

US law firm avoids immediate sanctions over fake claims in Visa and Mastercard settlement

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Angelica Dino

The judge reserved the right to issue sanctions if deemed necessary after further investigation

US Magistrate Judge Joseph Marutollo decided not to impose immediate sanctions on the plaintiffs' law firm Milberg Coleman Bryson Phillips Grossman in connection with fake claims submitted as part of a US\$ 5.6 billion antitrust settlement involving Visa and Mastercard.

Reuters reported that the judge's decision came after the firm agreed to pay US\$ 25,000 to cover the additional work required by the claims administrator due to the false submissions.

Judge Marutollo emphasized the importance of maintaining the integrity of the claims process, stating, "The integrity of the claims process in this matter remains essential. Indeed, throughout this litigation, efforts have been made to proactively protect class members from deception."

The settlement agreed upon in 2018, aimed to resolve claims from over 12 million merchants who alleged they had overpaid credit and debit card fees. Visa and Mastercard, however, denied any wrongdoing.

Milberg, which was not involved in crafting the settlement but was seeking a portion of the fund for a group of class members, found itself in hot water after submitting dozens of "proofs of authorization" that were later found to be fraudulent. According to attorneys representing the class, some submissions purportedly came from well-known multinational companies, yet even a cursory review revealed them to be false.

In their defense, Milberg argued that they had not acted in bad faith and requested the court refrain from imposing sanctions. The firm admitted that it "could have done a better job of screening the would-be clients' information—and will do so in the future."

Class attorneys from Robbins Geller Rudman & Dowd and Robins Kaplan had urged the Brooklyn court to consider sanctions against Milberg. According to court records, they highlighted that Milberg had submitted more than 115 fake client papers to claims administrator Epiq.

Milberg attributed the fraudulent submissions to a third-party referral source and expressed its willingness to cooperate with any US Justice Department investigation. The firm also noted in a recent filing that other parties had submitted fraudulent material in the case,

although it did not provide specific details.

Judge Marutollo stated he "reserves the right to issue sanctions should it be deemed necessary following further investigation." This leaves the door open for potential future penalties depending on the outcome of ongoing inquiries.

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July 23, 2024, 12:52 PM PDT

Humana Board Sued Over Projections of Post-Covid Insurance Use

By Martina Barash

- **COURT:** W.D. Ky.
- **TRACK DOCKET:** [No. 3:24-cv-00418](#)

Bloomberg Law News 2024-07-24T09:32:18979925727-04:00

Humana Board Sued Over Projections of Post-Covid Insurance Use

By Martina Barash 2024-07-23T15:52:59000-04:00

- **COURT:** W.D. Ky.
- **TRACK DOCKET:** [No. 3:24-cv-00418](#)

Humana Inc.'s directors and two executives are responsible for falsely reassuring investors about trends in health insurance as the US emerged from the Covid-19 pandemic, an investor alleges.

The insurer failed to disclose pent-up demand for medical services, which resulted in higher business costs, according to the derivative suit Monday in the US District Court for the Western District of Kentucky.

A series of jolts to the company's stock price followed reports, starting in June 2023, of higher utilization trends at competitor UnitedHealth Group Inc. and Humana, shareholder Nathan Silva says.



Humana has been harmed by the need to defend itself against a proposed investor class action filed in June of this year, its exposure to massive class-wide liability, and the costs of internal investigations and new financial controls, he says. It also overcompensated the individual defendants, he says on behalf of the company. CEO Bruce Broussard, who allegedly received more than \$16 million in compensation in 2023, is among the defendants.

The suit is among a number that deal with the effects of the Covid pandemic and its aftermath. Some have targeted vaccine and drug company statements and business tactics as the pandemic developed and eventually eased. Others focus on how companies in other industries weathered changes wrought by the pandemic.

Silva brings claims for securities fraud, breach of fiduciary duty, unjust enrichment, and waste of corporate assets. He seeks corporate governance reforms and compensatory and punitive damages.

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

W. Edward Skees, who practices in New Albany, Ind.; Rigrodsky Law PA; and Grabar Law Office represent Silva.

The case is Silva v. Broussard , W.D. Ky., No. 3:24-cv-00418, complaint 7/22/24 .

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AST SpaceMobile Leaders Misled About Satellites, Investor Says

By Martina Barash

- **COURT:** W.D. Tex.
- **TRACK DOCKET:** [No. 7:24-cv-00171](#)

Bloomberg Law News 2024-07-24T09:33:32670273069-04:00

AST SpaceMobile Leaders Misled About Satellites, Investor Says

By Martina Barash 2024-07-23T17:29:36000-04:00

- **COURT:** W.D. Tex.
- **TRACK DOCKET:** [No. 7:24-cv-00171](#)

AST SpaceMobile Inc.'s board and two executives misrepresented the production stage of the broadband company's test satellite both before and after its merger with a blank-check company, an investor says in a suit filed Tuesday.

Before the April 2021 merger with a special purpose acquisition company, AST "was a business vulnerable to severe challenges with its production, manufacturing, and profitability," shareholder Laurie Hanna says in a suit on behalf of the company. Indeed, its satellites "were not ready to be tested and launched," contrary to the leadership's representations, she says in her complaint, filed in the US District Court for the Western District of Texas.

AST continued to make optimistic statements about production and launch dates, but it ultimately "was unable to launch any satellite within the timeframes repeatedly represented to investors" because of supplier delays, Hanna says.

AST has been sued in proposed class actions in federal and Delaware state court, and is likely to spend millions of dollars on the litigation, internal investigations, and governance reforms, she says.

The suit is among many faced by companies formed through such de-SPAC, or blank-check, mergers. Numerous companies that went public through that method have faltered following the deals' peak in 2020 and 2021, sending investors to the courts.

Hanna brings claims for proxy misstatements, breach of fiduciary duties, unjust enrichment, abuse of control, gross mismanagement, waste of corporate assets, and contribution. She seeks damages, restitution, and internal governance reforms, including a provision allowing a vote on shareholder nominations for the board.

AST didn't immediately respond to an email requesting comment.

The Brown Law Firm PC represents Hanna.

The case is Hanna v. Avellan , W.D. Tex., No. 7:24-cv-00171, complaint 7/23/24 .

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US Judge Rejects Securities Class Action Against Cannabis Products Maker

Plaintiffs' theories of scienter were backed by vague and speculative claims, U.S. District Judge Paul A. Engelmayer said.

July 24, 2024 at 12:34 PM

Securities Litigation



Ellen Bardash



Securities fraud claims against a Canadian manufacturer of cannabis-related products have been dismissed in the U.S. District Court for the Southern District of New York.

Skadden, Arps, Slate, Meagher & Flom represented Canopy Growth Corp. in the case.

U.S. District Judge Paul A. Engelmayer on July 17 dismissed all claims against Canopy and three of its officers with prejudice, ruling that shareholders hadn't shown management had reason to mislead them about the performance of sports drink subsidiary BioSteel.

"None of the FAC's theories of scienter offer any basis for inferring knowledge—conscious behavior or recklessness—on the part of the individual defendants," Engelmayer wrote, referencing the plaintiffs' first amended complaint. "And the FAC does not plead any particularized facts supporting defendants' motive and opportunity to commit the fraud."

Canopy, which produces cannabis- and hemp-derived products, acquired a stake in BioSteel, also a Canadian brand, in 2019 and increased that stake to 90% in 2022.

Three shareholders filed separate securities complaints between May and July 2023. Engelmayer consolidated the three cases in November and appointed Pomerantz as lead plaintiffs' counsel. The plaintiffs claimed Canopy oversold BioSteel's performance and concealed distribution and excess inventory issues between November 2021 and June 2023.

In its motion to dismiss, Canopy conceded that some of the statements cited by the plaintiffs as being misleading could be actionable, but argued that the shareholders did not adequately plead scienter to warrant dismissal.

Among the reasons for siding with Canopy, Engelmayer wrote, was the confidential witnesses cited in the complaint were generally not high-level employees who would have had the accounting knowledge needed to substantiate allegations about BioSteel's revenue, and several claimed to have knowledge of departments or distribution areas they didn't work in directly.

Engelmayer wrote that the shareholders hadn’t shown the court that the defendant executives knew information that contradicted their public statements, with a lack of explanation on how the confidential witnesses obtained their information and whether they raised concerns with management. He also wrote that the information the witnesses said they relayed to executives was too vague to support an inference of scienter.

“The FAC instead invites the court to speculate that something must have been said, at an unspecified time within the class period, that put the individual defendants on notice that their statements were false,” Engelmayer stated.

Attorneys involved in the case did not immediately respond for comment.

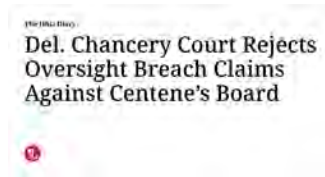
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Del. Chancery Court Rejects Oversight Breach Claims Against Centene's Board

K [dandodiary.com/2024/07/articles/director-and-officer-liability/del-chancery-court-rejects-oversight-breach-claims-against-centenes-board](https://www.dandodiary.com/2024/07/articles/director-and-officer-liability/del-chancery-court-rejects-oversight-breach-claims-against-centenes-board)

July 23, 2024



By Kevin LaCroix on July 23, 2024
Posted in Director and Officer Liability



For many years, Delaware's courts emphasized that duty of oversight claims (often known as *Caremark* claims) are "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." However, in a line of cases beginning with the Delaware Supreme Court's 2019 decision in *Marchand v. Barnhill*, Delaware courts have sustained various plaintiffs' assertion of breaches of the duty of oversight. This in turn encouraged more claimants to file duty of oversight claims, a development that clearly has alarmed the Delaware courts. The more recent result has been a series of cases in which the Delaware Chancery Court has emphatically shot down would-be duty of oversight claims.

The latest of these decisions is a ruling in a case involving the directors of Centene Corporation, in which Vice Chancellor Morgan Zurn granted the defendants' motion to dismiss the plaintiff's breach of the duty of oversight claims against the Centene board, in an opinion that emphasizes the high bar for *Caremark* liability. A copy of the July 12, 2024, opinion in *Bricklayers Pension Fund of Western Pennsylvania v. Brinkley* can be found [here](#). A July 15, 2024, Memo from the Fried Frank law firm about the court's ruling can be found [here](#).

Background

Centene is a healthcare company that administers Medicaid plans. In the time period before the events that were involved in the subsequent D&O litigation, Centene faced regulatory scrutiny for its Medicaid pricing practices, as result of which Centene's board was kept apprised of the company's efforts in connection with its pricing practices.

In 2016, according to later allegations, certain executives at Centene allegedly entered into a scheme to increase their incentive-based compensation through inaccurate cost reports that resulted in increased cost reimbursements to Centene. These efforts ultimately resulted in regulatory investigations of the company's pharmacy benefit management operations. The board learned of the alleged scheme when the Ohio attorney general filed a complaint against Centene for legal violations. Several other states also filed regulatory enforcement actions against Centene. These various enforcement actions ultimately resulted in settlements totaling hundreds of millions of dollars.

A plaintiff shareholder filed a derivative action against Centene's board seeking to hold the directors liable for the loss, based on the directors' alleged failure to exercise adequate oversight. The directors filed a motion to dismiss, arguing that the plaintiff's oversight duty claimed belonged to the board itself, and that the plaintiff had not made the requisite demand on the board to pursue the claim. While the plaintiff claimed that any such demand would be futile, the defendants argued that the plaintiff had filed to establish that a majority of Centene's current directors faced a substantial likelihood of liability.

The July 12, 2024, Opinion

In a detailed July 12, 2024, opinion, Vice Chancellor Zurn granted the defendants' motion to dismiss, holding that the plaintiff had "fallen short of demonstrating a majority of Centene's current directors face a substantial likelihood of liability, either in the maintenance of the Board's reporting systems, or in failing to respond to the alleged notice of the wrongdoing."

In reaching these conclusions, VC Zurn specifically found that the Centene board did not breach its oversight duties even though it had deferred to management to deal with the company's ongoing compliance problems. While reliance on management alone to address compliance risks is insufficient to address board-level oversight duties, the extent to which reliance on management may be sufficient depends on the context. Here, VC Zurn inferred that the Board knew what steps management was taking to address the compliance problems; the overall context was not so "extreme" that the Board was unreasonable in accepting management's assurances that the problems "were being handled."

In reaching this conclusion, VC Zurn observed that the company had information systems in place, including with respect to Medicaid compliance issues, and the company had several committees responsible for overseeing Medicaid compliance; the record, VC Zurn found, showed that the committees "did real work and reported to the full Board."

VC Zurn also rejected the plaintiff's assertion that the board ignored "red flags" of compliance problems. The plaintiff had argued that the board had disregarded "red flags" signifying "imminent corporate trauma," contending that the board willfully ignored the information and consciously decided not to act. VC Zurn was willing to "assume that adding

knowledge of a known faulty compliance system to knowledge of investigations, a subpoena and regulatory scrutiny would put the Board on notice that Centene was headed for a major corporate trauma,” but, the court emphasized, even so the plaintiff had not supported “the essential conclusion that the board ignored that information in bad faith.”

In discussing these issues, VC Zurn emphasized the high bar for finding the required element of bad faith. Here, the board accepted management’s statements that the compliance risks “were being handled,” and the board “did not make a conscious decision to violate the law.” VC Zurn found that no facts were alleged that supported an inference that the board failed to respond in bad faith. VC Zurn emphasized that the fact that illegal behavior took place at the company does not mean that a company’s internal controls must have been faulty, nor does it mean that a board must have known it. VC Zurn observed that “A bad outcome, without more, does not equate to bad faith.”

In addition, VC Zurn declined to infer from the absence of discussion in board minutes of compliance-related issues that there had been no such discussion. VC Zurn accepted that the alleged facts supported an inference that management had reported compliance problems to the board, notwithstanding the absence of the discussion of these issues in the minutes.

Discussion

As I noted at the outset, this ruling in the *Centene* case is the latest in a recent series of decisions in which the Delaware courts have granted defendants’ motions to dismiss in *Caremark* cases. For example, as discussed here, last December, Vice Chancellor Lori Will granted the defendants’ motion to dismiss in the *Segway* case. Similarly, in February, and as discussed here, VC Will granted the defendants’ motion to dismiss in the *Walgreens Boots Alliance* case. These two cases and the ruling in this case are similar in that in each case the court emphasized the high bar to establish liability in *Caremark* cases.

It is noteworthy, and relevant to the discussion of the outcome in the *Centene* case, that the court in both the *Segway* case and the *Walgreens* case communicated alarm at the seeming proliferation of *Caremark* cases since the Supreme Court’s decision in *Marchand v. Barnhill*. Both in those two earlier cases, and again in this case, the courts seemed committed to underscoring how difficult it is for claimants to sustain *Caremark* claims.

I was struck in reading VC Zurn’s opinion in the *Centene* case of the extent to which she seemed comfortable affirming that the company’s directors had not breached their duties of oversight notwithstanding the plaintiff’s allegations of the board’s reliance on the assurances of management. To be sure, VC Zurn did specifically find that the overall context was not so “extreme” that the board was unreasonable in relying on management’s assurances.

The law firm memo to which I linked above, in discussing this aspect of the court's decision, emphasized that "the clearer and more extreme the noncompliance, and the more significant the potential harms, the more the board should be involved." The memo also noted with respect to management reporting that "management should not only inform the board of significant compliance risks and problems but should specify any potential noncompliance by the company and should specify the steps management is taking to address the issues."

I also think it should be emphasized that while VC Zurn did not find the absence of discussion of compliance issues in the board minutes to be preclusive of the issue, the better practice would be for companies and their boards to take active steps to ensure that board minutes reflect board consideration of all key identified risk issues.

One final thought about this significance of the *Centene* decision, especially in the context of the earlier decisions in the *Segway* and *Walgreens* cases. There has been a great deal of speculation amongst various commentators and observers that oversight duty breach cases could emerge from various kinds of current litigation risk exposures, such as, for example, with respect to cybersecurity, ESG, and AI. The courts opinions in these three cases seem to be intended to communicate to would-be oversight duty breach claimants "Not so fast."

Silver Lake's \$12.5 Billion Qualtrics Deal Lawsuit Dismissed

By Jennifer Kay

- Lawsuit challenged acceptance of lower bid for Qualtrics
- Investors argued transaction had been 'rife with conflicts'

Bloomberg Law News 2024-07-24T09:33:06863416907-04:00

Silver Lake's \$12.5 Billion Qualtrics Deal Lawsuit Dismissed

By Jennifer Kay 2024-07-23T17:12:45000-04:00

- Lawsuit challenged acceptance of lower bid for Qualtrics
- Investors argued transaction had been 'rife with conflicts'

A Delaware judge has dismissed a shareholder challenge to Qualtrics International Inc.'s \$12.5 billion private equity sale by German software giant SAP SE to affiliates of Silver Lake Group LLC.

The Qualtrics deal closed in June 2023; Silver Lake wasn't named as a defendant in the consolidated litigation.

Former investors in the survey software company challenged the decision to accept Silver Lake's bid instead of a higher bid from fellow private equity firm Thoma Bravo LP, reportedly amid antitrust concerns about Thoma Bravo.

Though the investors painted a picture of "animosity" between SAP and Thoma Bravo, the rest of the transaction appears to have been "a good process," said Vice Chancellor J. Travis Laster in a bench ruling dismissing the investors' lawsuit.

"The only bad fact is taking the lower Silver Lake bid than the Thoma Bravo bid," he said.

An award of monetary damages to hold the board and controller liable for the decision to go with Silver Lake after a trial appeared unlikely at the pleading stage, Laster said.

The investors had argued the case should proceed because the sale process was "rife with conflicts, structural bias, and informational imbalance," according to an answering brief.

SAP SE, SAP America Inc., and other defendants are represented by Morris Nichols, Richards Layton & Finger, Shearman & Sterling, and Goodwin Procter. The investors are represented by Bernstein Litowitz and Block & Leviton.

The case is In re Qualtrics Int'l Inc. S'holders Litig., Del. Ch., No. 2023-1050, bench ruling 7/23/24 .

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

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NEWS

'Collusion' and 'Mudslinging' Fuel Attorney Fight in Oregon Wildfire Case

“The statements made in their reply brief are simply untrue, not based in reality, and defaming in nature,” said George McCoy, a partner at Warren Allen.

July 23, 2024 at 02:56 PM



Amanda Bronstad
staff reporter



What You Need to Know

- Warren Allen, Spreter Petiprin and Swigart Law Group want to represent class members who still haven't received compensation for wildfire damages.
- Lead counsel Edelson, Keller Rohrbach and Stoll Berne claim the competing firms are misrepresenting facts to class members and colluding with PacifiCorp.
- PacifiCorp, which is part of Berkshire Hathaway and owns Pacific Power, called the claims of collusion 'false, preposterous, and desperate.'

Last month’s \$178 million settlement with Pacific Power has sparked accusations of “collusion” and “mudslinging” among plaintiffs lawyers who represent thousands of victims of Oregon’s 2020 wildfires.

Chicago’s Edelson, which is co-lead counsel in the litigation, obtained about \$200 million in verdicts against Pacific Power and its parent company, PacifiCorp, the utility accused of starting the wildfires. However, a group of firms that announced last month’s settlement say they have a right to represent class members who still have not received compensation for wildfire damages.

Edelson’s lead counsel group fired back, insisting that the competing firms, led by Warren Allen in Portland, Oregon, are misrepresenting facts of the litigation to class members and colluding with PacifiCorp, which is part of Berkshire Hathaway, to settle at “paltry” amounts of \$440,000 per person.

“The settlement reflects an approximately zero-dollar valuation for non-economic damages and a modest recovery of economic damages,” they wrote in a July 18 response to the competing firms’ motion to clarify the scope of lead counsel’s representation of class members who want to pursue damages. “Under the circumstances, that is bizarre.”

Add to that, they noted, the competing firms began stuffing mailboxes, calling class members and walking up people's roads to pitch their services in person. Their primary activity has been "hosting free food and drink events at Chinook Winds Casino in Lincoln City, Oregon, to solicit clients."

Warren Allen's George McCoy, who filed the June 13 clarification motion with Spreter Petiprin in Huntington Beach, California, and San Diego-based Swigart Law Group, called the accusations a "mudslinging campaign."

"The statements made in their reply brief are simply untrue, not based in reality, and defaming in nature," he said of lead counsel's response. "The truth is that we have put significant money in the hands of Oregonians who were victims of the 2020 Labor Day wildfires. Our settlement has provided meaningful compensation to allow Oregonians to rebuild and recover from these traumatic events."

In contrast, he added, none of the plaintiffs represented by Edelson's group has been compensated, and their cases will be tied up in litigation and appeals for years.

"It has been almost four years, and there are still Oregonians who are homeless, living in their cars, or on the verge of financial collapse as a result of waiting for resolution," he continued. "We ... seek to provide an alternative pathway to Oregonians that will allow them to recover in a timely manner."

PacifiCorp, in a statement to Law.com, called the claims of collusion "false, preposterous, and desperate."

"These public attacks on successful settlements are plainly motivated by class counsel's desire to persuade their clients to hold out for the possibility of more money, from which they collected a significant fee percentage, often ranging from 30 to 50%," the statement says. "The fact that hundreds of plaintiffs have chosen to settle with PacifiCorp and disagree with class counsel's tactics is not evidence of collusion."

Multnomah County Circuit Court Judge Steffan Alexander has scheduled a Sept. 6 hearing.

'Stepping Over the Line'

It's not the first fight between Edelson and Swigart Law Group.

In a \$92 million settlement with TikTok over privacy violations, Swigart Law Group represented 1,402 class members who wanted to opt out of the deal and pursue individual arbitration. Swigart Law Group later withdrew the request because, according to Edelson, which represented an objector, TikTok agreed to pay them \$1,250 instead of the \$27.19 in the settlement.

The class action against PacifiCorp focuses on destruction over Labor Day weekend in 2020 in Oregon, which is now engulfed in a spate of new wildfires.

Last year, a jury in Portland, Oregon, awarded more than \$72 million to 17 plaintiffs suing for property damages. The verdict also reached a critical liability finding: that PacifiCorp's actions were willful, reckless and grossly negligent. That necessitated a second phase of the trial in which the same jury added nearly \$18 million in punitive damages, then assessed a 0.25 multiplier to class members who had not yet received compensatory damages.

In January, a different jury awarded more than \$62 million to nine survivors of the wildfires.

In March, another jury awarded \$29 million in compensatory damages to nine individuals and a camp for people with disabilities that burned to the ground.

Edelson's lead counsel group, which also includes Seattle's Keller Rohrbach and Portland's Stoll Berne, claims last month's settlement is far less than another wildfire deal PacifiCorp reached in which victims got 50% more.

As for their own negotiations, they met for a May 27 mediation but did not reach a deal.

“One week later, PacifiCorp and the ‘interested parties’ here—a trio of law firms who have conducted essentially zero litigation activity in the last three and a half years—announced, in an extraordinarily unusual joint press release hosted on PacifiCorp’s website, that *they* had purportedly settled more than 400 fire survivors’ cases,” they wrote in their opposition.

They’re asking the judge for discovery to determine how closely PacifiCorp is working with Warren Allen’s group to recruit class members. They note PacifiCorp’s prior conduct of “stepping over the line”—for example, repeatedly contacting jurors in violation of Oregon law.

“These are serious transgressions that reflect a complete (and apparently intentional) disregard for the rules governing juror contact,” Stoll Berne partner Cody Berne wrote in a filing supporting a motion regarding alleged improper conduct with jurors. “The court should reject PacifiCorp’s attempt to escape the rules and avoid scrutiny of its actions.”

After an April 5 hearing, Alexander ordered PacifiCorp to stop all communications with jurors and turn over its interviews under seal.

Lead counsel also claim the Warren Allen group’s advertisements are misleading because they give the impression that they’re part of the legal team litigating the class action.

PacifiCorp, which settled with 403 plaintiffs in last month’s deal, has resolved nearly 2,000 claims from businesses and individuals over the 2020 wildfires.

“These settlements were the result of months of negotiations with a mediator, culminating in meaningful compensation to help those affected by the fires recover, rebuild, and move forward,” PacifiCorp said.

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After controversy, judge in Musk pay case allows Delaware prof to file disputed brief

 [reuters.com/legal/litigation/column-after-controversy-judge-musk-pay-case-allows-delaware-prof-file-disputed-2024-07-23](https://www.reuters.com/legal/litigation/column-after-controversy-judge-musk-pay-case-allows-delaware-prof-file-disputed-2024-07-23)

Alison Frankel

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

July 23 (Reuters) - It cost him a lucrative law firm consulting gig, but a retired Delaware law professor won the right on Monday to argue against Tesla's attempt to bypass a court decision invalidating CEO Elon Musk's \$56 billion pay package.

Charles Elson, a longtime corporate governance expert from the University of Delaware, will be allowed to participate as an amicus, Chancellor Kathaleen McCormick of Delaware Chancery Court ruled , opens new tab. The judge is weighing the impact of Tesla's shareholder vote last month to approve a pay package that the judge invalidated in January.

Elson's newly approved amicus brief , opens new tab refutes Tesla's theory that fully informed shareholders "ratified" Musk's pay when they approved his package in June. The professor contends that Delaware law does not permit the company effectively to overturn McCormick's January ruling by holding a post-judgment shareholder vote.

Tesla, as you may recall, went to unusual lengths to try to block Elson from filing the brief back in May, before its shareholders voted on Musk's pay.

After Elson's lawyer sent Tesla a draft of the brief, the company contacted the law firm Holland & Knight, where Elson was a longtime corporate governance consultant. Holland & Knight represents Tesla in at least two major employment cases. Tesla, according to Holland & Knight, alerted the law firm that Elson's brief created a conflict because its consultant was taking a position contrary to Tesla's.

Holland & Knight, in turn, sent Elson an email that said Tesla had threatened to fire the firm if Elson filed the amicus brief.

Elson opted to resign from his consulting job at Holland & Knight. He and his lawyer, Joel Fleming of Equity Litigation Group, subsequently told McCormick in court filings that Tesla had tried to "bully" Elson into abandoning the amicus brief by improperly pressuring Holland & Knight.

Holland & Knight told me in May that Tesla did not try to pressure the firm but simply alerted partners about a potential conflict. The firm said its email to Elson describing Tesla's threat to fire Holland & Knight was "incorrect" and that it independently determined that Elson's proposed brief "would be inconsistent with our obligations to our client."

Tesla also filed a formal opposition [↗](#), opens new tab to Elson's brief in the Chancery Court docket, denying that it leveraged its client relationship with Holland & Knight to squelch the filing.

More substantively, the company argued that Elson's brief was "premature, unhelpful and improper" because it purported to address the impact of Tesla's shareholder vote before the vote had even taken place.

Tesla insisted that Elson — and not the company — was behaving improperly, accusing him of using the proposed amicus brief to attract media attention. Elson's true motive, Tesla asserted, was "plainly to cast aspersions on Tesla and its board" ahead of the shareholder vote.

In response [↗](#), opens new tab, Elson called Tesla's accusation "bizarre" and "desperate." He said his only intention was to help McCormick grapple with novel questions of Delaware law. In an accompanying affidavit, Elson said it was "unfortunate that Tesla and its counsel have decided to attack me personally rather than engaging on the merits."

In Monday's order, McCormick described Elson as "a leading authority on Delaware law" whose previous amicus brief in the Musk pay case was cited in her January opinion. The judge also refuted Tesla's argument that Elson's brief was premature, pointing out that Tesla had already argued in an April 17 letter to the court that the upcoming shareholder vote was likely to impact the case.

McCormick did not address the Holland & Knight controversy, though she brushed aside Tesla's assertion that Elson had an improper motive for filing the proposed brief in May.

"The brief addresses complicated legal and policy issues presented by the parties," McCormick said. "The court welcomes the thoughts of Professor Elson."

Those issues, as my Reuters colleague Tom Hals has reported, could have multibillion-dollar consequences for Tesla and the plaintiffs' lawyers who persuaded McCormick to strike down Musk's pay package.

Here's why. The chancellor, as you know, ruled in January that Tesla's board breached its duty to shareholders by granting Musk "unfathomable" compensation. The plaintiffs' lawyers who brought the case asked McCormick in March to award them Tesla shares now worth about \$7 billion.

Tesla obviously doesn't want to pay billions to those lawyers, but in addition to the policy arguments you would expect about unwarranted windfalls, it came up with a really creative argument: Tesla told McCormick that its shareholder vote in June cured the purported disclosure problems she identified in her January ruling.

As a result, Tesla argued, plaintiffs' lawyers are actually entitled to no more than a nominal fee of about \$14 million for forcing Tesla to beef up its disclosures.

Elson's brief contends that theory is unfounded in Delaware law. If McCormick ultimately agrees, she's unlikely to adopt Tesla's argument that its shareholder vote in June transformed plaintiffs' win into a loss and that shareholder lawyers should therefore receive only a minimal fee.

Tesla counsel from Sullivan & Cromwell and DLA Piper did not respond to my query on the new ruling. Elson declined to comment through his lawyer Fleming. In an email statement, Fleming said, "It was a bad day for bullies. We had no doubt that Chancellor McCormick would reject Tesla's attempts to attack and silence a highly respected law professor."

Plaintiffs' lawyer Gregory Varallo of Bernstein Litowitz Berger & Grossmann said via email that his side "appreciates the court's order allowing the filing of Professor Elson's amicus brief, which we believe correctly describes the Delaware law pertaining to ratification."

McCormick also ruled on Monday that the U.S. Chamber of Commerce can file an amicus brief [\[link\]](#), opens new tab arguing that she should reject shareholders' multibillion-dollar fee request because it will encourage plaintiffs' lawyers to bring "ever more frivolous lawsuits against large corporations in pursuit of the proverbial pot of gold."

McCormick, who heard several hours of arguments earlier this month on the fee request, will hold a hearing on Aug. 2 on the impact of the shareholder vote.

Read more:

Public policy favors \$7 billion fee award in Musk pay case, Tesla shareholder's lawyer says
Tesla told law firm 'relationship about to be terminated' in spat over law professor brief – email

Tesla shareholders' bid for \$6 bln in legal fees over Musk pay could fan flames for Delaware critics

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Reporting By Alison Frankel

Our Standards: The Thomson Reuters Trust Principles. [\[link\]](#), opens new tab

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Alison Frankel
Thomson Reuters

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

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Musk launches poll asking if Tesla should invest \$5 bln in xAI, early votes in favour

 [reuters.com/technology/artificial-intelligence/musk-launches-poll-asking-if-tesla-should-invest-5-bln-xai-2024-07-24](https://www.reuters.com/technology/artificial-intelligence/musk-launches-poll-asking-if-tesla-should-invest-5-bln-xai-2024-07-24)

Hyunjoo Jin, Shivani Tanna

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

SAN FRANCISCO, July 23 (Reuters) - Tesla (TSLA.O) , opens new tab CEO Elon Musk has launched a poll asking users on social media platform X whether the electric carmaker should invest \$5 billion in his artificial intelligence startup xAI - with early votes showing most in favour of the move.

"Board approval & shareholder vote are needed, so this is just to test the waters," Musk said of the poll which came on the heels of Tesla posting its lowest profit margin in five years on price cuts and increased spending on AI projects.

During Tesla's earning conference call, Musk said xAI would be "helpful in advancing full self-driving and in building up the new Tesla data center," adding that there are opportunities to integrate xAI's chatbot, Grok, with Tesla's software.

Nearly 3 hours after the poll was posted, roughly 386,000 people had participated with 70% voting in favour of the investment.

Tesla did not immediately respond to a Reuters request for comment, while xAI could not be reached for comment.

Musk, the world's richest person, launched xAI last year, hoping to build an alternative to ChatGPT. The startup raised \$6 billion in a series B funding in May, attaining a post-money valuation of \$24 billion. Backers include Andreessen Horowitz and Sequoia Capital.

Musk has previously said that he plans for a quarter of xAI , opens new tab to be owned by investors in X, formerly known as Twitter, which he bought for \$44 billion although the social media firm's value has plunged since then.

On the earnings call, Musk also dismissed concerns that he may be diverting resources from Tesla to some of his other companies.

In June, CNBC reported that he had ordered Nvidia (NVDA.O) , opens new tab to ship thousands of AI chips destined for Tesla to xAI and X. Musk said Tesla's data center was full and there was no place to put the chips.

Musk is a frequent poller on X. In 2021, he asked Twitter users about whether he should sell 10% of his Tesla stake and commenced selling shares just days after the poll.

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Reporting by Hyunjoo Jin in San Fransisco and Shivani Tanna in Bengaluru; Additional reporting by Utkarsh Shetti in Bengaluru; Editing by Edwina Gibbs

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Tesla Inc

Tesla shares tumble as profits slump and Elon Musk delays 'robotaxi' launch

Billionaire chief executive claims that plans for 'autonomous fleet' will transform company's market value



Tesla's net income for the second quarter fell 45% to \$1.47bn © David Paul Morris/Bloomberg

Tabby Kinder and **Stephen Morris** in San Francisco 2 HOURS AGO



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Tesla shares tumbled 10 per cent on Wednesday after slower sales, soaring costs from employee lay-offs and ever-greater investments in its artificial intelligence infrastructure hit quarterly profits at the world's largest electric-vehicle maker.

Net income for the second quarter fell 45 per cent to \$1.47bn, well short of analysts' \$1.9bn consensus estimate.

Elon Musk, Tesla's billionaire chief executive, also used the company's quarterly earnings announcement after the stock market closed on Tuesday to officially postpone the unveiling of Tesla's first "robotaxis" — [a fleet of self-driving taxis](#).

Despite the two-month delay from August to October, Musk claimed the project that would turn all [Tesla](#) vehicles into a “giant autonomous fleet” could take the company’s valuation as high as \$5tn — about six times its current market value.

Tesla shares dropped 10 per cent to \$222 in early trading on Wednesday.

While Tesla’s revenues rose 2 per cent to \$25.5bn, narrowly exceeding expectations, they were helped by an unusually large sum of regulatory credits related to emissions requirements as well as record growth in its energy storage business.

The energy storage business, which manufactures batteries for homes and businesses, deployed 9,400 megawatt hours in the second quarter, more than double its provision in the first three months of the year.

However, Tesla’s operating expenses soared 39 per cent during the quarter to almost \$3bn. In April, it announced plans to cut 10 per cent of its workforce, about 14,000 people, incurring large restructuring and legal costs.

Tesla has also been investing heavily in its AI infrastructure, including extending its “gigafactory” in Texas to house a cluster of 50,000 supercomputer H100 chips for full self-driving training.

Tesla’s gross margin fell slightly to 18 per cent in the quarter, down from a peak of 29.1 per cent in the first quarter of 2022. The closely watched financial metric was flattered by record \$890mn revenues from regulatory credits related to emissions requirements in the second quarter. Without those, Tesla’s automotive gross margin would have dropped to 14.6 per cent.

[Musk](#) has focused work on an autonomous taxi service in recent months, prioritising the project over developing a long-awaited affordable EV, known unofficially as the Model 2 that will be priced at \$25,000. He first outlined plans for a shared network of fully autonomous vehicles in 2016, saying it would help Tesla owners offset the cost of owning their vehicles.

Musk has also increased Tesla’s focus on developing Optimus, an autonomous humanoid robot. On Tuesday, he said Optimus robots were already performing tasks in Tesla factories and that it would begin limited production next year. Musk added that Tesla expected to produce the robots for consumer use in 2026.

“The value of Tesla, overwhelmingly, is autonomy,” he said. “If you believe Tesla will solve autonomy you should buy Tesla stock, and all other questions are . . . noise.”

Earlier this month, Tesla said it had delivered almost 444,000 EVs between April and June, [down 4.7 per cent](#) from a year earlier, but rebounding from a disappointing 387,000 in the first quarter. The sales were enough to retain its position as the largest EV company ahead of China’s BYD.

Even by Musk’s standards, Tesla has had an eventful 2024. The billionaire entrepreneur won two contentious votes at the company’s annual meeting last month when shareholders reapproved his historic [\\$56bn pay award](#) — which had been struck down by a Delaware court — and backed a proposal to reincorporate the company in Texas.

He followed these victories by pledging to move his social media company X and spacecraft group SpaceX from California to Texas as part of a [long-standing dispute](#) with California governor Gavin Newsom.

Musk has also emerged as one of the most prominent Silicon Valley figures to back former president Donald Trump in November’s US election.

Musk endorsed Trump shortly after an assassination attempt on the former president on July 13, and has helped set up a political action committee through which a number of technology investors and business executives will donate to his campaign. Musk has denied reports that he will personally donate \$45mn a month to the Trump campaign.

Trump has promised to end federal support for EVs, which he has blamed for damaging America’s car industry and criticised for being too expensive and made in China.

However, as he has stepped up communication with Musk in recent months, he appeared to soften his stance. “I’m constantly talking about electric vehicles but I don’t mean I’m against them. I’m totally for them,” Trump said at a rally in Michigan last weekend.

Additional reporting by Nicholas Megaw

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Tesla's Auto Woes Crash Elon Musk's AI Dreams

Second-quarter results showed a challenged car business, while the CEO just wants investors to think about autonomy

By [Stephen Wilmot](#) [Follow](#)

July 24, 2024 5:30 am ET



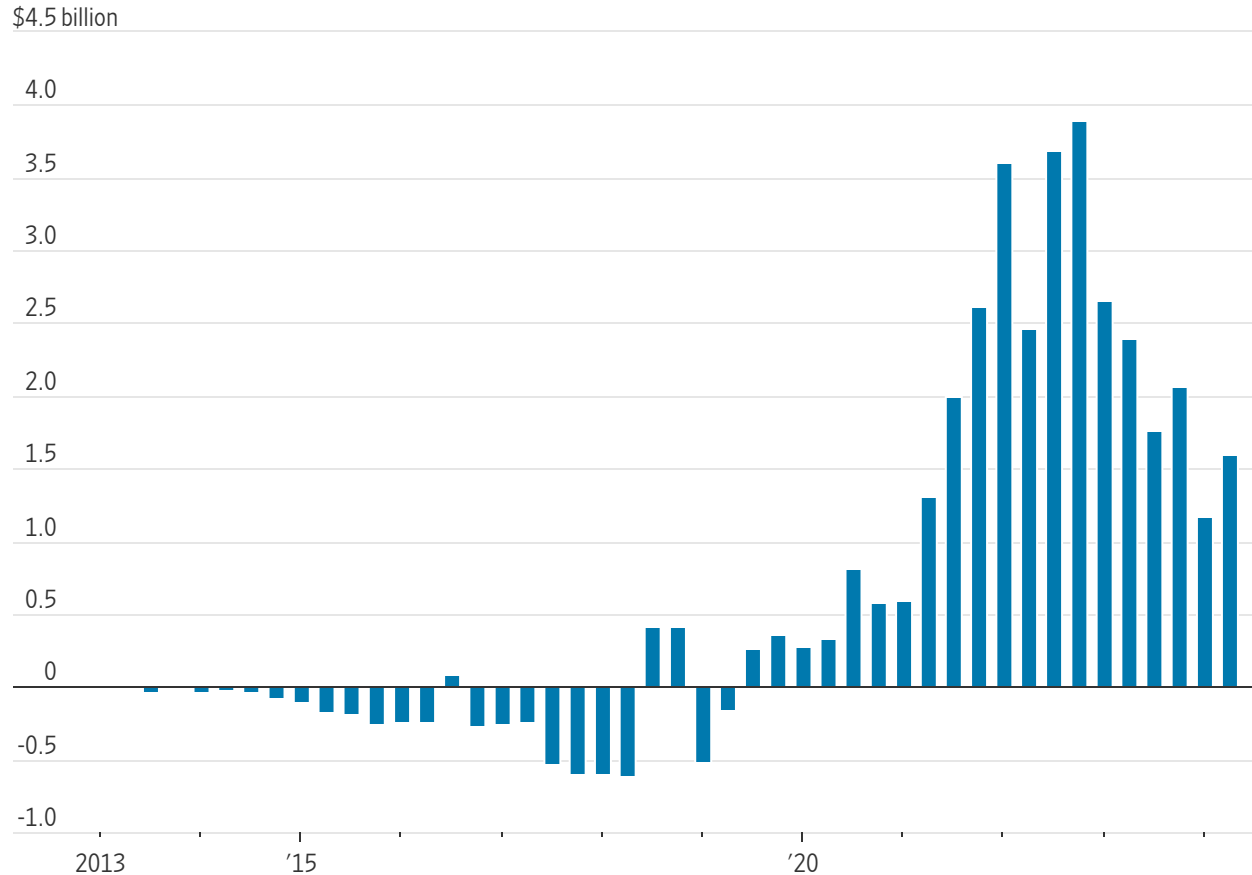
Tesla Model Y cars in a showroom in Beijing. PHOTO: WU HAO/SHUTTERSTOCK

Tesla TSLA **-10.76%** ▼ finally has financial results to support the argument that it is more than a car company. They still don't go anywhere near justifying the latest run-up in the stock.

The electric-vehicle pioneer's second-quarter numbers, reported late Tuesday, missed analysts' expectations at most levels. The automotive gross-profit margin excluding regulatory credits—a closely watched measure of underlying profitability in the core vehicle business—came in at 14.6%, compared with consensus expectations of 16%, according to RBC's calculation. The stock fell roughly 8% in premarket trading.

Tesla offered financing deals during the quarter to make its vehicles more affordable. These boosted deliveries, which came in above expectations earlier this month, but at the expense of gross margin, as it now turns out. Further down the income statement, the hit to margins was exacerbated by high operating costs, but some of this will unwind. The company reported \$622 million of restructuring charges for the quarter, reflecting mass layoffs following a terrible first quarter.

Tesla's quarterly operating profit or loss



Sources: FactSet, the company

One bright spot was the energy business, which sells battery storage units and solar panels, where revenue doubled compared with the second quarter of last year. The “services and other” business, which includes used Tesla sales, parts, insurance and the charging network, also grew strongly, with revenue up 21%. Together these units brought in revenue of \$5.6 billion, 22% of the company total and enough to help it unexpectedly report top-line growth.

While the services operation is closely related to the core automotive one, energy storage is a business with independent potential. At last, claims that

Tesla isn't just a car company have some grounding in the numbers, rather than merely in the expansive vision of chief executive Elon Musk.

Tesla's second-quarter delivery update already made the strength of the energy business clear, so this could be one reason why investors have warmed to the stock lately. But the 35% rally since last month's annual general meeting also seems connected to hopes for investments in artificial intelligence and autonomy. It was brought to an abrupt halt earlier this month when Bloomberg reported that Tesla was delaying a highly anticipated August robotaxi event that will likely tease details about its autonomy program. On Tuesday, Tesla confirmed the new date as Oct. 10.

How to factor businesses at radically different stages of technological development into one stock valuation is perhaps the essential problem for Tesla investors.

As Brad Cornell, emeritus professor of finance at UCLA's Anderson School of Management, puts it, even as Tesla shows signs of turning into yet another mature car company, Musk has convinced investors it has "growth options" such as robotaxis and humanoid robots. Unlike the core business, these options are virtually impossible to pin firm values on. This helps explain why Tesla is such a divisive and volatile stock.

A UBS analysis earlier this month argued that the market has valued the company's automotive business fairly consistently at between \$200 billion and \$300 billion over the past four years, with other initiatives accounting for the rest of its wildly fluctuating market value, which now stands at roughly \$790 billion. The brokerage downgraded its recommendation to sell on the basis that the post-AGM rally had, at that point, taken the proportion of Tesla's valuation represented by cars below its four-year average of 30%.

One might quibble with the details, but the basic insight seems sound: It is a good idea to unload Tesla shares when hopes for unproven businesses such as autonomy completely overshadow tangible fundamentals. Every quarter, after all, the company is forced to report actual numbers, bringing AI-crazed investors crashing back to earth.

Write to Stephen Wilmot at stephen.wilmot@wsj.com

Zantac Plaintiffs Get Remand Order Affirmed by Second Circuit

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Plaintiffs in nine similar cases over Zantac heartburn medication filed in Connecticut state court clearly proposed consolidation for pretrial purposes only, a federal appeals court said, affirming a remand order Tuesday.

The plaintiffs “went to great lengths to evade various triggers of federal subject-matter jurisdiction,” and that their motion only proposed pretrial consolidation and not a joint trial, the US Court of Appeals for the Second Circuit said.

The lawsuits assert “virtually indistinguishable” state-law personal injury claims related to the drug, the Second Circuit said.

Each suit was brought by the same firm against the same defendants, and contained fewer than 100 plaintiffs. Each suit also named three defendants and one plaintiff from Connecticut, and each complaint said that every plaintiff sought an individual judgment, the court noted.

The nine suits total more than 850 plaintiffs from 36 states.

After the defendants removed the suits to federal court, the plaintiffs asked the district court to remand them. The defendants argued that the plaintiffs’ motion to consolidate triggered federal jurisdiction by proposing a joint trial which fulfilled the mass action provision of the Class Action Fairness Act.

The plaintiffs argued the district court lacked subject-matter jurisdiction and that the context of their motion showed the consolidation was for pretrial management meant to avoid a fee for transferring each action to the state court’s complex litigation docket.

The Second Circuit rejected the defendants’ argument that courts examining whether a joint trial had been proposed can only look at the text of the proposal because examining plaintiffs’ intent would be unwieldy.

CAFA confers federal jurisdiction over civil actions where claims on behalf of 100 or more people are “proposed” to be tried together, Judge Guido Calabresi said.

“Our common understanding is that for one to ‘propose,’ that person must intend to make an offer or request,” Calabresi said.

Not only do multiple dictionaries include references to intent in the definition of “proposal,” but also the legislative history of the statute underscores the importance of looking at intent. The Senate report describing the mass action provision of CAFA references parties who “seek” to try their claims together, Calabresi said.

The statute’s authors “did not intend CAFA’s jurisdictional grant to spring into swift operation when triggered by the use of a magic word or citation,” Calabresi said.

The structure of the plaintiffs’ complaint make it “obvious” that they wanted to avoid federal jurisdiction and sought to keep their suits in state court, Calabresi said.

The Second Circuit also rejected the defendants’ argument that the plaintiffs’ motion itself showed an intent to consolidate for trial because it cites a Connecticut provision that refers to consolidation for a trial. But the provision’s application has a “convoluted history” and the citation to it doesn’t provide “clear evidence of that party’s intent to propose a joint trial,” Calabresi said.

Judge Alison J. Nathan joined the opinion.

Judge Amalya L. Kearsse dissented and said the state-court record didn’t show the plaintiffs stated their consolidation motion was for pretrial proceedings ahead of filing the motion.

The plaintiffs were represented by Parafinczuk Wolf PA and Izard Kindall & Raabe LLP.

The defendants were variously represented by Arnold & Porter Kaye Scholer LLP, Spears Mannin & Martini LLC, Shipman & Goodiwn LLP, Dechert LLP, Shook Hardy & Bacon, LLP, and Wiggin & Dana LLP.

The case is Bacher v. Boehringer Ingelheim Pharms. Inc. , 2d Cir., No. 23-00877, 7/23/24 .

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Banks Faulted for Failing to Prevent Zelle Frauds, Scams (2)

By Evan Weinberger

Documents

- [A Fast and Easy Way to Lose Money:
Insufficient Consumer Protection on
the Zelle Network](#)

-
- Big-bank-owned Zelle is the largest P2P payment service
 - Senate report calls out JPMorgan, Bank of America, Wells Fargo

Bloomberg Law News 2024-07-24T09:31:4589271509-04:00

Banks Faulted for Failing to Prevent Zelle Frauds, Scams (2)

By Evan Weinberger 2024-07-23T12:11:21000-04:00

- Big-bank-owned Zelle is the largest P2P payment service
- Senate report calls out JPMorgan, Bank of America, Wells Fargo

JPMorgan Chase & Co., Bank of America Corp., Wells Fargo & Co., and other banks operating on the Zelle payments network aren't doing enough to reimburse fraud and scam victims, a report from Senate Democrats said.

The three banks, which are among the seven financial institutions that own the popular person-to-person payments network, reimbursed only a tiny fraction of the thousands of fraud and scam victims between 2019 and 2023, according to a Tuesday report from Sen. Richard Blumenthal (D-Conn.), the chairman of the Senate Permanent Subcommittee on Investigations.

"They are simply not doing enough," Blumenthal said at a subcommittee hearing the same day. "They are failing to protect consumers from the growing risks of scams and fraud."

Companies that use Zelle define fraud as when a customer sees funds taken out of their accounts without their authorization, such as in a computer hack. Scam victims authorize a transaction and are victims of various tricks, such as people posing as bank employees, AI-generated voice schemes, and even fake advertisements for puppies.

The 1978 Electronic Fund Transfer Act requires banks and other payment providers to investigate and reimburse unauthorized funds transfers found to be fraudulent. The law doesn't require investigation or reimbursement for authorized transactions, including for scam victims.

Millions in Fraud

JPMorgan, Bank of America, and Wells Fargo reimbursed 38% of fraud disputes for \$64 million in 2023, more than \$100 million short of the \$166 million in fraud disputes for the year.

Scam victims had a rougher go, with JPMorgan Chase reimbursed three of 41,390 scam disputes in 2020, according to the report. Wells Fargo didn't reimburse any of the 25,061 scam disputes that year and Bank of America didn't even track scams as a specific category until the second half of 2020, the report found.

In total, the three banks rejected a total of nearly \$560 million in scam disputes from 2021 to 2023, the report found.

An Arizona company called Early Warning Services LLC operates Zelle. JPMorgan Chase, Bank of America, Wells Fargo, Capital One Financial Corp., PNC Financial Services Group, Truist Financial Corp., and US Bancorp own EWS, and around 2,100 banks and credit unions are members of the Zelle network.

JPMorgan Chase, Bank of America, and Wells Fargo account for around 73% of the payments made through Zelle, the report found. Zelle processed \$806 billion in payments in 2023, according to the report.

"We are committed to protecting consumers through highly effective fraud and scam countermeasures," an EWS spokesperson said.

EWS added that 99.95% of all Zelle transactions were completed without a fraud or scam dispute in 2023, up from 99.9% in 2022, even as transactions on the network grew 28% in that period.

Report Critiques

Wisconsin Sen. Ron Johnson, the Permanent Subcommittee's top Republican, said the fraud and scams were the fault of criminals, not banks or payments companies.

"I'm actually pretty impressed with the safeguards that these direct payment companies put in place before the consumer actually hits 'yes, send the money,'" he said at the hearing.

A JPMorgan Chase spokesperson blasted the report, saying that banks are "at the forefront of detecting and preventing frauds and scams."

"It's disappointing this Subcommittee spent a year investigating one of the safest payment platforms only to make partisan recommendations that ignore the underlying problem—the criminals," the spokesperson said.

Melissa Feldsher, JPMorgan Chase's head of commerce enablement, said in testimony prepared for the Tuesday hearing on Zelle fraud and scams, that only 0.05% of transactions made through the bank's Zelle platform were disputed in 2023.

JPMorgan Chase has instituted a series of protections for customers aimed at preventing frauds and scams before they happen. Those efforts blocked nearly \$1.1 billion in frauds and scams in the previous 12 months, Feldsher said in her prepared testimony.

Wells Fargo said its anti-fraud and anti-scam efforts have been increasingly effective, blocking more than one million potentially risky Zelle transactions before they left the bank in 2023.

"Over 99.9% of Zelle transfers by Wells Fargo customers are completed successfully without a fraud or scam claim," Adam Vancini, the San Francisco-based bank's head of payments for consumer, small, and business banking, said in prepared testimony.

Wells Fargo added that it wants to work with government and law enforcement to improve its anti-fraud and scam efforts.

"Along with the industry, we remain focused on protecting our customers from criminals, and combatting fraud and scams – efforts which require collaboration among industry, law enforcement and government partners to combat this criminal activity to the fullest extent," a Wells Fargo spokesperson said.

Bank of America didn't respond to a request for comment.

Mark Monaco, the Charlotte, N.C.-based bank's head of global payments solutions, said Bank of America working to lower the instances of fraud on its Zelle platform, adding that "even one customer harmed by a fraud or scam is one too many" in prepared testimony released by the committee.

'Imposter Scams'

Zelle expanded its scam reimbursement policy in June 2023 to cover "imposter scams," where customers are tricked into sending money to scam artists claiming to be from a government agency, bank, or other existing service provider.

The Senate report found that the policy change resulted in \$18.3 million in reimbursed scam claims in the six months after it was put in place, representing 15% to 20% of the fraud of all scam disputes in that time.

The Senate report calls for an expansion of the EFTA so that scam victims can receive reimbursement after an investigation into their claims and for the Consumer Financial Protection Bureau, which oversees EFTA compliance, to update its rules so banks provide more transparency about investigations.

The report also calls for EWS and its members to create a real-time fraud and scam reporting system so that banks and credit unions can keep up to date and better protect customers, among other recommendations.

(Updates with more comments throughout.)

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NOT FOR REPRINT

Critical Mass With Law.com’s Amanda Bronstad: What Could a CrowdStrike Class Action Look Like? Key Vote Coming Up in Talc Bankruptcy Plan

July 24, 2024 at 09:53 AM

Critical Mass



Amanda Bronstad
staff reporter



Welcome to Law.com Class Actions: Critical Mass, a weekly briefing for class action and mass tort attorneys.

This week: Prominent plaintiffs’ firms already are investigating CrowdStrike’s July 19 global tech outage that hampered airlines and other businesses. Johnson & Johnson needs 75% of talc claimants to vote this Friday for its \$6.48 billion bankruptcy plan. And who got appointed to lead antitrust lawsuits over concrete additives?

I’m Amanda Bronstad. Feel free to reach out to me with your input. My email is abronstad@alm.com. Follow me on [LinkedIn](#) or X: [@abronstadlaw](#).

‘Outage Creates Great Difficulty for Litigants’

The July 19 outage that ground thousands of businesses to a halt, including airline flights and 911 operations, could be subject to class actions, although there are limits on who might recover damages.

Here’s my story on the potential for class actions against CrowdStrike. Lawyers predicted that businesses that work with CrowdStrike, a cybersecurity software firm, are more likely than consumers who missed flights or employees with work disrupted to be in a class action. Airlines and others in the tourism industry were particularly hit hard, and some law firms and courts were impacted.

Prominent plaintiffs’ firms Lieff Cabraser and Lynch Carpenter already have announced investigations, and Amy Keller (DiCello Levitt) told me business interruption claims and securities litigation also are possible. In fact, Pomerantz and Bronstein, Gewirtz & Grossman have announced potential shareholder lawsuits.

CrowdStrike remains the primary defendant in any potential lawsuits. But Delta, which continues to cancel flights, faces a federal government investigation. And Los Angeles Superior Court, which suffered a separate ransomware attack, closed all 36 courthouses on Monday. It reopened “with limited functionality” on Tuesday.

Although there were no reports of problems in federal courts, U.S. District Chief Judge Rebecca Pallmeyer of the

Northern District of Illinois, signed a general order that said extended July 19 deadlines to Monday, stating:

“The court recognizes that the July 19, 2024 global IT outage creates great difficulty for litigants attempting to meet court deadlines.”

‘Record of Losses has Been Rather Stunning’

The deadline for talc claimants to decide whether to approve Johnson & Johnson’s \$6.48 billion prepackaged bankruptcy plan is this Friday. Johnson & Johnson needs 75% of talc claimants on board, but Beasley Allen has led opposition to the plan. Ahead of that vote, much is happening:

- A New Jersey judge who heard three days of an evidentiary hearing [ruled on July 19](#) that Beasley Allen should not be disqualified from leadership of the talcum powder cases. **Atlantic County Superior Court Judge John Porto** concluded that Johnson & Johnson hadn’t provided evidence that its former attorney had shared confidential information with [Andy Birchfield](#) (Beasley Allen). **U.S. Magistrate Judge Rukhsanah Singh**, who is involved in the talc multidistrict litigation in the **District of New Jersey**, and who heard arguments on the disqualification motion with Porto, gave both sides until July 29 to file supplement briefs on whether to adopt the ruling.
- Lead counsel in the talc multidistrict litigation, which includes [Leigh O’Dell](#) (Beasley Allen), have moved for a census of all the cases, including medical records on unfiled claims, many of which they believe involve women with diseases other than ovarian cancer. Those claims, which lead counsel insists Johnson & Johnson is gathering to garner the support of 71,000 women for its bankruptcy plan, would be “beyond the scope” of the multidistrict litigation, which focuses on ovarian cancer. On July 19, Johnson & Johnson attorney [Kristen Fournier](#) (King & Spalding) opposed the motion, which is “nothing more than a dressed-up **media statement**” designed to “blow up defendants’ ongoing efforts to negotiate a global resolution.” A hearing is set for Aug. 5.
- Johnson & Johnson moved to dismiss a class action brought by several firms including Beasley Allen that alleges fraudulent transfers, such as the “Texas two-step.” The case is a “misguided effort by a small group of plaintiff law firms to thwart the ongoing solicitation of a prepackaged Chapter 11 plan,” [Susan Sharko](#) (Drinker Biddle) wrote in the motion. Plaintiffs have no Article III standing to sue, since they aren’t injured, and their claims are preempted by U.S. Bankruptcy Code, the motion says. Talc plaintiffs opposed that motion on Tuesday, and a hearing is set for Aug. 5.

[Anne Andrews](#) (Andrews & Thornton) told me why she supports the bankruptcy plan for her clients:

“I’ve been in this at least for 10 years. I have watched the litigation and been involved in it and watched the lawyers opposed to this do their best in the court system we have. And I would say that the record of losses has been rather stunning.”

Who Got the Work?

A federal judge appointed seven firms this month to lead the antitrust multidistrict litigation over concrete additives. On July 9, U.S. District Judge Lewis Liman of the Southern District of New York appointed Hausfeld as interim lead class counsel and Berger Montague, Gustafson Gluek and the Roberts Law Firm on an executive committee for direct purchasers. The motion to appoint them said lead attorneys would be Hausfeld’s [Jeannine Kenney](#), [Nathaniel Giddings](#) and [Scott Martin](#), Berger Montague’s [Candice Enders](#) and [Patrick Madden](#), Gustafson Gluek’s [Michelle Looby](#) and [Dan Hedlund](#) and Roberts Law Firm’s [Mike Roberts](#) and [Karen Halbert](#). Liman also appointed Kaplan Fox, Lockridge Grindal Nauen and Cuneo Gilbert & LaDuca to serve as interim co-lead counsel for indirect purchasers. Their motion identified lead lawyers as Kaplan Fox’s [Robert Kaplan](#), [Gregory Arenson](#), [Elana Katcher](#), [Matthew McCahill](#), [Jason Uris](#) and [Chang Hahn](#), and Lockridge Grindal Nauen’s [Heidi Silton](#), [Jessica Servais](#) and [Joseph Bourne](#) and Cuneo Gilbert & LaDuca’s [Michael Flannery](#), [Christian Hudson](#) and [Lissa Morgans](#).

Here’s what else is happening:

‘Very Unreasonable’: Yahoo’s \$117.5 million data breach settlement was back in court after plaintiffs firm **Zaveri Tabb** challenged its fees, awarded in 2020 by then-District Judge **Lucy Koh**, of the **U.S. District Court for the Northern District of California**, who, at the time, criticized the number of plaintiffs’ firms involved. Koh is now on the **U.S. Court of Appeals for the Ninth Circuit**, so **District Judge Vince Chhabria** held a July 18 hearing, during which lead counsel John Yanchunis (**Morgan & Morgan**) explained why lead counsel shouldn’t have to pay the \$56,444. Chhabria called his explanation “very unreasonable.”

“Mudslinging Campaign:” Last month’s \$178 million wildfire settlement with **PacifiCorp** has fueled a fight among plaintiffs’ attorneys, who are accusing each other of “collusion” and “mudslinging.” **Edelson**, which is lead counsel in a class action that has obtained about \$200 million in verdicts on behalf of victims of Oregon’s 2020 wildfires, is accusing a trio of firms—**Warren Allen, Spreter Petiprin** and **Swigart Law Group**—of misrepresenting the litigation and colluding with PacifiCorp to lure class members into discount settlements. The three firms called the allegations part of a “mudslinging campaign.”

Girardi Trial: A federal judge denied **Tom Girardi**’s motion to delay his Aug. 6 criminal trial. In a July 17 order, **U.S. District Judge Josephine Staton**, in the **Central District of California**, wrote: “The court has some concern that this request for another continuance was long in the making.” In a separate July 17 order, she granted a motion to sever Girardi’s trial from that of his co-defendant, former **Girardi Keese CFO Christopher Kamon**, who will face a jury at a later date. She found the federal government’s criminal case against **Theranos co-founder Elizabeth Holmes** and its former president, **Ramesh “Sunny” Balwani**, “persuasive.”

Thanks for reading Critical Mass! I’ll be back next week!

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July 24, 2024, 1:30 AM PDT

Why Jury Consultants Are Now Essential in High-Stakes Trials

By David Lat

Column

Columnist David Lat explores how consultants go about choosing juries for big-ticket cases such as the Menendez and Trump trials, and the research they perform on candidates' backgrounds.

Bloomberg Law News 2024-07-24T09:39:31796402701-04:00

Why Jury Consultants Are Now Essential in High-Stakes Trials

By David Lat2024-07-24T04:30:53000-04:00

Are reports of the jury trial's death greatly exaggerated? While jury trials are less common than they were decades ago, we've seen a surprising number of them in 2024: E. Jean Carroll's civil case against former President Donald Trump for sexual abuse and defamation, Manhattan district attorney Alvin Bragg's criminal case against Donald Trump over hush-money payments, gun prosecutions of Hunter Biden and Alec Baldwin, and the corruption case against US Sen. Bob Menendez.

With the exception of the Baldwin case, which was dismissed mid-trial, all these cases went to verdict. And here's something else they probably shared in common: trial or jury consultants.

"There's been a big shift in the legal industry over the past 20 years," said Eric Rudich, managing partner of Blueprint Trial Consulting. "In the early 2000s, senior partners might say, 'Why do I need a consultant? I've done a million cases.' But now they say, 'I need a trial consultant to see how I should try this case.'"

"I have not gone to trial in 15 years without a jury consultant," said Gibson Dunn's Orin Snyder, one of the nation's top trial lawyers. "Trying cases is a team sport, and even if there's a captain or quarterback, an integral part of the team in modern jury practice is a highly skilled and effective jury consultant."

Trial consultants provide a wide range of services. They conduct community research surveys, convene focus groups, hold mock trials, assist with jury selection, and prepare demonstrative exhibits or visual aids to educate the jury. Trial lawyers and their clients can select particular options, depending on their needs and budget.

This requires consulting firms to have “a lot of disciplines under one roof,” according to Renato Stabile of Dubin Research & Consulting. Stabile and DRC’s founder, Josh Dubin, are lawyers by training. But their firm’s staff of approximately 60 also includes experts in psychology, data science, statistics, graphics, and technology. Experts with Ph.D. degrees in social psychology or communications are not uncommon in jury consulting.

Turning to jury selection, for which trial consulting firms are most well-known, the process more aptly would be named “jury deselection,” according to Stabile.

“You can only get rid of people from the jury, either for cause or using peremptory strikes,” he explained. “Don’t fall in love with any particular person because if the other side is doing their job, that individual won’t make it onto the jury.”

And in high-profile cases, weeding out so-called “nightmare jurors” is easier said than done. Lawyers must watch out for what Stabile called “stealth jurors,” who don’t reveal their true feelings about the relevant issues because they want to be part of the case. As an example, he cited the Trump hush money case, where certain people in the jury pool claimed they could be fair and impartial—until postings on their social media accounts suggested otherwise.

Stabile and his colleagues perform extensive research to unearth and expose potential biases among jury candidates. Before trial, they might conduct a community attitude survey, surveying thousands of jury-eligible individuals in the jurisdiction where the trial will take place.

This might be followed by a mock trial lasting two to four days. Lawyers or consultants present key evidence and arguments to perhaps 50 to 100 mock jurors—jury-eligible individuals who live in the jurisdiction and are paid for their time. Throughout the presentation, jurors use iPads to answer questions and provide reactions in real time.

After the presentation is over, the jurors are divided into smaller panels to deliberate for several hours, just like real juries. Provided with jury instructions and a verdict form, they’re asked to reach a decision. The lawyers and consultants watch the deliberations, either through one-way glass or recordings. The consultants write up their findings in research reports.

This research can inform what lawyers advance as key themes of the case; which witnesses they call, and how they prep them; which evidence gets used, and how it’s presented; how the lawyers write their opening and closing statements; what questions they ask of potential jurors, in questionnaires and voir dire; and which jurors the lawyers strike.

Hiring a jury consulting firm isn’t cheap—it can cost tens of thousands of dollars, all the way into the millions, to have a consulting firm join a case early, assist in guiding discovery, work on developing litigation strategy, and help execute that strategy during a months-long trial.

In light of the cost, it's important to manage client expectations about jury consultants. As David Oscar Markus of Markus/Moss, one of the country's leading criminal defense attorneys, told me, "When clients are spending all this money on a trial consultant, we have to be clear with them: hiring a consultant is just another tool in the toolbox. Nobody is a magician or a miracle worker. We are hiring a consultant to maximize the chance of a good result."

Good results aren't guaranteed. Just ask Donald Trump, who hired consultants in the E. Jean Carroll and hush-money cases—and lost both.

So is hiring a consultant worth it? Snyder of Gibson Dunn thinks so: "Yes, it's expensive—but if you have a client who can afford it, in every instance it's a great investment."

Jury and trial expert Robert Hirschhorn learned about the value of jury consulting in 1984, when he was going to trial in what he thought was an unwinnable case. He hired pioneering trial consultant Cathy "Cat" Bennett, a psychologist who started advising lawyers on jury selection as early as 1972.

After she revamped his case and he won, Hirschhorn was hooked on jury consulting. He went on to work with (and later marry) Bennett, and they picked juries in several famous cases—including the 1991 criminal trial of William Kennedy Smith, in which their client was acquitted. A year later, in 1992, Bennett died of cancer—but more than 30 years later, Hirschhorn's consulting firm still proudly bears her name.

Most jury consultants today rely heavily on empirical research. As Stabile of DRC told me, "We are big believers in following the data, even when it's counterintuitive."

Hirschhorn takes a more old-school approach. Although he also conducts focus groups—which he claims are accurate in civil cases, on the issue of liability, more than 80% of the time—he believes there's no substitute for looking a potential juror in the eye, in open court, and relying on your intuition.

"A lot of people want to make you think it's all science," he told me. "At least the way I do it, maybe 20 or 30% of it is science. It's really instinct, with a little science sprinkled in there. I let my heart and gut lead the way."

Hirschhorn has been picking juries this way for 40 years. But he doesn't think jury consulting will last forever.

"Consultants will eventually be replaced by AI," he predicted. "In the beginning, the AI tools will just crunch data and produce demographic profiles, so they won't replace us. But once AI progresses to the point where it can evaluate nonverbal communication, recognize emotion, and detect empathy, that's when the game will change."

"I don't know if that will take 20, 30, 40, or 50 years. But it will happen—eventually."

David Lat, a lawyer turned writer, publishes Original Jurisdiction. He founded Above the Law and Underneath Their Robes, and is author of the novel "Supreme Ambitions."

Trump's Top Bundler Pleaded the Fifth in Ohio Bribery Case



Donald Shaw

Jul 23, 2024 · 3 min

The bundler, who has given Trump \$3.6 million, advised FirstEnergy on its contributions to a dark money group that pleaded guilty to racketeering charges in Ohio's HB6 nuclear bailout scandal.



Republican Presidential nominee former President Donald J. Trump (Bill Pugliano)



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The Trump campaign's largest known bundler is a lobbyist who advised coal and nuclear power company FirstEnergy on its effort to secure a \$1.3 billion bailout from Ohio ratepayers and who pleaded the Fifth Amendment when called to testify on his role in a bribery scheme for which the company was criminally charged.

Geoff Verhoff, a senior adviser at public affairs firm Akin Gump Strauss Hauer & Feld, has bundled more than \$3.6 million this year for Trump 47 Committee, according to a new [filing](#) with the Federal Election Commission. Bundlers collect contributions from other donors and deliver them to campaigns.

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• JUL 19, 2024

A Harris presidency would carry baton on financial industry crackdown

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Michelle Price, Pete Schroeder

U.S. Vice President Kamala Harris walks at her Presidential Campaign headquarters in Wilmington, DE, U.S., July 22, 2024. Erin Schaff/Pool via REUTERS/File Photo Purchase Licensing Rights , opens new tab

WASHINGTON, July 23 (Reuters) - A potential Democratic administration led by Vice President Kamala Harris would likely advance President Joe Biden's agenda of tough financial rules, an unwelcome prospect for Wall Street banks, crypto companies and other players that have chafed under the current administration.

Harris is the frontrunner to win the Democratic nomination after Biden exited the presidential race on Sunday and endorsed her.

While Harris has had a low profile when it comes to the administration's financial policies, her track record taking on Wall Street banks and voting against deregulation suggests she would continue with Biden's ambitious agenda, said analysts.

The Biden administration agenda has included both adopted and proposed rules cracking down on bank fees, non-bank lenders and medical debt providers, requiring more transparency from hedge funds, as well as hikes in the amount of capital banks must hold and a slew of enforcement actions against major cryptocurrency firms.

"Harris is farther to the left than Biden, but the Biden administration has proven to be incredibly progressive, so there shouldn't be much daylight between a second Biden administration and a first Harris administration," Isaac Boltansky, director of policy research at brokerage BTIG, wrote in a note on Monday.

A spokesperson for Harris did not immediately provide comment on her potential agenda on financial regulation.

Among prominent progressive Democrats who have endorsed Harris is Senator Elizabeth Warren, who has helped shape Biden's financial regulatory agenda and who has not been shy of criticizing fellow Democrats she sees as soft on Wall Street.

"We view this as boosting risk for financials and crypto," TD Cowen analyst Jaret Seiberg wrote on Monday of Harris, adding that a second Democratic administration would finalize the Basel capital rules and a requirement that banks hold more long-term debt, and advance limits on overdraft and other fees.

To be sure, Harris is not yet the Democratic nominee and the details of financial regulation policy would be overseen by the agency picks. One former administration official noted that while Harris has been tough on banks in the past, she was not as left leaning on financial regulation issues as Warren.

Several major Wall Street names plan to support Harris for the Democratic nomination, Semafor reported on Sunday. A source familiar with the matter said that Peter Orszag and Ray McGuire at Lazard would donate to Harris, confirming parts of that report.

On Monday, investors unwound some of the so-called Trump-bond market trades that had bet on a Trump victory, "but he's still the favorite," said Paul Mielczarski, head of macro strategy at Brandywine Global.

"WALL STREET GREED"

Harris rose to prominence as the attorney general of California, where she took a tough hand with big banks.

In 2011, she negotiated hard for banks to commit more cash to help consumers harmed by predatory lending in the lead-up to the 2007-09 financial crisis. In 2016, her office launched a criminal investigation into Wells Fargo's fake accounts scandal.

The former administration official praised her work as California's AG and noted that Harris tapped Katie Porter [opens new tab](#), then a law professor, to oversee that \$18 billion bank settlement to help homeowners. Porter later served in Congress where she took on big bank CEOs and called out Trump's deregulation.

As a senator, Harris in 2018 sided with Warren and other progressives in voting against a bill rolling back rules introduced following the financial crisis. The Federal Reserve subsequently blamed that change for contributing to last year's failure of Silicon Valley Bank.

"Wall Street greed and abuse crashed our economy in 2008. I will fight against any legislation to deregulate the Big Banks," Harris posted on X [opens new tab](#), then Twitter, as the negotiations heated up.

As vice president, Harris last year spearheaded a Consumer Financial Protection Bureau (CFPB) initiative to remove medical debt from consumer credit reports, and in July endorsed a CFPB proposal requiring that mortgage servicers help struggling borrowers.

Big banks have loudly criticized the CFPB under its Biden-nominated director Rohit Chopra and have sued the agency to reverse several of its rules.

"Given that the CFPB Director serves at the pleasure of the president, a Democrat in the White House will give Director Chopra wide latitude on credit cards, payment companies, BigTech, and everything else under the Bureau's umbrella," BTIG's Boltansky wrote.

Get weekly news and analysis on the U.S. elections and how it matters to the world with the newsletter On the Campaign Trail. Sign up here.

Reporting by Michelle Price, Pete Schroeder, Douglas Gillison, Chris Prentice, Megan Davies, Nupur Anand, Lananh Nguyen and David Randall; Writing by Michelle Price; Editing by Leslie Adler

Our Standards: The Thomson Reuters Trust Principles. [↗](#), opens new tab

Pete Schroeder
Thomson Reuters

Covers financial regulation and policy out of the Reuters Washington bureau, with a specific focus on banking regulators. Has covered economic and financial policy in the U.S. capital for 15 years. Previous experience includes roles at The Hill newspaper and The Wall Street Journal. Received a Master's degree in journalism from Georgetown University, and an undergraduate degree from the University of Notre Dame.

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ANALYSIS

Lawyers in Big Law Kick Off Fundraising and Organizing for Kamala Harris

Paul Weiss chair Brad Karp said he's "working with many business leaders to raise money for the Harris campaign to enable her to fund what will inevitably be the most expensive election battle ever."

July 23, 2024 at 03:15 PM

Analysis



Abigail Adcox



What You Need to Know

- Efforts to help fundraise for Harris are already underway in Big Law.
- More fundraising efforts are likely to materialize in the coming weeks, according to several members of the legal community.
- Harris has already recruited some Big Law lawyers for roles in the campaign, including those at Covington and Paul Weiss.

Within days of Kamala Harris’ presidential campaign launching, some corners of Big Law are already organizing, advising and fundraising for the vice president, as Harris and her husband, Doug Emhoff, lean on their legal community ties.

Harris has maintained a base of support in Big Law since at least her 2020 presidential bid. Lawyers and employees of law firms were one of the top groups bankrolling Democratic presidential candidates in the 2020 primary, [including Harris](#), and that may continue in the 2024 election.

Brad Karp, chair of Paul, Weiss, Rifkind, Wharton & Garrison and a prolific fundraiser, told Law.com this week: “I’m working with many business leaders to raise money for the Harris campaign to enable her to fund what will inevitably be the most expensive election battle ever and provide whatever additional support I can, including voter protection support.”

Karen Dunn, co-chair of Paul Weiss’ litigation department, will assist Harris with debate preparation, according to a source familiar with the arrangements.

Peter Zeughauser, founder of Zeughauser Group, a management consulting firm for law firms, suggested that there will be a “massive outpouring of support from the legal community” for Harris.

“I don’t think there’s an Am Law 200 firm that won’t have a significant cadre of attorneys, partners and associates who will organize on her behalf and fundraise,” Zeughauser said.

The time for organizing and fundraising for the presidential race is dwindling, with only a little more than 100 days until the general election between Harris and GOP nominee Donald Trump. But attorneys and policy advisers at law firms with lobbying businesses tied to Capitol Hill, which typically host fundraisers for both Democrats and Republicans, indicated it’s not off the table.

“We’ve got a number of colleagues who are very close to her, and I would expect there will be a fair amount of focus on fundraising for her,” Rich Gold, leader of Holland & Knight’s public policy and regulation group, said Monday. “I can’t say there’s been a big focus on pulling together an event or something like that. But obviously that all will play out in the coming days.”

Nadeam Elshami, co-chair of Brownstein Hyatt Farber Schreck’s government relations department, said Monday that nothing concrete has been planned as far as a Harris fundraiser.

“But we are a bipartisan firm. So just like we do things on the Republican side, I’m certain we’ll be doing some things on the Democratic side,” Elshami said.

In the first days of Harris’ presidential campaign, her campaign has already raised more than \$100 million between Sunday afternoon and Monday evening, the campaign said early Tuesday.

Harris previously had a large network of lawyers supporting her 2020 presidential bid, including a group of more than 50 Big Law lawyers who formed the [National Lawyers Council for Kamala](#).

Harris also maintains strong connections to the legal community through her previous roles, including as California attorney general. And Emhoff, a longtime Big Law entertainment lawyer, was formerly a partner at [DLA Piper](#).

Harris’ campaign in its first days has already recruited several members of Big Law for different roles, beyond Dunn at Paul Weiss.

Harris has also turned to former Attorney General Eric Holder and his law firm, Covington & Burling, to help vet potential running mates, according to several media reports. A Covington spokesperson did not return a message seeking comment.

In a post on social media site X, Holder endorsed Harris, writing Tuesday that Harris is “ready and fully capable to lead our country at this critical moment in our nation’s history.”

“I am proud to endorse her and be a part of this historic effort,” Holder wrote.

Karp, in the statement to Law.com, also gushed about Harris’ qualifications and how lawyers are working with members of the business community to support her.

“I’ve known Kamala for many years and have had the privilege to get to know her and Doug Emhoff very well. They’re extraordinary people, warm and compassionate, tremendously talented, fully committed to serving our country and looking to improve our nation’s future for all Americans,” he said. “As part of this effort, I’m working closely with a number of other CEOs and committed business leaders, who believe that Kamala will be a formidable nominee for the Democratic Party and will make a spectacular president.”

Asked about any political backlash within a law firm for openly supporting Harris, Karp said: “Each of us needs to do what we believe is right, whatever the consequences. That has always been my mantra in leading Paul Weiss,” adding, “I would hope that engaging in policy debates, even spirited debates, on existentially important issues should still be a cherished part of our communal discourse and there ought not be punitive consequences for respectfully expressing one’s point of view.”

There are a number of former Harris aides in Big Law. Rachel Palermo and [Josh Hsu](#), who both worked for Harris as vice president in different roles, are now at Jenner & Block in the firm’s government controversies and public policy litigation and congressional investigation practices. Palermo and Hsu did not immediately respond to messages seeking comment.

And Yasmin Nelson, now a senior policy adviser at Holland & Knight, was previously a senior policy adviser to Harris in the U.S. Senate.

Patrick Smith contributed to this report.

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Big Law Donors Jump to Pad Harris' War Chest for White House Bid

By Tatyana Monnay and Brian Baxter 2024-07-23T16:01:02000-04:00

- Brad Karp, Roberta Kaplan backing Harris' bid
- Biden drops out of race, Harris takes his place

Attorneys are opening their wallets for Vice President Kamala Harris, who has risen to the top of the Democratic ticket to replace President Joe Biden.

Roughly 100 law firm partners reached out to express interest in fundraising for Harris the day after Biden dropped out of the race, said [Jon Henes](#), a former Kirkland & Ellis partner who was national finance chair for the Biden-Harris 2020 presidential campaign.

He will soon host a “major event” for Harris with the location and details yet to be finalized, said Henes, who [runs](#) the bankruptcy communications consultancy C Street Advisory Group. “It’s going to be a four-month sprint to the finish line,” Henes said in an interview. “I will do anything in my power to help her.”

The lawyers are embracing a role they played in past campaigns for one of their own. They donated more than [\\$2 million](#) to Harris’ 2018 Senate bid and gave the attorney [more than \\$3 million](#) during her first presidential run.

Harris is emerging as the the Democratic Party’s nominee following Biden’s July 21 letter announcing his departure from the ticket, as endorsements for her poured in from party leaders. She has already [secured the delegates](#) needed to formally accept the nomination at the Democratic National Convention in Chicago the week of Aug. 19.

Kellogg Hansen partner David Frederick said he plans to donate to Harris and is open to holding fundraisers for her. Last month he [gave \\$250,000](#) to the Biden Victory Fund, [now renamed](#) the Harris Victory Fund. “Defeating the former president and the MAGA Republicans is imperative,” Frederick said in an email.

Roberta Kaplan, the [veteran trial lawyer](#) who represented New York writer E. Jean Carroll in her landmark lawsuits against President Donald Trump, said she “long supported” Harris and is committed to backing her assuming she becomes the official nominee. Kaplan [gave the Democratic National Committee](#) more than \$20,000 and the former Biden Victory Fund another \$25,000 in March, according to Federal Election Commission records.

“When it comes to lawyers in particular, every single lawyer—even conservative ones—needs to be very concerned about what another Trump presidency would do to the rule of law,” Kaplan said.

Dependable Group

Attorneys have been a solid fundraising bloc for Harris. During her first presidential run she collectively [raised more than](#) \$436,000 from employees at Paul Weiss, Kirkland and DLA Piper, which is her [husband's former firm](#).

Now, the lawyers are lining up to back her second presidential run. A group of big donors that includes two attorneys, Paul Weiss chairman Brad Karp and C Street Advisory Group co-founder Brian Mathis, plan to hold an organizational call Wednesday with around 50 prominent Democratic supporters, according to a person familiar with the matter.

Mathis, a Harvard Law School graduate, raised funds for former President Barack Obama's presidential campaigns and helped Harris during her first White House bid. Karp gave the Biden-Harris campaign more than \$26,000 last year, [FEC records show](#).

“Kamala will be a formidable nominee, run a relentless, well-funded, issues-based campaign, inspire and activate key constituencies of the Democratic coalition and make a superb president,” Karp said.

Brian Hennigan, a founding partner at California litigation boutique Hueston Hennigan, said, “There's a lot of support, a lot of interest, and a lot of admiration for what she's done as California's attorney general.”

The firm held fundraising events for the former Biden-Harris campaign. Harris and her husband [Doug Emhoff](#) attended the most recent event in early 2024. Hennigan [gave](#) the campaign's victory fund \$100,000 in January.

Campaign Lawyers

Harris proved to be a strong fundraiser in the first 24 hours of her campaign. Democrats' grassroots funding platform ActBlue received over \$100 million in donations since Biden announced the end of his reelection bid. Liberal mega-donors including George and Alex Soros, Evercore Inc. founder Roger Altman, and Avenue Capital Group chief executive Marc Lasry have already [started backing Harris](#).

The Biden campaign was renamed "Harris for President," and its leaders, Jennifer O'Malley Dillon and Julie Chavez Rodriguez, kept in place.

The campaign's in-house team of roughly a dozen lawyers led by general counsel [J. Maury Riggan](#) will also transition to Harris, said a person familiar with the matter. Riggan is a former Wilmer Cutler Pickering Hale and Dorr counsel who previously served as a White House counsel under Biden.

Former US Attorney General Eric Holder and his firm, Covington & Burling, are helping Harris vet possible running mates, Bloomberg Law [reported](#) Monday, citing a person familiar with the matter.

Covington received \$373,500 in legal fees from the Biden campaign in June, according to FEC filings. The campaign also paid \$5,000 that same month to Revelstoke, a small firm formed two years ago by Danielle Friedman, a former Biden White House staffer who once worked at Perkins Coie.

— With reporting by Roy Strom

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To contact the editors responsible for this story: John Hughes at jhughes@bloombergindustry.com

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Blackstone's battered mortgage fund slumps as empty offices intensify pressure

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Michelle Conlin, Matt Tracy

Signage is seen at the Blackstone Group headquarters in New York City, U.S., January 18, 2023. REUTERS/Jeenah Moon/File Photo Purchase Licensing Rights , opens new tab

NEW YORK, July 24 (Reuters) - Commercial real estate finance company Blackstone Mortgage Trust (BXMT.N) , opens new tab saw shares drop 10% on Wednesday as the firm cut its dividend 24% in the face of continued strain from vacancy-ravaged office spaces. It is the latest sign of mounting woe for commercial real estate, which analysts say is set for a multi-decade reckoning as American workers stay rooted in their pandemic-era remote work habits, leaving wide swaths of office space empty at a time when interest rates remain elevated in the Federal Reserve's higher-for-longer world.

"For Blackstone to have to come out and cut dividends, I have to imagine that's going to weigh on some people's minds," said Stephen Buschbom, research director at Trepp, an industry data provider. "It wouldn't surprise me to see ripple effects throughout the industry when the biggest player is having to cut dividends," he said.

Blackstone recorded a \$140 million net increase in reserves for current expected credit losses. The firm said 55% of its U.S. office space is "watchlisted or impaired, though higher-quality office continues to show liquidity."

Investors remain deeply worried about the specter of a coming commercial office space collapse, as nearly \$1 trillion of the \$4.7 trillion of outstanding commercial mortgages come due in 2024, according to the Mortgage Bankers Association.

This looming maturity comes against a backdrop of declining property values and lower rent rolls. Blackstone cut its dividend to \$0.47 per share in the third quarter, down from \$0.62 paid in the second quarter. The company also authorized a \$150 million stock buyback.

The company reported a quarterly loss of \$61.06 million.

Loan resolutions will unlock earnings potential over time, the company says , opens new tab.

The office sector gloom extends to the entire industry. In February, KKR Real Estate Finance Trust (KREF.N) , opens new tab slashed its dividend amid souring loans.

Reporting By Michelle Conlin and Matt Tracy; Editing by Megan Davies and Chris Reese

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July 23, 2024, 11:39 AM PDT

Matt Levine's Money Stuff: Don't Loot the Scams

By Matt Levine

Opinion

Bloomberg Law News 2024-07-24T09:42:37667315542-04:00

Matt Levine's Money Stuff: Don't Loot the Scams

By Matt Levine 2024-07-23T14:39:21426-04:00

Fund.com

Fund.com was, for a while, apparently a scam. It was founded in 2004 as Eastern Services Holdings Inc., "one of many entities that Imran Husain formed and took public to sell to market manipulators." In 2007, it was sold to Jason Galanis, a market manipulator who had recently been banned by the US Securities and Exchange Commission from serving as a public-company officer or director. (Galanis is currently in prison for an assortment of *other* frauds, and is somehow involved in a Hunter Biden situation.) Under Galanis, the company acquired the web address "www.fund.com," changed its name to Fund.com Inc., and told people the address was worth \$10 million. "The Website Address certainly had some value, but Galanis appears to have manufactured the \$10 million figure through fraudulent transactions."

And then Fund.com went around doing fraud to sell stock to retail investors — "Galanis paid kickbacks to financial advisors to get them to invest their client portfolios in the Company," etc. — and raised money. With some of that money, Fund.com struck a deal to pay \$4 million for a 60% stake in AdvisorShares Investments LLC, a perfectly legitimate active exchange-traded fund manager. I am not sure how that happened, but by 2010 AdvisorShares regretted it: "After the Company's problems, the ETF Provider had no interest in the Company remaining an investor and sought to cancel the Company's equity stake." Meanwhile Fund.com's stock fell from a high of \$570 per share to a low of six cents, and it stopped filing its securities reports. And Galanis "created a new entity named Fund Alliance Corporation that purported to buy the Website Address for \$1.5 million," "for use in a crowd-funding scheme."

At this point, the company had an equity market capitalization of something like \$100,000, and an investor named Thomas Braziel saw an opportunity. The opportunity was that this company *looked* like the spent husk of a series of stock scams, but it *actually had assets*. Maybe. The assets were (1) the web address (if it could get it back from Galanis) and (2) the 60% stake in AdvisorShares (if it could prevent AdvisorShares from canceling that). So Braziel bought about 20% of the company for about \$20,000, and then tried to crack it open to take over the assets.

Classically the ways to do that include doing a tender offer for all of the shares, running a proxy fight to take over the board, stuff like that. But given what a spent husk Fund.com was, Braziel did something else: He petitioned a Delaware court to appoint him as receiver of the company. Basically, he went to court and said "I am a shareholder of this company, this company is defunct, you should put me in charge so that I can get some value out of it for myself and the other shareholders." This worked, in part because the company really was so defunct that it never responded to his petition:

The petition sought to have Braziel appointed as a liquidating receiver for the Company under Section 226(a)(3) of the DGCL. That statute authorizes a court to appoint a receiver when "the corporation has abandoned its business and has failed within a reasonable time to take steps to dissolve, liquidate or distribute its assets." 8 Del. C. § 226(a)(3).

When the Company did not respond to the petition, the Investment Fund moved for a default judgment. The motion emphasized that Braziel was a qualified person who had studied the rules governing receivers of Delaware corporations.

By order dated November 29, 2016, the court entered a default judgment and appointed Braziel as a receiver. The order charged Braziel with liquidating the Company and distributing its net assets to its investors. The order did not authorize Braziel to conduct business through the Company.

Having cracked open the company, Braziel succeeded in getting money out of it. He sued Fund Alliance and got the web address back for \$750,000. He renegotiated a settlement with AdvisorShares in which Fund.com got a couple of million dollars in exchange for canceling its AdvisorShares stake. Meanwhile, "on paper, the Company owed over \$8 million to Galanis's affiliates," and Braziel succeeded in getting that debt canceled because Galanis forgot about it:

On December 22, [Braziel] moved for an order requiring that the Company's creditors make any claims against the receivership estate by April 14, 2017. The court approved the order and set a bar date for asserting claims. Galanis and his associates failed to assert timely claims, which prevented them asserting any claims based on their purported \$8 million in debt. Braziel disallowed claims for two other potential creditors for another \$1.5 million.

All very nice work! Braziel now controlled a company that had little debt and some real money. What should he do with it? The good answer is "return the money to the shareholders pro rata, getting 20% himself." The actual answer is some combination of "take the money himself":

Over the next eight months, Braziel caused the Company to wire a total of \$121,000 to his personal checking account in eighteen installments. Braziel never disclosed the transfers to the court or his attorneys.

And “YOLO some call options”:

Braziel next decided to use the Company’s money to fund high-risk, high-reward investments. Using a combination of money he extracted from the Company, plus some funds received from family members, Braziel invested in common stock and call options on the stock of Belmond, Ltd., a Bermudian hotelier. Between July 12 and 18, 2018, the Company wired \$315,000 to Braziel’s checking account. On July 17, Braziel opened a brokerage account with Interactive Brokers, LLC (the “First Brokerage Account”). On July 18 and 19, Braziel moved \$270,000 from his checking account to the First Brokerage Account.

Starting on July 18, 2018, Braziel used the funds in the First Brokerage Account to buy and sell common stock and call options for Belmond’s stock.

This all went well enough that, “having seen that he could use the Company’s assets to make investments, Braziel filed a motion on October 16, 2018, that asked the court to discontinue the liquidation and approve the Company’s re-emergence as a publicly traded investment vehicle.” The company is back in business. Also all of his trades were good? The call options turned out to be on a merger target, and he sold the web address for more than he paid for it:

Two months after the entry of the Discontinuation Order, Braziel’s investment in Belmond paid off. The bulk of the position consisted of out-of-the-money call options expiring on December 21. Just in time, on December 14, LVMH Moët Hennessy—Louis Vuitton SE announced an acquisition of Belmond’s public equity at \$25 per share. Braziel sold the call options for \$936,344.77, generating a gain of \$832,464.61. In total, the value of the Belmond Investment amounted to approximately \$1,494,337.06. Braziel also sold the Website Address. In December 2018, a third party agreed to buy the Website Address for \$1.5 million. After a 15% sales commission, the Company netted \$1.275 million, resulting in a gain of \$525,000 over the \$750,000 the Company paid to re-acquire the Website Address in 2017.

Good! But also bad:

Braziel helped himself to the proceeds. Between December 20, 2018, and February 13, 2019, the Company wired \$1.65 million to Braziel’s checking account. Braziel spent \$347,786.43 on a sapphire ring and a pair of emerald-and-diamond earrings from Lorraine Schwartz, \$61,355.31 on a German watch, and over \$400,000 on luxury hotel stays, apparel, art, and other fineries. Braziel invested the rest of his takings in bankruptcy claims, cryptocurrency, leveraged loans, and high-risk equities. Many of these investments produced outside gains. Despite having obtained the gains using Company funds, Braziel did not share the gains with the Company.

Eventually “a longtime stockholder of the Company who spent part of his career as a federal prosecutor ... began to wonder what Braziel was doing.” So he asked, did not get a satisfactory answer, and sent a letter to the Delaware court that had supervised the liquidation, accusing Braziel of “embezzl[ing] three million dollars from the shareholders.” The court appointed a special magistrate to investigate, and the magistrate concluded that Braziel had in fact taken the money and should pay back about \$2 million. Braziel was apparently like “fair play, you got me”:

To the receiver’s [Braziel’s] credit, he largely acknowledged the accuracy of the special magistrate’s recommended factual findings. He also accepted aspects of the special magistrate’s recommended remedy by agreeing to provide restitution and to pay the costs of the special magistrate’s investigation.

He raised some technical objections, though, and last week Delaware Vice Chancellor Travis Laster decided he should actually pay back about \$1.95 million. The quotes above are from Vice Chancellor Laster’s opinion.

I suppose the moral of the story is something like: If you go around hunting for defunct scams that you can take over and sell for parts, you might be tempted to keep all the money for yourself. “Ahh, this thing was a scam anyway” you think; “any value that I can salvage is just found money and I should keep it.” But you are not actually allowed to do that! Even when you find a scam, the rule is not finders keepers.

All of this stuff happened years ago, though. Since then Braziel has built a fascinating business of finding scams to sell for parts. He has appeared in Money Stuff a few times before, and the Wall Street Journal’s story about last week’s decision notes:

Braziel, a managing partner at distressed investing firm 117 Partners and based in Italy, rose to fame in recent years for buying claims in high-profile cryptocurrency bankruptcy cases from customers, including in the defunct cryptocurrency exchange FTX, crypto lender Celsius Network and crypto platform Voyager Digital.

In some ways looting Fund.com does seem like good practice for trading FTX claims.

M&A fees

Investment bankers mostly work for free, and are sometimes lavishly overpaid. If you are the chief executive officer of a big company, and you want advice about potential acquisition targets, or modeling for potential financing transactions, or a recommendation for a new chief financial officer, you can call up your friendly investment banker and say “hey no rush or anything but I was wondering about ...” and she will send you a beautifully formatted 40-page analysis by the next morning. You would never think of paying for this, and she would never ask. But then if you ever *do* acquire a company or raise financing, you will feel some obligation to call her, and she will charge you millions of dollars for *that*.

This works fine, but it has to be carefully calibrated. If a bank builds its business on a model like “10% of our clients will pursue deals, and 50% of those deals will sign, and 80% of those deals will close,” then it can figure that it will get paid for 4% of its work and charge 25 times as much as that work costs, to cover all of the unpaid work. But then if the antitrust regime changes and only 60% of signed deals close, you are underpaid.

At Reuters, Anirban Sen reports:

Bankers have been pushing to get paid even when a deal is thwarted by regulators, and are charging more for services paid irrespective of whether a transaction closes, interviews with more than a dozen dealmakers showed.

The banks’ tactics include taking a larger slice of the breakup fee paid by the acquirer to the target for failing to close a deal, and charging more for “fairness opinions” they provide to companies on whether they should sell themselves. ...

U.S. antitrust regulators filed 50 enforcement actions against mergers in the 12 months to the end of September 2022, representing the highest level of enforcement activity in over 20 years, according to the most recent data published by the Federal Trade Commission and U.S. Department of Justice. ...

Top investment banks, including Goldman Sachs (GS.N), opens new tab, JPMorgan Chase (JPM.N), opens new tab and Morgan Stanley (MS.N), opens new tab, are pushing to be paid as much as 25% of the breakup fee on some transactions, depending on the transaction’s size, according to the dealmakers who were interviewed. That is up from a historic average of receiving about 15% of the breakup fee, they added. ...

Investment banks have also been making roughly 20-25% of their advisory fees to companies selling themselves subject to delivering fairness opinions, which are paid even if a deal does not close. Referred to in the industry as “announcement” fees, these are up from an average of 5% to 6% of the total advisory fees during the previous decade, according to several dealmakers and regulatory filings.

It would be funny if the bankers explicitly said “the only way we can keep our prices low is by also charging for busted deals,” but they don’t, probably because it’s hard to argue that their prices are low.

Hedge funds

A few months ago, I mentioned “Bill Ackman’s old-school approach to managing a hedge fund — he’s a famous guy, he makes concentrated high-conviction bets on stocks, he doesn’t hedge much,” and a reader wrote in to chastise me. The *old-school* approach to managing a hedge fund is Alfred Winslow Jones’s: Jones invented the hedge fund, and his early approach was arguably more like that of modern multistrategy funds that hire lots of smart investors to pick stocks and hedge out market exposure. (Thus the name.) Jones also invented the hedge fund compensation scheme, though (particularly the 20% performance fee), and *that* proliferated among funds that didn’t do as much hedging. But a famous guy making big stock bets and charging 20% of returns was, in the long history of hedge funds, something of a novelty.

Still, I stand by what I wrote: There *was* a fairly long vogue for high-profile individual hedge fund managers who made big bets, and that era is passing, and now hedge funds are big institutions stocked with well-paid but somewhat anonymous portfolio managers grinding out alpha with low volatility. At Business Insider, Linette Lopez meditates on the transition:

What is clear is that hedge funds run by an individual star, by one prodigious mind, are not raising the massive money they used to. Clients who once were proud to hand their money to a specific person are pushing back; they want to pay lower fees and see less-volatile returns. The funds that have survived rely on a stable of faceless traders testing out different ideas, brokering transactions, and harvesting the returns for the collective. Quant strategies — which are built on algorithmic trading — have also become more popular with the ultrawealthy. More robots, fewer people, lower overhead. ...

In decades past, clients were mostly HNWI: high-net-worth individuals. Nowadays the biggest money runners are institutions, and institutions are more exacting. One legendary but shy fund manager told me that these institutions are more interested in steady returns, and the wild swings in performance that hedge funds offer simply give them heartburn. “They can sleep better at night,” the person said. “The economy can turn bad, the stock market can crash, and they’re not going to share losses.”

Sebastian Mallaby, the author of “More Money Than God: Hedge Funds and the Making of the New Elite,” told me that institutions are also less willing to be enchanted by the personal magnetism of a founder like Julian Robertson, the founder of the legendary fund Tiger Management.

“In the old days, Julian Robertson would hold a party for HNWI and have some kind of wacky show for them at the Met, and they’d say ‘Julian, what a guy’ and leave him alone for a year,” Mallaby said. “That’s gone away because individual investors aren’t as important as institutional investors, who have to show they’ve been careful where they put the money.”

The story here is something like “institutions demand that they actually get identifiable alpha and uncorrelated, high and stable returns in exchange for all the fees they are paying hedge funds, and the hedge fund industry is responding by building stable professional institutions that actually provide that service.” That’s a good story! But the parties might be less fun.

Socialist calculation problem

Theoretically, there are about two good ways to run an economy:

1. Free markets. People can make stuff and buy whatever they want, and markets and price signals sort out how much gets made and who gets it. If people want widgets, and I make widgets, I can sell the widgets for money, which will make me want to make widgets. If nobody wants sprockets, and I make sprockets, soon I will stop and do something more useful.
- 2. A big computer. You program a big computer to figure out everyone’s preferences and marshal all the available resources, and then you solve a complicated optimization problem to figure out how best to use the resources to meet the preferences.

The first approach has been pretty widely adopted, in variously modified forms, over many years in many places, and has a decent if not unblemished record of allocating resources and satisfying demand. The second approach has *some* track record — I have at least once mentioned Francis Spufford's terrific historical novel, *Red Plenty*, about Soviet efforts in this vein — but there are not a lot of clean examples of it working at economy-wide scale. You would need a pretty big computer and it seems hard.

Still I am not sure that it is *refuted*? It's more, like, Real Big Computers Have Never Been Tried. You could tell a story like:

Computers are really good now. There have been rapid advances in processing power and machine learning and artificial intelligence, so you should expect big computers to have a better chance of running an economy in 2024 — or 2044 — than they did in 1964.

- One outcome of free markets seems to be the rise of *larger* companies, and the larger and more diversified a company is, the less it will be governed by price signals: If I mine my own ore and refine my own steel to make widgets, and then use those widgets in my gizmo factory, my decisions about how many widgets to make will be driven not by the price of steel or widgets, but by how many widgets the VP of Gizmo Factories wants and how much steel the VP of Steel Milling can provide.
- Index funds? When I mentioned *Red Plenty*, it was in the context of writing about a Sanford C. Bernstein & Co. research note arguing that "Passive Investing is Worse Than Marxism" because passive investors do not try to allocate capital to its best uses, but just buy whatever is in the index. *If that were true* — if financial markets have abdicated their responsibility to allocate resources using price signals — you'd need some sort of allocation mechanism to replace it.

Anyway this is all pretty idle speculation but here's a fun Wall Street Journal article about Amazon.com's smart speaker business:

When Amazon launched the Echo smart home devices with its Alexa voice assistant in 2014, it pulled a page from shaving giant Gillette's classic playbook: sell the razors for a pittance in the hope of making heaps of money on purchases of the refill blades.

A decade later, the payoff for Echo hasn't arrived. While hundreds of millions of customers have Alexa-enabled devices, the idea that people would spend meaningful amounts of money to buy goods on Amazon by talking to the iconic voice assistant on the underpriced speakers didn't take off.

Customers actually used Echo mostly for free apps such as setting alarms and checking the weather. "We worried we've hired 10,000 people and we've built a smart timer," said a former senior employee. ...

As [Chief Executive Officer Andy] Jassy tries to fix it, he is rethinking the obscure Bezos-era metric inside Amazon that helps explain why Echo and other devices could accrue such huge losses for so long with little repercussion. Called "downstream impact," or DSI, it assigns a financial value to a product or a service based on how customers spend within Amazon's ecosystem after they buy it. ...

The metric was developed in 2011 by a team of economists including an eventual Nobel Prize winner. In some instances, the model worked clearly. When customers buy Amazon's Kindle e-reader—one of Amazon's profitable devices—they are very likely to then buy ebooks to read on that device. Ebooks are part of the books business, not the devices business, but Amazon leaders said it made sense for the Kindle team to claim part of revenue when assessing their product's internal value. ...

In other cases—especially Echo devices—the downstream impact idea broke down, said the people familiar with the devices business.

If you were in the business of selling smart speakers, you would try to (1) sell them for more than it cost to make them and/or (2) negotiate some sort of arm's-length partnerships with advertisers, business partners, etc., who might pay you for access to your smart speakers' customers. If the amount of money that customers paid, plus the amount of money that advertisers/partners paid, exceeded the cost of making the speaker, you'd do it. If not, you'd stop. Capitalism!

But Amazon is not in the business of selling smart speakers. It's in the business of selling *everything*, which is harder. If you sell everything, your price signals get obscured. If Amazon just gave everyone a phone, for free, with the Amazon app on it, that would probably increase Amazon's sales of books and toilet paper and electronics and dog food and video subscriptions. But would it be worth it? For that you need a model developed by a team of economists. And sometimes the model doesn't work.

Bad trades

I wrote yesterday that, if you are very bad at picking stocks — if every stock that you buy goes down — you have a valuable skill, though one that is in practice difficult to monetize. (We were talking about a futures broker who monetized its customers' skill at making bad trades, by making the opposite trades itself, without telling the customers. Not helpful for the customers!) I forgot that there is an XKCD on the subject. "Hey, this company's CEO wants revenge on the same ghost as me! I'm buying!"

Things happen

Ether ETFs Trade Over \$500 Million in Strong Crypto Fund Debut. WorldQuant Grows Non-Millennium Cash It Manages to \$10 Billion. Cash Dries Up for Locals Fighting Climate Change. BlueCrest and FCA Back in Court Over \$700 Million Compensation. Wiz Rejects Google's \$23 Billion Offer, Seeks IPO Instead. CrowdStrike Warns of Hacking Threat as Outage Persists. Insurers' losses from global IT outage could reach billions. Delta Air Faces US Investigation Over Handling of System Outage. New York Financial Regulator Hires New Crypto Unit Leaders. Tesla Stages \$386 Billion Comeback as Musk Elevates AI Over EVs. Google abandons plan to remove cookies from Chrome browser. Spiders, Floods Join List of Things Disrupting Global Trade.

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- 1. This and other unattributed quotes are from last week's Delaware Chancery Court opinion.
- 2. The court says that in 2010, "the Company completed a 120:1 reverse stock split. Even after the split, the Company's stock traded for as little as six cents per share," though from my glancing at the chart I suspect that that \$570 number was split-adjusted and the actual price at the time was like \$5 or \$6. (\$570 would be very high for this sort of stock!) Doesn't really matter though.
- 3. This is loose and exaggerated. If 10% of your clients pursue deals, you do a lot more than 10% of your work for them — actually doing a merger is a lot more work than the pitching and casual advice that the other 90% of the clients get.

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July 23, 2024, 12:44 PM PDT

GE Vernova Now Must Explain Broken Wind Turbine to Investors

By Will Wade

- Company to report earnings after massive blade fell into sea
- Incident could affect nascent US offshore wind industry

Bloomberg Law News 2024-07-24T09:30:58064232753-04:00

GE Vernova Now Must Explain Broken Wind Turbine to Investors

By Will Wade2024-07-23T15:44:05993-04:00

- Company to report earnings after massive blade fell into sea
- Incident could affect nascent US offshore wind industry

GE Vernova Inc. is set to face hard questions from investors Wednesday after an accident shut down construction at the biggest US offshore wind farm.

Debris continues to wash ashore after part of a massive blade from a GE Vernova turbine broke off July 13 at the Vineyard Wind project south of Martha's Vineyard in Massachusetts.

The incident temporarily closed beaches on Nantucket island, one of America's premiere vacation destinations for well-heeled travelers. It has also raised questions about the long-term prospects of both the US offshore wind industry and the newly independent company, which spun off from General Electric Co. in April.

Shares of GE Vernova are down more than 5% since pieces of the blade started falling into the sea. The company is set to report earnings early Wednesday and will host a conference call with analysts seeking answers.

Read More: Busted Nantucket Wind Turbine Raises Risk as Bits Hit Beach

Investors will be looking for indications that the accident was not the result of a systemic issue or design flaw. In May, a blade was damaged on a GE Vernova turbine at the UK's Dogger Bank offshore wind project.

"The markets have responded as if this goes well beyond a single, one-off incident," said **Chris Dendrin**, an analyst with RBC Capital Markets. "The worst-case scenario could definitely be worse than having to replace a handful of blades."

The company and US officials are still investigating the Vineyard Wind accident, and it's unlikely they'll be able to identify a cause this soon, said Dendrin. However, GE Vernova is expected to deliver an initial environmental assessment to local officials Tuesday, and executives will address a public meeting in Nantucket Wednesday evening. In an emailed statement Tuesday, the company said its top priority was minimizing the accident's impact on neighboring communities.

The Vineyard Wind incident is raising political and financial risks for the emerging US offshore wind industry, whose future development is based on its status as a pollution-free energy source.

Companies are reeling after a year of cost overruns and canceled contracts. Former President Donald Trump, a longstanding critic of wind turbines, has vowed to target the industry if he reclaims the White House this fall. And Nantucket officials were meeting Tuesday to consider potential legal action.

"The timing on this is about as bad as we can imagine," said Eric Hines, a Tufts University engineering professor. "Offshore wind has plenty of detractors."

Vineyard Wind has been viewed as one of the industry's marquee projects. It became the largest operating offshore wind farm in the US in June when its 10th turbine began sending power to the grid. Once completed, its planned 62 turbines will have about 800 megawatts of capacity, enough to power about 400,000 East Coast homes.

But this accident comes even as litigation continues to dog the project. A Boston-based federal circuit court is set to hear oral arguments Thursday in consolidated cases brought by a fishing group and a seafood processor that assert environmental violations. The fishing group argues that the US agency that permitted the project failed to adequately consider impacts or examine "safety or engineering issues with respect to the new Haliade-X wind turbines."

--With assistance from **Jennifer A. Dlouhy** and **Brooke Sutherland**.

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Funds Say Boeing Can't Ditch 737 Max Securities Suit

By **Katryna Perera**

Law360 (July 23, 2024, 5:35 PM EDT) -- Pension funds leading a proposed securities fraud suit against Boeing have fired back at the airline manufacturer's attempt to dismiss allegations that it misled investors about the safety of its 737 Max jets, saying the suit sufficiently showcases how missteps by Boeing's top brass diminished shareholder value.

Lead plaintiffs, the Employees' Retirement System of Rhode Island and Local #817 IBT Pension Fund, filed a **brief** on Monday in opposition to Boeing's June dismissal motion. The pension fund says Boeing and its senior executives misled investors about the safety and quality of the company's airplanes for years and misleadingly emphasized the message, "safety dominates Boeing."

In its dismissal motion **last month**, Boeing said the plaintiffs' "kitchen-sink" approach falls short of pleading requirements, and the majority of challenged statements in the suit are general statements regarding the value Boeing places on safety and quality, which are not specific enough for a reasonable investor to depend on them alone, and therefore inactionable.

However, the pension fund says the statements are actionable and highly material because Boeing repeatedly emphasized that it "absorbed the lessons" of two crashes in 2018 and 2019 and that the defendants themselves acknowledge safety is "the most important part of shareholder value" at Boeing.

"Defendants contend, for example, that their representations were nothing more than vague 'aspirations.' One can imagine the public outcry had Boeing announced that it merely 'aspires' to make safe airplanes, and Boeing made no such announcement," Monday's brief says.

The individual defendants — president and CEO David Calhoun, former president and CEO Dennis Muilenburg, and Chief Financial Officer Brian West — also argued last month that their positions within the company do not support a strong inference of scienter and that the investors have not identified a single safety report allegedly acknowledged by senior management.

On Monday, the investors said that argument fails because following the 2018 and 2019 crashes, Boeing implemented a new reporting structure in which the company's senior management, including the individual defendants, were "personally required" to receive all safety reports.

According to the brief, the new reporting structure involves monitoring "all aspects of product safety," including "cases of undue pressure and anonymous product and service safety concerns raised by employees." Additionally, the reporting lines included direct reports from Boeing's chief engineer to the CEO, who was identified as accountable for the company's "safety performance," the brief says.

"Defendants' conceit that they may have been unaware of all of this is absurd," the brief says. "Given the direct personal attention they purportedly devoted to monitoring safety pursuant to Boeing's safety reporting system, the reality of Boeing's pervasive safety and quality deficiencies, the concerns raised by employees that resulted in retaliation, and the 'control' Boeing's leadership team exercised in setting corporate priorities in the first place, there is a strong inference that the defendants knew their statements were materially false and misleading when made."

Finally, Boeing argued in its dismissal motion that the suit fails to plead loss causation since it fails to show a causal link between the defendants' alleged corrective disclosures and share declines.

However, the pension funds argue the defendants ignore the complaint's allegations, which are often

backed by quotes from securities analysts that say the truth about Boeing's alleged deception was revealed in stages.

"The complaint details a series of revelations which exposed 'Boeing's systemic failure to maintain quality in its manufacturing processes, in stark contrast to defendants' public statements,'" the brief states. "Defendants ignore that, as to each corrective disclosure and materialized risk, the complaint describes the exposure of previously-concealed information and the resulting stock price decline."

The suit was filed weeks after the **Jan. 5 midair blowout** of a mid-cabin panel and subsequent rapid depressurization aboard Alaska Airlines flight 1282 shortly after it took off from Portland, Oregon, on its way to Ontario, California. The 737 Max 9 jet involved in the incident was delivered to Alaska Airlines in October 2023.

The Federal Aviation Administration temporarily grounded the Max 9 jets, mandated in-depth inspections and **launched a formal investigation** into Boeing.

Boeing's stock price dropped from \$249 on Jan. 5 to \$201.88 on Jan. 25, representing an 18.9% decline, according to the complaint.

The most recent version of the suit claims Boeing's nearly two-decade focus on prioritizing profits over safety "led to poor quality control standards in the production of its commercial aircraft such as the 737 Max, resulting in a heightened risk of manufacturing flaws which could render the company's new airplanes unsafe."

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

The pension funds are represented by Carol C. Villegas, Jake Bissell-Linsk and David Saldamando of Labaton Keller Sucharow LLP, Steven J. Toll and S. Douglas Bunch of Cohen Milstein Sellers & Toll PLLC, Chad Johnson, Noam Mandel, Jonathan Zweig, Desiree Cummings and Brent E. Mitchell of Robbins Geller Rudman & Dowd LLP and Craig C. Reilly of The Office of Craig C. Reilly.

Boeing and the individual defendants are represented by Richard C. Pepperman II and Judson O. Littleton of Sullivan & Cromwell LLP and Benjamin L. Hatch of McGuireWoods LLP.

The case is In re: The Boeing Co. Securities Litigation, case number 1:24-cv-00151, in the U.S. District Court for the Eastern District of Virginia.

--Additional reporting by Sydney Price. Editing by Drashti Mehta.



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Chancery Slams 'Squishy' Deal In 'Tagalong' BioMarin Suit

By **Leslie A. Pappas**

Law360, Wilmington, Del. (July 23, 2024, 5:46 PM EDT) -- A visibly irritated Delaware Chancery Court judge on Tuesday rejected a settlement with BioMarin Pharmaceuticals Inc. that would have given shareholder attorneys \$1.25 million in exchange for broad releases and "squishy" governance reforms, saying he didn't want to encourage "tagalong litigation" that yielded only "ephemeral" benefits.

At a bench ruling in Wilmington after more than an hour of questions to shareholder attorneys, Vice Chancellor Nathan A. Cook said approving the settlement would "send the wrong message" and could continue a "vicious cycle" of wasteful litigation.

"I have zero interest in approving this settlement and getting more cases like this," the vice chancellor said.

The settlement would have resolved two derivative cases that BioMarin shareholders filed in Delaware's Court of Chancery, alleging false and misleading disclosures related to the company's hemophilia drug candidate Valrox. Shareholders alleged company officials failed to disclose potential threats to approval of the drug, including a U.S. Food and Drug Administration notice that an important inspection would be delayed. When the truth finally came out, BioMarin stock plummeted more than 30%.

BioMarin shareholder Elaine Wang filed her lawsuit in January 2023 against BioMarin's board of directors, raising claims of breach of fiduciary duty, insider trading, waste of corporate assets and unjust enrichment. Shareholder Bill Tsantes **filed his complaint in May 2023** with similar claims, naming the same defendants.

The claims in the Delaware suits echoed those in a **federal securities action in California** that eventually settled for \$39 million.

After the securities class action settlement was approved in California, shareholders in the Delaware cases agreed to mediate with Michelle Yoshida of Phillips ADR Enterprises, who had helped mediate the California case.

Yoshida proposed the \$1.25 million attorney fee in a double-blind recommendation Nov. 10, 2023, and the parties accepted the recommendation, **a brief in support of the settlement** said. The parties filed a **stipulation** with the court in March 2024. In addition to the \$1.25 million fee, attorneys also sought \$2,000 incentive awards for the two shareholder plaintiffs.

Under the terms of the settlement, which aside from the fee awards included no monetary payout, the company agreed to implement several corporate governance reforms, such as establishing a Disclosure and Controls Committee that would ensure the accuracy of regulatory filings and press releases.

The reforms "will substantially bolster the company's governance going forward" and "would prevent the likelihood of such alleged misconduct recurring in the future," Timothy J. MacFall of Rigradsky Law PA, an attorney for the shareholders, told the court at the hearing Tuesday.

Vice Chancellor Cook protested that most of the reforms were "sort of squishy" and are things that

officers and executives "are supposed to do anyway."

The vice chancellor pushed MacFall to explain how the corporate reforms were any different from what the company was already doing. "I have no idea whether this moves the needle one iota over what the company was doing and currently doing. How do I know?" he asked.

The vice chancellor asked whether shareholders could point to any discovery that proved the reforms were making real changes. MacFall said the shareholders settled before getting that discovery.

"Nobody looked under the hood in any meaningful way," the vice chancellor said.

The vice chancellor also pressed MacFall to explain how much the potential damages in the case were worth, given that the California case settled for \$39 million. After some back and forth about various claims and the likelihood of success, the vice chancellor concluded, based on what he called a "back of the envelope calculation," the potential damages were worth at least \$5 million plus interest.

Why should he allow broad releases on claims that, if the shareholders' complaints were correct, could potentially be worth at least \$5 million to the company? the vice chancellor asked. "The company hasn't brought the claim yet. It's worth \$5 million, but I should go ahead and release it?" he asked. "Why?"

The vice chancellor also questioned how much effort attorneys had put into the litigation before turning to settlement discussions.

Shareholders argued in their briefs that their attorneys spent more than 1,100 hours on "significant litigation efforts," the vice chancellor said, quoting the brief, but a simple check of the docket showed little beyond the initial filing of a complaint.

MacFall replied that "the lion's share had to do with the settlement negotiation process."

"I don't want to incentivize this sort of outcome and the filing of these sorts of cases unless people are going to push and get a real benefit," the vice chancellor said.

None of the parties commented after the hearing.

The shareholder plaintiffs are represented by Bradford deLeeuw of deLeeuw Law LLC, Kip B. Shuman, Rusty E. Glenn and Brett D. Stecker of Shuman Glenn & Stecker, Gustavo F. Bruckner, Samuel J. Adams and Ankita Sangwan of Pomerantz LLP and Timothy J. MacFall, Seth D. Rigrodsky, Gina M. Serra and Herbert Mondros of Rigrodsky Law PA.

BioMarin and the individual defendants are represented by Ray J. DiCamillo of Richards Layton & Finger PA and Brett De Jarnette of Cooley LLP.

The cases are Elaine Wang v. Jean-Jacques Bienaimé et al., case number 2023-0058, and Bill Tsantes v. Jean-Jacques Bienaimé et al., case number 2023-0569, both in the Court of Chancery of the State of Delaware.

--Additional reporting by Katryna Perera and Jeff Montgomery. Editing by Janice Carter Brown.



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Chamber Rips Multibillion-Dollar Atty Fee Bid In Musk Pay Suit

By **Jeff Montgomery**

Law360 (July 23, 2024, 3:18 PM EDT) -- The nation's largest business organization has urged Delaware's Court of Chancery to adopt sweeping curbs to jumbo plaintiff attorney fee awards, declaring a multibillion-dollar fee bid following the cancellation of Tesla CEO Elon Musk's stock-based pay plan "shocks the conscience."

In a brief docketed as part of a Chancery class suit that led to the scuttling of Musk's 10-year equity package, once valued at \$56 billion, the U.S. Chamber of Commerce argued that "Delaware law does not permit, much less require, the massive fees" sought by counsel who won the pay rescission order by Chancellor Kathaleen St. J. McCormick on Jan. 30.

The controversy is the second recent, public corporate-side challenge to a Chancery decision, coming days after Delaware Gov. John Carney signed into law business- and corporate bar-backed legislation permitting big stockholder agreements of a type that had been struck down by Vice Chancellor J. Travis Laster earlier this year.

In the Tesla fee controversy, the Chamber argued it is "increasingly concerned about the costs imposed by the plaintiffs' bar that regularly sues businesses in this court." The group warned that the requested 24.4 million-share fee award — which fluctuates but was worth about \$6 billion on Tuesday — could actually harm Tesla if the value exceeds the difference between the invalidated and recently reapproved compensation.

Customary, or "lodestar," reasonable hourly rates times hourly billings for the firms involved, the Chamber argued, point to a \$13.6 million base fee, not one in the billions.

"If the court is to entertain fee requests of this magnitude, it should adopt additional safeguards" early in litigation to head off purportedly out-of-proportion plaintiff's attorney awards, the Chamber's brief said.

Changes should guard against what were described as inherent conflicts of interest created by the pursuit of fees in cases in which plaintiff-stockholders, and their counsel, are acting derivatively on behalf of the company.

"No one, including plaintiff, contends that competent counsel would not have taken this case for a far lesser sum," the Chamber wrote, arguing fees should only be large enough to "induce monitoring behavior. Nothing more should be awarded here."

Results in Tesla, the group noted, had the effect of "expanding the well-documented 'merger tax,'" or litigation-related legal costs that often follow big corporate tie-ups, "into something like a Delaware litigation tax."

During a daylong argument on the fee before Chancellor McCormick on July 8, Gregory V. Varallo of Bernstein Litowitz Berger & Grossmann LLP, lead counsel for the team that won the striking down of Musk's pay, argued that "if Delaware continues to perceive value in policing bad behavior" by controlling stockholders, "narrowing incentives to do so would be a very bad policy idea."

John L. Reed of DLA Piper US LLP, counsel to Tesla, argued class attorney efforts warranted only payment for up to four times their customary hours, or about \$54 million.

Instead, Reed said, counsel are seeking a fee based on a \$288,000-per-hour rate, some 17 times higher than the current highest fee ever awarded in Delaware.

Still pending in the Tesla case, meanwhile, is a battle between the company and class attorneys over arguments that a June 13 stockholder vote that ratified Tesla's previously stock-based compensation for Musk justifies reversal of Chancellor McCormick's strike-down.

"With 72% of disinterested voting shares ratifying the plan as in Tesla's best interests, settled precepts of equity and law support honoring the disinterested owners' collective business judgment over plaintiff's idiosyncratic preferences," according to a brief filed on behalf of Tesla's board members, including Musk.

The Chamber observed that concern over "weak cases" being filed "on an industrial scale" in pursuit of fees is a related problem.

"The solution to the former problem is now clear: Plaintiffs' counsel who do not bring 'real cases' should not be rewarded at all, even if they obtain the proverbial peppercorn," or minimal recovery.

Attorneys for Tesla argued that the chancellor should limit any fee award to a maximum of \$54 million, or about four times the class attorneys' reasonable hourly rate and hours spent on the case.

Class attorneys said their proposed award would amount to just over 11% of the nearly 267 million shares canceled by the action — well below the 33% found justifiable in the past for class attorney awards after taking a case all the way through trial and judgment.

Varallo said the chancellor's January decision rescinding Musk's award "had the effect of presenting the company with 304 million shares that it didn't have to use prior to Jan. 30. It can now use them for any corporate purpose."

Counsel for the stockholders and Tesla directors did not immediately respond to a request for comment.

The Chamber of Commerce of the United States is represented by Daniel A. Griffith of Whiteford Taylor & Preston LLC and Johnathon E. Schronce, Steven M. Haas and James M. Lockerby of Hunton Andrews Kurth LLP.

Tesla directors Elon Musk, Robyn M. Denholm, Antonio J. Gracias, James Murdoch, Linda Johnson Rice, Brad W. Buss and Ira Ehrenpreis are represented by David E. Ross, Garrett B. Moritz and Thomas C. Mandracchia of Ross Aronstam & Moritz LLP, Michael A. Barlow, Kathleen M. Sullivan, Alex B. Spiro, Christopher D. Kercher and Jonathan E. Feder of Quinn Emanuel Urquhart & Sullivan LLP, and Evan R. Chesler, Daniel Slifkin and Vanessa A. Lavelly of Cravath Swaine & Moore LLP.

The shareholders are represented by Jeroen van Kwawegen, Margaret Sanborn-Lowing, Gregory V. Varallo and Glenn R. McGillivray of Bernstein Litowitz Berger & Grossmann LLP, Jeremy S. Friedman, Spencer M. Oster and David F.E. Tejtzel of Friedman Oster & Tejtzel PLLC, and Peter B. Andrews, Craig J. Springer, David M. Sborz, Andrew J. Peach and Jackson E. Warren of Andrews & Springer LLC.

Musk and the other defendants are represented by Evan Chesler, Daniel Slifkin and Vanessa A. Lavelly of Cravath Swaine & Moore LLP and David E. Ross and Garrett B. Moritz of Ross Aronstam & Moritz LLP.

The case is Richard J. Tornetta et al. v. Musk et al., case number 2018-0408, in the Court of Chancery of the State of Delaware.

--Additional reporting by Leslie Pappas, Vince Sullivan, Lauren Berg and Rose Krebs. Editing by Philip Shea.



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Chancery Spikes Raytheon Stockholder's Derivative Suit

By **Leslie A. Pappas**

Law360 (July 23, 2024, 7:14 PM EDT) -- A shareholder who faulted directors at Raytheon Technologies Corp. for allowing a special committee to change employee compensation plans without first seeking stockholder approval has failed to show how the board of directors did anything wrong, a Delaware vice chancellor ruled Tuesday, dismissing the derivative lawsuit.

In a **23-page letter opinion** on Tuesday, Vice Chancellor Morgan T. Zurn found the complaint from The Vladimir Gusinsky Revocable Trust had failed because it didn't show how the board erred when it delegated authority to a special committee to amend two long-term incentive plans.

The plaintiff's theory "falters in two places: that the board made any decision at all about stockholder approval, and that the board did so in bad faith," the vice chancellor wrote.

The equity awards at issue were originally issued by Raytheon's predecessor, United Technologies Corp., under two long-term incentive plans issued to thousands of employees in 2014 and 2018.

The plans, which included stock options and stock appreciation rights, were administered by the UTC board and could only be modified with approval from UTC stockholders, except in the case of a spinoff, the opinion says.

The awards were amended in April 2020 during a company restructuring, when UTC spun off two of its business units into separate companies now known as Carrier Global Corp. and Otis Worldwide Corp. As part of the spinoff, UTC also merged its remaining aerospace business with Raytheon Co., ultimately forming what is now Raytheon Technologies Corp.

The trust's suit, filed in December 2022, challenged amendments made by a special committee of three independent directors in May 2020, shortly after the spinoffs and merger closed.

The board violated the terms governing the compensation plans by failing to seek a stockholder vote on the changes, the suit alleged. The changes that the special committee made resulted in a windfall for Raytheon executives, the complaint alleged.

The complaint named 15 current and former directors as defendants. To survive the motion to dismiss, the plaintiff would have had to show that at least seven of the directors had acted in bad faith, the opinion noted.

During a **hearing in March on the defendants' motion to dismiss**, Vice Chancellor Zurn had pushed the shareholder's attorney to explain how much power the board had delegated to the special committee and whether it had told the committee that amending the employee compensation plans required stockholder approval.

The shareholder's attorney, Benjamin I. Sachs-Michaels of Glancy Prongay & Murray LLP, said the board hadn't discussed with the committee whether the changes to the plans would require stockholder approval.

The plaintiff's "specific and insistent allegations" that the board "never expressly considered or decided whether" a stockholder vote was required under the plans made it impossible to make a finding of bad faith, the vice chancellor wrote in her opinion Tuesday.

"Plaintiff's numerous allegations that the board never thought about the stockholder approval requirement or made any decision about it at all foreclose the inference that the seven directors knowingly violated that requirement," she wrote.

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

The Vladimir Gusinsky Revocable Trust is represented by Benjamin I. Sachs-Michaels, Robert V. Prongay and Pavithra Rajesh of Glancy Prongay & Murray LLP, Richard Maniskas of RM Law PC, and Blake A Bennett of Cooch & Taylor PA.

Raytheon Technologies Corp. and the director defendants are represented by William Savitt, Graham W. Meli and Sunny S. Jeon of Wachtell Lipton Rosen & Katz and John L. Reed, Ronald N. Brown III and Peter H. Kyle of DLA Piper.

The case is Vladimir Gusinsky Revocable Trust v. Gregory J. Hayes et al., case number 2022-1124, in the Court of Chancery of the State of Delaware.

--Editing by Philip Shea.

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Chancery Ends Challenge To \$12.5B Qualtrics' SAP Sale

By **Jeff Montgomery**

Law360 (July 23, 2024, 8:20 PM EDT) -- Saying it was not reasonably conceivable that he would find software giant SAP and Qualtrics International Inc. directors liable for damages after Qualtrics' \$12.5 billion sale to Silver Lake Capital despite a superficially better offer, a Delaware vice chancellor on Tuesday dismissed a stockholder challenge to the deal.

Vice Chancellor J. Travis Laster summed up his reasons for the dismissal during a more-than 30 minute teleconference Tuesday, nine months after Qualtrics stockholders Sunil Soni and Alina Montano brought the suit in Delaware's Court of Chancery. Qualtrics is a global venture offering experience management expertise and services to organizations to address and develop insights from "points of friction" in digital and human interactions, the company says.

The proposed class case, filed in October, accused Qualtrics' directors and an American affiliate of German multinational SAP SE of favoring a conflicted, \$18.15 per-share offer from private equity giant Silver Lake and the Canada Pension Plan Investment Board despite a \$21 offer from private equity Thoma Bravo.

During the ruling on Tuesday, however, Vice Chancellor Laster said the suit was unable, even at its early stage, to show many "bad" facts underlying the snubbing of the Thoma Bravo offer, beyond the numbers themselves.

"Here, the regulatory problems, the problems associated with Thoma Bravo, make it not reasonably conceivable that the board's decision would fall outside the range of reasonableness," the vice chancellor said.

Among other concerns, Thoma Bravo could have triggered antitrust scrutiny that would have undercut the deal's value or jeopardized it. In addition, Thoma Bravo's proposal arrived without a "breakup" fee benefiting Qualtrics if the transaction ultimately tanked.

"In terms of Thoma Bravo's response, there was never an offer of [buyer] contractual provisions. They didn't get to the point of hiring an economic consultant to look at those types of things. The sell side came to the conclusion that Thoma Bravo had to be deeply discounted and might not be actionable at all because of antitrust" considerations.

SAP SE, which owned a 70% stake in Qualtrics, announced in March 2023 that it was in exclusive talks with Silver Lake about a buyout, with a \$12.5 billion deal quickly emerging.

Terms included continuation of intercompany agreements between SAP and Qualtrics that shareholders described in their complaint as being "generally favorable to SAP," which also was allegedly willing to take a discount to avoid Qualtrics' sale to a competitor.

Vice Chancellor Laster said attorneys for the stockholders who sued were unable to show why "entire fairness," the most onerous standard for companies defending a purportedly conflicted deal, should apply to the case rather than more business-friendly and flexible "enhanced scrutiny or deference to business judgment."

"This is a situation where the plaintiff needs to come up with something more," the vice chancellor said.

"Simply the presence of a continuing commercial agreement doesn't mean entire fairness" will trigger, the vice chancellor noted. "What's required is some form of incremental benefit over the status quo that the controller would receive." He added that the suit didn't point to any benefits for SAP and failed to explain why the Qualtrics deal was more favorable to SAP now than before.

"The plaintiff says the new agreement must mean that they conferred some benefit on SAP. I don't think that's what the law says," the vice chancellor said, observing that those who sued have to show how a new agreement is advantageous.

Counsel for the plaintiffs argued that SAP received a non-ratable benefit by avoiding a sale to Thoma Bravo, a competitor, despite the superficially better \$21 per-share offer, and instead directing the business to an ally, Silver Lake.

"First, \$21 was an initial indication of interest from a private equity buyer. That makes it somewhat of a questionable number," Vice Chancellor Laster said. "That number often goes down as due diligence continues," making the comparison between a "signed-up" \$18.50 price and a softer \$21 one less clear.

In addition, the vice chancellor said, "Thoma Bravo's offer was subject to considerable risks that Silver Lake's offer wasn't, and would have to be discounted to take into account that risk."

Neither side commented after the ruling Tuesday.

The shareholders are represented by Jeroen van Kwawegen, Edward G. Timlin, James Janison, Gregory V. Varallo, Mae Oberste and Daniel E. Meyer of Bernstein Litowitz Berger & Grossmann LLP, and Jason Leviton, Michael Gaines, Kimberly A. Evans, Lindsay K. Faccenda, Irene R. Lax and Robert Erikson of Block & Leviton LLP.

SAP is represented by Alan S. Goudiss, Daniel H.R. Laguardia and Samuel A. Stuckey of Allen Overy Shearman Sterling, and William M. Lafferty, Susan W. Waesco and Jacob M. Perrone of Morris Nichols Arsht & Tunnell LLP.

The individual defendants are represented by Deborah S. Birnbach, Christina Golden Ademola and Jordan Benson of Goodwin Procter LLP, and Rudolf Koch, Susan Hannigan Cohen and Cassandra L. Thompson of Richards Layton & Finger PA

The case is In re: Qualtrics International Inc. Stockholders Litigation, case number 2023-1050, in the Court of Chancery of the State of Delaware.

--Additional reporting by Leslie Pappas, Emilie Ruscoe, Dawood Fakhir, and Elaine Briseño, and Tom Zanki. Editing by Melissa Treolo.



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Ex-Celgene Exec Off The Hook For Statements To Investors

By **Carla Baranauckas**

Law360 (July 23, 2024, 6:01 PM EDT) -- Celgene Corp.'s former chief operating officer on Tuesday escaped some claims in a class action contending that the biopharmaceutical company artificially inflated its share price, with a New Jersey federal court finding that the ex-executive never made nor could he be linked to the statements that were issued by the company.

Investors said Scott Smith was the "maker" of statements in U.S. Securities and Exchange Commission filings and other communication platforms by way of his role on the committee tasked with reviewing the drafts and commenting on them, according to the decision by U.S. District Judge Michael E. Farbiaz.

But the judge concluded that Smith didn't pass any of the four tests for being considered a maker of the statements because there was no showing he signed the statements, affirmed them, lent his name to them or had strong control over them.

"Bottom line: the most commonly-invoked ways to show that a person 'made' a statement are not in play as to the chief operating officer," **the judge said**, granting Smith summary judgment on three of the 10 statements the investors targeted.

The company, Smith and two other executives sought summary judgment in the case, which was brought in 2018. Judge Michael E. Farbiaz withheld a decision on the company, granted Smith summary judgment as to three of the statements and noted that the plaintiffs appeared to have abandoned any objections to summary judgment motions by Scott and the two other former Celgene executives, Terrie Curran and Philippe Martin, on the rest of the statements. The judge said the parties can still weigh in on them after he rules on the defendants' summary judgment motion as to claims against the company.

The targeted statements were made in regulatory filings, press releases and conference calls spanning July 2017 to February 2018.

According to AMF Pensionsforsakring AB's **March 2018 suit**, Celgene boosted the company's share price by covering up the need for extra testing for the multiple sclerosis medicine ozanimod that complicated the timeline and potential approval of its application to the U.S. Food and Drug Administration, and it hid problems with market expansion for Otezla.

Celgene claimed in SEC filings that ozanimod was slated for FDA approval in late 2017 based on successful phase three trials, even though it hadn't completed crucial phase one testing, the complaint said.

The FDA ended up declining to review the new drug application for ozanimod, and a series of stock drops ensued as additional details surfaced about testing problems and delays, according to the complaint.

Celgene also exaggerated the growth prospects for Otezla, "despite receiving repeated internal warnings that achieving this guidance was impossible," the complaint said.

The company repeatedly told investors Otezla would reach up to \$2 billion in net sales by 2017, despite knowing problems with Otezla's pricing strategy, effectiveness and patient access, according

to the complaint.

Following disappointing third quarter 2017 results, Celgene's stock plunged by 16%.

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

The class is represented by Andrew L. Zivitz, Matthew L. Mustokoff, Joshua E. D'Ancona, Margaret E. Mazzeo and Nathan A. Hasiuk of Kessler Topaz Meltzer & Check LLP, Salvatore J. Graziano, Adam H. Wierzbowski and Brenna D. Nelinson of Bernstein Litowitz Berger & Grossmann LLP, James E. Cecchi and Donald A. Ecklund of Carella Byrne Cecchi Olstein Brody & Agnello PC and Christopher A. Seeger of Seeger Weiss LLP.

Celgene and its executives are represented by Lawrence S. Lustberg and Kate E. Janukowicz of Gibbons PC and Robert C. Micheletto, Nina Yadava, Rajeev Muttreja and Sarah Efronson of Jones Day.

The case is In Re: Celgene Corp. Securities Litigation v. Celgene Corp. Inc. et al., case number 2:18-cv-04772, in the U.S. District Court for the District of New Jersey.

--Additional reporting by Jeannie O'Sullivan. Editing by Stephen Berg.

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Half-Truths Vs. Omissions: Slicing Justices' Macquarie Cake

By **Daniel Levy and Pavithra Kumar** (July 23, 2024, 4:59 PM EDT)

The U.S. Supreme Court recently **ruled** in *Macquarie Infrastructure Corp. v. Moab Partners LP* that claims based on "pure omissions are not actionable under Rule 10b-5(b)" even where a U.S. Securities and Exchange Commission rule or regulation requires disclosure. Instead, to be actionable, an omission must make other separate "affirmative assertions (i.e., 'statements made')" misleading — a "half-truth."^[1]

Although the Supreme Court does not explicitly address other fundamental questions about the standards for establishing liability in Rule 10b-5 shareholder suits, its statements about why omitted information alone is not actionable under Rule 10b-5 provide a road map for what additional conditions would make the omitted information misleading.

And, according to the Supreme Court, they all relate to cake.

The Supreme Court provides the following pastry-based heuristic to elucidate what omitted information would be misleading and therefore actionable in a Rule 10b-5 litigation: "[T]he difference between a pure omission and a half-truth is the difference between a child not telling his parents he ate a whole cake and telling them he had dessert."^[2]

In this example, the Supreme Court says if the child never mentioned dessert, omitting that he ate the entire cake would have been a pure omission, which the Supreme Court rules is not actionable.

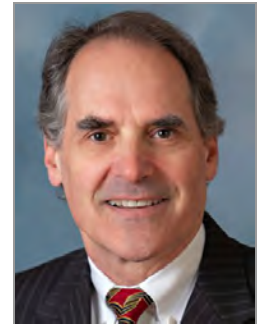
However, by mentioning eating dessert, while keeping mum about gorging on the entire cake, the child has told the parent a half-truth in his cake-related statements. Due to the half-truth, the parent might think the child ate some cake, but not all the sugar the cake had to offer, and therefore the parent might not know that the child's current peak performance would likely deteriorate precipitately in the near-term.

The above highlights that in the Supreme Court's plain vanilla cake example, while the child is the consumer of the cake, the parent is the consumer of the statement. Therefore, to understand whether the child's omitted information is misleading to the parent, the finder of fact would need to view the statement and concomitant omission through the eyes, knowledge and understanding of the parent.

When the child says "dessert," the Supreme Court believes the parent understands "a slice of cake," making the child's silence on the demise of the entire cake misleading.

However, it is a cake statement of an entirely different flavor if the parent knows that when the child says dessert the child always means the entire cake, and therefore understands that the child's performance will deteriorate, even though the child did not explicitly mention it in his dessert statement.

If the court found that the typical definitions and language used by the child and the parent effectively communicated all the relevant information to the parent, there would be no misleading



Daniel Levy



Pavithra Kumar

half-truth — and therefore, according to the Supreme Court, no actionable Rule 10b-5 avenue for the parent, closing out the case. Let them eat cake.

In the case of a Rule 10b-5 shareholder suit, the same fundamental issue exists. Who is the consumer of the information in the statement and the omitted information? The answer to that question allows the finder of fact to answer three other questions that follow directly from it.

In total, there are four fundamental answers needed to determine whether some omitted information is misleading to the consumer of the information:

1. From whose perspective must the omitted information be misleading?
2. What is the definition of a corporate statement?
3. How do the consumers of corporate statements use them?
4. What omissions make a corporate statement misleading?

Who is the consumer of corporate statements?

The Supreme Court did not explicitly address who the half-truth misleads in a viable Rule 10b-5 shareholder suit. Perhaps the "who" is so clear that this omission by the Supreme Court creates no confusion.

We rule they were not misleading on this point. Obviously, economists, financial experts and generally shareholders of the company's stock are the intended audience of the corporate statements.

Economists, experts and professional or institutional investors manage trillions of dollars in assets — approximately 80% of the equity market — making them the primary users of that information.[3]

While in some situations, a judge may determine whether the omitted information created a misleading half-truth, that determination cannot appropriately be made from the perspective of the legal profession. Rather, it has to be made based on the practices and definitions of the economists, financial analysts and investment professionals who would rely on it and therefore potentially be misled by it.

What is a corporate statement?

What is a "statement" that could become misleading if the company omits fuller information? For that answer, the Supreme Court turns to the Oxford English Dictionary — the 1933 edition, to be exact — which the court says "define[s] a 'statement' as a 'written or oral communication setting forth facts, arguments, demands or the like.'"[4]

In making this statement, the Supreme Court omits more of the definition of the word "statement" than it includes — which could be misleading, because directly after the selection chosen by the Supreme Court, the OED 1933 defines a "statement" as "a document setting out the items of debit and credit between two parties" — i.e., a financial statement.[5]

While an accounting error in the financial statement itself would not be a violation of Rule 10b-5, an omitted statement that makes a statement unclear would be.

Even the Supreme Court's limited citation identifies a broad range of facts delivered to economists, financial experts and investors in everything from advertisements and investor calls to financial statements, Form 10-Ks and Form 10-Qs, among others, as a "statement" that is potentially corruptible by a material omission of some other statement.

So, while the Supreme Court's Macquarie opinion discusses statements and omissions in the Management Disclosure and Analysis found in a Form 10-K, the set of statements that could become misleading due to an omission of some other statement could include financial statements in numerical form or written sentences — both of which are written presentations of facts.

How do economists, financial experts and investors use corporate statements?

To understand what omissions of information would make a given corporate statement misleading, we must understand how economists, financial experts and investors use corporate statements.

Economists, financial experts and investors as a group value a publicly traded company in a way that produces stock prices consistent with what economists call the efficient market theory, at least for many stocks.

In contrast to their common English meaning, the words "efficient market" have a technical meaning to economists that all available information in the market is already embedded in the stock price to an extent that prevents participants from gaining additional profit by using that already-public information.

That point, made famous by Nobel Prize winner Eugene Fama, is taught to most, if not all, Ph.D. and MBA students in the fields of finance and investing.[6] This current information encompasses all statements by the company, including its financial performance, market conditions in which the company achieved its financial performance, and any known changes or risks for the company or the market in the future.

Economists, financial experts and professional investors use the current and historical information presented by a company, among other sources, to assess how it is likely to perform in the future.[7] This does not imply that every investor uses all of this information, but rather that the market as a whole impounds this information into stock prices, which reflect its collective expectations of future financial performance.

What omissions make corporate statements misleading?

Having defined who could be misled and what they could be misled about, we turn to how they could be misled in a way that results in a Rule 10b-5 violation, bringing us back to the Supreme Court's cake example.

Following the Supreme Court, if the finder of fact in the cake dispute, understanding what the child's statement communicates to the parent, determines that the parent was misled by an omission causing a half-truth, the Supreme Court would find there could be a viable claim by the parent.

If, on the other hand, understanding the child-parent communication definitions and practices, the child's cake statement fully communicated to the parent the child's likely performance due to cake consumption without any further statements, the parent's case against the child would not pass the Supreme Court's test for a viable Rule 10b-5 violation for omissions due to half-truths in reporting, because the parent was not misled — leaving the parent's claim half-baked.

In the same way, a corporate financial statement listing current financial performance, but omitting a change material to the market or corporate condition known by the company, is misleading about the potential future performance of the company, if misleading to the consumers of that information.

Following the Supreme Court's ruling, financial statements of a mining company, for example, listing revenues and profits from current mining operations, but omitting the fact that the company knew that its mineral resources had been completely consumed, would be very misleading, just like the child who omitted from his cake statement that the cake was gone.

Even if the company never mentions ore deposits, the omission of the material change in the ore deposits that drives the results in the statement of financials is misleading to economists, financial experts and investors about the mining company's current statement of financials and what those financial statements mean about the companies' future performance.

In essence, in this case, the company had eaten all its cake, but omitted that important, known fact in its standard communications to the consumers of corporate information.

Any known omission of information material to the current performance of the company, or known material change in the corporate or market conditions supporting the current performance, is misleading to economists, financial experts and investors, because they are using that information to understand the current corporate performance and form expectations about the companies' future

performance to assess what the company is worth today.

It all turns on how the users of the statement — economists, financial experts and investors — understand the statement with and without the omitted information, based on the definitions used by them.

Viewed from this perspective of how economists, financial experts and investors use corporate statements and financials, the Supreme Court decision in *Macquarie* may be more prescriptive in how to form a Rule 10b-5 claim than limiting in what omitted factors would make a corporate statement misleading.

The ruling makes clear that shareholders who can identify with sufficient specificity how they were misled, due to omitted information materially altering their understanding of statements — including those of financial condition — should have a viable Rule 10b-5 litigation based on the definitions and interpretations used by economists, financial experts and investors, even if those definitions and interpretations differ from those used in the legal profession.

The mining company, like the child, cannot eat all of its cake and let investors think it still has it too.

Daniel S. Levy, Ph.D., is national managing director at Advanced Analytical Consulting Group Inc. and the CEO of EquiCalc Inc.

Pavithra Kumar, Ph.D., is a principal at Advanced Analytical Consulting Group.

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[1] **Macquarie Infrastructure Corp. v. Moab Partners LP** , No. 22-1165, 2024 U.S. LEXIS 1575, 601 U.S. ____ (April 12, 2024), ("SCOTUS Opinion") at p. 2.

[2] SCOTUS Opinion at p. 5.

[3] See, for e.g., Pensions & Investments, 80% of equity market cap held by institutions (April 25, 2017).

[4] SCOTUS Opinion at p. 6. SCOTUS also refers to Webster's New International Dictionary 2461 (2d ed. 1942), defining a "statement" as the "[a]ct of stating, reciting, or presenting, orally on paper."

[5] Oxford English Dictionary (1933) (def. 3.b).

[6] "Efficient Capital Markets: II," Eugene F. Fama, The Journal of Finance, Dec. 1991, Vol. XLVI, No. 5, pp. 1575-1617 at p. 1575.

[7] See, for e.g., Brief of Institutional Investors as Amici Curiae in Support of Respondents in *Macquarie Infrastructure Corp. v. Moab Partners LP*, Dec. 20, 2023, at pp. 12-14.

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'Let's Go Brandon' Coin Buyers Seek Class Cert.

By **Emilie Ruscoe**

Law360 (July 23, 2024, 6:02 PM EDT) -- Investors in the meme-inspired cryptocurrency LGBcoin sought class certification in a lawsuit alleging that prices for the token cratered after its much-hyped plan to sponsor the coin's eponymous NASCAR driver fell apart.

Sandra Bader, Eric De Ford and Shawn R. Key asked a Florida federal court to certify a class of those who purchased LGBcoin between Nov. 2, 2021, when the digital asset became available to the public, and March 15, 2022, around the time that a successor coin called \$LETSGO replaced the original token.

The investors estimated that the putative class comprises thousands of members, citing records showing there are over 10,000 LGBcoin account holders and contending that the case has "all the hallmarks of securities class actions traditionally certified" in the circuit.

The coin at issue in the case is inspired by the "Let's Go Brandon" meme, in which the phrase serves as a stand-in for a profane statement of distaste for current U.S. President Joe Biden.

The meme originated in October 2021 as a TV news reporter interviewed stock car racer Brandon Brown following a race at the Talladega Superspeedway in Alabama. As the interview took place, the news reporter mistakenly described chanting from the crowd in the background as "Let's go, Brandon," an expression of support for Brown.

The LGBcoin purchasers claim the cryptocurrency was created in part by hedge fund CEO James Koutoulas, whom the investors described as a Republican influencer.

The investors claim the earliest steps in developing the overtures included Koutoulas' "overtures to Brandon Brown's racing team, Brandonbilt Motorsports ('BMS') to discuss a partnership" between the token and Brown, whose career has been built on races run by spectator sports juggernaut NASCAR.

The investors allege that purchasers of the coin bought it in part because its creators were teasing "an upcoming announcement of a NASCAR partnership" with Brown, and LGBcoin did indeed announce in December 2021 that it would be Brown's full season primary partner for the 2022 NASCAR Xfinity Series season. The announcement allegedly sent prices for LGB coin up by nearly 510% from its opening price two months earlier.

But days later, the investors claim, NASCAR revoked the sponsorships in an effort to "steer away from political issues," which allegedly precipitated a complete wipeout of prices for LGBcoin.

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

Aaron M. Zigler, Mary Jane Fait and Nidya S. Gutierrez of the Zigler Law Group LLC and John T. Jasnoch and Sean T. Masson of Scott+Scott Attorneys At Law LLP.

The defendants are represented by Nicole M. Martell of Di Pietro Partners PLLC.

The case is De Ford v. Koutoulas et al., case number 6:22-cv-00652, in the U.S. District Court for the Middle District of Florida.

--Additional reporting by David Minsky and Sarah Jarvis. Editing by Vaqas Asghar.



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Capital One Card Holders Sue To Block Discover Merger

By **Jared Foretek**

Law360 (July 23, 2024, 4:59 PM EDT) -- Capital One credit card holders launched a proposed class action seeking to block the company's \$35 billion purchase of Discover Monday, claiming the acquisition will drive down competition and further consolidate the already-concentrated credit card market.

Filed in the Eastern District of Virginia, the complaint was brought by two cardholders who say the merger would "seriously" reduce pricing pressure on Capital One and other credit card issuers while also shrinking the payment processing market.

Discover is among just four companies in the domestic credit card payment processing market, which has already been the target of major litigation over alleged collusion and interchange fee-fixing primarily by its two largest players: Visa and Mastercard.

The plaintiffs in the suit claim Capital One, an issuer of both Visa and Mastercard credit cards, might be expected to end its relationship with the two processing companies due to its purchase of processing competitor Discover. But in fact, they say, Capital One is already indicating that it will continue its relationship as a Visa and Mastercard issuer, with which it agrees on interchange fees.

"If Capital One were to maintain its status as a major issuer for — and contractual counterparty of — Visa and Mastercard, then one of these leviathans' only serious competitors in the Credit Card Payment Processing Market would be regularly negotiating prices in that market with Visa and Mastercard," the class action complaint reads. "Yet that is exactly what Capital One's CEO has promised to do after the challenged merger closes."

The plaintiffs point to a number of statements from Capital One leadership on investor conference calls following the acquisition's announcement in February. In one, CEO Richard Fairbank said the company was planning to move only a portion of its card business to Discover's payment processing network.

He even said that Visa and Mastercard would continue to "be very important partners ... because there's a lot of value that they still can add to our customers," despite the proposed purchase of one of their only competitors in the space.

"Capital One plans to operate one of four competitors in the historically price-fixed Credit Card Payment Processing Market, and expressly agree on interchange fees with two of the three others," the plaintiffs say in their complaint.

On the credit card side, the suit claims that the acquisition will increase market concentration in the industry by merging two of the biggest credit card issuers.

Between Capital One and Discover, the proposed single issuer would control 13.68% of the card market, allowing Capital One to charge higher prices and interest rates on consumers, the plaintiffs claim. That is especially true, the suit says, because Capital One would grow from the ninth to the sixth-largest bank in the nation and the biggest credit card issuer, with more than \$200 billion in outstanding loans.

"As a [Consumer Financial Protection Bureau] study and report revealed in February 2024, 'large

banks charge higher interest rates than small credit card issuers, with "[n]early half of the largest credit card issuers ... offering cards with maximum purchase APR over 30%," the suit reads. "[Discover's] existence has the effect of forcing Capital One and other General Credit Card market participants to compete on price, particularly on the portion of the interchange fees remitted to customers."

In a statement, a Capital One spokesperson said the suit was meritless.

"It is becoming increasingly common for private suits like these to be brought relating to mergers," the spokesperson said. "The case has no merit and we will be responding to the allegations in our court filings."

The class action complaint is not the only scrutiny the proposed merger faces. Last week, officials from the Federal Reserve and the Office of the Comptroller of the Currency **held a virtual hearing** on the plan, asking for public comments on how the deal might impact cardholders. During the hearing, consumer and community investment advocates said the deal would "create another too-big-to-fail bank" and diminish competition.

Many Democrats have spoken out against the proposed merger, and even some Republicans have called on regulators to block it. In February, one Republican, Sen. Josh Hawley of Missouri, **told** the U.S. Department of Justice's Antitrust Division that the deal would give Capital One "unprecedented powers to extort American consumers."

Discover did not immediately respond to Law360's request for comment on the proposed class action.

The plaintiffs are represented by Brian J. Dunne, Edward M. Grauman, Andrew M. Williamson, Yavar Bathaee and Andrew C. Wolinsky of Bathaee Dunne LLP.

Counsel information for Capital One and Discover was not immediately available Tuesday.

The case is Baker et al. v. Discover Financial Services Inc. et al., case number 1:24-cv-01265, in the U.S. District Court for the Eastern District of Virginia.

--Additional reporting by Jon Hill and Courtney Buble. Editing by Vaqas Asghar.



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Fiat Chrysler Escapes Damages, But Defect Finding Stands

By **Jonathan Capriel**

Law360 (July 23, 2024, 6:03 PM EDT) -- Fiat Chrysler doesn't owe anything to consumers who sued it over allegedly faulty automatic head restraints in its vehicles, a Florida federal judge ruled, affirming a Fort Lauderdale jury's determination, but he declined to give the automaker a total win because it did violate the state's unfair trade law.

U.S. District Judge Raag Singhal said in his order on Monday that he "struggled with this decision." While it is true that an "extremely small percentage" of the head rests at issue actually proved to be defective, a jury verdict still found that FCA US LLC engaged in deceptive conduct when it sold vehicles with this issue, the judge said.

For this reason, he denied the automaker's motion seeking judgment as a matter of law on the consumers' claims made under the Florida Deceptive and Unfair Trade Practices Act.

"FCA argues that no reasonable jury could find that FCA engaged in deceptive or unfair conduct toward all class members at the time of sale," the judge said. "The jury, in fact, found that the class did not sustain any damages. But the evidence at trial supported [the] plaintiff's claim that a latent defect existed at the time of sale."

In January, a seven-person **federal jury found** that FCA did in fact violate the state's deceptive and unfair trade practices law, but it also determined that the drivers weren't owed any monetary damages.

A class of more than 70,000 Dodge, Jeep and Chrysler drivers in Florida were seeking more than \$56 million in damages to pay to replace the automatic head restraints.

The plaintiffs claimed that the automatic head restraints were held in place by a cheap plastic pin that degraded over time and caused them to deploy prematurely in 11 vehicle models. Vehicles include several new and used Dodge, Jeep and Chrysler SUVs and vans that were purchased or leased between 2010 and 2018 in Florida.

After essentially winning at trial, the automaker renewed its bid to have Judge Singhal toss, as a matter of law, claims that it violated the state deceptive practice law. Fiat Chrysler highlighted that less than .25% of class vehicles nationwide suffered from the inadvertent deployment. The Florida rate of failure was slightly higher, but it didn't reach a full 1%, the automaker said according to the court record.

But evidence presented during trial suggested that FCA undercounted inadvertent deployments because they happened outside the vehicle's warranty, the judge said.

"And, further, the court cannot say as a matter of law that even a very slight chance of an inadvertent deployment is not a defect in the eyes of a reasonable consumer," Judge Singhal said.

Neither side immediately responded to a request for comment.

The drivers are represented by Peter Prieto, Matthew Weinshall, John Gravante III and Dayron Silverio of Podhurst Orseck PA, Benjamin Widlanski, Rachel Sullivan, Robert J. Neary and Gail McQuilkin of Kozyak Tropin & Throckmorton LLP, George Franjola of the Law Office of George

Franjola, and Michael Burger of Santiago Burger LLP.

FCA is represented by Fred J. Fresard and Ian K. Edwards of Klein Thomas Lee & Fresard, Scott M. Sarason and Michael R. Holt of Rumberger Kirk & Caldwell PA.

The case is Nuwer et al. v. FCA US LLC, case number 0:20-cv-60432, in the U.S. District Court for the Southern District of Florida.

--Additional reporting by David Minsky. Editing by Nicole Bleier.

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GM Says \$100M Fee Request In Engine Defect Suit Is Too Much

By **Mike Curley**

Law360 (July 23, 2024, 3:54 PM EDT) -- General Motors LLC is urging a California federal court not to grant more than \$100 million in fees and \$1 million in costs to counsel for a class of car buyers who won a \$100 million trial in 2022, saying many of the fees and costs can't be recovered under the law.

In a **sur-reply** filed Monday, GM said their review of the opposing counsel's records shows that the court should either deny the motion for fees and costs entirely or substantially reduce the number because much of what's being billed is excessive or unexplained.

The plaintiffs, buyers of vehicles with Generation IV Vortec 5300 engines in California, Idaho and North Carolina, moved for the fees in February, and GM said Monday that motion was initially "bare bones" with summary charts instead of proper evidence, and U.S. District Judge Edward Chen allowed GM a sur-reply after the in February produced additional records.

Those records only undercut the attorneys' request, GM said, arguing first that the fees should be limited to cases brought by the three class representatives who went to trial, not to all of the other single-state class actions that the same attorneys brought while the case was pending, or other unsuccessful cases.

The automaker further urged the court to deny any fees for administrative and clerical work, as well as for the nearly 33 hours class counsel spent speaking to the media, saying the boost to their reputation from those media appearances is compensation enough.

Much of the records are excessive, duplicative or otherwise unnecessary and resulting from the attorneys' habit of overstaffing, GM argued, highlighting costs for sending five partners to status conferences who didn't speak at those conferences, as well as travel costs for other attorneys to attend hearings they didn't speak at, or one attorney's 51 hours listening to audio recordings of the trial.

GM said the records have other questionable entries, such as attorneys billing more than 24 hours in a day or more than 20 hours a day for days in a row, and different attorneys on different days recording actions with identical descriptions.

GM further argued that the records include work done by associates billed at partner rates, and excessive fees for travel time, as well as more than 640 hours and more than \$800,000 in fees for 11 attorneys just to work on the fee petition.

"Because plaintiffs' counsel was required to track their time over the course of this litigation, preparing the supporting charts and exhibits should have been largely a clerical task," GM wrote. "There is no reasonable justification for expending nearly 640 hours preparing this motion and, even then, most of the time entries associated with the fee petition are simply too vague to allow any meaningful assessment of reasonableness."

Beyond fees, GM argued that many of the costs claimed are not recoverable — such as e-discovery hosting charges and printing — and others, like travel, lodging and meals, are not adequately explained, as they don't say who was traveling, where, or why.

GM also challenged the inclusion of expert fees and thousands in other miscellaneous costs, such as

unexplained "reimbursements" and attorney advertisements.

Counsel for the car buyers declined to comment Tuesday. Representatives for GM could not immediately be reached for comment.

The buyers filed the suit in 2016, saying GM knowingly sold vehicles with defective engines that caused them to use too much oil. A jury ultimately ruled in favor of the drivers, awarding \$2,700 to each member of the class, for a total of more than \$100 million.

GM pressed Judge Chen to set aside the verdict, arguing that there wasn't enough evidence for the jurors to find that every driver's claim was timely. Judge Chen rejected the motion but said he wasn't sure the timeliness issue was fully settled and invited GM and the buyers to provide further briefing.

In November 2023, Judge Chen found that GM had **given up the chance** to scrutinize post-trial whether some absent class members had time-barred product liability claims because of its insistence on an "all or nothing" strategy of pushing for a singular trial addressing every issue arising from the three-state class.

The car buyers are represented by Adam J. Levitt, John E. Tangren, Daniel R. Ferri, Blake Stubbs and Mark Abramowitz of DiCello Levitt LLP, W. Daniel Miles III, H. Clay Barnett III, J. Mitch Williams, Dylan Martin and Rebecca D. Gilliland of Beasley Allen Law Firm, Jennie Lee Anderson and Lori E. Andrus of Andrus Anderson LLP and Anthony J. Garcia of AG Law PA.

General Motors is represented by April N. Ross, Rachel P. Raphael and Mark A. Feller of Morgan Lewis & Bockius LLP, Richard Godfrey of Quinn Emanuel Urquhart & Sullivan LLP and Renee D. Smith of Kirkland & Ellis LLP.

The case is Raul Siqueiros et al. v. General Motors LLC, case number 3:16-cv-07244, in the U.S. District Court for the Northern District of California.

--Additional reporting by Alyssa Aquino. Editing by Brian Baresch.



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Judge Doubts CenturyLink Can Block Borrowed Allegations

By **Thy Vo**

Law360 (July 23, 2024, 7:17 PM EDT) -- A Colorado Court of Appeals panel Tuesday pressed an attorney for CenturyLink on why a shareholder can't use allegations borrowed from other cases in his own securities suit against the telecommunications company, with one judge saying that requiring plaintiff's counsel to speak to every witness would be going overboard.

Dean Houser filed a proposed class action against CenturyLink in 2018 alleging the company failed to disclose illegal practices ahead of a proposed \$34 billion merger with Level 3 Communications Inc., harming Level 3 stockholders like himself.

CenturyLink attorney Sameer Advani of Willkie Farr & Gallagher LLP told the court that Houser can't rely on allegations made by former CenturyLink employees in other lawsuits without embarking on his own "reasonable inquiry" into those claims. Houser's complaint included allegations from a consolidated class action in Minnesota that were based on interviews with unnamed former employees.

"Part of the Rule 11 requirement is the obligation to verify the accuracy of the facts that go into your complaint. And if you're dealing with a former employee who is providing those actual facts — but you don't have any contact, you don't know who they are, you've never spoken to them — how can you possibly certify or attest that these are well-grounded facts?" Advani said.

If Houser's complaint is revived, the plaintiff's lawyers would be conducting discovery to find out whether the allegations in their own complaint are true, he said, arguing that the panel should affirm the dismissal of the suit.

But the rule doesn't require that lawyers personally talk to witnesses, Judge Stephanie Dunn said.

"It allows information and belief pleading. So there has to be some balance there," Judge Dunn said. "If you require them to personally investigate every witness, it kind of reads information and belief out of the rule."

Lawyers still have to have "a factual basis upon which the belief is based," Advani said.

Houser, who owned stock in Broomfield, Colorado-based Level 3, claims CenturyLink failed to disclose a widespread practice of "cramming," or placing misleading and deceptive charges on customers' bills. The alleged practice sparked lawsuits and investigations by multiple state attorneys general.

CenturyLink changed its name to Lumen Technologies Inc. in 2020.

Litigation against CenturyLink over the alleged cramming resulted in \$110 million in settlements, according to Houser's brief to the appellate court.

A Boulder County District Court dismissed the complaint in May 2020 for pleading deficiencies. A Court of Appeals panel affirmed that decision nearly two years later, finding in a March 2022 opinion that Houser failed to supply facts to back up claims that CenturyLink officials involved in the merger knew or could have known about the alleged cramming scheme and its effect on company revenues.

The Court of Appeals, however, said the plaintiffs should be allowed to amend their complaint and

sent the case back to the trial court.

The district court tossed the revised suit. In a May 2023 order, Boulder County District Judge Dea M. Lindsey found Houser appeared to copy allegations from the Minnesota complaint and didn't do the legwork to conduct his own reasonable inquiry.

The plaintiff also failed to allege facts demonstrating CenturyLink officials' knowledge of the alleged cramming or that they were aware at the time of the proposed merger, according to Judge Lindsey's order.

Francis A. Bottini Jr. of Bottini & Bottini Inc., counsel for Houser, told the panel Tuesday that the district court's order is essentially requiring a plaintiff "to plead evidence at the pleading stage."

Houser's trial lawyers did conduct a reasonable investigation into claims made in other lawsuits, including talking with the attorneys that filed the Minnesota lawsuit and interviewed the confidential witnesses, Bottini said, arguing there's no requirement that attorneys spell out those efforts in a complaint.

"Here's what I'm struggling with. Is it enough that you talked to counsel that talked to confidential witnesses?" Judge Dunn said, citing the fact that an attorney's duty to conduct a "reasonable inquiry" can't be delegated.

"What would be the standard? It's undisputed that plaintiffs can rely on news articles, SEC complaints, things like that," Bottini said.

He also questioned how a requirement that a plaintiff's lawyer speak to every witness would actually work, citing allegations involving published news articles.

"Do you need to speak to the Wall Street Journal reporter, do you need to speak to every person who was quoted in the Wall Street Journal article?" Bottini said.

Bottini also cited other documents attached to Houser's complaint to reinforce his allegations that CenturyLink had knowledge of the alleged cramming practices. The telecom company signed a settlement with the Arizona attorney general in April 2016 that wasn't publicly disclosed until after the offering, he said.

Judge Steven Bernard raised the fact that a Minnesota court concluded there was enough alleged in that consolidated class action for the case to proceed. A Colorado Court of Appeals panel also referred to the allegations of that suit in its opinion on Houser's first appeal, Judge Bernard said.

"And so that should help support the viability of the complaint, shouldn't it?" Judge Bernard said.

That got no disagreement from Bottini, who said Houser's lawyers "did an independent, very thorough investigation" after the Court of Appeals found he could amend the complaint.

"We did what this court told us to do after Houser 1," Bottini said.

Judge Dunn also asked counsel for CenturyLink to explain why calling the lawyer who filed the Minnesota class action is different from relying on a news article that quoted a confidential source.

"What would be the difference between relying on that, versus calling plaintiff's counsel and saying, 'Tell me about this confidential witness statement?'" Judge Dunn said. "I'm having a hard time drawing a distinction between those."

"It depends on the reliability of the sources," Advani responded, arguing courts have recognized, in the context of a securities case, that plaintiffs can cite civil actions filed by federal securities regulators in a complaint.

"When we get into the arena of employees providing the key facts that underlie the elements of knowledge or intent ... there, courts are very concerned about the accuracy" of those claims, he said.

There is a growing number of cases where courts have noted information in complaints were inaccurate because employees later repudiated their statements, Advani added.

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

Judges Stephanie Dunn, Pax L. Moultrie and Steven Bernard sat on the panel for the Colorado Court of Appeals.

Houser is represented by Francis A. Bottini Jr. and Albert Y. Chang of Bottini & Bottini Inc. and Jason P. Kane of Ranson & Kane PC.

CenturyLink is represented by Kathryn A. Reilly and Daniel N. Guisbond of Wheeler Trigg O'Donnell LLP and Sameer Advani of Willkie Farr & Gallagher LLP.

The case is Dean Houser v. CenturyLink Inc. et al., case number 2023CA1214, in the Colorado Court of Appeals.

--Editing by Kelly Duncan.

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