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July 22, 2024, 9:57 AM PDT

3G, Brazilian Billionaires Beat Kraft Heinz Insider Trading Suit

By Mike Leonard

Documents

Ruling

Docket

- No ‘smoking gun’ showing 3G had inside info before selloff
- Ruling is latest to reject claims over $1.2 billion stock sale

Bloomberg Law News 2024-07-23T11:10:12718829833-04:00

3G, Brazilian Billionaires Beat Kraft Heinz Insider Trading Suit

By Mike Leonard 2024-07-22T12:57:36000-04:00

- No ‘smoking gun’ showing 3G had inside info before selloff
- Ruling is latest to reject claims over $1.2 billion stock sale

Two of Brazil’s richest men prevailed in court against claims they sold $1.2 billion worth of Kraft Heinz Co. stock based on inside information about fallout from the company’s cost-cutting measures.

A Delaware judge tossed shareholder litigation against Jorge Paulo Lemann, Alexandre Behring, and affiliates of their investment firm, 3G Capital Inc., along with other current and former Kraft board members. Lemann, with a net worth of $24 billion, is the world’s 79th-wealthiest person, according to the Bloomberg Billionaires Index.

Vice Chancellor Lori W. Will, writing July 19, dismissed claims that Lemann, Behring, and 3G reduced their stake from 24% to 22% when they knew Kraft was set to announce a $15.4 billion impairment charge in February 2019 that would send its shares plunging. Her 41-page opinion cited an internal company report that concluded they lacked access to nonpublic information.

An email from 3G requesting “realistic” financial assumptions about Kraft in July 2018, about a month before the investment firm sold 7% of its stake, didn’t in any way “suggest that the trading defendants learned material information different from what the market knew,” the judge said. “It is hardly a smoking gun.”

The ruling is Will’s second rejecting virtually identical allegations, after a decision dismissing a parallel case brought by a group of pension funds. The lawsuits also echoed a securities fraud class action that Kraft and a group of executives settled for $450 million and another federal case thrown out by a judge in Chicago.

‘Thorough Investigation’

The suits in Delaware’s Chancery Court said Kraft board members looked the other way while 3G sold 20.3 million shares at prices inflated by bogus hype about the apparent short-term success of cost-cutting measures that were in fact ravaging the business by pressuring division leaders to engage in accounting fraud.

The cases involved shareholder derivative claims, which are technically filed on a corporation’s behalf against its leaders. Damages in derivative cases are typically paid into a company’s coffers by its officers and directors or their insurers.

In that context, investors seeking to bring a lawsuit must first demand an internal investigation or show the board is too compromised by its own legal exposure to conduct one. The pension funds leading the initial litigation failed to make that showing, Will said in 2021.

The case she dismissed July 19 was filed in mid-2022 by a different group of shareholders who did request an internal probe. Their suit challenged the board’s decision not to “sue all parties responsible for the fraud,” a legal theory the judge characterized as unjustified second-guessing. She pointed to a 110-page report issued by the working group that ran the investigation.

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

The decision didn’t directly address a pending lawsuit filed by an Austrian asset manager in November over claims that Lemann, Behring, 3G, and certain Kraft board members used fraudulent regulatory filings to dupe Will into dismissing the original pension fund suit. They have moved to dismiss that case.

Kraft and its board members, including Lemann and Behring, were represented by Paul, Weiss, Rifkind, Wharton & Garrison LLP. 3G and its affiliates were represented by Potter Anderson & Corroon LLP and Kirkland & Ellis LLP. The shareholders were represented by Cooch & Taylor PA, deLeeuw Law LLC, Wolf Haldenstein Freeman & Herz LLP, Hynes & Hernandez LLC, Schubert Jonckheer & Kolbe LLP, Greenfield & Goodman LLC, and Isquith Law PLLC.

The case is In re Kraft Heinz Demand Ref’d Deriv. S’holder Litig. , Del. Ch., No. 2022-0398, 7/19/24 .

Securities Law News
July 22, 2024, 11:48 AM PDT

Musk Pay Judge Allows Scholar's Brief Despite Tesla Protest

By Jennifer Kay

Documents

- Opinion
- Docket

Bloomberg Law News 2024-07-23T11:05:43195989117-04:00

Musk Pay Judge Allows Scholar's Brief Despite Tesla Protest

By Jennifer Kay 2024-07-22T14:48:37000-04:00

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 .

Securities Law News
July 22, 2024, 2:05 PM PDT

Okta Gets First Approval for $60 Million Settlement Over Merger

By Martina Barash

Documents

- Order
- Docket

Bloomberg Law News 2024-07-23T11:10:40475740552-04:00

Okta Gets First Approval for $60 Million Settlement Over Merger

By Martina Barash 2024-07-22T17:05:37000-04:00

Okta Inc. is entitled to preliminary approval of an agreement to pay $60 million to settle investor class claims over the progress of its integration with another user-authentication software company, a federal court ruled.

The proposed deal will likely be approved as fair, reasonable, and adequate after a Nov. 8 settlement hearing, Judge Susan Illston said July 19 for the US District Court for the Northern District of California.

- The plaintiffs alleged that after acquiring Auth0 Inc. in March 2021 for $6.5 billion, Okta falsely reassured investors that the companies were integrating seamlessly—and then abruptly shut down a sales integration program, causing a 34% stock drop
- Illston certified a class of investors in February in response to an unopposed request
- The investors' damages expert estimated the maximum potential recovery at $1.04 billion, while Okta's expert pegged it at $600 million, according to the investors' June 11 request for preliminary approval

Labaton Keller Sucharow LLP is lead counsel for the investors. Gibson, Dunn & Crutcher LLP represents Okta.

The case is In re Okta, Inc. Sec. Litig. , N.D. Cal., No. 3:22-cv-02990, 7/19/24 .

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

Securities Law News
July 22, 2024, 2:17 PM PDT

IDT, Founder Oppose Legal Fees Award Over Straight Path Deal

By Jennifer Kay

Documents

Docket

- Judge previously ruled investors weren't harmed in transaction
- Shareholder's lawyers seek $9.5 million for fees, expenses

Bloomberg Law News 2024-07-23T11:11:04889622329-04:00

IDT, Founder Oppose Legal Fees Award Over Straight Path Deal

By Jennifer Kay 2024-07-22T17:17:33000-04:00

- Judge previously ruled investors weren't harmed in transaction
- Shareholder's lawyers seek $9.5 million for fees, expenses

A Delaware court must approve a $9.5 million award for legal fees in shareholder litigation over Straight Path Communications Inc.'s sale to Verizon Communications Inc. to deter bad behavior by executives and directors, even though it granted only nominal damages in the case, attorneys for the shareholder argued Monday.

An attorney for IDT Corp. and its founder Howard Jonas said the fee application is "perverse" and granting it would personally harm Jonas.

The Chancery Court criticized IDT and Jonas for manipulating the $3.1 billion sale of IDT affiliate Straight Path, but its Oct.3 order ultimately determined that minority investors weren't harmed by Jonas's conduct. Vice Chancellor Sam Glasscock III awarded only nominal damages in the case, after six years of litigation and a 10-day trial in December 2022.

The fee application is consistent with awards upheld in similar cases where "pre-litigation conduct of the losing party was in bad faith" and where the court only awarded nominal damages, said Edward Timlin of Bernstein Litowitz Berger & Grossmann, representing the shareholder who led the litigation.

The Chancery Court didn't vindicate Jonas and IDT, but Jonas "clearly does not appreciate the gravity of the findings against him" and he's "acting as if he's won the trial," he said.

"We think it's important that there be some consequence here for a deterrence effect, both with respect to Mr. Jonas and with respect to Delaware fiduciaries more generally," Timlin said.

Rudolf Koch of Richards Layton & Finger, representing Jonas and IDT, argued the shareholder's attorneys seek a fee award that's greater than what they would have received had Glasscock awarded greater damages.

"It makes no sense," he said. "I think that's entirely perverse."

If granted, the fee award amounts to punitive damages against Jonas, who "was not trying to swindle any Straight Path stockholders," he said.

"While Howard's a wealthy man, taking $10 million from a human being personally would have a materially adverse effect on him and his family, and I just don't see how this court could do that consistent with equity, where the opinion found he did not cause any damages," Koch said.

Glasscock adjourned Monday's hearing without ruling on the fee award application.

Labaton Keller Sucharow and Bernstein Litowitz are the lead plaintiff's counsel. Jonas and IDT are represented by Richards Layton & Finger and Cyrulnik Fattaruso.

The case is In re Straight Path Comms. Inc. Consol. S'holder Litig., Del. Ch., No. 2017-0486, hearing 7/22/24
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UK banks

Barclays calls on High Court to block passive funds from investor lawsuit

Bank wants judge to slash value of a £560mn legal claim over its 'dark pool' trading exchange

The judge's decision will help determine if index-tracking funds can participate in other lawsuits against UK companies over share price declines © Tolga Akmen/AFP/Getty Images

Alistair Gray in London YESTERDAY

Barclays has called on the High Court in London to slash the value of a £560mn lawsuit from investors by striking out the claims of passive funds over a drop in its share price triggered by regulatory scrutiny of its "dark pool" trading exchange.

Scores of investment funds are suing Barclays, arguing the bank's share price had been "artificially inflated" by "false representations" the lender had made about its dark pool exchange that allows trades to be conducted in private.

Lawyers acting for Barclays argued that passive funds, which are taking part in the litigation, could not be said to have been misled by the bank and should not be able to sue as they had not read disclosures made by the lender. Passive funds buy shares automatically based on inclusion in market indices.

Helen Davies KC, representing the bank, told the court that the claimants' case had a "fundamental deficit".

But Jonathan Nash KC, acting for the shareholders, said in written arguments that all investors, whether active or passive, are “entitled to and do” trade on the basis that share prices incorporate “all material information”.

The judge’s decision will help determine if index-tracking funds can participate in other lawsuits that are piling up against UK companies over share price declines.

Shareholders in Barclays filed a lawsuit against the bank in London in 2020, arguing it had made “untrue” or “misleading” statements to the market.

It is one of several suits that have been filed in the High Court against London-listed companies including Glencore and Standard Chartered, which are also contesting them.

The bank is contesting the lawsuit and wants the court to strike out the claims of 242 funds and sub-funds that are valued at about £330mn — more than half the total £560mn against it.

Passive funds managed by Amundi and State Street are among investors suing Barclays over losses that shareholders sustained a decade ago.

About £2.5bn was wiped off Barclays’ market capitalisation on a single day in 2014 after US regulators sued the bank for allegedly favouring high-speed traders on its dark pool against the interests of institutional investors.

Eric Schneiderman, New York’s then attorney-general, claimed at the time that the bank’s dark pool was “full of predators — there at Barclays’ invitation”.

Barclays agreed in 2016 to pay $70mn to the Securities Exchange Commission and Schneiderman’s office as part of a settlement in which it also admitted to making material misrepresentations.

Most shareholder lawsuits have settled before trial, meaning there is little legal precedent in England and Wales on several important issues in such cases, including the status of passive investment funds, which have become large holders of UK stocks.

NEWS

Attorneys Brace for Wave of CrowdStrike Litigation

"In some ways, I think it really set off a big nuclear bomb of legal actions across a lot of different players in the industry," Beth Waller, a principal and chair of the cybersecurity and data privacy practice at Woods Rogers, said.

July 22, 2024 at 06:02 PM

Travel and Tourism

Lisa Willis

By land, by sea, and by air, the tourism industry, along with the rest of the world, was undeniably rocked by a behind-the-scenes yet omnipresent little-known company called CrowdStrike on July 19 when an update in its system caused a catastrophic meltdown, crippling flights and other forms for transportation for more than a day.

Four days later the cyber-tremors remain with lingering problems still plaguing computer users.

CrowdStrike has taken responsibility, blaming a bug in a software update.

But attorneys are now wondering who will pay in the wake of the cyber-event some are calling the largest IT outage in history.

Beth Waller, a principal and chair of the cybersecurity and data privacy practice at Woods Rogers in Virginia, thinks that while many businesses were impacted, tourism was undeniably the most visible. Waller's practice is 100% focused on cybersecurity, data privacy, and tech-related issues, dealing primarily with malicious incidents like ransomware and data privacy compliance-type concerns.

"You saw a lot of pictures walking through the airport, you could see that blue screen of death, right?" Waller said. "I think that there was a lot more of that blue screen of death behind the scenes that people just didn't see. And a lot of IT departments—I know a lot of clients—were scrambling to come back online."

Waller said the crippling impact remains.

"It was such a manual process to bring things back online. Typically, with a software update, you can input a software code, and you could push out an update across your environment, but … it broke so badly that they had to go door to door essentially."

Waller suggests there is a bucket list of up-and-coming litigation concerns, starting with legal action against CrowdStrike directly.

"You also have the possibility of claims against those same customers who experienced an outage against their cyber insurance carriers because a lot of those cyber insurance policies have provisions or may theoretically have provisions around business interruption or having a vendor outage," Waller said. "And a couple other buckets I've been thinking about is you've got CrowdStrike's own concerns, its own possibility of recovery for its own cyber insurance or technology errors and omissions coverage concerns."

Waller suggests that if this event brought companies offline to the extent that it really impacted their bottom line, the alternative is to seek protection against unhappy customers, shareholders, and class action via lawsuits.

"In some ways, I think it really set off a big nuclear bomb of legal actions across a lot of different players in the industry," Waller said.

Securities and Exchange Commission 8-K Filings

The event caused massive system failure and canceled over 5,000 commercial airline flights globally.

"If I'm an airline carrier that experienced a material event because of this being taken down, right, then I may also need to be looking at whether I have my own Securities and Exchange Commission 8-K filing because I've experienced a material event," Waller said. "We saw a lot in the news related to cybersecurity incidents, but it's really any material impact on the company's bottom line where they might need to resort to an 8-K filing."

The disruption extended beyond air travel, affecting businesses across various sectors, including retail sales, package deliveries, banks, and hospital procedures.

What would be the overall cost of such an event? Industry experts are speculating, and some are using the B word: a billion dollars.

"In some ways, it has got to be at least that," said partner Peter K. Spillis of Kelley | Uustal law firm in Fort Lauderdale, who has more than 25 years of experience in high-stakes civil trial work. "I mean, take just the airline industry, and the disruption there and the millions of people that that were stuck in airports and missed meetings and all the business that didn't get done because of that. That's just one segment. Now compound that out to every other industry that was affected. I think billions is a realistic number."

According to CrowdStrike officials in public statements following the meltdown, the glitch appears to have had no malicious support.

Spillis said litigation could prove challenging.

"The first hurdle for any of these businesses affected is whether there are enforceable arbitration agreements," Spillis said.

Spillis suggests the magnitude of mass arbitration may not be feasible due to the volume of cases.

"Sometimes a class action actually ends up being more efficient for them as well as their customers," Spillis said. "But I would think [arbitration] is a first step because I think that's been the trend lately."

Hindsight 20/20

Waller said that when reviewing an event like this, attorneys helping draft contracts with vendors should be mindful of their clients' needs.

“I would try to negotiate the best possible terms that I can get for business interruption whether it’s caused maliciously or caused by accident,” Waller said. “So I would be looking at my contracts and I’d be looking at my cyber insurance coverage to see if there was any windows or gaps that I could fill with my cyber insurance coverage.”

Waller also points to cybersecurity preparedness.

“I would also be looking at what I need to do to diversify the tools that I’m using within my enterprise because clearly what we’ve seen is that reliance on one of these tools can really hinder an entire industry.”

NEWS

Could There Be Class Actions Over CrowdStrike's Global Tech Outage?

Law firms are investigating potential lawsuits to come out of CloudStrike's global tech outage, but there may be limits on who can recover damages.

July 22, 2024 at 05:48 PM

Class Actions

Amanda Bronstad
staff reporter

Amanda O'Brien

What You Need to Know

- San Francisco's Lieff Cabraser Heimann & Bernstein and Pittsburgh-based Lynch Carpenter are among the plaintiffs' firms already announcing investigations of the July 19 outage
- Businesses that have contracts with CrowdStrike have a stronger case than consumers who missed flights or weren't able to work.
- Lawyers predicted only CrowdStrike would face lawsuits, and no other defendants, including Microsoft, which had 8.5 million Windows devices impacted.

Law firms are investigating potential lawsuits to come out of CloudStrike Holdings Inc.'s global tech outage, but there may be limits on who can recover damages.

San Francisco's Lieff Cabraser Heimann & Bernstein and Pittsburgh-based Lynch Carpenter are among the plaintiffs' firms already announcing investigations of the July 19 outage, which impacted thousands of companies worldwide. They are seeking businesses that have been impacted by the shutdowns caused by cybersecurity software firm CrowdStrike.

"With impacts from CrowdStrike's coding error reverberating across many different sectors, there are a number of lawsuits that plaintiffs may pursue," Amy Keller, of Chicago's DiCello Levitt, told Law.com. "Business interruption claims will no doubt be explored by businesses who were impacted by technology outages. Consumers may try to pursue claims for their own individual and unreimbursed losses caused by the outages. And securities litigation may also follow as a result of the loss of value of the stock price."

Pomerantz and Bronstein, Gewirtz & Grossman have already announced potential shareholder lawsuits. Shares of Texas-based CrowdStrike have plummeted nearly 30%.

CrowdStrike did not respond to a request for comment about potential litigation. In a statement, CrowdStrike CEO George Kurtz blamed the outage on a defect.

"I want to sincerely apologize directly to all of you for the outage," he said. "All of CrowdStrike understands the gravity and impact of the situation. We quickly identified the issue and deployed a fix, allowing us to focus diligently on restoring customer systems as our highest priority."

In a July 21 post on LinkedIn, CrowdStrike said a "significant number" of devices hit by the outage were back online and operational.

'Clear Cut Case of Liability on CrowdStrike'

The outage was caused by a faulty software update that impacted companies running on Microsoft's Windows operating system.

Cyber Law Firm co-founder Gabriel Tese indicated that lawsuits against CrowdStrike will be rooted in negligence claims. Many in the cyber community believe CrowdStrike would have caught the error if it had tested it before rolling out the update.

"Because it's such a widespread outage, you would assume that a cybersecurity company that not only sells these products but also consulting services would understand that failing to test their program before rolling it out could cause these business interruption impacts," he told Law.com. "It's a pretty clear cut case of liability on CrowdStrike—it's now a question of their insurance coverage."

One wrinkle, according to David Opderbeck, a professor at Seton Hall University School of Law, is that the outage wasn't a cyberattack.

"This might complicate some of the B2B claims, as well as insurance claims by affected entities," he said. "CrowdStrike's user agreements will have provisions regarding warranties, limitations of liability, maintenance, and updates, which in the case of some larger customers might have been subject to negotiations between sophisticated players. This will limit possible tort claims."

Still, businesses have the stronger case, he said. Consumers might not be able to pursue lawsuits given that they don't have any contract with CrowdStrike, he said. They also have suffered different types of injuries, making a certified consumer class action more complicated.

"The parties most immediately injured are the businesses using this software and lost business," Opderbeck said. "But if you go further downstream and say 'I missed a flight' or 'I didn't have access to my PC' or 'I wasn't able to do my work,' it's hard to see how there's a concrete injury and proximate cause."

The outage hit thousands of companies, grounding flights across the globe and impacting 911 services and health care facilities. It also shut down courts, which could involve a potential class action, Tese said.

"I could definitely see there being a class for litigants that had damages because their case couldn't be heard on a single day, but that's a really tenuous argument—basically saying 'because my case wasn't heard that day, it cost me these other damages'," he said, giving the example of intending to file a preliminary injunction during the system outage.

Lawyers predicted only CrowdStrike would face lawsuits, and no other defendants, including Microsoft, which said in a July 20 statement that 8.5 million Windows devices, or less than 1% of all Windows machines, were impacted.

Tese predicted that the CrowdStrike agreement likely indemnifies Microsoft.

Tese said: “CrowdStrike and its insurance is going to be solely liable for this.”

Law firm files state lawsuits targeting Google's Incognito mode

DJ dailyjournal.com/articles/379837-law-firm-files-state-lawsuits-targeting-google-s-incognito-mode

Data Privacy

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Jul. 23, 2024

In its federal filing, Potter Handy accused one of the law firms leading a class action against Google of drafting the settlement to benefit their clients and disadvantage other plaintiffs.

A new mass privacy tort lawsuit filed in Santa Clara County, accusing the tech giant of "surreptitiously" collecting and selling browsing data from Google Chrome users surfing the web in "Incognito mode," is Potter Handy LLP's latest attempt to help users pursue financial compensation after Google avoided paying plaintiffs in a class action settlement agreement over similar claims. The firm has filed two other similar actions against the company in the last month, as well as a motion to intervene in a federal class action seeking to halt final approval of the April 1 settlement agreement.

In its federal filing, Potter Handy accused one of the law firms leading the class's litigation team, Boies Schiller Flexner LLP, of drafting the settlement to benefit their clients and disadvantage other plaintiffs. Attorneys from BSF, and their co-counsel from Morgan & Morgan and Susman Godfrey LLP, praised the settlement as "groundbreaking" because, they estimate, that Google's agreement to delete "billions of data records" and beef up privacy for Incognito mode will cost the company nearly $5 billion.

Potter Handy's motion to intervene was filed on July 2. A hearing is set for Aug. 7 before U.S. District Judge Yvonne Gonzalez Rogers who, last May, declined to certify the class's claims for monetary damages but did grant class certification for injunctive relief.

The settlement agreement, known as the *Brown* lawsuit, provided no monetary compensation to the plaintiffs but left open the possibility of plaintiffs pursuing individual claims against Google. Potter Handy claims to represent 70,000 Chrome users seeking monetary compensation. According to the latest state court complaint, filed on July 16 by attorneys Mark D. Potter and Barry M. Walker, and Claire Cylkowski of Potter Handy, the new group of plaintiffs all qualified to be a part of the federal class action settlement. *Newman et al. v. Google LLC*, 24CV443288 (Santa Clara Super. Ct. filed July 16, 2024).

"Plaintiffs assert claims that already survived past motions to dismiss and summary judgment in the Brown Lawsuit, where the federal court certified two nationwide classes under Rule 23(b)(2) to pursue these claims for purposes of obtaining injunctive relief," the attorneys wrote. "Plaintiffs now each seek monetary relief from Google, including statutory damages. Google has taken the position that any request for monetary relief involves certain individualized issues and should be tried separately."

Since March 28, BSF and Morgan & Morgan have flooded Santa Clara Superior Court with more than 1900 complaints similar to the latest lawsuit filed by Potter Handy. Susman Godfrey is not part of the plaintiffs' litigation team in the state court cases.

José Castañeda, a policy communications spokesperson for Google, criticized the mounting number of state court lawsuits being filed in an email Friday, "These copycat complaints are meritless, and we will defend ourselves vigorously." Google repeatedly denied wrongdoing in the federal class action and admitted no wrongdoing under the settlement terms. The company's warns Incognito mode users that, "While Incognito mode provides local privacy on your device, it does not affect how Google collects data when you use other products and services as described in the Privacy Policy."

The Potter Handy team argued in its motion to intervene in the settled federal class action that final approval of the "misleading" agreement would lock away key documents in the law firm's state court cases, including a tolling agreement pushing back the statute of limitations. The attorneys claimed the settlement agreement treats unequally the unnamed federal class members and plaintiffs in the 1900 Santa Clara state cases filed by BSF and Morgan & Morgan, referred to as the "Luna Plaintiffs." *Brown et al. v. Google LLC*, 4:20-cv-03664 (N.D.Cal. filed June 2, 2020).

"Moving parties cannot rely on class counsel or class representatives to adequately protect their individual interests in pursuing damages claims in that they prepared the agreement that benefits Plaintiffs over most absent class members," the attorneys wrote. "Moving parties have no expectation that class counsel will pursue damages remedies on their behalf. Indeed, counsel for Moving Parties sought information regarding the tolling agreement, class counsel refused to provide a copy or any information regarding the negotiations leading to the agreement."

BSF, Morgan & Morgan, and Susman Godfrey denied these accusations in an opposition brief against Potter Handy's, writing that the "tolling agreement that is the focus of the Movants' application relates solely to damages claims and has nothing to do with the merits of the settlement."

"The damages claims of class members were not, and could not have been, affected by that Settlement, and it is that Settlement that is at issue on August 7, 2024. Similarly, the individual damages claims pending and to be brought have nothing to do with the motion for approval of the injunctive relief Settlement. Whatever advantages or leverage Movants and their counsel seek by their effort to intervene in, and delay, this case, their motion is without merit."

A Google spokesperson told the Daily Journal on April 1 the company was "pleased" with the settlement's terms saying, "The plaintiffs originally wanted $5 billion and are receiving zero."

In its opposition brief to Potter Handy's motion to intervene in the federal class action, Google's legal team in the federal class action from Quin Emanuel Urquhart & Sullivan LLP explained that allowing individual plaintiffs to continue suing the company for monetary damages was necessary to "avoid a costly and imminent trial for de minimis individual damages claims that Plaintiffs' counsel acknowledged were worth about 'three dollars a person."

Google's privacy practices and handling of California users' data have been a hotspot for civil litigation and governmental investigation recently.

On Friday, a U.S. 9th Circuit Court of Appeals appeared to breathe new life into a previously dismissed class action lawsuit that accused the company of gathering the data of Google Chrome users that opted out of sharing information with the company by turning off the internet browser's "sync" feature.

Additionally, California Attorney General Rob Bonta announced a $93 million settlement with Google after a "multi-year investigation" found that the tech giant misled Google account holders by continuing to capture, store, and monetize their location data after they had opted out of the feature, a September 2023 news release stated.

Attorneys from Potter Handy, BSF and Morgan & Morgan did not respond to a request for comment.

#379837

FT Alphaville Technology sector

Ex-directors allege fraud at Tether-backed crypto group Northern Data

Sacked 'whistleblowers' launch California court action against Europe's biggest bitcoin-miner-turned-AI-datacentre-builder

Northern Data chief operating officer Rosanne Kincaid-Smith (left) and CEO Aroosh Thillainathan © FTAV montage / Northern Data

Bryce Elder 5 MINUTES AGO

Two former executives of Northern Data, a German-listed crypto and AI infrastructure company backed by Tether, say they were sacked after raising concerns about alleged fraud they claim was being perpetrated by its chief executive and chief operating officer.

In a complaint filed last month at the California Central District court, Joshua Porter and Gulsen Kama allege that Northern Data was "falsely misrepresenting the strength of its financial condition to investors, regulators and business partners", and "was knowingly committing tax evasion to the tune of potentially tens of millions of dollars."

Northern Data said it "refutes the allegations in the strongest terms, and we are contesting them vigorously to protect ourselves against false assertions which damage our company and our business":

> “
>
> *Integrity is paramount to Northern Data Group and its leadership. As a publicly listed company we have comprehensive policies and procedures to ensure the accuracy of our financial reporting. Our 2022 accounts received an unqualified audit opinion and we will release our 2023 audited financials shortly.*

Northern Data has been making headlines for other reasons this week, with Bloomberg News reporting on Monday that the company has been investigating a US IPO for its AI cloud computing and data centre businesses:

> “
>
> Banks asked to pitch for a role have suggested valuations from about \$10 billion to \$16 billion. That compares with [Northern Data's] market capitalization of €1.3 billion (\$1.4 billion) as of Monday's close.
>
> Potential advisers are basing the valuation range in part on Northern Data's tie-up with Tether Group, people familiar with the matter have said. The Tether backing has facilitated the purchase of more than \$800 million of high-end Nvidia Corp chips used for generative AI applications.

Northern Bitcoin floated in 2018 as a pure-play crypto miner, then changed its name to Northern Data as it grew by acquisition into high-performance computing data centres. It plans to open US and UK cloud computing facilities to add to its eight crypto-mining sites, six of which are in North America.

Stablecoin issuer Tether owns 51 per cent of Northern Data shares, after last year agreeing to a "strategic investment" that involved swapping Nvidia GPUs for equity and a shareholder loan. The former directors' allegations predate its involvement.

Joshua Porter was appointed chief operating officer of Northern Data's US subsidiary in April 2022, then in January 2023 was promoted to North America president and CEO. He was sacked in March 2023 after raising concerns with his superiors that the company's German parent was "borderline insolvent", a court complaint dated June 21 2024 alleges:

> After receiving the promotion, Plaintiff Porter for the first time began getting a limited understanding of Northern Data's financials. Plaintiff Porter was shocked to learn that the company had a \$30M German tax liability and additional liabilities of almost \$8M while simultaneously having only \$17M cash on the balance and a monthly burn rate of \$3M-\$4M.

As well as raising concerns about "the company's financial state, cash position and solvency (or potential lack thereof)" with the executive leadership team, Porter also sought to blow the whistle on what the complaint calls Northern Data's "rampant tax evasion".

Accounting firm Deloitte refused to give an option letter supporting Northern Data's decision not to pay the IRS any taxes on crypto mining profits generated on US soil, the plaintiffs allege. But instead of changing its operational structure or tax treatment to not risk violating US law, Northern Data "took actions to unlawfully avoid US taxes" at least for the year 2021, the complaint says. It adds that in Potter's opinion the US tax liability "could easily be in the tens of millions of dollars", and that "an IRS audit could potentially cause Northern Data to become insolvent."

It was around this time that Aroosh Thillainathan, Northern Data's co-founder and CEO, stopped responding to Potter's communications, they allege:

> Plaintiff Porter's concerns fell on deaf ears, so he stated his intention to go directly to Northern Data's Board of Directors to alert them of the companies' unchecked illegal activity. Shortly after, in obvious retaliation for his whistleblowing activity, Plaintiff Porter was illegally terminated.

Gulsen Kama was appointed Northern Data's North America chief financial officer in July 2022 and was promoted to group deputy chief financial officer around two months later.

The complaint continues:

> "
>
> Following her promotion, Plaintiff Kama was actively exposing and then attempting to keep Defendants from falsely misrepresenting their financial position to potential auditors, tax advisors and investors. At various junctures, Plaintiff Kama reported her concerns regarding the accounting and securities fraud that she was finding to Northern Data's global CEO, COO, the Chair of the Supervisory Board and the company's Chief Legal and Compliance Officer, to no avail, because the CEO and COO were perpetuating the accounting and securities fraud.
>
> The CEO and COO intended to deceive existing and potential investors at an upcoming meeting scheduled for June 12, 2023. As a result of Plaintiff Kama repeatedly informing and warning the officers that were responsible for the illegal acts that they were committing fraud, on or about June 8, 2023, Plaintiff Kama was retaliated against and illegally terminated for her whistleblowing activities.

According to the plaintiffs, Kama handled meetings with KPMG, Northern Data's auditor for its 2020 and 2021 financials. In February 2023, in a meeting about signing off its 2022 numbers, KPMG "raised concerns about the liquidity position of the company being a going concern" and asked for documentation, the complaint says.

By early May, with KPMG still not engaged to be auditor, Thillainathan allegedly told Kama to look for another firm:

> "

> While he said to look at the top 20-25 ranked auditors; he expressed that he did not care if they were ranked that high, because no one cares who the auditors are. He claimed KPMG was being difficult and unreasonable, but the underlying command was that he wanted a company that would perform the audit with no questions asked. Plaintiff Kama attempted to push back but Thillainathan ordered her to do as instructed and told her point blank that her head was on the chopping block.

A month later, KPMG had still not signed the engagement letter and relations had allegedly deteriorated between Kama, Thillainathan and group chief operating officer Rosanne Kincaid-Smith.

Kama reportedly issued a special "hold" notice to the accounting and finance department requesting the preservation of historical records, and asking that staff loop her into all communications with the supervisory board. The next day, according to the complaint, Kama's employment was terminated.

Shareholders voted to approve a capital raise at the group's AGM on the following Monday, June 12, 2023. This matches a pattern of fundraisings "followed by issuing hyped-up press releases to drive up the stock price," the plaintiffs allege.

Berenberg data shows Northern Data has raised cash 13 times since December 2020. [Hi-res]

Figure 26: Capital increases

	Initial shares	New shares	New share counts	Gross proceeds (EUR)	Avg. price (EUR)	Notes
Dec-20	14,639,684	900,000	15,539,684	52,470,000	58	capital increase against cash contribution
Jan-21	15,539,684	1,750	15,541,434	12,000		subscription shares in connection with servicing the convertible bond
Mar-21	15,541,434	338,273	15,879,707	32,565,273	96	merger with Northern Data Services (UK) Ltd (Hydro66 Uk Ltd)
Apr-21	15,879,707	563,968	16,443,675	58,575,000	104	capital increase against cash contribution
Aug-21	16,443,675	2,306,294	18,749,969	167,437,294	73	merger with Decentric Europe BV
Oct-21	18,749,969	4,490,142	23,240,111			the first of two increases associated with the merger with Bitfield NV
Dec-21	23,240,111	575,403	23,815,514	302,742,545	60	the second of two increases associated with the merger with Bitfield NV
Apr-23	23,815,514	2,381,551	26,197,065			net proceeds of EUR32.3m, capital increase against cash contribution
Jun-23	26,197,065	2,619,706	28,816,771			net proceeds of EUR48.0m, capital increase against cash contribution, acquired by Zettahash
	28,816,771	2,881,634	31,698,405			EUR53m convertible bond
Dec-23	31,698,405	10,478,826	42,177,231			to acquire 48.07% of the shares in Damoon Ltd., Dundalk (Ireland), acquired by Zettahash
Jan-24	42,177,231	6,556,949	48,734,180			to acquire 30.08% of the shares in Damoon
	48,734,180	4,763,051	53,497,231			EUR87m convertible bond

Source: Company reports, Berenberg estimates

Zettahash is a wholly-owned Tether subsidiary © Berenberg

KPMG eventually delivered its audit report on Northern Data's 2022 financials in March 2024, flagging "material uncertainty about the group's ability to continue as a going concern" due to its reliance on bitcoin sales and the Tether shareholder loan.

The company last week delayed the publication of its 2023 audited financials to July 12. It had previously said the report would be released by the end of the first half of 2024.

Its new auditor is Liebhart & Kollegen, according to a May 2024 regulatory filing. Liebhart describes itself on its LinkedIn profile as a Stuttgart single-office law firm with "almost 15 team members". It has been contacted for comment.

KPMG and Tether did not respond to our requests to comment on the court action.

Northern Data successfully petitioned the court in May to have portions of the complaint redacted, saying these constitute "confidential and privileged communications protected by the attorney-client privilege and attorney work product doctrine." The plaintiffs this week said in a filing that they were reserving the right to challenge the sealing order.

Here are links to the court complaint and the application to seal.

Correction: an earlier version of this story said Northern Data had targeted publishing its audited 2023 results by the fourth quarter of 2023. The target was for 2022 results and the reference has been removed.

The story has been updated to include Northern Data's statement.

Update July 23: Northern Data has filed a motion to dismiss Kama and Porter's federal case, saying it "is a textbook example of bad faith litigation".

The motion, filed on Friday, says: "Porter and Kama are former employees of Northern Data who had unproductive, brief tenures at the company. Kama was terminated for cause; Porter was terminated in a broader wave of layoffs for his lack of productivity."

Lawyers for the German company said the federal filing is "rife with inaccuracies", and reject the claims of fraud, saying:

> "

> [Plaintiffs] have failed to plead their allegations of fraud with particularity. The core of each of Plaintiffs' six claims is an alleged systemic accounting and tax fraud perpetrated by Defendants "to the tune of potentially tens of millions dollars". These are inflammatory but completely unsupported claims. Nowhere in the FAC does either Plaintiff allege with any particularity the who, what, when, or where of the purported fraud as required under Rule 9(b) and this Court's cases imposing heightened pleading standards.

They also argue that the case should not be held in a Californian court, claiming it has "no jurisdiction" because Northern Data's US subsidiaries are Delaware-incorporated and primarily operate in Virginia.

The motion notes that Northern Data released audited financial statements for 2023 before it was filed.

In their conclusion, the lawyers write:

> “
>
> This unfortunate suit is a poorly veiled effort by former employees to extract additional compensation from Northern Data. It has been filed in a State that cannot exercise personal jurisdiction over the Defendants. It purports to bring whistleblower claims relating to accounting and tax issues that are not described with any specificity. It asserts frivolous false light and misappropriation claims that are refuted by the very document they cite. And it improperly utilizes privileged information that belongs to the company, and not the plaintiffs. Strike suits like these are damaging to companies. Throwing around terms like "tax evasion" and "securities fraud" with no factual support is irresponsible, which is precisely why Rule 9(b) performs a critical screening function. The Motion to Dismiss and Strike should be granted and the FAC should be dismissed.

The motion will be discussed at a hearing on August 19. It can be read in full here.

Securities Law News

July 22, 2024, 4:01 PM PDT

Auditor 'Going Concern' Warnings Tumble After SPAC-Driven Spike

By Avani Kalra

- Red flags about company odds of staying afloat drop 3%
- Life science sector going concern warnings reach highest rate

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Auditor 'Going Concern' Warnings Tumble After SPAC-Driven Spike

By Avani Kalra 2024-07-22T19:01:15000-04:00

- Red flags about company odds of staying afloat drop 3%
- Life science sector going concern warnings reach highest rate

The number of auditors of public companies who had substantial doubts about the businesses staying afloat fell in 2023.

Auditors of 21.9% of public companies last year had doubts about their clients' ability to continue as "going concerns," down from 24.3% in 2022, according to a new Ideagen Audit Analytics report. The study analyzed annual reports for US companies and foreign groups that file with US regulators.

The fiscal year 2023 numbers of going concern warnings represented a return to pre-2021 levels, the report said. Both going concerns and total independent auditor's reports slowly declined until booming in 2021, due in part to an unprecedented influx of special purpose acquisition companies.

The number of SPACs—blank-check firms formed with the purpose of targeting a private company to take public—peaked in 2021. SPACs with going concern warnings decreased 53% last year, while the number of filings from SPACs overall decreased 51%.

"The decrease in the number of companies that received a going concern in 2023 was pretty dramatic," Marie Pupecki, an accounting research analyst with Audit Analytics, said. "It would be more exciting, but SPACs have been skewing the numbers for the last couple of years."

Still, the rate of going concerns for SPACs remained high at 86% in 2023. The companies gripped Wall Street's attention in 2020, but criticism from regulators, poor returns from companies that went public, and a shaky market contributed to their steady decline.

Life Sciences Tops List

The 2023 numbers also showed high discrepancies across industries, the research firm said. The life sciences sector has seen some of the highest rates of going concern opinions, reaching a peak last year at 36.4%. That's up more than 13% from the industry's decade-low point in 2020.

"Life sciences tend to be highly capital intensive," Pupecki said. "They're usually doing years of development before they come up with a product, so it's not really unusual to see them with so many high going concerns. Many of them are not even in the active business mode at this point."

In contrast, the real estate and construction sector saw its going concern rate drop more than 12% after reaching the highest rate of any industry over a 10-year period in 2022. SPACs are grouped within the real estate and construction industry.

Accounting rules require auditors to assess whether there is a "substantial doubt" about the ability of a company to continue as a going concern. The auditor must state the concern, if there is one, in a company's 10K annual report. US accounting rules also require a company's managers to disclose any doubts about their ability to stay in business and reveal their plans for financial recovery.

Still, nearly half of 2023's biggest bankruptcies lacked the warnings typically revealed in these reports, according to a Bloomberg Tax analysis earlier this year. The analysis found that retailer Party City Co. and drug chain Rite Aid Corp., for example, were among companies that filed for bankruptcy last year without issuing a prior going concern warning.

Mike Shaub, a former accounting professor at Texas A&M University, said it can be difficult for auditors to issue going concern opinions.

"It's a Catch-22 for an auditor," Shaub said. A going concern warning "could become a self-fulfilling prophecy. All of a sudden, vendors don't want to do business with this company, customers find alternative suppliers. There's all kinds of problems that can arise."

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Securities Law News
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Auditors Limit Gen AI to Administrative Tasks, Regulator Says

By Amanda Iacone

Documents

Spotlight: Gen AI in Audits

Bloomberg Law News 2024-07-23T11:12:02837194815-04:00

Auditors Limit Gen AI to Administrative Tasks, Regulator Says

By Amanda Iacone 2024-07-22T16:05:42000-04:00

Top accounting firms have stopped short of using generative AI to vet financial statements of the largest companies in the US even as they experiment with how they could apply the nascent technology, according to the US audit board.

Some of the busiest US auditors are using generative artificial intelligence to research internal audit policies or draft memos. But firms generally restrict staff from using the fast-developing technology behind ChatGPT to do core audit testing, according to research findings the Public Company Accounting Oversight Board released on Monday.

The findings are based on discussions with accounting firms including the six largest auditors. PCAOB staff also spoke with corporate managers to gauge how they use gen AI to compile financial statements that undergo audit scrutiny.

Among the report's findings:

The largest auditors are ahead of smaller competitors in adopting gen AI.

- Auditors are concerned about protecting the data of their clients and whether they can rely on gen AI-produced results.
- Possible audit uses include risk assessments and comparing financial statement results with audited amounts.

- Companies tap gen AI to handle account reconciliations and to draft documents such as reports that benchmark a firm against its competitors.

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Securities Law News

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UK Audit Industry Forms New Nonprofit to Shape Market Reform (1)

By Michael Kapoor

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UK Audit Industry Forms New Nonprofit to Shape Market Reform (1)

By Michael Kapoor 2024-07-22T11:34:11000-04:00

A new organization to represent the interests of UK big-company auditors was announced Monday as the new Labour government promises to revive long-stalled audit reform.

The Centre for Public Interest Audit is a nonprofit with backing from the UK's seven largest audit firms and professional bodies such as the Institute of Chartered Accountants in England and Wales. It "will bring together auditors from across the profession to shape best practice and inform the future of public interest entity (PIE) audit," according to a press release. PIEs are companies of national importance, mostly FTSE 350 firms.

- "Our mission aligns with the UK government's aim to strengthen regulatory powers and improve public entity audit quality via its upcoming Audit Reform and Corporate Governance Bill," the organization's chair Margaret Ford said in a statement. In the King's speech June 17 the new Labour government promised to reform the audit market, including creating a new regulator.
- "Confidence in financial reporting is key to investment and growth, so ICAEW has come together with other parts of the profession," to set up the new nonprofit, ICAEW CEO Alan Vallance said by email Monday.
- The center will represent the audit profession and make "clear-cut recommendations of areas for development and improvement," according to the release.

(Updated in paragraph two with more details on backers of the new nonprofit.)

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Corporate America revels in Supreme Court windfall

reuters.com/breakingviews/corporate-america-revels-supreme-court-windfall-2024-07-23

Gabriel Rubin

A security guard walks down the steps of the U.S. Supreme Court in Washington, U.S., July 19, 2024. REUTERS/Kevin Mohatt Purchase Licensing Rights, opens new tab

WASHINGTON, July 23 (Reuters Breakingviews) - The scales of justice have been tipped in favor of Corporate America. A series of recent U.S. Supreme Court opinions overturned decades of precedent, making it easier to challenge federal regulations and enforcement actions. In situations where an agency overstepped authority granted by Congress or took liberties with how it interpreted ambiguous laws, judges will now be the final arbiters. The new legal landscape portends fat dividends for companies and their shareholders for years to come.

Over the course of just a few days, the court led by Chief Justice John Roberts issued three business-related rulings that are now rippling through boardrooms across the country. First, it neutered, opens new tab the Securities and Exchange Commission's proprietary system of tribunals, a warning sign for other agencies that sidestep federal courts in favor of cozier internal proceedings to handle enforcement actions and other smaller matters. Second, a decision penned by conservative jurist Clarence Thomas, gave companies additional time to legally push back against rules.

Third, and most consequentially, Loper Bright Enterprises vs. Raimondo, opens new tab issued a fatal blow to the doctrine known as Chevron deference, a 40-year-old precedent giving the benefit of the doubt to how government agencies decipher ambiguity in laws passed by Congress. Ironically enough, the oil titan's case against the National Resources Defense Council was originally construed as a victory for business because it allowed the executive branch, under Republican President Ronald Reagan at the time, to draft flexible rules that environmentalists considered unduly permissive.

Since then, the perception has broadly evolved into the idea that Chevron expanded an overbearing "administrative state." A Supreme Court reshaped by Donald Trump's appointees gave conservative legal organizations and their corporate sponsors the ability to help tear it down.

It's true the government rulebook has swelled since the 1984 decision, as have the accompanying costs of compliance. Although companies tend to overlook the benefits of regulation, including cleaner air and safer workers, the related expenses grew at roughly 1% a year between 2002 and 2014, according to a study, opens new tab published by the National Bureau of Economic Research. A separate estimate, opens new tab commissioned by the National Association of Manufacturers, an industry lobbying group, found they increased closer to 2% annually from 2012 to 2022. The 6-2 reversal penned by Roberts invites a massive rollback opportunity.

A gold rush already is underway. Law firms and in-house corporate attorneys scoured compliance documents for rules worth challenging. Existing litigation also was injected with uncertainty, leading some judges to issue injunctions on pending regulations and government programs. A laundry list of Washington-based trade associations, opens new tab, which spearhead legal initiatives for their respective industries, urged President Joe Biden's administration to refrain from issuing new rules given the heightened chance they would be knocked down. There are about 150 under review at various agencies that would have an economic impact of at least $200 million apiece.

Reuters Graphics Reuters Graphics

Early signs bode well for chief executives. A Texas judge backed a challenge to the Federal Trade Commission's non-compete rule, opens new tab for workers, which the U.S. Chamber of Commerce said overstepped the agency's authority. The business group also tried to have the injunction apply to all its members. Although a judge denied the request, having the audacity to ask suggests companies are emboldened in their cause against a rule that has been a signal initiative for FTC Chair Lina Khan.

The savings also could be significant. A group that represents medical testing companies such as Quest Diagnostics (DGX.N), opens new tab and Labcorp (LH.N), opens new tab is pushing back on a new Food and Drug Administration rule that might cost the industry more than $30 billion over two decades, according to agency estimates. The FDA has sought to toughen oversight by scrutinizing new types of diagnostics, as opposed to just certifying the labs that run them. The American Clinical Laboratory Association contends the decision is arbitrary, and courts are probably more inclined to agree following the Raimondo ruling.

Environmental rules and tax-code esoterica also are bound to get fresh consideration, given that Congress rarely spells out specifics in sprawling legislation like the 2017 Tax Cuts and Jobs Act or Biden's signature 2022 Inflation Reduction Act. For example, the administration is eager to midwife a clean hydrogen industry and has written tax-credit eligibility rules that would probably prevent fossil fuel producers such as Exxon Mobil (XOM.N), opens new tab from making hydrogen out of natural gas because of the associated carbon emissions. Big Oil has a strong case now to argue that the limitations are overly restrictive, and that it should qualify for a tax credit of $3 per kilogram of hydrogen. Separately, 3M (MMM.N), opens new tab has cited the Chevron reversal in an appeal over whether the IRS overstepped its authority in how it taxed some of the industrial giant's foreign income.

The transfer of power to judges from regulators was an explicit goal, Roberts wrote. And while the philosophical shift stands to benefit many companies, it also poses new questions. There will be venue shopping to find a sympathetic court. But asking judges to draw the line as to when and where to defer to an agency's expertise and when to take matters into their own hands will not have a clear definition and thus vary from case to case. Will a judge feel confident enough to overrule how food safety is determined, but not the specifics of regulating nuclear power? Fuzzy guidelines on deference mean another mess is in the making.

Further complicating the situation is that many agencies have seen the jurisprudential writing on the wall for years. As a result, they have been meticulous about ensuring that rules make clear whence their authority comes. Market regulators, opens new tab like the SEC have tried not to rely on Chevron as courts chipped away at it. Without its in-house justice system, it will have to be more cautious and confident about the cases it brings.
Another consequence of the Supreme Court's deregulatory blitz seems especially clear: with government bureaucrats second-guessing themselves to avoid losing in court, companies will be emboldened to use their own legal consiglieri and lobbying networks to shape laws from the outset. As regulatory costs go down, corporate influence in Washington is set to rise.

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CONTEXT NEWS

The U.S. Supreme Court on July 1 issued its final opinions from a term that included a landmark decision overturning a 40-year-old precedent known as "Chevron deference," which had allowed regulators broad leeway to interpret and implement laws. That power will now shift to the courts under the 6-2 ruling in Loper Bright Enterprises vs. Raimondo.

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Editing by Jeffrey Goldfarb and Pranav Kiran

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Trump Floated Jamie Dimon for Treasury Secretary, Then Denies It

B bloomberglaw.com/bloombergterminalnews/bloomberg-terminal-news/SH32YET0G1KW

- ‘He is somebody that I would consider,’ Trump said in June
- On Truth Social, he also denies considering BlackRock’s Fink

By Gregory Korte and Nancy Cook

(Bloomberg) --
Former President Donald Trump is disavowing a previous statement that he would consider JPMorgan Chase & Co. Chief Executive Officer Jamie Dimon for Treasury secretary — and denied that he was considering BlackRock Inc.’s Larry Fink, too.

“I don’t know who said it, or where it came from, perhaps the Radical Left, but I never discussed, or thought of, Jamie Dimon or Larry Fink for Secretary of the Treasury,” Trump said in a post on his Truth Social platform on Tuesday.

It was Trump himself who said Dimon could be a potential cabinet member. In a June 25 interview with Bloomberg Businessweek, Trump talked about his recent meeting with CEOs hosted by the Business Roundtable in Washington.

“We had a great meeting. Jamie Dimon was there. I have a lot of respect for Jamie Dimon,” Trump said.

Asked if Dimon might be a future Trump Treasury secretary, Trump said, “He is somebody that I would consider, sure.”

Read More: Trump on What He’d Do With Taxes, Tariffs, the Fed and More

Fink’s name surfaced in a New York Post column on Saturday, which reported that Trump was “still seeking out Fink for insights into the economy” despite their apparent political incompatibility.

BlackRock’s use of ESG — environmental, social and governance considerations — in its investing strategies has made it a target from some on the right. Fink has criticized Trump’s economic approach.

Trump said in the Businessweek interview that he supports developing the cryptocurrency industry, an area he might find common ground with Fink and Dimon.

Fink has said he’s become a big believer in crypto. Dimon remains skeptical, telling Bloomberg Television in April that Bitcoin is “a Ponzi scheme” and a fraud. But JPMorgan Chase has made small steps toward its own dollar-backed coin, and Trump said he sees an opening. Devotees of virtual currencies are hopeful a second Trump administration would be filled by individuals looking to scale back enforcement and regulation.

“It’s a baby. It’s an infant right now. But I don’t want to be responsible for allowing another country to take over this sphere. And so I think we’re going to be good,” Trump told Businessweek. “Also, I’ve gotten to know people in the industry, they’re top-flight people. And you ask Jamie Dimon, Jamie Dimon was, you know, very negative and now all of a sudden he’s changed his tune a little bit.”

Laura Davison, Romy Varghese

Securities Law News
July 23, 2024, 6:03 AM PDT

Private Equity Irks Clients by Trying to Shuffle Assets (1)

By Allison McNeely and Dawn Lim

- Firms want to kick the can on assets that need more time
- Financial engineering of continuation funds is a hard sell

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Private Equity Irks Clients by Trying to Shuffle Assets (1)

By Allison McNeely and Dawn Lim2024-07-23T09:03:51073-04:00

- Firms want to kick the can on assets that need more time
- Financial engineering of continuation funds is a hard sell

Private equity firms are using a form of financial engineering to buy more time for wringing returns from their under-achieving investments. Increasingly, their biggest clients are saying “no thanks.”

Ares Management Corp. weighed the idea, known as a continuation fund, but investors snubbed it earlier this year. New Enterprise Associates had to scale back a similar plan after talking to clients. By one gauge, only a third of the proposed funds have been getting done.

Continuation funds are among a growing array of asset-shuffling tactics that private equity funds are adopting because the normal way of producing payouts — selling assets — has been crimped by a feeble deal market.

In this case, managers slide hard-to-sell assets from an older fund into a brand-new one, akin to shifting an investment from one pocket to another. Meanwhile, the firm enlists new investors to buy into the continuation fund and cash out old clients — sometimes at a discount — while conjuring up a new stream of fees for managers along the way.

Clients don’t always see what’s in it for them. Data from Evercore Inc. shows continuation funds and other complex transactions fashioned by private equity firms fell 25% last year from 2021’s record $68 billion.

Some investors are balking at how continuation funds seem to reward managers for not getting the job done in time.

“We signed up for a 12-year fund. Now they’re asking investors to wait another seven years to get their money back,” said **Brian Dana**, a managing principal at investment advisory firm Meketa Investment Group. “It’s strange to me you won’t be done in the time you said you would.”

Across pension funds and endowment boardrooms, investors are taking a closer and more skeptical look at the contortions that private equity is using to get cash back to investors and drum up fees. The list includes various forms of borrowing such as margin loans, creating new share classes and complex securitizations that layer on leverage and risk, and investors are catching on to the full costs.

Cashing Out

Faced with the choice of whether to roll stakes into a continuation fund or cash out, Dana said his firm typically prefers to take the money and exit. That beats being stuck waiting, he said.

There’s also resistance when buyers and sellers disagree over what the fund’s assets are worth. With private equity sponsors effectively on both sides of the deal, the process is rife with potential conflicts of interest, and more pensions and endowments that bought the original funds are complaining that they’re tired of deals where they wind up on the losing end.

Earlier this year, Ares explored rolling some investments from its 2017 vintage Ares Corporate Opportunities Fund into a continuation vehicle to generate distributions. After hearing out key investors who asked the firm to keep the assets in the existing fund, Ares shelved the deal, people familiar with the matter said.

New Enterprise Associates, a venture capital firm, started exploring a continuation vehicle last year and cut the number of companies in the fund after getting feedback from investors, said people with knowledge of the matter. NEA structured it to mitigate conflicts and align interests, one of the people said.

Read More: Goldman-Led Group Backs Databricks, Plaid Through NEA Vehicle

Representatives for Ares and NEA declined to comment.

Only about a third of continuation funds that are contemplated are actually completed these days, down from about 80% in 2018, when the market was a lot smaller and newer, according to **Jon Costello**, founder and managing partner of Devon Park Advisors.

“Probably two-thirds should get done,” he said, but there’s not enough capital available to meet the demand from private equity firms for such deals. “The last third probably shouldn’t have been brought to market.”

Managers typically sell investors on continuation funds with a simple pitch: By holding on to an asset for longer, they can maximize returns over the long haul.

The reality can be more murky. Many sponsors turn to a continuation fund only after they explored other routes to a sale that wouldn't have produced a profit.

New investors that back continuation funds are typically firms that specialize in buying second-hand stakes. These so-called "secondaries" firms typically drive a hard bargain and seek discounts. They occasionally come together as a consortium, with the lead buyer speaking for about 25% to 30% of the deal.

Falling Short

Sometimes, though, there just isn't enough demand to make a continuation vehicle worth it.

The vast majority of the original investors in the asset typically opt to take their cash and not participate in the continuation fund. Some pensions can't easily commit to a continuation fund without going through layers of decision-makers.

What's more, certain deals allow managers to reap carried interest, the industry's favored form of compensation, simply by moving it from one of their funds to another. Pensions and endowments say managers deserve profits only after exiting a business or taking it public.

Investors also complain that if only the marquee asset goes into a new fund, the deal looks more like an expensive version of directly co-investing in a portfolio company alongside the manager. A co-investment typically has no fees.

In a sweeping bid to regulate private equity, the Securities and Exchange Commission tried requiring firms that designed complex secondary deals to hire independent auditors to ensure investors get a fair shake. A court blocked the rules.

An influential trade association for private equity fund investors published guidance on continuation fund deals last year, saying managers should be transparent and clear conflicts with major investors. Brian Hoehn, director of industry affairs of the Institutional Limited Partners Association, said firms are working more to notify investors.

Opting In

Sometimes investors are persuaded to go along.

Cinven considered moving chemicals company Barentz into a continuation fund late last year and asked big investors to waive conflicts of interest. The firm faced pointed questions, including whether they did enough to net the best price, according to people familiar with the matter.

Options including a public offering were considered and third-party advisers set the valuation, another person said. Cinven also offered to let clients keep investing on the same terms as before. The investors ultimately agreed, and Netherlands-based Barentz ranks among the firm's top performers, one person said. Cinven declined to comment.

Despite the growing skepticism of continuation funds among private equity clients, one industry participant predicts the vehicles will continue to grow as sponsors remain under pressure to generate cash.

"Sponsors need to get creative with their limited partners," said **Nigel Dawn**, Evercore's head of secondaries. He predicts that continuation funds will have a record year.

(Updates with Barentz location in third-to-last paragraph.)

--With assistance from **Marion Halftermeyer**.

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Uber, Investors Ink $200M Deal To End 'Train Wreck' IPO Suit

By **Jessica Corso**

Law360 (July 22, 2024, 7:57 PM EDT) -- Uber Technologies Inc. has agreed to pay $200 million to exit a class action accusing it of failing to inform investors about significant business risks tied to stalling growth and potential legal issues ahead of its $8.1 billion initial public offering in 2019.

Lead investor Boston Retirement System, which said it lost $230,000 in the months following the May 2019 IPO, informed a California district court Friday that the ride-hailing giant had agreed to settle the case.

Most of the $200 million will be paid out to those who purchased Uber shares within 6 months of the company becoming public, though class counsel Labaton Keller Sucharow LLP told the court that it anticipated requesting $58 million in attorney fees and $3.2 million in expenses for its work on the case.

"A fee request of no more than 29%, which is slightly above the Ninth Circuit benchmark, is warranted here in light of the tremendous result," the firm said in the settlement papers.

A hearing for preliminary approval is anticipated to take place in the San Francisco courtroom of U.S. District Judge Richard Seeborg on Aug. 29, according to Friday's motion.

"We believe strongly that our IPO materials were both complete and accurate and are pleased to put this matter behind us," an Uber spokesperson said in an email to Law360 on Monday. "The settlement is now subject to court approval."

Attorneys for Labaton Keller did not immediately respond to a request for comment Monday.

The lawsuit was filed in 2019, just months after the technology company went public. Suing investors claimed that Uber's various missteps and misrepresentations led to an **$8.1 billion debut** that amounted to a "train wreck" for investors.

They say Uber deceived shareholders about its stalling growth and hid the potential legal fallout from its alleged misclassification of drivers as independent contractors and passenger safety issues that were reported in the media in the months following the IPO, all of which suing investors say contributed to the company's stock drop.

Uber's stock lost 42% of its value by November 2019, trading at around $25 per share compared to its opening of $45 per share, according to the lawsuit.

The company's stock has since rebounded, and was trading at over $67 per share Monday, according to data kept by the New York Stock Exchange.

Uber was likely to argue at trial that it is now a profitable company with a "drastically improved reputation," potentially harming investors' cause if the case were to move forward, they told Judge Seeborg as they laid out reasons for accepting the $200 million settlement.

Uber hit a number of speed bumps in its attempt to exit the suit without paying, including the **rejection** of its dismissal bid in 2021 and the **certification** of the class a year later.

The class is represented by Jonathan Gardner, Alfred Fatale, Joseph Cotilletta and Beth Khinchuk of Labaton Keller Sucharow LLP.

Uber is represented by Daniel H.R. Laguardia, Paula Howell Anderson and Agnès Dunogué of Allen Overy Shearman Sterling US LLP.

The case is Boston Retirement System v. Uber Technologies Inc. et al., case number 3:19-cv-06361, in the U.S. District Court for the Northern District of California.

--Additional reporting by Linda Chiem. Editing by Kelly Duncan.

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Chancery Ruling Denies Extra New Relic Doc Release Demand

By **Jeff Montgomery**

Law360 (July 22, 2024, 7:22 PM EDT) -- Two shareholders of web analytics firm New Relic Inc. lost a Delaware Court of Chancery bid Monday for additional disclosures regarding the company's $6.5 billion, $87-per-share buyout by private equity firms Francisco Partners and TPG Capital LP, despite a magistrate's finding that the original, general demand was proper.

Magistrate in Chancery Selena Molina ruled that additional materials sought by City of Southfield Fire & Police Retirement System are not "necessary or essential" to its case.

"I find the plaintiffs have failed to justify further intrusion beyond what has already been produced," Magistrate Molina said during a conference call bench ruling.

The decision settled, for now, document demands by City of Southfield Fire & Police Retirement System and Arkansas Teacher Retirement System focused on allegations that New Relic founder Lew Cirne and activist investors were pushing the deal "regardless of whether it was in the best interests of the company and its stockholders."

In her decision, Magistrate Molina said the "challenged documents reflected Cirne's personal financial planning. How he valued a potential rollover may well be interesting to the plaintiffs and provide context but is not necessary" to the books and records investigation and was not contemplated in either pension fund's demand.

The ruling followed a one-day trial on July 10, with the magistrate ruling on Monday that "plaintiffs have sufficient information" from prior document deliveries to address concerns raised.

San Francisco-headquartered New Relic, which was publicly traded on the New York Stock Exchange before it was acquired, provides a cloud-based "observability" platform that allows its customers — which include Adobe, the American Red Cross, TopGolf and World Fuel Services — to view all their data in one place.

Two of the four stockholder groups that sued — Operating Engineers Construction Industry and Miscellaneous Pension Fund and City of Miami Fire Fighters' and Police Officers' Retirement Trust Inc. — sought voluntary dismissal from the case in May.

All four labor groups cited concern that Cirne independently negotiated with activist investor Francisco and TPG to complete the deal.

"Moreover, given the intense activist pressures faced by the company — resulting in those investors placing their own nominees on the board — it appears that such activists pushed (and the board acceded to) a quick sale of New Relic to monetize and move on from their investments, rather than maximize value for public stockholders," the Miami fund's complaint said.

New Relic sought a bad-faith, fee-shifting motion before the one-day trial, accusing the stockholder groups of ignoring a "clear prohibition on endless fishing expeditions" and said the stockholders continued to push "discovery-style requests, nit-pick based on produced documents" and took to trial "three documents that are not even company records."

The stockholder groups also moved to shift their fees to the other side, branding New Relic's fee-shifting itself evidence of bad faith.

Magistrate Molina said after the ruling that she believed all involved acted in good faith and said, "It would take a lot to convince me otherwise."

City of Southfield Fire & Police Retirement System and Arkansas Teacher Retirement System is represented by Christopher H. Lyons, Tayler D. Bolton, Randall J. Baron and David A. Knotts of Robbins Geller Rudman & Dowd LLP.

New Relic Inc. is represented by Colleen C. Smith, Zachary L. Rowen, and Ryan A. Walsh of Latham & Watkins LLP and Blake Rohrbacher, Kevin M. Kidwell and Margaret Rockey of Richards Layton & Finger P.A

The case is In re New Relic Inc. Books and Records Action, case number 2023-1089, in the Court of Chancery of the State of Delaware.

--Editing by Dave Trumbore.

Update: This article has been updated with counsel information for New Relic.

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Merchants Seek Pause Of Visa, MasterCard Swipe-Fee Deal

By **Sydney Price**

Law360 (July 22, 2024, 6:04 PM EDT) -- A group of merchants who use payment company Square's services to accept cards has asked a New York federal judge to pause the settlement of a massive swipe-fee antitrust litigation against Visa and Mastercard while they pursue a Second Circuit appeal of her ruling that they're bound by the deal.

The merchants said in a Friday **brief** that a stay is necessary because they want to try to pursue their claims separately from the settlement class. They're challenging U.S. District Judge Margo Brodie's May 28 order that the group of small businesses is in fact in the settlement class and bound by it. Those plaintiffs, she said, "admit in their declarations that they 'accept' payment cards."

But in the brief, the plaintiffs said a stay is necessary for a smooth claims distribution process.

"Because a distribution here and subsequent reversal of the court's May 28 order would present a problem like unscrambling an egg, each of the factors here favors a pragmatic stay of distribution," the brief said.

The MDL largely concerns the effects of Visa's and Mastercard's card acceptance rules on the various fees charged in every card transaction, like the interchange fee kept by the card-issuing bank and the network fee charged by Visa and Mastercard, according to the suggestion.

First, the appellants said they are likely to succeed on the merits of their appeal since it is "difficult to reconcile" the May 28 decision with a previous ruling in the Second Circuit showing that the term "accepted" as used in the settlement class definition was ambiguous.

The only entities that could fall within the class definition were those deemed to be direct payors of the challenged fees, the court determined in Fikes Wholesale Inc. v. HSBC Bank USA NA last year, according to the appellants' brief.

"The Square Sellers paid no interchange fees to Visa or Mastercard, or to anyone else," the brief said. "Moreover, they are not challenging the service fees they paid to Square."

The appellants also argue that the entire settlement fund will be "thrown into disarray" if the Second Circuit chooses to reverse the order and that other parties in the suit will be injured without the stay.

"The [class] would have lost the aggregate sum distributed to Square Seller claimants who should not have been included in their settlement class," the brief said. "As a practical matter, the Settlement Class never will get that back."

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

Visa and Mastercard have cut two settlements in the sprawling litigation that goes all the way back to 2005 and saw a previous deal thrown out by the Second Circuit in 2016. In March, the credit card companies cut a deal they say will reduce fees by $30 billion over the next several years while eliminating restrictions on steering customers to cheaper payment options.

The pact follows a $5.6 billion monetary settlement in the case upheld last year after changes were made to an earlier agreement.

The Lanning plaintiffs are represented by Wolf Haldenstein Adler Freeman & Herz LLP, Pearson Warshaw LLP, Markun Zusman Compton LLP, Kiesel Law LLP and Song PC.

Visa Inc. is represented by Arnold & Porter Kaye Scholer LLP and Holwell Shuster & Goldberg LLP.

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

The case is In re: Payment Card Interchange Fee and Merchant Discount Antitrust Litigation, case number 1:05-md-01720, in the U.S. District Court for the Eastern District of New York.

--Editing by Rich Mills.

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IDT, Founder Say Straight Path Suit Fizzle Warrants No Fee

By **Jeff Montgomery**

Law360 (July 22, 2024, 7:50 PM EDT) -- Pointing to a Chancery Court finding of no damages after seven years of class litigation over a nearly $1.2 billion alleged liability, attorneys for IDT Corp. founder Howard Jonas on Monday urged a Delaware vice chancellor to reject a class attorney bid for a $9.5 million fee award.

During a hearing, Rudolf Koch of Richards Layton & Finger PA, counsel to Jonas, told Vice Chancellor Sam Glasscock III that it would be "particularly inequitable to award the fee" — a third of the plaintiffs' case costs – and "reward counsel where they grossly mispriced their case and did not recover anything" for the trust that held Jonas' Straight Path stock and other shareholders.

The suit, filed in July 2017, had narrowed to a focus on Jonas, the controlling stockholder, and his alleged role in shutting down efforts by a special committee of the Straight Path board to retain rights to sue him to recover losses resulting from Federal Communications Commission sanctions and wireless license forfeitures levied against Straight Path while still controlled by IDT.

Jonas, who controlled both companies at the time, was accused of coercing and threatening Straight Path's independent directors into accepting a $10 million settlement of claims against him ahead of Straight Path's $3.1 billion merger with Verizon Communications in 2018.

The case went to a split, 10-day trial before Vice Chancellor Glasscock, ending with a ruling that stockholders suffered "only nominal damages" while Straight Path worked through a Verizon deal far more valuable than the full damage claim.

The chancellor found in an 83-page posttrial decision in October 2023 that "Howard Jonas drove an unfair transaction in breach of fiduciary duty, but that no damages flowed therefrom."

Koch argued on Monday that, under the circumstances, class attorneys still seeking a fee have to prove that Jonas knowingly acted in bad faith, "which is a higher, more-stringent standard than your honor applied at trial of subjective bad faith, and the bad faith must be particularly egregious."

Edward G. Timlin of Bernstein Litowitz Berger & Grossmann LLP, representing the shareholders, argued that "equitable" fee shifting is appropriate for the case, based in part on an exception to American litigation practices obliging each party to bear their own fees except in cases of "totally unjustified conduct."

The court, Timlin said, found that Jonas "engaged in flagrant process violations leading to a flagrant breach of fiduciary duty."

Jonas, among other accounts, was said to have "made clear to [Straight Path] special committee members that he'd dissolve" a key trust so he could remove directors" and "gave every indication he would torpedo the otherwise favorable deal unless they acceded to his desires," the attorney said.

"Without any fee award, Mr. Jonas will suffer no tangible consequences for flagrant breaches" of fiduciary duty, Timlin said during the hearing. "It's important for some deterrence for Jonas and Delaware fiduciaries. He clearly does not appreciate the gravity of the findings against him and is acting as if he won the trial."

Koch said that stockholder attorneys tried in a reply brief "to sidestep the fact that Howard was not found to have acted in subjective bad faith," arguing that clear evidence of bad subjective faith is required

"Howard may have been found to have pressured the special committee and created an unfair process," Koch told the vice chancellor, but "that does not mean he didn't think what he was doing was in the best interests of Straight Path and its stockholders, and the results were phenomenal."

Straight Path's license holdings were described as a "golden goose" at times during the litigation, but the assets were tarnished by an FCC enforcement action relating to license rule violations that were settled only after an agreement that the FCC would get 20% of the sale proceeds, along with other penalties.

Although the sale proceeds more than covered the federal sanctions, IDT and Jonas remained under the shadow of a prior commitment to indemnify Straight Path for FCC sanctions issued in connection with licensee "substantial service obligations."

Timlin said that, although stockholder attorneys once aimed for a fee in the hundreds of millions, their litigation aims settled downward to "expectation" damages of $50 million to $60 million. Other similar cases have settled in a range supporting a $9.5 million fee based on that amount.

"They appear to concede that $50 million to $60 million was a reasonable expectation pretrial," Timlin said. "If they had that perspective pretrial, this case would have settled years ago."

Koch argued that the stockholders counsel sought in a brief "to sidestep the fact that Howard was not found to have acted in subjective bad faith" after trial.

"Howard may have been found to have pressured the special committee and created an unfair process," Koch told the vice chancellor," but "that does not mean he didn't think what he was doing was in the best interests of Straight Path and its stockholders, and the results were phenomenal."

The FCC began investigating allegations that Straight Path's spectrum licenses had been renewed based on fraudulent reporting to the government in 2016. The inquiry resulted in a consent decree imposing a penalty on the company that required it to forfeit 20% of its licenses and sell the rest. The penalty also included a fine equal to 20% of the consideration Straight Path received in the sale.

Litigation in Delaware has been tangled at times in disputes over conduct of stockholder class representatives, including allegations of trading on inside information.

The shareholders are represented by Ned Weinberger and Mark Richardson of Labaton Keller Sucharow LLP, and Jeroen van Kwawegen, Edward G. Timlin and Eric Riedel of Bernstein Litowitz Berger & Grossmann LLP.

IDT, Jonas and the Patrick Henry Trust, which benefits Jonas and held his Straight Path stock, are represented by Jason Cyrulnik, Paul Fattaruso and Matthew Henken of Cyrulnik Fattaruso LLP, and Rudolf Koch, Kevin M. Gallagher, Daniel E. Kaprow and John M. O'Toole of Richards Layton & Finger PA.

The case is In re: Straight Path Communications Inc. Consolidated Stockholder Litigation, case number 2017-0486, in the Court of Chancery of the State of Delaware.

--Additional reporting by Leslie Pappas, Rose Krebs and Vince Sullivan. Editing by Melissa Treolo.

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Beauty Co. Misled Investors Ahead Of Its $424M IPO, Suit Says

By **Katryna Perera**

Law360 (July 22, 2024, 8:50 PM EDT) -- Israeli beauty and wellness products company Oddity Tech Ltd. has been hit with a potential class action in New York federal court by an investor who alleges that the company overstated its artificial intelligence technology capabilities before its $424 million initial public offering last year.

Plaintiff Brian Hoare **filed a complaint** Friday against Oddity, its CEO Oran Holtzman, its Chief Financial Officer Lindsay Drucker Mann and several members of its board of directors. The suit is on behalf of a proposed class of individuals and entities that purchased or acquired Oddity securities between July 19, 2023, and May 20, 2024.

According to the complaint, Oddity describes itself as a "consumer tech platform that is built to transform the global beauty and wellness market."

"The company purports to serve customers worldwide through its artificial intelligence-driven online platform, using data science, machine learning, and computer vision capabilities to identify consumer needs, as well as develop solutions in the form of beauty and wellness products," the complaint says.

Last July, Oddity **raised $424 million** in its IPO by offering 12.1 million shares at $35 apiece. Hoare says, however, that the defendants made several false and misleading statements to investors in the lead-up to the IPO.

"Leading up to and following Oddity's IPO, defendants widely portrayed the company as a disruptor in the cosmetics industry. In particular, defendants differentiated Oddity from traditional brick-and-mortar retailers by asserting that the company used proprietary AI technologies to target consumer needs," the complaint says.

"With investors and analysts increasingly attentive to the potential benefits and competitive advantages of AI-powered technologies, Oddity's purportedly differentiated approach to the cosmetics industry garnered praise and attention," the complaint says.

Hoare says the defendants also failed to disclose that Oddity's repeat purchase rates and revenues were partially derived from unsustainable and deceptive sales and advertising practices and that the company downplayed the true scope and severity of ongoing civil litigation against it and its subsidiaries.

The truth began to emerge in May when short-seller Ningi Research published a report claiming Oddity had misled investors about several areas of the business.

"In particular, the Ningi report alleged that Ningi 'talked to former employees who told [Ningi] that the [company's] AI is nothing but a questionnaire'; that Oddity's lauded 'repeat purchase rates' are attributable to 'customers unknowingly enter[ing] into non-cancelable plans' that allow the company 'to recognize repeat purchases in the following quarters even though the customers don't want the product'; and that Ningi had 'found hundreds of undisclosed lawsuits filed against Oddity and its subsidiaries in the U.S. and Israel, frequently alleging unpaid bills and violations of consumer protection laws,' including multiple class action lawsuits filed within the past several years," the complaint says.

Specifically, Hoare says the Ningi report found that Oddity allegedly "traps" customers into yearslong, unwanted, noncancelable and nonrefundable product plans that have resulted in more than 1,400 complaints published by consumers on the Better Business Bureau website within the last three years.

The report also said the individual defendants were engaged in a pump-and-dump stock scheme in the lead-up to and throughout the IPO.

On that news, Hoare says, Oddity's stock fell $3.02 per share, or 7.37%, to close at $37.97 per share on May 21. The share price then continued to decline by an additional $1.30 per share, or 3.42%, over the following two consecutive trading sessions, to close at $36.67 per share on May 23, according to the complaint.

The suit seeks damages, attorney fees and a jury trial.

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

Hoare is represented by Jeremy A. Lieberman, J. Alexander Hood II and James M. LoPiano of Pomerantz LLP and Corey D. Holzer of Holzer & Holzer LLC.

Counsel information for Oddity and the individual defendants was not immediately available Monday.

The case is Hoare v. Oddity Tech Ltd. et al., case number 1:24-cv-05037, in the U.S. District Court for the Eastern District of New York.

--Additional reporting by Jade Martinez-Pogue. Editing by Stephen Berg.

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Plantronics Investors Ink $29.5M 'Channel Stuffing' Sales Deal

By **Lauren Berg**

Law360 (July 22, 2024, 8:40 PM EDT) -- Plantronics investors have asked a California federal judge to greenlight a $29.5 million settlement resolving their claims the company used unsustainable "channel stuffing" sales practices to deceptively boost revenues, which led to a drop in stock price when the tactic failed and was revealed to investors.

The investors, led by Ilya Trubnikov and Roofers' Pension Fund, told the court the multimillion-dollar deal comes after more than four years of litigation and two formal mediation sessions, and it represents a "meaningful percentage of damages" that could have been recovered had the case gone to trial, according to the **motion for preliminary approval** filed Friday.

Had they prevailed at trial, the investors said, they could have recovered maximum damages of $248 million, but considering the risk of winning less or no damages at all, the negotiated **$29.5 million amount** is an "excellent result." What's more, if the court had shortened the class period as Plantronics wanted, the maximum recovery would have been $112.9 million, the motion states.

"Lead plaintiffs reached the agreement to settle only after conducting extensive litigation, which included a thorough investigation of the claims and preparation of multiple, detailed pleadings, full briefing of two rounds of motions to dismiss … substantial document and deposition discovery, and full briefing of lead plaintiffs' class certification motion," the investors said.

"Lead plaintiffs and lead counsel had ample information to ascertain the strengths and risks of the claims asserted in the action and for their conclusion that the $29.5 million settlement is fair and reasonable," they added.

The investors first sued Plantronics and its top brass in November 2019 over the electronics company's disclosure of a $65 million reduction in sales to channel partners — which sell Plantronics-designed phones and headsets, videoconferencing and analytics software, and other products — and slashed its fiscal 2020 guidance, with expected revenue between $1.7 billion and $1.8 billion.

When that news broke, the investors said Plantronics' stock price fell $14.44 per share, or nearly 37%, to close at $25 per share on Nov. 6, 2019.

According to their **operative complaint**, filed in April, the trouble began in March 2018, when Plantronics announced its **$2 billion acquisition** of Polycom, a privately held videoconferencing provider. But the deal came at a significant price for Plantronics, which funded the $948 million cash portion of the transaction with cash on hand and took on nearly $1.4 billion in new debt financing, "leaving the company highly leveraged," the investors said.

But Plantronics claimed the merging of the companies' sales forces and channel partners would lead to $75 million in cost synergies within a year, according to the redacted suit.

Investors said the market believed the company, and its stock price jumped 35% when the deal closed in July 2018.

The company continued to tout its success and revenue growth as a result of the acquisition, but in reality, the results were the byproduct of an undisclosed change in sales practices that increased inventory in Plantronics' channel partners, the suit states.

"The result was a deceptively achieved boost in revenue and that enabled the company to meet guidance at quarter-end by stealing sales from the next quarter, a practice commonly referred to throughout the company as unsustainable sales practices, 'channel stuffing' or 'hockey stick' sales," the investors said.

The class period begins Aug. 8, 2018, the day after Plantronics reported its first quarter fiscal year 2019 results for the period ending June 30, 2018, according to the complaint.

The investors said Plantronics emphasized its net revenues of $221.3 million on the company's legacy products alone, which was an increase of 8.5.% year-over-year and above its guidance range of $205 million to $215 million. But the company didn't disclose that those revenues were achieved through an "undisclosed sales practice that had the impact of covertly borrowing future earnings in order to increase the current period earnings," the suit states.

"While this practice secretly allowed Plantronics to meet, and even beat, its revenue and earnings guidance throughout the class period, it was a changed sales practice defendants learned posed a material risk to the company and obfuscated the market's underlying assumptions of the reported financial results and reported growth trends allegedly accomplished each quarter as Plantronics increased normal channel inventory from weeks to months," the investors said.

Just a year after the Polycom acquisition, Plantronics disclosed that its revenues were actually decreasing and that its inventory in the channel had to be cleared, according to the suit. By the end of the class period, on Nov. 5, 2019, Plantronics was forced to reveal quarterly losses of $25.9 million, the complaint states.

All in all, the investors said Plantronics' stock lost more than $1.8 billion in shareholder value during the class period, down about 65% from their class period high.

The investors, who estimated that the class numbers in the thousands, sought damages, attorney fees and litigation costs.

In June, the parties informed the court they had reached an agreement in principle, leading the court to vacate discovery and motion deadlines, as well as the trial date of Aug. 18, 2025, according to court records.

In their motion Friday, the investors said the $29.5 million settlement is a "favorable result" in light of the risks of continuing the long-running litigation, noting that the parties would still have to go through the summary judgment and trial processes.

The investors' lead counsel from Hagens Berman Sobol Shapiro LLP and Bernstein Litowitz Berger & Grossmann LLP intend to seek 22%, or $6.5 million, of the settlement fund, and no more than $750,000 in litigation expenses, according to the motion.

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

The settlement class is represented by Steve W. Berman, Sean R. Matt, Reed R. Kathrein and Lucas E. Gilmore of Hagens Berman Sobol Shapiro LLP, and John Rizio-Hamilton, William E. Freeland, Alexander M. Noble and Jonathan D. Uslaner of Bernstein Litowitz Berger & Grossmann LLP.

Plantronics is represented by Susan S. Muck, Kevin P. Muck, Jessica L. Lewis, Noah S. Guiney, Peter J. Kolovos and Sonia Sujanani of WilmerHale.

The case is In re: Plantronics Inc. Securities Litigation, case number 4:19-cv-07481, in the U.S. District Court for the Northern District of California.

--Editing by Lakshna Mehta.

Correction: An earlier version of this story misidentified the colloquial name of the alleged improper sales practice. The error has been corrected.

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Allarity Warns Of SEC Suit Over Cancer Drug Statements

By **Jessica Corso**

Law360 (July 22, 2024, 8:07 PM EDT) -- Clinical stage pharmaceutical company Allarity Therapeutics informed investors Monday that the U.S. Securities and Exchange Commission is preparing to sue following an investigation into statements the company made as it sought approval for a new cancer treatment.

Allarity said that it received a Wells notice from the SEC on July 18 informing it that agency staff will recommend that the commission file an enforcement action against the company.

The company didn't detail the potential claims against it, but said that the SEC's allegations are tied to disclosures Allarity made about its meetings with the U.S. Food and Drug Administration in 2021 after it filed a new drug application for Dovitinib or Dovitinib-DRP, which it has described in prior statements as a third-line treatment of renal cell carcinoma.

The company said Monday that it understands that three of its former officers have also received Wells notices from agency staff.

Allarity had previously disclosed that it was under SEC investigation, but its Monday announcement was the first time it informed investors that it had received word that the agency was planning to sue.

"The company is continuing to cooperate with the SEC and maintains that its actions were appropriate and intends to pursue the Wells notice process, including submitting a formal response to the SEC," Allarity told investors.

--Editing by Emily Kokoll.

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Morgan & Morgan Unit Faces Malpractice Class Claims

By **Jake Maher**

Law360 (July 22, 2024, 4:18 PM EDT) -- Personal injury giant Morgan & Morgan PA's Jacksonville, Florida, unit allegedly misled a Georgia deputy sheriff in his back injury case, costing him potentially hundreds of thousands of dollars, according to a proposed class action the firm has removed to federal court.

Brandon Walker of the McIntosh County Sheriff's Office accused the firm and one of its attorneys, Brad Milkwick, of giving him bad advice that cost him the chance to file a workers' compensation claim. He also made claims on behalf of a proposed class of former clients that the firm operated in Georgia without the proper registration until April 2023.

Walker originally sued in state court in Glynn County in June. Morgan & Morgan **removed** the case to the U.S. District Court for the Southern District of Georgia on Friday.

Walker **alleged** in his suit that he was rear-ended while in his sheriff's deputy cruiser in June 2022 by a driver going over 100 mph and suffered back injuries for which he needed to be airlifted for emergency treatment.

Walker contacted Morgan & Morgan's Jacksonville branch for representation, but he has alleged that the firm's work for him fell far short of the standard of care.

Milkwick, a Savannah attorney who was assigned Walker's case, spent less than five minutes on the phone talking to Walker, Walker alleged, and gave him false information, telling him that he would have to quit his sheriff's department job if wanted to make a workers' compensation claim.

Walker told the court that, based on the false advice he was given, he chose not to pursue a workers' compensation claim, and that the financial consequences could be severe. He has already had to pay back over $17,000 in medical care costs to his regular insurance carrier and is facing back surgery that his insurance will not cover, Walker alleged. He claimed that he may have to retire from police work as a result of his injuries, which will leave him with no insurance at all.

Walker claimed that Morgan & Morgan did not look into whether the other driver had any assets in addition to his insurance policy, which only paid out $25,000, and did not look into his driving record, which allegedly would have revealed that the other driver was a severe diabetic and had been in a single-car accident weeks earlier caused by diabetes medication complications.

He also alleged that it is too late to change course now, as Morgan & Morgan and Milkwick did not tell him that there is a one-year statute of limitations to file a workers' compensation claim.

On behalf of the proposed class, Walker also alleged that Morgan & Morgan violated Georgia law by practicing law in the state without being registered and collected fees from its clients for those legal services. Walker's proposed class consists of all clients of the firm who it did work for in Georgia before April 2023, when it was officially registered in the state.

A representative for Morgan & Morgan told Law360 Pulse in an email Monday that, "this case is meritless and we intend to provide a vigorous defense."

Counsel for Walker did not respond to requests for comment on Monday.

Walker is represented by Brent J. Savage, James H. Wilson III and Matthew R. Bradley of Savage

Turner Pinckney Savage & Sprouse, Nathan T. Williams and Paul A. Schofield of Williams Litigation Group and Mark A. Tate and Andrew Zemany of Tate Law Group.

Morgan & Morgan is represented by Justin P. Gunter, William J. Holley and Rachel Bramblett of Bradley Arant Boult Cummings LLP.

The case is Walker et al. v. Morgan & Morgan Jacksonville PLLC et al., case number 2:24-cv-00088, in the U.S. District Court for the Southern District of Georgia.

--Editing by Rich Mills.

Update: This story has been updated to include comment from counsel for Morgan & Morgan and updated counsel information.
