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American, JetBlue lose bid to dismiss passengers' antitrust lawsuits over alliance

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Mike Scarcella

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September 6, 2024

(Reuters) - American Airlines and JetBlue Airways on Friday lost a U.S. court bid to dismiss class actions claiming a former alliance between the companies caused passengers to pay higher prices for some flights in the Northeast.

U.S. District Judge Ann Donnelly in Brooklyn ruled that the passengers had presented sufficient information for now to pursue allegations that the airlines' agreement violated U.S. antitrust law.

American, JetBlue and attorneys for plaintiffs at law firms Robbins Geller Rudman & Dowd and Israel David did not immediately respond to requests for comment.

American and JetBlue have denied any wrongdoing.

American is the largest U.S. airline by fleet size and JetBlue is the sixth largest.

The airlines agreed in 2020 to operate together for most flights in and out of the Boston and New York areas. The alliance included schedule coordination, revenue sharing and reciprocal loyalty and corporate customer benefits.

The passengers sued in 2022, following a lawsuit by the U.S. Justice Department and a group of states that claimed the alliance harmed consumers.

A federal judge in Massachusetts overseeing the government's case ruled last year that American must end its alliance with JetBlue, after finding the deal was a "naked agreement" between the two companies to refrain from competing against each other.

The airlines' appeal of that order is pending, but the companies have taken steps to unwind the alliance.

American in June told the Boston-based 1st U.S. Circuit Court of Appeals that it would consider a new arrangement with JetBlue even if it wins a ruling reversing the May 2023 decision against the alliance.

The case is *In re: American Airlines / JetBlue Antitrust Litigation*, U.S. District Court, Eastern District of New York, No. 1:22-cv-07374-AMD-TAM.

References

ROBBINS GELLER RUDMAN & DOWD LLP; JETBLUE AIRWAYS CORPORATION; THOMSON REUTERS CORPORATION; US JUSTICE DEPARTMENT.; AMERICAN AIRLINES GROUP INC.

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Boeing Investors Advance Lawsuit Over Safety Statements, Risks

By Martina Barash 2024-09-09T09:12:04000-04:00

Boeing Co. investors can proceed with allegations of securities fraud over statements that safety was a top priority at the company, a federal court ruled in a proposed class action that followed a mid-flight incident.

The brief written order came after a Sept. 6 hearing overseen by Leonie M. Brinkema of the US District Court for the Eastern District of Virginia.

- Shareholders [sued](#) in January after a 737 MAX 9 door panel blew out during an Alaska Airlines flight
- Boeing made public statements that it was “laser-focused” on safety but outsourced the manufacture of airplane components, investors allege
- Safety revelations caused Boeing’s stock price to fall 19%, they say

Labaton Keller Sucharow LLP and Robbins Geller Rudman & Dowd LLP are lead counsel for the investors. McGuire Woods LLP and Sullivan & Cromwell LLP represent Boeing.

The case is [In re The Boeing Co. Sec. Litig.](#) , E.D. Va., No. 1:24-cv-00151, 9/6/24 .

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

To contact the editor responsible for this story: Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com

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Lawyers slated to get as much as \$40M from \$100M CDK car dealer class action settlement



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September 7, 2024

Lawsuits



Dirksen Federal Courthouse, Chicago | Jonathan Bilyk

Attorneys who represented thousands of car dealers in a sprawling class action lawsuit against auto dealership software maker CDK stand to collect nearly \$40 million in fees and recovered costs, after CDK agreed to pay \$100 million to settle claims it used its market dominance to make the dealers pay more than they should have to use their products.

Over the next few months, automotive dealerships in Illinois and throughout the U.S. will have the opportunity file claims for a cut of the settlement.

It is unknown at this point how much each of the dealerships could reap from the settlement. According to court documents, the settlement funds that remain after paying attorneys and settlement administrators will be divided among the dealerships based on the number of claims submitted; the number of dealership locations they may have operated; and how much they can prove they used CDK software at their dealership locations since 2013.

The settlement agreement, however, makes clear that the plaintiffs' lawyers who led the legal action will be allowed to claim up to 33% of the \$100 million settlement fund in fees and an additional \$7.5 million in costs.

Attorneys Peggy J. Wedgworth, Elizabeth McKenna, Robert A. Wallner, John Hughes and Michael Acciavatti, of the firm of Milberg Coleman Bryson Phillips Grossman, of New York, filed the motion for approval of the settlement with the court. They served as co-lead counsel on the matter.



Peggy Wedgworth | Milberg Coleman Bryson Phillips Grossman

"After almost seven years of litigation and extensive settlement negotiations, we have reached agreement with CDK to resolve dealership class plaintiffs' claims. This settlement provides a significant monetary recovery for the class, and we look forward to being able to distribute funds from the settlement with CDK, as well as funds from our prior settlement with Reynolds," Wedgworth said in a statement.

Other plaintiffs' attorneys listed on the settlement agreement as serving on the so-called "plaintiffs' steering committee," include Leonard A. Bellavia, of Bellavia Blatt PC, of Mineola, New York; Daniel C. Hedlund and Michelle J. Looby, Gustafson Gluek PLLC, of Minneapolis; James Barz and Frank Richter, of Robbins Geller Rudman & Dowd LLP, of Chicago.

Robert A. Clifford, of Clifford Law Offices PC, of Chicago, is listed as liaison counsel for the MDL.

A multi-prong legal action has been pending against CDK in courts in Chicago and elsewhere since 2018 accusing CDK of violations of federal and state antitrust law.

Thousands of car dealers have filed claims against CDK in that time. Federal judges have consolidated those claims into one so-called multi district litigation before U.S. District Judge Rebecca Pallmeyer of the Northern District of Illinois court in Chicago.

The claims assert CDK abused its position as the market leader for so-called Dealer Management Systems to conspire with another company, The Reynolds and Reynolds Company, to monopolize access to essential industry data and restrain competition to force dealers to pay more for the DMS products and services than they believe they would have in an open market.

Reynolds earlier settled the claims against them for \$29.5 million.

At the same time, CDK also faces additional claims, including antitrust actions from other software developers, accusing the company of unfair competition.

Judge Pallmeyer agreed in July to allow those claims to proceed as a class action.

And more recently, CDK has been hit with class actions from car dealers seeking to make CDK pay after a hack crashed DMS systems for days this summer, hamstringing car dealerships nationwide.

Those claims are not included in the most recent \$100 million settlement, which was announced in mid-August, a few weeks before the dealerships' antitrust claims were set to go to trial in September.

Judge Pallmeyer granted preliminary approval to the settlement on Aug. 23.

Under that order, the judge established a schedule for what happens next. Notices of the settlement will be sent to eligible dealerships beginning Sept. 23. Dealers will have until Jan. 9, 2025, to submit claims.

In the intervening months, plaintiffs' lawyers will submit a more detailed motion in support of their fee request and a motion for final approval of the settlement.

A final approval hearing has been scheduled for Feb. 25, 2025.

CDK has been represented by attorneys Mark Filip, Kevin M. Jonke, Craig S. Primis, Matthew J. Reilly, K. Winn Allen and Katherine Katx, of Kirkland & Ellis, of Chicago and Washington, D.C.

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Shareholder Seeks \$85 Million Deal in Windstream, EarthLink Suit

By Bernie Pazanowski 2024-09-09T11:09:35000-04:00

- Class action filed after Windstream merged with EarthLink
- Settlement reached, despite Windstream's pending bankruptcy

The lead plaintiff in a securities class action against EarthLink Holdings Corp. and Windstream Holdings Inc. asked a federal court for preliminary approval of an \$85 million dollar settlement he's reached with the companies.

Robert Murray brought a securities class action against EarthLink and Windstream and their board members, alleging violations of federal securities laws, after the two companies merged and Windstream subsequently filed for bankruptcy.

Murray said that the \$85 million settlement was reached with the help of a mediator and was the largest settlement of a securities fraud class action ever presented in the US District Court for the Eastern District of Arkansas. He also said that the settlement was fair to all investors who acquired Windstream stock when it merged with EarthLink Holdings Corp. in 2017.

Murray further noted that Windstream filed for bankruptcy protection in 2019 and that its reorganization plan declared all of its stock "cancelled, discharged and of no force and effect." The proposed settlement here "emerged from the ashes" of that case, he said.

According to the memorandum of law Murray filed Sept. 6, he and his attorneys have been adjudicating the case for over six years and it generated over a million pages of documents. He "acted vigorously to protect class interests," the memo said. But it also said that agreeing to the settlement outweighs the risks of going to trial.

It also called the \$85 million settlement "an outstanding, record-breaking result" that treats all class members "equitably relative to one another." The plan of allocation "is substantially similar to other plans approved in securities class actions across the country," it said.

Murray's attorneys said that their fees will not exceed 32% of the settlement, plus costs and expenses.

Robbins Geller Rudman & Dowd LLP; Johnson Fistel LLP; and Carney Bates & Pulliam PLLC represent Murray. Skadden, Arps, Slate, Meagher & Flom LLP represents the defendants.

The case is [Murray v. EarthLink Holdings Corp.](#) , E.D. Ark., No. 4:18-cv-00202-JM, memorandum filed 9/6/24 .

To contact the reporter on this story: Bernie Pazanowski in Washington at bpazanowski@bloombergindustry.com

To contact the editor responsible for this story: Blair Chavis at bchavis@bloombergindustry.com

Customer Contact Data Company Hit with COVID-Related Securities Suit

K [dandodiary.com/2024/09/articles/coronavirus/customer-contact-data-company-hit-with-covid-related-securities-suit](https://www.dandodiary.com/2024/09/articles/coronavirus/customer-contact-data-company-hit-with-covid-related-securities-suit/)

September 8, 2024



By Kevin LaCroix on September 8, 2024

Posted in Coronavirus



In my recent round-up of the top trends in the world of directors' and officers' insurance and liability, I noted that, even though we are now well into the fifth year

since the initial outbreak of COVID-19 in the U.S., COVID-related securities suits continue to be filed. In the latest example of this kind of lawsuit, last week a plaintiff investor filed a securities class action lawsuit against customer contact data firm ZoomInfo Technologies, alleging that after COVID-related demand inflated the company's results during the pandemic, the company allegedly strained to conceal subsequent declining demand from investors. A copy of the September 4, 2024, complaint can be found [here](#).

Background

ZoomInfo is a software and data company that provides customer contact and business information to its clients. ZoomInfo sells access to its platform through subscription contracts with terms ranging from one year to three years. ZoomInfo completed an initial public offering in June 2020.

The complaint alleges that due to favorable market dynamics created by the COVID-19 pandemic, ZoomInfo experienced growth in 2020 and 2021, as social distancing restrictions made traditional sales and marketing activities unavailable. As its clients turned to digital sales and marketing, ZoomInfo's revenues grew. The company reported "record" financial results during the pandemic, causing the company's share price to rise, after which company insiders allegedly sold significant amounts of their personal holdings in company stock.

The complaint alleges that as the pandemic evolved and as clients sought to reduce their use of the company's services, ZoomInfo allegedly "utilized manipulative and coercive auto-renewal policies" and other measures to try to "prevent a mass exodus of clients," which had the unfortunate effect of damaging customer relations. The "tactics" also created a "hidden

demand cliff” as clients’ contract periods eventually expired. The complaint alleges that the defendants “continued to make false and misleading statements to investors and engaged in business tactics designed to conceal the full truth from investors.”

Ultimately, the complaint alleges, the company had to report several quarters of deteriorating financial results and declining customer metrics, and had to take various charges that further weighed on the results. The complaint alleges that due to these “serial disclosures,” the company’s share price declined a total of 90%.

The Complaint

On September 4, 2024, a plaintiff shareholder filed a securities class action lawsuit in the Western District of Washington against ZoomInfo and certain of its executives. The complaint purports to be filed on behalf of a class of investors who purchased the company’s shares between November 10, 2020, and August 5, 2024.

The Complaint alleges that during the class period, the defendants misrepresented or failed to disclose: “(a) that ZoomInfo’s financial and operational results during the Class Period had been temporarily inflated by the ephemeral effects of the COVID-19 pandemic, which had pulled forward demand for the Company’s database of digital contact information; (b) that material portions of ZoomInfo’s existing customer base were attempting to either substantially reduce their use of the Company’s produce or abandon it altogether; (c) that ZoomInfo had used manipulative and coercive auto-renew policies and threats of litigation to force customers into remaining with the Company for an additional contractual term even though such customers did not want to; (d) that ZoomInfo’s coercive customer retention tactics had materially damaged the Company’s customer relationships, client franchise, and competitive advantages, and created a hidden demand cliff for customer contract renewal in future periods; and (e) that as a result of (a)-(d) above, ZoomInfo’s reported revenues, operating income, and customer retention metrics were materially overstated.”

The complaint alleges that the defendants violated Section 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. The complaint seeks to recover damages on behalf of the class.

Discussion

It has been a continuing wonder to me as COVID-related lawsuits have continued to come in, long after governmental shutdown orders have expired and long after life has basically returned to normal. The fact is that the pandemic was far more disruptive to companies’ operations and financial results than initially may have appeared to be the case, and the disruptive effect from the pandemic continue to reverberate through the economy. And as a result of these continuing reverberations, COVID-related lawsuits continue to be filed.

According to data on the *Stanford Law School Securities Class Action Litigation Clearinghouse* website ([here](#)), and with the addition of this latest lawsuit, there have now been a total of 79 COVID-related securities class action lawsuits filed since the initial COVID outbreak, including fourteen YTD in 2024 alone. The COVID related- lawsuits continue to be a significant factor in the total number of securities class action lawsuit filings. By year end, the COVID-related suits are likely to be a significant part of the total number of securities suit filings this year. At this point, it certainly seems likely that we will continue to see more COVID-related lawsuit filings in the months ahead.

The 2025 Lawdragon 500 Leading Litigators in America

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September 6, 2024

By Katrina Dewey | September 6, 2024 | Guides, News & Features



Cari Dawson (Alston & Bird), Neal Katyal (Hogan Lovells) and Steve D'Amore (Winston & Strawn)

We're honored to introduce The 2025 Lawdragon 500 Leading Litigators in America.

And honored is a complete understatement. It's been a thrill searching far and wide for the best litigators the U.S. has to offer – in antitrust, intellectual property, white collar and investigations, securities and corporate governance litigation, and a vast array of class actions, product liability and other complex civil litigation.

They've served in the military and government, hail from small towns and big cities, went to prestigious Ivy League schools, state schools, and HBCUs. They are men and women, gay and straight, and increasingly represent an inclusion that looks more like America.

Yet for all their differences, these 2878 lawyers share one thing: They all wanted to be a lawyer, and for most of them, a trial lawyer. They wanted to stand up in court and advocate on behalf of a client whose business, wellbeing or future was in jeopardy. They wanted to get on their feet.

There are nearly 100 law firms included on this guide with 10 or more lawyers recognized. That's a remarkable statement on the vibrancy of America's litigation corps. A handful of firms are next level, boasting talent across the board in the practices featured here, represented by roughly 500 lawyers apiece. The dazzle and success of Susman Godfrey; Quinn Emanuel; and Paul Weiss – the three firms with the most lawyers included – represents some of the greatest skill ever assembled in the legal profession.

These lawyers win hundreds of millions, billions even. They win rights, or lose them. They win freedom, or lose it for someone. They have the abilities to change businesses and entire industries. It's an audacious thing a trial lawyer does: to tell a judge, jury or other

arbiter, “Hear me. Believe me. Rule for my client.”

Bravo to everyone here, and every litigator out there working on their craft and a cause.

We selected this guide through a record number of submissions, as well as original journalistic research and vetting with the nation’s leading trial lawyers. This guide is 33 percent women and 19 percent inclusive. This guide is dominated by firms who principally represent corporations, typically on defense. But a significant number of the lawyers recognized here represent plaintiffs, as well. Those lawyers denoted with an asterisk are members of our esteemed Hall of Fame. We are grateful to Androvett and longtime friends Cadwalader for backing our efforts.

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Michael	Albert	Robbins Geller Rudman & Dowd	San Diego	Financial Litigation, Plaintiff
Dory	Antullis	Robbins Geller Rudman & Dowd	Boca Raton	Financial Litigation, Plaintiff
Kenneth J.	Black	Robbins Geller Rudman & Dowd	San Francisco	Financial Litigation, Plaintiff
Jennifer N.	Caringal	Robbins Geller Rudman & Dowd	San Diego	Securities Litigation, Plaintiff
Brian E.	Cochran	Robbins Geller Rudman & Dowd	San Diego	Securities Litigation, Plaintiff
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Sept. 9, 2024, 2:00 AM PDT

This Week in Chancery Court: Politan, Masimo Feud Goes to Trial

By Jennifer Kay

Bloomberg Law News 2024-09-09T12:34:46970648184-04:00

This Week in Chancery Court: Politan, Masimo Feud Goes to Trial

By Jennifer Kay 2024-09-09T05:00:05000-04:00

Politan Capital Management LP's proxy battle at health-care technology giant Masimo Corp. goes to trial this week in the Delaware Chancery Court, while a parallel lawsuit is pending in a California federal court.

Here's more from the Chancery Court and Delaware Supreme Court calendars:

Monday: Gilead Sciences v. Malik, Del. Ch., No. 2023-1117, hearing 9/9/24.

At issue: Gilead Sciences Inc. wants to recoup over \$4 million in legal fees that Usama Malik, the former CFO of its Immunomedics unit, racked up during a federal probe of allegations that he tipped off his girlfriend about a successful clinical trial for a breast-cancer drug, allowing her to bank more than \$200,000 from stock sales. Malik pleaded guilty in May 2023 to an insider trading charge, and he was sentenced to six months of home arrest and fined \$15,000. Both Gilead and Malik have filed motions for summary judgment in the Chancery Court case.

Court action: Oral arguments on the motions for summary judgment will be heard in Wilmington, Del.

Gilead Wants Ex-Executive to Repay Millions for Insider Probe

Monday: In re Cassava Sci. Inc. 2020 Cash Incentive Plan Derivative Litig., Del. Ch., No. 2022-0737, settlement hearing 9/9/24.

At issue: To resolve investor litigation alleging Cassava Sciences Inc. senior leaders overpaid themselves by tying huge cash bonuses to short-term stock increases when they had inside knowledge that good news about a drug trial was coming, the company agreed to a proposed settlement with corporate governance reforms. Under the deal, which must be approved by Vice Chancellor Morgan T. Zurn, any bonus for Cassava's CEO will be tied to federal drug approval and, in the event of a merger, to valuation milestones. The investors' attorneys seek a \$1 million fee award.

Court action: A settlement hearing will be held in Wilmington, Del.

Cassava Investor Sues Over Pay Plan Adopted Before Stock Spike

Tuesday: Ohio Pub. Emp. Ret. Sys. v. Boeing Co., Del. Ch., No. 2024-0795, telephonic hearing 9/10/24.

At issue: Boeing Co. wants the court to block the pension fund seeking information on the aerospace giant's safety-related policies and practices from also taking depositions. Demanding depositions at this point in a books-and-records lawsuit adds an unnecessary burden on the company, Boeing argues in a brief. The pension fund wants to see Boeing's internal documents, including board minutes and whistleblower complaints, dating back to early 2022. The lawsuit was filed in July two days after Boeing pleaded guilty and agreed to pay a fine of at least \$243.6 million to resolve criminal conspiracy charges stemming from 737 Max 8 crashes in 2018 and 2019 that killed 346 people.

Court action: Oral arguments will be heard via teleconferencing.

Boeing Sued by Pension Fund Seeking 737 Max Safety Records (1)

Tuesday: Golden Rule Fin. Corp. v. S'holder Rep. Servs. LLC, Del. Ch., No. 2022-0065, post-trial oral arguments 9/10/24.

At issue: A UnitedHealth Group Inc. unit filed suit in 2022 against the former owners of USHealth Group Inc., a business it bought in 2019. The parties went to trial in February, when the UnitedHealth unit argued the acquired company's error in calculating the size of an eight-figure post-closing adjustment "required the buyer to make a \$38.3 million true-up payment that reflected no increase in the company's true economic value," according to a pre-trial brief. Vice Chancellor Paul A. Fioravanti Jr. now hears closing arguments in the case.

Court action: Post-trial arguments will be heard in Wilmington, Del.

UnitedHealth Unit Reopens Fight Over \$750 Million Insurer Deal

Wednesday: Clement v. Apollo Glob. Mgmt. LLC, Del. Ch., No. 2023-0904, oral arguments 9/11/24.

At issue: Apollo Global Management Inc. seeks to dismiss a former Redbox Entertainment Inc. investor's claims that the private equity giant ran the video rental business into the ground, then bailed itself out by selling the company on lopsided terms. The investor's complaint "does not explain how Apollo taking a massive loss" on a loan converted to equity in Redbox's 2022 merger with Chicken Soup for the Soul Entertainment Inc. "constituted a 'unique benefit' to Apollo," the private equity firm argues in a brief.

Court action: Oral arguments on the motion to dismiss will be heard in Wilmington, Del.

Apollo-Led Sale of Meme Stock Redbox Draws Court Challenge

Wednesday: In re Mindbody Inc. S'holder Litig., Del., No. 484,2023, oral arguments 9/11/24.

At issue: Mindbody Inc., Vista Equity Partners Management LLC and ex-Mindbody CEO Richard Stollmeyer are appealing a Chancery Court ruling finding that they must pay an additional \$1 per share to investors than they initially received in a \$1.9 billion take-private deal. Chancellor Kathaleen St. Jude McCormick's opinion must be reversed, they argue in a brief, because she erred in ruling that Stollmeyer breached his fiduciary duties and in refusing to defer to the judgment of the eight-member Mindbody board when six directors "undisputedly had no conflict and none of whom received differential merger consideration."

Court action: The Delaware Supreme Court hears oral arguments in Dover, Del.

Vista, Mindbody Trial Earns Attorneys a Third of the Damages

Wednesday: Teamsters Loc. 443 Health Serv. & Ins. Plan v. Cencora Inc., Del., No. 5,2024, oral arguments 9/11/24.

At issue: Pension funds seek to reverse a Chancery Court ruling allowing former AmerisourceBergen Corp. board members to escape long-running litigation in Delaware over a subsidiary's alleged scheme to sell unsterile cancer medicines pooled from the overflow of pre-filled syringes. The company is now known as Cencora Inc. The pension funds argue in a brief that the company's one-member special litigation committee "reached unreasonable conclusions regarding the knowledge and culpability" of its officers and directors.

Court action: The Delaware Supreme Court hears oral arguments in Dover, Del.

AmerisourceBergen Ex-Board Beats Lawsuit Over Syringe Scam (1)

Thursday: Goldstein v. Denner, Del. Ch., No. 2020-1061, settlement hearing 9/12/24.

At issue: Sarissa Capital Management LP and founder Alex Denner agreed in June to pay \$40 million to end insider trading litigation tied to Sanofi SA's \$11.6 billion acquisition of Bioverativ Inc. The proposed settlement would resolve claims that Denner—a billionaire hedge funder and protege of legendary activist investor Carl Icahn—exploited his position as a Bioverativ board member to manipulate the deal process, making \$50 million on shares he'd bought six months earlier for well below the sale price. Vice Chancellor J. Travis Laster must approve the deal. Attorneys for the investor who led the litigation seek a fee award of \$10.8 million, plus reimbursement of almost \$690,000 in expenses. Sanofi affiliates previously agreed to pay \$84 million to settle parallel claims against Bioverativ's former board members, although the French drug giant wasn't named as a defendant.

Court action: A settlement hearing will be held in Wilmington, Del.

Denner, Sarissa Will Pay \$40 Million to End Bioverativ Deal Case

Friday: Politan Cap. Mgmt. LP v. Kiani, Del. Ch., No. 2024-0755, trial 9/13/24.

At issue: Politan alleges Masimo's founder, Joe Kiani, and other board members manipulated the date of an upcoming board election that's currently scheduled Sept. 19. Politan which wants two board seats at Masimo. The cases in Chancery Court and a federal court in Los Angeles offer an unusually frank glimpse into boardroom and backroom battling among corporate power brokers. In the California case, Masimo has said Politan's founder, Quentin Koffey, threatened Walt Disney Co. ex-CEO Bob Chapek when Chapek raised the idea of a negotiated settlement.

Court action: A one-day trial will be held in Wilmington, Del.

Masimo's Feud With Politan Escalates as Proxy Vote Nears (1)

Friday: Turnbull v. Klein, Del. Ch., No. 2023-1125, hearing 9/13/24.

At issue: Former US Well Services Inc. investors sued Crestview Partners LP affiliates in November over the fracking company's \$270 million sale to ProFrac Holding Corp., owned by the billionaires Dan and Farris Wilks. The complaint alleges that the merger followed a series of unfair financing transactions and stock conversions that increased Crestview's control over Houston-based USWS without serving any legitimate business purpose. Crestview and former USWS board members will argue before Vice Chancellor Sam Glasscock III to dismiss the lawsuit.

Court action: Oral arguments on the motions to dismiss will be heard in Georgetown, Del.

Crestview Sued by Investors Over \$270 Million Fracking Deal

To contact the reporter on this story: Jennifer Kay in Philadelphia at jkay@bloomberglaw.com

To contact the editor responsible for this story: Stephanie Gleason at sgleason@bloombergindustry.com

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Sept. 6, 2024, 9:48 AM PDT

Navidea BioPharma Sued Over Scheme to 'Steal' Corporate Control

By Mike Leonard

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2042-0923](#)

Bloomberg Law News 2024-09-09T12:36:20517988049-04:00

Navidea BioPharma Sued Over Scheme to 'Steal' Corporate Control

By Mike Leonard 2024-09-06T12:48:08000-04:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2042-0923](#)

A Navidea BioPharmaceuticals Inc. director stacked its board with cronies, seized control of the biotech company, and devoted its resources to satisfying his “insatiable, shameless greed,” according to a lawsuit.

An investor sued Navidea and its alleged sole remaining board member, John Scott, saying he engaged in an “extreme and unconscionable level of self-dealing” after the departure of dissenting leadership factions left the company susceptible to his “campaign of exploitation.” Even Scott’s allies ultimately resigned, but their apparent remorse was “too little, too late,” according to the lawsuit filed Thursday in Delaware’s Chancery Court.

The court complaint seeks damages from Scott and other former board members, along with an order invalidating “wrongful actions” that allegedly let Scott “steal” control of the company.

Navidea didn’t immediately respond to a request for comment Friday.

According to the shareholder complaint, Scott and his family took a large stake in the company—which focuses on treatments for cancer and inflammatory disorders—in September 2018, when they paid \$3 million for 12% of its stock. They then allegedly paid \$2 million in February 2020 for additional shares that increased their ownership of Navidea to around 30%, making them the company’s largest investors.

Once he controlled nearly a third of the company, Scott began wielding his power to block transactions that might have diluted his equity, even if they would have benefited the business, the lawsuit says. The coercive strategy allegedly left Navidea with no alternative other than additional financing deals with Scott—such as a \$5 million private placement and an unfair loan—that handed over even more of the company.

Over time, as Scott increased his stake, Navidea's falling share price made it an attractive takeover target, according to the court complaint. Scott and his allies allegedly responded by adopting a corporate poison pill that effectively blocked anyone else from taking a 5% stake.

He then pushed the company into even more self-dealing transactions—eventually gaining an outright majority of its voting power—and engineered bylaw changes that effectively gave him the power to hold board meetings on his own, the suit says.

The shareholder leading the lawsuit, Donald Garlikov, is represented by Barnes & Thornburg LLP. Navidea, Scott, and the former board members haven't yet made court appearances.

The case is Garlikov v. Navidea BioPharms. Inc. , Del. Ch., No. 2024-0923, complaint filed 9/5/24 .

To contact the reporter on this story: Mike Leonard in Washington at mleonard@bloomberglaw.com

To contact the editor responsible for this story: Andrew Harris at aharris@bloomberglaw.com

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Celgene Loses Bid to Knock Out Shareholder Suit Over MS Drug

By Matthew Bultman

- Long-running case involves FDA's 2018 rejection of ozanimod
- Judge says jury could find for investors on some statements

Bloomberg Law News 2024-09-09T12:37:13365268763-04:00

Celgene Loses Bid to Knock Out Shareholder Suit Over MS Drug

By Matthew Bultman 2024-09-06T14:40:25000-04:00

- Long-running case involves FDA's 2018 rejection of ozanimod
- Judge says jury could find for investors on some statements

Celgene Corp. lost a bid to escape a securities fraud lawsuit accusing the drugmaker of misleading investors about its application for a new multiple sclerosis drug.

A reasonable jury could find two former Celgene executives acted with fraudulent intent by failing to tell shareholders about a risk the Food and Drug Administration would reject the drug application, Judge Michael Farbiarz in the US District Court for the District of New Jersey said.

The executives' knowledge can also be imputed to the company, Farbiarz said, partly denying Celgene's motion for summary judgment.

Refusal Risk

Investors filed the lawsuit in 2018, about a month after the FDA rejected Celgene's application for ozanimod. The FDA, in a "refusal to file" letter, indicated the application needed more information about testing the drug.

The lawsuit pointed to numerous statements made by Celgene executives that were alleged to be misleading.

Among them were statements included in a press release and securities filings indicating the application was submitted and the company was awaiting results.

A reasonable jury could find Scott Smith, Celgene's former chief operating officer, and Terrie Curran, the former chief of the division responsible for the drug, knew there was a risk that a "refusal to file was right around the bend" and that the application would be "promptly sent back by the FDA as incomplete," Farbiarz said in a Sept. 4 decision.

The dissonance between the company's statements and what the executives knew about the risk of FDA refusal "could lead a reasonable jury to conclude that the Franchise President and the Chief Operating Officer had scienter as to these statements," the judge said.

Farbiarz granted Celgene's request for judgment as it related to other statements made before the drug application was submitted. Further information is required before a decision on certain other statements that are alleged to be misleading, the judge said.

Celgene was acquired by Bristol Myers Squibb Co., which in 2020 won FDA approval of ozanimod, sold under the brand name Zeposia, for the treatment of relapsing forms of MS.

Kessler Topaz Meltzer & Check LLP are lead counsel for the lead plaintiff. Gibbons PC and Jones Day represent Celgene.

The case is *In re Celgene Corp., Securities Litigation*, D.N.J., No. 18-4772, 9/4/24 .

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

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

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Sept. 6, 2024, 2:42 PM PDT

Perrigo Gets \$97 Million Settlement Over Mylan Fight Finalized

By Martina Barash

Bloomberg Law News 2024-09-09T12:35:43235620429-04:00

Perrigo Gets \$97 Million Settlement Over Mylan Fight Finalized

By Martina Barash 2024-09-06T17:42:31000-04:00

Perrigo Co. PLC has received final approval of its \$97 million class settlement with investors over a stock drop allegedly caused by the pharmaceutical company's statements during a takeover attempt by Mylan NV in 2015.

The investors' requests for attorneys' fees of 19% of the total—more than \$18 million—and significant litigation expenses also received a green light Thursday from Magistrate Judge Leda Dunn Wettre of the US District Court for the District of New Jersey. The litigation expenses consist of more than \$4 million incurred by plaintiffs' counsel in the seven-year court fight and "awards of \$100,000 to each of the three primary constituent members of Lead Plaintiff Perrigo Institutional Investor Group for costs incurred directly related to their representation of the Classes," according to the investors' request for final approval in July.

- The investors alleged Perrigo overstated its value during the takeover bid, with the remaining claims in the suit focused on Perrigo statements about performance of its Omega division and the alleged concealment of anticompetitive practices in its generic drug unit
- The parties agreed that the settlement doesn't constitute an admission of wrongdoing by Perrigo
- The settlement was announced in April

Pomerantz LLP and Bernstein Litowitz Berger & Grossmann LLP were co-lead counsel for the class. Greenbaum, Rowe, Smith & Davis LLP and Fried, Frank, Harris, Shriver & Jacobson LLP represented Perrigo. Siegel Teitelbaum & Evans LLP and Gibson, Dunn & Crutcher LLP represented ex-CEO Joseph Papa.

The case is *Roofer's Pension Fund v. Papa*, D.N.J., No. 1:16-cv-02805, 9/5/24.

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

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Agenus Hit With Investor Suit After FDA Feedback on Cancer Drug

By Matthew Bultman 2024-09-09T12:33:12000-04:00

- **COURT:** D. Mass.
- **TRACK DOCKET:** [24-cv-12299](#)

Agenus Inc. has been sued by a shareholder who alleges the biotech company misled investors about the clinical results of a colon cancer treatment.

The [proposed class action](#) comes after Agenus in July revealed that the Food and Drug Administration advised the company against submitting the trial results for accelerated approval of the treatment. Agenus' stock fell almost 59% on the news, the complaint said.

Investors allege the company overstated the therapy's clinical results and they were misled about its effectiveness.

The complaint was filed Sept. 6 in the US District Court for the District of Massachusetts. Agenus didn't immediately respond to a request for comment.

The Lexington, Mass.-based company develops immunotherapy treatments, including balstilimab and botensilimab to treat certain types of cancer. A focus was placed on a balstilimab and botensilimab combination to treat colon cancer, the suit said.

Agenus met with the FDA about the treatment earlier this year. The regulator took the view that the objective response rates from the clinical trials may not translate to survival benefit, Agenus [said](#) when announcing the results.

The suit points to various statements it contends were misleading, including a May press release in which Agenus announced the FDA meeting and said the results from the studies "contribute valuable insights into the potential of this therapy."

“The combination therapy of botensilimab and balstilimab was less effective than Defendants had led investors to believe,” the suit said.

Pomerantz LLP and Schall Firm represent the investor.

The case is [Olsen v. Agenus Inc.](#) , D. Mass., No. 24-cv-12299, 9/6/24 .

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

To contact the editor responsible for this story: Rob Tricchinelli at rtricchinelli@bloombergindustry.com



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COMMENTARY

Arguing Class Actions: Quality vs. Quantity—The Debate Over Reasonable Attorney Fees

Arguing Class Actions is a monthly column by Adam J. Levitt for the National Law Journal.

September 09, 2024 at 06:00 AM

Class Actions

By Adam J. Levitt | September 09, 2024 at 06:00 AM

     

Last year, U.S. District Judge Brian C. Wimes of the Western District of Missouri approved a \$500 million settlement in the T-Mobile data breach litigation, finding that the “historic” settlement extended “extraordinary” relief to the class. *In re T-Mobile Customer Data Breach Litigation*, Case No. 21-MD-3019 (W.D. Mo. June 29, 2023). On appeal, the U.S. Court of Appeals for the Eighth Circuit agreed—and the appellant objectors did not even dispute—that class counsel had “represented the class well” and “obtained a significant result.” *In re T-Mobile Customer Data Breach Litigation*, Nos. 23-2744 and 23-2798 (8th Cir. July 29, 2024). Nevertheless, the Eighth Circuit overturned the \$78 million fee award, deeming it a “windfall,” because class counsel had not, in its view, logged a sufficient number of hours to justify a roughly 16% fee.

The Eighth Circuit offered two main reasons for its decision: first, that many attorneys will still take these cases even with a lowered percentage, and second, that awarding high multipliers early in a case could encourage counsel to settle early and move on to the next case. *Id.* at *6-7. The flaw in both of those arguments is that it assumes the historic result was inevitable and that any lawyer would have achieved the same. It is incorrect to assume that lawyers are fungible, or that a large settlement will be available early in the case regardless of the skill of the attorneys involved. Corporate defendants shelling out thousands of dollars per hour believe that paying for top talent will get them the best result, even though they could find others to take their case at much lower rates. One of the main reasons any client chooses a contingent fee arrangement, in addition to shifting the downside risk from client to lawyer, is that the attorney gets paid according to the quality of the results, and, therefore, better aligns the incentives between attorney and client. Thus, trial courts should be afforded the deference and focus primarily on the result achieved for the client (here, the class), just as in any other contingent arrangement.

Paying for Results, Not Hours

The Eighth Circuit’s focus on billable hours actually creates, rather than removes, a perverse incentive for class action lawyers. Under that regime, plaintiffs counsel who have the type of strong case that *could* be settled for a large sum early on would be better off waiting to settle the case until they had generated more “lodestar.” Needlessly prolonging cases in this way not only wastes judicial resources, but it also demonstrably hurts the class, which must wait longer to receive any payments. And, during that time, any available insurance money is diverted to defense fees, meaning that there will be less insurance proceeds left to pay a settlement. Cutting attorney fees because a great result was achieved quickly is like telling a heavyweight boxer that he didn’t “earn” his purse if he knocked his opponent out in the first round, rather than needlessly dancing around for the next 11 rounds to justify his full compensation for what would have otherwise been a stellar, early result (not to mention the risk of losing the fight during those extra rounds). The absurdity here is no different.

The percentage method, by contrast, “directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.” See *Wal-Mart Stores v. Visa U.S.A.*, 396 F.3d 96, 121 (2d Cir. 2005), quoting *In re Lloyd’s American Trust Fund Litigation*, 96 Civ. 1262 (RWS) (S.D.N.Y. Nov. 26, 2002). Of course, these considerations will really only come into play when an excellent result is achieved quickly. If the result is lackluster, then a percentage-based fee will reflect that—hence the incentive alignment. Seventh Circuit Judge Frank Easterbrook recognized this principle in *In re Synthroid Marketing Litigation*, 325 F.3d 974, 977 (7th Cir. 2003), where he wrote that a 22% contingent fee in an early settlement was proper because one great “advantage of the contingent fee is that the client (or the judge as protector of the class’s interests) need not monitor how many hours the lawyers prudently devoted to the case. The client cares about the outcome alone.”

The Fallacy of Fungibility

Further, the Eighth Circuit’s implication that any attorney could have achieved the same result overlooks the particular skills and experience of class counsel and fails to account for the reality that not all attorneys are equally capable of securing a great outcome for the class early on in a case. Easterbrook rejected the idea that legal services can be treated as fungible commodities. Criticizing the district court’s reliance on average bids by plaintiffs’ attorneys in auctions held by other courts to choose lead counsel, Easterbrook astutely noted that there was no “evidence that the market in legal services is uncompetitive, or that the [class members] are victims of a cartel.”

The legal services auction framework that Easterbrook rejected is precisely what the Eight Circuit encourages by suggesting that other attorneys would take on the case for less money. As Easterbrook noted, while contingent-fee arrangements work to benefit the class, choosing attorneys based on the amount of their bid (i.e., their hourly rate), would have an adverse impact on the quality of representation: “When it is hard to monitor counsel’s effort and other elements of quality, it is also hard to know what the bid represents. Maybe it shows that less work will be invested, and that less compensation then is required. ... Lawyers will earn a competitive return even at the lower level of compensation, but the class may be worse off.” *In re Synthroid Marketing Litigation*, 325 F.3d at 979 (citation omitted). Classes’ best interests are far better served by attorneys who are focused on efficiency and optimal results, rather than “dancing around the ring” so as to not risk a penalty from the court.

Abuse of Abuse of Discretion?

What’s especially disappointing here is that, while the Eighth Circuit acknowledged that there were no “missteps in the [district] court’s overall methodology for determining attorney’s fees,” it nevertheless substituted its judgment for that of the presiding judge. See *In re Genetically Modified Rice Litigation*, 764 F.3d 864, 871 (8th Cir. 2014) (“We give substantial deference to a district court’s determinations, in light of [its] superior understanding of the litigation.”) (citations omitted). For example, the district court, in performing its analysis, found the requested lodestar multiplier to comport with several comparable results. While the Eighth Circuit simply dismissed these opinions as “outliers” from other circuits, the only contrary authority on which it relied were opinions from other circuits from more than 20 years ago that were totally unrelated to the subject matter of the case at hand. The court even seems to suggest that the outcome might have differed without the lodestar cross check, which isn’t even required in the Eighth Circuit: “We aren’t obligated to close our eyes to a crosscheck that the court performed even if it didn’t have to.” By ruling that the district court abused its discretion, despite its careful consideration of the correct factors, the Eighth Circuit declined to afford proper deference to the presiding judge, undermining the role of district courts in managing complex litigation.

Conclusion

Clients want two things: a good result and a swift result. Class cases should be no different. By overturning the district court’s well-reasoned fee award and prioritizing hours logged over results achieved, decisions like T-Mobile risk deterring skilled attorneys from taking on complex, contingency-fee cases, ultimately to the detriment of class members. Courts should emphasize the importance of outcomes and preserve the integrity and effectiveness of class actions as valuable and necessary consumer protection tools on the path to economic justice.

Adam J. Levitt *is a founding partner of DiCello Levitt, where he heads the firm’s class action and public client practice groups. He can be reached at alevitt@dicellolevitt.com.*

Thank you to DiCello Levitt partner Corban Rhodes and associate Emma Bruder for contributing to this column.



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



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Legal Fee Tracker: Giuliani's bill for Trump work could go to Georgia poll workers

 [reuters.com/legal/legalindustry/legal-fee-tracker-giulianis-bill-trump-work-could-go-georgia-poll-workers-2024-09-05](https://www.reuters.com/legal/legalindustry/legal-fee-tracker-giulianis-bill-trump-work-could-go-georgia-poll-workers-2024-09-05)

David Thomas

Former New York Mayor Rudy Giuliani departs the U.S. District Courthouse after he was ordered to pay \$148 million in his defamation case in Washington, U.S., December 15, 2023. REUTERS/Bonnie Cash Purchase Licensing Rights , opens new tab

Sept 5 (Reuters) - It's been nearly four years since Rudy Giuliani became the public face of Donald Trump's failed legal efforts to reverse his 2020 presidential election defeat.

Now, in the latest twist stemming from Giuliani's career-ending work for the former Republican president, his \$2 million outstanding legal bill to the Trump campaign could be collected by two Georgia poll workers falsely accused of election fraud.

Ruby Freeman and her daughter Wandrea' "Shaye" Moss on Friday said they are entitled to Giuliani's claim to his unpaid Trump fees, as part of their larger effort to collect on a \$148 million defamation judgment imposed on Giuliani in December.

Giuliani told a bankruptcy court , opens new tab earlier this year that he is still owed about \$2 million after the Trump campaign hired him to spearhead its election efforts following Democrat Joe Biden's 2020 victory. He said the fees were due to be paid by the 2020 campaign and the Republican National Committee.

Freeman and Moss are seeking an order , opens new tab that would allow them to take possession of the legal fee claim and other Giuliani assets, including three World Series rings, multiple watches, and apartments in New York City and Palm Beach, Florida. "Now that plaintiffs are finally in a position to collect their judgment, the court should not hesitate to employ the enforcement devices available under New York law," Freeman and Moss said in their lawsuit.

Attorneys for Freeman and Moss did not immediately respond to a request for comment.

Giuliani spokesperson Ted Goodman on Friday called Freeman and Moss' \$148 million verdict "objectively unreasonable" and slammed their new lawsuit. Goodman did not immediately respond to a request for comment on the \$2 million fee claim.

Freeman and Moss' lawsuit comes two months after a judge ended Giuliani's bankruptcy, leaving him vulnerable to creditors.

Freeman and Moss were election workers in heavily Democratic Fulton County, which includes Atlanta, where a strong showing by Biden helped give him a narrow Georgia victory.

Trump and his surrogates used surveillance video of the vote count at State Farm Arena to falsely accuse Freeman and Moss of processing "suitcases" full of fake ballots for Biden late at night on Election Day, after most poll workers and election observers left.

Freeman and Moss told Reuters in December 2021 that the accusations had derailed their lives.

A federal judge in Washington, D.C., in August 2023 held Giuliani liable for defaming Freeman and Moss as a sanction for failing to turn over electronic records during the litigation, paving the way for the \$148 million judgment.

Giuliani was disbarred in New York in July after a state court found the former New York City mayor and U.S. attorney had lied in arguing the election was stolen from Trump.

- In other legal news, a Delaware judge who will decide how much to award lawyers who successfully voided Tesla CEO Elon Musk's \$56 billion pay package received some unsolicited guidance last month from the state's top court: No windfalls.

- A company that defeated a U.S. Federal Trade Commission lawsuit claiming it duped consumers into buying print subscriptions has asked a U.S. judge to award \$5.4 million in legal fees for the agency's "dramatic overreach."

Attorneys for American Future Systems in a court filing on Tuesday said the FTC should be forced to cover legal fees after losing its case following a 15-day trial last year.

- A Washington state appeals court last week ruled [here](#), opens new tab that a public school district cannot force its insurer to pay a \$1.77 million settlement it struck with a Christian high school football coach whose lawsuit over on-field prayers went all the way to the U.S. Supreme Court.

The high court in 2022 sided with Joseph Kennedy against Bremerton School District, finding that the district violated Kennedy's rights after he was suspended for refusing to stop leading prayers with players on the field after games.

- A Paul Hastings lawyer overseeing the bankruptcy estate of an exiled Chinese businessman convicted of fraud in July has sued U.S. law firm Boies Schiller Flexner in an attempt to recoup money that was allegedly fraudulently transferred to the firm. Boies Schiller received more than \$653,000 in legal fees from a shell company belonging to Guo Wengui, trustee Luc Despins alleged in a lawsuit filed Friday in Connecticut bankruptcy court [here](#), opens new tab. The shell company was allegedly used by Guo to dodge his creditors, Despins said.

Boies Schiller had earlier represented Guo, who has several aliases including Ho Wan Kwok, in various legal proceedings and won an arbitration award over its fees.

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

Read more:

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Lawyers in Norfolk Southern Crash Want \$162 Million for Work

By Eric Heisig 2024-09-09T12:33:49000-04:00

- Norfolk Southern agreed to \$600 million settlement in April
- Attorneys say 27% award request is fair and reasonable

Attorneys representing those affected by a fiery and toxic train derailment last year in East Palestine, Ohio, are requesting \$162 million of the \$600 million settlement that Norfolk Southern Corp. agreed to pay in a series of lawsuits.

The litigation that led to the settlement involved more than 35 law firms contributing nearly 60,000 hours, taking 70 depositions, poring over more than one million documents, drafting court filings, and having experts create an environmental sampling and testing program, [a memorandum](#) filed late Sept. 6 says. The 27% attorneys' fees request is within the range of awards that judges on and below the US Court of Appeals for the Sixth Circuit have found reasonable, the lawyers claim.

The attorneys also want \$18 million for expenses and \$15,000 for each of the 16 class representatives.

"The work on this case brought unusually timely justice to the community that was severely impacted by the disaster, reaching a settlement in just over one year from the date of the derailment—which, if approved, will lead to funds being distributed to the Class in this calendar year," the memorandum states.

The request comes ahead of a Sept. 25 hearing on the proposed settlement before Judge Benita Y. Pearson, of the US District Court for the Northern District of Ohio. It was filed alongside requests for [final settlement approval](#) and for Pearson's blessing on [a method](#) of distributing the money.

Norfolk Southern and attorneys representing a class of people affected by the derailment announced the settlement [in April](#). Lawsuits over the February 2023 derailment started getting filed shortly after the train derailed and after the rail giant launched a controlled burn of the chemicals to mitigate the explosion risk, creating plumes of black smoke that blanketed the small village about 90 miles southeast of Cleveland.

The attorneys call the agreement “an excellent outcome” that enjoys overwhelming support, and said the judge should disregard the objections. Nearly 55,000 claims for a part of the settlement have been filed as of Sept. 3, according to a filing urging final approval.

Nobody was killed or injured in the accident, though the derailment spewed chemicals into the air, water, and soil in the Ohio town, sparking public outrage, a political firestorm, and concerns of current and future illnesses.

The company [separately agreed](#) to pay \$310 million to resolve claims brought by the federal government, though a different federal judge must also sign off on that settlement.

The class is represented by Zoll & Kranz LLC, Burg Simpson Eldredge Hersh & Jardine PC, Grant & Eisenhofer PA, Simmons Hanly Conroy LLP, and Morgan & Morgan PA, among others. Norfolk Southern is represented by Wilmer Cutler Pickering Hale and Dorr LLP and Dickie, McCamey & Chilcote PC.

The case is [In re E. Palestine Train Derailment](#) , N.D. Ohio, No. 4:23-cv-00242, motions filed 9/6/24 .

To contact the reporter on this story: Eric Heisig in Ohio at eheisig@bloombergindustry.com

To contact the editor responsible for this story: Patrick L. Gregory at pgregory@bloombergindustry.com

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BUSINESS | **LOGISTICS**

Norfolk Southern Probing Potential Misconduct by CEO Alan Shaw

Shareholders in May voted against a proposal by an activist investor to remove Shaw as CEO

By [Colin Kellaher](#) [Follow](#)

Updated Sept. 9, 2024 8:32 am ET



Alan Shaw became Norfolk Southern CEO in May 2022. PHOTO: BRENDAN SMIALOWSKI/AFP/GETTY IMAGES

Norfolk Southern **NSC 1.33%** ▲ is looking into potential misconduct by Chief Executive Alan Shaw, who recently withstood an activist investor's push to unseat him.

Norfolk late Sunday said its board has opened an investigation into allegations of potential conduct by Shaw that is inconsistent with the Atlanta-based freight railroad's code of ethics and company policy.

Norfolk didn't disclose the nature of the allegations, but CNBC, citing three people familiar with the matter, on Sunday reported that Shaw allegedly

engaged in an inappropriate workplace relationship. Shaw didn't respond on Sunday to a request for comment.

Norfolk said that its board has hired a law firm to conduct an independent investigation of the allegations and that it won't comment further until the probe is complete.

Norfolk shareholders in May voted against a proposal by activist investor Ancora Holdings to remove Shaw as CEO.

Ancora scored a partial victory, as investors voted to replace three members of the railroad's 13-person board, but Ancora had been pushing for seven board seats and demanding the replacement of both Shaw and Norfolk's chief operating officer, John Orr.

Shaw joined Norfolk in 1994 as a cost systems analyst and rose through the ranks to become CEO in May 2022. He received a base salary of \$1.1 million and total compensation topping \$13.4 million last year.

Several high-profile executives have lost their jobs in recent years over personal relationships that ran afoul of company policies, often losing out on millions of dollars in compensation.

Clawing back executive pay has become more common in recent years, and most companies have policies to recoup pay in certain circumstances.

Bernard Looney abruptly resigned last year as CEO of BP over what the British energy company described as past relationships with colleagues, losing out on as much as \$40.6 million in compensation he might have received.

McDonald's ousted Steve Easterbrook as CEO in 2019 after he had a consensual relationship with an employee, and the former executive in 2021 agreed to return compensation valued at more than \$105 million to resolve a legal dispute related to his dismissal as head of the fast-food chain.

Write to Colin Kellaher at colin.kellaher@wsj.com

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NEWS

Judge Pauses Landmark \$2.75B NCAA Settlement Proposal, Parties to Hash Out More Details

"This provision was carefully negotiated. It is a central part of the deal, and without it, I am not sure there will be a settlement to submit," Rakesh Kilaru, a partner with Wilkinson Stekloff and counsel to the NCAA, said.

September 06, 2024 at 04:13 PM



Colleen Murphy



The original version of this story was published on [Law.com](#)

A landmark \$2.75 billion NCAA settlement proposal hit a snag Thursday when a federal judge in California tasked attorneys with Hagens Berman Sobol Shapiro, Winston & Strawn, and Wilkinson Stekloff with revisiting the terms of what third-party collectives, or boosters, would look like for college sports in a post-settlement era.

The move potentially puts the antitrust settlement in *House v. NCAA* at risk after an agreement was reached in May between student-athletes, the National Collegiate Athletics Association, and five conferences, including: the Big Ten, Southeastern Conference, Pac-12, Big 12, and Atlantic Coast Conference. The agreement, which also applied to two other cases in the U.S. District Court for the Northern District of California, would allow for student-athletes to be paid for the use of their name, image, and likeness.

At a hearing Thursday, U.S. District Judge Claudia Wilken considered the [plaintiffs’ motion for preliminary settlement approval, which has been challenged by female athletes](#). Wilken questioned some of the terms, pointing out she did not see the word “collective” in the settlement agreement or in a July 1 NCAA guidance document.

Wilken said she was “quite concerned” about the settlement agreement’s language on third-party NIL restrictions.

Collectives, sometimes called boosters, are business entities that have become a popular way to provide NIL deals to student-athletes. The NCAA settlement would eliminate those payments. Wilken pointed out that the athletes would lose payments they had been receiving from the collectives.

Plaintiffs’ counsel, Jeffrey Kessler, a partner and co-executive chairman at Winston & Strawn, told the judge that the settlement agreement protects those payments. Current NCAA rules do not prohibit third-party NIL and will remain in effect under the settlement agreement, he said.

Kessler added that the NCAA cannot adopt new rules that impose more restrictions. Steve W. Berman, managing partner of Hagens Berman, is also representing the plaintiffs.

Rakesh Kilaru, a partner with Wilkinson Stekloff and counsel for the NCAA, said that pay-for-play is forbidden under the current rules. But under the new system, schools will have the discretion to pay student-athletes as they see fit.

“And that won’t be pay-for-play?” Wilken asked. Kilaru disagreed.

“That is true in the context of institutions and also true in the context of NIL,” Kilaru said. “The July 1 guidance, which I believe you are referring to, says you cannot have improper inducements for pay-for-play, and you can’t have recruiting that gets you to come to a school. Today, without the settlement, there is a ban on pay-for-play. And booster NIL payments, or NIL payments, that are not for legitimate NIL are currently prohibited.”

Wilken suggested that the settlement agreement should contain the same language in the guidance, but Kilaru pushed back and said third-party payments for illegitimate NIL are prohibited.

“It seems to me that collectives money might be justified, or disingenuously justified by calling it NIL,” Wilkens said. “Either it is or it isn’t, but what are you proposing to do about it?”

Kessler said he does not expect the settlement to reduce third-party payments from collectives. If anything, he said, he believes they are increasing.

“I think the bottom line, from our perspective, is that there isn’t anything that can be done,” Kilaru said.

Kilaru explained that pre-settlement, third-party NIL is allowed, and not a large amount of money is being provided directly from schools to student-athletes. He noted that post-settlement, not only will there be third-party NIL, but substantial benefits will also flow directly from institutions to student-athletes.

“This provision was carefully negotiated. It is a central part of the deal, and without it, I am not sure there will be a settlement to submit,” Kilaru said.

Still, Wilken wasn’t satisfied.

“I think we have got problems with this and I don’t have an idea of how to fix them,” Wilken said. “I think I am just going to have to throw this back on you all to see if you can come up with something better. Something that is workable, that is consistent and acknowledges what it used to be and changes that with something that makes sense, and that is understandable, and enforceable, and fair, keeping in mind that taking things away from people generally doesn’t work well.”

The NCAA sent Law.com a memorandum on Friday, which was also distributed to its membership. In the memo, the NCAA said the hearing did not go as expected after “months of negotiation” with the attorneys representing the student-athletes. The proposal offers “both sides the best possible alternative to endless litigation,” and allows student-athletes to receive landmark financial benefits, as well as the ability to monetize their name, image, and likeness rights without limitation, the NCAA said.

“The settlement agreement the NCAA and autonomy conferences submitted to the court was the product of hard-fought negotiations that would bring stability and sustainability to college sports while maintaining an education-based model that equips hundreds of thousands of students every year with degrees and tools to succeed throughout their life. That continues to be our goal and the NCAA and autonomy conferences will carefully consider the court’s questions, which are not uncommon in the context of class action settlements,” the NCAA said.

Still, the parties appear to be willing to review the judge’s concerns.

“The judge asked the parties to make certain clarifying language changes in the agreement and to make changes in the provisions regarding booster payments,” Kessler said in a statement sent to Law.com. “Plaintiffs are willing to do so and will be negotiating with defendants to address the judge’s concerns.”

Kessler said he is optimistic that a resolution is possible and hopes the settlement will be back on track within the three-week deadline. However, he added that if the NCAA and the conferences are unwilling to make the changes, his team is prepared to ask for a new trial date.

“Either way, we will continue to use the antitrust laws to protect the interests of college athletes in obtaining a fair and just system of compensation,” Kessler said.

The NCAA said other litigation involving these matters is still pending.

“Regarding the *Fontenot* and *Cornelio* lawsuits, we are advocating to address these claims, which are the same as the ones at issue in the *House*, *Carter* and *Hubbard* cases,” the organization’s memo said. “However, the Colorado cases are being litigated by different plaintiffs’ lawyers from those in California. Our belief is that either the federal judge in California or the federal judge in Colorado will recognize the duplicate claims and view the settlement to have addressed the student-athlete claims in all cases.”

NOT FOR REPRINT

DNA tester 23andMe to pay \$30M to end cyberattack class action

DJ [dailyjournal.com/articles/380868-dna-tester-23andme-to-pay-30m-to-end-cyberattack-class-action](https://www.dailyjournal.com/articles/380868-dna-tester-23andme-to-pay-30m-to-end-cyberattack-class-action)

Data Privacy,
Class Action,
Civil Litigation

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Sep. 9, 2024

All U.S. residents whose personal information was compromised get part of the \$30 million and 23andMe will certify "certain business practice commitments related to the security of users' personal information."

DNA tester 23andMe Inc. will pay \$30 million to settle a consolidated class action related to a cyberattack last October that exposed the sensitive personal information of millions of people, attorneys wrote in a court filing last week.

A motion for preliminary approval of the agreement is pending before U.S. District Judge Edward M. Chen, an appointee of President Barack Obama.

In July, plaintiffs' attorneys told Chen they had reached a settlement in principle with the South San Francisco company.

Gayle M. Blatt of Casey Gerry Schenk Francavilla Blatt & Penfield LLP, Cari C. Laufenberg of Keller Rohrback LLP, and Norman E. Siegel of Stueve Siegel Hanson LLP are co-lead counsel for the plaintiffs.

They reached an agreement with Ian C. Ballon and Rebekah S. Guyon of Greenberg Traurig LLP, who represent 23andMe, that all U.S. residents whose personal information was compromised get part of the \$30 million along with 23andMe's "certification of certain business practice commitments related to the security of users' personal information."

The settlement provides "specialized and comprehensive monitoring" for all class members, monetary relief for qualified settlement class members, and a provision enjoining class members from pursuing separate claims -- including in arbitration or state court -- pending their decision about whether to ask to be excluded from the deal.

Cybercriminals targeted plaintiffs' genetic and ancestral information and posted it for sale on the "dark web," according to the complaint.

"Among those specifically targeted for sale on the dark web are the 23andMe customers of Chinese and Ashkenazi Jewish descent, who face particularly acute dangers on account of being targeted because of antisemitism and anti-Asian ideologies," Siegel wrote. *In re: 23andMe Inc. Customer Data Security Breach Litigation*, 24-CV-03098 (N.D. Cal., filed April 16, 2024).

Neither the company nor any of the attorneys responded to emails seeking comment about the settlement Friday.

#380868

Craig Anderson

Daily Journal Staff Writer

craig_anderson@dailyjournal.com

Honey Buyers Can't Revive False-Ad Claims Against Tennessee Farm

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XA3BTOHK000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/XA3BTOHK000000)

Consumers alleging a Tennessee farm's advertisements that its honey was "100% raw Tennessee honey" were false failed to revive their proposed class action because their complaint lacked key details, a federal appeals court said Friday.

The plaintiffs said honey from Strange Honey Farm LLC wasn't raw, from Tennessee, or 100% honey, but "the complaint fails to adequately allege why these claims on the labels were false or when these allegedly fraudulent statements were made to plaintiffs," the US Court of Appeals for the Sixth Circuit said affirming the lower court's dismissal.

The consumers said the honey wasn't raw because the farm heats its products above 105 degrees fahrenheit and that testing the products' 5-hydroxymethylfurfural value (HMF) can show if honey has been heated.

"The complaint gives no explanation of what this alleged 'testing' entailed," Judge Richard Allen Griffin said. The complaint didn't say who did the testing, how many samples were tested, when the samples were purchased or how many samples were below the requisite HMF value indicating non-heated honey. "Indeed, the complaint does not allege that the jars of honey purchased by plaintiffs were the samples with the high HMF values or even that those jars purchased by plaintiffs were among the samples tested at all," Griffin added.

Allegations that Strange Honey's misrepresented the origins of its honey and use of fillers were "sparser still," Griffin said. In addition to gaps in facts about testing, the complaint also didn't explain how someone can determine whether honey is from Tennessee or elsewhere, he said.

No Leave to Amend

Though the complaint alleged Strange Honey sourced non-Tennessee honey and fillers to meet consumer demand, "alleging potential motives for mislabeling is different from alleging facts that adequately show that Strange Honey mislabeled its products," Griffin said.

Griffin said the lower court's decision to deny leave to amend was also proper because the consumers' proposed changes wouldn't have cured the gaps in their complaint. Though they proposed adding dates about when they bought the honey, the amendments don't specify whether the purchases were part of the testing.

“What is more, the proposed amended complaint provides no additional details about the nature of the testing, making it just as deficient as the original as to why the labels were fraudulent,” Griffin said.

Judges R. Guy Cole Jr. and Chad A. Readler joined the opinion.

The consumers were represented by Kent Heitzinger & Associates, Krislov & Associates Ltd., and Holifield & Janich PLLC.

Strange Honey was represented by Gordon Ball LLC.

The case is Greer v. Strange Honey Farm LLC , 6th Cir., No. 23-05589, 9/6/24 .

To contact the reporter on this story: Shweta Watwe in Washington at swatwe@bloombergindustry.com

To contact the editor responsible for this story: Andrew Harris at aharris@bloomberglaw.com

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kw=Procopio%20Cory%20Managing%20Partner%20John%20Alessio%20Dies%20at%2055&utm_position=1&utm_source=email&utm_medium=enl&utm_campaign=afternoonupdate&utm_content=202



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[NEWS](#)

Procopio Cory Managing Partner John Alessio Dies at 55

Alessio was first elected chair of the San Diego-based litigation firm in 2017.

September 06, 2024 at 05:28 PM

Law Firm Partners



Samson Amore



What You Need to Know

- Former Procopio Cory managing partner John D. Alessio, 55, has died following a battle with cancer.
- Alessio was in the midst of his third term as firmwide chair.

Procopio, Cory, Hargreaves & Savitch managing partner John D. Alessio, 55, died on Tuesday following a five-year battle against cancer, the firm announced Friday.

Alessio was a native San Diegan and practiced from the firm's downtown San Diego office for 16 years. He had previously run his own firm, Thompson & Alessio, for more than six years before joining Procopio Cory as a partner in 2008. Alessio was elected firmwide managing partner first in 2017 and was twice reelected. He served two consecutive three-year terms in the role and was just beginning his third, a firm spokesperson told ALM.

While practicing law, Alessio focused on business and employment litigation and class actions, and developed expertise in trade secret issues and contractual disputes in the U.S. and Mexico. He also oversaw Procopio Cory's recruitment of new staff and expansion into Orange County, Las Vegas and Washington, D.C.

Alessio was a graduate of the University of San Diego, where he obtained his bachelor's degree in business and a law degree. He was an active member of his community, founding the nonprofit Red Autismo, which aided autistic children in Los Cabos, and serving as a director for the World Design Capital San Diego-Tijuana. Alessio also was active in the local Entrepreneurs Organization and PEERS San Diego.

In a 2018 video for the firm, Alessio described community service as "an obligation," adding, "I think of all businesses, and especially law firms, because we feed off our community, and we can do a lot of good for our communities."

Alessio is survived by his wife, retired tax attorney Sofia Alessio and their two daughters, his mother and three siblings.

NOT FOR REPRINT

The DOJ called it the biggest bribery case in Ohio history. Did they let the bribers walk?

[cleveland.com/open/2024/09/the-doj-called-it-the-biggest-bribery-case-in-ohio-history-did-they-let-the-bribers-walk.html](https://www.cleveland.com/open/2024/09/the-doj-called-it-the-biggest-bribery-case-in-ohio-history-did-they-let-the-bribers-walk.html)

By Jake Zuckerman, jzuckerman@cleveland.com Adam Ferrise, cleveland.com

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Former FirstEnergy CEO Chuck Jones, center, and top lobbyist Mike Dowling, seated at the far right, as well as the state's former ranking utilities regulator Sam Randazzo, at left, all appeared in court on Tuesday, February 13, 2024, for their arraignment in Summit County Common Pleas Court. (David Petkiewicz/Cleveland.com)David Petkiewicz, cleveland.com

COLUMBUS, Ohio – The U.S. Department of Justice has sent an Ohio House Speaker to prison for taking a bribe, secured an indictment of a top regulator for the same and coaxed an admission from FirstEnergy that two of its executives had paid them off.

More than four years since the first arrests, though, the federal government hasn't charged any FirstEnergy executives, other politicians or operatives who advanced the scheme to force Ohio's ratepayers into a \$1.3 billion bailout of two nuclear plants owned at the time by the company.

Relatively little evidence suggests that is likely to change. The reasons why are murky.

Cleveland.com and The Plain Dealer reached out to about 60 people connected with the case, conducting background interviews with a dozen people close to the matter who are not authorized to speak publicly. The consensus: Federal prosecutors got the public officials, and now they're going to let the bribe payers walk.

So what has stopped the DOJ from pursuing more charges? The sources didn't speak with certainty, but they offered myriad possibilities: a central witness died; wealthy defendants hired premier legal representation; the department is historically soft on corporate crime; prosecutors misread the facts around some transactions; the U.S. Supreme Court's skepticism of public corruption cases; or prosecutors' aversion to trying tough cases they could lose.

"If I had to guess right now, you're not going to see an indictment," said one source familiar with the federal investigation about the likelihood of indicting corporate officials.

U.S. Attorney for the Southern District of Ohio Ken Parker and Emily Glatfelter, the prosecutor who put former Ohio House Speaker Larry Householder in prison, have been tight lipped. But five sources said they believe the feds are done with their work. One of them specified that the statute of limitations for filing an indictment has already passed, although others said prosecutors might still have time.

A spokeswoman for Parker's office declined an interview request with Parker or Glatfelter and did not answer written questions.

In an emailed statement, Parker said his office's work is "ongoing" and that prosecutors are not yet ready to "pat ourselves on the shoulder and say our work is complete."

"Our office is thoughtful about the types of charges and the timing of charges it brings," Parker's statement said. "It is always a priority of this office to do thorough work and build strong cases on behalf of the people we serve."

In recent court filings, Parker's office has doubled down on the notion that Householder accepted bribes from FirstEnergy's former CEO Chuck Jones or senior vice president Mike Dowling – a position the federal government has declined to back up with indictments of either executive.

If the federal case is over, it would end with two convicted at trial, two who pleaded guilty and cooperated with prosecutors and two co-defendants who died by suicide.

Facing federal inaction against the corporate officials, Ohio Attorney General Dave Yost and county prosecutors filed criminal charges against Jones, Dowling and former top utility regulator Sam Randazzo earlier this year. The state charges focus more on a \$4.3 million

payment from FirstEnergy to a business owned by Randazzo just before his appointment, rather than the \$60 million bribe FirstEnergy says its executives paid Householder for a legislative bailout. Both the state and federal prosecutors say the Randazzo payment was a bribe in exchange for favorable regulatory treatment. Jones and Dowling have pleaded not guilty.

Now, several factors weigh against the likelihood of new charges from the federal government.

By bringing a state case, Yost added a new hurdle for federal charges. U.S. attorneys abide by the “Petite Policy,” which generally restricts them from initiating parallel cases to those filed by state governments. The rule can be broken, but sources said it’s rare.

Randazzo died by suicide in April, leaving prosecutors without a key potential witness to a few critical events, conversations and transactions.

Memories fade with time, and unanswered questions in the case could come down to details about conversations in a corporate jet to Washington, D.C. in 2017 or over dinner at a swanky Columbus social club in 2018. And a stingy interpretation of the statute of limitations could kill an indictment long before any trial.

The DOJ doesn’t bring cases it doesn’t think it can win and has shown an unwillingness over the last two decades to target corporate misbehavior. And here, the state prosecutors now face a formidable, high-priced legal opposition, including former U.S. attorneys, former assistant U.S. attorneys and a former FBI special investigator with a background in public corruption cases.

Plus, the federal court system is increasingly skeptical of public corruption prosecutions. The U.S. Supreme Court has sided with a Virginia governor accused of taking bribes from a tobacco executive; an Indiana mayor accused of taking a consulting job as a gratuity for a lucrative public contract; an Enron executive accused of wire fraud after the company’s epic collapse; and several men convicted in a bid-rigging scheme under New York’s governor.

Some signs suggest Parker’s office has backed off the case. In August 2022, Parker asked that the PUCO stall its regulatory investigation into FirstEnergy, citing possible interference with a federal case. Without explanation, Parker didn’t renew the request in February. And earlier this summer, several requirements for FirstEnergy in its deal with the DOJ expired. Glatfelter told a judge that FirstEnergy must continue to cooperate in the federal investigation, but she didn’t specify who or what is being investigated.

Other limited signs indicate federal prosecutors are still at work. Parker’s office hasn’t yet dropped the wire fraud charge against FirstEnergy. And two men charged in the investigation – Householder’s political lieutenant, Jeff Longstreth, and a FirstEnergy Solutions lobbyist,

Juan Cespedes – pleaded guilty to racketeering and testified against Householder. Eighteen months later, neither has been sentenced. This could indicate they're still cooperating, although some sources offered other plausible explanations.



FBI agents carry boxes and bags out of the Columbus home of Public Utilities Commission of Ohio Chairman Sam Randazzo on Monday, Nov. 16, 2020. (Jeremy Pelzer/Cleveland.com)

The state's case

The federal government indicted Randazzo in December 2023, at the time its first new arrest in the case in 3.5 years. Nearly five months after Randazzo died, federal prosecutors notified the court of his death. The judge overseeing the case, Timothy Black, formally closed the case on Thursday.

If the federal government has indeed concluded its work, Yost is the last chance to convict the corporate bribe payers in what then-U.S. Attorney David DeVillers said in July 2020 was “likely the largest bribery, money laundering scheme ever perpetrated against the state of Ohio.”

The Summit County judge overseeing Yost's case dismissed charges against Randazzo soon after his death. However, his business that received the \$4.3 million, the Sustainability Funding Alliance, remains an active defendant.

So too do Jones and Dowling.

Unlike in the federal case, state court rules require prosecutors to publicly disclose some information about their case.

The court docket offers hints of deals with prosecutors. Yost's attorneys disclosed handing over to Jones and Dowling a document titled "Court Filing – Pine Immunity." Ty Pine was a FirstEnergy lobbyist for a decade who was close to Dowling and Jones. His attorney and Yost's office have declined to confirm or deny if he has an immunity deal.

Another document handed over is titled "Chack – OH AG NPA." Dennis Chack rose through the ranks of the company to become a senior vice president, and sources attribute this to a close personal relationship with Jones. While NPA is a common abbreviation for non-prosecution agreement, no one in this case would say what it stands for here.

Court records also disclose proffer agreements, which allow figures in an investigation to give prosecutors information that can't be used against them in a prosecution. Those with proffers listed in their name include Randazzo's secretary Debbie Ryan; FirstEnergy's former general counsel and chief ethics officer Ebony Yeboah-Amankwah; FirstEnergy's current controller and chief accounting officer Jason Lisowski; Randazzo's rival for a PUCO opening Jason Rafeld; Householder's chief of staff Jonathon McGee; Householder's energy policy aide Pat Tully; FirstEnergy's former chief legal officer Robert Reffner; and FirstEnergy associate general counsel Brad Bingaman.

Plus, Yost agreed to settle a civil lawsuit against FirstEnergy for a comparatively weak \$20 million. FirstEnergy agreed to cooperate with Yost's investigation.

A hearing is scheduled later this month on motions to dismiss the cases against Jones and Dowling, the first major test of the strength of the state's prosecution. A trial date has not yet been set.

In court filings in their joint defense, Jones and Dowling have denied the \$4.3 million paid to Randazzo was a bribe. They say the money was FirstEnergy paying off a legal settlement from 2015, when a group of large-scale electricity buyers represented by Randazzo agreed to back off in their legal opposition to new charges to customers requested by FirstEnergy.

Neither federal nor state prosecutors have charged the executives for bribing Householder.



U.S. Attorney for the Southern District of Ohio Ken Parker reads a statement after a jury convicted ex-Ohio House Speaker Larry Householder and lobbyist Matt Borges of racketeering. He's flanked by the prosecutors who tried the case, from left to right: Matt Singer, Megan Gaffney Painter, and Emily Glatfelter. (Jake Zuckerman/Cleveland.com)

A statehouse, sold?

In March 2023 in a staid federal courthouse in Cincinnati, Glatfelter was succinct in her opening statement.

"Larry Householder sold the statehouse," she said. "He ripped off the people he was elected to serve."

Throughout the trial, Glatfelter boiled down a complicated argument into a simple story. A dark money nonprofit Householder secretly controlled had accepted \$60 million from FirstEnergy between 2017 and 2020. Some of that went to traditional political spending in support of a \$1.3 billion nuclear bailout bill FirstEnergy wanted; some of it went to building Householder's political machine in the Ohio House; and about \$500,000 went to paying down Householder's personal debts and repair bills to a second home he owned in Naples, Florida.

The \$4.3 million the Justice Department says Randazzo accepted from FirstEnergy in 2019 was a separate case that brought charges against the ex-regulator in December 2023, months before he died by suicide.

Twice now, the feds have accused Ohio public officials of taking multimillion dollar bribes. And in a 2021 deal with federal prosecutors, FirstEnergy admitted to bribing both Randazzo and Householder, pinning most of the blame on Jones and Dowling. It signed a similar deal with the state this year. It paid \$230 million and \$20 million, respectively, in penalties.

After a judge announced Householder's conviction, Parker, Glatfelter, and three prosecutors who assisted in the trial stood outside the courthouse touting their accomplishment. A reporter asked how it can be that Householder accepted a bribe no one has been accused of paying.

"Thank you," was all Parker offered in response.



Stories by Jake Zuckerman

- Democratic Ohio Supreme Court Justice Jennifer Brunner rebuffs GOP request to step aside from redistricting case
- From influence peddler to inmate, Matt Borges wants a break
- Defense attorneys in HB6 bribery scandal include 11 former DOJ, state prosecutors

Jake Zuckerman covers state politics and policy for Cleveland.com and The Plain Dealer.

Adam Ferrise covers federal courts at Cleveland.com and The Plain Dealer.

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Around the Web

Defense attorneys in HB6 bribery scandal include 11 former DOJ, state prosecutors

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By Adam Ferrise, cleveland.com Jake Zuckerman, jzuckerman@cleveland.com

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Robert Hur, who recently led the investigation into President Joe Biden's handling of classified documents, is one of 11 former U.S. Department of Justice attorneys to represent FirstEnergy Corp. in the criminal and civil cases over the House Bill 6 bribery scandal. (AP Photo/Nathan Howard)AP

CLEVELAND, Ohio — One lawyer prosecuted a former a top national security adviser on the Iran-Contra scandal. Another took on top New York mafia figures in court. And a third recently investigated President Joe Biden over his handling of classified documents.

They are among the 11 former U.S. Department of Justice or state prosecutors hired by FirstEnergy Corp. and its former executives to defend criminal and civil cases related to the House Bill 6 scandal.

Simply put, the Akron utility's hiring of such top-shelf attorneys could help explain why some outcomes could be viewed as favorable to the company and its former employees.

"People who have resources are going to hire lawyers based not only on skill but on legal and political power and influence when they are doing things," said Michael Benza, a Case Western Reserve University law professor.

The attorneys hired by FirstEnergy and its former employees include Robert K. Hur, a former associate deputy attorney general in Donald Trump's administration. He was appointed special prosecutor to investigate Biden's mishandling of classified documents.

Hur rejected criminal charges against Biden, but his report included highly publicized remarks about Biden's age and memory.

He is joined in the civil cases by William Scherman, a former general counsel and chief of staff for the Federal Energy Regulatory Commission, which regulates nuclear power, an invaluable asset in a case revolving around energy macroeconomics and the bailout of two nuclear plants.

Hur and Scherman are among the attorneys representing former FirstEnergy CEO Chuck Jones in the civil cases.

Other attorneys representing Jones, former FirstEnergy Vice President Michael Dowling or the company include:

- Carole Rendon, a former U.S. attorney in Cleveland, who represents Jones. She was instrumental in the DOJ's investigation into Cleveland police over the department's use of excessive force. She also prosecuted Ben Suarez, a North Canton businessman convicted of witness tampering in a campaign-finance case.
- George Stamboulidis, who prosecuted corruption and New York mafia leaders in the Genovese, Colombo and Lucchese crime families as an assistant U.S. attorney and, in private practice, has been appointed by the DOJ as an independent monitor five times, including overseeing investment firm Merrill Lynch in the wake of the 2001 collapse of Enron. He represents Jones.
- Dan Webb, a former U.S. attorney in Chicago, who was appointed special counsel in the 1980s and prosecuted retired Adm. John Poindexter, then President Reagan's national security adviser, during the Iran-Contra scandal. Webb represents Dowling.
- John McCaffrey, a former FBI agent and a former assistant U.S. attorney whose investigations focused on public corruption and white-collar fraud against the government. He also represents Dowling.

Benza said having an attorney with inside knowledge of how federal prosecutors work is key.

“You will see qualified, very good, government lawyers cross over to the other side of the case and represent defendants in those cases because they have the skills, the experience to know how the government’s going to do it and then respond to it,” Benza said.

The legal strategy matched the company’s lobbying strategy: Hire not just the talented but the well-connected.

The House Bill 6 scandal stemmed from FirstEnergy pouring \$60 million through dark money channels to successfully lobby to get lawmakers to pass a \$1.3 billion legislative bailout for two aging nuclear plants. It also included a \$4.3 million payment to businesses owned by a state regulator. It spawned state and federal criminal investigations and several lawsuits.

In the more than five years since the nuclear bailout bill was signed into law, no FirstEnergy officials have been charged in the federal case. And five people with knowledge of the cases have told cleveland.com and The Plain Dealer that the federal case will likely end there, without a company official federally charged.

U.S. Attorney Kenneth Parker, who is overseeing the federal case, said in a statement that his office’s work is “ongoing.”

Some of those who spoke with cleveland.com and The Plain Dealer pointed to the high-level stable of lawyers hired by FirstEnergy as part of the reason the case has dragged on for years without charges filed against top company officials.

The company agreed to a deferred prosecution agreement with the U.S. Department of Justice in which it paid \$230 million and a similar agreement with state prosecutors for \$20 million.

As part of the agreements, the company admitted to bribing former Ohio Speaker of the House Larry Householder and former Public Utilities Commission of Ohio Chairman Sam Randazzo.

FirstEnergy also was bound by a provision in which it would cooperate with any law enforcement investigations.

That cooperation helped land Householder in prison for 20 years and a co-defendant, lobbyist Matt Borges, in prison for five. Two others pleaded guilty and haven’t yet been sentenced, and two others charged in the case— Randazzo and lobbyist Neil Clark — died by suicide.

Though federal prosecutors have so far passed on charging anyone at FirstEnergy, the Ohio attorney general’s office in February charged Jones and Dowling. Both pleaded not guilty, and the case is pending in Summit County Common Pleas Court.

FirstEnergy is paying for Jones and Dowling's attorneys in the criminal case, according to state prosecutors.

Assistant Attorney General Matthew Meyer, who is prosecuting the state case against Jones and Dowling, has often referred to the defendants' "platoon" of attorneys in court hearings and filings.

Former Ohio Attorney General Marc Dann, now in private practice and who has no connection to the FirstEnergy litigation or the investigations, said the case is consistent with a national pattern: Companies use plea agreements to avoid accountability for their officers. The businesses are represented by attorneys who themselves were former elite prosecutors.

The strength of FirstEnergy attorneys isn't just felt on the criminal cases.

In a lawsuit filed by investors against FirstEnergy, a federal judge ordered the release of an internal company investigation over House Bill 6. The judge's order said FirstEnergy couldn't appeal.

Company attorneys, however, took the unusual step of filing a lawsuit directly to the 6th U.S. Circuit Court of Appeals. The Republican-leaning court accepted the case, and some of the biggest law firms in the world filed arguments backing FirstEnergy's position.

The matter remains pending.

"With the right money and level of lawyers, you can buy yourself a lot of due process of law," Dann said.

Adam Ferrise covers federal courts for Cleveland.com and The Plain Dealer.

Jake Zuckerman covers state politics and policy for Cleveland.com and The Plain Dealer.

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Around the Web

HB 6 demonstrates how the U.S. Justice Dept. in Ohio protects the wealthy and lets bribers go free: Today in Ohio

 [cleveland.com/news/2024/09/hb-6-demonstrates-how-the-us-justice-dept-in-ohio-protects-the-wealthy-and-lets-bribers-go-free-today-in-ohio.html](https://www.cleveland.com/news/2024/09/hb-6-demonstrates-how-the-us-justice-dept-in-ohio-protects-the-wealthy-and-lets-bribers-go-free-today-in-ohio.html)

September 9, 2024

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Today in Ohio, the daily news podcast of cleveland.com and The Plain Dealer.

By

Laura Johnston, cleveland.com

CLEVELAND, Ohio -- The federal government hasn't charged any FirstEnergy executives, other politicians or operatives who advanced the scheme to force Ohio's ratepayers into a \$1.3 billion bailout of two nuclear plants owned at the time by the company.

We're talking about the travesty of letting bigwigs walk on Today in Ohio.

Editor Chris Quinn hosts our daily half-hour news podcast, with editorial board member Lisa Garvin, impact editor Leila Atassi and content director Laura Johnston.

You've been sending Chris lots of thoughts and suggestions on our from-the-newsroom text account, in which he shares what we're thinking about at cleveland.com. You can sign up here: <https://joinsubtext.com/chrisquinn>.

You can now join the conversation. Call 833-648-6329 (833-OHTODAY) if you'd like to leave a message we can play on the podcast.

Here's what else we're asking about today:

Reporters Jake Zuckerman and Adam Ferrise landed a big package over the weekend that asks the question: Why have federal prosecutors refused to go after the FirstEnergy execs who fueled Ohio's massive HB6 bribery scheme. Laura, does it look like they will ever be charged?

Lisa, we always hear that wealthy people get a different brand of justice because they can afford the best lawyers. There's clear evidence of that here. Let's look at the roster of attorneys representing the two Firstenergy execs.

Finally, Leila, Matt Borges was one of the smaller figures charged – and convicted – the this case. He's doing some hard time while the guys who funded the scheme are free. How's he doing?

Ohio Sen. JD Vance, the Republican vice presidential candidate, has based a lot of his identity on Middletown, Ohio, which featured prominently in his book Hillbilly Elegy. Reporter Sabrina Eaton went there. What did she find people there saying about how Vance portrays them?

Ohio is now in round 2 of setting up marijuana dispensaries. How many more are we talking about, and what makes these different than those that opened a month ago to big demand?

Every time someone asks Cleveland City Hall about the depletion of the police force, City Hall says Cleveland is part of a national trend. But a closer examination says maybe not. What did reporters Olivia Mitchell and Lucas Daprile find at the heart of the officer exodus from Cleveland?

Lucas also had a good news story late last week about crime. Despite the summer starting with some pretty awful high-profile cases, did crime drop this summer over last summer?

How is Case Western Reserve University ramping up to battle the tragedy of sudden infant death syndrome?

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Read the automated transcript below. Because it's a computer-generated transcript, it contains many errors and misspellings.

Chris (00:01.104)

My favorite moment of the weekend came in response to a column I wrote in which I compared local city councils to hogs at the trough devouring our tax dollars. I got a seriously angry email from somebody that said, I should not be so demeaning to hogs. It wasn't written in humor. It was written in all seriousness in capital letters. How dare I demean hogs by comparing them to our pathetic city councils.

Lisa (00:13.116)

you

Leila (00:19.135)

Hehehehehe

Lisa (00:28.635)

I'm

Chris (00:29.272)

It's Today in Ohio, the news podcast discussion from cleveland .com and The Plain Dealer. I'm Chris Quinn here with Lisa Garvin, Leila Tasi and Laura Johnston. More on that column. I did say in that column that we have not heard of anybody that is working to reduce the taxes that are going up without a vote of the people because of our recent reassessment. A part of the tax bill does arise with that. I heard from one who said he and some others on the West side are looking at it.

I'm not going to name him here because I don't want to embarrass him. He sent me a nice note. But he did say that what they're trying to do is figure out a way to twist the law. So they only give a break to the elderly and those who are needy, which misses the whole point here. The governments are getting money they didn't expect. Nobody had ever imagined a 32 % average increase. Everybody should get the money back. They want to stick it to business.

Well, small businesses can't afford big tax increases either. The way it works in Ohio, governments come to us. They say, hey, we need this money. And if they make their case, we vote for it. This is completely different. They ought to give it all back. Moving on, reporters Jake Zuckerman and Adam Fries landed a big package over the weekend that asks the question, why have federal prosecutors refused to go after the first energy executives who fueled Ohio's massive HB6 bribery scheme?

Laura, does it look like they will ever be charged in federal court?

Laura (02:02.766)

No, it is not looking likely. So they convicted the guy who was bribed, Larry Householder, but the guys who did the bribing may never even get charged. this is a head scratcher. It makes no sense. And we don't have definitive reasons for it. Adam and Jake reached out to about 60 people connected with the case, 60 people. They talked to about a dozen people with background interviews, close to the matter, not authorized to speak publicly.

Basically, they all believe that federal prosecutors got the public officials and now they're going to let the payers of those bribes, the executives at First Energy who are charging the taxpayers all this money and the ratepayers, they're going to go walking. So there's a bunch of possibilities. A central witness died, that's Sam Randazzo. Wealthy defendants hired these premier legal representation. The department's historically soft on corporate crime. Prosecutors misread the facts around some of the transaction.

The US Supreme Court has been historically skeptical of public corruption cases and prosecutors not wanting to try tough cases that they could use. Now, the US District Attorney said that his work is ongoing. Prosecutors are not ready to pat themselves on the shoulder and say their work is complete, but they wouldn't explain what's taking so long.

Chris (03:20.74)

Yeah, I think the thing that that blows away all those reasons is that they never tried. As we read what and talk to all these people, prosecutors never even went out and did the first interviews with potential witnesses against the executives. They're letting the rich guys go. I don't know if they're afraid of them, if they're afraid of their lawyers. But the people that paid all the bribes are going to get away with it.

because the federal government never even looked at them. That is so different from what happened in the Cuyahoga County bribery case where the federal prosecutors in Cleveland, they went after everybody. The people that paid the bribes, the people that received the bribes. And it was a full scale approach to say, nobody can do this. And if you do it, you go to prison. I don't get it. It's like they're in the bag for these executives. And it's a shame because the message it sends is if you're wealthy,

Laura (03:55.074)

Mm -hmm.

Laura (03:59.714)

Yeah.

Chris (04:17.828)

you can buy your way out of criminal charges.

Laura (04:21.128)

You can and just you could keep doing it, right? I mean, we talk all the time and on this podcast about pay to play in Ohio and the fact that our politicians are working for their parties and for their donators rather than the people. this is just keep trying, guys, like whatever

industry you're in, pay off the politicians because you're not going to get in trouble. And that is really kind of like spitting in the face of the taxpayers who pay for these attorneys who pay for the

the legislators and who end up paying that very high rates for first energy where you know you have a grid that you have a storm and your power goes out for a week. mean it's it's

Chris (04:58.426)

Yeah, it's it's malfeasance. They're not doing their job. Their job is to prosecute criminals. These are high criminals. We've got people sitting in prison who were involved in much lesser scams than this. This is one of the biggest scams we've ever seen. And it's fascinating when when we talk to all these people, there's nothing they never even began that element of the investigation.

Laura (05:19.959)

Right.

Yeah, they say that it's been maybe a year since they heard from these folks. And so you think if they were trying to build a case, they'd be going piece by piece, like you said, in the county corruption case, because I think we ended up with somewhere in the 50 to 60 range of people. More than OK. And we're talking small business owners, the people who were paying the bribes, the people who worked in the county offices. wasn't just the top people.

Chris (05:38.546)

I think it was more than 60, yeah.

Laura (05:48.406)

It wasn't just Demora and Russo. There were lower down folks there, and there were people at all of these businesses that were doing work for the county that were getting county contracts, and it just kept going. Sure, there was that major FBI raid, but that case played out for years. This seems to be like they charged what, four people at the beginning, then there was Randazzo.

And there is a state case from Attorney General Dave Yost, which adds another wrinkle in the federal ability to prosecute. But the charges against Chuck Jones and Mike Dowling and Sam Rondazo from the state are related to HB6, but they focus more on this different \$4 .3 million payment. It's not the exact same thing.

Chris (06:27.173)

Yeah.

Chris (06:31.818)

We should point out that we got under their skin at the end of the week. They finally gave us a statement saying, we're not done yet. We're not finished with this investigation. We're still working on it, you know, without providing any details. They refused to provide any information for weeks. And then finally, we get a statement that says, hey, don't say we're not doing anything. We're not done yet. Well, they're not doing anything. And it's time for our federal delegation to start putting pressure on them. Ohio deserves justice.

Laura (06:58.22)

And some people are even questioning the statute of limitations here. I mean, it does run out at some point.

Chris (07:06.246)

You're listening to Today in Ohio. Lisa, we always hear that wealthy people get a different brand of justice because they can afford the best lawyers. There's clear evidence of that in this first energy case. Let's look at the roster of attorneys representing the executives.

Lisa (07:21.853)

Or as Assistant Attorney General Matthew Meyer, who's prosecuting this case, calls them a platoon of attorneys.

There's 11, at least 11 former federal and state prosecutors that are now representing former First Energy executives, Chuck Jones and Mike Dowling in both their civil and criminal cases. First Energy is paying the attorneys according to Meyer. So let's take a look at them. So Chuck Jones has at least four attorneys. One of them is pretty well known, Robert Herr. He was the special prosecutor in the Biden mishandling of classified docs where he called him a well-meaning, but

whatever it was, a well-meaning but feeble old man or something like that. And he's also the former Trump associate deputy attorney general. So he's going to represent Jones in the civil case. Also a civil lawyer, William Sherman. He's the former general counsel and chief of staff at the Federal Energy Regulation Commission, which regulates nuclear power. Also Carol Rendon. She's a former Cleveland U.S. attorney. She's part of the Department of Justice probe into the Cleveland police officer's use of force.

And then there's George Stambolitis. He's a former assistant US attorney. He prosecuted New York mafia leaders. He's a five-time independent monitor for the Department of Justice in his private practice. Mike Dowling, at least two attorneys. John McCaffrey, he's a former

FBI agent and an assistant US attorney. He's focused on public corruption and white collar fraud against the government. And then Dan Webb.

who's a former Chicago U.S. attorney. He prosecuted Reagan National Security Advisor, Admiral John Poindexter in the Iran Contra scandal. So a lot of big hard hitters here. Case law professor Michael Benz says, often these very good government attorneys move to the other side and represent defendants because they have the skills and they have the knowledge on how government responds to these type of cases.

Lisa (09:17.83)

Former Ohio attorney general Mark Dan says, it's a national trend for companies to use plea agreements to avoid accountability for its executives and then represent them, know, have lawyers, elite former prosecutors represent them. But here's kind of a worrying thing here. So the First Energy, we have an investor lawsuit against these guys. A federal judge ordered the release of First Energy's internal probe into HB6 and said they couldn't appeal.

First energy attorneys filed suit directly with the Sixth U.S. Circuit Court of Appeals and the court has accepted the case. So that's a little scary there.

Chris (09:52.592)

Yeah, it's taken forever to get that. We know these lawyers and they are excellent lawyers. If you ever did anything wrong, you'd want one of them to represent you. I suspect that eventually there'll be some academic study looking at this because the evidence against the executives is so clear and what's on the record and they're not being charged. And I think an academic study could look at this is exactly how you can avoid being charged if you are wealthy beyond imagination.

Lisa (10:10.736)

Mm -hmm.

Chris (10:21.968)

And it really speaks to the kind of corrupt system we have for justice, which we'll be talking about next. You're listening to Today in Ohio. Laila, Matt Borges was one of the smaller figures charged and convicted in this case. And it feels like the biggest injustice is that he's doing hard time, serious hard time in a prison while the guys who funded the scheme, the worst operators on the private side are free. How's he doing?

Leila (10:50.189)

Well, it's been rough for Matt Borges. He's serving five years in a federal prison up in Michigan for his role in this scandal. This is a guy who used to be Ohio's Republican party chairman, rubbing elbows with the state's political elite, but now he's spending his days around violent criminals. In fact, Borges is fighting to get a transfer to a minimum security facility. He claims that a clerical mistake classified him as a violent offender.

which has kept him in a tougher prison than most white collar criminals would usually face. He's even acting as his own attorney to try and fix that error. This appeal is still pending, but for now he's really keeping his head down, working as an accounting clerk for a factory run by inmates and he's coaching a softball team in prison. He even participates in fantasy football leagues and he just sounds like he's trying to keep things as normal as possible under the circumstances.

His family is struggling too though his wife Kate said this has been a four year nightmare for them. They've poured everything they have into appealing his conviction and she's just focused on getting him somewhere safer and hoping for a reduced sentence. So Borges is appealing his conviction. He's still claiming that there were errors in his trial, but as we've said, meanwhile, other major players in the scheme haven't been charged federally.

We're just as serving as time, but in his mind, there are a lot of people out there who played bigger roles and haven't faced the same consequences. It's a really tough spot, but he's trying to keep his head up and make the best of it. says the hardest part is being separated from his family, but they've stayed close and kept in touch, which he says is what's getting him through it.

Chris (12:29.606)

The fact that he's behind bars is wholly because of his behavior. He committed crimes. They tried to get him to take a plea deal, which would greatly have reduced the sentence. He might not even have gone to prison. He refused. He tried to claim he was innocent. The evidence against him was very strong. Still, though, it seems draconian what they're doing to him. He is in a hard time prison, not a white collar prison. And the injustice of him doing it while the two guys that

Leila (12:34.884)

Right.

Leila (12:41.071)

Hm, mm -hm.

Chris (12:58.578)

created the whole thing sit free. God, it just feels so wrong. If I were Matt Borges, that's what would burn me up more than anything. I'm paying with five years of my life while those guys are dancing around spending their millions.

Leila (13:13.861)

Why didn't he take the plea deal here? mean, did he really? Was he really claiming he's innocent? He would have been out in six months, right? I mean, the feds had him dead to rights. I don't get what he thought he would accomplish by fighting it like that. He had so much at stake. Doesn't he have little kids and stuff?

Chris (13:19.931)

Yeah.

Yeah, he just refused. mean, he he just

Chris (13:32.65)

And he still maintains he was innocent. He just doesn't see it clearly. I think that's part of the ego of these big players is they somehow don't see the world through clear glasses. They're seeing it through some kind of filter. But there is a bad comparison going on between him and the worst actors in this thing. You're listening to Today in Ohio. Ohio Senator JD Vance, the Republican vice

Leila (13:39.375)

Yeah.

Chris (13:58.428)

presidential candidate has based a lot of his identity on Middletown Ohio, which featured prominently in his best -selling book Hillbilly Elegy reporter Sabrina Eaton went there what did she find about Middletown today Laura compared to the Middletown of. Fancy's childhood.

Laura (14:18.574)

Basically, it's complicated that there is definitely an idea that Middletown has been struggling for a long time. It was built around the steel plant. It's had trouble with people, unemployment. Its education system is not the best. It's had a ton of Section 8 HUD housing, but there is belief that it could be on the upswing. They have a mixed use development coming in. There's an idea about getting federal money for that steel plant.

Will bribers in FirstEnergy scandal be held accountable? The Wake Up for Monday, Sept. 9, 2024

 [cleveland.com/metro/2024/09/will-bribers-in-firstenergy-scandal-be-held-accountable-the-wake-up-for-monday-sept-9-2024.html](https://www.cleveland.com/metro/2024/09/will-bribers-in-firstenergy-scandal-be-held-accountable-the-wake-up-for-monday-sept-9-2024.html)

September 9, 2024

Subscriber 

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Former FirstEnergy CEO Chuck Jones, center, and top lobbyist Mike Dowling, seated at the far right, as well as the state's former ranking utilities regulator Sam Randazzo, at left, appear in court in February for their arraignment in Summit County Common Pleas Court. David Petkiewicz, cleveland.com

By

Cliff Pinckard, cleveland.com

Subscribe to the Wake Up, cleveland.com's free morning newsletter, delivered to your inbox weekdays at 5:30 a.m.

It's been more than four years since federal prosecutors uncovered one of the largest public corruption scandals in Ohio history, involving FirstEnergy and state lawmakers. While the U.S. Department of Justice sent former Ohio House Speaker Larry Householder to prison for taking a bribe, the DOJ has yet to charge any FirstEnergy executives involved in the \$1.3 billion bailout scheme. FirstEnergy has admitted that its executives paid off public officials, but the federal government seems content to stop with the politicians, leaving the bribe payers untouched.

For a series of stories this weekend, cleveland.com and The Plain Dealer interviewed dozens of sources close to the case, many of whom believe the DOJ is done with its work. But why hasn't the department pursued the corporate leaders behind the bribery? There are, of course, many theories, from legal complexities to a reluctance to pursue tough cases.

In the meantime, Ohio Attorney General Dave Yost is stepping in, filing state charges against some of the key corporate figures. Without further action from the federal government, however, questions about accountability for corporate misbehavior in Ohio continue to loom large.

— Leila Atassi

Matt Levine's Money Stuff: Fake Songs Made Real Money

By Matt Levine 2024-09-09T13:54:59201-04:00

Fake streams

This is roughly how Spotify works :

- 1. You pay \$12 a month to subscribe to Spotify. In exchange, you get to listen to unlimited music from its catalogue.
- 2. Spotify pools your \$12 with \$12 each from millions of other subscribers. Let's pretend it's 100 million subscribers, so \$1.2 billion a month.
- 3. Spotify takes a quarter of this money for itself, and pays the other three-quarters — \$900 million in our toy example — to the musicians whose songs are on its platform.
- 4. Spotify divides the money up among the musicians based on how often people listen to their songs. If the 100 million people each listen to 1,000 songs in a month — 100 billion streams — then, each time someone listens to an artist's song, the artist gets 0.9 cents, the \$900 million payout divided by 100 billion streams. (That seems like a lot of listening, but the [actual payout](#) seems to be roughly that order of magnitude — though my *other* numbers are less realistic — so let's go with it.)

The important thing to notice about this model is that the *users* pay a flat fee, no matter how much music they listen to, while the *artists* get paid based entirely on how often people listen to them. If you listen to the average amount of music, then \$9 of your \$12 gets allocated to the artists you listen to. If you sign up for Spotify and never listen to it, then \$9 of your \$12 just gets thrown into the pot and allocated based on what everyone *else* listens to. If you sign up for Spotify and listen to exactly one song once, it's not like your whole \$9 goes to the musician who made that song: That artist just gets 0.9 cents for your listen. But if you sign up for Spotify and listen *a lot*, you can generate more revenue for artists than you pay for your subscription: You effectively get to allocate *more* than the \$12 you pay to the musicians you listen to most often.

The arbitrage is obvious:

- 1. You are a musician with songs on Spotify.
- 2. You get yourself a Spotify account for \$12 a month.
- 3. *You* don't listen to 1,000 songs a month, though. *You* listen to 25 songs an hour, 24 hours a day: That's 600 songs a day, or 18,000 songs a month.
- 4. Probably very quietly? Like you've got Spotify playing at zero volume on one computer in your basement, 24/7.
- 5. This quiet computer only listens to *your* songs, so that all of the revenue from your 18,000 streams goes to you.
- 6. You pay the flat \$12 price for your account, but you *receive* 18,000 streams times 0.9 cents per stream equals \$162 per month in streaming royalties.
- 7. Subtract the \$12 subscription cost and that's \$150 per month of pure profit.

Those numbers are not really right, but they are roughly the correct orders of magnitude. If you are a musician with a Spotify account, you can generate more streaming revenue, *just from your own listening*, than you pay for the account. You just have to listen to your own music constantly.

This is the arbitrage; the rest is details. The main details are:

- Spotify doesn't like this and will try to stop you, so you have to engage in various sorts of subterfuge — set up the account under a fake name, maybe submit the songs under fake names, etc. — to make your account look like “normal user behavior” rather than “arbitraging the Spotify royalty system.”
- While \$150 per month is a nice percentage return on your \$12 subscription, it will not support your musical career, so if you want to do this as a business you will need to scale it up: You need, like, 1,000 accounts (\$150,000 a month of profit), not just one. This requires additional subterfuge.

[Here's a guy:](#)

Damian Williams, the United States Attorney for the Southern District of New York, and Christie M. Curtis, the Acting Assistant Director in Charge of the New York Field Office of the Federal Bureau of Investigation (“FBI”), announced the unsealing of a three-count criminal Indictment charging MICHAEL SMITH in connection with a scheme to create hundreds of thousands of songs with artificial intelligence and use automated programs called “bots” to stream the AI-generated songs

billions of times. SMITH fraudulently obtained more than \$10 million in royalty payments through his scheme. SMITH was arrested [Sept. 4] and will be presented before a U.S. Magistrate Judge in North Carolina. ...

SMITH created thousands of accounts on the Streaming Platforms (the “Bot Accounts”) that he could use to stream songs. He then used software to cause the Bot Accounts to continuously stream songs that he owned. At a certain point in the charged time period, SMITH estimated that he could use the Bot Accounts to generate approximately 661,440 streams per day, yielding annual royalties of \$1, 207,128.

Honestly it's hard to get mad at him? I suppose if you're a musician it's not that hard: Spotify pays about [\\$9 billion a year](#) in royalties, so if he's skimming \$1.2 million a year then that reduces every *other* musician's share of the pie by about 0.01%, and you know he's not the only guy doing this.

But if you're a fan of arbitrages, I mean:

- 1. This is the arbitrage! Just by *looking* at Spotify's economic model, you should immediately think of this arbitrage, and surely somebody is doing it.
- 2. It actually turns out to be a lot of work, bless his heart.

From [the indictment](#):

At certain points, SMITH had as many as 10,000 active Bot Accounts on the Streaming Platforms. Signing up such a voluminous number of Bot Accounts on the Streaming Platforms was labor-intensive, and SMITH paid individuals located abroad as well as coconspirators located in the United States to do the data entry work of signing up for the Bot Accounts. ...

To maximize the streams by the Bot Accounts, SMITH typically paid for “family plans” on the Streaming Platforms, which are intended for members of the same family living in the same household and are the most economical way to purchase multiple accounts on the Streaming Platforms, since family plans typically cost less per user than individual plans.

SMITH paid for the Bot Accounts, typically using proceeds generated by his fraudulent scheme. In

order to make it appear as if each Bot Account (or group of Bot Accounts within a single family plan) used a different source of payment, SMITH used a Manhattan-based service ("Financial Service-1") that provided large numbers of debit cards, typically corporate debit cards for employees of a company. ...

SMITH used cloud computer services so that he could use many virtual computers at the same time.

SMITH used some of the Bot Accounts on each virtual computer at the same time. SMITH typically used the web players for each of the Streaming Platforms, and had a number of Bot Accounts simultaneously streaming music on separate tabs in internet browsers on the virtual computers.

That's just to *listen* to his songs, but he also had to *make* them, which is where artificial intelligence allegedly comes in:

SMITH spread his automated streams across thousands of songs to avoid anomalous streaming as to any single song.

In or about 2018, SMITH began working with the Chief Executive Officer of an AI music company ("CC-3") and a music promoter ("CC-4") to create hundreds of thousands of songs using artificial intelligence that SMITH could then fraudulently stream. ...

CC-3 ultimately provided MICHAEL SMITH, the defendant, with hundreds of thousands of AI songs for which he could manipulate the streams. CC-3 's songs were typically given file names that were a randomized list of letters and numbers, such as "n_7a2b2d74-1621-4385-895d-ble4af78d860.mp3." SMITH then created randomly generated song and artist names for audio files so that they would appear to have been created by real artists rather than artificial intelligence. For example:

An alphabetically consecutive selection of 25 of the names of the AI songs SMITH used is as follows: "Zygophyceae," "Zygophyllaceae," "Zygophyllum," "Zygopteraceae," "Zygopteris," "Zygopteron," "Zygopterous," "Zygosporic," "Zygotenes," "Zygotes," "Zygotic," "Zygotic Lanie," "Zygotic Washstands," "Zyme Bedewing," "Zymes," "Zymite," "Zymo Phyte," "Zymogenes," "Zymogenic," "Zymologies," "Zymoplastic," "Zymopure," "Zymotechnical," "Zymotechny," and "Zyzomys."

An alphabetically consecutive selection of 25 of the names of the "artists" of the AI songs SMITH used is as follows : "Calliope Bloom," "Calliope Erratum," "Callous," "Callous Humane," "Callous Post,

"Callousness," "Calm Baseball," "Calm Connected," "Calm Force" "Calm Identity" "Calm Innovation" "Calm Knuckles" "Calm Market" "Calm The Super," "Calm Weary," "Calms Scorching," "Calorie Event," "Calorie Screams," "Calvin Mann," "Calvinistic Dust," "Calypso Xored," "Camalus Disen," "Camaxtli Minerva," "Cambists Cagelings," and "Camel Edible."

I can find nothing to criticize here.

I don't know, man. We have talked a few times about Avi Eisenberg, the Mango Markets guy, who found a manipulatable cryptocurrency market, manipulated the heck out of it, made tens of millions of dollars, was arrested, defended himself by saying he was an "applied game theorist" who spotted a good trade that was allowed by the market, and got convicted because nobody ever wants to hear a defense like that.

I have sort of made fun of Eisenberg's philosophy as a quirk of crypto, but I guess that's not really right. It's a quirk of music streaming platforms too, and online advertising markets, and financial markets. Basically much of modern economics, and life, has the following characteristics:

- Everything is intermediated through some depersonalized automated electronic exchange.
- The automated electronic exchange has a *mechanism* — how it actually works, what the exchange's software allows you to do — and also *rules*, the terms of service regulating how you can use the mechanism, which are fuzzier than the mechanism and written in small print, things like "don't do fraud" or "you have to be a human" or whatever.
- The mechanism is much more legible and salient than the rules, and in a depersonalized electronic world people treat the mechanism as the rules: They don't believe that the rules exist, because the rules seem to contradict *how the service works*. The basic description of Spotify's mechanics suggests Smith's alleged arbitrage; if he didn't do it surely someone else would.

Everything is like this. We talked last week about the "infinite free money Chase ATM glitch," in which people on TikTok discovered that if they wrote themselves a fake check and deposited it in an ATM and then withdrew the money, they'd have "free money." Everyone *used* to know that (1) one way to get free money was to write a fake check and trick someone into cashing it but (2) that was obviously a crime. But now you don't have to trick anyone into cashing the check: You just go to a machine and put the check into the machine, and if the machine gives you back money then surely that's just how the machine is supposed to work?

Polymarket derivatives

Meanwhile in crypto. Polymarket is a crypto prediction market that allows you to bet on lots of different events in the world. You can bet on who will win the 2024 US [presidential election](#), or who will win tonight's [football game](#) between the 49ers and the Jets. As is typical in prediction markets, the contract pays off \$1 to every holder on the winning side and \$0 to every holder on the losing side, so the contract prices reflect roughly the market-implied percentage chance of winning. As of about 10:30 a.m. today, the 49ers had a 66% chance of winning the game, and Donald Trump had roughly a 52% chance of winning the election. (There are also contracts with more than two possible outcomes.)

These are pretty simple questions to resolve — the election will be certified, the game will be televised and end in an official final score — though Polymarket lets you bet on more subjective questions too. “[Will August 2024 be the hottest on record](#)” is resolved by reference to a NASA web page, and “[who will win the US presidential debate](#)” resolves by reference to a poll. And because it is crypto, in fact “[all market resolution is completely decentralized](#)” and there is a complex system of bonds and rewards to resolve questions, but it is a convenient shorthand to say “the result of the 49ers/Jets contract is determined by the official final score of the 49ers/Jets game in real life.”

Some Polymarket contracts, though, are resolved not by events in real life but by reference to *other Polymarket contracts*. I suppose you would call these “derivatives”: Polymarket contracts whose prices are based on the prices of other Polymarket contracts. In particular, there are US presidential election derivatives. For instance, here is one titled “[Favorite to win on Polymarket day after debate](#),” which “will resolve to ‘Kamala’ if Kamala Harris is the Polymarket favorite to win the election one day after the debate,” or to “Trump” if Donald Trump is the favorite. “The Polymarket favorite” is determined by looking at the price of another Polymarket contract:

The favorite to win one day after the debate will be determined by looking at the 4 hour time window 24 hours after the debate is scheduled to begin, between Sep 11, 9 PM ET and 1 AM ET. This market will resolve to whichever candidate is ahead more than the other during this period.

The resolution source will be a comparison between the charts for each candidate found at <https://polymarket.com/event/presidential-election-winner-2024> when the “6H” option is selected and decimals are turned on (settings icon -> Decimals toggled on).

A reader emailed me about these markets a week or two ago, and my first thought was also surely your first thought: “Hmm, I bet you could manipulate that.” Right? Like, buy one side of the derivative market, and then buy the same side of the underlying market to push up the price during the resolution window, so that the derivative market resolves to “yes” and you make money on the derivative. The underlying market is close enough to 50/50 that you probably *could* push the price your way for four hours.

But then I thought, nah, not really. That contract I just quoted had about \$197,000 bet on it as of 10:30 a.m. today; the [underlying market](#) had about \$844 million. I just assumed that you’d have to spend way more to move the underlying market than you could make on the derivative market. As a general rule, this is the best defense against this sort of market manipulation: If the derivative markets are much smaller than the underlying real market, manipulating the underlying market to make money on derivatives is hard. Sometimes the opposite is true: Toward the end of Libor, the actual cash Eurodollar market that set Libor rates was quite small — Libor was “the rate at which banks [don’t lend to each other](#)” — while the market for Libor derivatives was enormous, and so you got a lot of manipulation. But here it seemed unlikely to me.

Still, someone tried. Here’s a [thread on X](#), and a [post from Rajiv Sethi](#), about an attempted manipulation of the “Favorite to win on Polymarket on Friday” contract last week. On Friday morning, Trump was about a 52% favorite on Polymarket to win the election, so the *derivative* contract on Harris — essentially, “will she become the favorite in the next few hours?” — was trading at about 2 cents on the dollar. But it would pay 100 cents if the odds *did* flip that day. If you bought enough of Harris on the main market, you could make a profit on the derivative market, and [someone tried](#):

In total, we found related entities (or perhaps the same person) withdrew ~9M USDC from Coinbase to buy Kamala yes, Trump no, and cheap Kamala derivatives shares. ...

In an attempt to profit from the derivatives shares by manipulating the election winner market from 12-3pm EST.

It [didn’t work](#):

However, the attempt failed to hold Kamala’s odds over Trump’s in a sustained, impactful enough way from 12-3pm EST

These users lost over \$60k in the derivative market, and are down another six figures in the

Presidential Election Winner market at current prices.

Ehh I guess I would have predicted that.

xAI

One of my favorite bits of corporate finance was when WeWork Cos. changed its name to We. Somehow the name We was owned by Adam Neumann, who was at the time the chief executive officer of WeWork. So WeWork paid Neumann \$5.9 million of stock to buy the “We” name. I wrote:

Mark Zuckerberg, it seems silly yet essential to point out, not only invented Facebook, he also named it Facebook. But it did not occur to him to charge à la carte for those services. He does not send Facebook an itemized bill for his services as founder, CEO, name guy, etc. When he negotiated the purchase of Instagram, he did not get a broker's commission. Mark Zuckerberg provides his services to Facebook as an all-inclusive bundle. The bundle costs Facebook \$1 per year. Cheap! Mark Zuckerberg is nevertheless a zillionaire, because he owns a big chunk of Facebook and Facebook is worth zillions of dollars.

There are other approaches, though. Elon Musk has tried all of them? The [Wall Street Journal reports](#) :

Elon Musk's AI startup xAI has discussed a deal where it would get some Tesla revenue in exchange for providing the carmaker access to its technology and resources, the latest example of the growing interconnectedness of Musk's companies.

Under a proposed arrangement as described to investors, Tesla would license xAI's artificial-intelligence models to help power its driver-assistance software, called Full Self-Driving, and share some of that revenue with the startup, according to people familiar with the matter. xAI would assist in developing other features for Tesla, including a Siri-like voice assistant inside its electric cars and software to power its humanoid robot Optimus, the people said.

The terms of any revenue-sharing agreement between xAI and Tesla would depend in part upon how extensively Tesla relied on xAI's technology as opposed to its own, the people said. xAI executives have discussed an even revenue split from Tesla's FSD, one of the people said.

What? (“WSJ is talking nonsense,” [Musk replied](#) on X.) It is worth saying that xAI was [founded in March 2023](#), while Musk has been saying that Tesla would roll out fully self-driving cars within a year or two [starting in about 2015](#). It’s a little weird that half of Tesla’s self-driving revenue would be attributable to xAI’s technology? Also where exactly did xAI get this technology? I mean?

xAI has hired employees from Tesla, including several who have worked directly on the Autopilot team focused on developing self-driving capabilities. Musk also diverted thousands of hard-to-get Nvidia GPUs from Tesla to xAI last year. After that move became public, Musk said that “Tesla had no place to send the Nvidia chips to turn them on, so they would have just sat in a warehouse.”

Just new frontiers in corporate governance here:

- Start a company, take it public and sell tens of billions of dollars of shares while remaining CEO.
- Start a new startup.
- As CEO of the public company, tell your employees to help the startup build its product.
- Have the startup license the product back to the public company.

You have to admire it. Why would he even do this? I do not think that it is to make more money for himself, though I suppose that’s possible. The best explanation that I have heard is alignment of incentives: Instead of a single Elon Musk Conglomerate that pursues all of Musk’s Mars-oriented whims, he needs lots of different companies to pursue each whim, so that the employees of each company are fully motivated — by the company’s clear mission and by stock-based compensation — to achieve that company’s goals. When artificial intelligence became a plausible business, it arguably made sense to separate out Tesla’s AI engineers from the rest of the company and house them in an AI-specific business, with its own stock, to motivate them to build AI faster and for broader use cases than just Tesla.

Other companies might have that thought and, like, spin out the AI company to shareholders, or build it as a private subsidiary with some employee ownership, or *something* where corporate formalities are observed and the public company’s existing shareholders capture some of the value. Tesla is different!

Fake tender

Well, what does “fake” mean, really? There are shades of gray. Ordinarily, when a buyer first announces an offer to acquire a public company, the buyer doesn’t have enough money on hand to buy the target. This was true when Elon Musk offered to buy Twitter Inc., it is normally true when a big private equity firm proposes a leveraged buyout, and it is sometimes true even when a big public company offers to buy a smaller competitor for cash. It is not uncommon to make a public offer on the basis of “I’m fairly confident someone would give us the money,” and it’s pretty common to sign a merger agreement on the basis of commitment letters from banks rather than actual cash.

But there are some potential buyers — big public companies, big private equity funds, Elon Musk I guess — who, when they say “I’m fairly confident someone would give us the money,” are *probably correct*, and there are others who are *reasonably mistaken*, and then there are others who are *doing a bit*. We talked last month about Edgar Bronfman’s fizzled bid to buy Paramount Global, where the story might have been that Bronfman is a rich well-connected guy who really thought he could raise the money and who had some serious financial partners, and Paramount engaged with him because they also thought he could get the money, but ultimately they decided they weren’t sure enough to keep talking to him.

But we also talked a few months ago about Matthew Brown’s fizzled bid to buy Virgin Orbit Holdings Inc., where the SEC charged him with fraud because at one point he allegedly “sent Virgin Orbit a fabricated screenshot of his company’s bank account, claiming it held \$182 million when in reality it had a balance of less than \$1.” This does not seem like a case of a guy who had serious financing partners and a high likelihood of raising the money, but then it didn’t work out. This seems like a case of a guy who had \$1 and thought it would be fun to pretend to buy a public company.

That happens a lot, oddly. *Often*, when people pretend to buy a public company, it is with the goal of manipulating the stock: You buy some stock, you announce a fake takeover, the stock goes up and you sell. But this is not at all necessary, and a lot of people seem to just enjoy pretending to buy public companies. When we talked about Brown, I wrote:

I am always open to the possibility that *some* people pretend to do takeovers for other reasons, not because they want to make a quick illegal profit on the stock but because they want to *get attention* and *feel important* and *conduct high-stakes negotiations*. Fictional high-stakes negotiations, of course — if they agree on a price for the company, they’re not going to *pay* it — but, still, fun role-playing.

Anyway last year Esmark Inc. made a very weird public announcement of an offer to buy US Steel Corp. Esmark is a private company run by a guy named James Bouchard, and it was unclear if it had

the capacity to buy US Steel. Also the offer did not look like a real offer: It was styled a “voluntary public cash and exchange offer,” but there were no tender offer filings and the wording was odd. Also Bouchard went and told a reporter “we have the cash,” which, I pointed out, is kind of a bad sign.

Last week the SEC [fined Esmark and Bouchard](#) a total of \$600,000 for doing what I guess you'd call a fake tender offer. From [the order](#):

On August 15, 2023, Bouchard participated in an interview on CNBC regarding Esmark's press release. During the interview, he stated that Esmark has no debt and runs off cash. He further stated that Esmark has \$10 billion in cash committed to the deal and would not put up any of Esmark's assets as collateral.

Statements in the press release and interview were false. Esmark and Bouchard did not have a reasonable belief that Esmark had the financial means to complete the tender offer. As of August 31, 2023, Esmark had less than 1% of the required \$7.8 billion in cash to complete the tender offer.

“Less than 1% of the required \$7.8 billion” could still be tens of millions of dollars. There is no suggestion of market manipulation here; the SEC's only point is that he didn't have the money and went on television saying he did. I suppose making a public offer to buy a famous public company is a way to get on television, and some people want that.

Things happen

Activist pushes for end of [Murdoch voting control](#) at News Corp. Ex-Point72 President Haynes Abandons Plan to Start Hedge Fund. HSBC Mulls Merging Commercial, Investment Bank to Cut Costs. B. Riley Confirms Talks on Asset Deals to Cope With Debt. The King of [Risky Hometown Bonds](#) Is Back. [Iraqi Banks](#) Used U.S.-Created System to Funnel Funds to Iran. The Boom in [Zero-Day Options](#) Is Coming for Tesla and Nvidia. “To [beat Liechtenstein](#) has been an incredible joy.”

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To contact the author of this story:

Matt Levine at mlevine51@bloomberg.net

To contact the editor responsible for this story:

Wendy Pollack at wpollack@bloomberg.net

- 1. I don't mean to single out Spotify: The Justice Department press release cites "Amazon Music, Apple Music, Spotify, and YouTube Music (the 'Streaming Platforms')," and the mechanics are roughly similar in each case.
- 2. Spotify Premium is apparently **\$11.99 per month** (free for the first three months) in the US, but different countries have different prices. Spotify has free, ad-supported versions, but roughly 88% of revenue in its most recent quarter was from its premium versions (see [slide 3 here](#)). (Smith allegedly "paid for the Bot Accounts," generally using "family plans," which "are the most economical way to purchase multiple accounts.") As of that quarter, it had 246 million premium subscribers and did €3.35 billion of premium revenue, which works out to about €13.62 per premium account per quarter or about €4.54 per month, lower than the \$11.99 US headline rate, but I guess there are family plans, cheaper geographies, etc.; it doesn't matter much for our purposes.
- 3. Apparently the royalty share is **75% of gross revenue**. Spotify's **cost of revenue**, which "consists predominantly of royalty and distribution costs related to content streaming," was about €2.7 billion in the second quarter, versus about €3.8 billion of revenue (€3.35 billion of premium revenue, the rest ad-supported). That's in the ballpark of 80% of subscriber revenue, though I'm sure other things get included in cost of revenue and actual royalties to artists are lower.
- 4. Spotify's description of the mechanics is [here](#): "We calculate streamshare by tallying the total number of streams in a given month and determining what proportion of those streams were people listening to music owned or controlled by a particular rightsholder."
- 5. Calvinistic Dust! Very **Philip Pullman**.
- 6. Sorry, wrong: Lots of crypto people, and Money Stuff readers, and sometimes me, love to hear a defense like that, but we never get on juries.
- 7. You could quibble in the sense that Musk had (and has) a reported net worth in the hundreds of billions of dollars, which was more than he offered for Twitter. But the bulk of that money was tied up in stock; he did not have the required \$44 billion *in cash*. The same is true of many private equity funds and public companies: Their *assets* are greater than the deal size, but they still need to borrow the *cash*.

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@annmlipton@esq.social

@AnnMLipton

...

Musk just taking Tesla's resources, handing them to xAI, then licensing them back to Tesla.

Well, the shareholders did vote to get Tesla out from under Delaware's overprotective thumb.



From wsj.com

6:05 AM · Sep 9, 2024 · 415 Views



Business Law Prof Blog

lawprofessors.typepad.com/business_law/2024/09/in-which-elon-musk-once-again-becomes-a-classroom-hypothetical.html

Saturday, September 7, 2024

In Which Elon Musk Once Again Becomes a Classroom Hypothetical

By Ann Lipton

This time, it's Brazil.

If you're not following the saga, the story is apparently that ex-Twitter, now controlled by Elon Musk (not the CEO, though; you can't even really say he's the owner without qualifying about the interests of other investors and – don't forget – the debtholders), ignored the order of Brazilian Supreme Court Justice Alexandre de Moraes to remove certain accounts associated with hate speech and misinformation. Apparently out of fear that Twitter's Brazilian employees would be arrested, Twitter shut down its Brazilian offices. At that point, Twitter was out of compliance with a Brazilian requirement that a legal representative be present in the country. So, Justice de Moraes ordered that access to Twitter be blocked throughout Brazil. (Legal challenges to that order continue)

That's not great for Twitter, but it turns out, it was even worse for *Starlink*, a wholly-owned subsidiary of Musk-controlled SpaceX, because the Justice ordered that *Starlink*'s financial accounts be frozen in order to force payment of fines owed by Twitter. Musk at first insisted that he would not block access to Twitter via Brazilian Starlink, then – on that point – relented. Shortly thereafter, it was reported SpaceX was evacuating its personnel from the country. As the Wall Street Journal put it, "Starlink's entanglement in a dispute originally about X is a stark illustration of how some government officials around the world may draw few distinctions between enterprises that Musk runs."

So, all of this has the makings of a great introductory classroom discussion of corporate separateness, enterprise liability, and veil-piercing. I have no idea what the law on this is in Brazil, but let's talk about how we'd analyze this under American law.

(more under the jump)

Ordinarily, a key virtue of the corporate form is that it is considered its own legal entity, and its assets only belong to the corporation itself. They are not available to its stockholders, or its officers; they are owned solely by the corporation. That means creditors have some reassurance that the corporation's pool of assets will remain with the corporation and will be available to pay debts.

Based on that simple maxim, then, it would be improper to freeze the assets of Starlink – a completely separate company from Twitter – to make good on Twitter's debts.

But! Under U.S. law, there is a concept of "enterprise liability." Sometimes two corporations are managed in such a way that there is no practical distinction between them. The classic example, used in just about every introductory business organizations class, is *Walkovszky v. Carlton*, where several taxi corporations were run in tandem. Each corporation owned only two taxis, but they had the same couple of shareholders, and they commingled all their resources. Which is to say, they had a single garage, a single set of drivers and mechanics and financiers and presumably dispatchers, and there were no observed formalities regarding their separate operations. They were managed in all practical respects like one big taxi company. But they had been legally divided into several companies, presumably so that the creditor of any one company would not be able to reach the assets of the other companies.

In such situations, some courts have held, the owners and operators of the companies have not respected the corporate separateness of the entities, and therefore, the law should not either. We can treat them as one big corporation, with all of the assets across all companies available to pay creditors. In general, courts look to such factors as overlapping shareholders, officers, and directors, physical space/assets, employees, a lack of documentation of the separate nature of the different businesses, and whether the two corporations were managed as though they were part of a single venture. The test is very difficult to meet, and often seems to produce inequitable results. See, e.g., *Supreme Court of Pennsylvania Recognizes "Enterprise Liability" Theory as Valid Means of Piercing the Corporate Veil*; Carliss Chatman, *Corporate Family Matters*.

One surprising modern day example is described in this article about the Catholic church and sex abuses cases, and legal disputes about church assets – which may be distributed among parishes, dioceses, held in trust by bishops, etc – available to pay judgments to the victims. (For a scholarly analysis of the Catholic church problem, see Stephen Bainbridge and Aaron Cole, *The Bishop's Alter Ego*). There is also this article about nursing home owners who separately operate real estate companies, staffing companies, pharmaceutical companies, and so forth, so that all the substantive operations of the nursing home are provided by contractors, and any excess nursing home profits go out the door to pay those other companies. Leaving the nursing home unable to pay judgments for substandard care.

How does that precedent apply here?

Well, you could say there was some degree of informal commingling of Twitter and Starlink – or at least SpaceX – assets. It's well known that Musk reallocates engineers – not to mention data and microchips – across his companies, and though Tesla SEC filings say this

is all done with proper formalities, Chancellor McCormick's findings in *Tornetta v. Musk* suggest otherwise.

And if Starlink is the only internet provider that *refuses to honor the order to block Twitter* – well, that just adds to the evidence that the two are run in tandem.

That *said*, the line-blurring here does not (as far as I can tell) appear to be anywhere *near* the level you'd ordinarily expect for a court to find an actual *lack of corporate separateness*. And it certainly helps matters for Starlink that Musk backed down and eventually agreed to block Twitter.

Which means, at least under American law, it's unlikely a court would find matters got so bad that the two would not be considered separate companies.

But there's another possibility – veil piercing (and/or reverse veil piercing). What if we don't think of Starlink and Twitter as one big company? What if we think of them both as, essentially, the personal assets of Elon Musk?

This is a similar, but separate, concept from enterprise liability. Enterprise liability looks horizontally across two corporations. Veil piercing looks to whether the shareholders of a particular corporation have so ignored the corporation's legal existence that it's only fair the courts do, too – and essentially treat the corporation, and its shareholders, as one and the same. Once again, we'd look to whether the shareholders ignored all corporate formalities, and made no distinction between the corporation's assets and their own assets, usually withdrawing and adding at will, and maybe making free use of the corporation's resources for personal purposes. In that case, we might ignore the corporation's separateness and look to the *shareholder* to satisfy the corporate debts. Sometimes – and this is where reverse veil-piercing comes in – we'd look to the *corporation's assets* to satisfy the *shareholder's* personal debts.

In this case, then, we'd say something like: Twitter is Elon Musk's plaything; therefore Twitter's debts are Elon Musk's debts (veil piercing). We'd seize Elon Musk's personal assets in Brazil if they were here, but they're not. What is here is Starlink/SpaceX. And Musk is so intertwined with SpaceX that we can treat *SpaceX assets* as *Musk assets*, and freeze those (reverse veil-piercing).

Does that work? Again, at least on the surface, not under American law, because whatever else Musk is doing, it seems unlikely that he's ignoring formal distinctions between *his own assets* and the assets of Twitter and SpaceX.

Not to mention, Musk *does not* own, uniquely, Twitter and SpaceX. Both companies have their own outside investors (and presumably *different* outside investors, at least to some degree - SpaceX has employee-shareholders, for example). That fact is exactly why veil

piercing and reverse veil piercing especially is rare outside the context of businesses with a single shareholder; outside shareholders of SpaceX might legitimately object to the notion that SpaceX assets are Musk assets – they think they have a claim on those assets, too!

So, again, if we're talking only about American law, it doesn't look like the Brazilian orders against SpaceX/Starlink would hold up.

That *said*, there's another angle here. There are currently at least three lawsuits pending against Tesla that argue, in one form or another, that Elon Musk violated his fiduciary duties to Tesla by reallocating resources to his other companies. These cases were filed just before Tesla reincorporated to Texas, so they're in Delaware under Delaware law. And, presumably, once the leadership structure gets settled (there's a pending motion to combine them), and they're litigated further, at least one argument the plaintiffs can now offer is that Musk's obvious hand in running his companies in tandem – how he overrides the formal CEO (Twitter), reallocates resources (Tesla, xAI, Twitter, SpaceX) at will – all sets Tesla up for these kinds of problems, exactly as the Wall Street Journal reported ("Starlink's entanglement in a dispute originally about X is a stark illustration of how some government officials around the world may draw few distinctions between enterprises that Musk runs."). And that, too, is evidence that Tesla's board has not exercised oversight of Musk.

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<https://www.wsj.com/tech/tesla-xai-partnership-elon-musk-30e22313>

Musk's xAI Has Discussed Deal for Share of Future Tesla Revenue

By [Berber Jin](#) [Follow](#) and [Becky Peterson](#) [Follow](#)

Updated Sept. 8, 2024 2:40 pm ET

Elon Musk's AI startup xAI has discussed a deal where it would get some Tesla TSLA **3.24%** ▲ revenue in exchange for providing the carmaker access to its technology and resources, the latest example of the growing interconnectedness of Musk's companies.

Under a proposed arrangement as described to investors, Tesla would license xAI's artificial-intelligence models to help power its driver-assistance software, called Full Self-Driving, and share some of that revenue with the startup, according to people familiar with the matter. xAI would assist in developing other features for Tesla, including a Siri-like voice assistant inside its electric cars and software to power its humanoid robot Optimus, the people said.

The terms of any revenue-sharing agreement between xAI and Tesla would depend in part upon how extensively Tesla relied on xAI's technology as opposed to its own, the people said. xAI executives have discussed an even revenue split from Tesla's FSD, one of the people said.

After this article was published, Musk replied on X to a user's summary of it by saying: "Haven't read the article, but the above is not accurate," and that "there is no need to license anything from xAI." Shortly after, he posted "WSJ is talking nonsense."

Musk has bet the future of Tesla on robotics and artificial intelligence. FSD costs Tesla drivers \$99 a month or a flat fee of \$8,000 to use the service, which requires drivers to keep their hands on the wheel. The company is also

developing a robotaxi, which is scheduled to be unveiled Oct. 10. It is unclear when it will be made available to the public.



A Tesla Model 3 used the Full Self-Driving Beta software while navigating a road in California last year.

PHOTO: MIKE BLAKE/REUTERS

Musk has promised for years that FSD will advance enough to make all Teslas fully autonomous and suggested that success could turn Tesla into a multitrillion-dollar company. Musk also has said Tesla would be worth “basically zero” without full autonomous driving.

Formalizing a partnership with xAI in which Tesla would hand over some of its revenue and future AI development to a separate Musk-controlled company would add to the tech mogul’s practice of sharing assets freely across his business empire.

Musk is already shifting talent and hardware between xAI and Tesla as he plays catch-up in the AI race, raising concerns about potential conflicts of interest. There is particular scrutiny around how Musk shares resources of Tesla, which is publicly traded. Several Tesla shareholders have filed suits claiming that the shift in resources to xAI has hurt the carmaker’s investors. The cases are pending in the Delaware Court of Chancery.

xAI has hired employees from Tesla, including several who have worked directly on the Autopilot team focused on developing self-driving capabilities. Musk also diverted thousands of hard-to-get Nvidia GPUs from Tesla to xAI last year. After

that move became public, Musk said that “Tesla had no place to send the Nvidia chips to turn them on, so they would have just sat in a warehouse.”



Elon Musk is shifting talent and hardware between his company xAI and Tesla, of which he is CEO, as he plays catch-up in the AI race. PHOTO: JARED SISKIN/PATRICK MCMULLAN/GETTY IMAGES

In pitches to investors, xAI representatives have described the company as a future crucial technology provider for Tesla's suite of software products, the people familiar with the possible revenue-sharing agreement said.

In a July post, Musk asked X users whether Tesla should invest \$5 billion into xAI. Two days later, he posted: “Looks like the public is in favor. Will discuss with Tesla board.”

Musk has historically awarded companies that help his other businesses with their equity. Musk previously said he would give investors in his \$44 billion X acquisition a quarter ownership in xAI. Grok, xAI's chatbot, is integrated into X, and the two companies share some resources.

“Tesla is learning quite a bit from xAI,” Musk said on a July conference call with investors after the company reported earnings. “It's been actually helpful in advancing Full Self-Driving and in building up the new Tesla data center.” He also said there were opportunities to integrate xAI's Grok chatbot into Tesla's software.

In May, xAI raised \$6 billion at a \$24 billion valuation from investors including Sequoia Capital, Andreessen Horowitz, Valor Equity Partners, and Saudi Prince al-Waleed bin Talal and Kingdom Holding. This month, the company launched a data center in Tennessee, dubbed Colossus, which Musk said is “the most powerful AI training system in the world.”

Musk has also said Tesla would spend \$10 billion in capital expenditures this year to build out its AI capabilities. “If somebody doesn’t believe Tesla is going to solve autonomy, I think they should not be an investor in the company,” Musk told investors on an April earnings call. It is unclear how the deal with xAI would affect Tesla’s spending.

Tesla has heavily invested in building out its data-center capabilities, including by developing special chips for a supercomputer it calls Dojo, with data centers in Palo Alto, Calif., and Austin, Texas, and plans for one in Buffalo, N.Y. Employees at xAI and Tesla have advised each other on the design and construction of their data centers, people familiar with the matter said.

Tesla’s sales and profit have taken a tumble amid increasing competition in the electric-vehicle market, with the company’s stock down about 14% this year through Friday.

—Tom Dotan and Meghan Bobrowsky contributed to this article.

Write to Berber Jin at berber.jin@wsj.com and Becky Peterson at becky.peterson@wsj.com

Appeared in the September 9, 2024, print edition as ‘Musk’s xAI Mulls Deal With Tesla Over Revenue’.

Videos

US financial regulation**US audit firms ordered to bring in outsiders to oversee quality**

Larger firms will have to set up an oversight board with at least one independent outsider



Under chair Erica Williams, the PCAOB has been taking a tougher line against shoddy audit work © Bloomberg

Stephen Foley in New York 2 HOURS AGO



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The largest US accounting firms will have to appoint independent outsiders to help oversee audit quality, under new rules approved by the Securities and Exchange Commission on Monday over the objections of the industry.

The SEC brushed aside a last-minute effort by firms including EY and PwC to halt the new governance rules, which are part of a broad overhaul of quality control standards written by the audit regulator, the Public Company Accounting Oversight Board.

Under the new PCAOB standards, firms that audit more than 100 public companies will have to set up an oversight board that includes at least one independent outsider. Around a dozen firms, including the Big Four, will be affected.

“Without high-quality audits, investors won’t receive complete and truthful financial disclosures,” said Gary Gensler, SEC chair, and “without strong quality control systems, auditors can’t consistently conduct high-quality audits.”

The PCAOB, under Biden administration-appointed chair Erica Williams, has been taking a tougher line against [shoddy audit work](#), after its inspectors found a spike in the number of deficient audits after the Covid pandemic.

The agency has also been pursuing an ambitious agenda to modernise audit standards that, in some cases, were written by the industry itself decades ago, before the PCAOB was created in the wake of the Enron scandal.

The SEC must approve new PCAOB standards, and the agency did so on Monday by a three to two vote, despite a warning from the US Chamber of Commerce that it would [consider suing](#) to halt the new governance arrangements.

While all of the Big Four accounting firms boast “advisory” bodies that help monitor quality, PwC argued it was unnecessary to give them a formal oversight role with the specific requirements set out by the PCAOB.

Other firms, including some smaller auditors, objected to a lack of detail on how the new oversight should work and how the PCAOB would enforce compliance.

“The PCAOB is pursuing a very expansive agenda without articulating what problems they’re trying to solve,” said Tom Quaadman, executive vice-president of the US Chamber, adding it would evaluate whether the PCAOB and SEC followed the proper legal process for setting the new standard.

The agency argued that external input to oversee a firm’s quality control processes would be an important check on management.

“When a firm’s QC system operates effectively, quality audits follow,” said Williams after SEC approval. “And when QC systems operate ineffectively, investors are put at risk.”

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Sept. 6, 2024, 11:45 AM PDT

Harris Donors Privately Urge Firing of FTC's Khan, SEC's Gensler

By Saleha Mohsin, Todd Gillespie and Sonali Basak

- The 35-year-old FTC chair has annoyed Wall Street dealmakers
- Gensler perceived by finance donors as talking down to them

Bloomberg Law News 2024-09-09T12:34:09626447013-04:00

Harris Donors Privately Urge Firing of FTC's Khan, SEC's Gensler

By Saleha Mohsin, Todd Gillespie and Sonali Basak2024-09-06T14:45:15070-04:00

- The 35-year-old FTC chair has annoyed Wall Street dealmakers
- Gensler perceived by finance donors as talking down to them

Major Democratic donors on Wall Street are increasingly pushing Kamala Harris' team to replace top regulators **Lina Khan** and Gary Gensler if the vice president wins in November.

On calls with her staff and at fundraisers, deep-pocketed donors have repeatedly named Khan, chair of the Federal Trade Commission, as impeding the technology sector and other lucrative parts of the economy, according to people familiar with the matter. The private conversations about having her replaced have intensified since public calls for her ouster in July from **Barry Diller**, chairman of IAC Inc., and LinkedIn Corp. co-founder Reid Hoffman, who said Khan was "waging war on American business."



Lina Khan

Photographer: Ting Shen/Bloomberg

Khan, 35, was appointed by President Biden in 2021 and is a favorite of progressive Democrats like Elizabeth Warren, who called her appointment “tremendous news.” Her time at the FTC has frustrated dealmakers from San Francisco to New York, who have experienced a relative drought of activity in recent years.

Democratic donors on Wall Street will likely keep lobbying in private for Khan to be replaced, some of the people said. However, it’s unlikely any of them are withholding contributions based on her fate at the FTC, and no clear communication has been given to donors about Harris’ position on Khan, they stressed.

Meanwhile, Gensler, whose term as head of the Securities and Exchange Commission is up in 2026, is disliked privately by both Democratic and Republican donors, some of the people said. Gensler has pushed for tougher regulations, but donors have particularly bristled at what they perceive as him talking down to Wall Street, the people said.

Billionaire **Mark Cuban**, a supporter of Harris, told CNBC this week that the SEC “needs to change” and that he’s asked the vice president’s team to “put my name in for the SEC.” Donald Trump pledged at a crypto conference that if elected he would fire Gensler.

The Harris campaign didn’t provide a comment for this story.

Douglas Farrar, an FTC spokesman, declined to comment. A spokesperson for Gensler said in an emailed statement that the SEC's projects "are making our capital markets more efficient, transparent and resilient."

Tricky Position

For Harris, who's trying to walk a fine line between attracting donors and appealing to the party's progressive wing, the pressure to remove Khan and Gensler puts her in a tricky position. While she's long represented Silicon Valley as senator for California and is well-versed in antitrust debates, Harris has also sought to appeal to Americans irritated by price-gouging, big corporations and Wall Street.

Antitrust lawsuits filed by the FTC under Khan's leadership have sought to block Microsoft Corp. from buying video-game publisher Activision Blizzard Inc. and aimed to halt the \$25 billion grocery-store merger of Kroger Co. and Albertsons Cos. So far, the FTC has a mixed record in stopping deals, having lost two early cases, but has had more success in recent lawsuits.



Gary Gensler

Photographer: Jeenah Moon/Bloomberg

Two donors close to Harris' campaign said the argument being presented against Khan is that the FTC's efforts to hold up mergers are hurting the economy. The idea is that if Harris wants to project herself as pro-growth and pro-business — as she and surrogates have sought to do — Khan will need to be replaced, the people said.

Members of the FTC can only be fired in cases of "inefficiency, neglect of duty, or malfeasance in office," according to federal law, though the president can designate another commissioner as chair. While Khan's term expires in September, she can remain in office until the Senate confirms a replacement. That would allow Harris to select a new FTC chair if she wins, though it can take a year or more for a nominee to make it through the confirmation process.

As for Gensler, much of the frustration on both sides of the aisle stems from the SEC's efforts to crack down on the digital asset industry, which Gensler has described as flagrantly violating securities laws.

No Compromise

Both regulators came into their positions with "a fairly aggressive regulatory agenda and have taken some big steps to try to carry that out," said Jill Fisch, a professor at the University of Pennsylvania Law School. "They weren't looking to play it safe. They weren't looking to compromise."

It's a challenge to deal with differing views on regulation running through the Democratic party, Fisch said. Historically, the FTC and SEC were close to the industries they oversaw and were intended to be walled off from their policy being overly driven by politics, she said.

"Right now it's no longer what's most sensible to do from a market and industry perspective, but what's politically salient, and what's going to please political leaders—and that's a very tough path to navigate," Fisch said.

Hoffman, who has donated \$10 million to the Harris campaign, appeared to walk back his remarks about Khan in a follow-up interview, saying he hasn't spoken to the vice president about his concerns and seeking to distinguish between his role as a donor and an expert on the tech industry.

Diller also said in a July CNBC interview that he would urge Harris to drop Khan, before also reining in his comment.



Barry Diller

Photographer: David Paul Morris/Bloomberg

Hoffman and Diller are worth \$5.1 billion and \$5.4 billion, respectively, according to the Bloomberg Billionaires Index. Both are also affiliated with companies facing FTC scrutiny.

Hoffman declined to comment for this story. An IAC representative didn't reply to an emailed request for comment.

Read more: Business Moguls Urge Harris to Dump Biden's FTC Chair Khan

Many donors have privately expressed frustration at the duo's public remarks against Khan, calling them counterproductive and making it more challenging for a potential Harris administration to make changes at the FTC without seeming beholden to billionaires' money, according to some of the people.

--With assistance from **Leah Nylen**, **Biz Carson**, Lydia Beyoud, Ben Bain and Laura Davison.

To contact the reporters on this story:

Saleha Mohsin in Washington at smohsin2@bloomberg.net;

Todd Gillespie in New York at tgillespie30@bloomberg.net;

Sonali Basak in New York at sbasak7@bloomberg.net

Trump and Paulson's Proposal: U.S. Sovereign Wealth Fund (or Another Grifter Bailout)

 wallstreetonparade.com/2024/09/trump-and-paulsons-proposal-u-s-sovereign-wealth-fund-or-another-grifter-bailout

By Pam Martens and Russ Martens: September 9, 2024 ~

Last Thursday, Republican presidential candidate Donald Trump spoke before the Economic Club of New York. During the speech, Trump revealed that if he wins the election he will create a U.S. Sovereign Wealth Fund.



John Paulson

Sovereign Wealth Funds are what countries that are rich from oil exports create with their surplus budget balances in order to diversify their nation's investments. (Countries such as Norway, Saudi Arabia, Abu Dhabi, Kuwait, and numerous other countries have Sovereign Wealth Funds.) Not only does the U.S. not have any budget surpluses to invest but it is projected to have a \$1.9 trillion budget deficit this fiscal year as well as having an existing national debt of \$35.4 trillion.

Trump explained his plan as follows in his speech at the Economic Club of New York:

"We'll create America's own sovereign wealth fund to invest in great national endeavors for the benefit of all of the American people. Why don't we have a wealth fund? Other countries have wealth funds. We have nothing. We have nothing.

"We're going to have a sovereign wealth fund, or we can name it something different. I'll talk about it with Mr. Paulson, who's in the audience, and a lot of other friends of mine. And we'll name it something that's appropriate. Perhaps sovereign wealth fund wouldn't be appropriate, but it's going to be the same thing. We'll put tremendous amounts of money through all this money that will be taken in through tariffs and other intelligent things, and we'll have the greatest sovereign wealth fund of them all. And we should have.

"And that will be used to do things that will be great for our country, including to invest and wisely invest and build it up bigger and stronger and better than any place on earth. We will build extraordinary national development projects, and everything from highways to airports and to transportation, infrastructure, all of the future. We'll be able to invest in state-of-the-art manufacturing hubs, advanced defense capabilities, cutting-edge medical research, and help save billions of dollars in preventing disease in the first place...

"And it is many of the people in this room who will be helping to advise and recommend investments for this fund...."

Not to put too fine a point on it, but most people who believe in capitalism also believe that it's the job of efficient markets to allocate capital to the most critical areas — not the job of government.

The “Mr. Paulson” that Trump referred to in his speech is the billionaire hedge fund titan, John Paulson. Bloomberg News reported that Paulson is advising Trump on the Sovereign Wealth Fund plan and his name is being floated as Trump's Treasury Secretary should Trump win in the November election. Paulson has hosted multiple fundraising events for Trump in the current election cycle and in Trump's failed run for reelection in 2020.

John Paulson became infamous for his role in the Goldman Sachs' ripoff known as Abacus, where he was allowed by Goldman to pick subprime debt he thought would default in order for him to take short bets. The SEC charged that Paulson made \$1 billion on the deal while defrauded investors to whom Goldman Sachs sold the deal as a good investment lost an equal amount.

The Securities and Exchange Commission failed to bring charges against Paulson. On July 15, 2010, the SEC announced that Goldman Sachs would pay \$550 million to settle its Abacus charges. Fabrice Tourre, a young Goldman investment banker involved in the deal, was the only person to face a civil trial. *No one* was criminally prosecuted in the matter.

More recently, Paulson has been making salacious headlines for being engaged to another woman who is pregnant with his child while he is still legally married. He and his wife, Jenny Paulson, have been engaged in a high profile, nasty divorce for three years, where she has charged that he hid billions of dollars from her in trusts.

Trump's previous Treasury Secretary, Steve Mnuchin, had similar warts on his character and set up a giant slush fund. (See 75% of the \$454 Billion CARES Act Money Never Went to the Fed; It Was Invested by a Mnuchin Slush Fund Called the ESF.)

In addition, Mnuchin battled the media for months in an effort to keep secret the names of the businesses that received funds under the Paycheck Protection Program (PPP), a Trump administration program ostensibly to help small businesses survive during the economic downturn caused by the COVID-19 pandemic. ProPublica reported the following when the Trump administration finally relented and released some of the details:

“Businesses tied to President Donald Trump's family and associates stand to receive as much as \$21 million in government loans designed to shore up payroll expenses for companies struggling amid the coronavirus pandemic, according to federal data released Monday...

“Several companies connected to the president's son-in-law and White House adviser, Jared Kushner, could get upward of \$6 million...

“Monday’s list included a Manhattan law firm whose marquee attorney has fiercely defended Trump for almost two decades. Kasowitz Benson Torres LLP — whose managing partner, Marc Kasowitz, was at one point the president’s top lawyer in the special counsel’s Russia investigation — was set to receive between \$5 million and \$10 million....”

Wall Street On Parade also reported extensively on the dodgy details underlying the PPP program and its sister operation, the Paycheck Protection Program Liquidity Facility. See, for example, Jay Sekulow, Trump’s Impeachment Lawyer, Collected \$1-2 Million in a PPP Loan for his Scandal-Ridden Charity; and The Fed’s Paycheck Protection Program Gave a Tiny NJ Bank \$5.3 Billion – 9 Percent of all the Money It’s Spent Thus Far.

During his speech last Thursday, Trump kept to his trademark brand of grossly distorting facts in favor of his imaginary alternative reality. Paulson was one of only four people allowed to ask questions of Trump during the Q&A that followed his speech at the Economic Club last Thursday. Paulson asked him about the \$2 trillion deficit under President Biden. Trump answered as follows:

“Well, we just hit record highs at numbers that nobody ever thought possible. You’re right, over \$2 trillion. Nobody thought that was a number that was – I mean, you could go back four years. Nobody thought a number like that would be possible. It’s crazy. It’s like – it’s just horrible, actually.”

According to the U.S. Treasury’s data, the budget deficit in Trump’s fourth year in office, 2020, was \$3.13 trillion.

As for allowing Donald Trump to get anywhere near investing large sums of money for the future of the United States of America, this is what Trump said during his speech last Thursday regarding the impact of climate change: (You can hear the remark at 1:08 on the C-SPAN video [here](#).)

“When people talk about global warming, I say the ocean is going to go down one hundredth of an inch within the next 400 years. That’s not our problem. Our problem is nuclear warming.”

Trump has used the phrase “nuclear warming” in previous interviews. Scientists have no clue as to what he is talking about. Credible climate change scientists also do not believe the ocean “is going to go down.” They have concluded that “Global warming is causing global mean sea level to rise in two ways. First, glaciers and ice sheets worldwide are melting and adding water to the ocean. Second, the volume of the ocean is expanding as the water warms....”

The Economic Club of New York did its own reputation no favors by hosting Trump at last Thursday’s event.



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ZoomInfo Sued By Investor Over Post-Lockdown Biz Pressure

By **Emilie Ruscoe**

Law360 (September 6, 2024, 10:37 PM EDT) -- Software company ZoomInfo Technologies Inc. has been hit with an investor proposed class action in Washington federal court alleging it hurt investors and its own reputation as it took desperate measures to maintain an early-pandemic customer boom and ultimately wrote down \$33 million because of improperly recognized revenue.

The complaint filed Wednesday by the City of Pontiac Police and Fire Retirement System claims that ZoomInfo decimated its own market capitalization with misguided retention measures.

The suit says ZoomInfo damaged its shareholders after trading prices for its shares fell when the company shared performance metrics following from "manipulative and coercive auto-renew policies and threats of litigation to force customers into remaining with the company."

ZoomInfo, which was founded in 2007 and went public in June 2020, provides customer analytics and intelligence to sales and marketing teams, and its flagship offering is its data platform, which provides clients with contact information for individuals and businesses.

The pension fund says ZoomInfo customers buy access to its platform via noncancelable subscription contracts lasting one to three years, and the company prices its subscriptions based on a customers' user count and the functionality they want, among other things.

Crucially for investors, the company recognizes its revenue proportionately over the course of each contract, and customers pay for their subscriptions at the beginning of one-year, six-month or three-month periods.

During the proposed class period of Nov. 10, 2020, to Aug. 5, 2024, the company told investors its customer base was diversified and included about 35,000 companies of various sizes, the suit says.

To support its analysis of client demand and its performance prospects, the suit says, the company offered up a pair of operational metrics: net revenue retention, which is a percentage expressing how many customers the company retained over 12 months, and its remaining performance obligations, which the company describes as "unearned revenue and unbilled amounts that will be recognized as revenue in the future" based on the status of existing contracts.

The pension fund claims ZoomInfo saw growth in 2020 and 2021 early in the COVID-19 pandemic "as social distancing restrictions made traditional in-person sales and marketing activities unavailable [and] businesses emphasized digital sales and marketing campaigns, which in turn, significantly increased demand for ZoomInfo's database of digital contact information."

In touting its successes, the company said it expected to see "continued growth and profitability," even on the other side of the pandemic restrictions, the suit says. Those projections pushed trading prices for its shares to an all-time high of nearly \$80.

But "ZoomInfo's financial and operational results had been temporarily boosted by the ephemeral effects of the COVID-19 pandemic," the suit says.

As a result, the company saw a number of customers try to reduce their contracts or leave the platform entirely as market conditions shifted.

"ZoomInfo utilized manipulative and coercive auto-renewal policies that required clients to notify the company of non-renewal at least 60 days before the end of the contract term — far beyond the industry norm" as part of its effort to prevent a "mass exodus of clients" and even threatened to sue some customers as they sought to cut back their payments, the suit says.

While the retention strategies headed off an initial customer bust, the pension fund says, they also "burned ZoomInfo's reputational capital, eroded the company's customer franchise, and placed the company at a competitive disadvantage as compared to new market entrants."

The company acknowledged the shortcomings of its approach in November 2022, when it announced declining retention rates, and August 2023, when it announced a \$33 million write-down related to customer nonpayment of previously recognized revenue, the suit says.

It says that by the end of the proposed class period, ZoomInfo shares had dropped 90%, from just under \$80 to about \$8.

Alongside the company, the complaint names ZoomInfo CEO Henry Schuck, Chief Financial Officer Cameron Hyzer and three defendants described as controlling shareholders of ZoomInfo: private equity firm TA Associates Management LP, investment firm The Carlyle Group Inc. and DO Holdings (WA) LLC, an investment vehicle co-owned by Schuck.

Together, the controlling shareholders held 80% of ZoomInfo's combined shareholder voting power following its August 2021 secondary public offering. That fact, combined with their control of the board, made ZoomInfo a controlled company by the corporate governance standards of the NASDAQ stock exchange it trades on.

The proposed class would include those who bought ZoomInfo shares during the class period.

Representatives for the pension fund did not immediately respond to requests for comment Friday. A representative for ZoomInfo declined to comment.

The pension fund is represented by Derek W. Loeser and Juli E. Farris of Keller Rohrback LLP, Samuel H. Rudman, Brian E. Cochran and Francisco J. Mejia of Robbins Geller Rudman & Dowd LLP and Matthew I. Henzi of AsherKelly Law.

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

The case is City of Pontiac Police and Fire Retirement System v. ZoomInfo Technologies Inc. et al., case number 3:24-cv-05739, in the U.S. District Court for the Western District of Washington.

--Editing by Brian Baresch.



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Boeing Loses Bid To Toss Investor Suit Over Blowout

By **Jared Foretek**

Law360 (September 6, 2024, 5:11 PM EDT) -- A Virginia federal judge gave the green light to Boeing investors to continue their securities fraud proposed class suit against the company over one of its planes' midair door blowout in January, rejecting the aerospace giant's motion to dismiss and telling Boeing it had a "real problem" on its hands.

Ruling from the bench Friday, U.S. District Judge Leonie M. Brinkema said she didn't need to hear any oral argument to make up her mind on Boeing's dismissal motion, as the complaint was extremely detailed when first filed and made a strong case that the company acted with scienter when making allegedly false statements to investors about the design, engineering and overall safety of its 737 Max fleet.

"This is a case where there's an extreme amount of detail there," Judge Brinkema said shortly after the case was called Friday. "The complaint speaks for itself. ... There's a strong inference of scienter here, and I think it's a real problem for Boeing."

She said that was "a shame" because Boeing had once been a highly esteemed company.

Brought by Rhode Island's largest public employees retirement fund in January — weeks after an Alaska Airlines jet lost a cabin panel in a blowout just after takeoff from Portland, after which Boeing shares tumbled in value — the **complaint** claims that Boeing executives repeatedly lied to and misled investors about the quality of the company's 737 Max production and operations, while actually "prioritizing profits over safety."

That secret ethos, the pensioners allege, led to "poor quality control standards in the production of [Boeing's] commercial aircrafts ... resulting in a heightened risk of manufacturing flaws which could render the company's new airplanes unsafe."

The Rhode Island fund was joined by several other retirement fund investors as plaintiffs in May.

Boeing said the funds were taking a "kitchen-sink" approach to their complaint, loading it up with statements from the company's brass that Boeing said were little more than generalized public statements and far from the kind of specific material that reasonable investors would depend on.

Even after Judge Brinkema announced how she would be ruling Friday, the company's attorney Richard Pepperman of Sullivan & Cromwell LLP tried to counter her comments about scienter in the pleadings.

"I acknowledge the complaint is very long, and very detailed," Pepperman said. But he called that a flaw in the lawsuit, rather than a strength, saying that — all told — the complaint includes over 200 statements from Boeing employees but lacks detail regarding how those employees would have known they were false or misleading.

"[The complaint has] no allegations of what the safety reports said," Pepperman told Judge Brinkema, arguing that under Fourth Circuit precedent, claims of scienter required more specificity from plaintiffs. "General allegations about reporting structures or general allegations of ... safety ... are insufficient."

Unswayed, Judge Brinkema said it would be impossible for the funds to peer into the company's executives' brains to understand what they knew and when they knew it, particularly at the pleading

stage.

But in general, she said, there was enough detail in the complaint speaking to the company's understanding of its own product to move past the dismissal stage.

"The safety of the product is the paramount ... especially after Boeing was on notice after those horrible incidents," Judge Brinkema said, referring to two 737 Max crashes in 2018 and 2019 that killed 346 people and led regulators to ground the plane worldwide.

Boeing should have taken every precaution to ensure those kinds of flaws never put passengers at risk again, Judge Brinkema said, "and it happened again."

After the crashes in 2018 and 2019 — which were determined to be the result of a catastrophic flaw in the plane's design — Boeing settled with the U.S. Department of Justice for more than \$2.5 billion.

While she didn't suggest that the cost of the pensioners' litigation would come close to that figure, Judge Brinkema did urge the company to consider taking a similar route.

"Boeing has settled this type of litigation before," she said. "It might be wise ... to try to get this resolved."

The funds are represented by Carol C. Villegas, Jake Bissell-Linsk and David Saldamando of Labaton Keller Sucharow LLP, Steven J. Toll and S. Douglas Bunch of Cohen Milstein Sellers & Toll PLLC, Chad Johnson, Noam Mandel, Jonathan Zweig, Desiree Cummings and Brent E. Mitchell of Robbins Geller Rudman & Dowd LLP and Craig C. Reilly of The Office of Craig C. Reilly.

Boeing is represented by Richard C. Pepperman II and Judson O. Littleton of Sullivan & Cromwell LLP and Benjamin L. Hatch of McGuireWoods LLP.

The case is In re: The Boeing Co. Securities Litigation, case number 1:24-cv-00151, in the U.S. District Court for the Eastern District of Virginia.

--Additional reporting by Linda Chiem, Sydney Price and Katryna Perera. Editing by Emily Kokoll.

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Earthlink Investors Accept \$85M Deal To End Merger Suit

By **Jessica Corso**

Law360 (September 6, 2024, 10:20 PM EDT) -- Earthlink investors who say they were duped into approving a \$1.1 billion merger with failing telecommunications company Windstream Holdings Inc. told an Arkansas federal judge Friday that they've reached an \$85 million deal to end the lawsuit two months before the case was scheduled to go to trial.

Earthlink, Windstream and the companies' former and current board members signed off on a proposed settlement that investors say is the largest securities class action recovery achieved in the Eastern District of Arkansas and the second largest across all Arkansas federal courts.

"This case survived a bankruptcy and overcame quite a few other roadblocks attempted by an aggressive set of defendants," class attorney David Knotts of Robbins Geller Rudman & Dowd LLP said Friday in an email statement to Law360. "But we had an engaged client, Arkansas resident Bob Murray, and a never-say-die litigation team that persevered for six years to secure this victory for stockholders."

A Windstream spokesperson declined to comment.

The lawsuit was originally filed in 2018, just two years after Windstream **purchased** Earthlink for \$1.1 billion in a deal that gave Earthlink shareholders 49% ownership of the combined company.

The suing investors said it was a bad deal, but their case was put on hold when Windstream **filed** for Chapter 11 bankruptcy protection in 2019.

The lawsuit was reopened in 2021 following the cable company's exit from bankruptcy, with the renewed lawsuit claiming that documents disclosed in those bankruptcy proceedings revealed that the deal was even worse than investors had originally suspected.

The amended complaint claimed Windstream was already "crumbling" by the time it purchased Earthlink but hid its poor financial state in order to secure the merger.

The companies moved to dismiss the amended complaint shortly after it was filed, alleging that the lead plaintiff's claims were time-barred and denying that Windstream failed to appropriately disclose risks or knowingly deceived Earthlink's shareholders.

U.S. District Judge James Moody denied the motion to dismiss last year and scheduled the case for trial in November.

The investor class is represented by David Knotts, Randall Baron, Rick Atwood, Noam Mandel, Desiree Cummings and Jonathan Zweig of Robbins Geller Rudman & Dowd LLP, Randall Pulliam and Hank Bates of Carney Bates & Pulliam PLLC, and Brett Middleton of Johnson Fistel LLP.

Windstream, its current and former board members and Earthlink are represented by Noelle Reed, Wallis Hampton and Virginia Milstead of Skadden Arps Slate Meagher & Flom LLP, and Gary Marts of Wright Lindsey & Jennings LLP.

Earthlink's former board members are represented by Peter Stokes and Richard Krumholz of Norton Rose Fulbright.

The case is Murray v. EarthLink Holdings Corp. et al., case number 4:18-cv-00202, in the U.S. District Court for the Eastern District of Arkansas.

--Editing by Kristen Becker.

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Biopharm Co., Directors Sued In Del. Over 'Extreme' Scheme

By **Jeff Montgomery**

Law360 (September 6, 2024, 8:41 PM EDT) -- A five-year run of "extreme and unconscionable self-dealing" has left 62% of Navidea BioPharmaceuticals Inc. equity in the hands of a single stockholder-director, a Delaware Court of Chancery suit has alleged, with the company now deregistered and currently without a viable product.

The suit, filed Wednesday by public stockholder Donald Garlikov, alleged that the company had been left "vulnerable to a campaign of exploitation" coinciding with the actions of an allegedly "overreaching" director and "opportunistic" transfers of equity and voting control enabled by other, since-resigned board members.

Departures of independent board members "utterly dismantled the oversight and monitoring functions of the company," the complaint alleged. In the vacuum, stockholder John K. Scott Jr., who owned 2.3% of the company's stock in mid-2018, was accused of gaining control of the business and growing his own and his family's stake to 61.8% by November 2023.

According to the six-count complaint, the changes coincided with a series of management shakeups and departures of senior officers and directors, with Scott's influence and eventual control growing as new directors allegedly loyal to his wishes and purportedly self-interested actions were brought on board.

Counts in the suit include five claims of breaches of the duty of loyalty against current and past board members, including Scott, and a claim of acting in bad faith against those named.

Sought in the complaint are orders invalidating and rescinding alleged wrongful acts by those named, as well as damages that would be determined by the court after trial.

Prior to Navidea's decline, it was described in the complaint as focused on "immuno-targeted products designed to aid in identifying undetected disease." Efforts were said to have been underway to commercialize the technology, "creating a robust pipeline of products for cancer and inflammatory disorders, with Cardinal Health investing \$80 million and offering up to \$230 million in milestone payments.

Instead, according to the complaint, board decisions were drawn away from fiduciary duty and loyalty to Navidea and toward actions that "rubber-stamped numerous self-dealing transactions" that benefited Scott and his business associates.

"In fact, Scott's self-dealing and insatiable, shameless greed became so extreme that even his cronies began resigning from the board," the complaint said. "To the extent that these cronies felt delayed guilt (or wanted to mitigate liability and damages) for participating in Scott's plan to 'steal' control of Navidea, the cronies' resignation was "'too little, too late.'"

Scott, meanwhile, was described in the complaint as the current sole director of a board that had seen frequent turnover, after growing for a time to seven members, with new directors having close ties to Scott but allegedly troubling baggage. Concerns included the appointment of one director who had previously filed for bankruptcy and kept his banking license only through use of another group's license to keep his investment bank operating.

Despite the licensing problem, Scott was said to have worked with director allies to "slowly 'stack' the board with friends and business associates who would not impede or object to Scott's control over the management and operations of the company, and Scott's quest to control the vote and equity of the company."

Disinterested and independent directors were meanwhile allegedly forced out in the face of threatened negative actions against them. At the same time, financial problems forced the company to place important product development trials on hold.

With Navidea's per-share value falling to below \$1 and the New York Stock Exchange exerting compliance pressure, Scott and his allies pushed through a "poison pill" to discourage a company takeover and protect net operating loss assets. Some terms of the action that required disclosure, however, were not made public.

Scott's stake in the business increased while alternative financing sources were ignored, the complaint said. An amendment and restatement of the company's bylaws, meanwhile, allowed for the establishment of a board quorum based solely on Scott's presence, according to the complaint.

In mid-2023, the company passed up an unsolicited, \$9 million written offer for some of the company's assets despite Navidea's lower, \$4 million market capitalization.

"The board took no action and established no process to evaluate accurately the value of the tender offer, and, instead, rejected the offer," the complaint said.

Scott and the company did not immediately respond to a request for comment Friday.

Garlikov is represented by Michael J. Maimone and Gabriella C. Mouriz of Barnes & Thornburg LLP.

Counsel information for the other parties was not immediately available Friday.

The case is David Garlikov v. Navidea BioPharmaceuticals Inc. et al., case number 2024-0923, in the Court of Chancery of the State of Delaware.

--Editing by Melissa Treolo.



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Coinbase, Execs Must Face Investor Suit Over Business Risks

By **Aislinn Keely**

Law360 (September 5, 2024, 10:14 PM EDT) -- A New Jersey federal judge on Thursday declined to dismiss a consolidated investor class action against Coinbase and its executives over disclosures the cryptocurrency exchange made about certain business risks it faced, although he trimmed certain allegations deemed to be, among other things, corporate puffery.

U.S. District Judge Brian R. Martinotti **delivered an order** Thursday that found a putative class of Coinbase common stock buyers can bring most of their allegations that the crypto exchange misrepresented or concealed parts of its business to the detriment of certain stockholders. These included certain risks of how assets might be treated in the event of a bankruptcy and the possibility that the U.S. Securities and Exchange Commission would bring an enforcement action against it over its cryptocurrency business.

With respect to this last allegation, the investors claimed Coinbase listed assets that its own review process showed had high likelihoods of being deemed securities and concealed indications as early as 2022 that the SEC believed the platform supported securities.

"The court finds plaintiffs have adequately alleged that defendants misleadingly described a favorable picture of the improbability that the SEC would file an enforcement action by repeatedly emphasizing that the crypto assets they listed were not securities," said the order.

The SEC eventually did file suit against Coinbase, accusing it in June 2023 of operating an unregistered securities exchange. The suit is still being **contested**.

The investors had also argued that Coinbase concealed the risk that certain customer assets could be treated as part of its estate in the event of a bankruptcy. Although Coinbase argued the risks associated with bankruptcy weren't material to stockholders, Judge Martinotti found that a 2022 disclosure to the SEC appeared to contradict that position, with Coinbase disclosing that customers may find custody services less attractive given the risk of asset treatment during bankruptcy.

"In this admission, the company effectively acknowledged the 'substantial likelihood' that the omission of the bankruptcy risk was material to investors," said the order.

The firm also had a duty to disclose the bankruptcy treatment as a risk to customer assets under custody, said the order. While Coinbase told customers of the risks of hacks and lost keys, the investors met the bar to allege it also "concealed their knowledge of potential bankruptcy risks," according to the order.

"The court finds that the subject statements here, to the extent they highlight Coinbase's alleged ability to safely store customers' assets, are actionable as they contain 'embedded' falsities and concern a central part of Coinbase's business," said the order.

However, statements that touted customers' trust in Coinbase were found to be non-actionable puffery and opinion, and tossed from the case.

In addition, Judge Martinotti found the investors hadn't adequately shown that Coinbase concealed an alleged proprietary trading business, since most of those allegations were based on a Wall Street Journal article that cited only anonymous sources.

The article "does not provide the sufficient level of detail required by the heightened pleading standard and does not indicate an independent investigative effort" to bring the claims under Section 10 of the Securities Exchange Act, the judge said.

In a statement to Law360, Coinbase highlighted that the court agreed with portions of its bid to dismiss the case, and that the case hasn't yet reached a fact-finding stage.

"It's important to note that the remaining pieces are allowed to move forward because of the way this motion to dismiss works: the court draws inferences based on the plaintiff's allegations rather than the reality of what happened," said a Coinbase spokesperson. "We remain confident that we are right on the facts and the law, and we look forward to proving the rest of our case."

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

U.S. Magistrate Judge Leda Dunn Wettre **consolidated** two actions in December 2022 to form the resulting securities class action, and tapped Sjunde AP-Fonden as lead plaintiff. The institutional investor allegedly sustained the largest financial loss at \$10 million.

The putative class is represented by Matthew L. Mustokoff, Stacey M. Kaplan, Joshua A Materese, Margaret E. Mazzeo, Austin W. Manning and Dylan J. Isenberg of Kessler Topaz Meltzer & Check LLP.

Coinbase and the individual defendants are represented by Kevin M. McDonough, Andrew B. Clubok and Susan E. Engel of Latham & Watkins LLP.

The case is Patel v. Coinbase Global Inc. et al., case number 2:22-cv-04915, in the U.S. District Court for the District of New Jersey.

--Additional reporting by Katryna Perera. Editing by Michael Watanabe.

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Starbucks Finds Interest For Appeal In Shareholder Suit

By **Rachel Riley**

Law360 (September 6, 2024, 7:59 PM EDT) -- A Washington Court of Appeals commissioner suggested to two Starbucks shareholders on Friday that their lawsuit must "do more than what it does" as of now if they want to accuse corporate leadership of responding illegally to barista unionization, hinting the court will likely take up the coffee giant's appeal.

Investors Joe W. Trimm and Andre Rodney **claim** Starbucks' board of directors and corporate officers breached their duties to shareholders and diminished stock value by turning a blind eye to management's alleged efforts to stifle organizing campaigns at stores across the country.

But as company leaders urged Court of Appeals Commissioner Jennifer Koh to grant review of two **failed dismissal bids** in the case, she appeared doubtful that the shareholders' allegations were enough to pass legal muster at this stage.

"I would like to know why it is — why you believe your complaint does not have to do more than what it does as far as the allegations of wrongdoing," Commissioner Koh asked the investors' attorney. Though the lawsuit cites labor violation cases, none of those cases appear to have concluded, she said.

Starbucks **has argued** that the shareholder derivative suit does not meet the high bar to survive dismissal, since Trimm and Rodney have not alleged they made demands to the board that were rejected before filing the suit.

The plaintiffs counsel, however, **has contended** they are exempt from the prerequisite because the directors utterly failed to establish a monitoring and reporting system to ensure that management followed the law when responding to union activity.

Justin Reliford of Scott + Scott Attorneys at Law LLP, representing the plaintiffs, said management's unlawful conduct began as early as 2019, in response to baristas organizing in Philadelphia, and continued until the shareholder suit was first filed in November 2023. The board, however, did not begin discussing labor issues until a 2022 meeting, the plaintiffs claim.

"That means for almost a three-year period, while thousands of unfair labor practices were being filed around the country, the board wasn't meeting to discuss management's response to the labor issues," Reliford said.

The commissioner still questioned how plaintiffs could establish a total failure by the board when there were at least a handful of meetings in which they discussed employee unionization efforts, as well as several board committees that also addressed labor issues.

"It seems to me to be clear that there were at least some meetings from June of 2022 that discussed labor relations, and had some folks at their committee meetings. The complaint definitely acknowledges that," Commissioner Koh said. "So I think that when you put that together with the 'utter failure,' I think you might have a little bit of a problem."

In addition to the coffee company, the lawsuit also names as defendants former CEOs Howard Schultz and Kevin R. Johnson and a series of current and former board members.

King County Superior Court Judge William Dixon V denied dismissal motions by both Starbucks Corp. and the group of individual defendants in a pair of two-page orders issued in May, without providing his reasoning.

The defendants have urged the judge to reconsider the denials in a motion that's still pending at the trial court level. The company has asked Commissioner Koh to stay the trial court proceedings, in addition to granting discretionary review by the Court of Appeals.

Gregory L. Watts of Wilson Sonsini Goodrich & Rosati PC, representing Starbucks and the individual defendants, said the shareholders have also fallen far short of the requirement that they show each director breached their duty to stakeholders through intentional misconduct.

"All they allege as to the outside directors, your honor, is their tenure on the board and their board committee assignments — that's it," Watts told the commissioner.

Commissioner Koh seemed to buy that argument, noting the complaint says "nothing about their personal intent and nothing about malicious intent."

The shareholders are represented by Justin Reliford of Scott + Scott Attorneys at Law LLP and Kim D. Stephens and Rebecca L. Solomon of Tousley Brain Stephens PLLC.

Starbucks and the individual defendants are represented by Gregory L. Watts, John C. Roberts Jr., Tyre L. Tindall and McKinney Wheeler of Wilson Sonsini Goodrich & Rosati PC.

The case is Joe W. Trimm v. Howard Schultz et al., case number 86734, in the Washington Court of Appeals, and 23-2-12444-8, in King County Superior Court.

--Editing by Alex Hubbard.

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

AstraZeneca Unit Owes \$130M In Chancery Scuttled-Drug Suit

By **Dorothy Atkins**

Law360 (September 6, 2024, 10:08 PM EDT) -- The Delaware Chancery Court awarded \$130 million to former shareholders of biopharmaceutical company Syntimmune in their breach of contract fight against AstraZeneca PLC unit Alexion Pharmaceuticals Inc., finding that Alexion failed to make promised payments after it acquired Syntimmune in 2018 and breached key terms of their merger agreement.

In a 140-page opinion on Thursday, Vice Chancellor Morgan T. Zurn held that Alexion failed to deliver \$130 million that the company had agreed to pay Syntimmune Inc. under their merger deal after reaching the first of multiple post-acquisition milestones in the development of a once-promising autoimmune disease antibody drug that Syntimmune created in 2016.

Vice Chancellor Zurn also found that Alexion breached terms of the merger agreement by deprioritizing the drug's development and eventually canning it altogether. However, the vice chancellor held off, for now, on calculating damages Alexion owes investors for the breach, as well as ruling on certain Alexion's counterclaims, and she wrote that she'll issue a separate order on those issues after supplemental briefing.

The ruling is the latest chapter in a hotly contested breach of contract lawsuit launched in December 2020 by Shareholder Representative Services LLC, or SRS, which represents Syntimmune's premerger investors.

The suit was filed days after AstraZeneca announced plans to acquire Alexion, and the dispute centers on a merger agreement that Boston-based Alexion and Syntimmune entered in November 2018 under which Alexion agreed to pay Syntimmune \$400 million in cash upfront.

In addition to the cash payment, the deal, which was valued at the time at \$1.2 billion, promised Syntimmune investors the possibility of collecting eight subsequent earn-out payments based on a series of milestones linked to the development of Syntimmune's promising autoimmune disease antibody drug — initially called SYNT001 and later ALXN1830.

But the investors sued Alexion in the Delaware Chancery Court after the company revealed that the development of Syntimmune's drug had been stalled due to repeated delays purportedly caused by a contaminated drug supply and the COVID-19 pandemic. Less than a year after AstraZeneca acquired Alexion for **\$39 billion in July 2021**, Alexion abandoned development of the drug altogether.

However, the investors allege in their complaint that Alexion deprioritized the drug's development in breach of their agreement in April 2020 due to Alexion's shifting corporate goals and its new program in which Alexion purportedly focused its efforts on launching 10 new drugs by 2023 in an internal corporate program dubbed "10 by 2023."

In September 2021, the vice chancellor **refused** to toss the investors' case at the pleading stage, and last year the dispute headed to a seven-day bench trial during which a former Syntimmune board member **testified** that SYNT001 could have had a market worth "many billions" if Alexion had developed it after buying the company in 2018.

On Thursday, the vice chancellor mostly sided with the Syntimmune investors and ruled that trial evidence and data show that Alexion had met the first milestone in developing SYNT001 under the

parties' merger agreement, but Alexion still had failed to pay investors \$130 million.

She also concluded that Alexion breached the terms of their merger agreement by failing to use "commercially reasonable efforts" to achieve the remaining milestones and by opting to terminate the drug's development instead.

The vice chancellor pointed out that Alexion's decision to defund the drug's development in 2020 was informed by the company's "10 by 2023" goal, which the vice chancellor noted was not a typical program and which was instead "an idiosyncratic corporate initiative" that "fell short of the commercially reasonable efforts it agreed to use" to develop SYNT001.

"A reduction in drug development efforts to accommodate such a unique program cannot satisfy an outward-facing efforts clause based on the typical efforts of similar companies," the opinion says.

Although the vice chancellor found that the investors failed to prove that Alexion's 2020 defunding of the drug's development definitively harmed them, she held that the investors have shown ending the drug's development outright has caused them an injury in breach of the merger contract.

The vice chancellor noted that if Alexion had launched the drug, it wouldn't have been the first in the market, or have the highest efficacy, but data on the drug did not show "concrete safety concerns or outsized risk," and the fact that the drug doesn't lower the protein albumin in the human body gave it a leg up against competitors.

In light of that evidence, the vice chancellor concluded that the cause for terminating the drug's development was due to the AstraZeneca acquisition, and not due to the drug development's earlier defunding.

"The parties have not identified, and the court is not aware of, any information suggesting Alexion was hesitant about the program before June 2021 or believed that it was too far behind to make development worthwhile," the opinion says.

The vice chancellor said she plans to issue a separate opinion addressing damages Alexion owes for the breach, as well as Alexion's counterclaim alleging the delays stemmed from problems with the drug supply the company received from Syntimmune. She ordered the parties to submit supplemental briefs on proposed damages regarding the breach.

A spokesperson for Alexion said Friday that the company is aware of the court's decision and declined to comment further.

Counsel for the investors didn't immediately respond to requests for comment Friday.

SRS is represented by Michael A. Barlow, Joseph M. Paunovich, Andrew M. Berdon, Alexee Deep Conroy, Angus Chen, Andrew Brayton, Courtney C. Whang, David M. Elihu and James Bieber of Quinn Emanuel Urquhart & Sullivan LLP.

Alexion Pharmaceuticals Inc. is represented by Scott B. Czerwonka and David E. Wilks of Wilks Law LLC and Deborah E. Fishman, Carson D. Anderson, Daniel L. Reisner, Jeffrey A. Fuisz, Matthew M. Wilk and Angela R. Vicari of Arnold & Porter.

The case is Shareholder Representative Services LLC v. Alexion Pharmaceuticals Inc., case number 2020-1069, in the Court of Chancery of the State of Delaware.

--Additional reporting by Leslie A. Pappas, Adam Rhodes, Bill Wichert, Rose Krebs and Matthew Perlman. Editing by Bruce Goldman.



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

Health-Ade Settles Suit Over 'Forever Chemicals' In Kombucha

By **Jonathan Capriel**

Law360 (September 6, 2024, 8:47 PM EDT) -- A consumer who filed a proposed class action against popular kombucha-maker Health-Ade LLC claiming the beverages contained "forever chemicals" has apparently settled her claims against the company, according to an order issued by a New York federal judge.

The lead plaintiff, Alanna Morton, and the company came to an agreement that "resolved" the lawsuit, according to a joint letter sent to U.S. District Judge Cathy Seibel on Thursday. Terms of a proposed settlement were not made public.

Judge Seibel dismissed the action with prejudice, but gave Morton 30 days to refile her lawsuit should the deal with Health-Ade fizzle out, according to her order.

In January, Morton sought to represent a nationwide class, as well as a New York subclass, claiming that scientific tests on multiple flavors of Health-Ade kombucha found they had measurable levels of per- and polyfluoroalkyl substances, or PFAS, which are also known as forever chemicals.

PFAS are called forever chemicals because they are nearly impossible to break down in the environment and have been tied to cancer, fertility issues, high blood pressure in pregnant women and other health problems, according to data from the U.S. Environmental Protection Agency. PFAS exposure can be found almost everywhere and most people have measurable levels in their blood, according to a recent report by the White House's Office of Science and Technology Policy.

Morton is represented by Joshua D. Arisohn of Bursor & Fisher PA.

Health-Ade is represented by Nilda M. Isidro of Greenberg Traurig LLP.

The case is Morton v. Health-Ade LLC, case number 7:24-cv-00173, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Craig Clough. Editing by Andrew Cohen.

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