With Dell decision, Delaware justices reconfirm Chancery judges' discretion over megafees

reuters.com/legal/government/column-with-dell-decision-delaware-justices-reconfirm-chancery-judges-discretion-2024-08-15

Alison Frankel

The seal of The Delaware Supreme Court is seen in Dover, Delaware, U.S., June 10, 2021. REUTERS/Andrew Kelly Purchase Licensing Rights, opens new tab

Aug 15 (Reuters) - The justices of Delaware's Supreme Court trust their lower-court colleagues to do the right thing when it comes to fee awards in giant shareholder cases.

That is the message from the state high court's decision, opens new tab on Wednesday to affirm a whopping $267 million fee award to the plaintiffs' lawyers who won a $1 billion settlement with Dell and its controlling shareholders in a breach of duty case arising from a controversial 2018 stock swap.

The fee award, which amounts to 26.7% of the settlement fund, is probably more than shareholder lawyers would have received in a $1 billion securities class action settlement in federal court.

Federal judges generally use a sliding scale for fee awards in securities cases: As the size of the settlement goes up, the percentage awarded to plaintiffs' lawyers goes down. The median fee award in federal securities class actions that settle for $1 billion or more is about

10.5% -- less than half the percentage awarded to Labaton Keller Sucharow; Quinn Emanuel Urquhart & Sullivan; Andrews & Springer; Robbins Geller Rudman & Dowd; and Friedman Oster & Tejtel in the Dell case.

In the Dell appeal, Dell investor Pentwater Capital Management, with backing, opens new tab from several influential securities law professors, asked, opens new tab the state justices explicitly to endorse a similar declining-percentage approach to fee awards in Delaware megafund cases.
They argued, as I've told you, that the declining-percentage approach properly incentivizes plaintiffs' lawyers without giving them a windfall at shareholders' expense.

But in Wednesday's opinion, written by Chief Justice Collins Seitz, the Supreme Court refused to adopt the declining-percentage approach, opting instead to continue to give Delaware Chancery Court judges broad discretion to award fees based on the so-called Sugarland test, opens new tab. (That five-pronged test, which dates back to 1980, prioritizes the results obtained by plaintiffs' lawyers; the time and effort they expended; and the complexity of the case.)

"The Sugarland factors control a megafund fee award, rather than any per se rule, whether declining percentage or any other rule," Seitz wrote in the Dell opinion. "This court will not usually disturb the Court of Chancery's ruling if the court adequately explains its reasons and properly exercises its discretion when it applies the Sugarland factors."

Chancery judges already have plenty of leeway to award a smaller-than-usual percentage in megafund cases, the Supreme Court noted. The justices said as much in their 2012 decision, opens new tab in Americas Mining Corporation v. Theriault, in which the Supreme Court affirmed a record-setting $300 million fee award to plaintiffs' lawyers who won more than $2 billion in a shareholder derivative case.
In that decision -- as in Wednesday's Dell opinion – the Delaware justices declined to adopt a strict declining-percentage rule, but pointed out that then-Chancellor Leo Strine granted plaintiffs' lawyers a fee of 15% of the judgment, rather than the 22.5% award they requested, based in part of the sheer size of the award.

To be sure, the justices said in Wednesday's Dell opinion that Chancery judges must be on guard against the perception that they are awarding windfall fees to shareholder lawyers.

That was surely no coincidence. As my Reuters colleagues Jon Stempel and Tom Hals reported on Wednesday, the backdrop for the Dell opinion is a pair of gigantic fee requests in shareholder cases against Tesla's board of directors: a $230 million request by plaintiffs' lawyers who sued over compensation for board members and a $7 billion request in litigation challenging CEO Elon Musk's pay package.

Without mentioning those cases, the justices said in the Dell decision that it is "essential" for Chancery judges overseeing megafund cases to think hard before awarding outsized fees.

"The potential for large fees incentivizes counsel to accept challenging cases," the court said. "But it is also legitimate to ask, outside our somewhat insular legal universe, whether the public would ever believe that lawyers must be awarded many hundreds of millions of dollars in any given case to motivate them to pursue representative litigation."

Neither Pentwater counsel Stephen Brauerman of Bayard nor shareholder lawyer Ned Weinberger of Labaton responded to my queries. But law professors on opposite sides of the Dell case offered different views of the ruling.

Vanderbilt University law professor Brian Fitzpatrick, who filed an amicus brief, opens new tab urging the Delaware Supreme Court not to adopt the declining-percentage model, said in an interview that the justices were "honest" about "the dilemma judges face all over the country" when they consider big fee requests.
But crucially, Fitzpatrick said, the Supreme Court did not allow concerns about the public perception of windfall awards to overshadow its analysis. "The bottom line: There's nothing new to see here," Fitzpatrick said.

Stanford Law School professor Joseph Grundfest, on the other hand, emphasized the justices' cautionary language about windfall awards and their citation of a 2000 Chancery Court opinion, opens new tab that said plaintiffs' lawyers should receive fees that are high enough to encourage meritorious lawsuits – but that anything above that incentive point is "a windfall, serving no other purpose than to siphon money away from stockholders."
"The question going forward," Grundfest said via email, "is, how much is just enough, and how much is too much?"

One potentially important clue in the Dell opinion, Grundfest said, could be the justices' discussion of how the Dell fee award compares with plaintiffs' lawyers' lodestar billings.

Pentwater argued that the $267 million fee award is seven times lodestar billings -- a multiplier that can only be considered a windfall.

The justices said a sevenfold multiplier is "at the high end," but not so unusual to be outside of the trial court's discretion.

Grundfest nevertheless said the Supreme Court's language can be read to set an upper limit on an acceptable multiplier.

Fee requests are teed up in the two megafund Tesla cases overseen by Chancellor Kathaleen McCormick. So we should find out soon how Chancery Court is interpreting the Dell opinion.

Read more:

Court upholds blockbuster $267 million legal fee award in Dell lawsuit
Dell case's $267 million legal fee appeal sparks law profs' fierce debate
Whopper $267 million fee award in $1 billion Dell case shows why Delaware is different
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Reporting By Alison Frankel

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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Business Law Prof Blog

Friday, August 16, 2024

NVIDIA

By Ann Lipton

In 1995, Congress passed the Private Securities Litigation Reform Act (PSLRA), which dramatically heightened the pleading burden for plaintiffs bringing securities fraud cases. At the same time, the PSLRA also instituted a mandatory stay on discovery until resolution of any motions to dismiss, which means plaintiffs have to use their own investigation – relying on public information, confidential sources, and the like – to draft a complaint that is sufficiently particular to satisfy PSLRA standards.

In 2002, Steve Bainbridge and Mitu Gulati published *How Do Judges Maximize? (The Same Way Everybody Else Does – Boundedly): Rules of Thumb in Securities Fraud Opinions*. The paper explained that, given the high pleading standards of the PSLRA, judges deciding motions to dismiss lighten the workload by coming up with various rules of thumb for determining whether a complaint pleads materiality or scienter. For example, they identified the puffery doctrine (presuming that investors treat vague statements of optimism as immaterial), the bespeaks caution doctrine (predictions of the future are immaterial if they are caveated by warnings of future uncertainty), and fraud by hindsight (refusing to draw inferences about what the company knew at an earlier time due to negative disclosures at a later time), as new bright line rules that judges employ to dismiss complaints, disconnected from the general fact pattern.

I can add a bunch more. For example, a refusal to infer knowledge from one's position in the company (except in generally rare instances where the "core operations" doctrine kicks in), a refusal to treat bonuses and similar compensation as a motive for fraud, a refusal to treat corporate departures as indicative of fraud unless there are "particularized allegations connecting the departures to the alleged fraud." *In re Hertz Global Holdings*, 905 F.3d 106 (3d Cir. 2018), and a refusal to treat insider trades by *non* defendants as indicative of scienter (an issue I blogged about here). These are more "rules" for complaints that, I'd argue, contradict our common sense understanding of how to go about inferring other people's states of mind on a day to day basis just, you know, as a consequence of *living as human beings on this planet*.

Additionally, a couple of years ago, I published *Fact or Fiction: Flawed Approaches to Evaluating Market Behavior in Securities Litigation*, which identified still more rules of thumb that judges have developed over time. For example, when addressing loss causation, courts often require revelation of the fact of falsity (rather than a revelation of problems traceable to the fraud), and will further hold that notice of an investigation, without more, categorically cannot cause a loss.

You see the problem. The question whether a complaint pleads falsity or a strong inference of scienter or loss causation or materiality is a holistic factual inquiry; but as these rules build up, pleading or litigating a securities case becomes about whether plaintiffs have complied with an increasingly arcane set of rules. I like to quote then-Chief Judge William Young from 1999, describing the PSLRA as a "Byzantine pleading code …for securities actions." *In re Number Nine Visual Tech. Corp.*, 51 F. Supp. 2d 1 (D. Mass. 1999).

Which is what I was thinking about when going over NVIDIA's opening brief in *NVIDIA Corporation v. E. Ohman J:or Fonder AB*, currently pending before the Supreme Court.

The plaintiffs pled falsity by relying, in part, on an expert report that drew inferences based on market information. The assumptions and inferences on which the report was based were in the complaint. Nonetheless, NVIDIA seeks to have the Supreme Court adopt a bright line rule that an expert opinion does not constitute an allegation of fact sufficient to satisfy PSLRA pleading standards. NVIDIA also challenges the market evidence and factual assumptions that underlay the report as too generic. Finally, NVIDIA admits that sometimes expert reports may be helpful, but here, the complaint rests *too much* on the expert report alone, so that the other facts surrounding it are not sufficient.

I see no way the Supreme Court can give NVIDIA what it wants without either acting as a district court and weighing *this* specific complaint and *these* specific allegations without regard for future cases, or - more likely - adding more artificial rules to securities pleadings. Expert reports are still pretty rare in complaints, but if the rule is you can't have them be the sole support of a complaint, then we'll see endless litigation over what counts as "sole" (especially since, in this very case, the plaintiffs offer additional allegations). And if plaintiffs can't use expert reports that draw inferences based on detailed market information, can they use short seller reports that do the same? (The Ninth Circuit, for example, has held that short seller reports analyzing public information may be a basis for alleging loss causation if they involve "extensive and tedious research involving the analysis of far-flung bits and pieces of data." *In re BofI Holding, Inc. Securities Litigation*, 977 F.3d 781 (9th Cir. 2020)).

If plaintiffs can't use short seller reports, what happens if the plaintiffs' attorneys draw inferences based on public information – does that go too far? Suddenly what started out as a simple rule about experts becomes whole new categories of prohibited inferences being added to the list. And ruleification ends up obscuring the ultimate inquiry, namely, whether there is a sufficient basis to infer that the defendants' statements were false.

There's a similar issue with respect to the other question presented in this case, which is about pleading scienter. In NVIDIA, the plaintiffs offer a lot of circumstantial evidence of scienter, plus make allegations regarding the existence of documents allegedly reviewed by the defendants, but the plaintiffs haven't seen the documents so they can't plead their exact contents. NVIDIA wants the Court to adopt a bright line rule that the contents of the documents must be described, because "Plaintiffs built their entire scienter case around NVIDIA's internal documents and data. By choosing this route, Plaintiffs were required by the PSLRA's pleading standards to allege with particularity what those documents and sources said and how they supported Plaintiffs' preferred inference of scienter." Which means, were the Court to accept NVIDIA's argument, the next step is litigation over what counts as the "entire" case, and how much description of a document is enough, and how much support a generally-described document can provide when there are *other* allegations of scienter. The argument becomes about the contours of the rule, not whether the substantive standard for pleading scienter is met.

Securities complaints are now hundreds of pages long – and sometimes, ironically, dismissed for being *too* long and confusing, because Goldilocks-like, they must be just right. *See, e.g.*, *Macovski v. Groupon, Inc.*, 2021 WL 1676275 (N.D. Ill., Apr. 28, 2021). (Apparently, plaintiffs must also take a class in narrative exposition before they can survive a motion to dismiss.) Selecting a lead plaintiff takes months, drafting an amended complaint typically is 60 days or so after that, plus another 60 for the motion to dismiss, 60 for the opposition, and 30-60 for a reply – weeks or months before an oral argument and god knows how long before a decision, and all of this *before there's been any discovery.* By the time you get to depositions, witnesses will be able to say "I don't remember" and be *completely credible*. The last thing this system needs is *more up front* rules about what plaintiffs can and cannot plead.

Securities Law News

Aug. 16, 2024, 6:33 AM PDT

Autodesk Executives Ignored Accounting Risks, Documents Show (2)

By Brody Ford

- Company continued controversial practice after pledging halt
- Activist Starboard Value is pushing for changes at the company

Bloomberg Law News 2024-08-16T11:06:55046286097-04:00

Autodesk Executives Ignored Accounting Risks, Documents Show (2)

By Brody Ford2024-08-16T09:33:35997-04:00

- Company continued controversial practice after pledging halt
- Activist Starboard Value is pushing for changes at the company

Autodesk Inc. continued to use a controversial sales strategy after promising investors it would stop and ignored internal warnings about the risks of doing so, according to previously unreported internal documents.

The yearslong strategy involved offering discounts to certain corporate customers willing to pay up front for large multiyear contracts. In an effort to provide more predictable cash flow and wean itself off of the discounts, the engineering software company in 2021 pledged to halt the practice.

But Autodesk kept doing it in an effort to meet financial targets, according to the documents, which were reviewed by Bloomberg. The company counted on the upfront payments to boost cash flow, the documents show.

Employees considered the practice risky because the discounts and other concessions reduced long-term revenue, boosted the chance of mistakes in financial modeling and made it harder for salespeople to do their jobs, the documents said.

The shares dropped about 1% as the markets opened Friday in New York.

An Autodesk spokesperson said the company’s use of upfront billing continues to decrease, but won’t end entirely “as we consider customer preferences and our presence in emerging countries.” She noted that an internal investigation resulted in no changes to any financial statements.

The accounting issues first came to light in April, when the company delayed its annual financial disclosures and said it was opening a review of processes related to free cash flow and operating margins. In May, the company announced it was replacing **Debbie Clifford** as chief financial officer. The following month, activist hedge fund Starboard Value LPsaid it had taken a stake and began pushing for board changes over concerns about how Autodesk was handling the accounting probe.

Employees warned executives about the strategic risk in early 2022, but the company continued to book such deals at least until the fiscal year ending in January 2024, according to the documents. Some of the deals were approved by Chief Operating Officer Steve Blum, the documents show.

Autodesk has offered similar discounts to smaller customers and has said it will phase out those offerings later than discounts for corporate customers.

For More: Autodesk CFO Replaced After Internal Accounting Investigation

Autodesk's accounting probe concluded in May, with the board deciding to remove Clifford as CFO. The company said it had provided related documents to the US Securities and Exchange Commission and US Justice Department.

Starboard has urged the board to consider replacing Chief Executive Officer **Andrew Anagnost** and said the company is "asking shareholders to accept a complete lack of consequences and accountability for" the accounting issues. The hedge fund, led by CEO Jeff Smith, unsuccessfully sued to reopen Autodesk's board nomination window, saying the company had purposely hidden the probe until after it had closed.

Autodesk has said management and the board met with Starboard multiple times. "Autodesk is taking decisive actions to drive growth, enhance margins and deliver strong free cash flow, and our business has momentum, as evidenced by our strong first-quarter results," the spokesperson said.

(Updates with shares.)

To contact the reporter on this story:
Brody Ford in New York at bford61@bloomberg.net

To contact the editors responsible for this story:
Sarah Frier at sfrier1@bloomberg.net

Robin Ajello, Nick Turner

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https://www.law.com/2024/08/16/federal-judge-awards-1m-to-plaintiffs-counsel-following-a-no-payment-shareholder-derivative-settlement/

NOT FOR REPRINT
NEWS

Federal Judge Awards $1M to Plaintiff's Counsel Following a No Payment Shareholder Derivative Settlement

The plaintiff noted the substantial benefits of the reforms, which included the creation of a new audit committee and an independent director position to sit on the board, among others.

August 16, 2024 at 03:06 PM

Securities Litigation

Allison Dunn

After a federal judge in Massachusetts approved a shareholder derivative settlement against a renewable energy company's board of directors and executives earlier this month, the court subsequently awarded plaintiff's counsel $1 million, settling a fee dispute to reflect no upward or downward multiplier.

On Wednesday, U.S. District Judge Nathaniel M. Gorton of the District of Massachusetts awarded $1 million to Thomas J. McKenna of the New York-based firm Gainey McKenna & Egleston and local attorney Michael P. Utke.

The attorneys represented the plaintiffs in a securities derivative settlement against XL Fleet over its 2020 merger with XL Hybrids. In the case, captioned *Kay v. Frodl*, the settlement comprised a series of immediate corporate reforms to strengthen the company's oversight on compliance that are to remain in effect for four years, the order said.

The parties ultimately disputed the degree of complexity involved in the securities litigation. The plaintiff's counsel pushed for a multiplier of approximately 2.5, given the range approved in other security and stockholder derivative actions.

The defendants, represented by counsel with Troutman Pepper Hamilton Sanders, argued that the reforms were "not nearly as significant as plaintiff suggest." The defendants also claimed that the mean multiplier in similar litigation was around 0.94 and said that no more than $200,000 in fees should be awarded, according to the order.

The court concluded that both parties made "persuasive arguments in different respects." In part siding with the defendants, Gorton agreed that the plaintiff relied on cases that are distinguishable and acknowledged a 2014 California district court ruling in *In re Oclaro Derivative Litigation* in which the fees were reduced, because the plaintiffs "essentially piggybacked" on related securities actions.

However, Gorton said that the present case was not settled immediately, and the court gave "credence to plaintiff's effort to facilitate a global resolution," which also resolved a related action against the company, now known as Spruce Power, in a Delaware federal court.

“An analysis of the factors above demonstrates that both parties make persuasive arguments in different respects. Defendant understates the impact of the independent director and plaintiff overstates the comparability of the cases she cites as analogous. The appropriate award is in between the divergent poles suggested by the parties,” Gorton said, concluding a multiplier of one was suitable in the present case.

The case centered on the plaintiff shareholder, Val Kay, who accused the Boston-based company’s board members and executives—including Deb Frodl, XL Fleet’s chair, the former chief executive officer, Eric Tech, among others—of approving the merge/r through a series of false and misleading statements about the company’s prospects and future revenue projections. A 2021 report detailed the alleged misrepresentations and actual condition of the company, which led stock prices to significantly decline, according to the court’s order.

Kay filed the action against XL Fleet’s leaders in 2022.

After granting the plaintiff’s motion for final approval of the settlement on Aug. 8, Gorton considered the $2.5 million attorney fee award requested by the plaintiff. The plaintiff noted the substantial benefits of the reforms, which included the creation of a new audit committee and an independent director position to sit on the board, among others. Plaintiff’s counsel further argued their efficiency in the matter supported such an award.

“At oral argument, plaintiff clarified that, while a majority of directors prior to the settlement were ’independent’ as defined by the New York Stock Exchange guidelines, the board was not majority independent in practical terms because three of the six directors were allegedly involved with the purported misrepresentations at the heart of the derivative action,” Gorton wrote. ”The court agrees that to the extent several of the reforms are redundant of preexisting conditions at the company, the formalization of good governance practices is essential to maintaining compliance with the security laws on a permanent basis.”

The plaintiff pointed to several awards that supported the higher amount, including a $4.16 million fee award in the 2022 case, *In re Southern Co. Shareholder Derivative Litigation* in the U.S. District Court for the Northern District of Georgia, as well as a $3.5 million award in a similar derivatives action that was settled at the pleading stage in *In re CoreCivic, Inc. Shareholder Derivative Litigation* in 2022 in the U.S. District Court for the Middle District of Tennessee.

The defendants claimed that such cases were distinguishable from the present, because most of the attorney fees were negotiated and agreed to by all parties, and the settlements included significant payments on top of governance reforms.

“The company is pleased that the judge denied the plaintiff’s attorneys’ request for $2.5 million in fees and reduced the amount by over 50%,” said the defendants’ counsel, Jay Dubow, who is based in Philadelphia and co-leads Troutman Pepper’s Securities Investigation and Enforcement Practice Group.

A message seeking comment from the plaintiff’s attorneys was not immediately returned.

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Shift4 Investor Lawsuit Over Accounting Falls Short on Intent

By Martina Barash 2024-08-16T14:51:15000-04:00

- Financial pressure on founder-CEO at center of allegations
- Investors will be able to re-file complaint, court says

Shift 4 Payments Inc. investors failed to adequately allege the payment processor took improper accounting and business actions to alleviate financial pressure on its CEO, a federal court ruled.

The investors didn't show the necessary level of intent for securities fraud because their chronology of facts undermines their theory about the company's—and CEO-founder Jared Isaacman's—motive, Judge Joseph F. Leeson Jr. said. The investors will have another chance to plead their case, Leeson said in an opinion docketed Thursday in the US District Court for the Eastern District of Pennsylvania.

The investors alleged that Isaacman borrowed against his Shift4 holdings and faced a margin call as share prices were falling in mid- to late 2022. Further, Isaacman had entered into prepaid stock contracts that would leave him in an unfavorable position if the company's stock traded below a certain price in February, March, and April of 2023, they said.

Cash outflow accounting, a buyout of residual sales commissions in which Shift4 took over from third parties in handling customer relationships, and a statement by Isaacman that the stock was "underappreciated" all improperly propped up the stock price, the plaintiffs said.

Restated financial statements and a short-seller report brought the stock price down in October2022, and April 2023, respectively, they said. The price fell 2.7% to $44.16 on Oct. 24, 2022, and 8.7% to $62.59 on April 19, 2023.

The investors adequately alleged that "the misclassification of the customer acquisition costs" in its cash flow accounting was materially misleading, Leeson said, though he rejected their allegation that the strategic buyout program from third-party distributors was misleading.

Their theory of intent for the misclassification issue fails, Leeson said. While Isaacman allegedly faced the threat of margin calls in 2022, "the accounting practice in question dates back as far as

2019," the judge said.

Isaacman's single instance of calling the stock underappreciated—and saying that he was considering taking it private—doesn't suffice to show intent, and there's not enough context to how its falsity, he said.

Leeson said he found "the competing nonculpable inference far more compelling: Shift4 believed the classification of customer acquisition costs in the financial statement was correct."

Pomerantz LLP and The Schall Law Firm are lead counsel for the investors. Latham & Watkins LLP and Fitzpatrick Lentz & Bubba represent Shift4 and Isaacman.

The case is Baer v. Shift4 Payments, Inc. , 2024 BL 282647, E.D. Pa., No. 5:23-cv-3206, docketed 8/15/24 .

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

To contact the editor responsible for this story: Drew Singer at dsinger@bloomberindustry.com

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Stellantis Made Misleading Revenue Projections, Investor Alleges

By Martina Barash 2024-08-16T11:55:06000-04:00

- **COURT:** S.D.N.Y.
- **TRACK DOCKET:** No. 1:24-cv-06196

Stellantis NV failed to disclose problems with inventory, pricing, market share, and expansion when projecting 2024 revenue, an investor says in a proposed class action.

Disappointing financials released July 25 caused the carmaker's stock to tumble, according to the suit, filed Thursday in the US District Court for the Southern District of New York.

The stock price dropped 7.7% the day of the report, closing at $18.09 per share, and 2.4% July 26, when the shares closed at $17.66.

The company said Aug. 12 that it would cut up to 2,450 jobs in Detroit, Bloomberg News reported.

Stellantis and its top leadership touted “reduction of inventory levels, pricing improvements, and expansion of its product offering” in support of a double-digit adjusted operating income margin forecast for 2024, shareholder Steven Long says in his suit.

While doing so, they failed to disclose “financial and operational problems, revenue lower than expected and expansions of the business not turning in their favor,” he says in his complaint against the company behind Dodge, Ram, and Chrysler vehicles, numerous European brands, and several luxury and premium lines of cars.

Stellantis said in an emailed statement Friday, “This lawsuit is without merit and the company intends to vigorously defend itself in response to it.”

The proposed class consists of those who acquired Stellantis stock between Feb. 15 and July 24, 2024, inclusive. With three billion Stellantis shares outstanding, the shares at issue in the suit “are held by thousands, if not millions, of individuals located throughout the country and possibly the world,” the complaint says.

Long seeks damages on his securities fraud claims.

Levi & Korsinsky LLP represents Long.

The case is Long v. Stellantis N.V. , S.D.N.Y., No. 1:24-cv-06196, complaint 8/15/24 .

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

To contact the editor responsible for this story: Brian Flood at bflood@bloomberginustry.com

Stellantis shareholders sue automaker in US after disappointing earnings

reuters.com/legal/stellantis-shareholders-sue-automaker-us-after-disappointing-earnings-2024-08-15

Jonathan Stempel

The logo of Stellantis is seen outside a company building in Chartres-de-Bretagne near Rennes, France, March 11, 2024. REUTERS/Stephane Mahe/File Photo Purchase Licensing Rights, opens new tab

NEW YORK, Aug 15 (Reuters) - Stellantis has been sued by shareholders in the United States who said the European-American automaker defrauded them by concealing rising inventories and other weakness, before posting disappointing earnings that caused its stock price to fall.

The complaint filed on Thursday in Manhattan federal court said Stellantis artificially inflated its stock price for much of 2024 by making "overwhelmingly positive" assessments about inventories, pricing power, new products and operating margin.

Shareholders said the truth came out on July 25 when Stellantis said first-half adjusted operating income fell 40% to 8.46 billion euros ($9.28 billion), below the 8.85 billion euros that analysts expected.
"This lawsuit is without merit and the company intends to vigorously defend itself," Stellantis said in an emailed statement to Reuters.

Stellantis also said adjusted operating income margin had fallen below its double-digit full-year target.

Its U.S.-listed shares fell $1.94, or 9.9%, to $17.66 in the two trading days after the announcement.

Chief Executive Carlos Tavares and Chief Financial Officer Natalie Knight are also defendants.

Stellantis was created in 2021 from the merger of Fiat Chrysler and France's PSA. Its 14 brands include Alfa Romeo, Citroen, Dodge, Jeep, Maserati, Opel, Peugeot, Ram and others.

It is common for shareholders to sue companies in the United States after unexpected stock price declines.

Thursday's lawsuit seeks unspecified damages for Stellantis shareholders between Feb. 15 and July 24, 2024.

A lawyer for the shareholders did not immediately respond to requests for comment.

Stellantis shares closed up 1.7% at $15.84 on Thursday in New York.

Last week, Stellantis announced a potential 2,450 layoffs at a suburban Detroit truck assembly plant, where production of the Ram 1500 Classic truck is ending.

The case is Long v Stellantis NV et al, U.S. District Court, Southern District of New York, No. 24-06196.

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Reporting by Jonathan Stempel in New York; Editing by Stephen Coates

Hertz Investor Sues Leaders Over Tesla Fleet Purchase, Buybacks

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Hertz Global Holdings Inc. directors and executives are responsible for the rental car company over-investing in electric vehicles and then suffering large depreciation-related financial losses from vehicle sales, an investor alleges.

The harm to the company includes paying about $127 million too much to repurchase its stock at inflated prices and spending money to defend itself in a proposed class action with similar allegations, Anand Roy says. He filed his shareholder derivative suit Wednesday in the US District Court for the Middle District of Florida.

Hertz announced in October 2021 that it had ordered 100,000 Tesla Inc. vehicles based on skyrocketing consumer interest, Roy says.

But in a January 2024 report, Hertz said it would sell about 20,000 EVs in its US fleet, representing about one-third of its global EV holdings, according to the complaint. The write-down associated with the sale prices it would receive amounted to $245 million in depreciation expense, Roy says.

The company announced in March that CEO Stephen Scherr was resigning. And its first-quarter results, announced April 25, showed a "sudden increase" in vehicle depreciation for both gas-powered and electric vehicles, he says.

The Middle District of Florida is also overseeing the proposed class action, which alleges Hertz misled investors about consumer demand for electric vehicles. Magistrate Judge Kyle C. Dudek appointed a lead plaintiff, investor Robert Stephens, in that case Wednesday.

Judge John L. Badalamenti is assigned to both cases.

Roy brings claims for proxy misstatements, securities fraud, breach of fiduciary duties, unjust enrichment, waste of corporate assets, abuse of control, and gross mismanagement. He seeks damages on behalf of the company and internal governance reforms.

Hertz didn't immediately respond to an emailed request for comment on behalf of the company or the individual defendants.

Jose D. Sosa, who practices in Palm Beach Gardens, Fla., and Brown Law Firm PC represent Roy.

The case is Roy v. Scherr , M.D. Fla., No. 2:24-cv-00744, complaint 8/14/24 .

Exclusive: Deutsche Bank's proposed Postbank case settlement offer rejected by plaintiffs

reuters.com/business/finance/deutsche-bank-proposes-settlement-postbank-case-2024-08-16

Tom Sims

The logo of Deutsche Bank is seen on the roof of a building outside a Deutsche Bank branch office in Malaga, Spain, April 24, 2024. REUTERS/Jon Nazca/File Photo Purchase Licensing Rights, opens new tab

FRANKFURT, Aug 16 (Reuters) - Deutsche Bank (DBKGn.DE), opens new tab has proposed a settlement to shareholders who sued Germany's largest bank for underpaying them for the acquisition of Postbank but the offer is too low, a lawyer for the plaintiffs said on Friday.
The lawyer, Jan Bayer, rejected the bank's proposal as a "crackhead" offer that is "dead on arrival".

Any settlement would mark a significant development in years-long litigation that has cast a shadow over Deutsche Bank and recently forced it to set aside 1.3 billion euros ($1.43 billion) ahead of any possible payout.

"As we've stated in the past, we are in settlement discussions with various groups of plaintiffs within the several Postbank takeover proceedings," Deutsche Bank said in a statement in response to a Reuters request for comment. It said it would not comment specifically on the latest developments in the talks.

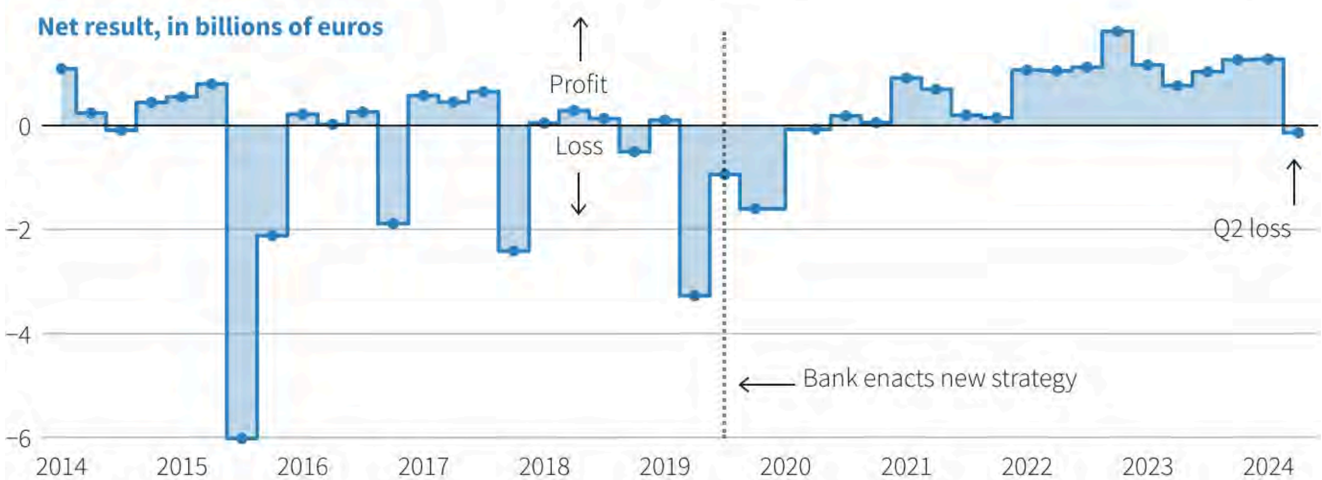
A key element of the settlement is an offer to pay the shareholders 36.50 euros per Postbank share.

Deutsche Bank declined to comment on how its offer compares with the 1.3 billion euros it had provisioned in the case. Bayer, the plaintiff lawyer, said his "wild guesstimate" is that Deutsche's offer is well below 50% of the claims.

Deutsche began its acquisition of Postbank, with its millions of clients and roots in the country's postal system, during the 2008 global financial crisis.

Deutsche Bank posts loss

Germany's largest lender posted a loss in the second quarter after 15 consecutive quarters of profit. The reason: a costly provision for an investor lawsuit over its Postbank division.



Source: Deutsche Bank | Reuters, Aug. 16, 2024 | By Tom Sims

Reuters Graphics

The bank at the time was seeking to broaden its reach in Germany with a steady income stream after years of rapid international expansion, but instead, Postbank became a source of consumer complaints, regulatory scrutiny and the costly lawsuits.

For years, the suits claiming Deutsche Bank had underpaid former shareholders for the Postbank acquisition bounced around in the courts.

The case took a dramatic turn in April, when a court in Cologne sounded sympathetic to the former shareholders' case, prompting Deutsche to make the unexpected provision to offset any possible claims.

In the aftermath, Deutsche scrapped plans to reward investors and buy back its own shares and posted a quarterly loss, breaking a profit streak of 15 consecutive quarters.

The Cologne court is due to hold a hearing in the case next Wednesday and possibly make a ruling. It has urged Deutsche and the plaintiffs to work on a settlement.

Bayer said that he had forwarded the offer to his clients and advised them the offer was "way too low".

"We recommended waiting for the court decision on Wednesday," Bayer said.

($1 = 0.9105 euros)

Reporting by Tom Sims; Editing by Elisa Martinuzzi, Rachel More, Miranda Murray, Jane Merriman and Susan Fenton

Tom Sims
Thomson Reuters

Covers German finance with a focus on big banks, insurance companies, regulation and financial crime, previous experience at the Wall Street Journal and New York Times in Europe and Asia.

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Securities Law News
Aug. 15, 2024, 2:58 PM PDT

Opendoor SPAC Merger Suit Nixed in Win for Social Capital Fund

By Martina Barash

Bloomberg Law News 2024-08-16T11:23:24145549183-04:00

Opendoor SPAC Merger Suit Nixed in Win for Social Capital Fund

By Martina Barash 2024-08-15T17:58:47000-04:00

An Opendoor Technologies Inc. shareholder can't proceed with a suit against a Social Capital blank-check company that brought the house-flipping startup public, a federal court ruled.

Others defendants who are off the hook for now include venture capitalist Chamath Palihapitiya and others who approved the proxy statement for the merger and later proxy statements, including current board members, according to the US District Court for the District of Arizona. The suit's flaw is that investor Samhita Gera didn't ask the board to take action for the company before she filed suit, and she didn't show the board was so compromised that such a demand would be futile, Judge Michael T. Liburdi said in an opinion docketed Wednesday.

- Social Capital Hedosophia Holdings Corp. II, a unit of Palihapitiya's venture capital company, was the special purpose acquisition company that merged with Opendoor
- Gera alleged the pre- and post-merger proxy statements didn't disclose technological problems and other issues at Opendoor, which has an algorithm that has drawn separate derivative and proposed class litigation
- Gera will get one further chance to re-plead her complaint

Bronstein Gewitz & Grossman LLC, McKay Law LLC, and Brown Law Firm PC represent Gera. A&O Shearman and Lewis Roca Rothgerber Christie LLP represent the defendants.

The case is Gera v. Palihapitiya , 2024 BL 281140, D. Ariz., No. 23-cv-02164, docketed 8/14/24 .

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

To contact the editor responsible for this story: Kiera Geraghty at kgeraghty@bloomberindustry.com

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https://www.law.com/2024/08/16/judge-rules-shaquille-oneal-will-face-lawsuit-for-promotion-sale-of-astrals-securities/

NOT FOR REPRINT

Judge Rules Shaquille O'Neal Will Face Lawsuit for Promotion, Sale of 'Securities'

"We are extremely fortunate that Judge Moreno authored the first extensive ruling on cryptocurrency and celebrity promotions," said Adam Moskowitz, the managing partner at the Moskowitz Law Firm.

August 16, 2024 at 03:13 PM

Cryptocurrency

Michael A. Mora

The original version of this story was published on Daily Business Review

What You Need to Know

- A federal district court in Miami ruled that former NBA star Shaquille O'Neal will have to face a lawsuit over his promotion of unregistered securities in the form of cryptocurrency tokens.
- Adam Moskowitz, the managing partner at the Moskowitz Law Firm, is the lead attorney for the proposed class of investors in their lawsuit against O'Neal, Astrals LLC and its various subsidiaries in the class action litigation before U.S. District Judge Federico Moreno.
- Moreno ruled that the plaintiffs properly alleged that O'Neal was a "seller" under Section 12 of the Securities Act of 1933.

A federal district court in Miami ruled on Friday that former National Basketball Association star Shaquille O'Neal will have to face a lawsuit over his promotion of unregistered securities in the form of cryptocurrency tokens and that he was a "seller" of these unregistered securities.

Adam Moskowitz, the managing partner at the Moskowitz Law Firm in Coconut Grove, Florida, is the lead attorney for the proposed class of investors in their lawsuit against the defendants, Shaquille O'Neal, Astrals LLC and its various subsidiaries in the class action litigation before U.S. District Judge Federico Moreno of the Southern District of Florida.

"We are extremely fortunate that Judge Moreno authored the first extensive ruling on cryptocurrency and celebrity promotions," Moskowitz said. "He is the first federal judge to directly address whether celebrity promoters can be liable for promoting these unregistered securities."

Alan H. Rolnick, a partner at Rivero Mestre in Coral Gables who represents O'Neal and Astrals, did not respond to a request for comment.

The Astrals Project is a collection of 10,000 metaverse-ready 3D avatars by artist Damien Guimoneau, according to its whitepaper.

These NFTs aim to promote investment in a virtual world in which users could socialize, play and interact with other users, including O'Neal himself, court documents show. Harper alleged that the value of Astrals' financial products was linked "almost entirely to O'Neal's celebrity status and many Astrals investors" were induced to purchase them because of his promotion.

The amended complaint alleged that as O'Neal was attempting to distance himself from his FTX promotions, he was doing the same with the Astrals entities.

"Ironically, right before O'Neal decided to run for the hills and abandon his Astrals Project, he posted a meme on the Astrals Discord, a .gif of a scene from the movie 'The Wolf of Wall Street,' assuring all of the Astral Investors that 'I'M NOT F***ING LEAVING,' implying that he would always be there for his Astrals Investors. But O'Neal has not been seen at Astrals since."

Soon after, the value of the NFTs plummeted. Plaintiffs, representing themselves and a putative global class of investors who purchased Astrals NFTs and/or Galaxy tokens from the Astrals Project, suffered financial losses and filed a lawsuit in September under an array of securities laws. Unsurprisingly, the defendants disagreed.

The defendants argued that the Astrals Project did not involve a capital investment drive or an appeal to passive investors; rather, the case involved the sale of collectible video game avatars that were "metaverse-ready" upon sale to gamers, court records show.

Now, Moreno has approved in part and denied in part the defendant's motions to dismiss and additional remedies.

In the 24-page ruling, Moreno held that the plaintiffs properly alleged that O'Neal was a "seller" under Section 12 of the Securities Act of 1933.

However, Moreno held that Section 12(a)(1) claims based on a purchase on or before May 23, 2022 are time-barred, but the claims regarding the Galaxy tokens are not time-barred, according to the ruling. Moreno also dismissed Count II against O'Neal only, as he is not a "control person" under Section 15.

Still, Moreno denied the defendants' motion to dismiss the amended complaint as the plaintiffs have sufficiently alleged that Astrals and Galaxy tokens are "securities" subject to federal securities laws, the ruling shows.

Moreno also made three additional rulings.

First, Moreno denied the defendants' motion to strike plaintiffs' class allegations, noting that the plaintiffs have yet to file a motion to certify a class and it would be premature to "analyze class allegations on their motion to strike as potential barriers may fall away or at least become more manageable after discovery."

Second, Moreno granted the defendants' motion to strike plaintiffs' expert report. The plaintiffs argued that there is "no 'inflexible rule' governing what may be attached to a pleading."

However, the defendants' argument that "the only legal expert will be the court" resonated with Moreno, who ruled that "all portions of the report that opine on and analyze whether Astrals are unregistered investment contracts must be stricken." Still, the report's portion covering governance or NFTs generally is not stricken and may later become relevant.

Third, Moreno denied the defendants' move to strike the plaintiffs' numerous references to the now-defunct FTX trading platform, such as O'Neal's appearance on an episode of the "FTX Podcast."

Moreno found that these allegations, while referencing FTX, have a relationship to the issues in the case as it is alleged that "Astrals community members were concerned about the future of the project (as the FTX trading platform collapsed) but were reassured by team members that the project would continue as planned with defendant O'Neal's close involvement."

RELATED STORIES

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Endo Trustee Sues McKinsey Over ‘Reckless’ Opioid Sales Advice

By James Nani 2024-08-16T12:50:41000-04:00

- McKinsey’s advice ‘destroyed billions’ in value, suit says
- Litigation trustee aims to raise money for Endo creditors

Consulting giant McKinsey & Co. should pay for the harm it caused pharmaceutical maker Endo International Plc through its “reckless” advice on marketing and selling opioids, a bankruptcy plan trustee said in a lawsuit.

The suit, filed Thursday in the US Bankruptcy Court for the Southern District of New York, is brought on behalf of a trust created to pay unsecured creditors of Endo and its affiliates. Endo in March won court approval of a Chapter 11 plan that resolved its major opioid liabilities and handed the company to its lenders.

The trustee accuses McKinsey and its affiliates of “intentional misconduct which destroyed billions of dollars of value of its client, Endo.” McKinsey’s actions include spearheading a “sales force blitz” from 2015 through at least 2016 to increase sales of Endo’s branded oxymorphone drug, Opana ER, the complaint said.

Endo was among several pharmaceutical companies that declared bankruptcy in recent years to try to shepherd thousands of opioid victim claims, including Purdue Pharma LP and Mallinckrodt Plc.

McKinsey has previously faced criticism and litigation related to advice it gave on selling and marketing opioids. A US judge in June approved McKinsey’s proposal to pay $230 million to settle claims its marketing work juiced opioid sales and led municipal governments to divert public resources to slow painkiller addiction.

Matthew Dundon, the trustee, declined to comment via email on Friday. The McKinsey action came on the same day Dundon sued dozens of insurers who have or may dispute their duties to cover the underlying claims.

The trustee argues that McKinsey’s conduct was part of a “broader, industry-wide pattern of intentional misconduct” related to opioids. Because of McKinsey’s opioid-related strategies Endo implemented, it’s had to pay more than $1.2 billion in damages and settlements in opioid-related litigation, the suit said. It also had to pay $344 million to defend itself against such suits.

The total amount the consulting company owes should be determined at trial, the complaint said. McKinsey didn’t immediately respond to a request for comment on Friday.

The 97-page complaint, parts of which are redacted, says McKinsey should indemnify Endo for the costs of the strategies it recommended and the company enacted. McKinsey also helped Endo’s officers and directors breach their fiduciary duties by helping drive sales of opioids despite knowing the risks of addiction and litigation, the trustee said.

Payments Endo made to McKinsey for its opioid-related consulting services should also be considered “constructive fraudulent transfers” because they ultimately led to the company’s bankruptcy, the trustee said.

Linda Huss, a spokeswoman for the operating Endo Inc., said in an email the complaint’s allegations “are unrelated to Endo, Inc.’s business, management team, or board of directors, and the matter will have no impact on the company.”

The trustee is represented by Seward & Kissel LLP. The remaining Endo debtors are represented by Skadden, Arps, Slate, Meagher & Flom LLP.

The case is Endo International plc , Bankr. S.D.N.Y., No. 22-22549, complaint 8/15/24 .

To contact the reporter on this story: James Nani in New York at jnani@bloombergindustry.com

To contact the editor responsible for this story: Maria Chutchian at mchutchian@bloombergindustry.com

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GSK to seek dismissal of Florida case against heartburn drug Zantac

reuters.com/legal/gsk-seek-dismissal-florida-case-against-heartburn-drug-zantac-2024-08-16

Reuters

A bottle of Zantac heartburn drug is seen in this picture illustration taken October 1, 2019. REUTERS/Brendan McDermid/Illustration/File Photo Purchase Licensing Rights, opens new tab

Aug 16 (Reuters) - British drugmaker GSK (GSK.L), opens new tab said on Friday it would seek a dismissal of an upcoming Zantac case in Florida, where plaintiffs alleged that its discontinued heart burn drug had caused prostate cancer.
The move followed a Florida court ruling on Thursday in favour of GSK and other defendants. The ruling excluded testimony from experts that ranitidine, the active ingredient in Zantac and generic versions of the drug, was a significant risk factor for prostate cancer in the Wilson case.

Other defendants include Boehringer Ingelheim, Pfizer (PFE.N), opens new tab and Sanofi (SASY.PA), opens new tab, which sold the drug at different times.
GSK said the Florida court decision echoed a December 2022 federal court ruling which rejected all expert evidence by the plaintiffs and dismissed all multidistrict litigation cases alleging bladder, esophageal, gastric, liver, or pancreatic cancer.

In June, a Delaware court's ruling permitted more than 70,000 lawsuits to go forward and allowed plaintiffs to present expert testimony that Zantac causes cancer. GSK is appealing that decision.

The majority of the more than 74,000 Zantac cases are in Delaware, and four are in Florida.

About five years ago, the U.S. Food and Drug Administration asked manufacturers to pull the drug off the market over concerns that ranitidine could degrade into a chemical called NDMA over time or when exposed to heat.

GSK shares have fallen nearly 10% since the Delaware decision in June. Analysts had estimated total settlement costs for the company of around $5 billion.

Reporting by Yadarisa Shabong in Bengaluru; Editing by Devika Syamnath

Bayer wins victory in US legal battle against Roundup cancer claims

reuters.com/legal/bayer-wins-victory-us-legal-battle-against-roundup-cancer-claims-2024-08-15

Jonathan Stempel

Item 1 of 2 Logo and flags of Bayer AG are pictured outside a plant of the German pharmaceutical and chemical maker in Wuppertal, Germany August 9, 2019. REUTERS/Wolfgang Rattay/File Photo

[1/2]Logo and flags of Bayer AG are pictured outside a plant of the German pharmaceutical and chemical maker in Wuppertal, Germany August 9, 2019. REUTERS/Wolfgang Rattay/File Photo Purchase Licensing Rights, opens new tab

Aug 16 (Reuters) - Bayer (BAYGn.DE), opens new tab won a legal victory in its fight to limit liability from claims that its Roundup weed killer causes cancer, as a U.S. appeals court on Thursday said federal law shields the German company from a lawsuit by a Pennsylvania landscaper.

The 3rd U.S. Circuit Court of Appeals in Philadelphia rejected plaintiff David Schaffner's claim that Bayer's Monsanto unit violated state law by failing to put a cancer warning on the label for Roundup.

Schaffner was diagnosed in 2006 with a kind of cancer called non-Hodgkins lymphoma, a common claim for Roundup plaintiffs.

He and his wife Theresa sued Bayer in 2019, in part over how his illness affected their relationship.

Chief Judge Michael Chagares wrote for a unanimous three-judge panel that the Federal Insecticide, Fungicide, and Rodenticide Act requires nationwide uniformity in pesticide labels, and prevented Pennsylvania from adding a cancer warning.

Bayer said the decision conflicts with rulings from federal appeals courts in San Francisco and Atlanta in similar cases.

That may increase the prospect that the U.S. Supreme Court could step in to resolve the split, and potentially reduce Bayer's liabilities.

Bayer shares, which have been weighed down for years by the litigation risk, were indicated 2.6% higher in Friday premarket trade at brokerage Lang & Schwarz.

Chip Becker, a lawyer for the Schaffners, said he was disappointed with the decision, and that federal law should not preempt his clients' failure-to-warn claim. He said the Schaffners are reviewing their legal options.

Bayer said it was pleased with the decision, and the Supreme Court should "settle this important issue of law."

It has maintained that Roundup and its active ingredient glyphosate are safe, and said it "continues to stand fully behind" the brand.

Bayer has faced extensive litigation over Roundup, and has seen its share price fall more than 73% since buying Monsanto for $63 billion in June 2018.

The company settled much of the Roundup litigation for $10.9 billion in 2020, but still faces about 58,000 claims, opens new tab. Another 114,000 claims have been settled or deemed ineligible.
Though Bayer won 14 of 23 Roundup trials through July 23, one victory was overturned on appeal, and the losses saddled it with billions of dollars of damages awards.

The Schaffners settled with Bayer in September 2022, conditioned on Bayer being unable to convince courts that federal law preempted Pennsylvania from requiring a cancer warning.

Chagares said it did, and that this approach "best achieves Congress's stated aim of uniformity in pesticide labeling."

Roundup is among the most widely used weed killers in the United States. Bayer phased out sales for home use last year.

The case is Schaffner et al v Monsanto Corp, 3rd U.S. Circuit Court of Appeals, No. 22-3075.

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

Reporting by Jonathan Stempel in New York; Additional reporting by Brendan Pierson and Ludwig Burger; editing by Jonathan Oatis

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

Roundup: Veradigm sale rumors, Meditech moves on interoperability

healthcareitnews.com/news/roundup-veradigm-sale-rumors-meditech-moves-interoperability

August 16, 2024

Global Edition
Electronic Health Records (EHR, EMR)

Also: Elevance Health and CDR announced a national primary care platform for risk-based healthcare delivery that takes a whole health approach to improve patient outcomes.

Photo: Sasa-Delic-SD/Getty Images

Over at the former Allscripts, ailing Veradigm reported a strong cash position and reduced debt this week, and sale rumors immediately flourished, while another electronic health record vendor, Meditech, announced Wednesday that it will take advantage of the Trusted Exchange Framework and Common Agreement. The EHR vendor said it selected Health Gorilla to give its health information exchange, Traverse Exchange, access to Application Programming Interface-based data exchange.

Elevance Health and its global private equity manager partner, Clayton, Dubilier and Rice, also said Wednesday that they have formed a national advanced primary care platform company named Mosaic Health. The integrated health platform aims to strengthen clinicians' relationships with their patients by positioning doctors to address patients' physical wellbeing and social and behavioral health factors.

Veradigm may be selling

Earlier this week, Veradigm, the consolidated company formerly known as Allscripts and Veradigm Life Sciences, reported a balance of approximately $330 million, showing a strong cash position and reduced debt.

The next day, Axios said it confirmed that sales had kicked off for the EHR vendor and healthcare technology company, and that private equity firms were circling.

Thoma Bravo, which owns NextGen Healthcare, is rumored to be one of the initial bidders vying for Veradigm, according to Ion Analytics, a provider of business software and intelligence.

NextGen previously partnered with Veradigm Life Sciences to capture nonhospital clinical data across the two companies’ combined EHR platforms, amassing 150 million de-identified EHR patient records to support large-scale medical research in 2019.

"Part of our strategy is to go deep into targeted therapeutic areas, with an initial focus on chronic diseases that have a significant population impact," Tom Langan, then chief executive officer, and now interim CEO of Veradigm, said about its efforts to compile clinical data.

A handful of brokerages advised stockholders to hold on Veradigm, according to Defense World, which reports on defense contracts and procurements.

After more than five years of corporate streamlining and leadership shuffles, and the sale of its hospital and large physician-practice business segment in 2022, Veradigm said last year that it found additional revenue misstatements dating back to fiscal year 2020.

In 2023, after a potential Nasdaq delisting, the consolidated company again appointed new leaders that December.

In January, law firm Robbins Geller Rudman & Dowd LLP announced it had filed a class action lawsuit against the EHR vendor for alleged violations of the Securities Exchange Act of 1934 in overstating its business revenues by $20 million. On March 1, the court appointed a lead plaintiff and lead counsel.

The company continues to promote milestones achieved in analytics and coding through various partnerships, including with New York City-based Holmusk, a behavioral health data company, nationwide orthopedic practice Unity MSK, and others.

We reached out to Veradigm, but the company will not comment at this time.

"As a matter of policy, Veradigm does not discuss rumors or speculation," a spokesperson told *Healthcare IT News* by email Thursday.

Disney's Terrible Argument In Wrongful Death Case Should Be A Lesson For Biglaw Attorneys Everywhere

abovethelaw.com/2024/08/disneys-terrible-argument-in-wrongful-death-case-should-be-a-lesson-for-biglaw-attorneys-everywhere

Kathryn Rubino August 15, 2024

Biglaw

Not every argument needs to go in the brief.

By Kathryn Rubino
onAugust 15, 2024 at 1:43 PM

I'm a fan of the Disney Parks. I have deep opinions about the new Lightning Lane system that allows you to bypass the standby line — for a fee. I watched every minute of Jenny Nicholson's four-hour dissection of the failure of the Star Wars hotel. I cheered at the D23 announcements of park expansion and immediately started imaging what to wear when Villains Land opens. You might even call me a Disney adult, which is fine.

(Photo by Joe Raedle/Getty Images)

I'm also a lawyer by trade and write about the legal industry. So basically everyone I know has sent me coverage of the latest legal maneuvers in a wrongful death lawsuit facing the mouse. And I'm sure you've heard the basics — Kanokporn Tangsuan, a doctor at NYU, died in October after dining in Disney Spring's Raglan Road. She had severe nut and dairy allergies and, despite allegedly informing her server of this and asking multiple times about her food, died of "anaphylaxis due to elevated levels of dairy and nut in her system." Her husband, Jeffrey Piccolo, brought a wrongful death lawsuit against Disney on behalf of his late wife's estate.

Disney would like to compel arbitration in the case, and has advanced some attention-getting details to make their case. The filing argues that because Piccolo downloaded a free trial of Disney+ two years ago (though he apparently canceled before he was charged), he's bound by the terms of service which says users must arbitrate all disputes with Disney. Piccolo also purchased tickets to EPCOT, which has a similar mandatory arbitration clause.

Of course, the claim that downloading — a trial, no less! — a streaming service precludes this wrongful death lawsuit has gotten so much attention. Piccolo's attorneys wrote of the request, "The notion that terms agreed to by a consumer when creating a Disney+ free trial account would forever bar that consumer's right to a jury trial in any dispute with any Disney affiliate or subsidiary, is so outrageously unreasonable and unfair as to shock the judicial conscience, and this Court should not enforce such an agreement." And honestly that's been the most common sentiment in the general public.

And whatever you think about the legality of mandatory arbitration clauses — it's shockingly obvious this was a terrible idea on the part of Disney. The mouse has some elite Biglaw lawyers — White & Case — on the case, and I bet they thought they ate when they found Piccolo's Disney+ trial subscription. But just because an argument is colorable doesn't mean you *should* make it. Hell, even limiting the request for arbitration to the park ticket purchase would have been superior — that's at least related to the death of Tangsuan. And on a gut-check level is a ton less absurd than suggesting a streaming service download prevents a wrongful death lawsuit. But the lawyers just couldn't help themselves. They saw MOAR arguments to make and just went ahead with them, regardless of the flood of negative publicity that might follow.

Because this case becoming widely known cable news fodder damages the sterling image Disney Parks enjoys. Historically, Disney has a great reputation when it comes to allergy accommodations — they flag safely prepared food, let kids trick or treat for allergy safe options at their Halloween parties, and provide guides on how to best prepare for a vacation at Disney with food allergies. Families that live with food allergies are known to select a Disney vacation because it is easier to deal with their allergies there than at alternatives. The attention this case is now receiving — because of this boneheaded legal argument — undoes literal years of Disney's hard work. All of a sudden the Disney bubble has been popped for allergy families (who already have to stay hyper vigilant even in the most accommodating situations) and they're left with a not-so-magical impression of Disney.

Regardless of the legal merits of the case, as a public relations matter I cannot understand why Disney didn't quickly (and quietly) settle and avoid this unwanted attention. What an unforced error.

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Zoom 100%

Filing # 203972594 E-Filed 08/02/2024 05:15:49 PM

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO.: 2024-CA-001616-O

JEFFREY J. PICCOLO AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KANOKPORN TANGSUAN, DECEASED,

Plaintiff,

vs.

GREAT IRISH PUBS FLORIDA, INC., A FLORIDA CORPORATION D/B/A RAGLAN ROAD IRISH PUB AND RESTAURANT AND WALT DISNEY PARKS AND RESORTS U.S., INC., A FLORIDA CORPORATION D/B/A DISNEY SPRINGS,

Defendants.
_____________________________________/

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT, WALT DISNEY PARKS AND RESORTS U.S., INC.'S <u>MOTION TO COMPEL ARBITRATION AND STAY CASE</u>

Plaintiff, JEFFREY J. PICCOLO as Personal Representative of the Estate of KANOKPORN TANGSUAN, Deceased, by and through the undersigned attorneys, files this Response in Opposition to Defendant, WALT DISNEY PARKS AND RESORTS U.S., INC.'s ("WDPR"), Motion to Compel Arbitration and Stay Case and states:

<u>BACKGROUND</u>

This is an action for wrongful death brought by Jeffrey Piccolo, as the Personal Representative of the Estate of his deceased wife, Kanokporn Tangsuan. Plaintiff's Complaint (attached as Exhibit A) alleges that on the evening of October 5, 2023, Kanokporn Tangsuan, her

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Zoom 100%

Kathryn Rubino is a Senior Editor at Above the Law, host of The Jabot podcast, and co-host of Thinking Like A Lawyer. AtL tipsters are the best, so please connect with her. Feel free to email her with any tips, questions, or comments and follow her on Twitter @Kathryn1 or Mastodon @Kathryn1@mastodon.social.

Topics

Biglaw, Disney, Lawsuits, White & Case

B. Riley shares extend slump to decade low on loss warning, regulatory concerns

reuters.com/business/finance/b-riley-shares-extend-slump-investors-fret-over-loss-warning-regulatory-woes-2024-08-15

Reuters

Price charts are displayed on a screen behind a trader at the New York Stock Exchange in New York. REUTERS/Lucas Jackson/File Photo Purchase Licensing Rights, opens new tab

Aug 15 (Reuters) - B. Riley Financial (RILY.O), opens new tab shares slumped over 27% by close of trade on Thursday, extending losses for the sixth straight session to their lowest in a decade on lingering worries over a second-quarter loss and regulatory scrutiny.
The stock has been hammered this week after the Los Angeles-based investment bank also delayed filing its regulatory reports.
On Monday, shares tumbled 52% after B. Riley warned of a loss of between $435 million and $475 million for the three months ended June. That compared with a profit of $44 million, a year earlier.

The bank also warned it could report a markdown of $330 million to $370 million in the quarter related to its investment in Vitamin Shoppe-parent Franchise Group. The deal had attracted scrutiny from shareholders and regulators.

This was the third time the bank delayed its reports with the Securities and Exchange Commission (SEC) this year. B. Riley said the holdup was due to delays tied to finalizing the valuations of certain loans and investments.

The company's shares, halted multiple times for volatility, closed at $5.04, the lowest since May 2014.

The stock, down more than nearly 76% so far this year, was among the top 10 losers in the Nasdaq composite index (.IXIC), opens new tab on Thursday. The rout has wiped out about $360 million of the bank's market value so far this week.
The company did not offer any immediate comment on the stock fall.

About 78% of the free float is sold short, which is close to the highest in at least five years, according to estimates from ORTEX Technologies.

Short interest picked up significantly starting around September, climbing above 20% of the float, and ramped up sharply, peaking in March at about 80% of the free float.

Short interest slipped to below 50% by mid-June but has risen sharply as the stock tumbled.

In July, B. Riley and its CEO received subpoenas from the SEC, primarily related to the bank's dealings with Franchise's former CEO, Brian Kahn.

Bloomberg News reported in November that Kahn was a co-conspirator in a securities fraud involving Prophecy Asset Management.

Kahn has denied the allegations made in the report, saying he never knew that Prophecy Asset was allegedly defrauding investors.

An external investigation and an internal review earlier this year cleared B. Riley of any wrongdoing.

Reporting by Manya Saini in Bengaluru, Saeed Azhar and Saqib Ahmed in New York ; Editing by Sriraj Kalluvila and Marguerita Choy

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

Attys Eye $10.5M In Fees From Pegasystems Securities Deal

By **Brian Dowling**

Law360 (August 16, 2024, 1:28 PM EDT) -- Attorneys for lead plaintiffs in a shareholder class action against Pegasystems are seeking $10.5 million in attorney fees from the $35 million settlement that ended claims that the software company failed to properly disclose a rival's trade secret litigation that led to a since-vacated $2 billion verdict.

Lead counsel from Robbins Geller Rudman & Dowd LLP and liaison counsel from Hutchings Barsamian Mandelcorn LLP told a Massachusetts federal judge Thursday they wanted 30% of the **$35 million settlement** to cover their fees representing three pension funds.

The trio of funds claimed Pegasystems and its chief executive Alan Trefler violated the Securities Exchange Act of 1934 by misleading them and other investors when they said trade secrets claims brought by its rival Appian Corp. were without merit.

Appian's claims led to a massive **$2 billion verdict** from a Virginia jury — a recovery **reversed** by the state's appeals court last month.

Pegasystems and the funds agreed to settle the securities class action in April for $35 million. Class counsel said the complexities of proving its case to a jury, including ongoing discovery, depositions, expert reports and a lengthy and expensive trial, weighed on its decision to settle the case.

The parties mediated the claims in February and reached the present deal to settle the case in early March.

The pension funds said the verdict, which was still pending with the appeals court, loomed over their decision to settle. They explained that if Pegasystems lost the appeal and Appian's verdict stood, it could be financially unable to pay any damages in the securities case.

In seeking the fees, the lead counsel said it devoted 13,570 hours and paid $420,000 in litigation expenses for the case, which it tried on a contingency basis.

Class counsel urged the court to grant their request for 30% of the settlement amount, in part, by explaining that the recovery is higher than average for recent securities class actions.

The attorneys cited statistics from economic consulting firm NERA to show that the median settlement for securities cases for the first half of 2024 was $9 million, and the average settlement value was $26 million.

Representatives for the lead plaintiffs were not immediately available for comment on Friday.

The lead plaintiffs are represented by Debra J. Wyman, Christopher D. Stewart, Megan A. Rossi, Nicole Q. Gilliland, Chad Johnson and Snehee Khandeshi of Robbins Geller Rudman & Dowd LLP, as well as Theodore M. Hess-Mahan of Hutchings Barsamian Mandelcorn LLP.

Pegasystems is represented by Daniel W. Halston, Michael G. Bongiorno, Robert Kingsley Smith and Erika M. Schutzman of WilmerHale.

The case is In re Pegasystems Inc. Securities Litigation, case number 1:22-cv-11220, in the U.S.

District Court for the District of Massachusetts.

--Editing by Patrick Reagan.

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Zymergen Investors Can't Beat Suit Over Pre-IPO Statements

By **Sydney Price**

Law360 (August 15, 2024, 7:13 PM EDT) -- Three of the largest investors of biotechnology company Zymergen cannot escape a suit accusing them of misleading shareholders ahead of the company's initial public offering by approving misstatements about the company's commercial product pipeline.

In the complaint, investor Biao Wang said shares of Zymergen fell 76% in August 2021, less than four months after its IPO, when it revealed "issues with its commercial product pipeline" that would affect its "delivery timeline and revenue projections." The company said it no longer expected revenue in 2021 and expected "immaterial revenue" in 2022, the suit says.

According to the suit, Zymergen had three early investors: DCVC, True Ventures and SoftBank. At the time of Zymergen's IPO, those were Zymergen's three largest shareholders and the only investors allowed to appoint board members. During the lead-up to Zymergen's IPO, the three venture capital firm board appointees were the only members of the Zymergen board's audit committee, which controlled Zymergen's financial statements and its internal audit function.

U.S. District Judge P. Casey Pitts on Wednesday said the suit has established that two of the three appointees controlled Zymergen and that they were controlled by their respective companies.

"It is enough to allege at the pleading stage that the defendant possessed actual power, even if the plaintiff cannot show that the defendant used that power to cause the underlying violation," **the order** says.

The complaint says Softbank's appointee Travis Murdoch and True Venture's appointee Rohit Sharma had to receive approval from their companies before making decisions as board members.

The complaint also says DCVC controlled its appointee Matthew Ocko, but does not allege that Ocko had to receive approval before making decisions. Ocko is alleged to be a co-owner of DCVC, unlike Murdoch and Sharma, who are alleged to be employees of the companies they were appointed by.

But Judge Pitts said the complaint does not have enough factual allegations to support a claim that DCVC controlled Ocko.

According to the suit, Zymergen's registration statement discussed hyaline — an optical film that would allow customers to make foldable touch screens and high-density flexible printed circuits — and 10 other products in Zymergen's development pipeline.

The registration statement estimated a total market opportunity of $1.2 trillion and a $1 billion opportunity in the display market alone for hyaline, the suit says. The complaint alleges that those and other statements in the registration statement were either untrue statements of material facts or omitted material facts about Zymergen's product pipeline, market opportunity and revenue timeline.

Wednesday's order says the complaint sufficiently alleges that the three investors did have a formal agreement to vote their shares together on key issues, including voting for one another's board nominees. Judge Pitts said that taken together, those allegations are sufficient to plead that each of the three investors possessed the power to control Zymergen as it prepared for and registered its IPO, both individually and acting together.

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

Wang is represented by Alaina L. Gilchrist, Daniel Jacob Pfefferbaum, Danielle Suzanne Myers, Jennifer N. Caringal, Juan Carlos Sanchez, Michael Albert, Patton L. Johnson and Shawn A. Williams of Robbins Geller Rudman & Dowd LLP.

The individual defendants are represented by Harry A. Olivar Jr. and Linda J. Brewer of Quinn Emanuel Urquhart & Sullivan LLP, Michael D. Celio and Michael J. Kahn of Gibson Dunn & Crutcher LLP and Jonathan A. Shapiro, Nicole Kim, Daniel Roeser and Valerie A. Haggan of Goodwin Procter LLP.

The case is Wang v. Zymergen Inc. et al., case number 5:21-cv-06028, in the U.S. District Court for the Northern District of California.

--Editing by Stephen Berg.

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Del. Justices Affirm $266M Atty Fee Award In Dell Class Suit

By **Lauren Berg**

Law360 (August 14, 2024, 8:36 PM EDT) -- Delaware's Supreme Court on Wednesday backed a Chancery Court decision awarding an almost record-breaking $266.7 million fee for stockholder attorneys who settled a class action against Dell Technologies Inc. for $1 billion, saying the Chancery "did not exceed its discretion in setting the fee percentage."

The state's highest court, in a 38-page **opinion**, affirmed Vice Chancellor J. Travis Laster's decision in July 2023 to **award the fees** to Labaton Keller Sucharow LLP, Quinn Emanuel Urquhart & Sullivan LLP, Andrews & Springer LLC, Robbins Geller Rudman & Dowd LLP and Friedman Oster & Tejtel PLLC. The high court said the vice chancellor did not exceed his discretion in setting the fee percentage at just under 26.7% of the "extraordinary" $1 billion settlement.

"In a thoughtful opinion, the Court of Chancery declined to apply a declining percentage to the fee award," the court said. "It also found that the $1 billion settlement was a significant achievement, and no other factors warranted reducing the percentage of fees awarded from the recovery."

Class counsel initially sought $285 million, or 28.5% of the deal, in fees and expenses, which would have been the second-largest fee ever awarded by the Chancery Court. But Vice Chancellor Laster trimmed it after nine investment funds objected.

Pentwater Capital Management LP then appealed the fee award as "excessive," saying it took too much away from the class. The hedge fund argued that the Chancery Court erred when it refused to apply a "declining percentage principle" that is frequently applied to mega-settlements in federal securities litigation.

The high court said Vice Chancellor Laster took the lead from the Delaware Supreme Court's landmark 2012 decision in Americas Mining v. Theriault. In that case, the high court upheld a $304 million attorney fee and expense award in a case where the Chancery Court awarded $2 billion in damages — a 15% slice of the total judgment.

The case set out that "when the benefit is quantifiable and the litigation settles in the late stage of the litigation but before trial, the resulting fee award is usually 25%-30% of the settlement," Wednesday's opinion said.

Pointing to Americas Mining, Vice Chancellor Laster determined that a downward adjustment to the percentage is not made based on the size of the settlement fund. Instead, the multifactor test developed in the Delaware Supreme Court case Sugarland Industries v. Thomas should be used, the high court said.

Those factors include the results achieved, counsel's time and effort, the complexities of the litigation, any contingency factors and counsel's "standing and ability," it said.

"As the court held, the declining-percentage approach was a covert return to the lodestar method, which this court considered and rejected in Sugarland," the court said, adding that the vice chancellor had determined the other test factors did not warrant a reduction in the percentage award.

The justices agreed with the Chancery Court's decision to follow Americas Mining in refusing to "adopt rigid rules in fee award cases," saying the Sugarland factors control a megafund fee award.

Vice Chancellor Laster acknowledged that, under Americas Mining, he had the discretion to reduce the fee percentage, but he also said that none of the reasons for a megafund reduction apply in this case. He said the risk of no recovery was "significant" and only intensified as trial approached.

And the high court agreed with the vice chancellor's observations that it was a "highly contentious" suit that spanned more than two years and involved nearly 100 lawyers for the defense.

"The underlying transaction was complex, and counsel achieved an excellent settlement for the class on the eve of trial," the high court said. "The Court of Chancery supported the reasons for its fee award percentage, including the reasons for no downward adjustment to the fee percentage."

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

The $1 billion deal approved in April 2023 headed off a trial on claims targeting Dell's effort to exchange Class V stock — created to finance much of Dell's $67 billion acquisition of EMC Technologies in 2016 — for shares of Dell common stock. The Class V shares generally traded at only 60% or 65% of the price of VMware, a business in which EMC owned an 81.9% equity stake when Dell acquired EMC.

Public shareholders, the class has argued, were shortchanged by $10.7 billion when, in December 2018, Dell paid $14 billion in cash and issued more than 149 million shares of its Class C common stock for the Class V shares.

When the challenged conversion closed on Dec. 28, 2018, VMware stock closed at $158.38 per share, and Class V stockholders received just $104.27 per share, fueling objections that the Dell Class C stock to be received for Class V shares had been overvalued.

The class is represented by Ned Weinberger, Domenico Minerva, Joseph Cotilletta and Mark Richardson of Labaton Keller Sucharow LLP, David M. Cooper, William R. Sears, George T. Phillips and Dominic J. Pody of Quinn Emanuel Urquhart & Sullivan LLP, Peter B. Andrews, Craig J. Springer and David M. Sborz of Andrews & Springer LLC, Chad Johnson, Noam Mandel, Desiree Cummings, Robert Gerson and Jonathan Zweig of Robbins Geller Rudman & Dowd LLP and Jeremy S. Friedman, David F.E. Tejtel, Christopher M. Windover and Lindsay La Marca of Friedman Oster & Tejtel PLLC.

Pentwater is represented by Stephen B. Brauerman and Sarah T. Andrade of Bayard PA.

The case is In re: Dell Technologies Inc. Class V Stockholders Litigation, case number 349, 2023, in the Supreme Court of the State of Delaware.

--Additional reporting by Leslie Pappas and Jeff Montgomery. Editing by Adam LoBelia.

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Intel Hit With Del. Derivative Suit After Stock, Revenue Drop

By **Jeff Montgomery**

Law360 (August 15, 2024, 7:11 PM EDT) -- An Intel Corp. stockholder has sued the chip giant for derivative damages tied to the company's more-than 27% stock drop and $7 billion production unit loss in 2023 following separation of the company's chip production and design operations, despite prior upbeat forecasts.

Gerald Joseph Lovoi's 32-page **suit** names 13 directors and officers of the multinational chipmaker, including CEO-director Patrick Gelsinger and Chief Financial Officer David A. Zinsner. It closely tracks claims in a federal securities class suit filed May 3 in the U.S. District Court for the Northern District of California seeking direct, compensatory damages.

According to the Delaware complaint, filed on Wednesday, Intel's troubles emerged after the business announced creation of an expanded, standalone production unit in 2021 — separate from design work — that would manufacture chips for its own use as well as other companies'.

By late January this year, Intel and Gelsinger were reporting upbeat outlooks for the up-and-running new capacity. But months later, in early April, the company recast late 2023 financial information and disclosed that the "foundry" segment had lost $7 billion in 2023 and that revenue for the year had fallen by $8.6 billion, or more than 31%, from the previous year, to $18.9 billion.

"As a direct and proximate result of the defendants' conduct, the company has been harmed and will continue to be," Lovoi's suit said. Damages cited included the current and potential costs of the securities case as well as costs faced "in remediating deficiencies in the company's internal controls."

Harm to the business, the Chancery Court suit says, includes a $3.61 per share, or 8.2%, drop in the company's stock price, which closed at $40.33 per share on April 3.

Singled out in the complaint are four Intel audit committee members who allegedly conducted "little, if any, oversight of the company's internal controls over financial reporting." That allegedly "complete failure to perform their duties in good faith" was said to have resulted in misrepresentations to the public and Intel stockholders.

Proxy statements assuring stockholders that directors understood and oversaw companywide risks, the complaint says, obscured the true state of the company's finances and its recently developed production business. As a result, the suit adds, Intel stockholders cast an uninformed vote to reelect incumbent directors to the board.

Intel did not immediately respond to a request for comment.

The suit says Lovoi has not made any demand on Intel's current board to take action against its members "as any pre-suit demand would likely be set aside" by directors.

"The board is incapable of making an independent and disinterested decision to institute and vigorously prosecute this action," the suit said. It added that ties between two directors who also are deans of engineering colleges at Princeton University and the University of California, Berkeley have created additional board conflicts as a result of multimillion-dollar contributions by Intel to both universities.

Intel stockholder Gerald Joseph Lovoi is represented by Brian D. Long of Long Law LLC and Shane Rowley and Danielle Rowland Lindahl of Rowley Law PLLC.

Counsel information for Intel Corp. directors and officers named in the suit was not immediately available.

The case is Gerald Joseph Lovoi v. Patrick Gelsinger et al., case number 2024-0845, in the Court of Chancery of the State of Delaware. The California securities action is Quillen v. Intel Corp. et al., case number 3:24-cv-02683, in the U.S. District Court for the Northern District of California.

--Editing by Linda Voorhis.

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Judge Gives Plaintiffs' Attys $1M In Fees For Derivative Row

By **Julie Manganis**

Law360 (August 15, 2024, 6:25 PM EDT) -- A Massachusetts federal judge sliced 60% off a request for attorney fees in a shareholder derivative lawsuit Wednesday, awarding plaintiffs' counsel $1 million for their work on the case, which led to a noncash settlement.

The attorneys — Michael P. Utke of the Law Office of Michael P. Utke LLC and Thomas J. McKenna and Gregory M. Egleston of Gainey McKenna & Egleston — had been seeking $2.5 million for their work on behalf of Val Kay, a shareholder of XL Fleet Corp.

U.S. District Judge Nathaniel M. Gorton awarded $1 million, concluding that while the lawyers' work on the case led to significant changes, they had the advantage of being one of several follow-on lawsuits filed over the deal, and they reached a settlement prior to any significant discovery in the case.

The complaint, filed in 2022, was one of multiple lawsuits filed in connection with the 2020 "take-public" deal between hybrid vehicle systems company XL Hybrid and special purpose acquisition company Pivotal Investment Corporation II to form XL Fleet.

Separate actions were filed in Delaware and in the Southern District of New York, all alleging that the new company's revenue projections were falsely inflated.

The deal also came under the scrutiny of the Securities and Exchange Commission, which last year **fined** Spruce Power Holding, a successor company to XL Fleet, $11 million to resolve similar allegations.

Kay brought the Massachusetts shareholder derivative action in 2022 against current and former directors and officers of XL Fleet and Pivotal Investment Corporation II.

After the merger, a due diligence report revealed the alleged misrepresentations and the company's true condition, causing the stock price to plummet, according to the suit.

The case, along with the related action in Delaware and a pending litigation demand, was settled in March, and Judge Gorton approved the settlement in August.

While there was no cash involved, the settlement includes terms that will require the board to adopt a series of reforms of its audit and compensation committees. It also requires the creation of an investment committee, appointing an additional independent director and recouping incentive and performance bonuses that were wrongfully paid to officers who engaged in misconduct, according to the decision.

The only issue left unresolved at that point was the attorney fees. Kay's attorneys were seeking $2.5 million in fees. The defendants, on the other hand, urged the judge to award no more than $200,000.

Counsel for Kay argued that the agreed-to reforms will provide "substantial benefit" to the company, justifying the $2.5 million ask.

The defendants, represented by Troutman Pepper Hamilton Sanders LLP, asserted that the reforms will not make as significant a difference as Kay contends, saying that the company had already implemented some of the measures, including adding a new independent director, and that the majority of the board was already independent.

The defendants also argued that Kay's case essentially piggybacked on the related securities class actions.

Judge Gorton said he saw some benefit to the reforms, calling the "formalization of good governance practices … essential to maintaining compliance with the security laws on a permanent basis."

He disagreed, however, with plaintiffs' counsel that their lodestar fee estimate of just under $1 million should be subject to a multiplier of 2.5.

Judge Gorton found that in the related case — which, he held, carried a larger risk for counsel than the Kay litigation — the judge used a multiplier of 1.33.

"The lodestar is a helpful indicator as to the reasonableness of the request and the court is convinced that a multiplier of one is suitable in this case, which did result in substantial reforms but also was resolved without resort to dispositive motions and with the assistance of other litigation," Judge Gorton wrote.

Jay A. Dubow of Troutman Pepper told Law360 Thursday that the defendants are "pleased that the court denied the request for $2.5 million in fees and awarded (plaintiffs' attorneys) less than half of what they sought."

Counsel for Kay did not immediately respond to a request for comment Thursday.

Kay is represented by Michael P. Utke of the Law Office of Michael P. Utke LLC, and by Thomas J. McKenna and Gregory M. Egleston of Gainey McKenna & Egleston

The defendants are represented by Erica H Dressler, Ghillaine A. Reid, Jaclyn M. Essinger and Jay A. Dubow of Troutman Pepper Hamilton Sanders LLP

The case is Kay v. Frodl et al., case number 1:22-cv-10977, in the U.S. District Court for the District of Massachusetts.

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

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Shift4 Beats Suit Over 'Questionable' Accounting Practices

By **Katryna Perera**

Law360 (August 15, 2024, 6:59 PM EDT) -- A Pennsylvania federal judge has dismissed a proposed class action accusing payment processing company Shift4 Payments Inc. of engaging in questionable accounting practices to keep its stock price afloat, ruling that the plaintiffs had not proven that the company knowingly lied, among other things.

U.S. District Judge Joseph F. Leeson Jr. issued an **opinion** on Wednesday granting Shift4's dismissal motion and agreeing with the company that the suing investors failed to plead sufficient material misrepresentations, knowledge of wrongdoing and loss causation, among other things.

According to the opinion, the suit focuses on two alleged misrepresentations — the classification of customer acquisition costs and statements regarding the purpose of third-party distributor acquisitions.

Customer acquisition costs are the money spent to obtain new customers, such as the "upfront processing bonuses" Shift4 paid to third-party distribution partners for the new merchant relationships they established on behalf of the company. The acquisitions of third-party distributors involved buying out those distribution partners to in-source its sales distribution network.

The investors alleged that Shift4 misclassified customer acquisition costs on its cash flow statements as investing activity rather than under operations and made false statements about why it was spending "hundreds of millions of dollars in capital for residual commission buyout transactions ... with distributors/resellers."

"Plaintiffs allege that these stated reasons are subterfuge and that the actual object was to inflate gross profit and EBITDA, thereby keeping the share price afloat," the opinion states, referring to earnings before interest, taxes, depreciation and amortization.

Judge Leeson said Wednesday that the reasons stated for the buyouts were opinions since they reflected the beliefs and views of Shift4's decision-makers, and therefore, they are not actionable.

"The acquisitions may have bolstered gross profit and EBITDA ... but that does not make the statements misleading. Nor does it show that Shift4's stated reasons were not sincerely believed or otherwise actionable," the opinion states.

However, the judge said the misclassification of customer acquisition costs was materially misleading since it caused the company's financials to be restated.

"Shift4 issued what is referred to as a 'Big R restatement,' which 'occurs when the error is material to the prior period financial statements.' Thus, by its very nature, the restatement rendered the prior classification of customer acquisition costs misleading," the opinion states.

On the suit's scienter claims, Judge Leeson said the chronology of the customer acquisition cost misclassification, the buyout initiative and even the resignation of Shift4's chief financial officer, "does not fit" into the investors' theory of motive.

"The court finds that the inference of scienter is far less compelling than the opposing inference: Shift4 believed the classification of customer acquisition costs in the financial statement was correct

... further, plaintiffs have failed to plead any facts connecting [the CFO's] departure, the 'boy's club' culture, or the strategic buyout initiative to any fraudulent conduct," the opinion states.

On loss causation, Judge Leeson declined to rule on one of the complaint's two identified corrective disclosures. According to the opinion, short-seller Blue Orca published a report in April 2023 painting a "damning picture" of Shift4's strategic buyout initiative and "aggressive accounting games," among other things.

"The report also detailed the extent to which the [buyout] initiative 'flattered' financial metrics such as adjusted EBITDA," the opinion states. "Upon release of the Blue Orca report, Shift4's share price 'fell $5.95 per share, or 8.68%, to close at $62.59 per share on April 19, 2023.'"

Judge Leeson said, "the court's research has yielded no definitive Third Circuit case law addressing whether a short seller's report may be a corrective disclosure. And because plaintiffs have failed to plead scienter, the court will defer answering that question at this juncture."

The other corrective disclosure was an announcement in October 2022 that part of Shift4's prior financial statements could no longer be relied upon and that a restatement was forthcoming. Judge Leeson said this statement, coupled with the actual restatement owning up to the material misstatement, is enough to plead loss causation.

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

The plaintiffs are represented by Jeremy A. Lieberman, Brenda Szydlo, Emily C. Finestone and Dean P. Ferrogari of Pomerantz LLP, Rina Restaino and Angus F. Ni of The Schall Law Firm and Corey D. Holzer of Holzer & Holzer LLC.

Shift4 and the other defendants are represented by Joshua A. Gildea of Fitzpatrick Lentz & Bubba PC and Melanie M. Blunschi, Daniel R. Gherardi and Benjamin Naftalis of Latham & Watkins LLP.

The case is O'Meara v. Shift4 Payments Inc. et al., case number 5:23-cv-03206, in the U.S. District Court for the Eastern District of Pennsylvania.

--Editing by Vaqas Asghar.

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Levi & Korsinsky To Lead Hertz EV Cost Shareholder Suit

By **Emilie Ruscoe**

Law360 (August 15, 2024, 4:10 PM EDT) -- Levi & Korsinsky LLP will represent a proposed class of investors in car rental giant Hertz Global Holdings Inc. in litigation alleging it exaggerated demand for electric cars, then took a $200 million earnings hit as it worked to offload those cars.

In a Wednesday order in Fort Myers, Florida, federal court, U.S. Magistrate Judge Kyle C. Dudek granted a lead plaintiff bid from Levi & Korsinsky client Robert Stephens, finding that of three lead plaintiff movants, Stephens had the greatest financial interest in the relief sought by the putative class.

The magistrate judge said Wednesday that Stephens appeared poised to "fairly and adequately protect the interests of the class" and had selected counsel that would "capably and competently" serve in the litigation.

Levi & Korsinsky will have an assist from Cullin O'Brien Law PA as its liaison counsel, the order states.

Stephens' lead plaintiff competition included Edward Doller, who filed the action in May and is co-represented by Pomerantz LLP and Miller Shah LLP, and Tom Murdoch, a client of Glancy Prongay & Murray LLP, the Desmond Law Firm and the Law Office of Frank R. Cruz.

Stephens' alleged losses are over $384,000, and Murdoch's are nearly $240,000, filings show. It was not immediately clear Thursday what Doller's alleged losses are. Records show that the firms representing him had initially filed a lead plaintiff bid on behalf of a Hertz investor group that was withdrawn in early August.

The complaint accuses Hertz of hurting investors after it announced "significant" losses amid moves to downsize its fleet, including its electric cars.

As the company announced plans in January to sell off about 20,000 electric vehicles from its U.S. fleet "to better balance supply against expected demand of EVs," it saw trading prices fall about 4% to close just under $9, the complaint said.

Another trading price decline in April saw Hertz shares slip nearly 20% to under $4.70 when the company announced a significant earnings miss for the first quarter of its 2024 fiscal year with an unadjusted earnings loss of $567 million.

In April, a Hertz representative said that a "key driver" of the disappointing numbers was heightened depreciation reducing the fair value of certain vehicles in its fleet, according to the complaint.

The company also said in April that it had upped the number of electric vehicles it aimed to sell off this year from 10,000 to 30,000, noting it had seen its profit after costs sink for electric vehicles faster than for internal combustion engine cars in its fleet.

The about-face on electric vehicles came after Hertz said in 2021 that it was seeing "skyrocketing" demand for electric vehicles and was planning "a significant investment" in electric cars to become North America's largest electric vehicle rental fleet.

Alongside the company, the suit names former Hertz CEO Stephen M. Scherr and Chief Financial

Officer Alexandra Brooks.

The proposed class would include those who purchased Hertz shares between April 27, 2023, when the company touted its "continued investments in the business, particularly in the areas of technology and electrification," and its April 2024 earnings announcement.

Hertz was also hit Thursday with a shareholder derivative action making similar claims.

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

Stephens is represented by Adam M. Apton of Levi & Korsinsky LLP and Cullin O'Brien of Cullin O'Brien Law PA.

Hertz and the individual defendants are represented by Edmund Polubinski III, Andrew Ditchfield and Deborah Mazer of Davis Polk & Wardwell LLP and Michael P. Matthews of Foley & Lardner LLP.

The case is Doller v. Hertz Global Holdings Inc. et al., case number 2:24-cv-00513, in the U.S. District Court for the Middle District of Florida.

--Editing by Alex Hubbard.

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Del. Chancery OKs $175M Judgment Against Insys Founder

By **Leslie A. Pappas**

Law360 (August 15, 2024, 5:17 PM EDT) -- The convicted founder of drugmaker Insys has told Delaware's Chancery Court he agreed to accept a $175 million judgment as part of a settlement with the company's liquidation trust over his role in an opioid kickback scheme that drove the firm into bankruptcy.

William H. Henrich, trustee of the Insys Liquidation Trust, and Insys Therapeutics Inc. founder John N. Kapoor filed a **stipulation** for entry of judgment Tuesday, and Delaware Vice Chancellor J. Travis Laster signed and entered the **judgment** that same day.

Under the parties' agreement, Kapoor will consent to a judgment against him and in favor of the trust in the amount of $175 million, plus interest, costs and disbursements as allowed by law, the order said. The stipulation is part of a settlement that was not made public and reached by the parties on July 29, court filings showed.

Eric D. Madden of Reid Collins & Tsai LLP, an attorney representing the liquidating trust, told Law360 Thursday that under the settlement, Kapoor will make a series of payments that will exceed a recent **$6 million court judgment** against him.

Counsel for Kapoor declined to comment on the developments.

The $6 million judgment was issued by Delaware U.S. District Court Judge Gregory B. Williams, who **ruled** on July 31 that the liquidating trust can claw back $6 million paid out for Kapoor's criminal defense, affirming a ruling made last year by the bankruptcy court.

The stipulation and judgment arise from Chancery Court litigation that dates back to 2016, when stockholders first **accused Insys' board** of breaching its fiduciary duty by implementing a plan to market Subsys, a powerful drug that treats breakthrough pain in cancer patients, for off-label use, leading to several criminal inquiries.

In May 2019, a jury found Kapoor and four other Insys executives **guilty of scheming to bribe doctors** to prescribe unnecessary doses of Subsys, a spray containing fentanyl. Kapoor was convicted on racketeering, conspiracy and other counts, following a 51-day trial over his part in what prosecutors said was a massive, illegal campaign to boost sales of the opioid products through bribery, kickbacks and insurance fraud. He was eventually **sentenced to more than five years** in federal prison.

Insys and its affiliates **filed for bankruptcy protection** in June 2019, shortly after agreeing to a **$225 million settlement** with the government over the kickback claims.

As part of its **court-approved Chapter 11 liquidation plan**, prepetition claims that Insys had against its former directors and officers were transferred to a liquidation and recovery trust. The Insys Liquidation Trust subsequently brought claims against the company's former directors, alleging that their failures of oversight enabled the unlawful sales and marketing scheme.

After Insys emerged from bankruptcy, the shareholders' derivative suit in the Chancery Court was amended so that Henrich, as the trust's trustee, became the plaintiff in the case.

In an amended complaint, Henrich asserted that Kapoor caused Insys to sustain almost $150 million in total out-of-pocket damages, in addition to billions of dollars in additional losses and liabilities. The updated suit also included claims against the company's former CEO and certain ex-directors.

The latest judgment against Kapoor comes more than a year after the trust reached another **$175 million deal**, in April 2023, which resolved the Chancery Court claims against former directors Patrick Fourteau, Pierre Lapalme, Steven Meyer and Brian Tambi.

Vice Chancellor Laster agreed in November to stay the trustee's claims against the remaining defendant in the case, former Insys CEO Michael L. Babich, pending an arbitrator's decision about whether the claims are subject to arbitration, the docket showed.

Henrich is represented by Norman M. Monhait and Eric D. Madden of Reid Collins & Tsai LLP.

Kapoor is represented by Michael W. McDermott and Peter C. McGivney of Berger McDermott LLP and John J. Falvey Jr. of Goodwin Procter LLP.

The case is Henrich v. Kapoor et al., case number 12696-JTL, in the Court of Chancery of the State of Delaware.

--Additional reporting by Chris Villani, Jeff Montgomery, Bonnie Eslinger, Yun Park and Vince Sullivan. Editing by Covey Son.

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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Judge Rejects GE's Bid To Pull Plug On Contamination Suit

By **Emily Field**

Law360 (August 15, 2024, 9:00 PM EDT) -- A Louisiana federal judge on Wednesday refused to let General Electric escape a lawsuit alleging it is liable for widespread environmental contamination caused by a now-closed pressure valve manufacturing facility that GE used to own.

According to the order by U.S. District Judge David C. Joseph refusing to grant summary judgment, GE "seeks to minimize" its role in the contamination, and there are material questions of fact regarding the scope and extent of GE's control over the investigation and remediation of contamination at the site in Rapides Parish. GE is the former parent company of the site's owner, Dresser Inc.

GE's motion characterized its role as one of "'shared service[s]' whereby GE was [merely] providing 'support' to other businesses," the order notes.

"But plaintiffs controvert this assertion," Judge Josep's order goes on, "by providing summary judgment evidence that it was GE, in fact, that directed the Dresser facility's investigation and response to the contamination from the time of its discovery until the Dresser Facility was transferred to Baker Hughes in January 2019."

The Barnes plaintiffs claim that the facility didn't properly dispose of solvents, cutting oils, acids and other chemicals and thereby contaminated the groundwater and soil, as well as creating property damage and personal injuries.

GE also couldn't get claims from Barnes and the other plaintiffs that it didn't control the site and contamination dismissed, according to the order.

"Here, however, GE is not alleged to have caused the contamination, but rather, to have exacerbated the damages sustained by the contamination," Judge Joseph wrote.

The case is one of at least 15 lawsuits filed in venues across the state related to the Dresser facility, GE **said in February** in seeking summary judgment in a case brought by Michelle Barton and William Barton Jr.

In the Barton case, GE said that it is not the successor-in-interest to or a mere continuation of Dresser Inc., asserting instead that both companies are "still viable legal entities" — and, therefore, the property owners' claims against GE should be dismissed with prejudice.

Counsel for the parties didn't immediately respond to requests for college on Wednesday.

The Barnes plaintiffs are represented by Jimmy Faircloth Jr., Barbara B. Melton, Mary Katherine Price and Richard E. Norem III of Faircloth Melton Sobel & Bash LLC.

GE is represented by Marjorie A. McKeithen, Lauren Mastio and Meghan E. Smith of Jones Walker LLP.

The case is Barnes et al. v. Dresser LLC et al., case number 1:21-cv-00024.

--Additional reporting by Madeline Lyskwa. Editing by Amy French.

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Monsanto Gets 3rd Circ. Win In Roundup Failure-To-Warn Case

By **George Woolston**

Law360 (August 15, 2024, 7:23 PM EDT) -- The Third Circuit ruled Thursday that a Pennsylvania state law failure-to-warn claim in a suit alleging the weed killer Roundup caused a Keystone State man's cancer is preempted by federal law, creating a circuit split on central issues in multidistrict litigation over the Monsanto product.

A three-judge panel held the Federal Insecticide, Fungicide, and Rodenticide Act expressly preempts any state law requirements for labeling that adds to or differs from FIFRA requirements, reversing a district court's judgment in favor of David Schaffner Jr. and Theresa Sue Schaffner.

The Environmental Protection Agency, after an "extensive" review of scientific evidence around the weed killer's possible carcinogenicity, approved labels omitting a cancer warning during Roundup's registration process, the panel said. Because regulations implementing FIFRA require health warnings on a pesticide's label to conform to the label approved by the EPA, "the alleged state-law duty to include the cancer warning on Roundup's label (the 'Pa. duty to warn') imposes requirements that are different from those imposed under FIFRA, and that it is therefore preempted by FIFRA," U.S. Circuit Judge Michael A. Chagares wrote for the panel.

A spokesperson for Bayer AG, which owns Monsanto, told Law360 in a statement Thursday that the ruling conflicts with decisions in the Ninth and Eleventh Circuits holding that federal law does not preempt state's failure-to-warn claims, and "necessitates a review by the U.S. Supreme Court to settle this important issue of law."

Counsel for the Schaffners, Charles L. Becker of Kline & Specter PC, expressed disappointment in the decision in a statement to Law360 on Thursday.

"We are disappointed with the Third Circuit's decision and believe that the court instead should have found that Mr. Schaffner's claim sounding in failure to warn is not preempted by FIFRA. We will carefully review the panel decision, which conflicts with Ninth and Eleventh Circuit decisions, and consider our next steps," Becker said.

Schaffner filed his suit in 2019 in the state Court of Common Pleas. It was later removed to Pennsylvania federal court by Monsanto, and one month later the Judicial Panel on Multidistrict Litigation transferred the case to the Northern District of California, where litigation around Roundup is centralized, the opinion said.

The MDL court rejected Monsanto's bid for summary judgment on preemption grounds and then sent the case back to Pennsylvania district court where a settlement was reached, the opinion said.

Monsanto agreed to pay Schaffner to drop all claims except failure to warn and consented to a judgment being entered against it on that claim, but reserved the right to appeal to the MDL court's orders rejecting its preemption argument, the opinion said.

The Schaffners argued the Ninth Circuit's rejection of Monsanto's preemption argument in its 2021 decision in Hardeman v. Monsanto binds the Third Circuit to the same conclusion under the law-of-the-case doctrine, and that it should not reconsider the question, the opinion said.

Under the law-of-the-case doctrine, an appellate panel generally won't reconsider questions another panel has decided on an earlier appeal in the same case. But Judge Chagares wrote that Hardeman and the Schaffner's case are distinct.

"Because Hardeman and the present case remain distinct despite having been centralized in the same MDL, a holding issued in the former is not binding as the law of the case upon this court," Judge Chagares wrote.

The panel also declined to apply issue preclusion, adopting a section of the Second Restatement of Judgments that held a court has discretion to decline to apply issue preclusion if the issue is a legal one and treating it as final would "inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based."

"For that reason, we do not apply issue preclusion in this case. The complex subject of preemption under FIFRA has not been comprehensively analyzed in prior caselaw, and the Supreme Court has yet to address FIFRA preemption in the specific circumstances presented by this case," Judge Chagares wrote, noting the panel's decision to independently evaluate the merits of Monsanto's arguments advances its function of developing law.

The Schaffners are represented by Charles L. Becker, Ruxandara M. Laidacker and Tobias L. Millrood of Kline & Specter PC and Adrian N. Roe and Michael D. Simon of MDSimon Ltd.

Monsanto is represented by Joseph H. Blum of Shook Hardy & Bacon LLP, Wendy W. Feinstein of Morgan Lewis & Bockius LLP, Michael X. Imbroscio and David M. Zionts of Covington & Burling LLP and Kenneth L. Marshall of Bryan Cave Leighton Paisner LLP.

The case is David Schaffner Jr. et al. v. Monsanto Corp., case number 22-3075, in the U.S. Court of Appeals for the Third Circuit.

--Additional reporting by P.J. D'Annunzio. Editing by Brian Baresch.
