

Misrepresentation claims survive in Wells Fargo fake job interview class action

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Michael Gennaro

This Friday, Aug. 11, 2017, file photo shows a sign at a Wells Fargo bank location in Philadelphia. (AP Photo/Matt Rourke, File)

SAN FRANCISCO (CN) — A federal judge ruled early Monday morning that class action claims accusing some Wells Fargo employees of conducting fake job interviews to get around the company's diversity guidelines could proceed.

The class plaintiffs are former investors of Wells Fargo, who filed suit in 2022 after the New York Times published articles in May and June 2022 detailing Wells Fargo's practice of conducting interviews with diverse candidates for positions that had already been filled or for positions the company knew the candidate was not qualified for.

After the New York Times' articles were published, Wells Fargo's common stock price plummeted, causing the plaintiff investors to suffer significant losses and damages, they claim.

In her 21-page ruling Monday morning, U.S. District Judge Trina Thompson, a Joe Biden appointee, wrote that new evidence — including declarations from multiple former employees across the country working in different divisions who acknowledged the fake interviews — was enough to prove for the misrepresentation claims to survive at this point.

"Defendants misleadingly stated that they implemented a policy requiring a slate of 50% diverse candidates to improve diversity, equity, and inclusion. Taking plaintiffs' allegations as true, defendants implemented these policies in a manner that did not align with this goal," Thompson wrote.

Wells Fargo had argued in a August 2023 hearing that its public statements committing to increased workforce diversity were not misleading because the company solely promised that 50% of interview candidates would be diverse, without addressing whether those diverse candidates would be hired. Thus, whether the interviews were conducted with the intent to hire the candidates is not relevant.

"Defendants' arguments ignore the surrounding language in the accused statements, and the greater context in which the statements were made," Thompson wrote.

Thompson noted that Wells Fargo framed the diverse search requirement as a method for improving the pipeline of candidates by interviewing more diverse candidates, but that the new evidence showed the company knew these candidates never had a chance of being

hired.

“Defendants misleadingly stated that they implemented a policy requiring a slate of 50% diverse candidates to improve diversity, equity and inclusion. Taking plaintiffs’ allegations as true, defendants implemented these policies in a manner that did not align with this goal,” Thompson wrote.

Thompson wrote that Wells Fargo implemented the diversity policy in the context of lawsuits and pressure from investors, the government and the general public to do more to increase diversity at the company, so any reasonable investor would expect the policy to address the underlying issue, not make it worse.

The plaintiffs initially argued that Wells Fargo execs knew about the practice of fake interviews because employees complained about them to upper management — making statements from reports and notices filed with the Securities Exchange Commission and press releases, which emphasized the company's commitment to improving workforce diversity, materially false.

However, the complaint was dismissed in August 2023 for failure to plead both falsity and knowledge of wrongdoing.

The plaintiffs amended their complaint, conducting an independent investigation interviewing nine former Wells Fargo employees, in addition to introducing four new documents that they said showed fake interviews were “systemic” at the company.

Wells Fargo’s 2020 diversity guidelines required that at least 50% of candidates interviewed for positions that have salaries of more than \$100,000 a year come from an underrepresented racial, ethnic or gender group or were veterans, people with disabilities or members of the LGBTQ community.

Counsel for Wells Fargo and the class plaintiffs did not respond to requests for comment before publication.

Categories / Business, Courts, Employment

Wells Fargo must face lawsuit over sham job interviews

 [reuters.com/legal/wells-fargo-must-face-lawsuit-over-sham-job-interviews-2024-07-29](https://www.reuters.com/legal/wells-fargo-must-face-lawsuit-over-sham-job-interviews-2024-07-29)

Jonathan Stempel

Wells Fargo Bank branch is seen in New York City, U.S., March 17, 2020. REUTERS/Jeenah Moon//File Photo Purchase Licensing 

July 29 (Reuters) - A U.S. judge ordered Wells Fargo (WFC.N) , opens new tab to face a lawsuit alleging it defrauded shareholders by proclaiming its commitment to hiring diversity, even as it conducted sham job interviews of non-white and female applicants it had no plans to hire.

U.S. District Judge Trina Thompson in San Francisco, who dismissed a version of the lawsuit last August, on Monday found direct and indirect evidence that the San Francisco-based bank intended to defraud shareholders about its hiring practices.

She rejected arguments that there was insufficient proof that fake interviews were widespread, or that top officials including Chief Executive Charles Scharf knew about it.

Shareholders challenged 11 bank statements touting the success of a policy adopted in March 2020 that at least 50% of candidates interviewed for jobs paying at least \$100,000 be minorities, women or people in other disadvantaged groups.

They cited interviews with former employees, an internal whistleblower email, and the sudden retirement of a senior wealth manager who allegedly pressured the whistleblower into conducting fake interviews.

"The employee-submitted complaints, the peculiar timing of [the manager's] departure, and defendants' demonstrated focus on diversity issues supports a strong inference of [fraudulent intent] that is cogent and at least as compelling as an opposing inference that defendants remained oblivious," Thompson wrote.

In a statement, Wells Fargo said it would continue defending against the lawsuit. It noted that the Department of Justice and Securities and Exchange Commission closed , opens new tab investigations into its hiring practices without taking action.

"Wells Fargo is deeply dedicated to diversity, equity and inclusion and does not tolerate discrimination in any part of our business," it added.

Lawyers for the shareholders did not immediately respond to requests for comment.

The fourth-largest U.S. bank has since 2016 faced many complaints and public criticism over its business practices, and remains under a Federal Reserve cap on asset growth.

Wells Fargo's share price fell 10.2% over two days in June 2022, wiping out more than \$17 billion of market value, after the New York Times , opens new tab reported the Justice

Department probe.

The case is SEB Investment Management AB et al v Wells Fargo & Co, U.S. District Court, Northern District of California, No. 22-03811.

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Reporting by Jonathan Stempel in New York; Editing by Aurora Ellis

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Bloomberg Law News 2024-07-30T12:01:19804469354-04:00

Terran Orbital Beats Investors' Securities Suit Over SPAC Merger

By Caitlin McLean 2024-07-29T15:23:31000-04:00

- Investors didn't support securities claims against satellite manufacturer
- Former workers said they consented to merger on false information

Terran Orbital Operating Co. and its directors are free of an investors' securities fraud lawsuit alleging the satellite manufacturer misled them on its merger with a special purpose acquisition company.

The investors failed to sufficiently support their claims that Terran Orbital mislead and provided them with false information when they consented to the company's merger with Tailwind Two Acquisition Corp., the US District for the Southern District of New York ruled July 26.

The investors—four former Terran Orbital employees who held shares of the old company's common stock—filed the class action suit under the Securities Act of 1933 claiming securities fraud. They allegedly agreed to the 2021 merger based on false and misleading information and lost money due to delays in the delivery of converted stock. The merger deal was estimated to give Terrain Orbital a \$1.3 billion valuation.

The investors' allegation that their stock had "suffered higher-than-expected dilution" when redemption rates exceeded figures they agreed to as part of the merger wasn't sufficient to support a claim under federal securities law.

The investors relied on a form that they say was misleading because it represented that there was a maximum redemption condition of 85%. But Judge Jesse Furman pointed out that the form wasn't misleading because it stated a list of risk factors and didn't make the representations the investors alleged.

Investors also failed to support their claim that certain merger form was misleading because it stated that the "cash to balance sheet" was \$179.1 million, when in fact was it only \$76.6 million. In the form, the investors acknowledged that the \$179.1 million wasn't guaranteed, Furman said.

The judge also found insufficient the investors' allegations related to changes to Tailwind's financing scheme and the process for exchanging Terran Orbital common stock for Tailwind shares following the merger.

Furman also dismissed the investors' claims alleging breach of fiduciary duty, and aiding and abetting against Terran Orbital directors. The investors didn't allege either an "unexculpated breach of duty of loyalty" or that the directors' alleged actions or omissions reflected an abuse of discretion sufficient to overcome the deference owed to their business judgments, Furman said.

The investors won't be able to amend their complaint because the issues with their "claims are substantive" and an "amendment would be futile," Furman said.

Moore Law PLLC represents the lead plaintiff. King & Spalding LLP represents Terran Orbital, Tailwind, and the directors.

The case is [Mullen et al. v. Terran Orbital Operating Corp.](#) , S.D.N.Y., No. 23-CV-1394 (JMF), 7/26/24

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[NEWS](#)

Eighth Circuit Reverses \$78.75M Attorney Fee Award in T-Mobile Data Breach Litigation, Finding Multiplier of 9.6 Unreasonable

"If we permitted the fee award here to stand, it would mean that counsel could make \$7,000 to \$9,500 an hour, which we think no reasonable class member would willingly pay to an attorney to help resolve this claim, especially when, as here, dozens of other attorneys were offering their assistance," said Judge Morris S. Arnold. "Reducing the fee award to, say, half of what was requested (resulting in fees of \$3,500 to \$4,750 per hour) could hardly be considered a penalty."

July 29, 2024 at 07:10 PM

Civil Appeals



Riley Brennan



The U.S. Court of Appeals for the Eighth Circuit reversed a \$78.75 million award for class counsel in a \$350 million settlement against T-Mobile, concluding a multiplier of nearly 10 times the attorneys’ hourly rate—upwards of \$9,500—was unreasonable.

In a [July 29 opinion](#), authored by Judge Morris S. Arnold, the three judge panel sent the plaintiffs’ attorney fee award back to the the U.S. District Court for the Western District of Missouri following multi-district litigation against T-Mobile relating to a data breach. An estimated 76.6 million people were affected when hackers obtained confidential information and sold or attempted to sell it.

After obtaining a \$350 million settlement with T-Mobile, class counsel requested 22.5% of the settlement fund. Of the [13 class members who filed objections to the settlement](#), Cassie Hampe, represented by Robert Clore and Mikell West of the Bandas Law Firm, and an attorney in [Sadbury, Massachusetts, John Pentz](#), on behalf of his mother, Connie Pentz, objected on the grounds that the request of \$78.75 million in attorney fees was excessive.

While the district court found class counsel’s request appropriate, the Eighth Circuit concluded the amount was too high, holding that a lodestar multiplier of 9.6 was unreasonable. In support of its decision the circuit court cited its 2019 decision in *Rawa v. Monsanto Co.*, where it held that a multiplier of 5.3 was “high.” The court also noted that the class counsel worked for a matter of months on the case, conducting “relatively little discovery,” and didn’t engage in “substantial motions practice,” the opinion said.

Less than a month after the initial complaint was filed and following a few days of mediation, the parties reached a settlement agreement. T-Mobile agreed to create a \$350 million fund, and the court directed the class counsel to request no more than 30 percent of the total fund for a fee award. Counsel ultimately requested 22.5 percent, or \$78.75 million.

“That’s not to intimate in any way that class counsel didn’t do a good job; in fact, they appear to have represented the class well, and they obtained a significant result,” Arnold wrote. “We simply note that the case had barely gotten off the ground before it settled, and counsel had yet to invest the time and effort to yield a return like the one the court awarded.”

The Eighth Circuit also disagreed with class counsel’s argument that reducing the award in light of the lodestar crosscheck penalizes counsel for quickly obtaining the relief.

“Class counsel could make the same argument in a case involving a multiplier of 100 or in a case involving only a day or two of work. The assertion contains no limiting principle. If we permitted the fee award here to stand, it would mean that counsel could make \$7,000 to \$9,500 an hour, which we think no reasonable class member would willingly pay to an attorney to help resolve this claim, especially when, as here, dozens of other attorneys were offering their assistance,” Arnold said. “Reducing the fee award to, say, half of what was requested (resulting in fees of \$3,500 to \$4,750 per hour) could hardly be considered a penalty.”

The court further cited the U.S. District Court for the Eastern District of New York’s 2003 holding in *In re Visa Check/Mastermoney Antitrust Litig.*, where it held that the counsel’s “request to be paid almost 10 times their hourly rate is absurd,” and instead adjusted the award to reflect a multiplier of 3.5.

“Class counsel here did only a fraction of the work as those in *Visa* and risked wasting only a fraction of the time and effort that was spent there. Yet they were awarded rates of pay far above their normal ones,” Arnold said, remanding the matter back to the district court for reconsideration.

Cari Campen Laufenberg, a partner at Keller Rohrback in Seattle, served as co-lead chair in the T-Mobile litigation.

“While we believe that capping attorneys’ fees based on the ‘lodestar multiplier’ creates perverse incentives for the class members, we appreciate that the court acknowledged that we ‘represented the class well ... and obtained a significant result’ for them,” she told Law.com.

Laufenberg added that counsel also appreciated the district court’s authority “to strike bad faith objections generally and that the decision to strike the objection ghost written by serial-objector” Pentz was appropriate.

“While the Court determined there was insufficient evidence to strike the objection filed by the Bandas Law Firm, it rejected their primary argument on appeal that the percentage of the fund awarded to class counsel as an attorneys’ fee should be decreased when they obtain larger recoveries for the class. We look forward to getting the relief in the hands of class members as soon as possible on remand,” she said.

“Ms. Hampe is grateful the Eighth Circuit recognized the validity of her objection and her counsel’s right to assert it. More importantly, she looks forward to the return of millions of dollars of attorneys’ fees to the T-Mobile class members,” said Hampe’s attorney, Clore.

T-Mobile’s attorney Kristy Brown of Alston & Bird in Atlanta, did not immediately respond to a request for comment.

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US appeals court tosses 'windfall' \$78 mln legal fee in T-Mobile lawsuit

 [reuters.com/legal/legalindustry/us-appeals-court-tosses-windfall-78-mln-legal-fee-t-mobile-lawsuit-2024-07-29](https://www.reuters.com/legal/legalindustry/us-appeals-court-tosses-windfall-78-mln-legal-fee-t-mobile-lawsuit-2024-07-29)

Mike Scarcella

A T-Mobile logo is advertised on a building sign in Los Angeles, California, U.S., May 11, 2017. REUTERS/Mike Blake/File Photo Purchase Licensing Rights , opens new tab

July 29 (Reuters) - A U.S. appeals court on Monday threw out a legal fee award of \$78 million for plaintiffs' lawyers in a \$350 million class action settlement with T-Mobile, calling the amount a "windfall" for the effort the attorneys put into the case.

The St. Louis-based 8th U.S. Circuit Court of Appeals ruled 3-0 , opens new tab that the awarded amount was excessive based on the hours of legal work expended by the lawyers behind the consumer privacy case, which T-Mobile agreed to settle in 2022.

"If we permitted the fee award here to stand, it would mean that counsel could make \$7,000 to \$9,500 an hour, which we think no reasonable class member would willingly pay to an attorney to help resolve this claim," Circuit Judge Morris Arnold wrote in the ruling, joined by Chief Circuit Judge Steven Colloton and Circuit Judge Raymond Gruender.

The T-Mobile settlement resolved privacy claims involving an estimated 76 million T-Mobile customers whose personal information was compromised in a cyber breach the year before. T-Mobile denied any wrongdoing in the settlement.

T-Mobile and lawyers for two class members who objected to the attorney fees did not immediately respond to requests for comment on Monday.

One of the class attorneys, Brad Wilders, in a statement said they "look forward to getting the relief in the hands of class members as soon as possible on remand."

The appeals court said the plaintiffs' lawyers for a matter of months had "represented the class well, and they obtained a significant result."

But, the panel said, "the case had barely gotten off the ground before it settled, and counsel hadn't yet invested the time and effort to yield a return like the one the court awarded."

The panel said reducing the fee amount by half — to about \$39 million — would not harm the class attorneys because the hourly rate would amount to \$3,500 to \$4,750.

The court declined to rule that a judge must always award a lowered percentage in "megafund" cases where the settlement is above \$100 million.

It said determining fees in such a case is a "wide-ranging inquiry that seeks to account for a variety of case-specific circumstances."

The cases are Daruwalla v. Hampe and Daruwalla v. Pentz, 8th U.S. Circuit Court of Appeals, Nos. 23-2744 and 23-2798.

For objectors: Robert Clore of Bandas Law Firm; and John Pentz

For class: Norman Siegel and Bradley Wilders of Stueve Siegel Hanson; James Pizzirusso of Hausfeld; and Cari Campen Laufenberg of Keller Rohrback

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Lawyers fight over \$78 mln fee bid in T-Mobile data breach settlement

T-Mobile loses bid to appeal key ruling in Sprint merger lawsuit

T-Mobile to pay \$350 mln in settlement over massive hacking

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Reporting by Mike Scarcella

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Meta Platforms

Meta to pay \$1.4bn to settle Texas facial recognition complaint

Facebook parent accused of gathering data from photos and videos without 'informed consent'



Meta will pay the money — its biggest penalty since the Cambridge Analytica scandal — to the state of Texas over five years © Reuters

Stephanie Stacey in London and Hannah Murphy in San Francisco 4 MINUTES AGO



Facebook owner Meta has agreed to pay \$1.4bn to the state of Texas to settle claims that the company harvested millions of citizens' biometric data without proper consent.

The settlement, to be paid over five years, is the largest ever obtained from an action brought by a single US state, said a [statement](#) from attorney-general Ken Paxton.

It also marks one of the largest penalties levied at Meta by regulators, second only to a \$5bn settlement it [paid](#) the US Federal Trade Commission in 2019 for the misuse of user data in the wake of the Cambridge Analytica privacy scandal.

The original complaint, filed by Paxton in February 2022, accused Facebook's now-closed facial recognition system of collecting biometric identifiers of "millions of Texans" from photos and videos posted on the platform without "informed consent", in breach of a 2009 state law governing the capture or use of biometrics.

Meta launched a feature in 2011 called “tag suggestions” that recommended to users who to tag in photos and videos, by scanning the “facial geometry” of those pictured, Paxton’s office said.

The complaint accused Facebook of violating Texas state law “not hundreds, or thousands, or millions of times — but billions of times”, with at least \$10,000 in civil penalties being sought for each violation.

In 2021, a year before the lawsuit was filed, Meta announced it was [shuttering](#) its facial recognition system including the tag suggestions feature. It wiped the biometric data it had collected from 1bn users, citing legal “uncertainty”.

The latest fine comes amid growing concern globally over privacy and data protection risks related to facial recognition, as well as algorithmic bias, although legislation is patchy, differing from jurisdiction to jurisdiction.

In 2021, Facebook agreed to pay a \$650mn settlement in a class-action lawsuit in Illinois under a state privacy law over similar allegations related to its face-tagging system.

Paxton’s office has a similar and [ongoing privacy lawsuit](#) against Alphabet’s Google, accusing the search platform of collecting millions of biometric identifiers through its products and services, which include Google Photos and Google Assistant.

“This historic settlement demonstrates our commitment to standing up to the world’s biggest technology companies and holding them accountable for breaking the law and violating Texans’ privacy rights,” Paxton said in a statement. “Any abuse of Texans’ sensitive data will be met with the full force of the law.”

Meta had previously said that the claims were without merit. According to a statement from law firm and co-counsel McKool Smith, the company and Texas [agreed to settle](#) the lawsuit on the evening before a trial was set to begin in mid-June, having asked to pause the proceedings whilst terms were finalised.

A spokesperson for Meta said on Tuesday: “We are pleased to resolve this matter, and look forward to exploring future opportunities to deepen our business investments in Texas, including potentially developing data centres.”

Airbnb Settles Antitrust Claims With Visa in Swipe Fee Case (1)

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X6Q73OAO000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X6Q73OAO000000)

Class Action

A Visa Inc. credit card is arranged for a photograph.

Photographer: Andrew Harrer/Bloomberg

- Airbnb says Visa claims will be dismissed with prejudice
- Terms of the settlement weren't disclosed in filings

Airbnb Inc. has settled claims against Visa Inc. in multidistrict litigation brought by merchants that accuse the credit card giant of colluding on swipe fees.

The online platform, along with its subsidiaries Airbnb Payments Inc. and Hotel Tonight LLC, on Monday filed a stipulation of dismissal, saying that the claims against Visa will be dismissed with prejudice. Terms of the deal weren't disclosed.

Plaintiffs' attorneys referred questions to Airbnb, which declined to comment. Visa didn't immediately respond to a request for comment.

The settlement comes after Airbnb had accused Visa of fixing fees that its issuing banks charge to Airbnb, Hotel Tonight, and other merchants in connection with the use of its branded credit or debit cards.

Airbnb opted out of a settlement class to pursue its own claims that the fee amounted to a tax on US merchants. The company filed a separate complaint in the US District Court for the Eastern District of New York and the stipulation of dismissal as part of its settlement.

Several merchants continue to pursue claims against both Visa and Mastercard after a federal judge in June rejected a \$30 billion settlement between Visa Inc., Mastercard Inc., and retailers to cap credit-card swipe fees.

Airbnb is represented by Quinn Emanuel Urquhart & Sullivan. Visa is represented by Arnold & Porter Kaye Scholer LLP and Holwell Shuster & Goldberg LLP.

The case is Airbnb v. Visa , E.D.N.Y., No. 1:24-cv-05251, stipulation of dismissal 7/29/24 .

(Adds Airbnb declining to comment in third paragraph.)

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Samsung case highlights costs of arbitrating mass claims

 [reuters.com/legal/legalindustry/samsung-case-highlights-costs-arbitrating-mass-claims-2024-07-26](https://www.reuters.com/legal/legalindustry/samsung-case-highlights-costs-arbitrating-mass-claims-2024-07-26)

Shira Scheindlin

A worker waters a flower bed next to the logo of Samsung Electronics during a media tour at Samsung Electronics' headquarters in Suwon, South Korea, June 13, 2023. REUTERS/Kim Hong-Ji//File Photo Purchase Licensing Rights , opens new tab

July 26, 2024 - The arbitration of mass claims is now available through all of the major ADR providers. The American Arbitration Association (AAA), JAMS and CPR have developed special rules to govern the resolution of such claims.

A bit of history is warranted. Most consumer contracts require that all disputes be resolved by arbitration. These contracts generally cover relationships with many financial institutions, the sale of consumer goods, and employment agreements. Many of these contracts agree that the employer, seller, or institution will pay the costs of the arbitration.

Plaintiffs' lawyers were not happy that their consumer and employment cases could no longer be brought as class actions in state and federal court. Their efforts to challenge these agreements as unconscionable or contracts of adhesion or both were unsuccessful. The United States Supreme Court has repeatedly ruled in favor of enforcing such agreements. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

Having been compelled to arbitrate, and unable to proceed on behalf of a class due to contractual waivers of class actions, plaintiffs began bringing arbitration claims on behalf of hundreds or thousands of claimants each alleging a similar injury. Each individual claim required the Respondent to pay the entire cost of the arbitration, beginning with the initial filing fee. Respondents quickly realized they had created a significant financial problem of their own making. The filing fees alone, in claims brought on behalf of a thousand or more claimants, often exceed several million dollars.

A recent case, *Wallrich v. Samsung*, is illustrative. The case began in the district court for the Northern District of Illinois. Petitioners were 49,986 users of Samsung electronic device users claiming violations of Illinois' Biometric Information Privacy Act. The user contracts specified that all disputes must be resolved in arbitration and contained class action waivers.

Petitioners brought 50,000 individual claims to the AAA. Pursuant to the AAA Supplementary Rules for Multiple Case Filings, governing cases where the same counsel files 25 or more claims against the same Respondent, Claimants paid their portion of the filing fees.

But Samsung refused to pay the initial administrative filing fees totaling \$4,125,000. When Samsung continued to refuse, the AAA administratively closed all the cases. At that point, Claimants (now petitioners) asked the court to compel arbitration by requiring Samsung to arbitrate and to pay its share of the arbitration fees.

Although the AAA had administratively closed the case the court found that the user agreement required dispute resolution "exclusively through final and binding arbitration . . ." and that this had not yet occurred. 691 F. Supp. 2d 867, 879 (N.D. Ill. 2023).

The court then found that petitioners had entered into a valid agreement to arbitrate disputes arising under its purchase agreements with Samsung. The court next found that any dispute regarding the scope of the arbitration clause was clearly and unmistakably delegated to the arbitrator through the plain language of the agreement and through the reference to and incorporation of the AAA rules.

The final issue for the court was whether Samsung's refusal to pay the AAA's fees for each individual claimant constituted a breach of its own arbitration agreement. Samsung argued that petitioners had a choice: They could either advance Samsung's share of the filing fee (subject to recoupment at the close of the arbitration) or they could forgo arbitration and proceed in court. The court rejected these suggestions. It found that a dispute over fees was substantive and involved the exercise of the right to arbitrate.

Noting that courts have reached different decisions on this issue, it nonetheless decided that it could and should compel Samsung to pay the administrative fee noting that Samsung was "hoist with its own petard." *Id.* at 884. It relied, in particular, on a New York state court decision in *Uber Tech., Inc. v. American Arbitration Assn., Inc.*, 204 A.D.3d 506, 510 (1st Dep't 2022), which noted that the fees that Uber was required to pay were a direct result of its "business decision to preclude class, collective, or representative claims in its arbitration agreement with its consumers"

The 7th U.S. Circuit Court of Appeals reversed the decision of the district court. See *Wallrich v. Samsung*, 2024 WL 3249646 (7th Cir. July 1, 2024). The court found that the consumers could not compel Samsung to pay the AAA's administrative fees. The reasoning of the appellate court was straightforward. It found that the parties had agreed to abide by the rules and procedures of the AAA.

As noted, the AAA terminated the proceedings, based on the failure of both parties to pay the full administrative fee, noting that Petitioners could have advanced Samsung's fees, and invited the parties to resolve their dispute in the district court. The Court found that at that point the arbitration was, and the dispute would now have to be resolved in the district court.

This battle is not over. This issue may well result in a Circuit split that reaches the Supreme Court. It will be interesting to see if the Supreme Court's general predilection to favor arbitration will still apply in the unusual circumstance where a company refuses to pay its share of the fees in a consumer mass action.

For now, this decision is not good news for the plaintiffs' bar which had thought that large companies had been hoisted on their own petard by requiring consumers to proceed in arbitration rather than by a class action in court. It is hard to imagine a more circular outcome. Plaintiffs are back in court where they have always preferred to be. Truth is stranger than fiction!

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Shira A. Scheindlin

Hon. Shira A. Scheindlin (Ret.), a former U.S. District Judge for the Southern District of New York, is of counsel at Boies Schiller Flexner LLP and is based in New York City. Since leaving the bench in May 2016, she has overseen many mediations and arbitrations, and served as a court-appointed special master, mock trial judge, and expert witness. She is based in New York and can be reached at sscheindlin@bsflp.com.





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NEWS

'Make it Hurt': How TorHoerman Scored Groundbreaking \$495M Formula Verdict

Jake Plattenberger said the jury heard evidence about his client's baby in the NICU: "this was a child medically stable and doing well and trending in the right direction before she received Abbott's product."

July 29, 2024 at 06:45 PM

Verdicts-Settlements



Amanda Bronstad

staff reporter



What You Need to Know

- The July 26 verdict is the second involving allegations that cow's milk-based infant formula causes necrotizing enterocolitis, or NEC, in premature babies.
- The verdict, in St. Louis was for \$95 million in compensatory damages and \$400 million in punitive damages.
- Other trials are scheduled in Missouri, Illinois, Pennsylvania and Washington, D.C., against Abbott and another manufacturer, Mead Johnson.

Robynn Davis was in the neonatal intensive care unit soon after being born in 2021 when she was given Similac infant formula made by Abbott Laboratories Inc.

That's when she took a turn for the worse, according to Jake Plattenberger, who represents Robynn's mother, Margo Gill. And it's what might have swayed jurors who issued a \$495 million verdict on July 26, he said.

"That was an important day, because the jury understood that at this point this was a child medically stable and doing well and trending in the right direction before she received Abbott's product," Plattenberger told Law.com.

The verdict, returned by a [jury in St. Louis](#), is the first against Abbott in a case linking necrotizing enterocolitis, or NEC, to cow's milk-based infant formula designed for premature babies. Sold in hospitals, not in retail stores, the formula is touted as a lifesaving alternative to breast milk, but lawsuits contend that it is linked to NEC, a gastrointestinal illness that sickens or kills premature babies.

Other trials are scheduled in Missouri, Illinois, Pennsylvania and Washington, D.C. Another [400 cases](#) were coordinated in the U.S. District Court for the Northern District of Illinois before Judge Rebecca Pallmeyer.

Plattenberger, of TorHoerman Law in Chicago, led a trial team that included firm founder Tor Hoerman, in Edwardsville, Illinois, and lawyers from two other firms: Jack Garvey, a St. Louis partner at Stranch, Jennings & Garvey and Alan Holcomb at Turnbull, Holcomb & Lemoine in Atlanta.

Abbott, represented by James Hurst of Kirkland & Ellis in Chicago, did not respond to a request for comment. In court, Hurst told jurors that Davis had a “major hypoxic event” when she was born, causing permanent brain injuries. She suffered severe pulmonary hemorrhages and underwent surgery before receiving any of Abbott’s formula, he said.

But that wasn’t a “real picture” of what was going on with Davis in the hospital, Plattenberger told Law.com.

“The defendants did their best to try to paint this picture of this baby in this constant state of crisis and failing health from the time she was born and throughout,” he said. “We felt that wasn’t an accurate picture of what was going on with this child.”

‘It’s a Gut Punch’

The verdict is the second involving NEC and infant formula. In March, another jury in Illinois’ St. Clair County Circuit Court [awarded \\$60 million](#) to the mother of a premature baby who died after receiving Enfamil infant formula made by a different manufacturer, Mead Johnson.

“The trial in Illinois involved a child who did not survive,” Plattenberger said. “Our trial involved a child that did survive and has lifelong severe injuries and things they’ll be dealing with. The case against the defendants is always a little different: different documents, different depositions.”

The Illinois case also did not involve punitive damages.

The Missouri verdict included \$95 million in compensatory damages, such as medical care for Davis, who cannot walk or talk and is fed through a tube because of brain injuries caused by NEC. After finding Abbott liable and awarding compensatory damages, the jury heard brief arguments on July 26 regarding potential punitive damages.

“Finish the job. Make them pay attention. Make it hurt, because it’s supposed to hurt,” Plattenberger told jurors, according to the livestream of the trial by Courtroom View Network.

He referenced Abbott’s billions of dollars in profits and revenues, but he told Law.com he deliberately did not give the jury a specific number for punitive damages.

“I said, ‘It’s up to you guys. What you think is the right number here,’” he said.

Hurst gave no figure either.

“You’ve sent a huge message already,” he told jurors, according to Courtroom View Network. “It’s a gut punch. It hurts as hard as it can hurt.”

The jury came back with \$400 million in punitive damages.

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NEWS

Hundreds of Plaintiffs Deploy Litigation Strategy in Zantac Suits

"Juries can be fickle, and if you have to try nine cases nine times, you may get nine different results," Peter Bowman, a personal injury lawyer for BBB Attorneys, said.

July 29, 2024 at 03:05 PM

Pharmaceuticals



Emily Cousins
Litigation Reporter



The original version of this story was published on [Connecticut Law Tribune](#)

The plaintiffs in nine cases against Big Pharma companies for alleged Zantac injuries are using a strategy to keep their nearly identical claims in Connecticut state court unconsolidated for trial by naming less than 100 people in each case.

The 853 plaintiffs scored a victory in the U.S. Court of Appeals for the Second Circuit when the court held in a 2-1 decision that the plaintiffs' motion to consolidate was for pretrial purposes only, and they did not intend to seek a joint trial.

The defendants are Boehringer Ingelheim Pharmaceuticals Inc., Boehringer Ingelheim Corp., Boehringer Ingelheim USA Corp., GlaxoSmithKline LLC, GlaxoSmithKline Holdings Inc., Pfizer Inc., Sanofi-Aventis U.S. LLC and Sanofi U.S. Services.

The plaintiffs claimed that the pharmaceutical companies failed to warn consumers that Zantac, an over-the-counter heartburn medication, causes cancer.

On appeal from a decision from the U.S. District Court in Connecticut to remand the nine actions to state court, the defendants argued that the plaintiffs made a "misstep" in their attempt to "evade the various triggers of federal subject-matter jurisdiction."

The defendants also claimed that the plaintiffs' motion to consolidate automatically led to a joint trial under the Class Action Fairness Act, or CAFA.

Why?

Peter Bowman, a personal injury lawyer for BBB Attorneys, said the defendants might want a consolidated case to obtain a consistent ruling.

"Juries can be fickle, and if you have to try nine cases nine times, you may get nine different results," Bowman said.

The Second Circuit agreed with the District Court in its holding that under CAFA the court must consider the plaintiffs’ intent, and based on the plaintiffs’ “great lengths” to avoid a consolidated federal trial, it was clear that the plaintiffs only wanted pretrial consolidation.

“We are very happy with the well-reasoned opinion by the Second Circuit and look forward to advancing the cases of our clients, who are all suffering from cancer as a result of their use of Zantac,” John A. Bruegger of Parafinczuk Wolf, counsel for the plaintiffs, said.

However, the Second Circuit decision was not unanimous.

Dissent

In Judge Amalya Kearse’s dissent, she opined that there was “nothing in the state-court record showing that plaintiffs stated, prior to or in making their motion for consolidation, that they sought consolidation of these cases only for pretrial proceedings.”

Counsel for the defendants—Patrick M. Fahey and Jaime Ashley Welsh of Shipman & Goodwin; Lindsey Cohan of Dechert; Lauran R. Greenspoon and Robert R. Simpson of Shook, Hardy & Bacon; James O. Craven and James I. Glasser of Wiggin and Dana; Anand Agneshwar and Daniel S. Pariser of Arnold & Porter Kaye Scholer; and Jospeh W. Martini of Spears, Manning & Martini—did not respond to a request for comment.

Bowman said, historically, that judges are meant to say “what the law is, not what it should be,” but this is a unique appeal.

“It’s rare to have a midcase appeal,” Bowman said. “When that happens, the court appropriately can look at the docket to see what the actions of the plaintiffs and the defendants were, and so when it sees issues related to that within the pleadings to avoid federal jurisdiction, I think it’s fair to acknowledge that and to use that intent in cases like this.”

Further, Bowman said this is not the first case to be consolidated solely for pretrial purposes in Connecticut, and the Second Circuit recognized that option.

Read the opinion and dissent:

23-877
Bacher v. Boehringer Ingelheim Pharmaceuticals, Inc., et al.

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United States Court of Appeals
for the Second Circuit

August Term, 2023

Argued: November 20, 2023
Decided: July 23, 2024

Docket Nos. 23-877(L), 23-878(Con), 23-879(Con), 23-880(Con), 23-881(Con), 23-882(Con), 23-883(Con), 23-884(Con), 23-885(Con)

BETH BACHER, REPRESENTATIVE FOR PAUL BACHER (DECEASED),
JEROME JAY BERKOWITZ, MARY CASSIDY, JOHN CORWIN, ARMANDO
RAMOS, RAFAEL ROLON, RODERICK SULLIVAN, THOMAS VAZZANO,
ANNE YOST, PLAINTIFF REPRESENTATIVE FOR RICHARD YOST
(DECEASED), *et al.*,

Plaintiffs-Appellees,

v.

NOT FOR REPRINT

<https://www.law.com/2024/07/29/hundreds-of-plaintiffs-deploy-litigation-strategy-in-zantac-suits/>

2/3

RTX Discloses Upcoming FCPA (And Related) Settlement

 fcpprofessor.com/rtx-discloses-upcoming-fcpa-related-settlement

July 30, 2024

Raytheon (which changed its name to RTX in 2003) has been under Foreign Corrupt Practices Act scrutiny for several years.

RTX recently disclosed an upcoming Foreign Corrupt Practices Act (and related) settlement to include a DOJ deferred prosecution agreement (with an independent compliance monitor requirement) and an SEC order.

The disclosure states:

“As previously disclosed, in 2019, Raytheon Company received a subpoena from the SEC seeking information in connection with an investigation into whether there were improper payments made by Raytheon Company, our joint venture known as Thales-Raytheon Systems (TRS), or anyone acting on their behalf, in connection with TRS or Raytheon Company contracts in certain Middle East countries since 2014. In the first quarter of 2020, the DOJ advised Raytheon Company it had opened a parallel criminal investigation. In the third quarter of 2020, Raytheon Company received an additional subpoena from the SEC, seeking information and documents as part of its investigation.

Based on the government’s and our own internal investigations, the Company engaged in resolution discussions with the SEC and DOJ, and during the quarter ended June 30, 2024, the Company reached agreements in principle with the DOJ and SEC as to the principal elements of such resolutions. Resolution with the SEC and DOJ remains subject to reaching final agreements satisfactory to all parties and the final approval of the SEC, the DOJ and the Company. Pursuant to the agreements in principle reached, the Company expects that it will enter into a deferred prosecution agreement (DPA) with the DOJ under which the DOJ will defer, for a period of three years, criminal prosecution of Raytheon Company related to Raytheon Company’s conspiracy to violate the anti-bribery provisions of the FCPA and conspiracy to violate the AECA [Arms Export Control Act] by failing to make related disclosures of certain payments that may qualify as fees, commissions and/or political contributions under Part 130 of the ITAR. If the Company, including Raytheon Company, fully complies with all of the obligations to be set forth in a final DPA during such DPA’s three-year term, the DOJ will move for dismissal with prejudice of the deferred charges against Raytheon Company. In addition, the Company expects that the SEC will issue an administrative cease and desist order finding that the Company violated the anti-bribery, books and records, and internal controls provisions of the FCPA.

The Company also expects, based on the agreements in principle described above, that it will be required to retain an independent compliance monitor for Raytheon Company satisfactory to the DOJ and the SEC and undertake compliance self-reporting obligations for a three-year term. The compliance monitor will oversee our compliance with the DPA. The Company further expects that, as part of the resolution, it will pay the DOJ an amount that includes a criminal monetary penalty and forfeiture and the SEC an amount that includes disgorgement, prejudgment interest on disgorgement, and a civil penalty. The Company has recorded an aggregate accrual of \$384 million for these matters during the quarter ended June 30, 2024. In the event that final agreements with the DOJ and the SEC are not reached, litigation may ensue and, accordingly, the actual loss incurred in connection with these matters, if any, could be less than, equal to or more than the aggregate accrued amount noted above.

Based upon the status of discussions, we believe that the finalization of our agreements with the DOJ and the SEC will occur during the second half of 2024 and therefore, expect payments to be made within the same timeframe. However, there can be no assurance that final agreements of such resolutions will be reached or as to the timing or ultimate terms, including those described herein, of such final resolutions, if any. The Company does not believe that these matters, including the accrual (and the future payment of the accrual), will have a material adverse effect on our results of operations, financial condition, or liquidity.”

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

 readsludge.com/2024/07/23/trumps-top-bundler-pleaded-the-fifth-in-ohio-bribery-case

July 23, 2024

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/Getty Images)

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.

Verhoff was one of four individuals who was present at an October 2018 meeting where a FirstEnergy lobbyist paid a bribe to former Ohio House Speaker Larry Householder. According to the testimony of the government's cooperating witness, former FirstEnergy lobbyist Juan Cespedes, during the meeting lobbyist Robert Klaffky slid an envelope containing a \$400,000 check under the hand of former Ohio House Speaker Larry Householder. In response to the check, Cespedes said, Householder, gave "very strong verbals and nonverbals that he would introduce" the FirstEnergy bailout legislation. The check was written out to Generation Now, a dark money nonprofit controlled by Householder that later pleaded guilty to racketeering charges in the matter.

Last March, Verhoff invoked the Fifth Amendment after being subpoenaed by Householder's counsel to testify at the former speaker's bribery trial. Verhoff's pleading motion admits that he was present at the meeting when the bribe was paid, and argues that Verhoff's testimony could provide the government with incriminating evidence against him.

Verhoff did not respond to a request for comment.

Akin Gump was retained by FirstEnergy to assist the company on its bankruptcy proceedings and to lobby for the passage of the bailout legislation, House Bill 6. Verhoff said in a 2021 sworn declaration that he advised FirstEnergy on its contributions to Generation Now and other political organizations and nonprofits. Verhoff said in the declaration that "corporate contributions to issues-based nonprofit organizations (commonly referred to as 501(c)(4) organizations) are commonplace and elected officials at both the federal and state level regularly have affiliations with such organizations."

For its work on FirstEnergy's bankruptcy and bailout matters, Akin Gump was paid \$68 million. According to a monthly fee statement filed by Akin Gump, the firm billed FirstEnergy \$675 per hour for Verhoff's "public policy" work.

In February, FirstEnergy's former CEO Chuck Jones and former Senior Vice President Michael Dowling were each charged by Ohio law enforcement with a dozen counts of corrupt activity, including bribery and fraud, in the ratepayer bailout scheme. They pleaded not guilty.

Verhoff was a vice chair of the Republican National Committee Finance Committee from 2017-2021. His current lobbying clients at the federal level include Pharmaceutical Research & Manufacturers of America, tobacco company Philip Morris, Verizon Communications, and Kohlberg Kravis Roberts (KKR), the second-largest private equity firm in the world by assets under management.

Another of Trump's lobbyist bundlers is Jeff Miller, whose firm Miller Strategies lobbied for FirstEnergy from 2017 until April of this year, reporting nearly \$2.2 million in lobbying revenue from the company. Miller, whose clients include Blackstone Group and SpaceX, has bundled nearly \$1.3 million for Trump 47 Committee so far this year. Earlier this year, Miller, whose firm also lobbies for Anheuser-Busch, announced that he would co-host a Trump fundraiser featuring Republican lawmakers and Donald Trump Jr. The same day as Miller's announcement, Trump signaled to his followers that they should go easy on the company as it faced a boycott by conservatives, posting on his Truth Social platform that "Anheuser-Busch is a Great American Brand that perhaps deserves a Second Chance?"

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July 29, 2024, 11:41 AM PDT

Matt Levine's Money Stuff: Due Diligence Can Be Risky

By Matt Levine

Opinion

Bloomberg Law News 2024-07-30T11:10:50826593626-04:00

Matt Levine's Money Stuff: Due Diligence Can Be Risky

By Matt Levine 2024-07-29T14:41:43041-04:00

M&A

If you are a big oil company looking to get into the renewable energy business, how do you know what to do? How do you learn how to make renewable fuels and market them to consumers? One possible approach is pure introspection: Get all your existing oil engineers and executives in a room and say “think about renewables” until you have a renewables business. (Perhaps have them read the public literature on renewables businesses first.) I am sure that in some contexts this approach works — it’s probably how a lot of financial firms get into a lot of new businesses? — but it seems hard.

More realistically, you are going to be building on somebody else’s — some competitor’s — work. One way to do that is to *buy* the competitor: You call up a renewables company that seems good, you say “hey we would like to buy you at a premium,” they say “sure sounds great,” you hand them a wad of cash and now you have a renewables business.

There are other ways. You can *hire* some people from existing renewables companies and get them to build a renewables business for you. This might cause trouble: They might have noncompete agreements, or confidentiality agreements, and if they use the renewables knowledge they gained their old jobs to build your business, they (and you) might get sued. It can be hard to know what is a protected trade secret and what is portable industry knowledge.

Or you can call up some existing renewables companies and say “hey we would also like to get into renewables, can you give us some advice?” But they might say no. You are, after all, a potential competitor.

Or there’s this:

Propel Fuels, Inc. ("Propel"), a leading retailer of low-carbon fuels at stations throughout California, shared today that its trade secret misappropriation case against Phillips 66 Company ("Phillips 66") has been scheduled for jury trial on August 26, 2024, in the Superior Court of California, County of Alameda, located in Oakland, California.

The lawsuit, filed on February 16, 2022, alleges that Phillips 66 stole confidential data, proprietary strategies and business intelligence developed by Propel over 13 years at a cost to Propel of more than \$200 million. ...

According to court filings, Propel and Phillips 66 entered into due diligence in 2017 in connection with a proposed acquisition of Propel by Phillips 66. Phillips 66 extended the due diligence process over eleven months, during which Propel, under a non-disclosure agreement, disclosed its proprietary strategies and data, and was actively building a new integrated renewable fuels business for Phillips 66, when Phillips 66 abruptly and without explanation terminated the deal on August 24, 2018.

The next business day, Phillips 66 announced to California regulators that it would enter the E85 market in the state and launched retail sales of high-blend renewable diesel weeks later. Phillips 66 rapidly expanded its California renewables business using Propel's data and market insights; it now retails E85 or renewable diesel at more than 600 stations in the state.

If you *pretend* you are going to buy a competitor, they will give you lots of access to due diligence materials, and you can learn a lot about their business. And then you can make an informed decision:

1. not to get into the business,

- 2. to get into the business by buying them, or
- 3. to get into the business yourself, *without* buying them, but maybe using what you have learned.

Oh, again, you might get sued — you had to sign a nondisclosure agreement to get all of this information — but again it can be hard to know what is protected confidential information and what is portable industry knowledge. From the lawsuit:

Phillips 66 also required disclosure (also under the NDA) of the proprietary marketing, customer identification, customer retention, regulatory, carbon credit, pricing and other business strategies that were the heart of Propel's business. Those were contained in the materials provided to Phillips 66 through the data room and due diligence responses, but also in confidential meetings with teams of Phillips 66 executives who repeatedly visited Propel's California headquarters and other locations to study the business. Throughout, those executives expressed admiration for the Propel's strategies and the company's ability to generate profits and high-volume sales in a market Phillips 66 thought was inaccessible.

The allegations are all about stealing *strategies*, business ideas, not, like, product designs or secret manufacturing processes. They are a bit fuzzy. Realistically any merger target faces this risk: that at the end of due diligence, the acquirer will just conclude “meh we can do this ourselves, we don’t actually need them.”

This is one reason that being a merger target is *risky*: You can’t generally sell your business without revealing a lot about the business to potential acquirers. If you reveal a lot and then the deal doesn’t happen, that’s bad. It might be bad for simple signaling reasons: What you revealed was bad, the potential acquirers fled, and now everyone knows that you have a bad business. Or it might be bad for competitive reasons: What you revealed was good, so the potential acquirers took the best parts for themselves.

We talked a few times earlier this year about a lawsuit that Jane Street Group brought against Millennium Management over a couple of former Jane Street traders who left for Millennium and allegedly brought a wildly profitable Indian options trading strategy with them. Jane Street says the strategy was a protected trade secret and they violated their nondisclosure agreements; Millennium says they were just practicing their trade as options traders. I once suggested that the common financial-industry practice of requiring employees to sign noncompete agreements might have been simpler: Instead of arguing about whether or not the options strategy was proprietary, Jane Street could have just said “you can’t trade anything anywhere else for a year after you leave,” avoiding the whole dispute.

Here too you could imagine a simpler approach: Before entering into due diligence (or at some point along the way, as diligence heated up), Propel could have demanded that Phillips 66 sign a noncompete agreement promising not to compete in renewables in California. You do not hear much about that approach in M&A, though, possibly because it would be very illegal under antitrust law? Though Propel actually tried it: “Phillips 66 team lead Matt Fischer expressly promised Propel’s CEO Rob Elam that Phillips 66 would not enter in the California renewables market without Propel,” says the lawsuit. In some ways it would be safer to get that promise in writing, but in other ways, not.

More Left

We talked on Friday about Andrew Left, the activist short seller who was charged with securities fraud last week. The US Securities and Exchange Commission and Department of Justice alleged that Left frequently shorted stocks, published research reports and tweets saying he was short, and then more or less immediately covered his shorts: The stocks would drop on his tweets, and he would buy them back at a quick profit rather than waiting to see if his short reports were correct and the stocks stayed down.

As I wrote on Friday: That seems fine? I mean, it would be fine if Left was explicit about it, and also probably fine if he was, you know, *implicit* about it. Put some fine print in the reports saying “we can cover at any time,” leave it at that, take some profits. But what annoys the authorities is that Left allegedly *lied* about it, telling people on Twitter and television that he was still short even after he had covered.

I can see why this would be annoying, and fraud. But it strikes me as a secondary issue; to me, the primary issue is: Was he right? Like, if he published short reports saying "Company X is a fraud," and then the stock dropped, and then he covered his shorts, and then a few months later Company X was shut down for fraud, then ... I would be inclined to give him the benefit of the doubt? Even if he was lying about still being short?

Because I think the point here is that it's securities fraud if he deceived people about some *material* fact. If people went around thinking "I need to be in the same trades Andrew Left," and he said "I shorted Company X and am still short right this minute and will stay short for months," and they believed him *about his position*, so they shorted Company X, and actually he had already bought back his short, then that would be fraud about a material fact.

But I don't think that happened? I think that happened is that people went around thinking "Andrew Left has a good track record of finding stocks to short," and he said "Company X is a fraud and I am short," and they believed him *about Company X*, so they shorted Company X. And then if he was honest and diligent and mostly correct about Company X being a fraud, then, you know, kind of no harm no foul? Even if he covered his shorts immediately?

I am not saying this is the law — I don't think it is — it's just a statement of my sympathies. And I have not closely studied his track record, and I don't know how honest and diligent his calls actually were; again, the SEC has messages that suggest he might not have been all that honest and diligent. But we did talk about one call, when Left decided to short a Canadian cannabis company called Cronos Group in 2018. "I have a hot voice in cannibas," Left told an associate; "Let's take a vantage [sic] of it." So, says the SEC:

Later that same day, Left published a report and sent a tweet to his readers recommending that they sell CRON and that the true valuation of the company was \$3.50 per share: "*\$CRON tgt price \$3.5. Everything that is contaminated about the Cannabis space. ALL HYPE with possible securities fraud.*" The tweet linked to the report which was titled, "*Cronos: The Dark Side of The Cannabis Space.*"

I wrote:

Weirdly the SEC does not get into this, but Cronos closed at \$12.74 per share on Aug. 29, 2018, the day before Left's report. It closed at \$9.12 on Aug. 30, after the report came out, a 28% drop. It then rallied, getting as high as \$23.70 in March 2019. But then it mostly went down. It hit Left's \$3.50 price target in early 2022, and closed at \$2.42 yesterday. It has never reported an operating profit. It took a while, and many readers who shorted the stock presumably lost money, but was Left ... right?

But somehow I missed that *the SEC charged Cronos with fraud* in 2022. It's not the biggest fraud in the world, and it happened starting in 2019 (so after Left's report), but still. The SEC says that Left was committing fraud when he said that Cronos would go to \$3.50 and might be committing securities fraud, even though Cronos went to \$3.50 and (in the SEC's view) committed securities fraud.

One other point. The SEC charges against Left allege that he basically did some pump-and-dumps (buy stocks, say misleading things to get others to buy them, sell into the demand), and — more characteristically, for a short seller — some reverse pump-and-dumps (short stocks, say misleading things to get others to sell them, buy into the demand). (The latter trade is sometimes called “short and distort,” to have another rhyme.) This is a very traditional thing to charge a media-happy investor with, and the SEC brings lots of cases like this.

But we did talk a few months ago about a very weird case in Texas where a federal district judge ruled that actually pump-and-dumps are legal — they are not securities fraud — because the government can’t prove that the pump-and-dumper *deceived* the same people that he *took money* from. A pump-and-dumper tells lies about a stock to induce people to buy the stock, and then he sells the stock. But you can’t prove — and in fact it is unlikely — that he sells the stock *to* the people he lied to. Probably the pump-and-dumper sells stock to market makers, and his deceived readers buy stock from the market makers, so the pump-and-dumper “did not obtain something of value from the entity to be deceived” and so did not defraud anyone.

I wrote about the decision at the time, but I have tried not to think about it much since, because (1) it is obviously wrong but (2) if you believe it, then pretty much *all* public-markets securities fraud is legal now, because all public-market securities fraud works like that: You never trade *directly* with the people you’re lying to, so you can — on this theory — never defraud anyone. But a reader emailed to mention that case and ask “what is different about the two cases,” and the answer is nothing. If that ruling is correct then nothing, including this, is fraud.

Invoices

Here’s a weird sanctions case:

State Street has agreed to pay about \$7.5 million to settle allegations a subsidiary of the financial-services firm received payments and redacted invoices from two Russian entities that faced U.S. sanctions restrictions.

The subsidiary, Charles River Development, a financial technology company specializing in software for communicating trading information, allegedly altered the dates and reissued invoices and accepted contractual payments from two clients majority-owned by Russian banks Sberbank or VTB Bank between 2016 and 2020, according to the U.S. Treasury Department’s Office of Foreign Assets Control.

Here is the Office of Foreign Asset Control announcement. Charles River sells the FIX Network, a trading communications network. Between 2016 and 2020, several of its customers were Russian entities sanctioned by the US. Seems bad, but apparently Charles River was *allowed* to provide services to those clients: They were sanctioned, but the sanctions did not prohibit them from buying software or services from Charles River, or Charles River from selling to them. The actual business relationship was fine.

Instead, the relevant sanctions prohibited “all transactions in, provision of financing for, and other dealings in new debt of longer” than a certain maturity (14, 30 or 90 days, depending on when the debt was issued). Charles River was not trading bonds of sanctioned companies, or lending them money. But it *was* providing them software and services, and sending them invoices. And then the Russian companies would pay the invoices. But if they paid more than 14 (or 30 or 90) days after the invoice, then the payment was illegal: Charles River was extending them more credit than the sanctions allowed.

There is an obvious solution, and the Russian clients and Charles River found it. From the settlement agreement:

In December 2016, at least one SSI [Sectoral Sanctions Identification List] customer contacted Charles River staff regarding payments that were being rejected by a U.S. financial institution due to the length of time between the invoice date and date of the associated payment. Citing sanctions difficulties, the SSI customer requested that Charles River redate an invoice that was more than 30 days old to prevent associated payments from being stopped by the beneficiary or correspondent banks. Charles River repeatedly redated invoices following such requests from SSI entities. At least 18 State Street staff members from multiple internal offices (including accounting, collections, and client management) were involved in, or aware of, the reissuance or redating of invoices for SSI entities.

This was a sanctions violation, redating invoices to make a 31-day debt look like a 29-day debt, etc. I actually feel like there are two pretty straightforward equilibria here, if you are Sberbank:

1. You get an invoice and you pay it immediately, to avoid any sanctions difficulty and remain on good terms with your US technology provider; or
- 2. You get an invoice, you wait 31 days, you say “ahhhhh, so sorry, the check is in the mail,” you send the check, and then your provider can’t cash it because it has become an illegal debt, thus saving you some money.

PSUS

Ah, well:

Billionaire Bill Ackman’s US closed-end fund is facing a delay to its highly-anticipated initial public offering as it awaits regulatory approval.

Pershing Square USA Ltd. is proceeding with its offering, with the date of pricing to be announced, according to a statement. The deal had been slated to price on Monday and trade the following day, according to terms of the deal seen earlier by Bloomberg News.

A registration statement has been filed with the US Securities and Exchange Commission but has not yet become effective, Pershing Square USA’s statement shows. The statement must be effective before shares can be sold to investors.

The pricing could now come as soon as the end of next week or early the following week, according to a person familiar with the matter.

We talked on Thursday about an unusual letter that Ackman sent to some of the investors in his management company, urging them to put orders in to buy some Pershing Square USA stock in the IPO. There are two possible ways to read the combination of that letter and the delay:

1. The letter is too good. Ackman's letter — which he did not expect would have to be publicly filed, but which Pershing Square USA did end up filing — makes several arguments for why Pershing Square USA's stock should trade up after the IPO. Traditionally, you are just not supposed to do that: You lay out the business case for your company and its valuation, but you don't say, *in your official securities filings*, "this is a hot deal and you should buy it because it's going to trade up." Here the valuation case is harder: Pershing Square USA will, initially, just be a pot of cash waiting to be invested, and the shares are being offered at a fixed price. But Ackman argued that retail demand in the aftermarket will push up the price. "The Company specifically disclaims the statements made by Mr. Ackman," it sheepishly says, but it's hard to take that disclaimer too seriously. It's possible that the SEC had some pointed questions about this pitch, and the delay is essentially a cooling-off period to prevent the IPO from pricing too soon after this unconventional marketing.

- 2. The letter is bad. Ackman's letter also says that it would be "important and extremely helpful to the IPO" for the management company investors to put in orders, because IPOs "are highly momentum driven and back end loaded," and it is "important that the banks get a sense that a deal's momentum is building as they convey that feeling of momentum to the capital markets desks of every institutional investor." You could read that to suggest that the banks do *not* yet have a strong enough sense of momentum, and that Ackman is hoping these investors will provide some. (Bill Cohan calls it "Bill's now-infamous letter begging a bunch of Pershing Square investors to also invest in Pershing Square USA," adding that it "did ... hint at Bill's concern over the deal.") Perhaps another week of marketing will find some more investors.

Vacation

We talked last month about how Jefferies Financial Group Chief Executive Officer Richard Handler handled the meltdown of Archegos Capital Management, but here is a more detailed description from the Financial Times:

He was on holiday in the Turks and Caicos Islands when he received a worried call from his head of equity trading about Jefferies' exposure to what was then an obscure family office called Archegos.

"I said, 'I'm going to get a spicy margarita and I'm going to be back in about 15 minutes,'" Handler tells the Financial Times. "'When I come back, just give me one number and it's the amount of money we lost. I want the whole thing down by the time I come back.'"

Jefferies escaped from Archegos' collapse with a modest \$40mn loss while other banks were left on the hook for billions of dollars.

"Sometimes when you're on vacation, there's a clarity . . . because you're not so close to the situation," Handler says. "Our team did all the hard work by correctly identifying the issue and quickly elevating it. You can just look at the big picture and make the decision."

So probably not a swim-up bar, as I initially surmised? (Or a very long swim to the bar?) It is such a charming model of the chief executive officer's role: You get talented empowered underlings, they do the work and make the easy decisions, and they come to you for the hard calls, which you make while waiting for your drink. He should take more vacations.

Things happen

Convertible bonds are hot. Trump Became Crypto Believer After Falling in Love With NFTs of Himself. Kamala Harris campaign seeks 'reset' with crypto companies. Larry Fink's stately search for his successors. Investors Embrace Bond Funds Before Rates Start to Fall. The Silicon Valley Startup Using AI to Scour the Earth for Copper and Lithium. Is there a way back after hitting a colleague? Snail racing. "The court in its decision Thursday had rendered the word 'boneless' completely meaningless."

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- 1. Except to Elon Musk. Or Warren Buffett.
- 2. Uh, Saturday, if you read Money Stuff on email. Sorry!
- 3. I don't know why the SEC puts a "sic" on "a vantage" but not "cannibas," sorry.
- 4. Except *probably* fraud *by the company itself*. At least in offerings.

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SEC, Justice Department Finally Ready To Prove Short Selling Is Insider Trading

D dealbreaker.com/2024/07/sec-justice-department-finally-ready-to-prove-short-selling-is-insider-trading

Jon Shazar

Last month, we had a little fun at the Securities and Exchange Commission's and Justice Department's expense, noting that their sprawling, years-long investigation into short selling—in the belief that it was just another of insider trading's many guises—had resulted in all of \$2.25 million in fines against a small Canadian hedge fund no one's ever heard of.

Well, the joke's on us and, more acutely, on Citron Research's Andrew Left.

The Securities and Exchange Commission alleged Friday that Left used his firm, Citron, to generate about \$20 million in profits from illegal trading involving almost two dozen companies. The Justice Department also announced a criminal case against Left, accusing him of securities fraud and allegedly lying to investigators about compensation from hedge funds.

The hedge fund allegedly paying that secret compensation? Why, none other than the aforementioned small Canadian hedge fund no one's ever heard of.

That million bucks Left allegedly received from Anson Funds is just a small part of the \$20 million he's alleged to have illicitly earned. The rest, sayeth the Feds, was just pure pump-and-dump in reverse.

"Left knowingly exploited his ability to move stock prices by targeting stocks popular with retail investors and posting recommendations on social media to manipulate the market and make fast, easy money," the Justice Department said in its statement.... Left, according to prosecutors, would also quickly close positions after releasing a research report or making comments. That would let him take advantage of short-term price movements....

The SEC alleges Left bragged to colleagues that some of his statements caused retail investors to trade the way he wanted them to and that it was like taking "candy from a baby."

Of course, as Left knows only too well, it isn't always like taking candy from a baby. But it was apparently too thrilling to stop, even after the meme-stock mania taught Left to know better, and even after some FBI agents borrowed Left's computers for a while.

Also, Left—not for the first time—is not only convinced he's done nothing wrong, but that everything the Feds say he's done is actually god's work.

“The DOJ and the SEC threaten the integrity of the securities markets and put the health of our financial system at risk by trying to silence a publisher of truthful information who also trades in the securities he writes about,” said [Left lawyer James] Spertus.

US Accuses Famed Short-Seller Andrew Left of Securities Fraud [Bloomberg]

For more of the latest in litigation, regulation, deals and financial services trends, sign up for Finance Docket, a partnership between Breaking Media publications Above the Law and Dealbreaker.

Short-Seller Andrew Left Pleads Not Guilty to Fraud Charges (3)

By Tom Schoenberg and Maia Spoto (BLAW)

- Left's trial date over fraud allegations set for September
- Magistrate judge imposes \$1 million collateralized bond

Bloomberg Law News 2024-07-30T11:10:13663621511-04:00

Short-Seller Andrew Left Pleads Not Guilty to Fraud Charges (3)

By Tom Schoenberg and Maia Spoto (BLAW)2024-07-29T22:06:41282-04:00

- Left's trial date over fraud allegations set for September
- Magistrate judge imposes \$1 million collateralized bond

Famed short-seller **Andrew Left** pleaded not guilty to US charges that he committed fraud, setting the stage for a high-profile legal battle over his strategies.

Left on Monday made his first appearance in federal court in Los Angeles since being charged last week by the Justice Department. Prosecutors allege Left manipulated the market to benefit his trading and made false statements to investigators. If convicted, he could face decades behind bars.

During a hearing that lasted about 40 minutes, Magistrate Judge Rozella Oliver imposed a \$4 million bond with \$1 million of it collateralized. She gave him until Aug. 5 to come up with the \$1 million.

Assistant US Attorney Brett Sagel argued that Left was a flight risk, pointing to more than \$70 million in assets, including a property abroad. "He can walk out of this country and live a very luxurious life," Sagel said.

Left, who wore a dark blazer and whose hands were cuffed during the court proceedings, mostly answered "yes" or "no" to the magistrate judge's questions. He was flanked by his lawyers.

While he awaits trial, Left is also prevented from making many financial transactions of more than \$100,000 without special permission and his trading activity was restricted. His trial date was set for Sept. 24. He was ordered to surrender his passport and his domestic travel was also restricted.

Over the years, Left gained prominence among the cadre of investors who specialize in betting against specific stocks. But prosecutors now say he used his influence and the platform, Citron Research, to steer trading in ways that improperly benefited his own positions.

Research Reports



Andrew Left, founder of Citron Research
Photographer: James Jackman/Bloomberg

The Justice Department said Left would create a false perception that his public comments on a stock were in line with his trading activity. Left would also at times quickly close positions after releasing a research report or making comments, according to prosecutors. That would let him take advantage of short-term price movements.

Read More: Short Seller Andrew Left Lives in Fear of the Feds at His Door

James Spertus, Left's lawyer, said last Friday that the government's case against client was "defective," and that Left had no duty to disclose his personal trading intentions. He added that the government wasn't accusing Left of publishing false information.

The case against Left stems from a wide-ranging US effort to examine relationships between hedge funds and skeptical researchers. Left's prosecution is already being used as fodder by critics of the industry.

Separately, the US Securities and Exchange Commission sued Left over alleged violations of the law on Friday in a civil complaint.

(Updates with details on Left's travel restrictions in sixth paragraph. An earlier version corrected the size of the unsecured portion of his bond.)

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QXO's Share Plunge Erases \$37 Billion in Paper Value (2)

By Bailey Lipschultz

- Update unlocks hundreds of millions of shares for trading
- Company has a war chest of \$5 billion to strike deals

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QXO's Share Plunge Erases \$37 Billion in Paper Value (2)

By Bailey Lipschultz2024-07-30T09:47:18091-04:00

- Update unlocks hundreds of millions of shares for trading
- Company has a war chest of \$5 billion to strike deals

QXO Inc., a company that had boasted an implied valuation of more than \$90 billion at one point last week, saw its shares extend an after-hours selloff to spiral sharply downwards on Tuesday.

Shares of the investment vehicle built by **Brad Jacobs** sank 82% on Tuesday to \$11.03 each as of 9:45 a.m. in New York. The Jared Kushner-linked firm unlocked millions of shares late Monday by registering a pair of private placements with the US Securities and Exchange Commission, sending its stock plunging in after-hours trading.

The fallout offered a dose of reality as the stock traded closer to a valuation reflecting the roughly \$5 billion Jacobs has raised. Tuesday's trading valued the company at roughly \$8.2 billion on a fully diluted basis, a premium to its cash value, though it shed some \$36.6 billion in paper value from Monday's close.

QXO started with a \$1 billion investment by a group led by Jacobs into Nasdaq-listed SilverSun Technologies Inc. The investors announced the deal in December, revealing plans to spin off its existing business to shareholders, leaving the remaining company as a kind of blank-check vehicle, a standalone platform for acquisitions in an industry to be announced. Unlike a special purpose acquisition company, the new firm would strike more than one deal.

Jacobs disclosed the name and industry, building materials distribution, the same month. QXO later decided to not spin off SilverSun and will retain its business.

Jacobs' company has built a war chest in recent months via private placements priced at roughly \$9.14 per share, bringing in billions of dollars, filings show, even as the publicly-traded stock surged as high in June as \$290 apiece. Jacobs Private Equity doesn't presently intend to sell any of its stake after its 180-day lockup ends, the filing shows.

Read More: Matt Levine's Money Stuff: Private Equity Puts Debt Everywhere

Small-time investors fueled a 112% jump in the stock earlier this month, days after QXO announced it had brought in a \$620 million private placement that included \$150 million from Kushner's Affinity Partners. The son-in-law of former president Donald Trump was also tapped to join QXO's board of directors.

Monday's filing dramatically increased the pool of available shares to about 400 million from close to 665,000. The share count may grow even larger, as the private placement also gave buyers warrants. On a fully diluted basis, there could be nearly 890 million shares available for trading.

While the stock's implied 96% drop from the June 10 peak appears jarring, the range of investors left with losses is likely small given the tiny amount of shares that were available for trading at that point. In the three months before Monday's filing, only about 35,000 QXO shares changed hands on a daily basis.

(Updates with trading in first three paragraphs and filing details in sixth paragraph.)

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Catching Up With Delaware's Chancery Court

By **Leslie A. Pappas**

Law360 (July 29, 2024, 4:27 PM EDT) -- Litigation linked to billionaire Elon Musk sparked several filings in Delaware's Court of Chancery last week, including a call for sanctions and hand-wringing about a proposed multibillion-dollar attorney fee. Other court activity centered on Paramount's proposed \$4.5 billion stock-and-cash merger with Skydance Media, a couple of deals with Silver Lake Capital, and new cases involving digital publisher The Arena Group, airplane manufacturer Boeing Co., and 3D-imaging and digitization venture Matterport Inc.

Here are all the highlights from last week in Delaware's Chancery Court.

In the Courtroom

At a virtual teleconference, attorneys for IDT Corp. founder Howard Jonas urged Vice Chancellor Sam Glasscock III to reject a **\$9.5 million fee request from class attorneys** for a 2017 suit related to Straight Path Communications Inc. that found stockholders suffered "only nominal damages."

During an **afternoon books and records trial**, an attorney for Employees' Retirement System of Rhode Island told Magistrate Selena E. Molina that Paramount Global hadn't provided anything in response to their demand for documents about its pending takeover by Skydance Media.

In appeal arguments at Delaware's Supreme Court, the bankrupt U.S. arm of India-based educational technology giant Byju's insisted that its dispute with a consortium of lenders belongs in New York and Vice Chancellor Morgan T. Zurn was wrong to find the lenders had validly taken over the company after several defaults.

And at a hearing in Wilmington, an activist shareholder that launched a failed proxy contest at Texas-based bank First Foundation Inc. **struggled to convince** Vice Chancellor Nathan A. Cook that the settlement it reached to end the litigation was worth a \$3.5 million attorney fee.

Decisions

Vice Chancellor J. Travis Laster **dismissed a stockholder challenge** to the \$12.5 billion sale of Qualtrics International Inc. to Silver Lake Capital, saying it was not reasonably conceivable that he would find directors of Qualtrics and software giant SAP liable for damages for snubbing a competing offer from private equity firm Thoma Bravo.

Vice Chancellor Laster also **struck down several provisions** of a stockholder agreement that information technology company N-able Inc. made with Silver Lake Group LLC and Thoma Bravo LLC, saying a "donut hole" baked into recent amendments to the Delaware General Corporation Law forced him to apply the old rules to the governance dispute.

After a Supreme Court remand, Vice Chancellor Laster found that XRI Investment Holdings is **entitled to recoup** more than \$4.1 million in damages and nearly \$2 million in legal expenses for its lawsuit against Gregory A. Holifield and GH Blue Holdings LLC.

Vice Chancellor Nathan A. Cook **rejected a proposed shareholder 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.

Vice Chancellor Morgan T. Zurn **dismissed a derivative lawsuit** from a shareholder who faulted directors at Raytheon Technologies Corp. for allowing a special committee to change employee compensation plans without first seeking stockholder approval, saying the plaintiff had failed to show how the board of directors acted in bad faith.

Two pension fund shareholders of web analytics firm New Relic Inc. **lost a bid for additional disclosures** about the company's \$6.5 billion, \$87-per-share buyout by private equity firms Francisco Partners and TPG Capital LP, with Magistrate Selena E. Molina finding that the additional materials were not "necessary or essential."

New Cases

Ross Levinsohn, who was fired from his CEO positions at digital publisher The Arena Group and Sports Illustrated in December, **sued the digital publisher for advancement** of his court costs for dueling lawsuits in California and Delaware.

A Vista Outdoor Inc. stockholder **sued for records** on the company's breakup and sale plan, which saw directors abandon an initial effort to spin off but retain an interest in its sporting products business and instead propose a sale to Czechoslovak Group AS.

A shareholder of Paramount Global Class B common stock sued chairwoman Shari Redstone and several members of its board over the allegedly "unfair" merger with Skydance Media LLC, **claiming the deal is being orchestrated** to cash out Redstone's investments in Paramount at a substantial premium compared to other stockholders.

A former common stockholder of Via Renewables Inc. **sued** the Houston energy company's board members and controlling stockholders, alleging that they had breached their fiduciary duties in connection with a June 13 buyout that took the company private.

A shareholder of 3D-imaging and digitization venture Matterport Inc. **launched a lawsuit for company documents**, citing concerns that the business was selling itself to global real estate analytics company CoStar Group in part to protect insider equity from pending litigation.

Two pension fund stockholders of Boeing Co. also **sued for access to company documents**, alleging a "slow rolling" of responses by the industry giant to safety and quality issues involving the 737 Max, 777 and 787 commercial passenger jets.

Ongoing Disputes

In an opening **brief in support of a motion to dismiss** a breach of contract suit from two investment funds, Hertz Global Holdings Inc. asserted that the affiliates of Discovery Capital Management LP had premised the allegations in the complaint on a misreading of the warrant agreement.

Aaron Greenspan of PlainSite.org, a legal research site that makes government documents public, **called for the court to sanction** Elon Musk, his X entities, and his counsel after they allegedly got a court clerk to "silently erase" a public version of a document that the site wanted to post from Twitter Inc.'s **2022 court battle** with Musk over his \$44 billion takeover.

Fees, Fees, Fees

The U.S. Chamber of Commerce urged the court to adopt sweeping **curbs to jumbo plaintiffs 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."

Quotable

"Unnecessarily large fee awards distort the incentives of the plaintiffs' bar, encouraging more lawyers to bring ever more frivolous lawsuits against large corporations in pursuit of the proverbial pot of gold. That will mean more unmeritorious cases burdening litigants and the judiciary, the potential loss of meaningful settlements, and more opportunities for lawyers to divert earnings from

corporations and stockholders to their own pockets." – The U.S. Chamber of Commerce, in **an amicus brief** urging the court to reject an "unprecedented" multibillion fee award for shareholder attorneys who won a court ruling that voided Tesla CEO Elon Musk's multibillion stock-based pay plan.

--Additional reporting by Jeff Montgomery, David Steele, and Katryna Perera. Editing by Kelly Duncan.

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Takeaways From Tossed Deal In Visa, Mastercard Class Action

By **Dsu-Wei Yuen, Brian Hurh and Rich Zukowsky** (July 29, 2024, 3:53 PM EDT)

On June 13, U.S. District Judge Margo Brodie **held a hearing** on preliminary approval of a proposed settlement agreement in the long-running merchant antitrust class action against Visa and Mastercard in the U.S. District Court for the Eastern District of New York.

During the hearing, spectators witnessed the novel sight of mostly small merchants aligned with Visa and Mastercard arguing in favor of the proposed settlement. Despite their efforts, the objections of mostly large retailers carried the day, and on June 25, Judge Brodie **issued** a sealed memorandum and order, publicly released on June 28, rejecting the settlement.

We have previously considered the terms of the proposed settlement and the reasons it was unlikely to be approved.[1] In this article we examine more closely Judge Brodie's rationale for denying the motion for preliminary approval of the settlement and the likely course of action to follow.

The court considered factors under Rule 23(e)(2) of the Federal Rules of Civil Procedure after a hearing in deciding whether to grant preliminary approval. [2] We discuss the court's analysis of each factor below.

Adequate Representation

In 2012, the parties' prior attempted settlement was struck down by the U.S. Court of Appeals for the Second Circuit due to the inherent conflict of interest between legacy merchants seeking monetary damages for prior card transactions and current merchants seeking equitable relief for future card transactions.

The Second Circuit ruled that class counsel could not adequately represent both classes simultaneously, and therefore the merchants were split into two separate classes — the legacy merchants seeking monetary damages and proceeding with Rule 23(b)(3) class action certification, and the current merchants seeking equitable relief and proceeding with a Rule 23(b)(2) class action certification.

The Eastern District of New York granted final approval of the settlement of the 23(b)(3) class action in 2019, which was affirmed by the Second Circuit in 2023.[3] The 23(b)(2) class action is the subject of the proposed settlement discussed here.

Despite attempts by retailers including Target, 7-11 and Walmart to argue that the class action representatives could not adequately represent the interests of large national merchants, Judge Brodie found no structural defect following the split of the legacy and current merchant classes, and that class counsel are likely to have adequately represented the 23(b)(2) class.

Arm's-Length Negotiation



Dsu-Wei Yuen



Brian Hurh



Rich Zukowsky

Judge Brodie found that given the class action's extensive procedural history and the lengthy record of negotiations with and without the assistance of mediators, there was no indication that the settlement was not negotiated at arm's length.

Adequate Relief

Costs, Risks and Delay of Trial and Appeal

Judge Brodie found that the complexity, expense and likely duration of the litigation would continue to require costly counsel and experts, as well as a wealth of time from all parties. This subfactor weighed in favor of approving the settlement.

However, given the late stage of the litigation and that the merchants' claims had survived numerous summary judgment motions, the case was ready for trial, and therefore this subfactor weighed against approving the settlement.

The judge then considered the range of reasonableness of the settlement in light of the best possible recovery, and the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. Many merchants objected to the limited value of the proposed terms, such as:

- The "honor all cards" rule remaining in place, requiring merchants to accept cards presented for payment regardless of the interchange rate;
- The restrictions on surcharging largely remaining in place, which would still prohibit surcharging at the issuer level and, according to the court, would also effectively cap surcharges at 1% for merchants accepting American Express; and
- The temporary reduction in interchange rates would represent a small fraction of the typical interchange on a transaction and is less than half of the increase in rates that Visa and Mastercard have imposed since the litigation began.

The judge agreed with the objecting merchants that in comparing the terms of the compromise with the likely rewards of litigation, these subfactors also weighed against approving the settlement.

Effectiveness of Proposed Methods of Distributing Relief, Including Method of Processing Claims

This factor was deemed not applicable given that the only relief sought is equitable and no method of distribution would be required.

Terms of Any Proposed Award of Attorney Fees, Including Timing of Payment

Because Visa and Mastercard would separately pay approved attorney fees, which would not be deducted from the class's recovery, the court deemed the class's interests to be adequately protected.

Any Agreement Required to Be Identified Under Rule 23(e)(3)

The settlement would have released the defendants from all claims to the extent that they sought any form of declaratory, injunctive or equitable relief related to any conduct that was or could have been alleged or raised in this case.

The release would have also covered all potential causes of action that may have accrued as of the settlement approval date and for the duration of the settlement terms. The judge largely rejected the arguments of several large retailers and merchant trade groups that argued that the release was

overly broad.

Equitable Treatment of Class Members

Large merchants argued that the settlement did not benefit them equitably relative to other merchants for the following reasons:

- Large national merchants are more likely to operate in states where surcharging is prohibited, diminishing the (already dubious) value of the surcharging rule revisions;
- Large national merchants that pay the most in interchange fees are also more likely to have negotiated individual rates with their acquirers or Visa and Mastercard directly — therefore the decrease in posted general interchange rates would not benefit them; and
- Large national merchants would be also unlikely to avail themselves of the merchant buying group and merchant education fund provisions.

The court agreed with the large merchants and cited the Second Circuit ruling from 2012 observing that the other concessions made in the settlement agreement were "virtually worthless."

Finally, Judge Brodie considered the ability of the defendants to withstand a greater judgment. Merchant trade groups pointed out that the estimated annual savings of \$6 billion to merchants was paltry compared to the \$100 billion that merchants paid in interchange fees on Visa and Mastercard transactions in 2023.

The judge also noted evidence that interchange fees in the U.K., the European Union and Australia are capped at a significantly lower rate, and yet Visa and Mastercard continue to be viable in these markets.

The judge therefore concluded that this factor also weighed against approving the settlement.

Back to the Future — 2012 and 2019 Show the Way

As can be seen, the only elements of the proposed settlement agreement that the judge deemed to have any value to merchants, i.e., surcharging and interchange, failed for structural reasons.

Even if Visa and Mastercard were to increase the value of the settlement by further increasing permitted surcharges or interchange discounts, this would not solve — and in fact would exacerbate — the inherent conflict of interest between large national retailers and small merchants.

Given that sweetening the proposed settlement pot likely will not be an option, we view the most likely outcomes to be the following.

Split the 23(b)(2) Class

The structural issues identified by Judge Brodie can be removed by splitting merchants that accept cards in states that prohibit surcharging and merchants that have negotiated individual rates with Visa and Mastercard into their own class.

This new class is likely to seek a repeal of the "honor all cards" rule and a cap on interchange rates, while the remaining merchants from the existing class can proceed with the proposed settlement terms.

Allow Merchants to Opt Out of the Proposed Settlement

The current merchants were certified as a mandatory, non-opt-out class pursuant to Rule 23(b)(2) in

September 2021.

While the court cited "[c]oncerns about opt-outs resulting in contradictory equitable relief and disincentivizing settlement weigh[ed] in favor of denying opt-out rights," there is precedent for courts to allow opt-out rights where the purposes of Rule 23(b)(2) certification — cohesiveness of the class — cease to exist.

Suspend Enforcement of the "Honor All Cards" Rule

Visa and Mastercard could choose to allow merchants to discriminate at the point of sale based on card type in states that prohibit surcharging.

This solution appears the least likely as the potential for cardholder confusion is high, and would impose administrative burdens on acquirers and merchants.

Dsu-Wei Yuen is of counsel at Davis Wright Tremaine LLP.

Brian Hurh is a partner and co-lead for the banking and payments regulatory business line at the firm.

Rich Zukowsky is counsel at the firm.

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[1] <https://www.dwt.com/blogs/financial-services-law-advisor/2024/06/visa-mastercard-interchange-fee-settlement-terms>.

[2] (A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

[3] Merchants seeking damages for Visa or Mastercard transactions accepted from January 1, 2004, through January 25, 2019, can file a claim for their share of the settlement until August 30, 2024. A large number of merchants opted out of the settlement and are continuing with their own individual lawsuits against Visa and Mastercard.

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Magistrate Eyes Cuts To Norfolk Southern Investors' Suit

By **Ryan Harroff**

Law360 (July 29, 2024, 7:02 PM EDT) -- A New York federal magistrate judge has recommended tossing a portion of a securities suit filed against Norfolk Southern Corp. in the wake of the East Palestine, Ohio, train derailment, reasoning that the retirement funds serving as lead plaintiffs fell short of pleading standards.

U.S. Magistrate Judge Sarah L. Cave recommended partially granting Norfolk Southern's bid to throw out the securities fraud claims arising from "strategic plan statements regarding alleged regulatory violations" and any alleged omissions in those statements.

According to Judge Cave's Friday report and recommendations, the lead plaintiffs Ohio Carpenters Pension Fund and the City of Pontiac Reestablished General Employees' Retirement System did not plausibly allege that the company violated any law or regulation with its safety practices and thereby cannot claim it failed to inform them of any violations. The parts of the investors' Securities Exchange Act claims related to those alleged omissions have got to go, the report states.

While Judge Cave said the investors fell short on the claims over purported statutory and regulatory violation omissions, she said the claims over the company's statements on its operating ratio and what the amended complaint calls its "TOP Initiative" should survive dismissal.

The "TOP Initiative" refers to a series of moves by Norfolk Southern starting in 2019 to use the controversial practice of "precision scheduled railroading" to cut down on its operating costs by, among other things, reducing the total staff on a given train and making those trains both longer and heavier. According to the investors, the company failed to inform them that these moves would significantly increase the risk of derailments and other accidents.

Because the company allegedly omitted important information on the increased risks Norfolk Southern was taking, the investors said they were blindsided when stocks plummeted after the **highly publicized derailment** and toxic chemical release in East Palestine, Ohio, in 2023.

Judge Cave said that the investors did plausibly allege their claims on Norfolk Southern's TOP Initiative and operating ratio statements. Additionally, Judge Cave said that the investors' claims seeking to hold specific executives liable for those purportedly misleading statements and omissions specifically should stand. U.S. District Judge Lewis A. Kaplan, who is overseeing the claims, had not ruled on the dismissal motion Monday.

Norfolk Southern **argued in its motion** that the proposed investor class was trying to allege "fraud by hindsight" and that the whole case should be dismissed. Multiple underwriting companies also named in the suit including Goldman Sachs & Co. LLC, Wells Fargo Securities LLC and BofA Securities Inc. joined in on the rail company's dismissal bid in May.

The company is also currently facing a **separate securities fraud suit** in Georgia as well as **ongoing probes and lawsuits** from state and federal government entities over the East Palestine derailment, its environmental impacts and the harm done to residents in the area.

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

Ohio Carpenters Pension Fund and the City of Pontiac Reestablished General Employees' Retirement

System are represented by Alfred L. Fatale III, Guillaume Buell, Charles Wood and Charles J. Stiene of Labaton Sucharow LLP. The City of Pontiac Reestablished General Employees' Retirement System is also represented by Cynthia J. Billings-Dunn of AsherKelly Attorneys At Law.

The Norfolk Southern defendants are represented by Michael G. Bongiorno, Tamar Kaplan-Marans, Jeremy T. Adler and Samuel E. Frizell of WilmerHale.

The underwriter defendants are represented by Adam S. Hakki, Agnès Dunogué, Benjamin Klebanoff and Thad Behrens of Allen Overy Shearman Sterling US LLP.

The case is In Re Norfolk Southern Corp. Bond/Note Securities Litigation, case number 1:23-cv-04068, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Juan-Carlos Rodriguez, Linda Chiem and Madeline Lyskawa. Editing by Emily Kokoll.

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Wells Fargo Can't Escape Investors' Sham Diverse Hiring Suit

By **Sydney Price**

Law360 (July 29, 2024, 9:39 PM EDT) -- A California federal judge refused to throw out a proposed securities class action against Wells Fargo alleging it conducted sham interviews to meet diversity targets that triggered a stock drop when the truth came to light, finding Monday that the investors had plausibly alleged the bank's ill-will.

U.S. District Judge Trina L. Thompson said in her **order** that the plaintiffs sufficiently plead that Wells Fargo made material misrepresentations about its "diverse search requirement" announced in 2020. Wells Fargo told the public at the time that the policy required at least half of interview slates to consist of "diverse" candidates for most U.S. positions with compensation above \$100,000. "Diverse" was defined based on race or ethnicity, sex or gender, veteran-status, sexual orientation and disability, according to the order.

Wells Fargo argued its statements were not misleading because they solely promised that 50% of interview candidates would be diverse, not that they would be hired. But Judge Thompson said the arguments ignore the surrounding language in the highlighted statements and the context in which they were made.

Before the 2020 announcement, Wells Fargo had faced years of accusations of discrimination, unequal treatment and other financial scandals, which hurt investment prospects, Monday's order states. Legal costs were up to \$13.6 billion by the end of 2020, according to the order.

"Defendants made [their] statements regarding the diverse search requirement in response to these incidents, and reasonable investor[s] would expect the policy to actually address the underlying issues," the order states.

The investors initially sued in June 2022 in the wake of media reports that Wells Fargo employees were conducting interviews with diverse candidates for already filled positions in order to meet internal diversity quotas. It was most recently amended in September 2023 after Judge Thompson found there was no proof that any of the allegedly bogus interviews were conducted during the time when the bank was championing a policy of increasing diversity in its slate of candidates for high-paying roles.

The updated version of the suit points to a 4,500-word email sent in September 2021 to 250 Wells Fargo employees, including senior executives, by whistleblower Joseph Bruno, who complained about misconduct within the company's wealth management division, including the practice of fake interviews encouraged by a senior regional manager.

The investors also point to a February 2021 complaint to Wells Fargo's board by an individual named Phillip Miller, who claimed the bank was considering Black applicants solely to achieve its diversity, equity and inclusion goals without any commitment to hire them.

Wells Fargo previously argued that these communications do not support a **strong inference of scienter** because the suit did not plead particularized facts supporting the conclusion that the bank actually reviewed them, and that the allegations were copied from another complaint and applied without additional investigation. But Judge Thompson sided with the plaintiffs on Monday in refusing to dismiss the claims.

"Plaintiffs' communication with a confidential witness who had personal knowledge of certain issues, in addition to their review of corroborating public information, was 'adequate independent investigation,'" the order states.

Counsel for the investors and a representative of Wells Fargo did not immediately respond to requests for comment on Monday.

The investors are represented by Sharan Nirmul and Jennifer L. Joost of Kessler Topaz Meltzer & Check LLP, and David R. Kaplan of Saxena White PA.

Wells Fargo and the other defendants are represented by Brendan P. Cullen and Sverker K. Högborg of Sullivan & Cromwell LLP.

The case is *Ardalan v. Wells Fargo & Co. et al.*, case number 3:22-cv-03811, in the U.S. District Court for the Northern District of California.

--Editing by Adam LoBelia.

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BofA, Citi Among Banks In \$80M Deal To End Bond-Rig Suit

By **Sydney Price**

Law360 (July 29, 2024, 9:27 PM EDT) -- Units of Bank of America, Citigroup and other banking giants have agreed to pay \$80 million to settle investor claims accusing them of conspiring to fix European government bond prices.

According to a **motion for preliminary approval** of the deal filed in New York federal court Friday, the proposed \$80 million settlement would resolve this case in its entirety with a total recovery of \$120 million for these plaintiffs and another group of plaintiffs. The settling defendants include subsidiaries and affiliates of Bank of America, Merrill Lynch, NatWest Markets, Nomura International, UBS, Citigroup and Jefferies.

The plaintiffs previously settled with affiliates of State Street, JPMorgan Chase, Unicredit Bank AG and Natixis SA for a total of \$40 million, which received final approval by the court on April 19, according to the order.

The litigation alleges a cartel of financial institutions conspired from 2007 to 2012 to buy newly issued European sovereign bonds and resell them to institutional investors at inflated prices.

The settlement notice on Friday says that counsel's knowledge of the merits and potential weaknesses of claims supports preliminary approval of the settlement.

The litigation, which dates to March 2019, is built on the European Commission's January 2019 announcement that it had notified eight banks of concerns that they had taken part in a scheme "aimed at distorting competition when acquiring and trading European government bonds."

Counsel for the class says that it has undertaken extensive investigation involving the analysis of French and Italian 10-year bonds in and around auctions between 2006 and 2013, and collected and analyzed "millions" of Italian, French, German and Spanish government bond quotes in the secondary market from 2004 through 2015.

This scheme involved the use of chatrooms where the banks' traders swapped information and coordinated their activity, according to a statement of objections issued by the commission at the time.

Class counsel said continued litigation would likely be extremely challenging considering the complexities of the case.

"Prosecuting this action would have required the analysis of complex financial data, the creation of sophisticated damage models to help explain and prove the nature of defendants' alleged misconduct, and the deciphering of intra-firm communications and documents, including chatroom transcripts involving trader jargon," the order states.

In 2021, the European Commission fined Nomura, UBS and UniCredit collectively more than €370 million (\$440 million) for what it said was their participation in the price-fixing cartel.

The commission said that banks involved in the cartel included Bank of America, NatWest and Natixis, but they were not fined.

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

The investors are represented by Gregory S. Asciolla and Noah Cozad of DiCello Levitt, Kristen Anderson, Donald A. Broggi, Michelle E. Conston, Patrick J. Rodriguez, Patrick Coughlin, Daniel Brockwell, David R. Scott and Amanda Lawrence of Scott + Scott Attorneys at Law LLP, Vincent Briganti, Geoffrey M. Horn, Christian Levis, Roland R. St. Louis III and Charles Kopel of Lowey Dannenberg PC and Joseph J. Tabacco Jr., Todd A. Seaver, Carl N. Hammarskjold and Christina Sarraf of Berman Tabacco.

The settling defendants are represented by Skadden Arps Slate Meagher & Flom LLP, Allen Overy Shearman Sterling, Davis Polk & Wardwell LLP, Cravath Swaine & Moore LLP, Gibson Dunn & Crutcher LLP, Cleary Gottlieb Steen & Hamilton LLP and Morgan Lewis & Bockius LLP.

The case is In re: European government bonds antitrust litigation, case number 1:19-cv-02601, in the U.S. District Court for the Southern District of New York.

--Editing by Michael Watanabe.

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Truth Social SPAC, Sponsors Battle In Chancery Over Payout

By **Jeff Montgomery**

Law360 (July 29, 2024, 10:35 PM EDT) -- Attorneys for a founding investor in the special purpose acquisition company that took former President Donald Trump's social media site public told a Delaware vice chancellor Monday the SPAC ignored its charter and withheld information about the deal in order to avoid paying tens of millions in anti-dilution protection.

Matthew D. Perri of Richards Layton & Finger P.A., counsel to ARC Global Investments II LLC, told Vice Chancellor Lori W. Will that the SPAC — Digital World Acquisition Corp. — ignored contract terms protecting ARC Global from changes in the then-private company's equity makeup that would push ARC's ownership of the business below 20%.

"We believe [DWAC's public statements] were misleading, including the suggestion that the board had the discretion to adjust the conversion ratio," intended to assure ARC investors they would receive one share of DWAC for every four of the newly public company, Perri told the vice chancellor during a one-day Court of Chancery trial in Wilmington.

ARC sued, alleging breach of contract and breach of fiduciary duty in connection with stockholder approval of the take public transaction.

"ARC made a \$25,000 investment in founder shares and received 7.4 million shares valued at more than \$220 million as of July 1, 2024. That's an astonishing return on investment of 880,000%," Bradley J. Bondi of Paul Hastings LLP, counsel to DWAC and four directors, said. "If ARC were to prevail today, the return on investment would be 1,192,428%."

Patrick Orlando, former CEO of DWAC and a largely sidelined original managing member of ARC, was accused by the SEC earlier this month of falsely representing that the special purpose acquisition company had no potential merger targets when he was in fact discussing a merger with the parent company of Trump's social media site, Truth Social.

Vice Chancellor Will said she would take the arguments under advisement. A second hearing or trial might be required if the court concludes that a conversion ratio different from the one DWAC settled on is needed.

Orlando is currently fighting his removal from the ARC position in a separate Chancery Court action.

Orlando was replaced as DWAC's CEO after allegations that he had failed to publicly disclose early "de-SPAC" merger talks with Trump Media & Technology Group, failed to make public an agreement to pay TMTG \$1 million if the SPAC deal failed and failed to disclose transfers of ARC shares after his firing.

The U.S. Securities and Exchange Commission imposed an \$18 million sanction in connection with Digital World's conduct.

ARC alleged that DWAC improperly calculated the stock conversion ratio, in breach of contract and accused other directors of the SPAC besides Orlando of breaching their fiduciary duty.

The sponsoring group sued Digital World and its directors Eric S. Swider, Frank J. Andrews, Edward J. Preble and Jeffrey A. Smith on Feb. 29, shortly before Digital World shareholders approved the

merger with TMTG.

ARC, which held 76.4% of Digital World's outstanding Class B common stock at the time, alleged that the SPAC was planning to convert Class B shares using an improper conversion ratio that would exclude certain securities.

In an amended complaint filed in June after the merger closed, ARC asserted that Digital World used a conversion ratio of 1.348-1, when it should have been approximately 1.81-1.

ARC Global Investments II LLC is represented by Matthew D. Perri, Daniel E. Kaprow, Elizabeth J. Freud, Alfred P. Dillione and Rae Ra of Richards Layton & Finger PA.

Digital World Acquisition Corp. and its member are represented by Kevin M. Coen and Jacob M. Perrone of Morris Nichols Arsht & Tunnell LLP and Bradley J. Bondi, D. Scott Carlton, Traci Zeller and Nicholas Griepsma of Paul Hastings LLP

The case is ARC Global Investments II LLC v. Digital World Acquisition Corp. et al., case number 2024-0186, in the Court of Chancery of the State of Delaware.

--Editing by Peter Rozovsky.

8th Circ. Tosses 'Windfall' \$79M Legal Fee In T-Mobile Suit

By **Lauren Berg**

Law360 (July 29, 2024, 11:17 PM EDT) -- The Eighth Circuit on Monday threw out a \$78.7 million attorney fee award for plaintiffs' attorneys who negotiated a \$350 million settlement with T-Mobile over a massive data breach in 2021, saying the award amounts to a "windfall" for class counsel.



Attorney fees are under contention in a lawsuit over a T-Mobile data breach that exposed customers' names, dates of birth and Social Security and phone numbers. (Photo by Beata Zawrzel/NurPhoto via AP)

The three-judge panel, in a unanimous **opinion**, reversed the award of attorney fees, rejecting the "ad hominem decision" of the Missouri district court overseeing the multidistrict litigation to strike Cassie Hampe's objection to the requested attorney fees.

For one thing, the panel said, there's no evidence to back up the court's finding that Hampe and her counsel are trying to extort a payout, have raised a vexatious objection or have acted unethically.

"And though it's possible that her meritorious objection is delaying execution of the settlement (a matter she vigorously contests, if so, that's par for the course when class members are given an opportunity to object to the terms of a class settlement," the panel said, reversing the decision to toss Hampe's objection.

Back in July 2022, T-Mobile **agreed to pay \$350 million** and boost its data security spending by \$150

million over the next two years to resolve claims in the litigation after more than 76 million Americans' data was allegedly exposed during a 2021 breach.

Under the deal, class members would receive \$25 per hour, or their hourly rate if it's higher, for the time they spent missing work to deal with the impacts of the data breach. Class members can also get up to \$25,000 in monetary reimbursement for losses stemming from the breach and a slew of services aimed at ensuring their future protection.

T-Mobile confirmed in August 2021 that tens of millions of its customers' personal information had been exposed to bad actors who were able to access customer records and credit applications that included names, dates of birth and Social Security and phone numbers. The most affected group of customers, according to T-Mobile, was 41 million people who applied for credit with the tech company.

Dozens of lawsuits followed the announcement, and in December 2021, the Judicial Panel on Multidistrict Litigation **consolidated the cases** in the Western District of Missouri under U.S. District Judge Brian Curtis Wimes.

Thirteen class members filed objections to the settlement, including Hampe and Connie Pentz, whose estate is now represented by her son, John Jacob Pentz III. Hampe and Pentz each argued that the requested amount of attorney fees was excessive, but the district court struck both of their objections.

The appellate panel on Monday reversed the court's decision regarding Hampe, but affirmed the decision striking Pentz's objection. The panel said the district court identified specific problematic behavior on Pentz's part, including refusing to disclose her attorney's name and evading service of a subpoena.

Pentz "essentially inserted herself into the dispute and then, without explaining why, refused to play by the rules that the district court set," the panel said. "Pentz objects that by subjecting her to a deposition, the district court 'unduly encumbered' her due-process right to be heard. We doubt it."

"In the circumstances, we cannot fault the court for striking her objection," it added.

There are two main methods courts use when awarding attorney fees: the "lodestar" method, which involves multiplying the number of hours worked by the attorneys' hourly rates and can be adjusted up or down depending on the circumstances of the case, and the percentage method, where attorneys take home a percentage of the settlement fund, according to the opinion.

In this case, class counsel asked for 22.5% of the \$350 million settlement fund, or \$78.75 million, which Hampe argued was excessive, particularly because the settlement is a "megafund," the opinion states. Hampe argued that, many times, huge recoveries are the product of class size and not counsel's efforts, according to the opinion.

The panel said there seem to be good arguments on both sides of the debate for whether there should be limits placed on attorney fee awards when a settlement exceeds \$100 million.

"On one hand, it doesn't seem reasonable for attorneys to receive a windfall for doing little work; on the other, it doesn't seem reasonable to penalize attorneys for obtaining a quick success," the opinion states.

While it's not entirely clear what Hampe wants the appellate court to do, the panel declined to hold that a court must award a reduced percentage in megafund cases, finding that such a decision is a "wide-ranging inquiry that seeks to account for a variety of case-specific circumstances," according to the opinion. The panel said it is clear the district court carefully took into account the size of the class, the results achieved and the attorneys' labor when it awarded \$78.7 million in fees.

Putting the court's methodology to the side, however, the court did abuse its discretion when approving a lodestar multiplier of 9.6, which the panel said is almost twice as high as what the Eighth Circuit has considered a "high" multiplier of 5.3. And without including class counsel's projected future hours, the multiplier was nearly three times as high, the panel said.

"Class counsel worked on the case for just a matter of months, conducted relatively little discovery, and engaged in no substantial motions practice, save for responding to a motion to remand," the panel said. "That's not to intimate in any way that class counsel didn't do a good job; in fact, they appear to have represented the class well, and they obtained a significant result."

"We simply note that the case had barely gotten off the ground before it settled, and counsel hadn't yet invested the time and effort to yield a return like the one the court awarded," it added.

Finally, the panel hit back at class counsel's argument that a lodestar crosscheck isn't required under Eighth Circuit precedent, saying that while that's accurate, the court has never held that a crosscheck is always unwarranted, either.

For example, a crosscheck might be helpful when a megafund case settles quickly, "given the potential for a windfall," the opinion states.

"Whether required or not, though, the district court performed the crosscheck, and we think that it revealed that class counsel have received a windfall," the panel said. "We aren't obligated to close our eyes to a crosscheck that the court performed even if it didn't have to."

Rob Clore of Bandas Law Firm PC, who represents Hampe, told Law360 on Monday that his client is "grateful the Eighth Circuit recognized the validity of her objection and her counsel's right to assert it."

"She looks forward to the return of millions of dollars of attorneys' fees to the T-Mobile class members," he added.

Counsel for the class did not immediately respond to a request for comment late Monday. Pentz could not be immediately contacted.

Chief U.S. Circuit Judge Steven M. Colloton and Circuit Judges Morris S. Arnold and Raymond W. Gruender sat on the panel that reached Monday's decision.

The consumers are represented by Tousley Brain Stephens PLLC, Stueve Siegel Hanson LLP, Horn Aylward & Bandy LLC, MoginRubin LLP, Keller Rohrback LLP, Hausfeld LLP, Morgan & Morgan PA and Cotchett Pitre & McCarthy LLP, among others.

Hampe is represented by Robert W. Clore of Bandas Law Firm PC.

Pentz is representing himself.

The cases are Veera Daruwalla et al. v. Cassie Hampe, case number 23-2744, and Veera Daruwalla et al. v. John Pentz, case number 23-2798, both in the U.S. Court of Appeals for the Eighth Circuit.

--Editing by Emily Kokoll.



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Firm Partners Ask Fla. Court To Toss Investor's Derivative Suit

By **Carolina Bolado**

Law360 (July 29, 2024, 7:34 PM EDT) -- Two partners in a law firm have asked a Florida court to dismiss a derivative lawsuit brought by an investor claiming that they orchestrated a litigation funding fraud, arguing that the investor has no right to bring the suit without a vote from the other members of the company.

In a motion to dismiss filed July 23, Lee Melchionni and Sylvia Benito, who run Justice Partners LLC, said investor Allan Teh does not have standing to bring a derivative lawsuit on behalf of Justice Partners because, under the company's operating agreement, no member can bring a suit against anyone on behalf of the company unless 75% of the members vote in favor of it. Teh is a member of Justice Partners by virtue of his 2021 purchase of 4,000 shares for \$4 million, according to the motion.

"Plaintiff does not (and could not truthfully) allege that any such vote has occurred, and on that simple basis the entire action must be dismissed," they said.

They argue that Teh also does not adequately plead any fraud or conspiracy to commit fraud and fails to explain how Justice Partners was allegedly defrauded.

"The gravamen of the entire amended complaint is that the defendants ... allegedly conspired to fraudulently induce Teh (or other investors) to invest in JP LLC under false pretexts," they said. "It is Teh (not JP LLC) who could have relied on any of the defendants' statements in connection with his investment, and thus it is Teh who would have suffered any alleged harm."

Teh sued Melchionni, Benito, Persist Communications Inc. and New York-based Lake Law Firm LLC in Miami-Dade County Circuit Court in June 2023, alleging on behalf of Justice Partners that he was fraudulently induced into investing \$4 million to fund mass tort claims involving injuries from hernia meshes, 3M ear plugs and Roundup and talcum powder toxicity. He claims the cases and settlements never came to fruition.

The money he invested was in exchange for a member interest in Justice Partners, which loaned money to its law firm affiliate, Justice Partners Law Group. That firm invested in a venture with Lake Law to represent clients in the mass tort and class action litigation, according to court documents.

Justice Partners is run by Melchionni and Benito through a management company that they own, JP Management.

In another motion to dismiss filed by Persist Communications and Lake Law, also filed July 23, the two entities said Teh's claim is individual, not derivative.

"What plaintiff is really alleging in poor disguise is that he, as an investor, was individually defrauded by them in making his investment," the companies said. "That is the only way to make sense of the fraud claim."

They added that Teh's claim that Persist Communications and Lake Law helped aid and abet this alleged fraud by taking the lousy cases from Justice Partners — while Melchionni and Benito transferred good cases to other investment vehicles — makes no sense.

"Why would Lake Law conspire to move better cases away from itself when Lake Law's sole source of revenue comes from recoveries from its own stable of cases?" they said.

The suit is one of four that Teh has launched over his \$4 million investment. He claims he was approached by Melchionni and Benito in 2021 for the purpose of funding a limited liability company that would invest the money in a law firm to obtain and handle the mass tort cases. But the funds were "used for the personal pecuniary gain of Melchionni, Benito, Lake Law and Persist," according to the suit.

He claims the cases that previously had been deemed "acquired" by Justice Partners are not mere "leads."

In another one of Teh's lawsuits, he said he agreed to form KS Law Group LLP on the suggestion of Melchionni and Benito to allow him to better control how the investment was spent. But he says 13 days after providing the investment, the money was drained from the KS Law bank account and transferred to an account maintained by Persist. Teh said he was later informed that the mass tort cases were rejected and learned that Melchionni and Benito never obtained retainer fee agreements.

Teh is represented by Matthew L. Jones of Jones & Adams PA.

Melchionni and Benito are represented by Amiad Kushner of Seiden Law LLP and Daniel S. Bitran and Isaac Mitrani of Mitrani Rynor Adamsky & Toland PA.

The Lake Law Firm and Persist Communications are represented by Andrew S. Berman of Young Berman Karpf & Karpf PA.

The case is Teh v. Melchionni et al., case number 2023-018039-CA-01, in the Eleventh Judicial Circuit Court of Florida.

--Additional reporting by David Minsky. Editing by Jay Jackson Jr.

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Law Firm Can't Nix \$2.9M Judgment Over Concussion Fees

By **James Boyle**

Law360 (July 29, 2024, 3:55 PM EDT) -- A law firm that represented National Football League players in a multidistrict litigation over the league's handling of concussions can't avoid a litigation funding agency's \$2.9 million judgment against it, after a Pennsylvania federal judge shot down Mitnick Law Office's arguments that the fees being garnished fell under various exceptions.

The court on Friday denied the New Jersey-based firm's motions to dissolve writs of execution obtained by Balanced Bridge Funding LLC in 2022 and reissued in 2024, finding that the firm's various exemption arguments were not strong enough to deny the orders. The firm, operated by Craig Mitnick, received an advance payment of cash from Balanced Bridge to help fund his representation of plaintiffs in the NFL concussion MDL in exchange for rights to attorney fees Mitnick earned.

Mitnick said in a comment emailed to Law360 Pulse that he intends to appeal the matter to the Third Circuit.

"As much as I respect the judge's decision and his intellect, I will be appealing this order to the Third Circuit Court of Appeals," Mitnick said. "My interpretation of the current statutes and law support an appellate decision in favor of Mitnick Law Office."

The writs directed BrownGreer, a company that administered settlement payments from the concussion MDL, and Locks Law Firm, to which Mitnick referred cases in return for referral fees, to garnish fees and payments intended for Mitnick after an arbitrator ruled he owed Balanced Bridge approximately \$2.9 million plus interest.

U.S. District Judge Gerald Pappert said in his **opinion** published Friday that the writs were valid. One of Mitnick's arguments for exempting the money from BrownGreer and Locks Law Firm said those payments constituted wages, which could not be garnished. Judge Pappert said neither BrownGreer nor Locks Law Firm could be considered Mitnick's employer and rejected the argument.

Mitnick also argued that the money submitted by BrownGreer could not be garnished because it also included settlement payments owed to his clients. Judge Pappert pointed out BrownGreer had already worked out a plan to send Mitnick's fees and costs to Balanced Bridge and separately send Mitnick the payment owed to his clients when they are eligible.

Judge Pappert noted that Mitnick had separately sent other exemption arguments via letters that were not attached to his original motion. For example, Mitnick said the writs issued in 2022 had expired after 90 days, according to the Pennsylvania Rules of Civil Procedure. The judge noted that the 90-day window applies to the service of the writs.

If BrownGreer and Locks Law Firm had not been served the writs within 90 days of their issuance, Mitnick's argument would be valid, Judge Pappert said. U.S. Marshals served the documents to both parties within a month after they were issued, the opinion noted.

A request for comment from Balance Bridge's attorneys didn't receive an immediate response.

Mitnick Law Firm is represented by Craig R. Mitnick.

Balanced Bridge Funding LLC is represented by Jacob S. Perskie of Fox Rothschild LLP.

The case is Balanced Bridge Funding LLC vs. Mitnick Law Office LLC, case no. 2:21-cv-04073, in the U.S. District Court for the Eastern District of Pennsylvania.

--Editing by Rich Mills.

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Texas, Meta Reach Historic \$1.4B Deal In Biometric Data Suit

By Catherine Marfin

Law360 (July 30, 2024, 10:06 AM EDT) -- The state of Texas has reached a historic \$1.4 billion settlement with Meta Platforms Inc. in a lawsuit accusing the social media giant of illegally collecting Facebook users' biometric data through its now-discontinued facial recognition feature, attorneys for the state announced Tuesday.

Texas Attorney General Ken Paxton and McKool Smith, which also represents Texas, said that the deal is "the largest settlement ever obtained from an action brought by a single state." The specifics of the settlement were announced Tuesday after the parties requested a 30-day stay in late May to **finalize the deal**.



The blockbuster settlement with Meta resolves Texas' biometric privacy claims over the company's use of its now-discontinued facial recognition technology to identify Facebook users. (AP Photo/Tony Avelar, File)

"Companies that operate in Texas must be held accountable for their actions, particularly when it puts the privacy of Texans at risk. We're grateful to have had the opportunity to work with the Office of the Attorney General, and we appreciate how the court handled this lawsuit," McKool Smith attorneys Sam Baxter and Jennifer Truelove said in a written statement.

Paxton said in a written statement that the settlement "demonstrates our commitment to standing up to the world's biggest technology companies and holding them accountable for breaking the law."

Paxton added that the deal was the largest privacy settlement the attorney general's office has ever secured, and marks the first lawsuit and settlement obtained under the state's Capture or Use of Biometric Identifier Act, or CUBI.

"Any entity abusing Texans' sensitive data will be met with the full force of the law," Paxton's statement read.

Zina Bash of Keller Postman LLC, who also represents the state, called Tuesday's settlement "unprecedented."

"It was the first time the State of Texas sought to enforce its biometric-privacy law since enactment, requiring our team to develop novel litigation approaches and analyze important questions of first impression," Bash said in a written statement. "And it was the first time a single state has ever achieved a settlement of this magnitude — which is even more rewarding because of the record time in which we obtained it. When we filed the case in 2022, we knew the state wanted to move quickly, and our team was relentless in litigating the case."

A Meta spokesperson said the company was "pleased to resolve this matter, and look forward to exploring future opportunities to deepen our business investments in Texas, including potentially developing data centers."

Paxton **sued** Facebook's parent company in February 2022 in Texas state court, accusing the social media company of violating CUBI by not asking for Facebook users' consent before collecting their data. The state also alleged Meta unlawfully disclosed the data to third parties and didn't get rid of the data in compliance with CUBI's time frame.

Facebook introduced the facial recognition technology at issue in 2010 and allowed users to easily tag friends in photos and videos uploaded to the site. The tool was also used in a Facebook app called "Moments," which allowed users to compile and share photos.

The site used facial recognition for more than a decade before the company **announced** it would stop using the system in November 2021. That announcement came after a California federal judge approved a **\$650 million class settlement** in a suit alleging the technology violated Illinois' biometric privacy law.

Texas' suit, meanwhile, came after the state investigated Facebook over the technology in 2020.

Meta has maintained that it complied with Texas' statute and was open with users about how the feature worked. In addition to arguing that Texas' suit was insufficient because the state's privacy law doesn't authorize the state to seek an injunction. The company has also criticized the state for suing only after the California settlement was approved.

Prior to the settlement announcement, Meta and the state were locked in an **appellate battle** over whether CEO Mark Zuckerberg would have to sit for a deposition. A Harrison County district court judge on Jan. 4 ordered Zuckerberg to make himself available for a deposition within 30 days, prompting multiple **appeals** from Meta.

The Texas Supreme Court removed the appeal from its active docket after the Texas settlement was announced.

Texas is represented by Brent Webster, Ken Paxton, James Lloyd, Ryan Baasch, Christin Vasquez, Jennifer Roscetti, Brad Schuelke, Jennifer Severn and Gabriella Gonzalez of the Office of the Texas Attorney General, Samuel F. Baxter, Jennifer L. Truelove, Kevin Burgess, John B. Campbell, Lewis T. LeClair, Robert M. Manley, Eric B. Halper, John C. Briody, Radu A. Lelutiu, Michael E. Catapano, Ayana M. Rivers, Melissa Cabrera and Eliza Beeney of McKool Smith, and Zina Bash, Ashley Keller, Ben Whiting, J. Dominick Larry, Alex Dravillas, Jessica Beringer, James Ji, Brett Corson, Denis Carey, Randall S. Newman, Branden Weber, Andray Napolez, J.J. Snidow, Jamie Price, Zachary Clark, Roseann R. Romano and Kiran Bhat of Keller Postman LLC.

Meta is represented by John T. Cox III, Allyson N. Ho, Andrew LeGrand, Ashley Rogers, Christine Demana, Erin Marie Choi, Lauren Goldman, Collin J. Cox and Prerak Shah of Gibson Dunn & Crutcher LLP, Matthew D. Provance of Mayer Brown LLP and Harry "Gil" Gillam Jr. of Gillam & Smith LLP.

The case is State of Texas v. Meta Platforms Inc. f/k/a Facebook Inc., case number 22-0121, in the 71st District Court in Harrison County, Texas.

--Additional reporting by Allison Grande and Katie Buehler. Editing by Alyssa Miller.

Update: This story has been updated with comments from Meta and the state's counsel.

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SEC OKs Award Of More Than \$37M To Whistleblower

By **Sarah Jarvis**

Law360 (July 29, 2024, 6:27 PM EDT) -- The U.S. Securities and Exchange Commission has awarded more than \$37 million to an anonymous whistleblower the agency credits for spurring a successful enforcement action despite retaliation from an unidentified employer.

In a heavily redacted Friday **order**, the SEC adopted the recommendation of its claims review staff in approving the funds for the whistleblower. Details about the enforcement action, parties involved and what percentage of the monetary sanctions the whistleblower award amounts to are unknown.

"Today's whistleblower learned of misconduct and made the difficult decision to report their concerns," said Creola, chief of the SEC's Office of the Whistleblower, in a Friday statement. "This individual, who was retaliated against for their whistleblowing activity, played a crucial role in the ultimate success of the enforcement proceeding."

The agency also adopted a staff recommendation to deny award claims filed by three other individuals, according to the order, which indicated in a footnote that eight additional claimants also saw their award applications denied.

The SEC said in its announcement that the whistleblower reported the underlying misconduct internally, leading to an eventual investigation carried out by the employer, which later reported the results to the SEC. That self-report then led the SEC to conduct its own investigation, the agency noted.

"Without the whistleblower's ongoing, extensive, and timely assistance, the staff would not have learned the full context and extent of the employer's misconduct," the SEC said in its announcement.

According to Friday's order, the whistleblower directly provided "significant information" and sworn testimony about colleagues "and the integrity of the firm's internal investigation." The whistleblower also faced retaliation from supervisors and other senior employees, including a negative performance review and a "sharply lower" bonus than what was received the prior year, despite meeting performance goals, the SEC noted.

Whistleblower awards can range from 10% to 30% of the money the SEC collects in enforcement actions that collect more than \$1 million.

Earlier this month, the SEC awarded **another \$37 million** to a whistleblower for providing information — including "evidence of scienter of high-level executives" — that led to a successful enforcement action.

The SEC is currently defending itself in a **case** before the Fifth Circuit alleging the agency shortchanged two whistleblowers who uncovered the largest fraud in Texas history. In the underlying action, Life Partners Holdings Inc. was ordered to pay \$38.7 million in disgorgement and civil penalties in 2014 after a jury found it had defrauded life settlement investors.

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