

Lawyers want \$122.5 million of \$490 settlement of case alleging Apple CEO Tim Cook defrauded shareholders

macdailynews.com/2024/07/18/lawyers-want-122-5-million-of-490-settlement-of-case-alleging-apple-ceo-tim-cook-defrauded-shareholders

July 18, 2024



Apple CEO Tim Cook

Attorneys from Robbins Geller Rudman & Dowd and Labaton Keller Sucharow who secured a \$490 million settlement for Apple investors in a securities class action lawsuit are requesting a quarter of that amount in legal fees. They argue that the complexity of the case and the time invested warrant the hefty sum.

The firms filed a request with a federal judge in Oakland, California, seeking \$122.5 million in compensation. This translates to roughly \$3,100 per hour for the 65 lawyers and staffers who reportedly dedicated a combined 39,500 hours to the case.

Reuters:

Multiplying those hours by the professionals' hourly rates would yield an award of about \$27.8 million, they said, arguing that their much larger request is appropriate given their adversary was "the largest – and arguably one of the most powerful – companies on the planet."

Lawyers involved in the case at Robbins Geller and Labaton and a spokesperson for Apple did not immediately respond to requests for comment.

The settlement resolves allegations that Apple CEO Tim Cook defrauded shareholders by concealing falling demand for iPhones in China. When Apple reduced its quarterly revenue forecast by as much as \$9 billion in 2019, it was the first time since the iPhone's launch that Apple had cut its revenue forecast. Apple denied the claims.

The firms' \$122.5 million request matches the benchmark of 25% of a class action settlement fund for attorney fee awards adopted by federal courts in California and elsewhere in the 9th Circuit. But courts there have sometimes pushed back at the 25% standard in so-called megafund cases where settlements exceed \$100 million.

As we wrote back in November 2020, "Both Cook and Luca could have thought, at the time of their statements, that China iPhone sales would continue and they might not have been able to foresee, even though it seems painfully obvious in hindsight, that a late rush of battery replacements would ensue in December just before the low-priced iPhone battery replacement program's end date, negatively impacting sales of new iPhones."

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Tags: Apple shareholders, China, iPhone sales, Labaton Keller Sucharow, Robbins Geller Rudman & Dowd, Tim Cook

SunPower Wins Dismissal of Investor Suit Over Defects (1)

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July 18, 2024, 12:22 PM PDT

Matthew Bultman

Bloomberg Industry Group

- Investors haven't shows SunPower knew statements were false
- Judge gives investors a chance to amend their complaint

By Matthew Bultman

(Bloomberg Law) --

A federal judge dismissed a shareholder lawsuit against SunPower Corp. alleging the solar energy company hid information about product defects.

Investors sued after Richmond, Calif.-based SunPower said in January 2022 it expected to record up to \$31 million in charges to replace connectors that cracked. The lawsuit said SunPower had concealed the defects and the risk of related costs, misleading investors.

Absent from the complaint, however, are allegations that SunPower knew of the defects before January 2022, Judge Araceli Martínez-Olguín in the US District Court for the Northern District of California said in a Wednesday opinion.

"While Plaintiff argues that all of the statements were knowingly false when made, Plaintiff fails to identify how and when Defendants became aware of the connector defects or the gravity of those defects," Martínez-Olguín said.

The judge dismissed the complaint but gave investors a chance to amend.

The investors' lawsuit identified various statements alleged to be misleading, including language in a November 2021 securities filing that warned SunPower may be responsible for repairing defective parts and could incur additional costs as a result.

The US Court of Appeals for the Ninth Circuit has held that statements of hypothetical risks can be misleading when the company knows that the risks have already materialized.

But Martínez-Olguín said the SunPower investors' related arguments rested on the "factually unsupported assertion" that the cracking issue had materialized at the time of the fling. Analyst reports quoted in the complaint contradict those arguments, the judge said.

The reports suggest "SunPower did not know of the product defect until just before it announced its proactive replacement of all such connectors," the judge said.

It has been a tumultuous year for SunPower, which said in April it needed to restate almost two years of financial results. It has also replaced its chief executive officer and chief operating officer.

On Thursday, SunPower's shares plunged after it told dealers it would no longer support new installations and was halting shipments, Bloomberg News reported.

Robbins Geller Rudman & Dowd LLP represents the lead plaintiff. Wilson Sonsini Goodrich & Rosati represents SunPower.

The case is *Jaszczyszyn v. SunPower Corp.*, N.D. Cal., No. 22-cv-00956, 7/17/24.

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(Updates with information on SunPower's stock drop starting in 10th paragraph.)

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American Airlines Touted Failing Sales Strategy, Investor Says

By Martina Barash

- **COURT:** N.D. Tex.
- **TRACK DOCKET:** [No. 4:24-cv-00673](#)

Bloomberg Law News 2024-07-19T10:07:44053728798-04:00

American Airlines Touted Failing Sales Strategy, Investor Says

By Martina Barash 2024-07-18T17:58:17000-04:00

- **COURT:** N.D. Tex.
- **TRACK DOCKET:** [No. 4:24-cv-00673](#)

American Airlines Group Inc. made misleading positive statements about a new, internet-focused sales and distribution strategy before announcing lowered revenue guidance it blamed on the program, an investor says in a proposed class action filed Thursday.

The airline and its leadership acknowledged in May that the reduced bookings were due to those strategy changes, Yazzan Qawasmi says. His complaint, filed in the US District Court for the Northern District of Texas, alleges “that they did not execute their strategy properly, and that they will now be modifying their strategy in an attempt to recapture the customers their strategy drove away.”

American simultaneously announced the termination of Vasu Raja, its chief commercial officer, who oversaw the project.

The announcement caused American’s stock to drop 14% on May 29, Qawasmi says.



There are hundreds or thousands of members of the proposed class, consisting of those who acquired American stock between Jan. 25, 2024 and May 28, 2024, inclusive, the complaint says.

Qawasmi seeks damages on his securities fraud claims.

"We are reviewing the complaint, which we believe is without merit," American said in an emailed statement.

Condon Tobin Sladek Thornton Nerenberg PLLC and Levi & Korsinsky LLP represent Qawasmi.

The case is Qawasmi v. American Airlines Group Inc. , N.D. Tex., No. 4:24-cv-00673, 7/18/24 .

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Athira Pharma Derivative Suit Settlement Gets Final Approval

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Athira Pharma Inc. investors obtained a fair settlement with the biotech company's leaders, a federal court said in approving the agreement to institute internal governance and oversight reforms following a research misconduct scandal.

Attorneys' fees of roughly \$1.1 million and expenses totaling about \$29,000 are also approved, Judge Thomas S. Zilly said Thursday for the US District Court for the Western District of Washington.

- The shareholder derivative 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 reforms include a new board committee and officer position to oversee regulatory compliance, product safety and effectiveness, and research integrity, according to the investors' July 3 request for approval
- Zilly granted preliminary approval of a \$10 million settlement in the class case in a pair of rulings in February and March, according to that case's docket

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, 7/18/24 .

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Business Law Prof Blog

lawprofessors.typepad.com/business_law/2024/07/the-directderivative-distinction-strikes-again.html

Friday, July 19, 2024

The direct/derivative distinction strikes again

By Ann Lipton

In November 2021, Hertz authorized a buyback of its stock. The effect of the buyback to was transform CK Amarillo from a 39% stockholder – who also had board seats – into a 56% stockholder.

Public stockholders of Hertz sued, alleging that the Hertz directors violated their fiduciary duties by transferring control of Hertz to CK Amarillo, without requiring that CK Amarillo pay a control premium.

One critical question was: Is this claim direct or derivative?

Normally, claims arising out of stock buybacks are derivative claims. And normally, when a stockholder continues to hold shares in the entity, and nothing has changed about those share characteristics, and the stockholder was not asked to *vote* on anything, claims arising out of corporate action are derivative. And just recently, the Delaware Supreme Court decided *Brookfield Asset Management, Inc. v. Rosson*, 261 A.3d 1251 (Del. 2021), where it held that if a company sells new shares to a controlling stockholder on the cheap, the claim is derivative, not direct – overruling *Gentile v. Rossette*, 906 A.2d 91 99 (Del. 2006), which held the claim is both.

But, as I argued in my paper, *The Three Faces of Control*, *Brookfield* also implied that claims would in fact be direct *if* the corporate action caused someone who *wasn't* a controller to become one, or if the corporate action *gave new control rights* to someone who hadn't had them before. I wrote:

This appears to have been a rather backhanded way of holding that, if an equity issuance *did* result in a shift from an uncontrolled status to a controlled one, shareholders would be permitted to bring claims for breach of fiduciary duty directly, rather than derivatively....

Additionally, the *Brookfield* court also seemed to have endorsed the notion that equity issuances might give rise to direct claims even if they *did not* result in the creation of a new controlling shareholder, so long as they ended up redistributing specific control rights away from the public shareholders

On June 20, in a bench ruling in *Cascia v. Farmer*, 2023-0520, Chancellor McCormick preliminarily agreed, holding that the plaintiffs could sue both directly and derivatively. She stated that she might revisit matters later in the case, but for the purposes of a motion to dismiss:

Brookfield appeared to leave open the possibility that a transfer of control might give rise to dual-natured claims. The Court expressly stated in *Brookfield* that *Gentile* was overruled only "[t]o the extent the corporation's issuance of equity does not result in a shift in control from a diversified group of public equity holders to a controlling interest."

The high court also noted, again, that there was no "practical need for the Gentile carve-out" in part because other legal theories "provide a basis for a direct claim for stockholders to address fiduciary duty violations in a change of control context." Here, plaintiff's case is about the harm resulting from a change of control....

Look, I recognize that this is a clarification of *Brookfield* that I don't know that our Court has given before. And at base, I'm unwilling to reach a definitive ruling on this factual and legal issue at the pleading stage. But you-all will have litigation ahead and many opportunities to convince me otherwise. At this stage, given the pleading-friendly standard we apply to plaintiffs, I'm denying the motion to dismiss the direct claims

So, obviously, I think this is the correct decision, but in the wake of SB 313, it's more than that.

Suppose a board hands new control rights to someone via the use of a stockholder agreement. Under my interpretation of *Brookfield*, which Chancellor McCormick has now tentatively endorsed at least in part, challenges to that action may, at least on some occasions, be brought directly rather than derivatively. And it will be interesting to watch courts untangle when the rights are significant enough to be one or the other.

Delaware Judge Defends Moelis Order Behind Corporate Law Update

By Jennifer Kay

- Landmark ruling merited substantial payday, pension fund said
- Case prompted corporate law changes drafted by Delaware bar

Bloomberg Law News 2024-07-19T10:06:13621440791-04:00

Delaware Judge Defends Moelis Order Behind Corporate Law Update

By Jennifer Kay 2024-07-18T16:01:43000-04:00

- Landmark ruling merited substantial payday, pension fund said
- Case prompted corporate law changes drafted by Delaware bar

Lawyers who secured a first-of-its-kind decision against billionaire Kenneth Moelis, prompting backlash from the state bar and swift changes to Delaware corporate law, deserve to take home \$6 million in fees, a Delaware Chancery Court judge ruled Thursday.

Attorneys for a pension fund argued a new Delaware law targeting Vice Chancellor J. Travis Laster's Feb. 23 decision — which invalidated most of an agreement between Moelis and the investment bank he founded — shouldn't cut into their payday. Laster agreed, saying their \$6 million fee award application was consistent with precedent and reasonable considering the challenges they can expect to face at appeal.

Laster, who had objected to the legislative changes in posts to his personal LinkedIn profile, didn't directly respond in his bench ruling to the law quietly signed Wednesday by Gov. John Carney (D). But he defended his view of shareholder pact provisions that he said allowed the billionaire to "micromanage" board-level decisions at Moelis & Co.

The pension fund's litigation clearly created a benefit for the company's shareholders, Laster said.

"The plaintiff cut back the tendrils of the stockholder agreement provided at the board level that no controlling stockholder operating at the stockholder level exclusively using stockholder rights could ever achieve," he said.

Moelis argued a fee award ranging from \$450,000 to \$600,000 would suffice. The company hasn't yet appealed Laster's February ruling, as the court still needs to issue a final order in the case. The new law takes effect Aug. 1.

Thomas Curry of Saxena White, representing the pension fund, noted the "unprecedented mobilization of the corporate bar to overrule the case." He said he was "troubled by the development."

The public criticism and legislative response to Laster's decision, however, shouldn't have had any effect on the fee award because the pension fund had pushed to bring certainty to an area of law where it wasn't clear whether many stockholder agreements could be enforced, he said during a hearing in Wilmington, Del.

"Maybe the legislation signed yesterday takes some of the wind out of our sails a little bit, but I think in terms of incentive-setting, there can be some enhancer based on novelty," Curry said.

John DiTomo of Morris Nichols, representing the company, asked Laster to ignore the legislative changes and public outcry from corporate attorneys. The pension fund hadn't created a benefit for Moelis shareholders, and case law doesn't show that market practice changes merited a seven-figure fee award, he said.

Laster said he didn't consider the company's proposed fee award "as even being in the right ball park."

Corporate lawyers worried that Laster's previous ruling created too much uncertainty for many different types of contracts because it invalidated stockholder agreement clauses granting founders, preferred backers, or activist investors significant authority over core managerial decisions. The legislation (S.B. 313) encountered little pushback from lawmakers, though open government advocates and dozens of law professors and objected to the changes drafted by the Corporation Law Council, an influential Delaware State Bar Association committee.

Though he expected the pension fund to face a difficult appeals process, "I intend for this to be my last act in the case at the trial level," Laster said before adjourning the hearing.

The pension fund is represented by Saxena White PA. Moelis is represented by Morris, Nichols, Arsht & Tunnell LLP and Wachtell, Lipton, Rosen & Katz.

The case is W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., Del. Ch., No. 2023-0309, hearing 7/18/24 .

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Judge Claps Back at Yahoo Lead Counsel for 'Very Unreasonable' Fee Dispute

'Can you point to a single case in the history of litigation where a judge awarded class counsel a multiplier on work performed by other lawyers?' U.S. District Judge Vince Chhabria asked lead counsel John Yanchunis at a Thursday hearing.

July 19, 2024 at 10:53 AM



Amanda Bronstad
staff reporter



What You Need to Know

- U.S. District Judge Vince Chhabria was assigned to the Yahoo data breach case after a dispute arose between lead counsel and Zaveri Tabb, which sought \$56,444 of its fees.
- Former U.S. District Judge Lucy Koh had raised concerns about the number of plaintiffs' firms involved in the Yahoo case.
- Lead counsel John Yanchunis said the fee order was designed to compensate plaintiffs' attorneys appointed by Koh as 'class counsel.'

A federal judge censured lead counsel in the Yahoo data breach settlement for retaining thousands of dollars in attorney fees that likely should have gone to a small San Diego plaintiffs' firm.

U.S. District Judge Vince Chhabria was assigned to the \$117.5 million data breach settlement with Yahoo after a dispute arose between lead counsel John Yanchunis, a Tampa, Florida, partner at Morgan & Morgan, and Zaveri Tabb, which sought clarification about whether lead counsel in the multidistrict litigation failed to pay \$56,444 of its fees.

Reviewing the [2020 fee order](#) by District Judge Lucy Koh, who has since been appointed to the U.S. Court of Appeals for the Ninth Circuit, Chhabria questioned Yanchunis about what he called “very unreasonable” calculations.

“Can you point to a single case in the history of litigation where a judge awarded class counsel a multiplier on work performed by other lawyers?” the judge asked Yanchunis. “We didn’t do the work, but we would like a multiplier on the work that some other lawyers did?”

Chhabria gave Yanchunis until the end of the day Friday to cite a single case that backs up his claim.

“If you have a case that stands for the proposition that lead counsel can get a multiplier on work it did not do, that lead counsel can get a multiplier on work some other lawyer did, go ahead, send me a letter with a case site,” he said. “Send me as many cites as you want.”

In a May 15 motion, Zaveri Tabb attorney Dean Janis said his firm was entitled to \$502,679 in costs but received \$446,235, and its efforts to resolve the shortfall with lead counsel “have been completely ignored.”

The Yahoo settlement was one of the first significant data breach agreements. Koh, of the Northern District of California, initially rejected the settlement, raising concerns about the number of plaintiffs’ firms involved in the case. She ultimately awarded \$22.7 million in fees.

Koh, who raised similar concerns when approving a prior \$115 million data breach settlement with Anthem, had prohibited law firms not appointed in the Yahoo case from billing hours without her approval.

At Thursday’s hearing, Yanchunis recited those events to explain why the 1.15 multiplier in Koh’s fee order was designed to compensate plaintiffs’ attorneys appointed by her as “class counsel”—not every firm with a case against Yahoo.

“It was her decision to go down the pathway she did,” he explained. “I did not write the order.”

But Chhabria said that didn’t make sense given that her fee award was based on the submitted \$19.8 million lodestar or the average hourly rate multiplied by the amount of hours billed, which is based on the work done by all firms, not just class counsel.

And if she multiplied that lodestar by 1.15 to further compensate only “class counsel,” or those appointed by her, he would have to lower the amount of fees.

That, he said, seemed like a “massive error,” he said, rather than something more of an “imprecision” given that many judges refer to “class counsel” in the colloquial sense, he noted.

“I don’t know why we would ascribe that to Judge Koh,” he said.

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Elon Loses His Favorite Law Firm In Data Scraping Case Because They Played Both Sides

A abovethelaw.com/2024/07/elon-loses-his-favorite-law-firm-in-data-scraping-case-because-they-played-both-sides

Techdirt

July 19, 2024

It's pretty rare to see a judge disqualify a law firm from taking on a case. But Judge William Alsup has done just that, disqualifying the litigation powerhouse law firm Quinn Emanuel from representing ExTwitter in a big data scraping case.

We wrote about this case back in May, highlighting both the importance and complexities of it. There are all sorts of questions about whether or not scraping content from the public web should be allowed or not. Companies like Facebook have fought against it for years, but other companies were less concerned about it until recently. And that's because over the last couple of years, they've realized that AI companies are willing to pay millions of dollars to get access to that data.

Both Meta and ExTwitter have targeted Bright Data, one of a number of scraping companies. So far, Bright Data has won lawsuits against both companies. Courts have said, "hey, look, this is public information, and you can't sue someone for collecting public information."

In the ExTwitter case, Judge Alsup gave the company about a month to try to file an amended complaint to see if the company could salvage any sort of legitimate claim. Just before that deadline, some lawyers from Quinn Emanuel (one of Elon's favorite law firms) made an appearance on behalf of ExTwitter (basically, because the original complaint was so trounced, Elon was handing the case over to Quinn in hopes they could rescue it).

However, the folks at Bright Data were a bit surprised by this and quickly filed a motion to disqualify Quinn from the case, noting that Quinn had been retained and done work with Bright Data in its nearly identical case against Meta. This meant that (1) they would have inside knowledge of Bright Data and its litigation strategy and (2) they were effectively "switching sides" in a case, which is a huge legal ethical problem.

When Meta and Bright Data filed dueling lawsuits against each other, Bright Data engaged Quinn, Emanuel, Urquhart & Sullivan, LLP for advice. Now, Quinn has switched sides, representing X in suing Bright Data to prevent public web scraping and to shut down the same services at issue in the Meta case. Doing so violates the core tenets of loyalty and confidentiality under California's Rules of Professional Responsibility. Quinn must be disqualified.

Quinn shot back that it had really done nothing too big or important for Bright Data, hadn't learned anything confidential, and that this was another case anyway (this one is about ExTwitter, not Meta!)

The fact that different Quinn Emanuel attorneys (who are now ethically walled), pursuant to a tailored engagement letter, previously billed 30.6 hours for discrete, peripheral advice regarding a specific lawsuit in which Bright Data allegedly breached a different social media platform's different terms and conditions should not result in X being deprived of its chosen attorneys at Quinn Emanuel in a case concerning Bright Data's breach of X's terms of use and other claims.

Judge Alsup is not known for putting up with bullshit, and has disqualified Quinn, and did so in fairly stringent terms. I'd call this a minor benchslap.

X does not dispute the central facts or law undergirding Bright Data's motion. In its own words, "disqualification becomes mandatory" if the X and Meta matters are "substantially related." And it tallies a team of nine attorneys who provided an overall assessment of the Meta litigation. Save for what it acknowledges are "minor wording" differences between Meta's and X's Terms, it agrees the cases are virtually identical, involving the same Bright Data services and conduct, and the same legal issues for the overlapping claims. The cases are irrefutably "substantially related."

X argues this is not dispositive because Quinn's role in the Meta case was too short-lived, "discrete," or "limited" to trigger any ethical obligation beyond that, no matter how related it is. But the disqualification inquiry focuses on the relatedness of the cases and whether the lawyer had a "direct and personal" contact with the former client. That Quinn was not lead counsel is irrelevant. Nor can Quinn escape disqualification by characterizing its engagement as "limited." That is just lawyer argument. The facts are that Quinn was hired to provide an overall assessment of the Meta litigation, and its report covered all aspects of the case, including procedural issues, discovery, strengths and weakness of the claims, defenses, and other issues.

And what about the fact that *that* case was about Meta, and this one is about ExTwitter? Judge Alsup wasn't born yesterday.

True, X says, but irrelevant, because X was not mentioned by name. But cases can be substantially related even if the plaintiff is different. X concedes it geared its advice to place Bright Data in the best position procedurally and substantively to defend future claims by other website operators. That these other operators were referred to categorically, rather than by name, does not render Quinn's advice immaterial, given that the conduct and governing law are the same.

Faced with undeniable factual and legal similarity, X tries changing the test. "To determine whether a substantial relationship exists," it says, Bright Data must show that "any information Quinn Emanuel acquired ... is material to the X Matter." Q.Br. 8-9. But "this type of inquiry is outlawed." Farris v. Fireman's Fund Ins. Co., 119 Cal. App. 4th 671, 683 n.10 (2004). Under Rule 1.9(a), access to confidential information is irrelevant; and under Rule 1.9(c), access is presumed in substantially related matters. Neither rule would make sense if Bright Data had to prove that Quinn has confidential information to avoid proving that fact.

Regardless, Quinn possesses a wealth of material information. X's efforts to minimize this through lack of recollection and disregard for the connections between the two cases cannot overcome the facts. Elan Transdermal Ltd. v. Cygnus Therapeutic Sys., 809 F. Supp. 1383, 1392- 93 (N.D. Cal. 1992) ("The Court, reading the stack of declarations from Irell attorneys, all proclaiming their ignorance ..., is reminded of the words of Hamlet's mother: 'The lady doth protest too much, methinks.'"). Quinn prepared and received attorney work product, and engaged in multiple attorney-client communications, going to the heart of the legality of the services at issue. Not even the Quinn Report's primary author claims irrelevance.

And, just to drive the point home:

*The Court, it says, should use its "equitable" powers to forgive its past transgression and sanction its continuing ethical violation. But California courts do **"not engage in a 'balancing of equities' between the former and current clients. The rights and interests of the former client will prevail."***

There's a lot more in the opinion, but Judge Alsup is not at all impressed by the arguments Quinn lawyers are making here. I mean:

In any event, Quinn’s representation was not narrowly circumscribed. It was not asked to opine on some arcane or peripheral issue of, say, tax law or even copyright law. Bright Data retained Quinn because it was lead counsel in hiQ and familiar with Bright Data’s scraping technology from discovery in that case. Avisar ¶ 2. Quinn was given broad remit to advise on all of Bright Data’s defenses and strategies in the Meta cases. That is not “peripheral;” it is core.

*Nor is there merit to X’s argument that Quinn’s advice was only tangentially relevant to this case. Quinn concedes it provided advice with an eye towards future suits by “other” website operators. Skibitsky ¶ 11. To minimize this fact, Ms. Skibitsky observes that Bright Data only quoted from the Quinn Report’s Executive Summary. Id. at ¶ 18. But the very purpose of an Executive Summary is to highlight the most important points in the Report. And this one was even in bold italics. One does not do that for unimportant points. Nor does Ms. Skibitsky deny that Quinn extensively discussed these issues with Bright Data’s Board. At most, she states that she can’t recall which “specific website operators” were discussed. Id. But that does not change the **undisputed** fact that she and her colleagues discussed Bright Data’s strategy for defending the identical services from identical claims by other website operators.*

And thus, sorry Elon, Quinn needs to sit this one out.

Elon Loses His Favorite Law Firm In Data Scraping Case Because They Played Both Sides

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NFL 'Sunday Ticket' plaintiffs defend \$4.7 bln verdict, deny 'runaway' jury

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Mike Scarcella

A ball with the National Football League (NFL) logo is spotted on a lush green field during a drill exercise at the talent identification camp for the NFL, in Lagos, Nigeria, June 17, 2024. REUTERS/Akintunde Akinleye Purchase Licensing Rights , opens new tab

July 18 (Reuters) - Subscribers to the National Football League's Sunday Ticket telecasts who claimed they were overcharged have urged a judge in California to affirm a \$4.7 billion jury verdict they won last month, after the league asked the court to toss the award or hold a new trial.

Lawyers for the class action plaintiffs argued , opens new tab in a Wednesday night filing that the evidence at trial justified the verdict and amount.

"It is hard to imagine a more blatant antitrust violation than the one the jury concluded defendants committed," the subscribers told U.S. District Judge Philip Gutierrez.

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

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

A Los Angeles federal jury on June 28 concluded that the NFL had restricted the availability of "Sunday Ticket," allowing DirecTV to charge artificially higher prices as its former sole distributor. DirecTV was not on trial.

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.

In a July 3 filing, the NFL called the damages amount "nonsensical" and denied that subscribers were overcharged.

The NFL said a "runaway" jury did its "own unfounded math," and the amount awarded unfairly used the list price for "Sunday Ticket" and treated subscriber discounts as overcharges.

"The verdict in this case is at once among the largest in American history and also among the least defensible," the NFL said.

The subscribers countered that the NFL's "pure conjecture into the jurors' mental processes is legally impermissible." They said there was no evidence the jury relied on evidence it was told to ignore.

They argued that the jury's award was "within the range of proof, which is all the law requires."

U.S. antitrust law allows for the tripling of damages awards, which would award the subscribers more than \$14 billion.

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

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

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

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Reporting by Mike Scarcella

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In "plant-based" Huggies case, a U.S. appeals court weighs in on false labeling

 [reuters.com/legal/litigation/column-plant-based-huggies-case-us-appeals-court-weighs-false-labeling-2024-07-19](https://www.reuters.com/legal/litigation/column-plant-based-huggies-case-us-appeals-court-weighs-false-labeling-2024-07-19)

Alison Frankel

Huggies brand diapers are seen at the Safeway store in Wheaton, Maryland February 13, 2015. REUTERS/Gary Cameron (UNITED STATES) Purchase Licensing Rights , opens new tab

July 18 (Reuters) - If a company makes false claims about its products on the front of its packages, can it successfully defend itself by pointing to the small print on the back label?

The 9th U.S. Circuit Court of Appeals said no back in 2008, in a decision , opens new tab that essentially held consumers can't reasonably be expected to scrutinize back labels to be sure that sellers aren't lying to them on the front of the package.

Then last year, the court seemed to narrow its longstanding precedent, ruling , opens new tab that back-label small print can, in fact, shield defendants in some false advertising cases.

But in a decision , opens new tab this week in a dispute over Huggies "plant-based" baby wipes, the 9th Circuit clarified that last year's exception was not meant to swallow 2008's rule.

Consumers in the Huggies wipes case asserted allegations that Kimberly Clark deceptively advertised the wipes as being made only from natural ingredients. The appeals court, following the lead of the trial court, split class claims into two categories, based on variations in packaging for the wipes. Huggies' current packaging describes the wipes as "plant-based," but includes an asterisk next to those words. Below the asterisk is a note informing consumers that the wipes are about 70% plant-based, by weight.

The 9th Circuit agreed with U.S. District Judge Jesus Bernal of Riverside, California that because of the asterisk and accompanying note, the current labelling is not deceptive , opens new tab. The court affirmed Bernal's dismissal of class claims based on that packaging.

At the same time -- in the more interesting part of the opinion -- the 9th Circuit revived class action claims arising from older Huggies packaging that did not include the asterisk or the accompanying qualifier on the front label.

9th Circuit Judges Ronald Gould and Salvador Mendoza and 6th Circuit Judge Ronald Gilman, sitting by designation, said that even though the back label disclosed both natural and synthetic ingredients in the wipes, consumers plausibly alleged they were deceived by the front label.

The packaging on these older products, the panel said, conveyed a “concrete and unambiguous meaning to a reasonable customer: that the product is entirely plant-based and exclusively contains ‘natural’ materials.”

The key word in that finding is “unambiguous.”

The court drew a distinction in Wednesday's decision from a case it decided just last year involving a Procter & Gamble shampoo and conditioner whose front label depicted an avocado, a green leaf and a gold-colored vitamin along with the words “nature fusion.”

The 9th Circuit said the front label was ambiguous because consumers could draw different conclusions about its meaning. The back label, the court said in the 2023 decision, resolved the ambiguity by disclosing that the shampoo and conditioner contained synthetic chemicals, so P&G could not be held liable.

Kimberly Clark's lawyers from Gibson, Dunn & Crutcher tried to argue [opens new tab](#) that the Huggies front labeling, like the labeling in the shampoo case, was ambiguous because consumers could interpret its meaning differently.

The 9th Circuit said Kimberly Clark was overreading its decision in the shampoo case.

“A front label is not ambiguous simply because it is susceptible to two possible meanings,” Gould wrote in the panel opinion. “A front label is ambiguous when reasonable consumers would necessarily require more information before reasonably concluding that the label is making a particular representation.”

Gould said that Kimberly Clark's reading of the shampoo decision would “effectively overrule” the 9th Circuit's 2008 precedent -- “something we did not and could not do as a three-judge panel.”

Kimberly Clark also tried to argue that the trial judge had discretion under a different 9th Circuit case, this one from 2021, to take account of the back label.

In the 2021 case, the appeals court refused to revive claims that Trader Joe's deceptively advertised honey as “100% New Zealand Manuka Honey” even though testing showed the product was not completely derived from nectar from the Manuka flower. The 9th Circuit said reasonable honey purchasers would know that because bees forage for nectar, it's not possible to derive honey from a single floral source and that the relatively low price of the Trader Joe's product should have signaled that its product had a lower Manuka percentage than competing products.

Kimberly Clark argued that reasonable baby wipes customers know that wipes “don't grow on trees.” So, the company said, its customers, like the honey purchasers in the Trader Joe's case, should be expected to consider context beyond the front label, including the back

label's disclosure of synthetic ingredients.

The 9th Circuit shut down that argument as well. The honey customers, it said were buying a "niche, specialty product" and were therefore more likely to be wary of hyped-up labeling. In fact, the court noted, the 9th Circuit's opinion in the honey case contrasted those consumers with harried parents walking down the grocery aisle, who, it said, are "not likely to study with great diligence the contents of a complicated product package."

In essence, the Huggies opinion carves a new path through the thicket of 9th Circuit precedent, allowing consumers to survive dismissal if they can show a package's front labelling deceptively led them to a reasonable conclusion, even if that conclusion was contradicted by other package labeling or by contextual clues.

Plaintiffs lawyer Glenn Dannas of the Clarkson Law Firm, who argued at the 9th Circuit on behalf of the prospective class, did not respond to a query.

Kimberly Clark counsel Theodore Boutrous of Gibson Dunn said via email that the company is pleased the appeals court confirmed its current packaging for the wipes is not deceptive. "We respectfully disagree, however, with the court's opinion about some of our older packaging, and look forward to the opportunity to demonstrate our case," Boutrous added.

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Reporting By Alison Frankel

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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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National PFAS Class Action Refiled, to Stay in District Court

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- *Hardwick* case seeks medical monitoring, scientific studies
- Judicial panel says case doesn't belong in national litigation

A revised class action that seeks information about the health effects of two PFAS will remain in the federal district court that partly granted the plaintiff's request in 2022.

The clerk for the Judicial Panel on Multidistrict Litigation announced via a text order on Thursday that *Hardwick v. 3M Company* is "not appropriate for inclusion" in a nationwide case consolidating thousands of water utility, personal injury, and other claims against companies that made per- and polyfluoroalkyl substances (PFAS) or a type of fire suppressant that has long contained some of those chemicals.

The revised case, brought by Ohio resident and firefighter Kevin Hardwick, will remain in the US District Court for the Southern District of Ohio, which in 2022 allowed the creation of a class of Ohio residents.

The lawsuit was refiled in the district court in June following an appeal of the district's ruling to the US Court of Appeals for the Sixth Circuit, which found in November 2023 that plaintiffs failed to offer required evidence linking the PFAS in Hardwick's blood to the 3M Co., Daikin Industries Ltd., and 10 others named in the original 2018 complaint.

The revised case narrows the defendants to three: 3M; E.I. Du Pont de Nemours and Co., now called EIDP; and the Chemours Co. It also explains the plaintiff's specific reasons for linking two PFAS—perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS)—to these companies.

The listed reasons include "fingerprints" that remains on the chemicals due to the companies' production methods. 3M, for example, produced both chemicals for many years using a patented production process incorporating electricity that imparts a "signature" that scientists have learned to detect, the complaint said.

Hardwick seeks to establish a nationwide class of individuals with 2 parts per billion or more of PFOA and PFOS in their blood. Class members could participate in a medical monitoring program including diagnostic testing and studies overseen by a court-appointed panel of independent scientists. The requested relief mirrors what attorneys accomplished in the West Virginia lawsuit popularized by the film "Dark Waters."

Taft Stettinius & Hollister LLP, Douglas & London PC, and Buchanan O'Brien Barr Mougey PA represent Hardwick. Robert Bilott, a Taft partner who represents Hardwick, also represented plaintiffs in the West Virginia litigation.

The case is Hardwick v. 3M Co. , S.D. Ohio, No. 24-03121, Notice of Judicial Panel on Multidistrict Litigation's order 7/18/24 .

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Oracle Will Pay \$115 Million to Settle Customer-Tracking Lawsuit

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Class Action

The Oracle offices in Redwood City, Calif., on May 15, 2023.

Photographer: David Paul Morris/Bloomberg

July 19, 2024, 9:10 AM PDT

Tonya Riley



Oracle will pay \$115 million to settle a proposed class action alleging the company tracks consumers' online activities and creates digital dossiers about them for marketing purposes in violation of state and federal privacy laws.

Plaintiffs asked the US District Court for the Northern District of California to approve the settlement in an unopposed motion Thursday.

The settlement—filed just shy of two years after the initial complaint was filed—comes after three rounds of motions to dismiss and eight months of settlement negotiations and was reached after Oracle announced in June that it would shut down its ad tech business.

Proceeds under the settlement will be distributed to class members through a set fund. The agreement also calls for non-monetary relief including a commitment by Oracle to audit its customer compliance with contractual consumer-privacy requirements.

“The Settlement thus demarcates a new era for Oracle’s relationship with class members, offers substantial benefits, and at the same time eliminates the risk and uncertainty of continued litigation,” according to the motion.

Named plaintiffs Michael Katz-Lacabe, a privacy activist, and Jennifer Golbeck, a professor at the University of Maryland, accused Oracle of using advertising-tracking technology to collect data about consumers and combining that data with information from brick-and-mortar stores to create comprehensive individual profiles. The company then used the information in its data-broker marketplace, according to the complaint.

The settlement resolves claims for invasion of privacy under the California Constitution, violation of the California Invasion of Privacy Act, and violation of the Florida Security of Communications Act.

Judge Richard Seeborg previously dismissed claims of intrusion upon seclusion under Florida common law and of violations of the federal Electronic Communications Privacy Act.

Lieff Cabraser Heimann & Bernstein LLP represents the plaintiffs. Morrison & Foerster LLP represents Oracle.

The case is Katz-Lacabe v. Oracle America Inc. , N.D. Cal., No. 3:22-cv-04792, 7/18/24 .

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[Browse More Stories in Class Action](#)

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California courts significantly impacted by global IT outage

DJ [dailyjournal.com/articles/379798-california-courts-significantly-impacted-by-global-it-outage](https://www.dailyjournal.com/articles/379798-california-courts-significantly-impacted-by-global-it-outage)

Several state courts have had their operations significantly impacted by a global technology outage attributed to software company CrowdStrike and affecting Microsoft systems, with some remote appearances canceled and delays expected.

Los Angeles County Superior Court is experiencing "significant system-wide connectivity issues that are impacting the Court's ability to conduct business," according to a press statement.

"Matters where parties were scheduled to appear remotely today, July 19, will be continued and parties notified of a new date," the court advised.

San Diego County Superior Court, which is also affected by the outage, advised those with hearings scheduled for today to still attend as planned.

"The San Diego Superior Court was affected by the mass IT outage and we are working to resolve the issue as quickly as possible. Courtrooms are prioritized to be repaired and several are already operational. If you have a court date this morning, please report to the courtroom as scheduled," a press statement advised.

"If you were permitted to and planned to appear remotely, you may do so, however, you may need to wait in the Microsoft Teams "lobby" if that courtroom has not yet been repaired. We hope that all courtrooms will be operational later this morning."

San Diego's online filing system is currently operational.

Orange County Superior Court advised: "We are experiencing a technical issue with our systems today which may cause delays in our work and service to the public. We are working through them to reestablish full service."

Santa Clara County Superior Court advised in a press statement that desktop devices across all courthouses had been affected by the outage.

"In response to this outage, our IT department is actively deploying technicians to each courthouse. We are prioritizing courtrooms with morning calendars, ensuring the continuous operation of safety and security-related equipment, and maintaining service at Clerk's Office public service windows. These steps are essential to minimize disruptions and ensure that critical court functions continue smoothly," the statement read.

At the time of publishing it was unclear if San Francisco County's systems, and those of other counties, had been impacted.

It is unclear whether federal courts are affected by the outage.

This is a breaking news story, check back for updates.

#379798

US Supreme Court is making it harder to sue - even for conservatives

 [reuters.com/legal/us-supreme-court-is-making-it-harder-sue-even-conservatives-2024-07-19](https://www.reuters.com/legal/us-supreme-court-is-making-it-harder-sue-even-conservatives-2024-07-19)

Andrew Chung

A general view of the U.S. Supreme Court building in Washington, U.S., June 1, 2024.
REUTERS/Will Dunham/File Photo Purchase Licensing Rights , opens new tab

July 19 (Reuters) - Over its past two terms, the U.S. Supreme Court has put an end to five high-profile and politically sensitive cases emerging from one particular federal appeals court on the same basis, declaring that the litigation should not have been allowed in the first place.

In all five cases - involving abortion rights, online free speech, federal student loans, immigration and Native American child welfare - the justices overturned rulings by the staunchly conservative New Orleans-based 5th U.S. Circuit Court of Appeals or judges within that circuit.

In doing so, the Supreme Court sent a message to the 5th Circuit, which handles appeals from federal courts in the Republican-led states of Texas, Louisiana and Mississippi, and the entire U.S. judiciary to tighten up on legal standing, a basic requirement all plaintiffs must satisfy to sustain their cases.

The doctrine of legal standing can be a powerful gate-keeping tool for the judiciary, requiring plaintiffs to show they have been or will be injured in some non-speculative, concrete way that is traceable to the defendant and can be remedied by the court.

The actions by the justices in this area could reduce the tide of bold lawsuits involving contentious political matters, now often mounted in the three states covered by the 5th Circuit because of its reputation for conservatism, according to legal experts.

"I don't think there is much question that the Supreme Court has attempted to rebuke the 5th Circuit in an across-the-board way that will make it more difficult for the aggressive judges on the circuit to grant standing in questionable cases," said constitutional law professor Stephen Griffin of Tulane University in New Orleans.

The Supreme Court's 6-3 conservative majority has continued to move American law sharply rightward, this term alone granting broad immunity to Republican former President Donald Trump on his 2020 election subversion charges and dramatically undercutting the power of U.S. regulatory agencies. And yet it appears intent on reinforcing limits on standing, including for conservative plaintiffs and Republican-led states.

The recent 5th Circuit cases "have kind of a conservative valence where we certainly might expect the justices to have some sympathy for the underlying substantive claims," said law professor Jonathan Adler of Case Western Reserve University in Cleveland. "And yet they nonetheless stick to their guns on standing."

The 5th Circuit has gained prominence as a favored venue for conservative litigants thanks to its far-reaching rulings against Democratic President Joe Biden's administration. But the Supreme Court has now rejected 5th Circuit decisions allowing lawsuits against a wide array of Biden administration or longstanding federal policies.

In June 2023, the justices ruled that Texas and Louisiana lacked the standing to contest Biden's shift in immigration enforcement priorities, that two individual borrowers did not have standing to oppose Biden's plan to cancel student loan debt, and that Texas and other plaintiffs did not have standing to challenge a federal law involving adoption or foster care placements of Native American children.

Last month, the justices ruled that anti-abortion groups and doctors did not have standing to try to restrict access to the abortion pill, called mifepristone, and that Republican-led Missouri and other plaintiffs did not have standing in a suit claiming federal officials were coercing tech companies to censor social media users, in particular conservatives.

In another major case in 2021, the Supreme Court rejected a bid by Texas and other plaintiffs to invalidate the Affordable Care Act, also known as Obamacare, finding that they had no standing despite the 5th Circuit's conclusion otherwise.

'SEEING SOME CHANGE'

University of Texas at Austin law professor Tara Leigh Grove noted that in the past it was liberal litigants such as environmental groups that tested the boundaries on standing.

"There used to be this assumption that progressives wanted the courts to do a whole lot, and conservatives wanted judicial restraint. And I think we're seeing some change in that," Grove added.

The Supreme Court is also signaling that it is rethinking its previous permissiveness in letting states sue, legal experts said, which could rein in a now-common practice of state attorneys general from one party constantly suing over the policies of a president from the opposing party.

Adler said that standing doctrine "prevents courts from becoming where we hash out all our policy differences, because ... a lot of the cases it keeps out are cases where litigants are trying to resolve policy disputes in court."

Two of the five recent rulings reversing the 5th Circuit on standing - mifepristone and student debt - were unanimous, though the justices were sometimes sharply divided on standing. The social media ruling was authored by conservative Justice Amy Coney Barrett, who indicated frustration with the 5th Circuit and the trial judge. Conservative Justices Samuel Alito, Clarence Thomas and Neil Gorsuch dissented from the decision.

The Supreme Court ultimately blocked Biden's debt forgiveness plan in a separate case last year brought by six conservative-leaning states. Liberal Justice Elena Kagan wrote in dissent that the states simply disliked the policy and that the court, in granting the plaintiffs standing, had exceeded its judicial role.

"The court acts as though it is an arbiter of political and policy disputes, rather than of cases and controversies," Kagan wrote.

Some Supreme Court rulings in the past that denied legal standing of plaintiffs drew criticism from liberals for potentially dissuading individuals, especially racial minorities and the poor, from even attempting to vindicate their rights.

That makes the recent rulings concerning 5th Circuit cases stand out all the more.

"These are important developments because the 5th Circuit has repeatedly used manufactured cases filed by plaintiffs who have not been legally injured to attempt to move the law in drastically conservative directions," said David Gans, an attorney at the Constitutional Accountability Center liberal legal group.

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Reporting by Andrew Chung in New York; Editing by Will Dunham

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NEWS

'Slow Time Bomb': Attorney Sells Law Practice, Prompted by SCOTUS Ruling

"If it's going to cost us more to litigate than we can win, you've gutted Title IX without it being obvious," said Washington, D.C. plaintiff lawyer Laura Dunn.

July 18, 2024 at 03:22 PM

Law Firm Management



Abigail Adcox



Washington, D.C., attorney Laura Dunn has sold her Title IX practice to a New York law firm, partly because a 2022 U.S. Supreme Court ruling limited opportunities to recover damages for her clients, she said.

“This was kind of like a slow time bomb,” Dunn said about the ruling. “The only people that enforce Title IX in the U.S. are plaintiff’s lawyers, and the only way that we do it is on a contingency basis. If it’s going to cost us more to litigate than we can win, you’ve gutted Title IX without it being obvious.”

Dunn started her practice in 2019, representing sexual harassment and assault survivors in campus, criminal and civil litigation matters. She has represented sexual assault survivors claiming discrimination under Title IX, which mandates that educational institutions provide equal access to education, regardless of sex. Dunn founded and led SurvJustice, a nonprofit organization for survivors of sexual violence, back in 2014.

Dunn’s solo practice has been active, with firm revenue at an estimated nearly \$500,000, according to Dunn.

However, the Supreme Court’s 2022 ruling in *Cummings v. Premier Rehab Keller* has “impeded the civil practice of Title IX” by reducing the available damages to sexual assault survivors, Dunn said in an interview. As a result, it impacted the financial viability of her Title IX practice, as most of her cases are on a contingency basis.

Dunn is now joining as of counsel New York-based C.A. Goldberg, which acquired Dunn’s Title IX practice, she confirmed this week. She will continue to receive between 25% to 33.3% of any revenue from Title IX and/or campus sexual assault cases that she brought over to C.A. Goldberg.

“I have been considering next steps of potentially running for office or otherwise getting involved to improve enforcement of Title IX, and part of freeing me up was to sell my law practice,” she said.

Overall, the 2022 Supreme Court ruling limited the scope of damages available under Spending Clause statutes.

“The way that lower courts have started to interpret [*Cummings v. Premier Rehab*] is that emotional distress damages are not available, so cases that used to on average be \$350,000 a case, now there’s at least an argument that maybe they’re only worth \$10,000, what we call nominal damages,” said Dunn.

The sale of Dunn’s Title IX practice to C.A. Goldberg was effective as of July 3. C.A. Goldberg, which now has seven attorneys including Dunn, is also a victims’ rights law firm that represents victims of online and offline harassment, stalking, and other forms of sexual harassment and violence.

Firm founder Carrie Goldberg said in an emailed statement that the acquisition felt like a “synergistic moment.”

“My firm began 10 years ago doing victims rights—especially for those harmed through internet weapons. And within two years, our most major cases were on behalf of students whose schools re-abused them when they sought help,” Goldberg added. “Now most of our cases are product liability and personal injury cases against tech companies, but we’ve always had a steady stream of cases where we are going after the more immediate offender—like to get our clients orders of protections or to sue the individual who harmed or defamed them.”

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ANALYSIS

Companies Deluged With Anti-ESG Shareholder Proposals

Some firms are receiving pro-ESG and anti-ESG proposals on the same issue, underscoring how challenging topics such as diversity and climate change have become for corporate America.

July 18, 2024 at 08:46 AM

Corporate Governance



Chris O'Malley



The number of anti-environmental, social and governance proposals put to shareholder votes at annual meetings this year has skyrocketed, but most received paltry support, [new data from governance consultant Georgeson](#) shows.

The data highlights what a fractious issue ESG has become, with conservative pushback to causes such as diversity and LGBTQ rights creating divides on corporate boards and sparking sudden strategy shifts at some high-profile companies.

In January, a director of the trucking company Werner Enterprises resigned, fed up with what he viewed as its [overemphasis on ESG matters](#). More recently, Tractor Supply Co. abruptly [dumped its diversity programs](#), and [John Deere ended support](#) for “social or cultural awareness” events.

Securities rules allow shareholders to submit matters within certain parameters to company shareholders for its annual meeting, the bulk of which are held during the spring. The Georgeson data covers votes from July 1, 2023, through May 17, 2024.

That span saw 112 anti-ESG proposals from Russell 3000 companies come to a vote. That’s a 19% increase from the 94 votes a year ago and nearly double the 57 votes two years ago.

“This year really proved that 2023 wasn’t an aberration. It’s a new dynamic that is unlikely to dissipate, at least in the current era that we’re in,” said Kilian Moote, managing director of Georgeson’s U.S. ESG advisory practice.

“It’s characterized by a high volume of proposals, a lot of activity, a lot of new tactics being tried to really leverage the tools around corporate governance that proponents have in a democratic capital market.”

In the latest year, Georgeson found that 70% of anti-ESG proposals covered social matters, such as the risks of championing racial- and gender-equality efforts, and 13% cover environmental topics, such as the risks of decarbonizing too quickly.

Even with the increase in anti-ESG proposals, in 2024 they represented less than 13% of ESG proposals overall. In 2024, companies voted on 886 pro-ESG proposals. The number has been roughly flat over the last three years.

“The increase in anti-ESG proposals reflects the wider debates about such issues in society,” the Georgeson report said. “To illustrate this point, some companies this season received both pro-ESG and anti-ESG proposals on the same social topic.”

Georgeson found that as the number of anti-ESG proposals has risen, shareholder support has dwindled—falling from 9% in 2022, to 5% in 2023 and 3% this year.

“If I’m a funder [of groups making anti-ESG proposals], I would question whether I’m getting a bang for the buck,” Heidi Welsh, the founding executive director of the Sustainable Investments Institute, told Law.com.

But just because a proposal gets low support doesn’t necessarily mean it was unsuccessful from the proponent’s standpoint, Georgeson’s Moote said.

“It’s [about] informing broader narratives, discussions and there’s a lot of different reasons one might file a proposal even if it doesn’t receive high shareholder support,” he said.

That is indeed part of the game plan of the National Legal and Policy Center, one of the most prolific drafters of anti-ESG proposals. Even if they don’t win majority shareholder support, they raise awareness and can spur conversations with the board and management, said Luke Perlot, associate director of the organization’s corporate integrity project.

Perlot observed that left-leaning groups for years patiently buttonholed corporations, eventually winning them over. “Look at the left turn of corporate America,” he said.

Consider the [anti-ESG proposal](#) that the NLPC submitted this year to Mondelez International, whose products range from Ritz crackers and Oreo cookies to Tang. It called for Mondelez’s board to assess the business risks and consequences of its affiliations with groups such as PFLAG, formerly known as Parents & Friends of Lesbians and Gays.

Mondelez sponsored PFLAG’s annual conference, which NLPC said advocated for the placement of sexually explicit books in school libraries. The group said Mondelez pledged \$500,000 to PFLAG, and it noted that Oreo’s website promoted the organization through a [Pride hyperlink](#).

The proposal noted that a number of companies, including [Target](#) and [Bud Light](#), have faced sales declines and stock price hits stemming from their LGBTQ support.

“Boycotts, silent or boisterous, can arise without warning. Once they gain momentum, the damage can be difficult to contain. InBev, Target and Disney are learning the hard way. Thus, it is critical the Board of Mondelez International focus on its vulnerabilities before they become a liability,” the proposal said.

Mondelez recommended that shareholders vote “no” on the proposal, and shareholders obliged, resulting in shareholder support below 1%.

But NLPC said its efforts weren’t for naught, observing that Oreo’s site throttled back on its Pride marketing toward children.

If groups submitting proposals measured success by the number receiving majority shareholder support, they’d be downtrodden indeed. This year, just one ESG proposal in the social realm has achieved that, according to a [report from Freshfields Bruckhaus Deringer](#).

That proposal, submitted by pro-ESG activist John Chevedden, called for the diabetes-management company DexCom Inc. to produce a report on its political contributions.

Rep. Issa announces new Litigation Transparency Act of 2024

 legalnewsline.com/stories/661892992-rep-issa-announces-new-litigation-transparency-act-of-2024

July 19, 2024

Rep. Darrell Issa | House.gov

Rep. Darrell Issa announced the introduction of the Litigation Transparency Act of 2024, which requires the disclosure of third-party litigation financing agreements at the start of civil lawsuits. The bill mandates that investors entitled to receive payment based on the case's outcome be identified early in the legal process.

According to a press release by House.gov, civil litigation funding comes from various undisclosed sources, such as hedge funds, commercial lenders, and sovereign wealth funds. Potential for large settlements and the involvement of patent-assertion entities lead to issues in Intellectual Property. Recently, there have been rising concerns about national security, particularly in cases where Chinese-backed investors are financing IP litigation against U.S. firms. This issue has been raised by 14 State Attorneys General, former Director of National Intelligence John Ratcliffe, Senator Marco Rubio, and Senator John Kennedy.

"This legislation is a breakthrough measure that will target serious abuses in our litigation system and achieve long-overdue transparency," said Issa according to a press release by House.gov. "If a third-party investor is financing a lawsuit in federal court, it should be disclosed at the onset of the case. Awareness by all parties will help ensure fair and equal treatment by the justice system and deter bad actors from exploiting our courts."

The Insurance Information Institute (III) stated that third-party litigation funding is a form of "legal system abuse" and is making insurance more expensive for policyholders, according to a press release. "The price of insurance is the effect, not the cause of risk, and there must be more work done to curb legal system abuse, as auto insurers – both personal and commercial – are seeing significant increases in claims costs when attorneys enter into the picture," said III CEO Sean Kevelighan.

Nationwide, the cost of car insurance has risen 19.5% over the last year, according to the U.S. Bureau of Labor Statistics.

ORGANIZATIONS IN THIS STORY

Opinion **Advice & Comment**

Lawsuit financing: investors smell profit in classic hold-your-nose stocks

There's much to be said for shares in companies whose returns are uncorrelated to stock markets — if you don't mind the whiff of 'champerty'

KATE BURGESS



© Miss Peach

Kate Burgess YESTERDAY



There is a trio of what I call hold-your-nose stocks on the UK market — companies that promise stellar returns but will make some investors uncomfortable.

I'm not talking about big sin stocks such as oil, gas, guns, alcohol or gambling. I'm talking about Aim-quoted [Burford Capital](#), Litigation Capital Management and Manolete Partners, which bankroll lawsuits. It's known as third-party [litigation finance](#) or TPLF.

There is a lingering whiff around TPLF that goes back to the Middle Ages, when lawmakers worried that nobles were staking doubtful, even dishonest, claims for a share of winnings. So-called champerty was banned in most jurisdictions, partly out of fear that it encouraged litigiousness.

“We’ve moved on since then,” says Christopher Bogart, chief executive of Burford. “And litigation is a necessary evil of business life.”

When the law against champerty was effectively abolished in the last century it unleashed a new vibrant band of legally savvy financiers prepared to back plaintiffs, both individual and commercial.

Industry participants say virtually every big US private capital firm is now involved in funding lawsuits, some quietly, some less so, and much of it lucratively. Fortress Investment Group says it has deployed more than \$5bn in financing litigation since 2012.

“ The sheer size of returns triggered onlookers to mutter about ambulance chasers and profiteering

Kate Burgess

There are only a handful of listed companies involved in TPLF. Burford is the only quoted litigation funder in the US. But we get some sense of the size of the possible market with the action, backed by TPLF, [against Johnson & Johnson](#) and allegedly carcinogenic talc. The case was settled in May with the US healthcare giant agreeing to pay about \$14bn over 25 years — \$6.5bn in present value terms.

So far, says Patrick Moloney, LCM’s chief executive, market penetration is low. But TPLF is increasing. He insists it is a force for good and an agent of change, aiding those pushing for better governance or environmental standards and bringing corporate miscreants to book.

He has a point. In the UK, the sub-postmasters in the Post Office Horizon scandal, who fought to overturn wrongful convictions, [were bankrolled by Therium Capital](#), a private financier. Litigation financiers help to level the playing field, giving ordinary people access to justice they otherwise could not afford.

Even so, the sheer size of returns triggered onlookers to mutter about ambulance chasers and profiteering. Alex Chalk, former Lord Chancellor, said Therium received a significant chunk of the millions awarded to sub-postmasters and called for caps on the contracts between plaintiffs and financiers.

The threat of regulation will persist, adding uncertainty to a sector already dogged by questions about visibility, earnings quality and balance sheet opacity. That makes it an easy target for short sellers — they attacked Burford's bookkeeping five years ago. Burford subsequently revamped its methodology and subjected itself to US oversight by listing shares in New York and the group is now included in the Russell 2000 index of smaller companies. But the shares still trade roughly 47 per cent below their 2018 peak.

To put it plainly, valuing litigation funders is tough. These companies measure returns based on what they think is fair value. In essence, this is a net present value of potential payouts from cases that may settle some time in the future.

Historically, as much as half of gains booked yearly by Burford and LCM have been unrealised, subject to regular adjustments and writedowns. Smaller insolvency specialist Manolete, which buys claims of creditors in windups and turns over cases relatively quickly, reports lower unrealised gains. Steven Cooklin, founder and chief executive, says 90 per cent of gains in any one year are realised.

Even so, Manolete was punished when it reported an adverse decision on one of its larger cases in the High Court in 2022. The group was already struggling with Covid when insolvencies were suppressed and timetables extended. The board wrote down the full value of the case that year, throwing Manolete into a full-year loss of about £4mn.

Things are improving. "Record numbers of companies are going into liquidation — the highest rate since 1960," says Cooklin, adding that Manolete has renegotiated covenants on its £12mn in debt.

But while Peel Hunt, the broker, forecasts pre-tax profits of near to £6.8mn, one analyst says the market has yet to be convinced after Manolete missed forecasts last year "by a country mile". Shares in the company are down about a third this year.

Manolete's woes add grist to the mill of those who argue TPLF makes for a poor stock market investment. Fair-value accounting may smooth revenues but returns from multiyear projects are still lumpy. And small changes in assumptions on timelines, outcomes and interest rates have a big effect on fair values and shares.

Burford's shares are down a fifth since May after it reported a big drop in first-quarter income, due to the variable timing of revenue recognition. The market is forecasting earnings could drop sharply in the year to December on the back of lower realisations. Some think it will take another favourable judgment on a big case to lift expectations.

Burford was bolstered last year by a New York judgment ruling that Argentina had unlawfully renationalised energy company YPF in 2012. Burford's share of winnings could be about \$6bn, double the group's market value. That said, it is telling that Burford puts a book value of nearer \$1.4bn on the claim.

“

Litigation is a necessary evil of business life

Christopher Bogart, chief executive of Burford Capital

Still, for those with a ready supply of nose pegs, there is much to be said for shares in companies whose returns are uncorrelated to stock markets and economic cycles. And average historical returns have been high. Burford reckons its long-term return on invested capital is about 82 per cent, equating to a multiple of invested capital of close to two times. The average duration of

cases is about 2.5 years, according to Bogart. But it is the big wins that make up for losses and the long-running nature of major litigation.

LCM, which started out life in Australia, seems less hazardous. It is smaller than Burford but more diverse than Manolete. And where Burford invests largely off its own balance sheet, financed through \$1.6bn in debt, LCM has no net debt and is shifting more towards fund management and using other investors' capital to bankroll cases.

It has a more cautious approach to fair-value accounting, too, and its historical multiples of invested capital over a dozen years has been about 2.8 times with cases lasting on average 3.5 years. Zeus Capital reckons rising levels of performance fees will reduce unrealised gains and boost multiples of invested capital to nearer four times. That is fairly stellar.

It is still a hold-your-nose stock, but there seems less likelihood that investors who dive into LCM will come to the surface spluttering.

The Big Read US politics & policy

Has Silicon Valley gone Maga?

Some of America's wealthiest tech investors have come out for Trump. But most Big Tech leaders are staying silent, for now

Tabby Kinder, George Hammond and Hannah Murphy in San Francisco, and **Alex Rogers** in Milwaukee 36 MINUTES AGO



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In Silicon Valley, the heartland of US innovation that has long been considered a bastion of liberal beliefs, Donald Trump's victory in the 2016 presidential election provoked despair.

"This feels like the worst thing to happen in my life," wrote Sam Altman, the co-founder of OpenAI, on X. "The horror, the horror", said venture capitalist Shervin Pishevar, an Uber investor who made a call for California to secede from the US.

Eight years on, the mood has changed. An influential segment of Silicon Valley's wealth and power is now lining up behind Trump to win the White House in November alongside his vice-presidential candidate, JD Vance, a former venture capitalist who lived in San Francisco for almost two years.

Over the past few weeks, an unfolding cast of prominent technologists have declared their newfound support for Trump, with momentum growing even faster since the attempt on his life on July 13.

“I fully endorse President Trump and hope for his rapid recovery,” Elon Musk wrote on X, the platform he owns, just 30 minutes after the shooting. Two days later, Marc Andreessen and Ben Horowitz, early internet pioneers whose venture capital firm controls \$35bn, threw their backing behind the Trump-[Vance](#) ticket. And Keith Rabois, an early executive at PayPal and LinkedIn, who in 2016 called Trump a “sociopath”, pledged \$1mn to his campaign. “Biden is the worst president of my lifetime,” the Khosla Ventures managing director now tells the Financial Times.

They joined a slew of Silicon Valley investors like Chamath Palihapitiya and David Sacks, hosts of the “All-In” tech podcast, and Sequoia Capital partners Doug Leone and Shaun Maguire, who had [publicly backed Trump](#) weeks earlier. All of them have made, or are planning to make, large donations to a new pro-Trump [political](#) action committee led by Joe Lonsdale, the co-founder of software giant Palantir Technologies and venture firm, 8VC.

Pishevar, far from hoping California would leave the union, has instead moved himself and his business to Miami, Florida and become a Trump supporter. “The Democratic party I knew under Obama doesn’t exist anymore,” he says, in an interview at the Republican National Convention in Milwaukee. “The shift in Silicon Valley is indicative of the recognition that the Republican party has become much more open to grand ideas to really rebuild America and embrace [tech](#) and innovation.”



Yet the shift is far from universal in a sector, and location, that is still overwhelmingly a Democratic stronghold. Around 80 per cent of donations from internet companies have gone to Democrats so far in this election cycle, according to Open Secrets (though that has dropped from 90 per cent in 2020), and Big Tech veterans like Microsoft board member Reid Hoffman are still backing President Joe Biden, and have urged peers to do the same. In San Francisco, only 9 per cent of people voted for Trump in 2016, rising to 13 per cent in 2020.

Some of San Francisco's life-long Democrats believe the trend is being overplayed, the work of a small number of influential figures with big megaphones. "It's a handful of west coast financiers doing what Wall Street bankers have long done — feathering their nests," says [Michael Moritz](#), the billionaire former leader of Sequoia Capital. "They represent Silicon Valley about as much as the traditional Wall Street types represent the Bronx."

What happens in this wealthy enclave of the United States is hardly representative of the rest of the country. But the divide here reflects political rifts being felt nationally, as friends and co-workers disagree over whether a second Trump term represents a threat or an opportunity.

Moritz's views are at fierce odds with his colleagues, Leone and Maguire. Hoffman was part of the founding team of PayPal — alongside Musk and Sacks and longtime Trump donor, Peter Thiel. Lonsdale and Thiel's Palantir co-founder and chief executive, Alex Karp, is a major Biden donor.

At the same time, the willingness of some of Silicon Valley's best-known wealth creators to back Trump exposes how parts of the technology industry feel the Democrats have failed to help them thrive.

"People who innovate are fleeing. It is an intellectual mistake that the progressive wing doesn't engage," says Karp. "I personally am not thrilled by the direction [of the Democratic Party], but how far can they go before I reconsider? I am voting against Trump."

The reasons for the shift are as commercial as they are ideological.

Silicon Valley's Trump supporters are betting the former president will lower their tax burden and boost their business profits. Many of them are desperate to avoid Biden's plan to tax unrealised capital gains at 25 per cent for individuals whose wealth is over \$100mn. The tax would "absolutely kill both start-ups and the venture capital industry that funds them," Andreessen Horowitz posted on its website last week.

Competition regulators have clamped down on tech companies in recent years, forcing Big Tech into years of paralysis on mergers and acquisitions, and starving venture-backed start-up companies of lucrative exit deals. Lina Khan, chair of the Federal Trade Commission, and Jonathan Kanter, the assistant attorney-general for antitrust at the Department of Justice, have targeted tech monopolies, going after Amazon, Meta, Google, Apple and others in the courts.

Rapid developments in artificial intelligence in the past 18 months have made this a particularly pressing problem for tech companies. "We are on the edge of an AI surge that will make the dotcom boom look like spring break," says Boris Feldman, co-head of Freshfields' global tech practice, who advises multiple "magnificent seven" tech companies. "Tech CEOs are concerned that, because of Khan's obsessive hostility towards major tech companies, [the FTC] will be willing to impede developments in AI, placing us at a competitive disadvantage to non-western countries."

Trump is unlikely to go soft on tech monopolies, and indeed his running mate Vance has been vocal on his desire to rein in Big Tech. But the sense in tech circles is that a Republican administration will not be nearly as anti-merger as the current government. On top of that, both Trump and Vance, who invested in dozens of fledgling AI companies at his firm Narya Capital, have positioned themselves as strong sceptics of regulating AI.

Looser regulation would be a particular boon for the founders and backers of AI start-ups. "American technological pre-eminence lives or dies on the fate of whether start-ups can succeed," said Andreessen last week, explaining that his venture firm's "little-tech" agenda was at the root of his decision to support Trump.



It's clear now that, at least on little tech ... we think Donald Trump is a better choice than Joe Biden

BEN HOROWITZ
CO-FOUNDER OF ANDREESSEN HOROWITZ



Andreessen Horowitz has another major financial interest in championing Trump: cryptocurrency. Trump has pitched himself to tech executives as “the crypto president” and he plans to make a speech, in person, at a major Bitcoin conference in Nashville later this month. The price of Bitcoin surged immediately following the assassination attempt on Trump, with crypto investors increasing their bets he will win.

Andreessen Horowitz has an \$8bn bet on crypto, making it one of the largest crypto investors in the world. But it has had to fight to influence US politicians as the crypto industry faces heightened scrutiny from regulators after the collapse of crypto exchange FTX and the conviction of its founder, Sam Bankman-Fried, for embezzling customer funds. Gary Gensler, the chair of the Securities and Exchange Commission, has been an “existential threat” for crypto investors, Feldman says. “They must get him out. They will spend whatever it takes to accomplish that.”

There are ideological reasons behind the shift, too. Silicon Valley’s culture over the last two decades became defined by progressive attitudes that aimed to root out social injustice, with tech giants adopting mottos such as Google’s “Don’t Be Evil”, Meta encouraging employees to challenge its management on company issues, and tech workers forcing their employers to veto government defence contracts on moral grounds.

Over time, that has changed. Google ditched its motto in 2018 and Meta started restricting political speech by staff in 2020. Growing geopolitical tensions between the US and China and Russia's invasion of Ukraine have pulled tech giants such as Google back into government work on defence programmes — and employees are told to leave if they don't like it.

One of the most obvious divides with tech industry culture used to be Trump's stance on immigration. Half of start-ups valued at \$1bn or more were started by immigrants. Any proposal to "choke off" immigration "makes me sick to my stomach", said Andreessen in 2016 in a direct response to Trump. But an immigration crisis at the US-Mexico border has fuelled some of the tech swing to Trump since then, particularly from Musk, according to people close to him.

"I think it's totally cultural," says Jacob Helberg, a Palantir adviser and former major Biden donor now supporting Trump with his husband Rabois. "Most people are willing to absorb high taxes. I think part of what we're seeing is the perspective of time has led a lot of people to conclude that President Trump's policies were actually more right than wrong."

Provocateurs like Musk have railed against "wokeness" for years, and that sentiment has become an increasingly mainstream opinion in some tech circles, with companies reining in their rhetoric and, in some cases, their action on diversity and sustainability.

Last week, Musk not only endorsed Trump but also announced he would [move both X and SpaceX from California to Texas](#) in protest at a new state gender identity law for schoolchildren.

Even some Democrats in Silicon Valley admit that parts of the liberal agenda swung the pendulum too far one way and alienated supporters. "Political correctness in the party is a huge problem, the Democrats can't yet understand the cost of it," says Palantir chief Karp.



There is an even more simple explanation for the sudden outpouring of support, however: Silicon Valley's power brokers now think Trump will win, after the events of the last month, and they want to have credibility with, and access to, the new administration.

Big Tech's top executives are staying silent for now, but there are signs of a wider movement happening. On July 12, Meta finally lifted all of the restrictions it had placed on Trump's Facebook and Instagram accounts after the January 6 2021 attack on the US capitol.

Mark Zuckerberg, the founder and chief executive of Meta, on Friday said Trump's immediate reaction to the shooting was "[badass](#)" — though added he was not planning to be involved in the election in any way.

Now that the public support for Trump that was once taboo in Silicon Valley is broadly acceptable, more might follow.

This would be vindication for PayPal co-founder Thiel, who was disavowed by parts of Silicon Valley for his donations to Trump eight years ago, and moved from San Francisco to Los Angeles in protest at the tech hub becoming a "one-party state." He has not donated to Trump this campaign so far, but has been the biggest source of funds behind both the venture capital and political career of Vance.

But Silicon Valley's newer generation of Trump boosters may find it harder than expected to gain the access they hope for. "They're all calling and they all want to support me," Trump said of Fortune 100 chief executives in an interview with Bloomberg this week. "And if you knew about politics, whoever's leading gets all the support they want. I could have the personality of a shrimp, and everybody would come."

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Matt Levine's Money Stuff: Maybe Good Governance Is Bad

By Matt Levine

Opinion

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Matt Levine's Money Stuff: Maybe Good Governance Is Bad

By Matt Levine 2024-07-18T14:29:07320-04:00

Should index funds be illegal?

You know the theory: When the same big diversified institutional investors own all of the companies, those companies have less incentive to compete with each other. If Airline A and Airline B have the same shareholders, and Airline A cuts prices to win more market share, that simply hurts the shareholders: Overall, the airlines sell the same number of tickets but at lower prices.

We talk about this theory a lot. It is controversial, in part because of disputes about the empirical evidence but mostly, I think, because it doesn't *feel* right. That is:

1. Most large diversified asset managers do not think this way: They don't *want* to reduce competition, and they do not go around meeting with the managers of their portfolio companies to say "hey you should compete less."
- 2. Most corporate executives do not think this way: They don't care about overall profits for their shareholders; they care about *their* company's profits and market share. They care because they are naturally competitive people who want to win, but they also care because *they* are not diversified shareholders: The executives themselves own a lot of stock in their own firms, so they are motivated to win market share for themselves.

So if you think this theory is right you will need sort of a better mechanism, one that does not rely on the diversified investors actually *wanting* less competition, or on the corporate managers trying to give it to them.

Here is a clever one from Zohar Goshen and Doron Levit:

In equilibrium, common owners exert market power indirectly by delegating control rights to other shareholders through broad implementation of “strong” governance structures across their portfolio firms. That is, more firms adopt strong governance under common ownership. These delegated control rights are then leveraged by activists, which pressure managers of their target firms to reduce investments. The aggregate effect of lower investments reduces the demand for labor and lowers wages. Importantly, even though activist hedge funds do not internalize externalities across firms, the cumulative impact of their interventions contributes to anticompetitive outcomes. Effectively, common owners establish a labor market monopsony without resorting to collusion among firms. Consequently, the symbiotic relationship between common owners and hedge fund activists is detrimental to society.

It is important to note that common owners need not consciously act as a monopsony or a cartel. The anticompetitive effects follow naturally from common owners’ push for strong governance. The conventional wisdom praises institutional investors for strengthening corporate governance as it mitigates agency costs (Jensen and Meckling 1976). And indeed, institutional investors are consistently pushing toward strong governance structures for publicly traded firms. However, this perspective often overlooks the principal costs inflicted by activist hedge funds. Consequently, common owners who push for strong governance and bolster hedge fund activism, might mistakenly attribute the realized positive returns on their portfolios to the benefits of reduced agency costs rather than acknowledging the role of labor monopsony at play. In other words, the commonly held naive view that strong governance unequivocally enhances shareholder value by reducing agency costs could explain the anticompetitive impact of common ownership.

They are concerned with labor-market competition rather than product-market competition: Their worry is not “companies with common owners won’t compete on price” but rather “companies with common owners won’t compete to hire workers.” But their mechanism is *governance*. Schematically it is something like:

1. Big institutional investors like “good governance.” They push companies to adopt good governance structures that give shareholders strong rights to supervise managers. Strong governance structures include things like one share one vote (no dual-class stock), all directors elected every year (no classified boards), independent board chairs, no poison pills etc.
- 2. Good governance is good for activist hedge funds: It’s hard to win an activist proxy fight at a company with a staggered board and dual-class stock, but it’s easier at a company with shareholder-friendly governance.
- 3. Activists, in this telling, are bad: They “pressure managers of their target firms to reduce investments.” There is a stereotype that activist investors push for short-term financial engineering rather than long-term investments in the business.

This, in Goshen and Levit’s story, is bad for employees (fewer investments means less demand for workers), but you could tell other stories: “Companies with common owners are more vulnerable to activists, so they do more stock buybacks and invest less in their business, so they don’t compete as effectively to develop new products,” for instance.

I don't know. But what I like about this story is that it *does* reflect how investors and managers think:

1. Big diversified investors *do* care about good governance. The giant asset managers who own every company can't necessarily develop strong views on how every company should run its business; they focus on systemic stewardship, on doing things that work across their portfolio rather than things that are company-specific. And they do tend to have a broad systematic view that strong, shareholder-friendly governance is good, so all companies should have it.

- 2. This story doesn't rely on managers wanting to reduce competition, or wanting to work in the economic interests of their diversified shareholders. It relies on managers being scared of activists, or being kicked out after losing proxy fights.

Block trades

Earlier this year, Morgan Stanley got in trouble for leaking some block trades. Big shareholders (private equity funds, etc.) in public companies would come to Morgan Stanley to say "we would like to sell our XYZ stock today, we will ask you for a bid this afternoon, get to work preparing your bid, but whatever you do don't tell anyone else about this." And then Morgan Stanley's head of equity syndicate, Pawan Passi, would call his buddies at a few hedge funds and say "we have a block of XYZ stock coming, get ready," and the hedge funds would short the stock and make money (because the block trade would lower the stock price), while the big shareholder would lose money (because the short sales would also lower the stock price and result in a lower price for the block).

Eventually US regulators discovered this and concluded that it was bad: Morgan Stanley had material nonpublic information (its clients' block-trade plans), it had an obligation to keep that information confidential (the clients told it not to tell anyone, and it agreed), and it leaked the information to the hedge funds so that they could trade. That looks a bit like insider trading. So the US Securities and Exchange Commission and federal prosecutors brought charges, fined Morgan Stanley a lot of money and barred Passi from the securities industry for a year. (Amazingly, he then went to work at one of the hedge funds that he had tipped off — though it converted into a family office, possibly so that he could work there despite his industry ban.)

But the hedge funds that Passi tipped off — the ones who actually traded on his information — never got in trouble. It's a little weird. But I think the best analysis is something like: Passi (and thus Morgan Stanley) *knew* that he was doing the wrong thing. He had the information, he knew it was confidential (because the client told him directly), he knew the hedge funds would trade, and he leaked it anyway. The hedge funds didn't *necessarily* know that. They could have thought, not "Morgan Stanley is betraying its client by leaking this information to me," but rather "Morgan Stanley is *helping* its client by trying to line up buyers for the block trade, and since they didn't tell me not to pre-hedge, I'm going to do that." As far as the hedge funds knew, maybe, Morgan Stanley was *supposed* to be telling them about the block trade as part of its marketing, and they were free to trade.

This analysis is a little suspect — that's not usually how block trades work? — and it is complicated by the fact that some of the hedge funds would tell Passi things like "I know who my daddy is" and "[I] would be at the kiddie table if it wasn't for [Passi]." "You don't say 'I know who my daddy is' to your salesperson unless you know you are getting some sort of weird personal favor," I wrote. But maybe that's wrong; maybe it meant, like, "thank you for including me in your entirely legitimate marketing process."

Anyway the weird upshot of all of this is that one of those hedge fund traders, Robert Gagliardi, is suing his subsequent employer, Evolution Capital Management, for a \$7.5 million bonus that he says it owes him. Evolution has said that it can't pay him the bonus because of his "disreputable conduct," and "said in filings last month that it believed Gagliardi was the unnamed investor referenced by the SEC and US Department of Justice in January." Specifically it thinks he's the "I know who my daddy is" guy:

The extracts Evolution selected included one from a DoJ document in which an unnamed investor, which the hedge fund said it believed was Gagliardi, referred to Passi as his "daddy" who had "put [him] in the ... game" on block trades. Another extract from the document described an investor betting against Canada Goose after talking to a Morgan Stanley banker who asked, "how is your store of cold weather jackets?", and "chuckled".

He does not exactly deny the "daddy" comment, but he does say he did nothing wrong:

Gagliardi said in his latest court filing, dated July 12, that he would "proceed on the assumed basis that those extracts refer to him", but that Evolution's inclusion of them in its court filings was "abusive" and part of a "smear campaign", and that no regulator had ever accused him of wrongdoing. ...

He said none of the authorities' documents "makes any allegation of wrongdoing against" the investor or alleges "disreputable conduct" or that the person in question "knowingly used confidential information to obtain any unfair market advantage".

He said the SEC had "confirmed expressly" in a letter dated March 4 that "on the basis of the matters to date it does not recommend that any action be taken" against him. An SEC spokesperson declined to comment.

Yes right he apparently traded on an illegal tip, but *his* trading wasn't illegal, so it's not a reason to deny him a bonus.

Diversification

Bloomberg's Layan Odeh and Dinesh Nair have a profile of Connor Teskey, the potential future chief executive officer of Brookfield Asset Management, which discusses Brookfield's somewhat odd corporate structure. A lot of financial firms are partnerships owned by their executives, and a lot of financial firms are public companies, and a fair number of financial firms are public companies that want to promote a partnership culture and whose executives own a lot of stock. But Brookfield maybe goes further than most in being public but also a partnership:

The Brookfield way extends to a compensation system that has churned out multimillionaires and billionaires. Unlike other alternative-asset managers that reward senior executives with carried interest, Brookfield prefers to award stock. For rising executives, significant equity awards cement their devotion to the firm. And for long-timers, their swelling stakes give them a big incentive to stay.

In a somewhat unusual structure, the firm has two classes of shares: Class A stock that's publicly traded and gives owners the right to vote for half the board, and class B stock that's held only by current and former insiders who elect the other half.

The idea is that the "partners" act as the stewards of B shares and commit to investing large portions of their wealth in A shares, ensuring stability. ...

The result is that the firm's top five executives each hold stock worth billions. The A shares that [current CEO Bruce] Platt owns directly in Brookfield and BAM — disclosed in regulatory filings — are worth well over \$3 billion, and that doesn't include other holdings tied to the company. One person close to the company estimated that, further down, about 10 employees have a net worth of around \$300 million apiece, and that 15 more have roughly \$100 million.

The way you get to \$300 million of Brookfield stock is mostly by being *granted* the stock as part of your compensation. But you can always buy a little extra:

Piling up stock is seen as a virtue. When Platt noticed a staffer clutching a Starbucks cup in the elevator, he asked how much it cost, and — after some quick mental math — suggested the employee drop their daily ritual and use the money to buy two more shares a month and drink the coffee available for free in the office.

"Cut out your daily Starbucks so you can buy a house" is probably the most controversial personal finance advice, but "cut out your daily Starbucks so you can buy more shares in your employer" is even weirder. Your human capital is tied to your employer, you're getting paid in stock, *and* you have to put all your free cash into more stock?

Fusion

One possible analysis of Sam Altman is that many of his science-fiction-y plans are far-fetched and overhyped and he won't really build artificial general intelligence or commercial fusion reactors. But that is boring, and I think it is more fun to assume that everything is 100% real and think about incentives and governance. Like:

1. Sam Altman is the chief executive officer of OpenAI, which is — let's assume — moments away from making superintelligent robots that could usher humanity into a world of abundance and/or enslave us all.

- 2. It is very very very important that the robots usher in abundance rather than enslaving us all.
- 3. A superintelligent-robot-builder who was motivated by money might be tempted to build enslaving robots rather than abundance robots, for somewhat underspecified financial reasons.

- 4. More seriously, a superintelligent-robot-builder who was motivated by money might *hoard the robots*, providing a lot of abundance for people willing to pay a lot for robots, but no abundance for anyone else.
- 5. Therefore, it is important for OpenAI's motives to be pure. So it is structured as a nonprofit, and its "principal beneficiary is humanity, not OpenAI investors." Even though it has investors who expect to make a lot of money, weird.
- 6. Altman himself owns no equity in OpenAI, so that his motives can be pure: He builds the robots for humanity, not for the money.
- 7. However! A world of superintelligent robot abundance will require certain inputs.
- 8. Mainly (1) microchips, (2) electric power and (3) text to train models.
- 9. And Altman is free to invest in all of those selling-picks-and-shovels businesses.
- 10. Preferably in as futuristic and sci-fi a way as possible: Not, like, buying stock in California electric utilities, but funding nuclear fusion startups.
- 11. In his role as CEO of OpenAI, Altman is obligated to provide the robots to humanity in a responsible, fair, abundance-promoting way.
- 12. But he can absolutely gouge them on electricity, that's no problem at all.

Now that I have typed it all out I realize it doesn't make that much sense. Still it's a good dumb sci-fi plot. Everyone has a superintelligent robot, but the guy who invented the robots controls the electricity. Anyway:

Sam Altman, the billionaire chief executive officer of OpenAI, is staking a sizable chunk of his personal wealth on a startup chasing the holy grail of nuclear fusion – the elusive, theoretically limitless clean-energy source that, he says, is key to an artificial intelligence-enabled future.

While other billionaires, including Jeff Bezos, Bill Gates and George Soros, have backed fusion ventures, Altman has made his largest personal investment in Helion Energy, which stands out for its audacious timeline. It plans to open the world's first fusion power plant by 2028 and to supply Microsoft Corp. with energy from it soon after. ...

Helion offers little to persuade doubters or skeptics. Though it's among the best-funded fusion companies, it doesn't publish experimental results or engage in peer review the way large rival startups do, raising red flags in the scientific community.

CEO David Kirtley says the main task isn't necessarily publishing — it's building a fusion reactor.

"When we founded Helion, our goal wasn't to demonstrate interesting new physics," Kirtley said in a March interview. "By iterating and building quickly, you actually learn more than you ever could if you did a lot of simulation and a lot of computation upfront."

OpenAI was supposed to be, you know, "open" AI; it was supposed to selflessly publish research to improve humanity's understanding of AI, though that goal changed a bit over time. But the fusion company doesn't care about publishing research; it cares about building a reactor.

Congrats on your dinosaur Ken Griffin

I feel like, when you read about someone buying an expensive bauble, maybe 50% of the time it is Ken Griffin? Pretty much anywhere you go in the world, Griffin has bought the most expensive home there. He owns a Constitution. Also now he's got a dinosaur:

Hedge-fund billionaire Kenneth Griffin paid \$44.6 million for a nearly complete Stegosaurus skeleton at Sotheby's on Wednesday, the most ever paid for a fossil at auction.

The 150 million-year-old dinosaur, nicknamed "Apex," was only expected to sell for up to \$6 million. Its sale surpassed the \$32 million paid four years ago by Abu Dhabi for a Tyrannosaurus rex skeleton widely known as "Stan." The sale also soared past the \$8.4 million paid in 1997 for another T.rex nicknamed "Sue," now on view at Chicago's Field Museum.

Griffin, the 55-year-old founder and chief executive of Citadel, said he aims to lend "Apex" to a museum in the U.S. "Apex was born in America and is going to stay in America," he said after the sale.

Good for him. You sometimes read stories like "Area Billionaire Lives Modest Life in Modest House, Drives Modest Car, Sometimes Flies Commercial," and, you know, why? What is the point of all that money if not to spend it on amusing toys? If you've got a huge collection of huge houses, why not put a stegosaurus in the foyer of one of them?

Also, I realize that crypto is back, but in 2021 Griffin had to bid against a crypto decentralized autonomous organization to buy that Constitution. There was not, as far as I know, a StegosaurusDAO in 2024, so crypto isn't *fully* back.

Elsewhere in baubles

Here's Josh Harris, who got his money by buying companies and spends it by buying sports teams:

In business, it's about Ebitda, stock price, valuation, cash flow. In sports, it's about winning championships and creating memories. Obviously the journey started as more of a value-oriented journey, very similar to what I do at 26North [the alternative investments company Harris founded in 2022]. But the evolution is quite different. At the time I paid \$6 billion for the Commanders, and at 60 times Ebitda my credentials as a value investor were shattered, I like to joke.

Yeah but that stegosaurus has no Ebitda at all, it just stands there. At the very high end, it is easy to confuse consumption with investment: Your homes and art and yachts and stegosauri and sports teams all have a lot of resale value, and if you made your money as a savvy investor you will naturally want to buy your toys low and sell them high. But you have plenty of money and they are toys! The goal is "creating memories," or having a dinosaur in your dining room; you don't have to be a value investor.

Looking for a man in finance

There was a viral TikTok about “looking for a man in finance, trust fund, six-five, blue eyes,” so now, if you go to Phebe’s or the PJ Clarke’s by Brookfield Place, there is some chance that you will encounter a journalist doing a story about men in finance. Here’s one from Joanna Rothkopf at the Cut:

What of the humble finance bro who, for the record, didn’t ask for any of this? All he ever wanted was to work through the best years of his life juiced up on a steady cocktail of Adderall and whey protein until he had earned enough money to mistreat hotel staff. No one was thinking about how all this commotion affected him: Was he dating more? Less? Did he like being the center of attention?

So she goes to the Spaniard, “described to me as an ‘analyst bar’ in the West Village,” and at first meets “men who can’t possibly be bankers,” because “their wardrobe and grooming suggest they work in a creative-adjacent industry like advertising or military contracting.” Eventually she meets some more-or-less finance-y people:

The first thing to know, the guys say, is that “finance” isn’t even what most people think it is anymore. “Everyone thinks, Oh, finance, but that’s just something they learn is prestigious in school,” Dennis says. Because of the earnings cap at a level like, say, managing director, he continues, “You could make way more by owning five bodegas.” They all agree that owning five bodegas is a great way of making money, though it is also a different sort of job.

As for the meme, of course they know about it. “I’m a manager; I gotta keep up with what the people I’m managing are talking about,” Dennis says before showing me a tweet from @litcapital that reads, “When you crushed 10 espresso martinis at The Spaniard last night and hungover staring at the screen all morning.”

Maybe a little weird for the manager to be at an analyst bar but whatever.

Things happen

Blackstone Profit Misses Estimates as Real Estate Exits Slow. Meta explores stake in Ray-Ban maker EssilorLuxottica. Ray-Ban Maker EssilorLuxottica to Buy Supreme Brand for \$1.5 Billion. Warner Bros Discovery drafts break-up plan. A New York City Pension Makes Renters’ Rights an Investment Priority. Beyond Meat Engages Bondholders for Restructuring Talks. Hong Kongers Fleeing to UK Leave \$3.8 Billion Trapped Behind. Wall Street Wants In on America’s Battery Storage Boom. Space Firms Pitch SpaceX Workers Hurt by Musk’s Relocation Plan. Where CEOs Find Time for Triathlon Training and Motorcycle Racing. How Billionaires Die.

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- 1. Except in the US shale oil industry, where it is all pretty straightforward.

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Citigroup waived ATM fees in 'underserved' areas. Conservatives cried foul.

 [reuters.com/legal/transactional/column-citigroup-waived-atm-fees-underserved-areas-conservatives-cried-foul-2024-07-18](https://www.reuters.com/legal/transactional/column-citigroup-waived-atm-fees-underserved-areas-conservatives-cried-foul-2024-07-18)

Jenna Greene

People walk beneath a Citibank branch logo in the financial district of San Francisco, California July 17, 2009. REUTERS/Robert Galbraith/File Photo Purchase Licensing Rights [↗](#), opens new tab

July 18 (Reuters) - ATM fees are one of life's small annoyances, a few dollars added to an out-of-network withdrawal because your bank didn't have a machine nearby.

That's why a lawsuit against Citigroup for waiving its \$3 out-of-network ATM fee for customers of certain credit unions and community banks, most of them minority-owned, strikes me as an instance of no good deed going unpunished.

As my Reuters colleague Jonathan Stempel reported, the third-largest U.S. bank was sued in May by two Florida customers who do not bank with Citigroup and were charged fees for using its ATMs.

They cried foul, alleging Citigroup is discriminating against clients of non-minority owned banks -- or as the complaint [↗](#), opens new tab put it, "financial institutions owned by people of the wrong race"-- by making them pay ATM transaction fees, while customers of the 50 banks that are members of Citi's "ATM Community Network" program are not charged extra. The plaintiffs are represented by litigation boutique Consovoy McCarthy, where firm lawyers last year persuaded the U.S. Supreme Court to strike down race-based college admissions policies and in June, succeeded on appeal in blocking grants (at least for now) by Fearless Fund to Black women-owned businesses.

But this case may be a tougher hill for them to climb, considering nearly one-third of the banks in the community network program are not even minority-owned, according to Citigroup.

Consovoy lawyers Bryan Weir, Daniel Shapiro and Brandon Haase, who all signed the complaint, did not respond to my requests for comment.

Citigroup, which is represented by a Jones Day team that includes partners Jayant Tambe and Eliot Pedrosa, said it is "proud of our commitment to expanding affordable banking access in underserved communities."

The case may turn on a 158-year old civil rights law from the Reconstruction era that prohibits private parties from discriminating on the basis of race in making or enforcing contracts.

Consovoy lawyers successfully invoked the provision, Section 1981 of the Civil Rights Act of 1866, in lawsuits last year against Morrison & Foerster and Perkins Coie. The suits alleged the law firms' diversity fellowships for members of "historically underrepresented" groups improperly discriminated on the basis of race.

Both firms subsequently modified their fellowship criteria, and the lawsuits were dropped.

In the Citigroup suit, Consovoy lawyers assert the plaintiffs are being discriminated against because they are "not clients of a bank or credit union owned by members of Citi's favored racial groups."

As a result, they say, the plaintiffs (whose races are not identified) suffer "associational discrimination" by being charged ATM fees.

But the plaintiffs don't allege that their banks (which are not identified in the complaint and are not parties to the suit) even wanted to join the Citi community network, let alone that they were barred from doing so based on the disfavored race of their owners.

This strikes me as a potentially fatal flaw. Just as high school students have been found to lack standing to challenge admissions procedures at colleges where they didn't apply, Jones Day lawyers say there's no grounds here to claim the plaintiffs' banks were wrongly excluded -- especially since 14 of the community network member institutions are not minority owned.

Nor can the plaintiffs claim to have faced discrimination on account of their own race in using Citibank's machines, the Jones Day team continued.

"Citibank treats white or black out-of-network customers identically," they wrote -- and it's not as if the ATMs can tell the difference.

"Put more simply," the lawyers continued, "while Citibank's ATMs require a user to enter his or her personal PIN, they do not ask any user to enter their race."

The suit proposes a class that would include everyone in the U.S. who paid a fee to use one of Citibank's 2,000-plus ATMs in the last four years. While the fee amount is not specified in court papers, a Citi spokesperson told me the surcharge is \$3 across all regions.

The plaintiffs lawyers want the fees refunded -- an amount that would likely run into the tens or even hundreds of millions of dollars -- plus punitive and other damages.

They also want the court to order Citi to discontinue the community network program, which per a company press release [↗](#), opens new tab was launched in 2016 to expand access to affordable banking services “especially in low-income communities and communities of color.”

In other words, the plaintiffs’ goal if they win is not to obtain access to free ATM transactions for themselves, but to end it for others.

As a remedy, it reminds me of an old Soviet-era joke. One farmer has a cow, the other does not. But then a genie grants the cow-less farmer a wish!

“Kill my neighbor’s cow,” the farmer says.

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Reporting by Jenna Greene

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Jenna Greene
Thomson Reuters

Jenna Greene writes about legal business and culture, taking a broad look at trends in the profession, faces behind the cases, and quirky courtroom dramas. A longtime chronicler of the legal industry and high-profile litigation, she lives in Northern California. Reach Greene at jenna.greene@thomsonreuters.com

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Judge Guts SEC Case Against SolarWinds Over Cyber Practices

By Cassandra Coyer and Jeff Stone

Bloomberg Law News 2024-07-19T10:05:12489392549-04:00

Judge Guts SEC Case Against SolarWinds Over Cyber Practices

By Cassandra Coyer and Jeff Stone2024-07-18T17:41:43493-04:00

A US federal judge dismissed much of the Securities and Exchange Commission's lawsuit against SolarWinds Corp. that alleged the software provider misled investors about its cybersecurity practices and the significance of a major data breach that spilled into the US government.

Thursday's ruling was seen as a blow to the SEC's aggressive efforts to regulate the cybersecurity practices of publicly traded companies, actions that had created significant angst among the private sector and from security practitioners.

But the agency's case wasn't entirely dismissed. US District Judge Paul Engelmayer of the Southern District of New York allowed the SEC to move forward with a claim that SolarWinds committed securities fraud with a statement about the Austin-based company's cyber preparedness. However, in his decision Thursday, Engelmayer threw out the SEC's allegations that other statements and filings were misleading, and its claims that the company had minimized the scope and severity of a major hack that was disclosed in December 2020.

Judge Engelmayer also dismissed at least some claims against SolarWinds' Chief Information Officer Timothy Brown, whom the SEC accused of intentionally failing to disclose the company's expansive security vulnerabilities in Form 8-K filings during the months leading up to and after the Russian intrusion.

But Engelmayer found that SolarWinds' executives and Brown's bosses were ultimately the parties responsible for crafting and signing the disclosures, not Brown himself.

The SEC's complaint failed to claim that "the officers who approved the cybersecurity risk disclosure understood it was misleading," he said. "These executives, not Brown, appear to have had ultimate authority over the company's risk disclosure."

Engelmayer upheld claims over Brown's role in the company's allegedly misleading security statement about SolarWinds' practices before the hacking disclosures. The rest of the claims against Brown over his public statements in company-approved press releases, blog posts, podcasts and the disclosures made in the Forms S-1 and 8-Ks were dismissed.

"I think the SolarWinds case is a bellwether action," said Jennifer Lee, a partner at Jenner & Block and a former SEC official. "I absolutely think that the SEC will be looking at this decision, thinking about how it might want to refine its theories, and also consider just how it wants to move forward in terms of enforcement actions."

Michael Borgia, a partner at Davis Wright Tremaine LLP, said, "I think it's a bit of a slap down certainly."

"I do not think this spells a more sort of reticent, timid SEC in the cyber enforcement space," he said. "I think they'll dust themselves off and keep going because clearly they think this is a significant priority."

Gerry Stegmaier, a partner at Reed Smith LLP, said any sighs of relief over the decision may be premature. "The SEC continues to remain very active in looking for cybersecurity generally and companies' incident response generally," he said, in a statement.

Russian hackers breached SolarWinds by inserting malicious code into a software update that was sent to its customers. The hackers then used the malware as a backdoor for further intrusions on a relatively small number of them, including dozens of companies and at least nine government agencies. The breach was revealed in December 2020.

"We are pleased that Judge Engelmayer has largely granted our motion to dismiss the SEC's claims. We look forward to the next stage, where we will have the opportunity for the first time to present our own evidence and to demonstrate why the remaining claim is factually inaccurate," a SolarWinds spokesperson said in a statement. "We are also grateful for the support we have received thus far across the industry, from our customers, from cybersecurity professionals, and from veteran government officials who echoed our concerns, with which the court agreed."

An SEC spokesperson declined to comment.

(Updates with quote from Gerry Stegmaier in 11th paragraph. A previous version of this story misspelled Judge Paul Engelmayer's name.)

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Ex-CEO Faces SEC Complaint in Alleged Scheme to Take Over Trump Media

The SEC seeks disgorgement of any alleged “ill-gotten gains” from Miami businessman Patrick Orlando and civil penalties on allegations he gave false statements concealing a plot to acquire Trump Media.

July 18, 2024 at 05:13 PM

Securities Litigation



Sulaiman Abdur-Rahman



What You Need to Know

- Patrick Orlando is the former CEO of Digital World Acquisition Corp.
- The SEC accuses Orlando of making false statements concealing his alleged plot to acquire Trump Media.
- DWAC terminated Orlando as CEO and later closed its merger with Trump Media in March 2024.

The U.S. Securities and Exchange Commission has sued Miami businessman Patrick Orlando alleging the former CEO of Digital World Acquisition Corp. made false statements concealing his alleged plan for acquiring Trump Media & Technology Group Corp.

“As part of this scheme,” the SEC alleged in the complaint filed Wednesday, “Orlando signed Forms S-1 in the spring and summer of 2021 that falsely and misleadingly stated that DWAC had not selected any merger target or engaged in any substantive discussions with any merger target.”

The SEC alleges Orlando “continued to misrepresent the nature of the negotiations” in 2022.

Orlando is the former CEO and chairman of DWAC, the [special purpose acquisition company \(SPAC\)](#) that closed its merger with Trump Media on March 25, according to the SEC’s complaint. The company trades under the ticker symbol DJT and owns Truth Social, a social media platform created by former President Donald Trump.

This SEC complaint filed in District of Columbia federal court was surfaced by [Law.com Radar](#).

The SEC seeks disgorgement of any alleged “ill-gotten gains” from Orlando. The regulatory agency also seeks civil penalties and final judgment permanently barring Orlando from “acting as an officer or director of any issuer that has a class of securities registered pursuant to Section 12 of the Exchange Act.”

Orlando is currently the manager of Benessere Investment Group and ARC Global Investments II. Homer Bonner Jacobs Ortiz filed a complaint in Miami federal court earlier this year seeking damages related to Orlando being “ousted” as CEO and chairman of DWAC in 2023.

Counsel for Orlando’s Benessere and ARC II business ventures did not immediately respond to requests for comment on this article.

Trump Media did not respond to a request for comment on this article.

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

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Veteran SPAC Sponsors Drive \$1.7 Billion Surge in Just Six Weeks

By Bailey Lipschultz

- High-profile de-SPACs from Trump to Oklo help revive interest
- Average blank-check vehicle redemption rate still above 90%

Bloomberg Law News 2024-07-19T10:22:18395075276-04:00

Veteran SPAC Sponsors Drive \$1.7 Billion Surge in Just Six Weeks

By Bailey Lipschultz2024-07-18T14:35:28609-04:00

- High-profile de-SPACs from Trump to Oklo help revive interest
- Average blank-check vehicle redemption rate still above 90%

Michael Andretti, Howard Lutnick and **James Graf** are among the serial sponsors returning to a US blank-check market that's been heating up over the past six weeks, with mostly seasoned backers attracting \$1.7 billion between them.

All told, another \$3.3 billion could be raised in the coming months by sponsors that have filed for new offerings since early June. With former blank-checks making headlines, including an advanced nuclear systems developer backed by **Sam Altman**, the movie studio behind the *Saw* franchise, and Donald Trump's media company, the market is increasingly confident that the battered special purpose acquisition company model has staying power.

"From the investor perspective, even if their previous de-SPACs didn't do that great, there are benefits of having gone through the process and understanding what's involved in operating a SPAC," said **Eric Pestrue**, portfolio manager at RiverNorth Capital Management, which has invested in SPACs since 2016.

The relative increase in blank-check issuance comes from veterans. The majority of the nearly 30 SPACs to price or file for new offerings since May feature dealmakers that completed blank-check tie-ups in the past, a Bloomberg analysis shows.

"Over the past year, the hold-up hasn't been investors — investors have been wanting to buy new SPACs," Pestrue said.

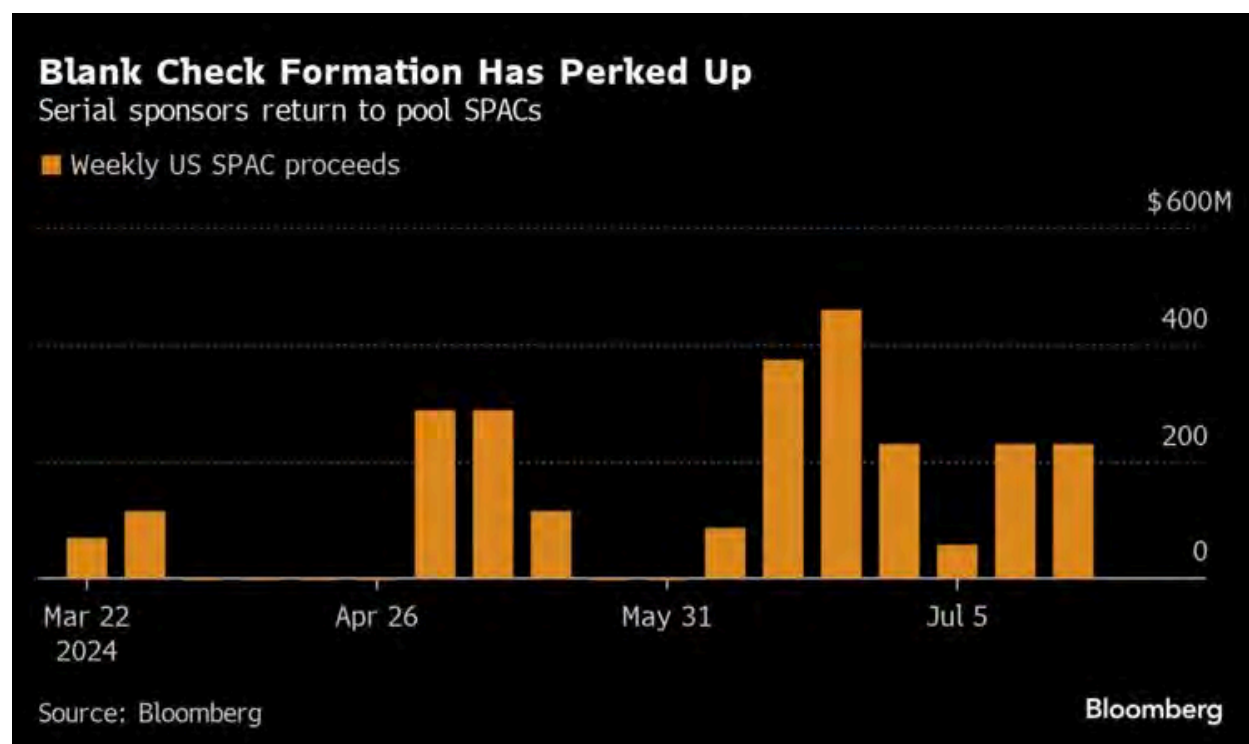
Read More: Trump Media Taps Obscure SPAC-Friendly New Jersey Fund for Cash

The pricing of new initial public offerings and the formation of blank-check vehicles have both picked up amid a lukewarm market for non-SPAC US IPOs. A cadence of 10 to 15 new SPACs per quarter would strike a delicate balance, offering an alternative to traditional first-time share sales without inviting comparisons to the mania of the go-go stretch from 2020 to 2021.

Recent blank-check vehicles' performance after completing their deals has been mixed. Shares in Oklo Inc., the startup backed by OpenAI's chief executive officer, and Lionsgate Studios Corp., which merged with former Hollywood executive Harry Sloan's SPAC, have slumped since going public, whereas Trump Media & Technology Group Corp. has held its position among top-performing ex-SPACs and minted paper fortunes for a range of insiders.

Read More: SPAC Veteran Klein Is Back With First IPO in Nearly Three Years

"You'll continue to see serial issuers be the majority of the capital out there and I think it's because they have attributes that work well for the structure," said **Don Duffy**, president of ICR. "They've done deals before, they have deal flow and they tend to have more capital."



Despite the high-profile debuts that have garnered the industry's attention, and boosters insisting that the IPO market's below-average activity should be bullish for blank-check vehicles, roughly half of the nearly 50 companies to complete a US SPAC merger this year have lost more than 80% of their value.

Read More: Altman-Backed Nuclear Firm Bullish on Data Center Need

A key issue has been the still-high rates of redemptions, when investors return their shares to the SPAC in exchange for money held in trust, which depletes the amount available for a merger. This year's average redemption rate sits above 90%, SPAC Research data analyzed by Bloomberg show, extending a trend that first started causing fractures in early 2021.

The resumption of US SPAC offerings has propped up IPO activity for banks that helped fuel the pandemic-era mania. Cantor Fitzgerald is credited with six deals that brought in \$1.5 billion this year, SPAC Research data show, which has helped it jump into the top spot in Bloomberg's league tables for US IPO underwriting.

With roughly 100 SPACs looking for targets, it may prove a far better time to strike deals than when the industry was in a bubble.

"There was a period of time in 2021 and 2022 where there were more SPACs than there were private businesses that really should've been public, and that led to not a lot of deals getting done," said **Joe Voboril**, a partner at 1789 Capital and finance chief for Colombier Acquisition Corp. II. "The pendulum has almost fully swung in the other direction."

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American Airlines Hit With Class Action Over Sales Strategy

By **Spencer Brewer**

Law360 (July 18, 2024, 4:53 PM EDT) -- An investor launched a proposed class action against American Airlines over the company's botched sales and distribution strategy, saying that American touted its strategy as driving revenue while hiding the fact that the strategy was "driving customers away" in a Texas federal court on Thursday.

Lead plaintiff Yazzan Qawasmi says he, along with many other investors, bought into American's promises of growth following the adoption of a new sales and distribution strategy. The strategy downsized the company's sales and distribution channels to redirect consumers solely to their online platform, which flopped, Qawasmi claims.

"It was actually driving customers away from American as the strategy and its attested poor execution made it more difficult for customers to access the Company's services," Qawasmi said in the complaint.

In January, American CEO Robert Isom provided a rosy outlook when offering guidance for 2024. This was backed, in part, by a statement made by Vasu Raja, then EVP and Chief Commercial Officer of American, who pointed to the new sales and distribution strategy as a factor that would drive growth for the company, according to the complaint.

Qawasmi claims that during the class period from Jan. 25 to May 28, American made "overwhelmingly positive" statements about the strategy while hiding the fact it was not living up to the hype executives had created. These positive statements drove investors to buy American's stock when they otherwise might not have, per the complaint.

The truth came out, Qawasmi said, after market hours on May 28, when American announced it had canned Raja and reduced its short-term guidance. In a conference presentation the following day, the company claimed the lower guidance was due to softness in consumer bookings, a domestic supply and demand imbalance and a reduction in capacity growth.

The company's stock dipped 13.5% in one day, from \$13.44 per share on May 28 to \$11.62 per share on May 29, 2024

"In pertinent part, Defendants announced that the reduced consumer bookings were significantly due to the changes American made to their sales and distribution strategy, that they did not execute their strategy properly, and that they will now be modifying their strategy in an attempt to recapture the customers their strategy drove away," Qawasmi said in the complaint.

Qawasmi says that statutory safe harbor typically provided to forward-looking statements doesn't apply here because American made material misrepresentations about the strategy's effectiveness and the company's outlook. In addition to the company, Qawasmi has also named Isom, Raja and Devon May, American's EVP and CFO, as defendants.

Qawasmi has accused American and the other defendants of breaking securities laws. He asked the court for relief including damages and attorney fees.

In an email statement, an American Airlines representative said, "We are reviewing the complaint, which we believe is without merit."

The new suit is not the only class action the company is facing. In June, a Texas federal judge said he **would not free American Airlines** from a class action claiming its pilots' \$26 billion retirement plan focused too heavily on environmental and social factors, ruling the airline's failure to push investment managers to abandon the strategy buttresses the plaintiffs' case that American endorsed it.

American Airlines pilot Bryan Spence accused the airline of breaching fiduciary duty by pursuing ESG — which refers to environmental, social and governance standards for investments, such as climate impact — portfolio strategies when making investment decisions for the company's 401(k) plans at the expense of investment options that could have netted greater returns.

A representative for Qawasmi did not immediately respond to a request for comment.

Qawasmi is represented by Stuart L. Cochran of Condon Tobin Sladek Thornton Nerenberg PLLC.

Counsel information for American was not immediately available Thursday.

The case is Qawasmi v. American Airlines Group Inc. et al., case number 4:24-cv-00673, in the U.S. District Court for the Northern District of Texas.

--Additional reporting by Sydney Price. Editing by Vaqas Asghar.

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Another Enphase Investor Suit Claims Execs Hid Slow Growth

By **Madeline Lyskawa**

Law360 (July 18, 2024, 4:32 PM EDT) -- Enphase Energy's top brass has been slapped with another shareholder complaint in California federal court, alleging they misrepresented the energy technology company's financial outlook by concealing a decrease in battery shipments and slower manufacturing outputs, which artificially inflated its stock price.

In his complaint, Giovanni Ibarra on Wednesday accused Enphase Energy Inc. CEO Badrinarayanan Kothandaraman, Chief Financial Officer Mandy Yang and Director Richard Mora, among other executives, of breaching their fiduciary duties by personally making or causing the company to make materially false and misleading statements to investors about its business, operations and prospects.

"Specifically, the individual defendants willfully or recklessly made and/or caused the company to make false and misleading statements that failed to disclose, inter alia, that: (1) the company's battery shipments to Europe and California had decreased; (2) Enphase's battery deployment and adoption were experiencing a slowdown," Ibarra said.

The executives also caused Enphase to "repurchase its own stock at prices that were artificially inflated due to the foregoing misrepresentations and material omissions," overpaying for repurchases of its own stock by approximately \$114,389, Ibarro alleged. He further accused Mora, specifically, of having engaged in "lucrative insider trading, obtaining personal profits of approximately \$965,776," by selling shares at the inflated price.

Ibarra's complaint comes less than two months after fellow shareholder Mark Bialic **filed a proposed class action** against Enphase, Kothandaraman and Yang in late May, alleging substantially similar claims. A second proposed class action was filed by Enphase investor Wayne Hayes on Monday.

Like Bialic and Hayes, Ibarra told the court that the Enphase executives had represented that they expected the company's revenue to fall between \$700 million and \$740 million for the first quarter of 2023, with both Kothandaraman and Yang touting Enphase's record quarterly revenue for the first quarter of 2023, which they said was not hindered by seasonality and a challenging macro environment during an earnings call.

But on April 25, 2023, the truth about the company's potential growth came to light when Enphase issued a press release reporting the company's first-quarter 2023 financial results, which revealed that revenue in the U.S. had declined approximately 9% "due to seasonality and macroeconomic conditions," Ibarra said. The company's stock price fell from \$220.60 per share to \$163.83 per share in one day, representing a decline of almost 26%, as a result, Ibarra said.

His complaint slaps the executives with nine claims, including for violations of Sections 14(a), 20(a) and 10(b) of the Exchange Act, breach of fiduciary duties, unjust enrichment, abuse of control, gross mismanagement and waste of corporate assets.

Ibarra further urged the court to declare that the executives have breached their fiduciary duties to Enphase, award Enphase the damages it sustained as a result of the alleged violations and direct the company and its executives to take all necessary actions to reform and improve Enphase's corporate governance and internal procedures.

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

Ibarra is represented by Robert C. Moest and Timothy Brown of The Brown Law Firm PC.

Counsel information for Enphase Energy and its officers was not immediately available.

The case is Ibarra v. Kothandaraman et al., case number 3:24-cv-04278, in the U.S. District Court for the Northern District of California.

--Additional reporting by Sydney Price. Editing by Marygrace Anderson.

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Auto Software Co. Cerence's Brass Sued Over Licensing Woes

By **Katryna Perera**

Law360 (July 18, 2024, 6:48 PM EDT) -- A shareholder of Cerence Inc. has sued the automobile software company's current and former top brass in Delaware Chancery Court, alleging they made misleading and false statements about the company's expected revenue and the types of licensing deals the company was pushing and entering into.

Alberto Goncalves filed a **complaint** Wednesday against Cerence's current CEO, Stefan Ortmanns; its former CEO, Sanjay Dhawan; its former chief financial officers, Thomas Beaudoin and Mark Gallenberger; and several board members.

According to the complaint, Cerence builds artificial intelligence-powered virtual assistants and software platforms for the automobile and larger transportation market. Its customers include all major automobile manufacturers, including BMW, Ford, Toyota and Volkswagen Group.

The largest share of the company's revenue comes from its license segment, which is composed of variable and fixed license deals. According to the complaint, Cerence's variable license deals are on a "pay-as-you-go" basis, where customers book a deal but do not pay for it or activate it until they produce a vehicle into which the software is installed.

Cerence is then provided a royalty report from the customer at the end of each quarter detailing how many vehicles the customer produced and shipped with Cerence's technology. The complaint states that this type of license deal generates stable quarterly revenue for Cerence, and the deals are an "important indicator of the company's organic growth."

Alternatively, in fixed license deals, customers purchase a set number of licenses upfront, and Cerence recognizes the full value of the contract after it receives payment, according to the complaint.

Goncalves says that while the fixed license deals, also known as "prepays," offered some benefit to Cerence by providing a lump sum of cash upfront, relying on them too heavily created a risk of harm to future revenue and the company's long-term stability.

"If Cerence sold too many prepaid licenses, customers would have an excess supply of licenses to work through and would not generate new revenue for Cerence until after they used all of the licenses," the complaint states.

Goncalves alleges that during the relevant period, the defendants repeatedly assured investors that Cerence was reducing its reliance on fixed license deals or at least keeping them within the "historical range." In reality, though, Goncalves says Cerence's sales staff was instructed to "dramatically increase" the sales of fixed licenses, and as a result, the number of fixed license deals spiked to its highest level in Cerence's history during the relevant period.

According to the complaint, the defendants also directed sales staff to convert existing variable contracts into prepays so that the company could instantly recognize the revenue to strengthen its reported financial results.

Additionally, the defendants directed sales staff to offer customers a new type of fixed license deal called "minimum commitment deals," according to the complaint.

"Under these new deals, customers committed to purchasing a set number of licenses within a designated timeframe but paid no cash up front, and defendants booked all the revenue up front on these contracts to bolster the company's revenues," the complaint states. "This stripped years of Cerence's future revenue at a discount and jeopardized its longer-term financial health without providing any cash up front, but created the materially false impression of strong financial performance and drove up Cerence's stock price in the near term."

According to the complaint, Cerence's fixed license deals had increased by roughly 41% by the end of fiscal year 2021 and accounted for 100% of the company's total fixed revenues in the first quarter of 2022.

The truth began to come to light in November 2021, when Cerence issued its fiscal year 2022 guidance and anticipated revenue of \$400 million to \$425 million, which was "substantially below" analysts' expectations, according to the complaint.

"Investors began to understand that Cerence had only made its revenue guidance because it entered into a large number of fixed deals, which defendants knew were harmful to Cerence's financial health," the complaint states. "Following this news, Cerence's stock price fell approximately 21% to close at \$82.59 per share on Nov. 22, 2021."

Cerence's stock price fell again in December 2021 by 11% when the company announced the sudden resignation of Cerence's then-CEO, Dhawan.

The last stock drop occurred in February 2022, when Cerence again lowered its fiscal year 2022 guidance, stating that its expected revenue was between \$365 million and \$385 million.

"Defendant Ortmanns stated that 'the conversion from bookings to revenue will take longer than expected,' and ... the company highlighted that its past sales of fixed licenses had caused a year-over-year 'variable license [revenue] decline,' significantly impairing Cerence's most valuable revenue stream," the complaint states.

On this news, Cerence's stock price fell roughly 30% to close at \$43.61 per share on Feb. 7, 2022, according to the complaint.

The suit seeks damages, restitution, improvements and reforms to Cerence's corporate governance and internal procedures and attorney fees.

Representatives for Cerence and the defendants declined to comment Thursday, and counsel for Goncalves did not immediately respond to requests for comment.

Goncalves is represented by Seth D. Rigrodsky, Gina M. Serra and Herbert Mondros of Rigrodsky Law PA.

Counsel information for the defendants was not immediately available.

The case is Alberto Goncalves v. Arun Sarin et al., case number 2024-0731-KSJM, in the Court of Chancery of the State of Delaware.

--Editing by Kelly Duncan.



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Biopharma Shareholder Sues In Del. For Docs On Akeso Deal

By **Leslie A. Pappas**

Law360 (July 18, 2024, 7:28 PM EDT) -- A shareholder of Summit Therapeutics Inc. sued the Florida biopharmaceutical company in Delaware's Court of Chancery on Thursday, seeking corporate records to investigate whether a \$520 million financing arrangement connected to a partnership with Akeso Inc. benefited the company's co-CEOs at the expense of public stockholders.

Stockholder plaintiff Rainaldi Revocable Trust asserts that a note purchase agreement that Summit entered into with co-CEOs Robert W. Duggan and Mahkam Zanganeh in December 2022 "appears to be unfair to the company and its stockholders for a number of reasons, which in turn provides plaintiff with a credible basis to suspect wrongdoing."

The note purchase agreement is connected with a strategic partnership that Summit struck with Chinese drugmaker Akeso Inc. to license ivonescimab, a bispecific antibody used to treat various types of cancer. The licensing agreement, announced in December 2022, gave Summit the rights to commercialize the drug in the United States, Canada, Europe and Japan.

In exchange for those rights, Summit had to make an upfront payment of \$500 million to Akeso, the complaint says. To finance the upfront payment, Zanganeh and Duggan — who is also Summit's controlling stockholder — agreed to loan the company \$520 million in exchange for unsecured promissory notes in the same amount, the complaint says.

Duggan loaned \$500 million and Zanganeh loaned \$20 million, according to the complaint. The notes were structured to accrue interest at an initial rate of 7.5%. As part of the deal, Duggan and Zanganeh also got \$7.69 million of prepaid interest, which they chose to receive in shares of Summit's common stock.

The note purchase agreement was negotiated before the partnership with Akeso was made public, and Summit's stock was trading at around 79 cents per share, the complaint says. After the partnership was announced, the company's stock price jumped to \$2.31, and then jumped again the next day to \$3.08.

Yet Duggan and Zanganeh were given an "artificially low" \$0.7913 share valuation in connection with the prepaid interest payment on the notes agreement.

"As a result, Duggan and Zanganeh received a substantially greater interest payment than the \$7,691,666 in value that should have been paid to them with a 7.5% interest rate," the complaint said.

Using the \$2.31 closing price of the company's common stock on Dec. 6, 2022, the shares paid to Duggan and Zanganeh were actually worth \$22.45 million, equivalent to an actual paid interest rate of 22% on the notes, the complaint says. And if calculated using the Dec. 7 closing price of \$3.08, the shares were worth \$29.94 million.

Rainaldi sued under Section 220 of the Delaware General Corporation Law, which allows a shareholder to inspect a company's books with a "proper purpose," such as investigating corporate wrongdoing.

Summit has produced documents about note purchase agreement, but has not produced documents

about the licensing agreement, which tells only "half of the story," the complaint says.

The complaint seeks a full production of documents.

"As the license agreement was the *raison d'être* for the note purchase agreement, plaintiff cannot properly investigate the potential wrongdoing without receiving relevant documents concerning the license agreement," the complaint says.

The case is Rainaldi Revocable Trust v. Summit Therapeutics Inc., case number 2024-0759, in the Court of Chancery of the State of Delaware.

--Editing by Linda Voorhis.

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Judge OKs \$47.5M QuantumScape Shareholder Deal

By **Sydney Price**

Law360 (July 19, 2024, 12:02 PM EDT) -- A California federal judge granted preliminary approval to a \$47.5 million deal ending class action allegations by QuantumScape investors that the company made misleading statements about the quality of its batteries.

According to U.S. District Judge William H. Orrick's **order** issued Thursday, lead counsel from Levi & Korsinsky LLP intend to seek an award of attorney fees of no more than 33% of the settlement fund, which equates to roughly \$15 million, and about \$2 million in litigation costs.

After a preliminary review, the settlement appears to be "fair, reasonable and adequate," Judge Orrick said. A fairness hearing is set for Nov. 13, according to the order.

"The settlement resulted from arm's-length negotiations overseen by an experienced mediator; eliminates the risks to the parties of continued litigation; does not provide undue preferential treatment to plaintiffs or to segments of the class; and appears to fall within the range of possible approval," the order states.

The deal was **submitted to the court** for preliminary approval in June. In their suit, the QuantumScape investors alleged the company and executives repeatedly represented that their batteries had overcome challenges related to dendrite formation and outperformed the conventional batteries already on the market.

However, two publications revealed that these representations were false and caused QuantumScape's stock price to drop.

The investors are represented by Nicholas I. Porritt, Max E. Weiss and Adam M. Apton of Levi & Korsinsky LLP.

QuantumScape and the other defendants are represented by Ignacio E. Salceda, Dale Bish and Rebecca L. Epstein of Wilson Sonsini Goodrich & Rosati PC.

The case is In re: QuantumScape Securities Class Action Litigation, case number 3:21-cv-00058, in the U.S. District Court for the Northern District of California.

--Editing by Daniel King.

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Ocugen Execs Hit With Derivative Suit Over Shoddy Controls

By **Sydney Price**

Law360 (July 18, 2024, 6:46 PM EDT) -- The top brass at biopharmaceutical company Ocugen Inc. were hit with a derivative suit alleging the company's lack of effective internal financial controls caused it to be misvalued and allowed shareholders to approve proposals based on incomplete information.

According to the complaint filed by shareholder Priyank Garg on Wednesday in Pennsylvania federal court, Ocugen primarily develops gene and cell therapies and vaccines. In April, Ocugen revealed that its accountant Ernst & Young had concluded that Ocugen's financial statements for each fiscal year since 2020 were materially misstated and unreliable.

The suit alleges that the individual defendants failed to take the appropriate steps to ensure Ocugen's financial controls were robust and effective.

In addition to nominal defendant Ocugen, the suit's defendants include its CEO Shankar Musunuri, former Chief Financial Officer Sanjay Subramanian, controller Michael Breining and several other current and former executives and directors.

The relevant period begins May 8, 2020, the day Ocugen filed its first-quarter 2020 financial results with the U.S. Securities and Exchange Commission. According to the suit, the filing contained a statement affirming the effectiveness of Ocugen's disclosure controls.

In 2022 and 2023, Ocugen shareholders voted to approve board member reelections proposed in proxy statements on the basis of false or misleading information, the suit alleges.

Ocugen continued to file inaccurate reports with the SEC until April 1, 2024, when it made a restatement announcement. At the time, Ocugen told investors the identified errors will result in a restatement of line-items including collaborative arrangement revenue and research and development expenses, the suit states.

On the news, Ocugen's shares fell 16 cents each, or about 10%, to close at \$1.38 per share on April 2, according to the suit.

Garg accuses the defendants of violating the Exchange Act, breaching fiduciary duties, being unjustly enriched, insider selling and misappropriation of information.

Counsel for Garg and a representative of Ocugen did not immediately respond to requests for comment on Thursday.

Garg is represented by Michael J. Hynes and Ligaya T. Hernandez of Hynes & Hernandez LLC and Marion C. Passmore and Melissa A. Fortunato of Bragar Eagel & Squire PC.

Counsel information for Ocugen and the individual defendants was not immediately available on Thursday.

The case is Garg v. Musunuri et al., case number 2:24-cv-03119, in the U.S. District Court for the Eastern District of Pennsylvania.



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Chancery Awards \$6M Stockholder Atty Fee In Moelis Suit

By **Jeff Montgomery**

Law360 (July 18, 2024, 9:54 PM EDT) -- A Delaware vice chancellor granted a \$6 million fee request on Thursday from attorneys who won a Chancery Court strike-down of a stockholder agreement granting Moelis & Co. founder Ken Moelis expansive control over the global investment bank's decisions.

Vice Chancellor Travis J. Laster approved the fee in a bench ruling after detailing 18 unprecedented pre-approval requirements and six board composition covenants that company controller Ken Moelis gained through his challenged pact with the company.

The decision rejected a \$450,000 to \$600,000 award proposed by counsel for Moelis, although the vice chancellor said he had considered pegging the fee at \$3 million before Moelis' recommendation.

"In my view, the plaintiff has the right answer" on the correct fee, the vice chancellor said. "I'm not sure I could award that big an amount if the defendant had come in with a more reasonable ask, but I don't see the defendant's proposal as being in the right ballpark."

Delaware Gov. John Carney signed legislation Wednesday giving state-chartered corporations broad authority to adopt agreements of the type Moelis secured and that the vice chancellor struck down in February. The new law takes effect Aug. 1 and will not apply to cases pending before that time.

John P. DiTomo of Morris Nichols Arsht & Tunnell LLP, counsel to Moelis, said that when the court issued its decision, Ken Moelis already controlled 40 percent of the vote, and he said Moelis still had significant beneficial control that was undisturbed by the court's decision.

"There's nothing to suggest that any value changed in light of your honor's decision," DiTomo said.

Thomas Curry of Saxena White PA, counsel to the stockholders who sued Moelis, told the vice chancellor: "I think this case, at least at the time of the judgment, was essentially off the charts" on factors used to assess litigation value.

The case, among other details, produced a Chancery Court ruling initially seen as sharply limiting stockholder agreements that deal away the power of directors and other stockholders. The decision was then quickly sidelined when state lawmakers directly authorize the same pacts.

"I think this is a case that should have ended up in the first chapter of every business case book," Curry said.

Prompting the fee debate ruling and argument was a 133-page opinion released by the vice chancellor on Feb. 23 that concluded the Moelis provisions violate Delaware law because they take away powers from the board that can only be altered by a company's charter or bylaws. He described the compact at the time as part of "a new wave of stockholder agreements" corporate planners now regularly use that include "extensive veto rights and other restrictions on corporate action."

The stockholder agreement applies to Moelis, who also serves as the bank's CEO and board chairman, and three entities he controls. Moelis and his three affiliates negotiated the agreement with the company in 2014 when the bank went public.

Vice Chancellor Laster said that the rights Ken Moelis secured meant "the board is not managing the company, Moelis is managing the company."

Separately, the vice chancellor said, "I would have thought that the defendant might have acknowledged there was some type of benefit. But they didn't. They affirmatively stated that no benefit was conferred" by the suit.

Despite the fee approval, the vice chancellor cautioned that his award "is mirage money. Unless and until the plaintiff prevails on appeal plaintiffs aren't getting paid," he said, adding that Thursday's ruling was only round one.

"There's clearly a benefit here. The plaintiff knocked out and cut back the tendrils that the stockholder agreement provided to affect action at the board level that no controlling stockholder – acting as a stockholder using stockholder rights – could ever achieve," Vice Chancellor Laster said.

During the ruling, the vice chancellor said Moelis jumped from having a single board veto right "to 18 pre-approval requirements and six board composition covenant requirements" in his favor. "That jump is like Evil Knievel trying to jump the Grand Canyon," he said

While detailing each preapproval right, the vice chancellor asked variations on the question: "Does anybody think a 40 percent stockholder, using a 40 percent voting block, could reach inside the boardroom using stockholder rights to do that? No, they can't."

Arguments that the governance agreements failed to give Moelis any incremental new rights are "facially frivolous," the vice chancellor said. "He clearly has the right to interfere at the board level in ways no controlling stockholder would dream of."

The fee request amounted to about 4.81% of an estimated \$124.6 million benefit to the company, the vice chancellor said.

West Palm Beach Firefighters' Pension Fund is represented by Thomas Curry, David Wales and Adam Warden of Saxena White PA.

Moelis & Co. is represented by John P. DiTomo and Miranda N. Gilbert of Morris Nichols Arsht & Tunnell LLP, and William Savitt, Anitha Reddy, Getzel Berger and Emma S. Stein of Wachtell Lipton Rosen & Katz.

The case is West Palm Beach Firefighters' Pension v. Moelis & Co., case number 2023-0309, in the Court of Chancery of the State of Delaware.

--Additional reporting by Leslie Pappas. Editing by Peter Rozovsky.



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Del. Dispatch: 27.6% Stockholder Not A Controller

By **Gail Weinstein, Philip Richter and Steven Epstein** (July 19, 2024, 11:06 AM EDT)

*This article is part of a monthly column that delves into the most significant corporate law cases emerging from Delaware and offers practice points arising from recent court decisions. In this installment, we examine the Delaware Court of Chancery's recent decision in *Sciannella v. AstraZeneca*.*

The Delaware Court of Chancery has taken a broader view in recent years of who may be deemed a controller. Significant consequences flow from a determination of control — including, for example, the imposition on the stockholder of fiduciary duties to the corporation and its other stockholders, and the application of entire fairness — Delaware's most stringent standard of review — to the transaction being challenged.

The court conducts a facts-intensive, holistic analysis that considers all potential sources of a minority stockholder's influence to determine whether the stockholder may control the company generally or controlled the transaction at issue. In some recent cases, including *Voigt v. Metcalf* and *Tornetta v. Musk*, the Court of Chancery has stated that a holding of around 20% in and of itself may be a strong factor indicating control, given that it provides a meaningful leg-up on stockholder votes, as not all stockholders vote, and provides for a significant voice in the boardroom.

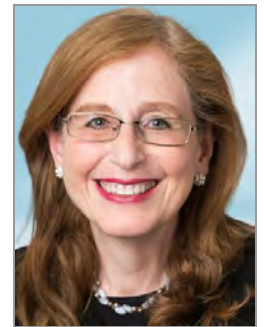
In *Sciannella v. AstraZeneca UK Ltd.*, **issued** on July 2, the court found that AstraZeneca UK, a 26.7% stockholder of Viela Bio Inc., was not a controller of Viela.

The plaintiff contended that AstraZeneca PLC's U.K. affiliate was a controller. AstraZeneca had created Viela, via a spinoff, to act as its research and development arm for biologics; had total control over Viela's day-to-day management through extensive support agreements; had effective blocking rights over corporate actions requiring a 75% stockholder vote; had designated directors on the board; and had appointed its own former executives to key management positions including CEO. Also, Viela had stated in its public filings that it was substantially reliant on AstraZeneca.

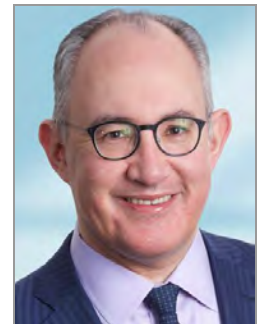
According to the plaintiff, AstraZeneca had controlled Viela's \$3 billion sale to Horizon Therapeutics Inc., under a "rushed, single-bidder process," in order to facilitate AstraZeneca securing antitrust clearance for its pending \$38 billion acquisition of Alexion Pharmaceuticals Inc., Viela's main competitor. The plaintiff asserted that AstraZeneca's proposal to Viela, during its sale process, to finalize expeditiously a termination of AstraZeneca's support agreements with Viela, was a threat to disrupt its operations, such that it was coerced into the quick sale.

The plaintiff's suit alleged breaches of fiduciary duties by AstraZeneca, and by certain Viela directors and officers who allegedly advanced AstraZeneca's interests and/or provided inadequate disclosure to the stockholders.

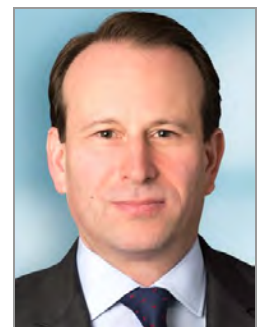
The court, at the pleading stage, dismissed the claims, holding that (1) AstraZeneca was not a controller, and therefore owed no fiduciary duties; and (2) the disclosure to the stockholders was adequate, therefore any fiduciary breaches by Viela's directors and officers were cleansed under the



Gail Weinstein



Philip Richter



Steven Epstein

Delaware Supreme Court's 2015 decision in *Corwin v. KKR Financial Holdings LLC*, which accords business judgment deference to transactions approved by stockholders in a fully informed vote.

Key Points

The court's focus in a control inquiry is on whether the stockholder had control over the company's board — either generally or with respect to the challenged transaction.

The court found that AstraZeneca's effective blocking rights related mostly to stockholder actions rather than board actions, that it had designated just two directors on the eight-person board, and that its control over management did not indicate control over the board.

Overall context matters.

In addition to the foregoing, the court seemed to view AstraZeneca as not having acted like a controller — it had never exercised its blocking rights, and neither it nor its director-designees had sought to dominate the board.

Further, the court did not consider AstraZeneca's proposal to Viela to cease to provide support services as a threat to coerce Viela into a quick sale, as the separation of the companies had been ongoing since Viela's initial public offering years earlier, and AstraZeneca's proposal included assurances that it would work with Viela to ensure a smooth transition.

We would note that the court was also likely influenced by the facts that the board that approved the sale was comprised primarily of independent directors, the sale process included outreach to and discussions with multiple potential bidders, the board's negotiations resulted in Horizon twice raising its offer price — from \$44 per share initially to a final price of \$53 per share — and the sale price reflected a 52.8% premium.

Background

In February 2018, AstraZeneca created Viela by spinning off its business. AstraZeneca placed five of its former executives in top management positions at the new company, selected two directors to join the eight-person board, and entered into a series of commercial agreements to support the company.

In May 2020, Viela did a follow-on offering, following which the three largest stockholders other than AstraZeneca each appointed a director to the board. In mid-June 2020, Viela was granted U.S. Food and Drug Administration approval for its primary drug in development, Uplizna, and in late June 2020, Uplizna launched commercially.

In early July 2020, Viela began discussing a potential collaboration with or acquisition by Horizon. The board's financial adviser then conducted outreach to other potentially interested parties, resulting in preliminary discussions with multiple parties. In December 2020, after Viela and Horizon had reached an agreement on price and exchanged merger agreement drafts, Horizon put the deal on hold because it experienced supply chain problems that it had to deal with. Viela continued discussions with the other potentially interested parties.

Meanwhile, an antitrust review of the AstraZeneca-Alexion deal was underway. During this time, on Jan. 8, 2021 — following discussions between Viela's CEO, who was a former AstraZeneca executive, and one of AstraZeneca's designees on the board, who was simultaneously CEO of AstraZeneca PLC — AstraZeneca delivered a letter to Viela stating that it wanted to work with Viela "over the coming weeks to achieve the full separation of Viela from AstraZeneca as expeditiously as possible."

In mid-January 2021, Horizon told Viela that it had solved its supply chain issues and wanted to reengage on the deal. The sale to Horizon was unanimously approved by the board less than two weeks later, at the same price per share as had been agreed to before the deal was put on hold. In March 2021, 94% of Viela's outstanding shares were tendered to Horizon, and the merger closed.

The plaintiff **brought suit** in February 2023. At the pleading stage, Vice Chancellor Paul Fioravanti granted the defendants' motion to dismiss the case on July 2, 2024.

General Control and Board Decisions

AstraZeneca did not exert general control over Viela, as it did not have the ability to control board decisions.

Blocking rights

Based on its 26.7% equity stake, AstraZeneca had effective veto rights over (1) stockholder removal of directors for cause, because the charter provided that stockholders could remove directors only for cause and with a 75% vote; and (2) stockholder-proposed bylaw amendments opposed by the board — because a 75% vote was required for the stockholders to amend bylaws, but only majority stockholder approval was required if the board recommended in favor of such an amendment.

AstraZeneca had no ability to block board-proposed bylaw amendments because the charter authorized the board to amend the bylaws unilaterally.

The court found that these rights, while meaningful, were "not nearly as formidable as the blocking rights highlighted in other cases" where control was found on the basis that the stockholder "had the ability to block board decisions." The court also noted that AstraZeneca had never exercised its blocking rights.

Designation of Directors

The court emphasized that, even if AstraZeneca controlled its two director-designees, no facts were alleged supporting an inference that they, or AstraZeneca, controlled a majority of the board. The court also rejected the plaintiff's allegation that three directors, who had not been designated by AstraZeneca, "were 'particularly susceptible to AstraZeneca's pressure' because they were 'executives or founders of investment funds that were early investors in AstraZeneca's spin-off of Viela.'"

The court further noted that there were no allegations that, for example, these directors had "future investment opportunities that would be forfeited if the Board did not approve the Merger."

Appointment of Management

The court noted that no facts were alleged supporting that "AstraZeneca's appointment of Viela's executives in 2018 translates to AstraZeneca exercising control over them in 2020."

Support Agreements

The court found that nothing alleged indicated that AstraZeneca "had the ability to dominate the Board's decision-making process as a result of the Support Agreements or Viela's operational dependence on AstraZeneca."

Admissions in Public Filings

Viela's disclosure — that it was substantially reliant on AstraZeneca, and would be significantly disadvantaged and face operational difficulties if its support were discontinued — was a "far cry from the outright admission" of control.

Public acknowledgments of a minority stockholder's influence bear on the control inquiry only "when coupled with other well-pled allegations of control," the court stated.

Transaction-Specific Control

AstraZeneca did not exert transaction-specific control over the sale of Viela.

The plaintiff contended that AstraZeneca delivered the Jan. 8 letter to pressure Viela into a rushed, single-bidder sale process. The plaintiff noted that the acquisition agreement for the AstraZeneca-Alexion deal contained a hell-or-high-water clause requiring AstraZeneca to take all actions necessary or appropriate to obtain antitrust clearance for that deal, and the plaintiff asserted that the letter "'loom[ed] large' over the Merger and amounted to 'coercion, domination and/or bullying' of Viela's

Board."

The court, however, stressed that the process of separating Viela from AstraZeneca had been ongoing for years, AstraZeneca did not have the right to terminate certain of the support agreements immediately, the Jan. 8 letter did not say AstraZeneca would terminate the support agreements, Viela already was in discussions with Horizon before the letter was delivered, and Viela continued discussions with other potential buyers after the letter was delivered.

Moreover, the court did not view the letter as a threat to Viela, as it laid out AstraZeneca's "plan to collaborate with Viela to 'ensur[e] [its] business continuity' and put it in 'the best position' moving forward." The letter did not mention the possibility of AstraZeneca selling its block of Viela stock, and it did not indicate AstraZeneca was otherwise abandoning Viela. The letter was not coercive, as Viela was not left "in the position of having 'no other alternatives' other than to facilitate the Company's sale to Horizon."

The court also viewed the fact that Viela played no role in bringing Horizon back to the table after the deal was on hold as "undermin[ing] Plaintiff's entire theory that AstraZeneca exercised control to force Viela into the Merger."

Prior Projections

Viela's prior, more optimistic projections did not have to be disclosed.

The plaintiff contended that Viela's disclosure was inadequate, as the June 2020 projections — which were prepared by management in the ordinary course and were less optimistic than the October 2020 projections prepared during the sale process — were not disclosed.

The court disagreed, on the basis that the June 2020 projections were prepared before the FDA's approval of Uplizna and its launch, and before other changes that occurred due to the COVID-19 pandemic. The October 2020 projections, however, reflected Viela's most recent information, were reliably prepared by management, and were the projections relied on by the board and its financial adviser in connection with the sale.

Further, the court noted that, after receiving the October 2020 Projections, the board "proceeded to reject not one, but two offers from Horizon before agreeing to the \$53.00 per share price."

The court distinguished other cases, where it had concluded that earlier financial projections were material and had to be disclosed, on the basis that in those cases there were "concerns about [the later projections'] reliability and materiality" — for example, where a CEO who was self-interested in the deal unilaterally slashed earlier projections prepared by management and vetted by the board.

Practice Points

M&A parties should keep in mind the significant benefits of a good board process and good disclosure to stockholders.

This case was dismissed at the pleading stage based on the court's findings that the minority stockholder did not control the board, and that the disclosure to stockholders was adequate.

Importantly, only two of the directors on the eight-person board had been designated by the alleged controller; the alleged controller did not act like a controller, in the court's view; the board's process included discussions with multiple potentially interested parties; the board achieved multiple price increases from the buyer; the deal represented a high premium; and the disclosure was adequate, as the updated projections that were disclosed reflected material, new information and were prepared reliably.

Minority stockholders should keep in mind that a minority equity stake, when coupled with supermajority stockholder approval requirements — or possibly even standing alone — can indicate control.

To determine control status, the court will consider all potential sources of a minority stockholder's

influence, in their totality, as well as the particular factual context.

A minority stockholder providing significant support to the company should consider carefully any proposal to sever ties with the company.

In the context of a sale process, for example, such a proposal could be viewed as coercion of the board to sell the company or to sell it to a particular bidder. The risk of such a conclusion should be mitigated by making it clear in any such proposal that the stockholder is not abandoning the company and will continue to assist it to ensure a smooth transition.

The stockholder should also maintain a record establishing the valid business reasons for making the proposal at that time.

A company should carefully review the nature and scope of any disclosure it makes with respect to a nonmajority stockholder's control or influence.

The court may view an outright admission that a minority stockholder controls the company as strong evidence of control, whereas it may not view a statement of significant reliance similarly, absent other strong indications of control.

Updated projections should be prepared reliably, particularly during a sale process.

Courts are typically skeptical of revisions of management projections during a sale process, particularly in alleged controller transactions. When they are necessary, the board should explore carefully — with management and the bankers — the rationale for the revisions, the process that was undertaken, and the reasons for a less optimistic view regarding the business.

Depending on the circumstances, to provide a fuller picture, the company could consider also disclosing the prior projections, with an explanation that they were not relied on by the board or its financial adviser, and the reasons the update was appropriate. Generally, revisions to projections should be made under a regular, deliberative process, rather than, for example, being made by or at the direction of a controller or a self-interested executive.

Gail Weinstein is senior counsel at Fried Frank Harris Shriver & Jacobson LLP.

Philip Richter is a partner and co-head of the M&A practice at the firm.

Steven Epstein is a managing partner and co-head of the M&A and private equity practice at the firm.

Fried Frank partner Steven Steinman contributed to this article.

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Del. Justices Asked To Undo Firm's 'Malicious' Suit Escape

By **Rose Krebs**

Law360 (July 18, 2024, 2:18 PM EDT) -- Applied Energetics is asking the Delaware Supreme Court to revive a complaint alleging Gusrae Kaplan Nusbaum PLLC and a former partner filed a frivolous federal securities fraud suit in order to hobble other litigation against the company's former chief executive officer.

In an **opening brief** filed in its appeal on Wednesday, Applied Energetics Inc. argued that Superior Court Judge Eric M. Davis erred in his April decision tossing its complaint against Gusrae Kaplan and Ryan Whalen for jurisdictional reasons.

The laser-weapons maker argued that Judge Davis wrongly ruled Delaware has no personal jurisdiction in the matter over the firm and its former partner.

"Appellant respectfully requests this court reverse the Superior Court, hold that Delaware has personal jurisdiction over defendants, and permit this action to proceed to the merits," Applied Energetics said.

Alternatively, the company asked the Supreme Court to reverse the trial court's ruling and direct the lower court to allow it to "conduct limited jurisdictional discovery."

In his **April decision**, Judge Davis ruled that Applied Energetics "failed to identify sufficient Delaware contacts to establish personal jurisdiction over defendants" when dismissing the lawsuit.

Applied Energetics **filed the Superior Court complaint** in July 2023, accusing Gusrae Kaplan and Whalen of filing a "frivolous" federal securities fraud suit in New York with the intent of hindering Delaware Chancery Court litigation against George Farley, the company's former CEO. Whalen, who left Gusrae Kaplan in October 2021, is now general counsel at global investment bank EF Hutton, his LinkedIn profile says.

In its Superior Court suit, Applied Energetics accused the firm and Whalen of malicious prosecution. At issue was a 2019 suit Gusrae Kaplan filed in New York federal court against Applied Energetics, two of the company's attorneys and their law firms, its board of directors, and an outside consultant.

The firm alleged that Applied Energetics committed securities fraud, claiming the company's attorney sent a letter to Gusrae Kaplan demanding that the firm return shares of Applied Energetics stock issued to it via an agreement negotiated with Farley.

Gusrae Kaplan also alleged in its suit that this letter caused its securities broker not to process sales of the firm's Applied Energetics stock.

The law firm and Whalen represented Farley in Delaware Chancery Court litigation, including a 2018 breach of fiduciary suit filed by Applied Energetics, according to Judge Davis' April decision.

In the Chancery suit, Applied Energetics accused Farley of wrongfully awarding himself 25 million company shares.

In the Superior Court suit, Applied Energetics accused Gusrae Kaplan of using the New York litigation to deliberately depress the price of Applied Energetics' publicly traded stock and to create a conflict

between the company and its counsel in the Farley litigation, Stein Riso Mantel McDonough LLP, now Mantel McDonough Riso, who were named as **co-defendants** in the securities fraud action.

According to the suit, the securities fraud action depressed Applied Energetics' stock price by at least 50%, which led to the company's being forced to issue at least 16.7 million excess shares, amounting to more than \$40 million in damages.

Applied Energetics claimed it was forced to issue at least twice as many shares during this time period as it would have to obtain the same investment capital.

In his ruling, Judge Davis rejected Applied Energetics' argument that "jurisdiction exists over" the firm and Whalen, tossing aside the company's claim that their pro hac vice appearances in the Chancery Court litigation subjected them to the court's jurisdiction.

"Plaintiff identifies no Delaware-specific act giving rise to the claim for malicious prosecution," and the claim for malicious prosecution did not arise from their appearances in Chancery Court, Judge Davis said.

"AEI attempts to tie the filing of the New York action and defendants' appearances in the 2018 Delaware action by pointing to the fact that they overlapped in time," the decision said. "The inference that AEI asks this court to draw is that defendants filed the New York action in order to 'depress [the company]'s stock price and hamstring [AEI]'s ability to prosecute" the Delaware action.

But Judge Davis tossed that contention aside, saying: "Even if that were so, the jurisdictional act giving rise to the claim for malicious prosecution is the filing of the New York action, not defendants' pro hac vice appearances in Delaware."

Judge Davis also rejected Applied Energetics' contention that the Superior Court had jurisdiction because of Gusrae Kaplan and Whalen's "extensive contacts with, and revenue derived from Delaware" in the form of legal fees in the Chancery Court litigation.

"The court cannot accept this argument because, if successful, nearly all outside counsel would be subjected to the jurisdiction of Delaware courts in unrelated actions by virtue of one or two appearances in Delaware litigation," Judge Davis said. "More is required."

Judge Davis also said: "Though the situs of the stock of a Delaware corporation is in Delaware, it is unclear to the court whether actions occurring outside Delaware that negatively impact the stock price of a Delaware corporation can constitute 'tortious injury in the state.'"

But in its brief Wednesday, Applied Energetics argued that the Delaware Supreme Court's authority over pro hac vice attorneys is "coextensive with Delaware's personal jurisdiction over 'all actions' arising from 'any activities related thereto,'" citing Delaware court rules.

"If, for example, an out-of-state pro hac vice attorney were to bribe a witness, or intentionally destroy material evidence, or commit any other tortious conduct designed and intended to gain an improper litigation advantage in the Delaware court proceeding to which they have been admitted pro hac vice, the Delaware Supreme Court would have jurisdiction to discipline that attorney even if the tortious conduct was committed out-of-state," the company said.

Applied Energetics asserted that although the firm and Whalen were based in New York, Whalen "appeared on a pro hac vice basis as counsel of record in two successive and related cases in the Court of Chancery" against Farley related to the share issuance.

When it granted the motion to dismiss, the Superior Court erred, in part, because "a party who intentionally directs tortious conduct toward a resident of another state, intending to cause harm in that other state, is subject to that state's personal jurisdiction," Applied Energetics asserted.

Applied Energetics settled its 2018 Chancery action against Farley and others in 2020 and Gusrae Kaplan voluntarily dismissed its New York federal action in 2021, according to Judge Davis' ruling.

Counsel for the parties didn't immediately respond Thursday to requests for comment.

Applied Energetics is represented by Theodore A. Kittila, James G. McMillan III and William E. Green Jr. of Halloran Farkas & Kittila LLP.

Gusrae Kaplan and Whalen are represented by Robert J. Katzenstein, Robert K. Beste, Julie M. O'Dell and Lauren A. Ferguson of Smith Katzenstein & Jenkins LLP.

The case is Applied Energetics Inc. v. Gusrae Kaplan Nusbaum PLLC and Ryan Whalen, case number 178,2024, in the Supreme Court of the State of Delaware.

The case on appeal is Applied Energetics Inc. v. Gusrae Kaplan Nusbaum PLLC and Ryan Whalen, case number N23C-07-200, in the Superior Court of the State of Delaware.

--Additional reporting by Tracey Read. Editing by Robert Rudinger.

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LPL Reaps Benefits From Forced Cash Sweep, Suit Says

By **Sydney Price**

Law360 (July 18, 2024, 9:52 PM EDT) -- LPL Financial was hit with a putative class suit by a customer who claims the broker-dealer automatically moves customers' uninvested cash into its cash sweep programs, primarily benefiting the firm at the expense of its clients.

According to customer Daniel Peters' Wednesday suit in California federal court, LPL allegedly used its cash sweep programs, known as ICA and DCA, to generate substantial revenue for itself using its customers' money. The programs sweep uninvested cash from customers every day into a series of bank accounts that pay out substantial returns to LPL but pay minimal interest to customers, the suit says.

According to the complaint, LPL customers do not have a choice in whether they participate in the programs, saying it's required to open an account.

LPL's monthly account statements provide customers with the identity of the bank where the cash is held, and the interest rate paid to the customer on their cash, but do not show what percentage of the total interest paid was retained by LPL or the fees LPL received for placing its customer's cash through the programs, the suit alleges.

Peters alleges customers will always receive substantially less interest on cash holdings than if the money is placed into a typical bank savings account or money market fund.

"Defendant thus fails to disclose that it will always receive a larger portion than its customers, of the interest generated by the customers' cash and how much higher that portion is: not just the majority, but nearly the entirety of that interest goes to defendant, rather than to its customers," the suit says.

The suit alleges none of the account agreements and disclosure booklets provided by LPL fully disclose how LPL allocates the interest payments on the customers' cash between itself and the customers.

Peters also claims LPL's tactics have improved its bottom line, which resulted in a "meteoric rise" in LPL's common stock share price.

The suit accuses LPL of breaching its fiduciary duty, being unjustly enriched, breach of contract and violating the California Unfair Competition Law. Peters seeks to represent a class of anyone whose cash was swept by LPL beginning July 17, 2018.

Counsel for Peters and a representative of LPL did not immediately respond to requests for comment Thursday.

Peters is represented by Sophia M. Rios, Micheal Dell'Angelo and Andrew Abramowitz of Berger Montague PC and Alan L. Rosca and Paul J. Scarlato of Rosca Scarlato LLC.

Counsel information for LPL was not immediately available.

The case is Peters et al. v. LPL Financial LLC, case number 3:24-cv-01228, in the U.S. District Court for the Southern District of California.



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Vermont Suit Accuses PBMs Of Price-Fixing

By **Jared Foretek**

Law360 (July 18, 2024, 3:43 PM EDT) -- Vermont's attorney general filed suit against pharmacy benefit managers Express Scripts and CVS Wednesday, accusing the companies of abusing their market power to drive up prescription costs for consumers and squeezing out price competition from small pharmacies.

Filed in Vermont state court, the lawsuit claims that because of "massive consolidation" in the pharmacy and PBM industry, CVS, Express Scripts and their numerous subsidiaries exert almost total control over which drugs will be covered by insurance and how much they will cost through their dual roles as PBMs and retailers.

"Through their interconnected roles as PBMs and pharmacies, the PBMs are driving up prices and foreclosing patients' access to life-sustaining treatments in order to increase their profits," the complaint, brought by Vermont Attorney General Charity Clark, reads.

In Vermont, the suit claims, Express Scripts and CVS Caremark – the PBM arm of CVS – control over 95% of the pharmacy benefit market, giving them the ability to design drug formularies used by insurers to dictate which drugs are covered, their out-of-pocket costs, and any restrictions on their use by insured patients.

Their market power, in turn, forces insurers and drugmakers to adhere to the formularies and even pay the PBMs for placement, the suit says.

"PBM Defendants have created a business model where, in order to gain preferred formulary positions, the drug manufacturers must pay the PBMs substantial amounts of money. ... These payments are the quid pro quo for formulary inclusion," the complaint reads. "Rather than pass through these Manufacturer Payments to patients and their clients to lower the prices, the PBMs instead obfuscate and retain significant amounts of these Payments as profit."

The scheme intensified around 2021 when, the suit says, PBMs took up an exclusionary formulary strategy of simply not listing certain drugs, threatening to potentially cut off access to one or more drugs treating the same condition.

According to Clark, this allowed companies like CVS Caremark and Express Scripts to demand even higher manufacturer payments, which pharmaceutical makers passed along through increased list prices.

"Notably – and contrary to their public representations – the PBM Defendants make more money from drugs with higher list prices and higher Manufacturer Payment amounts," the suit claims.

The result is a wildly distorted market, the state says, in which a prescription for the generic multiple sclerosis drug teriflunomide can cost \$4,465 through specialty mail-order pharmacies but less than \$20 through Mark Cuban's Cost Plus Drug Company. In another example, the suit claims that CVS Caremark charged one patient \$138,000 annually for a cancer medication called everolimus, which only cost CVS \$14,000 annually to buy.

And it's not just consumers who have been hurt, the state claims. Smaller, unaffiliated pharmacies have gotten less favorable reimbursement rates from PBMs than their preferred, affiliated pharmacies like CVS, according to the complaint.

All the while, CVS and Cigna, which owns Express Scripts-parent company Evernorth, have reaped massive rewards, Clark says, coming in at number six and 16, respectively, on Fortune 500's ranking of American companies by revenue.

The suit, which claims that the companies are violating the Vermont Consumer Protection Act, follows **suits** against Express Scripts and other PBMs by a proposed class of consumers and other state attorneys general, who have **claimed** that the companies profited from and contributed to the opioid crisis.

The Federal Trade Commission, meanwhile, **released a report** earlier this month claiming that PBMs have leveraged their significant power in the pharmaceutical market to drive up costs and squeeze smaller pharmacies.

CVS and Express Scripts did not immediately respond to Law360's requests for comment Thursday. In a statement issued Wednesday, Clark said her office was suing to "bring transparency to prescription drug pricing."

"While the pharmacy benefit managers named in our lawsuit claim they perform their services on behalf of their clients and patients to lower prescription drug prices and promote patient health, that is just not true," Clark said. "Instead, they have distorted the market to line their own pockets at the expense of Vermonters."

The state of Vermont is represented by Attorney General Charity Clark, Assistant Attorneys General Jill S. Abrams and Merideth C. Chaudoir, W. Lawrence Deas and William Liston of Liston Deas PLLC, Joanne Cicala, Josh Wackerly and R. Johan Conrod of The Cicala Law Firm PLLC, Matthew C. McDonald of David Nutt & Associates, and Tanya D. Ellis and Trey Watkins of Forman Watkins & Krutz LLP.

Counsel information for CVS and Express Scripts was not immediately available Thursday.

The case is The State of Vermont v. Evernorth Health Inc. et al., case number 24-cv-02759, in State of Vermont Superior Court, Washington Unit.

—Additional reporting by Matthew Perlman. Editing by Peter Rozovsky.