

CrowdStrike faces shareholder lawsuit after global IT failure

 [itpro.com/software/crowdstrike-faces-shareholder-lawsuit-after-global-it-failure](https://www.itpro.com/software/crowdstrike-faces-shareholder-lawsuit-after-global-it-failure)

Nicole Kobie

August 1, 2024

(Image credit: Getty Images)

CrowdStrike faces lawsuits after it pushed out an update that sparked a global IT outage two weeks ago — the first of which comes from its own shareholders.

On July 19, CrowdStrike sent out a faulty update to its Falcon detection system, crashing 8.5 million devices running Microsoft Windows, wreaking havoc across media, airlines, banks and more.

CrowdStrike said on Monday that the majority of affected devices should be back to normal.

Yesterday, a group of shareholders filed a proposed class-action lawsuit in a US federal court, claiming that CrowdStrike misled them with regard to how software testing worked at the company, an allegation CrowdStrike denies.

That comes amid reports Delta is also considering seeking damages.

CrowdStrike Investor action

The lawsuit alleges that CrowdStrike misled or failed to tell investors that it had "instituted deficient controls in its procedure for updating Falcon and was not properly testing updates to Falcon before rolling them out to customers," according to a [statement](#) released by the legal team.

The statement added that the "inadequate software testing created a substantial risk" of a major outage, and that "ultimately created substantial reputational harm and legal risk to CrowdStrike."

Get the ITPro. daily newsletter

Receive our latest news, industry updates, featured resources and more. Sign up today to receive our FREE report on AI cyber crime & security - newly updated for 2024.

The court filing alleges that cybersecurity expert commentary following the outage has "provided evidence that CrowdStrike was taking insufficient precautions regarding such updates, including running insufficient tests."

In the 12 days following the outage, CrowdStrike's market value slid by \$25 billion, falling by 11% after the flawed update, a further 13% after CEO George Kurtz was called to congress to testify about the event, and then a further 10% on news that Delta Air Lines had hired a prominent attorney to seek damages, according to the investors' legal team.

The court filing added: "As a result of these materially false and misleading statements and omissions, CrowdStrike stock traded at artificially high prices" during the period referenced by the case.

CrowdStrike said in a statement to *Reuters*: "We believe this case lacks merit and we will vigorously defend the company."

The lawsuit was filed by Robbins Geller Rudman & Dowd on behalf of the Plymouth County Retirement Association and filed in Austin, Texas, where CrowdStrike is headquartered. It seeks unspecified damages.

Looming lawsuits

The shareholder lawsuit is the first to be filed, but CrowdStrike could face further legal action. The next might come via Delta Air Lines, with the CEO saying the company has "no choice" but to seek damages.

RELATED WHITEPAPER

Get tips on how to leverage composable ERP

Delta CEO Ed Bastian told *CNBC* the outage cost the airline \$500m (£390m) in lost revenue as well as costs to compensate stranded customers after more than 5,000 flights were cancelled. Delta had to manually reset 40,000 servers across the company.

"We have to protect our shareholders," Bastian said. "We have to protect our customers, our employees, for the damage, not just to the cost of it, but to the brand, the reputational damage."

He added: "If you're going to be having access, priority access to the Delta ecosystem in terms of technology, you've got to test the stuff. You can't come into a mission critical 24/7 operation and tell us we have a bug."

CrowdStrike is yet to respond to a request for comment from *ITPro*.
Nicole Kobie

TOPICS

Crowdstrike

Page Printed From:
<https://www.law.com/dailybusinessreview/2024/08/01/mdl-judge-faces-ruling-on-who-should-be-in-charge-of-claims-by-ftx-customers/>



NOT FOR REPRINT

MDL Judge Faces Ruling on Who Should Be in Charge of Claims by FTX Customers

In a response to three questions posed by the federal district court in Miami, Adam Moskowitz, managing partner at the Moskowitz Law Firm, announced on Thursday that all FTX victims may actually be made "whole" in the multidistrict litigation.

August 01, 2024 at 11:57 AM

Cryptocurrency



Michael A. Mora



What You Need to Know

- Three judges have found themselves in a complicated jurisdictional fight.
- Co-counsel for the class in the multidistrict litigation cases are pitted against the FTX bankruptcy lawyers.
- At issue is \$11 billion in forfeiture to the victims of Sam Bankman-Fried’s criminal actions.

Co-lead counsel at Boies Schiller Flexner and the Moskowitz Law Firm filed motions Thursday, announcing that all victims of the FTX collapse may actually be made “whole” in the multidistrict litigation cases and asking a federal district court in Miami to order FTX Trading Ltd. to stop pursuing a determination that the claims in the MDL are part of the bankruptcy estate.

David Boies, chairman at [Boies Schiller Flexner](#), and Adam Moskowitz, managing partner at the [Moskowitz Law Firm](#), are co-lead counsel for the class in the FTX MDL cases before U.S. District Judge Michael Moore in the Southern District of Florida. They argued that Moore—and not U.S. Chief Bankruptcy Judge John Dorsey in the District of Delaware—should be in charge of claims by FTX’s defrauded customers.

“Judge Moore stayed discovery in this case so he has time to make the proper ruling on pending issues, and he should be allowed to, and no other litigant in any other court should be able to dictate what the MDL court does or does not do,” Moskowitz said.

“All three of these great federal courts should try their best to work together for the benefit of all the FTX victims,” Moskowitz added. “Already, over \$600 million has been paid to these bankruptcy lawyers and players. So we just all need to make sure we’re doing everything we can for all FTX victims in the most efficient and coordinated manner.”

Stephanie Wheeler, a partner at [Sullivan & Cromwell](#) who is counsel for third-party petitioner FTX Trading and its affiliated debtors and debtors-in-possession, did not respond to a request for comment.

Still, the bankruptcy lawyers have since argued in court filings that the now-bankrupt cryptocurrency exchange owns substantial money misappropriated by founder Sam Bankman-Fried, so some of the forfeited funds should be allocated to FTX's creditors through the bankruptcy process.

Now, Boies and Moskowitz are seeking a hearing on the motion to enjoin FTX Trading under the [All Writs Act](#).

Bankman-Fried, who founded FTX and the cryptocurrency trading firm Alameda Research, was [convicted by a jury](#) in November of misappropriating billions in customer funds. Following his conviction, U.S. District Judge Lewis Kaplan, who presided over the Southern District of New York criminal trial, ordered him to pay \$11 billion in forfeiture to the victims of his fraudulent actions.

In one motion, the MDL lawyers responded to three questions proposed by the court: first, the court should not defer ruling on the plaintiffs' motion for preliminary approval until after the issues raised in the adversary proceeding have been resolved by the bankruptcy court.

Second, the court should "independently examine the issues raised by the FTX debtors in the adversary proceeding." Third, the FTX "debtors' notice and the related adversary proceeding should have no impact on plaintiffs' proposed settlements with the promoter settling defendants," according to one of the motions.

In doing so, the MDL lawyers argued that the bankruptcy court does not have jurisdiction over the MDL action. In addition, the MDL lawyers alleged in a second motion that the bankruptcy lawyers preferred the class to accept a "low-value bankruptcy plan" while they cut better deals with FTX Trading's former co-conspirators.

However, for the latter, the MDL lawyers said that is a weak argument based on the U.S. Supreme Court ruling in [Harrington v. Purdue Pharma](#), which makes clear that "victims are owners of their own claims against non-debtor third parties and the bankruptcy process cannot take that away without their consent."

Still, bankruptcy lawyers asked for a preliminary injunction in an adversary proceeding they filed against the venture capital and insider plaintiffs, in "what amounts to a collateral attack on this court's authority over its own proceedings," the MDL lawyers wrote. "If granted, the litigants in this case will not be free to comply with this court's orders and deadlines."

To put the bankruptcy lawyers' position in context, the MDL lawyers cited the reaction of Judge Frank Easterbrook of U.S. Court of Appeals for the Seventh Circuit [in a similar](#) "collateral attack on his authority over his own court."

"On learning of this preposterous order (I practically fell out of my chair, and I have a sturdy chair)," Easterbrook prefaced before entering an order—"not an invitation"—in which he threatened to sanction litigants in a case for obtaining a subsequent court order that conflicted with an order he had entered.

NOT FOR REPRINT

Copyright © 2024 ALM Global, LLC. All Rights Reserved.

Arbor Realty Accused of Misleading on Loan Portfolio (1)

By Martina Barash

- **COURT:** E.D.N.Y.
- **TRACK DOCKET:** [No. 1:24-cv-05347](#)

Bloomberg Law News 2024-08-02T09:51:40948277993-04:00

Arbor Realty Accused of Misleading on Loan Portfolio (1)

By Martina Barash 2024-08-01T17:59:33000-04:00

- **COURT:** E.D.N.Y.
- **TRACK DOCKET:** [No. 1:24-cv-05347](#)

Arbor Realty Trust Inc. faces a proposed class action accusing it of hiding a “toxic real estate portfolio of mobile homes” and income problems that caused stock drops when revealed in short-seller reports.

After Arbor touted its financials from early 2021 through early 2023 in press conferences and earnings calls, NINGI Research and Viceroy Research both slammed the company’s loan book and transparency, Lois Martin says in her complaint, which was filed Wednesday in the US District Court in the Eastern District of New York.

Arbor’s stock price declined on March 14-15, 2023, following NINGI’s report, and on Dec. 5-6, 2023, following Viceroy’s, Martin says. Shares fell again on July 12, 2024, following news of probes by federal prosecutors and the Federal Bureau of Investigation, she says.

“The claims are without merit, and we look forward to prevailing early in the litigation process,” Arbor said Thursday in a statement provided by their attorney.

The complaint estimates the proposed class consists of hundreds or thousands of members.

Martin seeks damages on her securities fraud claims.

Levi & Korsinski LLP represents Martin.

The case is Martin v. Arbor Realty Trust, Inc. , E.D.N.Y., No. 1:24-cv-05347, complaint 7/31/24 .

Five Below Hit With Shareholder Suit Amid Stock Price Slump

B [bloomberglaw.com/product/blaw/bloomberglawnews/litigation/XKBKANO000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/litigation/XKBKANO000000)

Litigation

Photographer: Angus Mordant/Bloomberg

Aug. 2, 2024, 10:54 AM PDT



Matthew Bultman

Reporter



- Suit follows departure of longtime CEO, sales forecast cut
- Investors allege retailer hid economic pressures from them

Five Below Inc. was sued by a shareholder who alleges the discount retailer misled investors about its financial strength and operations.

The lawsuit comes after Five Below in June reported weaker-than-expected results and cut its sales forecast for the rest of the year. Five Below last month announced the departure of its longtime CEO, Joel Anderson.

Investors allege Five Below had presented rosy sales projections, while hiding from them economic pressures that would interfere with the company's strategic operations and prevent it from executing successfully.

By July, "investors discovered that FIVE's financial and operational problems were significantly worse than represented," the complaint, filed Thursday in the US District Court for the Eastern District of Pennsylvania, said.

The stock of Philadelphia-based Five Below has declined almost 67% year-to-date, hitting \$70.52 on Thursday, according to Bloomberg News.

Five Below in June reported first-quarter sales that missed expectations, in part because the company had stocked more Squishmallows—a popular plush toy—than shoppers wanted to buy.

The company provided “overwhelmingly positive statements to investors while, at the same time, disseminating materially false and misleading statements and/or concealing adverse facts,” the lawsuit said.

A representative for Five Below didn’t immediately respond to a request for comment.

Levi & Korsinsky LLP and Bielli & Klauder LLC represent the shareholder.

The case is Himes v. Five Below Inc. , E.D. Pa., No. 24-cv-03638, 8/1/24 .

To contact the reporter on this story: Matthew Bultman in New York at mbultman@bloombergindustry.com

To contact the editor responsible for this story: Michael Smallberg at msmallberg@bloombergindustry.com

[Browse More Stories in Litigation](#)

© 2024 Bloomberg Industry Group, Inc.

All Rights Reserved

Adidas shareholders fight against dismissal of securities suit over failed Kanye West partnership

 [courthousenews.com/adidas-shareholders-fight-against-dismissal-of-securities-suit-over-failed-kanye-west-partnership](https://www.courthousenews.com/adidas-shareholders-fight-against-dismissal-of-securities-suit-over-failed-kanye-west-partnership)

Monique Merrill

The German sportswear brand dropped Ye in 2022 after the rapper made a series of antisemitic and racist public remarks, leading to a massive plummet in profit earnings.

A sign advertises Yeezy shoes made by Adidas at Kickclusive, a sneaker resale store, in Paramus, N.J., Oct. 25, 2022. (Seth Wenig/AP/File)

(CN) — Adidas shareholders argued in federal court Thursday against dismissal of their accusations that the German sportswear brand committed security fraud via its partnership with Ye, the controversial artist formerly known as Kanye West.

HRSA-ILA Fund filed the class action against Adidas in April 2023, arguing the company violated the Securities Exchange Act's anti-fraud provision by failing to disclose Ye's problematic behavior within the company to investors.

Adidas severed ties with Ye and his Yeezy brand in October 2022 after the rapper made a series of antisemitic and racist remarks in public and on social media, leading to a plunge in the company's profit earnings.

Central to the shareholders' argument is the accusation that Adidas' business risk disclosure implies that the company had not encountered the risk yet, though the plaintiffs say Adidas was already aware of the rapper's controversial remarks.

Shareholder attorney Daniel Tyre-Karp of the Rosen Law Firm argued to U.S. District Judge Karin Immergut Thursday that Adidas should have either disclosed the risk had occurred or omitted mentioning the risk entirely.

He said the disclosure misled investors into believing the chance for that specific risk was hypothetical.

"They cannot say that a risk could impact a company when that risk has already taken place," Tyre-Karp said.

Included in the company's business risk disclosure was a section warning that "unethical business practices on the part of business partners or improper behavior of individual athletes, influencers or partners in the entertainment industry could have a negative spill-over effect on the company's reputation, lead to higher costs or liabilities or even disrupt business activities."

The shareholders maintain that the company had known for years that Ye had a propensity for antisemitic remarks and misled investors about the risk the celebrity partnership posed to the company.

Attorneys for the plaintiffs pointed to an article from the Wall Street Journal in November 2022 that detailed Adidas executives' discussions about the risk of their staff's exposure to Ye, including that the rapper showed pornographic videos to executives and that his behavior had been a topic of discussion among senior leaders for years. He argued that Ye's misconduct surfacing to public awareness and the company experiencing backlash was inevitable.

"When the truth came out, the stock price went down," Tyre-Karp said.

Immergut, a Donald Trump appointee, questioned whether the drop in Adidas' share prices was due to Ye's public statements or the revelation that Adidas was likely to terminate its relationship with Ye. She also questioned whether the company could have reasonably predicted his public statements.

"Do you agree that people can change?" Immergut asked the plaintiffs.

The judge also disregarded the plaintiffs' argument that Adidas failed to adhere to the core requirements of the Global Reporting Initiative despite saying otherwise on the basis that the initiative is open-ended and not a requirement under United States securities law.

The lawsuit names Adidas and the company's former chief executive officer Kasper Rorstead and chief financial officer Harm Ohlmeyer as defendants, though Rorstead has yet to be served.

Adidas holds that the case is a business issue, not securities fraud, and accused the opposing counsel of incorrectly interpreting the risk disclosure and applying fraud by hindsight.

"That disclosure is not warning of the risk of celebrity misbehavior," Adidas attorney Maeve O'Connor of Debevoise and Plimpton said. "It doesn't say behavior could occur — it almost takes it as a given."

Immergut did not indicate when she would rule.

Since Adidas dropped Ye it has been selling some of the leftover stock from Ye's Yeezy brand and donating a portion of the profits to anti-hate groups.

Categories / Business, Entertainment, Securities



Tesla logo displayed on the exterior wall of the automakers' factory in Fremont, California. File photo.

NEWS

'When Does It End?,' Chancellor Asks Defense Counsel in Dispute Over Musk Compensation

Chancellor Kathaleen St.J. McCormick pressed attorneys on the scope of their request to the court and what authority the court has to grant it.

August 02, 2024 at 01:52 PM

🕒 4 minute read

Corporate Governance



Ellen Bardash



Tesla logo displayed on the exterior wall of the automakers' factory in Fremont, California. File photo.

Attorneys for Elon Musk and Tesla argued on Friday that despite there being no directly comparable Delaware case law permitting it, Chancellor Kathaleen St. J. McCormick should allow Tesla shareholders' vote to ratify the compensation plan she previously ruled should be rescinded.

McCormick pressed both David Ross of Ross Aronstam & Moritz and Rudolf Koch of Richards, Layton & Finger first on the scope of what the defendants are asking for, then on what precedent, if any, would give her the authority to grant that request—ratification following an adjudicated breach of the duty of loyalty.

Koch said the court is being asked to decide whether the shareholder was coerced and whether it was fully informed. If McCormick were to agree with the plaintiff that there was coercion, he said, she could then choose to hold an evidentiary hearing.

"Where does it end in your world?" McCormick asked. "When does the trial end?"

Ross said the motion doesn't seek to vacate the court's factual findings, only the remedy granted, arguing the Tesla shareholders who participated in the vote were well informed in large part because they had the court's decision to refer to.

"In this setting, what we are seeking to do is give effect to the stockholder vote," Ross said. "We don't think the fact that there was a defect in the process should make it impossible for stockholders to get the benefit."

At Tesla's annual meeting in June, 72% of shareholders voted in favor of the compensation plan, valued at upward of \$55 billion, as well as in favor of reincorporating the company in Texas. The vote came about two weeks after McCormick decided to hold back on ordering Musk and Tesla not to argue her post-trial decision is unenforceable or try to relitigate the matter in another jurisdiction.

McCormick, reading from Tesla's proxy issued ahead of the vote, asked Ross if a stockholder vote alone is enough to ratify a conflicted controller transaction, extinguishing breach of fiduciary duty claims.

Ross said it is if the vote is fully informed and uncoerced, though the defense isn't asking her to extinguish the claims.

"Willingness and ability to say no is critically important to giving stockholders leverage," Ross said. "Your opinion effectively said no for them."

McCormick said at issue is not a question of the court taking a choice away from shareholders, but whether the law gives the shareholders the power to ratify.

Koch said the Court of Chancery frequently takes the reasoning from case law and extends it to apply to cases that may not be squarely on point.

"I candidly don't see how Delaware law can tell the owners of the company that they can't make the economic choice that they've made here," he said.

In addition to the defense's motion to amend the post-trial opinion, the court has yet to weigh in on fee requests.

Tornetta's counsel moved in March for an award of 29.4 million shares of Tesla common stock, at the time valued at roughly \$5.6 billion, plus \$1.1 million in expenses. The unconventional ask for stock rather than its cash equivalent amounts to about 11% of the 267 million shares in the Musk plan McCormick ordered rescission of in January.

Koch stated if the plan is ratified, shareholder plaintiff Richard Tornetta will no longer be able to claim the litigation's benefit to shareholders has a value of tens of billions of dollars, and any fee award his attorneys seek as a proportion of that benefit should also be scaled down, though Tornetta could take credit for the outcome of the shareholder vote and request fees based on that.

Counsel for Tornetta is scheduled to begin its presentation in opposition to the defense motion in the afternoon.

This is a developing story. Please check back for updates.

NOT FOR REPRINT

© 2024 ALM Global, LLC, All Rights Reserved. Request academic re-use from www.copyright.com. All other uses, submit a request to asset-and-logo-licensing@alm.com. For more information visit [Asset & Logo Licensing](#).

You Might Like



August 01, 2024

Journey Bandmates in Corporate Deadlock Turns to Court of Chancery

By

Bloomberg Law News 2024-08-02T14:34:3469546384-04:00

Musk Makes Final Pitch to Judge Who Blocked Record Pay Deal (1)

By Jef Feeley2024-08-02T13:40:10426-04:00

- Tesla seeks to revive \$56 billion payout after investor vote
- Judge isn't required to consider vote, which came after ruling

One of the last chapters in Elon Musk's six-year legal fight to save his \$56 billion Tesla Inc. pay package unfolded Friday, as the world's richest man made his final pitch to a judge that ruled the compensation deal was flawed and threw it out.

Delaware Chancery Court Judge [Kathleen St. J. McCormick](#) heard arguments on whether a June 13 vote by shareholders to revive the compensation plan for Tesla's co-founder justifies changing her ruling. Earlier this year, she found the largest executive-pay package in history was fouled by conflicts of interest and improper disclosures.

"We're asking you to give effect to the vote," Tesla lawyer David Ross said during the hearing. Just because the board used a flawed process for setting Musk's pay, stakeholders "shouldn't be foreclosed" from deciding to ratify the compensation package, he said.

However, under questioning from McCormick, Ross acknowledged an investor vote had never been used to affect a post-trial ruling under Delaware law. The judge has no legal obligation to recognize the vote, but she can consider it. If she sticks with her earlier decision, Musk, Tesla's chief executive officer, can finally appeal the decision to the Delaware Supreme Court.

"The real question is whether shareholders can ratify" breaches of legal duties by directors after a judge has called them out after a trial, McCormick said during the hearing, signaling her skepticism of arguments made by Musk and Tesla.

Read More: Tesla Investors Get Behind Musk's Fight for \$56 Billion Pay Deal

Musk's lawyers argue the proxy vote by Tesla investors addressed concerns raised by the judge, including those about company directors who approved the pay plan being beholden to the billionaire

and not looking after shareholders' interests.

Rudolf Koch, a lawyer for Tesla's board, said if McCormick brushes aside the June proxy vote, she would be at odds with the state's corporate-law statutes that focus on protecting shareholders. "I don't see how Delaware law can tell owners of a company that they can't make" their own decision on how much the CEO should be paid, Koch told the judge.

Attorneys for Richard Tornetta, a Tesla investor who challenged Musk's pay as a waste of corporate assets, argued the shareholder vote was irrelevant to the case and that the company's maneuvers to address problems identified by the judge were inadequate. They are slated to make their arguments later today.

In legal filings, Tornetta's lawyers argued the latest proxy vote was tainted by Musk's threats to walk away from Tesla if his pay plan wasn't resurrected and take with him some of the company's Artificial Intelligence assets.

McCormick isn't expected to rule on the relevance of the shareholder vote until later this year. The ruling also will include her decision on a request by Tornetta's lawyers to have their legal fees for winning the case paid with \$7 billion in Tesla stock.

McCormick's courtroom in Wilmington, Delaware, was packed with lawyers, reporters and onlookers for what may be the last hearing in a case that began with Tornetta's lawsuit in 2018. Neither Musk nor Tornetta were in attendance.

The unprecedented court case has drawn world-wide attention. More than 8,000 Tesla shareholders sent letters to McCormick sharing their opinions on her pay ruling. And Musk was so upset by the judge's decision to block the pay packages that he moved Tesla's state of incorporation out of Delaware to Texas.

The case is Tornetta v. Musk, 2018-0408, Delaware Chancery Court (Wilmington).

(Updates with judge's comment in fifth paragraph.)

To contact the reporter on this story:

Jef Feeley in Wilmington, Delaware at jfeeley@bloomberg.net

To contact the editors responsible for this story:

Misyrlena Egkolfopoulou at megkolfopoul@bloomberg.net

Steve Stroth, Anthony Aarons

© 2024 Bloomberg L.P. All rights reserved. Used with permission.

A recurring trend: securities fraud complaints targeting key metrics

 [reuters.com/legal/legalindustry/recurring-trend-securities-fraud-complaints-targeting-key-metrics-2024-08-02](https://www.reuters.com/legal/legalindustry/recurring-trend-securities-fraud-complaints-targeting-key-metrics-2024-08-02)

Virginia Milstead, Mark Foster

The seal of the U.S. Securities and Exchange Commission is seen at its headquarters in Washington, D.C., U.S., May 12, 2021. REUTERS/Andrew Kelly/File Photo Purchase Licensing Rights , opens new tab

August 02, 2024 - In securities litigation, plaintiffs focus on certain types of disclosures on a routine basis. One frequent target area focuses on key performance indicators (KPIs). These key metrics provide meaningful insight into public companies' financial and operating performance. They are not metrics that have uniform definitions or methodologies for calculation subject to industry standards, unlike accounting metrics that are subject to GAAP — generally accepted accounting principles.

The SEC has provided guidance on how companies should disclose KPIs as well as non-GAAP metrics, and it routinely issues comment letters to public companies on these issues. The plaintiffs' bar has taken notice and has found some success in asserting claims predicated on allegedly misleading disclosures relating to these metrics. Cases provide useful insights for companies that report such key metrics to investors.

Making statements about one performance metric but not another

Plaintiffs often claim that a company's disclosure of one metric is materially misleading because it omits disclosure about other, more relevant metrics. A case in point: *Shenwick v. Twitter*, 282 F. Supp. 3d. 1115 (N.D. Cal. 2017). There, plaintiffs challenged disclosures by Twitter about its MAU — Monthly Average Users — a performance indicator used by social networking and other companies to count the number of unique users of a product within a month.

Plaintiffs claimed that Twitter touted the "acceleration" and "turnaround" of its MAU. At the same time, however, it allegedly did not disclose that it was experiencing flat or declining DAU — Daily Active User — trends. Plaintiffs asserted that "MAU was unhelpful at best and misleading at worst in the absence of companion DAU" data that had more bearing on user engagement, which was critical to assessing the advertising opportunity to generate revenue.

Plaintiffs claimed that without disclosure of flat or declining DAU trends, investors were led to believe that Twitter's MAU projections were "viable" and that its MAU growth was "high quality."

The court held that Twitter had no independent duty to disclose DAU. The court, however, found that plaintiffs stated a viable claim that the undisclosed DAU trends rendered implausible the MAU growth trends that Twitter chose to "tout" in its public statements.

The court recognized that both DAU and MAU were critical to Twitter's business and that Twitter's executives would have known about the adverse DAU trends when they spoke positively about MAU trends. Accordingly, the court held that plaintiffs sufficiently alleged a claim. Twitter subsequently settled the case for approximately \$800 million.

Plaintiffs are not always successful in asserting claims based on similar theories, as illustrated in *Jedrzejczyk v. Skillz Inc.*, 2023 WL 2333891 (N.D. Cal. Mar. 1, 2023). There, plaintiffs asserted that Skillz's metrics on user engagement and revenue generation for its mobile gaming platform were false and misleading.

Skillz allegedly disclosed its average revenue per user (ARPU) without disclosing what plaintiffs contended was more relevant — average revenue per paying user (ARPPU). Plaintiffs claimed that defendants obfuscated a downturn in ARPPU by "focusing primarily on reporting the platform's MAU," which allegedly "gave them the impression that adding users to the Skillz platform was the primary factor driving revenues when it was really just a vanity metric."

The court rejected the claim. The court explained that Skillz was "not obligated to disclose any and all metrics relevant to its business — just those that if omitted, would create an impression of a state of affairs that differs in a material way from the one that actually exists."

The court reasoned that the case was different from Twitter: While ARPPU and MAU were related, they were "not contingent: a negative trend in one does not ipso facto negate a positive trend in the other."

Alleged manipulation of metrics

Plaintiffs have also accused companies of misleading investors in the way that they define or calculate their key metrics. Consider *Orbis Glob. Equity Fund Ltd. v. NortonLifelock Inc.*, 2023 WL 1800963, at *11 (D. Ariz. Feb. 7, 2023).

Plaintiffs alleged that Symantec manipulated its non-GAAP operating margin metric to give a misleading picture of the company's profitability by excluding recurring operating expenses as "transition and transformation" ("T&T") costs — which Symantec's peers did not do and which allegedly contradicted Defendants' statements that their T&T expenses were not incurred in the ordinary course. Plaintiffs relied on statements from high-level executives at the company who provided examples of the types of costs "pushed in the T&T bucket" to "inflate" Symantec's profitability.

Eventually, Ernst & Young ("EY") was retained to study Symantec's practices related to non-GAAP measures and found "significant problems." Symantec subsequently disclosed that it had "relatively weak and informal processes with respect to some aspects of the review, approval and tracking of transition and transformation expenses."

The court ruled that plaintiffs adequately alleged securities fraud. The court explained: "While Defendants were not obligated to report non-GAAP measures, once they chose to do so they were bound to do so in a manner that wouldn't mislead investors." The court credited statements from company employees who corroborated the plaintiffs' claim that over \$365 million of T&T costs during the relevant period were improperly excluded — a significant percentage of the non-GAAP measures that Symantec reported.

The court also found that E&Y's determinations precluded dismissal of the case, particularly in light of its analysis showing that only two out of Symantec's 38 peers adjusted their non-GAAP measures for 'transition costs' and one stopped doing so during the relevant period. This undercut Symantec's assertion that its non-GAAP metrics "facilitated comparisons to its peers." The company settled related class claims for over \$70 million.

Other companies have defeated claims that they manipulated their metrics by pointing to clear disclosures defining the metric and its calculation. In *Shen v. Exela Technologies, Inc.*, 2021 WL 2589584 (N.D. Tex. June 24, 2021), plaintiffs accused Exela, a global business process automation provider, of deceiving investors about its financial condition. Plaintiffs claimed that Exela touted its "adjusted EBITDA." EBITDA is a metric that stands for earnings before interest, taxes, depreciation, and amortization. Adjusted EBITDA, on the other hand, is a metric that approximates the normal earnings power of a business excluding non-cash expenses and excluding, or adding back, non-recurring cash expenses.

Plaintiffs alleged that Exela engaged in "accounting shenanigans" by adding back supposedly non-routine expenses when, in fact, the expenses were routine, recurring expenses.

The court ruled that Exela told "the whole truth and nothing but about how it was calculating adjusted EBITDA." The court pointed out that for non-GAAP metrics there is no "'right' formula because, unlike GAAP metrics, they have no uniform definition." After reviewing Exela's disclosures on the subject, the court was convinced that "Exela expressly disclosed" that certain of its non-cash "optimization and restructuring expenses" were added back into Adjusted EBITDA.

A court reached a similar conclusion in *In re Netflix, Inc. Securities Litigation*, 2005 WL 3096209 (N.D. Cal. Nov. 18, 2005). Plaintiffs alleged that Netflix misled investors about its "churn rate," and other key metrics derived from it, including average subscriber lifetime and the subscriber lifetime value.

Plaintiffs claimed that the reported churn rate was artificially deflated to make Netflix's customer base look stronger than it was. Plaintiffs challenged Netflix's measurement of churn as "inaccurate, illogical, and unconventional."

The court rejected plaintiffs' securities fraud allegations. Importantly, the court observed that Netflix repeatedly disclosed its definition of churn and disclosed the raw data that would enable investors and analysts to calculate churn using the definition and methods preferred by the plaintiffs. Even if there were "other, more common methods that would have been more predictive, descriptive, or consistent," that did not make Netflix's disclosures fraudulent.

The court explained it was "not a case in which defendants used one calculation method when another is mandated by industry practice, generally accepted accounting principles, or federal securities regulations." In the absence of any mandated way of disclosing "churn," the court found that the "critical key to understanding Netflix's methodology was adequately and repeatedly disclosed."

Key takeaways

Key performance metrics provide useful insights about business performance and prospects. Because these metrics are frequently the focus of securities litigation, public companies and those charged with preparing disclosures should consider taking steps to minimize the risk of facing securities litigation claims predicated on allegations that the presentation or disclosure of the metrics is misleading.

As a starting place, it is important that company leaders carefully review the SEC's rules, regulations, and guidance on KPIs and non-GAAP metrics. Companies should consider providing a clear definition of their key metrics and information about how the metric is calculated, including information about the assumptions and inputs and how they are calculated. If the company changes its definition or methodology, disclosures about those changes and the reasons for the changes would be prudent.

With appropriate attention routinely given to how key metrics are utilized internally and disclosed externally, companies can help minimize the risk of securities litigation centered on this subject of recurring interest to the plaintiffs' bar.

Virginia Milstead is a regular contributing columnist on securities law and litigation for Reuters Legal News and Westlaw Today.

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

Opinions expressed are those of the author. They do not reflect the views of Reuters News, which, under the Trust Principles, is committed to integrity, independence, and freedom from bias. Westlaw Today is owned by Thomson Reuters and operates independently of Reuters News.



Virginia Milstead

Virginia Milstead is a litigation partner in Skadden, Arps, Slate, Meagher & Flom LLP's Los Angeles office. She has a broad commercial litigation practice, representing clients in both federal and state courts, with a particular emphasis on securities and M&A litigation, shareholder derivative litigation and related claims. She can be reached at virginia.milstead@skadden.com.



Mark Foster

Mark Foster is a litigation partner in the firm's Palo Alto office. His practice involves representing public companies — and their officers and directors — in securities fraud class actions, shareholder derivative lawsuits and shareholder demands and related investigations, among other matters. He can be reached at mark.foster@skadden.com.



Business Law Prof Blog

lawprofessors.typepad.com/business_law/2024/08/miscellany.html

Friday, August 2, 2024

Miscellany

By Ann Lipton

This week I just direct your attention to various items.

First, the NYSE recently proposed a rule change that would exempt closed end funds from the requirement of holding annual shareholder meetings. Closed-end funds are frequently the subject of activist attacks – here I blogged about a Second Circuit case that struck down a takeover defense measure in a Nuveen fund – so a rule change here would be, you know, significant. Anyway, here is the link to the comments the SEC has received, and the one I found particularly useful, was by the Working Group on Market Efficiency and Investor Protection in Closed-End Funds, which is a collection of law and business professors.

Second, Project 2025 is all in the news these days as a preview of what a second Trump administration might look like, and it turns out, there are proposals for changes to the federal securities laws.

We have the usual conservative stuff, like, get rid of disclosure requirements pertaining to “social, ideological, political, or ‘human capital’ information that is not material to investors’ financial, economic, or pecuniary risks or returns.” Obviously, the issue here, unaddressed in the document, is that most commenters would *agree* that only financially material information should be required; the disagreement is over *what that means*. And that becomes very obvious in the document, because it singles out the climate change disclosure rules as *expensive* and therefore ripe for repeal, but it never argues that they require disclosure of *immaterial information* (though to be fair, the document is full of proposals to repeal climate change-related regulation, and I haven’t read all of it; maybe somewhere else there’s an argument that climate change is financially immaterial).

Anyway, there’s also a proposal that three SEC commissioners be permitted to override the Chair with respect to placing items on the agenda, and *pace Jarkesy*, they’d allow defendants to choose whether their cases are heard in federal court or administrative courts (which incidentally seems similar to a proposal by Christopher Walker and David Zaring, though their paper is not cited).

Digital assets would be commodities unless the holder has a contractual right to a share of earnings, or, in the case of liquidation, a claim on the assets.

They'd also simplify firm categories to public, private, and small (based on public float or – interestingly, beneficial owners rather than street name owners), and remove accreditation requirements. Which as I understand it would functionally mean that companies could choose whether to file registration statements or not. Intriguingly, however, they do propose to:

Abolish Rule 144 and other regulations that restrict securities resales and instead require a company that has sold securities to provide sufficient current information to the market to permit reasonable investment decisions and secondary sales.

I'm not sure how that proposal interacts with the earlier proposal to segment the market cleanly into public, private, and small firms, but there you go.

Third, a historian at the University of Delaware, Professor Dael Norwood, is researching Delaware's history of permitting corporations to vote in local elections; he's blogged about his findings [here](#) and [here](#).

And finally, here is a story about how the new trend of retail stores locking up products is backfiring, because it makes it harder for customers to actually, you know, buy stuff. What intrigues me is how it seems as though stores are making these decisions based more on vibes than actual data, and rejecting the obvious solutions like hiring more staff to police the aisles (or even just to open the cabinets). Efficient markets are supposed to force corporate managers to make more reasoned choices, no? But apparently the heuristic "employees are an expense, do everything but hire people" is very tough to combat. Even at companies like Walmart, which adopt pay for performance metrics.

Page Printed From:
[https://www.law.com/therecorder/2024/08/01/a-judge-asks-is-it-time-to-end-ken-feinbergs-roundup-settlement-program/?](https://www.law.com/therecorder/2024/08/01/a-judge-asks-is-it-time-to-end-ken-feinbergs-roundup-settlement-program/?cmp=share_twitter)
[cmp=share_twitter](#)



NOT FOR REPRINT
[NEWS](#)

A Judge Asks: Is It Time to End Ken Feinberg's Roundup Settlement Program?

Last month, U.S. District Judge Vince Chhabria asked plaintiffs' lead counsel if the settlement program under Ken Feinberg should come to an end.

August 01, 2024 at 07:58 PM

Litigation



Amanda Bronstad
staff reporter



What You Need to Know

- Only a few hundred Roundup cases remain unresolved in the multidistrict litigation, while state court juries are issuing verdicts nationwide.
- Co-lead plaintiffs' counsel Aimee Wagstaff told the judge she's heard from Roundup plaintiffs who are unhappy with Feinberg's offers.
- Feinberg, who told Law.com he plans to meet with Chhabria later this month, continued to recommend the program, under which two-thirds of Roundup claimants have taken the money.

As juries in state courts came out with multiple verdicts this year over Monsanto’s Roundup pesticide, one federal judge has asked: Should a settlement program managed by noted special master Ken Feinberg continue?

U.S. District Judge Vince Chhabria, who is overseeing the Roundup multidistrict litigation in the Northern District of California, appointed Feinberg as special master. Since 2020, Feinberg has run a settlement program as Monsanto’s parent company, Bayer, [announced plans](#) to resolve the estimated 120,000 claims alleging Roundup caused non-Hodgkin lymphoma for nearly \$10.9 billion.

At its height, the Roundup multidistrict litigation had 5,500 cases, according to a status update from the lawyers last month. Only a few hundred Roundup cases remain unresolved in the multidistrict litigation and, last month, Chhabria asked plaintiffs’ lead counsel if the Feinberg program should come to an end.

At a July 18 hearing, co-lead plaintiffs’ counsel Aimee Wagstaff stopped short of calling for closure of the program altogether. But she and others on the leadership team have heard from plaintiffs lawyers with individual Roundup cases about the amounts being offered through the program, which, in a July 15 status report, Wagstaff called “shockingly low.”

“We hear anecdotally from people who are unhappy about the program,” she said, “but we don’t hear from people who are happy about the program.”

Wagstaff, of Denver-based Wagstaff Law Firm, suggested terminating the program in favor of a settlement process in which both sides have more input and share the costs of the mediator.

“It is creating this illusion that you have this national, amazing, high-pedigree mediator giving this, take it or leave it, that the court sanctioned,” she told Chhabria. “And all the while, Monsanto is paying for it.”

Monsanto attorney Brian Stekloff, of Washington, D.C.’s Wilkinson Stekloff, noted that Roundup plaintiffs aren’t forced to mediate their cases under the program. And he had another explanation for why the cases aren’t being litigated.

“There is a bunch of borderline frivolous cases in this MDL,” he said.

Chhabria isn’t just asking the lawyers. After the hearing, he reached out to Feinberg, who told Law.com that he plans to speak with the judge again later this month.

“He gave me every indication it will continue,” Feinberg said about the Roundup settlement program. “Whether the plaintiff, and his or her lawyer, wants to accept what is offered is entirely up to them. I have nothing to do with it.”

He continued to recommend the settlement offers to Roundup plaintiffs, particularly given their “unacceptable” alternative of lengthy litigation, which they might not win, all while Monsanto faces financial troubles.

As to whether the settlement values are too low, Feinberg said that statistics don’t lie.

“And two-thirds of the claimants in the MDL have taken the money,” he said. “That tells you something is right, whether the amount or the speed or simplicity of the program. The statistics demonstrate that everyone gets a voluntary option. No one is compelled.”

In court, Chhabria said terminating the program might not be the answer, but he had concerns that some plaintiffs feel pressured into accepting a settlement.

“Mr. Feinberg is amazing, but mediators have a different perspective,” he said at the hearing. “Their job is not necessarily to come up with a number that is ‘fair.’ Their job is to come up with a number that will be accepted by both sides. And the number accepted by both sides is not necessarily fair.”

‘A Bunch of Lawyers Out There Committing Malpractice’

Chhabria sought input about Feinberg while weighing the possibility of wrapping up the Roundup multidistrict litigation. Bayer’s lawyer, Anthony Martinez, of Shook, Hardy & Bacon, in Kansas City, Missouri, noted that only 195 new cases were filed last year in the multidistrict litigation.

“There are frankly primarily two firms filing the vast majority of those cases, and most of those cases are being resolved through the Feinberg program,” Stekloff told the judge. “Absent the process that’s in place, the vast majority of the cases that are new cases are being filed in state courts across the country with a focus on Missouri and a few other jurisdictions.”

Many of those cases have gone to trial, with verdicts ranging from \$1.25 million to \$2.25 billion. Monsanto also has won several trials.

Chhabria raised concerns that lawyers filing many of the new Roundup lawsuits in the multidistrict litigation might be committing malpractice given their poor handling of the cases, particularly their selection of experts, who testify on whether Monsanto's pesticide causes non-Hodgkin lymphoma. On June 20, Chhabria tossed an entire case after finding the sole general causation expert's analysis to be "junk science."

In 2018, Chhabria green-lighted the lead plaintiffs' general causation experts as part of the Roundup multidistrict litigation, though calling his decision a "very close question," and, a year later, the first bellwether verdict, and the only federal trial, ended in a \$80 million jury award.

But many of the new cases in the MDL are introducing additional general causation experts, or their own specific causation experts.

"My concern is there's a bunch of lawyers out there committing malpractice on behalf of their clients," he said. "My reaction to that is, is there anything more that leadership counsel can do to save these plaintiffs from being the victim of malpractice by their lawyers?"

Chhabria suggested that lead plaintiffs' counsel could help some of the other lawyers with their experts. In last month's status update, Wagstaff said such an idea would be "unprecedented" and require additional plaintiffs' firms on the leadership team and a common benefit assessment on unresolved cases to fund the experts, an unlikely prospect given a 2021 order in which Chhabria called the Roundup lead counsel's fee request totaling about \$800 million "an example of MDLs gone wild."

At this month's hearing, Wagstaff simply said: "A client gets to choose their lawyer."

'Having Other Judges Dive Into This'

Feinberg said he had no statistics on the eligibility of the claims under the settlement program, adding that all of them must be processed. But if Chhabria closes the Roundup multidistrict litigation, he said, the settlement program should continue at least for the next year.

"And I got every indication from him that if everybody wants the MDL to end in a year, he would be amenable to that," he said. "He thinks it's rather unprecedented that both sides would want the MDL to end, but if that's what they want, he didn't make a decision, but he said he's inclined to end it."

Should the multidistrict litigation end, other federal judges, with different views, could weigh experts in individual Roundup cases, Chhabria noted.

"That seems like it's still the kind of problem the MDL statute was designed to solve: avoiding having 40 different judges dive into a complicated causation question like this," he said. "On the other hand, there could be some value to having other judges dive into this causation issue. Perhaps somebody will take a different perspective from me on the issue of whether a reasonable jury could conclude, based on the experts already presented, that Roundup can cause NHL. And maybe there would be value in having a different judge look at it from a different perspective."

What's certain, Wagstaff said, is that the litigation will go on "for a very long time" as long as Roundup continues to be sold on store shelves.

And the Feinberg program, she said, might be what's driving poor cases.

"It's promoting frivolous filings," she said. "But if that goes away, and that's not there, and not offered, people aren't going to file those cases."

<https://x.com/RMFifthCircuit/status/1819162629262434576>

Alison Frankel reposted



Raffi Melkonian
@RMFifthCircuit

...

OK, I'm leafing through the judge's decision wiping out the Sunday Ticket verdict against the NFL, and it is a wow Mc Wow decision.

Here is the opinion. I will break it down in this thread. 1/



drive.google.com
NFL JMOL.pdf

5:05 PM · Aug 1, 2024 · 146.2K Views

18

100

331

169



Post your reply

Reply



Raffi Melkonian @RMFifthCircuit · 19h

...

(1) The plaintiffs had used an expert to calculate how much harm the NFL was causing through Sunday Ticket. The expert used college football and how games are distributed there as his example. The Court says this methodology doesn't work.

Case No. ML 15-02668 PSG (SKx)

Date August 1, 2024

Title In re: NFL "Sunday Ticket" Antitrust Litigation

While the Court previously denied Defendants' *Daubert* motion and motion *in limine* on Dr. Rascher's opinions, Dr. Rascher's trial testimony revealed his college football but-for world was not the product of sound economic methodology. Dr. Rascher needed to explain how these out-of-market telecasts would have been available for free to cable and satellite customers in the but-for world. Dr. Rascher did not do so. Instead, he hypothesized there could have been

2

4

48

16K





Raffi Melkonian @RMFifthCircuit · 19h

The Judge says this college methodology didn't take into account the distinctions between college and pro football.

Dr. Rascher's failure to produce a coherent model is particularly problematic as there are significant differences between college football and the outcome in his college football but-for world. Unlike Dr. Rascher's college but-for world, not all college football games are available on over-the-air networks and on the major cable stations as some college football games—including games of top 25 ranked teams—were available only by purchasing premium offerings like the Pac 12, SEC, or ACC network packages or viewable only on local regional networks. *Id.* (Rascher) 835:17–837:13. Further, Dr. Rascher's most likely version of the but-for world that retained the NFL's distribution of in-market games on CBS and FOX did not resemble college football broadcasting. See *id.* (Rascher) 890:8–891:10. For instance, college



5



2



40



14K



Raffi Melkonian @RMFifthCircuit · 18h

The Court *also* excluded the Plaintiffs' second damages expert because he could not explain why consumers might have been willing to pay more than the DirecTV price for a streaming NFL service without an underlying subscription.

Ultimately, and regardless of whether a competitive live streaming service existed, this issue reveals the main flaw with Dr. Zona's models: He failed to define an assumption that was necessary for evaluating the rationality and reliability of his models by never deciding what a "direct-to-consumer" product entailed. Without knowing what "direct-to-consumer" meant, it is impossible to determine if it would have been economically rational for consumers to purchase Sunday Ticket from an alternative distributor at a higher price. And, that definition was necessary for determining whether a viable alternative distributor even existed during the class period. Without that information, the Court cannot determine whether the but-for worlds without exclusivity were modeled reliably.



2



2



37



13K



Raffi Melkonian @RMFifthCircuit · 18h

And because both Plaintiffs' experts were knocked out, that means Plaintiffs had no case.

So, it is incredibly rare for a Plaintiffs' experts to be excluded *post-trial* - this sort of thing is usually handled before the trial. It's very unusual for a judge

But without Dr. Rascher's and Dr. Zona's testimonies, it is impossible for a jury to determine on a class-wide basis that Sunday Ticket subscribers would have indeed paid less in the absence of Defendants' anticompetitive conduct. Thus, Plaintiffs failed to provide evidence from which a reasonable jury could make a finding of injury and an award of actual damages that would not be erroneous as a matter of law, be totally unfounded and/or be purely speculative. See *J-M Mfg.*, 2020 WL 4196880, at *41. As a result, the Court **GRANTS** Defendants' motion for judgment as a matter of law.



7



16



97



14K





Raffi Melkonian @RMFifthCircuit · 18h

to be persuaded after the trial ends that the experts he just listened to for weeks or months were talking nonsense. Remarkable!

But there's more.

3

3

67

10K

1



Raffi Melkonian @RMFifthCircuit · 18h

More remarkable still, the Judge then analyzed the damages *amount* the jury found. He did some "reverse engineering" to figure out what they must have done back in the jury room.

consumers—in 2018 and 2019. *Id.* 4:19–22. The jury then subtracted \$102.74, Dr. Zona's calculation for the average price paid by residential Sunday Ticket subscribers, *see* 06/13/24 *Tr.* (Yurukoglu) 1325:25–1327:14, yielding the \$191.26. The jury then multiplied the \$191.26 by the number of subscriptions to arrive at its damages figure. Indeed, given the precision of the jury's damages awards, awarding damages to the cent, the Court finds Defendants' **reverse engineering** to be compelling.*

Class	A "Actual Price"	B "But-For Price"	C "Overcharge" (C = (A – B))	D Number of Subscriptions	E "Damages" (E = C x D)
Commercial	\$294.00	\$102.74	\$191.26	506,788	\$96,928,272.88
Residential	\$294.00	\$102.74	\$191.26	24,105,049	\$4,610,331,671.74

Defendants ask the Court to assess whether the jury's inputs to its calculations are supported by the evidence or only based on speculation or guesswork. *See In re First All.*

4

8

51

13K

1



Raffi Melkonian @RMFifthCircuit · 18h

And then he said, if that's right, then they ignored my (the judge's) instructions, so the damages are wrong.

I've genuinely never seen a judge take this approach. I'm not saying it's never happened, but usually the judge says "Look, who knows what the jury did."

The Court instructed the jury that the "proper way to calculate [the amount of damages to award to Plaintiffs] is to determine the difference between the prices Plaintiffs actually paid for Sunday Ticket and the prices Plaintiffs would have paid had there been[] no agreement to restrict output." *Jury Instructions*, Instr. 41. The Court cautioned that while the jury may "determine the average overcharge paid by class members or estimate the overcharge paid by class members," it must base "the average or estimate . . . on evidence and reasonable inferences" and not on "guesswork or speculation." *Id.*, Instr. 42.

The Court finds that the jury's damages awards were not based on the "evidence and reasonable inferences" but instead were more akin to "guesswork or speculation." For the price Plaintiffs actually paid for Sunday Ticket, the jury relied on the residential list price for two years in the class period. There was no evidence that supported the jury's determination this represented the price paid for Sunday Ticket for the whole class period or that any member of

18

11

131

12K

1



pat bahn  @patbahn · 18h

...

Seems unusual to disallow the experts after allowing them to testify



14

2.8K



Robert C @theSLlawyer · 13h

...

Do you know who the primary defense attorneys were? Which big firms? We (some colleagues) had something similar happen on excluding the expert post-trial, but we got reversed, which I'm suspecting will happen here.

2



3

1.4K



Wene Wenbikere @wenbickert · 17h

...

Paul Clement fared a little better here than in Helix. Sheesh



2K



Michael A. Hiener @MichaelAHiener · 6h

...

Was a motion for directed verdict not made at the close of plaintiff's case?



276



US judge throws out \$4.7 billion verdict against NFL in 'Sunday Ticket' lawsuit

 [reuters.com/sports/nfl/us-judge-throws-out-47-bln-verdict-against-nfl-sunday-ticket-lawsuit-2024-08-02](https://www.reuters.com/sports/nfl/us-judge-throws-out-47-bln-verdict-against-nfl-sunday-ticket-lawsuit-2024-08-02)

Mike Scarcella

Item 1 of 2 The NFL logo is pictured at an event in the Manhattan borough of New York City, New York, U.S., November 30, 2017. REUTERS/Carlo Allegri/File Photo

[1/2]The NFL logo is pictured at an event in the Manhattan borough of New York City, New York, U.S., November 30, 2017. REUTERS/Carlo Allegri/File Photo Purchase Licensing Rights , opens new tab

Aug 1 (Reuters) - A U.S. judge in California on Thursday threw out a \$4.7 billion verdict against the National Football League in a lawsuit claiming it overcharged subscribers to its Sunday Ticket game telecasts for more than a decade.

The ruling , opens new tab by Los Angeles-based U.S. District Judge Philip Gutierrez followed arguments by the NFL that the verdict was unjustified and the result of a "runaway" jury.

The NFL in a statement said it welcomed the judge's ruling. "We believe that the NFL's media distribution model provides our fans with an array of options to follow the game they love," the NFL said.

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

"Sunday Ticket" is the only broadcast option for NFL fans who want to watch their teams play out-of-market games. The subscribers alleged "Sunday Ticket" prices were inflated to limit subscriptions and protect distribution rights fees that broadcast networks paid to air games in local markets.

Gutierrez in his 16-page order threw out the testimony from two key witnesses for the subscribers. He said the jury's damages verdict was otherwise unsupported by the evidence and ruled that there were too many defects in the case for it to proceed at all.

"Plaintiffs failed to provide evidence from which a reasonable jury could make a finding of injury and an award of actual damages," Gutierrez wrote.

The court's ruling granting judgment as a matter of law to the NFL can be appealed to the San Francisco-based 9th U.S. Circuit Court of Appeals.

A Los Angeles federal jury said in its June 27 verdict that the NFL had restricted the availability of "Sunday Ticket," allowing DirecTV to charge artificially higher prices as its former sole distributor. DirecTV was not on trial.

The jury awarded \$4.6 billion based on 24.1 million residential subscriptions throughout the 12-year class period, and \$96.9 million based on about 506,780 commercial subscriptions for bars and restaurants.

The NFL in a court filing called the damages amount "nonsensical" based on the evidence the jury was allowed to consider and denied subscribers were overcharged.

The subscribers countered that the NFL based its arguments on "pure conjecture" into the jury's reasoning and said there was no evidence the jurors relied on evidence they were told to ignore.

U.S. antitrust law allows for the tripling of damages awards, which could have potentially increased the value of the verdict to \$14 billion.

Reporting by Mike Scarcella; Editing by David Bario and Daniel Wallis

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

Billions in Damages From CrowdStrike Outage to Go Uninsured

B [bloomberglaw.com/bloombergtterminalnews/bloomberg-terminal-news/SHLHTZDWRGG1](https://www.bloomberglaw.com/bloombergtterminalnews/bloomberg-terminal-news/SHLHTZDWRGG1)

- Insured losses estimated between \$300 million and \$1.5 billion
- The days-long outage took a \$5.4 billion toll on Fortune 500

By Evan Gorelick

(Bloomberg) --

The vast majority of damages from last month's CrowdStrike Holdings Inc.'s global IT outage will go uninsured, according to new estimates from Guy Carpenter and CyberCube Analytics Inc.

The days-long cyberincident — which grounded planes, shuttered businesses and stopped markets — cost Fortune 500 companies about \$5.4 billion in damages, according to insurance company Parametrix. But insured losses are expected to be far less than that. Reinsurance broker Guy Carpenter estimated this week that insured losses will range from \$300 million to \$1 billion, while the risk analytics firm CyberCube puts that figure between \$400 million and \$1.5 billion.

The forecasts signal a relatively muted insurance response to one of the biggest cyber incidents. In its latest earnings report, CrowdStrike reported a total of nearly 24,000 enterprise customers, including nearly 60% of the Fortune 500. But, according to Guy Carpenter's estimates published on Thursday, fewer than 1% of global companies with cyber insurance saw an impact from the outage.

"There are some uninsured or underinsured companies suffering impacts at a wide range of severity," Erica Davis, global co-head of cyber at Guy Carpenter, told Bloomberg News, adding that other factors, including the relatively short duration of the outage, are also likely to widen the gap between actual damage and insurable damage.

Since the outage began with a botched software update rather than a cyberattack, the non-malicious nature of the incident will also limit the scope of coverage, Guy Carpenter said. CyberCube added that while the IT crash was a major event for cyber insurers, "it does not come close to the destructive potential that leading insurers are holding capital against."

Marsh, the world's largest insurance brokerage, had over 75 clients warn of potential cyber claims on July 19, the first day of the outage, Bloomberg previously reported. That number has since passed 200, said Meredith Schnur, Marsh's cyber practice leader for the US and Canada.

Delta Air Lines Inc., which was dealt a notably harsh blow, has since hired attorney David Boies to seek possible compensation from CrowdStrike and Microsoft Corp. for the incident, which cost the airline \$500 million, Chief Executive Officer Ed Bastian told CNBC this week.

Although lawyers are circling, estimates suggest “a sizable but manageable insured loss,” Guy Carpenter said in its report this week.

To contact the reporter on this story:

To contact the editors responsible for this story:

Robin Ajello

Legal Fee Tracker: Texas contracts show law firms' stake in \$1.4 bln Meta settlement

 [reuters.com/legal/transactional/legal-fee-tracker-texas-contracts-show-law-firms-stake-14-bln-meta-settlement-2024-08-01](https://www.reuters.com/legal/transactional/legal-fee-tracker-texas-contracts-show-law-firms-stake-14-bln-meta-settlement-2024-08-01)

David Thomas, Mike Scarcella

The logo of Meta Platforms' business group is seen in Brussels, Belgium December 6, 2022. REUTERS/Yves Herman/File Photo Purchase Licensing Rights [↗](#), opens new tab

Aug 1 (Reuters) - Two private law firms that helped Texas ink a \$1.4 billion biometric privacy settlement with Facebook parent Meta Platforms (META.O) [↗](#), opens new tab this week could wind up with more than \$300 million in combined legal fees for their work on the case, according to contracts they signed with the state.

The Texas attorney general's office hired Chicago-founded Keller Postman [↗](#), opens new tab and Dallas-founded McKool Smith [↗](#), opens new tab to sue Meta in 2022, agreeing to two paths for their eventual payment. One option grants each firm 11% of the recovery, which works out to about \$154 million apiece from the settlement. The other provides for them be paid by the hour, with individual lawyer rates ranging up to \$945 per hour, but with the total multiplied by four.

The firms will receive whatever option produces the smaller sum, according to the contracts, so they could not collect more than the 11% contingency fee. They have not disclosed their hours.

Reuters obtained the contracts through a records request.

Keller Postman and McKool Smith must submit a final written statement detailing their fees and expenses within 60 days of the Meta settlement being "fully executed."

Zina Bash, a Keller Postman partner and former senior counsel to Texas' Republican Attorney General Ken Paxton who was lead counsel in the Meta case, said in an email that her firm faced "an aggressive defendant with limitless resources and an appetite for challenging every conceivable aspect of our case."

"Our team spent countless hours and advanced millions of dollars to help bring this momentous settlement to fruition," she said.

Asked about its fee share, McKool Smith in a statement said it was proud of its work "to secure this historic result."

A spokesperson for the Texas attorney general did not immediately respond to a request for comment on the legal fees.

Texas sued Facebook in 2022, accusing the social media platform of capturing biometric information "billions of times" from photos and videos that users uploaded to the social media platform as part of a free, discontinued feature called "Tag Suggestions."

It was the first lawsuit the state had brought under its 2009 biometric privacy law, according to law firms that tracked the litigation. The law provides for damages of up to \$25,000 per violation.

Meta denied any wrongdoing. A spokesperson for the social media platform said Tuesday it was pleased to resolve the matter and looks forward to "exploring future opportunities to deepen our business investments in Texas, including potentially developing data centers."

A Meta spokesperson did not immediately respond to a request for comment on the law firms' fees. The company was represented by law firms Gibson, Dunn & Crutcher and Mayer Brown.

Texas is separately waging a lawsuit against Alphabet's GOOGL.O Google that accuses the company of violating the state's biometric law. Google has denied wrongdoing. The state is represented by a team of attorneys from Norton Rose Fulbright in that case.

The Texas attorney general has active outside counsel contracts with at least 10 other law firms, according to its website.

It has become relatively common for attorneys general to contract with private law firms, especially in technically complex lawsuits like privacy and cybersecurity cases, said Ashley Taylor, a partner and co-leader of Troutman Pepper's state attorneys general practice.

"It's a very consistent trend line over a 20-year period," Taylor said.

-- In other legal fee news, the 8th U.S. Circuit Court of Appeals on Monday rejected a \$78 million legal fee award for plaintiffs' lawyers in a \$350 million class action settlement with T-Mobile.

The fee award amounted to a "windfall" for the three class firms -- Stueve Siegel Hanson, Hausfeld and Keller Rohrback -- the panel found [☐](#), opens new tab.

The award would have provided \$7,000 to \$9,500 an hour for the lawyers' time, "which we think no reasonable class member would willingly pay to an attorney to help resolve this claim," the panel said.

-- U.S. law firms Hagens Berman Sobol Shapiro and Winston & Strawn could earn more than \$515 million in fees from a \$2.7 billion deal with the National Collegiate Athletic Association over rules against paying student athletes.

The settlement [☐](#), opens new tab was presented to a U.S. judge on Friday, and could lead to hundreds of thousands of current and former students receiving payments tied to their athletic service.

Hagens Berman and Winston & Strawn could also apply for more fees in the future, based on a percentage of the pool of money that schools anticipate using to pay athletes. Those additional fees could be worth tens of millions of dollars.

(Legal Fee Tracker is a weekly feature exploring attorney compensation awards and disputes in class actions, bankruptcies and other matters. Please send tips or suggestions to D.Thomas@thomsonreuters.com [↗](#), opens new tab)

Read More:

Legal Fee Tracker: Quinn Emanuel fights to keep \$185 million award in Obamacare case

Legal Fee Tracker: Lawyers want \$122.5 million in Apple securities case

Legal Fee Tracker: Billions on the line in fee fight over Musk pay

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

Reporting by David Thomas

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



David Thomas
Thomson Reuters

David Thomas reports on the business of law, including law firm strategy, hiring, mergers and litigation. He is based out of Chicago. He can be reached at d.thomas@thomsonreuters.com and on Twitter [@DaveThomas5150](#).

- [✉](#)
- [X](#)

Boar's Head Sued for Alleged Deceptive Practices Alerting Recall

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XEAA4TV0000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XEAA4TV0000000)

Class Action

Boar's head is being sued in federal court over its recent product recall.

Photographer: Justin Sullivan/Getty Images

- Proposed class case claims recall designed to miss customers
- Company fails to disclose products bacteria-laden: complaint

Boar's Head Provisions Co. Inc. is facing a proposed class action in federal court alleging it engaged in deceptive business practices by failing to disclose to customers that its products were contaminated with *Listeria*.

Boar's Head misleadingly labels and markets its products to "reasonable consumers," like lead plaintiff Rita J. Torres, the complaint said, by failing to disclose to consumers on its packaging that its Virginia ham, beef salami, and other products are contaminated with *Listeria monocytogenes*—disease-causing bacteria that "could lead to serious and life-threatening adverse health consequences."

Boar's Head issued a recall of its products July 25, but the recall "was deliberately designed to preclude the vast majority of consumers from receiving a recall," according to the complaint filed in US District Court for the Eastern District of New York Aug. 1. The recall was "designed to reach very few people and designed to benefit very few of the consumers who purchased the Products," the complaint says.

Torres, of Queens, NY, seeks certification for a nationwide class of consumers who purchased the products in the class period, as well as a subclass of consumers in New York.

She alleges violations of state business laws and seeks damages, attorneys' fees, and costs.

A Boar's Head representative could not immediately be reached for comment.

Sultzer & Lipari PLLC and Adams Reese LLP represent the plaintiff.

The case is *Torres v. Boar's Head Provisions Co. Inc.*, E.D.N.Y., No. 24-05405, Complaint 8/1/24

To contact the reporter on this story: Sam Skolnik in Washington at sskolnik@bloomberglaw.com

Boar's Head hit with consumer lawsuit after deli meat recall over listeria concerns

 [reuters.com/legal/boars-head-hit-with-consumer-lawsuit-after-deli-meat-recall-over-listeria-2024-08-01](https://www.reuters.com/legal/boars-head-hit-with-consumer-lawsuit-after-deli-meat-recall-over-listeria-2024-08-01)

Diana Jones

An employee uses a deli meat slicer at Paulina Meat Market in Chicago, Illinois, U.S., June 28, 2022. REUTERS/Bianca Flowers/File Photo Purchase Licensing Rights , opens new tab

Aug 1 (Reuters) - Boar's Head Provisions was hit with a proposed consumer class action lawsuit in New York federal court on Thursday, a day after it expanded its recall to more than seven million pounds of deli meats and other products over concerns that they are contaminated with potentially deadly listeria bacteria.

In the lawsuit, filed in Brooklyn, Boar's Head customer Rita Torres says she purchased one of the recalled products but would have avoided it had the company warned consumers about the possible contamination. The lawsuit appears to be the first proposed class action filed in the wake of the recalls, according to court records.

Torres, who is seeking to represent a nationwide class of Boar's Head customers who purchased the recalled products, is seeking unspecified monetary damages.

Representatives for Boar's Head did not immediately respond to a request for comment, nor did attorneys for the proposed class. Boar's Head, a family-owned company founded in 1905, sells products in grocery stores nationwide and outside the United States.

On July 26, the company initially flagged more than 200,000 pounds of liverwurst and other deli products for recall over concerns about listeria, which can cause illness particularly in pregnant people, people with weakened immune systems and the elderly, according to the U.S. Department of Agriculture.

The company dramatically expanded the recall on Tuesday to include more than 70 products made at the company's Jarratt, Virginia, facility between May and July, according to the department.

The company told customers to discard the products or return them to the store where they were purchased for a full refund in a statement about the recall on its website.

As of Tuesday, 34 people have been sickened in the outbreak across 13 states, including 33 hospitalizations and two deaths, according to the USDA.

At least one other lawsuit against Boar's Head has been filed over this alleged outbreak, by a Missouri woman who says she consumed some of the contaminated deli meat and fell ill. It's pending in state court in St. Louis.

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

Reporting by Diana Jones; Editing by Leigh Jones and Diane Craft

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

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.

- 
- 
- 

Coca-Cola Seeks to End Case Claiming PFAS Found in Simply Juice

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X55DT84K000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X55DT84K000000)

Class Action

- Latest complaint didn't address court concerns, company says
- "100% pure" labels accurate since PFAS not intentionally added

The Coca-Cola Company argued a plaintiff has exhausted his chances to sufficiently allege its Simply Tropical brand juice contains PFAS, a family of "forever chemicals" known to be harmful to humans and the environment.

The beverage giant told the US District for the Southern District of New York that plaintiff Joseph Lurenz's latest complaint contains "even vaguer" allegations than a previous amended suit the court dismissed in June. Coca-Cola, in a letter requesting a conference before filing a pre-motion to dismiss, argued the suit should be dismissed entirely, without leave to amend.

The class action was brought in 2022 by individuals who had purchased Simply Tropical, alleging that Coca-Cola-owned Simply Orange Juice Company deceived consumers by advertising its product as "all natural" or "100% pure."

The court in June found that Lurenz failed to adequately prove the product contained PFAS through his own testing. In the latest complaint, Lurenz claimed he sent the juice products to an independent third-party lab that month and proved widespread PFAS contamination.

The testing done for the second-amended complaint shouldn't be considered because the results can't apply to claims filed in 2022, Coca-Cola argued. Further, Lurenz didn't claim he regularly purchased these products, meaning he can't establish concrete economic harm.

The company also claimed that since PFAS aren't intentionally added to the product, labels stating that Simply Tropical juice is made with all-natural ingredients remain true and don't mislead a "reasonable" consumer.

The Coca-Cola Company and Simply Orange Juice Company are represented by Alston & Bird LLP.

The case is Lurenz v. The Coca-Cola Co. , S.D.N.Y., No. 7:22-cv-10941, request for pre-motion conference filed 7/31/24 .

To contact the reporter on this story: Taylor Mills in Washington at tmills@bloombergindustry.com

Page Printed From:
https://www.law.com/nationallawjournal/2024/08/01/duane-morris-uses-non-equity-partnership-as-income-shifting-device-class-action-contends/?kw=Duane%20Morris%20Uses%20Nonequity%20Partnership%20as%20%27Income%20Shifting%27%20Device%2C%20Class%20Action%20Contends&utm_position=6&utm_source=email&utm_mediu



NOT FOR REPRINT
NEWS

Duane Morris Uses Nonequity Partnership as 'Income Shifting' Device, Class Action Contends

San Diego nonequity partner Meagan Garland also claims the firm discriminates against attorneys of color and women in compensation decisions.

August 01, 2024 at 11:57 AM

Employment Law



Amanda O'Brien



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

What You Need to Know

- Duane Morris allegedly misclassified nonequity partners, illegally withheld compensation, and underpaid non-white attorneys.
- The suit claims that the firm shifted some of its tax obligations and operating expenses onto nonequity partners in an effort to boost its profitability.
- It also alleges that the opaque nature of the committee's decisions perpetuates gender and racial discrimination.

Duane Morris was hit with a class action suit in California federal court Wednesday over an alleged “systemic misclassification” scheme against its nonequity partners and claims of discriminatory pay decisions on the basis of race and gender.

The suit, filed in the Northern District of California by Black female nonequity partner Meagan Garland against Duane Morris, its equity partners, and its ancillary tax accounting practice, claims that nonequity partners, despite being taxed as partners, function legally as employees at the firm given the stability of their compensation regardless of overall firm performance and their lack of influence over firm policy decisions.

Garland began working for the firm in 2018 as special counsel in San Diego; she was promoted to nonequity partner in 2021, according to the suit, and soon found that despite performing the same duties as when Gardner was special counsel, she was no longer entitled to several employment benefits and her compensation had decreased as a result of her new position.

“Duane Morris and [its tax accounting group] defraud non-equity partners into believing non-equity partner is a ‘promotion,’ when it is really an income shifting device, a scheme to effectively decrease non-equity partner pay by shifting Firm responsibilities,” the suit claims.

Among the responsibilities shifted to nonequity partners, the suit alleges, are tax and retirement plan contribution obligations, as well as a 4% capital contribution from annual fixed-fee compensation. The suit further detailed that the firm withheld 18% of annual compensation for a year to offset firm operating expenses, meanwhile allegedly failing to withhold federal and state payroll taxes and other tax obligations from Garland’s compensation.

In doing so, the suit continues, the firm lessened its business expenses, in part by not paying the employer’s share of payroll taxes and not paying or subsidizing workers’ compensation insurance, disability insurance, or employee benefits for non-equity partners.

“Defendants violated the California Labor Code, California Revenue and Taxation Code, and the U.S. Tax Code by intentionally avoiding paying plaintiff and class members’ wages and monies, thereby ... creating for the firm an artificially lower cost of doing business in order to undercut their competitors and boast about nearly two decades of record profits year over year,” the suit says.

The suit further claims that Garland’s compensation throughout her employment with Duane Morris was “unreasonably low when compared with white and/or male comparators” as a result of discrimination by the firm’s compensation committee.

“Ms. Garland’s starting salary as a 12-year lawyer [in 2018] was \$20,000 less than what the firm paid a white second-year employment associate ... upon joining the firm in 2022,” the suit claims. “As of 2023, a white, male employment partner in California with the same billing rate as [Garland] was paid almost double Plaintiff’s compensation and double her bonus. ... [And] as of 2023, a white, male partner with five fewer years of experience earned \$165,000 more than [Garland].”

The suit attributes these discrepancies in pay to discrimination reinforced by the firm’s “opaque” compensation process.

“Duane Morris’s male-dominated, mostly-white Executive Committee determines compensation for all attorneys, including non-equity partners, and does so in an opaque, even blackbox fashion,” the suit says. “The secrecy about how compensation decisions are made only reinforces the pay inequity and enables the Firm to continually disfavor female and non-White attorneys in favor of male and white attorneys.”

Garland is suing the firm under charges of misclassification of employment, unlawful deductions, failure to timely pay wages owed during employment, breach of contract, breach of implied covenant of good faith and fair dealing, failure to reimburse reasonable business expenses, failure to make required withholdings, violation of business and professions code §§17200, fraud by intentional misrepresentation, conspiracy to commit fraud, negligent misrepresentation, breach of fiduciary duty, professional negligence, and unjust enrichment.

Garland is seeking unpaid wages and penalties, liquidated damages, compensatory damages, economic or special damages, unreimbursed expenses, attorney fees, statutory penalties, restitution, disgorgement prejudgment interest, civil penalties, and punitive damages. She is also looking for the firm to display a notice detailing is alleged violations of the California Labor Code.

Garland is represented by attorney Bibianne Fell of Fell Law.

“Our analysis shows that Duane Morris non-equity partners have been paying for the illusion of success. The firm’s profits per partner appears to have soared on the backs of non-equity partners. A debt is owed and it’s time to square that debt,” Fell wrote in response to a request for comment. “When a highly experienced, partner-level, Black woman is paid less than white junior associates, there’s a problem. This lawsuit shines a light on that problem.”

A spokesperson for Duane Morris said, “We strongly disagree with the allegations set forth in the complaint. We look forward to responding to those allegations and vigorously defending the case in court.”

RELATED STORIES

'Harder to Justify' Counsel Tiers in Big Law, Amid Focus on Nonequity Partners, Lateral Recruiting

'Fake Partners': These Holdout Law Firms Are Sticking With Single-Tier Partnerships

Two-Tiered Partnership Structure Is Nothing New in Australia, But Not All Firms Are Fans

THE NATIONAL LAW JOURNAL

Breaking news and trends for law firm and legal departments about the evolving federal regulations in a volatile political climate.



FEDERAL LEGAL NEWS

- [Courts & Litigation](#)
- [Expert Columns](#)
- [Latest Stories](#)
- [Events](#)

SPECIAL COVERAGE

- [Special Reports](#)
- [Special Supplements](#)

SURVEYS & RANKINGS

- [The NLJ 500](#)

NATIONAL LAW JOURNAL

- [Current Issue](#)
- [Contact](#)
- [Sitemap](#)

NOT FOR REPRINT

MicroStrategy Posts Loss After Writedown of Bitcoin Cache (1)

By Olga Kharif and Muyao Shen

- Revenue from software business was less than forecast
- MicroStrategy is largest public corporate holder of Bitcoin

Bloomberg Law News 2024-08-02T09:49:38902025645-04:00

MicroStrategy Posts Loss After Writedown of Bitcoin Cache (1)

By Olga Kharif and Muyao Shen2024-08-01T18:23:09947-04:00

- Revenue from software business was less than forecast
- MicroStrategy is largest public corporate holder of Bitcoin

MicroStrategy Inc. registered a second consecutive quarterly loss after taking an impairment charge against the value of its roughly \$14.5 billion in Bitcoin holdings.

The Tysons Corner, Virginia-based firm reported second-quarter revenue from its software business of \$111.4 million, below analysts' forecasts of \$119.3 million. The net loss was \$102.6 million or \$5.74 a share, compared to a net income of \$22.2 million or \$1.52, in the year-earlier period. The company uses income from its software business to support Bitcoin purchases.

In 2020, MicroStrategy became the first public company to buy Bitcoin as a capital allocation strategy, with co-founder and Chairman **Michael Saylor** citing the need to hedge against inflation. While Saylor has won the admiration of digital-asset proponents, few US public company besides Tesla Inc. and a handful of crypto-related firms have decided to hold the volatile cryptocurrency on its balance sheet.

Revenue was the lowest in the last decade, other than the two quarters at the start of the Covid 19 lockdowns. Analysts have been keeping an eye on the revenue drop as to what it would mean for the company's cash flow situation. MicroStrategy's operations consumed \$23.3 million, it's biggest cash consumption in at least a decade, leaving them with \$67 million of cash on hand, according to Bloomberg calculations.



Michael Saylor, chairman of MicroStrategy, speaks at the Bitcoin 2024 conference in Nashville, Tennessee on July 26, 2024.

Source: Bloomberg

Read more: MicroStrategy Cash Flow Raises Some Eyebrows Amid Bitcoin Rally

MicroStrategy also filed to sell up to \$2 billion in Class A shares and use the proceeds for purposes including the acquisition of Bitcoin and the repurchase or repayment of debt.

The company posted impairment losses from digital assets of \$180.1 million in the quarter, compared to \$24.1 million during the same quarter last year. MicroStrategy bought 12,222 Bitcoin in the quarter, bringing its total holdings to 226,500 Bitcoin.

Shares of MicroStrategy, which have appreciated 140% so far this year, rose about 4% in after-hours trading.

(Adds details on filing for stock offering in the fifth paragraph.)

--With assistance from **Tom Contiliano**.

To contact the reporters on this story:

Olga Kharif in Portland at okharif@bloomberg.net;

Muyao Shen in New York at mshen118@bloomberg.net

Intel Corp**Intel shares fall 28% on plans to cut 15,000 jobs**

US chipmaker says it will also reduce capital spending as turnaround strategy hits another setback



Intel CEO Pat Gelsinger so far been unsuccessful in efforts to cash in on booming demand for artificial intelligence chips © REUTERS

Richard Waters in San Francisco 5 HOURS AGO



Intel lost more than a quarter of its value on Friday after revealing drastic plans to slash its employee headcount and capital spending, as it suffered the latest setback in its slow-moving turnaround plans.

Chief executive Pat Gelsinger's emergency moves to put the iconic Silicon Valley company back on a stable financial footing include a 15 per cent cut to its workforce, or about 15,000 jobs, with most of the positions set to go this year.

To shore up its weakening finances, [Intel](#) also scrapped its dividend and announced an unexpected reversal in its surging capital spending, with investment this year now likely to be 20 per cent less than forecast.

The US chipmaker's shares fell by as much as 28 per cent at the New York open on Friday, amid a broader stock market [sell-off](#). That topped the 10 per cent decline seen after Intel's last earnings report, reflecting another big hit to Wall Street's confidence that Gelsinger will be able to pull off his ambitious turnaround plan.

Shares in other semiconductor stocks also fell on Friday following Intel's latest quarterly results, including chip equipment manufacturer ASML, which dropped 9 per cent, and supplier Tokyo Electron, down 12 per cent after a generally weak day for Japanese stocks.

While most analysts have given Gelsinger high marks for steering Intel past long-running weaknesses in its underlying manufacturing process technology, he has been less successful in recapturing market share lost to rival AMD or cashing in on the booming demand for artificial intelligence chips.

"Second-half trends are more challenging than we previously expected," Gelsinger said on Thursday. By slashing headcount, investment and other costs this year, the company said it believed it would "achieve a clear line of sight towards a sustainable business model".

Intel blamed its latest setback partly on production issues around its Meteor Lake processors, the first generation of its chips to be made using the new ultra-violet lithography technology on which it has staked its turnaround.

Gelsinger also said customers had shifted much of their data centre spending to buying AI chips such as those made by Nvidia, leading to a pause in the server processors made by Intel. Sales in the company's data centre division fell 3 per cent in the latest quarter, despite the wider boom in data centre spending that was revealed in recent days by some of the biggest tech companies.

Gelsinger said nothing had changed about Intel's longer competitive position and said the company would start to see significant benefits from its recent heavy manufacturing and process investments with a new generation of chips due to reach large-scale production in 2026.

However, cuts to capital spending in the near term, and the weak third-quarter forecast, stirred concerns on Wall Street that Intel was losing ground to rivals such as AMD and Nvidia, at a time when it had been expected to start showing the benefit of Gelsinger's three-year investment push.

He said the company had completed the "catch-up" spending it needed to do to make itself more competitive again and was in a position to tailor its investment more closely to the near-term demand outlook, leading it to take a more cautious position.

For the second quarter, Intel's revenue fell 1 per cent to \$12.8bn, below the \$12.9bn Wall Street had expected. David Zinsner, chief financial officer, said the latest figures reflected "gross margin headwinds from the accelerated ramp of our AI PC product, higher than typical charges related to non-core businesses and the impact from unused capacity".

On a pro forma basis, Intel reported earnings of 2 cents per share, down from 13 cents the year before and below the 10 cents analysts expected.

For the third quarter, meanwhile, it said revenue was likely to be \$12.5bn to \$13.5bn, with a pro forma loss of 3 cents a share. Wall Street had been expecting a profit of 13 cents a share on revenue of about \$14.4bn.

The weak forecast comes months after Intel received a promise of \$8.5bn in direct funding from Washington to help cement its position as a national champion in the semiconductor industry, at a time when the US has made it a national priority to rebuild its advanced chip manufacturing base.

Intel said its longer-term investment plans were insulated from its current weakness and that its efforts to vault back to a global leadership position in chipmaking technology by next year were still on track.

This article has been amended to note that Intel said the job cuts would affect roughly 15,000 roles, not 19,000

[Copyright](#) The Financial Times Limited 2024. All rights reserved.

Tesla sued by family of motorcyclist killed in Autopilot crash

 [reuters.com/business/autos-transportation/tesla-sued-by-family-motorcyclist-killed-autopilot-crash-2024-08-02](https://www.reuters.com/business/autos-transportation/tesla-sued-by-family-motorcyclist-killed-autopilot-crash-2024-08-02)

Hyunjoo Jin

The front hood logo on a 2018 Tesla Model 3 electric vehicle is shown in this photo illustration taken in Cardiff, California, U.S., June 1, 2018. REUTERS/Mike Blake/File Photo
[Purchase Licensing Rights](#) , opens new tab

SAN FRANCISCO, Aug 1 (Reuters) - The parents of a motorcyclist who was killed in a 2022 crash involving a Tesla Model 3 on Autopilot in Utah sued the electric carmaker and the vehicle's driver, claiming that the driver assistant software and other safety features are "defective and inadequate."

Landon Embry, 34, died on the scene after the Model 3 put on Autopilot at 75-80 miles per hour struck the back of his Harley Davidson motorcycle, throwing him from the bike, according to the lawsuit filed in state court in Salt Lake City last week.

The lawsuit claims the driver of the Model 3 was "tired" and "not in a condition to drive as an ordinarily prudent driver."

The complaint said the Autopilot sensors such as cameras "should have identified the hazard posed by Decedent's motorcycle in its presence."

"A reasonably prudent driver, or adequate auto braking system, would have, and could have slowed or stopped without colliding with the motorcycle," the complaint said.

Tesla was not immediately available for comment.

The lawsuit adds to growing scrutiny of Tesla's driver assistant systems Autopilot and Full Self-Driving.

A Tesla Model S car was in "Full Self-Driving" mode when it hit and killed a 28-year-old motorcyclist in the Seattle area in April this year, police said this week.

In April, Tesla settled a lawsuit over a 2018 crash that killed an Apple engineer after his Model X, operating on Autopilot, swerved off a highway near San Francisco.

Reporting by Hyunjoon Jin in San Francisco; Additional reporting by Mike Scarcella; Editing by Leslie Adler

Our Standards: The Thomson Reuters Trust Principles. , opens new tab

Elon Musk PAC data backs Trump over Harris in election

 [cnbc.com/2024/08/02/elon-musk-pac-voter-data-trump-harris.html](https://www.cnbc.com/2024/08/02/elon-musk-pac-voter-data-trump-harris.html)

Brian Schwartz

August 2, 2024

Key Points

- Tesla boss Elon Musk and other tech executives are funding a social media ad blitz to support the presidential campaign of Donald Trump.
- The ads come as Musk uses his account on X, the social media platform he owns, to back the Republican nominee over the de facto Democratic nominee, Vice President Kamala Harris.
- Musk's America PAC is collecting data in more than a half-dozen swing states that could determine the outcome of the 2024 election.

In this article

TSLA-7.81 (-3.60%)

Elon Musk, Chief Executive Officer of SpaceX and Tesla and owner of X speaks during the Milken Conference 2024 Global Conference Sessions at The Beverly Hilton in Beverly Hills, California, U.S., May 6, 2024.

David Swanson | Reuters

If a voter in Michigan performs a search on Google, a somewhat shocking ad might pop up.

The ad shows a young man lying in bed late at night when someone else texts him, "Hey you need to vote," and then sends the man a video of the attempted assassination of former President Donald Trump. The man can hear the gunshots and people screaming in the background.

As Trump is rushed off stage with blood pouring down his face, the man watching the video types in response, "This is out of control. How do I start?"

The ad then displays a website for a group called America PAC.

The website says it will help the viewer register to vote. But once a user clicks "Register to Vote," the experience he or she will have can be very different, depending on where they live.

If a user lives in a state that is not considered competitive in the presidential election, like California or Wyoming for example, they'll be prompted to enter their email addresses and zip code and then directed quickly to a voter registration page for their state, or back to the

original sign up section.

But for users who enter a zip code that indicates they live in a battleground state, like Pennsylvania or Georgia, the process is very different.

Rather than be directed to their state's voter registration page, they instead are directed to a highly detailed personal information form, prompted to enter their address, cell phone number, and age.

If they agree to submit all that, the system still does not steer them to a voter registration page. Instead, it shows them a "thank you" page.

So that person who wanted help registering to vote? In the end, they got no help at all registering. But they did hand over priceless personal data to a political operation.

Specifically, a political action committee created by Tesla CEO Elon Musk, one aimed at giving the Republican presidential nominee Trump an advantage in his campaign against Vice President Kamala Harris, the de facto Democratic nominee.

"I have created a PAC, or a super PAC ... the America PAC," Musk said in a recent interview.

Musk also owns the social media platform X, and has a net worth of over \$235 billion, according to Forbes.

The combination of owning a social media company that gives him an enormous platform to push his political views, and creating a PAC with effectively unlimited resources, has made Musk, for the first time, a major force in an American presidential election.

Musk PAC uses 'register to vote' data

The America PAC has spent over \$800,000 since early July on digital ads that target voters in the key battleground states of Arizona, Michigan, Georgia, North Carolina, Nevada, Pennsylvania and Wisconsin, according to AdImpact.

The ads appeared on Facebook, Instagram and Google through YouTube, and they all encouraged people to register to vote at America PAC's website.

The PAC's effort to collect information from people using the idea of "voter registration" is a critical piece to its plan to make personal contact with these voters.

"America PAC is focusing on door-to-door canvassing in support of Trump," said Brendan Fischer, a deputy executive director at campaign finance watchdog Documented.

"I think it is safe to assume that the voter data gathered through these digital appeals are going to inform America PAC's canvassing and other political activities," he added.

Fischer pointed to the group's privacy policy which says they can use the data they've collected on "other activities and/or fundraising campaigns."

Since June, America PAC has spent over \$21 million on canvassing, digital media, text message services and phone calls, according to Federal Election Commission filings.

The PAC's website offers no indication one way or another what the group's political leaning is. But in its federal filings, the group discloses that all of its work is designed to either help Trump or hurt his opponent.

Fischer said he has seen some other PACs try to use a "register to vote" message to gather people's data.

But what is unique about America PAC's project is who is backing it and the timing of its creation.

In most cases, super PACs are not allowed to directly coordinate the ads they pay for with the campaign. But this spring, regulators ruled that door-to-door canvassing falls outside the scope of the ban because, unlike an ad, it is a person-to-person exchange.

"What makes America PAC more unique: it is a billionaire-backed super PAC focused on door-to-door canvassing, which it can conduct in coordination with a presidential campaign," Fischer said. "Thanks to a recent FEC advisory opinion, America PAC may legally coordinate its canvassing activities with the Trump campaign — meaning, among other things, that the Trump campaign may provide America PAC with the literature and scripts to make sure their efforts are consistent."

"Coordination is incredibly important: it ensures that the PAC's activities are maximally beneficial to the campaign, and frees up the campaign's own funds for other uses," he said. "I suspect that the PAC's ability to coordinate its data-driven canvassing activities with the Trump campaign made it very appealing for donors."

Longtime Republican strategists Phil Cox, Generra Peck and Dave Rexrode are among those now guiding the PAC after a shake-up in mid-July, according to a person with direct knowledge of the matter. This person was granted anonymity to speak freely about a private matter.

The change suggests there could be a shift in tactics by the PAC come November. The New York Times first reported on the moves.

Musk is not the only tech executive backing this effort.

The America PAC raised over \$8 million between April 1 and June 30, according to FEC records. It has received donations from veteran investor Doug Leone, cryptocurrency investors Cameron and Tyler Winklevoss, and a company run by longtime venture capitalist Joe Lonsdale, according to FEC records.

Lonsdale, a co-founder of the software company Palantir, is also a leader of the PAC, and “serves as a political confidant to” Musk, according to The New York Times.

The records do not yet list Musk as a donor. He recently said on X that he is “making some donations to America PAC,” but did not say how much. The PAC is not required to file a third-quarter report until Oct. 15, the first time that Musk’s name could be listed as a donor.

A spokesman for America PAC declined to comment. Musk did not return emails seeking comment.

Musk on X mirrors Musk PAC

The PAC’s ads that have aired on social media platforms also mirror a larger message that Musk pushes out to his 191 million followers on X several times a day: The notion that America is in chaos and voting for Trump over Harris is the only way out.

“These PACs have often functioned as the alter ego of whatever billionaire is behind them,” said Daniel Weiner, a director of the Brennan Center’s elections and government program.

Experts say Musk’s ownership of X and the lack of any real guardrails around how he uses it, is a sign the platform could be used by the Tesla boss as a political weapon to take on Harris and Democrats at large with fewer than 100 days left until Election Day.

“I’d say that it is somewhat concerning that the owner of one of the most important social media platforms is openly partisan (rooting for one of the candidates) and is using his platform ... as a vehicle for pursuing his openly partisan ends,” said Matthew Baum, a professor at the Harvard Kennedy School, whose research includes studying misinformation.

Baum said such ownership of a social media company like X leaves open the possibility of “capture of a major platform by a partisan actor, who would then be largely free to use the platform as they see fit, regardless of the potential negative social or political consequences.”

“There is a concern that Musk is weaponizing that platform to help his preferred candidate” in Trump, said Weiner.

Bloomberg Law News 2024-08-02T14:38:10054500883-04:00

Short-Seller Left's Deleted Tweets Reappear in Fraud Case (1)

By Erik Larson2024-08-02T10:22:07174-04:00

- Tweets used to deceive investors about Left's views, US says
- Left has pleaded not guilty to securities fraud in Los Angeles

Embattled short seller **Andrew Left** deleted his research firm's entire tweet history last year to fend off what he described at the time as "class-action attorneys and trolls" looking for dirt in his past stock commentary.

Dozens of deleted tweets are now front and center in the US Justice Department's indictment accusing Left of manipulating the market to benefit his own trading and lying to investigators.

Prosecutors say the tweets, on the platform now called X, were intended to dupe hundreds of thousands of people who followed Left's Citron Research account into helping him move the market and reap millions.

"By using the Citron Twitter account to generate 'catalysts' — events with the ability to move stock prices — defendant Left profited from his advance knowledge that he was about to trigger such movements in the market," the indictment says.

James Spertus, Left's lawyer, says it's "preposterous" that Left's tweets could move large cap stocks and says they represented his legitimate views.



Andrew Left

Photographer: James Jackman/Bloomberg

“Underlying every count in the indictment is the claim that the opinions tweeted were not what he believed, and that’s just not true,” Spertus said. “The misrepresentation here is from the Department of Justice, not Mr. Left.”

Spertus added that the target price for a stock has no relation to the price at which Left personally would close out a short position and assuming a connection is a mistake by the government.

The short seller pleaded not guilty earlier this week in Los Angeles, where he faces decades behind bars if convicted. A status conference in the case is scheduled for Monday.

The case, if it goes to trial, could shine a light on the way short sellers use social media and help draw a line between legitimate commentary and intentional manipulation.

Here are some of the tweets at the center in the indictment:

Roku ‘Uninvestible’

Early in the morning on Jan. 8, 2019, Left opened short positions in Roku Inc., the maker of TV streaming boxes and software, setting him up to profit if the stock were to fall, prosecutors say. At 9:41 a.m., Left posted on Citron's Twitter account that Roku was “uninvestible,” according to the indictment. Left soon deleted the tweet and, the US says, “falsely and misleadingly” posted this instead:

“To clarify, we are watching ROKU from the side.”

Left made at least \$700,000 from his Roku trades that morning, prosecutors say.

Beyond ‘Stupid’

Left began building a short position in Beyond Meat Inc. in mid-May 2019, according to the indictment. Then, on May 17 at 1:50 p.m., Left ripped into the maker of plant-based meat substitutes on Citron's Twitter account, as noted in the indictment, mocking the company and predicting it would suffer from a new competitor:

“\$BYND has become Beyond Stupid. Most heavily traded retail stock on Robinhood, market cap now bigger than industry, and superior competitor coming to market soon. We expect \$BYND to go back to \$65 on earnings On retail exhaustion. [Look]”

The short seller quickly began closing his position in Beyond Meat in Citron's trading account, according to prosecutors. Within 12 minutes of posting the tweet, Left sold the \$90 put options that expired the same day, the US says.

American ‘Upside Down’

Left opened short positions in American Airlines Group Inc. in his trading accounts around June 5,

2020, prosecutors say. He also purchased short-dated \$19 and \$20 put options that expired the same day, as the airline was trading at about \$20, according to the indictment. At 11:54 a.m., Left allegedly took to Twitter to blast the airline's balance sheet:

"\$AAL Back to \$10 Robinhood traders have 0 idea what they [sic] buying. Balance sheet is upside down. Unencumbered assets worth far less than current price. The reason why Buffett fully exited lower. They don't teach finance in the Sherwood Forest."

Left completely closed his pre-tweet trades in the airline by about 12:37 p.m., for a profit of at least \$429,000, the US says.

Cannabis 'Dark Side'

Left began building a short position in Cronos Group Inc. on Aug. 29, 2018, a few days after he wrote to a hedge fund portfolio manager that "we can make money in weed" and "we can DESTROY" Cronos, according to the indictment. On Aug. 30, 2018, at 10:07 a.m., Left used Citron's Twitter account to post a link to a Citron short report and said:

"\$CRON tgt price \$3.5. Everything that is contaminated about the Cannabis space. ALL HYPE with possible securities fraud"

At the time of the tweet, Cronos was trading at about \$11.50 a share. About an hour later, Left used Twitter again to promote his short position on the weed company and upcoming TV appearance, prosecutors say.

"Andrew Left from Citron on CNBC Fast Money 5:25pm ET to discuss why \$CRON is the most overhyped of all the 'pot stocks' with a target price of \$3.5[.]"

Left began closing his short position on Cronos about 24 minutes after posting the first tweet, according to the indictment. By the end of the day, Left had reduced his pre-tweet position in the company by about 61%, the US said. The next day, Left wrote to another person that his commentary was like taking "candy from a baby" because Cronos was popular with retail traders, the US said.

Spertus pointed to Left's reports, which the tweets link to, saying they included a disclaimer that

people shouldn't trade based on what he says. He added that Left only tweeted or issued reports that include public information.

"He's the publisher. It's not inside information," Spertus said. "It's discovery from public information that he puts into the marketplace."

Long on Tesla

On Oct. 23, 2018, Left took to Twitter to promote his long position on Tesla and included a link to a Citron report on Elon Musk's electric car maker, which at the time was trading at about \$266, according to the indictment:

"\$TSLA dropping earnings on top of \$F tomorrow might be a bad sign for shorts. After reviewing all recent info on \$TSLA dominating its categories, Citron is LONG Tesla for this quarter."

But within a minute, he placed an order to sell call options for about 120,000 shares — more than half of his pre-tweet position — reaping about \$1 million in profit, according to the indictment. By the close of the next trading day, Left sold about 81% of his pre-tweet position for a profit of at least \$6.6 million, the US said.

Nvidia 'Oversold'

On Nov. 20, 2018, Left allegedly received a message from someone identified only as "Individual C" who asked him if he wanted to "make some fast money" by commenting on Nvidia Corp., according to the indictment. At 10:17 a.m., just after he opened long positions on Nvidia, prosecutors said Left used Citron's Twitter account to promote the company as a favorable investment.

"Citron buys \$NVDA. This is the first time in 2 years stock offers an appealing risk-reward to investors... We see \$165 before we see \$120." At the time, NVDA's stock was trading at approximately \$144.

Despite Left's assertion that he expected Nvidia's share price to rise to \$165, less than two hours after his announcement about a share purchase, Left allegedly sold all of his pre-tweet positions in

his trading accounts. At that point, the company was trading between \$150 and \$151. He made a profit of at least \$930,000, prosecutors say.

Facebook Addiction

On Dec. 26, 2018, Left opened a long position in Facebook, the indictment shows. Prosecutors alleged that two days later, at 9:52 a.m., Left used Citron's Twitter account to post a link to a positive report on the company's outlook that downplayed social-media addiction concerns about children:

"\$FB Backing up the sleigh. \$160 tgt. Citron presents the only information that counts on \$FB looking past the rhetoric. Would you rather have your kids addicted to Nicotine or Instagram? Wall St answer will amaze you[.]"

At the time of the tweet, Facebook's stock was trading at about \$129, the US says. Left allegedly started closing his position in Facebook within hours of posting the tweet, selling about 89% of his shares as the company was trading between \$130 and \$134. Within two days Left had sold all of his pre-tweet long positions for a profit of at least \$680,000, the US says.

(Adds hearing date in eighth paragraph)

--With assistance from **Tom Schoenberg**.

To contact the reporter on this story:

Erik Larson in New York at elarson4@bloomberg.net

To contact the editors responsible for this story:

Anthony Aarons at aaarons@bloomberg.net

Misyrlena Egkolfopoulou

© 2024 Bloomberg L.P. All rights reserved. Used with permission.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Beanbag Chair Maker Offers \$615K To End Conn. Stock Suit

By **Aaron Keller**

Law360 (August 1, 2024, 5:22 PM EDT) -- A Connecticut-based maker of beanbag chairs and modular sofas that in 2019 sought to raise \$100 million through a secondary share offering has asked a federal judge to approve a \$615,000 settlement with a group of investors angry over alleged financial moves that caused a stock price dip.

Settlement documents filed in Connecticut federal court indicate that The Lovesac Co. and lead plaintiff Susan Cooke Peña wish to settle claims surrounding an Aug. 16, 2023, U.S. Securities and Exchange Commission filing that cautioned investors not to rely on a March 29, 2023, annual report or a June 9, 2023, quarterly report.

Peña would receive a \$3,500 award, the filings indicate. Class counsel said they planned to seek a one-third cut for attorney fees plus costs of not more than \$45,000.

"Plaintiff believes that the proposed settlement is fair, reasonable, and adequate, and in the settlement class members' best interest," according to a **memorandum** asking U.S. District Judge Kari A. Dooley to rubber stamp the deal.

The **operative complaint** says an internal audit discovered that Lovesac improperly capitalized \$2.2 million of shipping expenses, causing the company to overstate its operating and net incomes.

The company's stock slid 70 cents per share the day after the cautionary announcement that called out the errors, a drop of 2.95%, the investors said.

The complaint also claimed five ex-Lovesac employees were poised to describe "chaos, inconsistency, lack of engagement, and even outright theft" at the company, further calling its financial condition into question.

The filing alleged two violations of the Exchange Act.

The proposed settlement would give investors "at least" 44.5% of their estimated maximum per-share damages, Wednesday's memorandum indicates.

Citing a study, the plaintiff said the average securities class action case results in a 1.8% recovery.

"Thus, the recovery the settlement provides far exceeds the median recovery realized in securities class action cases," they pointed out. "It is also above recoveries courts have declared reasonable. In fact, courts have regularly approved materially smaller settlements as fair and reasonable."

Peña in March took over for the original proposed lead plaintiff, Albert Gutknecht, after it became clear that Peña had a larger financial interest at stake, court paperwork indicates.

The proposed settlement came just three days after another group of investors filed a **derivative lawsuit** against the company's leaders in Connecticut federal court.

That lawsuit, by lead plaintiff Jessica Getz, accuses company leaders of breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, unjust enrichment, waste of corporate assets and violating the Exchange Act.

In 2019, Lovesac placed a block of 2.5 million **secondary shares** on the market. Experts at the time said the offering could raise nearly \$100 million. The company went public in June 2018, raising \$56 million in an **initial offering**.

Counsel for the Peña and the proposed class declined to comment Thursday. An attorney for Lovesac also did not immediately reply to a message from Law360.

Peña and the proposed class in the securities case are represented by Jacob A. Goldberg and Leah Heifetz-Li of The Rosen Law Firm PA, Joel T. Faxon and Brittany S. Cates of Faxon Law Group LLC, and Brian Schall of the Schall Law Firm.

Gutknecht is represented by J. Alexander Hood II, Jeremy A. Lieberman and Emily Catherine Finestone of Pomerantz LLP.

Lovesac is represented by Steven J. Porzio of Proskauer Rose LLP.

The securities case is Gutknecht v. Lovesac Co. et al., case number 3:23-cv-01640, in the U.S. District Court for the District of Connecticut.

The new derivative case is Getz v. Nelson et al., case number 3:24-cv-01260, in the U.S. District Court for the District of Connecticut.

--Additional reporting by Tom Zanki. Editing by Andrew Cohen.

All Content © 2003-2024, Portfolio Media, Inc.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Expert Witness Standards Must Consider Peer Review Crisis

By **Jeffrey Gross and Robert LaCroix** (August 1, 2024, 2:57 PM EDT)

—The recent amendment to Rule 702 of the Federal Rules of Evidence, effective since Dec. 1, 2023, was the rule's first substantive amendment in two decades.

It **followed** years of criticism that courts had not followed the rule or its intent regarding the standard of proof that applies when evaluating the reliability of expert testimony.[1]

A 2022 report from the Advisory Committee on Evidence Rules concluded that courts had been confused about the standard of proof, which led to the 2023 amendment.[2]

But the committee's narrow focus on the standard of proof ignored other inconsistencies in how courts apply Rule 702, and the U.S. Supreme Court's landmark 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals Inc.*

One issue stands out: The *Daubert* decision lists, as one of several nonexhaustive factors for evaluating reliability, whether the expert's methodology "has been subjected to peer review and publication." [3] Just what to make of the peer-review factor has bedeviled courts ever since, as recent decisions following *Daubert* continue to illustrate.

For instance, the Zantac products liability litigation has yielded conflicting results in cases considering nearly identical expert testimony, as discussed in greater detail below.

And just **last month**, the Michigan Supreme Court, over a sharply worded dissent, held in *Danhoff v. Fahim* that the lower courts had focused too "strictly on plaintiffs' inability to support [their expert's] opinion with published literature," and reversed the decision to exclude the expert.[4]

Including peer review as a factor seemed uncontroversial at the time *Daubert* was decided. But between the *Daubert* decision in 1993 and today, the so-called replication crisis has upended how the scientific community views the reliability of studies.

The crisis began in the mid-2000s, after independent researchers discovered they could not replicate — that is, repeat — many experimental results. Researchers also could not reproduce the published results of earlier research using the source data. The crisis undermined public trust in scientific studies, including those published in peer-reviewed journals.

Many have described the crisis in stark terms: Alvaro de Menard, a participant in a Defense Advanced Research Projects Agency initiative on replication, who surveyed studies that could not be replicated, lamented that the crisis left him with "a sense of Lovecraftian awe at the sheer magnitude of it all." [5]

Given these revelations regarding the soundness of peer-reviewed studies, courts and rulemakers should reevaluate whether or when peer review should receive any weight when assessing the reliability of expert testimony.



Jeffrey Gross



Robert LaCroix

The Replication Crisis and Peer Review

Broadly speaking, "peer review" refers to the practice of many academic journals inviting critiques from other researchers in a study author's field before publication of the study.[6]

Theoretically, peer review can root out errors before publication. But that theory is questionable for many reasons. Reviewers may not have the right background to find the errors. Reviewers also may lack sufficient financial or reputational incentives to review rigorously. Or they may not want to challenge an author directly.[7]

In 2005, Stanford University professor John Ioannidis published a groundbreaking essay, "Why Most Published Research Findings Are False," which exposed what is now called the replication crisis.

He found that, "for most study designs and settings, it is more likely for a research claim to be false than true." He also concluded that, "for many current scientific fields, claimed research findings may often be simply accurate measures of the prevailing bias." [8]

Further studies and analyses concluded that peer review did not prevent serious errors.[9]

The revelations were deeply unsettling. Research on replication studies has found that fewer than 30% of studies in social psychology, and approximately 50% in cognitive psychology, were able to be replicated.[10]

Even among the studies published in some of the highest-profile American scientific publications, Nature and Science, only about 67% of studies were able to be replicated.[11]

Even if corrective measures in recent years — such as preregistration of hypotheses and study plans, more enforcement of requirements to share the data underlying experimental results, and other norms of open scholarship — may have reduced the problem, research has found that some high-profile peer-reviewed articles still contain apparently manipulated data.[12]

In Daubert parlance, we now see that there is a high known error rate for peer-reviewed studies, which should cause us to reconsider whether peer review is a trustworthy proxy for reliability.

The development of artificial intelligence could further undermine peer review if authors use it inappropriately in their published studies — for instance, by using a large language model to mass produce low quality work, or by failing to check for hallucinations in AI-generated text.[13]

Nowadays, many scientists do not automatically assume that peer-reviewed work is a bellwether of reliability. Scientists seriously consider many sources that are not peer-reviewed, such as conference papers and preprints of articles submitted to, but not yet accepted for publication by, academic journals.[14]

And many of the most celebrated scientific findings in history were not peer-reviewed. Indeed, only one of Albert Einstein's papers was peer-reviewed. The peer-review process so infuriated him that he moved the article to another journal.[15]

It is time for peer review to be seriously reconsidered by courts and the advisory committee, including whether it is an outmoded shibboleth for identifying reliable science in a courtroom.

Courts' Inconsistent Treatment of Peer Review After Daubert

The Supreme Court's decision in Daubert explained that whether a particular technique or methodology had been published in a peer-reviewed journal is a "relevant, but not dispositive consideration." [16] The court noted that some propositions were too new or of limited interest, such that publication was unlikely.

But on remand to the U.S. Court of Appeals for the Ninth Circuit, in a passage that would become influential, the court ruled that "peer review [was] a significant indication" that research "meets at least the minimal criteria of good science." [17]

Courts proceeded inconsistently in how they applied Rule 702 after Daubert. Some courts followed the Ninth Circuit's view in Daubert that peer review was a strong signal of reliability, but other courts gave it little weight.[18]

The inconsistent treatment persisted, even when some courts noted the shifting views in the scientific community.[19]

Because courts rarely explained why they decided peer review deserved either substantial importance or minimal importance for a particular expert's work, many decisions appeared to reach a tentative conclusion about admissibility first, and then addressed peer review as an afterthought.

The disparate weight courts give peer review is illustrated by a recent pair of cases involving identical expert testimony in two different courts, each purporting to apply Daubert.

The cases were part of multidistrict litigation — In re: Zantac (Ranitidine) Product Liability Litigation, and related litigation in Delaware state court, In re: Zantac (Ranitidine) Litigation — involving claims that the antacid drug Zantac and its generic counterparts caused cancer.

The first court to rule, the U.S. District Court for the Southern District of Florida, excluded one expert's testimony on causation, **finding** in 2022 that the expert had "designed and conducted novel experiments for this litigation that did not follow any preexisting, peer-reviewed experimental designs, much less designs established to assess drug stability." [20]

But the lack of peer review was just one of the factors considered by the court, and the decision did not state how strongly it weighed that factor.

Yet in a separate lawsuit involving the same expert's proposed testimony, the Delaware Superior Court concluded in late May that the "lack of peer review ... is fodder for cross-examination, not exclusion." [21]

The different results in these nearly identical cases support the view that the overall gestalt has mattered more than careful analysis of the significance of peer review.

Further, no matter what courts have said about peer review, data suggests that peer review has not been a strong predictor of whether courts will admit expert testimony.

In the years after the Supreme Court's Daubert decision, many states adopted Daubert — including its recognition of peer review as a relevant indicator of reliability — but many did not. [22]

A large 2022 study of appellate decisions in criminal cases, published in the journal *Psychology, Public Policy and Law*, found no statistically significant difference in exclusion rates between federal court decisions before and after Daubert, nor between courts in states that chose to follow Daubert and those that did not. [23]

Role of Peer Review After December 2023 Rule 702 Amendment Still Uncertain

The December 2023 amendment to Rule 702 clarified that the "preponderance of the evidence" standard applies to establishing the reliability of expert testimony. But the amendment did not address peer review.

Today, courts approach peer review the same as they did before the amendment: Some courts treat a lack of peer review as a serious shortcoming, but others do not. [24] And because courts rarely explain why they gave some or substantial weight to peer review, these decisions cannot be explained simply by the fact that Daubert lists it as a possible, but not essential, factor for assessing reliability.

This unresolved issue is important, because Rule 702 requires courts to act as gatekeepers for expert testimony. But the rules for determining what expert testimony passes muster for admission at trial should be clear.

More broadly, when courts rely on illustrative lists of factors that can support passing a legal test, reasoned opinions should give guidance to future courts about how and why the factors support particular decisions.

The jurisprudence under Rule 702 over the last few decades suggests that more guidance would be useful, including updated analysis of whether the replication crisis and current views in the scientific community should affect whether peer review belongs as a factor that helps identify reliable expert testimony.

Jeffrey Gross is a partner and Robert LaCroix is an associate at Reid Collins & Tsai LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] See, e.g., David E. Bernstein & Eric G. Lasker, *Defending Daubert: It's Time to Amend Federal Rule of Evidence 702*, 57 Wm. & Mary L. Rev. 1, 8-12 (2015).

[2] Fed. R. Evid. 702 advisory committee's note to 2023 amendment.

[3] 509 U.S. 579, 593-94 (1993).

[4] **Danhoff v. Fahim** , No. 163120, --- N.W.3d ----, 2024 WL 3333321, at *13-14 (Mich. July 8, 2024).

[5] Alvaro de Menard, *What's Wrong with Social Science and How to Fix It: Reflections After Reading 2578 Papers*, *Fantastic Anachronism* (Sept. 11, 2020), <https://fantasticanachronism.com/2020/09/11/whats-wrong-with-social-science-and-how-to-fix-it/>.

[6] See, e.g., Melinda Baldwin, *In Referees We Trust?*, 70 *Physics Today* 44, 44 (2017).

[7] *Id.* at 49.

[8] John P.A. Ioannidis, *Why Most Published Research Findings Are False*, *PLoS Med* (2005).

[9] Sara Schroter et al., *What errors to peer reviewers detect, and does training improve their ability to detect them?*, 101 *J. Royal Soc. Med.* 507 (2008).

[10] Stephan Lewandowsky & Klaus Oberauer, *Low Replicability Can Support Robust and Efficient Science*, 11 *Nature Communications* 358, at 2 (2020) (citing Rolf A. Zwaan et al., *Making Replication Mainstream*, 41 *Behavioral & Brain Scis.* e120 (2018)).

[11] *Id.* (citing Open Science Collaboration, *Estimating the Reproducibility of Psychological Science*, 349 *Science* 1, 1-8 (2015)).

[12] See, e.g., Uri Simonsohn et al., [109] *Data Falsificada (Part 1): "Clusterfake"*, *DataColada* (June 17, 2023), <https://datacolada.org/109>.

[13] Some, including the editors of the journal *Science*, claim that the advent of AI raises the risk of shoddy papers passing peer review. See *LLMs Now Write Lots of Science. Good*, *The Economist* (June 27, 2024), <https://www.economist.com/leaders/2024/06/27/llms-now-write-lots-of-science-good>.

[14] Cassandra L. Ettinger et al., *A Guide to Preprinting for Early-Career Researchers*, 11 *Biol. Open* 7 (2022).

[15] Andre Spicer & Thomas Roulet, *Hate the peer review process? Einstein did too*, *The Conversation* (June 2, 2014), <https://theconversation.com/hate-the-peer-review-process-einstein-did-too-27405>.

[16] 509 U.S. at 593.

[17] *Daubert v. Merrell Dow Pharms., Inc.* , 43 F.3d 1311, 1318 (9th Cir. 1995).

[18] See, e.g., *Baugh v. Cuprum S.A. de C.V.* , 845 F.3d 838, 845 (7th Cir. 2017) (lack of peer review no bar to admissibility because expert applied techniques well-established in industry); *Primiano v. Cook* , 598 F.3d 558, 566 (9th Cir. 2010) (reversing exclusion of non-peer reviewed opinion based on expert's "background and experience, and his explanation of his opinion"); *Bitler v. A.O. Smith Corp.* , 400 F.3d 1227, 1235 (10th Cir. 2005) (affirming admissibility of opinion that was "not susceptible to testing or peer review"); Danhoff, 2024 WL 3333321, at *13-14.

[19] *Valentine v. Pioneer Chlor Alkali Co.* , 921 F. Supp. 666, 674 (D. Nev. 1996) (noting "some serious debate in the scientific community itself over the significance of publication per se and the adequacy of pre-publication evaluation of scientific writings").

[20] *In re Zantac (Ranitidine) Prod. Liab. Litig.* , 644 F. Supp. 3d 1075, 1140 (S.D. Fla. 2022).

[21] *In re Zantac (Ranitidine) Litig.*, C.A. No. N22C-09-101 ZAN, 2024 WL 2812168, at *34 (Del. Super. May 31, 2024).

[22] See Jennifer L. Groscup et al., *The Effects of Daubert on the Admissibility of Expert Testimony in State and Federal Criminal Cases*, 8 Psych., Pub. Pol. & L. 339, 342, 344 (2002).

[23] *Id.*

[24] Compare *United States v. Ortiz* , --- F. Supp. 3d ----, 2024 WL 2889873, at *9 (S.D. Cal. June 10, 2024) (excluding expert opinion on DNA testing methodology that had not been peer reviewed) with *Teresko v. The 3M Co.* , No. 22-cv-1532-JPS, 2024 WL 2864402, at *19-20 (E.D. Wis. June 16, 2024) (excluding novel expert opinion with passing reference to lack of peer review) and *Garcia v. Singh* , Civ. No. 2:23-545-WJ-GJF, 2024 WL 2939126, at *3 (D.N.M. June 11, 2024) (excluding expert based on lack of record about Daubert factors, including peer review).

NFL Sacks \$4.7B Sunday Ticket Verdict With Post-Trial Win

By **Craig Clough**

Law360 (August 1, 2024, 9:21 PM EDT) -- A California federal judge on Thursday overturned a Los Angeles jury's \$4.7 billion verdict against the National Football League for violating antitrust laws with its Sunday Ticket television package, granting the league a post-trial win by finding that the plaintiffs' damages experts presented "flawed methodologies."



The National Football League was granted a post-trial win in the suit accusing it of violating antitrust laws with its Sunday Ticket television package after a judge determined, among other things, jurors disregarded his instructions. (AP Photo/Rick Osentoski, File)

U.S. District Judge Philip S. Gutierrez issued the order one day after **holding a hearing** on the NFL's motion for either **judgment as a matter of law or a new trial**. During the hearing, he appeared to side with the league's arguments that the damages models presented by experts for the two classes were unsound.

"The court agrees that [the expert's] testimonies based on their flawed methodologies should be excluded," Judge Gutierrez wrote in his **decision** Thursday. "And because there was no other support for the class-wide injury and damages elements of plaintiffs' [Sherman Act] claims, judgment as a matter of law for the defendants is appropriate."

Judge Gutierrez also wrote that even had he not thrown out the experts' testimony, he would have

ordered a new trial based on the **"irrational" verdict** of the jury, which he said was reached by jurors developing their own damages model and rejecting the models presented by the plaintiffs.

Because the court can determine how the jury reached its award "to the cent," the judge wrote, he found that the jurors disregarded his instructions.

"As to plaintiffs' third argument — that the court cannot speculate as to the jury's deliberations — this is a rare situation where it is clear, without speculation, that the award was based on improperly considered evidence," the judge wrote. "This is not a case where a jury deviated from an experts' damages figure for an arbitrary reason."

The eight-person jury handed the NFL the blockbuster courtroom defeat on June 27 following a month-long trial and about six hours of deliberations. It found 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 have been tripled under antitrust law if it stood.

The trial included testimony from NFL Commissioner **Roger Goodell** and Dallas Cowboys owner Jerry Jones.

During the trial, the subscribers argued that there is evidence the NFL and DirecTV reached side agreements to keep the price of Sunday Ticket artificially inflated to appease CBS and Fox, which viewed it 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, 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 Sunday ticket during the class period was \$102.74, far below the average sticker price by hundreds, 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 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.

Judge Gutierrez agreed with the NFL in Thursday's order, and he rejected arguments made by the plaintiffs in their opposition and orally on Wednesday that the court should not speculate on the jurors' reasoning.

"Neither of the jury's damages awards to the residential nor commercial classes were proposed by plaintiffs or found in the record," the judge wrote. "Defendants argue that while 'the jury did not detail the basis for its calculations, its highly specific damages figures leave no doubt what it did.' The court agrees. The jury awarded damages to the cent and basic arithmetic shows their methodology."

But that finding would only result in a new trial, the judge wrote.

The judge went further and granted the NFL's request for judgment as a matter of law because he concluded he should throw out the testimony of the classes' experts, Daniel A. Rascher and John Douglas

Zona.

Rascher argued to the jury that the NFL should have followed the college football method of letting individual teams or groups of teams negotiate their own TV rights, which he said results in nearly all major college games being broadcast on free television or basic cable. But he was too imprecise in his methods, the judge found.

"Dr. Rascher's failure to produce a coherent model is particularly problematic as there are significant differences between college football and the outcome in his college football but-for world," Judge Gutierrez wrote. "Unlike Dr. Rascher's college but-for world, not all college football games are available on over-the-air networks and on the major cable stations as some college football games — including games of Top 25 ranked teams — were available only by purchasing premium offerings like the Pac 12, SEC, or ACC network packages or viewable only on local regional networks."

During Wednesday's hearing, Judge Gutierrez mentioned that he is a Notre Dame fan, but he is not able to get every Notre Dame football game for free or through basic cable.

The judge also found various problems with Zona's testimony. He argued that if the NFL allowed a competitor to DirecTV to also offer Sunday Ticket, it would have sliced the price customers paid roughly in half. But Zona didn't explore what those competitors would be, the judge said.

Zona "failed to define an assumption that was necessary for evaluating the rationality and reliability of his models by never deciding what a 'direct-to-consumer' product entailed," the judge wrote.

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

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 Adam LoBelia.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

JPML Greenlights Shale Oil Price-Fixing MDL In New Mexico

By **Jared Foretek**

Law360 (August 1, 2024, 7:26 PM EDT) -- A group of U.S. shale oil producers will have to defend claims that they conspired with OPEC to artificially inflate gas prices in New Mexico federal court after the U.S. Judicial Panel on Multidistrict Litigation centralized at least five suits there Thursday.

In its new **order**, the panel took three proposed federal class actions Nevada and consolidated them with two others already in New Mexico, while noting that 11 other suits will likely be joined there in the future as well.

The five suits consolidated Thursday allege **conspiracies** between eight of the country's biggest shale oil producers that had the effect of deliberately raising prices for consumers on gasoline, diesel fuel, marine fuel and heating oil.

"All actions propose putative classes of indirect purchasers of various petroleum-based products made from crude oil," the panel said in its order. "Centralization will eliminate duplicative discovery; prevent inconsistent pretrial rulings, particularly as to class certification; and conserve the resources of the parties, their counsel, and the judiciary."

Among other groups, the suits propose a nationwide class of gasoline consumers who claim they were "forced to purchase gasoline at artificially inflated levels."

Hess, Permian Resources, Chesapeake Energy, Continental Resources, EOG Resources, Diamondback Energy, Pioneer Natural Resources and Occidental Petroleum are all alleged to have participated in the conspiracy, which saw them collude with the Organization of the Petroleum Exporting Countries, or OPEC, to limit production and keep oil prices high following the 2022 Russian invasion of Ukraine, according to the plaintiff consumers.

The companies opposed centralization to New Mexico, instead indicating that they wanted the cases all moved to the Western District of Texas via Section 1404 transfer but without centralization.

But according to the panel, centralizing the cases made the most sense given the number of tagalong suits expected.

"We find that there is no reasonable prospect that the multidistrict character of this litigation will be resolved through Section 1404 transfer in the near future, given the uncertain outcome of pending transfer motions and the expanding number of involved districts," the panel wrote. "All parties agree the actions should proceed in a single court, and ... centralization at this time will allow the parties and the judiciary to more quickly realize such efficiencies."

The plaintiffs have claimed that much of the shale oil production at issue takes place in New Mexico, and the judges said that the state should be a fairly convenient venue for a number of the defendants with headquarters in Texas and Oklahoma.

U.S. District Judge Matthew L. Garcia will oversee the consolidated pretrial proceedings in his first MDL.

The five cases consolidated in Thursday's order are *Rosenbaum et al. v. Permian Resources Corp. et al.*, case number 2:24–00103, *Mellor v. Permian Resources Corp. et al.*, case number 2:24–00253,

and MacDowell et al., v. Permian Resources Corp. et al., case number 2:24–00325, in the U.S. District Court for the District of Nevada; and Foos et al., v. Permian Resources Corp. et al., case number 1:24–00361, and Brown et al., v. Permian Resources Corp. et al., case number 1:24–00430, in the U.S. District Court for the District of New Mexico.

The plaintiffs are represented by Christopher A. Turtzo of Morris Sullivan & Lemkul LLP, Patrick J. Coughlin, Carmen Medici, Fatima Brizuela, Daniel J. Brockwell, Patrick McGahan, Michael Srodoski, Isabella De Lisi, Zachary Kranc and Patrick Rodriguez of Scott + Scott Attorneys at Law LLP, Mark J. Bourassa, Jennifer A. Fornetti and Valerie S. Christian of The Bourassa Law Group, Stuart G. Gross and Travis Smith of Gross Klein PC, Todd M. Schneider and Matthew S. Weiler of Schneider Wallace Cottrell Konecky LLP, Matthew T. Dushoff and William A. Gonzales of Saltzman Mugan Dushoff PLLC, William G. Caldes, Jeffrey L. Spector and Diana J. Zinser of Spector Roseman & Kodroff PC, Garrett D. Blanchfield and Roberta A. Yard of Reinhardt Wendorf & Blanchfield, David P. McLafferty of McLafferty Law Firm PC, Christopher A. Dodd of Dodd Law Office LLC, Warren T. Burns, Korey Nelson and Daniel H. Charest of Burns Charest LLP, Rex A. Sharp, Isaac L. Diel, W. Greg Wright, Brandon C. Landt and Hammons P. Hepner of Sharp Law LLP, Steven N. Williams, Gerald S. Williams and Kai'Ree K. Howard of Steven Williams Law PC, and Carl V. Malmstrom and Thomas H. Burt of Wolf Haldenstein Adler Freeman & Herz LLP.

EOG is represented by John M. Taladay, Christopher Wilson, Kelsey Paine and Megan Tankel of Baker Botts LLP.

Pioneer and ExxonMobil are represented by Boris Bershteyn, Karen Hoffman Lent, Michael H. Menitove and Zachary C. Siegler of Skadden Arps Slate Meagher & Flom LLP, and Samuel G. Liversidge, Jay P. Srinivasan and S. Christopher Whittaker of Gibson Dunn & Crutcher LLP.

Diamondback is represented by Thomas B. Walsh IV, Thomas M. Melsheimer, Jeffrey L. Kessler and Jeffrey J. Amato of Winston & Strawn LLP.

Chesapeake is represented by Lawrence E. Buterman and Marguerite M. Sullivan of Latham & Watkins LLP.

Hess is represented by Kevin S. Schwartz and David A. Papirnik of Wachtell Lipton Rosen & Katz.

Occidental is represented by Devora W. Allon and Jeffrey J. Zeiger of Kirkland & Ellis LLP.

Continental is represented by Christopher E. Ondeck, Stephen R. Chuk and Kyle A. Casazza of Proskauer Rose LLP, and Michael Burrage of Whitten Burrage.

Permian is represented by Michael W. Scarborough, Craig P. Seebald, Stephen M. Medlock and Dylan I. Ballard of Vinson & Elkins LLP.

The case is In re: Shale Oil Antitrust Litigation, case number 3119, in the U.S. District Court for the District of New Mexico.

--Additional reporting by Nadia Dreid. Editing by Adam LoBelia.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

MultiPlan, Insurance Cos. Must Face Collusion MDL In Illinois

By **Lauraann Wood**

Law360 (August 1, 2024, 8:53 PM EDT) -- The Judicial Panel on Multidistrict Litigation on Thursday centralized in Chicago six class actions challenging the MultiPlan pricing tools that healthcare providers allege are used by UnitedHealth, Aetna, Cigna and other major insurers to systematically underpay out-of-network providers, with more than a dozen similar lawsuits potentially tagging along.

The JPML said in its **order** that centralizing the suits in the Northern District of Illinois will be convenient for not just the parties involved, but the witnesses as well. Six cases are pending in that district already and two defendants are based there, with several others located nearby, the panel noted. U.S. District Judge Matthew Kennelly, who sits in that district, has experience navigating the nuances of complex multidistrict litigation, making him well-suited to handle the case, according to the panel's decision.

"No party disputes that these actions share factual questions arising from an alleged conspiracy to fix, suppress, and stabilize reimbursement rates paid to healthcare providers for out-of-network healthcare services in the U.S. in violation of the Sherman Act," the panel said. "Centralization will eliminate duplicative discovery; prevent inconsistent pretrial rulings, particularly as to class certification; and conserve the resources of the parties, their counsel, and the judiciary."

Some defendants from other jurisdictions argued that their anticipated or already-pending motions to transfer litigation to the Northern District of Illinois would make centralization unnecessary, but "we disagree," the panel said. Defendants have moved to transfer a case in California, but the same is not true for cases pending in the Southern District of New York, the order said.

And "because defendants do not intend to immediately move to transfer the first-filed Southern District of New York ... action — they prefer instead to wait until a ruling on their motion to dismiss issues — it is unclear when the multidistrict character of this litigation could be eliminated, if at all," the JPML wrote.

"All parties agree the actions should proceed in a single court, and Section 1407 centralization affords the parties and the judiciary the fastest route to realizing the efficiencies of coordinated proceedings for all related actions," it added.

Hunter Shkolnik, who represents plaintiffs in seven related actions in the Southern District of New York, told Law360 in an email Thursday that he and his client are pleased the JPML agreed centralization was necessary, and "the transfer to a highly respected and experienced jurist like Judge Kennelly will definitely streamline this litigation."

Representatives of the other parties didn't immediately respond to requests for comment.

Minnesota-based provider Live Well Chiropractic PLLC launched **one of the suits** grouped together by the JPML's order. Live Well filed its case last year, accusing MultiPlan Inc. and a dozen insurers of forming a cartel through services that determine the reimbursement rates paid to out-of-network providers.

The provider filed suit amid growing concerns that MultiPlan allows insurers to effectively collude when pricing provider payments. Other suits in the MDL have been filed by doctors and hospital

systems, including Curtis F. Robinson M.D. Inc., Allegiance Health Management Inc., Ivy Creeks of Tallapoosa LLC, Adventist Health System Sunbelt Healthcare Corp. and Community Health Systems Inc.

Live Well said in its suit that MultiPlan claims its "repricing" tools help insurers determine a fair rate to reimburse providers. But in reality, MultiPlan's services do what they're designed to do: suppress and fix the prices insurers pay physicians, according to Live Well's suit.

MultiPlan says its pricing algorithm calculates reimbursement rates based on historical data for similar providers for the same healthcare services, with regional cost-of-living adjustments, the provider said. But behind the scenes, Live Well alleged, MultiPlan overrides the "fair" rate calculated by the algorithm and instead imposes a reimbursement rate selected by MultiPlan and the insurer ahead of time.

MultiPlan and the insurance companies all agree on the method of pricing the out-of-network claims, to share their competitively sensitive data to help drive the algorithm and to apply the "override" values, according to the provider's suit. The insurers also agreed to pay providers "what MultiPlan tells them to pay" and to not undercut other MultiPlan customers with competitive pricing, Live Well said.

Curtis F. Robinson M.D. Inc. is represented by Yaman Salahi, Julian Zhu and Natasha Fernández-Silber of Edelson PC.

Allegiance Health is represented by Matthew Strauser, Amanda Klevorn, Christopher Cormier, Korey Nelson, Matthew Tripolitsiotis, Natalie Earles, Quinn Burns and Warren Burns of Burns Charest LLP, and Robert Clifford, James Pullos, Kristofer Riddle and Shannon McNulty of Clifford Law Offices.

Live Well is represented by Kristie LaSalle, Kyle Pozan, Stephen Teti and Brian Clark of Lockridge Grindal Nauen PLLP.

Ivy Creek is represented by Jonathan Smallwood, Michael Srodoski, Patrick McGahan, Patrick Coughlin, Robin Van Der Meulen and Joseph Guglielmo of Scott + Scott Attorneys At Law LLP.

Plaintiffs Adventist Health System Sunbelt Healthcare Corp. and CHS/Community Health Systems Inc. are represented by Dylan Ballard, James McGovern, Mackenzie Grey Newman, Madison Lo, Michael Smith McCambridge, Michael Scarborough, Rami Rashmawi, Stephen Cohen and Stephen Medlock of Vinson & Elkins LLP.

Multiplan is represented Latham & Watkins LLP and Phelps Dunbar LLP.

Other defendants in the Live Well suit are represented by Latham & Watkins, Gibson Dunn & Crutcher LLP, Neal Gerber & Eisenberg LLP, Hogan Lovells, Davis Polk & Wardwell LLP, McDermott Will & Emery LLP, Sidley Austin LLP, Eimer Stahl LLP, Cleary Gottlieb Steen & Hamilton LLP, Allen Overy Shearman Sterling, Smith Gambrell & Russell LLP and Crowell & Moring LLP.

The case is In re: MultiPlan Health Insurance Provider Litigation, MDL number 3121, before the Judicial Panel on Multidistrict Litigation.

--Additional reporting by Matthew Perlman. Editing by Covey Son.



Portfolio Media, Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Boar's Head Faces Putative Class Action Over Listeria Recall

By **Hailey Konnath**

Law360 (August 1, 2024, 11:34 PM EDT) -- A New York woman has filed a proposed class action against Boar's Head in the midst of its widespread recall of meat and poultry products due to a potential listeria outbreak, claiming that the company failed to disclose to consumers that its products were contaminated.

The suit, filed by Rita J. Torres on Thursday, appears to be the second filed against Boar's Head Provisions Co. Inc. following the recalls. Earlier this week, Boar's Head expanded its recall to include an additional 7 million pounds of ready-to-eat meat and poultry products. Another suit was filed in St. Louis County Circuit Court by a Missouri couple on July 26, the day the company first recalled liverwurst products.

In her complaint, Torres said Boar's Head engaged in "deceptive and misleading business practices" throughout New York and the United States.

"Defendant has improperly, deceptively and misleadingly labeled and marketed its products to reasonable consumers, like plaintiff, by omitting and not disclosing to consumers on its packaging that the products are contaminated with *Listeria monocytogenes*," Torres said.

Boar's Head's recall is insufficient and "deliberately designed to preclude the vast majority of consumers from receiving a recall," she said. That's because consumers must retain the products and return them to the store where they were purchased to secure refunds, she said.

"Defendant is well aware that any consumer who was made aware of the recall would be predisposed to throwing the products away," Torres said.

She added, "The class action remedy is superior to defendant's failed recall in every conceivable fashion."

On July 26, the U.S. Department of Agriculture's Food Safety and Inspection Service announced that Boar's Head was recalling all liverwurst products "currently available in commerce" because they were possibly contaminated by listeria. The recall involved removing more than 200,000 pounds of products from the market, Boar's Head said.

The products were recalled after an unopened liverwurst product collected by the Maryland Department of Health tested positive for listeria.

An expanded recall was announced on July 30, with the company recalling an additional 7 million pounds of meat and poultry products. As of that day, more than 30 people in 13 states had fallen ill as a result of infections linked to meats sliced at delis, it said. Two people have died, the agency said.

Torres noted Thursday that listeria could lead to "serious and life-threatening adverse health consequences." That risk is particularly high for pregnant individuals, infants, the elderly and those who are immunocompromised, she said.

She said she purchased Boar's Head Ham in Queens County, New York,

Consumers, like Torres, "trust manufacturers such as defendant to sell products that are safe and

free from known harmful substances, including *Listeria monocytogenes*," the complaint states. However, "unfortunately for consumers," the Boar's Head products purchased by putative class members contained those *monocytogenes*, Torres said.

"Defendant is using a marketing and advertising campaign that omits from the packaging that the products contain *Listeria monocytogenes*," Torres said. "Knowing of the presence of *Listeria monocytogenes* is material to reasonable consumers."

Torres said that Boar's Head's recall is designed to reach "very few people" and will benefit "very few of the consumers" who purchased the affected products.

She said that she and other consumers lost the "entire benefit of their bargain" when they received a contaminated food product. Boar's Head was able to charge more for its products than it would have had it not concealed the contamination from consumers via its packaging, Torres claimed.

Torres seeks to represent a nationwide class of all individuals who purchased the recalled products during the applicable statute of limitations period. She's alleging multiple violations of New York General Business Law.

Torres' suit follows one lodged by Missouri couple Sue and Patrick Fleming of High Ridge, Missouri. That action — the first filed over the outbreak — alleges that Sue Fleming "became deathly ill and was hospitalized" after consuming Boar's Head liverwurst in June.

According to the FSIS, listeria can cause "fever, muscle aches, headache, stiff neck, confusion, loss of balance and convulsions sometimes preceded by diarrhea or other gastrointestinal symptoms."

Boar's Head said in a July 30 statement that the company and its employees "deeply regret that our liverwurst products were found to be adulterated with *Listeria monocytogenes*."

"No words can fully express our sympathies and the sincere and deep hurt we feel for the families that have suffered losses and others who endured illness," the company said.

It said the health and well-being of consumers "are paramount."

"You have our commitment that we are dedicated to all Boar's Head products consistently meeting the high quality and safety standards you deserve and expect," the company said.

Boar's Head and counsel for Torres didn't immediately respond to requests for comment late Thursday.

Torres is represented by Jason P. Sultzer, Philip J. Furia and Daniel Markowitz of Sultzer & Lipari PLLC, Michael R. Reese and Carlos F. Ramirez of Reese LLP, Nick Suci III of Milberg Coleman Bryson Phillips Grossman PLLC, Charles E. Schaffer of Levin Sedran & Berman LLP and Jeffrey K. Brown of Leeds Brown Law PC.

The Flemings are represented by Ryan Osterholm and Brendan Flaherty of OFT Food Safety & Injury Lawyers.

Counsel information for Boar's Head wasn't immediately available Thursday.

The federal case is *Rita J. Torres v. Boar's Head Provisions Co. Inc.*, case number 1:24-cv-05405, in the U.S. District Court for the Eastern District of New York.

The Missouri case is *Sue Fleming at al. v. Boar's Head Provisions Co. Inc. et al.*, case number unknown, in St. Louis County Circuit Court.

--Editing by Jay Jackson Jr.