

Lululemon Hit With Shareholder Lawsuit Over Activewear Trends

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- **COURT:** S.D.N.Y.
- **TRACK DOCKET:** 1:24-cv-06033

A Lululemon Athletica Inc. shareholder has sued the apparel company, accusing executives of misleading investors about product execution issues and slowing activewear trends.

The lawsuit cites a Bloomberg News report in July that Lululemon paused sales of its Breezethrough yogawear. The decision was part of a string of challenges at Lululemon, whose leggings business was hurt by a lack of new colors and unavailability of certain sizes.

Given the challenges, executives' positive statements about the company's business, operations, and prospects were materially misleading, investors said in a complaint filed Thursday in the US District Court for the Southern District of New York.

"These material misstatements and/or omissions created an unrealistically positive assessment of Lululemon and its business, operations, and prospects, thus causing the price of the Company's securities to be artificially inflated at all relevant times," the complaint said.

Investors pointed to several allegedly misleading statements, including ones in January when Lululemon increased its revenue and earnings expectations for the fourth quarter of 2023. The company stated its sales trend "remains balanced across channels, categories, and geographies."

Investors allege Lululemon failed to disclose the Breezethrough product launch underperformed and, as a result, the company was experiencing stagnating sales in the Americas region.

Lululemon's stock had fallen 52% this year and was on pace for its worst annual performance in over a decade, Bloomberg News reported in late July. The report noted analysts' concerns about the company's ability to hit financial targets.

Lululemon didn't immediately respond to a request for comment.

Glancy Prongay & Murray LLP and The Law Offices of Frank R. Cruz represent the investor.

The case is *Patel v. Lululemon Athletica Inc.*, S.D.N.Y., No. 24-cv-06033, 8/8/24 .

Business Law Prof Blog

 lawprofessors.typepad.com/business_law/2024/08/ninth-circuit-follows-frutarom.html

Friday, August 9, 2024

Ninth Circuit Follows Frutarom

By Ann Lipton

Previously, I blogged about *Mivtachem Insurance v. Furtarom*, 54 F.4th 82 (2d Cir. 2022), where the Second Circuit held that false statements about a target company - most of which were included in the acquiring company's S-4 - were not made "in connection with" sales of the acquirer's securities, and therefore, purchasers of the acquirer's stock did not have standing to bring Section 10(b) claims against target company officers.

Inevitably, the same thing came up in a pair of cases about SPACs, where purchasers in the publicly-traded SPAC entity wanted to bring claims based on pre-merger false statements about the target company. A New York district court, following *Frutarom*, denied the claims; a California district court rejected the Second Circuit's reasoning (and dismissed the claims on other grounds, namely, that at the time of the false statements it wasn't clear that the target company really was going to be a target company).

Anyway, the California case, which involved the Lucid de-SPAC, was just appealed to the Ninth Circuit and the Ninth Circuit ... followed the Second Circuit's rule. In *Max Royal LLC v. Atieva*, it held:

As noted above, *Blue Chip* limits standing to “purchasers or sellers of the stock in question.” 421 U.S. at 742. Plaintiffs contend that the “stock in question” is “the security about which Plaintiffs allege injury,” and not necessarily a security of the company that made the alleged misrepresentations. Plaintiffs further contend that the “*Blue Chip* rule merely checks whether plaintiffs allege injury from the purchase or sale of a security” and that standing is determined based on “whether the security plaintiff purchased is sufficiently connected to the misstatement.” For several reasons, we conclude that Plaintiffs’ construction of standing is inconsistent with *Blue Chip*. ...

Plaintiffs ignore the plain language of *Blue Chip* and assert that Section 10(b) standing extends to any stockowner who claims that the misstatements of another person or company negatively affected the value of the owner’s stock. Under Plaintiffs’ desired formulation of the standard, hypothetical plaintiffs would need only to have purchased a security—any security—to satisfy the purchaser-seller requirement. But Plaintiffs’ interpretation of the securities laws would vastly expand the boundaries of Section 10(b) standing and contradict the express limiting purpose of the *Birnbaum* Rule. The Supreme Court has cautioned that Section 10(b) does not “provide a cause of action to the world at large,” and “should not be interpreted to provide a private cause of action against the entire marketplace in which the issuing company operates.” *Stoneridge*, 552 U.S. at 162 (cleaned up) (quoting *Blue Chip*, 421 U.S. at 733 n.5)....

We agree with the Second Circuit’s reasoning in *Menora* and likewise reject Plaintiffs’ “sufficiently connected” test. The Supreme Court adopted a bright-line rule for standing—even at the risk of it being “arbitrary” in some cases—to avoid the type of “endless case-by-case” analysis contemplated by Plaintiffs....

It is undisputed that the securities about which Defendants allegedly made misrepresentations were those of Lucid. Under the *Birnbaum* Rule, Plaintiffs would need to have purchased or sold Lucid stock to have standing to bring this action under Section 10(b). Here, Plaintiffs did not purchase or sell Lucid stock, as Lucid was a privately held company during the relevant period. Plaintiffs purchased CCIV stock, but their complaint does not allege that anyone made misrepresentations about CCIV stock. Because Plaintiffs did not purchase or sell the securities about which the alleged misrepresentations were made, Plaintiffs lack standing under Section 10(b).

That CCIV later acquired Lucid does not change our analysis.

One interesting point about the Ninth Circuit’s reasoning is that the court added, “If Congress wants to treat SPAC acquisitions differently than traditional mergers, it has the authority to do so.”

Except the SEC, anyway, *did* do so - inapplicable to this transaction, but applicable to transactions going forward, the SEC adopted new rules requiring target company officers to sign the registration statement issued in connection with the de-SPAC transaction. And in the adopting release, it said:

Given that the target company therefore is, in substance, an “issuer” of securities in a de-SPAC transaction regardless of transaction structure, the Commission proposed to amend Instruction 1 to the signatures section of both Form S-4 and Form F-4 to require that, when the SPAC would be the issuer filing the registration statement for a de-SPAC transaction, the term “registrant” would mean not only the SPAC but also the target company....

As discussed in more detail below, it is our view that in a de-SPAC transaction the target company is an issuer of securities under section 2(a)(4) of the Securities Act, and, therefore, the target company along with its required officers and directors must sign a registration statement filed by a SPAC or another shell company for the de-SPAC transaction, because both in substance and by operation of new Securities Act Rule 145a, the target company is issuing or proposing to issue securities in a de-SPAC transaction, regardless of the transaction structure....

Now, the SEC was explicitly contemplating Section 11 liability, not 10(b) liability, and it therefore was talking about the S-4 rather than statements made outside the securities filings, but that might be the kind of thing that ... informs ... a court's analysis, no?

Anyway, I also wonder how this reasoning impacts *SEC v. Panuwat*, i.e., the "shadow" insider trading case, which I previously blogged about here. That case also involved information about one company being used to trade in the securities of another company - and after *trial*, a jury found the trader liable. I assume Panuwat will cite *Max Royal* on appeal, though I suppose the Ninth Circuit might limit its holding to private Section 10(b) actions.

Anyway, here's Marc Steinberg and Antonio R. Partida criticizing *Frutarom*.

In re: CCIV/Lucid Motors Securities Litigation

DJ [dailyjournal.com/dar/282958](https://www.dailyjournal.com/dar/282958)

Daily appellate reports

Securities

Ruling by

Ronald M. Gould

Lower Court

USDC Northern District of California

Lower Court Judge

Yvonne Gonzalez Rogers

Stock purchasers had no standing to assert securities violation claim when they were not purchasers of the contested stock involving the alleged misrepresentations.

Court

9th

Cite as

2024 DJDAR 7508

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Aug. 9, 2024

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Disposition Type

Affirmed

Oral Argument

Jun. 13, 2024

Summary

Atieva Inc., dba Lucid Motors, manufactures electric cars. Between January 11 and February 22, 2021, Lucid was in merger negotiations with Churchill Capital Corporation IV. During this period, on February 5 and 12, Lucid's CEO allegedly made misrepresentations regarding Lucid's ability to meet production targets. On February 22, Churchill acquired Lucid. When it became known that Lucid's projections were vastly overstated, Churchill's stock price plummeted. Plaintiffs Max Royal LLC and others sued Lucid and its CEO for securities fraud violations. Plaintiffs had bought Churchill stock after Lucid CEO's misrepresentations but before the merger. Defendants argued in part that plaintiffs lacked standing given that plaintiffs were not actual purchasers of Lucid stock. The district court, held that plaintiffs had standing because, despite not having actually purchased the disputed stock, they were affected by the alleged misrepresentation. Later, however, the district court dismissed the case based on the merits. Plaintiffs appealed.

Affirmed. Under the *Birnbaum* Rule, only purchasers or sellers of the contested stock have standing. Following this test, to have standing, plaintiffs must have purchased or sold Lucid stock. As plaintiffs purchased Churchill stock and not Lucid, they lacked standing. That Churchill later acquired Lucid was of no import. Churchill and Lucid were separate entities

when Lucid's CEO made the alleged misrepresentations, and his misstatements may not be attributed to Churchill despite Churchill's later acquisition of Lucid. Accordingly, the dismissal was affirmed but due to lack of standing rather than on the merits.

— Antoneth Dizon Fong

In re: CCIV / LUCID MOTORS

SECURITIES LITIGATION,

MAX ROYAL LLC; SEUNG R. LEE;

HEE K. LEE; AARON LAN;

PARADIGM BUSINESS PARK LLC;

SICHAO XU,

Plaintiffs-Appellants,

v.

ATIEVA, INC., DBA Lucid Motors; PETER RAWLINSON,

Defendants-Appellees.

No. 23-16049

D.C. No. 4:21-cv-09323-YGR

United States Court of Appeal

Ninth Circuit

Filed August 8, 2024

OPINION

Appeal from the United States District Court for the Northern District of California

SPAC Investors Lack Standing to Sue Over Lucid Motors Production

By Martina Barash

- Investors held stock in acquiring, not target, company
- Panel of 9th Cir. judges joins 2d Cir. on lack of standing

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SPAC Investors Lack Standing to Sue Over Lucid Motors Production

By Martina Barash 2024-08-08T15:54:52000-04:00

- Investors held stock in acquiring, not target, company
- Panel of 9th Cir. judges joins 2d Cir. on lack of standing

Investors who purchased stock in a blank-check company can't sue Lucid Motors' predecessor over alleged pre-merger manufacturing misrepresentations because they lack standing, the Ninth Circuit ruled Thursday.

The investors "would need to have purchased or sold Lucid stock to have standing to bring this action under Section 10(b)" of the Securities Exchange Act, Judge Ronald M. Gould said for the appeals court. But they didn't buy or sell Lucid stock "as Lucid was a privately held company during the relevant period," he said.

The unanimous three-judge panel of the US Court of Appeals for the Ninth Circuit joined the Second Circuit, the only other federal appeals court that's considered the issue of "alleged misstatements made in advance of an anticipated merger," according to the opinion.

A 1975 US Supreme Court case, *Blue Chip Stamps v. Manor Drug Stores*, "confines standing to 'purchasers or sellers of the stock in question,'" Gould said.

"The Supreme Court adopted a bright-line rule for standing—even at the risk of it being 'arbitrary' in some cases—to avoid the type of 'endless case-by-case' analysis contemplated by Plaintiffs," he said.

The investors alleged that before the merger, Atieva Inc., which did business as Lucid Motors, and its CEO made misrepresentations about Lucid's production targets and timeline. The investors owned stock in a special purpose acquisition company, Churchill Capital Corp. IV, which was considering merging with Atieva and eventually did complete a de-SPAC merger to bring Lucid public.

The production misrepresentations affected CCIV's stock price, they said.

The US District Court for the Northern District of California disagreed with the Second Circuit on standing but dismissed the suit for failure to sufficiently allege the materiality of the representations.

The Ninth Circuit affirmed the dismissal on different grounds—standing—and didn't reach the materiality question.

"That CCIV later acquired Lucid does not change our analysis" on standing, Gould said, joined by Judges Richard C. Tallman and Ryan D. Nelson. "At the time of Defendants' alleged misrepresentations, CCIV and Lucid were two entirely separate companies," Gould said. Lucid's alleged misrepresentations can't be imputed to another company that later acquired it, he said.

"If Congress wants to treat SPAC acquisitions differently than traditional mergers, it has the authority to do so," he said.

Labaton Keller Sucharow LLP and Levi & Korsinsky LLP represented the investors. Pomerantz LLP also represented one of the investors. Davis Polk & Wardwell LLP represented Atieva and CEO Peter Rawlinson.

The case is Max Royal LLC v. Atieva, Inc. , 9th Cir., No. 23-16049, 8/8/24 .

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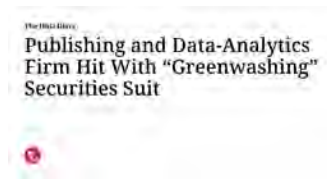
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Publishing and Data-Analytics Firm Hit With "Greenwashing" Securities Suit

K [dandodiary.com/2024/08/articles/securities-litigation/publishing-and-data-analytics-firm-hit-with-greenwashing-securities-suit](https://www.dandodiary.com/2024/08/articles/securities-litigation/publishing-and-data-analytics-firm-hit-with-greenwashing-securities-suit)

August 8, 2024



By Kevin LaCroix on August 8, 2024

Posted in Securities Litigation



In an unusual lawsuit that pairs individual wrongful termination allegations with class action securities law claims, a former employee and present shareholder of a unit of the UK-based publishing and data analytics firm RELX PLC alleges that the company fired him in retaliation for raising concerns about the company's "greenwashing." He also alleges that the company misled investors about the company's climate commitments and its climate-related actions. The complaint alleges that the company made public commitments to climate remediation but at the same time continued to engage in business activities contrary to these commitments. As discussed below, this new lawsuit, although unusual, underscores the fact that climate related allegations, including greenwashing allegations, continue to represent a significant potential source of D&O liability. A copy of the August 6, 2024, complaint can be found [here](#).

Background

RELX is a publishing company that also owns the data companies LexisNexis and Martindale-Hubbell. Elsevier is a book publishing subsidiary of RELX. Cell Press, a publisher of scientific journals, is a subsidiary of Elsevier.

Kip Lyall was an employee of Cell Press from 2014 to August 2023. Lyall was an illustration and design program manager for Cell Press. In 2021, Lyall became a RELX shareholder when he purchased four shares of RELX stock.

Lyall alleges in his complaint that in 2020, he came to believe that RELX was engaging in "greenwashing," in that while the company made numerous public climate commitments, the company was "actively supporting fossil fuel expansion." Lyall says he decided to speak up regarding his climate-related concerns, but that rather than discussing his concerns, the company "intimidated and harassed him," and in August 2023, terminated him, allegedly for speaking out.

Lyall also alleges that the company misled investors about its climate commitment. He alleges that while the company signed the Climate Pledge stating its commitment to minimize climate impacts as part of global efforts to achieve net zero emissions by 2050, and contrary to the companies “bold representations and pledges to environmental sustainability,” the company made “numerous business decisions that contradict their climate pledges.” For example, Lyall alleges that contrary to the Climate Pledge, the company continued to support new fossil fuel projects, and continued to publish journal for oil and gas technology and strategies for petroleum exploration. Lyall also alleges that the company’s political action committee (PAC) supports politicians who deny climate change.

With respect to his wrongful termination claims, Lyall alleges that in response to his expression of his concerns about the company’s climate change actions, the company “specifically pressured, harassed, retaliated [sic] and terminated [him] for advocating for Defendants to align their actions with their sustainability pledges.” The complaint quotes Lyall as saying “The pressure put on me to conform to the company’s ‘narrative’ turned my paycheck into a bribe, and the guilt from that blended with the overwhelming feeling that I was not doing enough given the scale of this emergency.”

Lyall also alleges that he “experienced severe decline in his mental health” as a result of “anxiety and helplessness” and also that he “experienced grief and despair.” The complaint alleges that Lyall sought counseling and therapy, and that as a result of a mental health professional’s written letter, requested an accommodation limiting mandatory meetings to a maximum of 45 minutes, because additional time “poses a threat to [Lyall’s] health.” The company alleges that the rather than accommodation Lyall, the defendants terminated him.

The Complaint

Lyall’s August 6, 2024, complaint, filed in the District of Massachusetts against RELX, Elsevier, and Cell Press, contains multiple counts filed on behalf of Lyall alone, relating to his wrongful termination claim. The individual claims include alleged violations of the Americans with Disabilities Act; the Massachusetts Fair Employment Practices Act; wrongful discharge, under Massachusetts law; and promissory estoppel.

In addition to these individual claims, the complaint also sets for a separate class action claim in which Lyall alleges that the defendants violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. These claims purport to be filed on behalf of a class of investors who purchased RELX shares in the five-year period preceding the date of the complaint’s filing. The complaint alleges that the defendants’ statements artificially inflated the price of RELX shares. The complaint alleges that the class members were harmed and seeks to recover damages on behalf of the class.

Discussion

I have to say that the packaging up of the securities class action claim with the plaintiff’s wrongful termination claims sort of feels like trying to hook up a sea-going ocean liner to the back of a Toyota Camry. The plaintiff (and his attorneys) may well believe that the securities law allegations are legitimate and meritorious, but more cynically minded people may see only an attempt to try to bootstrap a straightforward wrongful termination claim into a much bigger-seeming deal.

Just the same, and even though it is only a part of what is otherwise just a wrongful termination lawsuit, the complaint does contain a securities class action claim on behalf of a class of investors. To that extent, at least, it does represent yet another example of a securities suit filed based on greenwashing allegations. To the same extent, the lawsuit, or at least the suit’s securities law claim, is yet another example of how ESG and climate change-related lawsuits are being filed not against ESG laggards – that is, company’s that are not focused on ESG-related issues—but rather are being filed against companies that overstated their ESG commitment. The new lawsuit also shows how the actions of activists can lead to ESG-related litigation.

While this is a rather unusual complaint, it does also serve as an illustration of the ways in which ESG continues as a potential source of D&O claims and a potential source of corporate liability exposure. For a lot of reasons, ESG may have faded from the top of the headlines in the business press, but it has not gone away as a potential D&O liability exposure.

This case has only just been filed and it remains to be seen how it will fare. The securities claims will face a host of hurdles. For starters, the only three defendants named in the suit are RELX, Elsevier, and Cell Press. Since securities law liability only applies to the “makers” of supposedly misleading statements, it seems likely that Elsevier and Cell Press should be able to get themselves dismissed, as they did not “make” the supposedly misleading statements. When the time comes to test the sufficiency of the plaintiff’s allegations, the court will have to look long and hard to find anything that would remotely satisfy the plaintiff’s obligation to plead scienter with particularity. The complaint also fully anticipates that the plaintiff’s securities law claims, in whole or in part, may have statutes of limitations issues.

Regardless of how this lawsuit ultimately turns out, it is a reminder that companies continue to face ESG-related liability risks. It also underscores the fact that companies that made elaborate climate change commitments may face scrutiny and may be held to account to the extent later actions fall short of earlier pledges.

I will say this: I know a lot of people that wish they had a note from their doctor saying that the can’t be forced to sit in a meeting longer than 45 minutes. I think we all know that meeting longer than 45 minutes can be crazy-making even if you aren’t obsessed with global climate change.

Energy Transfer Investors' Pipeline Suit Trimmed Before Trial

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XA35S4N0000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XA35S4N0000000)

A monitor displays Energy Transfer LP signage on the floor of the New York Stock Exchange (NYSE) in New York, Nov. 19, 2018.

Photographer: Michael Nagle/Bloomberg via Getty Images

Energy Transfer LP investors have a narrower path to hold the gas distribution company liable for alleged pipeline capacity and timeline misrepresentations at trial, a federal court ruled.

But the investors have established conclusively that certain company statements were misleading and made with intent, Judge Gerald Austin McHugh said Thursday for the US District Court for the Eastern District of Pennsylvania.

The class action trial will focus on statements that led up to an alleged partial corrective disclosure in August 2018, under McHugh's ruling. McHugh said the investors can attempt to prove at trial that the disclosure caused their stock losses.

The case is Allegheny Cnty. Employees' Ret. Sys. v. Energy Transfer LP , 2024 BL 273821, E.D. Pa., No. 2:20-cv-00200, 8/8/24 .

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Musk, Tesla Oppose Bid to Merge Twitter, AI, Insider Trade Suits

By Mike Leonard

Documents

-  [Motion](#)
-  [Perry v. Musk](#)
-  [Rhode Island v. Musk](#)
-  [Teamsters v. Musk](#)

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- Lawsuits filed in Delaware just before Tesla moved to Texas
 - Bid to consolidate could preview fight for huge legal payday

Bloomberg Law News 2024-08-09T10:02:11744792675-04:00

Musk, Tesla Oppose Bid to Merge Twitter, AI, Insider Trade Suits

By Mike Leonard 2024-08-08T12:58:54000-04:00

- Lawsuits filed in Delaware just before Tesla moved to Texas
- Bid to consolidate could preview fight for huge legal payday

Two pension funds are asking a judge to combine a group of lawsuits that allege Elon Musk harmed Tesla Inc. by making insider trades, buying Twitter Inc., and steering resources to artificial intelligence-related side projects.

Rhode Island's retirement system and a Cleveland union fund moved Wednesday to consolidate the three cases, each a shareholder suit filed in Delaware's Chancery Court days before Musk moved the automaker's charter to Texas. The disputes concern "overlapping claims involving essentially the same defendants," according to the brief court filing.

Although the funds made the motion jointly, it could preview a high-stakes fight to lead litigation offering a potentially enormous payday. The shareholder attorneys who sued to invalidate Musk's record \$56 billion compensation package, for instance, have asked a judge to be paid with Tesla stock valued at around \$7 billion, a request she's still considering.

Musk relocated Tesla on June 14 after spending months lashing out over the landmark pay decision by Chancellor Kathaleen St. J. McCormick. The reincorporation came a day after Tesla's investors overwhelmingly signed off on the move and voted to reinstate his compensation. McCormick is currently weighing whether to revise her January ruling in light of the vote.

Final Delaware Court Fight

The three investor lawsuits—filed between late May and mid-June by the pension funds and a third stockholder—represent a final effort to hold Musk accountable in Delaware for his alleged wrongdoing at Tesla's helm. They involve claims that the billionaire stole corporate opportunities when he bought Twitter and started a new business, xAI, after failing to engineer a merger between Tesla and OpenAI Inc., the artificial intelligence pioneer he's now suing.

The Delaware shareholder suits also say Musk sold billions worth of Tesla stock based on inside information while manipulating the market.

The bid to consolidate the three disputes is opposed by Tesla, Musk, other board members, and Michael Perry, the investor who submitted one of the court complaints, according to Wednesday's filing. The pension funds said that if the cases are combined, they'll either reach an agreement on how to handle the litigation or file competing applications to lead the lawsuit.

The cases involve shareholder derivative claims, which are technically brought on a corporation's behalf against its leaders. Damages in derivative cases are typically paid into a company's coffers by its officers, its directors, its controlling stockholders, or their insurers.

The Employees Retirement System of Rhode Island is represented by Prickett, Jones & Elliott PA and Lief Cabraser Heimann & Bernstein LLP. The Cleveland Bakers and Teamsters Pension Fund is represented by Grant & Eisenhofer PA, Saxena White PA, and Schall Law Firm. Perry is represented by deLeeuw Law LLC, Squitieri & Fearon LLP, and Moore Law PLLC.

Tesla, Musk, and the other board members are represented by Richards, Layton & Finger PA and Freshfields Bruckhaus Deringer US LLP.

The cases are Perry v. Musk , Del. Ch., No. 2024-0560, motion filed 8/7/24 , Emp. Ret. Sys. of R.I. v. Musk , Del. Ch., No. 2024-0631, 8/7/24 , and Cleveland Bakers & Teamsters Pension Fund v. Musk , Del. Ch., No. 2024-0646, 8/7/24 .

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Kraft Heinz Defeats Effort to Revive Insider Trading Lawsuit

By Jennifer Kay

- Delaware's high court affirmed judge's dismissal of first suit
- Kraft said Erste's latest insider trading claims were "spin"

Bloomberg Law News 2024-08-09T10:01:36397971442-04:00

Kraft Heinz Defeats Effort to Revive Insider Trading Lawsuit

By Jennifer Kay 2024-08-08T16:37:20000-04:00

- Delaware's high court affirmed judge's dismissal of first suit
- Kraft said Erste's latest insider trading claims were "spin"

Kraft Heinz Co. prevailed Thursday over an Austrian asset manager's attempt to reopen litigation over \$1.2 billion in stock sales shortly before Kraft's share price plummet in 2018.

The Delaware Chancery Court dismissed claims from Erste Asset Management GmbH, an affiliate of Erste Group Bank AG, saying it didn't actually have new evidence that supported reviving insider trading allegations that had been tossed in 2021.

The information supporting its theory "that one of the Kraft Heinz directors deemed to be independent had received stock options for undisclosed consulting services" would have been uncovered in the previous litigation if Erste had attempted to review those records before the appeals stage, Vice Chancellor Lori Will said in an opinion dismissing the complaint with prejudice.

Will also rejected Erste's attempt to recover its legal fees from the previous lawsuit. "Erste may disagree with this court's dismissal of its derivative suit. But the sort of rare circumstances that might merit revisiting it are absent," she said.

Erste sought to reopen claims of insider trading in the stock sales by Kraft and 3G Capital Inc. affiliates. The Chancery Court dismissed the original lawsuit in 2021, a decision affirmed a year later by the Delaware Supreme Court.

Kraft had derided Erste's latest claims as "spin" during a hearing in May. Erste's arguments focused on Kraft director John Cahill's ties to 3G and his compensation for the consulting work he did for Kraft from 2015 through 2019. Cahill served as Kraft's CEO before its merger with Heinz, and the company said he ended his consulting work in July 2019.

"Erste would have known about both Cahill's stock options and recut consulting arrangement had it exercised reasonable diligence," Will said.

In July, Will dismissed separate allegations that two of Brazil's richest men—Jorge Paulo Lemann and Alexandre Behring—and affiliates of their investment firm, 3G, sold Kraft stock based on inside information.

Paul Weiss represents Kraft Heinz. Potter Anderson and Kirkland & Ellis represent 3G. Erste is represented by Friedlander & Gorris and Bragar Easel & Squire.

The case is Erste Asset Mgmt. GmbH v. Hees , Del. Ch., No. 2023-1191, opinion 8/8/24 .

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Shopify appeal has become battle royale over where internet companies can be sued

 [reuters.com/legal/litigation/column-shopify-appeal-has-become-battle-royale-over-where-internet-companies-can-2024-08-08](https://www.reuters.com/legal/litigation/column-shopify-appeal-has-become-battle-royale-over-where-internet-companies-can-2024-08-08)

Alison Frankel

The logo of Shopify is seen. Picture taken on September 28, 2018. REUTERS/Chris Wattie/File Photo Purchase Licensing Rights  , opens new tab

Aug 8 (Reuters) - If you believe Shopify and its friend-of-the-court backers from traditional and internet business groups, the entire future of online commerce is at stake in an appeal over whether the online payment platform must face a consumer privacy class action in California courts.

Shopify and its supporters are calling on the 9th U.S. Circuit Court of Appeals, in its en banc rehearing of a three-judge panel decision  , opens new tab to toss the class action, to send a clear message that ecommerce companies can't be dragged into court in every state where they operate.

Otherwise, wrote Shopify's lawyers from Hueston Hennigan in a July 26 brief  , opens new tab, chaos will ensue. Seamless nationwide operations involving a back-end internet ecosystem of payment platforms will become a patchwork, with providers forced to block customers from particular states. Consumers and online merchants will have fewer choices. Commerce will be crippled.

"Internet commerce," warned the Computer & Communications Industry Association in a friend-of-the-court brief  , opens new tab docketed this week, will come "to a screeching halt."

Yikes! But some of the predictions from the consumers' side of the case are equally dire. A friend-of-the-court brief  , opens new tab by nearly three dozen state attorneys general from across the political spectrum cautioned the 9th Circuit that its eventual decision could hamper states' abilities to use their own courts to police internet companies. (One of Shopify's amici, NetChoice, retorted in a brief  , opens new tab this week that AGs shouldn't have the power to use their state courts to sue any online business lest such businesses face "constant litigation by regulators, in their own state courts, with varied political agendas and by private individuals not in privity with the online business.")

This knotty jurisdictional appeal, in other words, has become a showdown over the future of online commerce.

I first told you about the case last year, when a three-judge 9th Circuit panel concluded that California did not have specific jurisdiction over a prospective class action by California

resident Brandon Briskin. He alleged that when Shopify, unbeknownst to him, processed his online purchase from a California-based retailer, the payment platform illicitly extracted data from his phone to create a “consumer profile.” Briskin claimed that Shopify’s business model is to collect data from unwitting consumers and resell the information to merchants.

Shopify, which did not respond to a query, said in its 9th Circuit brief that there is no merit to “Briskin’s fanciful allegations that Shopify nefariously wiretapped him.”

But it has long argued that Briskin’s suit failed for a more fundamental reason: It didn’t belong in California because the Canada-based company and its U.S. subsidiaries in New York and Delaware did not specifically aim any conduct at California. Shopify said it processes online transactions the same way regardless of the location of the purchaser or the merchant, so there’s no justification, under 9th Circuit or Supreme Court precedent, for California to claim jurisdiction.

The 9th Circuit panel agreed last November, holding that Shopify did not aim conduct at California because (in a ruthless simplification of the opinion) its nationwide payment processing system does not depend on the location of the merchant or the consumer.

Briskin’s lawyers at the Public Citizen Litigation Group persuaded the 9th Circuit in May to grant en banc review. The court then ordered [a new tab](#), opens new tab the parties to file supplemental briefs addressing three questions: What standard should the court use to evaluate jurisdiction over internet companies? Must plaintiffs show that defendants treated a particular jurisdiction differently from all others to establish that it “aimed” conduct at that locale? And must the court consider the original meaning of the Fourteenth Amendment’s Due Process clause to decide the case?

The two sides’ answers are a veritable tour of the Supreme Court’s recent jurisdictional precedent. But the crux of the dispute, according to Briskin counsel Nicolas Sansone of Public Citizen, is whether Shopify aimed conduct at California by systematically harvesting data from California consumers without their permission and reselling the data, including information about purchasers’ residences, in consumer profiles.

In both Briskin’s en banc brief [a new tab](#), opens new tab and in a phone interview, Sansone said that Shopify was not a mere back-end payment processor but a data mining business that exploited California consumers and must be held to account for its conduct in California courts. “The business model,” he said, “rests on contacts with the forum state.” Shopify – which, remember, denies that it illicitly collects data – said the “avallment” theory espoused by Briskin and amplified in a friend-of-the-court brief [a new tab](#), opens new tab from the Electronic Frontier Foundation still does not establish that Shopify aimed conduct at California because the company could not know that Briskin (or, presumably, any other individual consumer) was in California when he made the purchase Shopify processed.

“No court has adopted the theory Briskin advances, because to do so would be to ignore the longstanding significance of territorial borders and subject all internet-based business, large and small, to jurisdiction in virtually any state in the country,” Shopify said, in sentiments echoed by this week’s amicus filings.

At the very least, argued Shopify amicus BSA | The Software Alliance [\[link\]](#), opens new tab, the en banc 9th Circuit should stick closely to the facts of this case instead of crafting a sweeping rule that could have unintended consequences.

The 9th Circuit isn’t the only federal appellate court to be mulling jurisdiction over online businesses. As Shopify noted in its en banc brief, the 1st Circuit ruled [\[link\]](#), opens new tab in May that Massachusetts did not have jurisdiction to hear a consumer privacy class action brought by a Massachusetts resident who accused Ohio-based Bloomingdales.com of illicitly harvesting his data. The plaintiff has petitioned for en banc reconsideration of that decision. But as the amicus attention shows, consumers and businesses are counting on the Shopify en banc appeal to provide early answers in this mostly uncharted area. Oral arguments are scheduled for Sept. 23.

Read more:

Shopify, online payment platforms get free pass on jurisdiction from appeals court
In Shopify class action, US appeals court will revisit thorny venue issue

Reporting By Alison Frankel

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

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Alison Frankel
Thomson Reuters

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

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Law firms suing Apple over smartphone dominance fight for lead roles

 [reuters.com/legal/litigation/law-firms-suing-apple-over-smartphone-dominance-fight-lead-roles-2024-08-09](https://www.reuters.com/legal/litigation/law-firms-suing-apple-over-smartphone-dominance-fight-lead-roles-2024-08-09)

Mike Scarcella

Customers walk past an Apple logo inside of an Apple store at Grand Central Station in New York, U.S., August 1, 2018. REUTERS/Lucas Jackson/File Photo Purchase Licensing Rights [↗](#), opens new tab

Aug 9 (Reuters) - Two competing groups of law firms are pressing a judge to appoint them as leaders of potentially lucrative consumer class actions accusing Apple (AAPL.O) [↗](#), opens new tab of monopolizing the smartphone market.

The opposing coalitions of plaintiffs lawyers on Thursday made their pitches to U.S. District Judge Julien Neals in New Jersey, who is presiding over private antitrust cases that were filed against Apple after the U.S. Justice Department and a coalition of states sued the iPhone maker in March.

The firms seeking to represent consumers who bought iPhones from Apple include Hagens Berman Sobol Shapiro, Girard Sharp, Seeger Weiss and Carella, Byrne, Cecchi, Brody & Agnello on one side, with Hausfeld and Susman Godfrey on the other.

At stake is the chance to win an outsized share of legal fees stemming from any settlement of judgment in the consolidated case, which could be worth billions of dollars if it succeeds. The firms all have a track record of securing large antitrust recoveries.

The civil cases mirror the Justice Department's complaint, which accused Apple of violating antitrust law by using contractual restrictions to force developers to play by its rules. The lawsuits allege Apple has set up roadblocks diminishing consumer choice for third-party services.

Cupertino, California-based Apple has denied the government's claims and asked the court to throw them out. Apple has not responded yet in the consumer cases. Apple and its defense lawyers at Kirkland & Ellis did not immediately respond to requests for comment. Lawyers at the plaintiffs firms vying to lead the cases did not immediately respond to requests for comment.

In their pitch [↗](#), opens new tab, Hagens Berman's Steven Berman and his team said their rivals' coalition "would place the fate of this groundbreaking case in the hands" of just two law firms. They called that proposal "unrealistic" given the complexity, size and stakes of the case.

Hausfeld and Susman Godfrey in their counter proposal [↗](#), opens new tab said the interests of the class in a single-defendant case would not "be served by the inefficiencies that come

from a sprawling, multi-firm, multi-layered leadership structure.” The two firms touted their “efficient, lean leadership structure.”

A third set of firms, facing no opposition, have asked to represent “indirect” purchasers such as consumers who bought an iPhone from a mobile phone carrier. Those law firms include [Schneider Wallace Cottrell Konecky and Berger Montague](#), opens new tab

A coalition of several other firms, including Korein Tillery, MoloLamken and Kellogg, Hansen, Todd, Figel & Frederick, asked to lead a class of only Apple Watch purchasers [Kellogg, Hansen, Todd, Figel & Frederick](#), opens new tab.

In Re: Apple Inc Smartphone Antitrust Litigation, U.S. District Court, District of New Jersey, 2:24-md-03113-JXN-LDW.

Read more:

[Google monopoly ruling could help Apple defense in antitrust case](#)

[Apple asks US judge to toss antitrust lawsuit](#)

[Apple app store consumer class action set for February 2026 jury trial](#)

Reporting by Mike Scarcella

Amplitude Snares Private Data of Millions Via Apps, Suit Says

By Jorja Siemons 2024-08-09T13:45:13000-04:00

- **COURT:** N.D. Cal.
- **TRACK DOCKET:** No. [3:24-cv-04913](#) (Bloomberg Law subscription)

Amplitude Inc.'s technology embedded in popular mobile apps surreptitiously siphons millions of consumers' geolocation data and other sensitive information it shares with third parties, a DoorDash customer's proposed federal class action said.

The analytics company's technology integrated into shopping, productivity, dating, gaming and other types of apps harvests private data and shares it with marketing platforms such as Facebook Ads and TikTok Ads without app users' consent, according to a [complaint](#) filed Thursday in the US District Court for the Northern District of California. Amplitude also collects consumers' names and email addresses which, together with geolocation data, reveals where users live, work, and frequently visit, it said.

The software company acquired "first-party data" directly from consumers through computer code in its software development kit that developers can integrate into apps to perform tasks, the proposed class action said. More than 40,000 mobile app developers use Amplitude's technology that "enables backdoor access to consumers' devices and opens a data collection pipeline directly from consumers to Amplitude," the complaint said.

"Amplitude collects information across multiple apps and identifies each consumer by a unique ID thus creating a digital dossier for the consumer, which includes information about the locations they have visited, the apps they use, their In-App Activity, and their interests, among other things," it said.

The company's "entire business model" relies on collecting and sharing data with other companies, it added, noting geolocation collection could reveal sensitive locations related to people's medical care, reproductive health, and religious affiliations.

DoorDash app user Kyle Atkins, a California resident alleged in the putative class action that Amplitude's practices violate federal and state wiretap statutes by intercepting electronic communications, as well as state invasion of privacy and computer data fraud statutes.

Atkins alleged Amplitude designed its system to intercept the content of electronic communications between users and apps. DoorDash app developers integrated the technology into its platform, which enabled Amplitude to collect timestamped geolocation data, device fingerprint information, and the names of restaurants Atkins viewed without his knowledge, the filing said.

Atkins enabled the DoorDash app to use his phone's location services for delivery purposes, the complaint said. He didn't consent to Amplitude's data collection because he had no knowledge of it, it said.

Amplitude didn't act as a "mere extension" of apps because it used intercepted communications for its own purposes, the complaint said. The company violates California law, which prohibits the installation of a "pen register"—or a device that records addressing or signaling information—without first obtaining a court order, it said.

The company has been "unjustly enriched" with the data it obtained from Atkins and other users, according to the complaint.

The proposed class action seeks injunctive relief and damages including disgorgement of profits.

Amplitude didn't immediately return Bloomberg Law's request for comment. Its counsel hasn't yet entered into appearance.

Atkins and the proposed class are represented by Edelson PC.

The case is [Atkins v. Amplitude, Inc.](#) , N.D. Cal., No. 3:24-cv-04913, complaint filed 8/8/24 .

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Lululemon greenwashing

 [courthousenews.com/lululemon-greenwashing](https://www.courthousenews.com/lululemon-greenwashing)

Brief

MIAMI — Lululemon engaged in "greenwashing" when it falsely advertised that the athleisure brand has sustainable products and businesses practices, consumers say in a class action that claims the company is actually a major contributor of greenhouse gas and microplastic emissions.

[Read the complaint here.](#)

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As window closes for Camp Lejeune claims, unique process yields little resolution

 [reuters.com/legal/litigation/window-closes-camp-lejeune-claims-unique-process-yields-little-resolution-2024-08-09](https://www.reuters.com/legal/litigation/window-closes-camp-lejeune-claims-unique-process-yields-little-resolution-2024-08-09)

Diana Jones

An aerial view of buildings at U.S. Marine Corps Base Camp Lejeune, on the Atlantic Ocean, in eastern North Carolina, U.S., in this undated handout photo. U.S. Marine Corps/Handout via REUTERS Purchase Licensing Rights , opens new tab

Aug 9 (Reuters) - As the window for people to claim they were harmed by contaminated water at Marine Corps Base Camp Lejeune closes on Aug. 10, the unique, massive injury case against the U.S. government remains almost wholly unresolved, with the path forward still unclear.

More than 385,000 administrative claims have been filed with the U.S. Navy by people claiming they were harmed by the water at the Jacksonville, North Carolina, military facility, which the government has admitted was tainted with toxic chemicals for more than 30 years beginning in the 1950s. The deadline stops people from bringing more claims.

While that number of claims may contain duplicate filings, the Camp Lejeune situation is still likely to be one of the largest personal injury cases of all time, coming close to the number of claims over 3M's military ear plugs, which has included more than 390,000 cases.

But unlike the 3M case and most mass litigation, which can utilize the federal multidistrict litigation system to streamline thousands of similar cases, the Camp Lejeune claims face a unique process dictated by a federal law that made them possible.

So far, that process has led to frustration among some victims and lawmakers. Of the hundreds of thousands of claims filed over the tainted water, just 114 have been resolved, according to a tally from the Camp Lejeune Claims Unit at the U.S. Navy, which administers a government program offering settlements based on medical diagnoses and how long the person was on base.

The U.S. Marines first discovered dangerous chemicals in the water at Camp Lejeune in 1982, and the U.S. Department of Health and Human Services later acknowledged that between 1953 and 1987 chemicals in the water on the base may have affected a million people, leading to diseases like kidney cancer, leukemia and bladder cancer.

Aug. 10 marks two years since President Joe Biden signed legislation that included the Camp Lejeune Justice Act. After years of courts dismissing lawsuits over the water based on North Carolina state law, the act opened a limited pathway for Camp Lejeune claims,

requiring people seeking compensation from their injuries to file an administrative claim with the U.S. Navy before they can file a federal lawsuit. Those cases go to a single federal court in North Carolina.

Attorneys who work on the Camp Lejeune cases and other lawsuits against the government say the Camp Lejeune claims and the law dictating how they are handled are unique and have no historical comparison.

About 1,900 lawsuits are pending, and that number is expected to grow, as more claims that met the administrative deadline filter into the court.

A panel of four judges in the Eastern District of North Carolina is making all major rulings. The first trials in the lawsuits have no start date, and recent orders from the court make it unlikely they will happen until mid-2025. All trials will be decided by the judges, who agreed with the government that the law allowing the claims did not permit jury trials.

After the government and the victims requested a settlement master, it took six months for the court to appoint the attorneys who will oversee negotiations for a global settlement of the cases. They will likely need the first trials to go forward to inform those negotiations.

Some of the bill's sponsors say they are disappointed with the long wait for resolution.

Pennsylvania House Representative Matt Cartwright, one of the sponsors of the original legislation, told Reuters that the bill was designed to provide compensation for these victims, so he is surprised to see the government is "acting like a tobacco company that got sued," fighting the cases at every turn and attempting to resolve them as cheaply as possible. He called the settlement offers the government was making "embarrassingly small."

In a statement, a U.S. Department of Justice spokesperson said that "although the Camp Lejeune Justice Act created a litigation scheme, rather than a compensation scheme, the Justice Department, alongside our partners at the Department of Navy, has engaged in significant efforts to resolve these claims efficiently."

Eric Flynn, an attorney at Bell Legal Group, which is representing thousands of Camp Lejeune claimants, said some of his clients have expressed to him that the government's offer "doesn't capture their experience."

In May, North Carolina House Representative Greg Murphy, another of the bill's original sponsors in the House, introduced the Camp Lejeune Justice Corrections Act, which would clarify that any Camp Lejeune case could be tried before a jury. It would also expand the number of federal courts that can handle the cases.

In the meantime, plaintiffs like Kim Ann Callan of Florida are in a holding pattern.

Callan, 66, an outspoken advocate for Camp Lejeune victims who was an infant at the camp when her father was a Marine stationed there, sued the government after she was diagnosed with leukemia and other conditions she attributes to the water. She has a claim filed on behalf of each of her parents as well, but she's seen no movement on any of her cases.

"If somebody comes to me with \$1,000, \$10,000, \$100,000, it doesn't matter," Callan said. "I want accountability and I want them to never, never, never do this again," Callan said.

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Reporting by Diana Jones; Editing by Leigh Jones

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.

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Delta rejects CrowdStrike criticism, sees \$500 mln hit from cyber outage

 [reuters.com/business/aerospace-defense/delta-air-warns-380-mln-revenue-hit-crowdstrike-outage-2024-08-08](https://www.reuters.com/business/aerospace-defense/delta-air-warns-380-mln-revenue-hit-crowdstrike-outage-2024-08-08)

Rajesh Singh, David Shepardson

People speak to Delta agents as they try to rebook their travel plans after long delays following cyber outages affecting airlines at Hartsfield-Jackson Atlanta International Airport in Atlanta, Georgia, U.S., July 22, 2024. REUTERS/Megan Varner/File Photo Purchase Licensing Rights , opens new tab

CHICAGO/WASHINGTON Aug 8 (Reuters) - Delta Air Lines (DAL.N) , opens new tab said on Thursday it is pursuing legal claims against CrowdStrike (CRWD.O) , opens new tab and Microsoft (MSFT.O) , opens new tab after a global outage last month caused mass flight cancellations, disrupting travel plans of 1.3 million customers and costing it at least \$500 million.

A software update last month by global cybersecurity firm CrowdStrike triggered system problems for Microsoft customers, including many airlines. The disruptions persisted at Delta even as they subsided the next day at other major U.S. carriers.

The Atlanta-based carrier canceled about 7,000 flights over five days. It also faces an investigation from the U.S. Transportation Department for the disruptions.

"An operational disruption of this length and magnitude is unacceptable, and our customers and employees deserve better," Delta's CEO Ed Bastian said in an SEC filing on Thursday.

The dayslong disruptions have sparked a blame game. Bastian has faulted both CrowdStrike and Microsoft for failing to provide an "exceptional service."

Both the tech companies have rejected Delta's claim that they should be blamed for flight disruptions.

On Sunday, CrowdStrike said it would respond "aggressively" to protect its shareholders, employees, and other stakeholders if Delta filed a lawsuit.

Microsoft has also vowed to defend itself "vigorously," saying its preliminary review suggested that Delta, unlike its competitors, apparently had not modernized its IT infrastructure.

In a letter to CrowdStrike on Thursday, David Boies, who is representing Delta, said the airline was "surprised and disappointed by CrowdStrike's decision to try a 'blame the victim' defense."

"There is no basis -- none -- to suggest that Delta was in any way responsible for the faulty software that crashed systems around the world, including Delta's," Boies wrote.

He said Delta has invested billions of dollars in information technology and attributed the airline's struggle to restore operations to its reliance on CrowdStrike and Microsoft.

A CrowdStrike spokesperson said Delta was pushing a "misleading narrative." "CrowdStrike and Delta's teams worked closely together within hours of the incident," the spokesperson said.

Delta said it expects a direct revenue hit of \$380 million from the outage in the current quarter due to refunds to customers for canceled flights and compensation in cash and frequent flyer miles.

The company reported additional expenses of \$170 million as a result of customer expense reimbursements and crew-related costs. The flight cancellations, however, are estimated to lower its fuel bill by \$50 million, Delta said.

Delta told U.S. lawmakers that CrowdStrike's faulty update "impacted more than half of Delta computers, including many of Delta's workstations at every airport in the Delta network."

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Reporting by Rajesh Kumar Singh in Chicago and David Shepardson in Washington; Editing by David Gregorio and Diane Craft

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NEWS

'Monopoly Prices'?: Big Pharma Co. Amgen Accused of Anticompetitive Conduct

“A 50-mg dose of Enbrel now costs patients \$7,401.83 per month: 643% more than it cost when launched in 1998,” according to the allegations in the antitrust class action filed against Enbrel manufacturer Amgen Inc.

August 09, 2024 at 01:59 PM

Antitrust



Sulaiman Abdur-Rahman



What You Need to Know

- CareFirst BlueCross BlueShield accuses Amgen Inc. of monopolizing the prescription drug market for etanercept.
- Amgen manufactures Enbrel, an injectable form of etanercept for treating rheumatoid arthritis.
- CareFirst BCBS filed the antitrust class action in the Eastern District of Virginia.

A new lawsuit accuses Amgen Inc. of preventing competition and maintaining monopoly prices with its blockbuster Enbrel prescription drug for treating adults with rheumatoid arthritis.

Glasser and Glasser, Hagens Berman Sobol Shapiro and Lowey Dannenberg filed the antitrust class action Tuesday on behalf of two nonprofit corporations doing business as CareFirst BlueCross BlueShield.

The complaint alleges “Amgen has enjoyed exclusive sales of Enbrel” since the drug brand for etanercept launched in November 1998. “A 50-mg dose of Enbrel now costs patients \$7,401.83 per month: 643% more than it cost when launched in 1998,” according to the allegations in the complaint.

CareFirst BCBS on behalf of itself and members of the proposed class seek damages and a permanent injunction to remedy Amgen’s alleged unlawful monopolization in the market for etanercept in the United States.

This complaint filed in U.S. District Court for the Eastern District of Virginia was surfaced by [Law.com Radar](#).

The complaint accuses Amgen of buying exclusive etanercept patent rights from Roche, a competing drug company, and using those rights to “thwart competition” until at least 2029 in violation of the Sherman Act and state antitrust laws. Amgen previously found itself at the center of a patent dispute when the [U.S. Supreme Court decided *Amgen v. Sanofi* in 2023](#).

Amgen, a Delaware corporation with principal offices in Thousand Oaks, California, acquired Immunex Corp. and the rights to Enbrel in 2002, according to the lawsuit, which describes Enbrel as a “crown jewel of Amgen’s \$28-billion-a-year portfolio.”

The Food and Drug Administration has approved Enbrel as an injectable prescription drug for treating adults with rheumatoid arthritis, plaque psoriasis and other similar ailments. The active ingredient in Enbrel is etanercept.

Enbrel blocks tumor necrosis factor or TNF, a protein found in elevated levels of patients with rheumatoid arthritis and similar conditions, according to the FDA.

CareFirst BCBS indirectly purchases Enbrel for its members in the District of Columbia, Maryland and Virginia.

An Amgen spokesperson said the company has no comment for this article.

This action was surfaced by Law.com Radar, which delivers artificial intelligence-enhanced case summaries and daily case reports from more than 2,200 state and federal courts. [Click here](#) to get started and be among the first to act on opportunities in your region, practice area or client sector.

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ANALYSIS

Disclosure Flip-Flop by Nuclear Reactor Firm Powers Debate Over SEC Reporting Obligations

NuScale Power found itself having to explain why it stated that it did not believe it was under SEC investigation, even though it had been contacted by the agency seven months earlier and asked to provide a trove of information.

August 09, 2024 at 10:11 AM

Corporate Governance



Chris O'Malley



Greg Andrews



Nuclear reactor developer NuScale Power told investors on July 29 that the U.S. Securities and Exchange Commission had not told the company that it was the target of a current or prospective investigation, and “is unaware of any reason for such an investigation.”

Then, just four days later, NuScale revealed in an SEC filing that it had been contacted by the agency seven months earlier and asked to provide information on its employment, severance and confidentiality agreements.

“NuScale cannot predict the timing or outcome of the SEC’s investigation at this time,” the company said.

The seeming flip-flop, which occurred at a time the company already was battling shareholder litigation alleging that it failed to disclose material information during quarterly analyst calls, highlights the vexing decisions general counsel often face over when their companies should disclose a regulatory inquiry and how to characterize it.

Securities lawyers say that when companies receive requests for information from the SEC on a topic, they often don’t know why the agency is asking. Nor do they usually know whether it or any other company is suspected of wrongdoing, and whether the inquiry ever will advance to becoming a formal investigation.

“When the SEC staff is doing a broad-based inquiry, as opposed to a targeted examination, the challenge—and opportunity—for a company is to look more deeply into how the subject matter of the inquiry applies to it, looking through the lens focused by the SEC inquiry,” said Stanley Keller, senior partner at Locke Lord in Boston. He emphasized that he was speaking generally and was not addressing NuScale’s situation.

“The more targeted the inquiry or examination, the more effort and caution a company should apply to evaluating it,” Keller added.

Portland, Oregon-based NuScale made its disclosure, in the form of a [July 29 news release](#), hours after the investigative news site [Hunterbrook Media](#) published a report headlined, “Breaking: NuScale Under SEC Investigation by Enforcement Division.”

The news site had submitted a Freedom of Information Act request, and in response the agency had written, “We have confirmed with Division of Enforcement staff that the investigation from which you seek records is still active and ongoing,” The SEC cautioned that this “should not be construed as an indication by the commission or its staff that any violations of the law have occurred.”

NuScale did not respond to Law.com’s requests for comment on the matter.

The company’s second disclosure, made Aug. 2 via an [8-K SEC filing](#), revealed that late last year the SEC’s Denver office had contacted it seeking information on its employment, severance and confidentiality agreements.

The company said its understanding when it received the request in December was that the questions related to “a broader inquiry involving multiple companies related to the SEC’s whistleblower provisions.”

NuScale said in the Aug. 2 disclosure that it had heard nothing from the SEC since then, until it contacted the SEC on July 30, following publication of the Hunterbrook report.

“On July 31, the SEC made follow-up requests for additional information relating to the December 2023 request. The Company is in the process of responding to those requests and we intend to fully cooperate with the SEC,” NuScale said in the [8-K](#).

The disclosure flap appears likely to spur a new round of litigation against 17-year-old NuScale, the first firm in the U.S. to receive federal certification for a small-scale modular nuclear reactor design. It’s already [battling a November 2023 shareholder class action](#) alleging that company executives didn’t fully disclose risks and misled investors regarding the viability of its proposed nuclear project in Idaho that it shelved last fall after utilities balked at rising costs.

At least three law firms not involved in that suit, including [the Schall Law Firm](#), have issued recent news releases dredging for shareholders who might serve as plaintiffs.

But making a legal case that NuScale should have disclosed the SEC’s request for information last December earlier could be tricky.

It is possible the company would say the event in December 2023 was just a “general inquiry” by the SEC, said Mark Maddox, a principal at Maddox Hargett & Caruso in Fishers, Indiana, and former Indiana securities commissioner.

“Depending on what it knew at the time, the company probably had the discretion not to disclose it in December,” he said.

But after NuScale learned from the SEC late last month that it was under “investigation,” it could be argued that it had to make to disclose at that point. “It’s a close call and depends on what the company knew in December about the likely progress of the inquiry,” Maddox said.

“For a public company, determining whether and when to disclose [an SEC] investigation can be a tough judgment call. There are no bright-line rules and the legal precedents are sparse,” Bruce Ericson, a partner at Pillsbury Winthrop Shaw Pittman, [wrote in Corporate Disputes magazine](#).

Keller, of Locke Lord, said “this is very much a matter of judgment based upon the particular facts and circumstances.”

He said companies should keep “in mind how things will look in hindsight and the benefits of getting out in front of an issue, but balance that with avoiding creation of a problem that may not exist. The key is gathering the information and exercising prudent judgment.”

NuScale’s general counsel during the period it made the disclosures was Robert Temple, a 30-year veteran of the power industry who took the legal reins of NuScale in 2016. On LinkedIn, Temple announced a week ago that he had departed NuScale and launched his own law and consulting firm in Las Vegas. Temple did not immediately respond to Law.com’s request for comment.

A former SEC branch chief in Washington, D.C., who declined to be named, said companies sometimes opt not to disclose an investigation if they believe its premise is flat-out wrong. Otherwise, “they’ve damaged the company and shareholders for nothing.”

Another consideration, he said, is whether company officials believe the matter will become public anyway, in which case there might be tactical advantages to disclosing first.

Keller said he has long urged clients to maintain strong internal controls and model corporate governance practices. Doing so reduces the risk that problems will crop up or, if they do, mushroom into fodder for shareholder litigation or regulatory enforcement actions.

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Coal Is Cool Now

Published: Thu Aug 08 14:49:15 EDT 2024

By Matt Levine

(Bloomberg Opinion) --

Programming note: *The Money Stuff* podcast is off this week.

ESG

You could have — or you could have had, anyway — a model of environmental, social and governance (ESG) investing that goes like this:

1. There are a lot of ESG investors, or ESG-ish investors, or investors who consider ESG factors in some form.
2. ESG investors try to avoid “dirty” companies, on some definition.
3. Therefore, the cost of capital of dirty companies is higher than that of clean companies.
4. If your business is 90% clean and 10% dirty, you count as “dirty” for enough ESG purposes that your cost of capital is high. There is no averaging: “Clean” or “dirty” is a binary, and if you’re partly dirty then your whole business has a high cost of capital.
5. So if you have a \$9 billion clean business and a \$1 billion dirty business, and you shut down the dirty business (or sell it for \$1), the remaining \$9 billion clean business will trade at a higher multiple and be worth, say, \$11 billion.
6. Thus you can *create value* for shareholders, not by making more money, but by making *less* money in a way that makes the shareholders happier.

And then in the US in 2024 you’d have to add a contrary model that is like:

1. There are some investors and politicians who think ESG is bad.
2. Therefore, the cost of capital (or regulatory grief expenses, etc.) of *self-consciously clean* companies is higher than that of appealingly dirty companies.
3. If your business is 90% clean and 10% dirty, and you divest the dirty business, the cost of capital of the remaining clean business will go *up*, because people will be mad at you for caving to ESG orthodoxy.
4. If you’re an electric car company, maybe you should go out and buy a coal mine? Or at least say offensive things about diversity?
5. In any case, though, if you’re a commodity trading company and you were thinking about

divesting your coal business, you should cut that out right now.

The Wall Street Journal reports:

Glencore abandoned a plan to spin off its coal business after shareholders encouraged it to keep mining the fossil fuel, in the latest signal that the finance world's sustainable-investing craze is fizzling out.

London-listed Glencore, one of the world's biggest producers of electricity-generating thermal coal, said Wednesday it asked investors with two-thirds of voting shares for their views on the spin off. Of those who expressed a preference, more than 95% wanted Glencore to retain coal, the company said. ...

Coal has long been a pillar of Glencore's business, but the company had signaled it would eventually get rid of its mines and double down on supplying metals and minerals needed for electric vehicles.

The U-turn shows how environmental, social, and governance investing has lost momentum since it took off in the early days of the Covid-19 pandemic, when billions of dollars poured into funds that directed money based on sustainability credentials and chief executives flaunted their ethical bona fides.

Just last fall, Glencore shareholders backed the plan to split the company's coal unit and list its shares in New York. Explaining their change of heart Wednesday, CEO Gary Nagle pointed to the politicization of ESG investing in the U.S. as well as shifting attitudes about the pace of move from fossil fuels to cleaner sources of energy.

The "ESG pendulum has swung back over the last nine or 12 months," Nagle said. "You've seen how some of the U.S. states have reacted to some of the ESG narrative." Meantime, he said, there has been a growing realization that fossil fuels will keep powering the world during the energy transition.

Plus, he added, shareholders "do still recognize that cash is king...and the fact that these businesses generate huge amounts of cash."

Not so long ago, though, that cash was worth less than cleaner cash. Now it might be worth more.

VIX futures options

A great deal of financial engineering is about accessible *packaging*. You start by inventing, say, some cool derivatives strategy, and you sell it to hedge funds that have ISDAs with your bank. That is a

limited audience, and you want to sell the strategy more broadly. Well, maybe you can put it in a structured note: Instead of doing an over-the-counter derivatives trade with your bank, requiring an ISDA and a lot of custom negotiations, customers can just buy a security (the note) that reflects the terms of the derivatives bet. You can sell this to a lot more clients: Most of the individual customers in your wealth management division can't do over-the-counter derivatives trades with you, but they can buy securities, so you have packaged the bet in a much more widely accessible format.

Not *that* accessible, though, and if the bet is good and clever and broadly appealing enough, you will go one step further and package it into an exchange-traded fund. Then *everyone* — not just your wealth management clients — can buy it on the stock exchange, because an ETF is, for most purposes, just stock. “An OTC derivatives trade” is a very niche product, “a note” is a more accessible wrapper, and “a stock” is more accessible still.

The terms of the trade will be more or less the same in each case.¹ The job is not always to find new ways to define and slice and allocate risk, new economic propositions for people to bet on. The job is to make it easier for them to make the bets that already exist.

So for instance there are futures on the S&P 500 index, which professional investors can use to efficiently get exposure to the broad stock market. But in your retail brokerage account, it might be easy to trade stocks and a pain to trade futures, so there are also S&P 500 ETFs, which serve the same purpose in a stock-shaped wrapper. Professionals can trade options on S&P 500 futures, but you can also trade options on S&P 500 ETFs if that is more convenient for you.

There are many flavors of this, because there are many sorts of investors who have different restrictions on what they can buy. For instance, there are investors whose job is to invest in futures, so if you can turn a thing into a futures bet, they can invest in it. So Bloomberg's Lu Wang and Sam Potter report:

Cboe Global Markets Inc. is poised to offer options on futures for an index based on options on another index.

The Chicago-based firm plans to issue options tied to futures for the Cboe Volatility Index, the famous “fear gauge” otherwise known as the VIX. That gauge is itself built using options that track the S&P 500. ...

As things stand, options on the VIX are cash-settled and traded in securities accounts, meaning they're off-limits to certain investors who are constrained by mandates or regulations.

In contrast, the options-on-futures will be physically-settled and can be traded in a futures account.

“By listing options on futures, this product will become CFTC-regulated, thereby enabling those investors to gain access to a VIX options product,” the firm said in its announcement. “By combining Cboe’s popular VIX futures with options functionality, this product will give market participants a new way to efficiently hedge market moves and construct unique exposures to volatility.”

See, the point is that there were already VIX options, but now there are VIX *futures* options, which are roughly economically equivalent but have a different packaging that is more accessible to some investors. From the press release:

"We expect options on VIX futures will complement our existing product suite, appealing to a broad group of users, including Commodity Trading Advisors, customers of Futures Commission Merchants, and market participants currently active in VIX exchange-traded products and in Cboe's SPX option and VIX product ecosystems," said Catherine Clay, Head of Global Derivatives at Cboe. "By listing these options on Cboe's U.S. futures exchange, CFE's global network of FCMs and brokers can trade them using the same connections and memberships already established for trading VIX futures, thereby enhancing ease and accessibility."

In some sense this all feels untidy, like there ought to be only one sort of VIX option, regulated in one way, tradeable in one place, and anyone who wants that economic exposure should be able to show up in that one place and trade the one thing. But what fun would that be? Half of the point of the financial industry is to find new ways to sell the same risks to different audiences.

Ripple

Ripple Labs Inc. is a crypto company that was founded in 2012, which is a very long time ago in crypto years. Like many crypto companies of its vintage, Ripple wanted to revolutionize payments. Ripple’s particular thing is “to modernize international payments by developing a global payments network for international currency transfers” and to “enable cross-border payments that are faster, more reliable and more affordable for banks, fintechs, crypto businesses and their customers.”

More concretely, Ripple argues that the traditional financial system’s method of dealing with cross-border payments is obsolete and overcomplicated. If you live in France and want to buy something in Mexico, you will go to your French bank and ask it to send pesos to your Mexican supplier, and your French bank will have to have a relationship with a Mexican bank to make the transfer work. Global payments are intermediated by a chain of correspondent banks and nostro accounts, which can lead to long settlement times and require pre-funding of payments. Ripple wants to replace that infrastructure with its blockchain, with its token — called XRP — used to intermediate between

currencies. So if you are, say, a Lithuanian money transfer firm, and your clients want to move money from France to Mexico, you just buy some XRP for euros and sell them instantaneously for pesos, doing the transfer quickly and with fewer intermediaries. Ripple calls this “on demand liquidity,” or ODL: If you want to exchange euros for pesos, you can instantly buy the XRP from the Ripple network and sell them for pesos.

Without getting into the details of the design, adoption, etc., of this mechanism, it seems fine? As an idea? “Crypto is a way to do instantaneous payments” and “crypto is a way to disintermediate banks and make payments more direct” are classic old-school crypto theses.

More recent crypto theses have been more like “crypto is a way to fund social media projects”: Crypto *started* as a currency, a payments mechanism, but became a more general financial-technological tool, a way to give ownership in all sorts of systems to the users of those systems. People sometimes call this “Web3,” with the idea being that crypto would give a new decentralized form to the internet, and I once wrote that “a basic premise of Web3 is that every product is simultaneously an investment opportunity.” This idea — that every product is also an investment — creates a lot of problems under US securities laws. “These tokens are mostly *utility tokens* that allow people to access our network,” crypto founders say, “so they’re not securities,” but the US Securities and Exchange Commission says “no, these tokens are mostly *investment opportunities*, and if you sell them without registration then you’re violating the law.”

Whereas “XRP is just a thing that you can send to make payments” feels a bit less like that? But Ripple *did* tout XRP as an investment opportunity, and its price *has* fluctuated with Ripple’s fortunes. So the SEC sued Ripple, claiming that XRP is a security and that Ripple did lots of illegal unregistered sales of securities. Last year, the judge in the case issued a ruling that was generally interpreted as a loss for the SEC and a win for Ripple. Specifically, the judge ruled that:

1. XRP is “little more than an alphanumeric cryptographic sequence” and not itself a security.
2. But Ripple’s sales of XRP to institutional investors were *securities offerings*, because the combination of (1) XRP and (2) the institutional investors’ negotiations and understandings with Ripple constituted an “investment contract” under US securities law.
3. Meanwhile, Ripple’s sales of XRP in the open market, in anonymous transactions on crypto exchanges, were *not* securities offerings, because they came with no direct promises or contractual arrangements.

The shorthand is something like “securities law protects institutional investors who negotiate directly with crypto issuers, but crypto issuers are free to rip off individual investors who just buy tokens on crypto exchanges.” I thought this decision was pretty weird, later court cases have often disregarded it, and the SEC might still appeal, but that was the decision.

Yesterday the judge issued a final ruling in the case, deciding how much Ripple should have to pay for doing *some* illegal securities offerings. Here too the consensus is that Ripple did pretty well; Bloomberg's Chris Dolmetsch reports:

Ripple Labs Inc. was ordered by a federal judge to pay a civil penalty of \$125 million for improperly selling its XRP token to institutional investors, a fraction of what US regulators had sought in a long legal battle with the cryptocurrency company.

The order came after the Securities and Exchange Commission sued Ripple Labs in 2020, claiming it broke the law when it raised money by selling the digital token without registering it as a security. The case has been closely watched because of its implications for the SEC's regulatory power over crypto.

The agency had sought almost \$2 billion in penalties, while Ripple said it shouldn't have to pay more than \$10 million. In her ruling Wednesday, US District Judge Analisa Torres noted that the case didn't include any claims of fraud.

XRP rose as much as 25% to 64 cents after the ruling. ... Torres found last year that XRP was covered by securities law only when sold to institutional investors, a ruling hailed as a major victory for the industry.

Here's the weird part, though. Ripple's central idea is its approach to payments, issuing XRP as a way to facilitate cross-border payments. And so ODL, on-demand liquidity, selling tokens directly to institutions so they can do payments, is kind of the core business? And ... that's the illegal part? From Wednesday's ruling (citations omitted):

The SEC asserts that Ripple "continues to sell [XRP], unregistered," to Institutional Buyers—specifically, in "continu[ing] to execute contracts for unregistered sales of XRP in direct [on-demand liquidity ('ODL')] transactions." Ripple admits that after the Order was issued, it has continued to sell XRP in ODL transactions. It also concedes that the Order defined Institutional Sales as including sales to "ODL customers." However, Ripple argues that its "ongoing ODL Sales do not have the key characteristics that this Court relied on in finding that Ripple's Institutional Sales were sales of investment contracts." Not so. Although the Court noted that "*some* Institutional Buyers agreed to lockup provisions or resale restrictions"—features "inconsistent with the notion that XRP was used as a currency or for some other consumptive use"—the Court did not hold that a contract lacking these features is *ipso facto* lawful under Section 5.

The judge adds that she "does not today hold that Ripple's post-Complaint sales have violated" the securities laws, and explains in a footnote that most of Ripple's ODL business is outside the US (and

so not subject to US securities laws), and that “all new ODL customers have at least \$5 million in total assets, so that they are ‘accredited investor[s]’ under” Regulation D, the SEC rules that allow unregistered securities sales in private placements. Ripple can keep selling XRP in unregistered securities transactions, as long as it only sells them to foreigners or to US accredited investors.

Except that it can’t sell them to US accredited investors anymore. It was apparently selling them under Regulation D, and Regulation D has a “bad actor disqualification” provision: You can’t use Regulation D to sell unregistered securities if you have a history of getting into certain kinds of trouble with the SEC. This court case — in which Ripple was fined \$125 million for doing illegal securities offerings — counts, so Ripple can’t use Regulation D anymore. Noticing this problem, Ripple asked the judge to waive the disqualification, and she declined:

Ripple asks the Court to “waive the ‘bad actor disqualification’ provisions of § 230.506(d)(1), which prevent an enjoined issuer from using the SEC’s Regulation D exemption for certain private securities offerings.” Although the Court has the discretion to do so, Ripple cites no authority that persuades the Court that judicial waiver is necessary or appropriate here.

This is not necessarily a fatal problem: There are other exemptions to securities registration requirements, and in particular this doesn’t really affect Ripple’s non-US business. (Ledger Insights suggests some other possible workarounds.) But it is a weird problem: The core useful *non-investment* case for XRP, using it to actually facilitate payments, seems to be the one thing that is not allowed. Ripple can sell XRP to retail investors for speculative purposes, but using XRP for cross-border payments is the problem.

Private credit squared

We have talked a few times about a stylized model of modern banking and private credit. The basic idea is:

1. Traditionally, banks fund themselves with short-term deposits and make long-term loans, which is risky.
2. Increasingly, banks have retreated from making many types of loans. Loans to fund private equity leveraged buyouts, most stereotypically, though also, like, mortgages.
3. They have been replaced by other lenders, whom I will loosely call “private credit” lenders.
4. The private credit lenders do not get their funding from short-term deposits. Instead, they raise locked-up funds from investors, stereotypically insurance companies and pension funds who have long time horizons and don’t need immediate access to their money.
5. This, broadly, seems *safer* than having banks make the loans. It’s sort of a move toward “

narrow banking.”

6. But the private credit lenders would like to juice their returns a bit with leverage: Instead of lending \$100 of their investors’ money, they would prefer to lend \$100 of investor money and \$100 more that they themselves borrowed.
7. The private credit lenders borrow this money *from banks*.
8. So the banks get back into the risky lending business, albeit in a safer way: Instead of lending directly to leveraged buyout companies, the banks lend to the lenders in LBOs, taking a more senior claim that is less likely to lose money.

This is a very schematic model, though, and in the real world there are many variations and combinations. For instance, many big banks have themselves gotten into the private credit business: They have big asset management arms, they have relationships with institutional investors (and with borrowers), they can raise long-term funds to make private credit loans. But the big banks are also providing leverage to private credit firms. (That’s Step 7 in my little model.) And so you can combine the ideas: Banks can raise private credit funds to make loans to other private credit funds, why not.

So the Wall Street Journal reports:

Goldman Sachs is letting some big clients get a piece of one of its hottest businesses.

The Wall Street giant has started allowing certain asset-management clients—namely insurance companies—to invest alongside it when it loans money to borrowers including private-credit funds and nonbank lenders such as mortgage providers. ...

Each year, Goldman makes billions of dollars of asset-backed loans, so called because they are tied to collateral. For example, if a lender it finances goes bust, Goldman could take over a pool of mortgages or other consumer loans. ...

Goldman holds the least risky pieces of the loans on its balance sheet and, until now, hasn’t given asset-management clients access to them. Goldman’s asset-management business will also give insurance clients access to other asset-backed loans, such as aircraft financings. ...

The financing team is part of Goldman’s biggest division, global banking and markets, and could use capital from insurance clients in Goldman’s private-credit unit to become a bigger lender. Private credit, meanwhile, is part of Goldman’s second-biggest division, asset and wealth management, and needs to attract more assets to manage.

The private credit team will determine whether to invest clients’ money in these asset-backed loans after the financing team tells them which deals are available.

The cross-divisional effort is part of a long-running push by Goldman Chief Executive David Solomon and President John Waldron to encourage employees to direct business to other units of the bank.

Big modern banks like Goldman are in large part in the business of providing leverage to other financial firms — private credit lenders, mortgage lenders, hedge funds, etc. — using their own money. But they are also in the business of managing money for insurance companies. Why not combine those businesses?

Balyasny

If you are a portfolio manager at a big multistrategy hedge fund, the first trade you make each day is deciding whether to change jobs. Roughly speaking the trade is:

1. If you stay at your current job, you have to keep coming into work each day, and you get paid some amount of money that is roughly a function of (1) how much capital you currently manage and (2) how well you do it.
2. If you leave for a new job, you have to take a long gardening leave, which (1) seems fun? but (2) reduces your earnings substantially for some time. And then your pay at your new job is roughly a function of (1) how much capital your new fund can give you, (2) how well you do and (3) whether they give you a bigger cut of the profits than your old job did. Plus there is probably an additional constant term: Maybe they'll write you a big guaranteed check to induce you to come, or to make up for your lost earnings during your gardening leave.

So probably you should stay if (1) you enjoy your current job more than you would enjoy gardening leave, or at least not *much* less, and/or (2) you think you can make more money at your current job (based on your capital allocation and your expectations about performance) than in the new job (based on what they promise you about capital, payouts, and guarantees).

One broad comment you can make about the shape of this trade is that, the bigger the guarantees are relative to your own expectations about your performance, the more attractive switching will be. If you think "I will probably mess up horribly in the next 12 months, get zeroed on my pay and get fired," and someone offers you a \$25 million guarantee that involves *sitting idle on gardening leave* for the next 12 months, you do that trade all day long!

Now, on the other hand, the *better* you expect your performance to be, the more interested you might be in jumping to a new firm that will give you a bigger share of it. Moving might have more long-term upside, more long-term downside (what if you realize that you liked your old firm more?), and a lot of short-term downside protection.

These are mostly idle thoughts but Bloomberg's Nishant Kumar, Katherine Burton and Gillian Tan report:

Balyasny Asset Management is spending more than \$200 million in payouts to recruit senior money managers who previously worked for rivals such as Ken Griffin, Steve Cohen and Izzy Englander, according to people with knowledge of the matter.

Among Balyasny's priciest hires are Peter Goodwin, who is coming over from Point72 Asset Management to help lead its global equities business, and Citadel's portfolio manager Alberto Mann. Both have been promised more than \$50 million each in potential compensation to make the switch, the people said, asking not to be identified because the details are private. ...

The hirings are also part of efforts by Chief Investment Officer Balyasny to take the equities business to the "next level" following the departure of the division's chief Jeff Runnfeldt last year. Pivoting away from Runnfeldt's strategy of hiring relatively less expensive junior traders, Balyasny has taken a more aggressive approach by tapping into the red-hot market for experienced senior money managers. ...

Like peers, Balyasny's payouts are a combination of signing bonuses as well as compensation for any pay lost from leaving a past employer and having to sit out non-compete periods, which can be more than a year in many cases. The promised money will be paid out over two years or more, the people said. Some traders are also promised a higher cut of trading profits up to a certain level during initial periods and their compensation may include the cost of building out their teams.

Presumably at some point the market for pod-shop portfolio managers will cool, and when it does, the people who are currently on gardening leave before starting with \$50 million guarantees will look really, really smart. Though I suppose that Balyasny, Griffin, Cohen and Englander are famously skilled traders who are now mostly in the meta-business of trading the market for portfolio managers, so maybe they are just better at this game than the portfolio managers are.

Things happen

Private Equity Builds \$722 Billion War Chest in Hunt for Deals. JPMorgan Says Three Quarters of Global Carry Trades Now Unwound. Barclays Joins Rivals in Scrapping Cap on UK Banker Bonuses. Why the Active/Passive Debate Matters. How turmoil at a \$94bn US pension fund hit home for Ohio teachers. What Works in Taiwan Doesn't Always in Arizona, a Chipmaking Giant Learns. UK to introduce bill to regulate ESG rating agencies. Office Loans Are Toxic, but Apartment Loans Are in Bad Shape Too. AI Companies Fight to Stop California Safety Rules. Elon Musk's Plan for Monster

Rocket Rattles Florida's Space Coast. Wall Street Bonus Watcher Says Some Payouts Will Jump Up to 35%. After a Pay Boom, Raises Are Shrinking. Small language models. Donald Trump's sons are doing some sort of crypto thing.

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1. The fees might be different!

Bloomberg Law News 2024-08-09T15:05:2708366761-04:00

Elizabeth Warren Asks Tesla to Probe Musk Conflicts of Interest

By Kara Carlson2024-08-09T10:25:58380-04:00

Senator Elizabeth Warren has asked Tesla Inc.'s board to investigate whether Chief Executive Officer Elon Musk is using the electric-vehicle maker's resources to benefit other companies he owns and runs.

In a [10-page letter](#) sent Thursday to Tesla Chair **Robyn Denholm**, the Democratic senator said Musk's activities — like diverting computer chips from the carmaker to his social media company X Corp. — may be inappropriate. Musk acknowledged in June he sent the graphics processing units to X and artificial intelligence venture xAI Corp., saying they would have otherwise sat in a warehouse.

Warren argued diverting the chips could be a “misappropriation of corporate resources” and said founding xAI in itself is an “unavoidable conflict of interest” for Musk.

Tesla didn't immediately respond to a request for comment.

The senator also raised concerns that Tesla's board may have “neglected” its corporate governance duties and that the company lacks oversight. She wants additional information to better understand whether the Securities and Exchange Commission or other regulatory agencies may need to intervene.

Warren, who sits on the Senate's Banking and Armed Services committees, has voiced similar concerns in the past, and has asked the SEC to investigate Tesla before.

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Bloomberg Law News 2024-08-09T15:01:47142505832-04:00

New Allies Elon Musk, Donald Trump Now Share a Boutique Law Firm

By Brian Baxter 2024-08-09T13:34:14000-04:00

- Harmeet Dhillon's firm is advising Musk's X in antitrust lawsuit
- Dhillon also outside counsel to Trump's presidential campaign

Elon Musk and former President Donald Trump, increasingly allied on some key issues, can now list one more thing they have in common: a legal adviser.

The Dhillon Law Group is leading a new suit by X Corp., formerly Twitter Inc., against a group of advertisers boycotting the Musk-owned social media company. The boutique firm, [founded](#) by conservative lawyer Harmeet Dhillon, also [serves](#) as primary outside counsel to Trump's presidential campaign.

Musk recently [endorsed](#) Trump in his bid for the US presidency. The pair are rolling out a "[major interview](#)" Monday on X, Trump said in a social media post.

Both men are known for cycling through outside counsel—and sometimes [building](#) their [own](#) litigation teams—to address myriad legal and regulatory issues.

Dhillon, who [addressed](#) the Republican National Convention last month in Milwaukee, [lost](#) a long shot bid for leadership of the organization last year. The California litigator's other notable clients include ex-Fox News personality Tucker Carlson, who Dhillon [defended](#) in a sex discrimination case last year.

Musk's X filed an [antitrust case](#) this week against the World Federation of Advertisers, an industry group behind the nonprofit Global Alliance for Responsible Media, which Musk claims organized an advertiser boycott of X that's cost the company billions of dollars. GARM, whose members include major companies like McDonald's Corp. and Nike Inc., announced Thursday it would [discontinue its operations](#) but contest Musk's lawsuit in court.

Dhillon's shop and the S|L Law Firm in suburban Dallas are serving as co-counsel to X in that

[litigation](#). X's [complaint](#) lists Dhillon—who worked at four Big Law firms prior to starting her outfit two decades ago—and fellow partners Christopher Renner, Andrew Mann, and Jonathan Shaw as representing X.

Mann [joined](#) Dhillon's firm last month from Troutman Pepper, where he [was a partner](#). Renner, a former co-chair of the antitrust practice at Jenner & Block, was recruited in June. Shaw is a [former partner](#) at Boies Schiller Flexner and Susman Godfrey who joined Dhillon in 2022.

Dhillon's firm hasn't previously represented Musk-related entities in US federal court, according to Bloomberg data. Renner, while a partner at Boies Schiller, once counseled SolarCity Corp. in an [antitrust case](#) filed in 2015. Tesla [acquired SolarCity](#) the following year.

Mann said in a [post to LinkedIn](#) this week that he moved to the Dhillon firm with the “specific purpose and intent to use the talents I’ve been blessed with to make a difference.” He and Renner previously worked together at the FTC.

Harmeet Dhillon and David Warrington, another partner at her firm who is serving as general counsel to Trump's campaign, didn't respond to requests for comment. Nor did [Adam Mehes](#), a former litigator at Davis Polk & Wardwell who is now senior counsel and [head of litigation](#) at X.

In a [LinkedIn post](#) of her own Thursday in response to Mann's hire, Dhillon said “it's an honor to practice law with women and men who share our values of excellence, integrity, and a better world.”

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CMO TODAY

Elon Musk's X Sued a Nonprofit Advertising Initiative. It Shut Down Days Later.

The World Federation of Advertisers said it is discontinuing the activities of GARM, its initiative to protect brands from unsafe content

By [Megan Graham](#) [Follow](#) and [Patience Haggin](#) [Follow](#)

Updated Aug. 9, 2024 11:32 am ET



Many advertisers have cut back or stopped spending on X since Elon Musk bought the company in 2022, when it was still known as Twitter. PHOTO: ETIENNE LAURENT/AGENCE FRANCE-PRESSE/GETTY IMAGES

An advertising-industry initiative dedicated to safeguarding marketers from harmful content is halting work following a lawsuit filed by Elon Musk's social-media platform X.

The initiative, called the Global Alliance for Responsible Media, was formed in 2019 by the World Federation of Advertisers, major marketers, social-media companies and ad agency groups to tackle hate speech, bullying and divisive fake content.

But X this week alleged companies including CVS Health, Mars and Unilever had conspired to withhold billions of dollars in a “massive advertising boycott” to force the platform to maintain certain safety standards, according to the complaint filed Tuesday in Texas’ northern district. The suit also named the World Federation of Advertisers.

At least 18 brands associated with the coalition stopped advertising on Twitter in November and December 2022 either in the U.S. or worldwide, according to the lawsuit. Dozens more of the coalition’s members cut back spending on ads through 2023.

Stephan Loerke, the chief executive of the World Federation of Advertisers, said Thursday that the organization would be “discontinuing all GARM activities with immediate effect,” in an email viewed by The Wall Street Journal. Loerke’s comments were reported earlier by Business Insider.

“We take this matter very seriously indeed and intend to rebut these allegations in court,” Loerke said in the email, adding that the decision to shut down activities “was not made lightly but GARM is a not-for-profit organization, and its resources are limited.”

The World Federation of Advertisers said in a statement that the lawsuit misconstrues GARM’s purpose and actions, and is significantly draining its finances. “WFA therefore is making the difficult decision to discontinue GARM activities,” the group said.

The shutdown represents a victory for Musk, who has been aggressive about fighting back against critics in public statements as well as in courts. Last year, X filed two other lawsuits against groups that have criticized Musk’s handling of content moderation on the site, accusing them of acting illegally in how they prepared reports about content on X.

X’s chief executive, Linda Yaccarino, hailed the shutdown at GARM.

“No small group should be able to monopolize what gets monetized,” Yaccarino said in a post on X. “This is an important acknowledgment and a necessary step in the right direction. I am hopeful that it means ecosystem-wide reform is coming.”

X will still have to work with large ad-industry trade groups that keep a close watch on the actions and policies of tech platforms. It also will have to deal with the major advertising holding companies that advise marketers on where to spend their budgets. Several of those holding companies encouraged their clients to at least temporarily suspend spending with X, then known as Twitter, when Musk bought it in 2022.

—*Alexa Corse contributed to this article.*

Write to Megan Graham at megan.graham@wsj.com and Patience Haggin at patience.haggin@wsj.com

Crypto Executives Voice Concern to White House Advisers on Call

By Olga Kharif

- Adviser to Vice President Kamala Harris was on the zoom call
- Executives from Coinbase, Ripple, Kraken and Uniswap attended

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Crypto Executives Voice Concern to White House Advisers on Call

By Olga Kharif2024-08-08T17:11:18887-04:00

- Adviser to Vice President Kamala Harris was on the zoom call
- Executives from Coinbase, Ripple, Kraken and Uniswap attended

Advisers to the Biden administration stopped short of making any promises to crypto industry executives who voiced policy concerns, according to a participant on a Zoom call held Thursday.

The White House advisers didn't discuss any policy changes with the group, which included Coinbase Global Inc., Kraken and Ripple Lab officials. An earlier discussion was held in July. A White House spokesperson didn't immediately respond to a request for comment.

Officials of Coinbase and Ripple have been among the loudest critics of the administration's digital-asset policies and the actions of the US Securities and Exchange Commission. They've also been the biggest donors to political action committee Fairshake during the current election cycle.

The campaign of Republican nominee and former President Donald Trump has openly embraced the crypto industry in recent months, promising to support Bitcoin mining in the US and to oppose central bank digital currencies, for example. The Harris campaign hasn't publicly announced her positions on issues important to the industry yet.

"The focus is on the future," Coinbase Chief Legal Officer Paul Grewal, said in an interview. Grewal noted that he has talked directly with the Harris campaign several times in the last two weeks, and that Thursday's call "stood in marked contrast to my experience with the Harris campaign."

Deputy Chief of Staff Bruce Reed, National Economic Adviser Lael Brainard, Congressman Ro Khanna of California, and Kristine Lucius, a senior adviser and director of legislative affairs for the vice president, were on the call, according to a list seen by Bloomberg. Deputy Treasury Secretary Wally Adeyemo attended as well.

Industry participants included Ripple Chief Executive Officer **Brad Garlinghouse**, Skybridge Founder **Anthony Scaramucci**, **Jeremy Allaire** of stablecoin issuer Circle, Hayden Adams from crypto-exchange project Uniswap, Kraken CEO **David Ripley** and venture capitalists Ron Conway, **Chris Dixon** and **Mark Cuban**.

A Ripple spokesperson confirmed Garlinghouse and co-founder Chris Larsen attended the meeting. The Treasury Department declined comment. Other attendees didn't immediately respond to Bloomberg when reached for comment, or couldn't be reached.

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Dave Liedtka, Olga Kharif

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Three Sued for Insider Trading in Frequency Therapeutics Stock

By Martina Barash

- **COURT:** D. Mass.
- **TRACK DOCKET:** [No. 1:24-cv-12043](#)

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Three Sued for Insider Trading in Frequency Therapeutics Stock

By Martina Barash 2024-08-08T16:43:47000-04:00

- **COURT:** D. Mass.
- **TRACK DOCKET:** [No. 1:24-cv-12043](#)

A Frequency Therapeutics Inc. consultant, his son, and his son's friend sold the drug developer's stock just after learning about disappointing results of a clinical trial, before the information became public, the SEC alleges in a suit filed Thursday.

The three "avoided losses of \$86,750, \$8,376, and \$15,323 respectively, on their unlawful Frequency trades," the Securities and Exchange Commission said in a complaint filed in the US District Court for the District of Massachusetts. Their trading on the nonpublic information gave them an unfair advantage over other investors, the commission says.

Boston resident Steven Targum, 75, consulted for Frequency on its clinical trial design for a hearing loss drug from February 2021 until about February 2023, according to the SEC. On Saturday, Feb. 4, 2023, he allegedly received an email from the company's chief medical officer describing the results as not "what people had hoped."

He told his son, Elliot Targum, who in turn informed his close friend and neighbor, Nicholas Rosenberg, the SEC says.

Frequency fended off a proposed class action alleging the regenerative medicine company willfully misrepresented the progress of the drug in March 2023, and the US Court of Appeals for the First Circuit affirmed the result in July of this year.

The SEC seeks injunctions, disgorgement, and civil penalties on its securities fraud claims.

An attorney for the Targums at Campbell Conroy & O'Neil PC didn't immediately respond to an emailed request for comment, nor did an attorney for Rosenberg at Lovett O'Brien LLP.

The SEC represents itself.

The case is SEC v. Targum , D. Mass., No. 1:24-cv-12043, complaint 8/8/24 .

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

To contact the editor responsible for this story: Nicholas Datlowe at ndatlowe@bloombergindustry.com

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Video Game Co. Can't Beat All Of Investors' Fraud Claims

By **Sydney Price**

Law360 (August 8, 2024, 9:52 PM EDT) -- Digital entertainment and e-commerce company Sea Ltd. can't fully defeat a pension fund's lawsuit alleging that the company misled the market to stop a free fall in its share price after a subsidiary lost publishing rights in Southeast Asia to the popular League of Legends video game, among other things.

Sea is headquartered in Singapore and provides entertainment, e-commerce and digital financial services through its three business lines: Garena, Shopee and Sea Money, according to Wednesday's order dismissing part of the suit. In the complaint, investors say shares fell nearly 60% as the truth regarding the negative trends in Garena's and Shopee's businesses was revealed to the market.

According to the suit, which is led by Laborers District Council Construction Industry Pension Fund, Garena's revenue and users were in consistent decline by mid-2022, and its only successful self-developed video game, Free Fire, had been banned in India. Garena would soon lose the publishing rights to League of Legends, but executives tried to downplay the game's importance to the company's bottom line, the investors state.

Judge Douglas L. Rayes said in the Wednesday order that Sea Group Chief Corporate Officer Yanjun Wang's claim on a 2022 earnings call that League of Legends' "contribution is immaterial" to Garena's business is a statement about a current or past fact and therefore is not covered by the safe harbor provisions of securities laws. Wang's representation that the license agreement's termination "would have no impact on our overall publishing business" is, however, a forward-looking statement.

"That said, where a forward-looking statement is accompanied by a non-forward-looking statement that is materially false or misleading, virtually 'no cautionary language — short of an outright admission of the false or misleading nature of the nonforward-looking statement — would be 'sufficiently meaningful' to qualify the statement for the safe harbor,'" the order stated.

Judge Rayes also said the investors have plausibly pled falsity to Wang's statements.

The investors claims that "League of Legends is one of the most monetized video games in the world ... and was one of five games that accounted for more than 95% of Sea's digital entertainment revenue from 2020 to 2022 — create a reasonable inference that League of Legends was material to Garena's publishing business, contrary to Wang's statement on the earnings call," Judge Rayes said.

Regarding the company's Shopee business, which is Sea's e-commerce platform and the largest e-commerce platform in Southeast Asia, the defendants also misled investors with some of their statements, Judge Rayes said.

For example, the suit says that in an April 2023 filing with the U.S. Securities and Exchange Commission, Sea represented that it was "not aware" of any factors "reasonably likely" to have a material adverse effect on Sea's finances, or that would cause reported financial information "not necessarily to be indicative of future operating results or financial conditions."

Judge Rayes said the suit's allegations show plausible support that at the time of the filing, Shopee was experiencing an ongoing decline.

"[B]y failing to disclose this trend — one that was reasonably likely to affect Sea's financial condition

— defendants misled investors," the order stated.

Judge Rayes did say, however, that certain statements the investors took issue with are protected safe harbor and refused to dismiss them. For example, the defendants' statements on a 2022 earnings call identifying post-pandemic reopening trends and inflation as some of the factors that could impact Shopee's gross merchandise value were accompanied by appropriate cautionary warnings, which are sufficient to trigger protections, Judge Rayes said.

"Wang noted post-COVID reopening trends and inflation as some of the factors that could impact Shopee's GMV," the order stated. "Additionally, at the beginning of the earnings call, Sea warned that defendants 'may make forward-looking statements, which are inherently subject to risks and opportunities.'"

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

Laborers District Council Construction Industry Pension Fund is represented by Tor Gronborg, J. Marco Janoski Gray and T. Alex B. Folkerth of Robbins Geller Rudman & Dowd LLP, and Hart L. Robinovitch of Zimmerman Reed LLP.

Sea and the individual defendants are represented by John C. Gray of Lewis Roca Rothgerber Christie LLP and Adam S. Hakki, Daniel C. Lewis and Joshua T. Ebersole of Allen Overy Shearman Sterling.

The case is Laborers District Council Construction Industry Pension Fund et al. v. Sea Ltd. et al., case number 2:23-cv-01455, in the U.S. District Court for the District of Arizona.

--Editing by Kristen Becker.

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Block & Leviton, Bernstein Litowitz To Lead WWE-UFC Suit

By **Jeff Montgomery**

Law360 (August 8, 2024, 4:12 PM EDT) -- Block & Leviton LLP and Bernstein Litowitz Berger & Grossmann LLP pinned down counsel leadership duties Thursday for a pending, high-profile Delaware Court of Chancery stockholder challenge to World Wrestling Entertainment Inc.'s \$21.4 billion merger with Ultimate Fighting Championship.



Former WWE CEO Vincent McMahon, pictured in 2010, was accused of seeking a merger with UFC based on its willingness to let McMahon roll over his equity and stay involved in WWE management despite claims of sexual misconduct. (AP Photo/Jessica Hill, File)

Vice Chancellor J. Travis Laster made the choice over a team drawn from Prickett Jones & Elliott PA and Robbins Geller Rudman & Dowd LLP representing the City of Pontiac Reestablished General Employees' Retirement System. He observed that the two differed narrowly only in a few areas, though both teams were well suited for the case.

Tipping the scale in part, the vice chancellor wrote, was the Block-Bernstein team's commitment to litigating sexual misconduct claims, as well as the 9.5-times larger share stake held by their stockholder clients: Dennis Palkon and the Laborers' District Council and Contractors' Pension Fund of Ohio.

The two teams' class complaints, the vice chancellor wrote in a six-page decision, "principally contended that Vincent McMahon, the former CEO of the company, orchestrated an unfair transaction to preserve his

role in his wrestling empire. The complaints alleged that without the merger, McMahon would have been kicked out for engaging in a lot of sexual misconduct."

McMahon was accused of seeking a tie-up with Endeavor Group's mixed-martial arts UFC based on the buyer's willingness to let McMahon roll over his equity and stay involved in WWE management despite what both stockholder suits highlighted as claims of rape and sexual misconduct.

"All of the claims in this litigation stem from one thing: Vince McMahon's pervasive sexual misconduct against many women in the WWE organization for several years," Kimberly A. Evans of Block & Leviton LLP said during a **leadership hearing** on July 30.

Vice Chancellor Laster wrote that the Palkon-Ohio group's experience in litigating sexual assault-related cases includes "working with (and on behalf of) survivors of sexual misconduct. The Pontiac group has some experience in this area, but not to the same degree."

While the Pontiac group pressed litigation for books and records in support of their case "more aggressively and were able to recover additional, relevant documents," the vice chancellor wrote, the difference did not rise to a "meaningful" degree.

The Palkon group's application reflected "greater interaction between the lawyers and their clients," the decision noted. Their team had "already negotiated an engagement letter that includes a percentage cap on fees," a forecasting approach recommended by scholars.

Other comparative factors were deemed neutral and in balance, including the quality of complaints, access to resources and counsel experience.

At the center of the suit is a deal first **announced in April 2023** and closed in September that saw existing WWE shareholders roll all existing equity into TKO Group Holdings — which formed when the WWE merged with Endeavor Group Holdings, the UFC's parent company.

Endeavor retained 51% of the combined entity while WWE stockholders held 49% in a transaction that combined two of the world's largest professional fighting sports and entertainment organizations.

Counsel competing for the selection did not immediately respond to a request for comment.

Dennis Palkon and the Laborers' District Council and Contractors' Pension Fund of Ohio are represented by Jason M. Leviton, Joseph Kiefer, Kimberly A. Evans, Lindsay K. Faccenda, Irene R. Lax and Robert Erikson of Block & Leviton LLP, and Jeroen van Kwawegen, Edward G. Timlin, Margaret Sanborn-Lowing, James Janison, Gregory V. Varallo and Andrew E. Blumberg of Bernstein Litowitz Berger & Grossmann LLP.

City of Pontiac Reestablished General Employees' Retirement System is represented by Randall J. Baron, David A. Knotts, Lion Wintemute, Christopher H. Lyons and Tayler D. Bolton of Robbins Geller Rudman & Dowd LLP, and Marcus E. Montejo, Corinne Elise Amato, Kevin H. Davenport, John G. Day and Seth T. Ford of Prickett Jones & Elliott PA.

The case is In re World Wrestling Entertainment Inc. Merger Litigation, case number 2023-1166, in the Court of Chancery of the State of Delaware.

--Editing by Alex Hubbard.



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Lululemon Soured Investors With Latest Leggings, Suit Says

By **Emilie Ruscoe**

Law360 (August 8, 2024, 9:42 PM EDT) -- Activewear company Lululemon Athletica Inc. faces an investor's proposed class action alleging it failed to disclose issues underlying sluggish U.S. growth, including factors that allegedly affected a recent bungled rollout of its Breezethrough leggings.

In a Thursday complaint in Manhattan federal court, Lululemon investor Prathik Patel claimed the company violated fraud provisions of the federal securities laws after trading prices for its shares slid following three disclosures over the past five months.

Specifically, Patel claimed that the company hid stagnating sales in its key Americas regional segment resulting from struggles with "inventory allocation issues and color palette execution issues."

Patel pointed to the company's March announcement of results for its 2023 fiscal year, which included the company's statement that its final quarter of 2023 saw growth of only 9% in the Americas when the company had seen 29% growth in during the same quarter the year before.

The investor claimed the March financial results announcement precipitated a nearly \$76 decline in trading prices of the company's shares from nearly \$479 to just over \$403, a drop of nearly 16%.

Patel also referenced a late July media report about the company's purportedly "inconsistent" inventory allocation practices affecting the availability of Lululemon's recently launched Breezeblock legging. According to Patel, trading prices for Lululemon shares fell over \$9 from about \$281 to about \$272, after the report's publication, representing a drop of about 3%.

The day after the report went live, the investor said, a Lululemon spokesperson announced the company was pausing sales of its Breezethrough yoga wear "to make any adjustments necessary to deliver the best possible product experience."

The spokesperson's announcement was followed by a trading price decline of nearly \$25 from about \$272 to just over \$247 or about 9%, Patel said.

On Thursday, Lululemon closed out the day with its shares trading at under \$242, down from the \$247 Patel cited at the end of proposed class period.

Breezethrough leggings were sold for the brand's standard legging price of just under \$100, records show. The product line made headlines in July with analysts citing negative consumer reactions to the pants because of their V-shaped back seam, which was widely described as unflattering.

Patel seeks to represent a class of investors who purchased Lululemon shares between Dec. 7, 2023, when the company touted product offerings that "powerfully resonate with our guests globally," and July 24, 2024, the day before the company pulled the legging design.

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

Patel is represented by Gregory B. Linkh, Rebecca Dawson, Robert V. Prongay and Charles H. Linehan of Glancy Prongay & Murray LLP and Frank R. Cruz of The Law Offices of Frank R. Cruz.

Counsel information for the defendants wasn't immediately available Thursday.

The case is Patel v. Lululemon Athletica Inc. et al., case number 1:24-cv-06033, in the U.S. District Court for the Southern District of New York.

--Editing by Jay Jackson Jr.

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Ford Hid High Warranty Costs From Investors, Suit Says

By **Rae Ann Varona**

Law360 (August 8, 2024, 9:41 PM EDT) -- A Ford Motor Co. investor launched a putative securities fraud class action Thursday alleging the automaker hid quality issues dating back to 2022, only disclosing the higher-than-expected warranty costs in its recently released second quarter 2024 financial results.

Plaintiff Albert Guzman alleges Ford failed to disclose several important facts to investors, including that the company was experiencing deficiencies in its quality assurance for vehicles since 2022 and, as a result, experienced higher warranty costs.

Guzman says it wasn't until a July 24 press release that Ford revealed its profitability was "affected by an increase in warranty reserves" and "higher warranty costs."

"On this news, the company's share price fell \$2.51, or 18.36%, to close at \$11.16 per share on July 25, 2024, on unusually heavy trading volume," Guzman asserts in his complaint.

Guzman seeks to represent those who purchased or otherwise acquired Ford securities between April 27, 2022, when Ford announced its first quarter 2022 financial results, and the July 24 announcement.

He alleges that in between those dates, Ford failed to disclose its warranty reserves don't accurately reflect the quality issues in vehicles it sold since 2022 and that its profitability was reasonably likely to suffer.

For instance, financial reports earlier in the period estimated "a range of up to about \$700 million in the aggregate," in excess of accruals for material field service and customer service actions, according to Guzman's complaint.

He says that in its third quarter 2023 financial results in late October, Ford touted that it was changing how it works to improve quality and costs and that its results showed how the company was "beginning to fulfill" its growth potential and also underscored the role of "higher quality" in driving profitability.

At the time, Ford President and CEO Jim Farley said the company was "radically changing how we work ... so that our promise isn't masked by cost and quality issues," the suit says.

And when the company announced its fourth quarter 2023 financial results in February, the company provided an outlook for a "healthy" 2024 that lauded the company's "quality that's constantly getting better," Guzman says.

Ford had also said that its total costs were expected to be "flat year-over-year," according to Guzman.

Those statements were "materially false and/or misleading, and failed to disclose material adverse facts about the company's business, operations, and prospects," Guzman alleges.

He says that when Ford's latest financial results came out, analysts and journalists reported \$2.3 billion in total warranty and recall costs for the second quarter, \$800 million more than the first

quarter and \$700 million more than a year ago.

The material misstatements and omissions resulted in an "unrealistically positive assessment of the company's financial well-being and prospects," causing the company's securities to be "overvalued and artificially inflated," Guzman says.

Counsel for Guzman and Ford did not immediately respond to requests for comment Thursday.

Guzman is represented by Sharon S. Almonrode of The Miller Law Firm, Robert V. Prongay, Charles H. Linehan and Rebecca Dawson of Glancy Prongay & Murray LLP and Frank R. Cruz of the Law Offices of Frank R. Cruz.

Counsel information for Ford was not immediately available.

The case is Albert Guzman et al. v. Ford Motor Co. et al., case number 2:24-cv-12080, in the U.S. District Court for the Eastern District of Michigan.

--Editing by Drashti Mehta.

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Apollo Stockholder Suit Held Until Del. Justices Hear Moelis

By **Jeff Montgomery**

Law360 (August 8, 2024, 5:51 PM EDT) -- Both sides in a Delaware Court of Chancery challenge to an Apollo Global Management Inc. stockholder agreement adopted in 2022 have agreed to a litigation pause, citing the import of a possible Delaware Supreme Court appeal targeting a case that upended state corporate law on similar pacts.

Sidelined for now following the parties' Wednesday motion to stay is a suit lodged by investor Patrick Quade seeking to block Apollo's agreement with its three co-founders, filed weeks after Chancery Court's February 2024 ruling in West Palm Beach Firefighters' Pension Fund v. Moelis & Co.

In Moelis, Vice Chancellor J. Travis Laster ruled invalid some types of public company stockholder agreements, citing Section 141(a) of the Delaware General Corporation Law. Just months later, Delaware lawmakers declared those same types of deals valid if pending or completed before Aug. 1, after a fast-paced amendment drafting by a corporate law panel of the Delaware State Bar Association.

Stuck for now in a corporate law "donut hole," the vice chancellor found recently, are still-pending stockholder pacts, a complication acknowledged by Apollo and Quade after a July 11 motion to dismiss filed by Apollo.

After conferring, counsel for Apollo and Quade jointly "have determined that the outcome of any appeal of the Moelis decision before the Delaware Supreme Court will impact this action," the Wednesday filing said.

Quade's suit alleged that Apollo entered into its stockholders' agreement "in order to entrench and perpetuate control in the hands of Apollo's founders." As a result, directors of the asset management company are blocked from acting only in the best interest of Apollo and all its stockholders.

Also at issue are provisions that mandate filling board vacancies with former managing partners or their designers, and entitlement of each former managing partner to a seat on Apollo's executive committee. Nonproportional distributions to founding members without the approval of others are likewise prohibited.

Quade's attorneys argued that Apollo's agreement has the effect of removing from directors "in a very substantial way their duty to use their own best judgment on a management matter," including selection of directors, the complaint said.

Apollo argued in its motion to toss the suit that Delaware law expressly permits extrinsic facts, including stockholder agreements, "to be incorporated by reference into a company's certificate of incorporation, and permits those extrinsic facts, by virtue of their incorporation, to have the same status as provisions" in the company's certificate of incorporation.

The two sides said in their motion to stay that they had agreed to confer immediately once any Moelis appeal is resolved or the deadline for appeal passes, with the court to be told afterward how the Apollo case will proceed.

Apollo also argued in its dismissal motion that the provisions targeted in Quade's suit include "important guide rails — omitted from the complaint — which operate to ensure that the board has

retained the freedom to exercise its discretion and judgment."

Another part of the stockholders' agreement, Apollo's dismissal motion said, are broad "fiduciary out" provisions allowing directors to reject actions that would conflict with their fiduciary duties.

The parties did not immediately respond to a request for comment Thursday.

Quade and the proposed class are represented by Ralph N. Sianni of Andersen Sleater Sianni LLC, and Hung G. Ta, JooYun Kim, Alex H. Hu and Natalia D. Williams of HGT Law.

Counsel information for Apollo Global Management Inc. wasn't immediately available Thursday.

The case is Patrick Quade v. Apollo Global Management Inc., case number 2024-0254, in the Court of Chancery of the State of Delaware.

--Editing by Melissa Treolo.

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Auto Paint Co. Faces Investor Suit Over Competition Woes

By **Sydney Price**

Law360 (August 8, 2024, 10:54 PM EDT) -- Vehicle paint protection company XPEL Technologies misled investors about the extent of competition it faced in the marketplace and how the changing demographics of electric vehicle buyers would affect the business, according to a proposed class action filed Thursday in Texas federal court.

Shareholder Greg Adishian alleged in his **complaint** that the company misled the public about its ability to reach non-enthusiast car customers and concealed that its competitors encroached on its market share. XPEL, a supplier of auto paint protection, window film and ceramic coatings, became increasingly dependent on existing customers and partners as its revenue shrank in 2023 and 2024, Adishian said.

In addition to XPEL, its CEO Ryan L. Pape and Chief Financial Officer Barry R. Wood are individual defendants in the suit.

The proposed class period begins Nov. 8, 2023, the day XPEL announced its financial results for the third quarter of the year. Revenue for the quarter had grown 14% but had missed expectations, according to the suit. On an investor call that day, Pape "expressed confidence" for 2024 revenue growth.

The company did not reveal during the call or for the remainder of the class period, however, that XPEL's competitors were draining an "increasingly large" segment of the market, the suit claims.

The truth emerged, the suit alleges, on May 2, the day XPEL announced its first-quarter 2024 financial results. The company reported 5% revenue growth year-over-year, which was "well below" analysts' expectations, according to the suit. During the earnings call, Pape admitted that the XPEL had been losing customers, Adishian says.

Pape said the electric vehicle "revolution" had created a new class of auto enthusiasts to buy their products, but since that market had cooled, so had XPEL's sales.

"EV sales declines probably hurt us twice, once on volume, but also by shifting the composition of those buyers to those that have a lower propensity to participate in the automotive aftermarket," Pape said according to the suit.

On this news, XPEL shares fell \$20.93, or nearly 39%, to close at \$32.86 on May 2, according to the suit.

Adishian claims XPEL and the individual defendants acted with scienter, or actual knowledge of wrongdoing or reckless disregard, and violated the Exchange Act. He claims the defendants' statements aren't covered by the safe harbor provisions of securities laws and seeks damages on behalf of the proposed class.

Counsel for Adishian and a representative of XPEL did not immediately respond to requests for comment on Thursday.

Adishian is represented by Cameron Cano, Thomas L. Laughlin IV, Jonathan Zimmerman and Nicholas S. Bruno of Scott+Scott Attorneys at Law LLP and Brian Schall of The Schall Law Firm.

Counsel information for XPEL and the individual defendants was not immediately available Thursday.

The case is Adishian v. XPEL Technologies Corp. et al., case number 5:24-cv-00873, in the U.S. District Court for the Western District of Texas.

--Editing by Linda Voorhis.

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Tesla Shareholder Attys Seek Merger Of Twitter, Other Suits

By **Jeff Montgomery**

Law360 (August 8, 2024, 8:15 PM EDT) -- Two Tesla stockholder attorney teams have asked Delaware's Court of Chancery to consolidate three derivative suits challenging billions of dollars' worth of stock moves by Elon Musk and other actions in connection with his Twitter purchase, his artificial intelligence venture and alleged insider trading.

Each of the three cases, the motions argued, points to Musk as Tesla's controller and challenges the conduct of Tesla's board of directors under Delaware law in the face of Musk's alleged breaches of fiduciary duty and self-interested actions.

Musk and others named as defendants in the three cases and counsel in the insider trading-related action "do not consent" to the consolidation, the motion filed in all three cases disclosed. None had docketed opposition directly as of late Thursday.

All three cases are currently before Chancellor Kathaleen St. J. McCormick, who has been presiding over an epochal series of proceedings and decisions that included her Jan. 30 voiding of Musk's proposed stock-based, 10-year compensation plan, then valued at around \$56 billion.

The compensation shutdown triggered a stockholder vote to reincorporate in Texas, although mountains of litigation remained in Delaware. Still pending, too, is a shareholder bid for a stock-based fee for the voided pay plan worth more than \$5 billion.

The largest of the three suits, led by the Employees' Retirement System of Rhode Island, accused Musk of concealing his true intent to sell \$16 billion worth of Tesla stock as his Twitter takeover took shape, allegedly allowing the shares to go for inflated prices to buyers kept in the dark about the true purpose.

Tesla's stock price dropped after the public learned of Musk's plan to buy Twitter, triggering reports that he and his brother Kimball, a board member, would have made \$2 billion less on their sales had the plan come to light.

"The common questions of law and fact, overlapping claims involving essentially the same defendants, and the substantially same relief sought in the actions will require the court to make nearly identical determinations," said counsel for the Cleveland Bakers and Teamsters Pension Fund, which sued Musk and Tesla's board over alleged diversions of talent and resources to the breakaway xAI venture.

In addition to including Elon and Kimbal Musk, the actions have in common other defendants, including board members Ira Ehrenpreis, James Murdoch, Robyn Denholm, Kathleen Wilson-Thompson and Joe Gebbia.

Some involved in the potential litigation scrum appear in only some claims, including Oracle co-founder and chief technology officer Larry Ellison, named only in the Rhode Island case.

Consolidation is appropriate in part, the two stockholder teams argued, because "the cost of litigating two [in this case three] separate derivative actions will ultimately be borne by shareholders of the company, both in payment of legal fees and the distraction of company management."

The cases are Employees' Retirement System of Rhode Island v. Elon Musk et al., case number 2024-0631; Cleveland Bakers and Teamsters Pension Fund et al. v. Elon Musk et al., case number 2024-0646; and Perry v. Musk et al., case number 2024-0560, in the Court of Chancery of the State of Delaware.

The Employees' Retirement System of Rhode Island is represented by Marcus Montejo, Bruce Jameson, Kevin Davenport, John Day and Seth Ford of Prickett Jones & Elliott PA and Daniel Chiplock, John Nicolaou, Sean Petterson, Richard Heimann, Katherine Benson and Bruce Leppla of Loeff Cabraser Heimann & Bernstein LLP.

The Cleveland Bakers and Teamsters Pension Fund as well as Daniel Hazen and Michael Giampietro are represented by Christine M. Mackintosh, Vivek Upadhy and William G. Passannante II of Grant & Eisenhofer PA, Thomas Curry, David J. Schwartz, David L. Wales and Adam D. Warden of Saxena White PA, and Brian Schall of The Schall Law Firm.

Elon Musk, Kimbal Musk, Ira Ehrenpreis, James Murdoch, Robyn Denholm, Kathleen Wilson-Thompson, Joe Gebbia, JB Straubel, Larry Ellison, Hiromichi Mizuno and Tesla Inc. are represented by Rudolf Koch, Kevin M. Gallagher and Andrew L. Milam of Richards Layton & Finger PA and Boris Feldman, Doru Gavril, Rebecca Lockert, Jon Fougner and J. Mia Tsui of Freshfields Bruckhaus Deringer US LLP.

--Editing by Philip Shea.

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SPAC Investors Can't Sue Lucid Over Merger, 9th Circ. Says

By **Lauren Berg**

Law360 (August 8, 2024, 10:25 PM EDT) -- The Ninth Circuit on Thursday refused to revive investors' proposed class action alleging that Lucid duped them into buying stock in a special purpose acquisition company ahead of the electric-vehicle maker's \$11.75 billion merger, saying an acquiring company's investors can't sue the target company over its alleged misstatements before the merger.

A three-judge Ninth Circuit panel issued a published **opinion** affirming the dismissal of a lawsuit brought by investors who purchased shares of the special purpose acquisition company Churchill Capital Corp. IV in early 2021 before it merged with Lucid in an **11-figure deal** that closed in July 2021.

The panel, whose reasoning differed from the district court's analysis, found that the Churchill investors lacked standing to sue Lucid under the U.S. Supreme Court's so-called Birnbaum rule, which confines standing to those who bought or sold the stock related to the alleged misrepresentations, the opinion states.

In this case, which involves alleged misstatements made in advance of an anticipated merger, the panel said it agreed with the Second Circuit's 2022 reasoning that "purchasers of a security of an acquiring company do not have standing under Section 10(b) [of the Exchange Act] to sue the target company for alleged misstatements the target company made about itself prior to the merger between the two companies."

The trip to the Ninth Circuit is the latest chapter in a lawsuit that Churchill investors filed in 2021, following Lucid's merger with the SPAC, which are shell vehicles designed to raise money to acquire an entity, take it public and generally take over businesses in industries where their executives have expertise.

The investors alleged that Atieva Inc., which does business as Lucid Motors, and its CEO Peter Rawlinson coerced them into buying Churchill stock by overstating Lucid's electric-vehicle production forecasts and capabilities, despite knowing at the time that the Lucid factory was not functional.

After the merger was official and trading closed, Lucid announced the company would produce only 577 of its vehicles, dubbed Lucid Airs, in 2021, not 6,000 to 7,000, as it had previously stated, prompting the post-merger stock's price to plummet 49.9%. The suit sought to certify a class of investors who bought the SPAC stock before the merger from Feb. 5, 2021, through Feb. 22, 2021.

In February 2022, Lucid and Rawlinson asked U.S. District Judge Yvonne Gonzalez Rogers to throw out the case, arguing that the SPAC investors lacked standing and failed to point to actionable misrepresentations by the company.

In January 2023, Judge Gonzalez Rogers **rejected** Lucid's arguments on standing, but agreed with the defendants that the investors had failed to offer facts showing that statements by Lucid and its executives were material in their decisions to purchase SPAC stock, and failed to allege that the merger was likely to happen at the time of the purportedly misleading statements.

The investors **appealed**, and during oral argument in June, they asserted that the trial judge erred by applying a heightened pleading standard and substituting her own judgment for what a reasonable investor would have understood based on the alleged misstatements.

However, all three judges on the panel commented during the hearing that the appellate court is likely bound by the U.S. Supreme Court's 1975 holding in **Blue Chip Stamps v. Manor Drug Stores** , which suggests that the investors had to have bought the stock at issue to have standing to assert a viable securities fraud claim against Lucid.

And in its opinion Thursday, the panel solidified that analysis, finding that Blue Chip limits Section 10(b) standing to "purchasers and sellers of the security about which the alleged misrepresentations were made."

"It is undisputed that the securities about which defendants allegedly made misrepresentations were those of Lucid," the panel said. "Under the Birnbaum rule, plaintiffs would need to have purchased or sold Lucid stock to have standing to bring this action under Section 10(b)."

"Plaintiffs did not purchase or sell Lucid stock, as Lucid was a privately held company during the relevant period. Plaintiffs purchased CCIV stock, but their complaint does not allege that anyone made misrepresentations about CCIV stock," it said. "Because plaintiffs did not purchase or sell the securities about which the alleged misrepresentations were made, plaintiffs lack standing under Section 10(b)."

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

U.S. Circuit Judges Ronald M. Gould, Richard C. Tallman and Ryan D. Nelson sat on the panel that reached Thursday's decision.

The investors are represented by Jake Bissell-Linsk, Guillaume Buell and Carol C. Villegas of Labaton Keller Sucharow LLP and Shannon L. Hopkins of Levi & Korsinsky LLP.

Lucid and Rawlinson are represented by Brian M. Burnovski, Chui-Lai Cheung, Neal Potischman and Daniel J. Schwartz of Davis Polk & Wardwell LLP.

The case is In re: CCIV/Lucid Motors Securities Litigation, case number 23-16049, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Hailey Konnath, Katryna Perera and Dorothy Atkins. Editing by Jay Jackson Jr.



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Uber's \$200M Deal To End Investors' 'Train Wreck' IPO Suit OK'd

By **Bonnie Eslinger**

Law360 (August 8, 2024, 9:57 PM EDT) -- A California federal judge granted preliminary approval Thursday to Uber's \$200 million class action deal with investors who claim the ride-hailing giant made false and misleading statements ahead of its \$8.1 billion initial public offering regarding its passenger safety record, financial condition and the legality of its business model.

After a hearing in San Francisco, U.S. District Judge Richard Seeborg gave a green light to the agreement between Uber Technologies Inc. and the investors.

"The proposed settlement does fall within the ambit of fair, reasonable and adequate," the judge said.

Under the deal, Uber will put \$200 million into an escrow account. After attorney fees, litigation and administration costs, and other court-approved costs are deducted, the net funds will be distributed pro rata based upon each investor's claim.

Class counsel will request an award of attorneys' fees of up to 29% of the fund — \$58 million — plus litigation expenses of about \$3.2 million, according to the agreement.

During Thursday's hearing, a lawyer for the investors, Alfred Fatale of Labaton Keller Sucharow LLP, called the agreement "an excellent recovery for the class."

Uber has argued throughout the case that the registration statement issued with the IPO disclosed everything the investors claim was misstated or omitted, Fatale said.

In addition, "getting into damages was going to be a real battle of the experts before a jury," he said.

The investors alleged that Uber violated Section 11 of the federal Securities Act, which makes issuers, officers and others involved in the preparation of registration statements liable for any misrepresentation or omission of material information.

Fatale told the court on Thursday that based on their team's research, the \$200 million deal is the second largest settlement of an IPO Section 11 case in dollar value.

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

Uber's stock lost 42% of its value by November 2019, trading at around \$25 per share compared to its opening of \$45 per share, according to the lawsuit. Lead investor Boston Retirement System said it lost \$230,000 in the months following the May 2019 IPO.

Investors said Uber deceived shareholders about its stalling growth, hid the potential legal fallout from its classification of drivers as independent contractors and failed to disclose passenger safety issues and deficiencies in its driver background check procedures, all of which the investors said contributed to the company's stock fall.

According to a **motion for preliminary approval** filed in July, most of the \$200 million will be paid out to those who bought Uber shares within six months of the company becoming public.

Uber lost some key rulings along the way, including the **rejection of its dismissal bid** in 2021 and the **certification of the class** a year later.

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

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

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

--Additional reporting by Linda Chiem and Jessica Corso. Editing by Brian Baresch.

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2nd Circ. Won't Rethink Decision On 'Short-Swing' Profits

By **Emilie Ruscoe**

Law360 (August 8, 2024, 8:45 PM EDT) -- The Second Circuit won't reconsider its decision to revive a lawsuit against hedge fund Raging Capital Management LLC over claims that it improperly made \$5 million in short-swing profits as a corporate insider of retailer 1-800-Flowers.

In a Thursday order, the appellate court denied Raging Capital's petition for a panel rehearing or rehearing en banc. The court didn't address its reasons for the denial.

Raging Capital **petitioned the Second Circuit** for review after a three-judge panel ruled in favor of investor Brad Packer, who brought derivative claims accusing Raging Capital of profiteering off its status as a beneficial owner of 1-800-Flowers' stock. The appeals court vacated a lower court's dismissal of Packer's claims and remanded the case to a district court to proceed.

In its request for review, the hedge fund said Packer couldn't show 1-800-Flowers was harmed by the fund's actions or even that the fund had any special knowledge because of its shareholder status.

Counsel for Raging Capital declined to comment Thursday.

Raging Capital is represented by Thomas J. Fleming and Daniel M. Stone of Olshan Frome Wolosky LLP.

Packer is represented by Glenn Ostrager, Joshua Broitman and Roberto Gomez of Ostrager Chong Flaherty & Broitman PC and Paul Wexler.

The case is Brad Packer v. Raging Capital Management LLC, case number 23-367, in the U.S. Court of Appeals for the Second Circuit.

--Additional reporting by Jessica Corso. Editing by Drashti Mehta.

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Investors, Banks Pitch Next Steps In Saved Bond-Rigging Suit

By **Katryna Perera**

Law360 (August 8, 2024, 10:36 PM EDT) -- Investors accusing major banks of conspiring to rig corporate bonds have told a New York federal court they want to file a new complaint after the Second Circuit revived the suit last month over a potential conflict with the previous judge, while the defendants say this would take the case "back to square one."

In a joint **letter** to the court on Wednesday, individual and institutional investor plaintiffs asked for the opportunity to move the court for leave to amend their complaint. The banks argued in the same letter that there is no reason to start the litigation over again.

"Plaintiffs are not asking the court to grant leave to amend, but rather merely for the opportunity to move the court for leave," the letter states. "Moreover, allowing briefing on the motion will not unduly delay this case or unfairly prejudice defendants, as this case is effectively back at square one with the court's prior order and judgment vacated."

The Second Circuit **revived** the proposed class action last month, ruling that the New York federal judge who previously dismissed the suit should have recused himself due to his wife's ownership of Bank of America stock. The case has since been reassigned to U.S. District Judge Valerie E. Caproni.

The investors said Wednesday that following the Second Circuit's decision, the parties began discussing "next steps" in the litigation, and the talks centered on the investors' desire to file an amended complaint.

The investors say they do not intend to "change the scope of the case" or any legal theories but that "the passage of time and plaintiffs' continued efforts to investigate this matter have enabled it to strengthen its factual allegations and explanation of statistical analyses."

However, the banks argue that the plaintiffs' proposal would "take the case back to square one," which they would be highly prejudicial to themselves.

"Nothing in the Second Circuit's July 2, 2024 opinion vacating [U.S. District Judge Lewis J. Liman's] decision — which 'd[id] not reach the merits of the case' and 'd[id] not question the district judge's reasoned judgment,' contemplated that the case must start over from scratch and that defendants must redo briefing that they already have done," the letter states.

Additionally, the banks say that the investors offer no good reason why they should be allowed another opportunity to amend their claims four years into the litigation, and that the investors attempt to justify the delay by saying the amendments would include recently uncovered factual developments.

"Although plaintiffs insist that they are not changing their 'legal theories,' plaintiffs appear to be seeking leave to file what would essentially amount to a brand new lawsuit," the letter states. "Nothing in the Second Circuit's July 2 decision contemplated such a do-over and the resulting prejudice that defendants would suffer."

The banks urge the court to review de novo Judge Liman's previous dismissal of the suit based on the existing complaint and previous motion papers. Additionally, the banks say each party should be allowed to present a five-page supplemental memorandum addressing subsequent authority.

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

Investors filed the action in 2020 alleging that a group of big banks, including Bank of America Corp., Wells Fargo & Co. and JPMorgan Chase & Co., conspired to fix the prices of corporate bonds to the detriment of others trading those instruments.

The banks lodged a joint motion to dismiss in December 2020, calling the investors' argument "impossibly broad" and "legally insufficient." Judge Liman agreed and **dismissed** the case in October 2021.

After the investors filed their notice of appeal, the court clerk informed them that Judge Liman's wife owned stock in Bank of America while he was presiding over the case.

Although **the clerk reported** that Judge Liman's wife's stock ownership had "neither affected nor impacted his decisions" in the case, he eventually recused himself, and the case was reassigned.

A three-judge panel of the Second Circuit vacated Judge Liman's decision in July and remanded the suit to the district court, saying it agreed with the investors that vacatur of Judge Liman's ruling is required under U.S. Code Section 455(a), which says judges must recuse themselves from a proceeding in which their impartiality "might be reasonably questioned."

According to the opinion, Section 455(a) has been described as a "catchall recusal provision" that "governs circumstances that constitute an appearance of partiality, even though actual partiality has not been shown."

The panel said it is probable that Judge Liman did not know of his wife's **conflict** until the issue was reported by The Wall Street Journal, months after he issued his ruling. However, because he presided over the litigation while his wife held ownership interest in a party to the suit, recusal was necessary.

The panel clarified that it does not question Judge Liman's "reasoned judgment" and said it does not suggest that he treated any of the parties in the case unfairly. However, the point of Section 455(a) is to avoid even the appearance of partiality, "even absent an explicit showing of it," the judges said.

The panel further said vacatur is necessary because the "type" of conflict of interest present in the action risks injustices in future cases.

The investors are represented by Scott+Scott Attorneys At Law LLP, Korein Tillery LLC and Bartlit Beck LLP.

The banks are represented by Sullivan & Cromwell LLP, Allen Overy Shearman Sterling, Paul Hastings LLP, Cahill Gordon & Reindel LLP, Covington & Burling LLP, Davis Polk & Wardwell LLP, Skadden Arps Slate Meagher & Flom LLP, Simpson Thacher & Bartlett LLP, Paul Weiss Rifkind Wharton & Garrison LLP and Jones Day.

The case is Litovich v. Bank of America Corp., case number 21-2905, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Peter Rozovsky.



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Camp Lejeune Toxic Water Judge Flags Pretrial 'Difficulties'

By **Travis Bland**

Law360 (August 8, 2024, 9:52 PM EDT) -- A federal judge presiding over injury suits stemming from contaminated water at Camp Lejeune urged the federal government and plaintiffs' lawyers Thursday to resolve "ongoing difficulties" such as fact disputes ahead of bench trials, calling the parties' stipulations since the last status conference "less than robust."

U.S. Magistrate Judge Robert B. Jones Jr. issued an unprompted **order** telling the sides they would benefit from a "thorough and detailed discussion" on proof needed for claims in bench trials, adding he wants the sides to inform him of any agreements on the elements of a Camp Lejeune Justice Act claim and the general framework for trial.

"To date, based on the parties' representations, it appears the stipulations have been less than robust," he said.

Judge Jones ordered a report on the parties' progress by Aug. 20, a week before the next scheduled status conference.

The order also told the sides that updates on settlements should no longer be included in routine reports to the court in light of settlement masters and a liaison being appointed, as well as another judge's order to **limit the public disclosure** of administrative settlement information.

More than 1,800 individual lawsuits have been filed so far under the CLJA, alleging exposure to water on the military base that contained excessive levels of chlorinated solvents and other contaminants, causing bladder cancer, kidney cancer, lymphoma and other diseases.

The CLJA was signed by President Joe Biden on Aug. 10, 2022. It provides more flexibility for people who lived around the U.S. Marine Corps base between 1953 and 1987 — when the water system was replaced — to sue the government. However, according to the veterans, the federal government waited 10 years, after which the statute of limitations ran out, to publish tests that showed contaminated water.

In June, the two sides said that the U.S. Department of the Navy has made 58 settlements worth a total of **\$14.4 million** between February 2023 and June 4, according to a joint status report.

The case is headed toward bench trials for so-called "Track 1" plaintiffs, who are alleging the contaminated water caused only one of bladder cancer, kidney cancer, leukemia, Parkinson's disease or non-Hodgkin's Lymphoma. Other plaintiffs claiming they suffered a combination of diseases are set to have trials after the Track 1 plaintiffs.

Counsel for the plaintiffs declined to comment Thursday. Representatives for the government did not immediately respond to a request for comment.

The veterans and families are represented by J. Edward Bell III of the Bell Legal Group PLLC, Zina Bash of Keller Postman LLC, Elizabeth J. Cabraser of Lieff Cabraser Heimann & Bernstein LLP, W. Michael Dowling of the Dowling Firm PLLC, Robin L. Greenwald of Weitz & Luxenberg PC, James A. Roberts III of Lewis & Roberts PLLC, and Mona Lisa Wallace of Wallace & Graham PA.

The government is represented by Adam Bain and Haroon Anwar of the U.S. Department of Justice's

Civil Division.

The case is Camp Lejeune Water Litigation v. U.S., case number 7:23-cv-00897, in the U.S. District Court for the Eastern District of North Carolina.

--Additional reporting by Donald Morrison and Emily Field. Editing by Adam LoBelia.

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Calif. Yacht Group Urges Toss Of Fee Antitrust Suit In Fla.

By **David Minsky**

Law360 (August 8, 2024, 9:13 PM EDT) -- The California Yacht Brokers Association has urged a Florida federal court to toss a proposed class action alleging that it's part of a scheme to inflate boat sales fees, saying it's not violating the Sherman Antitrust Act because the Golden State allows commission sharing and requires sellers to pay for buyer representation.

The CYBA brought its **omnibus motion to dismiss** Monday in Miami federal court, saying Ya Mon Expeditions LLC, Blueberry Enterprises LLC and others failed to state a claim, failed to join a necessary party and that the venue is improper because the CYBA doesn't conduct substantial business in Florida.

"A good reason for seller's broker owing buyer a fiduciary duty is that marine vessels gather latent defects quickly over time and buyers are easily at risk of purchasing vessels that are not appropriate for them or are not as they appear," the CYBA said in its motion. "As such, California is not a 'buyer beware' jurisdiction, rather seller's broker must affirmatively protect the buyer pursuant to California law."

Ya Mon Expeditions initiated its lawsuit in February, alleging the CYBA and several other defendants conspired in a scheme requiring proposed class members to pay inflated commissions to the brokers representing yacht buyers on multiple listing services.

But in its motion to dismiss, the CYBA said the allegation that sellers are forced to pay for buyer representation is a conflict of interest "makes no sense" because a fiduciary duty is imposed on yacht brokers under California law and by the state's Department of Parks and Recreation Division of Boating and Waterways, which licenses and regulates ship and yacht brokers in the Golden State.

Additionally, commission sharing is specifically allowed in California — or that a broker may pay a broker — and "it cannot be expected that CYBA would prohibit commission sharing," as the prohibition of commission sharing would violate the law, according to CYBA's motion that was co-written by its attorney Christopher Brainard of C.M. Brainard & Associates, a yacht broker himself.

The CYBA also says it has "indirect sovereign immunity" under the 1943 U.S. Supreme Court decision **Parker v. Brown**, arguing that the Sherman Act wasn't intended to confine state sovereignty and that states are permitted to limit competition to some extent in order to "promote other valuable goals."

"It is all too easy to 'dress' a boat and sell it to an unsuspecting buyer — California's solution is to mandate that seller's own broker must represent and protect [the] buyer," CYBA's motion stated. "If buyers are left with less representation, they will inevitably end up with vessels that are less than they thought they were getting and the market as a whole will suffer — everyone loses."

A CYBA representative declined to comment and attorneys representing the plaintiffs did not immediately respond to a request for comment Thursday.

The plaintiffs are represented by Lea P. Bucciero, Ricardo M. Martinez-Cid and Matthew Weinshall of Podhurst Orseck PA, Kevin D. Neal, William F. King and Kenneth N. Ralston of Gallagher & Kennedy PA and Hunter Shkolnik and Salvatore C. Badala of Napoli Shkolnik PLLC.

California Yacht Brokers Association Inc. is represented by Emily Heim of Bayramoglu Law Office LLC and Christopher M. Brainard of C.M. Brainard & Associates.

The case is Ya Mon Expeditions LLC et al v. International Yacht Brokers Association Inc. et al, case number 1:24-cv-20805, in the U.S. District Court for the Southern District of Florida.

--Editing by Michael Watanabe.

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Oracle's \$115M Deal For Selling Internet Users' Data Gets OK

By **Bonnie Eslinger**

Law360 (August 8, 2024, 10:03 PM EDT) -- A California federal judge on Thursday preliminarily approved Oracle's \$115 million deal to end a proposed class action alleging that the software company illegally sold internet users' electronic profiles, but expressed concern over an "overly burdensome" opt-out process that Oracle's lawyer said would prevent "mass" opt-outs.

U.S. District Judge Richard Seeborg said the settlement appeared to be fair, reasonable and adequate but asked counsel for the plaintiffs why there was no online or email process for consumers who wish to opt out of the deal.

"It seems like it's a fairly cumbersome opt-out procedure," the judge said.

The lawyer, David Rudolph of Lieff Cabraser Heimann & Bernstein LLP, told the court that the process was simple: Individuals who wished to be excluded merely had to download a form, fill it out and mail it in.

"That's just to make sure that it's orderly and that they are not being done in a mass fashion, which is an issue," Rudolph said. "They have to be signed by the individual."

The mass opt-outs are being orchestrated by objectors and their counsel, Rudolph added.

Judge Seeborg said that was not the court's concern.

"To the extent that one group wants to try to exert leverage on another, that's not my problem," the judge said.

A lawyer for Oracle also said that having online opt-outs created problems.

One reason for the mail-in process "is to discourage counsel from driving opt-outs on a mass basis on behalf of putative class members," said Tiffany Cheung of Morrison Foerster LLP. "Unfortunately we have seen there are situations where opt-outs are driven by counsel rather than the individuals."

Judge Seeborg shot back that it wasn't the court's role to stop lawyers from recruiting putative class members to opt out.

"I understand why you don't want it. But at a certain level, it's an open market out there," the judge said.

Cheung also told the court that online forms make it easier for someone to fabricate an invalid opt-out.

"It does create more cost in terms of administration and fraudulent opt-outs that need to be addressed," she said.

Judge Seeborg wrapped the discussion by saying it wasn't something that would stop the deal from going forward.

"But I may think about it a bit further," he added.

According to the settlement agreement, if 15,000 or more of the members of the settlement class validly exclude themselves from the deal, Oracle has the option of rescinding the agreement.

The proposed agreement also states that class counsel will ask the court to award up to 25% of the settlement fund — up to \$28.75 million — for attorney fees. In addition, the attorneys are seeking reimbursement for their expenses, up to \$225,000. The deal also suggests that the two class representatives named in the complaint receive additional awards of up to \$10,000 each out of the settlement fund for their work done on behalf of the class.

During Thursday's hearing, Rudolph said that based on the expected claims rate, members of the nationwide settlement class would receive about \$15 to \$25 under the deal.

And while the claims, if successful, could have yielded damages in the billions, there were risks if the case went to trial, he said.

"It's still a really phenomenal result in a case like this," Rudolph said of the \$115 million settlement. "Combined with injunctive relief."

The proposed class action **launched in August 2022** accused Oracle of collecting personal data using several tools, including software code stored on web browsers that collect users' data, allegedly without consumers' knowledge or consent.

The consumers claimed that Oracle has made \$42.4 billion in annual revenue selling personal information — including addresses, race, political views, location and retail purchases — of anyone who uses the internet for everyday activities. They contended that the company collected this information with its Oracle ID Graph and related marketing products.

Additionally, the company allows third-party data brokers to "traffic in" personal data on its data marketplace without web users' knowledge or permission, the suit said, adding that Oracle also partners with more than 65 such major data brokers.

Judge Seeborg **cut earlier renditions** of the complaint in October 2023 but gave the consumers multiple shots at amending it.

The consumers beefed up their allegations about statements made publicly by Larry Ellison, Oracle's chair and chief technology officer, claiming he admitted to the alleged misconduct during a September 2016 OpenWorld keynote. The complaint claimed that Ellison in that speech described the amassing of profiles by Oracle's ID Graph and "flippantly acknowledged that Oracle's profile-building conduct was privacy invasive, potentially illegal, and was 'scaring the lawyers.'"

After Oracle filed another motion to dismiss, Judge Seeborg subsequently **agreed to cut** the consumers' intrusion upon seclusion claim brought under Florida common law and a claim under the Federal Wiretap Act, also known as the Electronic Communications Privacy Act.

Following that order, however, Oracle and the consumers reached the current settlement.

In a motion for preliminary approval **filed in July**, the consumers said the deal provides relief for a nationwide class of those "whose personal information, or data derived from their personal information, was acquired, captured or otherwise collected by Oracle Advertising technologies or made available for use or sale by or through Oracle's ID Graph, Data Marketplace or any other Oracle Advertising product or service from Aug. 19, 2018, to the date of final judgment in the action."

The deal also calls for Oracle to "not capture certain complained-of electronic communications" and to implement an audit program that will review its customers' compliance with contractual consumer privacy obligations, according to the motion.

The consumers are represented by Michael W. Sobol, David T. Rudolph, Jallé H. Dafa, John D. Maher, Amelia A. Haselkorn and Nabila Abdallah of Lieff Cabraser Heimann & Bernstein LLP.

Oracle is represented by Tiffany Cheung, Christin Hill, Purvi G. Patel, Whitney O'Byrne, Erik

Manukyan, Emma Burgoon and Zachary S. Newman of Morrison Foerster LLP, and in-house by Kyle Zipes and Nargues M. Eder.

The case is Michael Katz-Lacabe et al. v. Oracle America Inc., case number 3:22-cv-04792, in the U.S. District Court for the Northern District of California.

--Additional reporting by Gina Kim, Lauren Berg and Dorothy Atkins. Editing by Rich Mills.

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