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Samsung Beats Second Mass Arbitration Bid Over Biometric Claims

By Christopher Brown 2024-07-31T18:36:09000-04:00

- Lower court improperly granted petition to compel arbitration
- Claimants told to file in court or refile with arbitrator

Samsung Electronics America Inc. won a repeat victory in its effort to fend off mass arbitration of claims that it illegally collected the biometric information of consumers through its smart phones and other devices.

Around 800 consumers with claims against Samsung under the Illinois Biometric Information Privacy Act were prematurely attempting to force Samsung back into arbitration after the American Arbitration Association had terminated the proceedings early on, the US Court of Appeals for the Seventh Circuit said Wednesday.

The claimants were free to bring their claims in federal court, but Samsung couldn't be compelled to arbitrate—and pay the AAA's administrative fees—unless the claimants filed a petition to compel arbitration after refiling the claims with the AAA, the court said in its decision to overturn a district court ruling in the claimants' favor.

The ruling came [less than a month](#) after the Seventh Circuit issued a similar ruling in Samsung's favor in a case involving around 40,000 BIPA claims and \$4 million in arbitration fees, *Wallrich v. Samsung Electronic America Inc.*

Mass arbitration is the simultaneous filing of thousands of arbitration claims in an effort to put settlement pressure on companies by threatening them with enormous filing fees. Plaintiffs are employing the emerging tactic against companies using arbitration clauses to reduce their exposure to class actions.

Businesses have criticized mass arbitration as an abusive practice that seeks to weaponize filing fees against defendants, but plaintiffs' attorneys defend it as a necessary response to recent business-friendly court rulings.

The case came before the Seventh Circuit after the 800 claimants first brought their claims before the AAA and then agreed with Samsung to attempt mediation, the court's per curiam opinion said.

The AAA then terminated the proceedings due to Samsung's refusal to pay the administrative fees, but it indicated that the claimants could refile their demands if mediation was unsuccessful.

After mediation failed, the claimants filed a petition to compel arbitration in the district court rather than refiling with the AAA. The district court granted the petition, and Samsung appealed.

Arbitration Agreement

Reversal turned on whether the AAA's decision to terminate the initial arbitration proceedings resulted in the arbitration being "fully arbitrated in accordance with their arbitration agreement," the court said.

Reversal of the district court was clearly mandated if it was fully arbitrated, it said.

But reversal was also mandated if the arbitration was deemed incomplete in light of the AAA's invitation to refile the claims, the court said. In that case, the claimants needed to refile the claims before filing a petition to compel arbitration, it said.

"Without refiling their arbitration demands, the consumers cannot show that Samsung refused to arbitrate—after all, there would be nothing to refuse," it said.

The court also couldn't speculate how Samsung would have responded to the refiled claims, whether it would stick to its strategy of refusing to pay the filing fees, or how the AAA would ultimately have handled such a refusal, it said.

The case went before Judges Diane S. Sykes, Frank H. Easterbrook, and Thomas L. Kirsch II.

Robbins Geller Rudman & Dowd LLP and Milberg Coleman Bryson Phillips Grossman PLLC represent the claimants. Skadden Arps Slate Meagher & Flom LLP, O'Melveny & Myers LLP, Donohue Brown Mathewson & Smyth LLC, and Kopecky Schumacher Rosenberg LLC represent Samsung.

The case is [Hoeg v. Samsung Elecs. Am. Inc.](#) , 7th Cir., No. 1:23-cv-01951, 7/31/24 .

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An ousted FirstEnergy CEO signed a deal blaming his mentor for a bribery scheme. He said the feds never talked to him

 cleveland.com/open/2024/08/an-ousted-firstenergy-ceo-signed-a-deal-blaming-his-mentor-for-a-bribery-scheme-he-said-the-feds-never-talked-to-him.html

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The signage for what was once FirstEnergy Stadium is visible on the facade before an NFL preseason football game, Aug. 27, 2022, in Cleveland. FirstEnergy and the Browns mutually agreed to end the title sponsorship after the company became enmeshed in a bribery scandal. (AP Photo/Keith Srakocic, File)AP

By

Jake Zuckerman, jzuckerman@cleveland.com

COLUMBUS, Ohio – Steven Strah looked to Chuck Jones as a mentor and friend for 20 years. They worked together. Their families vacationed together. They attended each other's parents' funerals. Jones, as FirstEnergy's CEO, groomed Strah as his heir apparent.

Then came a flash of high-profile arrests as law enforcement accused then-Ohio House Speaker Larry Householder of taking millions of dollars in bribes from Jones and FirstEnergy Senior Vice President Mike Dowling. Strah, thrust into the role of CEO ahead of schedule after Jones was fired, in 2021 signed a contract similar to a plea agreement with federal prosecutors on FirstEnergy's behalf. The agreement depicted his mentor as the architect of a scheme to bribe two top government officials with \$64 million.

But Strah, who rose to the role of CFO in 2018 and CEO in October 2020, said during a newly revealed deposition from September 2023 that he has never been interviewed by federal authorities investigating what they have described as the biggest public corruption scheme in Ohio history.

He said he has never met with the FBI, U.S. Department of Justice, or the U.S. Securities and Exchange Commission about the matter.

Cleveland.com / The Plain Dealer requested comment from the U.S. Attorney's Office for the Southern District of Ohio, which oversaw the federal investigation.

FirstEnergy, in the agreement Strah signed, admitted to bribing Householder, now serving a 20-year federal prison sentence after a 2023 trial found him guilty of racketeering. A co-conspirator is serving a five-year sentence, and two others have pleaded guilty and await sentencing.

Jones and Dowling face state charges for another bribe FirstEnergy admitted to in the agreement: \$4.3 million paid to Sam Randazzo, the state's former top utility regulator, in exchange for favorable rulings.

But during his deposition in a lawsuit brought by investors who say the company's scheme wiped out tens of millions in value, Strah repeatedly refused to affirm questions about whether Jones led a bribery scheme -- which is exactly what the deferred prosecution agreement that Strah signed says Jones did.

"Chuck, as I said yesterday, has been a long-term friend, mentor, leader within the FirstEnergy organization during his time, so there is disappointment associated with his termination," he told lawyers representing investors that are suing the company. "There's disappointment associated with what our company has been through. And yes, there's a wide range of emotions that I can't necessarily tell you that I know exactly the way I feel right now or what my opinion is."

The deposition amounts to Strah's most robust public comments about a scandal he inherited as CEO.

During the deposition, attorneys for Jones asked questions suggesting FirstEnergy made a scapegoat of Jones and Dowling to stave off a liquidity crisis a corporate indictment could have triggered. Attorneys for the plaintiffs, meanwhile, asked questions suggesting that Strah – who earned \$25.7 million between his October 2020 promotion to CEO and his September 2022 ouster – knew more than enough while he was the company’s CFO to detect illegal executive-level behavior in a Fortune 500 company.

In a two-day deposition taken last September, Strah expressed ambivalence over Jones’ culpability. He said he doesn’t regret signing the deferred prosecution agreement. He has no reason to doubt it. But the Jones he knew for 20 years leading up to Householder’s arrest had an “unrelenting ethical approach to business in all regards,” he said. When asked if he still feels that way now, he hedged but never reached the point of speaking ill of his old colleague.

“Well, a lot has transpired over the last three years, in my view, and I just don’t know,” he said.

Strah said he has no personal knowledge of the 42-page “statement of facts” he attested to within the deferred prosecution agreement, which required FirstEnergy to pay a \$230 million fine and cooperate with the federal investigation. While he swore its accuracy to a federal judge and said in the deposition he has no reason to doubt any element of it, Strah said he lacks any firsthand knowledge of its contents and hasn’t made any independent effort to confirm its conclusions.

He said the board of directors asked him, as CEO, to sign the deferred prosecution agreement, based on findings of an internal investigation commissioned by the board. FirstEnergy has spent more than a year battling in court to block investors suing the company, and in turn the public, from ever seeing that internal investigation.

“It was basically a completion of the board of directors’ internal investigation that established those facts,” Strah said.

In September 2022, two FirstEnergy board members “initiated” Strah’s retirement, he said. He said he didn’t know if he wanted to retire or if he was forced to. No one told him why he was ousted. Strah said he isn’t paying his own legal bills, but stopped short (amid a swarm of objections) of saying FirstEnergy was picking up the tab.

Strah’s testimony came in the context of a lawsuit from company investors who say FirstEnergy failed to disclose its bribery operations, which wiped tens of millions in value from their investments when word of the first arrests broke. The transcript of Strah’s deposition is the latest document from the lawsuit released by the Ohio Consumers Counsel in response to a public records request.

The deferred prosecution agreement said Jones and Dowling engineered a plan to pay off Householder to champion passage of a \$1.3 billion legislative bailout for nuclear plants owned by a FirstEnergy subsidiary and a new revenue stream for the parent company. Separately, they paid Randazzo \$4.3 million before he started as the state's top utility regulator in exchange for regulatory favors and assistance with the bailout bill.

As of today, Householder is in prison for 20 years. Matt Borges, a lobbyist conspirator tried alongside him, is serving a five-year sentence. Two conspirators – lobbyist Juan Cespedes and political operative Jeff Longstreth – pleaded guilty and have not yet been sentenced. Lobbyist Neil Clark was indicted but died by suicide before trial. Randazzo was also indicted but died by suicide before trial. Both Jones and Dowling have been accused in state court of bribing Randazzo. They have pleaded not guilty and await trial.

Liquidity crisis

Amid the drama of a cascading scandal, including the FBI arresting Householder at his farm and raiding Randazzo's condo, FirstEnergy had a major cash flow problem.

According to a power point presentation from company treasurer Steven Staub, FirstEnergy at the time had borrowed \$2.2 billion and held \$1.8 billion in cash. A deal with the DOJ, the presentation states, was the best chance to stay afloat "while minimizing onerous terms."

Meanwhile, consultants from Barclays warned the company that it could face as much as \$3.8 billion in fines if indicted. Strah said in the deposition that it was at least "possible" the banks would also declare a default and "accelerate" the repayment demand for \$2.2 billion, prompting a calamitous cash crunch.

The \$230 million fine from the federal government sat at the low end of the spectrum of possible fines.

Strah conceded this was at least one factor that prompted FirstEnergy to enter the deferred prosecution agreement. Dan Warren, an attorney for Jones who led the questioning, made his point clear.

"Did you have any qualms at all?" he asked of signing the agreement. "Did you lie awake at night worrying about it or think, 'Is this really the right thing to do? To accuse the person who I worked with and looked up to and was a friend to for over 20 years in order to avoid the bank's closing a multibillion-dollar loan on me?'"

Strah only said that by entering into the agreement, "it brought greater certainty around the financial performance of the company" and helped in other ways "to move forward in a positive manner."

Florida men

Strah was vacationing in Naples, Florida with Jones and other company men on April 24, 2019. While there, Strah testified that Jones said after a round of golf they were going to stop by a friend's house. That friend turned out to be Randazzo, then-chairman of the PUCO.

Jones, unbeknownst to Strah, texted Randazzo at the time offering (perhaps in jest) they would show up in disguise.

"We will wear beards and moustaches and, in my case, a wig, off the books," the text states.

It was the first time Strah had met Randazzo, he said. According to Strah, they discussed FirstEnergy's grid modernization efforts, which were funded in part by a \$460 million charge to customers called the Distribution Modernization Rider. (Months after this meeting, the Ohio Supreme Court would deem the PUCO-approved charge to be unlawful and discontinued collections. Auditors later said they were unable to determine if any of the money actually went into modernizing the grid.)

Investor attorneys also asked Strah about some text messages and other communications unearthed during the lawsuit suggesting some awareness from Strah of Jones and Dowling's schemes.

For instance, company accountant Jason Liskowski emailed Staub to say "Strah is aware" about a pending \$10 million transfer from FirstEnergy to Partners for Progress, a dark money 501(c)(4) nonprofit. Such nonprofits, which don't disclose their donors and can accept unlimited sums from companies to spend on politics, were used to bribe Householder, as the company admitted in its deferred prosecution agreements.

Strah said he didn't know Partners for Progress was a 501(c)(4) and didn't research the payment. He simply put his trust in Dowling.

In another text, after HB6 passed, Strah wrote vice president of investor relations Irene Prezelj after the company's share price jumped to note that although the "price of poker went up ... our Ohio advancement" is being recognized.

The first arrests

Carol Rendon, an attorney for Jones, declined to comment on Strah's deposition.

Strah was in a meeting with FirstEnergy's executive council when text messages came through that the FBI arrested Householder and four accomplices on July 21, 2020. Both Jones and Dowling were present.

Under questioning from investor attorneys, Strah said he remembered nothing else about that day. Not Jones' reaction. Not Dowling's. Not whether he met with them.

When asked about a calendar item titled "Event Dinner" at Jeff Ruby's steakhouse in Columbus organized by Dowling listing names of Dowling, Jones and Strah, he drew a blank.

"I, I don't – I don't remember that restaurant. I don't remember meeting with Mr. Jones and Mr. Dowling at that period of time," he said.

Transcripts of Steven Strah's two-day deposition can be found [here](#) and [here](#).



Stories by Jake Zuckerman

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Jake Zuckerman covers state politics and policy for [Cleveland.com](#)

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FirstEnergy set aside nearly \$120M in second quarter to put HB 6 scandal behind it

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Akron Beacon Journal (Ohio)

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FirstEnergy set aside nearly \$120M in second quarter to put HB 6 scandal behind it

FirstEnergy will tentatively pay a \$100 million settlement to the U.S. Securities and Exchange Commission.

Patrick Williams, Akron Beacon Journal

FirstEnergy has set aside nearly \$120 million in its second financial quarter to move past the House Bill 6 scandal, utility President and CEO Brian X. Tierney said on a Wednesday quarterly earnings call.

In its second financial quarter, FirstEnergy reached an "agreement in principle" with the U.S. Securities and Exchange Commission to tentatively pay the commission a \$100 million settlement, Tierney said. And the utility has reserved an additional \$19.5 million as part of its efforts to resolve an investigation by the Ohio Organized Crime Investigations Commission and a civil suit by Ohio Attorney General Dave Yost's office, Tierney said.

The company entered into a deferred prosecution agreement with federal prosecutors in July 2021. The three-year agreement required FirstEnergy to pay a \$230 million penalty – \$115 million to the U.S. Treasury and another \$115 million to a program for low-income utility customers administered by the Ohio Development Service Agency.

Tierney told investors Wednesday that the U.S. Attorney's Office for the Southern District of Ohio filed a status report last week "confirming that FirstEnergy successfully completed the obligations it was required to perform ... under the deferred prosecution agreement, including

remediation measures and the implementation of a compliance and ethics program."

Utility regulator Public Utilities Commission of Ohio (PUCO) is also conducting audits on: FirstEnergy's spending on political and charitable causes, with an audit report due on Aug. 28; the utility's compliance with corporate separation laws, with discovery continuing and a hearing set for Oct. 9; and its "distribution modernization" and "delivery capital recovery" riders, with ongoing discovery and a hearing set for Feb. 3, 2025, Tierney said.

Meanwhile, according to a Tuesday Reuters report, FirstEnergy is facing a shareholder class action suit that the "company and its lawyers have aggressively challenged ... at every possible turn."

FirstEnergy requesting utility rate increase with state regulator

The utility is also seeking to increase Ohio consumer electricity rates in a request with PUCO, Tierney said.

FirstEnergy issued a filing to PUCO on Wednesday requesting the increase, which Tierney said factored into the company's electric security plan (ESP) and "other updates."

If FirstEnergy's proposed increase is approved by the commission, its Ohio customers who take the company's standard service offer (SSO) — meaning they do not choose a separate company to supply their energy — would see a bill increase, said utility spokeswoman Hannah Catlett.

For residential Ohio Edison customers using an average of 750 kilowatt-hours (kWh) of electricity each month, that translates to a \$1.92, or 1.5%, monthly increase, Catlett said.

The Illuminating Company's residential customers who take the SSO and use an average of 750 kWh each month would see a \$9.50 monthly increase, or 7.2%, while Toledo Edison's residential customers who take the SSO and use an average of 750 kWh per month would see an increase of \$1.09, or 0.8%, Catlett said.

This month, PUCO granted FirstEnergy's request for a rehearing on its proposed ESP. In May, the commission approved a plan that varied from what FirstEnergy had proposed.

The Beacon Journal previously reported that FirstEnergy cannot charge its customers to pay its fines in the H.B. 6 scandal.

Generally, Tierney said he believes "a well-run and growing utility" should regularly opt for rate changes, adding: "I think in most jurisdictions, we should be going in every two to three years at the max."

Personnel changes coming to FirstEnergy

On June 1, Tierney celebrated a year with FirstEnergy. His most recent role prior to joining the utility was serving as senior managing director and global head of operations and asset management for Blackstone Infrastructure Partners.

FirstEnergy's Chris Walker, chief of human resources and corporate services, and Irene Prezelj, head of investor relations and communications, are retiring, Tierney said.

Company leadership is also working with unions that represent utility workers to make pay adjustments "to help ensure we are paying competitive wages to our represented workforce," Tierney said

Additionally, Tierney said: "We started an effort to hire journey-level line workers to better serve our customers, and we are forming a new apprenticeship program to further support a skilled and well-trained workforce to serve our customers going forward."

FirstEnergy operating EPS up, GAAP EPS down compared to 2023

FirstEnergy's operating earnings per share (EPS) were at \$0.56 for the second quarter of 2024, compared to \$0.47 EPS for the second quarter last year.

However, FirstEnergy's Generally Accepted Accounting Principles (GAAP) EPS were down to \$0.08 for the second quarter of 2024, compared to \$0.41 GAAP EPS for the second quarter last year.

Also for year-to-date figures through June, operating EPS were up and GAAP were down compared to last year.

FirstEnergy closed at \$41.91 per share Wednesday, up 11 cents (0.26%).

Patrick Williams covers growth and development for the Akron Beacon Journal. He can be reached by email at pwilliams@gannett.com or on X, formerly known as Twitter, @pwilliamsOH.

This article originally appeared on Akron Beacon Journal: FirstEnergy set aside nearly \$120M in second quarter to put HB 6 scandal behind it

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Company: Ohio Development Services Agency; U.S. SECURITIES AND EXCHANGE COMMISSION; FIRSTENERGY CORP.; US TREASURY (CATS); BLACKSTONE INFRASTRUCTURE PARTNERS L.P.; Illuminating Company (The)

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FirstEnergy Corp (FE) Q2 2024 Earnings Call Transcript Highlights: Strong Operating Earnings ...

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August 1, 2024

FirstEnergy Corp (FE) Q2 2024 Earnings Call Transcript Highlights: Strong Operating Earnings ...

Aug 01, 2024

Release Date: July 31, 2024

For the complete transcript of the earnings call, please refer to the full earnings call transcript.

Positive Points

Operating earnings for the quarter increased by 19% to \$0.56 per share compared to \$0.47 per share last year. Customer demand showed positive growth with weather-adjusted residential and commercial sales up 4% and 7%, respectively. Capital investments to improve customer experience increased by 22% for the first six months of the year. The company reaffirmed its 2024 operating earnings guidance range of \$2.61 to \$2.81 per share and its CapEx plan of \$4.3 billion. FirstEnergy Corp (FE, Financial) successfully completed the obligations under the deferred prosecution agreement, marking significant progress in resolving legacy issues.

Negative Points

GAAP earnings for the second quarter were significantly lower at \$0.08 per share compared to \$0.41 per share last year. Higher planned operations and maintenance expenses partially offset the positive impacts on operating earnings. The 30% sale of FirstEnergy Transmission LLC to Brookfield resulted in expected dilution. The company faces ongoing regulatory

challenges, including unresolved issues in Ohio's ESP5 case and pending rate cases in Pennsylvania and Ohio. The financial impact of legacy issues remains, with reserves of \$100 million for SEC settlement and \$19.5 million for Ohio matters.

Q & A Highlights

Q: Can you quantify the impacts of the 1% load growth figure and discuss potential upsides?

A: We are currently evaluating our future load growth rate. While we see positive impacts from data centers and EV adoption in Maryland and New Jersey, overall, we are still seeing modest, steady load growth. Data centers generally take service at a transmission level, which isn't as earnings impactful today but could positively impact rates for existing customers. We anticipate providing an update around EEI. (Unidentified Company Representative)

Q: Why haven't you filed a framework around the Susquehanna docket when most of your peers have? A: It's not as business impactful to us at this point. We are interested to see what forecasts say about it and whether it takes capacity out of the market. We recently saw high prints on the PJM capacity auction, but I don't think it will solve the generation resource adequacy issue. (Unidentified Company Representative)

Q: What is the likelihood of reaching a settlement in the Pennsylvania rate case? A: Settlement talks are in early stages, but we are optimistic about reaching a settlement before the hearings in August. (Unidentified Company Representative)

Q: Can you discuss the potential for new generation state to form a strategic reserve or other efforts to stem higher prices? A: We are open to constructs that allow us to invest in capacity on a regulated basis. We are not looking to return to competitive generation but are willing to engage in discussions that benefit our customers. (Unidentified Company Representative)

Q: What are the drivers for the strong presence across both commercial and residential customer classes this quarter? A: For residential, we see higher average usage per customer, especially in New Jersey and Maryland, due to progressive energy policies and economic activity. For commercial, we are seeing a rebound to pre-pandemic levels. (Brian Tierney, President and CEO)

Q: What are your thoughts on the potential for reaching a settlement in the Ohio rate case? A: We always aim to reach a settlement in any rate case. This one is in early stages, and we will engage with interveners and other interested parties throughout 2024 and into 2025. (Unidentified Company Representative)

Q: How do you view the impact of higher capacity and energy prices on customer bills and potential efforts to address this? A: We are analyzing the impact on a jurisdiction-by-jurisdiction basis. In West Virginia, we expect a wash due to balanced capacity needs. In

other states, we are open to constructs that allow us to invest in capacity on a regulated basis. (Unidentified Company Representative)

Q: What is the status of the pension lift-out transaction and its impact on the balance sheet?

A: We are targeting a second pension lift-out transaction to eliminate the remaining \$700 million in non-regulated pension liability. This would be funded through the pension plan and would not require external financing. (Jon Taylor, CFO)

Q: What is the earliest you think a NYSERDA-type agency could get started in any of your states? A: It would require legislative changes and activation of a new entity, so it is not a short-term process. However, it could provide a sustainable solution for procuring incremental needs. (Brian Tierney, President and CEO)

Q: Do you think the current PJM construct will solve the generation resource adequacy issue? A: No, I don't think the PJM construct will fix the issue even if it sends positive price signals. We need a sustainable solution that involves robust grid investments and constructive engagement with states and regulators. (Brian Tierney, President and CEO)

For the complete transcript of the earnings call, please refer to the full earnings call transcript.

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Ohio scandal hits FirstEnergy earnings

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Gregory Purcell

July 31, 2024

AKRON, Ohio – FirstEnergy reported that it is making progress with the Department of Justice, SEC (Securities and Exchange Commission) and the Office of the Ohio Attorney General to settle its four-year-old Ohio bribery scandal, but costs related to its settlement will continue to batter profits in the future.

Revenues were up, but profits were down in the second quarter compared to last year for FirstEnergy, the parent company of Met-Ed, Jersey Central Power and Light and eight other regulated distribution companies in the Midwest and Mid-Atlantic regions.

Speaking to analysts on an earnings call, Brian X. Tierney, president and chief executive officer, said the U.S. Attorney's Office for the Southern District of Ohio confirmed that FirstEnergy has successfully completed the obligations that it was required to perform for a three-year period.

Also, Tierney said that FirstEnergy has continuing obligations to publish any payments to a 501(c)(4) and to a political official; not make any statements that contradict its acceptance of responsibility; notify the DOJ of any changes in its corporate form; and continue to cooperate with the DOJ.

In addition, Tierney reported an agreement in principle with SEC staff and has recorded a reserve of \$100 million in the second quarter of 2024 in connection with the expected resolution. Also, he said the company has recorded a reserve of \$19.5 million in the quarter in connection with a resolution with the Ohio Attorney General and the Ohio Organized Crimes Investigation Commission (OOCIC).

Tierney said in a statement, "Earlier this year, we introduced a robust capital investment program that is supported by a transformed balance sheet. We've achieved constructive regulatory outcomes, and we've structured our operations to improve the customer experience and reliability. We are proud of the progress we've made and are committed to driving results through a culture focused on performance excellence and continuous improvement."

Second Quarter Results

"Our second quarter financial results are in line with our expectations, reflecting the strength of our regulated investment strategies," noted Tierney. "In addition, we're achieving meaningful milestones in our journey to become a premier electric company."

FirstEnergy reported second quarter 2024 GAAP (Generally Accepted Accounting Principles) earnings of \$45 million, or \$0.08 per basic and diluted share, on revenue of \$3.3 billion. This compares to second quarter 2023 GAAP earnings of \$235 million, or \$0.41 per basic and diluted share, on revenue of \$3.0 billion.

GAAP results for the second quarter of 2024, the company said, include an increase in asset retirement obligations associated with new environmental regulations and future expected remediation costs for retired electric generation facilities, debt redemption costs, and legal costs and charges connected to the anticipated resolution of certain HB-6 (the Ohio scandal) related matters, partially offset by the receipt of insurance proceeds associated with a shareholder derivative lawsuit.

Operating (non-GAAP) earnings for the second quarter of 2024 were \$0.56 per share, above the midpoint of the company's guidance. In the second quarter of 2023, operating (non-GAAP) earnings were \$0.47 per share.

Second quarter 2024 results increased \$0.09 per share, or 19%, resulting from the company's Energize365 investment plan. FirstEnergy noted these drivers were partially offset by higher planned operating expenses and net financing costs.

On a weather-adjusted basis, total distribution deliveries increased 3% compared to the second quarter of 2023. Weather-adjusted usage increased 4% and 7% among residential and commercial customers, respectively.

Earlier this year, the company said it introduced new segment reporting to enhance transparency and align with its operating structure. Segment results for 2023 have been recast for comparative purposes.

Second quarter operating earnings in the Distribution segment decreased \$0.02 per share compared to the second quarter of 2023 as higher revenues were offset primarily by higher planned operating expenses in the second quarter of 2024.

In the Integrated segment, second quarter operating earnings increased \$0.09 per share compared to the second quarter of 2023, primarily due to the impact of base rate adjustments, rate base growth, and higher distribution customer demand. These items were partially offset, in part, by a higher effective income tax rate.

In the Stand-Alone Transmission segment, the company reported, second quarter 2024 operating earnings decreased \$0.04 per share. Results benefited from rate base growth, however this was more than offset by the dilutive effect of the 30% interest sale in FirstEnergy Transmission LLC, which closed on March 25.

Second quarter 2024 operating results improved in Corporate/Other by \$0.06 per share due to lower interest costs from lower average debt levels, partially offset by lower earnings from the company's legacy investment in the Signal Peak coal mine

First Half Results

For the first half of 2024, FirstEnergy reported GAAP earnings of \$298 million, or \$0.52 per basic and diluted share, on revenue of \$6.6 billion. This compares to GAAP earnings of \$527 million, or \$0.92 per basic and diluted share, on revenue of \$6.2 billion in the first half of 2023.

Operating (non-GAAP) earnings for the first half of 2024 were \$1.11 per share, compared to \$1.06 per share in the first half of 2023.

Operating results for the first half of 2024 reflect continued growth from the company's regulated investment strategy and favorable distribution sales compared to the first half of 2023. These factors offset the impact of higher planned operating expenses and financing costs.

Guidance

FirstEnergy provided a third quarter earnings guidance range of \$490 million to \$547 million, or \$0.85 to \$0.95 per share. The company also affirmed its 2024 operating (non-GAAP) earnings guidance range of \$2.61 to \$2.81 per share, and its long-term, 6% to 8% targeted annual operating earnings growth rate, which is based off the previous year's operating earnings guidance midpoint and supported by the company's refreshed and extended \$26 billion, five-year capital investment plan, Energize365.

About FirstEnergy

Headquartered in Akron, Ohio, FirstEnergy (NYSE: FE) includes one of the nation's largest investor-owned electric systems, more than 24,000 miles of transmission lines that connect the Midwest and Mid-Atlantic regions, and a diverse generating fleet with a total capacity of more than 16,000 megawatts.

Norfolk Southern bondholders one step closer to big ruling on East Palestine train derailment

 legalnewsline.com/stories/662262055-norfolk-southern-bondholders-one-step-closer-to-big-ruling-on-east-palestine-train-derailment

August 1, 2024

Federal Court



EPA image of crash site recovery operations at the Norfolk Southern Railroad train derailment in East Palestine, Ohio | response.epa.gov/

NEW YORK (Legal Newsline) - Investors who bought some \$3 billion in senior notes from Norfolk Southern can sue over claims the railroad failed to disclose the risks behind a job-cutting performance improvement plan they say led to a disastrous 2023 derailment in East Palestine, Ohio.

A magistrate judge in federal court in New York recommended the plaintiffs have presented enough evidence – including statements by seven unnamed former employees – to proceed with securities-fraud claims against Norfolk Southern. The magistrate dismissed claims the railroad failed to disclose investigations into possible legal and regulatory violations that the government dropped without issuing penalties.

District Judge Lewis Kaplan will now decide whether to affirm Magistrate Judge Sarah Cave's report and recommendations.

Norfolk Southern in 2019 adopted a plan it called TOP21 (for Thoroughbred Operation Plan) to improve its financial performance by cutting operating costs and increasing the efficiency of its network. The company ultimately reduced employee headcount by 30%, while tying executive bonuses to reductions in operating expenses.

The securities plaintiffs claimed TOP21 led to “miles-long trains being run by a single hand-count's worth of over-levered, exhausted employees.” They accused Norfolk Southern of violating Section 11 of federal securities law by failing to disclose the risks behind TOP21 in offering statements, including that it wasn't sustainable without affecting rail safety.

One former employee said that after the operating cuts, “derailments occurred in the yard every day or every week.”

Norfolk Southern moved to dismiss, arguing it fully disclosed the risks of operating a railroad, including derailment. It also argued the unnamed former employees could only testify about what they observed in their jobs, not company wide practices.

Magistrate Judge Cave disagreed, finding the plaintiffs had raised enough fact questions for their cases to survive dismissal. The plaintiffs include the Ohio Carpenters' Pension Fund and the City of Pontiac retirement system.

Securities issuers aren't required “to disclose a fact merely because a reasonable investor would very much like to know that fact,” Cave noted. But the plaintiffs presented enough evidence to support claims Norfolk Southern failed to disclose the risk that TOP21 was likely to cause more accidents.

“While Defendants' statements were not a ‘guarantee’ that no accidents would occur—a likely unobtainable standard of which ‘reasonable investors may be deemed to’ understand—these statements could still have misled investors if defendants' implementation of the TOP Initiative was in fact making the company's operations less safe and more risky,” Cave wrote.

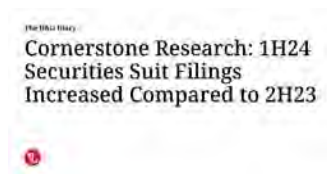
It would be impermissible “hindsight pleading” to turn the derailment into a securities fraud claim, she said. But the “failure to disclose the then-ongoing and serious safety and operational deficiencies” could be a material misstatement, the magistrate concluded.

In the Second Circuit, she wrote, “a generic warning of risk” isn't sufficient when undisclosed facts would “substantially affect a reasonable investor's calculations of liability.”

Cornerstone Research: 1H24 Securities Suit Filings Increased Compared to 2H23

K [dandodiary.com/2024/08/articles/securities-litigation/cornerstone-research-1h24-securities-suit-filings-increased-compared-to-2h23](https://www.dandodiary.com/2024/08/articles/securities-litigation/cornerstone-research-1h24-securities-suit-filings-increased-compared-to-2h23)

August 1, 2024



By Kevin LaCroix on August 1, 2024
Posted in Securities Litigation

CORNERSTONE RESEARCH

The number of securities class action lawsuits filed in the first six months of 2024 increased relative to the number of securities suits filed in the second

half of 2023, according to a new report from Cornerstone Research. The number of suits filed in the first half of 2024 is roughly level with the historical semiannual average number of filings. The July 31, 2024, report, which is entitled "Securities Class Action Filings:2024 Midyear Assessment," can be found [here](#). Cornerstone Research's July 31, 2024, press release regarding the report can be found [here](#).

According to the report, there were a total of 112 securities class action lawsuits filed in state and federal courts during the first six months of 2024. Three of the 112 twelve suits were standalone state court securities class action suits ("standalone" meaning without a parallel federal court suit); the remaining 109 securities suits were federal court filings. The number of first-half securities suit filings (112) annualizes to a year-end total of 224, which is higher than the 216 total in 2023, and would in fact represent the highest annual total since 2000.

The number of first-half securities suits filings (112) is roughly level with the 1996-2023 historical semiannual average of 113 filings and higher than the 103 securities suits filed in the second half of 2023. There were only two securities class action merger objection lawsuits filed in the first six months of 2024, meaning there were 110 "core" securities class action lawsuits in the year's first half. The 110 core securities suit filings in the first six months of 2024 were higher than the 1997-2023 semiannual average of core filings of 96.

According to the report, one factor contributing to the number of securities class action lawsuit filings in the first six months was the number of artificial intelligence (AI) related securities suits. In an interesting feature in this report, Cornerstone Research tallied all of the AI-related securities class action lawsuits filed, going back to the first in 2020. According to the report, there have been a total of 31 AI-related securities suits filed during the period

2020 to the end of the first half of 2024, with six of them filed in the first half of 2024. The report notes a number of other filing trends; in particular, the report notes that the number of COVID-19-related securities suits in the first half of 2024 (7) means that the suits are on track to exceed the number of COVID-related suits filed in 2023 (11).

The report notes that at the current pace, 4% of the companies listed on major U.S. exchanges are or will become subject to a securities class action lawsuit in 2024, which would represent an increase compared to 2023 (when the percentage was 3.3%). The 4% projected litigation rate would be below the 2010-2023 annual average percentage of 5%, but that average is somewhat distorted by the flood of federal court merger objection lawsuit filings during the period 2016-2020.

There were 13 core federal filings against non-U.S. companies in the first half of 2024, suggesting an annualized year-end total of 26 filings against non-U.S. companies, which would be the lowest number in at least ten years, and well below both the recent high number of filings against non-U.S. companies of 73 filings in 2020, and below the 32 filings in 2023.

The report reflects two different measures of investor losses represented in the securities class action lawsuits filed in the year's first six months. The first of these is Disclosure Dollar Loss (DDL), which measures the dollar value change in the defendant company's share price between the trading day immediately prior to the end of the class period and the trading day immediately after the last day of the class period. The second of these is Maximum Dollar Loss (MDL) which measures the difference in the defendant company's share price between the trading day during the class period with the highest market capitalization and the share price on the day following the end of the class period.

The MDL that the first half filings represent declined to \$908 billion, compared to the second half 2023 MDL of \$1,002 billion, but remained above the 1997-2023 semiannual average of \$600 billion.

The DDL reflected in the first half filings increased to \$185 billion, compared to \$171 billion in second half of 2022, which is well above the 1997-2023 semiannual average DDL of \$119 billion but well below the record high of \$518 billion in the first half of 2022.

CrowdStrike is sued by shareholders over huge software outage

 [reuters.com/legal/crowdstrike-is-sued-by-shareholders-over-huge-software-outage-2024-07-31](https://www.reuters.com/legal/crowdstrike-is-sued-by-shareholders-over-huge-software-outage-2024-07-31)

Jonathan Stempel

Item 1 of 2 Air Asia passengers queue at counters inside Don Mueang International Airport Terminal 1 amid the global outage that disrupted the airline's operations, in Bangkok, Thailand, on July 19, 2024. REUTERS/Chaline Thirasupa//File Photo

[1/2] Air Asia passengers queue at counters inside Don Mueang International Airport Terminal 1 amid the global outage that disrupted the airline's operations, in Bangkok, Thailand, on July 19, 2024. REUTERS/Chaline Thirasupa//File Photo [Purchase Licensing Rights](#) , opens new tab

July 31 (Reuters) - CrowdStrike (CRWD.O) , opens new tab has been sued by shareholders who said the cybersecurity company defrauded them by concealing how its inadequate software testing could cause the July 19 global outage that crashed more than 8 million computers.

In a proposed class action filed on Tuesday night in the Austin, Texas federal court, shareholders said they learned that CrowdStrike's assurances about its technology were materially false and misleading when a flawed software update disrupted airlines, banks, hospitals and emergency lines around the world.

They said CrowdStrike's share price fell 32% over the next 12 days, wiping out \$25 billion of market value, as the outage's effects became known, Chief Executive George Kurtz was called to testify to the U.S. Congress, and Delta Air Lines (DAL.N) , opens new tab reportedly hired prominent lawyer David Boies to seek damages.

The complaint cites statements including from a March 5 conference call where Kurtz characterized CrowdStrike's software as "validated, tested and certified."

In a statement on Wednesday, Austin-based CrowdStrike said: "We believe this case lacks merit and we will vigorously defend the company," Kurtz and Chief Financial Officer Burt Podbere are also defendants.

The lawsuit led by the Plymouth County Retirement Association of Plymouth, Massachusetts, seeks unspecified damages for holders of CrowdStrike Class A shares between Nov. 29, 2023 and July 29, 2024.

Shareholders often sue companies after unexpected negative news causes stock prices to fall, and CrowdStrike could face more lawsuits.

Delta Chief Executive Ed Bastian told CNBC on Wednesday that the outage cost his airline \$500 million, including lost revenue and compensation and hotels for stranded fliers.

CrowdStrike shares closed on Wednesday down \$1.69 at \$231.96. They closed at \$343.05 on the day before the outage.

The case is Plymouth County Retirement Association v CrowdStrike Inc et al, U.S. District Court, Western District of Texas, No. 24-00857.

Get a quick look at the days breaking legal news and analysis from The Afternoon Docket newsletter. Sign up here.

Reporting by Jonathan Stempel in New York; Editing by Sandra Maler

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

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kw=Investors%20Sue%20CrowdStrike%20in%20Class%20Action%20Suit&utm_position=1&utm_source=email&utm_medium=enl&utm_campaign=morningupdate&utm_content=20240801&utm_term=c



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Investors Sue CrowdStrike in Class Action Suit

The lawsuit was filed by the Plymouth County Retirement Association, which is represented by New York-based Labaton Keller Sucharow.

July 31, 2024 at 01:20 PM

Securities Litigation



Katie Hall



The original version of this story was published on [Texas Lawyer](#)

Investors on Tuesday sued [CrowdStrike](#) in a federal securities class action lawsuit in the Western District of Texas, after the cybersecurity firm’s software experienced an outage that grounded hundreds of flights, upended health care and halted banking across the globe.

The lawsuit was filed by the Plymouth County Retirement Association, which is represented by New York-based Labaton Keller Sucharow. The firm was listed as a top performer [in a recent report](#) of plaintiffs firms that have been successful in bringing securities fraud claims.

The suit is on behalf of all people and entities who acquired CrowdStrike Class A common stock between the class period of Nov. 29 and July 29 and who are seeking to pursue remedies under Sections 10(b) and 20(a) of the Securities Exchange Act and the U.S. Securities and Exchange Commission Rule 10b5.

Shares of CrowdStrike fell 11% on July 19, the day of the outage, then an additional 13.5% on July 22, according to the suit.

As news outlets reported that Delta Air Lines had hired prominent attorney David Boies to seek damages from CrowdStrike, shares fell another 10% on Tuesday, according to the complaint.

Investors contend that, as a result of misleading statements and omissions, CrowdStrike stock traded at artificially high prices during the class period. In addition to CrowdStrike Holdings Inc., the lawsuit also names the company’s CEO George Kurtz and CFO Burt W. Podbere as defendants.

“Throughout the class period, defendants repeatedly touted the efficacy of the Falcon platform, while assuring investors that CrowdStrike’s technology was ‘validated, tested, and certified,’” the lawsuit said.

However, the plaintiffs contended that CrowdStrike failed to disclose that it had instituted deficient controls for updating Falcon, its flagship software, and was not properly testing updates to Falcon before rolling them out to customers.

A CrowdStrike spokesperson said, “We believe this case lacks merit, and we will vigorously defend the company.”

The case is *Plymouth County Retirement Association v. CrowdStrike Holdings*, 1:24-cv-00857.

Read the class action complaint below:

Case 1:24-cv-00857 Document 1 Filed 07/30/24 Page 1 of 29

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

PLYMOUTH COUNTY RETIREMENT
ASSOCIATION, Individually and on Behalf of All
Others Similarly Situated,

Plaintiff,

v.

CROWDSTRIKE HOLDINGS, INC., GEORGE
KURTZ, and BURT W. PODBERE,

Defendants.

Civil Action No. 24-cv-857

CLASS ACTION
DEMAND FOR JURY TRIAL

CLASS ACTION COMPLAINT FOR VIOLATIONS
OF THE FEDERAL SECURITIES LAW

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https://www.law.com/therecorder/2024/07/31/investors-sue-crowdstrike-in-class-action-suit/?kw=Investors Sue CrowdStrike in Class Action Suit&utm_position=1&utm_source=email&utm_medium=enl&utm_campaign=...

1/1

Bloomberg Law News 2024-08-01T12:55:09830343523-04:00

Matt Levine's Money Stuff: Bill Ackman Raised No Money

By Matt Levine 2024-08-01T12:24:11253-04:00

Please note: *Our email domain is changing, which means you'll be receiving this newsletter from noreply@news.bloomberg.com. Update your contacts to ensure you continue receiving it — check out the bottom of this email for more details.*

Oh PSUS

Generally the way an initial public offering works is that a company decides to sell, say, 10 million shares, representing 10% of the company, and then there is a negotiation about price. “This company is great and worth \$5 billion, so you should pay \$50 per share,” its bankers will tell investors. “Ehh the company is fine and worth \$4 billion, so I’ll pay \$40,” the investors will say. There’ll be debates and negotiation and posturing, the bankers will take orders at different prices, and eventually they will come to the company and say “we have orders for 20 million shares at \$43 per share, and we think you should price the IPO there. That way, we’ll sell 10 million shares at \$43, and a lot of people will be left wanting more and will buy shares in the aftermarket and the stock will trade up and everyone will be happy.” And the company will say “sure” and the deal will price at \$43.

Sometimes, in the marketing process, the banks and the company will decide to upsize or downsize the deal (sell 12 million shares, or 8 million). But the main point of the IPO process is to figure out the price. Some people think the company is worth a lot, some people think it’s worth less, and you want a price where enough investors think they’re getting a good deal. The IPO is launched with a *range* of prices — the prospectus will say “10 million shares at a price between \$42 and \$45” or whatever — and the final price will be set by supply and demand. The IPO is a process for discovering the value of a company.

Pershing Square USA, Bill Ackman’s proposed US-listed closed-end fund, is — was? will be? was to have been? — a pot of money. You give Bill Ackman the money, he invests it, you get the returns. If you give him \$50, he invests \$50, and you get the returns on \$50. If you give him \$73, he invests \$73, and you get the returns on \$73. It is, in some sense, *meaningless* to talk about the valuation of Pershing Square USA. The valuation of a pot of money is the amount of money in the pot. The valuation of an empty pot of money is the money you are about to put into the pot.

In another sense, it is quite meaningful to talk about the valuation of Pershing Square USA, and lots of people — particularly Ackman — do. These conversations take forms like:

- Skeptics say: “Closed-end funds typically trade at a discount to net asset value, and Bill Ackman’s own European-listed closed-end fund currently trades at a discount to net asset value, so Pershing Square USA will probably trade at a discount to net asset value, so if you put \$50 into the pot it will be worth \$45.”
- Ackman [says](#): “It requires a significant leap of faith and ultimately careful analysis and judgment for investors to recognize that this closed end company will trade at a premium after the IPO when very few in history have done so,” but it will, because “everyone appreciates our track record (36 times vs. 7 times for the S&P 500 over 20 years), our unprecedented \$500m investment, the low fees, the liquid profile of the company, the firm’s brand and our large global base of institutional, retail, and media interest in the firm.” That is, there is so much demand for Bill Ackman to invest people’s money, and he is so good at it, that people would pay \$55 to let him invest \$50 for them.

So you can argue about whether \$50 in a pot of money invested by Bill Ackman should be worth \$45 or \$50 or \$55 or some other number.

But here’s what you can’t do: *You can’t negotiate the price.* Pershing Square USA was going to fill its pot of money by doing an IPO. The IPO launched with a fixed price of \$50 per share. If you put in \$50, Pershing Square USA would invest the \$50 for you. But \$50 is an arbitrary number; the point is not that you’re putting in \$50, but rather that you are investing at the net asset value, because your money *is* the net asset value: You’re filling up the pot. If you put less money in the pot, the pot will have less money. If you called up the bankers and said “hey look I like Bill Ackman but I don’t like the valuation, I think this fund will trade at a discount, I only want to pay \$45 per share,” what would that even *mean*? You could give Pershing Square USA \$45, but then it would invest \$45 for you, and you’d still be buying at 100% of net asset value.

Now, it is not quite right that the IPO investors *have* to invest at 100% of NAV. For one thing, Pershing Square USA has to pay some underwriting expenses out of the money it raises: If you put in \$50, in fact Pershing Square will invest \$49 or so for you, and the underwriters will get the rest. So the investors are actually paying a bit *more* than 100% of NAV.

Conversely, you could imagine ways for investors to invest at *less* than 100% of NAV. If shareholders put in less than the amount of money in the pot, somebody else has to put in the rest. Here’s one

way:

- 1. Investors put in \$4 billion at \$50 per share (80 million shares).
- 2. Bill Ackman puts in \$1 billion, from his personal account, at \$100 per share (10 million shares).

That leaves 90 million shares outstanding and a \$5 billion pot of money. The net asset value per share (ignoring underwriting fees) is \$55.56 per share; the outside investors buy at a discount to net asset value. Ackman himself buys at a premium to net asset value. You can probably spot the objections to this structure.

If you have a buzzy tech startup and you launch an ambitious IPO and investors say “this startup is cool but your valuation is too high, we want to pay less,” you can just do that. You can sell them the shares at a lower price; you will raise less money than you wanted and be less rich than you expected and be a bit disappointed and perhaps embarrassed, but you’ll go public and try to improve from there.

If you have a closed-end fund and you launch an ambitious IPO targeting institutional investors and those investors say “you are cool but I want to pay less for these shares,” there is just *not a lot you can do*. You can’t raise a fund by letting everybody invest at 90% of net asset value. Where will the other 10% come from? If you can’t get enough people to pay 100% — or a bit more — then there’s just no deal.

Anyway!

Billionaire Bill Ackman’s Pershing Square has withdrawn an initial public offering for a US closed-end fund, after sharply downsizing a \$25 billion fundraising target and facing difficult questions from investors.

Pershing Square USA Ltd. will reevaluate its structure based on investor feedback, Ackman wrote in a statement Wednesday. “We will report back once we are ready to launch a revised transaction,” Ackman wrote.

The withdrawal comes after Pershing Square slashed the anticipated size twice in just over a week.

The hedge fund manager had floated a potential size of \$25 billion during the marketing of the offering earlier this month, which took place in a series of one-on-one meetings and larger town halls. Pershing Square USA was scaled back to a range of \$2.5 billion to \$4 billion in a July 24 letter, and finally \$2 billion — a hefty drop off from what would've been the biggest US closed-end fund ever.

Here is [Ackman's statement](#):

Over the last seven weeks, we have met with many institutions and family offices, and held numerous town halls for Pershing Square USA, Ltd. While we have received enormous investor interest in PSUS, one principal question has remained:

Would investors be better served waiting to invest in the aftermarket than in the IPO?

This question has inspired us to reevaluate PSUS's structure to make the IPO investment decision a straightforward one. We will report back once we are ready to launch a revised transaction.

Ackman has spent the IPO process arguing that the shares are worth more than \$50, and therefore you should buy them in the IPO at \$50, because they will trade up to \$55 or whatever in the aftermarket. Investors, meanwhile, argued that the shares are worth less than \$50, and therefore they should wait to buy them in the aftermarket at \$45 or whatever. But if everyone thinks that, there is just no deal: The shares can't trade to \$45 unless Pershing Square USA sells them at \$50 first.

Now, if *some* people think the shares are worth \$50 and others don't, then Pershing Square USA could price a small deal, sell to the people willing to pay \$50, and then let the shares trade down in the aftermarket. There are two problems with that:

- 1. It limits Pershing Square USA's ability to raise more money later. If the stock trades below net asset value, then selling more shares will dilute existing shareholders. As [Ackman told investors](#): "If PSUS achieves a sustained premium to NAV which I believe it will achieve, it will enable us to access low-cost equity capital when we have good uses for that capital. As a result, PSUS will compound its AUM from both performance and accretive equity issuances. ... This transaction is therefore all about a successful IPO from the first day and successful trading at a premium thereafter." Trading at a discount would be a *failure*.
- 2. Ackman has been weirdly public about all of these dynamics — I keep quoting from a letter he sent to investors about them, which Pershing Square USA made public last week — so it was not

hard for investors to figure out that there was not enough demand at \$50. If you think everyone *e/se* is waiting to buy in the aftermarket at \$45, then you should too.

I guess I'm excited to see what the reevaluated structure looks like? (Bill Cohan [reported yesterday](#): “All good,” Bill texted me this afternoon. “Better actually.” Okay!) Here's an idea:

Traditionally, US funds had a distribution component which helped reduce discounts and give capital back to investors at the net asset value, according to John Cole Scott, president of CEF Advisors.

“It might sound silly, but he should offer 2% — a quarter of NAV — to investors,” Scott said. “It's what most other equity funds do. This tends to lead to narrower discounts.”

Eh. My idea — buy some shares yourself at a huge premium to NAV, to subsidize everyone else — is free. We'll see what they come up with.

Meanwhile, QXO

Wait, no, I do have one more idea. You know who did this trade incredibly, incredibly well? You know who went out to big institutional investors and raised a multibillion-dollar closed-end fund that trades at a big premium to net asset value, and that *proved* it would trade at a big premium to NAV *before* raising money from institutions? You know who did one of the coolest weirdest equity capital markets raises I've ever seen? Brad Jacobs, man.

Jacobs quietly priced an IPO for his own closed-end fund this week, and it traded up nicely. I mean, not really, but bear with me. We have talked about this trade before. The summary:

- 1. Jacobs is a successful investor who does roll-ups of logistics-y businesses, and he wanted to raise a fund to buy companies in the building products distribution industry.
- 2. So he went and found a small public company called SilverSun Technologies Inc., which had a market capitalization of about \$20 million when he found it.
- 3. He [agreed to invest](#) \$1 billion (of his own and some seed investors' money) in it, at a price of \$4.57 per share.
- 4. Investing \$1 billion in a \$20 million company gave him, you know, 99% of the stock ; he quickly took over management and renamed SilverSun “QXO Inc.”

- 5. At this point, QXO was *mostly* a pot of (his) money, which he planned to use to buy building products distributors. But a teeny little stub of it was the public stock that was left in the hands of the old SilverSun shareholders, which continued to trade.
- 6. That stock traded way, way up, on some combination of (1) small float and volume (average trading was under 40,000 shares per day), (2) retail enthusiasm for Jacobs and (3) confusion about how the share math worked. The stock peaked at \$235.61 per share this June, which represented roughly \$150 million worth of *public shares*, but a nearly \$100 billion market capitalization when you count Jacobs' shares — which, again, he bought for \$4.57.
- 7. Jacobs then went to other institutional investors and [sold them stock at \\$9.14 per share](#), which represented (1) a premium to net asset value, (2) a premium to what *he* paid and (3) a huge discount to the public trading price of the stock.
- 8. In total, QXO has raised a bit more than \$5 billion from investors (including Jacobs' initial investment), at a fully diluted market capitalization of about \$6.8 billion. So the *institutional* investors in Jacobs' fund have bought in at about a 33% premium to net asset value. (Except that Jacobs and his initial investors who put in the \$1 billion bought at a discount.)
- 9. All that money was locked up: The big investors couldn't sell until QXO filed a registration statement allowing them to sell their shares.
- 10. The tiny sliver of public shares continued to trade at huge prices unrelated to the prices that big investors paid in the fundraising rounds. Last week, while QXO raised another \$620 million at \$9.14 per share, the stock hit \$123.96.

I wrote last week:

The public shares are less than 0.1% of the fully diluted stock, and they trade at prices that are pretty unrelated to the price of the other 99.9%. QXO is 99.9% a fund for big investors to bet on Brad Jacobs' ability to roll up the building products distribution industry, and 0.1% a bizarre speculative retail vehicle.

But that was perhaps too strong. "Pretty unrelated," maybe, but not *entirely* unrelated. If you were an institutional investor considering investing in QXO at \$9.14 per share, it was probably *some* comfort to you that retail investors were currently buying the same shares at \$123.96. Not *that* much comfort — low volumes, confusion, etc. — but there was technically a public price for the stock you were buying, and that price was way higher than what you were paying.

Then, this Tuesday, QXO's stock price collapsed. The stock closed on Monday at \$60.50; it opened at \$10.90 on Tuesday, an 82% drop. Then it traded up a bit, closing at \$12.05 on Tuesday and \$12.50 on Wednesday. All of this came on heavy volumes: After trading a few tens of thousands of

shares per day for the last few months, QXO traded 19.2 million shares on Tuesday and 6.7 million on Wednesday.

What happened? Well, on [Monday evening](#), QXO filed a [registration statement](#) allowing its big investors to sell the hundreds of millions of shares that they bought for \$4.57 or \$9.14. And then on Tuesday they did. Not all of them, not even close to all of them, but millions of them anyway. On Monday there were something like 664,284 shares of QXO available for trading; now there are something like 790 million. The supply of QXO shares increased overnight by more than 100,000%. And so the price fell by 82%.

Which is ... really, really good? At no point this week did the stock trade below \$10 per share. If you were an institutional investor who bought into QXO in its fundraising rounds, you paid \$9.14 for stock that is currently trading at about \$12.50. Would it be fair to say that you got a 36% IPO pop? That you bought at \$9.14 in a — weird, slow, delayed — initial public offering for QXO, and then were able to resell at \$12.50 in the aftermarket? I mean, no, but also kind of yes.

And, again: You knew this would happen, or at least you had an inkling. If Brad Jacobs called you up and said “do you want to put some money into my fund at a premium to NAV,” you would have said “why would I do that,” and he could have said “well, the fund is publicly traded, and it’s currently trading at an *enormous* premium to NAV, so if you buy at a modest premium to NAV you will make an easy profit.” And you could have looked at the trading history of QXO and said “huh, this is weird, but he’s got a point.” And then you could have bought at \$9.14 and sold at \$12.50 and life is good.

Meanwhile Bill Ackman was out there calling up investors saying “would you like to invest in my fund at a small premium to NAV,” and investors are like “why would I do that,” and he was like “well it will trade at a big premium to NAV,” and the investors were like “but closed-end funds never do,” and he was like “well this one will,” and the investors were like “no it won’t,” and, uh, he did not win that argument.

The lessons here are not necessarily *obvious*, or easily applicable, but there sure are lessons. A reader emailed me to suggest that Pershing Square USA should buy a deli, and honestly it’s a good idea?

IRL

IRL was a social media app that raised \$150 million from SoftBank Group Corp. in 2021, when everyone was raising money from SoftBank. SoftBank wanted to fund things that had rapid user growth, so IRL obligingly showed SoftBank rapid user growth, and SoftBank gave it money. Eventually things went south, and last year SoftBank sued IRL's founder, Abraham Shafi, saying that he had tricked them. We talked about the lawsuit at the time, because it was funny. In SoftBank's telling, IRL's users were mostly *fake*: Its board of directors did an investigation and determined that 95% of the users were bots, posting on IRL's groups to create an appearance of activity in a ghost town, and that Shafi directed employees to attract more bots to create an appearance of user growth.

Shafi later countersued the board, saying that "they needed a scapegoat" and all the stuff about bots wasn't true.

Yesterday the US Securities and Exchange Commission [also sued Shafi for fraud](#). You might think: "Sure, startups have some latitude to puff themselves up to venture capitalists, but you can't sell even SoftBank a social network that is 95% fake, so once SoftBank revealed the fraud of course the SEC would step in." But: no? The SEC complaint *isn't about bots*. Instead, the SEC [faults Shafi for acquiring users with "incent ads,"](#) and not telling SoftBank:

Shafi described IRL as an app that had attracted 12 million purported users and achieved a high rank in the Apple App Store based on viral popularity and organic growth. This description misleadingly omitted the significant role that advertising played in Shafi's growth strategy for IRL. Since the fall of 2019, Shafi had promoted IRL and boosted its perceived popularity by spending millions of dollars on "incent" advertisements—advertisements that offered users incentives to download the app.

Moreover, Shafi did not simply fail to disclose IRL's use of incentive advertisements. He also made false statements about IRL's advertising expenditures, providing prospective investors with offering materials that significantly understated the amount of money that IRL had spent on marketing-related expenses.

He also allegedly "charged at least hundreds of thousands of dollars in personal expenses to IRL business credit cards."

Okay! How many startups do you think have these three characteristics:

- 1. They raised money from SoftBank by showing strong user growth.

- 2. They were aggressive about paying for user growth — by advertising, by giving users discounts or freebies to lure them in, etc. — because they knew SoftBank really wanted growth, and they were a bit coy, in their fundraising presentations, about exactly what they were doing to create that growth.
- 3. The founder worked all hours, blurred the lines between life and work, and charged personal expenses to the startup's credit card.

My guess is that the answer is not *one*. Is the answer possibly “all of them”?

The SEC mentions the bot thing in a tossed-off paragraph at the end of the complaint:

Shortly after the Special Committee removed Shafi from the CEO role, IRL's purported number of users plummeted. A forensic analysis undertaken at the direction of the Special Committee determined that, prior to the collapse, a substantial percentage of IRL's users were likely bots. More specifically, the analysis determined that 95% of users for which detailed usage data were available were likely bots, and that the accounts for which such data were not available were also unlikely to be representative of human activity.

Sounds like fraud, no? Not to the SEC, which just moves right along. What's weird here is that the two fraud cases sort of undermine each other. The SEC's theory is that IRL got user growth by paying users to download its app, and that SoftBank and other investors were focused on download numbers and user-acquisition costs and were bamboozled by the fake downloads. SoftBank's theory is that IRL got user growth by adding lots of bots, and that SoftBank was focused on usage numbers and was bamboozled by the bots. On the SEC's theory, the bots were not really relevant to the investment decision, and on SoftBank's theory, the incent ads were not really relevant. They both seem to think that Shafi tricked SoftBank, but they don't agree on how.

CrowdStrike

I wrote my “everything is securities fraud, so CrowdStrike is securities fraud” column last week, before anyone sued CrowdStrike for securities fraud, because I knew it was coming. Just a quick update: [Here it is](#).

CrowdStrike has been sued by shareholders who said the cybersecurity company defrauded them by concealing how its inadequate software testing could cause the July 19 global outage that crashed

more than 8 million computers.

In a proposed class action filed on Tuesday night in the Austin, Texas federal court, shareholders said they learned that CrowdStrike's assurances about its technology were materially false and misleading when a flawed software update disrupted airlines, banks, hospitals and emergency lines around the world.

Yes that is a risk when you ship a flawed software update and you are a public company.

Things happen

Glencore's Billionaire Ex-Oil Head Charged With Corruption by UK. Fed Clears Path for [September](#) Interest Rate Cut. Bond Traders Are Fully Pricing In Three Fed Rate Cuts This Year. [Portable alpha](#). Exxon Almost Walked Away From Its \$1 Trillion Oil Discovery. Top BlackRock executive benefits from unusual ['points-style' bonus](#) pay. How Thousands of Middlemen Are Gaming the H-1B Program. SocGen retail bank gloom overshadows [equities trading bonanza](#). Traders Defying US Ban Embrace Polymarket With Election Bets. Meta Has Run Hundreds of [Ads for Cocaine](#), Opioids and Other Drugs. Jumbo Blueberry Grower Gets \$1 Billion Valuation in Funding Round. [WeedMD](#) co-founder fined \$200K for giving confidential information to friend.

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- 1. That is, 10 million shares is 10% of the company, so the total capitalization is 100 million shares, which at \$50 each is a total value of \$5 billion.
- 2. Actually 11.5 million, counting the greenshoe.
- 3. Minus fees, which are zero in the first year and 2% of assets after that.
- 4. Again ignoring fees. Factually people **do** pay him quite a lot of money to invest their money for them!

- 5. I suppose if the IPO went really *well* they could price it at like \$53, invest the \$50, and use the \$3 to throw themselves a party, but there are probably problems with that idea and it never seems to have been considered.
- 6. There's actually a sliding scale of underwriting fees, from 0.1% to 2% depending on the size of the deal; see [page 112 of the prospectus](#).
- 7. An equivalent idea: Ackman puts in \$250 million and gets **no** shares, just puts in the money out of the goodness of his heart (and to get the deal done, to earn future fees, etc.) You can play around with this. "Ackman puts in \$500 million, gets **no** shares, but gets piles of warrants struck at \$100"? You could get to a structure something like a SPAC, a special-purpose acquisition company, where a sponsor puts up the startup costs, eats them if things go poorly and gets rewarded if they go well.
- 8. You'll notice that 1 billion divided by 1.02 billion is about 98%, but in fact Jacobs got rather more than 99% of the stock: He invested at a big discount to the public price, but the deal involved paying out the public shareholders (originally via a spinout of SilverSun's business, later via a cash dividend).
- 9. Also about 2 million on Monday — but as far as I can tell most of that was after the close (and after the prospectus was filed), at prices in the \$10 to \$12 range, not near the \$60.50 closing price.
- 10. That's the number of shares registered in the prospectus supplement, though some of those are shares underlying warrants, etc., so not necessarily immediately available. Also Jacobs' own shares are subject to a six-month lockup agreement, so he can't sell this week, but the outside investors mostly can.
- 11. Again: after accounting for the underwriting fees.

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Sema4 Wins Dismissal of Investor Suit Over AI Platform, Finances

B [bloomberglaw.com/product/blaw/bloomberglawnews/litigation/X3SAQ6HO000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/litigation/X3SAQ6HO000000)

A federal court dismissed a shareholder lawsuit alleging health company Sema4, now known as GeneDx, touted a data platform that didn't exist and made false statements about its financial reporting.

Investors failed to show Sema4 executives' statements about the allegedly nonexistent platform, Centrellis, were made intending to defraud shareholders, Judge Vernon Oliver in the US District Court for the District of Connecticut said in a Wednesday order.

Reasonable investors also wouldn't have been misled by the company's statements about its revenue and reimbursements from third parties, among other things, according to the order.

"Contrary to Plaintiff's characterizations of Defendants' public disclosures, the record is clear that Defendants disclosed that there was considerable risk to the Company's business model," Oliver said.

The judge gave investors a chance to amend their complaint.

Sema4 uses artificial intelligence to enable personalized medicine for patients. A spinout of the Mount Sinai health system, it went public after combining with CM Life Sciences in 2021.

The lawsuit, filed a year later, alleges Sema4 made up Centrellis to tout itself as a data company, rather than just a diagnostics company, and to increase its valuation. The suit relies, in part, on testimony from a former Sema4 vice president.

Sema4 has called allegations that Centrellis didn't exist "nonsense."

Even assuming investors are right and the platform was made up, Oliver said the investors haven't alleged the former vice president had interactions involving Centrellis with individual executives who've been sued.

"Thus, while FE-1's testimony is probative regarding the falsity of the alleged statement, they are not probative of Defendants' mental state," Oliver said.

Glancy Prongay & Murray LLP are counsel for the lead plaintiff. Fenwick & West LLP and Spears Manning & Martini LLC represent Sema4.

The case is *Helo v. Sema4 Holdings Corp.*, D. Conn., No. 22-cv-01131, 7/31/24.

Securities Law Prof Blog

 lawprofessors.typepad.com/securities/2024/07/new-securities-law-articles-in-print-3.html

Wednesday, July 31, 2024

New Securities Law Articles in Print

The following law review article relating to securities regulation is now available in paper format:

Connor Kidd, Student Article, *Can Shareholders Really Trust Proxy Statements?: A Negligence Standard for Section 14(a) of the Securities Exchange Act of 1934*, 75 Baylor L. Rev. 544 (2023).

Creighton R. Meland Jr., *Shareholder Proposals and Social Policy*, 48 S. Ill. U. L.J. 215 (2024).

David Rosenfeld, *Elon Musk and the Virtues of Restraint*, 53 Stetson L. Rev. 307 (2024).

Sarah M. Verzal, Comment, *Research a la Carte: Why the United States Should Permit Unbundled Commissions Following MiFID II*, 41 Wis. Int'l L.J. 73 (2024).

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July 31, 2024, 10:28 AM PDT

Juul, Nick Pritzker End Case Challenging Bailout by Billionaire

By Mike Leonard

- Lawsuit said note conversion would siphon value to insiders
- Investment funds drop court case, disclose confidential accord

Bloomberg Law News 2024-08-01T10:49:19717704832-04:00**Juul, Nick Pritzker End Case Challenging Bailout by Billionaire****By Mike Leonard 2024-07-31T13:28:08000-04:00**

- Lawsuit said note conversion would siphon value to insiders
- Investment funds drop court case, disclose confidential accord

Juul Labs Inc. and an affiliate of hotel billionaire Nick Pritzker have settled litigation they faced over rescue financing that would allegedly have “plundered” the vaping company.

The agreement on undisclosed terms resolves a case brought by a group of investment funds, led by affiliates of D1 Capital Partners LP and Sculptor Capital Management Inc. The suit, filed in October, said the proposed \$1.9 billion debt-to-equity conversion would siphon value to corporate insiders including Pritzker's venture firm, Tao Capital Partners LLC, while virtually wiping out the funds holding the notes.

The vaping company—which has confronted a barrage of legal challenges over its marketing practices—averted a 2022 bankruptcy after getting a lifeline from major investors including Pritzker, a board member whose family founded Hyatt Hotels. Tao has investments in a range of Silicon Valley businesses, including Uber Technologies Inc. and several of Elon Musk's companies, according to its website.

Juul and Tao have argued throughout the dispute in Delaware's Chancery Court that the debt notes automatically converted in October, but a temporary restraining order issued by Vice Chancellor Nathan A. Cook blocked Juul from moving forward with the transaction while the case played out.

In connection with the settlement, the investment funds “hereby expressly confirm and agree” that the automatic conversion took place, according to a July 29 court filing. Cook agreed to dismiss the case the same day.

The funds are represented by Paul, Weiss, Rifkind, Wharton & Garrison LLP. Juul is represented by Morris, Nichols, Arsht & Tunnell LLP and Clear Gottlieb Steen & Hamilton LLP. Tao is represented by Richards, Layton & Finger PA.

The case is D1 Jasper Holdings LP v. Juul Labs Inc. , Del. Ch., No. 2023-1060, 7/29/24 .

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Judge appears unlikely to uphold \$4.7B NFL verdict

DJ [dailyjournal.com/articles/379993-judge-appears-unlikely-to-uphold-4-7b-nfl-verdict](https://www.dailyjournal.com/articles/379993-judge-appears-unlikely-to-uphold-4-7b-nfl-verdict)

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Aug. 1, 2024

U.S. District Judge Philip S. Gutierrez did not issue a ruling during the hearing, but he did not seem persuaded by the plaintiffs' lead attorney's argument that the damages were fair and rational.



A \$4.7 billion jury verdict against the National Football League for antitrust violations related to its Sunday Ticket package is in jeopardy as the presiding Los Angeles federal judge told the parties Wednesday that jurors failed to follow his instructions and irrationally concocted a damages model that was inconsistent with the case's evidence.

U.S. District Judge Philip S. Gutierrez did not issue a ruling during the nearly three-hour judgement hearing and took the matter under submission. However, he did not seem persuaded by the plaintiffs' lead attorney, Susman Godfrey LLP partner Marc M. Seltzer, who argued for almost two hours that the jurors' calculations were fair, and it was not the court's place to speculate on their mental processes.

The June 27 verdict came just a day after the close of a month-long trial. An eight-person jury found the league violated sections 1 and 2 of the Sherman Act with its licensing of out-of-market Sunday afternoon football games on DirecTV from 2011 to 2023. The league was found to have conspired with DirecTV by selling the package at an artificially high price to stifle competition with local television networks such as FOX and CBS. Due to the treble damages remedy in the federal antitrust statute, the league could face a penalty of up to \$14 billion if the verdict is upheld.

However, the lawsuit - based on analyses from two of the plaintiffs' sports economy experts - called for damages of \$7 billion from calculations of a but-for world where the NFL provided Sunday Ticket to fans absent of DirecTV during the class period. *In re: National Football*

League's Sunday Ticket Antitrust Litigation, 2:15-mj-02668 (C.D. Cal., filed Dec. 10, 2015).

Dr. Daniel Rascher concluded damages would be worth \$7.01 billion if the NFL had mirrored the NCAA's Saturday College Football model, where each broadcast package is sold separately by conference or team. Alternatively, Dr. J. Douglas Zona concluded damages would be around \$3.48 billion under a model where Sunday Ticket was offered directly to the consumer via online streaming.

Wilkinson Stekloff LLP partner Brian L. Stekloff for the NFL argued the jurors' "nonsensical" calculations were indefensible and showed the plaintiffs failed to prove how the league enacted classwide antitrust harm because their verdict was not consistent with either model.

"The jury clearly found that they did not believe in the college football model. ... I think the verdict demonstrates both [Rascher's and Zona's] unreliability and a failure of the plaintiffs to prove classwide anticompetitive effects, injury and damages, as they were required to do based on the models," Stekloff said.

Gutierrez seemed to agree. In explaining his instruction to the jury, the judge said he told them the averaged or estimated overcharges the class members paid, "must be based on evidence and reasonable inferences and not guesswork or speculation. That's not what they did."

Rather than using the economists' models, jurors used the 2021 list price of Sunday Ticket, \$293.96, and subtracted the average annual price paid by residential subscribers, \$102.74, the NFL theorized. They then used the difference as the overcharge and multiplied that number by the number of subscribers during the class period to come up with the damages amount.

"We're not speculating what the jurors did. ... There's no doubt about what they did exactly," Gutierrez said. "To the pennies, that's what they did."

While acknowledging the jurors took a precise percentage that wasn't part of the presented models, Seltzer said they had the discretion to do so.

"The jury has the ability to make an agreement among themselves when they're trying to come to a verdict to effectively negotiate what they think a fair result is," Seltzer said. "The mission was whether it fell within the range supported by the evidence, and here, it falls within that range. They may not have to accept Dr. Rascher's testimony 100-percent to award damages in this case, they can award less damages ... and they can do it by means that tests outsiders as transparent, in terms of the map they use. That's not a basis to set aside a verdict."

Gutierrez did not seem moved and reiterated his point that because the math was precisely calculated, there was little doubt as to how the jury reached its verdict.

However, Seltzer said there was no way to know for sure unless all eight jurors were brought back for cross examination.

"To argue that they made that finding impliedly is actually delving into the mental processes of the jury to figure out why they did what they did, which is not permissible," Seltzer said.

#379993

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NFL appears likely to win verdict turnover as judge agrees jurors fumbled \$4.7 billion award

 [courthousenews.com/nfl-appears-likely-to-win-verdict-turnover-as-judge-agrees-jurors-fumbled-4-7-billion-award](https://www.courthousenews.com/nfl-appears-likely-to-win-verdict-turnover-as-judge-agrees-jurors-fumbled-4-7-billion-award)

Edvard Pettersson

Green Bay Packers wide receiver Dontayvion Wicks (13) catches a pass for a first down during the second half of an NFL football game against the Tampa Bay Buccaneers, Sunday, Dec. 17, 2023, in Green Bay, Wis. (AP Photo/Morry Gash)

LOS ANGELES (CN) — A federal judge indicated Wednesday that he's likely to overturn the \$4.7 billion verdict a jury returned last month in favor of NFL Sunday Ticket subscribers over claims the National Football League conspired with DirecTV to artificially inflate the price for the bundle.

U.S. District Judge Philip Gutierrez didn't issue a ruling during the hearing in downtown Los Angeles on the NFL's motion for judgment as a matter of law or for a new trial. However, he agreed with the league that the jury's damages award wasn't supported by the evidence.

The jury calculated the precise amount of damages to be \$4,707,259,944.62 using a theory that had never been presented during the trial, the judge said.

"There's no doubt about what they did," Gutierrez said. "They didn't follow the instructions."

The question now is whether the judge will enter judgment in favor of the NFL or order a new trial.

Brian Stekloff, an attorney for the NFL, argued that the case should be closed without a retrial because the plaintiffs' damages experts failed to provide an adequate model for jurors to decide the actual damages Sunday Ticket subscribers sustained.

"You can't take unreliable methodologies that don't fit the facts and let the jury decide what is reasonable," Stekloff said.

The NFL focused on the testimony of Daniel Rascher, a sports economist at the University of San Francisco, who told the jury that without the NFL's anti-competitive practices, and if Sunday Ticket were made available through multiple distributors, subscribers wouldn't have to pay anything beyond what they pay for their cable, satellite or streaming service.

According to Stekloff, Rascher created a "fantasy world" in comparing the NFL to college football, including by cherry-picking elements of college football's marketing of TV rights to fit his narrative and failing to explain how NFL teams would make individual broadcasting deals for their games rather than pooling their TV rights for the Sunday afternoon games.

The jury, Stekloff said, rejected Rascher's damages calculation of \$7 billion as well as the alternative models the plaintiffs presented at trial, and in the end created its own model.

The league's attorney reasoned that the jurors had taken the listed price of Sunday Ticket Basic in 2018 and 2019, which was \$294 a year, and subtracted \$102.74, the average price subscribers actually paid, to arrive at a "discount" — then multiplied that amount by the number of commercial and residential subscribers. This damages theory was never introduced at trial, and it conflates commercial and residential subscribers who paid very different rates.

The judge agreed while in most cases it isn't appropriate to speculate about how the jury arrives at a damages award, in this case there was no question about how they came up with the amount.

"Is it rational to say the damages are the discounts?" Gutierrez asked Mark Seltzer, an attorney representing the subscribers. "It's not even a discount that applies to this case. That's even more irrational."

Seltzer argued that jurors have the ability and the right to negotiate among themselves what a fair damages award is as long as it falls within a range supported by the evidence.

He also told the judge that even if college football isn't a perfect comparison for the NFL, the fact that the National Collegiate Athletics Association was able to quickly switch from pooling all of its TV rights to letting individual conferences and teams negotiate their own deals supported the plaintiff expert's position that the NFL could do the same.

"The yardstick model can't be perfect," Seltzer said. "But you can't dream up a closer comparison than college football."

Gutierrez, however, didn't seem persuaded by the plaintiffs' premise that all college football games were available at no extra cost. As a Notre Dame fan, he said, he needs to get a separate subscription to watch at least some of the team's games.

During the three-week trial, the subscribers built their case that the NFL — working with DirecTV, CBS and Fox — conspired to control the price charged for the Sunday Ticket bundle.

They cited internal meeting agendas and emails from NFL, CBS and DirecTV executives as they argued the NFL was limiting the output of so-called out-of-market Sunday games to safeguard its stream of advertising dollars — and to ensure the networks paid the NFL top dollar for exclusive rights to those games.

The subscribers said the league balked at every attempt by DirecTV to lower Sunday Ticket prices. When the NFL negotiated a new deal for its Sunday Ticket bundle with streaming services and other TV providers a few years ago, they said, the league also rejected an ESPN proposal to charge subscribers just \$70 a season — or to offer consumers the option to only subscribe to the team they were interested in.

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Federal judge rejects settlement in UFC monopoly lawsuits

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Phillip Moyer

Logo at UFC Headquarters in Las Vegas, NV (Public domain via Flickr)

LAS VEGAS (CN) — Weeks after hearing arguments on a \$335 million settlement that would end two class actions against MMA giant UFC, a federal judge rejected the deal and set a tentative trial date for October.

The settlement, reached after 10 years of litigation, concerns two separate lawsuits. The first, *Le v Zuffa*, accuses the MMA giant of restricting athletes' earnings. The second, *Johnson v Zuffa*, challenges the company's restrictive contracts.

U.S. District Judge Richard Boulware wrote in a minute order issued late Tuesday that "for the reasons stated on the record at the hearings on these motions" — a reference to the hourslong July 12 hearing in which Boulware questioned whether the deal was fair to members of the second class action — the deal must be rejected. He promised a written order with expanded reasoning in the near future.

At the hearing, Boulware questioned plaintiffs about the length of the opt-out period, the absence of any active UFC fighters listed as named plaintiffs, whether class members would understand what rights they're giving up by accepting the settlement, and the fact that the settlement doesn't address UFC's arbitration clause.

One of the plaintiffs' attorneys argued that denying the settlement would put the entire process back to square one and emphasized that the settlement would be one of the largest ever reached for an anticompetitive lawsuit. He also emphasized that, after the settlement was first announced in March, class members have contacted him with a singular concern — when they would receive the money.

In a statement, UFC said Boulware's ruling both denies the fighters' rights to be heard and ignores established law.

With the settlement denied, the next steps for the two class actions are unclear, though Boulware did set a tentative trial date for Oct. 28 in the *Le* case. The rejection puts additional strain on the plaintiffs, whose attorneys emphasized at the hearing that they've expended significant resources on the case without pay for a full decade. However, they also said they would continue representing both classes as the case moves forward regardless.

In a statement, UFC said Boulware's ruling both denies the fighters' rights to be heard and ignores established law.

"We obviously disagree with this ruling and believe it disregards the expertise of counsel from both sides, as well as that of an accomplished and expert mediator – all of whom have decades of experience in antitrust case law," the organization said, adding it may appeal.

One of the plaintiffs' attorneys Eric Cramer of Berger Montague said in an email a revised settlement isn't out of the question, but might have to be handled differently.

To eliminate several of the issues expressed by the court regarding the prior proposed combined settlement of *Le* and *Johnson*, plaintiffs believe the best path forward, if a new settlement becomes a possibility, is to attempt to resolve the two cases separately, focusing first on the *Le* case given its imminent trial date, and using the progress made to date as a jumping off point for further discussions," Cramer wrote.

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Stanley cup lawsuits over lead fail to claim harm, company says

 [reuters.com/legal/litigation/stanley-cup-lawsuits-over-lead-fail-claim-harm-company-says-2024-08-01](https://www.reuters.com/legal/litigation/stanley-cup-lawsuits-over-lead-fail-claim-harm-company-says-2024-08-01)

Diana Jones

[REUTERS/India Walton Purchase Licensing Rights](#)  , opens new tab

Aug 1 (Reuters) - The maker of the popular Stanley cups asked a Seattle federal judge on Wednesday to throw out a proposed nationwide class action claiming the company failed to warn customers that the products were made with lead, saying the lawsuits don't allege any harm from the cups.

Attorneys for Washington-based Pacific Market International told U.S. District Judge Tana Lin in a motion to dismiss  , opens new tab that the consumers behind four lawsuits consolidated into a single class action seeking hundreds of millions in damages haven't alleged the cups are harmful or pose a safety threat.

"That glaring omission cannot be an oversight," the company wrote.

In a separate motion also filed on Wednesday, Pacific Market argued that the plaintiffs improperly relied on Washington state consumer laws to bring claims on behalf of a nationwide class of consumers and asked the judge to strike the allegations.

John Rushing of Rushing McCarl, one of the firms representing the plaintiffs, told Reuters the company's motion mischaracterizes the allegations in the complaint.

"We have every confidence that we will defeat this motion," Rushing said.

Attorneys for Pacific Market International did not immediately respond to requests for comment.

Since February, Pacific Market International has been the target of a series of class actions filed in both state and federal courts by consumers who say they weren't warned that a seal on the cups' vacuum insulation is made with lead, which is toxic.

The plaintiffs claim that they would not have purchased the cups had they known that the cups contained lead, arguing that they could have been exposed to the metal. They do not allege that they ingested lead.

The consolidated lawsuit is seeking refunds for the cups purchased, punitive damages as well as an injunction requiring Stanley to disclose the presence of lead in its cups.

The company has acknowledged in a statement posted on its website that there is lead present in the seal for the cup's vacuum insulation, but it said "no lead is present on the surface of any Stanley product that comes into contact with the consumer nor the contents of the product."

In April, the cases – brought by six individuals in four different states – were consolidated in Seattle.

The Stanley cups, formally known as the Stanley Quencher cups, retail for between \$35 and \$50. Recent sales of the cups, driven largely by social media, propelled the 100-year-old, privately held Stanley brand to a 10-fold increase of \$750 million in revenue last year, according to CNBC in December.

The case is In Re Pacific Market International, LLC, Stanley Tumbler Litigation, case number 2:2024-cv-00191 in the U.S. District Court for the Western District of Washington.

For the plaintiffs: Jason Dennett of Tousley Brain Stephens; Brendan Donckers of Breskin Johnson & Townsend; Alan Mansfield of Whatley Kallas; Ryan McCarl of Rushing McCarl; Rebecca Peterson and Robert Shelquist of Lockridge Grindal Nauen; William Doyle and Chris Cantrell of Doyle APC; Daniel Gustafson, David Goodwin and Mary Nikolai of Gustafson Gluek; and Lori Feldman of George Feldman McDonald.

For Pacific Market International: Pallavi Mehta Wahi, Ashley Gammell and Tyler Lichter of K&L Gates; and James Speyer and Alex Beroukhim of Arnold & Porter Kaye Scholer.

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Reporting by Diana Jones

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Diana Novak Jones
Thomson Reuters

Co-author of the Daily Docket, Reuters' daily legal industry newsletter. Diana reports on litigation, mass torts and the plaintiffs' bar. She previously worked at Law360 and the Chicago Sun-Times.

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Boeing 737 MAX crash families say planemaker should face much higher fine

 [reuters.com/business/aerospace-defense/boeing-737-max-crash-families-say-planemaker-should-face-much-higher-fine-2024-07-31](https://www.reuters.com/business/aerospace-defense/boeing-737-max-crash-families-say-planemaker-should-face-much-higher-fine-2024-07-31)

David Shepardson

The Boeing 737 MAX aircraft is displayed at the Farnborough International Airshow, in Farnborough, Britain, July 20, 2022. REUTERS/Peter Cziborra/File Photo Purchase Licensing Rights , opens new tab

WASHINGTON, July 31 (Reuters) - Families for some of the 346 people killed in two fatal Boeing (BA.N) , opens new tab 737 MAX crashes said on Wednesday a U.S. judge should reject the planemaker's proposed plea deal with the Justice Department and the government should seek a much higher fine.

On July 24, the planemaker finalized an agreement to plead guilty to a criminal fraud conspiracy charge and pay up to \$487 million after breaching a 2021 deferred prosecution agreement.

Paul Cassell, a lawyer for some of the families, said in a court filing the fine "is inadequate -- or, at the very least, rests on misleading accounting and inaccurate accounting." He added the fine "fails to reflect that Boeing's crime killed 346 innocent victims." Cassell called that decision "not only inaccurate—it is morally reprehensible."

Adrian Vuckovich, another lawyer representing relatives, said in a separate filing "we suggest that Boeing should be required to pay a substantial fine which recognizes the value of each of the 346 people killed, the substantial harm to others and pay a fine which is consistent with fines paid by other corporate criminal defendants."

The families cited O'Connor's statement in a February 2023 ruling: "Boeing's crime may properly be considered the deadliest corporate crime in U.S. history."

Spokespeople for Boeing and the Justice Department did not immediately comment on the families' filings.

The DOJ told Boeing earlier this month it could accept a settlement that branded the planemaker a felon or fight the charge in court. The Justice Department said in May that Boeing had breached its obligations in the agreement that shielded the planemaker from criminal prosecution stemming from misrepresentations about a key software feature tied to fatal 737 MAX crashes in 2018 and 2019 in Indonesia and Ethiopia.

The Justice Department has a separate criminal probe ongoing into the Alaska Airlines (ALK.N) , opens new tab jet that was missing four key bolts.

As part of the guilty plea deal, Boeing agreed to pay the maximum fine of \$487.2 million and the DOJ recommended the court credit its previous 2021 payment of \$243.6 million against that, which was required by 2021 deal.

The deal also imposes an independent monitor, who will have to publicly file annual progress reports, to oversee the firm's compliance. The company's board -- including new CEO -- must meet with the victims' families within four months of sentencing.

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Reporting by David Shepardson; Editing by David Gregorio

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Oil Price-Fixing Cases Against Hess, Pioneer Moved to New Mexico

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X5H8KK30000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X5H8KK30000000)

- Class actions allege collusion to fix prices of oil, gasoline
- Oil companies had sought Texas as venue for cases

Nearly a dozen lawsuits accusing oil producers including Hess, Pioneer, and Diamondback Energy of price fixing will be consolidated in New Mexico federal court, a judicial panel ruled Thursday.

The suits, pending in New Mexico and Nevada federal courts, will be transferred to the US District Court of the District of New Mexico, the Judicial Panel on Multidistrict Litigation said. The suits include similar allegations from both consumer and business plaintiffs, who claimed they were forced to pay higher gas and heating oil prices as a result of the defendants' collusion.

"Five related actions are pending in this district, which bears a factual nexus to the litigation, given that plaintiffs contend that much of defendants' shale oil production occurs in New Mexico," the Thursday order said. "This district also is relatively convenient for several defendants, which have headquarters in nearby Texas and Oklahoma."

The panel's ruling comes amid increased federal scrutiny into the oil industry. Hess Corp., Occidental Petroleum Corp. and Diamondback are among the companies under investigation by the Federal Trade Commission, which is searching for evidence of executives attempting to collude with OPEC officials on oil market dynamics.

Some consumer plaintiffs argued New Mexico was the appropriate venue for pretrial proceedings. They say the oil producers operate shale oil wells in the state and that much of the evidence and documents relevant to the litigation may be found in New Mexico.

The oil companies had argued the cases should be heard in the Western District of Texas, where they say the vast majority of witnesses and evidence relevant to litigation are located. Texas is also home to the headquarters of defendants including Diamondback, Permian Resources Corp., and Occidental.

"Most of the alleged relevant acts occurred in Texas—while none occurred in New Mexico," the oil companies said.

The plaintiffs are represented by firms including Sharp Law LLC, Steven Williams Law PC and Dodd Law Office LLC. The oil firms are represented by firms including Latham & Watkins LLP, Winston & Strawn LLP and Vinson & Elkins LLP.

The case is In re Shale Oil Antitrust Litigation , No. 3119, 8/1/24 .

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https://www.law.com/therecorder/2024/07/31/federal-ruling-sets-precedent-for-trap-and-trace-software-class-actions-in-calif/?kw=Federal%20Ruling%20%27Sets%20Precedent%27%20for%20%27Trap%20and%20Trace%27%20Software%20Class%20Actions%20in%20Calif.&utm_position=5&utm_source=email&utm_medium=



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NEWS

Federal Ruling 'Sets Precedent' for 'Trap and Trace' Software Class Actions in Calif.

"It's the first case effectively saying that software on a website can violate the Trap and Trace Law," said Robert Tauler, an attorney at Los Angeles firm Tauler Smith, who is representing the plaintiff.

July 31, 2024 at 09:43 AM

Litigation



Kat Black



What You Need to Know

- A federal court in California broadened the definition of the
- The court denied C2 Education's motion to dismiss a a class action alleging it violated the California Invasion of Privacy Law.
- The ruling, said the plaintiff's attorney, called it a precedent.

A federal court delivered a landmark decision impacting “trap and trace” software cases in California, denying defendant C2 Educational Systems Inc. a motion to dismiss a class action alleging it violated the California Invasion of Privacy Act (CIPA) through its partnership with TikTok.

“I think it does set a precedent,” said Robert Tauler, an attorney at Los Angeles firm Tauler Smith, who is representing the plaintiff in *Dino Moody v. C2 Educational Systems*. “It’s the first case effectively saying that software on a website can violate the Trap and Trace Law.” Tauler estimated that his firm has filed at least two-dozen “trap-and trace” cases.

The original complaint argued that C2 Education, a Duluth, Georgia-based platform that offers online tutoring and test prep for K-12 students, breached California’s California’s Trap and Trace Law, California Penal Code § 638.51 by installing TikTok software that siphons user data and matches it with TikTok’s database on its website in a process known as “fingerprinting.”

The Trap and Trace Law prohibits the use of pen registers or devices that record “dialing, routing, addressing, or signaling information” from a “wire or electronic communication,” according to the California Penal Code.

The case was filed in May 2024 in California’s Central District Court and assigned to Judge R. Gary Klausner. C2 Education is represented by counsel at Ogletree Deakins Nash Smoak and Stewart, who did not immediately respond to a request for comment.

According to the ruling, issued FridaY, C2 Education argued in its motion to dismiss that the Trap and Trace provision of CIPA does not apply to website software, only “physical devices attached to telephone lines.”

The court disagreed with the rigor of this definition, observing that CIPA’s § 638.50 provision does not stipulate that trap and trace devices must be physical ones and that it “simply refers to ‘device[s] or process[es]’ that record or capture certain information from ‘a wire or electronic communication.’” It credited the ruling in the class action *Greenley v. Kochava, Inc.*, filed in 2023 in the Southern District of California, for its reasoning, noting that the opinion in *Greenley* determined that software “fingerprinting” falls under the pen register definition outlined by CIPA.

The court also refuted C2 Education’s argument that TikTok software only records IP data and “merely collects information necessary for basic operation and maintenance,” an action that is protected by an exemption provided in Section 638.51. “However, Plaintiff does not allege that the TikTok Software records only IP addresses. Instead, Plaintiff alleges that the TikTok Software recorded various other types of information such as browser and device data as well as form data,” it said. Additionally, the court maintained that the plaintiff did not consent to TikTok’s collection of his data as C2 Education contended.

The ruling rebuffed C2’s claim that the device and browser data fed to TikTok does not fall within the scope of the Trap and Trace statute and disagreed with C2’s argument that § 638.51 does not grant a private right of action “because it is a criminal statute that imposes only criminal penalties.”

“These allegations demonstrate that Defendant, through the use of the TikTok Software, collected Plaintiff’s information, thereby constituting an invasion of privacy. And invasions of privacy are actionable injuries,” the ruling stated.

“I think it’s a big ruling because you have, in this instance ... a federal court saying this is a claim that the federal courts recognize which generally means that—state courts having a more liberal pleading standard—will also recognize, the cases have become quite valuable now,” said Tauler.

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StubHub sued by D.C. attorney general over ticket fees

 [reuters.com/legal/government/stubhub-sued-by-dc-attorney-general-over-ticket-fees-2024-07-31](https://www.reuters.com/legal/government/stubhub-sued-by-dc-attorney-general-over-ticket-fees-2024-07-31)

Mike Scarcella

REUTERS/Yuriko Nakao Purchase Licensing Rights  , opens new tab

July 31 (Reuters) - Live event ticket resale platform StubHub was accused in a lawsuit by the District of Columbia attorney general on Wednesday of duping customers and inflating ticket prices with hidden fees.

District of Columbia Attorney General Brian Schwalb's office said StubHub deceptively advertises low prices for tickets and then forces consumers into a checkout process that ends with a "vastly higher" cost than the original.

"This is no accident — StubHub intentionally hides the true price to boost profits at its customers' expense," Schwalb, a Democrat, said in a statement announcing the lawsuit.

The lawsuit  , opens new tab, filed in District of Columbia Superior Court, accused StubHub of violating D.C.'s consumer protection law.

New York-based StubHub in a statement said its "user experience is consistent with the law, our competitors' practices, and the broader e-commerce sector." The company said it was "committed to creating a transparent, secure, and competitive marketplace to benefit consumers."

The lawsuit comes amid a broader crackdown on "junk fees," as the Biden White House prioritized a consumer-protection agenda focused on banking, transportation and other industries. The effort has led to court challenges.

StubHub runs a ticket exchange and resale platform featuring tickets for sports, live music and other events. Fans buy and sell tickets on the platform.

The lawsuit showed an example of a ticket that was advertised for \$178 but really cost \$248, after a \$70 fee for "fulfillment and service" was included. The site uses a "countdown clock" to pressure buyers into moving quickly, the lawsuit said.

Since 2015, StubHub has sold nearly 5 million tickets to D.C. consumers, with hidden fees estimated at \$118 million, according to Schwalb's office.

The District of Columbia paired with plaintiffs firm Tycko & Zavareei to file the lawsuit. Schwalb's office has worked with other private firms on other lawsuits.

StubHub has asked  , opens new tab a federal judge in California to dismiss a separate private consumer class action there that also accused it of misleading buyers about fees.

In that case, StubHub has denied deceiving customers and argued that the countdown time was “critical” to stop a would-be buyer from sitting indefinitely on tickets, reducing the available supply for other purchasers.

The case is District of Columbia v. StubHub Inc, District of Columbia Superior Court, no case number available.

For D.C.: Adam Teitelbaum and Laura Beckerman of the D.C. Attorney General’s Office, and Hassan Zavareei and Annick Persinger of Tycko & Zavareei

For StubHub: No appearance yet

Read more:

Biden administration takes aim at junk fees across the economy

Major airlines sue Biden administration over fee disclosure rule

New Biden target in junk fee crackdown: retirement advisers

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Reporting by Mike Scarcella

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July 31, 2024, 12:41 PM PDT

Byju's Ex-Director Fined \$10,000 a Day Over Missing \$533 Million

By Steven Church

- Penalty designed to help find \$533 million hidden by Byju's
- Ruling is latest twist in dispute over defaulted loan

Bloomberg Law News 2024-08-01T10:49:50924222719-04:00

Byju's Ex-Director Fined \$10,000 a Day Over Missing \$533 Million

By Steven Church2024-07-31T15:41:25969-04:00

- Penalty designed to help find \$533 million hidden by Byju's
- Ruling is latest twist in dispute over defaulted loan

A suspended director of the troubled Indian educational tech firm Byju's must pay \$10,000 a day until he helps locate \$533 million that his company is accused of hiding from US lenders, a judge said Wednesday.

Riju Ravindran, brother of Byju's founder, has been at the center of a nearly two-year-old fight over the missing cash, which lenders say should be returned to them after the company defaulted. Ravindran is one of three directors of Think & Learn Pvt. — which operates the Byju's brand — who were recently replaced by a trustee as part of an involuntary bankruptcy case filed in India, according to US court documents.

After imposing the sanctions on Ravindran, US Bankruptcy Judge Brendan Shannon also rejected a request to put the US debt fight on hold so Ravindran and the company could find new lawyers. American lawyers for Ravindran and Byju's units want to quit defending their clients in the bankruptcy dispute, blaming "an irreparable breakdown."

Instead, Shannon ruled that Ravindran's lawyers must continue to represent their clients until at least a hearing next month, when all sides return to US Bankruptcy Court in Wilmington, Delaware, where much of the conflict has been playing out.

Previously: Byju's Hid \$533 Million in Fund Run From IHOP

The moves are the latest twists to an usual saga involving a company that was once a symbol of India's rising technology sector. Within 18 months of borrowing \$1.2 billion from US lenders in 2022, Byju's missed key financial reporting deadlines, had their offices raided by Indian regulators and was accused by American lenders of defaulting.

Since then, the company has been accused of fraudulently transferring \$533 million away from a shell company set up in the US that was responsible for paying the debt. Byju's has defended its actions by claiming it has been targeted by predatory lenders.

The missing money is at the heart of a dispute between lenders owed \$1.2 billion and the startup founded by entrepreneur **Byju Raveendran**.

The missing cash belongs to a bankrupt shell company, Byju's Alpha Inc., which is affiliated with Think & Learn and was taken over by the lenders after their loan defaulted.

The US bankruptcy case is BYJU's Alpha Inc., 24-10140, US Bankruptcy Court District of Delaware (Wilmington).

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Michael B. Marois

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Aug. 1, 2024, 2:00 AM PDT

Corporate Attorneys Brace for Impact of New Delaware Board Law

By Jennifer Kay

**Deep Dive
Documents** [SB 313](#)

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- State bar committee drafted corporate law changes on contracts
 - Some attorneys worry new law adds to 'uncertainty' in Delaware

Bloomberg Law News 2024-08-01T09:39:57690680274-04:00

Corporate Attorneys Brace for Impact of New Delaware Board Law

By Jennifer Kay 2024-08-01T05:00:27000-04:00

- State bar committee drafted corporate law changes on contracts
- Some attorneys worry new law adds to 'uncertainty' in Delaware

Delaware's new corporate law amendments taking effect Thursday reinforce common practices vulnerable to litigation, after a landmark court order invalidating a billionaire founder's veto rights over board decisions, corporate attorneys say.

Companies can now use private contracts to grant stockholders the types of control that previously required a charter provision or a special class of stock. The state bar committee that drafted the amendments in response to a Feb. 23 Chancery Court decision invalidating extensive veto rights in a pact between Moelis & Co. and its founder called them a "routine" update by the state that effectively writes the rules for corporate America.

Whether they resolve claims the Chancery Court stirs up too much "uncertainty" for corporations and investors to want to stay in Delaware remains unclear. Some attorneys worry the amendments may embolden boards or controlling stockholders seeking greater power, and that the rebukes of sitting Chancery Court judges during the legislative process undermined Delaware's reputation more than any ruling.

William Regner, a partner at Debevoise & Plimpton, said the amendments will allow clients to be “a bit more relaxed about putting something in an agreement rather than in a charter.”

The new law is “trying to create fewer targets for plaintiffs,” he said. “That’s been something that Delaware’s been very focused on—trying to tamp down vexatious litigation.”

Guardrails on what boards can do with core management powers remain in place, said Larry Hamermesh, a retired University of Pennsylvania law professor who specializes in Delaware corporate disputes. “They still are subject to their fiduciary duties when they exercise the authority to grant powers like that by contract or by charter amendment or through issuing blank-check preferred stock,” he said.

Jonathan Lazarow of Ambrose, Mills & Lazarow questioned whether private equity firms will be more aggressive as buyers in M&A transactions and write up agreements under the new law that give them a controlling vote on every issue that comes before the board. “And I’d be interested to see if sellers push back on some of these agreements—if it makes it harder to get a deal done,” he said.

Typically, a firm’s goal in any deal is closing, then parlaying that success into multiple deals down the line, Lazarow said, adding that just because an agreement is legal doesn’t always mean it’s the best way to return capital to investors.

“We could spend all day long talking about whether the statute provides security—and it does, it gives some certainty that we know how the courts are going to rule—but in private equity and venture capital transactions, it doesn’t matter. It’s your reputation that matters,” he said. “If you get a reputation for putting a deal together that’s not friendly, or makes it hard, it’s harder for you to get deal numbers two, three, and four.”

Amendments Questioned

Law professors, open government advocates, and two sitting Chancery Court judges publicly questioned the speed with which the amendments were drafted. The legislation, which received little pushback from lawmakers before being signed into law July 17, doesn’t apply to contracts challenged in court before Thursday.

The provisions the Chancery Court struck down in the *Moelis* case were common practice, and their dubious legality was common knowledge, said Ann Lipton, a Tulane University Law School professor. “There has been a trend of investors forming these contracts anyway, even though they were counseled” that they may not be enforceable, Lipton said.

Renee Zaytsev, a Boies Schiller Flexner partner, said the amendments push beyond the specific provisions highlighted by *Moelis* and could potentially allow the resurrection of board entrenchment moves previously squashed by the court.

“Are these things going to come back in a slightly different form, because now you can enter into a stockholder agreement where you’re giving this stockholder the right to veto or have control over when a poison pill is redeemed?” she said. “There’s lots of creative ways that boards can use these new amendments to not just give into stockholder demands but also to proactively protect their board seats and ward off activist threats.”

Zaytsev also questioned the new law’s language allowing contracts to specify that an agreement may include a provision requiring adjudication under another state’s laws. “That’s something very new and creates a lot of uncertainty,” she said. “Is someone going to specify that Texas’s business courts are going to be interpreting Delaware law? It’s very strange.”

Political Battle

The Delaware House’s discussion of the amendments featured rare public tension between the state bar and Chancery Court. In response to public criticism of the amendments from two sitting Chancery Court judges, former Chancery Court Chief Judge William Chandler testified that “judges need to stay in their own lane” and “don’t need to intrude upon the process of making law.”

That testimony was “unjust,” and its focus on “uncertainty” in Delaware suggests the amendments form a political response to unpopular judicial opinions as well as a statutory change, Joel Friedlander of Friedlander & Gorris said in a recent paper.

“This political attack on the judiciary is unjust, a danger to judicial independence, and potentially damaging to Delaware’s authority in the realm of corporate law,” Friedlander said.

He argued no legislators explained why the ruling against Moelis was wrong, and “the drafting of Senate Bill 313 suggests that sophisticated lawyers were not sanguine about the prospects of an appeal.”

It’s political moves like the new amendments, not court decisions, that erode Delaware’s reputation, Lipton said. The swift passage of the new amendments make it clear that “if you don’t like the decision out of Chancery, you can just run to the legislature,” she said.

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Chancery Keeps Challenge To \$1.5B Genius Sports Deal Alive

By **Leslie A. Pappas**

Law360 (July 31, 2024, 7:02 PM EDT) -- Stockholders of a blank check company that took sports data company Genius Sports Ltd. public have overcome a bid to spike their Delaware Court of Chancery challenge to the \$1.5 billion deal.

In a bench ruling Tuesday, Vice Chancellor Lori W. Will **denied motions to dismiss** the three-count class action complaint, which alleges breaches of fiduciary duty and unjust enrichment against special purpose acquisition company dMY Technology Group Inc. II and its former officers and directors.

Shareholders Aaron Offringa and Michael Farzad filed the proposed class action in **September**, alleging that dMY II's structure created an inherent conflict of interest between the SPAC's directors and its public stockholders.

Special purpose acquisition companies, also called blank check companies, are shell entities that raise money through an initial public offering for a future business combination. DMY II **went public in August 2020** in a \$240 million IPO.

Genius Sports' predecessor, Genius Sports Group Ltd., **announced in October 2020** that it would go public through a merger with dMY II that valued the enterprise at roughly \$1.5 billion. The former shareholders allege that dMY II's board provided no meaningful oversight in connection with the merger, acting instead as a rubber stamp.

During arguments in April on the motions to dismiss, shareholders argued that the proxy statement sent to shareholders about the merger didn't fully disclose how a newly inked agreement with the National Football League would cost the company \$120 million per year, making the business projections in the proxy unachievable.

The shareholders are represented by David Wissbroecker, Michael J. Barry and Kelly L. Tucker of Grant & Eisenhofer PA, Brian J. Robbins, Gregory E. Del Gaizo and Mario D. Valdovinos of Robbins LLP, and Randall J. Baron, Benny C. Goodman III and Erik W. Luedeke of Robbins Geller Rudman & Dowd LLP.

DMY Sponsor II LLC and the individual defendants are represented by Gregory Starner and Joshua D. Weedman of White & Case LLP, and Daniel A. Mason and Sabrina M. Hendershot of Paul Weiss Rifkind Wharton & Garrison LLP.

The case is Aaron Offringa v. dMY Sponsor II LLC, case number 2023-0929, in the Court of Chancery of the State of Delaware.

--Editing by Kelly Duncan.

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Rising Star: Robbins Geller's Ting H. Liu

 [law360.com/articles/1855080/rising-star-robbins-geller-s-ting-h-liu](https://www.law360.com/articles/1855080/rising-star-robbins-geller-s-ting-h-liu)

Law360(July 31, 2024, 4:29 PM EDT) · Listen to article --Ting H. Liu of Robbins Geller Rudman & Dowd LLP helped investors secure a \$350 million settlement against Alphabet after the Google parent company suffered a data breach, earning her a spot among the securities law practitioners under age 40 honored by **Law360 as Rising Stars**.



Ting H. Liu

Robbins Geller

- **Age:** 35
- **Home base:** San Diego
- **Position:** Partner
- **Law school:** University of San Diego School of Law
- **First job after law school:** Law clerk to U.S. District Judge Anthony J. Battaglia of the Southern District of California

Her biggest case:

Liu said that shortly after she joined Robbins Geller in 2018, she helped draft a complaint against Alphabet alleging that the company misled investors about a data breach and data security vulnerabilities at the company. Google had admitted that a software glitch it discovered and patched had allowed third-party app developers to access the private profile

data of 500,000 users of its Google+ social media site.

After The Wall Street Journal disclosed the breach, Alphabet's stock price tanked. From filing an amended complaint in 2019 to working on key motions and discovery, Liu helped **secure a settlement** in that case, from filing an amended complaint in 2019 to working on key motions and discovery.

She said it was a unique experience to take on a company as large as Alphabet when she was just starting out as a new associate, but it was challenging to overcome a California federal court's 2020 decision to grant Alphabet's motion to dismiss. Additionally, handling that work during the onset of the COVID-19 pandemic presented another wrinkle, as she and her colleagues adapted to social distancing and remote work.

Liu and the Robbins Geller team filed an appeal that ultimately led to a three-judge panel of the Ninth Circuit reinstating the case and vacating the lower court's dismissal of the complaint.

"It was a challenge at that first step to be dismissed, but overall, we overcame that," Liu said. "And in the end, it's one of my most outstanding cases and the one I'm most proud of."

In April, U.S. District Judge Trina L. Thompson gave the **initial green light** to the \$350 million settlement. If approved, the deal would represent the fourth-largest securities class action recovery in the Northern District of California, and Robbins Geller noted that it would also be the largest recovery for a privacy-related securities fraud.

Her most interesting case:

Liu is also part of the Robbins Geller team litigating a **case** against scandal-plagued utility company FirstEnergy Corp., stemming from a \$1 billion bribery scandal that took down the former speaker of the Ohio House of Representatives.

Liu said she never thought she would have the chance to litigate a case like this as a securities fraud attorney, noting that in addition to affecting Ohio residents and their energy rates, the case is also intertwined with politics.

"FirstEnergy entered into a [deferred prosecution agreement] with the FBI, and that has just made that whole underlying foundation of that case very interesting," Liu said. "Usually we don't get a full confession from a company in a securities fraud case, but in that case we had one."

She added that securities fraud law is unique because the facts of each case are "so

incredibly different," noting she has worked on matters ranging from data vulnerabilities to healthcare and teledentistry.

"It's fun to be able to dig into these different types of cases and different facts," Liu said.

What motivates her:

Liu is motivated by her parents, who she said immigrated to the U.S. from Taiwan after communism overtook China and started over by learning a new language, adapting to a new culture and working hard.

"They worked incredibly hard to provide the life my sister and I had — to have a roof over our heads, never want for anything, provide us the best education they could," Liu said. "So I really think about them as I'm sitting here as a partner here at this firm, going to advocate for those who may not necessarily be able to bring an action against Alphabet or Google and giving those individuals or investors who've been damaged by corporate fraud a voice."

She also said that on a day-to-day basis, her colleagues at Robbins Geller motivate her with their work, creativity and diligence, and that she tries to live up to the standards they have set.

Why she's a securities attorney:

Liu said she was drawn to securities law so she could help advocate for those who suffer harm from large corporations.

"We go up against these giant companies, and as an individual investor or an individual plaintiff, there's no way for you to bring a case — much less a class action — and pay for experts, IT and millions of documents downloaded," Liu said. "So I think I knew from the beginning of law school that I really wanted to advocate for those people."

She added that while she was clerking for California U.S. District Judge Anthony J. Battaglia, she met some Robbins Geller attorneys and was attracted to their advocacy for people who lost their retirement money due to corporate fraud.

How she thinks the legal industry will change in the next 10 years:

Liu said artificial intelligence technology such as ChatGPT will impact the legal profession in the years to come, though it's unclear exactly how. But with the younger generation growing up with easy access to this technology, she's keeping an eye on its impacts going forward.

She speculated the technology could handle work including writing letters to the court,

though she wonders how it will affect firms, clients and attorneys.

"How do we deal with privacy for our clients and privacy with our company by downloading something into a third party application?," Liu asked. "I think those are all really interesting questions."

--As told to Sarah Jarvis. Editing by Karin Roberts.

Law360's Rising Stars are attorneys under 40 whose legal accomplishments belie their age. A team of Law360 editors selected the 2024 Rising Stars winners after reviewing nearly 1,200 submissions. Attorneys had to be under 40 as of April 30, 2024, to be eligible for this year's award. This interview has been edited and condensed.

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CrowdStrike Investors Sue Over Stock Drop After Outage

By **Katryna Perera**

Law360 (July 31, 2024, 6:00 PM EDT) -- A group of CrowdStrike investors sued the cybersecurity company Tuesday in Texas federal court, alleging that it misrepresented the measures it was taking to prevent a system crash, which caused its stock price to plummet after the platform experienced a massive outage earlier this month.

The Plymouth County Retirement Association filed **a complaint** against CrowdStrike, its CEO and President George Kurtz and its Chief Financial Officer Burt Podbere. The suit is on behalf of a proposed class of individuals and entities that purchased or acquired CrowdStrike stock between Nov. 29, 2023, and July 29, 2024.

According to the complaint, CrowdStrike is a global cybersecurity company headquartered in Austin, Texas, that provides software to help companies prevent data breaches. Its customers include airlines, banks, hospitals and government entities. The complaint said CrowdStrike's main product is the Falcon software platform, which purportedly uses artificial intelligence and machine learning technology to detect, prevent and respond to security breach threats.

Customers who use the Falcon software have it embedded into their computers and the software requires constant updates to "keep pace with cybersecurity threats through rapid innovation," according to the complaint.

The retirement association said CrowdStrike and the individual defendants misled investors about the efficacy of the Falcon platform and falsely assured investors that the software was "validated, tested, and certified."

The defendants also allegedly failed to disclose that CrowdStrike had instituted deficient controls in its procedure for updating the Falcon software and was not properly testing updates before rolling them out to customers.

The complaint said this inadequate testing created a "substantial risk that an update to Falcon could cause major outages for a significant number of the company's customers," and that "such outages could pose, and in fact ultimately created, substantial reputational harm and legal risk to CrowdStrike."

On July 19, investors learned that an update pushed out by CrowdStrike had caused a massive outage for millions of Microsoft Windows device users worldwide. The customers affected included financial institutions, government entities and corporations, the complaint said.

"Among several other consequences of the CrowdStrike outage, airlines were forced to ground countless flights and emergency 911 hotlines were inoperable," the complaint said. "CrowdStrike also informed its customers that bad actors were trying to exploit the CrowdStrike outage to hack CrowdStrike customers."

On that news, the retirement association said, CrowdStrike's stock price fell \$38.09, or 11%, to close at \$304.96 on July 19, 2024.

Two days later, on July 22, Kurtz was called upon by Congress to testify about the outage, and analysts downgraded CrowdStrike's stock rating, causing its share price to fall again by \$41.05, or

13.5%, to close at \$263.91 on July 22, 2024.

"Investors continued to learn about the legal risk defendants had concealed on July 29, 2024, as news outlets reported that Delta Air Lines had hired prominent attorney David Boies to seek damages from the company following the CrowdStrike outage," the complaint said. "On this news, shares of CrowdStrike fell \$25.16, or 10%, to close at \$233.65 on July 30, 2024."

The suit said that since the outage, public commentary has revealed that CrowdStrike was taking insufficient precautions to prevent a crash.

"For instance, CrowdStrike has promised to take remedial measures to ensure that such a crash does not happen again, including implementing a so-called canary deployment of such updates, meaning a progressive rollout that starts with a subset of users. This indicates CrowdStrike was not taking such measures prior to the CrowdStrike outage," the complaint said.

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

A spokesperson for CrowdStrike told Law360 on Wednesday, "We believe this case lacks merit and we will vigorously defend the company."

Counsel for the plaintiffs did not immediately respond to requests for comment Wednesday.

The Plymouth County Retirement Association is represented by Guillaume Buell, Eric J. Belfi and Francis P. McConville of Labaton Keller Sucharow LLP.

Counsel information for CrowdStrike and the other defendants was not immediately available Wednesday.

The case is Plymouth County Retirement Association v. CrowdStrike Holdings Inc. et al., case number 1:24-cv-00857, in the U.S. District Court for the Western District of Texas.

--Editing by Stephen Berg.



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\$7.25M Del. Settlement Offered In \$1.35B UpHealth SPAC Suit

By **Jeff Montgomery**

Law360 (July 31, 2024, 6:45 PM EDT) -- Parties to a Delaware Court of Chancery stockholder suit that challenged a \$1.35 billion take-public "blank-check" company merger with Florida-based digital health manager UpHealth Inc. have reached a \$7.25 million settlement of all claims, pending court approval, according to an agreement filed Tuesday.

The complaint, **filed in September 2021**, pointed to an UpHealth share nosedive after the November 2020 deal and sought recovery from special purpose acquisition company sponsor Avi Katz and others for fiduciary duty failures and unjust enrichment.

The suit targeted Katz — an architect of multiple special-purpose acquisition company, or SPAC, deals — as well as Katz-controlled deal sponsor GigAcquisitions2 LLC. Also named were the directors or officers of GigCapital2 Inc., the public shell that acquired UpHealth and took it public along with telehealth solutions provider Cloudbreak Health LLC.

SPACs are hollow, initially speculative public entities created to assemble cash for go-public deals without the need for an initial public offering.

After closing, the enterprise lost more than 62% of its value, according to the complaint. Katz and GigAcquisitions2, however, emerged at closing with warrants worth \$43 million after a \$4.8 million investment.

Vice Chancellor Lori W. Will in March 2023 **refused to dismiss** the suit, finding "grounds to infer that the defendants were incentivized to enter a value-destructive de-SPAC merger that allowed the sponsor to make colossal returns on a nominal investment," supported by an allegedly materially misleading proxy statement, while public investors suffered massive losses.

Neither side conceded any liabilities in connection with the dispute and settlement, which still requires court approval.

Counsel for the stockholders indicated that they would seek an fee, not yet specified, as part of the agreement.

The case is Cody Laidlaw v. GigAcquisitions2 LLC, case number 2021-0821, in the Court of Chancery of the State of Delaware.

--Additional reporting by Dorothy Atkins. Editing by Amy French.

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Chancery OK Sought For \$2.5M BigBear.ai SPAC Suit Deal

By **Leslie A. Pappas**

Law360 (July 31, 2024, 8:39 PM EDT) -- GigCapital Global has agreed to pay \$2.5 million to settle a Delaware Chancery Court shareholder class action that sought damages for alleged breaches of fiduciary duty and unjust enrichment in connection with the 2021 go-public merger with artificial intelligence company BigBear.ai.

The **proposed settlement**, which still requires court approval, would release claims against all defendants without admission of wrongdoing, and would end litigation that Stephen Bushansky, a former stockholder of GigCapital4 Inc., **filed in June 2023**.

GigCapital4 Inc. was a private-to-public equity entity, more often called a special purpose acquisition company, that merged with BigBear.ai on Dec. 7, 2021, a transaction that was valued at \$1.57 billion at the time.

Defendants in the complaint included Avi Katz, a director of Gig4 who is also the founding managing partner of GigCapital Global, Gig4's CEO Raluca Dinu, Chief Financial Officer Brad Weightman and Gig4 directors Neil Miotto, Andrea Betti-Berutto and Dorothy D. Hayes.

A SPAC, also known as a "blank check company," is a publicly traded shell company that is formed for the sole purpose of raising capital through an initial public offering that it can then use to acquire another company.

GigCapital4 was part of GigCapital Global, a family of SPACs that Katz founded in late 2017.

The settlement filed with the court Tuesday involved all parties in the litigation as well as nonparty BigBear.ai Holdings Inc.

BigBear.ai is a leading provider of AI-powered military and business intelligence solutions that serves markets such as global supply chain and logistics, autonomous systems, and cybersecurity, according to the company's website.

The stipulation of settlement filed with the court Tuesday also said that Bushansky's attorneys would petition the court for a fee award to be paid out of the settlement fund. The stipulation did not say how much attorneys would seek.

None of the parties immediately responded Wednesday to Law360's email seeking comment.

Stephen Bushansky is represented by Michael Rogovin of Weiss Law and Michael J. Barry, Kelly L. Tucker, and Jason M. Avellino of Grant & Eisenhofer PA.

GigAcquisitions4, LLC and the individual defendants are represented by John L. Reed, Ronald N. Brown III, Kelly L. Freund, and Melanie E. Walker of DLA Piper LLP.

BigBear.ai Holdings Inc. is represented by Carolyn Blakenship of BigBear.ai

The case is Stephen Bushansky v. GigAcquisitions4 LLC, et al., case number 2023-0685, in the Court of Chancery of the State of Delaware.



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Report Finds Uptick In AI-Related Shareholder Suits

By **Jessica Corso**

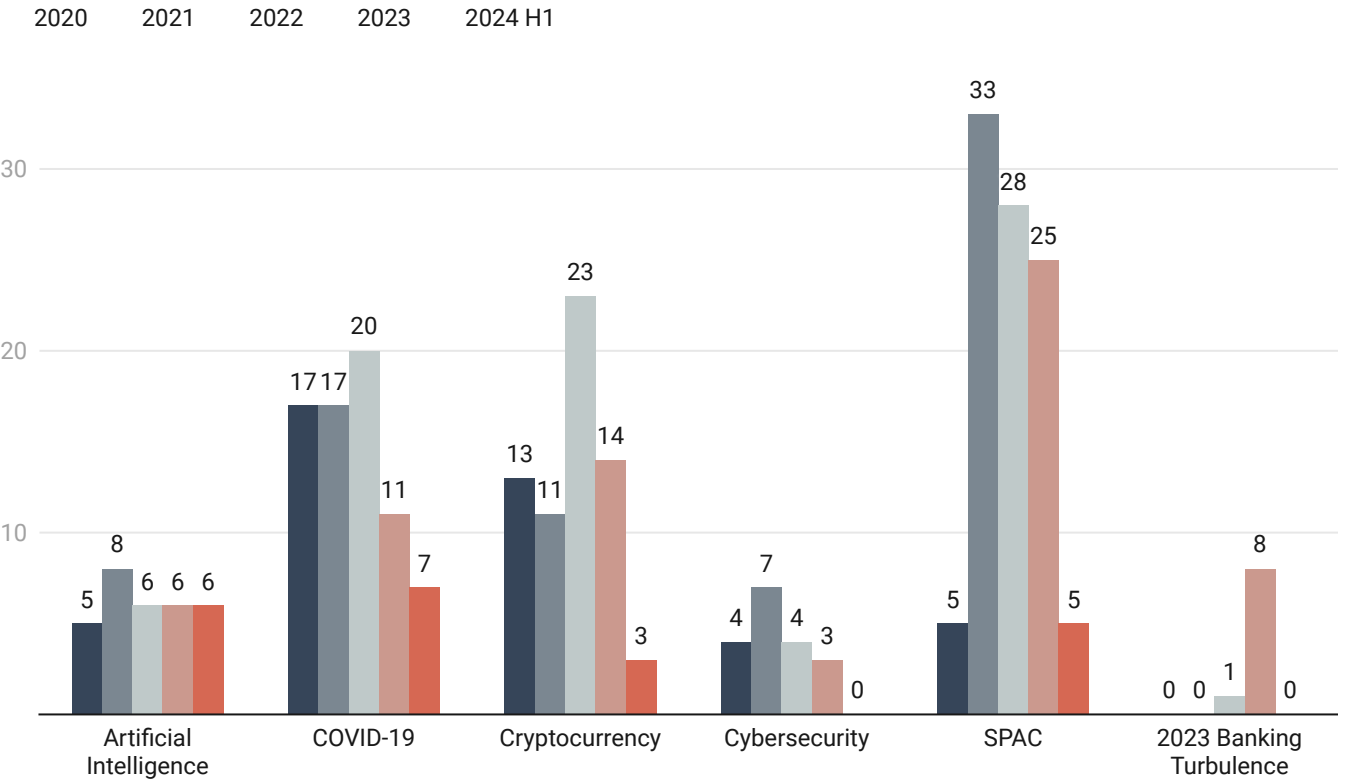
Law360 (July 31, 2024, 9:03 PM EDT) -- Class action lawsuits accusing companies of deceiving investors about their artificial intelligence capabilities are on the rise this year while the previously trendy areas of shareholder litigation against cryptocurrency companies and special purpose acquisition companies have fallen significantly, according to a Wednesday report from Cornerstone Research.

Six lawsuits were filed between January and June against companies that allegedly either overplayed the reliability of their AI models or failed to disclose the risks associated with those models, according to Cornerstone's latest report on the securities class action landscape.

Combined with the two additional AI-related investor suits filed in July, including **one against Israeli beauty company** Oddity Tech Ltd., the number of shareholder class actions targeting AI tech this year has already surpassed the total number filed last year, according to data from the Stanford Law School Securities Class Action Clearinghouse. Stanford worked alongside Cornerstone to prepare Wednesday's report.

The Continued Pandemic Fallout

There have been more Covid-19 related lawsuits filed so far this year than cryptocurrency, AI or SPAC suits. Suits over SPAC deals in particular have seen a sharp drop from a high of 33 new cases in 2021.



Source: Cornerstone Research • Created with [Datawrapper](#)

"The growing prominence of AI in the business models of many companies may lead to more filings in the future," Sasha Aganin, the report's coauthor and a Cornerstone Research senior vice president, said in a statement Wednesday.

The report found that even as the number of AI lawsuits is on the rise, the number of lawsuits targeting crypto firms and SPACs has fallen. Only three lawsuits against crypto companies were filed over the first six months of 2024 compared to a total of 14 cases in 2023 and 23 cases in 2022, the year of the so-called **crypto winter** when FTX and several others in the industry collapsed.

That was also the year that the demand for SPAC mergers **began to cool**. Cornerstone's data shows that 2021 was the high-water mark for investor suits targeting SPACs, which are blank check companies that exist to purchase private companies and take them public.

Thirty-three SPAC class actions were filed in 2021 compared to 28 in 2022 and 25 in 2023, according to the data. Only five were filed in the first six months of this year, including one accusing Evolv Technologies Holdings Inc. of **deceiving investors** about its AI weapons detection technology following its 2021 SPAC merger, according to the Stanford Clearinghouse.

That lawsuit was also listed by Stanford and Cornerstone under its AI case database, which is a trend the researchers just began tracking this year.

Another trend highlighted by the report was the strength of filings tied to the COVID-19 pandemic, with seven new class actions in the COVID space over the first six months and an additional three filed since the beginning of July, according to the data.

Those cases often express investor dissatisfaction with the way that the pandemic impacted the demand for the products and services of companies, Aganin told Law360.

"As companies exited the pandemic, they made comments about implications of the end of the pandemic on their businesses going forward," he said in an email. "In some cases, investors ended up being disappointed months and quarters later."

Outside the rise and fall of certain litigation trends, the securities class action landscape overall has remained fairly consistent when it comes to the number of new cases being filed.

There were 113 new cases filed in the first six months of 2024 compared to 112 over the same period last year, according to the Cornerstone report. There were 115 over the first half of 2022 and 111 over the first half of 2021, the data shows.

The second half of the year usually brought fewer filings, with 103 filed during the back half of last year and 93 filed over the last six months of 2022, according to the data.

The Rise of the Third Circuit?

The Second and Ninth Circuits continue to be the preferred jurisdictions for shareholder class actions, seeing 60% of new cases filed so far this year, but Third Circuit courts are seeing more activity now than they have historically.

	Second	Third	Ninth
2024 H1	26	13	38
2023 H2	24	18	34
2023 H1	25	18	33
Semianr average 1997-2023	28	9	25

Source: Cornerstone Research • Created with [Datawrapper](#)

Jonathan Youngwood, leader of Simpson Thacher & Bartlett LLP's civil securities litigation practice, said that consistency in the number of new securities suits filed every year over the past few years is probably the biggest news out of Wednesday's report. He told Law360 that he doesn't anticipate any major changes in the securities landscape between now and the end of the year.

"I would say absent some disruption in the economy that creates a whole new category of case or meaningful downward movements in the markets, my bet is that when we look at this next year in January we're going to see numbers that continue the trends of this first six months," Youngwood said.

--Editing by Emily Kokoll.

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Doc 'Muddle' Stalls Trump Media SPAC Figure's Ouster Suit

By **Jeff Montgomery**

Law360 (July 31, 2024, 6:26 PM EDT) -- Pointing to multiple, conflicting operating agreement versions, a Delaware vice chancellor said she was unable to rule Wednesday on a suit to uphold dismissal of the managing member of a blank check company sponsor for the deal that took former President Donald Trump's social media company public.

Vice Chancellor Lori W. Will's decision kept in limbo for now a case filed by members and shareholders of ARC Global Investments II LLC seeking to confirm the purported March 22 ouster of the company's original managing member, Patrick Orlando.

"We're dealing with muddled issues I can't resolve today," the vice chancellor said during a teleconference hearing. Among the mysteries highlighted in the ruling: conflicting percentages of members required to uphold a removal, a June 2021 subscription agreement that allegedly incorporated an amendment from February 2023, and a version that went unsigned.

"The bottom line at this point: I have no idea which operating agreement controlled. I have no idea which version was in effect at the time of the purported removal of Mr. Orlando," the vice chancellor said. "Sorting out this question is going to require some discovery."

The Orlando purging suit followed by three weeks a different suit, filed by ARC, alleging that the blank check, special purpose acquisition company – Digital World Acquisition Corp. – used an incorrect share conversion ratio that shortchanged ARC in the March closing of the take-public deal for Trump Media & Technology Group.

Chancellor Will held a trial on the papers in the ARC complaint Tuesday, with attorneys for ARC arguing that DWAC ignored its charter and withheld information about the deal in order to avoid paying tens of millions in anti-dilution protection.

During that trial, Bradley J. Bondi of Paul Hastings LLP, counsel for DWAC, countered that "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%. He added: "If ARC were to prevail today, the return on investment would be 1,192,428%."

Neither side commented on the vice chancellor's decision Wednesday to put off a finding regarding Orlando's dismissal. An evidentiary hearing is scheduled in the same case for Tuesday.

Orlando was the first CEO and chairman of DWAC, the ARC-backed special purpose acquisition company that took Truth Social public in March. He was fired from Digital World following disclosures 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 Trump Media & Technology Group \$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.

Among other observations Wednesday, Vice Chancellor Will said she found it "surprising" that ARC had joined Orlando in the motion to dismiss the ouster suit, pointing out that ARC was a "nominal party that must remain neutral."

Also left hanging Wednesday was a dispute over a motion to intervene in the case filed by former DWAC attorney Michael Melkerson, who has argued that a motion filed by Orlando to enforce a settlement of the dismissal case is invalid.

Attorneys for Orlando said in a brief filed on July 3 that Melkerson "has been orchestrating this ill-conceived control dispute since day one." They added in the same document that "This misguided action has always been an attempt to gum up the works and extract an inappropriate premium for Melkerson and the plaintiffs at the expense of ARC's members. The court can expect more of the same if intervention is granted."

Patrick Orlando and nominal defendant ARC Global Investments II LLC are represented by Matthew D. Perri, Daniel E. Kaprow, Elizabeth J. Freud and Rae Ra of Richards Layton & Finger PA.

The Digital World Acquisition Corp. parties are represented by David L. Finger of Finger & Slanina LLP.

The case is Aaron Leon et al. v. Patrick Orlando et al., case number 2024-0311, in the Court of Chancery of the State of Delaware.

In the anti-dilution case, 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 members are represented by Bradley J. Bondi, D. Scott Carlton, Traci Zeller and Nicholas Griepsma of Paul Hastings LLP and Kevin M. Coen and Jacob M. Perrone of Morris Nichols Arsht & Tunnell 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 Linda Voorhis.



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NewAge Execs Deny Inflating Military Contract Prospects

By **Elliot Weld**

Law360 (July 31, 2024, 7:36 PM EDT) -- Executives and board members of the defunct beverage company NewAge Inc. hit back at investors' allegations that they lied about having a deal to sell their products in military commissaries, saying the investors had failed to show that material misstatements were made.

In a motion to dismiss filed Tuesday, the executives and board members told a Colorado federal court that NewAge was transparent about its limited inventory resources, uncertain supply relationships and regulatory impediments as it worked to expand product distribution and develop a set of CBD-infused drinks.

NewAge's former CEO Brent Willis said that, despite those hurdles, the company developed a strategy to expand product distribution and develop a line of CBD-infused drinks.

"Plaintiffs admit that NewAge achieved some measure of success on both fronts," Willis said in the motion. "But apparently not to the extent plaintiffs hoped. Missing the proverbial mark, though, is not securities fraud — it is a byproduct of capitalism and an unfortunate norm for small companies attempting to forge sustainable growth in a crowded industry."

The executives and board members said they were transparent about their beliefs that they could overcome hurdles, and experienced disappointments as a result of trying to break into a sector dominated by billion-dollar companies. Investors cannot show that they were defrauded, the executives added.

The investors sued in December 2022, claiming that NewAge lied when it said it had entered into a deal to sell its products in military commissaries and when it touted a CBD beverage product portfolio the company claimed to have developed.

Willis argued that the investors' allegations that he made false statements about NewAge's relationship with the military and other clients is belied by their own admission that NewAge did, in fact, sell to the military. The investors are only arguing that the statements were misleading because they thought those relationships should be more lucrative, Willis said.

Nine other executives and board members, represented by a Greenberg Traurig LLP legal team, argued that they are only defendants by their association to Willis, and that they neither made nor were responsible for any of the statements challenged in the lawsuit.

The nine defendants said the only statement attributed to any of them in the suit about the CBD portfolio is one from former NewAge Chief Financial Officer Gregory Gould, who is quoted by the investors as asking whether the CBD portfolio will have an impact on the company's finances in 2019 and then saying, "The answer to this is yes." But the defendants argued that the suit cut Gould's quote short, and he actually went on to say, "How big and important will this be this year? Well, we honestly don't know."

Alicia Syrett, a former board member, said in a separate motion that the investors had dragged her into the suit "based on nothing more than her brief tenure as a member of the board and the audit committee," her receipt of stock-based compensation, and her signing filings with the U.S. Securities and Exchange Commission.

The suit only contains two allegedly false statements that occurred during Syrett's time with the company that are tied to her in any way, and they pertain to two 10-K statements that NewAge filed with the SEC and that allegedly contain misstatements about how effective the company's internal controls were, Syrett said.

But the alleged misstatements are "mere statements of management opinion" that cannot be sued over, Syrett said in her motion.

Fred Cooper, who was a member of NewAge's board, said in his own motion to dismiss that the allegations in the complaint "substantially predate" his involvement with the company. The investors' theory of motive for the alleged securities fraud was a \$34.8 million stock sale in 2018 and resultant payout to the defendants, but Cooper did not become involved with NewAge until after that, he said.

The suit doesn't allege that Cooper sold any stock during the class period sought by the investors, and because the allegations against Cooper are largely circumstantial, the evidence of his knowledge of the fraud must be "correspondingly greater," the former board member argued. Yet, the investors' allegations as to his knowledge are lacking, Cooper said.

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

The investors are represented by James M. Wilson and Robert Killorin of Faruqi and Faruqi LLP.

Willis is represented by Micahel Diver, Michael Lohnes, Lari Dierks, Jamie Noonan, Sarah Eichenberger and Dillon Rodriguez of Katten Muchin Rosenman LLP.

The nine defendants Care Aure, Ed Brennan, Chuck Ence, Greg Fea, Gregory Gould, Tim Haas, Reginald Kapteyn, Amy Kuzdowicz and Kevin Manion are represented by Laura Sixkiller, David Klaudt and Robert Long of Greenberg Traurig LLP.

Syrett is represented by Jaimie Nawaday and Malavika Rao of Seward & Kissel LLP.

Cooper is represented by David Hunt of David S. Hunt PC.

The case is Clifton v. Willis et al., case number 1:22-cv-03161, in the U.S. District Court for the District of Colorado.

--Additional reporting by Sydney Price. Editing by Melissa Treolo.



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Wells Fargo Hit With Suit Over Cash Sweep Program

By **Sydney Price**

Law360 (July 31, 2024, 8:40 PM EDT) -- Wells Fargo was hit with a proposed class action by a customer claiming the bank's cash sweep investment program only allows users to sweep their cash into Wells Fargo-selected accounts, a practice the suit says has drawn regulatory scrutiny because it disproportionately benefits the bank.

According to customer Keith Bujold's **suit filed Tuesday**, Wells Fargo allegedly uses its cash sweep programs to generate "enormous" fees for itself at the expense of its customers who receive only a minimal return on their cash deposits. Customer cash is routinely swept into accounts held with banks both affiliated and not affiliated with Wells Fargo, and Wells Fargo keeps for itself the vast majority of interest and fees the banks pay out on the cash deposited by customers, according to the suit.

Bujold alleged Wells Fargo's bank sweep programs consist of two separate but similar programs: the expanded bank deposit sweep and the standard bank deposit sweep. Each business day, available cash balances in all eligible customer accounts are swept out of the accounts and into one of the program banks.

"Indeed, the rates that [Wells Fargo Advisors] sets in consultation with its affiliated banks are far below the rates [Wells Fargo Advisor] customers could have otherwise earned on their cash in the marketplace," Bujold said.

Wells Fargo's practices have drawn attention from regulators, according to the complaint. For example, in July, the bank announced it would change the pricing of its sweep programs to pay customers higher rates of interest following a **2023 disclosure** of an investigation by the U.S. Securities and Exchange Commission regarding its sweep programs.

"According to [Wells Fargo Advisors], the price changes will likely cost defendants an estimated \$350 million in yearly revenue, evidence of the massive windfall the programs provide to defendants at the expense of [Wells Fargo Advisors'] customers," the suit states.

Bujold has accused Wells Fargo of breaching its fiduciary duties, negligence, breach of contract, unjust enrichment and violating the New York General Business Law, and seeks damages on behalf of a proposed class of customers whose cash was swept by Wells Fargo since 2018.

A representative of Wells Fargo declined to comment on Wednesday. Counsel for Bujold did not immediately respond to requests for comment.

Bujold is represented by Joshua P. Davis, Kyla J. Gibboney, Julie A. Pollock, Michael Dell'Angelo and Andrew D. Abramowitz of Berger Montague, and Alan L. Rosca, Jonathan A. Korte and Paul J. Scarlato of Rosca Scarlato LLC.

The case is Bujold v. Wells Fargo & Co. et al., case number 3:24-cv-04616, in the U.S. District Court for the Northern District of California.

--Editing by Lakshna Mehta.



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Wells Fargo Let Workers' Prescription Costs Soar, Suit Says

By **Lauren Berg**

Law360 (July 31, 2024, 10:06 PM EDT) -- A group of former Wells Fargo employees have accused the banking giant of mismanaging its prescription drug benefits program, costing its Employee Retirement Income Security Act plan and employees millions of dollars in premiums and medication costs, according to a proposed class action in Minnesota federal court.

Wells Fargo's duties under ERISA include monitoring benefit plan expenses and comparing alternative service providers in order to keep costs reasonable, but the bank's mismanagement has led to higher prescription drug costs, higher premiums and lower wages, according to a 101-page **complaint** filed on Tuesday by former bank employees Sergio Navarro, Theresa Gamage, Dayle Bulla and Jane Kinsella.

According to the suit, Wells Fargo agreed to pay its pharmacy benefits manager, Express Scripts, for generic drugs that are widely available at much lower prices.

The suit also names five bank executives as defendants.

In the case of one generic drug for multiple sclerosis treatment, patients can get a 90-unit supply — without using insurance — at Wegmans for \$648, Rite Aid for \$891 or Walmart for \$895, according to the complaint. But Wells Fargo agreed to make the plan, and its participants, pay a staggering \$9,994 for the same prescription, the suit states.

"The burden for that overpayment falls on both the plan and its participants/beneficiaries," the plaintiffs say. "The plan itself pays most of the agreed amount from plan assets, while plan participants/beneficiaries pay more in the form of increased premiums and increased out-of-pocket costs."

"No prudent fiduciary would agree to make its plan and participants/beneficiaries pay a price that is fifteen times higher than the price available to anyone who just walks into a pharmacy and pays without using their insurance," the suit says.

That roughly \$9,000 per prescription difference largely goes right in the pocket of Express Scripts, the complaint states.

Furthermore, Wells Fargo designated about 300 generic drugs as "preferred" medications plan participants are encouraged to use, but the plan and its participants pay an average markup of nearly 115%, the complaint says.

And it's worse for drugs designated as "specialty" medications based on the conditions they treat, the suit says. On average, Wells Fargo's prices for specialty medications are marked up by 383% above what it costs pharmacies to acquire those drugs, according to the suit.

Wells Fargo also agreed to require plan participants to use Accredo, the mail-order pharmacy owned by Express Scripts, to obtain some of their prescriptions, even though it can cause patients to spend thousands more than using a regular retail pharmacy, according to the complaint. In one example, the plaintiffs say a medication used to treat lymphoma costs \$3,750 at Rite Aid, \$4,129 at Wegmans and \$7,256 at Walgreens without insurance but costs a whopping \$69,806 from Accredo.

"In short, defendants are steering plan participants/beneficiaries toward an option that, for many drugs, wastes thousands of dollars in plan assets while enriching Express Scripts by that same amount," the plaintiffs say. "This fiduciary mismanagement has resulted in higher costs for the plan, higher premiums for participants/beneficiaries including plaintiffs, and higher out-of-pocket costs for those required to use Accredo to fill their prescriptions."

Lastly, Wells Fargo agreed to pay excessive administrative fees to Express Scripts, and "squandered" the bargaining power it holds as a large benefits plan, according to the complaint. In 2022 alone, the bank paid the PBM \$25 million, or \$135.81 per plan participant, the suit states.

The bank should have taken steps to steer plan participants towards the most cost-effective options, negotiated for better rates from Express Scripts or moved to a PBM that "bases its prices on actual pharmacy acquisition costs rather than inflated and manipulable benchmarks, the plaintiffs say.

Navarro, Gamage, Bulla and Kinsella seek to represent a nationwide class of potentially tens of thousands of people who were participants in or beneficiaries of the plan from July 30, 2018, through judgment in the lawsuit, according to the complaint.

The suit claims breach of fiduciary duties and prohibited transactions.

It seeks an order requiring Wells Fargo to restore the plan's losses, an award of restitution to plan beneficiaries, appointing an independent fiduciary to run the plan, and monetary and injunctive relief, attorney fees, and litigation costs.

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

The former employees are represented by Daniel E. Gustafson and Amanda Williams of Gustafson Gluek PLLC and Jamie Crooks and Michael Lieberman of Fairmark Partners LLP.

Counsel information for Wells Fargo and the other defendants was not immediately available.

The case is Sergio Navarro et al. v. Wells Fargo & Co. et al., case number 0:24-cv-03043, in the U.S. District Court for the District of Minnesota.

--Editing by Drashti Mehta.



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AT&T Faces New Data Breach Class Action By Non-Customers

By **Rae Ann Varona**

Law360 (July 31, 2024, 11:36 PM EDT) -- AT&T, already facing litigation over a data breach it admitted to in mid-July, was hit Tuesday with another putative class action in Texas federal court, this time by two individuals who alleged the telecom giant disregarded the breach's impact on customers of other companies using AT&T's network.

Iowa residents Debbie Hale and Nick Margeas said in the **new suit** that they were customers of Verizon and T-Mobile, respectively, when hackers downloaded call and text message records belonging to not only AT&T's wireless customers between May and October 2022 and early 2023, but also customers of wireless providers that used AT&T's network. AT&T **disclosed** the breach in a July 12 U.S. Securities and Exchange Commission filing.

Yet AT&T hasn't taken steps to warn customers of other companies that used AT&T's network of the data breach, they said.

"Plaintiffs now face the possibility that malevolent actors will blackmail them with the information disclosed in this data breach and therefore have sustained emotional distress," their suit asserts.

The two seek to represent all individuals who used T-Mobile, Verizon, Boost Infinite, Cricket Wireless and other "mobile virtual network operators," or MVNOs, that used AT&T's network between May 1, 2022, and Oct. 31, 2022, or in January 2023.

According to their complaint, MVNOs contracted with AT&T to use its network during the relevant period. Hale and Margeas alleged T-Mobile and Verizon also entered agreements with AT&T or its subsidiaries that permit roaming on their networks. In other words, customers' calls are carried by whichever network covers a certain area.

AT&T's July data breach announcement was the second this year, following an announcement in late March that a data set with customer information, including Social Security numbers, full names and birth dates, was released on the dark web weeks before. The breach, which the Dallas-based company said may have affected about 7.6 million current customers and 65.4 million former customers, had sparked **numerous lawsuits**, also in Texas federal court.

According to Hale and Margeas, a cybercriminal had also indicated years before that millions of AT&T customers' data was taken. They said the company failed to adequately warn its customers that they risked having their identity stolen "until years later."

The two said that despite AT&T's "history of massive data breaches," it hasn't done enough to protect its customers or safeguard putative class members' personally identifiable information, "allowing cybercriminals to access this wealth of priceless information ... years before AT&T warned its customers to be on the lookout."

They said that despite taking measures to protect their personal information, including by storing documents with the information in secure locations and "diligently" choosing unique usernames and passwords, they now risk fraud, blackmail and identity theft.

They and putative class members will also have to spend time and money mitigating the breach's impact, including by placing freezes with credit reporting agencies, closing or modifying financial

accounts and reviewing unauthorized activity "for years to come," they said.

In suing for negligence, Hale and Margeas contended that AT&T owed them a duty to disclose the breaches in a timely and accurate matter, as well as a duty of care since they were "foreseeable and probable victims of any inadequate data security practices."

AT&T also knew or should have known that its systems were targets for theft and other cybersecurity attacks, they said.

They are seeking, among other relief, damages and declaratory, injunctive and equitable relief.

Hale and Margeas' proposed class action adds to others **filed** days after the July announcement by direct AT&T customers from Florida and California who had been with the company for more than 15 years and as early as 2007 when the company merged with Cingular Wireless. The suits were filed in Texas, Montana and New Jersey.

Elizabeth A. Fegan of Fegan Scott LLC, an attorney for Hale and Margeas, told Law360 on Wednesday that "AT&T's most recent data breach affected a class of customers of multiple other wireless carriers for whom we look forward to holding AT&T accountable."

AT&T did not immediately respond to a request for comment.

Hale and Margeas are represented by Scott Summy of Baron & Budd PC, Elizabeth A. Fegan and Megan Shannon of Fegan Scott LLC, and J. Barton Goplerud of Shindler Anderson Goplerud & Weese PC.

Counsel information for AT&T was not available as of Wednesday afternoon.

The case is Hale et al. v. AT&T Inc., case number 3:24-cv-01943, in the U.S. District Court for the Northern District of Texas.

--Additional reporting by Allison Grande, Peter McGuire and Lauren Berg. Editing by Michael Watanabe.



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Justices Urged To Review Airline Price-Fixing Deal Payout

By **Jared Foretek**

Law360 (July 31, 2024, 8:50 PM EDT) -- Two class members in a long-running airline price-fixing suit are asking the U.S. Supreme Court to reverse a secondary distribution of over \$5 million in settlement money, saying unclaimed funds should have been sent to state treasuries, not class counsel.

Brought by one individual class member and a Colorado-based company, the new petition challenges a Ninth Circuit ruling upholding the secondary payment, in which the appeals panel held that the two objectors lacked standing.

The individual, David Gould, received his initial settlement check and cashed it, which meant he qualified for the secondary distribution of unpaid funds. But the company, Xanadu Corp., says it never got its first check for more than \$500,000 because the envelope it was sent in lacked a city, state or ZIP code.

That meant that when it came time for the leftover payments to go out, the company was bypassed because it had never cashed its initial check.

"The claims administrator simply ignored Xanadu's messages without providing any response," the two objectors tell the Supreme Court in their July 25 petition.

The district court ultimately found that Xanadu had not established that it had made qualifying ticket purchases, meaning that it lacked standing to object.

The secondary distribution came from what went unclaimed from the \$104 million settlement for claims of airline price-fixing on trans-Pacific flights. But according to the objectors, more than 16,000 of the 61,700 total claimants never received payment, either because the checks were returned by the postal service or went uncashed. About \$99 million was claimed in the first go-round.

In the plan for leftover funds approved by the district court, class counsel at Hausfeld LLP got an additional \$1 million, a fact the objectors say the claims administrator effectively hid from non-English speaking class members, as a notice about the additional payment went up only on the English-language claims site.

The objectors also say the claims administrators did little to try to find the claimants whose checks were returned by the postal service.

"The only action taken was that the claims administrator ran their address through something called a TRACE database to see if there was a corrected address," the petitioners write.

The settlement stemmed from multidistrict litigation launched in 2007, when a consumer class accused major airline carriers of conspiring to increase prices on trans-Pacific flights. Air France, Japan Airlines, Vietnam Airlines, Qantas Airways, Singapore Airlines, Philippine Airlines, Air New Zealand and China Airlines all settled at various times.

The Ninth Circuit **held** that Gould lacked standing because, as a first-round recipient, he would not be harmed by the secondary payout plan. With respect to Xanadu, the appeals panel held that the district court had not erred in finding that its claims of ticket purchases were unsupported.

But the two objectors argue in their brief to the high court that the leftover money should have been directed to state treasurers of the last known addresses for would-be recipients. They say the class counsel wanted to rush through a close to the claims process to expedite their additional payment, even if it meant violating the rules of civil procedure mandating that class attorneys "must fairly and adequately represent the interests of the class."

Typically in class actions, the challengers say, 10% to 30% of payments don't reach approved claimants. In this case, that figure was greater than 25%, they say, arguing that some checks arrived after a 30-day window to cash them expired.

"The problem with taking funds from uncashed and undelivered checks for attorney fees or for redistribution is that the money belongs to other people, not to Class Counsel or the court," the petition reads. "These are not people who waived their right to file a claim, but people who took the time out to preserve their rights and are now having their money given to Class Counsel and other people."

What's more, they write, California law – which governs the settlement agreements – mandates that uncashed and undelivered checks of any amount fall under the state's unclaimed property laws and must be turned over to the state.

The objectors also seek to reestablish Xanadu's standing for the justices. They argue in the petition that the class counsel held the company, which had foreign counsel and lacked a corporate domain name, to a higher standard than other claimants before ultimately denying the company's claims, which had initially been approved.

This amounted to a clear due process violation, they argue.

"Xanadu addressed every concern of Class Counsel and participated in a one-hour Zoom meeting, but its claim was denied because it was unable to produce records from 20 years ago – something that was specifically not required by the court's February 3, 2022, distribution Order," the petition reads.

Class counsel did not immediately respond to Law360's request for comment Wednesday.

The objectors are represented by Stephen Kent Rose and J. Allen Roth.

The class is represented by Jeannine Kenney of Hausfeld LLP.

The case is Xanadu Corp, et al., Petitioners v. Meor Adlin, et al., case number 24-96, in the United States Supreme Court.

--Additional reporting by Gina Kim. Editing by Peter Rozovsky.

NFL Finds Judge Open To Tossing \$4.7B Sunday Ticket Award

By **Craig Clough**

Law360 (July 31, 2024, 9:46 PM EDT) -- A California federal judge appeared open Wednesday to the NFL's argument that he should throw out a jury's stunning \$4.7 billion antitrust verdict over the league's Sunday Ticket television package, saying he has "trouble" with the jury's damages award and suggesting that jurors may have disregarded his instructions.



The NFL has contested a jury's \$4.7 billion antitrust verdict over its Sunday Ticket television package, saying the jury disregarded the court's instructions and came up with its own damages model. (AP Photo/Adam Hunger, File)

Throughout a morning hearing, U.S. District Judge Philip S. Gutierrez expressed support for **the NFL's arguments** that the two certified classes failed to present viable models to support classwide injuries and that the jury developed its own model.

The judge repeatedly discussed the amount awarded, which did not align directly with any of the three models presented by the subscribers.

Although the judge said it is typically wrong for the court to assume what a jury did to reach its decision, he appeared to agree with the NFL that because the verdict rendered was so specific, the jurors must have disregarded the court's instructions and come up with their own damages model.

"I'm having trouble with the models and the damages that the jury came up with," the judge told Marc M.

Seltzer of Susman Godfrey LLP, who represents the subscribers.

The jury awarded \$96,928,272.90 to the commercial class and \$4,610,331,671.74 to the residential class. The NFL argued that amount was a "discount" that the jury awarded through "made-up methodology," and presented evidence of exactly which figures jurors used to come up with their calculation.

When Seltzer told the judge on Wednesday that "there's no way to tell" exactly how the jury reached its award, Judge Gutierrez disagreed, noting that the award was "down to the penny" and adding that the total "can only be a discount."

The motion filed by the NFL and its 32 teams in July sought judgment as a matter of law or a new trial on a number of grounds, focusing much of its legal effort on the math behind the jury's verdict.

The eight-person jury handed the NFL the **blockbuster courtroom defeat** on June 27 following a monthlong trial and about six hours of deliberations, finding that between 2011 and 2023, the league, its 32 teams and DirecTV violated Section I and Section II of the Sherman Act by overcharging Sunday Ticket subscribers, which resulted in an unreasonable restraining of trade and an illegal monopoly.

The award could ultimately be tripled under antitrust law if it stands.

During the trial, the subscribers argued that there is evidence the NFL and DirecTV reached side agreements to keep the price of the Sunday Ticket artificially inflated in order to appease CBS and Fox, which viewed the Sunday Ticket as a threat to their free, over-the-air broadcast of Sunday NFL games.

The subscribers also argued that the NFL's policy of pooling the television rights for its out-of-market games violated antitrust laws.

During the class period, the Sunday Ticket offered subscribers every Sunday afternoon NFL game that did not air free on CBS or Fox in a local market. The price varied by year but was always hundreds of dollars.

The verdict's total was a bit of a head-scratcher, as it did not track anywhere close to three distinct totals sought by the subscribers in three different damages models. Those totals were **\$7.01 billion, \$3.48 billion** and \$1.7 billion.

During the trial, the NFL's attorneys argued that the average price paid for every DirecTV residential subscriber for the Sunday ticket during the class period was \$102.74, far below an average sticker price in the hundreds of dollars, because many subscribers received deals and discounts, including a free year of Sunday Ticket.

But the subscribers' attorneys often pointed out that the \$102.74 figure did not represent what the class paid, as many DirecTV subscribers who received a free year never ended up subscribing to the package and were not damaged.

According to the NFL, what the jury did was take a number floated by the subscribers — \$294 — as a list price during the last few years of the class period, and subtract \$102.74 to come up with an "overcharge" the subscribers paid.

The results "replicate the jury's damages awards perfectly for the residential class, and within two cents for the commercial class," the NFL said in the motion.

Brian L. Stekloff of Wilkinson Stekloff LLP, who represents the NFL, argued on Wednesday that the jury clearly rejected the models presented by the subscribers' two experts, and then came up with its own model.

At the class certification stage, Judge Gutierrez ruled that the experts could be used at trial to establish classwide injuries, damages and anticompetitive effects of the NFL's actions. But with the jury having clearly rejected all three damages models presented, the classes proved none of these things at the trial, Stekloff argued.

"This is why the verdict is inconsistent with the ... underlying model upon which you let this case go forward," Stekloff said.

The jury has to accept one of the models as valid, but "we know that they did not accept [any] of those

models," Stekloff also said.

The judge appeared to agree with the NFL's theory of how the jury reached the award, and said that "there's no doubt about what [the jury] did."

Seltzer argued that because the verdict fell within the range of options presented, it's inappropriate for the judge to speculate as to the jury's reasoning and find it wasn't rational.

Perhaps the jury had doubts about what amount the class members paid, and then used the \$102.74 figure, he said.

"That's exactly consistent with Your Honor's instructions to the jury," Seltzer said. "So the first issue is, what did people really pay?"

He also argued the jury may have taken the \$294 figure of what the class may have paid in the last few years and considered it against the defense figure of \$102.74. The jury still could have accepted the \$7 billion damages model but just disagreed with the suggested award because the model concluded the class should have paid nothing, he said.

Using the figures that way, the jury may have said "we'll effectively try to resolve the dispute by saying at least the difference between the two would be the amount people were overcharged," Seltzer said. "And that would yield exactly the number they came up with."

"That would be a perfectly rational way of doing business for the jury," Seltzer added. "And therefore, Your Honor has no basis to upset the jury's verdict on the theory that they somehow disobeyed Your Honor's instructions. That's a non sequitur. They didn't do any such thing."

Seltzer also said "we have no idea what they did. Unless you bring the jury back and cross-examine them, there's no way to know what they did. And that's exactly the situation where courts have said there's no basis to overturn the jury's verdict."

The judge did not make a ruling at the hearing.

The subscribers are represented by Ian B. Crosby, Marc M. Seltzer, Kalpana Srinivasan, Amanda Bonn, William C. Carmody, Seth Ard, Tyler Finn, Eliza Finley and Ian M. Gore of Susman Godfrey LLP, Scott Martin, Sathya S. Gosselin, Christopher L. Lebsock, Samuel Maida and Farhad Mirzadeh of Hausfeld LLP and Howard Langer, Edward Diver, Peter Leckman and Kevin Trainer of Langer Grogan & Diver PC.

The NFL and individual NFL clubs are represented by Rakesh N. Kilaru, Beth A. Wilkinson, Brian L. Stekloff, Max J. Warren, Anastasia M. Pastan and Jeremy S. Barber of Wilkinson Stekloff LLP and Neema T. Sahni, Gregg H. Levy, Derek Ludwin and John S. Playforth of Covington & Burling LLP.

The case is In re: National Football League's Sunday Ticket Antitrust Litigation, case number 2:15-ml-02668, in the U.S. District Court for the Central District of California.

--Editing by Michael Watanabe.



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Philip Morris Nicotine Pouches Are Deceptive, Lawsuit Claims

By **Aaron Keller**

Law360 (July 31, 2024, 6:08 PM EDT) -- Philip Morris violated advertising and trade practices laws by selling "highly addictive" nicotine products designed and packaged to resemble breath mints and deceptively telegraphed that the tobacco-free pouches were healthier than cigarettes, according to a proposed class action in Connecticut federal court.

A 44-page **complaint** filed Tuesday accused Connecticut-based Philip Morris International Inc. and subsidiary Swedish Match North America LLC of marketing ZYN, the product at issue, to adolescents and young adults as a purportedly healthy tobacco alternative by touting its "food-grade flavorings," "natural additives" and ingredients "commonly found in chewing gum."

The company also employed social media influencers known in some media accounts as "Zynfluencers" to advertise the product, the complaint points out.

"Oral nicotine pouches are the latest chapter of the tobacco-company playbook, including the playbook of [the] defendants, to hook adolescents and young adults on nicotine," the filing stated.

"ZYN is sold in containers (referred to as 'cans') deceptively designed to look like containers for a popular brand of mints," it also said. "The pouch itself resembles a piece of gum, as opposed to anything people would affiliate with a nicotine or tobacco product."

According to the complaint, Philip Morris further tricked customers into thinking ZYN was healthy by saying it contained "minerals used in baked goods" and sweeteners "often used in beverages and confections."

"ZYN was designed to be harmful to anyone using ZYN in that it contained the addictive drug, nicotine, and served no purpose other than delivering that addictive drug to users," the document alleged.

The lawsuit also claimed that the company targeted ZYN to "adolescents and young adults" who wished to use the product "discretely" where cigarettes could not be used.

In a statement to Law360 on Wednesday, a Philip Morris spokesperson said the company was aware of the lawsuit.

"We believe the complaint is without merit, and we will vigorously defend it," the spokesperson said.

The complaint alleged that Philip Morris developed and patented ZYN in 2015 after the Tobacco Control Act of 2009 and other anti-smoking laws cut into the traditional market for cigarettes.

The company began seeking "alternative means of administering nicotine in a pleasurable manner" while avoiding the harms of smoking, according to patent application documents cited and quoted in the complaint.

The resulting product, ZYN, skirts some traditional regulations because it does not contain tobacco leaves, according to the filing.

Lead plaintiff Ethan Norris, of Florida, claimed that he began using ZYN when he was under 18

because he thought it was a "safer and healthier alternative to smoking and believed that ZYN could help him stop using e-cigarettes, which it failed to do."

The complaint accused the defendant companies of deceptive and unfair trade practices under Florida law. It also alleged one violation of a Florida statute banning false and misleading advertising and one count of common-law unjust enrichment.

The lawsuit appears to have been filed in Connecticut because Philip Morris moved its corporate headquarters to Stamford in 2022.

In recent press releases, Philip Morris said its vision involved "actively delivering a smoke-free future."

"Since 2008, PMI has invested over \$12.5 billion to develop, scientifically substantiate and commercialize innovative smoke-free products for adults who would otherwise continue to smoke, with the goal of completely ending the sale of cigarettes," a Tuesday press release said.

Smoke-free products currently account for about 38% of Philip Morris' sales, the company has indicated.

The company's second-quarter financial report, dated July 23, said ZYN shipments shot up to 135.1 million cans, a 50.3% jump over the previous year.

Attorneys for the proposed class did not respond to a Law360 inquiry.

Norris is represented by James J. Reardon Jr. of Reardon Scanlon LLP, Joshua D. Arisohn, Philip L. Fraietta and Brittany S. Scott of Bursor & Fisher PA, and Scott R. Drury of Drury Legal LLC.

Counsel information for the defendants was not immediately available.

The case is Norris v. Philip Morris International Inc. et al., case number 3:24-cv-01267, in the U.S. District Court for the District of Connecticut.

--Editing by Rich Mills.



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Tampax, Kotex Tampons Hid Unsafe Lead Levels, Suits Say

By **Bonnie Eslinger**

Law360 (July 31, 2024, 10:04 PM EDT) -- Kimberly-Clark and Procter & Gamble were each slapped with putative class actions in California federal court Tuesday claiming that some tampon products contain toxic levels of lead — and that the information was hidden from consumers.

Both complaints, filed by California consumer Allison Barton, claim deceptive advertising, unfair competition and violations of the state's Consumer Legal Remedies Act.

Each suit states that the "unfair, unlawful, deceptive, and misleading advertising and labeling of the products" was approved by the company and its agents.

The suit against The Procter & Gamble Co. claims that it didn't disclose or "materially omits" that its Tampax Pearl tampons contain an "unsafe amount" of the chemical element. The same allegation is lodged in the separate suit against KimberlyClark Corp. based on its U by Kotex Click tampons.

The suits both say the claims are based on independent scientific testing and analysis, without disclosing who conducted the analysis or when.

California law sets a maximum allowable level of 0.5 micrograms of lead per day, the suits state. The "ordinary and expected use of the products" exposes users to "far more" than that amount, both suits claim.

"Defendant knows or should know that the products contain lead," the suits say, adding that the companies have a duty to disclose the lead in their products based on the health risks.

The advertising statements made by the companies about the products would likely lead reasonable consumers to believe that the products are safe and free of harmful elements, the suits say.

The Tampax products, for example, are labeled with such statements as "free of elemental chlorine bleaching," "free of dyes," and "clinically rested gentle to skin," the suit against Procter & Gamble says.

Similarly, the Kotex products at issue state on their labels that the tampons contain "no harsh ingredients" and are "pesticide free," "gynecologist tested" and "BPA free," the suit says.

These representations are misleading based on the lead contained in the products, according to the complaints.

The federal court is appropriate for the state law claims because the cases are proposed class actions and the claims of the proposed class members in each case exceed \$5 million in the aggregate, the suits state.

"Lead affects almost every organ and system in the body and accumulates in the body over time, leading to severe health risks and toxicity, including inhibiting neurological function, anemia, kidney damage, seizures, and in extreme cases, coma and death," the suits each state.

The lead in the products is particularly problematic because they are inserted vaginally when used, the suits add.

"Thus, unlike food containing lead that is consumed orally, the products do not metabolize, and the lead contained in the products is not filtered by the liver," the suits each state. "The lead contained in the products can directly enter the bloodstream."

That last point, the complaints note, is underscored by a July study published in the scientific journal *Environment International*. Led by a UC Berkeley researcher, the study determined that tampons from several brands can contain toxic metals like lead, arsenic and cadmium. A post on the UC Berkeley School of Public Health states that the study is the first to measure metals in tampons. The products analyzed are not identified.

The lawsuits also cite a 2023 fact sheet from the World Health Organization that says exposure to lead "can affect multiple body systems and is particularly harmful to young children and women of childbearing age."

California's Proposition 65 establishes a maximum allowable dose level, or MADL, of 0.5 micrograms of lead per day for reproductive toxicity, the suits say. According to the independent laboratory testing, the Tampax products contain 0.181 mcg of lead per gram of product and the Kotex products contain 0.189 mcg of lead per gram of product, the suits say, adding that the tampons are sold in various sizes, which have different gram weights.

"Per day, based on an average number of tampons used, consumers are exposed to lead in excess of the MADL, irrespective of the size of the product used," the suits both say.

Reasonable consumers, like Barton, would not know or suspect that tampons contain lead, the suits assert.

Kimberly-Clark and Procter & Gamble "knew, or should have known, that the products contain lead and willfully or intentionally failed to disclose this fact to consumers," the suits state.

The suits seek to represent proposed classes of California consumers who within the last four years purchased the tampons. Each complaint states that their respective class consists of hundreds of thousands of purchasers throughout the state.

Absent the class actions, the companies' "unlawful conduct will continue without remedy" while each "profits from and enjoys its ill-gotten gains," the suits state.

The litigation filed on behalf of Barton seeks compensatory and monetary damages for the plaintiff and the proposed class members, along with injunctive relief and attorney fees and costs, among other relief.

Kimberly-Clark provided a statement to Law360 that said, "U by Kotex Click® is a safe, trusted brand" and Kimberly-Clark "adheres to rigorous safety and quality requirements, while complying with all relevant regulatory and legal requirements."

"This newly filed lawsuit notably does not claim that anyone has been injured. The allegation that the marketing of the product has caused economic harm to consumers is entirely unfounded. We look forward to vigorously defending the brand that women have trusted for decades," Kimberly-Clark said.

Barton's lawyer, Naomi Spector of KamberLaw LLP, says it's the law firm's policy not to comment on active litigation.

Procter & Gamble did not immediately respond Wednesday to a request for comment on the allegations.

Barton is represented by Naomi B. Spector of KamberLaw LLP.

Counsel information for Procter & Gamble and Kimberly-Clark was not available Wednesday.

The cases are Allison Barton v. The Procter & Gamble Company, case number 3:24-cv-01332, and

Allison Barton v. Kimberly-Clark Corporation, case number 3:24-cv-01337, both in the U.S. District Court for the Southern District of California.

--Editing by Abbie Sarfo.

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UFC Fighters' \$335M Wage Deal Rejected Amid Scrutiny

By **Matthew Perlman**

Law360 (July 31, 2024, 10:17 PM EDT) -- A Nevada federal court has rejected a \$335 million deal that would end claims from mixed martial arts fighters accusing Ultimate Fighting Championship of suppressing their wages, setting up a potential trial later this year.

U.S. District Judge Richard F. Boulware II issued a minute order on Tuesday denying motions for preliminary approval of a **settlement** covering two cases against UFC, saying that an explanation of the reasoning for the decision would be issued later.

The judge also set a tentative Oct. 28 trial date in one of the cases, which the order said would be finalized at a status conference in August.

The fighters **reached an initial deal** in March with UFC parent TKO Group Holdings Inc. over claims the promoter used coercive contracts and other tactics to eliminate competition from rivals, allegedly suppressing fighter wages by as much as \$1.6 billion.

The settlement covers claims for two class actions, one filed in 2014 by former UFC fighter Cung Le and a second filed by former UFC fighter Kajan Johnson in 2021, which claims the conduct challenged in the Le action continued after discovery closed in that case in mid-2017.

Judge Boulware raised concerns about the settlement during a hearing in June, saying he wanted to see "life changing" money for the fighters, who have gone through 10 years of litigation. This prompted a revised distribution plan, but the court was not convinced by the changes, according to Tuesday's order.

UFC said in a statement Wednesday that the company disagrees with the ruling and believes the decision disregards the expertise of counsel on both sides, as well as the mediator, who all have decades of experience in antitrust case law.

The statement also said the ruling prevents the athletes from receiving what they have argued is in their best interest and unwinds a settlement the fighters' attorneys have said is an excellent result that far surpasses a typical antitrust class action settlement.

"Additionally, by taking the unusual step of denying the settlement at this preliminary approval stage, the judge is also denying the athletes their right to be heard during this pivotal moment in the case," UFC said.

A representative for the fighters said in a statement on Wednesday that they respect the court's ruling rejecting the settlement and will be "moving forward full speed on all fronts," preparing for trial in the Le case while conducting discovery in the Johnson action.

At the same time, the fighters are also open to reengaging the UFC to see if they can reach a new deal that addresses the court's concerns, according to the statement.

"In particular, to eliminate several of the issues expressed by the court regarding the prior proposed combined settlement of Le and Johnson, plaintiffs believe the best path forward, if a new settlement becomes a possibility, is to attempt to resolve the two cases separately, focusing first on the Le case given its imminent trial date, and using the progress made to date as a jumping off point for further

discussions," the fighters' representative said. "At root, plaintiffs want nothing more and nothing less than justice for the professional MMA fighters we have represented for more than 10 years in the most efficient and effective way possible."

The statement from UFC said the company is considering its options, including a potential appeal, but has also started talking with the fighters "who have expressed a willingness to engage in separate settlement discussions for the Le and Johnson cases."

In the earlier version of the \$335 million settlement, the Le class was set to received 75% of the funds — after attorney fees and costs — due to an earlier filing date and potentially greater damages. The revised allocation would have handed the nearly 1,120 Le class members a bigger chunk of the deal, 90%, with the remaining 10% going to the approximately 1,300 Johnson class members.

The fighters are represented by Eric L. Cramer, Michael Dell'Angelo, Ellen T. Noteware, Patrick F. Madden, Najah A. Jacobs and Joshua P. Davis of Berger Montague, Richard A. Koffman, Benjamin D. Brown, Daniel H. Silverman and Daniel Gifford of Cohen Milstein Sellers & Toll PLLC, Joseph R. Saveri, Kevin E. Rayhill, Christopher K.L. Young and Itak Moradi of Joseph Saveri Law Firm LLP, Don Springmeyer of Kemp Jones LLP, Robert C. Maysey and Jerome K. Elwell of Warner Angle Hallam Jackson & Formanek PLC, and Crane Pomerantz of Clark Hill PLC.

The UFC is represented by Christopher S. Yates, Aaron T. Chiu, Sean M. Berkowitz, Laura R. Washington and David L. Johnson of Latham & Watkins LLP, William A. Isaacson, Jessica E. Phillips, Brette M. Tannenbaum and Yotam Barkai of Paul Weiss Rifkind Wharton & Garrison LLP, and Donald J. Campbell and J. Colby Williams of Campbell & Williams.

The cases are *Cung Le et al. v. Zuffa LLC*, case number 2:15-cv-01045, and *Johnson et al. v. Zuffa LLC et al.*, case number 2:21-cv-01189, both in the U.S. District Court for the District of Nevada.

--Additional reporting by Bonnie Eslinger. Editing by Lakshna Mehta.

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Wash. Hospital Workers Keep \$230M Wage Win, Attys Get 30%

By **Rachel Riley**

Law360 (July 31, 2024, 9:36 PM EDT) -- A Washington state court rejected a hospital system's attempt to undo its nearly \$230 million loss in a class wage and hour case, ruling Wednesday that jurors reasonably relied on expert damages calculations, while also signing off on a roughly \$70 million attorney fee award for class counsel.

King County Superior Court Judge Averil Rothrock **declined** to set aside or slash the **\$229 million judgment** she entered in May against Providence Health Services for time clock rounding and meal break violations. In her decision, the judge recognized a statistician's testimony and other documentary evidence as a "reasonable basis" for the jury's award to the workers, even though the hospital operator contested the expert's calculations.

Judge Rothrock **ruled in January** that Providence was liable for violating a state wage law by rounding time worked to the nearest 15-minute increment for payroll purposes and failing to provide second meal breaks for staff during shifts longer than 10 hours.

Jurors decided during an April damages trial that the healthcare system owes nearly \$100 million to roughly 33,000 current and former hourly workers at Providence facilities across Washington state. The judge then **doubled that verdict** under a state law that entitles employees to twice the damages when an employer willfully withholds wages owed and tacked on almost \$33 million in prejudgment interest.

Providence contended in a **post-judgment motion** that the workers' expert witness, statistician Brian Kriegler, erred in factoring in overtime rates into his equation to determine how much the employees should be compensated for the missed meal breaks. The healthcare network challenged the award under Civil Rule 59(a), which allows a state court to vacate a verdict and order a new trial if there's no evidence to justify the decision or if the court erred in applying the law during the trial that the moving party objected to.

Judge Rothrock said Wednesday the rule "is not intended to permit a trial court to put its own stamp on a jury's calculation of damages as Providence's motion invites here."

"The court, aware of its important though confined role, is satisfied that the jury's verdict is supported by substantial evidence in the record," the judge wrote in her order. "This conclusion applies equally to Providence's arguments for remittitur or a new trial."

In another motion, the hospital operator urged Judge Rothrock to decertify one of the two worker classes that has been referenced in case filings as the second meal period class. It argued that the representative of that class, Naomi Bennett, never qualified for a second meal break because she was never scheduled to work shifts lasting longer than 8 hours.

Judge Rothrock rejected the decertification motion as untimely **in another order**. She noted that Providence did not raise concerns regarding Bennett's adequacy as a class representative for the purposes of determining liability following her January ruling that Providence had violated state wage law.

The judge further disagreed with the employer's points about Bennett, who testified at the damages trial that she occasionally worked longer shifts while employed as a nursing assistant at Providence

medical center in Everett, Washington, because the facility was understaffed.

"Here, the court finds that plaintiff Bennett was an hourly employee in the class period and was subject to the same course of conduct that gave rise to both her individual and class claims for damages: Providence's failure to provide Ms. Bennett and class members with a second meal period when they worked more than ten hours in a shift," Judge Rothrock wrote.

In a **third order**, the judge granted a request from class counsel HKM Employment Attorneys LLP and Stutheit Kalin LLC for an attorney fee award equal to 30% of the common fund plus post-judgment interest. The court also ordered service awards of \$40,000 to Bennett, \$15,000 to co-class representative Janet Hughes and \$2,500 each to seven class members who were deposed.

Judge Rothrock declined some elements of the plaintiffs' fee motion, including that the fee and service awards be part of a supplemental judgment. However, the judge said she would enter a supplemental judgment against Providence for the plaintiffs' cost once the amount was finalized, seeking further information on roughly \$220,000 related to expert services, trial vendor costs and travel.

Once the awards have been distributed from the common fund, Judge Rothrock ordered, the workers shall seek the court's approval of "a plan of allocation of the remaining common fund that will distribute the remaining net funds to class members in direct proportion to their actual wage loss," and the "actual costs of third-party claims administration and expert fees associated with the calculation of distributions awarded."

HKM's Jason Ritterer, who represented the worker classes, applauded the judge's orders.

"As we expected, the court has upheld the jury's unanimous decision to hold Providence accountable for its years of willful wage violations committed against its hourly caregivers," Ritterer told Law360. "Given its impending change in leadership, Providence now has the opportunity to take accountability and pay its employees the wages they are owed."

Providence announced earlier in July that it is promoting Chief Operating Officer Erik Wexler to take the helm of the healthcare network in January 2025, following the retirement of its current CEO, Dr. Rod Hochman.

A Providence spokesperson told Law360 that the hospital system "continues its appeal of the trial court's rulings, including the recent orders regarding post-trial motions and award of attorney fees," and declined to comment further.

Providence affiliate Swedish Health Services, which operates several Seattle-area hospitals, **faces similar allegations** in another class action.

The workers are represented by Jason Ritterer, Donald W. Heyrich, Rachel M. Emens, Henry Brudney and Joseph W. Wright of HKM Employment Attorneys LLP, and Peter D. Stutheit, Kyann C. Kalin and Megan R. Lemire of Stutheit Kalin LLC.

Providence is represented by Paula L. Lehmann, Melissa Mordy, Boris Gaviria, Kathryn S. Rosen, Margaret Burnham and Lance Pelletier of Davis Wright Tremaine LLP.

The case is Bennett et al. v. Providence Health & Services, case number 21-2-13058-1, in King County Superior Court.

--Editing by Covey Son.