

Uber Investors Reach \$200 Million Deal in Securities IPO Suit

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Signage outside the Uber Technologies Inc. headquarters in San Francisco on Feb. 8, 2022.

Photographer: David Paul Morris/Bloomberg

- Proposed deal ends long-running suit over IPO disclosures
- Class counsel will seek 29% of settlement fund or \$58 million in fees

A class of Uber Technologies Inc. investors are requesting preliminary approval of a \$200 million settlement to end claims that the ride-hailing company misled them over its financial performance during its 2019 initial public offering.

The proposed settlement, filed July 19 in the US District Court for the Northern District of California, is the latest development in a long-running lawsuit alleging that the IPO's offering documents included materially false and misleading statements.

The investors alleged that, at the time of its IPO, Uber failed to disclose information about passenger safety, including incidents of sexual assault and deficiencies in its background check procedures for drivers. The company also allegedly didn't disclose an alleged practice of skirting laws and regulations to expand and operate in various jurisdictions, and that its business model depended on the purported misclassification of its drivers as independent contractors, rather than employees.

Class counsel will request no more than 29% of the settlement fund or \$58 million in fees, plus expenses not to exceed \$3.2 million.

Labaton Keller Sucharow LLP, Levi & Korsinsky LLP, Scott & Scott Attorneys at Law LLP, Robbins Geller Rudman & Dowd LLP, and Cotchett Pitre & McCarthy LLP represent the investors. A&O Shearman and Willkie Farr & Gallagher LLP represent Uber.

The case is Boston Ret. Sys. v. Uber Techs. Inc. , N.D. Cal., No. 19-06361, motion filed 7/19/24 .

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New Relic Founder's Personal Emails Shielded by Delaware Court

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Photo: Bloomberg

- New Relic's \$6.5 billion acquisition was finalized in November
- Judge sides with company over Lew Cirne's personal emails

Personal emails from New Relic Inc. founder and former CEO Lew Cirne are protected from a shareholder investigation into the cloud analytics company's \$6.5 billion take-private sale last year, a Delaware court ruled Monday.

New Relic produced over 9,000 pages of documents in response to books-and-records demands from pension funds investigating potential breaches of fiduciary duty and the independence of the company's board and management. But it balked at providing Cirne's personal emails, which the pension funds sought regarding the rollover of Cirne's equity in connection with the merger.

Delaware Chancery Court Magistrate Selena Molina agreed with New Relic's refusal in a bench ruling following a July 10 trial.

"The additional detail, including how Mr. Cirne valued a potential rollover or otherwise planned for same, may well be interesting to the plaintiffs to provide context, but is neither necessary nor essential to the plaintiffs' purpose for investigation of the defendant's books and records," she said.

The pension funds demonstrated a credible basis for suspecting wrongdoing at the time they served their demands for New Relic's internal files, Molina said. Nevertheless, she said the plaintiffs "have failed to convince me that we should go any deeper."

The consolidated litigation sought internal documents to investigate possible pressure to complete New Relic's sale to Francisco Partners Management LP and TPG Global LLC last November.

New Relic is represented by Richards Layton & Finger and Latham & Watkins. The pension funds are represented by Robbins Geller and Bleichmar Fonti & Auld.

The case is In re New Relic Inc., Del. Ch., No. 2023-1089, bench ruling 7/22/24 .

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The 2024 Lawdragon 500 Leading Global Litigators

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July 19, 2024

By Katrina Dewey | July 19, 2024 | Guides, News & Features



Angela Machala (Winston & Strawn), Érica Franzetti (King & Spalding) and Ted Greeno (Quinn Emanuel)

We're honored to introduce The 2024 Lawdragon 500 Leading Global Litigators.

From Dubai to Dallas and London to Los Angeles, these advisors are at the forefront resolving global disputes.

Historically, that has meant international arbitration and other cross-jurisdictional bodies where the clash of laws and interests is weighted and resolved. Today, that also encompasses disputes among global corporate and other interests that transcend boundaries and borders. Included here are the lawyers whose vision and reach is worldwide.

A vast number are experts in energy, oil and construction. Included as well are those focused on public international law, human rights, financial disputes and asset recovery.

This guide highlights the global strategy of world-defining law firms, with firms including Quinn Emanuel, Skadden, A&O Shearman and Norton Rose tallying dozens of recognized lawyers. These are not firms that were built by the faint of heart, and it's an honor to recognize lawyers including John Quinn who had the vision to collect the world's leading litigators in one firm that has come to define global excellence.

This is our 3rd edition of Global Litigators. We selected the lawyers included through a robust nomination process – thank you for the amazing submissions! We also conduct independent research and vetting through clients and peers. Those denoted with an asterisk are members of our esteemed Hall of Fame.

This guide is 39 percent female and 27 percent inclusive. It's a thrill to watch new faces emerge on the global stage bringing fresh eyes to the world's most challenging disputes.

First Name	Last Name	Organization	Location	Practice
Paul	Geller	Robbins Geller	Boca Raton	International Litigation & Arbitration, esp. Plaintiff
Darren	Robbins	Robbins Geller	San Diego	Global Plaintiff Litigation

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Cosmetics Platform Hit with AI-Washing-Related Securities Suit

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July 22, 2024

The D&O Diary

Cosmetics Platform Hit
with AI-Washing-Related
Securities Suit



By Kevin LaCroix on July 22, 2024
Posted in Artificial Intelligence

ODDITY

When SEC Chair Gary Gensler expressed concerns last December about the possibility of reporting companies engaging in “AI-washing,” he was referring company disclosures that overstate or mislead

investors as to their true AI capabilities or the extent to which the company has incorporated AI into their operations or products. Since the time of those remarks, there have in fact been several AI-washing based SEC enforcement actions (as discussed, for example, [here](#)), and even several securities class action lawsuits based on AI washing allegations (for example, [here](#)). Late last week, in the latest example of an AI-washing-based securities class action lawsuit, a plaintiff shareholder filed a securities class action lawsuit against Israeli-based cosmetics internet platform Oddity Tech Ltd., based on allegations that the company overstated the extent to which AI processes and tools enhanced its delivery of consumer services. A copy of the July 19, 2024, complaint can be found [here](#).

Background

Oddity is an Israeli consumer tech platform focused on the beauty and wellness market. Oddity completed an IPO in the U.S. on July 19, 2023. The company portrays itself as a “disruptor” in the cosmetics industry, differentiating itself from traditional retailers by claiming that it uses proprietary AI-based technologies to target consumers’ needs.

On May 21, 2024, short-seller NINGI Research published a report explaining that the firm had shorted Oddity’s stock because, the firm alleged, Oddity had “completely misled investors about every critical aspect of its business, concealing a large brick-and-mortar business and sales generated by dishonest marketing tactics.”

Specifically, the NINGI report alleged, based on supposed interviews with former company employees, that Oddity’s claimed AI approach is “nothing but a questionnaire” and that Oddity’s lauded “repeat purchase rates” are attributable to “customers unknowingly entering

into non-cancelable plans” that allow the company to record repeat purchases “even though the customers didn’t want the product.” The NINGI report also claimed that the firm had found “hundreds of undisclosed lawsuits alleging violation of consumer protection laws.” The subsequently filed lawsuit claims that the company’s share declined on this news.

The Lawsuit

On July 19, 2024, exactly one year after the company completed its IPO, a plaintiff shareholder filed a securities class action lawsuit in the Eastern District of New York against Oddity and certain of its directors and officers. The complaint purports to be filed on behalf of investors who purchased Oddity securities during the period July 19, 2023, through May 20, 2024.

The complaint alleges that during the class period the defendants made false or misleading statements or failed to disclose that: “(i) Oddity overstated its AI technology and capabilities, and/or the extent to which this technology drove the company’s sales; (ii) Oddity’s repeat purchase rates and revenues were, at least in part, derived from unsustainable and deceptive sales and advertising practices; (iii) Oddity downplayed the true scope and severity of ongoing civil litigation against the Company and/or its subsidiaries; and (iv) as a result, Oddity’s public statements were materially false and misleading at all relevant times.”

The complaint alleges that the defendants violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 thereafter. The complaint seeks to recover damages on behalf of the plaintiff class.

Discussion

In reading this complaint, I was struck by the extent to which this complaint is almost entirely dependent on the short-seller’s report. In prior posts, for example here, I have discussed the reasons to be wary of securities complaints prepared in reliance only upon short-sellers’ allegations. Short-sellers obviously are financially motivated to disparage the target company’s business and operations, and indeed, some courts have been – for good reason, in my view — skeptical of complaints that are heavily reliant on short sellers’ allegations. Thus, while there may be reasons to be wary of company’s efforts to try to establish their AI credentials through so-called AI washing, there are also good reasons to be wary of the allegations in this complaint.

Another thing that struck me in this complaint is the fact that even though this lawsuit was filed exactly one year to the day after the company completed its U.S. IPO, the complaint does not contain IPO-related allegations. The complaint does not allege misrepresentations in the IPO documents. It does not assert claims on behalf of investors who purchased shares in the IPO; the claims are asserted only on behalf of secondary market purchasers. The complaint does not assert Section 11 claims. A quick glance at the stock price graph for this

company since the IPO reveals the likely reason why; for most of the period since the IPO, the company's shares have been trading above the offering price. (A glance at the stock price graph also suggests pretty strongly that the market actually was not all that troubled by the short seller's supposed revelations.)

From my perspective, the most noteworthy attribute of this complaint, and the reason I am writing about it here, is that the lawsuit involves AI-related allegations. In recent months, because of all of the hype in the investment markets surrounding AI, shares of companies with a good AI story have soared. These circumstances created a context within which there is a high likelihood that companies whose AI credentials are questioned, causing a drop in the price of the company's shares, are likely to get hit with a securities suit.

And indeed there have been a number of AI-related securities class action lawsuits filed this year, as I have discussed in prior posts (most recently here). By my count, this lawsuit is the fifth AI-related securities suit to be filed this year. As I noted in the prior post, there were in fact other AI-related securities suits filed prior to this year, as well.

Because of all of the noise surrounding AI; because of the extent to which the securities markets have been influenced by AI-related hype; and indeed because of the extent to which a lot of the assertions about the capabilities of artificial intelligence seem to be seriously overblown, it seems likely to me that there will be more AI-related securities lawsuit filed as the year progresses. Indeed, I strongly believe that the number of AI-related securities suit filings will prove to be a significant factor in the overall number of securities class action lawsuit filings during the year.

All of which does raise the question of what the right underwriting response to AI-related issues may be. At a minimum, I think underwriters will want to actively discern whether applicant companies are actively promoting their AI capabilities. Underwriters may also want to develop questions designed to determine whether the extent to which an applicant company's claimed AI credentials are based on actual technological investments and the extent to which the AI-based claims represent only a marketing approach. There is undoubtedly a lot more that could be said on this topic, which likely will be the subject of extensive further discussion within the D&O industry in the months ahead.

Musk Pay Judge Allows Scholar to File Brief, Over Tesla Protest

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Elon Musk, chief executive officer of Tesla Inc., departs court during the SolarCity trial in Wilmington, Del. on July 13, 2021.

Photographer: Al Drago/Bloomberg

The Delaware judge who struck down Elon Musk's \$56 billion pay package at Tesla Inc. will allow the US Chamber of Commerce and a legal scholar to weigh in on the case, according a three-page letter opinion issued Monday.

The organization and retired University of Delaware professor Charles Elson sought to file friend-of-the-court briefs concerning a Tesla shareholder vote re-approving the largest ever CEO compensation deal, and a bid for a roughly \$7 billion payout for the attorneys who won the case. Chancellor Kathaleen St. Jude McCormick will hear arguments over Tesla's motion to reinstate Musk's compensation deal at an Aug. 2 hearing.

- Tesla opposed Elson's motion to file a brief in the case supporting the plaintiff, activist shareholder Richard Tornetta. Elson said he resigned from a consulting job over what he what he called "appalling" threats from the electric vehicle maker and its CEO.
- Elson is "a leading authority on Delaware law who previously assisted the court in this action" and his brief "addresses complicated legal and policy issues presented by the parties," McCormick said.
- The US Chamber of Commerce's brief supporting Tesla was unopposed, and the business group's "reputation and ability speaks for itself," McCormick said.

The case is Tornetta v. Musk , Del. Ch., No. 2018-0408, letter opinion 7/22/24 .

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Plantronics Class Action Reaches \$29.5 Million Proposed Deal

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- Plantronics accused of not disclosing improper sales practice
- Agreement is favorable given 'real risk' of lesser recovery

Plaintiffs in a securities class action against electronics equipment company Plantronics Inc. say the parties have reached a \$29.5 million settlement, according to a filing with a California federal district court.

The parties reached the agreement after “four years of hard-fought litigation” and two mediation sessions, the plaintiffs told the US District Court for the Northern District of California in an unopposed motion for preliminary approval of settlement. Judge Jon S. Tigar is presiding over the case.

Plaintiffs sued in November 2019 asserting violations of federal securities laws against Plantronics and other defendants. They said Plantronics made materially false and misleading statements to investors by failing to disclose that the company’s revenues were obtained through an undisclosed sales practice that had the impact of covertly borrowing future earnings in order to increase current period earnings.

Ilya Trubnikov and Roofers Pension Fund filed motions seeking appointment as lead plaintiffs in 2020, which the court granted.

The lead plaintiffs purchased Plantronics securities and suffered damages as a result of the federal securities law violations and false and/or misleading statements, the complaint said.

According to the motion, the class consists of all persons or entities that purchased or otherwise acquired publicly-traded common stock of Plantronics between Aug. 7, 2018, and Nov. 5, 2019.

The parties reached the settlement after “extended arm’s length negotiations between experienced counsel,” with the assistance of “two highly experienced mediators.”

The \$29.5 million amount represents about 12% of the maximum class-wide damages, which is a favorable recovery when considered “in light of the real risk” of a lesser recovery, and the typical level of recovery in securities class actions, the motion said.

Lead counsel intends to seek fees of up to 22% of settlement funds, and payment litigation expenses not to exceed \$750,000, the motion said.

A hearing on the motion is scheduled for Sept. 26, but the plaintiffs said the court could approve the agreement without a hearing because the motion is unopposed.

Hagens Berman Sobol Shapiro LLP and Bernstein Litowitz Berger & Grossman LLP represent the plaintiffs.

The case is In re Plantronics Inc. Securities Litig. , N.D. Cal., No. 19-cv-7481, motion 7/19/24

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Pity R.R. Donnelley & Sons?

 fcpaprofessor.com/pity-r-r-donnelley-son

July 22, 2024

Imagine a company coughing up millions of dollars of shareholder money to settle an SEC enforcement action based, in part, on an enforcement theory that a federal court a mere 30 days later concluded was incorrect.

As highlighted in this prior post, on June 18, 2024 the SEC announced that R.R. Donnelley & Sons Company (RRD), a global provider of business communication and marketing services, agreed to pay over \$2.1 million to settle disclosure and internal control failure charges relating to cybersecurity incidents and alerts in late 2021.

Under the heading “RRD’s Failure to Maintain Sufficient Internal Accounting Controls and Disclosure Controls and Procedures,” the order stated in pertinent part:

“RRD failed to reasonably design and maintain internal controls that complied with [the FCPA’s internal controls provisions]. Namely, as discussed above, RRD’s cybersecurity alert review and incident response policies and procedures failed to adequately establish a prioritization scheme and to provide clear guidance to internal and external personnel on procedures for responding to incidents. In addition, RRD failed to establish sufficient internal controls to oversee the MSSP’s review and escalation of the alerts.

During the 2021 ransomware incident, RRD’s failure to design and maintain internal controls sufficient to provide reasonable assurances that access to RRD’s assets was permitted only with management’s authorization was exploited by hackers. While RRD’s internal systems began issuing alerts on the first day of the compromise, approximately three weeks before any encryption and exfiltration of data took place, RRD’s external and internal security personnel failed to adequately review these alerts and take adequate investigative and remedial measures until a company with shared access to RRD’s network notified RRD about anomalous internet traffic on December 23, 2021.”

Based on the above, the order found that RRD violated, among other things, the FCPA’s internal controls provisions.

The June 18, 2024 SEC enforcement action against RRD was a virtual carbon copy of the October 30, 2023 SEC enforcement action against SolarWinds Corporation (a Texas-based software company) and its chief information security officer (Timothy Brown) for disclosure and internal control failures relating to allegedly known cybersecurity risks and vulnerabilities. (See here for the prior post).

The SEC's complaint against SolarWinds alleged regarding internal controls:

"As an Exchange Act Section 13(a) reporting company, SolarWinds was required to "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that...access to assets is permitted only in accordance with management's general or specific authorization." In that regard, SolarWinds was required to develop reasonable safeguards against unauthorized access to Company assets by designing and maintaining reasonable controls to prevent and detect unauthorized access to, or use of, its assets.

SolarWinds' information technology network environment, source code, and products were among the Company's most critical assets. As discussed above, Orion [a software platform] was among SolarWinds' "crown jewel" assets. SolarWinds' Code of Conduct also described the Company's software code and information technology infrastructure among its most important assets and emphasized employees' responsibility to protect such information. In its October 18, 2018 Form S-1, SolarWinds stressed the importance of its "technology infrastructure to sell [its] products and operate [its] business" as well as its customers' reliance on SolarWinds' technology to manage their own information technology infrastructure.

SolarWinds assessed the effectiveness of its internal controls using the framework in Internal Control – Integrated Framework issued in 2013 by the Committee of Sponsoring Organization of the Treadway Commission ("COSO Framework"). For cybersecurity controls, the COSO Framework requires an organization to select and develop internal control activities over technology that are designed and implemented to restrict technology access rights to authorized users and to protect the entity's assets from external threats.

Under the COSO Framework, SolarWinds chose to use the NIST Framework [National Institute of Standards and Technology Cybersecurity Framework] ... conduct assessments. As discussed above, SolarWinds admitted in internal documents that it had no program or practice in place for a majority of the controls in the NIST Framework, and had assessed itself to be performing poorly on multiple critical controls.

As a result of the above shortcomings to SolarWinds' cybersecurity controls, the Company failed to devise and maintain a system of internal controls sufficient to provide reasonable assurance that access to the Company's assets was only in accordance with management's general or specific authorization.

Unlike most issuers subject to SEC scrutiny, SolarWinds mounted a legal defense and filed a motion to dismiss – a motion that was pending on June 18th when RRD resolved its SEC enforcement action.

As highlighted in this recent post – a mere 30 days after RRD resolved its SEC enforcement action based, in part, on the SEC’s expansive internal controls theory of enforcement, a court dismissed the SEC’s similar internal controls charge against SolarWinds.

In short, the court found it “not tenable” that the internal controls provisions covered SolarWind’s cybersecurity controls.

The court stated:

“The text [of the internal controls provisions] ... defeats the SEC’s attempt to apply this provision to cybersecurity controls. And there is no evidence of any other sort that Congress intended its reference to “a system of internal accounting controls” to reach cybersecurity controls.

[...]

The history and purpose of the statute confirm that cybersecurity controls are outside the scope of Section 13(b)(2)(B). Sections 13(b)(2)(A) and 13(b)(2)(B) were enacted as part of the 1977 Foreign Corrupt Practices Act (“FCP A”), amending the 1934 Securities Exchange Act, *In re Yesner*, 2001 WL 587989, at *33, and together are referred to as the “accounting provisions,” Foreign Corrupt Practices Act of 1977, Statement of Policy, 21 SEC Docket 1466, 1468 (Jan. 29, 1981). The FCPA was passed in response to “a pattern of questionable payments to foreign government officers by prominent American corporations.” *Id.* The accounting provisions were enacted “to assure books and records accurately and fairly reflected transactions and the disposition of assets, to protect the integrity of the independent audit, and to promote reliability and completeness of financial information that is disseminated to investors.” *In re Yesner*, CPA, 2001 WL 587989, at *31. And with regard to Section 13(b)(2)(B) in particular, Congress’s explicit purpose, as codified in the text, was to “provide reasonable assurances that, among other things, transactions are recorded as necessary to permit the preparation of financial statements in conformity with generally accepted accounting principles or any other applicable criteria.” S. Rep. No. 95-114 at 7 (1977) (emphasis added). Indeed, Congress recognized that because “the accounting profession has defined the objectives of a system of accounting control, the definition of the objectives contained in this subparagraph is taken from the authoritative accounting literature.” *Id.* (citing American Institute of Certified Public Accountants, Statement on Auditing Standards No. 1, 320.28 (1973)) (emphasis added).

To that end, these provisions require public companies, in addition to filing with the SEC annual and quarterly reports containing detailed financial information, to put in place systems to ensure that the information reported is accurate and complete. Section 13(b)(2)(A) regulates financial recordkeeping. It requires public companies to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of [their] assets.” And Section 13(b)(2)(B), at issue here, requires issuers to “devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances” that assets are safeguarded from unauthorized use, that corporate transactions conform to managerial authorizations, and that records are accurate. As evinced by the broader statutory

scheme, the internal accounting controls identified in Section 13(b)(2)(B) thus are intended to provide extra assurance of the accuracy and completeness of the financial information on which the issuer's annual and quarterly reports rely.

To state the obvious, cybersecurity controls are not-and could not have been expected to be-part of the apparatus necessary to the production of accurate such reports. The Court therefore dismisses the AC's internal accounting control claim against SolarWinds for failure to state a claim."

Both SolarWinds and RRD faced nearly identical SEC enforcement theories concerning the internal controls provisions.

One choice to fight and won and one choose to settle.

Both decisions (presumably made by the board of directors and/or audit committees of the companies as advised by outside counsel) are presumably protected by the business judgment rule.

But which decision was best?

RRD spent \$2.1 million dollars of shareholder money to settle an enforcement action based in part on an enforcement rejected by a federal court a short time later.

Challenging the SEC's enforcement theory obviously was not a cost free exercise for SolarWinds and the company may have exceeded \$2.1 million in attorneys fees given the briefing in the case.

This much is probably true though.

No other company likely will benefit from RRD's risk averse decision to resolve an SEC enforcement action based on a dubious enforcement theory.

Whereas, other companies will likely benefit from SolarWind's decision to contest the SEC's theory of enforcement and the court's conclusion. But then again, one non-binding federal court decision (on a relative issue of first impression) will likely not cause the SEC to back off its dubious enforcement theory because – after all – the SEC can rightly assert that another company agreed to resolve a matter based on the same enforcement theory.

U.S. Bank Loses Bid to Scuttle Revived Commerzbank RMBS Claims

By Martina Barash

Bloomberg Law News 2024-07-22T12:02:52891938634-04:00

U.S. Bank Loses Bid to Scuttle Revived Commerzbank RMBS Claims

By Martina Barash 2024-07-19T17:35:00000-04:00

U.S. Bank NA failed to persuade a federal court to undo a ruling allowing Commerzbank AG to pursue both contract and tort claims over residential mortgage-backed securities.

A 2023 decision of New York's highest court, *IKB International, S.A. v. Wells Fargo Bank, N.A.*, doesn't undermine the logic of two prior decisions in the Commerzbank case, Judge Denise Cote said Thursday for the US District Court for the Southern District of New York. Indeed, the state court opinion articulated "the very standard" for the claims that Cote's predecessor applied, she said.

- The suit stems from Commerzbank's purchase of RMBS certificates from U.S. Bank, the trustee that allegedly managed the securities, before the collapse of that sector of the market during the 2008 financial crisis
- The US Court of Appeals for the Second Circuit revived the case in April, directing the district court to consider certain conflict-of-interest issues in the case
- Cote didn't reach arguments about whether the New York state court decision could be used to derail the Second Circuit's ruling

Wollmuth Maher & Deutsch LLP and Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro represent Commerzbank. Jones Day and Robins Kaplan LLP represent U.S. Bank.

The case is *Commerzbank A.G. v. United States Bank N.A.*, 2024 BL 245677, S.D.N.Y., No. 16-cv-4569, 7/18/24.

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This Week in Chancery Court: Byju's Appeal, Paramount Merger

By Jennifer Kay

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This Week in Chancery Court: Byju's Appeal, Paramount Merger

By Jennifer Kay 2024-07-22T05:00:40000-04:00

Paramount Global faces off with a Rhode Island pension fund this week in Delaware Chancery Court over documents related to its merger talks with David Ellison's Skydance Media.

Here's more from the Chancery Court and Delaware Supreme Court calendars this week:

Monday: In re New Relic Inc., Del. Ch., No. 2023-1089, ruling 7/22/24.

At issue: A pension fund seeks internal books and records from New Relic Inc. to investigate whether activist hedge fund JANA Partners LLC drove pressure to complete a \$6.5 billion sale of the cloud analytics company to Francisco Partners Management LP and TPG Global LLC. New Relic has argued that it's complied with the pension fund's repeated records requests, but it balked at providing personal emails from founder and former CEO Lew Cirne. Magistrate Selena Molina is scheduled to deliver a bench ruling in the case, following trial earlier this month.

Court action: Molina will issue a bench ruling via teleconference.

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

Monday: In re Straight Path Comms. Inc. Consol. S'holder Litig., Del. Ch., No. 2017-0486, oral arguments 7/22/24.

At issue: In a case where IDT Corp. and founder Howard Jonas defeated shareholder litigation over the \$3.1 billion sale of an affiliate, Straight Path Communications Inc., to Verizon Communications Inc., Vice Chancellor Sam Glasscock III awarded "nominal damages" to the shareholder leading the case. Glasscock's ruling criticized Jonas for manipulating the transaction but determined that his wrongdoing didn't inflict any harm on minority investors. The judge now hears arguments over the lead plaintiff counsel's fee award application seeking \$9.5 million. "Here, an award of fees is not only equitable but would further Delaware's oft-stated policy goal of disincentivizing disloyal behavior," according to a brief from the shareholder's attorneys.

Court action: A hearing on the attorneys fee award application will be heard via videoconference.

IDT, Founder Beat Lawsuit Over \$3.1 Billion Straight Path Deal

Monday: State of Delaware v. Johnson & Johnson Inc., Del. Ch., No. 2024-0635, teleconference 7/22/24.

At issue: Chancellor Kathaleen St. Jude McCormick will hold a hearing on Delaware's portion of a national \$700 million settlement to resolve litigation over the marketing of Johnson & Johnson's baby powder and body powder products that contained talc. Delaware's portion of the settlement totals \$4.9 million, according to a consent judgment filed with the court. Delaware Attorney General Kathy Jennings (D) said in a statement that the settlement "underscores our commitment to protecting Delawareans and holding companies accountable, irrespective of their size, when they attempt to deceive our citizens."

Court action: The hearing will be held via teleconference.

Tuesday: WT Rep. LLC v. Philips Holdings USA Inc., Del. Ch., No. 2024-0170, oral arguments 7/23/24.

At issue: A Koninklijke Philips NV affiliate faces claims it's dodging post-deal payments tied to its \$250 million acquisition of medical device business Vesper Medical Inc. Former Vesper investors allege Philips owes milestone payments stemming from regulatory approval of a breakthrough stent system used to treat obstruction of large veins in the pelvis, which can lead to blood clots and other complications. Philips seeks to dismiss the lawsuit, arguing in a brief that it doesn't owe any milestone payments because the FDA only approved some stent sizes used in the system, but not all. The amounts of the disputed payments are redacted in court documents.

Court action: Oral arguments on the motion to dismiss will be heard in Wilmington, Del., before Delaware Superior Court Judge Paul R. Wallace. Superior Court judges are assigned some breach of contract litigation to help alleviate the Chancery Court's busy caseload.

Philips Sued for Milestone Payments After \$250 Million Deal (1)

Tuesday: In re Qualtrics Int'l Inc. S'holders Litig., Del. Ch., No. 2023-1050, ruling 7/23/24.

At issue: Ex-investors in Qualtrics International Inc. challenged its \$12.5 billion private equity sale by German software giant SAP SE to affiliates of Silver Lake Group LLC. Vice Chancellor J. Travis Laster is scheduled to give his ruling on the defendants' motion to dismiss the consolidated lawsuit. The investors argued the case should proceed because the sale process was "rife with conflicts, structural bias, and informational imbalance," according to an answering brief.

Court action: Laster will issue a bench ruling via teleconference.

Wednesday: Ravindran v. GLAS Tr. Co. LLC, Del., No. 463, 2023, oral arguments 7/24/24.

At issue: The Delaware Supreme Court will consider an appeal seeking to reverse a Chancery Court ruling that determined lenders to Byju's, once one of India's hottest tech startups, properly cited a default on a \$1.2 billion loan when taking over control of a unit of the education-technology provider. Vice Chancellor Morgan T. Zurn ruled the lenders, including Redwood Investments LLC and Silver Point Capital LP, were within their contractual rights to replace a relative of company founder Byju Raveendran on the board of Byju's Alpha, a special-purpose company formed for financing purposes, with their nominee.

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

Byju's Lenders Win Fight Over Loan Default, Control of Unit (2)

Wednesday: State of Rhode Island Office of the Treasurer v. Paramount Glob., Del Ch., No. 2024-0457, trial 7/24/24.

At issue: The Employees' Retirement System of Rhode Island seeks internal Paramount files related to the Skydance merger, and it's taking the books-and-records demand to trial. Paramount argues the pension fund's demand is over-broad, and it's not entitled to the documents, according to a brief. The media giant sought to push back the trial, but its motion for a continuance was denied in a pre-trial conference.

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

Paramount Investor Asks Judge for Access to Merger Documents (1)

Friday: Driver Opp. Partners LLP v. Briggs, Del. Ch., No. 2023-0287, hearing 7/26/24.

At issue: First Foundation Inc. reached a settlement in April 2023 to end litigation over its board nomination deadline by letting stockholders vote on a director candidate put forward by a Driver Management Co. affiliate. Stockholders ultimately rejected Driver's nominee. Driver's attorneys now seek \$3.5 million for fees and expenses related to their efforts that "conferred substantial corporate benefits in connection with protecting the stockholder franchise," according to a brief. First Foundation opposes that fee application, arguing in a brief that "in no event is Plaintiff entitled to more than \$250,000."

Court action: A hearing on the attorneys fee award application will be held in Wilmington, Del.

First Foundation Has Board Deal With Driver, Ending Court Fight

Friday: Sunstone Partners Mgmt. LLC v. Synopsys Inc., Del. Ch., No. 2024-0261, hearing 7/26/24

At issue: Private equity firm Sunstone Partners Management LLC sued Synopsys Inc. in April for allegedly breaching an exclusivity agreement when Synopsys shopped its \$3 billion software integrity business widely earlier this year. Sunstone seeks damages and reimbursement for “millions of dollars in fees and expenses” in a rare instance of private deal negotiations spilling into the courts. Synopsys seeks to dismiss the lawsuit, arguing in a brief that “a forward-looking announcement” about exploring “strategic alternatives” for the software business “was entirely consistent with the ongoing negotiations between Sunstone and Synopsys.”

Court action: Oral arguments on the motion to dismiss will be heard in Wilmington, Del., before Delaware Superior Court Judge Wallace. Superior Court judges are assigned some breach of contract litigation to help alleviate the Chancery Court’s busy caseload.

Synopsys Sued by PE Firm for Shopping \$3 Billion Unit

To contact the reporter on this story: Jennifer Kay in Philadelphia at jkay@bloomberglaw.com

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Class action lawyer pleads ignorance as he fights having to pay victorious defendant's fees

 legalnewsline.com/stories/661975553-class-action-lawyer-pleads-ignorance-as-he-fights-having-to-pay-victorious-defendant-s-fees

July 22, 2024

Attorneys & Judges



Attorney William Wright of The Wright Law Office | The Wright Law Office

Ocala, Fla. (Legal Newsline) - A Florida class action lawyer is claiming he didn't know an identical lawsuit against Big Lots had failed before he filed his, in an attempt to avoid paying a share of a \$180,000 penalty.

When Florida federal judge Gregory Presnell ruled New York lawyer Spencer Sheehan perpetrated a fraud on his court, he also ordered the lawyer who signed the complaint - William Wright of West Palm Beach - to show why he shouldn't be on the hook for Big Lots' attorneys fees.

Wright, who represented plaintiff Peggy Durant, signed the complaint and Sheehan's name was also included. Sheehan had filed the same suit in New York federal court and lost, leaving Presnell to find the second case was frivolous.

Wright claims in a July 17 filing that Sheehan, who has filed hundreds of novel consumer deception class actions that have angered several judges, never told him about the first, failed lawsuit.

"Wright was unaware of the *Devey* dismissal opinion until defense counsel cited it in their motion to dismiss the *Durant* matter," Wright wrote. "Neither Sheehan nor defense counsel ever mentioned or discussed the *Devey* litigation with Wright, nor was *Devey* ever noticed as a related case.

"Further, though aware that Sheehan is a prolific filer of consumer cases, Wright was unaware of the other opinions admonishing Sheehan's conduct referred to in Defendant's motion to dismiss or in this Court's opinion for fees and costs.

"Similar class action cases are often filed in other jurisdictions. But at the time of the Durant filing, Wright had no reason to believe Sheehan had previously filed the exact case and had already been admonished in the dismissal opinion."

It's hard to tell if Judge Presnell will believe his argument. His order granting Big Lots' request for attorneys fees noted Sheehan's name was on the complaint but he never motioned the court for permission to practice in the Middle District of Florida.

Wright claims Sheehan's name appeared simply so Sheehan, of New York, would be noticed with case developments. Wright says he was unaware court rules required Sheehan's pro hac vice motion and believed Sheehan only needed to file that motion if he made an appearance in the case.

Wright has had Sheehan's name removed from this and other cases it appeared on that are being pursued by Wright in the district.

"Thus, goes his story, his haste in acting to correct this 'misunderstanding' plainly shows this was an innocent, harmless error," Presnell wrote. "Unfortunately, however, this story fails to square with the facts."

Wright's claim he didn't know of the failed New York case also drew skepticism - it "not only stretches the bounds of his credibility to breaking point but, if true, evidences his unwillingness to undertake even the most basic act of diligence to verify the veracity and integrity of his filings."

Wright noted that Big Lots' motion only asked for Sheehan to pay its fees and was prepared by the firm Davis Wright Tremaine, which also won the New York case.

"Defense counsel found no reason to include William Wright or The Wright Law Office in their client's motion for fees and costs," Wright wrote.

"This speaks volumes about Wright's culpability in the Durant case and his knowledge of *Devey*. Defense counsel has the most thorough understanding of the facts.

"Had defense counsel thought Wright was in any way involved in frivolous or vexatious litigation, he undoubtedly would have been named in the motion for fees and costs."

Sheehan advertises on Facebook to find new plaintiffs, like a woman who used Ricola cough drops for more than 20 years before deciding to sue.

Sheehan first gained notoriety as the "vanilla vigilante," filing a host of lawsuits that claimed vanilla flavoring in products did not contain traditional vanilla.

Sheehan has sued because the strawberry flavoring in Pop-Tarts comes from pears and apples and is dyed red. He complained Bagel Bites have cheese that is a blend made with skim milk and feature tomato sauce that contains ingredients consumers wouldn't expect (the judge hearing that case called his claims "unreasonable and unactionable").

Last year, he lost a lawsuit that said the fudge in fudge-covered Oreos should adhere to traditional definitions of "fudge" by containing more milk fat and not palm oil and nonfat milk.

A federal judge has called him "a wrecking ball." The suits against Big Lots claimed the Fresh Finds brand coffee at Big Lots claimed to make up to 210 suggested strength 6 oz. servings but actually didn't.

But judges found those plaintiffs didn't pay enough attention to other serving instructions on the package.

ORGANIZATIONS IN THIS STORY

U.S. District Court for the Middle District of Florida

Judge refuses to disqualify leading opponents of J&J's talc bankruptcy plan

 [reuters.com/legal/legalindustry/judge-refuses-disqualify-leading-opponents-jjs-talc-bankruptcy-plan-2024-07-19](https://www.reuters.com/legal/legalindustry/judge-refuses-disqualify-leading-opponents-jjs-talc-bankruptcy-plan-2024-07-19)

Brendan Pierson

A bottle of Johnson & Johnson baby powder is seen in a photo illustration taken in New York, February 24, 2016. REUTERS/Mike Segar/Illustration/File Photo Purchase Licensing Rights  , opens new tab

July 19 (Reuters) - A New Jersey judge on Friday rebuffed Johnson & Johnson's (JNJ.N)  , opens new tab bid to disqualify the law firm Beasley Allen from representing plaintiffs claiming they got cancer from the company's talc, a setback for the company as it tries to resolve more than 60,000 such claims for \$6.48 billion through a pre-packaged bankruptcy plan.

Judge John Porto of the New Jersey Superior Court ruled that  , opens new tab J&J had not presented "any credible basis" for its claims that Beasley Allen partner Andy Birchfield formed an unethical alliance with one of the company's former lawyers.

Also on Friday, U.S. Magistrate Judge Rukhsanah Singh, who is overseeing talc cases pending in New Jersey federal court, ordered J&J to show cause why she should not adopt Porto's findings as well as she considers a parallel motion to disqualify the firm from the federal cases.

"It's gratifying that the state court found that as individuals, and on behalf of our firm, we can continue to seek justice for the thousands of women and families whose lives have been devastated by J&J's talc-based powders," Birchfield said in a statement.

Erik Haas, J&J's worldwide vice president of litigation, in a statement said that the company "will appeal the trial court's ruling that it is not an ethical violation for plaintiffs' counsel to knowingly and surreptitiously collaborate with defendants' former counsel on the same matter, same claims and same issues that the former counsel represented the defendants."

J&J has denied plaintiffs' claims that its talc is tainted with cancer-causing asbestos, saying the product is safe.

In its December motions to disqualify Beasley Allen, J&J claimed that Birchfield acted unethically by working with former Faegre Drinker Biddle & Reath partner James Conlan, who worked on the talc litigation for the company for about two years before leaving legal practice in 2022, to propose an out-of-bankruptcy settlement.

The company said Conlan must have disclosed confidential information, but Porto said there was no evidence for that.

J&J is currently soliciting votes in support of its plan, which would require support from 75% of claimants. A deadline on voting is set for next Friday.

Two previous efforts to settle the case in bankruptcy were rejected by courts, but J&J has said it is confident in its strategy.

In re Talc-based powder products litigation, MCL No. 300, Superior Court of New Jersey, Atlantic County

For J&J: Stephen Brody of O'Melveny & Myers

For Beasley Allen: Jeffrey Pollock of Fox Rothschild

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Reporting By Brendan Pierson in New York

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Litigation: Editor's Picks



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NEWS

Judge: Beasley Allen Should Not Be Disqualified From Talc Leadership

Atlantic County Superior Court Judge John Porto concluded on Friday that J&J hadn't provided evidence that its former attorney had shared confidential information with Beasley Allen.

July 19, 2024 at 06:44 PM

Legal Ethics and Attorney Discipline



Amanda Bronstad
staff reporter



What You Need to Know

- Friday's order comes one week before a key deadline in J&J's prepackaged third bankruptcy, which would provide \$6.48 billion to talc victims.
- A New Jersey judge held an evidentiary hearing on the disqualification issue on March 25, April 10 and May 3, alongside U.S. Magistrate Judge Rukhsanah Singh of the District of New Jersey.
- J&J, in its disqualification motions, had argued that Beasley Allen had a conflict of interest after principal Andy Birchfield and Jim Conlan, a former partner at Faegre Drinker, forged a partnership to float a possible \$19 billion talc settlement.

A judge has rejected Johnson & Johnson's move to disqualify Beasley Allen from leadership of the talcum powder litigation.

Friday's order by Atlantic County Superior Court Judge John Porto comes one week before a key deadline in J&J's prepackaged third bankruptcy, which would provide \$6.48 billion to talc victims. Porto, who held an evidentiary hearing on the disqualification issue on March 25, April 10 and May 3, alongside U.S. Magistrate Judge Rukhsanah Singh of the District of New Jersey concluded that J&J hadn't provided evidence that its former attorney, James Conlan, founder of Legacy Liability Solutions LLC, had shared confidential information with Beasley Allen principal Andy Birchfield, in Montgomery, Alabama, when the two began working together a year ago on a plan to resolve the talc litigation.

“This court finds J&J did not overcome its burden of persuasion and proof that Conlan shared J&J’s confidential and privileged information to Birchfield or anyone else at Beasley Allen,” Porto wrote in his [33-page order](#). “There is also no dispute that Conlan and Birchfield met and spoke frequently promoting the Legacy proposal. However, this court finds that an attorney or a law firm’s disqualification cannot be based simply on unsupported suppositions or accusations that a client’s former attorney working in a non-lawyer capacity meets with and has various discussions regarding a business proposal even in that same litigation. This court does not accept the blanket contention that every Legacy conversation had by Conlan is imbued by privileged communications or implicates privileged work product belonging to J&J.”

J&J needs the support of at least 75% of talc claimants for a July 26 vote on its bankruptcy plan, which Beasley Allen and several other firms have opposed. The success of the bankruptcy plan is critical to resolving talc cases given that two prior Chapter 11 cases were dismissed in 2023 after the U.S. Court of Appeals for the Third Circuit found the debtor, J&J subsidiary LTL Management, wasn’t in financial distress.

“It’s gratifying that the state court found that, as individuals, and on behalf of our firm, we can continue to seek justice for the thousands of women and families whose lives have been devastated by J&J’s talc-based powders,” Birchfield said in a statement. “The abuse and manipulation of our judicial system by the company and the personal attacks J&J has pursued continue to be exposed as bullying tactics designed to intimidate and silence other lawyers, scientists, organizations, consultants, and members of the news media who have sought and exposed the truth. The deceit and denials by J&J will not deter us from seeking fair and equitable compensation for those victims.”

J&J Worldwide Vice President of Litigation Erik Haas said J&J will appeal the ruling.

“We respectfully disagree and will appeal the trial court’s ruling that it is not an ethical violation for plaintiffs’ counsel to knowingly and surreptitiously collaborate with defendants’ former counsel on the same matter, same claims and same issues that the former counsel represented the defendants,” he wrote in a statement. “No company could reasonably do business within this state if that is adopted as the rule of law, which, indeed, would be no rule of law at all.”

Not a ‘Side-Switching’ Attorney

The disqualification motion is one of several battles between J&J and Beasley Allen, whose principal, Leigh O’Dell, also in Birmingham, serves as co-lead plaintiffs’ counsel in the talc multidistrict litigation. Beasley Allen is one of about half a dozen plaintiffs firms that filed two class actions against J&J ahead of the planned bankruptcy. A [May class action](#) sought a [temporary restraining order](#) and preliminary injunction to halt the Chapter 11 filing, but U.S. District Judge Michael Shipp of the District of New Jersey, who is overseeing the talc multidistrict litigation, rejected that motion, concluding on June 28 that he lacked subject-matter jurisdiction.

Another class action filed last month seeks relief on behalf of future talc victims who [want medical monitoring](#) to screen for ovarian cancer.

J&J also sought to subpoena Beasley Allen and others for information related to its litigation financing after one of its clients emailed outside counsel Jim Murdica, of Barnes & Thornburg in Los Angeles, asking about the bankruptcy plan. On July 9, retired U.S. Magistrate Judge Joel Schneider of the District of New Jersey [found there was no cause](#) for J&J to pursue such discovery.

Richard Golomb, of Philadelphia’s Golomb Legal, one of the firms filing the class actions, said of Friday’s ruling: “This is the second time in consecutive weeks that a court has reviewed J&J’s sleazy tactics to gain a litigation edge and said ‘no.’ It’s time to stop putting profits over people and come to the table in an effort to reach an out-of-bankruptcy solution for the tens of thousands of woman and their families that have suffered enough.”

J&J, in its [disqualification motions](#), had argued that Beasley Allen had a conflict of interest after Birchfield and Conlan, a former partner at Faegre Drinker Biddle & Reath, forged a partnership to float a possible \$19 billion talc settlement.

Conlan set up his own business venture, Legacy, in 2022.

Because he no longer practices law, Porto wrote, Conlan is not what J&J’s lawyer called a “side-switching” attorney.

“This court finds it is undisputed that Conlan possessed and still possesses J&J’s privileged and confidential information regarding the talc litigation that he learned in the 20 months at Faegre Drinker when he represented J&J,” Porto wrote. “Conlan is not found to be associated with the Beasley Allen law firm in any capacity. Conlan was never employed either as a lawyer or as a non-lawyer by that law firm.”

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Oracle reaches \$115 mln consumer privacy settlement

 [reuters.com/legal/oracle-reaches-115-mln-consumer-privacy-settlement-2024-07-19](https://www.reuters.com/legal/oracle-reaches-115-mln-consumer-privacy-settlement-2024-07-19)

Jonathan Stempel

Figurines with computers and smartphones are seen in front of Oracle logo in this illustration taken, February 19, 2024. REUTERS/Dado Ruvic/Illustration/File photo Purchase Licensing Rights , opens new tab

July 19 (Reuters) - Oracle (ORCL.N) , opens new tab agreed to pay \$115 million to settle a lawsuit accusing the database software and cloud computing company of invading people's privacy by collecting their personal information and selling it to third parties.

A preliminary settlement of the proposed class action was filed on Thursday night in San Francisco federal court, and requires a judge's approval. Oracle denied wrongdoing.

The plaintiffs, who otherwise have no connection to Oracle, said the company violated federal and state privacy laws and California's constitution by creating unauthorized "digital dossiers" for hundreds of millions of people.

They said the dossiers contained data including where people browsed online, and where they did their banking, bought gas, dined out, shopped and used their credit cards.

Oracle then allegedly sold the information directly to marketers or through products such as ID Graph, which according to the company helps marketers "orchestrate a relevant, personalized experience for each individual."

The settlement covers people whose personal information Oracle collected or sold since Aug. 19, 2018.

As part of the settlement, the Austin, Texas-based company agreed to not to gather user-generated information from URLs of previously visited websites, or text that users enter in online forms other than on Oracle's own websites.

Oracle did not immediately respond on Friday to requests for comment.

The named plaintiffs include privacy rights activist Michael Katz-Lacabe and Jennifer Golbeck, a University of Maryland professor specializing in social media and privacy.

Lieff Cabraser Heimann & Bernstein, which represents the plaintiffs, may seek up to \$28.75 million from the settlement for legal fees.

The case is Katz-Lacabe et al v. Oracle America Inc, U.S. District Court, Northern District of California, No. 22-04792.

US judge approves \$284 mln in settlements in financial aid litigation

 [reuters.com/legal/government/us-judge-approves-284-mln-settlements-financial-aid-litigation-2024-07-19](https://www.reuters.com/legal/government/us-judge-approves-284-mln-settlements-financial-aid-litigation-2024-07-19)

Mike Scarcella

U.S. one dollar banknotes are seen in this illustration taken February 8, 2021.

REUTERS/Dado Ruvic Purchase Licensing Rights , opens new tab

July 19 (Reuters) - A U.S. judge on Friday approved \$284 million in settlements in a class action accusing major U.S. universities of favoring wealthy applicants for admission, short-changing students who sought financial aid.

Chicago-based U.S. District Judge Matthew Kennelly approved the settlements after a hearing on the fairness of the accords, reached over many months, according to an attorney representing the students who filed the lawsuit.

"We are pleased that the settlements were approved and we are eager to get money out to class members," said Berger Montague chairman Eric Cramer, a lead attorney for the plaintiffs, after the hearing.

The proposed class action on behalf of about 200,000 current and former college students was filed in 2022 against 17 prominent colleges and universities.

The lawsuit alleged the schools violated U.S. antitrust law by breaching a pledge not to consider students' finances in making admissions decisions.

Ten schools have settled so far. Eligible class members can expect to receive at least \$2,000 from the settlements, according to court records.

Among the defendants, Brown, Yale and Columbia universities agreed to pay a combined \$62 million to resolve claims against them. Dartmouth and Rice said they would each pay \$33.75 million. Northwestern agreed to pay \$43.5 million, and Vanderbilt will pay \$55 million.

Litigation is continuing against universities including Cornell, Georgetown and University of Pennsylvania.

The universities that settled have each denied any liability, as have the schools that are still named as defendants.

In settling the students' claims, the schools have said resolutions will allow them to move past the litigation and focus on their academic missions.

Plaintiffs lawyers in the case have said they are pursuing a strategy of “increasing the settlement amounts with each successive agreement to exert pressure on non-settling defendants.”

Kennelly also approved a request from the plaintiffs’ lawyers for \$94 million in legal fees for spending so far more than 91,310 hours on the case, Cramer said.

The case is Henry v. Brown University, U.S. District Court for the Northern District of Illinois, No. 1:22-cv-00125.

Read more:

Lawyers in US college aid case ask for \$94 million in legal fees

US court approves \$284 mln so far in college aid antitrust settlements

Brown, Yale, Columbia among latest to settle financial-aid lawsuit

U. Chicago first to settle financial aid price-fixing claims in U.S. court

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Amazon defeats US consumers' class action over Whole Foods delivery fees

 [reuters.com/legal/litigation/amazon-defeats-us-consumers-class-action-over-whole-foods-delivery-fees-2024-07-19](https://www.reuters.com/legal/litigation/amazon-defeats-us-consumers-class-action-over-whole-foods-delivery-fees-2024-07-19)

Mike Scarcella

An Amazon logo is seen at its centre in Darlington, County Durham, Britain September 3, 2020. REUTERS/Lee Smith Purchase Licensing Rights , opens new tab

July 19 (Reuters) - A federal judge has dismissed a proposed class action accusing e-commerce giant Amazon (AMZN.O) , opens new tab of misleading customers about the benefits of its subscription service Prime, causing them to pay a hidden \$9.95 delivery fee for some Whole Foods purchases.

U.S. District Judge Tana Lin in Seattle federal court ruled , opens new tab on Thursday that the consumer lawsuit for now failed to adequately make a claim of deceptive practices under a Washington state consumer protection law.

The plaintiff had not shown which Amazon ads she relied on to believe there was “free delivery” from Amazon-owned Whole Foods, the judge said. Lin also said the service fee for deliveries was shown on two webpages during the checkout process.

Amazon and attorneys for the plaintiff did not immediately respond to requests for comment on Friday.

Lin said the plaintiff could file an amended lawsuit focused on the claim that some consumers might think free delivery from Whole Foods was guaranteed for the entirety of Prime membership.

Amazon bought Whole Foods in 2017 for \$13.7 billion.

The consumer lawsuit filed in 2022 alleged Amazon’s marketing about Whole Foods deliveries for Prime members is “false, misleading and likely to deceive a reasonable consumer.”

Attorneys leading the case have estimated there are hundreds of thousands of members in the class, including customers who signed up for Prime for free deliveries from Whole Foods.

Amazon had touted “free delivery” for Prime Members on some Whole Foods deliveries, but in 2021 began charging them and other customers a “service fee” for those orders.

In a filing, Amazon told the court that the benefits of Prime membership are subject to change, and that Amazon has “sole discretion” to add or remove perks such as free delivery. The company denied violating the Washington state consumer protection law, which prohibits deceptive advertising and other unfair practices.

Amazon is fighting other lawsuits in state and federal courts from consumers, businesses and government agencies challenging its business practices.

The U.S. Federal Trade Commission last year accused the company of using unlawful monopoly power to block competitors and charge inflated prices. Consumers in another case have accused Amazon of driving up the prices of eBooks. Amazon has denied wrongdoing in those cases.

The case is In re: Amazon Service Fee Litigation, U.S. District Court, Western District of Washington, No. 2:22-cv-00743-TL.

For plaintiffs: Manish Borde of Borde Law; Adam Berger of Schroeter Goldmark & Bender; and Ronald Marron of Law Offices of Ronald A. Marron

For Amazon: Brian Buckley, Monica Chan and Jedediah Wakefield of Fenwick & West

Read more:

[Amazon defeats US consumer lawsuit over 'buy box' product listings](#)

[Amazon accused of audiobook monopoly in author class action](#)

[FTC lawsuit over Amazon's Prime program set for June 2025 trial](#)

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Buffett's PacifiCorp suspected of collusion by wildfire victims' law firms

 [reuters.com/legal/buffetts-pacifcorp-suspected-collusion-by-wildfire-victims-law-firms-2024-07-19](https://www.reuters.com/legal/buffetts-pacifcorp-suspected-collusion-by-wildfire-victims-law-firms-2024-07-19)

Jonathan Stempel

A ponderosa pine tree is cut down after having burnt in the Brattain Fire, at Fremont National Forest, near Paisley, Oregon, U.S., September 19, 2020. REUTERS/Adrees Latif/File photo
Purchase Licensing Rights , opens new tab

July 19 (Reuters) - The law firms leading class-action litigation against PacifiCorp over the 2020 Labor Day weekend wildfires in Oregon want to examine whether the utility owned by Warren Buffett's Berkshire Hathaway (BRKa.N) , opens new tab is colluding with three other law firms to reach lowball settlements with fire victims.

PacifiCorp and the three firms denied any collusion on Friday, with the utility calling such claims "false, preposterous and desperate."

The dispute may complicate PacifiCorp's efforts to settle claims from wildfires that burned several hundred thousand acres in Oregon and northern California.

Fire victims have blamed the Portland, Oregon-based utility for failing to shut off power lines during a windstorm.

In a court filing dated Thursday, Edelson PC, Keller Rohrbach and Stoll Berne said they were blindsided when PacifiCorp and the three other firms jointly announced a \$178 million settlement on June 3 with 403 victims of the Beachie Creek and Echo Mountain Complex fires.

The class-action firms said payouts per victim were barely two-thirds of the payouts in an earlier \$299-million settlement obtained by different law firms for victims of the Archie Creek fire, and included almost nothing for pain and mental suffering.

They also said the June 3 settlement came just one week after mediation to resolve the class action broke down, as the three law firms began cold-calling and mailbox-stuffing to encourage fire victims to hire them and settle.

"(The three firms) appear to be working hand-in-hand with PacifiCorp to enrich themselves, benefit PacifiCorp, and harm fire survivors" by settling claims at a "PacifiCorp-approved, bargain-basement price point," the class-action firms said.

In its statement, PacifiCorp said the class-action firms appeared to be trying to persuade their clients to hold out for more money and to collect higher legal fees for themselves.

"That hundreds of plaintiffs have chosen to settle with PacifiCorp and disagree with class counsel's tactics is not evidence of collusion," the utility said.

In their statement, the three law firms - Warren Allen, Spreter Petiprin and the Swigart Law Group - called claims in Thursday's filing "simply untrue."

They said the \$178-million settlement offers "meaningful" sums to help Oregonians start rebuilding, while claims in the class action could be tied up for years.

PacifiCorp has paid more than \$1 billion to settle nearly 2,000 wildfire claims, but faces billions of dollars of additional claims, including a \$30-billion lawsuit.

The class-action firms want the Portland judge overseeing their case to let them review communications between PacifiCorp, the three other firms and class members for possible collusion, and allow victims who settled to back out if collusion were found.

PacifiCorp is a unit of Berkshire Hathaway Energy, which is 92% owned by Berkshire Hathaway, the conglomerate that Buffett has run since 1965.

Greg Abel, Buffett's expected successor as chief executive, said at Berkshire's annual meeting on May 4 that PacifiCorp will continue challenging "unfounded" wildfire litigation. The case is James et al v. PacifiCorp et al, Oregon Circuit Court, Multnomah County, No. 20CV33885.

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Reporting by Jonathan Stempel in New York, Editing by Alexia Garamfalvi and Rod Nickel

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Proposed \$4 billion Maui wildfire settlement hits mainland snag

 [courthousenews.com/proposed-4-billion-maui-wildfire-settlement-hits-mainland-snap](https://www.courthousenews.com/proposed-4-billion-maui-wildfire-settlement-hits-mainland-snap/)

Hillel Aron

(CN) — A proposed \$4 billion settlement that would resolve more than 450 lawsuits over the 2023 Maui wildfires hit a snag on Friday, when Hawaii Governor Josh Green said he was unhappy with the deal.

"There are some parties on the mainland that are simply asking for too much of the settlement, resources that I insist must go to families who were devastated by the fire," Green said in a written statement. "I will personally call them out by name next week if they hurt Hawaii's people or further delay this agreement."

At least 102 people were killed in the fires that broke out in Hawaii in August 2023, making it the fifth most deadly wildfire in U.S. history. The fires also destroyed the historic town of Lahaina and caused an estimated \$6 billion in damages. At the time, Green called it "worst natural disaster" in the state's history.

The proposed settlement comes just a few weeks before the one year anniversary of the Aug. 8 wildfires.

The blaze also sparked hundreds of lawsuits. Many — including a number of class actions filed by residents and businesses, and a suit filed by the County of Maui — were aimed at the island's electric utility, Hawaiian Electric, and its subsidiaries for negligently maintaining its power lines.

"Defendants knew that the high winds the NWS predicted would topple power poles, knock down power lines, and ignite vegetation. Defendants also knew that if their overhead electrical equipment ignited a fire, it would spread at a critically rapid rate," Maui County said in its complaint.

Other lawsuits named state and local governments, landowners and Charter Communications as defendants.

On Thursday, Bloomberg reported that Hawaiian Electric, Charter and other defendants had tentatively reached a global settlement worth more than \$4 billion, with the utility company set to pay \$1.5 billion, following a series of court-ordered mediation sessions.

"The settlement hasn't been finalized yet," Green said in his statement, "but we are working on it 24/7 to reach a positive resolution in the very near future."

Maui County City Council is also set to vote Friday on on adoption of a resolution regarding the settlement after they first passed the resolution authorizing the Maui County Council to approve a global settlement on July 9.

Thousands on Maui remain displaced by the fires, despite support from the Hawaii legislature and federal funding.

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PFAS plaintiff failed to connect testing to the Nantucket Nectars he drank

 legalnewsline.com/stories/661885376-pfas-plaintiff-failed-to-connect-testing-to-the-nantucket-nectars-he-drank

July 19, 2024

Federal Court

Brodie | Wikipedia

BROOKLYN, N.Y. (Legal Newsline) - The maker of Nantucket Nectars has defeated a class action over alleged chemicals in its bottles, as a federal judge has found claims of contamination far too vague.

New York judge Margo Brodie will give Timothy Walker a chance to file an amended complaint to address her criticisms in a July 16 ruling that granted the motion to dismiss of Keurig Dr Pepper.

The case, filed by lawyers from The Sultz Law Group and Millberg Coleman Bryson Phillips, is one of many consumer class actions that claim the presence of chemicals known as PFAS in products.

Plaintiffs have experienced varying levels of success at the motion-to-dismiss stage of litigation. Last month, a federal judge threw out claims over Simply Tropical juice drinks.

The lawsuits do not allege injury from PFAS, chemicals also found in firefighting foam that have drawn the interest of state and federal regulators. Instead, the lawsuits say plaintiffs wouldn't have bought or spent as much on products had they known they contained PFAS.

Plaintiffs rely on independent testing on small sample sizes to show PFAS must be present in products nationwide. Walker's lawyers allege PFAS in nine different samples of Nantucket Nectars.

"Plaintiff does not allege when the products were tested or when he purchased the products such that it can support an inference that he purchased a contaminated product," Judge Brodie wrote.

"He states only that he purchased and consumed the products 'during the applicable statute of limitations period' and 'during the class period,' neither of which he defines with a specific time frame. He similarly does not specify when the independent testing of the products was performed."

PFAS are dubbed "forever chemicals" because they persist in groundwater and human tissue for years. The federal government has set a maximum contaminant level for PFAS, even as groups call the move premature. Much of the research regarding their effect on the human body is disputed.

The EPA's own Science Advisory Board has been critical about the research used to establish its new rules. That group wrote "the limitations of the current database on associations of human PFAS exposures... indicate that more evidence is required to select immunomodulation as a critical endpoint for human PFAS risk assessment."

Litigation has sprung up in recent years, including private lawyers aligning themselves with government officials to represent them on contingency fees. Many of the cases are in a multidistrict litigation proceeding in South Carolina federal court, while consumer class actions are also being filed around the country.

DuPont is paying \$1.185 to settle claims in the South Carolina MDL, while 3M is set to pay at least \$10.5 billion. Lawyers will make around \$1 billion in fees from those two settlements.

For Walker in the Nantucket Nectars case, he will need to better allege he suffered an injury by connecting the bottle he drank to those tested. His complaint did not allege what he bought was tested.

"Without additional information about the testing performed or the actual products purchased by Plaintiff, the Court cannot conclude that it is plausible that Plaintiff purchased a contaminated product," Brodie wrote.

ORGANIZATIONS IN THIS STORY

U.S. District Court for the Eastern District of New York

Top 50 Biglaw Firm To Ditch Office, Move To Hybrid Work Plan For Lawyers In Miami

 abovethelaw.com/2024/07/top-50-biglaw-firm-to-ditch-office-move-to-hybrid-work-plan-for-lawyers-in-miami

Staci Zaretsky

July 22, 2024

Biglaw

The firm still has no plans to move other offices to this hybrid framework -- yet.

By Staci Zaretsky

on July 22, 2024 at 1:02 PM

It wasn't long ago that Biglaw firms began flocking to Miami, Florida, where the only thing hotter than the sun is the area's prospects as a stellar secondary market. With brick-and-mortar offices opening there left and right, last month, one of the Am Law 100 firms that opened up shop there in 2019 announced plans to ditch its current office in favor of a more progressive framework.

Morrison & Foerster — a firm that brought in \$1,343,000,000 gross revenue in 2023, putting it at No. 38 in the Am Law 100 — broke news that after its lease expires at the end of the year, it will “transition to a flexible office space model.” At the time, we questioned what this could mean, wondering, “Is the firm moving to a virtual office like Husch Blackwell's Link, adopting a WeWork-style environment, or hoteling its attorneys in a new space? We suppose we shall see.”

According to the Daily Business Review, we now know what's going on at MoFo Miami. It's nine local attorneys will be working remotely and using WeWork offices on an as-needed basis. (We love being right!)

As noted by Pat Cavaney, the firm's chief operating officer, “At this point in time, we have no other plans [to go fully hybrid in other markets]. One of the things we want to do is see how this model works for us.” Cavaney went on to say that while he doesn't think there will be an issue, “[W]e'll be watching, undoubtedly making a few tweaks in terms of how we do certain things.”

Best of luck to Morrison & Foerster on its new hybrid work operations in Miami! Will the firm's decision inspire more of its Biglaw brethren to make similar moves? Stay tuned.

Why Morrison & Foerster Is Transitioning Into a Hybrid Office Model in Miami [Daily Business Review]

Earlier: Top 50 Biglaw Firm Isn't Shuttering Its Miami Office, But Moving To A More 'Flexible' Office Alternative

Staci Zaretsky is a senior editor at Above the Law, where she's worked since 2011. She'd love to hear from you, so please feel free to email her with any tips, questions, comments, or critiques. You can follow her on X/Twitter and Threads or connect with her on LinkedIn.

Topics

Biglaw, Hybrid Work Policies, Miami, Morrison & Foerster, Remote Work

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Why Morrison & Foerster Is Transitioning Into a Hybrid Office Model in Miami

The office serves as the firm's springboard to Latin America, and consequently, its attorneys are already working across geographies. One benefit is likely cost savings in the pricey South Florida market.

July 19, 2024 at 01:43 PM

Law Firm Office Launches and Closures



Alexander Lugo

 The original version of this story was published on [Daily Business Review](#)

What You Need to Know

- Morrison & Foerster will be leaving its physical office in Miami for a hybrid work model this year.
- The lawyers based out of the Miami office will work remotely and use WeWork offices when needed.
- The move to rely solely on hoteling is rare, but other firms are reducing space to encourage more hybrid work models.

After about five years in Miami, Morrison & Foerster will not renew its office lease in Miami to transition into a hybrid work model there.

Because the firm uses Miami as a springboard into Latin America, its nine local attorneys will work remotely and use WeWork offices whenever they need to meet in person. Although the move to have lawyers be almost fully remote is rare, several other firms have also downsized office spaces recently to try maximizing efficiency.

The downsizing does not point to a reduction in headcount or growth, but more a sign of what law firms are prioritizing, according to Tere Blanca, founder of Blanca Commercial Real Estate.

“The standards for occupancy of space across industries have undergone various shifts in terms of how you utilize the space,” Blanca said. “And in markets where there’s terrific rent growth that this region has experienced, for instance, there’s a motivation to look at your layout and ask, ‘Do I need to have an office as I used to 20 years ago?’”

Instead of prioritizing lofty and spacious conference rooms, firms are now looking to make them smaller while communal spaces, like lunchrooms, tend to get more priority, according to Blanca.

Another benefit is cost saving, as real estate tends to be a large expense for firms. But because legal services do tend to require more personal work, that industry isn’t as prone to going remote as other industries, so law firms still require some in-person space, Blanca said.

Although a desire to shift office needs existed before 2020, the COVID-19 pandemic accelerated the trend. Now that remote work is more common, offices are increasingly shifting to accommodate hybrid models.

Because demand in Miami is so hot at the moment, some firms are going in the opposite direction. [Greenberg Traurig renewed its Miami space](#) last year, keeping it intact, while [White & Case expanded](#). Despite being new to the market, Kirkland & Ellis also expanded, according to a report from Blanca Commercial Real Estate.

However, Florida-based Fowler White Burnett recently joined a list of firms reducing space, according to the same report. Hinshaw & Culbertson and Duane Morris also [reduced office space last year](#) across Florida.

Meanwhile, Akerman has been [reducing office space across its portfolio](#) for years now, downsizing its offices by 21% just last year. The reduction came as the firm seeked to calibrate several leases to better fit a hybrid model while also consolidating its back office.

But Morrison & Foerster’s approach is rare, according to Blanca, who hasn’t seen many other firms rely solely on hoteling. It’s also a first for the firm, according to the firm’s chief operating officer Pat Cavaney.

“We’ll certainly learn from it. And certainly across our real estate portfolio, just like all law firms, we’re continuing to just evaluate opportunities where there’s maybe underutilization of space,” he said.

The Miami office was a good place to start for the firm because it’s often used as a springboard into Latin America, leading to work that’s spread out across geographies, according to Cavaney. Its impact will also be closely monitored by the firm as it looks to the Miami model as a guide on what to do with other offices in the future.

“At this point in time, we have no other plans [to go fully hybrid in other markets]. One of the things we want to do is see how this model works for us,” Cavaney said. “I don’t anticipate that there will be an issue there, but we’ll be watching, undoubtedly making a few tweaks in terms of how we do certain things.”

The experiment is a continued effort for the firm to find the correct balance that helps it maximize its spaces. That balance is still not common at many firms as Am Law 100 firms struggle to minimize square footage per attorney ratios, according to [a report from property advisers at Savills](#).

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FirstEnergy 'successfully completed' terms of its deal with feds over bribery schemes, prosecutors say

 1.next.westlaw.com/Document/le55978b0485911efaff6d4c4c6778ea4/View/FullText.html

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July 22, 2024

FirstEnergy 'successfully completed' terms of its deal with feds over bribery schemes, prosecutors say

Jake Zuckerman; cleveland.com

COLUMBUS, Ohio - Prosecutors said Sunday that FirstEnergy Corp. has "successfully completed" the terms of a deal struck when the company admitted to separate schemes to bribe a top state regulator and the Ohio House speaker.

As such, prosecutors released the company from some of its obligations under its deferred prosecution agreement. However, the U.S. Attorney's Office for the Southern District of Ohio isn't dropping the charge of honest services wire fraud against the company until the completion of any investigation, criminal prosecution or civil lawsuit related to the bribery scandal.

On July 21, 2021, FirstEnergy admitted to what at the time was just an allegation: that it paid Ohio House Speaker Larry Householder a \$60 million bribe in exchange for his efforts to pass legislation that provided a \$1.3 billion bailout for the company's nuclear plants. The company also admitted to paying Public Utilities Commission of Ohio Chairman Sam Randazzo a \$4.3 million bribe for regulatory favors and assistance lobbying for the bailout bill.

FirstEnergy paid a \$230 million penalty and agreed to cooperate with the prosecution. In exchange, the government agreed to delay the prosecution against FirstEnergy and, pending the company's cooperation, eventually drop the charge.

In a Sunday court filing, prosecutors said FirstEnergy has undertaken remedial measures called for in the agreement, including implementing a compliance and ethics program designed to detect and deter illegal activity.

The filing refreshes a festering question of what the U.S. Attorney's Office is working on. The recent filing doesn't say that any investigation is ongoing. However, the government hasn't dropped its case against FirstEnergy. While the deferred prosecution agreement and evidence at Householder's trial depicts FirstEnergy CEO Chuck Jones and senior vice president Mike Dowling as masterminds behind the scheme, the federal government hasn't accused either of any crimes. The federal indictment against Randazzo is technically still pending. However, he died by suicide in April.

Householder and lobbyist Matt Borges were convicted at trial for racketeering in 2023 and were sentenced to 20 and five years, respectively. Two other conspirators who pleaded guilty and testified in the case have not yet been sentenced, a possible sign of ongoing cooperation.

A spokesman for the U.S. Attorney's Office declined comment beyond the language of the office's Sunday court filing. Prosecutors indicated they would provide the court with another status update in February 2025.

While FirstEnergy is relieved of some reporting obligations, it must continue to cooperate with the government, disclose its contributions to 501(c)(4) nonprofits (the "dark money" legal vehicles for its bribes to Householder), and refrain from any statements contradicting its acceptance of responsibility.

In a Sunday securities filing, FirstEnergy affirmed that its remaining obligations will continue until 30 days from the conclusion of any federal investigation. At that point, the government will dismiss its case against the company.

Separate from the federal cases, the state has accused Jones and Dowling, the two FirstEnergy executives said to have orchestrated the scandal, with a laundry list of crimes related to the bribe FirstEnergy admitted to paying Randazzo. They have pleaded not guilty and await trial.

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

Company: Public Utilities Commission; FIRSTENERGY CORP.

News Subject: (Crime (1CR87); Criminal Law (1CR79); Fraud (1FR30); Government (1GO80); Government Litigation (1GO18); Legal (1LE33); Lobby & Pressure Groups (1LO18); Social Issues (1SO05))

FirstEnergy's three-year obligations relating to bribery charges to end in 30 days

 1.next.westlaw.com/Document/I9d27d710484211ef8c4fd12722a0e017/View/FullText.html

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7/22/24 Reuters News 15:54:00

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July 22, 2024

FirstEnergy's three-year obligations relating to bribery charges to end in 30 days

July 22 (Reuters)

July 22 (Reuters) - FirstEnergy's special reporting obligations tied to 2021 federal charges against the power company will end within 30 days, according to a status report filed by the U.S. Attorney's Office (USAO) on Monday.

In 2021, under a three-year deferred prosecution agreement (DPA) the company had agreed to pay \$230 million as a penalty to resolve the criminal investigation launched by the USAO.

The investigation alleged that the company conspired to pay millions of dollars to elected state officials to pursue legislation that would benefit the company.

U.S. prosecutors had agreed to defer prosecution provided FirstEnergy continues to cooperate with the investigation.

The status report filed by the USAO for the Southern District of Ohio said the utility firm has completed certain required DPA obligations in the three-year term.

FirstEnergy has "undertaken remedial measures and implemented a compliance and ethics program designed to detect and deter violations of U.S. law as required by the DPA," the report said.

The company will continue to be bound by the remaining provisions in the DPA and on a quarterly basis will have to publish a list of all payments made to "either entities or entities known by FirstEnergy to be operating for the benefit of a public official", the status report said.

Matt Levine's Money Stuff: Bad Trades Are Also Valuable

By Matt Levine 2024-07-22T14:15:42189-04:00

Wing Fung

If you are a trader, a good skill to have is buying stuff that will go up. If the stuff — stocks, bonds, currencies, whatever — that you buy reliably goes up, then you can make a lot of money. You can make money simply by buying the stuff, having it go up, and then selling it for more money than you paid. But there are other ways to monetize the skill. You can start an investment newsletter, and charge people a fee for telling them what stuff will go up. You can start a hedge fund, buying stuff for other people and taking a cut of their profits.

Meanwhile, other people might try to free-ride on your skill. People might find out what you are buying — your broker will see your orders, or maybe you're running a hedge fund and have to disclose what you buy — and might try to copy you, since what you buy keeps going up. Your purchases *contain information* — they encode the message “this stuff will probably go up” — and that information is valuable.

If you are a trader, another ... skill? ... you might have is buying stuff that will go *down*. You keep saying “ooh this stock is poised to go to the moon,” you buy it, it goes to zero. This skill seems somehow more attainable than the first skill, though it's not clear that that's actually true. It is harder to make money with this skill. If you buy stuff, and it goes down, and you sell it, you will have *less* money.

Oh, I know, I know, you can try [the George Costanza approach](#): Any time you think you should buy a stock, you sell it instead. But this seems tricky to do yourself; it requires not only the self-knowledge to say “I keep getting things wrong” but also the ability to continually analyze your instincts to identify the valuable signal. “After extensive research and analysis, I want to buy this stock, which means I should sell it,” you think, but what if actually *that* is the impulse you should be resisting? How do you know where to stop your conscious analysis and do the opposite of the result?

Can you monetize the skill in other ways? I think if you have a strong track record and a rigorous repeatable process of only buying stocks that go down, you really *should* be able to start a newsletter

or get hired by a hedge fund to tell people your best ideas (so they can short them), but again I think this is tricky in practice. Probably if you waltz in the door at Citadel and are like “hi my superpower is that I am exceptionally terrible at picking stocks” they will have doubts. I bet there’s some sell-side equity research analyst out there who is kept on the payroll for making reliably wrong stock picks, but it can’t be that common.

Can other people free-ride on your skill? Can they look at your track record and say “everything this person picks goes down, so I should short it”? I mean! Tuttle Capital Management once launched some very rude exchange-traded funds to fade Jim Cramer’s and Cathie Wood’s stock picks, but I don’t think those had [any real alpha](#); it is not actually the case that Cramer or Wood has this sort of anti-skill. In general, if your stock picks are *known* broadly, they’re probably not bad enough to make betting against you a reliable strategy.

On the other hand, your *broker* probably knows (1) what you’re buying and (2) how you’re doing. If you’re terrible, your broker might be tempted. Here is a funny [CME Group disciplinary action](#) against a [futures broker](#) called Wing Fung Futures Limited:

Pursuant to an offer of settlement in which Wing Fung Futures Limited (“Wing Fung”) neither admitted nor denied the rule violations or factual findings upon which the penalty is based, on July 16, 2024, a Panel of the Chicago Mercantile Exchange Business Conduct Committee (“Panel”) found that between July 22, 2020, and July 7, 2022, Wing Fung deployed an automated trading system (“ATS”) in the Australian Dollar, British Pound, Canadian Dollar, Euro FX, Japanese Yen, New Zealand Dollar, E-mini NASDAQ, Micro E-mini NASDAQ, and E-mini S&P 500 futures markets wherein the ATS’s strategy was to submit orders based upon trades executed by its clients who were regularly unprofitable. Specifically, upon a target client establishing a short/long position, the ATS generated a trading signal to enter an order in the same market for the same price and quantity as the client, though to establish the opposite short/long position. The Panel found that by employing this strategy, Wing Fung attempted to profit from its knowledge of its clients’ record of losses, which was not available to others in the marketplace. Additionally, the Panel found that Wing Fung employees used Wing Fung’s clients’ unique operator IDs to enter orders into Globex. The Panel further found that Wing Fung’s leadership fundamentally did not understand, or were otherwise completely unaware, of Exchange rules that prohibited the activity described above. Therefore, the Panel found that Wing Fung failed to diligently supervise its employees and agents.

I will say that in general if you are a client-facing foreign currency firm, and your clients are terrible at trading currencies, it is often a good and legitimate strategy to *internalize* their orders: If they want to buy 10,000 Australian dollars for US dollars, you *sell* them the Aussie from your own account, so that

you are naturally on the other side of their orders and make money when they lose money. But I suppose if you're a broker who sends client orders to the exchange, and you also send your *own* opposite orders to the exchange to fade them, that looks rude.

Crypto is for fun

I wrote in 2021 that “Crypto Markets Are Where the Fun Is”:

If you work on Wall Street — particularly as a derivatives structurer or high-frequency trading developer or securities lawyer — you actually like this stuff. You are there because you are fascinated by structure, because you enjoy puzzling out the technical details of these mechanisms and trying to find new ways to push on them. In traditional finance this is all sort of saturated and competitive: Not only is it hard to get rich by coming up with a new derivative structure or trading algorithm, but it's hard to even get the intellectual satisfaction of doing that, because so much of what is possible has already been done, and innovation tends to be technical and incremental. Whereas in crypto it can feel like more of a blank slate, or at least, like a different foundation where it takes ingenuity to re-erect the old structures.

There is a sweet spot, though. If you have spent the last 20 years working in equity market structure, you might know too much to start over in the crypto sandbox. Your deep knowledge is a source of competitive advantage and *Fingerspitzengefühl*; you will *enjoy* making technical and incremental improvements, while you would find it tedious to have to relearn a new market structure from scratch, and you might find crypto's newer market structure naive and annoying.

For a while, the right trade was apparently: If you run a successful experienced trading firm, you get the *interns* to trade crypto. Here is [a Fortune story](#) by Leo Schwartz about the rise and fall of Jump Crypto, the division of Jump Trading Group that was once run by Kanav Kariya:

In late 2015, Jump had created a research and development office at its founders' alma mater, sponsoring research projects and working with professors on futuristic projects, like using virtual reality headsets to mimic trading environments. They would also hire university students as interns, finding potential stars by word of mouth. A friend referred Kariya, who started as a student at Jump's college satellite.

Jump had a conundrum. The firm needed to test the mettle of its would-be staffers—whether they

could parse the nuances in financial markets and translate them into algorithmic trading models. But it couldn't give the temporary hires the keys to the kingdom, with its proprietary strategies and billions of dollars in capital.

Crypto offered a solution. The sector had its own tradable assets, exchanges, and quirks, but it was separated enough from Jump's world of stocks and bonds that it wouldn't pose a threat. "It was a bit of a toy market," says one former employee, who spoke with Fortune on the condition of anonymity to discuss their previous firm. ...

So when Kariya joined as an intern in January 2017, he was assigned to build early crypto trading infrastructure for the firm—with little oversight. "We could just go out and do our own thing," he would tell a podcast in January 2023. "Work under this fully encapsulated bubble."

It feels like a useful mental model for crypto: Crypto is what you get when you take the smart ambitious interns at traditional financial firms and put them in charge of their own play market. Only for real money.

This is true in a deeper sense. In many cases, the essential attribute of a crypto token is *liquidity*: What you want, often, is a token that trades a lot, because your goal for the token is to trade it a lot. Real-world utility, a sensible business model, acceptance in real transactions, etc., are all less important than just *trading*, if you think of crypto as a toy market for traders to play with. If a token trades a lot at a high price, that in itself *justifies* the price, because that is all that is asked of a token: It doesn't need to have a good underlying business or cash flows; it just has to trade a lot at a high price.

And so Jump was, for a while, critical to the crypto economy, because it was a big market maker, so it could ensure that tokens would trade a lot. Since that was what created value, Jump could *make* tokens valuable. In exchange for that service, token creators would give Jump some of the tokens, and Jump would then have an incentive to make them valuable:

Token projects will lend market makers a large supply of tokens so they can kickstart trading. Some firms also negotiate a call option, which gives the market makers the right to buy a chunk of the tokens for a steep discount if the project goes well. Selig says that the inverted structure in crypto—where market makers work with token projects, rather than exchanges—makes some sense, given projects' need to spur trading activity. It also creates dynamics that would never be allowed in TradFi. While crypto market makers still make money off the trading spreads, the massive windfalls

often come from those lucrative call options.

For a firm like Jump, becoming the market maker for a token project meant unlimited upside with no real financial risk. “If you’re at Jump, you decide which one is going to win,” one crypto exchange founder tells Fortune, speaking on the condition of anonymity to discuss industry dynamics.

Man, what a crazy time the crypto boom was. It really did teach a generation of young financial traders that they could build perpetual motion machines: You make a token, you trade it, that makes it go up, *the value comes from you trading it*, you can do no wrong, you get rich, “unlimited upside with no real financial risk.” One token that Jump made valuable was Luna, which brought the whole thing down.

Bridgewater

If you run a hedge fund, and then you leave the hedge fund and sign a non-compete agreement, and then you get into the business of managing money for one of the hedge fund’s top clients, that’s ... weird isn’t it? Bloomberg’s Ben Bartenstein reports:

An investment partnership between Ray Dalio’s family office and Abu Dhabi royal Sheikh Tahnoon bin Zayed Al Nahyan has been delayed as Bridgewater Associates grapples with the legal terms of its billionaire founder’s exit from the firm. ...

The 74-year-old signed a non-compete agreement upon departing the world’s largest hedge fund several years ago, the people said, requesting anonymity as the matter is private. Dalio’s planned venture with Sheikh Tahnoon, one of Bridgewater’s top clients, will put that contract under the microscope, they said. ...

The American investor and Emirati royal were planning to launch the partnership in the middle of last year, according to people familiar with the matter. They’ve been looking to team up on an asset management arm based within Abu Dhabi’s international financial center for G42, the artificial intelligence firm set up by Sheikh Tahnoon, the people said.

Dalio could potentially manage some of the money for a fee, they said, though he has been providing informal advice in the interim.

I obviously don't know the terms of the non-compete, but I assume that in the glory days of Bridgewater under Dalio, if a senior executive had left to manage money for a top client, they would have had a videotaped public trial in which everyone would have been encouraged to criticize the departing executive in personal terms. I suppose the new Bridgewater is gentler, though, plus even in the old Bridgewater they might have been careful about criticizing *Dalio*.

Ozempic is [good/bad] for business

I have had fun around here imagining that GLP-1 agonist weight loss drugs (Ozempic, Wegovy, etc.) are “universal demand suppressants” that make their users so content and disciplined that they stop consuming anything else. If it were true, this would have weird economic effects: Drug companies could charge a lot for Ozempic, nobody else could charge a lot for anything, overall corporate profits might go down, and diversified shareholders, harmed by this, might call up the drug companies and say “hey, we are your owners, you're losing us so much money, stop making these profitable drugs.”

But of course this is all a thought experiment; it doesn't actually happen. In fact, if everyone eats fewer snacks and gets healthier, that increases demand for many things: People might exercise more, buy more airplane tickets (while using less jet fuel when they fly), live longer and consume stuff into older age, etc. [Another way to imagine](#) GLP-1 drugs is that they are, like, demand quality sorters: They make their users demand more good stuff and less bad stuff; they enhance their willpower so they buy more stuff that they *should* want and fewer guilty pleasures. And so the GLP-1 trade is, like, “long companies that make good stuff and short companies that make bad stuff.”

Here, via [Tyler Cowen](#), is a [Meatingplace article](#) on the sorting:

Lean protein “emerged as the biggest winner” on supermarket shelves among shoppers who have taken popular new weight-loss drugs, according to a report using consumer surveys.

Data analytics firm Grocery Doppio's “State of Digital Grocery Performance Scorecard: H1 2024” found reduced grocery spending among 97% of consumers who had taken GLP-1 medications — glucagon-like peptide-1 receptor agonists, including semaglutide drugs Ozempic, Rybelsus and Wegovy, prescribed for diabetes or obesity.

Their grocery bills were down by an average of 11%, yet they spent 27% more on lean proteins from lean meat, eggs and seafood. Other gainers were meal replacements (19%), healthy snacks (17%),

whole fruits and vegetables (13%) and sports and energy drinks (7%).

Snacks and soda took the brunt of reduced spending by consumers after GLP-1 treatment: snacks and confectionary (-52%), prepared baked goods (-47%), soda/sugary beverages (-28%), alcoholic beverages (-17%) and processed food (-13%).

Lower overall grocery bills is the main point, but it's a good time to be selling whole fruits and vegetables and a bad time to be selling snacks and confectionary.

Elsewhere, here is a [New York Times story](#) about addictive microtransactions in sports video games:

To encourage players to spend money, Electronic Arts and 2K have made the experience of virtually opening card packs as appealing as possible. A tiny dopamine rush triggers a desire to buy even more.

Jamie Madigan, a psychologist who specializes in video games, said these systems operated on the same principle of random rewards as slot machines. The anticipation is more important than the reward itself.

"There's been research," Madigan said, "to show that the exciting part isn't finding out what's in the box, but before you open the box — seeing the little effects pop up, hearing the sounds, watching the opening animations."

If GLP-1 drugs are not universal demand suppressants but universal willpower enhancers, eventually there will be studies of the effect of Ozempic on videogame microtransactions, won't there? I'm excited for that.

Harvard

Harvard University is basically in the business of brand alliances. Harvard has a very strong academic brand, so that "I went to Harvard" is widely assumed to convey "I am smart." (Disclosure, sorry, I went to Harvard.) But then it also wants to partner with other people who have other good but less academic brands: It wants *some* people to be associated with Harvard not because they have high test scores but because they are famous actors or great athletes or rich. Those people bring

Harvard's brand to a wider audience, which helps Harvard attract smart students and famous professors who think "ah cool I get to be around celebrities and rich people, that will probably be fun and also good for my career." (The rich people also give Harvard money.) And the celebrities and rich people *want* to attach their brand to Harvard's, because Harvard has that good academic brand, and people want to look smart.

The trick is to do this in a way that is cynical *enough* to maximize impact, but not *too* cynical; you have to maintain the core academic brand.

Here's a fun Bloomberg Businessweek article about a Harvard Business School marketing professor who, unsurprisingly, is very good at this:

Anita Elberse ... is best known for her course The Business of Entertainment, Media, and Sports—or #BEMS to its alumni who post about it on Instagram and LinkedIn. The four-day, \$12,000 program, an elective open to professionals not enrolled at HBS, has become a blockbuster for the university. Elberse's case studies, ranging from David Beckham's brand management to Beyoncé's music launch strategies, are often announced like an album drop on social media. Which is why, along with execs from Hollywood and Madison Avenue, stars such as Channing Tatum and LL Cool J have signed up, hoping to build the next celebrity business empire.

Its appeal isn't just that it allows C-level normies to study alongside celebrities but also that it allows famous people to feel like Ivy Leaguers. "This week I got accepted into Harvard! Words cannot describe my excitement!" posted singer Ciara online after getting into Elberse's program in 2019. "Course complete!" declared Fixer Upper moguls Chip and Joanna Gaines on Instagram the same year, next to a photo of the couple wearing Harvard letter sweaters and holding up diplomas. (Elberse later wrote a case on their Magnolia Network.) ...

This year marks the program's 10th anniversary. Elberse says the more it grows in popularity, the more she has to guard against celebs co-opting the Harvard brand to further their own. "We sometimes say 'no' to people if I don't get a sense they're here for the right reasons," she says. "This is not about you taking photos walking around the Harvard campus."

I mean, it is a little bit, right? Like if you have a lot of Instagram followers and you post yourself in a Harvard sweater walking around the campus, that is just good for everyone's business.

Things happen

How a Routine CrowdStrike Update Crashed the World's Computers. Trading Disrupted, Bankers Go Home After Outages Sweep Globe. [Ukraine](#) strikes deal to restructure \$20bn of debt. Mysterious Russia-linked buyers amass LNG 'dark fleet.' The 401(k) [Rollover Mistake](#) That Costs Retirement Savers Billions. Private Equity's [Dry-Powder Mountain](#) Reaches Record Height. Top financial watchdog says [shadow bank vulnerabilities](#) yet to be fixed. BOE Wants Banks to Use Long-Term Repos Amid Liquidity Drain. Australians Told to Monetize the Family Home to Fund Retirement. The company that [owns colors](#). Don't blow up an ATM in Germany.

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- 1. Or you might tweet about it, for your own reasons.
- 2. In particular, while it seems easy to lose money trading, a lot of that goes to transaction costs. And some of it goes to making low-probability bets, which you will mostly lose, but taking the opposite side of those bets might only *look* like a good strategy until one of them hits.
- 3. Also what if you get better? Like what if you start trading, and after a year you are like "everything I decide is wrong, I should do the opposite," and you do and make money, but by continuing to trade you naturally learn more about financial markets, so that eventually your decisions start being right — or at least, less reliably wrong — so the signal stops working?
- 4. Is this *kind of* the business model of US retail equities brokerage? Maybe a teeny bit. Also we talked last week about certain sorts of dealers — stock and FX market makers, sports gambling websites — who are naturally on the other side of their clients' trades, and who therefore try to *kick out* the clients whose bets are reliably good, leaving them to trade only with the people who are worse at it.
- 5. Also Jump Crypto "partnered with FTX to build a decentralized exchange on Solana called Serum." We have also discussed Serum.
- 6. I know. "Meatingplace is an online community that shares market insight, news analysis and lively professional discussion among professionals in the North American red meat and poultry

processing industries.”

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[Securities Law News](#)

July 19, 2024, 10:27 AM PDT; Updated: July 19, 2024, 1:43 PM PDT

SolarWinds Ruling Hits SEC for Using Accounting Law on Hacks (1)

By Matthew Bultman

Documents

 [Opinion](#)

 [Docket](#)

-
- SEC has used 'Swiss Army' accounting law after cyber incidents
 - Judge says agency's reading of statute 'not tenable'

Bloomberg Law News 2024-07-22T12:01:16029857961-04:00

SolarWinds Ruling Hits SEC for Using Accounting Law on Hacks (1)

By Matthew Bultman 2024-07-19T13:27:39000-04:00

- SEC has used 'Swiss Army' accounting law after cyber incidents
- Judge says agency's reading of statute 'not tenable'

A federal judge's decision tossing most of the Securities and Exchange Commission's lawsuit against SolarWinds Corp. deals a major blow to the agency's efforts to apply a decades-old accounting law to cybersecurity breaches.

Among the claims dismissed from the SEC's lawsuit was a charge that SolarWinds violated internal accounting control rules in connection with a hack of its software that intruded on dozens of companies and at least nine government agencies that was revealed in December 2020.

The accounting rules require companies to accurately report financial transactions and events, Judge Paul Engelmayer of the US District Court for the Southern District of New York said. But the SEC's attempt to apply those rules to password policies and other cybersecurity controls "is not tenable," the judge said in his Thursday ruling.

The SEC has expanded the reach of the rules outside traditional accounting controls, including in a settlement last month with marketing and printing company R.R. Donnelley & Sons Co., raising questions about how far the rules extend. Critics have called the rules the agency's "Swiss Army Statute."

"It's a significant setback in how the SEC has attempted to apply the internal accounting controls concept to the cybersecurity space in the last year," said Walker Newell, a vice president at Woodruff Sawyer, an insurance brokerage and consulting firm, and a former SEC enforcement attorney.

Sweeping Ramifications

The accounting rules, adopted under the 1977 Foreign Corrupt Practices Act, require companies to have internal controls sufficient to, among other things, ensure assets are accessed only with management's authorization.

The SEC argued that SolarWinds' source code, databases, and products were its most vital assets. Because of poor controls, hackers were able to get access without "management's authorization," the SEC said.

SolarWinds argued the SEC's allegation amounted to a rewriting of the law. The accounting rules, which were designed to root out traditional accounting fraud, can't reasonably be interpreted to cover password and VPN protocols, it said.

"SolarWinds is clearly correct," Engelmayer said.

The ramifications of the SEC's interpretation would be sweeping, potentially allowing the agency to regulate all systems public companies use to safeguard valuable assets, the judge said.

"It could empower the agency to regulate background checks used in hiring nighttime security guards, the selection of padlocks for storage sheds, safety measures at water parks on whose reliability the asset of customer goodwill depended, and the lengths and configurations of passwords required to access company computers," Engelmayer said.

"That construction—and those outcomes—cannot be squared with the statutory text," he added.

Defining Risk

R.R. Donnelley agreed to settle similar internal accounting charges stemming from a cyber breach. That case, along with the suit against SolarWinds, represented a new and expansive take by the SEC on the accounting control provisions.

The SEC has also brought control provision charges against companies related to stock buyback and trading plans.

Thursday's decision "will eliminate any sense in which cybersecurity writ large can be shoehorned into being an accounting issue," said Edward McNicholas, co-lead of Ropes & Gray LLP's data, privacy, and cybersecurity practice.

The SEC's lawsuit against SolarWinds struck a chord in the cyber industry, in part because of the decision to charge the company's security chief, Timothy Brown, individually. Engelmayer dismissed some claims against Brown.

There were also questions about how regulators can judge whether a company's cyber controls are sufficient. Unlike accounting, which has a recognized set of standards, an appropriate cyber control can be unique to individual companies, attorneys said.

"The unfortunate reality in cybersecurity is there is no standard," said Saket Modi, CEO of cyber risk management firm Safe Security. "What is missing in the industry is that fundamental framework, under which you can have a consistent terminology of how do you define risk and how do you measure risk," he added.

The case is Securities and Exchange Commission v. SolarWinds Corp. et al , S.D.N.Y., Docket No. 1:23-cv-09518, 7/18/24 .

(Updates with additional reporting throughout.)

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IT Meltdown Triggers Corporate Reporting Requirements: Explained

By Nicola M. White

- Crash puts pressure on disclosures from Microsoft, CrowdStrike
- Companies share material events via securities filings

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IT Meltdown Triggers Corporate Reporting Requirements: Explained

By Nicola M. White 2024-07-19T18:04:42000-04:00

- Crash puts pressure on disclosures from Microsoft, CrowdStrike
- Companies share material events via securities filings

Friday's "blue screen of death" software meltdown grounded flights, upended trading, and disrupted corporate offices after a faulty update crashed Microsoft Windows computer systems worldwide.

The IT failure also puts pressure on the two companies at the center of the chaos—Microsoft Corp. and cybersecurity company CrowdStrike Inc.—to disclose details to investors and Wall Street regulators.

Both companies will be expected to share via securities filings with the market both the immediate news of the mass outage and the subsequent estimated impact on their business operations and customers.

"I've got to believe there are rooms full of senior managers and lawyers trying to figure out how to communicate this," said George Wilson, director of the Practising Law Institute's program focused on securities regulation.

What reporting obligations does a company have?

Public companies are required to alert the market when there's a "material" event that affects their business, issuing a special form 8-K, also known as a current report, that becomes part of their permanent securities filings history. Those filings are due within four business days, with certain exceptions.

The Securities and Exchange Commission requires companies to issue specific types of 8-Ks covering more than two dozen scenarios, from a departing top executive, to a new earnings release, to the appointment of a new auditor. In 2023, the SEC added another requirement: separate 8-Ks to reveal cyber attacks.

Friday's global outage doesn't appear to be a cyber breach. CrowdStrike's Chief Executive Officer George Kurtz said in an early-morning post on X that the problem stemmed from a defect in a single content update for Windows hosts. "Today was not a security or cyber incident," the CEO posted later in the day.

As of Friday afternoon, neither Microsoft nor CrowdStrike had issued 8-Ks about the global IT crash. The companies didn't immediately respond to requests for comment.

So what kind of 8-K would it be?

In addition to the more than two dozen specific events that trigger an 8-K, there's the catch-all category of "other events." Companies use this filing to alert the market about information they think is important to convey. That's where judgment kicks in. What, exactly, is considered "important" to investors.

Companies generally lean on the concept of materiality, the idea of sharing relevant decision-making information, to decide when to issue such forms, Wilson said.

"It's pretty hard to argue this is not a material event when it shows up on CNBC and millions and millions of people are affected," he said.

What kinds of details would a company report?

Two types of disclosures kick in: one set to address a company's role in the outage and another about the impact the outage had on its business, as well as its customers. The SEC will want details, said Bruce Pounder, founder of GAAP Lab, an accounting advisory firm.

"You can't simply say, 'Hey, one of my major systems failed and it affected our customers in a way that may affect our business,'" Pounder said. "There would be a pretty strong expectation from the SEC to provide a fulsome disclosure."

Both companies will likely tread carefully, at least in the near term, however, said James Cox, a Duke University law professor who specializes in corporate and securities law.

"Once you start talking about a subject it's very hard to extricate yourself from saying too much that's going to get you into trouble," Cox said.

What about upcoming financial reports?

Microsoft closed its fiscal books on June 30 and is expected to release full-year results on July 30. CrowdStrike, which has a Jan. 31 fiscal year end, closes its second-quarter books on July 31. It hasn't set an earnings release date, according to its website.

Although Microsoft's books are closed, that doesn't mean it's pencils down for the company's accountants and attorneys. Companies are required to include "subsequent events" if they are material, and they also can discuss events that happened after the balance sheet date within the Management's Discussion & Analysis or the risk factors sections of their financial reports.

CrowdStrike hasn't closed its books yet. And the crash is expected to have a bigger financial impact on the Austin-based firm, whose update triggered the meltdown hitting Microsoft Windows systems.

Its stock price fell Friday morning, settling at an 11% drop by market close, according to Bloomberg. CrowdStrike, which entered the S&P 500 index in June, is also smaller than Microsoft. Its market capitalization on Friday afternoon was about \$74 billion versus Microsoft's more than \$3 trillion.

"Microsoft is so big that it's hard to imagine anything having a material impact when it happened in early hours and was fixed before lunch," Wilson said.

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CrowdStrike shares tumble 13% on IT outage impact

 [reuters.com/technology/crowdstrike-shares-set-extend-losses-outage-effects-linger-2024-07-22](https://www.reuters.com/technology/crowdstrike-shares-set-extend-losses-outage-effects-linger-2024-07-22)

Reuters

Technology

By Reuters

July 22, 2024 7:23 AM PDT Updated 5 hours ago

Travelers walk past a monitor displaying a blue error screen, also known as the "Blue Screen of Death" inside Terminal C in Newark International Airport, after a worldwide tech outage caused by an update to CrowdStrike's "Falcon Sensor" software which crashed Microsoft Windows systems, in Newark, New Jersey, U.S., July 19, 2024.... Purchase Licensing Rights [↗](#), opens new tab Read more

July 22 (Reuters) - Shares of CrowdStrike (CRWD.O) [↗](#), opens new tab plunged 13% on Monday, extending their loss-making streak, after Wall Street analysts downgraded the stock on concerns over the financial fallout from a global cyber outage last week.

CrowdStrike's glitchy update to its security software crashed computers powered by Microsoft's Windows operating system, disrupting internet services across the globe and affecting a broad swathe of industries including airlines, banking and healthcare.

Advertisement · Scroll to continue

Microsoft (MSFT.O) [↗](#), opens new tab said on Saturday about 8.5 million Windows devices, or less than 1% of all Windows machines, were affected.

While analysts largely expect CrowdStrike to recover from the incident given its leading position in the industry, concerns around reputational damage, a hit to new customer contracts, competition and possible legal tussles remain.

"We don't believe it will materially affect renewals, at least not in the short term ... However, we do think this will at least delay deal signings, if not cause some losses in closely contested deals," Guggenheim analysts said on Sunday.

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Meanwhile, rival SentinelOne's (S.N) [↗](#), opens new tab shares surged 11% on Monday, with J.P. Morgan calling the company "the most obvious beneficiary" of what analysts say is the widest IT outage in modern history.

There was a non-zero chance that legal battles will be fought after CrowdStrike's customers get their systems up and running again, Bernstein analyst Peter Weed said.

Services across industries gradually came back online later on Friday but firms were dealing with backlogs, delays and even canceled flights, raising questions on how to avoid such a situation in the future and whether such critical software should remain in the hands of a few companies.

00:08Embraer's Eve rolls out flying taxi prototype 

CrowdStrike's shares were trading at \$265.24 on Monday, following an 11% drop on Friday. At least six brokerages cut their price targets on CrowdStrike, with two more downgrading the stock's rating to "neutral" from "buy".

"The globally disruptive nature of this event will likely have an impact on CrowdStrike's financial and operational performance... Time spent on damage control is time spent on not selling," J.P. Morgan analysts said.

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Reporting by Zaheer Kachwala and Deborah Sophia in Bengaluru; Editing by Anil D'Silva

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Chancery Dismisses Kraft Heinz-3G Stock Drop Suit

By **Leslie A. Pappas**

Law360 (July 19, 2024, 7:37 PM EDT) -- Shareholders of The Kraft Heinz Co. lost their Chancery Court lawsuit over a \$1.2 billion stock sale by 3G Capital Inc. after the Delaware court deemed concerns about board conflicts "meaningless, given the dearth of well-pleaded allegations."

The **42-page memorandum opinion** issued Friday by Vice Chancellor Lori W. Will tossed the stockholder derivative suit from plaintiffs Stephen Datnoff, Judy Mesirov and Adriana D. Felicetti, who alleged that 3G sold 7% of its Kraft Heinz stock in August 2018 based on inside information about a pending \$15.4 billion write-down — which wasn't announced until February 2019.

Shareholders complained that the board had wrongfully refused to litigate the alleged breaches of fiduciary and insider trading, and that a working group set up to probe their demands had failed to do its job.

But the complaint failed because the shareholders didn't offer enough facts to support their allegations, the vice chancellor said in her opinion.

"The working group undertook a thorough investigation and reached conclusions based upon evidence and independent advice," she said. "There are no well-pleaded facts creating a reasonable doubt that the board acted in good faith and with due care when it rejected the demands."

The suit was among several filed over the \$15.4 billion non-cash impairment, which reduced the company's reported net income in the fourth quarter of 2018 and sent its stock price plummeting 27.5%, according to the opinion.

Shareholders responded with a **federal securities class action** in the Northern District of Illinois in February 2019 and several derivative actions in Delaware's Court of Chancery starting in July 2019.

The federal suit **settled for \$450 million**. The Delaware suits were **consolidated** and eventually **dismissed** for failure to plead demand futility, because the shareholders in those cases had not made litigation demands to the board.

Unlike the shareholders in the earlier cases, plaintiffs Datnoff, Mesirov and Felicetti sent litigation demands to the company, asking the board to investigate potential wrongdoing by 3G, its affiliates, and current and former directors and officers of Kraft Heinz.

The board created a working group to investigate the claims in April 2020 and after a two-year investigation, decided not to pursue litigation.

The three shareholders **sued in early 2023**, alleging that the company had wrongfully refused their demands.

In her opinion Friday, Vice Chancellor Will said the shareholders had failed to show that the board had failed to act in good faith when it decided not to pursue the litigation, or that the working group hadn't done a good job when investigating the claims.

The working group reviewed more than 150,000 documents, interviewed a dozen people, and considered a detailed prior investigation led by outside counsel, the vice chancellor wrote. The working group wrote a 110-page report that recommended that the demands be rejected, and the full board agreed.

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

The shareholders are represented by Carmella P. Keener of Cooch & Taylor PA, P. Bradford deLeeuw of DeLeeuw Law LLC, Benjamin Kaufman and Patrick Donovan of Wolf Haldenstein Freeman & Herz LLP, Michael Hynes and Ligaya Hernandez of Hynes & Hernandez LLC, Robert C. Schubert and Willem F. Jonckheer of Schubert Jonckheer & Kolbe LLP, and Richard D. Greenfield, Marguerite R. Goodman and Ann M. Caldweel of Greenfield & Goodman LLC, and Fred T. Isquith of Isquith Law PLLC.

The Kraft Heinz Co. and the individual defendants are represented by Matthew D. Stachel, Daniel J. Kramer, Andrew J. Ehrlich and William A. Clareman of Paul Weiss Rifkind Wharton & Garrison LLP.

3G Capital is represented by Michael A. Pittenger, Jacqueline A. Rogers and Caneel Radinson-Blasucci of Potter Anderson & Corroon LLP and Sandra C. Goldstein, Stefan Atkinson and Kevin M. Neylan Jr. of Kirkland & Ellis LLP.

The case is *In re Kraft Heinz Demand Refused Derivative Stockholder Litigation*, case number 2022-0398, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery, Lauraann Wood, and Abraham Gross. Editing by Kelly Duncan.

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Cannabis Co. Gets Investor Fraud Suit Thrown Out

By **Mike Curley**

Law360 (July 19, 2024, 2:17 PM EDT) -- A New York federal judge has thrown out a consolidated class action alleging Canopy Growth Corp. misled investors about the financial prospects of a newly acquired subsidiary, saying the complaint fails to show that the company knew it was misleading investors.

In an **order** filed Wednesday, U.S. District Judge Paul A. Engelmayer said the confidential witnesses that the complaint relies on either can't establish why they would have firsthand knowledge of the company's financial status, or their allegations are too vague to show that the company and its officers knew or should have known the subsidiary wasn't performing as well as they said.

According to the order, most of the confidential witnesses are primarily former low-level sales and marketing employees, not executives or managers, and the complaint doesn't explain how they have firsthand knowledge of complex accounting issues. The judge highlighted one witness who was an American sales director but claimed to know the details of the subsidiary's European distribution contracts.

Judge Engelmayer further wrote that five of the six witnesses don't allege they had any contact with Canopy's senior executives, and the sixth's only allegation — that he told "Canopy management" about a cost-of-goods-sold issue — doesn't include who he told, what he told them, or when.

In addition, that issue does not have any apparent relationship with the misstatements that the complaint challenges as false, according to the order.

While another witness alleged that inventory problems were discussed at monthly meetings, that witness doesn't allege that he attended the specific meetings, only that the issues "would have been discussed" on the calls.

"The FAC instead invites the Court to speculate that something must have been said, at an unspecified time within the Class Period, that put the individual defendants on notice that their statements were false," the judge wrote, saying the pleading standards require more than that.

Judge Engelmayer added that "most fundamentally" the witnesses' accounts of alleged inventory and distribution issues at the subsidiary are too vague, with assertions that there was "a lot of" excess product and the issue was "so bad" that the company was giving inventory away.

The suit was first filed **in May** 2023 by investor Christopher Turpel, who accused Canopy Growth of failing to disclose weaknesses in its operations, accounting and financial reporting, particularly regarding the financial prospects of sports nutrition subsidiary BioSteel Sports Nutrition Inc., leading to inflated stock prices.

A prisoner currently serving time in California state prison filed a similar suit in **July last year**, seeking to represent a class of people who bought stock in Canopy Growth between May 2022 and May 2023. That case and another similar complaint were consolidated under Turpel's suit in November.

In March, Canopy moved to dismiss the complaint, arguing it fails to establish a motive and relies on "fraud by hindsight" to try and turn the company's optimism for the subsidiary into fraud.

In Wednesday's opinion, the judge agreed, saying the complaint fails to establish that Canopy's

executives were intimately familiar with BioSteel's inner workings, particularly as the statements highlighted in the complaint were generalized business updates touting the brand.

"That a CEO or CFO would express general optimism and highlight the successes of an acquired subsidiary does not, without more, support the inference of real-time knowledge of the operational data necessary to know that the challenged statements were wrong," the judge wrote.

Nor does the alleged "sudden reversal of fortune" support the claims that the officers must have known there were problems, Judge Engelmayer wrote, noting that the actual size and scale of the revenue adjustment Canopy put out — a decrease of 4% — is relatively modest, too small to imply that BioSteel's problems must have been known to the defendants before they were disclosed.

The judge added that BioSteel only contributed between 7% and 17% of Canopy's consolidated revenue, so the plaintiffs can't argue that it was such a part of Canopy's core operations that the officers must have been aware of its issues.

Finally, the judge wrote that the departures of Canopy's chief financial officer and BioSteel's CEO and their proximity to the alleged fraud aren't themselves suspicious, as the complaint doesn't plead that they were "highly unusual and suspicious," as it primarily focuses on timing without alleging facts to show that the departures were related to any misstatements.

While the complaint alleges that the CEO was ousted after a "testy exchange" with Canopy's CEO, it does not say what the context or content of that exchange were, or that the exchange was related to any misstatements.

"That a subsidiary executive was terminated at a point before the parent disclosed errors and began an internal investigation does not connote that the parent's executives had earlier acted with fraudulent intent," the judge wrote.

Because the complaint fails to state a claim and the plaintiffs have not sought leave to amend, Judge Engelmayer dismissed the complaint with prejudice.

Representatives for the parties could not immediately be reached for comment Friday.

The defendants are represented by James R. Carroll, Rene H. DuBois and Alexander C. Drylewski of Skadden Arps Slate Meagher & Flom LLP.

The plaintiffs are represented by Joshua B. Silverman and Christopher P.T. Tourek of Pomerantz LLP.

Plaintiff Chen Li is also represented by Junbo Hao of Hao Law Firm.

Plaintiff Christiann Kantner is also represented by Peretz Bronstein and Eitan Kimelman of Bronstein Gewirtz & Grossman LLC.

Plaintiff Thinh Nguyen is also represented by Jacob Goldberg and Gonen Haklay of The Rosen Law Firm PA and Brian J. Robbins and Stephen J. Oddo of Robbins LLP.

The case is In re: Canopy Growth Securities Litigation, case number 1:23-cv-04302, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Jade Martinez-Pogue. Editing by Patrick Reagan.



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Two Class Atty Teams Challenge EngageSmart Deal In Del.

By **Jeff Montgomery**

Law360 (July 19, 2024, 5:11 PM EDT) -- A new and an amended stockholder complaint have taken aim in Delaware's Court of Chancery at the \$4 billion January take-private acquisition of customer engagement and payments venture EngageSmart Inc. by interests of Vista Equity Partners, following a Thursday deadline for consolidated complaint and lead attorney and plaintiff proposals.

The filings cap months of books and records probing by multiple law firms focused on the all-cash deal, which paid EngageSmart's shareholders \$23 per share or a premium of roughly 23% to the company's unaffected closing price on Oct. 4.

One initial complaint filed in October 2023 on behalf of stockholder Anthony Franchi — which at the time named EngageSmart as defendant — argued that the transaction both undervalued EngageSmart and paid majority owner General Atlantic an unfair control premium.

In one of the books and records complaints filed ahead of the suits on behalf of the Oklahoma Law Enforcement Retirement System, Bernstein Litowitz Berger & Grossmann LLP argued that both the price and process of the transaction had raised concerns.

"Despite expressly acknowledging that Goldman Sachs was conflicted due to its ties to EngageSmart and General Atlantic, the special committee allowed Goldman Sachs to drive the process," Jeroen van Kwawegen of Bernstein Litowitz said in a 13-page books and records letter demand.

Court filings show that two attorney teams met the Thursday deadline set by Vice Chancellor J. Travis Laster for additional or amended complaints: one brought by Labaton Keller Sucharow LLP, Friedman Oster & Tejtel PLLC and Block & Leviton LLP, and another filed by Bernstein Litowitz, Grant & Eisenhofer PA and Prickett Jones & Elliott PA.

The Labaton Keller team sued EngageSmart and Vista Equity and its affiliates last year, with the since-amended version filed on Thursday still under seal. The initial complaint alleged breach of contract against EngageSmart and tortious interference against General Atlantic and the Vista parties, among other counts, pointing to unequal treatment benefiting General Atlantic and additional insiders.

"By offering an equity rollover to General Atlantic, Vista induced a breach of the [EngageSmart] charter," the Labaton Keller complaint said, alleging that General Atlantic committed the same breach by accepting the equity rollover, which gave it 35% of the postclosing private entity.

EngageSmart, headquartered in Braintree, Massachusetts, provides vertically tailored customer engagement software and integrated payment solutions. The company went public in September 2021 after raising about \$378.3 million in its initial public offering. As of June 30, the company serves 109,700 customers in its small and medium business solutions segment and roughly 3,400 customers in its enterprise solutions division, according to the statement.

Before the closing, EngageSmart entered into voting support agreements with affiliates of General Atlantic and Summit Partners — which own 52% and 14% of the company's fully diluted stock, respectively — in which the investors agreed to vote all their shares in favor of the deal.

The Bernstein Litowitz-led complaint listed as stockholder plaintiffs the Oklahoma Law Enforcement

Retirement System and individual investor Brian Evans. The team's 12-page books and records letter demand at the time alleged that the deal process "smacks of unfairness."

In a letter supporting the books and records demand sent by Grant & Eisenhofer on Dec. 4, 2023, Vista was accused of improper informal communications with General Atlantic and EngageSmart dating to the spring of 2022, including with Goldman Sachs and EngageSmart CEO Bob Bennett, as well as the company's Chief Financial Officer Cassandra Hudson, with both company officials in line for "lucrative" paydays.

"It appears that the special committee and the board inappropriately favored Vista," the Grant & Eisenhofer letter said. "Such favoritism is illustrated by the fact that the special committee did not even bother to inform competing bidders that Vista pivoted to making an offer for a control transaction, despite all messaging being only a minority investment was on the table," the G&E books demand said.

Counsel for the proposed classes and lead parties named did not immediately respond to a request for comment Friday.

The cases are Oklahoma Law Enforcement Retirement System et al. v. Robert P. Bennett et al., case number 2024-0760, and In re: EngageSmart Inc. Stockholder Inc. Litigation, case number 2023-1093, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jade Martinez-Pogue. Editing by Melissa Treolo.

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Heartland Investor Looks To Block \$2B UMB Bank Takeover

By **Katryna Perera**

Law360 (July 19, 2024, 8:55 PM EDT) -- A Heartland Financial USA investor sued the lender and several members of its top brass, along with UMB Financial Corp., in Colorado state court seeking to block UMB's \$2 billion acquisition of Heartland, arguing that the deal undervalues Heartland by roughly \$1.5 billion.

Plaintiff Robert Garfield filed a **complaint** on Thursday against the two financial institutions, several members of Heartland's board of directors and its CEO, Bruce Lee.

In April, UMB announced that it had **agreed to purchase** Heartland in an all-stock transaction valued at roughly \$2 billion. Under the agreement, Heartland stockholders will receive 0.55 shares of UMB common stock for each share of Heartland common stock held, for a value of \$45.74 per share based on UMB's April 26 closing price, the banks said in a joint statement.

The transaction would mark the largest regional bank merger of 2024 and would elevate the combined bank to the top 5% of publicly traded banks in the U.S. by assets, which will shoot up to \$64.5 billion, they added.

However, Garfield says in his suit that the sale price "significantly undervalues" Heartland and the process leading to the sale was tainted by conflicts of interest held by Heartland's directors and the company's financial advisor, Keefe Bruyette & Woods Inc.

"If the sale is consummated, HTLF's shareholders will receive a mere fraction (0.55) of a share of UMB, worth \$45.74 based on the closing price of UMB common stock on April 26, 2024 (the last trading day prior to announcement of the sale), for each share of HTLF common stock," the complaint states. "This price grossly undervalues HTLF. In fact, UMB's own financial advisor, BofA Securities Inc. determined that an exchange ratio as high as 0.9924, or \$82.54 per share, would be fair and appropriate."

KBW had a conflict of interest because, according to the complaint, it will receive a roughly \$19 million fee if the sale closes but only a \$2 million fee if it doesn't. Therefore, KBW had a significant financial incentive to support the sale "regardless of the transaction's questionable economics and unfairness to HTLF's investors," Garfield says.

Garfield further alleges that the process leading to the sale was "inadequate" since the defendants only negotiated the sale with UMB and did not reach out to other buyers who could have paid a higher price for Heartland.

"Compounding that failure, the director defendants also caused the company to agree to pay UMB a \$70 million termination fee if HTLF's shareholders disapprove the sale or if the company is sold to another buyer for a higher price, thereby deterring other bidders," the complaint further states.

Garfield also says the sale will greatly enrich the defendants while hurting investors. Garfield claims that Lee will monetize his equity holdings in the bank, valued at more than \$3.7 million, following the sale. Without the UMB deal, Lee would be unable to monetize his holdings without violating company policy, which requires him to hold a substantial amount of Heartland shares, according to the complaint.

As a result of the sale, Lee will also receive a transaction-related payout of more than \$8.5 million, according to the complaint, and the other defendants will be enriched because they will also be allowed to monetize their shares of the bank, including their unvested Heartland equity awards, collectively valued in excess of \$6.1 million.

In addition to suffering economic losses due to the undervalued sales price, the suit says investors will suffer "incalculable and irreparable damages to their corporate right to a fair vote" as a result of the defendants' dissemination of a misleading proxy statement about the upcoming shareholder vote scheduled for Aug. 6.

According to the complaint, the proxy statement does not fully disclose the conflicts of interest of the director defendants or KBW and fails to include material information about Heartland's "true worth."

The suit seeks to enjoin the defendants from closing the shareholder vote on the sale until the alleged deficiencies in the proxy statement are rectified, along with attorney fees and a jury trial.

"It is UMB's practice to not comment on active litigation. However, we feel strongly that this merger is a benefit to both companies, our shareholders and the communities we serve and do not agree with the arguments raised in this suit," UMB Financial Corp. Chairman and CEO Mariner Kemper said in a statement.

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

Garfield is represented by Karen Jean Cody-Hopkins of Cody-Hopkins Law Firm and Richard B. Brualdi and John F. Keating Jr. of The Brualdi Law Firm PC.

Counsel information for the defendants was not immediately available.

The case is Robert Garfield v. Robert Engel et al, case number 2024CV32184, in the District Court of Denver County, Colorado.

--Additional reporting by Al Barbarino. Editing by Alex Hubbard.



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Investors Want Merrill, UBS Back In \$364M Libor-Rigging Suit

By **Emilie Ruscoe**

Law360 (July 19, 2024, 7:41 PM EDT) -- Investors who were allegedly harmed by the manipulation of a widely used interbank lending interest rate have appealed a final judgment that ended claims against major banks and financial services companies in protracted litigation that has garnered settlements totaling \$364.5 million.

In a **notice filed Thursday**, the investors told U.S. District Judge George B. Daniels they would appeal his final judgment, which in part ended their claims against nonsettling defendants including Bank of America, UBS AG and Merrill Lynch International.

The investors have alleged the banks were involved in a conspiracy to rig the London interbank offered rate for the Japanese yen.

Lead plaintiffs California State Teachers' Retirement System, Fund Liquidation Holdings LLC, Hayman Capital Master Fund LP and Japan Macro Opportunities Master Fund LP also said they'd appealed "all other orders entered in the case that were adverse, either in whole or in part, to plaintiffs," which encompasses decisions dating as far back as 2015.

Judge Daniels' final judgment came after the investors asked the court to make the filing, telling him that since a settlement was finalized in June with the final live defendant in the action, they wanted the court to enter a final judgment "dismissing this action as a whole" so they could appeal the dismissal of the nonsettling defendants.

The appeal follows soon after the court finalized a **\$35 million settlement** of investor claims against French financial services company Société Générale.

The other nonsettling defendants from the dismissal bids the investors pointed to include Dutch bank Rabobank, British company Lloyds Banking Group, and the trading subsidiary of U.K.-based National Westminster Bank.

The case is Fund Liquidation Holdings LLC et al. v. UBS AG et al., case number 1:15-cv-05844, in the U.S. District Court for the Southern District of New York.

--Editing by Lakshna Mehta.

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Class Seeks \$1.5B Settlement In Payday Loan Dispute

By **Crystal Owens**

Law360 (July 19, 2024, 9:48 PM EDT) -- A class of borrowers has urged a Virginia federal court to approve what would be the largest settlement ever obtained in a challenge to participants in the tribal lending industry, arguing that the agreement would give significant relief to hundreds of thousands in the form of debt cancellations and cash payments.

The borrowers, in a **memorandum in support** of preliminary approval for a class action settlement, asked the court on Wednesday to sign off on a deal that would cancel about \$1.4 billion in outstanding loans and allocate \$37.4 million for the creation of a common fund to be distributed to consumers "who paid unlawful amounts."

"Put differently, the proposed settlement provides almost 1.5 billion dollars in benefits to class members before even accounting for other valuable forms of consideration, like deletion of any negative credit reporting associated with the loans," the class members wrote.

They estimated the settlement class includes roughly 980,000 members.

In a complaint first lodged in July 2020 and amended a second time in January 2023, the borrowers accused the federally recognized Lac du Flambeau Band of Lake Superior Chippewa Indians of exploiting its tribal sovereign immunity for profit for around a decade. To do so, the tribe partnered with non-Native American payday lenders to create more than a dozen lending companies that claimed to be tribally owned, according to the lawsuit.

One non-tribal lender and a defendant in the case, Skytrail Servicing Group LLC, is the "de facto lender of loans originated in the name of" one of those tribal lending entities, the borrowers said.

The named plaintiffs, who took out loans carrying interest rates as high as 771%, alleged the lending business violated the Racketeer Influenced and Corrupt Organizations Act and state usury laws. In addition to Skytrail and its owner, William Pruett, numerous tribal council members and employees were named as defendants in the suit.

The Lac du Flambeau Band, however, was not itself named as a party in the litigation.

In August 2023, U.S. District Judge Norman K. Moon **denied the payday lender** and Wisconsin-based tribal leaders' motion to toss the consumers' claims or send them to arbitration, finding that a provision in the borrowers' loan agreements for the purportedly usurious loans only permits an arbitrator to apply tribal and applicable federal law to the dispute.

The class members took out the triple-digit interest rate loans online in Maryland, Virginia, Georgia and Florida — states that have "usury laws to protect and safeguard the public from predatory lending practices" — and the arbitration provision would prevent them from benefiting from those protections, Judge Moon ruled.

"Thus, under these circumstances, [the] defendants seek to compel arbitration as 'a calculated attempt to avoid the application of' any liability under state usury laws," the judge said. "For these reasons, the entire arbitration provision is unenforceable for violating public policy."

Skytrail Servicing Group appealed that decision in September, during which time the parties participated in 11 mediation sessions before coming to the proposed settlement agreement, according to the memorandum the borrowers submitted Wednesday.

Should the Virginia district court sign-off on the settlement, it would surpass multiple past agreements approved in similar tribal lending cases, the filing noted.

"And critically, the proposed settlement does not release any viable claims against other alleged co-conspirators, who will be sued in a new case that will seek to recover even more relief for the class," borrowers said.

The proposed settlement agreement, if approved, will allocate funds using a three-tiered formula after deducting for service awards, attorney fees and court costs, the memo highlighted.

Class members in the first tier include those consumers who repaid the original principal amount of their loans and resided in Arizona, Colorado, Connecticut, Idaho, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, South Dakota, Vermont and Virginia at the time they borrowed the money.

Members of the second tier will include those who made payments above the legal interest rate limits in their respective states if the original principal amount of their loans were repaid, and they reside in Alabama, Alaska, California, Delaware, Florida, Georgia, Hawaii, Iowa, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Washington, Washington D.C. or Wyoming at the time they took out the loan.

Settlement class members in Nevada and Utah — comprising the third tier — will not receive cash payments, according to the proposed agreement.

"The proposed class action settlement is a hard-earned and excellent result considering the circumstances of the litigation, the strength of plaintiffs' case, and defendants' resources," the borrowers said. "The terms of the proposed class action settlement, as well as the circumstances of negotiations and its elimination of further costs caused by litigating this case through trial and appeal, satisfy the structures for preliminary approval."

Counsel for the parties couldn't immediately be reached for comment Friday.

The class members are represented by Andrew J. Guzzo, Casey S. Nash and Kristi C. Kelly and Matthew George Rosendahl of Kelly Guzzo PLC.

Skytrail and Pruett are represented by David N. Anthony of Troutman Pepper Hamilton Sanders LLP.

The tribal defendants are represented by Alan D. Wingfield and John E. Komisin of Troutman Pepper, Shilee T. Mullin and Patrick J. McAndrews of Spencer Fane LLP and Andrew Adams III of Hogen Adams PLLC.

The case is Fitzgerald et al. v. Wildcat et al., case number 3:20-cv-00044, in the U.S. District Court for the Western District of Virginia.

--Additional reporting by Ali Sullivan. Editing by Covey Son.



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Jazz Says Narcolepsy Drug Charge MDL Should Be Tossed

By **Bonnie Eslinger**

Law360 (July 19, 2024, 11:20 PM EDT) -- Jazz Pharmaceuticals urged a California federal judge to toss claims from insurers and consumers pursuing multidistrict litigation accusing the drugmaker of staving off generic competition to its blockbuster narcolepsy medicine Xyrem through antitrust conduct and deals with other drugmakers, saying the company engaged in "permissible competition."

During a hearing in San Francisco before U.S. District Judge Richard Seeborg, Stan Fisher of Williams & Connolly LLP, a lawyer for the Irish pharmaceutical maker, argued that the court could resolve the claims against Jazz without going to trial.

Fisher first tackled an allegation from the plaintiffs that Jazz's anticompetitive scheme included abusing a U.S. Food and Drug Administration process for dealing with risky drugs, to have drugmakers create a risk evaluation and mitigation strategy. According to the plaintiffs, Jazz stretched its negotiations with the FDA for nearly seven years, with the agency approving Jazz's proposal for its drugs to be distributed through a single centralized pharmacy, which would prove challenging for a generic company.

Fisher said the lengthy negotiations were not a sham as suggested by the plaintiffs.

"This was part of their application from the get-go, and was approved again," Fisher said.

At one point, Jazz had a multiple pharmacy proposal, but the FDA rejected it, the lawyer said.

Fisher also fought against the claim that his client had to work with generic companies on a "shared" risk evaluation and mitigation strategy and that Jazz's unwillingness to do so delayed generic competition.

"No duty to deal means the conduct isn't just legal," Fisher said. "It's not anticompetitive, it's permissible competition."

Jazz didn't want to be in a position where it might be outweighed by the generics in creating its REMS, the lawyer said.

"Jazz's position was, 'Look, we're the only one on the market right now, with Xyrem, we can't be in a position where, you know, we're going to let the generics in, and they're going to be able to outvote us when we have a product, the only product on the market, which will likely be for years,'" Fisher said.

Keeping control of its business interests is reasonable, not anticompetitive, Fisher said.

The lawyer also aimed at the plaintiffs' assertion that Jazz settled patent litigation brought by Hikma Pharmaceuticals and other generic drugmakers by creating unlawful "reverse payment" deals, in which Jazz made it financially beneficial for the other companies to delay their entry into the market. In the complaint, the plaintiffs allege that as a result of these deals, Jazz remains the sole supplier of sodium oxybate, the medication that is Xyrem, according to their claims.

It's not true, as plaintiffs claim, that Hikma was ready to launch "at risk" while it challenged Jazz's patents in court, Fisher said.

"At-risk launch isn't just that Hikma was going to get FDA approved. It's that they're going to launch in the face of ongoing patent litigation," Jazz's lawyer said, adding that could result in being pulled off the market and facing damages and lost profits.

"The debate about whether they would have gotten approved earlier really doesn't matter. It's about whether they were going to launch at risk," Fisher said.

While Hikma's predecessor company had filed in 2010 for FDA approval to release a Xyrem generic, a company executive has testified that they were going to wait and not launch at-risk, Fisher told the court. The only document that the plaintiffs point to is a document from Hikma's predecessor saying they possibly would have launched, he added.

Judge Seeborg asked if that contradicting evidence means the court can't grant summary judgment.

Fisher said it wouldn't be reasonable to conclude that Hikma would launch at risk.

During Fisher's arguments, Judge Seeborg also asked if he had to consider each alleged anticompetitive action individually or if could he consider the allegations in a "holistic way."

The lawyer for Jazz said the court could do both, but stood firm that no individual conduct could be deemed unlawful.

A lawyer for the plaintiffs, Dena Sharp of Girard Sharp LLP said questions about Jazz's risk evaluation and mitigation strategy negotiations should go to a jury.

She read from a letter that the FDA sent Jazz in 2015, saying, "Our action approving the REMS submitted by Jazz should not be construed or understood as agreement with Jazz, that limiting dispensing to a single pharmacy is the only way to ensure that the benefits of Xyrem outweigh the risks."

The judge said that doesn't show that the petition was bogus.

"A sham request in my mind, usually connotes, one of the indicators is it gets tossed out," Judge Seeborg said.

The FDA only approved that REMS after years of back and forth with Jazz.

The Xyrem REMS could have delayed generic brands from being approved, the FDA also noted in its letter, Sharp said.

Sharp also addressed the judge's comment about how to view the individual elements of the alleged scheme.

"It's quite clear that while the court of course has to view conduct in context, it also has to zoom out and look at it holistically," the lawyer said.

Which means even legal conduct could be found to be part of an overall monopolistic scheme, she said.

Regarding the alleged antitrust injury — the delayed entry of generic competition through the claimed reverse payments — Sharp said the question isn't whether Hikma would have launched at a certain time, but when Hikma would have gotten approved.

"Hikma had effectively no regulatory impediments to its ability to be approved by the FDA except for the REMS," Sharp said. "And when we look at the way the Jazz used the REMS to create roadblocks along the way, the generics were unable to go get companion generic REMS."

The judge did not issue rulings from the bench on the motions for summary judgments from both sides but took the matter under submission.

Last year, Judge Seeborg **granted class certification** to the insurers and consumers and also granted preliminary approval to a deal under which drugmakers Amneal Pharmaceuticals LLC and Lupin Pharmaceuticals Inc. will pay \$3.4 million to settle out of the case, leaving Jazz and Hikma to face the two certified classes comprised of a damages class and an injunctive relief class.

The class is represented by Dena C. Sharp, Scott Grzenczyk, Tom Watts and Jordan Isern of Girard Sharp LLP and Michael M. Buchman of Motley Rice LLC.

Humana Inc., Health Care Service Corp., Molina Healthcare Inc., Blue Cross Blue Shield of Florida Inc. and Health Options Inc. are represented by Matthew S. Weiler, Todd M. Schneider, Jason H. Kim, Matthew S. Weiler of Schneider Wallace Cottrell Konecky LLP and Peter D. St. Phillip, Noelle Ruggiero and Uriel Rabinovitz of Lowey Dannenberg PC.

United HealthCare Service is represented by Hamish P.M. Hum and Beko O. Reblitz-Richardson of Boies Schiller Flexner LLP and Judith A. Zahid, Eric W. Beutzow, James R. Martin and Jennifer Duncan Hackett of Zelle LP.

Jazz is represented by Jeffrey Faucette of Skaggs Faucette LLP and Heidi K. Hubbard, Stanley E. Fisher, Benjamin M. Greenblum, Alexander S. Zolan, Teagan J. Gregory and Lauren H. Uhlig of Williams & Connolly LLP.

Hikma Pharmaceuticals is represented by Jack E. Pace III, Heather M. Burke and Kathryn J. Mims of White & Case LLP.

The case is In re: Xyrem (sodium oxybate) antitrust litigation, case number 3:20-md-02966, in the U.S. District Court for the Northern District of California.

--Additional reporting by Bryan Koenig, Adam Lidgett and Dani Kass. Editing by Jay Jackson Jr.



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Oracle Inks \$115M Deal To End Consumer Data Collection Suit

By **Lauren Berg**

Law360 (July 19, 2024, 9:45 PM EDT) -- Oracle America Inc. agreed to pay \$115 million to resolve a proposed class action alleging the software company illegally sold internet users' electronic profiles, consumers told a California federal judge, putting to rest a case that has stretched on for nearly two years.

In a **motion for preliminary approval** filed Thursday, the consumers ask the court to green light the deal — which was reached following eight months of negotiations — saying it's a "fair, reasonable and adequate" resolution to address their claims that Oracle amassed a vast number of detailed profiles, or digital "dossiers," on millions of people worldwide.

Along with establishing a \$115 million nonreversionary cash fund, the deal calls for Oracle to "not capture certain complained-of electronic communications" and to implement an audit program that will review its customers' compliance with contractual consumer privacy obligations, according to the motion.

"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," the consumers say, adding that the deal "was reached a critical juncture in the litigation," following extensive motions and discovery, but before class certification, summary judgment and trial.

The proposed class action was initially **launched in August 2022**, accusing Oracle of collecting personal data using several tools, including software code stored on web browsers that collect users' data, allegedly without consumers' knowledge or consent.

The consumers claim Oracle has made \$42.4 billion in annual revenue selling personal information — including addresses, race, political views, location and retail purchases — of anyone who uses the internet for everyday activities. They contend the company collects this information with its Oracle ID Graph and related marketing products.

Additionally, the company allows third-party data brokers to "traffic in" personal data on its Data Marketplace without web users' knowledge or permission, the suit asserts, adding that Oracle also partners with more than 65 such major data brokers.

U.S. District Judge Richard Seeborg **cut earlier renditions** of the complaint in October 2023, but gave the consumers multiple shots at amending it.

In the latest version of the complaint, the consumers beef up their allegations about statements made publicly by Larry Ellison, Oracle's chair and chief technology officer, claiming he admitted to the alleged misconduct by stating during a September 2016 OpenWorld keynote speech that Oracle's new technology was "scaring the lawyers."

The complaint claims Ellison specifically described the amassing of profiles by Oracle's ID Graph, and he "flippantly acknowledged that Oracle's profile-building conduct was privacy invasive, potentially illegal, and was 'scaring the lawyers.'"

The new complaint also adds accusations that Oracle has publicly criticized Google's alleged "shadow

profiles," which are purportedly the same profile-creating practices Oracle is accused of, and Oracle has told legislators that Google's conduct violates privacy rights.

But Oracle filed another motion to dismiss, asking Judge Seeborg to throw out two claims for good and said it would respond to the other allegations once the judge rules on the motion.

In April, Judge Seeborg **agreed to cut** the consumers' intrusion upon seclusion claim brought under Florida common law and a claim under the Federal Wiretap Act, also known as the Electronic Communications Privacy Act.

The judge said the complaint failed to identify any particular "electronic space" where named plaintiff Jennifer Golbeck had a reasonable expectation of privacy in which Oracle allegedly intruded.

Following that order, however, Oracle and the consumers were able to reach the current settlement.

In their motion Thursday, the consumers say the deal provides relief for a nationwide class of those "whose personal information, or data derived from their personal information, was acquired, captured or otherwise collected by Oracle Advertising technologies or made available for use or sale by or through Oracle's ID Graph, Data Marketplace or any other Oracle Advertising product or service from Aug. 19, 2018, to the date of final judgment in the action."

The consumers estimate that the class comprises some 220 million people, the motion states.

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

The consumers are represented by Michael W. Sobol, David T. Rudolph, Jallé H. Dafa, John D. Maher, Amelia A. Haselkorn and Nabila Abdallah of Lieff Cabraser Heimann & Bernstein LLP.

Oracle is represented in-house by Kyle Zipes and Nargues M. Eder, and Tiffany Cheung, Christin Hill, Purvi G. Patel, Whitney O'Byrne, Erik Manukyan, Emma Burgoon and Zachary S. Newman of Morrison Foerster LLP.

The case is Michael Katz-Lacabe et al. v. Oracle America Inc., case number 3:22-cv-04792, in the U.S. District Court for the Northern District of California.

--Additional reporting by Gina Kim, Bonnie Eslinger and Dorothy Atkins. Editing by Kristen Becker.