperation to close the sale, according to a third amended complaint.

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

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

Tuesday: ITG Brands LLC v. Reynolds American Inc., Del. Ch., No. 2017-0129, trial 7/8/24.

At issue: ITG Brands LLC and Reynolds American Inc. go to trial over payments owed to the state of Florida under a 1990s-era tobacco settlement. The payments involve brands ITG acquired from Reynolds, including the Winston, Salem, Kool, and Maverick tobacco product lines. Vice Chancellor Lori Will previously ruled that ITG’s asset purchase agreement required the company to pay Reynolds’ share of the Florida settlement, and ITG owes Reynolds damages. The amount of those damages will be determined at trial, as well as whether ITG or Reynolds gets to keep money that falls under a “profit adjustment” formula applied to all parties to the settlement.

Court action: Will presides over a trial in Wilmington, Del.

Philip Morris Blocked From Joining Reynolds, ITG Brands Case

Tuesday: In re Golden Nugget Online Gaming Inc. S’holders Litig. , Del. Ch., No. 2022-0797, settlement conference 7/9/24

At issue: DraftKings Inc. agreed in March to pay \$22 million to end litigation challenging its \$1.6 billion acquisition of Golden Nugget Online Gaming Inc. from billionaire entertainment mogul Tilman Fertitta. The proposed settlement would resolve a lawsuit filed by former Golden Nugget shareholders against members of its board, including Fertitta, owner of Landry's Inc. and the NBA's Houston Rockets. The DraftKings deal closed in May 2022.

Court action: A hearing on the settlement will be heard in Wilmington, Del.

DraftKings Agrees to Pay \$22 Million in Golden Nugget Deal Case

Tuesday: JB & Margaret Blaugrund Found'n v. Guggenheim Funds Inv. Adv. LLC , Del. Ch., No. 2021-1094, settlement hearing 7/9/24

At issue: Guggenheim Funds Investment Advisors LLC and former trustees of a closed-end fund it managed, the Fiduciary/Claymore Energy Infrastructure Fund, agreed in April to an \$18.8 million deal ending shareholder litigation over the fund's sale. The accord would resolve claims that Guggenheim and the ex-trustees arranged the all-stock transaction with a Kayne Anderson Capital Advisors LP affiliate in an effort to dodge allegations that they ran the fund into the ground. The transaction closed in March 2022.

Court action: A hearing on the settlement will be heard in Wilmington, Del.

Guggenheim Has \$19 Million Deal Ending Lawsuit Over Energy Fund

Wednesday: In re Qualtrics Int'l Inc. S'holders Litig., Del. Ch., No. 2023-1050, oral arguments 7/10/24.

At issue: Former investors in Qualtrics International Inc. challenged its \$12.5 billion private equity sale by German software giant SAP SE to affiliates of Silver Lake Group LLC. The defendants have asked the court to dismiss the consolidated lawsuit. The investors argue the case should proceed because the sale process was "rife with conflicts, structural bias, and informational imbalance," according to an answering brief.

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

Silver Lake's \$12.5 Billion Qualtrics Deal Draws Challenge (1)

Wednesday: In re New Relic, Del. Ch., No. 2023-1089, trial 7/10/24.

At issue: A pension fund seeks internal books and records from New Relic Inc. to investigate whether activist hedge fund JANA Partners LLC drove pressure to complete a \$6.5 billion sale of the cloud analytics company to Francisco Partners Management LP and TPG Global LLC.

Court action: Magistrate Selena Molina presides over a one-day trial in Wilmington, Del.

New Relic Sued Over \$6.5 Billion Sale to Francisco Partners, TPG

Thursday: S'holder Rep. Servs. LLC v. Signify Health Inc., Del. Ch., No. 2023-0076, oral arguments 7/11/24.

At issue: Signify Health Inc. faces claims it rushed to integrate a \$250 million purchase, Caravan Health Inc., to avoid making \$50 million in additional post-deal payments. Ex-Caravan investors argue that Signify agreed to wait to take actions such as consolidating Caravan's workforce and operations or diverting Caravan employees that "Caravan knew would negatively impact its ability to achieve the earn-out payment," according to a brief. That interpretation of the merger agreement is "distorted," Signify said in a reply brief supporting its motion to dismiss.

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

Signify Health Faces \$50 Million Suit Over \$250 Million Deal (1)

Friday: Assad v. TPG Inc., Del. Ch., No. 2023-0096, settlement hearing 7/12/24.

At issue: TPG Inc. affiliates and former Convey Health Solutions Holdings Inc. board members agreed to pay \$19.5 million to end shareholder litigation challenging the medical technology company's \$1.1 billion take-private buyout. Vice Chancellor Will must give final approval to the deal. Attorneys for the shareholders who led the class action lawsuit seek nearly \$4.4 million in fees and expenses, according to their brief.

Court action: The settlement hearing will take place in Wilmington, Del.

TPG Reaches \$19.5 Million Settlement in Convey Health Deal Case

(Updates to remove canceled Trump Media hearing.)

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Legal Fee Tracker: Lawyers' \$170 million payday in limbo in credit card swipe fee case

 [reuters.com/legal/legalindustry/legal-fee-tracker-lawyers-170-million-payday-limbo-credit-card-swipe-fee-case-2024-07-05](https://www.reuters.com/legal/legalindustry/legal-fee-tracker-lawyers-170-million-payday-limbo-credit-card-swipe-fee-case-2024-07-05)

David Thomas



Signage is seen at the legal offices of the law firm Grant & Eisenhofer P.A. in Wilmington, Delaware, U.S., June 9, 2021. REUTERS/Andrew Kelly Purchase Licensing Rights  , opens new tab

July 5 (Reuters) - The fate of \$170 million in fees sought by lawyers at Grant & Eisenhofer and three other law firms that negotiated an antitrust settlement with Visa and Mastercard is up in the air, after a Brooklyn federal judge rejected the proposed deal last week. Following nearly 20 years of litigation, the settlement would have required Visa and Mastercard to limit the swipe fees, or interchange fees, paid by millions of merchants when shoppers use credit or debit cards. Merchants have long accused Visa and Mastercard of overcharging them on the fees.

Under the agreement, Visa would have paid up to \$113.3 million and Mastercard would have paid up to \$56.6 million to compensate the class action lawyers if their fee request was approved.

But the settlement, which the lawyers said would save merchants \$30 billion over five years, did not go far enough, U.S. District Judge Margo Brodie said in her 88-page ruling [↗](#), opens new tab.

Brodie's decision did contain some good news for the class attorneys, who also included lawyers at Hilliard Shadowen, Freed Kanner London & Millen and the Nussbaum Law Group. Brodie did not object to the terms of their \$170 million fee request, which the defendants had agreed to pay out within 20 business days of the judge's approval.

The wait will now be much, much longer, however, as the attorneys must now try to extract more concessions from Visa and Mastercard.

The defendants could likely withstand a "substantially greater" settlement, Brodie said in her decision, citing an estimate that merchants paid \$100 billion in interchange fees on Visa and Mastercard transactions in 2023 alone.

The accord would have lowered the typical 1.5% to 3.5% swipe fee by 0.04 percentage points for three years, capped fees for five years, and given merchants more room to impose surcharges.

The deal kept fees too high and still required merchants to accept an "Honor All Cards" rule requiring that they take all Visa and Mastercard cards, or none, Brodie said.

Attorneys at the four class counsel firms did not respond to requests for comment on the decision. A Mastercard spokesperson declined to comment, and a Visa spokesperson did not immediately respond to a request for comment. The companies have denied violating antitrust law.

The rejection of a proposed class action settlement in the preliminary stages is relatively rare, class action experts told Reuters.

Brodie's decision cannot be appealed, and even if it could, it would be difficult to overturn given her findings, said Ted Frank of the Hamilton Lincoln Law Institute, who is known for bringing objections to class action settlements.

"You wouldn't be able to show that it's clearly erroneous," Frank said. Frank said he consulted with an objector to a 2013 settlement in the swipe-fee case. He has not done any legal work relating to the 2024 settlement.

The proposed settlement attracted opposition from large retailers like Walmart, Target and GrubHub, as well as the National Retail Federation and the Retail Industry Leaders Association, who said it was inadequate.

The NRF has not yet weighed in on the plaintiffs' fee request, but that's largely due to other concerns over the deal, said Stephanie Martz, the group's chief administrative officer and general counsel.

"It's not 'not a problem,' but it's not our particular problem," Martz said.

Any new settlement would likely include a higher fee request, Vanderbilt Law School professor Brian Fitzpatrick said in an email, based on both the value of a renegotiated deal and the additional time required to reach it.

- In other fee news, Tesla and the legal team that voided Elon Musk's \$56 billion in stock options will make their arguments to a Delaware judge on Monday over the lawyers' bid for compensation. The plaintiff's team is seeking 29 million Tesla shares, worth around \$7 billion as of Wednesday, which they argued is around 11% of the benefit they achieved for the company.

Tesla has argued that the case obtained virtually nothing for the company and the fee should be around \$13.6 million.

- Plaintiffs' firms including Carney Bates & Pulliam, Shamis & Gentile and Edelsberg Law that reached a \$48 million deal resolving claims that Progressive undervalued wrecked cars and said they will seek up to \$16 million in legal fees.

- Law firms Hagens Berman and Cohen Milstein were awarded \$51.6 million [□](#), opens new tab for their work representing chicken consumers in a long-running price-fixing case, after an appeals court ordered the Chicago federal judge overseeing the litigation to re-visit his initial \$57 million award.

(Legal Fee Tracker is a weekly feature exploring attorney compensation awards and disputes in class actions, bankruptcies and other matters. Please send tips or suggestions to D.Thomas@thomsonreuters.com [□](#), opens new tab)

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Reporting by David Thomas

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Athira Pharma Oversight Reforms Merit Approval, Investors Say

By Martina Barash

- Former CEO allegedly published papers with altered images
- Related \$10 million class settlement moving toward completion

Bloomberg Law News 2024-07-08T09:53:36466121136-04:00

Athira Pharma Oversight Reforms Merit Approval, Investors Say

By Martina Barash 2024-07-05T15:28:55000-04:00

- Former CEO allegedly published papers with altered images
- Related \$10 million class settlement moving toward completion

Athira Pharma Inc. investors who sued the biotech company's leaders urged a federal court to give final approval to a settlement that specifies several internal governance and oversight reforms following a research misconduct scandal.

The derivative suit settlement commits the board to maintain the changes for five years, shareholders Stephen Bushansky and Thomas Houlihan told the US District Court for the Western District of Washington in a July 3 filing.

The suit and a related class action stem from allegations that Athira's former CEO, Leen Kawas, published research papers with altered images while completing graduate coursework—research that underlay the company's in-development products for Alzheimer's treatment. The board placed Kawas on leave when the reports emerged, and she later resigned.

Judge Thomas S. Zilly, who oversees both lawsuits, granted preliminary approval of a \$10 million settlement in the class case in a pair of rulings in February and March after finding defects in an earlier version of the settlement.

No investors have submitted objections to the derivative suit settlement with Kawas and several company directors, Bushansky and Houlihan said.

The proposed reforms include creating a new board committee—and a compliance officer position—to oversee compliance with regulatory and other requirements, product safety and effectiveness, and research integrity, according to the filing.

Zilly preliminarily approved the deal in May.

Weiss Law LLP and Slyne Law LLC are lead counsel for the investors. Perkins Coie LLP represents Kawas. Wilson Sonsini Goodrich & Rosati represents the director defendants.

The case is *Bushansky v. Kawas*, W.D. Wash., No. 2:22-cv-00497, approval request 7/3/24 .

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SeaStar Misstated Device Prospects Before 40% Drop, Trader Says

By Martina Barash 2024-07-08T11:25:43000-04:00

- **COURT:** D. Colo.
- **TRACK DOCKET:** [No. 1:24-cv-01873](#)

SeaStar Medical Holding Corp. failed to disclose both that it flubbed an FDA application and that its accounting procedures were inadequate, an investor alleges in a suit over the stock's largest selloff.

SeaStar's predecessor had touted the value of its anti-inflammatory medical device before merging with a blank-check company to go public, shareholder Forrest Wells says in a proposed class action, filed July 5 in the US District Court for the District of Colorado. Numerous businesses that have gone public by merging with special purpose acquisition companies have seen their shares falter following the deals' peak in 2020 and 2021, sending investors to the courts.

SeaStar's stock began trading on Oct. 31, 2022, after its de-SPAC merger was consummated, Wells says.

On May 9, 2023, SeaStar announced that the Food and Drug Administration had rejected its "humanitarian device exemption" application for rare diseases—submitted before the merger—for its device's use in treating pediatric acute kidney injury, he says. SeaStar's stock price fell 40% the following day in its biggest selloff since the company went public, according to data compiled by Bloomberg.

Meanwhile, SeaStar allegedly wasn't conducting its accounting properly. On March 27 of this year, the company said it would need to restate its financials, explaining that many SPACs, "including ours, relied on a host of complex financial instruments"—an announcement that caused a 5% share price drop, Wells says.



The proposed class of those who acquired SeaStar securities between Oct. 31, 2022 and March 26, 2024, inclusive, consists of hundreds or thousands of members, the complaint estimates.

Wells seeks damages on his securities fraud claims.

SeaStar didn't immediately respond to an emailed request for comment.

Pomerantz LLP represents Wells and the proposed class.

The case is [Wells v. SeaStar Medical Holding Corp.](#), D. Colo., No. 1:24-cv-01873, complaint 7/5/24.

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Enviva Leaders, Underwriters Defeat Investor Greenwashing Claims

By Martina Barash

- Company allegedly touted use of scrap wood, biomass fuel
- SEC concerned about companies' environmental, AI claims

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Enviva Leaders, Underwriters Defeat Investor Greenwashing Claims

By Martina Barash 2024-07-05T10:06:21000-04:00

- Company allegedly touted use of scrap wood, biomass fuel
- SEC concerned about companies' environmental, AI claims

Enviva Inc. investors failed to adequately allege the wood-pellet energy company misled them about its products' environmental benefits in stock offering documents and other statements over the course of two years, a federal court ruled.

The now-bankrupt energy company is no longer an active defendant the proposed class action. Its top leaders and the banks behind its January 2022 stock offering registration aren't responsible for the investors' market losses, Judge Deborah K. Chasanow said July 3 for the US District Court for the District of Maryland.

The investors sued over a stock-price drop following an October 2022 short-seller's report calling the company's practices "textbook greenwashing" and another negative report by a conservation news outlet about two months later.

The suit came amid legal and regulatory action over allegedly false environmental claims, known as greenwashing. The Securities and Exchange Commission has signaled a similar willingness to go after so-called AI-washing, in which companies exaggerate their use of artificial intelligence or downplay its risk.

Enviva's disclosures about its use of whole trees made its later statements about using low-value scrap wood from private landowners "immaterial in light of the total mix of information available," Chasanow said.

The investors didn't adequately respond to defense arguments that Enviva disclosed the existence of an ongoing debate about wood pellets' greenhouse gas emissions compared with coal's, or about the truth of Sarbanes-Oxley Act certifications, she said.

And statements about the company's commitment to sustainability can't be sued over because they were merely aspirational, she said, dismissing the suit.

Pomerantz LLP was lead counsel for the class. Vinson & Elkins LLP represented the individual defendants. Orrick, Herrington & Sutcliffe LLP represented the underwriters, including Goldman Sachs & Co., J.P. Morgan Securities LLC, and Citigroup Global Markets Inc.

The case is *Fanucchi v. Enviva Inc.*, 2024 BL 227817, D. Md., No. 8:22-cv-02844, 7/3/24 .

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DraftKings digital trading cards are securities - Boston judge

 [reuters.com/legal/transactional/column-draftkings-digital-trading-cards-are-securities-boston-judge-2024-07-03](https://www.reuters.com/legal/transactional/column-draftkings-digital-trading-cards-are-securities-boston-judge-2024-07-03)

Alison Frankel

A DraftKings logo is displayed on a board inside of the DFS Players Conference in New York November 13, 2015. REUTERS/Lucas Jackson Purchase Licensing Rights [↗](#), opens new tab

July 3 (Reuters) - If you are a fantasy sports betting aficionado, you are probably aware of Marketplace, a site where customers of the fantasy sports company DraftKings can buy or trade DraftKings-created digital trading cards of football players, UFC fighters and pro golfers.

DraftKings (DKNG.O) [↗](#), opens new tab customers can use those digital trading cards to play an online game called Reignmakers, assembling teams of players whose cards they own and pitting their teams against those of other card owners to win cash prizes.

DraftKings bills Marketplace and Reignmakers as a way for customers to build their own fantasy franchises and compete all season long based on the performance of their athletes.

But that's not all they are, according to a ruling [↗](#), opens new tab on Tuesday from a federal judge in Boston.

U.S. District Judge Denise Casper held that DraftKings customers can proceed with a lawsuit alleging that the digital trading cards sold at Marketplace and used to play Reignmakers are securities under the U.S. Supreme Court's longstanding Howey test [↗](#), opens new tab. The judge denied DraftKings' motion to dismiss [↗](#), opens new tab a prospective class action by customers who claim [↗](#), opens new tab to have been induced to buy the digital trading cards, or nonfungible tokens, by DraftKings' promises of profitability.

Under Casper's reading of plaintiffs' allegations, Marketplace is not merely the digital-era equivalent of a baseball card shop or a collectibles dealer peddling Pokemon cards. It is a securities exchange — and DraftKings is an alleged dealer-broker of unregistered securities.

Casper said the plaintiffs, at least at this stage of the case, satisfied the Howey test [↗](#), opens new tab, which defines securities (or investment contracts) as investments of money in a common enterprise with the expectation of profits that are solely derived from the efforts of the issuer or promoter.

Neither DraftKings nor its lawyers from Sullivan & Cromwell and Wilmer Cutler Pickering Hale and Dorr responded to my query on Casper's ruling. Plaintiffs' lawyers at Kirby McInerney also did not respond.

As Casper noted in Tuesday's ruling, she is not the first judge to conclude that NFTs are securities and that NFT issuers can be liable for selling unregistered securities. U.S. District Judge Victor Marrero ruled [last year](#) that Dapper Labs' digital trading cards, which depicted highlights from National Basketball Association games, met the Howey test for securities. Dapper Labs, which allegedly reaped \$112 million from the original sale of the NBA NFTs and \$41 million from commissions on their resale, has since reached a preliminary \$4 million settlement with a class of customers who bought the NFTs.

In addition, the U.S. Securities and Exchange Commission reached settlements last year with two other NFT issuers it accused of selling unregistered securities. Impact Theory, which raised nearly \$30 million from the sale of NFTs, agreed to pay a \$500,000 fine to the SEC. Stoner Cat, which raised \$8.2 million from NFT sales, agreed to a \$1 million fine to the regulator.

DraftKings' profits allegedly dwarfed those in the other cases in which NFTs were deemed securities. The class complaint asserts that the company "reaped, or will reap, hundreds of millions of dollars in profits" from the sale or resale of its digital trading cards.

DraftKings' lawyers tried in their dismissal motion to distinguish between the fantasy sports site's NFTs and those at issue in the Dapper Labs case.

For one thing, they argued, the DraftKings cards have a real use: They are the means by which DraftKings customers can play the Reignmakers game. And the cards' value, DraftKings argued, is not entirely dependant on the company's actions. The price of each digital card, the company said, can rise or fall based on the performance of the athlete it depicts — a factor entirely divorced from DraftKings' control. Moreover, DraftKings said, customers can (at least theoretically) trade its digital cards on a public blockchain. By contrast, the Dapper Labs NFTs could be traded only on a proprietary blockchain.

DraftKings also disputed allegations that customers reasonably considered themselves to be engaged in a joint enterprise with the company and each other to drive up the value of the NFTs. It rebutted plaintiffs' claims that DraftKings insiders hyped the investment potential of the digital cards, arguing that such pronouncements were from outside commentators, not company executive.

DraftKings also argued that the whole point of the Reignmakers game is to pit NFT purchasers against one another, not to cast them as investors with a common goal.

Casper said that some of the company's arguments might eventually undermine plaintiffs' theory when the facts are fleshed out in discovery. But at the dismissal stage, the judge said, plaintiffs plausibly alleged that customers who bought DraftKings NFTs believed that the company was committed to pumping up the value of the digital cards for their mutual benefit.

“Although the NFTs are non-fungible assets whose prices do not uniformly rise and fall,” Casper wrote, “it is still plausible for this court to infer, and for plaintiffs to expect, that if DraftKings drummed up additional demand for its NFTs while limiting the supply, that the value of most NFTs in the ecosystem would rise.”

The market for NFTs, as you know, has dried up since its heyday a few years ago. But what’s especially interesting about the DraftKings case is that the company continues to issue new digital trading cards, albeit without calling them NFTs at the Marketplace or Reignmakers websites.

This class action, in other words, isn’t a mere relic of the bygone NFT era but an ongoing headache for a blockchain early adopter.

Read more:

US regulator fines Stoner Cats creator for offering NFTs

LA media company settles first SEC enforcement case over NFTs

U.S. judge permits lawsuit claiming NBA Top Shot NFTs are securities

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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.

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kw=Zantac%20Plaintiffs%20Move%20for%20Judge%20to%20Recuse%20Over%20Alleged%20Conflict&utm_position=2&utm_source=email&utm_medium=enl&utm_campaign=morningupdate&utm_c



NOT FOR REPRINT

Zantac Plaintiffs Move for Judge to Recuse Over Alleged Conflict

"While I offer no opinion as to whether Judge [Josua] Roberts harbors any actual bias in favor of pharmaceutical companies, specifically including GSK, there are many reasons why Judge Roberts' ability to rule impartially in this case may reasonably be questioned," plaintiffs' counsel wrote.

July 05, 2024 at 02:36 PM

Judicial Ethics

By Aleeza Furman | July 05, 2024 at 02:36 PM



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

The plaintiffs in Philadelphia’s mass tort over the antacid Zantac are asking the supervising coordinating judge to recuse himself from the case.

The plaintiffs contend that Judge Joshua Roberts of the Philadelphia Court of Common Pleas has ties to a key drugmaker defendant through his wife’s position at an Am Law 200 law firm representing the company in the national litigation.

“Although these issues in no way call into question counsels’ belief that this honorable court will expend every effort to always proceed ethically with the intention of ruling without bias, the appearance of impropriety and potential for unconscious bias compel plaintiffs’ counsel to move for recusal in order to protect the interest of plaintiffs in this litigation,” the plaintiffs said in a [motion](#).

The plaintiffs moved for recusal after Roberts disclosed that his wife, Shannon McClure, is a partner at Reed Smith, which represents Zantac manufacturer GlaxoSmithKline in litigation over the drug.

The law firm has performed Zantac-related legal work for GSK in multiple states, according to the motion. Though Reed Smith’s Zantac work for GSK did not extend to Pennsylvania, the plaintiffs asserted, Reed Smith was involved in the Philadelphia mass tort through its representation of a different pharmaceutical company that is no longer actively part of the case.

Plaintiffs in the Zantac litigation generally allege that the over-the-counter heartburn medication, which the U.S. Food and Drug Administration recalled in 2020, caused various forms of cancer.

The plaintiffs do not allege that McClure, who works in Reed Smith’s global commercial disputes group, is directly involved in the Zantac litigation. However, they argue that McClure’s role at her firm means she—and, by extension, her husband—has a stake in the litigation’s outcome.

“Your Honor’s spouse is a partner at Reed Smith, which means she shares in the profits of the firm, regardless of which clients she represents,” the plaintiffs claimed. “Her income, therefore, is tied in part to fees generated from two clients who are defendants here. As her spouse, Your Honor directly benefits from those distributions.”

Neither Roberts nor McClure responded to requests for comment.

A spokesperson for GSK, which is represented in the Philadelphia mass tort by Dechert, declined to comment.

Before filing the motion for recusal, plaintiffs counsel sought an ethics opinion from retired U.S. District Chief Judge Lawrence Stengel of the Eastern District of Pennsylvania, now a shareholder at Saxton & Stump.

In his review of the matter, Stengel [determined](#) that Roberts’ connection to GSK could potentially raise concerns about the appearance of impropriety or bias.

He found that Reed Smith appears to derive a significant portion of its business from its pharmaceutical practice and that GSK appears to be an important client for the firm. He also noted that several Reed Smith attorneys regularly author posts, many about Zantac, for a pro-defense blog.

“While I offer no opinion as to whether Judge Roberts harbors any actual bias in favor of pharmaceutical companies, specifically including GSK, there are many reasons why Judge Roberts’ ability to rule impartially in this case may reasonably be questioned,” Stengel wrote.

Anapol Weiss shareholder Tracy Finken, who represents plaintiffs in the Philadelphia mass tort, did not respond to requests for comment.

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NATIONAL LAW JOURNAL

Chicken Cartel Attorneys' Fees Fall Slightly to \$51.7 Million

By Justin Wise

Documents

[Docket](#)[Opinion and Order](#)

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- Judge's original attorney fee award was \$57.4 million
 - Court found market rate for antitrust fee awards of 30%

Bloomberg Law News 2024-07-08T09:55:42621144049-04:00

Chicken Cartel Attorneys' Fees Fall Slightly to \$51.7 Million

By Justin Wise 2024-07-05T11:45:31000-04:00

- Judge's original attorney fee award was \$57.4 million
- Court found market rate for antitrust fee awards of 30%

Attorneys who spearheaded a cartel class action against some poultry giants are set to receive \$51.7 million under a slightly reduced fee award that stemmed from objections raised by a class member.

The figure is 30% of the \$172.2 million deal that Tyson Foods Inc., Koch Foods Inc. and Pilgrim's Pride Corp. reached with a class of "direct purchasers," according to a July 3 opinion from Judge Thomas M. Durkin of the US District Court for the Northern District of Illinois.

Attorneys are due to receive about \$5 million less than Durkin's original award, which represented a third of the settlement size.

The Seventh Circuit in August ordered the court to reevaluate the fee after siding with class member John Andren's objection. The court asked the judge to factor in bids made by attorneys in auctions in comparable cases and the decision by courts to award lower fees.

Under a new analysis, Durkin concluded that the “best evidence” of the market rate for attorneys fees in antitrust cases across the country is 30%. “This result suggests a downward departure from the one-third fee the court previously awarded,” Durkin said.

Ted Frank of the Hamilton Lincoln Law Institute, an attorney for Andren, said in an email Friday that they’ll “evaluate over the next few weeks whether it makes sense to appeal.”

“We’re happy about the reduction of a bit over \$5 million, though it’s less than we feel appropriate,” Frank said. “The opinion has some internal inconsistencies and we think it contradicts the mandate in places.”

The case against Tyson, Koch, and Pilgrim’s, a subsidiary of Brazilian meatpacking giant JBS SA, centered around an alleged scheme to exchange nonpublic information and fix the prices for chicken broilers. It was among a wave of cartel cases focused on the agriculture and livestock businesses.

Companies including Sanderson Farms Inc., Perdue Farms Inc., and Tyson Foods Inc. have reached settlements totaling about \$70 million to resolve separate antitrust claims from farmers. Pilgrim’s Pride Corp. last month also reached a settlement with farmers for an undisclosed figure, a move that came after a judge set a trial for 2025.

Attorneys representing the direct purchasers include Lockridge Grindal Nauen PLLP and Hagens Berman Sabol Shapiro LLP.

The case is *In re Broiler Chicken Antitrust Litig.*, N.D. Ill., 1:16-cv-08637, 7/3/24.

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Litigation claiming acne meds turn to benzene hits Harris Pharmaceutical

legalnewsline.com/stories/661439609-litigation-claiming-acne-meds-turn-to-benzene-hits-harris-pharmaceutical

July 3, 2024

SAN DIEGO (Legal Newsline) - One of the dozens of lawsuits started by a lab that heated acne medicine to show it would turn into benzene targets the Harris brand of products.

A class action lawsuit was filed June 25 by Laura Willis Albrigo against Harris Pharmaceutical, Inc. in the United States District Court for the Southern District of California.

The suit alleges that Harris Pharmaceutical's benzoyl peroxide (BPO) acne treatment products contain or degrade to form unsafe levels of benzene, a known human carcinogen.

The complaint cites findings from Valisure LLC which detected high levels of benzene in BPO products, including those marketed by Harris Pharmaceutical. Valisure did so by heating the products to 170 degrees Fahrenheit for significant periods of time.

Valisure's testing often jumpstarts lawsuits but has been criticized by the federal Food and Drug Administration.

The plaintiff claims that the presence of benzene was not disclosed on product labels and that consumers were misled about the safety of these products. The lawsuit seeks damages, attorneys' fees, costs, interest, restitution, and other equitable relief.

Adam Apton of Levi & Korsinsky represents the plaintiff.



NOT FOR REPRINT

Just the Tip of Iceberg as Bellwether Plaintiffs Get \$10.3M in Arbitration

"The overwhelming evidence revealed that Respondents' false, misleading, deceptive, and unconscionable conduct gave Claimants a false sense of security," AAA Panel Chair Raul A. Gonzalez said.

July 05, 2024 at 03:26 PM

Mass Torts



Adolfo Pesquera



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

What You Need to Know

- A U.S. Army family that lived at Fort Hood was awarded \$10.3 million in economic and mental anguish damages because of a black mold infested home.
- This was a bellwether arbitration case to establish findings for 104 families subject to mass arbitration rules.
- The panel found the privatized housing defendants acted unconscionably and trebled damages.

A former U.S. Army family who resided at Fort Hood was awarded \$10.3 million in economic damages and mental anguish after suffering from a black-mold-infested house.

The plaintiffs were one of 10 families who sued the defendants in 2020 in federal district court but were forced to proceed with their claims individually through arbitration.

Their case was a bellwether case that has implications for more than 100 other lawsuits that fall under mass arbitration rules.

Sgt. Jason Kiernan, wife Sarah Kiernan and their three minor sons were represented by Frank Guerra, Jennifer A. Neal and Robert Brzezinski of Guerra LLP, and Ryan C. Reed of Pulman, Cappuccio & Pullen.

"This important ruling proves that military families like the Kiernans have the right to expect safe homes and they are right in holding these companies accountable. Mold is a terrible risk to those exposed to it at home—and the evidence shows these companies could not have cared less," Guerra claimed.

"Our service members and their families cannot be expected to live in fear of their homes and continue to be abused by the corporate-controlled military housing system," Reed said.

Former Texas Supreme Court Justice Raul A. Gonzalez chaired the three-member arbitration panel. Gonzalez noted the Kiernans causes of action included violations of the Deceptive Trade Practices Act, breach of statutory implied warranty of habitability, breach of contract, gross negligence and statutory fraud in real estate transaction.

The respondents, Fort Hood Family Housing LP, FHFH Inc., and Lendlease US Public Partnerships LLC asserted the Federal Enclave Doctrine barred the claims A federal enclave is a land held by and under the control of the federal government that was given to the federal government by a state, Gonzalez said.

The Husch Blackwell firm represented the defendants, but did not respond to requests for comment.

The panel found the respondents failed to show the housing units are located on real property for which exclusive legislative jurisdiction was ceded by Texas and accepted by the federal government, according to the arbitration award.

The Kiernans were among numerous families living on Fort Cavazos, which was Fort Hood at the time, that brought complaints about living conditions.

Sarah Kiernan became pregnant with her third son while living on privatized base housing and complained of health concerns. She underwent a C-section Feb. 6, 2019 and soon after noticed respiratory issues with her newborn. He had to be life-flighted to Dell Children's Medical Center where he stayed in pediatric intensive care for 20 days.

On May 15, 2015, one of their sons was playing in the home when he fell through a room wall, exposing mold in the walls. Within weeks, a family doctor penned a letter advising concern for the family's health if the continued to live in the home.

"The Kiernans lived in a rotation of hotel rooms for three months until a military transfer could be made," the award states.

The panel made numerous findings against the respondents, including that business records used code words to hide "mold" from the maintenance histories; the Kiernans were told annual preventative maintenance included HVAC duct cleaning but the last cleaning was in 2008.

"To aid in its deception, the testimony revealed that FHFH took advantage of the involvement of the families' chains of command in the housing problems which created increased stress, anxiety, uncertainty, and worry for the Kiernans' military life through possible employment repercussions to Mr. Kiernan and a loss or reduction of family medical benefits," the award said.

The respondents' history of underreporting issues and under-maintaining homes resulted in significant and repeated mold growth inside the homes respondents leased to the captive audience of service-members and their families, the award said.

"The overwhelming evidence revealed that Respondents' false, misleading, deceptive, and unconscionable conduct gave Claimants a false sense of security that the home was properly repaired and was safe for them to occupy with families and infants," the award said.

The award for economic damages for housing, medical and other expenses was \$2,361,963 and trebled to \$7,085,890. Mental anguish damages, after being trebled, was \$2,922,245. Pre-judgment interest was \$304,517.

The arbitration panel reserved jurisdiction to assess the award for attorney fees at a later date.

A National Issue

Neal of the Guerra firm said shoddy housing for military families has led to litigation across the United States.

The Department of Defense began to outsource its housing of troops in the 1990s under the Military Housing Privatization Act, signing contracts with private companies for terms as long as 50 years.

In addition to the other nine families that initially joined the Kiernans against the respondents in this case, the Guerra firm is representing 95 other families that come under mass arbitration rules.

The Kiernans were one of two bellwether cases to be tried before the same panel, Neal said. The other case was lost because of statute of limitations, but Neal said it was an outlier and the vast majority of cases do not have a statute limitations bar.

In addition, more than 30 families have cases pending that remained under federal court jurisdiction and a trial was held in June 2023, Neal said. One family from a group of 10 families prevailed at trial but the magistrate then granted defendants their motion for summary judgment on federal enclave jurisdiction and common law fraud.

All claims were removed except breach of contract, which severely restricts damages, Neal said.

“We appealed Magistrate Richard Farrer’s ruling July 3 to the (U.S. Court of Appeals for) the Fifth Circuit,” Neal said.

She said because of that appeal, more than 25 other cases before other federal district court judges have been stayed pending the appellate court’s decision.

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The battle over J&J's bankruptcy plan to end talc lawsuits

[reuters.com/investigates/special-report/usa-lawsuits-johnson-and-johnson-bankruptcy](https://www.reuters.com/investigates/special-report/usa-lawsuits-johnson-and-johnson-bankruptcy)

A REUTERS SPECIAL REPORT

Johnson & Johnson is locked in a bitter fight with lawyers opposing its third attempt to settle tens of thousands of lawsuits through a controversial bankruptcy-court maneuver. The women alleging J&J's talc products caused their cancer are caught in the crossfire.

By MIKE SPECTOR

Filed July 8, 2024, 10 a.m. GMT

Eron Evans died in 2016 at 41 of ovarian cancer, leaving behind two daughters. Her grieving mother, Darlene, blames Johnson & Johnson's Baby Powder – and she's pursuing a lawsuit her daughter started a decade ago, alleging the company's talc caused the deadly illness.

The 71-year-old Houston-area grandmother has drained her savings caring for the girls, she said. Now she and tens of thousands of other claimants face a July 26 deadline to vote on J&J's third attempt at a controversial bankruptcy maneuver that would cap its liability and set up a fund to pay victims.

"I don't know how much longer I can carry on," Evans told Reuters. "I feel pressure that I should probably vote 'yes.'"

Eron Evans, shown here with one of her daughters, died in 2016 of ovarian cancer at age 41. She had sued J&J alleging talc in its Baby Powder caused her disease.

After being rebuffed twice by federal courts, the \$350 billion healthcare giant is attempting again to end the litigation in a so-called "Texas two-step" bankruptcy. The maneuver involves offloading its talc liability onto a newly created subsidiary, which then declares Chapter 11. The goal is to use the proceeding to force all plaintiffs into one settlement – without requiring J&J itself to file bankruptcy.

But the company needs the votes of 75% of claimants before the subsidiary can ask a bankruptcy judge to impose the deal on all of them. J&J faces lawsuits from more than 61,000 plaintiffs but the figure swells as high as 100,000 when counting claimants who haven't sued, according to Erik Haas, J&J's global vice president of litigation. The company maintains its talc products are safe and do not cause cancer.

Some plaintiffs' lawyers, including Evans', are urging their clients to support the settlement. Her attorney, Jim Onder, called the offer a good-enough deal to take, given the alternative. Some of his clients, he said, are dying while the legal fight drags on.

Darlene Evans, a 71-year-old Houston-area grandmother, is among tens of thousands of claimants facing a July 26 deadline to vote on J&J's proposal to settle its talc litigation in the bankruptcy proceedings of a J&J subsidiary.

"While no amount of money is ever enough for the horrific suffering these women have undergone, this is an opportunity to get money now and avoid many years of additional protracted litigation," Onder told Reuters.

But a coalition of other plaintiffs' lawyers is fighting back, saying J&J's bankruptcy maneuver should not be legally allowable – given that the company itself is immensely profitable – and that its \$6.48 billion offer is too low.

In a June 21 email to plaintiffs' lawyers seeking their support, J&J's lead settlement attorney, Jim Murdica, accused attorneys leading the opposition of turning settlement talks into a "flame throwing war" of overheated rhetoric aimed at J&J and fellow plaintiffs' lawyers supporting its plan. The company alleges the holdout lawyers oppose its proposal out of greed, to extract hundreds of millions of dollars in additional fees that would be unavailable in a bankruptcy deal.

The lawyers who oppose J&J's plan, in turn, accuse the company of abusing the bankruptcy system to deny plaintiffs' right to pursue a jury trial or decide individually whether to settle. And they say J&J is rigging the settlement vote by recruiting clients with bogus claims, arising from cancers with less-proven links to talc, that the company would never pay outside of bankruptcy.

In a statement to Reuters, J&J's Haas dismissed such allegations and called its proposed settlement "one of the largest in the history of tort litigation." J&J, he said, "firmly believes its offer is fair and reasonable."

This summer's battle for votes, replete with the barbed rhetoric of a political campaign, could have profound implications on the fate of the Texas two-step as an emerging U.S. corporate defense strategy.

J&J is among a handful of major corporations that have tried the gambit, which seeks to resolve mass litigation in bankruptcy courts without exposing the company being sued to the consequences of Chapter 11, which can include damaging its market value and credit rating.

The strategy gets its name from a Texas law that enables the maneuver by allowing a legally imperiled company to split into two new firms: One to absorb liability and seek bankruptcy protection, the other to continue with business as usual.

Reuters has detailed the secret planning of Texas two-steps by J&J and other corporations in a series of investigative reports.

The creative legal maneuver, which J&J first undertook in October 2021, once promised to revolutionize the way corporations handled mass tort claims, providing a simple way to jettison the threat of jury trials. But J&J and other firms have met stiff resistance from some plaintiffs and judges, and none has succeeded in reaching a bankruptcy settlement after years of trying.

J&J says it now has “overwhelming” support from plaintiffs’ lawyers who have agreed to recommend the settlement to about 80,000 claimants they collectively represent, largely those with ovarian cancer.

Andy Birchfield from the law firm Beasley Allen is leading the opposition and pushing for a much larger settlement. He told Reuters he hopes to muster about 25,000 votes to block the bankruptcy, about half of which are his own clients.

J&J's Haas said Beasley Allen’s “obsessive anti-vote campaign is a last-gasp effort to stop the claimants from speaking for themselves.”

Erik Haas, the top litigation executive at Johnson & Johnson, appears before a September 19, 2023 Senate hearing entitled, “Evading Accountability: Corporate Manipulation of Chapter 11 Bankruptcy.”

In his June email seeking settlement support, J&J settlement attorney Murdica called for an end to “hyperbole and unnecessary personal attacks” by opposing lawyers. He told Reuters the message resulted in a subsequent “factual and accurate discussion” with some plaintiffs’ attorneys. Haas said some subsequently signed onto J&J’s proposed deal.

A bankruptcy settlement offers all claimants fairer compensation than trial courts, where most are likely to get nothing, Haas said.

A key contention in the litigation, which dates back more than 15 years, is that customers contracted cancer through exposure to asbestos-tainted talc in J&J’s Baby Powder. Mined talc can contain asbestos, a known carcinogen. J&J says its talc does not contain asbestos.

Related content

Going for Broke: How Corporate America uses bankruptcy to escape accountability

J&J agrees to resolve 42 U.S. states' talc investigations

J&J effort to resolve talc lawsuits in bankruptcy fails a second time

U.S. court rejects J&J bankruptcy strategy for thousands of talc lawsuits

J&J has won most cases that have gone to trial. But its losses include a Missouri verdict for ovarian-cancer victims that ultimately cost J&J \$2.1 billion. A plaintiff with mesothelioma – a deadly cancer that attacks a thin layer of tissue that covers many internal organs – won a \$260 million judgment from an Oregon jury in June. J&J vowed to appeal.

In the previous two Chapter 11 cases, a J&J subsidiary declared bankruptcy in hopes that claimants would vote to approve the settlement after the filing. This time, J&J hopes to garner support from 75% of claimants and have a subsidiary file a “prepackaged” bankruptcy with the necessary votes in hand.

Under this bankruptcy plan, should it survive legal challenges, payouts for individual cases would be determined by administrators of a trust created to pay claims. The average payout for an ovarian cancer claim is likely to fall between \$75,000 and \$150,000, according to an estimate by J&J's subsidiary in bankruptcy plan documents reviewed by Reuters.

Birchfield and his allies accused the company in a statement of trying to “stuff the ballot box” by reaching settlement agreements with lawyers representing claimants suffering from diseases with no scientific link to talc. They allege J&J is paying off these weak cases, which it would never otherwise settle, in exchange for the votes it needs.

Haas, J&J's litigation executive, called the ballot-stuffing argument a smear tactic and said the company has “no choice but to propose a plan that addresses claims beyond ovarian cancer” to achieve “global peace.” He said Birchfield and other plaintiffs' lawyers have filed

such cases in trial courts.

Birchfield said he has no plans to pursue cases in trial courts that don't support an ovarian cancer diagnosis, and that his office is still seeking medical records for some claims. His firm's only objective, he said, is to get "fair value" for its clients.

While J&J recruits votes for a deal, Birchfield has launched his own campaign, sending emails to fellow plaintiffs' lawyers urging them to hold fast against J&J's plan. A June email reviewed by Reuters called J&J's effort a "scam" to evade accountability.

"The stakes could not be higher," the email said.

Johnson & Johnson company offices are shown in Irvine, California. The company faces tens of thousands of lawsuits alleging its talc products caused cancer. REUTERS/Mike Blake

A change of venue

For J&J, the enduring allure of Chapter 11 lies in the fact that bankruptcy judges, unlike trial-court judges, can enforce global settlements that permanently halt all related lawsuits and forbid new ones. Otherwise, any settlement with some clients would still leave holdouts or future plaintiffs with the right to sue – and leave J&J exposed to the kind of multibillion-dollar verdicts that made it resort to a two-step in the first place.

J&J's previous two-step bankruptcies in New Jersey, where the company is headquartered, were rejected on the grounds that its subsidiary lacked the "financial distress" required for bankruptcy protection because it could access billions of dollars in J&J's money to pay claims. So J&J's subsidiary plans to file in Texas this time, where some legal experts say it could get a different opinion on the financial-distress standard.

The first rejection of J&J's strategy on those grounds came from the 3rd U.S. Circuit Court of Appeals in Philadelphia, which ruled against its initial two-step bankruptcy in January 2023.

J&J's subsidiary nevertheless filed a second bankruptcy in April 2023. The case went to U.S. Bankruptcy Judge Michael Kaplan in New Jersey, the same judge who had ruled in favor of J&J's first two-step before the appeals court rejected it.

U.S. Bankruptcy Judge Michael Kaplan decided in July 2023 to dismiss J&J's second attempt to resolve talc litigation in the Chapter 11 proceedings of a subsidiary. REUTERS/Leah Millis

This time, Kaplan was skeptical. J&J had reduced the amount of money backing its subsidiary from about \$61.5 billion in the first bankruptcy to \$30 billion in the second in an effort to convince the court that the subsidiary meets the financial-distress standard. Kaplan said the reduction in money available to J&J's subsidiary appeared "manufactured" to get around the appeals court's ruling and decided to dismiss the bankruptcy in July 2023 for failing to meet the appeals-court standard that the subsidiary's distress must be "imminent" and "immediate."

The judge, however, urged J&J and claimants to "build upon the remarkable progress" made toward reaching a settlement and consider pursuing a resolution in another kind of bankruptcy proceeding.

'Fraudulent' claims?

J&J believes it will get the claimant support it needs for its third two-step. The company removed some of the opposition by settling – outside of bankruptcy court – with claimants who had previously helped derail its Chapter 11 plans.

By May, J&J had reached agreements to settle almost all claims from people with mesothelioma. J&J declined to disclose the total it paid but sources familiar with the matter said it was about \$2 billion. In June, J&J agreed to pay about \$700 million to U.S. states alleging the company misled consumers about the safety of its talc products.

The majority of the remaining cases involve ovarian cancer. The claims arising from that disease and mesothelioma have been considered the strongest cases by plaintiffs' lawyers because scientific evidence, while mixed and disputed by J&J, links the illnesses to talc.

Birchfield alleges J&J is weaponizing thousands of "fraudulent" claims related to other diseases – including cervical, vaginal and uterine cancers – as a strategy to overwhelm the objecting votes of ovarian-cancer plaintiffs.

The total number of claims allegedly involving diseases without clear connections to talc isn't known. But it could be enough to decide the outcome of a potentially close vote based on J&J's estimates of total claims.

J&J recruited one key plaintiffs' lawyer who had initially opposed its two-step bankruptcy in part by agreeing to settle in Chapter 11 with about 9,000 of his clients with uterine cancer, according to the attorney's testimony in J&J's second subsidiary bankruptcy. That lawyer was Onder, who represents a total of 21,000 clients, including those with ovarian cancer.

That's a potentially decisive voting bloc for J&J. Haas said in a May investors call the company faces between 85,000 and 100,000 total claims, "depending upon the ultimate process that we go through in vetting those claims."

Birchfield argues J&J has little incentive to weed out bogus claims because they could provide the critical 'yes' votes it needs for a Chapter 11 settlement.

Onder first agreed to support J&J's settlement during its second bankruptcy attempt. Under questioning at the time from another plaintiffs' lawyer opposing the deal, Onder acknowledged that J&J had agreed to pay his clients for uterine-cancer claims it wouldn't otherwise settle outside of bankruptcy.

J&J is actively recruiting to drive up the number of claims, Birchfield says.



Watch Video At: <https://youtu.be/ucbt1z2LNMs>

J&J is running advertisements to alert potential claimants to vote on its bankruptcy plan by July 26.

"Attention talcum powder users!" declares one ad running on YouTube and paid for by a J&J subsidiary. "Have you had ovarian or gynecological cancer?" J&J's settlement "will pay those who believe they got sick from using talc products," the ad continues. "You have until July 26, 2024, to vote to accept or reject the plan."

The ad directs potential claimants to a website that says J&J's plan covers "any talc-related" claims involving "bodily injury, death, sickness, disease, emotional distress, fear of cancer, medical monitoring, or other personal injuries (whether physical, emotional, or otherwise)." There's no guarantee any particular claim will be paid, the site says.

The ad is part of a required effort when soliciting votes on a bankruptcy plan to alert potential claimants, Haas said.

Birchfield takes issue with J&J's solicitation of claims beyond ovarian cancer in the campaign, which spans television, radio, newspapers and online media. The intent of such efforts is to rig the vote, Birchfield argues.

“The magical appearance of tens of thousands of unsubstantiated cases could dilute the entire pool of plaintiffs” and provide the votes J&J needs, Birchfield and another attorney warned in a May email blast urging other lawyers to fight J&J's settlement.

Andy Birchfield, an attorney at law firm Beasley Allen, is a leading opponent of J&J's third attempt to settle talc lawsuits in the bankruptcy proceedings of a subsidiary. REUTERS/Andrew Kelly

‘Pure greed’

J&J's lawyers have launched counterattacks on attorneys representing the holdouts, especially Birchfield. The company alleges Birchfield and his firm are undermining their clients' best interests to get a bigger payout for themselves.

Plaintiffs' lawyers commonly charge their clients contingency fees – a cut of any settlement or trial judgment. The lawyers' share is often a third, though it varies.

Birchfield charges 40% of a settlement or judgment. But he and other lawyers also stand to collect additional compensation for their work on a steering committee overseeing most of the trial-court cases J&J faces, which are consolidated in a New Jersey federal court. The additional fees and expense reimbursements could total between 8% and 12% of any settlement, according to Birchfield and a court filing.

Haas calls such fees a “tax” and “windfall” unavailable to Birchfield in bankruptcy, attributing their opposition to “pure greed.”

Birchfield maintains he puts his clients' compensation before his own.

In a separate line of attack, J&J has asked the federal judge overseeing more than 57,000 talc legal actions, also in New Jersey, to ban Birchfield from the litigation.

The company alleges Birchfield and a former J&J attorney had formed an improper alliance to present a proposal for a much larger \$19 billion settlement, which at the time included the since-settled cases from U.S. states and mesothelioma claimants. Haas called the settlement proposal “delusional” and the partnership a “shockingly egregious” violation of attorney-client privilege between J&J and its former lawyer. Birchfield dismissed the allegation as a baseless effort to bully his clients.

‘Ridiculous’

Elizabeth Onkalit, 44, is among the clients of Birchfield's firm who oppose J&J's proposal.

"It sounds like it's a ton of money," she said. "But when it comes down to it, there are so many people that were affected by this. It's just not adequate."

She was 28 when an oncologist diagnosed her with stage-four ovarian cancer at a Denver hospital in 2008, she said. She blames Baby Powder.

"Honestly, it seems like a joke. It's just ridiculous. They don't want to take care of the people they hurt."

The disease had spread to her stomach, lungs and lymph nodes. She had her ovaries removed and endured chemotherapy. She's now in remission, she said, and struggling to conceive a child through in vitro fertilization. She doesn't understand how J&J can keep filing multiple bankruptcies to delay compensating victims and force them into one settlement.

"Honestly, it seems like a joke," Onekalit said of J&J's plan for a third bankruptcy. "It's just ridiculous. They don't want to take care of the people they hurt."

Elizabeth Onekalit sued J&J alleging that its Baby Powder caused her ovarian cancer. She's opposing the company's proposed settlement in bankruptcy court. REUTERS/Kevin Mohatt

Haas said J&J empathizes with Onekalit and all claimants with cancer but denied the company caused it.

Evans, the Texas grandmother who cared for her late daughter's children, is angered by J&J's repeated bankruptcy maneuvers. But she said she might support the settlement anyway because she's weary of the endless legal battle and worries about fellow plaintiffs who could also use the money.

Regardless, Evans said, the proposed payout doesn't amount to justice.

Baby Powder, she said, had been a staple in their home. She had grown up using it herself and used it on all of her children. "I doused them in it," she said.

She thinks about how her daughter missed so many milestones in her children's lives.

"You've got to ask yourself: What's the price tag on that?"

Bankruptcy battle

By Mike Spector

Photo editing: Corinne Perkins

NFL asks judge to toss \$4.7 billion 'Sunday Ticket' antitrust verdict

 [reuters.com/legal/litigation/nfl-asks-judge-toss-47-billion-sunday-ticket-antitrust-verdict-2024-07-05](https://www.reuters.com/legal/litigation/nfl-asks-judge-toss-47-billion-sunday-ticket-antitrust-verdict-2024-07-05)

Mike Scarcella

The NFL logo is pictured at an event in the Manhattan borough of New York City, New York, U.S. [REUTERS/Carlo Allegri/File Photo Purchase Licensing Rights](#) , opens new tab

July 5 (Reuters) - The National Football League has asked a judge to throw out a \$4.7 billion class action jury verdict, calling the amount "nonsensical" and denying that evidence showed subscribers of its "Sunday Ticket" telecasts had been overcharged.

"The verdict in this case is at once among the largest in American history and also among the least defensible," the NFL said , opens new tab in its Wednesday filing, which asked the court to either overturn the jury's award or grant a new trial.

A Los Angeles federal jury determined on June 28 that the NFL used agreements with broadcast partners to restrict the availability of "Sunday Ticket," allowing DirecTV to charge artificially higher prices as its former sole distributor.

The jury awarded \$4.6 billion based on 24.1 million residential subscriptions throughout the 12-year class period, and \$96.9 million based on about 506,780 commercial subscriptions for bars and restaurants, court records show.

A residential subscription to "Sunday Ticket" now costs as much as \$449 through its current distributor, Google's YouTube. DirecTV and Google were not defendants in the trial.

U.S. antitrust law allows for the tripling of damages awards, and the plaintiffs asked U.S. District Judge Philip Gutierrez on Tuesday to award them more than \$14 billion.

"Sunday Ticket" is the only broadcast option for fans to watch their teams play out-of-market games. The lawsuit claimed "Sunday Ticket" prices were inflated to limit subscriptions and protect distribution rights fees that CBS and Fox paid to air games in local markets.

The NFL and attorneys for the plaintiffs did not immediately respond to a request for comment.

The league argued in its post-verdict filing that the court should have barred two "unreliable" experts for the plaintiffs from testifying.

Jurors did their "own unfounded math," the NFL said. The amount they awarded unfairly used the list price for "Sunday Ticket" and treated subscriber discounts as overcharges, according to the NFL.

The NFL said allowing the verdict to stand will "threaten to upend the entire structure by which content is created, distributed, and priced."

A hearing in the case is scheduled for July 31.

In re: National Football League's "Sunday Ticket" Antitrust Litigation, U.S. District Court, Central District of California, 2:15-ml-02668.

Read more:

NFL hit with \$4.7 billion verdict in 'Sunday Ticket' antitrust trial

NFL must face trial in 'Sunday Ticket' class action, US judge rules

NFL must face class action lawsuit over 'Sunday Ticket' prices

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Reporting by Mike Scarcella

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Citing juror bias and 'nonsensical' calculations, NFL moves for \$4.7B jury verdict to be set aside

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Jul. 8, 2024

In its motion, the NFL claims errors at the June trial led to the improper verdict, including the jury's use of a phone calculator that wrongfully identified and multiplied overcharges during the class period.

Attorneys representing the National Football League in its "Sunday Ticket" antitrust action said the calculations informing the jury's \$4.7 billion verdict against the league last month were irrational and reflected "speculation" and "guesswork" that was influenced by a failed price-fixing conspiracy theory brought by the plaintiff class and a biased juror.

"The verdict in this case is at once among the largest in American history and also among the least defensible," the NFL's defense counsel at Wilkinson Stekloff LLP and Covington & Burling LLP wrote in a judgment motion Wednesday. "Plaintiffs failed to prove the existence of the overarching conspiracy they have repeatedly contended was the basis for the suit and the jury was improperly tainted by a biased juror."

The NFL's motion follows a month-long trial where an 8-person jury in Los Angeles found the league violated Sections 1 and 2 of the Sherman Act with its licensing of out-of-market Sunday afternoon football games via its Sunday Ticket broadcast package. The plaintiffs' class, represented by attorneys at Susman Godfrey LLP, Hausfeld LLP and Langer Grogan & Diver PC, convinced jurors that the league colluded with DirecTV from 2011 to 2023 in a scheme to keep Sunday Ticket at an artificially high subscription price to drive traffic to local networks, CBS and FOX, and force a majority of fans to watch a limited selection of free, over-the-air games. *In re: National Football League's Sunday Ticket Antitrust Litigation*, 2:15-ml-02668 (C.D. Cal., filed Dec. 10, 2015).

The NFL argued Sunday Ticket was a complimentary, "premium product" and that the league offers several cheaper alternatives that expand beyond what's aired for free on local broadcasts. Separately, it contended that its network agreements are exempt from antitrust

scrutiny pursuant to the Sports Broadcasting Act, therefore allowing them to pool the rights of all 32 of its teams in a national package.

Over 2 million nationwide residential subscribers during the class period were awarded \$4.6 billion and nearly 50,000 commercial businesses were awarded \$97 million. Plaintiffs had originally sought \$7 billion in damages. The NFL's counsel argues the jury rejected the original damages figure and created their own model.

"The damage award is nonsensical: It represents the sum total of discounts that class members received - a number hastily calculated by a jury that quickly rejected plaintiffs' models. And the case plaintiffs presented that led to the verdict focused on belated, invented-for-trial claims supported only by contortions of inadmissible evidence. None of this is appropriate and the court's intervention is needed now," the NFL's counsel wrote in the motion. "This unprecedented verdict cannot stand. The court should enter a Rule 50 judgment, and conditionally (or alternatively) grant a new trial."

The plaintiffs' counsel declined to comment on the NFL's motion Friday. U.S. District Judge Philip S. Gutierrez is scheduled to hear oral arguments on the matter and could potentially issue a judgement ruling July 31.

In the motion, the NFL claims three errors at the June trial led to the improper verdict: the jury's use of a phone calculator that wrongfully identified and multiplied overcharges during the class period, an improper reinvention of the plaintiffs' price-fixing theory and the jury's rejection of expert analysis that detailed anticompetitive harm and less restrictive alternatives that "made clear that the verdict was based on balancing at step four" of the Four-Step Rule of Reason in antitrust law analysis.

Additionally, the NFL contends they have a right to a new trial based on juror partiality. "Juror 7 - the foreperson - had an improper financial stake in the outcome of the litigation but was allowed to remain on - and lead - the jury," the defense argued in the motion.

During jury selection, Gutierrez acknowledged that class members who paid for "Sunday Ticket," as well as their household members, had an improper financial interest in the case and would therefore create a potential for bias. "Defendants made an objection to Juror 7, who 'pays for' a household member's Sunday Ticket subscription. But the court rejected the challenge because Juror 7's household member was not a class member. That does not eliminate the possibility of bias, which is all the law requires."

#379604

DeWine and Husted compromised themselves for money, Goshay writes

[beaconjournal.com/story/opinion/columns/2024/07/07/dewine-and-husted-compromised-themselves-for-money-goshay-writes/74225939007](https://www.beaconjournal.com/story/opinion/columns/2024/07/07/dewine-and-husted-compromised-themselves-for-money-goshay-writes/74225939007)

COLUMNS

Charita Goshay: Mike DeWine and Jon Husted sold their political ambitions to FirstEnergy

Charita M. Goshay
Canton Repository



From the people who brought you "The Larry Householder Show" and "Coingate," now comes "The First Energy Follies" starring Gov. Mike DeWine and Lt. Gov. Jon Husted.

Several media outlets recently reported on emails from 2018 showing that Husted and DeWine were hip-deep in button-holing FirstEnergy executives for campaign donations. That largesse was rewarded with the passage of House Bill 6, which resulted in a \$1.3 billion bailout paid for by FirstEnergy customers.

Three FirstEnergy executives who hosted lavish fundraisers for DeWine and Husted have since been indicted on bribery and money-laundering charges. For his part, Householder has landed in the hoosegow for accepting \$61 million in bribes.

Husted and DeWine have said they didn't know that bribes were involved to push House Bill 6.

Here's the thing: Short of being caught with "a live boy or a dead girl" as the saying goes, there was no way DeWine, a former prosecutor, congressman and state attorney general who cleared the backlog of rape cases, was going to lose to Democrat Rich Cordray, who ran a campaign so lifeless, the ads could have been used to put colicky newborns to sleep.

DeWine has been in the game long enough to know that corporations and the people who run them don't hand candidates thousands of dollars as a gesture of good citizenship.

The grift that keeps on giving: Ohio's House Bill 6 bribery case is the scandal that won't go away

The emails suggest that Husted led the charge in securing dark-money campaign funds from FirstEnergy, whose executives also donated to DeWine's daughter's campaign for Greene County prosecutor, and paid a \$4.3 million bribe to the late Sam Randazzo, a former FirstEnergy executive who led the Public Utilities Commission of Ohio, to ensure he did their bidding.

DeWine was warned by his own adviser not to appoint Randazzo, but did it anyway.

Why? Was no one else on the planet qualified?

Randazzo and lobbyist Neil Clark, who was involved with the scandal, died by suicide.
(*Editor's note: This column was updated to note that Randazzo and Clark died by suicide.*)

Offering nothing more than "we followed the law," DeWine has been channeling "Hogan's Heroes" Sgt. Schultz, who famously declared "I know nothing! Sometimes I even forget whom we are fighting!"

Once upon a time, Ohio was a purple state, a bellwether which leaned conservative but never veered into Crazytown. Many Buckeyes are old enough to remember having governors from both major parties.

Corn-fed corruption:Ohio Assembly mocking democracy in the Heart of it All

But single-party domination and extremism has resulted in a bribery scandal of biblical proportions, gerrymandering, eliminating policies to ensure gun-safety, an attempt by the secretary of state to change how election results are calculated, and trying to pass draconian laws, thus proving yet again that absolute power corrupts.

Anyone who's lived in Ohio for five minutes knows that Republicans have always taken turns at being governor, that they avoid intraparty wrangling. Husted is widely expected to run in 2026, but thanks to the FirstEnergy scandal, those plans have struck an iceberg. That sound you hear, is state Attorney General Dave Yost tuning up his guitar as he prepares to jump the line.

But Yost has his own problems. Someone once wisecracked that the most dangerous place in America is to be between Yost and a TV camera. Back in 2023, he couldn't appear on Fox News quick enough to deny and dismiss reports that a 10-year-old Columbus girl underwent an abortion in Indiana after being raped by her mother's boyfriend.

The story not only turned out to be true, it became a key factor in Ohioans voting to enshrine abortion protections despite the GOP's best efforts to derail it.

Prior to that, Yost filed an amicus brief supporting Texas Attorney General Ken Paxton's bogus lawsuit claiming that the 2020 presidential election was rigged. Yost knew better but like U.S. Sen. J.D. Vance, he sacrificed his principles upon the altar of ambition.

All these factors give state Democrats a toehold toward competing for the governorship in 2026. If they were smart, they'd run these scandals on a loop. But as we've seen in recent years, Ohio Democrats have a bad habit of bringing a feather-duster to a knife fight.

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Ex-lobbyist serving 5 years after conviction in FirstEnergy bribery trial argues appeal

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July 3, 2024

Ex-lobbyist serving 5 years after conviction in FirstEnergy bribery trial argues appeal

Jake Zuckerman; cleveland.com

COLUMBUS, Ohio - A well-connected former lobbyist, sentenced in 2023 to five years in prison after jurors found he bribed a political operative with \$15,000 for private campaign information, argued to appellate judges last week that he did nothing illegal.

Matt Borges, once the chairman of the Ohio Republican Party who later worked as a political operative for FirstEnergy Solutions, told judges on the Sixth Circuit Court of Appeals that prosecutors relied on Borges' use of moblike language in text messages rather than their underlying substance when they accused him of racketeering.

"He was a lobbyist, not a politician," Borges' attorney Dennis Belli wrote. "He did not accept money to facilitate the passage of [House Bill] 6. He held no public office and had no ability to engage in official action. After passage of HB6, Borges worked as a private actor to defeat an effort by a group (funded by natural gas-utility interests) to repeal the legislation. The gravamen of his wrongdoing was offering a payment to an employee of a private corporation for so-called 'inside' information."

Borges, 52, was one of the initial five men arrested in July 2020, alongside ex-House Speaker Larry Householder. Prosecutors say Householder, a Glenford Republican, led a scheme in which he secretly accepted \$60 million from Akron-based FirstEnergy Corp. into a

nonprofit he controlled to spend for personal use and to engineer his rise to power. In exchange, Householder championed HB6, legislation that bailed out two nuclear plants owned by a FirstEnergy subsidiary to the tune of more than \$1.3 billion.

Last year, prosecutors presented to jurors evidence that Borges, hired by the company after HB6 passed to guard it against a repeal effort, deployed dirty political tricks and tapped into his personal political connections to protect the new law. That included paying a \$15,000 bribe to a repeal campaign operative for information on whether the organizers had gathered enough signatures to put the issue on a general election ballot; hiring private investigators to track political operatives affiliated with the repeal campaign; pushing Attorney General Dave Yost toward different legal interpretations to benefit FirstEnergy; organizing political contributions to allies who "helped" the company, and others.

"Characterizing Borges' lobbying activity as 'pressuring' the state's chief lawyer is pure drivel," his attorney wrote. "Borges did not hold an official position in state government. He therefore had no bully pulpit from which to pressure anyone. The government did not claim, much less prove, that Borges' contacts with the Ohio Attorney General exceeded the normal activities of a lobbyist."

Prosecutors, in a responsive filing, dismissed Borges' arguments. They recited the trial evidence, an array of undercover recordings, text messages, and testimony from a FirstEnergy Solutions lobbyist and the operative who accepted Borges' bribe at the behest of the FBI.

The jury, prosecutors say, convicted Borges because he knowingly participated in a pattern of illegal activity on behalf of a criminal enterprise. They said Borges didn't identify any significant legal error, and the evidence against him was overwhelming.

Borges is currently housed at FCI Milan, a federal prison outside Detroit. He's scheduled for release July 4, 2027.

Both Borges and Householder, who is serving a 20-year sentence, have filed appeals with the Sixth Circuit since they were convicted. The two men are the only defendants thus far to serve time in prison. Two men who pleaded guilty to racketeering in October 2020 - Householder political adviser Jeff Longstreth and FirstEnergy Solutions lobbyist Juan Cespedes - have not yet been sentenced. Two others accused in the scandal pleaded not guilty to related charges but died by suicide before trial. That includes Public Utilities Commission of Ohio chairman Sam Randazzo, who was accused of taking a \$4.3 million bribe from FirstEnergy before, among other favors, helping draft and pass HB6 from inside state government. FirstEnergy CEO Chuck Jones and senior vice president Mike Dowling have pleaded not guilty to state bribery charges and await trial.

FirstEnergy Corp., as a corporate entity, in July 2021 signed a deferred prosecution agreement with the prosecution. In addition to paying a \$230 million penalty, the company admitted to Jones and Dowling waging campaigns to bribe both Randazzo and Householder. Barring action from the U.S. Attorney's Office for the Southern District of Ohio, that argument is set to expire this month, at which time the government would drop a charge of honest services wire fraud against the company.

Jake Zuckerman covers state politics and policy for Cleveland.com and The Plain Dealer.

---- Index References ----

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NewsRoom

Matt Levine's Money Stuff: Paramount Did Its Deal

By Matt Levine 2024-07-08T14:28:56142-04:00

Paramount

There it is:

Paramount Global agreed to merge with Skydance Media in a deal that hands control of the storied Hollywood studio to producer David Ellison, ending one of the industry's most dramatic acquisitions.

As part of the complicated deal months in the making, Paramount Chair Shari Redstone agreed to sell her family's National Amusements Inc., which controls about 77% of the voting stock in Paramount, for \$2.4 billion, according to a statement released by the company Sunday.

The accord marks an abrupt turnaround after talks between Redstone and Ellison, the son of Oracle Corp. co-founder Larry Ellison, collapsed last month. Redstone's decision at the time to end discussions shocked the board and frustrated employees and investors, sending the stock tumbling.

The Ellison family and RedBird Capital Partners have agreed to invest more than \$8 billion in the business. That includes \$1.5 billion to help pay down Paramount's debt and \$4.5 billion to buy Paramount shares.

I suppose you can think of this deal as having three main parts:

- 1. The Skydance investors buy National Amusements to get control of Paramount. National Amusements [owns roughly 10% of the stock of Paramount](#), but Paramount has two share classes: Class A stock, which has voting rights, and Class B, which doesn't. And National Amusements owns roughly 77% of the voting Class A stock. So the Skydance consortium pays Redstone \$2.4 billion for National Amusements, and it gets voting control of Paramount.
- 2. Paramount then acquires Skydance: Paramount will merge with Skydance, giving Skydance some shares of new Paramount. This deal values Skydance at \$4.75 billion, and Skydance gets paid

in new (nonvoting) Paramount stock at \$15 per share.

- 3. The Skydance investors also kick in another \$6 billion of cash to buy Paramount shares: They buy \$1.5 billion of stock (nonvoting stock at \$15 per share) directly from Paramount to strengthen the balance sheet, and another \$4.5 billion from Paramount's shareholders. The \$4.5 billion goes first to non-Redstone holders of *voting* Paramount shares, at \$23 per share, for a total of up to \$211 million, though they can choose to roll over into new Paramount stock instead. (In which case they will get 1.53 nonvoting Class B shares of the new company per Class A share of the old company: In any case, the Skydance investors will end up with 100% of the voting stock.) And then the rest of the cash — about \$4.3 billion — goes to buying *nonvoting* Class B shares at \$15 per share. If every Paramount shareholder elects cash, then only about 43% of them will get cashed out. The rest will keep their nonvoting Class B stock in the new Paramount. As of noon today, Paramount's Class B shares were trading around \$11.47, so presumably everyone will elect cash and get prorated.

Those elements are sort of in declining order of importance. Step 1 is really the main thing: You can't do anything with Paramount without Shari Redstone's voting shares, and that means buying her out at a premium. And then buying out Redstone gives you control of Paramount. If you want to take over Paramount, make yourself chief executive officer and generally take control of its strategy, buying a block of 77% of the voting stock gets you most of the way there.

But Step 2 is also important to making the deal make sense for Skydance: They want to integrate their company with Paramount. The [investor presentation](#) touts the benefits of "unification of marquee rights" (because Paramount and Skydance co-produce various franchises like Top Gun, Mission: Impossible and Star Trek) and transitioning "to a world-class media and technology enterprise." Also it is optically appealing for this deal to involve a merger of two actual content companies, instead of just a group of investors taking over Paramount without paying for all of the shares.

And Step 3 is important to getting the deal through a special committee of independent Paramount directors. The deal makes sense for Redstone and Skydance with only Steps 1 and 2: Redstone would get her cash, and Skydance would get its merger and its control of Paramount, without paying any of Paramount's other shareholders anything. But Paramount's board of directors has fiduciary obligations to the nonvoting shareholders, and it wants them to get something too. Cashing out *all* of them at a premium would be too big an ask, but cashing out *almost half* of their stock, at a premium, is a compromise the board can live with. "We are pleased to have reached an agreement that we believe delivers to Paramount stockholders both immediate value and future upside opportunity," said [the special committee](#).

Meanwhile Redstone is getting roughly \$2.4 billion for National Amusements (including debt), [which](#)

[owns](#) about 31.5 million Class A shares and about 32 million Class B shares. At the deal prices (\$23 per Class A share, \$15 per Class B), National Amusements' stake in Paramount is worth about \$1.2 billion. The extra \$1.2 billion presumably accounts for National Amusements' chain of movie theaters, which are worth something. But it also presumably accounts for an extra premium for Redstone, who is essential to the deal, and whose Class A shares are just worth *more* than everyone else's. The other Class A shareholders have votes, but she has the votes that matter.

Empty voting

We have talked occasionally about a company called the Shareholder Vote Exchange, which briefly offered retail shareholders the opportunity to sell their shareholder votes. The idea was that retail shareholders tend not to vote their stock, and if you could set up a system where somebody (an activist shareholder running a proxy fight, or a company trying to fend off the activist) could pay them like 25 cents per share for their votes, then (1) that's found money for the retail holders and (2) maybe it makes proxy fights more competitive, or more efficient, or something.

This struck me as more of a fun thought experiment than a real business, and in fact SVE shut down in April after a pretty brief run. Meanwhile in the real world, institutional investors do have ways of buying. The dynamic is, roughly:

- Some people — activists and management in proxy fights and hostile takeovers — care quite a lot about votes.
- Other people — index funds, for instance — maybe don't.
- The *stock lending* market is where they meet to exchange cash for votes.

That is, intuitively, the stock lending market lets active investors borrow stock from people (mutual funds, exchange-traded funds, retail investors with margin accounts, etc.) who own it. The owners keep the economic ownership of the stock (if the stock goes up or down, they make or lose money), but, while they have loaned out the stock, they can't vote it. The borrowers pay the owners a fee to borrow the stock.

You can use this to pay for votes. Conceptually, there are several economically equivalent ways to do this:

- 1. The simplest form is that you borrow the shares from their owners, pay a lending fee, hold the shares, vote them, and then return them to the lenders.
- 2. More plausibly, you could “short against the box”: You *buy* shares, and you *also* borrow shares and sell them short. Buy 10 million shares (and get their votes), and at the same time borrow and short 10 million shares to hedge. You have no economic position, but you have 10 million votes.
- 3. You could do the same thing with derivatives: Buy 10 million shares (and get the votes), then enter into a swap where you short 10 million shares to hedge. (And then your swap counterparty, a big bank, presumably borrows and shorts shares to hedge the swap.)

In the first example, you neither buy nor sell shares, so you are flat, but you borrow the votes. In the second example, you *both* buy and sell shares, so you are flat, but you get the votes from the shares you buy. In the third example, you buy shares for cash and short them synthetically. They all come to the same place: You own no shares economically, but you get to vote them.

I am not sure that this actually happens a whole lot. When we first talked about SVE, I wrote:

My impression is that US activist hedge funds are more likely to do the *opposite*, acquiring economic exposure to more shares than they actually own. ... If you are going to spend money on research and lawyers and proxy fights to do an activist campaign, you want a lot of economic exposure, not just a lot of votes.

Still there is no particular reason to think it is impossible, particularly if buying the votes is cheap. A hedge fund called Politan Capital Management has been having a complicated [activist proxy fight](#) with a company called Masimo Corp., and its [latest filing](#) features [a letter](#) alleging “empty voting”:

We have observed that a brokerage firm associated with an investor who is a friend of [Masimo Chairman Joe] Kiani voted a major position – approximately 9.9 percent of the company’s outstanding stock – in favor of the company’s nominees. The number of shares voted at this brokerage firm exceeded the shares publicly reported to be owned by this investor by several multiples. That excess amount was accumulated at the brokerage in the period running up to the record date and then disposed of out of the same brokerage right after the record date. These share movements corresponded almost exactly with movements in and out of brokerages associated with firms that lend shares in the market. Further, in the same period of these share movements, the short interest in Masimo stock increased by similar amounts.

Upon reviewing this data, which was first made available to us on Monday, July 1, we believe it is likely that this investor has engaged in a pattern of trading that is known as “record date capture” and “empty voting” that provides the investor the ability to vote shares of which they do not have economic exposure. This trading strategy involves purchasing shares to be able to hold them on the record date and therefore be entitled to vote them, while simultaneously borrowing and shorting an equivalent number of offsetting shares in order to eliminate economic exposure to the stock. In these instances, the position is closed shortly after the record date, once the right to vote has been secured. Empty voting at this scale threatens to distort corporate democracy at Masimo, as a stockholder whose votes are divorced from their economic interests may not vote in a manner that is in the best interests of the company and all its stockholders.

This is a thing that academics, and people involved in proxy fights, like to complain about, but it does not actually seem to be a requirement of US shareholder voting that your economic interest match your voting rights. If people are willing to lend you their stock so you can vote it, I think you can just do that?

Private credit

Here is a crude stylized history of the development of private credit :

- 1. Once, companies (and private equity sponsors) borrowed money either from banks or in the bond market.
- 2. “From banks,” in that sentence, is a bit misleading: A lot of bank loans (particularly leveraged loans to fund private equity buyouts) are syndicated broadly to non-bank investors. Banks don’t just lend from their balance sheets and hold loans to maturity; they are largely in the moving business, not the storage business.
- 3. Then private credit was invented: Asset managers raised long-term locked-up funds from institutional investors, and they used those funds to make loans to companies (and private equity sponsors) directly, bypassing banks and the bond market.
- 4. Then private credit funds were like “well this is fine, but it would be even better if, instead of using our investors’ money to make loans, we could borrow some money to fund the loans.” Instead of taking \$100 of investor money, lending it out at 10%, and passing on the 10% returns to the investors, you take \$100 of investor money *plus* \$100 of borrowed money that costs 8%, you lend it out at 10%, you pay back your interest cost and you pass on 12% returns to your investors.
- 5. Banks were like “yes that sounds great.” Lending to private credit funds is a way to make up for

the business that private credit funds took from the banks: Private credit funds now compete with banks to make buyout loans, and when the private credit funds win those deals, the banks miss out on fees. But the banks can get some of the business back by lending to the private credit funds. Also, lending to private credit funds is structurally less *risky* for the banks than doing the buyout loans themselves: If the buyout goes bust and can't repay its loans, the private credit funds take the first loss and the bank has a senior position.

- 6. But banks still are in the moving business, not the storage business.
- 7. So eventually they ask questions like “what if we syndicated our loans to private credit funds, so that we don't have to hold them on our balance sheet”?

And so you get this, from [Christopher Whittall at IFR](#):

Citigroup is working on securing credit ratings for senior loans it makes to direct lenders to create more of a syndicated market where the bank can distribute these exposures to a wider range of investors.

The move comes amid a mushrooming in private credit markets over the past decade, coupled with a sharp rise in the amount of financing that banks provide to direct lending funds so they can leverage their portfolios of loans to middle-market companies.

The plans to encourage more investors to put their money into these senior loan facilities shows how banks' financing desks are struggling to keep pace with the rapid expansion of direct lending – and how these funds are becoming more deeply intertwined with the broader financial system.

“Private credit markets are growing at 8%–10% a year, but bank balance sheets clearly aren't growing at that rate,” said Mickey Bhatia, Citi's head of spread products. “Banks are now looking to create more of a syndicated market out of their senior loan book, but you need to get ratings in order to maximise the distribution of these loans.” ...

“The market has changed. In corporate bond trading the wallet [industry revenue pool] has declined sharply since 2020,” he said. “Private financing is where the growth is. These funds are growing and they need leverage, so they come to us for financing.” ...

Bhatia said senior loans to private credit funds attract risk-weighted capital of 20% for banks – a level he described as “optimal”. These financing facilities are typically secured against the assets of direct lending funds or against the funds themselves. The seniority of the loan provides banks with a thick

layer of insulation against default in the underlying direct lending portfolios, making it resemble the senior tranche of a mid-market collateralised loan obligation.

The rough sorting is:

- 1. Dedicated risk-taking private equity firms own the equity in companies.
- 2. Dedicated semi-risk-taking private credit funds own a mezzanine tranche of the companies, getting high returns to take credit risk.
- 3. Banks and the bond market own the senior tranche, getting low returns in exchange for providing much of the money but not taking too much risk.

Elsewhere in private credit, the Bank for International Settlements published its [Annual Economic Report](#) in June, with a box on “the challenge of private credit.” There are concerns about incentives:

The close links of private credit with private equity raise questions about the incentive structures and the existence of proper internal corporate controls. For instance, in the United States 78% of private credit deal volume goes to private equity sponsored firms. Private credit funds have also issued loans to private equity funds collateralised with the funds’ underlying portfolio of companies. These so-called net asset value loans can have a variety of purposes, such as for bridge financing. However, they are also being used to accelerate distributions to private equity investors. While fund managers often invest their own capital in the vehicle (“skin in the game”), signalling the compatibility of managers’ incentives with investors’ interests, as many as 40% of the funds do not feature skin in the game (Graph D1.B. light blue bar). This suggests scope for incentive misalignment in a substantial segment of the sector.

Risks to financial stability from private credit warrant close monitoring. Mitigating factors include the still small size, low share in investors’ portfolios, low liquidity risks and low fund-level leverage. However, the direct and indirect interconnections with other parts of the financial system, especially banks, could amplify future shocks. Private credit is connected to the banking sector at least through: (i) contingent credit lines that banks provide; (ii) joint ventures, in which some banks originate and distribute the underlying portfolio asset while retaining skin in the game; and (iii) interest rate hedging, where banks serve as counterparties to firms seeking to hedge their floating-rate liabilities to private credit funds.

I suppose “the close links of private credit with private equity raise questions about the incentive structures and the existence of proper internal corporate controls” means something like “it is weird that the same big private equity firms that write the equity checks for all the buyouts are now also writing the debt checks, and there are some obvious potential conflicts.” If a company runs into trouble, and it has both private equity owners and private credit lenders from overlapping firms, how do they carve up the value? “Ferociously,” is probably the answer. Or maybe “by taking as much value as possible from the banks providing the senior leverage.”

Accredited investors

I should say, another very important part of the development of private credit is this:

Thanks to recent rising markets—paired with elevated inflation and some very vintage rules—the number of Americans who qualify as “accredited investors” has skyrocketed to an all-time high. Accreditation gives individuals access to riskier, less regulated assets. This includes private markets that have long been the domain of endowments, pension funds and other “smart money” types. It opens doors to the historically exclusive echelons of private equity, credit and real estate placements.

...

To be accredited, an individual would either need to make more than \$200,000 a year or have a net worth of more than \$1 million. ... Now roughly 1 of every 5 American households could be an accredited investor. In the early '80s the figure was 1 of every 50.

The asset-hungry industry sees an opening and is charging toward it. Blackstone, Apollo, KKR and other large asset managers are seeking high growth, but with institutional money less available, they want—need—money from wealthy investors. New products and platforms are popping up widely. Blackstone Inc. arrived early, as far back as 2017, with the likes of the Blackstone Real Estate Income Trust, known as BREIT. The alternative manager has raised more than \$4 billion for the Blackstone Private Equity Strategies Fund, a new private equity fund for wealthy individuals. Competitors are circling, with KKR & Co. and Apollo Global Management Inc. among the biggest names. Many products so far require a financial adviser as an intermediary, and some have additional investment requirements, but a platform called Moonfare allows individual investors willing to allocate a minimum of \$75,000 to invest directly in alternative assets.

Again, there is a sort of mezzanine tranche of investing: There are private investment opportunities

that are available only to institutions and the very rich (investing directly alongside Elon Musk in buying Twitter, buying Paramount with your dad, etc.), there are public investments that are available to everyone (listed stocks, mutual funds), and in the middle there is a widening class of technically private but pretty mass-marketed opportunities like investing in private credit funds. Something like one in five US households *own stocks* outside of retirement accounts, so “the public investor class” and “the accredited investor class” overlap almost perfectly. If you are marketing your product to people who invest, you might as well market it to accredited investors.

FX Viper

“Old School FX Traders Are Being Replaced By Algos With Names Like Viper,” is the headline of this Bloomberg story, and to be fair the old school foreign exchange traders *also* have names like “Viper.” Just a seamless transition from shouty human traders with aggressive nicknames to quiet algorithms with aggressive nicknames.

In some sense it is obvious that the FX market would be automated: It trades around the clock, currencies are fungible and there are many fewer currencies than there are stocks. It took longer than stocks largely because stocks trade on public exchanges, while currencies were historically traded directly with banks in more fragmented and opaque ways. But “currency markets are now home to around 90 different trading venues, up from just 20 in 2012,” and enough of them are electronic that if your goal is “buy 50 million pounds quietly” you can probably trust that to an algorithm rather than a human’s gut instinct for markets:

RBC Bluebay Asset Management, for instance, relishes the ability to hide sizable trades from other players by using algorithms that ‘slice and dice’ their execution. ...

“It’s better for risk — I want everything to be less touched, less keyboards stroked,” said Stuart Campbell, who leads fixed income trading at the asset manager. “In the FX world, you can pretty much trade any size through algos, there’s less and less need for me to pick up the phone to do a big block trade.”

The “buy quietly” algorithm is apparently named Chameleon:

At BNP [Paribas SA], the three algorithms all have different characteristics. Clients can use Viper when they want to be aggressive with their trades and get out of risky positions quickly. Chameleon,

on the other hand, is better for executing larger transactions and allowing them to slowly dribble into the market without creating larger gyrations.

Iguana was the final algorithm that BNP built. It was created for when clients know they want to execute a certain trade over a specific time horizon, but they aren't sure when within that window would be the best time to place the trade.

Really they need to build a fourth algorithm — Brontosaurus? — that will get you slightly worse execution than the other three, but will take you out to long boozy lunches.

Things happen

Boeing to Plead Guilty to Fraud for Violating Deal Over 737 Max Crashes. “There is a new force on Wall Street: [power traders](#).” [Vanguard's](#) Die-Hard Customers Have a Message for New CEO: ‘The Service Is Abysmal.’ Judge Who Voided Musk’s Pay Package Faces Tough Call on \$7 Billion Legal Fee. The [Noncompete Clause](#) Moves Deeper Into Limbo. JPMorgan Warns Customers: Prepare to [Pay for Checking Accounts](#). Dragons and Sex Are Now a \$610 Million Business Sweeping Publishing. Japan Finally Phases Out [Floppy Disks](#).

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- 1. The math there: The investor presentation ([page 29](#)) says that there will be 1,086 million new Class B shares. Subtract 317 million shares issued to Skydance in the merger (\$4.75 billion divided by \$15) and another 100 million issued in the primary share purchase (\$1.5 billion divided by \$15) and you get 669 million shares. ([As of April](#), Paramount had about 626 million Class B shares outstanding, but the number in the investor presentation includes restricted stock units.) Multiply that by \$15 per share and you get just over \$10 billion, while there's about \$4.3 billion of cash left to pay them out.

- 2. This is sometimes called “[record date capture](#),” and it strikes me as odd; my impression is that US stock borrow desks will lend you shares to short but not to vote. I am not sure I have heard of it happening in the US. (The paper I link to in this footnote cites a UK example.) In any case the other two examples are clearly feasible in the US and roughly equivalent to the simple form.
- 3. Ask Shari Redstone.
- 4. This is crude in many respects, but an important one is that lots of private credit-type lenders have long borrowed in the bond markets. Business development companies, for instance, do lots of bonds.

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The Redstones leave investors on the hook for their Paramount failings

Possible sequel to this sorry show may be an investor lawsuit



Shari Redstone, whose family has over more than three decades made Paramount a powerhouse in global media, but failed to keep pace with the streaming and digital revolution © Reuters

6 HOURS AGO



Paramount shareholders will not like how this movie has ended. Still, there might be some relief the show is finally over.

On Sunday night, the US media titan finally concluded its merger saga, announcing a combination with Skydance Media. The denouement is predictably a mess.

Ordinary shareholders get \$15 in cash for 48 per cent of their holdings along with a stake in the new Paramount for the remainder, or \$4.3bn in total. The small sliver of voting shares owned by the public get \$23 per share. The investment vehicle of the fabled Redstone family, which owns just a tenth of the overall Paramount economics but a three-quarters voting interest, gets the sweetest deal: roughly \$38 per share or \$2.4bn all together. (The Redstones' small cinema chain will be acquired too and their net proceeds are \$28 per share).

play, with the family simply exercising their control rights to seal the deal. A possible sequel to this sorry show then may be an investor lawsuit: a key contract provision seemingly demands that Skydance underwrite some portion of future potential Redstone liability.

In the meantime, all eyes should be on the Skydance business. Skydance, an ambitious movie producer backed by KKR and RedBird Capital, is reverse-merging into Paramount at a \$4.75bn valuation. Skydance is separately buying \$1.5bn of fresh Paramount equity.

In total, between its film business, acquisition of the various existing shares of Paramount and its cash infusion, it will own 70 per cent of the new Paramount economics. The mooted enterprise value of the new Paramount is \$28bn. How that paper valuation stacks up will become clearer as the company's shares start trading on Monday.

The Redstone family over more than three decades made Paramount a powerhouse in global media. But they failed to keep pace with the streaming and digital revolution of the past decade. Through the quirks of their dual-class share structure, the brunt of that disappointment falls on the public shareholders who could not secure the lopsided payout that the family negotiated. Any litigation settlement is unlikely to bridge much of the chasm.

Skydance — whose chief executive is the son of software mogul Larry Ellison — will now have total voting control of Paramount. At least, after putting in \$8.5bn of cash, Skydance's dominant economic interest may leave it better aligned with public shareholders than the Redstone family's arrangement. Perhaps it will be more motivated to pursue a happy ending.

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Paramount's Third Act Will Still Offer Plenty of Drama

Skydance brings a strong track record, but making streaming profitable as traditional business declines will be a tough haul

By [Dan Gallagher](#) [Follow](#)

July 8, 2024 1:07 pm ET



David Ellison will become chief executive of Paramount. PHOTO: RON ADAR/SOPA IMAGES/ZUMA PRESS

Not that they have much choice in the matter, but Paramount Global's **PARA -4.83%** ▼ shareholders should still give David Ellison a chance.

The troubled media giant has finally wrapped its on-again, off-again merger deal with Skydance Media. Under the deal announced late Sunday, Skydance founder Ellison will become chief executive officer of Paramount while holders of the company's Class B shares can elect to receive an equal number of shares of the newly combined company, or \$15 a share in cash up to a total payout of \$4.3 billion. The \$15-a-share price tag is a 56% premium to the record low the stock hit last month after Paramount's controlling shareholder, Shari Redstone, issued a surprise thumbs down to Skydance's last offer. It is also about half of the

Skydance was Paramount's key production partner on that film and several others, including entries in the popular Mission Impossible, Star Trek and Transformers franchises. Hence, the two seemed the most natural fit as Redstone fielded entreaties from other interested parties that reportedly included private-equity giant Apollo, Hollywood rivals Sony and Warner Bros. Discovery and—most recently—IAC Chairman Barry Diller, who once ran the Paramount studio. “Unifying Franchise IP” was touted as a key selling point of the deal in a conference call Monday morning.

Curtain Call

Paramount's Class B share price, past two years



Source: FactSet

That will be the easy part. Monday's call also made clear the magnitude of the challenges that Paramount's new management team faces. Ellison wants to make Paramount into a “world-class media and technology enterprise,” but he has to manage a rapidly declining cable-TV and advertising business. He promised \$2 billion in “cost efficiencies” after the deal closes in the third quarter of next year. He also committed to an aggressive reduction of the company's debt, targeting a net leverage ratio of 2.9 times in 2026 compared with Paramount's current

leverage ratio of 4.3 times.

Those are the right promises to make, given the media industry's many struggles. But they are also easier said than done. Warner Discovery warned investors late last year that it was unlikely to hit its own previously stated leverage target unless the advertising market improved. Its stock has sunk 38% since that warning. Paramount's own shares slipped nearly 3% Monday morning.

struggling with the shift to streaming as Netflix—once a Hollywood upstart—has built a scaled operation with nearly 270 million paying subscribers producing about \$7.9 billion in annual operating income. Paramount last reported about 71 million streaming subscribers, while its direct-to-consumer unit generated an operating loss of about \$1.4 billion for the 12-month period ended in March. Growing subscribers while keeping costs under control will be a huge challenge.

On the brighter side, the merger with Skydance is less likely to run afoul of regulators—at least compared with the option of combining Paramount with another established Hollywood studio. It also puts Paramount under the control of a management team that has lately amassed a strong track record of box-office and television success. The new management will also have a lot more skin in the game: Redstone's National Amusements controlled 77% of Paramount's voting stock while holding less than 10% of the company's total equity. Skydance will own about 70% of the new company's outstanding equity once the deal closes.

That should help Ellison and his team build more credibility with Paramount's shareholders—something sorely lacking under the old arrangement. There is little place to go but up, as more than three-quarters of Wall Street analysts currently carry neutral or sell ratings on Paramount's shares, according to FactSet.

It also helps that Ellison comes with the backing of his father, Oracle founder and Chairman Larry Ellison, whose \$178 billion net worth will likely scare off competing bidders despite the deal's 45-day go-shop provision. Ric Prentiss of Raymond James wrote Monday that the go-shop period “should disabuse notions of a much larger cash offer waiting for the company.” For Paramount, Skydance is the only show in town.

Write to Dan Gallagher at dan.gallagher@wsj.com

Videos

Boeing Co

Boeing to plead guilty to fraud charge over 737 Max crash deal

Aircraft maker reaches plea agreement with US justice department



Boeing's 737 Max was involved in crashes in Indonesia and Ethiopia in 2018 and 2019 © Elaine Thompson/AP

Claire Bushey in Chicago and **Stefania Palma** in Washington YESTERDAY



Boeing is to plead guilty to conspiracy to defraud the US government after it violated a deal struck with the Department of Justice in the wake of two deadly crashes involving its 737 Max aircraft, prosecutors said in a court filing on Sunday.

The US aerospace group faces a fine of \$487.2mn, the maximum by law, a justice official said. [Boeing](#) is expected to pay half that sum, subject to court approval, given it has already paid \$243.6mn over the matter.

The official said the proposed plea agreement over the one charge did not involve immunity for individual staff, including executives. It only applies to misconduct preceding the 737 Max crashes and does not shield Boeing for any other conduct, including the [mid-air blowout aboard an Alaska Airlines flight](#) this year, the official added.

Boeing confirmed it had “reached an agreement in principle on terms of a resolution with the justice department”.

A lawyer for the families of the 346 people who were killed in the 737 Max crashes — off the coast of Indonesia in 2018 and in Ethiopia in 2019 — called the agreement a “sweetheart deal” that failed to hold Boeing accountable. After the crashes the jet was grounded worldwide for nearly two years.

“The plea deal . . . unfairly makes concessions to Boeing that other criminal defendants would never receive,” the families argued in a court filing. “As a result, the generous plea agreement rests on deceptive and offensive premises.”

Under the proposed agreement, Boeing will have to invest at least \$455mn over the next three years to improve compliance and safety programmes, and work with an independent compliance monitor picked by the justice department. There would be no cap on any restitution that a court could demand the company make to victims’ families.

The criminal conviction could affect Boeing’s eligibility to win US defence contracts, a pillar of its business.

The department [offered Boeing the plea deal last week](#) as an alternative to facing a criminal trial.

The company was charged in 2021, with Boeing admitting it had deceived federal aviation regulators about flight-control software installed on the 737 Max. The software could be erroneously triggered to push the nose of the jet downward.

Following that charge, the department deferred prosecution and agreed to dismiss the charge as long as Boeing adhered to a compliance programme established after the crashes.

However justice officials this year notified Boeing it had breached the earlier deal after a door panel blew off a jet in January during a commercial flight. Boeing disputed that it had violated the agreement.

Boeing [paid \\$2.5bn](#) under the 2021 deal, of which \$244mn went towards fines. Another \$500mn established a fund for the families of crash victims, while the bulk of the payment went to airlines, which are the company’s customers.

The families of those killed have been fighting Boeing and the justice department in federal court in Texas. In October 2022 Judge Reed O’Connor ruled that the families legally qualified as crime victims, a status that requires the department to confer with them.

O'Connor will now need "to decide whether this no-accountability deal is in the public interest", said Paul Cassell, an attorney representing the families.

He said the families would ask the judge "to reject this inappropriate plea and simply set the matter for a public trial, so that all the facts surrounding the case will be aired".

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Northern Data Sinks on Allegations by Ex-Workers on Finances (2)

By Emily Nicolle

Bloomberg Law News 2024-07-08T09:52:0762611748-04:00

Northern Data Sinks on Allegations by Ex-Workers on Finances (2)

By Emily Nicolle2024-07-06T03:21:54139-04:00

Northern Data AG shares sank as much as 30% on Friday after news that two former senior employees alleged in a lawsuit that the German cryptocurrency miner misrepresented its finances.

The complaint, filed by Joshua Porter and Gulsen Kama in California last month, accused the Frankfurt-based company of firing them after they raised concerns about the financial picture that Northern Data was presenting to investors, regulators and business partners.

Trading in the stock was briefly halted due to volatility after the complaint was first reported by FT Alphaville.

Porter and Kama also alleged that the firm “was knowingly committing tax evasion to the tune of potentially tens of millions of dollars,” the complaint showed.

“Northern Data refutes the allegations in the strongest terms, and we are contesting them vigorously to protect ourselves against false assertions which damage our company and our business,” a company spokesperson said in an emailed statement.

“As a publicly listed company we have comprehensive policies and procedures to ensure the accuracy of our financial reporting. Our 2022 accounts received an unqualified audit opinion and we will release our 2023 audited financials shortly,” the spokesperson said in the statement.

Northern Data is speaking with potential advisers about a US initial public offering of its artificial intelligence cloud computing and data center businesses, Bloomberg News reported earlier this week. Suggested valuations for the business ranged between \$10 billion and \$16 billion, with a listing targeted for as early as the first half of 2025.

Read more: Northern Data Weighs AI Unit IPO at Up to \$16 Billion Value

The report triggered a 31% jump in Northern Data shares on Tuesday; the stock has since reversed all those gains.

Northern Data in November secured a €575 million (\$623 million) debt-financing facility from stablecoin firm Tether Holdings Ltd. In January it completed the acquisition of a vehicle from Tether valued at €400 million, making Tether the “cornerstone” investor in Northern Data, according to a statement at the time.

“While we cannot comment on ongoing legal matters, we reaffirm our commitment to our investors and stakeholders to maintain trust and uphold the principles that guide our operations,” Tether said in an emailed statement on Friday.

(Updates with company comment from fifth paragraph.)

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Philip Lagerkranser, Ros Krasny

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July 5, 2024, 10:01 AM PDT

SunPower Shares Slump Amid Financial Misconduct Allegations (1)

By Rafaela Jinich

- Company got SEC subpoena in February over revenue recognition
- Shares fell more than 50% this year as solar market struggles

Bloomberg Law News 2024-07-08T09:53:06609238125-04:00

SunPower Shares Slump Amid Financial Misconduct Allegations (1)

By Rafaela Jinich2024-07-05T13:01:07594-04:00

- Company got SEC subpoena in February over revenue recognition
- Shares fell more than 50% this year as solar market struggles

SunPower Corp. tumbled the most in seven weeks after the struggling solar company's accountant quit amid allegations of misconduct by senior executives.

The company's shares slumped as much as 18%, the most intraday since May 15, and were trading at \$2.20 at 12:58 p.m. in New York. The company has declined more than 50% this year amid a broader decline in the rooftop solar market.

Ernst & Young notified the company June 27 it was resigning as SunPower's independent accountant because it was unwilling to be associated with financial statements prepared by management, according to a filing late Wednesday. The accountant cited allegations of misconduct involving senior members of management with roles overlooking financial reporting. SunPower is looking to hire a new independent accountant, according to statement.

[Read More: SunPower Says SEC Issued Subpoena on Accounting Practices](#)

SunPower also said in the filing that it received in February a subpoena from the US Securities and Exchange Commission relating to its revenue recognition practices. The company didn't respond to inquiries Friday.

The disclosures come amid a challenging year for SunPower. The company said in April it needs to restate almost two years of financial results. It also replaced its chief executive officer and chief operating officer, defaulted on a credit agreement in late 2023 after an earlier earnings revision that delayed results and is grappling with an installation slump in California — its home state and the country's biggest solar market.

(Updates with accountant search in third paragraph.)

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McKinsey Beats Jay Alix's RICO Case Over Bankruptcy Conflicts

By Thomas Gleason

Documents

 [Opinion](#)

 [Docket](#)

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- Jay Alix wasn't given power to sue by his firm, judge says
 - Second Circuit previously revived Alix's claims

Bloomberg Law News 2024-07-08T09:55:19772059829-04:00

McKinsey Beats Jay Alix's RICO Case Over Bankruptcy Conflicts

By Thomas Gleason 2024-07-05T13:14:51000-04:00

- Jay Alix wasn't given power to sue by his firm, judge says
- Second Circuit previously revived Alix's claims

McKinsey & Co. Inc. and its executives defeated a racketeering lawsuit after the judge ruled its competitor's founder lacked standing to sue.

Jay Alix, founder of global consulting firm AlixPartners LLP, wasn't injured by the claims in his complaint against McKinsey, and AlixPartners didn't transfer its claims to Alix for him to sue on its behalf, Judge Jesse Furman of the US District Court for the Southern District of New York ruled Wednesday. Those issues couldn't be resolved by AlixPartners assigning him to sue McKinsey because it would require the original complaint to be amended beyond what federal rules allow, Furman said in the opinion.

The ruling is the latest in longstanding litigation in which Alix accused McKinsey of concealing conflicts of interest to secure lucrative corporate bankruptcy work.

"Alix has no one to blame but himself — or perhaps AlixPartners," Furman said in the opinion. "They did not take the steps that were necessary for Alix to press the claims he brings here."

Alix intends to appeal in the next 30 days or so, his attorney Sean O'Shea of Cadwalader, Wickersham & Taft LLP said.

"We respectfully disagree with the decision on a technical ground only raised recently after six years of litigation," O'Shea said. "We believe we have the better argument. We intend to appeal again, and we expect to be successful again."

Furman originally dismissed the case in 2019, but the US Court of Appeals for the Second Circuit revived Alix's claims. The circuit court ruled the lack of standing might be resolved by federal rule 17, which allows for the injured party to ratify an agent to sue on their behalf post-filing and allows the suit to proceed as if the injured party had filed the original complaint.

"The Second Circuit believes this case should continue," O'Shea said. He expects the circuit court to remain consistent in that view and send it back to the district court after an appeal.

Alix first sued McKinsey in 2018. The allegations included three violations of the Racketeer Influenced and Corrupt Organizations Act.

McKinsey asked the Supreme Court to examine Alix's standing in the case after the Second Circuit revived his claims. But the Supreme Court denied McKinsey's request and the lawsuit returned to the district court in 2022. McKinsey moved to dismiss it based on Alix's lack of standing due to rule 17 in March of this year.

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

Alix is represented by Cadwalader, Wickersham & Taft LLP.

McKinsey is represented by Kobre & Kim LLP and Debevoise & Plimpton LLP. Executives are represented variously by Kramer Levin Naftalis & Frankel LLP, Driscoll & Redlich, McDonald Hopkins LLC, Spears & Imes LLP, Glenn Agre Bergman & Fuentes LLP, and Blank Rome LLP.

The case is Alix v. McKinsey & Co., Inc. et al , S.D.N.Y., Docket No. 1:18-cv-04141-JMF, 7/3/24 .

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Deal Reached In Del. Suit Targeting Gores-Backed UWM SPAC

By **Jeff Montgomery**

Law360 (July 3, 2024, 5:45 PM EDT) -- Architects of a \$16 billion special purpose acquisition company merger that took United Wholesale Mortgage public have reportedly agreed to settle a Delaware Chancery Court stockholder suit accusing private equity billionaire Alec Gores and others of misleading investors.

The agreement, not yet filed with the court or made public, if approved, would head off a three-day trial scheduled to begin on Jan. 27, 2025, and end a string of disputes over stockholder attorney demands for production of records.

Kelly L. Tucker of Grant & Eisenhofer PA, counsel for co-lead stockholder plaintiffs Richard Delman and Michael Farzad, told Vice Chancellor Lori W. Will in a letter on Tuesday that an agreement in principle had been reached, with the filing of settlement papers and the scheduling of a hearing to follow.

A settlement would end what is, by far, the largest class suit in a years-long string of challenges in Chancery Court to often-disastrous, so-called blank check company take-public deals.

Gores Holdings IV LLC stockholder Richard Delman alleged the Gores-tied SPAC — Gores Holdings IV — its board of directors, Alec Gores and the Gores Group private equity he controls and others connected to the blank check company put their own financial interests ahead of shareholders when they pursued the UWM deal.

Gores and other SPAC founders, officers and controllers, all early investors and buyers of SPAC "founder" shares, "were strongly incentivized" to avoid missing a deadline for closing on a deal. That would have triggered liquidation of the business and total loss for founder-shareholders, according to the complaint, which has now been consolidated with stockholder Michael Farzad's suit.

"As a result, they orchestrated the merger with a mortgage lending company, Legacy UWM, at the apex of the refinance and origination market, in the middle of a global, unprecedented pandemic, when interest rates were historically low and new originations were at a high," the complaint said.

Allegedly upbeat forecasts drowned out concern about inflated projections and what later developed as a slowdown in the finance and origination market, along with a rise in interest rates and regulatory concerns.

The suit further accused Gores Holdings IV of having less than \$8.25 in cash at closing when counting the board's expected compensation despite valuing those shares at \$10 each in the SPAC's merger agreement and other filings.

According to the complaint, the deal was a "losing proposition for public investors" but a windfall for those behind it. Public investors would have been better cashing out of the deal for their original \$10 buy-in before closing in January 2021, the now-consolidated suit said.

Public investors who buy into SPACs, or blank check companies, typically pay \$10 per share with assurances that they will recover the buy-in with interest if the company doesn't complete a business combination within a fixed time frame, usually between 18 and 24 months. Instead, the Chancery Court's docket includes a parade of suits filed by disappointed investors confronted with losses.

The right to cash out before closing was allegedly impaired by hollow recommendations in favor of the merger and a misleading proxy, the suit said.

The proposed class is represented by Michael J. Barry, Kelly L. Tucker and Jason M. Avellino of Grant & Eisenhofer PA, Brian J. Robbins, Gregory E. Del Gaizo of Robbins LLP, Randall J. Baron, Benny C. Goodman III and Erik W. Luedeke of Robbins Geller Rudman & Dowd LLP and Michael Klausner.

Gores Sponsor IV LLC, AEG Holdings LLC, Alec Gores, Randall Bort, William Patton, Jeffrey Rea, Mark Stone and Andrew McBride are represented by Bradley R. Aronstam, S. Michael Sirkin and Roger S. Stronach of Ross Aronstam & Moritz LLP and John A. Neuwirth, Evert J. Christensen Jr. Matthew S. Connors and Tanner S. Stanley of Weil Gotshal & Manges LLP.

The case is Richard Delman and Michael Farzad v. Gores Sponsor IV LLC et al., case number 2023-0386, in the Court of Chancery of the State of Delaware.

--Editing by Drashti Mehta.

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Real Estate Recap: Post-Chevron, Lawyer Leaps, Q&A Recap

By **Real Estate Authority Staff**

Law360 (July 5, 2024, 7:42 PM EDT) -- Catch up on this past week's key developments by state from Law360 Real Estate Authority — including policy areas to watch in the wake of the U.S. Supreme Court's paradigm-shifting Chevron ruling, recent real estate lawyer moves and some insightful conversations with real estate lawyers you may have missed.

For limited complimentary access to Law360 Real Estate Authority, **[sign up here](#)**.

National

Real Estate Policy Areas To Watch In Chevron's Wake

Housing rules, permitting practices and climate goals stand to be challenged by an anticipated wave of litigation spurred by back-to-back U.S. Supreme Court opinions that alter how and when judges can interpret ambiguous legislation.

Real Estate Lawyers On The Move

Haynes and Boone LLP and McDonald Hopkins LLC are among the law firms that have made recent real estate or construction hires.

The Commercial Real Estate Q&As You Can't Miss

Check out Law360 Real Estate Authority's most buzzed-about commercial real estate Q&As from the first half of 2024.

The Residential Real Estate Q&As You Can't Miss

Check out Law360 Real Estate Authority's hottest residential real estate Q&A's from the first half of 2024.

California

Enviro Group Claims Navy Bungled SF Superfund Cleanup

The U.S. Navy's efforts to remediate an 866-acre shipyard Superfund site in San Francisco have been flawed from the start and undermined by the Navy, which has gone so far as to obscure the results of its own contamination testing, per an environmental advocacy group's suit.

Calif. Ballot Measure Seeks Nix Of Tax Hike Threshold Change

California would scrap part of a ballot initiative that would have reduced the threshold needed for local governments to pass special taxes for public infrastructure and affordable housing projects under another ballot measure passed by legislators.

Robbins Geller, Rosen Law Firm Seek Lead Role In REIT Row

Two parties urged a California federal court to appoint them as the lead plaintiff and their legal representation as the lead counsel for a proposed securities class action that accuses Equinix Inc., a data-center focused real estate investment trust, or REIT, of artificially pumping up its financial metrics.

Colorado

Trade Groups Sue Denver Over Gas Stove Ban

A coalition of trade groups representing the restaurant, home construction, rental housing and propane gas industries have claimed in Colorado federal court that two Denver ordinances that restrict the use of gas appliances can't be enforced because they're preempted by federal law.

Colo. City Housing Authority Says Board Can't Be Fired At Will

A Colorado city's ordinance violates state law because it gives the mayor the power to replace the commissioners of the city's housing authority without just cause, the housing authority has claimed in Colorado state court.

Connecticut

Hinckley Allen Adds 2 McElroy Deutsch Attys To Real Estate Team

Hinckley Allen & Snyder LLP has expanded its offerings in Connecticut, adding two commercial real estate financing attorneys from McElroy Deutsch Mulvaney & Carpenter LLP.

Delaware

Petersen Health Gets OK For \$118M Initial Bid On Facilities

A Delaware bankruptcy judge on July 1 gave bankrupt senior living chain Petersen Health Care permission to accept a \$118 million bid as the floor for an auction of its 82 facilities to be held on Tuesday.

Florida

Gov. Says Ky. Tower's Sale Didn't Cancel Ties To Laundering



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First-Of-Its-Kind Chancery Ruling Will Aid SPAC Defendants

By **Lisa Bugni and Benjamin Lee** (July 5, 2024, 10:36 AM EDT)

The Delaware Court of Chancery's May 31 decision in *In re: Hennessy Capital Acquisition Corp. IV Stockholder Litigation* marks the court's **first total dismissal** of a complaint alleging breaches of fiduciary duties in connection with disclosures relating to a merger transaction involving a special purpose acquisition company.[1]

The decision establishes precedent that should aid the defense of future claims.

Background

A string of early pleading stage successes, and several eight-figure settlements, have encouraged a wave of lawsuits challenging the accuracy and sufficiency of public disclosures surrounding transactions in which private companies become public by merging with special-purpose acquisition companies.

A SPAC is a blank-check public company without commercial operations formed to raise capital to fund a business combination with an existing operating company.

In the seminal SPAC case *In re: MultiPlan Corp. Stockholders Litigation*, the Delaware Chancery **held** in 2022 that claims alleging misleading proxy disclosures impaired SPAC stockholders' ability to decide whether to redeem their shares and recoup their initial investment or hold the shares and become stockholders in the acquired company were direct, rather than derivative claims.[2]

Since that ruling, courts have analyzed motions to dismiss under the plaintiff-friendly standard of Rule 12(b)(6) of the Federal Rules of Civil Procedure rather than the heightened demand futility standard that applies to derivative claims.

The MultiPlan decision also rejected defense arguments that claims alleging breaches of fiduciary duties in connection with stockholder redemption rights should be (1) barred as contractual in nature and (2) deemed "holder" claims not properly litigated as class actions due to individualized questions of reliance on the challenged disclosures.[3]

Finally, the Chancery Court held the MultiPlan plaintiffs adequately pled that structural elements of the transaction, which are common to many SPAC deals, created conflicts of interest between the SPAC fiduciaries and stockholders necessitating review of the claims under the onerous entire fairness standard.

Under the entire fairness standard defendants bear the burden of proving that the challenged act or transaction was entirely fair to the corporation and its stockholders.[4]

The MultiPlan plaintiffs defeated the defendants' motion to dismiss and later settled the case for \$33.75 million.[5] Since the MultiPlan ruling, SPAC cases have proliferated and plaintiffs have largely succeeded in avoiding pleading stage dismissals.



Lisa Bugni



Benjamin Lee

The Chancery's ruling dismissing the Hennessy case with prejudice represents the court's first full dismissal of claims challenging a SPAC transaction under the entire fairness doctrine and establishes useful precedent that may help defendants stem the SPAC litigation tide in future cases.

Hennessy Ruling

The Hennessy case arose from the SPAC's Dec. 21, 2020, merger with Canoo Holdings Ltd., an electric vehicle startup company.[6] Legacy Canoo's business was built around its "skateboard" EV chassis designed to support multiple vehicle cabin configurations.[7]

Hennessy's proxy statement recommending stockholder approval of the merger with Legacy Canoo discussed opportunities associated with Legacy Canoo's contract engineering services segment and business-to-consumer subscription model, both of which plaintiffs alleged the proxy suggested were expected to contribute meaningfully to the company's future financial performance.[8]

At a meeting held approximately three months after the merger closed, Canoo's board received a management presentation discussing the company's transition from a "3-year-old private company into a public company" which included a slide titled "Canoo's Business Model Needed a Reboot." [9]

The board also received a presentation from McKinsey & Co. which noted that, in "September to October 2020, McKinsey had begun to '[a]ssess [Legacy] Canoo's initial economic model,'" and in "October to November 2020, it '[identified the] most attractive segments to focus on.'" [10]

McKinsey's presentation also stated that "[c]ritical changes were made to Canoo's business model" based on McKinsey's "subscription model insights," including "[d]eemphasiz[ing] [the] role of [lifestyle vehicle] subscription[s]" and "[p]ivot[ing] from [a] subscription-led sales model to [an] outright sale led sales model." [11]

During a quarterly earnings call a few days later, Canoo's executive chairman reported that the board had decided to "deemphasize" the company's subscription model and engineering services business line. [12]

After some analysts expressed surprise at the shift, the executive chairman noted that "the study we did" led him to want to move "in a different direction" and that the "[b]oard's help and observations ... kind of solidified that." [13] After the earnings call, Canoo's stock price declined more than 21%. [14]

In the lawsuit that followed, the plaintiff alleged that Hennessy's board and sponsor breached their fiduciary duties by failing to disclose McKinsey's engagement and the changes to Legacy Canoo's business model. [15]

Before analyzing the sufficiency of the plaintiff's allegations, the Chancery Court noted the explosion of SPAC litigation following the MultiPlan decision, observing that "[r]emarkably similar complaints accuse SPAC directors of breaching their fiduciary duties based on flaws in years-old proxy statements that became problematic only when the combined company underperformed." [16]

Such "[p]oor performance," the court continued, "is not, however, indicative of a breach of fiduciary duty. Conflicts are not a cause of action. And pleading requirements exist even where entire fairness applies." [17]

Examining the complaint's allegations, the Chancery Court found them wanting, as the disclosure claims relied entirely on post-closing developments" — namely, the presentations at the post-merger Canoo board meeting and ensuing changes to the company's business model. [18]

The court contrasted the plaintiff's allegations with those in MultiPlan and other SPAC cases denying motions to dismiss, noting that the complaints in those cases pled "concrete facts about the merger target's prospects" that were "known or knowable" by the defendants prior stockholders' approval of the challenged mergers. [19]

The court found that "[n]o such material facts that were known or knowable by the defendants" were

pled in the Hennessy complaint, which "instead addresses actions by Canoo's post-closing board." [20]

In so finding, the Chancery Court rejected the plaintiff's arguments that "use of the past tense" in some portions of the cited board presentations supported an inference that the decision to revamp Canoo's business model preceded the merger.[21]

The court cited the executive chairman's statement on the post-merger earnings call that the decision to "deemphasize the originally stated contract engineering services lines" was made with the input of Canoo's board, which input presumably was supplied at or following the post-merger board meeting. [22]

While the plaintiff's allegations, taken as true, supported an inference that "McKinsey may have reached early recommendations about aspects of the company's business" prior to the stockholder meeting, the court noted that "Delaware law does not ... require the disclosure of preliminary analyses and discussions" and that "[t]o require an unadopted, interim analysis to be disclosed would invite speculation about matters that may never solidify." [23]

The court also held that the plaintiff's claim that Hennessy's engagement of McKinsey was material information that defendants were required to disclose lacked support in Delaware law.[24]

Finally, the Chancery Court observed that "[e]ven if I credited the bare allegation that Legacy Canoo's business shifted pre-closing, there are no facts from which I could fairly infer knowledge by Hennessy's Board." [25]

In light of the plaintiff's failure to "sufficiently allege that Legacy Canoo decided to materially reconfigure its business model before the merger closed and that the decision was knowable by Hennessy's Board," the Chancery Court dismissed with prejudice the plaintiff's breach of fiduciary duty claims and related claims alleging aiding and abetting and unjust enrichment as to certain defendants.[26]

Conclusion

As the first total pleading stage victory for defendants in SPAC-related fiduciary duty litigation under the entire fairness standard, Hennessy is a noteworthy ruling.

Such claims frequently challenge disclosures bearing on companies' future, post-closing business prospects, and the Chancery Court's ruling that plaintiffs must plead "material facts that were known or knowable by the defendants" before the merger in order to survive dismissal is an important, and likely to be often-cited, precedent.

At the very least, the Chancery Court's reminder that "pleading requirements exist even where entire fairness applies," and its dismissal ruling giving those words real teeth, marks a significant moment in the development of this nascent arena of stockholder litigation.

Lisa Bugni is a partner and Benjamin Lee is counsel at King & Spalding LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] *In re Hennessy Capital Acquisition Corp. IV Stockholder Litigation* , C.A. No. 2022-0571-LWW, 2024 WL 2799044 (Del. Ch. May 31, 2024).

[2] *In re MultiPlan Corp. Stockholders Litigation* , 268 A.3d 784, 802-05 (Del. Ch. 2022).

[3] *Id.* at 805-08.

[4] *Id.* at 810-12, 815.

[5] See <https://www.multiplanstockholderslitigation.com/>.

[6] Hennessy, 2024 WL 2799044, at *3.

[7] Id.

[8] Id. at *4-5.

[9] Id. at *5.

[10] Id. at *6.

[11] Id.

[12] Id.

[13] Id.

[14] Id.

[15] Id. at *11.

[16] Id. at *1.

[17] Id.

[18] Id. at *1 & *11

[19] Id. at *12.

[20] Id. at *13.

[21] Id.

[22] Id.

[23] Id. at *14.

[24] Id.

[25] Id. at *15.

[26] Id. at *15-18.

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\$125M Deal To End Discovery-AT&T Merger Suit In Chancery

By **Jeff Montgomery**

Law360 (July 5, 2024, 5:51 PM EDT) -- A \$125 million settlement is in the works for a nearly two-year-old, now-consolidated Delaware Court of Chancery suit filed by former Discovery Inc. stockholders challenging the company's \$43 billion merger with AT&T in April 2022, according to a court filing Friday.

The two sides had notified Vice Chancellor J. Travis Laster in June that a deal had been reached to end the case, pending agreement on final terms.

The vice chancellor approved Labaton Keller Sucharow LLP, Kessler Topaz Meltzer & Check LLP and Bernstein Litowitz Berger & Grossmann LLP to lead a class claim challenging a Discovery Inc. controlling investor's allegedly coercive extraction of a \$1.1 billion side benefit from a \$43 billion merger last year.

Still pending are requests and amounts to be reserved for attorney fees, expenses and plaintiff incentive awards.

Combined in the litigation were two suits alleging breaches of fiduciary duty in the run-up to the Discovery-Warner tie-up with AT&T's WarnerMedia business in 2021. The deal created Warner Brothers Discovery Inc., with AT&T shareholders owning 71% and former Discovery shareholders receiving the balance.

The combined suit alleged, however, that a former Discovery controller extracted an improper \$1.1 billion side benefit. Heading toward discovery and trial before the settlement was announced were claims targeting Advance/Newhouse and its three designates to Discovery's pre-merger board: Robert Miron, Steven Miron and Susan Swain.

Under the terms of the agreement, Advance/Newhouse Partnership and Advance/Newhouse Programming Partnership will pay \$100 million of the total. Discovery Chairman Robert Miron — formerly Advance/Newhouse Partnership CEO — and current Advance/Newhouse Partnership CEO Steven Miron will pay \$12.5 million apiece. No liability was assigned to Susan Swain, CEO of C-Span.

The consolidated suit accuses those named of lining up a "not entirely fair" deal and breaching their fiduciary duties in connection with one series of Discovery's convertible preferred stock.

Leading the case are Bricklayers Pension Fund of Western Pennsylvania, City Pension Fund for Firefighters & Police Pension Officers in the City of Pembroke Pines, Key West Police and Firefighters' Pension Fund, and Steve Silverman.

Vice Chancellor Laster certified the class on April 12.

Two lawsuits were originally filed less than a year after the megamerger closed, creating a stand-alone global media and entertainment giant that is 71% owned by former AT&T shareholders and 29% owned by former Discovery shareholders.

The two lawsuits both alleged breaches of fiduciary duty in connection with the deal.

Both complaints named Advance/Newhouse Partnership and Advance/Newhouse Programming

Partnership as defendants.

The two partnerships are part of the Advance/Newhouse group, a privately held set of media companies controlled by the Miron and Newhouse family that operates Condé Nast and other media companies. Before the merger, Advance/Newhouse owned all of Discovery's outstanding Series A-1 and Series C-1 preferred stock.

Counsel for the combined company and the stockholders did not immediately respond to a request for comment.

The case had been scheduled for a five-day trial in November.

The case is In re: Warner Bros. Discovery Inc. Stockholders Litigation, case number 2022-1114, in the Court of Chancery of the State of Delaware.

--Editing by Dave Trumbore.

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Owens Corning Board Sued In Del. Over Advance-Notice Bylaws

By **Leslie A. Pappas**

Law360 (July 5, 2024, 2:27 PM EDT) -- A shareholder of Owens Corning has sued its board in Delaware's Court of Chancery, alleging the building materials company has "weaponized" its bylaws to entrench its sitting directors and prevent activist stockholders from nominating alternative candidates to the board.

The proposed stockholder class action filed late Wednesday by shareholder George Assad alleges that, in response to the "specter of stockholder activism," the Owens Corning board has "opportunistically seized upon a recent SEC regulation to improperly deprive the company's stockholders of their franchise rights."

Owens Corning's board amended its advance-notice bylaws June 15, making it "unreasonably difficult, if not impossible, for stockholders to satisfy the company's notice requirements to nominate candidates for election to the company's board," Assad's complaint said.

Incorporated in Delaware with offices in Toledo, Ohio, Owens Corning produces roofing, insulation, fiberglass composites and related building products.

The suit names Owens Corning board Chair and CEO Brian D. Chambers and the rest of the company's 10-member board as defendants.

The suit is **among dozens filed** in Chancery Court that challenge changes companies have made to their bylaws in response to the U.S. Securities and Exchange Commission's universal proxy card rules that went into effect September 2022.

SEC Rule 14a-19 was intended to make it easier for shareholders to nominate alternative director candidates, but many companies responded by amending their advance-notice bylaw provisions to include stringent and sometimes confusing requirements.

Energy companies Halliburton Co. and Alcoa Corp.; payments and billing companies Bill Holdings Inc., Remitly Global Inc. and Flywire Corp.; subscription software company Zuora Inc.; ZipRecruiter Inc.; cybersecurity company SentinelOne; retailer Albertsons Companies Inc., and self-driving car tech company Luminar Technologies Inc. have all been the target of similar shareholder suits.

The Owens Corning bylaw provisions that are allegedly improper include an "acting in concert" provision with "wolfpack" and "daisy chain" elements, according to the complaint.

The wolfpack provision requires a stockholder who nominates a director candidate to disclose all other stockholders who may share a "common goal relating to the management, governance or control of the [c]orporation," even when there is no express agreement to act together, the complaint says.

Delaware courts find wolfpack provisions problematic because they "chill" stockholder discussion about proxy contests and impede a stockholder's ability to launch that contest, the complaint says.

The daisy chain element defines two stockholders to be acting in concert with each other if they are working with a third common stockholder, even if the two stockholders do not know about each other's existence, the complaint says.

"In practice, this means that a stockholder who nominates a director candidate must disclose information about stockholders they do not know exist and may never have talked to, making it impossible to comply with this bylaw," the complaint said.

The complaint raises a single count of breach of fiduciary duty against all defendants and seeks a court declaration that the bylaw provisions are invalid, illegal and void.

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

Assad is represented by Jeroen van Kwawegen, Edward Timlin, Christopher J. Orrico, Shiva Mohan and Daniel E. Meyer of Bernstein Litowitz Berger & Grossmann LLP, Lori Marks-Esterman and Jacqueline Y. Ma of Olshan Frome & Wolosky, Christine M. Mackintosh, Vivek Upadhyia and William G. Passannante II of Grant & Eisenhofer PA and Richard Maniskas of RM Law PC.

Counsel information for Owens Corning and the director defendants was not immediately available.

The case is George Assad v. Brian D. Chambers et al., case number 2024-0688, in the Court of Chancery of the State of Delaware.

--Editing by Janice Carter Brown.

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Scotts Miracle-Gro Investor Sues Board Over Inventory 'Flood'

By **Ryan Harroff**

Law360 (July 5, 2024, 1:35 PM EDT) -- Scotts Miracle-Gro Co. executives "repeatedly and consistently obfuscated the truth" about excess inventory as the company pushed the extra products on its distributors, according to a new investor suit.

Ultimately, the company's stock price dropped 19% in one day when the truth came out, the suit said.

Investor Rachel Scott took the lawn seed company's current board of directors and some former executives to federal court in the Southern District of Ohio on Wednesday, claiming they breached their duty to investors and to the company itself by misrepresenting the state of the business.

According to the investor's **derivative complaint**, the executives caused the company to "flood its sales networks with inventory" after it overloaded itself as an overcorrection to a prior product shortage, and did not tell its shareholders about the situation until significant damage had been done.

While they were allegedly flooding the market with product at a rate higher than actual demand, the suit said, the executives "boasted" to investors they were having a sales boom and had no inventory problem to speak of. The truth started to come out as refill orders from the company's overloaded distributors fell well short of expectations and the firm subsequently had to restructure its debt, the suit said.

According to the complaint, "the truth fully emerged" via an Aug. 2 filing with the U.S. Securities and Exchange Commission. The filing showed the company had adjusted its covenants with its creditors in anticipation of lower earnings, and came the same day that a conference call revealed sales had dropped 6%, along with other bad news on Scotts Miracle-Gro's financial state. The company's stock price dropped 19% that day, from \$71.44 to \$57.86, because of these revelations, the suit said.

The suit accused Scotts Miracle-Gro's current and former executives of unjustly enriching themselves, breaching their fiduciary duties by misleading investors, wasting company assets, abusing their control over the firm, violation of the Securities Exchange Act and gross mismanagement of the lawn seed company.

Scotts Miracle-Gro is entitled to damages with interest for the purported violations of its current and former board members, the suit said. The plaintiff investor also asked the court to order that efforts be made to increase shareholder participation in the board's practices going forward, including a provision to let shareholders nominate at least four board members. The suit also called for attorney fees for the investor.

Counsel for the investor and representatives for the company did not immediately respond to requests for comment Friday.

The investor is represented by David N. Truman and Stuart G. Torch of Employment Law Partners LLC.

Counsel information for Scotts Miracle-Gro was not immediately available.

The case is Rachel Scott v. The Scotts Miracle-Gro Co. et al., case number 2:24-cv-03636, in the U.S. District Court for the Southern District of Ohio.

--Editing by Robert Rudinger.

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Voyager Investors' \$6.5M Deal Over Crypto Marketing OK'd

By **Sydney Price**

Law360 (July 5, 2024, 3:54 PM EDT) -- A New York federal judge has granted preliminary approval to a \$6.5 million cash settlement between the top brass of the now-bankrupt cryptocurrency firm Voyager Digital Holdings and a class of its users who claimed they "aggressively marketed" unregistered securities.

According to the order signed Tuesday by U.S. District Judge P. Kevin Castel, class counsel will request up to \$1.3 million, or 20% of the settlement fund, in attorney fees and expenses up to \$40,000. A settlement hearing will be held on Oct. 8, according to the order.

The parties agreed to settle the suit in January following a full-day mediation session in November, the order said.

"There can be no doubt that by the time the settlement was reached, lead counsel and plaintiffs were fully informed about the strengths and weaknesses of the case," the order said.

The complaint, most recently amended in September 2023, accused several Voyager executives, directors and risk committee members of violating securities laws in connection with the company's offer of Earn Accounts — which paid users interest in exchange for the loan of their digital assets — and the company's VGX Tokens.

The suit was brought on behalf of parties that purchased Earn Accounts and VGX tokens between Jan. 1, 2020, and Nov. 9, 2022.

The investors claim that in addition to being unregistered with the U.S. Securities and Exchange Commission, the Earn Accounts and tokens were not protected by the Securities Investor Protection Corp. or insured by the Federal Deposit Insurance Corp.

As a result, they say, Voyager investors experienced risk disproportionate to that faced by other investors who had put their assets into safeguarded investment products.

Voyager filed for Chapter 11 protection in July 2022 following a run on the lender and the default of a \$650 million loan to defunct crypto hedge fund Three Arrows Capital.

Former Voyager CEO Steven Ehrlich, a defendant in the suit, was also sued by the U.S. Commodity Futures Trading Commission and the Federal Trade Commission in October for allegedly misleading investors about the safety of their funds ahead of the firm's collapse.

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

The plaintiffs are represented by Sean T. Masson and John T. Jasnoch of Scott + Scott Attorneys at Law LLP and James Q. Taylor-Copeland of Taylor-Copeland Law.

Ehrlich is represented by Daniel L. Schwartz, Joshua W. Cohen and Helen Harris of Day Pitney LLP.

The other Voyager defendants are represented by Kayvan B. Sadeghi and Shailee Diwanji Sharma of Jenner & Block LLP.

The case is Roberts et al. v. Ehrlich et al., case number 1:22-cv-09590, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Emilie Ruscoe and Aislinn Keely. Editing by Drashti Mehta.

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Del. Suit Says Flawed Lockup Corrupted Post-IPO Stock Sales

By **Jeff Montgomery**

Law360 (July 5, 2024, 4:29 PM EDT) -- A stockholder of artificial intelligence-focused C3.ai Inc. has launched a derivative suit in Delaware's Court of Chancery seeking damages for the company after insiders allegedly made hundreds of millions off an initial public offering propped up by false sales projections and an early share lockup release.

Investor Joel Rosenfeld said in his complaint filed Wednesday that the early partial lockup termination allowed directors to sell 20% of their shares 90 days after the company's IPO, instead of the more typical 180-day time frame. Restrictions were lifted on the balance after an additional 90 days

The two-step schedule allegedly allowed insiders to dump their stock before negative information about the company and a bogus sales force collaboration agreement became public. Those named and others were able to sell more than \$870 million worth of allegedly inflated shares before the purported scheme collapsed.

Company founder and CEO Thomas M. Siebel stood at the center of the scheme, according to the five-count complaint. He was accused of touting for months before and after the IPO an allegedly nonexistent agreement with global oil field services venture Baker Hughes Co. that was said to have given C3.ai access to marketing and sales power from Baker Hughes' 12,000-member sales operation.

"In order to maximize the sales price for their shares, the individual defendants set out to convince the markets that C3 had substantial prospects for future growth, despite its nonexistent profits," the complaint said.

Another C3.ai stockholder filed a similar Chancery derivative damage suit under seal in May that is still awaiting arguments on redactions.

A securities class suit focused on C3.ai's actions was also filed in the U.S. District Court for the Northern District of California seeking direct damages for stockholders, with that case now awaiting arguments on a motion to dismiss a second amended version of the complaint. Additionally, four consolidated federal securities derivative suits targeting C3.ai are pending in California.

Named in the latest Delaware suit are nine current directors of the company — which focuses on artificial intelligence software-as-a-service — as well as four former directors. The group includes Siebel and former U.S. Secretary of State Condoleezza Rice, as well as Lorenzo Simonelli, president, CEO and Chairman of Baker Hughes and a C3.ai stockholder and former director.

Alleged against all individuals named are counts asserting breaches of fiduciary duty, aiding and abetting breaches, and insider trading. In addition, the suit includes a count alleging "contribution and indemnification" based on liabilities incurred by the company as a result of "knowing, reckless disloyal and/or bad faith acts or omissions" by those named.

Seven months after its December 2020 IPO, C3.ai disclosed that it had reorganized its direct sales team soon after going public "due to ineffectiveness, and that C3 had no tangible arrangement with Baker Hughes' 12,000-person sales force, but relied on its own in-house sales force, which it was forced to place under a massive restructuring," according to the complaint.

The revelation directly contradicted C3.ai offering materials that claimed Baker Hughes had secured \$320 million in noncancelable revenue commitments for 2020, 2021 and 2022.

"Baker Hughes brought in no deals through its reseller agreement with C3, so it was impossible for C3 to have recognized revenue through the purported Baker Hughes arrangement," the complaint said.

Following the disclosures, "C3 stock spiraled downward by 20%," according to the complaint, with the securities class suit filed soon afterward in the U.S. District Court for the Northern District of California against the company, Siebel, C3.ai's board, underwriters for the company's IPO and Baker Hughes.

Insiders named in the Delaware suit sold 11.6 million shares — some \$775 million worth — after the first 90-day IPO insider sales prohibition expired. Siebel alone allegedly received more than \$603 million in proceeds, according to the complaint.

Rosenfeld and the proposed class are represented by Blake A. Bennett of Cooch & Taylor PA, and David C. Katz, Mark D. Smilow, Joshua M. Rubin and Jonathan Meer of Weiss Law.

Counsel information for the defendants was not immediately available Friday.

The case is Joel Rosenfeld et al. v. Thomas M. Siebel et al., case number 2024-0698, in the Court of Chancery of the State of Delaware.

--Editing by Melissa Treolo.

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FCA Delaying Answers In Exploding Van MDL, Drivers Say

By **Jonathan Capriel**

Law360 (July 5, 2024, 5:33 PM EDT) -- Drivers alleging Chrysler hybrid minivans contain a defect that causes them to explode are urging a Michigan federal court to force the automaker to identify specific vehicles that caught fire after it purportedly fixed them in a recall, claiming the company has ignored its requests for information for more than five months.

A proposed class of motorists in the multidistrict litigation said in a **motion** filed Wednesday that FCA US LLC must be compelled to answer two interrogatories related to the recalled 2017-2018 Chrysler Pacifica. Any further delay in answering these could hinder the drivers' case, the motion asserts.

"FCA has ignored its discovery obligations and failed to respond to certain interrogatories issued more than five months ago," the drivers' motion states. "As set forth below, both interrogatories seek highly relevant information that go to the heart of plaintiffs' allegations. In fact, FCA has even agreed to produce responses to these Interrogatories, but months have now passed with no action by FCA."

The motion seeks court intervention ordering FCA to hand over the "critical and highly relevant information" from the two interrogatories.

The motorists want to know how many of the hybrid Pacificas caught fire after being repaired in a recall that the automaker issued. They want specifics, such as VIN numbers and the dates the blazes occurred, and whether FCA told the National Highway Traffic Safety Administration about the incidents.

Additionally, the motorists want to know what FCA learned from the recall, specifically, what was found to be the "root cause" of the vehicles catching fire.

The drivers allege that a battery in Pacifica plug-in hybrid minivans spontaneously explodes because of defects in design or problems in the manufacturing process. The batteries sometimes ignite spontaneously even when the engines are off, the drivers claim. Since 2019, more than a dozen of these have caught fire, according to the motion.

FCA's February 2022 recall didn't solve the problem, as at least four drivers have filed consumer reports with the NHTSA complaining of vehicle fires, according to the motion.

Altogether, 11 class actions with about 70 plaintiffs have been consolidated into the MDL.

According to the drivers' motion, they sent a number of interrogatories to FCA in January. The automaker responded to some and objected to others in February. What answers were given were deficient, according to a letter the drivers sent in March. FCA agreed to provide supplemental information in April, ultimately sending a document just before June, but the automaker didn't answer the two interrogatories in question, the motion claimed.

"It has now been more than five months since plaintiffs issued their Interrogatories and more than three months since Plaintiffs detailed the deficiencies in FCA's responses," the motion said. "Given FCA's repeated failures to provide substantive responses, Plaintiffs have no choice but seek Court intervention."

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

The consumers are represented by E. Powell Miller, Dennis A. Lienhardt and Dana E. Fraser of The Miller Law Firm PC, Steven W. Berman of Hagens Berman Sobol Shapiro LLP, by Stephen R. Basser and Samuel M. Ward of Barrack Rodos & Bacine, by Niall McCarthy and Karin Swope of Cotchett Pitre & McCarthy LLP, and by Gayle Blatt and Camille Guerra of Casey Gerry Schenk Francavilla Blatt & Penfield LLP.

FCA US LLC is represented by Stephen A. D'Aunoy, Thomas L. Azar Jr., Scott H. Morgan, Fred J. Fresard and Ian K. Edwards of Klein Thomas Lee & Fresard.

The MDL is Chrysler Pacifica Fire Recall Products Liability Litigation, case number 2:22-cv-03040, in the U.S. District Court for the Eastern District of Michigan.

--Additional reporting by Danielle Ferguson. Editing by Amy French.

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NFL Moves To Undo 'Runaway' \$4.7B Sunday Ticket Verdict

By **Craig Clough**

Law360 (July 5, 2024, 7:50 PM EDT) -- The NFL urged a California judge Wednesday to cancel a jury's blockbuster \$4.7 billion verdict that found it violated antitrust laws with its DirecTV Sunday Ticket package, saying the "irrational" award didn't match any of the damages models jurors were presented and confirms that the plaintiffs failed to prove their case.

The motion filed Wednesday by the NFL and its 32 teams sought judgment as a matter of law or a new trial on a number of grounds, focusing much of its legal effort on the math behind the jury's verdict, which the motion argued was reached by jurors improperly calculating their own damages model because they rejected the models presented by the two certified classes in the case.

"While many errors at trial led to this runaway verdict, three errors stand out" beyond the NFL's **previous motion** for judgment as a matter of law filed before the jury reached its verdict, the NFL said.

The league argued that the "rejection of the plaintiffs' damages models should result in the court undoing the verdict, because those models were the only evidence of class-wide injury," the league said, adding that reversal "of a jury verdict is also proper where, as here, a jury's damages award is an irrational or indefensible outcome. Courts often grant new trials in non-class action cases on this basis."

All the errors at trial should result in the court granting judgment as a matter of law to the NFL and conditionally or alternatively granting a new trial, the NFL said.

The eight-person jury handed the NFL the **stunning courtroom defeat** on June 27 following a month-long trial and about six hours of deliberations, finding that between 2011 and 2023, the league, its 32 teams and DirecTV violated Section I and Section II of the Sherman Act by overcharging Sunday Ticket subscribers, which resulted from an unreasonable restraining of trade and an illegal monopoly.

During the trial, the plaintiffs argued that there is evidence the NFL and DirecTV reached side agreements to keep the price of the Sunday Ticket artificially inflated in order to appease CBS and Fox, which viewed the Sunday Ticket as a threat to their free, over-the-air broadcast of Sunday NFL games.

The plaintiffs also argued that the NFL's policy of pooling the television rights for its out-of-market games violated antitrust laws.

During the class period, the Sunday Ticket offered subscribers every Sunday afternoon NFL game that did not air free on CBS or Fox in a local market. The price varied by year, but was always hundreds of dollars.

DirecTV was not a defendant in the case, but the jury had to find that DirecTV was part of the antitrust conspiracy in order to find for the plaintiffs, according to several questions on the jury's verdict form.

The verdict's total was a bit of a head scratcher, as it did not track anywhere close to three distinct totals sought by the subscribers. Those totals were \$7.01 billion, \$3.48 billion or \$1.7 billion.

The top amount was based on a theory that the league should have followed the **college football method** of allowing individual teams to negotiate their own out-of-market TV rights rather than pooling them.

The middle amount was based on theory of DirecTV having a competitor rather than exclusivity to the Sunday Ticket during the class period, and the lower amount was based on an alleged "**NFL tax**" the league pressured DirecTV to institute and charge a rate above the "optimal price."

The case is a sprawling class action, with a class of at least 2.4 million residential subscribers who purchased the Sunday Ticket package after June 17, 2011, and a class of at least 48,000 bars, restaurants and other establishments that subscribed during the same period.

The jury awarded damages of \$96.9 million for the commercial class and \$4.6 billion for the residential class, which the NFL argued are figures that were never proposed by the plaintiffs or presented in any testimony.

"Although the jury did not detail the basis for its calculations, its highly specific damages figures leave no doubt what it did," the NFL said.

During the trial, the NFL's attorneys argued that the average price paid for every DirecTV residential subscriber for the Sunday ticket during the class period was \$102.74, far below an average sticker price in the hundreds of dollars, because many subscribers received deals and discounts, including a free year of Sunday Ticket.

But the plaintiffs' attorneys often pointed out that the \$102.74 figure did not represent what the class paid, as many DirecTV subscribers who received a free year never ended up subscribing to the package and were not damaged.

According to the NFL, what the jury did was take a number floated by the plaintiffs — \$294 — as a list price during a few years of the class period, and subtract \$102.74 to come up with an "overcharge" the subscribers paid.

"Having mistaken a discount for an overcharge, the jury then multiplied that 'overcharge' (\$191.26) by the numbers of residential and commercial subscribers displayed during Plaintiffs' closing," the NFL said. "That made-up methodology makes no sense."

The results "replicate the jury's damages awards perfectly for the residential class, and within two cents for the commercial class," the NFL said.

Aside from the verdict being proof that the plaintiffs failed to present any workable class-wide damages theory, juries are also not allowed to do calculations in this "speculative and unreliable" way, the NFL argued, citing the Sixth Circuit's 2001 opinion in [Ezzo's Invs., Inc. v. Royal Beauty Supply](#), Inc. and the First Circuit's 1988 opinion in [Wells Real Est., Inc. v. Greater Lowell Bd. of Realtors](#).

"That is just what happened here: The jury concocted its own model in response to the failures of Plaintiffs' case," the NFL said.

The league also argued that the "jury's calculations — which treat a discount as an overcharge and confuse a list price (i.e., a price on a piece of paper) with the actual price paid (i.e., money out of pocket) — are completely unsound," and also does not consider that the commercial class paid entirely different prices from the residential class.

At a minimum, the classes should be de-certified because the plaintiffs relied on expert damages reports at the certification level that the jury clearly rejected, or the damages should be reduced to a nominal \$1, the league argued.

The league also said that the plaintiffs were improperly allowed to make a new argument at trial that it engaged in price fixing, which it **complained about** after opening statements, but the court failed to correct.

The NFL also argued, among other things, that the court erred in how it described the rule of reason in the jury instructions, where jurors were told to consider whether the competitive harm caused by the challenged conduct outweighs the procompetitive benefits.

Additionally, the league argued that the jury foreperson had a potential bias. That foreperson said during the voir dire process that he pays for a relative's Sunday Ticket through YouTubeTV, which does not fall during the class period, but the NFL argued that this still should have disqualified the juror.

"Plaintiffs repeatedly argued that Sunday Ticket should have been available at a lower price during the entire pendency of the class period, including at lower prices than Juror 7 currently pays for Sunday Ticket on YouTube," NFL said, adding that the "fact that the jury concluded that the but-for price of Sunday Ticket should have been \$102.74 during the class period confirms the point" which is a "structural error" that "warrants a new trial."

Counsel for the plaintiffs did not immediately respond to a request for comment, and counsel for the NFL declined to comment.

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

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

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

--Editing by Peter Rozovsky.