Securities Law News
Sept. 9, 2024, 11:30 AM PDT

National Instruments Investors Advance Insider Trading Claim

By Martina Barash

- Company allegedly didn't disclose acquisition offers
- Misleading omission claim fails, insider claim proceeds

Bloomberg Law News 2024-09-10T12:57:39656927406-04:00

National Instruments Investors Advance Insider Trading Claim

By Martina Barash 2024-09-09T14:30:39000-04:00

- Company allegedly didn't disclose acquisition offers
- Misleading omission claim fails, insider claim proceeds

National Instruments Corp. investors adequately alleged the testing equipment and software company's stock buybacks during two months in 2022 constituted insider trading because it had nonpublic information about takeover attempts by Emerson Electric Co., a federal court ruled.

But the investors can't proceed with a claim that NI's failure to disclose the Emerson offers was itself misleading, Judge Denise Cote said Sept. 6 for the US District Court for the Southern District of New York. That claim's dismissal might shrink the proposed class, Cote said.

The suit stems from initial attempts by Emerson to get the NI board's approval for an acquisition. Emerson offered to purchase NI stock for $48 per share in May 2022 and again in June 2022 with an inducement of finding "additional value," according to the complaint.

Emerson's interest would have boosted the share price if publicly known, the investors say. Emerson ultimately agreed to acquire NI for $60 per share in April 2023, according to Bloomberg News. The acquisition was completed on Oct. 11, according to Emerson's annual report.

The investors alleged that NI committed two separate securities fraud violations—misrepresentations and insider trading—under Section 10(b) of the Securities and Exchange Act and Rule 10b-5, Cote said.

The misrepresentation allegations fall short, Cote said. "None of the statements that the plaintiffs have identified was rendered misleading by NI's omission of facts regarding Emerson's offer," she said.

NI's statements disclosing its own stock repurchases "simply summarized transactions that had already occurred," she said. "They did not imply, for instance, that these repurchases occurred at the highest possible price offered by any market participant."

Nor did they show that risk disclosures about impediments to an acquisition were misleading, she said.

But the insider trading claim survives because the plaintiffs adequately alleged the materiality of the omitted information, even though the acquisition was a "contingent or speculative" event, the judge said. They pleaded the takeover's magnitude—Emerson's purchase of all the stock—and the probability of it occurring, she said.

Robbins Geller Rudman & Dowd LLP is lead counsel for the class. Davis Polk & Wardwell LLP and Dowd Bennett LLP represent NI and Emerson.

The case is In re Nat'l Instruments Corp. Sec. Litig. , 2024 BL 312136, S.D.N.Y., No. 23-cv-10488, 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: Kiera Geraghty at kgeraghty@bloombergindustry.com

TuSimple Shifting Gears and Leaving Town

sdbj.com/technology/tusimple-shifting-gears-and-leaving-town

September 10, 2024

NewsenewsFeatured

TECH: Co. Signs Deal for Animation, Video Games

By

GARY WARTH
September 10, 2024

1

TuSimple is shelving its autonomous truck business to focus on building an animation and video game franchise. The company hasn't ruled out returning to transportation when the industry's economics become more favorable, according the company's CEO. Photo courtesy TuSimple

SAN DIEGO – After a tumultuous couple of years that saw the company fire its CEO, subjected to several investigations and delisted from Nasdaq, TuSimple has announced a new venture in animation and video games.

San Diego will not be part of the company's future, however, as TuSimple expects to relocate to either China or Japan with the next six months.

Cheng Lu
President & CEO
TuSimple Holdings

President and CEO Cheng Lu made a surprise announcement in August that TuSimple has a new partnership with Shanghai Three Body Animation Co. to develop an animated feature film and video game based on Liu Cixin's science fiction trilogy "The Three-Body Problem," which has sold over 30 million copies worldwide and has been adapted into a current Netflix series.

The new venture appears an unusual shift for a company known for autonomous fleet transportation, but Lu said it's all about using its AI technology in a new way and pursuing a more stable, lucrative market.

"We think there's a lot of opportunities," he said. "The video game market itself is about $200 billion market globally."

The future of self-driving trucks to make deliveries, however, is more uncertain. Lu noted that some companies in the field have closed in recent years, and commercialization of the technology will be much longer than expected.

While the company is more stable, it also is considerably smaller.

TuSimple laid off about 150 employees in December, accounting for 75% of its U.S. workforce, with plans to shut down its domestic operation and focus solely on the Asia-Pacific region. In January, the company delisted itself from Nasdaq, and shareholders sued following news about the U.S. shutdown.

A federal judge in January stopped the company’s planned move by issuing a temporary restraining order preventing TuSimple from taking assets and intellectual property overseas.

Lu said there is a pending settlement to the lawsuit that should be finalized within a few months, and an amendment to the TRO requires a nondisclosure agreement with companies they work with. TuSimple is allowed to partner with Three Body Animation under the TRO, he said.

Promising Launch

TuSimple was founded in 2015 by California Institute of Technology graduates Mo Chen and Xiaodi Hou, who opened offices in San Diego and Beijing, China. Two years later, it was the first San Diego company to receive a California DMV permit to test its autonomous vehicle technology.

By 2019, the company’s valuation was at $1 billion, and it had raised $95 million, had 12 customers and was making three to five trips a day for them with autonomous trucks in Arizona.

In 2020, the company launched the “Autonomous Freight Network” after partnering with UPS, Penske, U.S. Xpress and Berkshire Hathaway subsidiary McLane Company, Inc. Lu envisioned a national transportation network of mapped routes, connecting hundreds of terminals to enable efficient, low-cost long-haul autonomous freight operations.

In December of 2022, TuSimple became the first company in the world to successfully complete a trip on a public highway alongside other vehicles with a fully autonomously truck, which traveled 80 miles between two Arizona cities without a driver.

TuSimple became a publicly traded company in 2021, and a year later co-founder Xiaodi Hou, who had been chief technology officer, replaced Lu as CEO. The company’s shares dropped 30% at the announcement.

TuSimple’s Troubles

In 2021, the Committee on Foreign Investments in the United States (CFIUS) began an investigation into the company over a 2017 transaction in which Sun Dream Inc., a subsidiary of the Chinese media conglomerate Sina, acquired a 20% stake in the company.

The following year, TuSimple came to an agreement with CFIUS to keep its U.S.-developed core technology out of China in exchange for limited oversight from the watchdog group. Two board members with connections to Sun Dream also agreed to step down once their terms are up, and Hou was fired and replaced by Lu.

The CFIUS, FBI and U.S. Securities and Exchange Commission also launched investigations about TuSimple's relationship with China-backed Hydron Inc., which had been launched in 2022 by TuSimple co-founder Mo Chen.

The temporary restraining order prevents TuSimple from sharing intellectual property with Hydron, and Lu said the investigations soon will be closed.

"So on that part, we're happy to see that everything is very close to resolution, and we can finally put things behind us and move forward," he said.

Lu said TuSimple's AI technology can help make the process of developing animation and video games more efficient, but the company hasn't abandoned working in transportation.

"It's a very asset-heavy operation, which requires a lot of capital," he said about autonomous trucks. "Given where we are and where the market is, that doesn't have the highest return on our investment at this point.

"Right now, our focus is on the animation project," he said.

TuSimple might relocate to China or to Japan in about six months because of the animation and gaming talent in those countries. He expects a return to San Diego when the film is released in a couple of years, but only as an exhibitor at Comic-Con International.

TuSimple Holdings, Inc.
FOUNDED: 2015
CEO: Cheng Lu
HEADQUARTERS: San Diego
BUSINESS: AI technology
FUNDING: $1.8 billion since inception
EMPLOYEES: 12 in San Diego, 250 globally
WEBSITE: https://ir.tusimple.com
NOTABLE: TuSimple's new animated feature will be based on the novel "The Three-Body Problem," which has sold 30 million copies.

Previous article
Eli Lilly Inks $1B Partnership with San Diego Biotech

Opioid plaintiffs' committee urges US appeals court to toss fee bid by shut-out law firms

reuters.com/legal/litigation/column-opioid-plaintiffs-committee-urges-us-appeals-court-toss-fee-bid-by-shut-2024-09-09

Alison Frankel

REUTERS/Mohamed Abd El Ghany Purchase Licensing Rights, opens new tab

Sept 9 (Reuters) - When it comes to calling dibs on $2.1 billion set aside for lawyers who contributed to settlements with nine major opioids defendants, the plaintiffs' lawyers in charge of the sweeping nationwide case are not kidding around.

On Friday, the plaintiffs' executive committee — which includes Motley Rice, Simmons Hanly Conroy and Lieff Cabraser Heimann & Bernstein — moved to dismiss, opens new tab an appeal at the 6th U.S. Circuit Court of Appeals by two firms that were shut out of so-called common benefit fees, arguing that the firms waived their right to ask for review by the federal circuit when they agreed to participate in the elaborate fee allocation process in the opioids multidistrict litigation.

The firms that filed the appeal — Goldstein, Russell & Woofter and Kelley & Ferraro — represented six Ohio cities that objected a few years back to a proposal by about 50 other cities and counties to certify a first-of-its-kind “negotiating class” to provide structure for settlement talks with the drug companies, distributors and pharmacies sued for fueling a nationwide epidemic of opioids abuse.

Goldstein name partner Kevin Russell, who presented oral argument for the objecting Ohio cities at the 6th Circuit, helped persuade the appeals court to overturn certification of the negotiation class in a 2020 decision, opens new tab that said the novel device might compromise class members’ opt-out rights.
The Goldstein and Kelley firms contend that their work on behalf of the objectors entitles them to a fee from a $2.1 billion fund set aside from settlements with nine defendants, including Janssen, McKesson (MCK.N), opens new tab, Teva (TEVA.TA), opens new tab, CVS (CVS.N), opens new tab and Walmart (WMT.N), opens new tab. (Common benefit funds, which are meant to compensate lead plaintiffs' lawyers for work that benefits everyone in the case, are quite common in multidistrict litigation.)

Unfortunately, most of the records surrounding the Goldstein and Kelley request are not public, so we don't know the full extent of their arguments for a share of the common benefit fund. All we know, based on their Sept. 4 filing, opens new tab at the 6th Circuit, is that they cited their work for objectors and requested an award of .08% of the $2.1 billion fund, or about $1.7 million.

The opioids settlement agreements with Janssen, McKesson and the other seven defendants that contributed to the common benefit fund contained special protocols, opens new tab for allocating common benefit fees. The protocols called on U.S. District Judge Dan Polster of Cleveland to appoint three members of a "fee panel," which would accept and review extensive submissions from plaintiffs' firms that believed they deserved a share of the money.

Firms that participated in the process would have only "limited appeal rights": If they were unhappy with the panel's decision, the protocol allowed them to seek review from Polster, who could overturn panel rulings only if he determined the panel abused its discretion.

Polster's April 2022 order, opens new tab implementing the fee-award protocols from the settlement agreement was more definitive: The judge said he would make "the final determination" and would enter a "final non-appealable award" on how to distribute money from the common benefit fund.

The panel appointed by Polster — retired federal judge David Herndon, opioids special master David Cohen and mediator Randi Ellis — determined, opens new tab that Goldstein Russell was not entitled to any award from the common benefit fund. Goldstein Russell was not alone: The panel wholly rejected fee requests from 20 other firms as well.

Of the 97 firms that submitted fee applications, opens new tab, only seven asked Polster to review their awards. Not all of the firms that sought review were shut out of fees. As my Reuters colleague Brendan Pierson reported in June, Motley Rice appealed its award of $396 million, even though it received a bigger share of the common benefit fund than any other firm in the litigation.

The Goldstein firm's submission to Polster, like those of all the firms that asked the judge to review their awards, was filed directly to the special master and not publicly docketed. All we know is that when Polster issued his final fee order, opens new tab in July, he did not even discuss Goldstein or Kelley. The judge boosted the award to Spangenberg, Shibley, & Liber but otherwise did not tinker with the fee panel's determinations.

Goldstein and Kelley told the 6th Circuit in a Sept. 4 notice that they intend to appeal not just their award but also the fee-setting procedures Polster established.

The plaintiffs' executive committee promptly moved to toss the appeal two days later.

The committee's motion contends that the settlement agreements signed by Goldstein clients plainly established that plaintiffs' lawyers would have only "limited" rights to appeal fee awards to Polster. Goldstein and Kelley, moreover, had to acknowledge those limits when they submitted a request to the fee panel, the motion argued.

And if there was any ambiguity about restrictions on the right to review fee awards, the filing said, Polster's April 2023 order, which specified that he would have the final say on the distribution of fees from the common benefit fund, should have been made clear to Goldstein and Kelley that they are not entitled to 6th Circuit review.

"Appellants knowingly and voluntarily agreed that the district court's order would be 'non-appealable' and thus waived their right to appeal to this court," the motion said.

I emailed Kevin Russell and Daniel Woofter of Goldstein Russell and James Ferraro of Kelley & Ferraro but did not hear back.

Peter Weinberger of Spangenberg Shibley, who signed the dismissal motion from the plaintiffs' executive committee, declined to comment.

As of Monday afternoon, the 6th Circuit hasn't asked for a response to the motion.

Read more:

US law firm Motley Rice appeals $396 mln opioid fee award
Top law firms in US opioid lawsuits to get hundreds of millions in fees
Get a quick look at the days breaking legal news and analysis from The Afternoon Docket newsletter. Sign up here.

Alison Frankel
Thomson Reuters

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

Securities Law News

Sept. 9, 2024, 9:33 AM PDT; Updated: Sept. 9, 2024, 11:34 AM PDT

Agenus Hit With Investor Suit After FDA Cancer Drug Feedback (1)

By Matthew Bultman

- **COURT:** D. Mass.
- **TRACK DOCKET:** 24-cv-12299

Bloomberg Law News 2024-09-10T12:58:08712757111-04:00

Agenus Hit With Investor Suit After FDA Cancer Drug Feedback (1)

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.

The suit alleges the company overstated the therapy's clinical results and investors were misled about its effectiveness.

The complaint was filed Sept. 6 in the US District Court for the District of Massachusetts. An Agenus spokesperson said the company "will defend itself against these baseless claims."

"As this is an ongoing legal matter, we cannot comment further at this time, but we remain committed to transparency and compliance with all regulatory obligations," the spokesperson said.

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 .

(Updated with comment from Agenus)

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

Bloomberg Law

Request a Demo Login

Securities Law News
Sept. 9, 2024, 2:44 PM PDT

Bancor Exchange Gets Crypto Investors' US Court Suit Thrown Out

By Martina Barash

Bloomberg Law News 2024-09-10T12:56:24476279081-04:00

Bancor Exchange Gets Crypto Investors' US Court Suit Thrown Out

By Martina Barash 2024-09-09T17:44:28000-04:00

Cryptocurrency investors can't sue the Bancor digital asset exchange over its alleged suspension of an investment protection feature in the US, a federal court ruled.

Judge Robert Pitman of the US District Court for the Western District of Texas on Sept. 6 adopted a magistrate judge's recommendation of dismissal. The magistrate judge said Bancor, its founders, and related entities—all based in Israel or Switzerland—lack sufficient contacts for personal jurisdiction, and also said extraterritoriality concerns made US securities laws inapplicable.

- The investors alleged that Bancor touted protection against certain losses from investing crypto assets in an exchange rather than holding them, according to Magistrate Judge Mark Lane's July report
- But withdrawals analogous to a bank run caused Bancor to "suspend" its protection, leaving investors with millions of dollars in losses, they said
- The claims against Bancor DAO, an unincorporated general partnership that didn't make an appearance in the case; related entities BProtocol Foundation and LocalCoin, Ltd.; and the platform's four co-founders are dismissed, Pitman said

Hoppin Grinsell LLP and Silver Golub & Teitell LLP are lead counsel for the investors. Jenner & Block LLP and Ewell, Brown, Blanke & Knight LLP represent the defendants.

The case is Basic v. Bprotocol Found. , W.D. Tex., No. 1:23-cv-00533, 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: Andrew Harris at aharris@bloomberglaw.com

Securities Law Prof Blog

Monday, September 9, 2024

New Securities Law Articles in Print

The following law review articles relating to securities regulation are now available in paper format:

Patrick M. Corrigan, *Do the Securities Laws Actually Protect Investors (and How)? Lessons from SPACs,* 101 Wash. U. L. Rev. 1123 (2024).

Kathryn Judge & Dan Awrey, *The Administrative State, Financial Regulation, and the Case for Commissions*, 35 Stan. L. & Pol'y Rev. 49 (2024).

Aneil Kovvali, *ESG and Securities Litigation: A Basic Contradiction*, 73 Duke L.J. 1229 (2024).

Benjamin R. Lukas, Note, *Show Me the Green: The Battle for Investor Trust in ESG Funds*, 73 Duke L.J. 1338 (2024).

Securities Law News

Sept. 9, 2024, 6:27 PM PDT

Masimo Retail Investor Role in Politan Proxy Fight Eyed by Judge

By Maia Spoto

- Politan says it sent info to moot issues ahead of Sept. 19 vote
- Masimo says not enough time for retail investors to absorb it

Bloomberg Law News 2024-09-10T12:58:34010837264-04:00

Masimo Retail Investor Role in Politan Proxy Fight Eyed by Judge

By Maia Spoto 2024-09-09T21:27:39000-04:00

- Politan says it sent info to moot issues ahead of Sept. 19 vote
- Masimo says not enough time for retail investors to absorb it

A federal judge's decision about an upcoming proxy fight at Masimo Corp. may hinge on whether new information filed Monday by Politan Capital Management LP has time to reach retail shareholders.

The hedge fund filed new disclosures for investors that it said were meant to moot allegations that Politan made materially misleading statements ahead of a Sept. 19 shareholder vote.

The vote—which Masimo seeks a preliminary injunction to delay—could oust Masimo's CEO from the board and shift control of the electronic health monitor maker to Politan. Judge James V. Selna of the US District Court for the Central District of California issued a tentative ruling under seal ahead of the Monday hearing on the injunction request.

Selna asked how long it would take the market to understand and act on the supplemental information, filed ten days before the election, given that more than 90% of Masimo's shareholders are sophisticated institutional investors.

The vote is so close, that it may be decided by retail shareholders that hold the remaining stake, Michelle Johnson of Latham & Watkins LLP argued for Masimo. As a result these voluntary disclosures likely aren't enough to counter alleged materially misleading information about the company's governance practices and Politan's takeover plans, she said.

"Swing state," Selna said, prompting laughs in the courtroom.

Michael Swartz of Schulte Roth & Zabel LLP said for Politan argued that absorption of the material would be very quick.

Economic loss

Politan is looking to add a third and fourth director to Masimo's board, which would give it control over the company.

Masimo alleges that Politan mislead investors about its plans to take control of the company, and about the role the hedge fund and its founder, Masimo board member Quentin Koffey, played in helping a shareholder firm sue Masimo, among other key details.

Politan has denied the claims and has said the allegations about the lawsuit are based on an unreliable source.

Selna said in an Aug. 29 order that injunctive relief may not be legally possible because Masimo hasn't blamed financial loss on Politan or asked for money damages.

A vote based on materially false information would harm the company by leading to Politan's control of the board, giving Masimo's current CEO claim to a change of control payment, and prompting the departure of the company's COO and 300 engineers, Johnson said.

The company has also lost resources fighting the "illegitimate" proxy fight, Masimo said in court filings.

Swartz said that Masimo's line of reasoning would allow "every single proxy contest" to "automatically satisfy" the economic loss requirement.

Politan is represented by Schulte Roth & Zabel LLP, Munger Tolles & Olson LLP, Cadwalader Wickersham & Taft LLP, and Morris, Nichols, Arsht & Tunnell LLP. Masimo is represented by Latham & Watkins LLP and Richards, Layton & Finger PA.

The case is Masimo Corp. v Politan Cap. Mgmt. LP, C.D. Cal., No. 24-cv-1568, 9/9/24 .

To contact the reporter on this story: Maia Spoto in Los Angeles at mspoto@bloombergindustry.com

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

Trojan condoms contain 'forever chemicals,' lawsuit claims

reuters.com/legal/trojan-condoms-contain-forever-chemicals-lawsuit-claims-2024-09-09

Jonathan Stempel

A plane flies an advertisement for Trojan Bareskin condoms over the concert grounds on the second day of the Firefly Music Festival in Dover, Delaware U.S., June 15, 2018. REUTERS/Mark Makela/File Photo Purchase Licensing Rights, opens new tab

NEW YORK, Sept 9 (Reuters) - A new lawsuit on Monday claims that Trojan condoms are not safe because they contain toxic "forever chemicals," which have been linked to cancer.

In a proposed class action filed in Manhattan federal court, the plaintiff Matthew Goodman said Church & Dwight's (CHD.N), opens new tab products, advertised as "America's #1 Condom," are unfit for their intended purpose because they contain per- and polyfluoroalkyl substances, or PFAS.

Goodman said independent lab testing of the Trojan Ultra Thin condoms that he bought at a Manhattan pharmacy found a presence of organic fluorine, which is "practically nonexistent" outside its use in man-made PFAS chemicals.

"Based on the label, he reasonably believed the product was safe for use on his genitalia," the complaint said, referring to Goodman.

"Had defendant disclosed on the label that the products contained PFAS chemicals, and the harms that can result from contact with PFAS chemicals, he would not have purchased the products, or at the very least, would have only been willing to pay significantly less," it added.

The complaint seeks at least $5 million in damages from Ewing, New Jersey-based Church & Dwight for purchasers of Trojan condoms nationwide.

Church & Dwight did not immediately respond to requests for comment after market hours. Lawyers for the plaintiff did not immediately respond to similar requests.

In July, the consumer advocacy blog Mamavation said tests, opens new tab of 29 popular condoms and lubricants found several with a possible presence of PFAS, including Trojan Ultra Thin condoms.
PFAS are found in hundreds of consumer and commercial products including cosmetics, non-stick pans and stain-resistant clothing.

They became known as "forever chemicals" because they do not break down easily in the human body or environment.

PFAS have been linked to negative health effects, opens new tab including higher cholesterol, low birth weights and reduced antibody response to vaccines, as well as kidney and testicular cancer.

The case is Goodman v. Church & Dwight Co, U.S. District Court, Southern District of New York, No. 24-06813.

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

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

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

PROFILE

After Battling Cancer, Boies Schiller Rainmaker Stuart Singer Tackles Something New: Day-to-Day Firm Management

Singer, who took time away from his busy litigation practice in 2022 to battle non-Hodgkin's lymphoma, became one of Boies Schiller's three co-managing partners earlier this year at a moment of transition for the firm.

September 10, 2024 at 07:30 AM

Law Firm Management

Ross Todd
Editor/columnist

At a time when a lot of people might take a step back from professional responsibilities, **Boies Schiller Flexner** partner **Stuart Singer** took a step forward.

In 2022, after 65 years of good health, Singer took time away from his prodigious litigation practice to seek treatment for non-Hodgkin's lymphoma. He relocated from his home in South Florida to Boston to go through six cycles of chemotherapy over 18 weeks at Beth Israel Deaconess Medical Center.

"When you have something like that happen to you, you take stock and you think about what you want to do," said Singer earlier this summer. "Do you want to do something completely different? Or do you want to continue with what you're doing?"

Singer has plenty of interests outside his professional life that could have nudged him toward retirement: golf, wine, debate. But those familiar with his passion for the law and his connection with clients were hardly surprised when he went back to practicing full-tilt shortly after doctors gave word his cancer was in remission. He's continued to work for memorabilia company Panini in disputes shaping the sports trading card industry and Florida Power & Light Co. in dealing with the legal fallout from power outages caused by Hurricane Irma in 2017.

It's perhaps a bit more surprising that on top of resuming his role as one of the firm's top rainmakers, Singer has since embraced a new role as one of Boies Schiller's day-to-day managers. Earlier this year, Singer became one of the firm's three managing partners alongside fellow South Florida partner **Sigrid McCawley** and the firm's chair-elect, **Matthew Schwartz**. During this time of transition for the firm, with founder **David Boies** serving his final year as chairman, Singer, the longest-tenured of the three MPs, is helping to oversee the firm's focus on business development opportunities and redouble efforts to strengthen operations in California, where Boies Schiller experienced significant losses over the past few years. He's also overseeing more mundane matters such as new matter approval and making sure bills go out on time.

Singer, now 68, sat down during one of his trips to the firm's San Francisco office earlier this summer to discuss why he would take on such duties in the wake of a significant health scare.

He was matter-of-fact.

Boies and fellow founding partner **Jonathan Schiller** approached him about taking on the role last year. "I thought about it and said I'd be interested in doing that if they thought it would be helpful to the firm," Singer said.

In a phone interview, Boies said Singer's willingness to step up for the firm in such circumstances "illustrates the kind of person he is … unflappable and undeterred by almost anything"

"I think he really, genuinely, as I do, enjoys what we do," he said. "I think that no one who was his age would be doing this at this level, even without a health scare, if they didn't really love what they did."

Let's pause for a second to note that Boies is now 83 and still taking on new matters. The Wall Street Journal reported last month that he represented Delta Airlines as it considered litigation against Microsoft and cybersecurity company Crowdstrike over the tech outages that ravaged air travel this summer.

"As David Boies likes to say, he's gonna practice indefinitely, but not infinitely," Singer told me. "But I think he's leaning more to the infinite."

The Recruit

Former Boies Schiller partner **Bill Isaacson** had a significant hand in bringing Singer to the firm nearly a quarter century ago.

Isaacson, now a partner at **Paul, Weiss, Rifkind, Wharton & Garrison**, calls Singer "the only person in my professional life who was my friend before we were in a law firm together."

The two go way back. Isaacson was on the debate team at the University of Redlands when Singer, a former national champion debater at Northwestern University himself, then a top student at Harvard Law School, signed on to help coach the Redlands team. (David Boies, it should be noted, also debated at Redlands.) When Singer later clerked for U.S. Supreme Court Justice Byron White, Isaacson says Singer invited him to play basketball at "the highest court in the land"—the high court's vaunted hoop.

After his Supreme Court clerkship, Singer took the then-unusual step of moving back to his native South Florida to practice, first at **Greenberg Traurig**. Singer said he made the move because he saw Florida as full of business opportunity and a place where he could try cases.

"Very soon after I joined, I tried my first jury trial and won a whopping $13,000 verdict for an explosion on a golf course irrigation system," Singer said. "Some of the people at law school who said, 'I can't believe you're going to Florida' would call me up several years later to ask 'Are there job opportunities down there?' because they were tired of reviewing documents in a conference room for two years."

Singer eventually built a sizable litigation practice and landed at the firm then known as **Kirkpatrick & Lockhart**, where he became a member of the management committee. Around the turn of the century, though, with Boies Schiller on the rise, Singer reached out to Isaacson to inquire about a possible move.

"At that point, I thought Boies Schiller was now on the map because Stuart was interested," Isaacson said.

Isaacson said he took the idea of bringing on Singer to firm co-founder Schiller, who initially balked at the idea. Before giving up, Isaacson says he told Schiller: “I just thought I’d mentioned he’s really smart.”

“And then Jonathan said, ‘You know, all the years we’ve been working together, you’d never described anyone as really smart.’ He said, ‘Let’s get him in here!’”

After meeting with the D.C. team and flying to New York to meet with Boies, Singer joined the firm in 2000.

“I’ve always said that whatever contributions I’ve made to Boies Schiller, the most important one was my knowing Stuart Singer,” said Isaacson. “There’s this phrase these days of firms trying to differentiate by acquiring talent. Stuart was talent.”

In the years since joining Boies Schiller, Singer expanded his trial and appellate practice and increased its national reach for clients including Fidelity National Financial, Carnival Corp., Ryder Corp., NextEra Energy and Greenberg Traurig. He’s helped build out Boies Schiller’s South Florida presence, served as the administrative partner of its Fort Lauderdale office and sat on the firmwide executive committee.

But his first turn as a part of the firm’s day-to-day management team comes in the wake of significant talent losses in recent years, including the departure of Isaacson and partner **Karen Dunn** to Paul, Weiss. According to data from the National Law Journal, the firm shrank from more than 320 lawyers at its peak headcount to about 150 before the latest transition plans were announced last year. Among those who left were two partners originally tapped as Boies’ leadership heirs: **Nicholas Gravante Jr.**, based in New York, who left to join **Cadwalader, Wickersham & Taft,** and **Natasha Harrison**, based in London, who left to form her own firm.

In the wake of all the losses, both Singer and Boies pointed to the firm’s stability in Ft. Lauderdale, an office with about 25 lawyers.

“I think it was important that I had a primary role in growing a successful office that’s been very stable, very profitable,” Singer said. “I think that showed that I had the leadership skills that would be useful in a broader setting.”

Ursula Ungaro, a former federal judge in the Southern District of Florida whom Singer helped recruit to the firm in 2021, said she was surprised to see Singer take on the managing partner role in the wake of his health scare. “But I’m beginning to think that Stuart has the capacity for almost anything,” Ungaro said. Even from her role on the bench, Ungaro said she was impressed by Singer’s ability to express himself and get along with opposing counsel. But in working alongside him in litigation for Panini, she said she’s seen Singer’s value as a leader first-hand. “One of the things I really admire about Stuart is that he has a remarkable ability for assembling teams and getting absolutely the best out of people that they have to offer,” she said. “I think he brings to the table enormous judgment, enormous experience and this really just extraordinary talent to bring people together.”

Boies credits Singer with developing a “family” atmosphere in Ft. Lauderdale, where he says there’s a “tremendous” and “well-deserved” loyalty to Singer from younger lawyers whom he’s helped mentor.

“I think one of the things that we let get away from us a little bit was collegiality and the closeness that we had within offices for a long time,” said Boies of the cultural changes that came with growth. Boies said that rapid expansion and the volume of work the firm was dealing with could have contributed to less cultural cohesion. “Everybody was focusing on getting the immediate job done and spending less of the time on the long-run development and mentoring of the kind that you have got to do.”

“No one is more dedicated to the firm institutionally and more dedicated to and responsive to the younger people” than Singer, Boies said.

Singer admits that the firm made missteps before landing on its current succession plan, with Schwartz set to take the reins as chair from Boies at the turn of the year. But he said by focusing on “three legs of the stool” the firm is built on—contingency work, hourly work primarily for defense-side clients and a significant focus on public interest cases—the firm can put itself on solid footing heading into the future.

He said he sees a generation of up-and-comers at the firm, and he’s hoping to focus them on business development opportunities.

“I particularly enjoy working with our younger lawyers at this point in my career, and I viewed the opportunity to become involved in management in a more active way as a way of doing that on a larger scale,” Singer said.

Deere settles US SEC bribery probe into massage parlor, other gifts in Thailand

reuters.com/legal/deere-pay-993-mln-settle-us-sec-bribery-probe-2024-09-10

Jonathan Stempel

The leaping deer trademark logo is seen on John Deere equipment at a dealership in Taylor, Texas, U.S., February 16, 2017. Picture taken February 16, 2017. REUTERS/Mohammad Khursheed/File Photo Purchase Licensing Rights, opens new tab

Sept 10 (Reuters) - Deere (DE.N), opens new tab agreed to pay $9.93 million to settle U.S. Securities and Exchange Commission charges that a Thailand subsidiary offered massage parlor services and other improper gifts to win government business, and engaged in commercial bribery.
Tuesday's settlement resolves charges, opens new tab that high-level managers and employees at the agricultural equipment and heavy machinery company's Wirtgen Thailand unit made improper payments to officials at entities including the Royal Thai Air Force and Thailand's Department of Highways.

The SEC said payments were made though the unit's code of conduct prohibited giving "absolutely anything" to improperly influence government officials.

Payments made from late 2017 through 2020 allegedly took the form of cash, meals, sham consulting fees, sightseeing ventures disguised as "factory visits" in Switzerland and other European countries, and massage parlor "entertainment."

The SEC said Deere's conduct violated the books and records and internal accounting controls provisions of a federal anti-bribery law, the Foreign Corrupt Practices Act.

Deere's payment includes a $4.5 million civil fine, the disgorgement of $4.34 million of improper benefits, and $1.09 million of interest.

It also reflected Moline, Illinois-based Deere's cooperation with the SEC, termination of employees involved in misconduct, and upgrades to compliance procedures and anti-bribery training.

"These allegations represent a clear violation of our company policies and ethical standards," Deere said in a statement. "They are in direct conflict with our core values--particularly our commitment to integrity--and we strongly condemn such practices."

Reporting by Jonathan Stempel in New York; Editing by Chizu Nomiyama

Deere & Co. Resolves $9.9 Million FCPA Enforcement Action

fcpaprofessor.com/deere-co-resolves-9-9-million-fcpa-enforcement-action

September 10, 2024

As highlighted in this recent post, approximately 20% of Foreign Corrupt Practices Act enforcement activity takes place in the month of September as the SEC's fiscal year comes to a close.

In September's first FCPA enforcement (there have been several non-FCPA, FCPA enforcement actions already – see here), Deere & Co. has agreed to pay approximately $9.9 million to resolve an SEC matter based on the conduct of a subsidiary in Thailand. The enforcement action largely concerns Thai officials visiting massage parlors and participating in non-business travel funded by the subsidiary.

This administrative order finds in summary fashion:

> "This matter concerns violations of the books and records and internal accounting controls provisions of the Foreign Corrupt Practices Act of 1977 (the "FCPA") by Deere, a global agricultural machinery manufacturer, through its wholly owned subsidiary, Wirtgen Thailand. From at least late 2017 through 2020, Wirtgen Thailand made improper payments to foreign officials at multiple government entities, including the Royal Thai Air Force and the Department of Highways, to win business, and during the same period also engaged in commercial bribery.
>
> The improper payments took various forms, including cash, sham consulting fees, extravagant "factory visit" trips to foreign countries, meals, entertainment at massage parlors, and others. The misconduct involved now former high level regional managers and employees and occurred during a period in which Deere failed to complete the full integration of this acquired subsidiary into its compliance program and overall control environment. As a result of this misconduct, Deere obtained an improper benefit of approximately $4.3 million and violated the books and records and internal accounting controls provisions of the FCPA."

According to the SEC:

> "Wirtgen Group ("Wirtgen") was a privately held company headquartered in Windhagen, Germany, and engaged in the business of manufacturing road equipment. In December 2017, Wirtgen was acquired by and became a wholly owned subsidiary of Deere, and its books and records are consolidated into the books and records of Deere. Deere conducts business in Thailand through Wirtgen's subsidiary, Wirtgen Thailand."

Under the heading “Wirtgen Thailand was Awarded Multiple Government Tenders as a Result of Numerous Bribery Schemes,” the order states:

> “To win tenders with government agencies RTAF [Royal Thai Air Force], DOH [Department of Highways], and DRR [Department of Rural Roads], Wirtgen Thailand engaged in bribery through several different mechanisms, including entertaining government officials at massage parlors, hosting officials on elaborate sightseeing expeditions disguised as “factory visit” trips, and making cash payments to officials both directly and through the use of a third-party agent. These payments were in violation of company policies and were falsely recorded on the company’s books and records as legitimate expenses.”

Under the heading “Bribery of RTAF, DOH, and DRR Through Improper Entertainment Expenses,” the order states in pertinent part:

> "From at least late 2017 through 2020, Wirtgen Thailand regularly entertained foreign officials from RTAF, DOH, and DRR at several massage parlors in Thailand, in violation of Wirtgen Group's Code of Business Conduct prohibiting giving "absolutely anything" to improperly influence a government official. Many of these massage parlor entertainment expenses, which were submitted for approval by Wirtgen Thailand's Managing Director and his sales team, contained round number denominations and lacked specificity. In several instances, names of additional Wirtgen Thailand employees were added to expense receipts to make the expenses appear more reasonable, when in fact those employees were not present at the massage parlors. These expenses reports were then routinely approved by Wirtgen's Managing Director for Southeast Asia or its Managing Director in Thailand, without regard for compliance with Deere's policies and procedures relating to entertainment of government officials and the true purpose for the payments.
>
> Expense reports from at least November 2019 through March 2020 describe expenses incurred at several massage parlors in Thailand in order to improperly influence officials of the Royal Thai Air Force while bidding on tenders. Listed as an attendee at massage parlor visits in December 2019, and again in March 2020, was a high level RTAF officer in charge of drafting and awarding tenders. Other expense reports, submitted and approved in November 2019 and February 2020, reflect massage parlor services provided to another high-ranking officer of the RTAF. The company entertained RTAF officials at massage parlors in exchange for obtaining information about the tender process and specific bidding requirements for tenders they were actively bidding on. As a result, Wirtgen Thailand was awarded two RTAF tenders in March and April 2020 for approximately $665,000.
>
> Similarly, Wirtgen Thailand incurred massage parlor expenses from at least 2017 through 2019, to host representatives from DOH tender committees, including a March 9, 2017, expense for "Department of Highway – Group of 15 persons from DOH Committee…" Another expense report submitted for approval in July 2018, noted only "entertainment" of DOH.
>
> As with the RTAF tenders, this entertainment was provided by Wirtgen Thailand's Managing Director in order to improperly influence the outcome of an upcoming DOH tender. The Managing Director noted in August 2018, "Finally, we have 1st succeed to step in this tender since 3 years tried to add qualification to the DOH tender." The "DOH Team" was again taken to a massage parlor by the Wirtgen Thailand Managing Director in September 2018 and December 2018, and the subsequent expense reports noted only "entertainment" in round numbers.

> Wirtgen Thailand won multiple tenders from DOH during this time period, including a December 2018 tender for $2,303,294, an October 2019 tender for $498,567, and a November 2019, tender for $1,451,432.
>
> Wirtgen Thailand also provided improper benefits at massage parlors to officials of the Department of Rural Roads in December 2019 in order to influence the award of tenders. Wirtgen Thailand was subsequently awarded a tender by the DRR in April 2020, for $1,283,905. Two of the four DRR signatories on that tender were recipients of entertainment by Wirtgen Thailand at this December 2019 massage parlor visit. In an email to his supervisor, Wirtgen Thailand's Managing Director noted "after a few months fighting to get this deal done, I did whatever channel and opportunities to turn back the tender result, we finally got the judgment to agree with DRR decision."
>
> The expenses incurred to provide massage parlor services to officials at RTAF, DOH, and DRR between 2017 and 2020, were done to improperly influence tender awards, but nonetheless were approved by Wirtgen Thailand's Managing Director and Wirtgen's Managing Director for Southeast Asia. None of these over $58,000 in expenses complied with the company's policies and procedures relating to entertainment of government officials, none followed proper approval processes for such interactions, and all were improperly booked as legitimate business expenses."

Under the heading "Bribery of DOH Through Sightseeing Trip Disguised as "Factory Visit," the order states:

> "In October 2019, Wirtgen Thailand paid for four foreign officials from the Department of Highways, including a member of the DOH procurement committee, and two of their spouses, to travel to its facilities in Germany. This "factory visit" was allegedly for the purpose of learning more about the company's equipment. The invoice accompanying the expenses for this trip described the purpose of the trip as being "to visit factory." However, the itinerary for this trip indicated that no factory visit took place. Instead, the trip solely consisted of sightseeing in Switzerland, including travel to Interlaken, Zermatt, and Lake Lucerne, as well as shopping and touring in the Alps, with stays in luxury hotels at each stop. Deere spent approximately $47,500 entertaining DOH officials on this sightseeing spree to win lucrative tenders.
>
> During the trip, which lasted for eight days, Wirtgen Thailand submitted a bid on a DOH tender. On October 16, 2019, just after the sightseeing trip ended, Wirtgen was awarded that tender, valued at approximately $498,567. Wirtgen was then awarded a second tender worth $1,451,432 one month later, on November 20, 2019.
>
> During this period, Deere had policies governing visits by non-U.S. government officials to its factories and facilities which required the provision of a variety of information in connection with seeking approval. This included details regarding the purpose of each visit, an agenda, names of government officials in attendance, whether any gifts or entertainment would be provided, and information about overall accommodations and cost. Wirtgen Thailand did not provide the required information and did not obtain prior authorization for the DOH trip. Instead, the expenses associated with this trip were knowingly approved and justified by Wirtgen's Managing Director for Southeast Asia because the company needed to "gain information and build rapport" with government customers."

Under the heading "Bribery of Government Officials in Thailand Through Cash Payments and a Third-Party Agent," the order states:

> "From 2018 to 2020, Wirtgen Thailand also made direct cash payments and payments made through a third-party agent to bribe government officials at DOH, DRR, and RTAF on numerous occasions to obtain business.
>
> For instance, in April 2019, Wirtgen Thailand's Managing Director texted the company's Finance Manager "re DOH … will have candy money for you too, next week…. Re DRR I will have to discuss it again." With respect to these cash bribes, the Managing Director instructed the Finance Manager to "Liaise with DOH…. Prepare 5 envelopes. And withdraw cash. You may take THB 100,000 first. For use on the delivery date." The Finance Manager subsequently asked, "For the five envelopes should I go ahead and put [THB] 20,000 in each?" to which the Managing Director replied that he would do it himself.
>
> In addition to directly paying cash bribes, Wirtgen Thailand used a third-party consultant to assist in paying bribes to government officials at DOH and DRR in order to secure four lucrative tenders for machine sales worth approximately $4.67 million. For each tender, Wirtgen Thailand entered into a sham commission agreement with the third-party consultant, which provided no legitimate services and was simply a conduit for paying bribes to the Thai government officials.
>
> The sham commission agreements authorized payments of approximately $285,129 and were signed by the Managing Director of Wirtgen Thailand. Wirtgen Thailand's Finance Manager also signed the sham commission agreement related to the DRR tender. Prior to the signing of the commission agreements, Wirtgen Thailand's Managing Director submitted Applications for Approval of Commissions to another Manager in Thailand.
>
> Communications between Wirtgen Thailand's Managing Director and its Finance Manager refer to a series of bribe payments made by the third-party consultant on Wirtgen's behalf to numerous government officials, including cash bribes to the new director of DOH, the former director of DOH, and a set of golf clubs given to the deputy director of DRR. All of these improper payments were made in connection with a 2020 DRR tender.
>
> Wirtgen Thailand's commission agreement with the third-party consultant in connection with the DRR tender contained bank account information on where to direct the commission payment. The account holder was a senior official of DOH who, along with his wife, had also gone on the nine-day sightseeing and "factory visit" trip to Germany, Prague and Austria in October 2019, and this same official was entertained in December 2018 at a massage parlor as described above.

> In 2018, this same third-party consultant was used to facilitate the sale of machinery outside of the tender process to SKT, an organization that operated as a dealer in the sale to DOH. Wirtgen Thailand paid the third-party approximately $46,205 and obtained the sale of 10 units of pneumatic tire rollers for approximately $924,104. 27. Between 2018 through 2020, as a result of bribes made through the third-party consultant, Wirtgen Thailand obtained illicit profits of approximately $2.7 million on sales of machinery to SKT, DOH and DRR."

A portion of the SEC's order also contains a section titled "Commercial Bribery of Customer A" which states in pertinent part:

> "During this same time period, Wirtgen Thailand engaged in commercial bribery of Customer A *[a private company that handles construction, project management, and design of large-scale infrastructure projects in Thailand]* by employing a similar scheme to secure sales of large industrial machines, which required the subsequent purchase of spare parts to keep them operational. The bribes occurred in at least 2018 and 2019, and included improper gift and entertainment expenses, extravagant sightseeing vacations under the guise of "factory visit" trips and making cash payments disguised as "brokerage fees" to Customer A employees involved in procurement. Wirtgen Thailand benefited from Customer A's purchases of spare parts required to service machines purchased as a result of the bribe scheme through 2023.
>
> […]
>
> As a result of these bribes paid through cash, gifts, entertainment, and travel, Wirtgen Thailand made profits of approximately $1.5 million on $5.3 million in gross sales of machines and spare parts to Customer A from 2018 to 2023."

Based on the above, the SEC found that Deere & Co. violated the FCPA's books and records and internal controls provisions.

As to the former, the order states:

> "the improper payments were inaccurately recorded in Deere's books and records as legitimate commissions and other business expenses, and its records further lacked sufficient detail and support to record payments to agents in Thailand as legitimate commissions and business expenses."

As to the later, the order states:

> "Deere's failure to fully integrate Wirtgen Thailand into its existing internal control system contributed to its failure to devise and maintain a sufficient system of internal accounting controls with respect to employee expense reimbursements, third party payments, and gifts, travel, and entertainment. As illustrated by the conduct described above, those controls were insufficient to detect or prevent these improper payments that occurred for a period of several years."

Without admitting or denying the SEC's findings Deere & Co. agreed to cease and desist from committing future violations and agreed to pay $9,930,355 (disgorgement of $4,343,401 and prejudgment interest of $1,086,954, and a civil monetary penalty in the amount of $4,500,000).

Under the heading "Cooperation and Remediation" the order states in pertinent part:

> "Respondent's cooperation included providing translations of certain relevant documents, making current and former employees available to the Commission staff, including witnesses located overseas, and timely providing the details of facts developed during its internal investigation, including the sharing of forensic accounting analysis, relevant emails and company documents, and information pertaining to current and former employees.
>
> Respondent's remediation included termination of employees responsible for the misconduct and initiating significant improvements to its internal audit and compliance programs. Respondent revised its Code of Business Conduct, including its anti-bribery and corruption and travel policies, and introduced new compliance initiatives, including the circulation of a companywide bi-monthly compliance newsletter and a new podcast dedicated to discussion of compliance issues. Respondent also increased training on anti-bribery issues. Respondent has also undertaken an analysis of its compliance program and continues to make improvements utilizing anticorruption risk assessments, internal audits and enhanced internal accounting controls related to third party management."

No new trial after novel 'shadow trading' theory win

DJ dailyjournal.com/articles/380888-no-new-trial-after-novel-shadow-trading-theory-win

Five months after the U.S. Securities and Exchange Commission secured a significant trial win against a biopharmaceutical executive based on its novel "shadow trading" theory, a federal judge denied the defendant's bid for a new trial on Monday.

Matthew Panuwat's "onetime conduct was a serious violation of the law that deserves a remedy that will deter him and others from similar conduct, but not permanently damage his career in the way that imposition of the officer/director bar would," Senior U.S. District Judge William H. Orrick wrote in his order. He referred to the SEC's request to bar Panuwat from serving as an officer or director of any publicly traded company. In addition to enjoining Panuwat from future securities law violations, Orrick imposed the maximum civil penalty of $321,197.40.

Following a two-week trial this year, a federal jury in San Francisco found that Panuwat had engaged in "shadow trading," a form of insider trading involving confidential information about one company used to trade in the securities of another closely related company. The SEC successfully accused Panuwat of using privileged material belonging to his employer, Medivation Inc., to trade in the securities of Incyte Corp.

The allegations against Panuwat were the first time the theory went to trial and the jury's decision expanded the scope of insider trading regulations.

The SEC's case was led by in-house attorneys Bernard B. Smyth and Jason M. Bussey. The agency declined to comment on Orrick's order. Panuwat was defended by Skadden Arps Slate Meagher & Flom LLP partner Jack P. DiCanio and Spertus Landes & Josephs LLP Anthony Pacheco, who did not respond to an inquiry for comment. *Securities and Exchange Commission v. Panuwat,* 3:21-cv-06322-WHO (N.D. Cal., filed Aug. 17, 2021).

In his motion for a new trial, Pacheco argued that the court wrongly instructed the jury on the elements of misappropriation and precluded evidence of Panuwat's valid defense theories. Federal law requires that some fiduciary relationship existed "between the defendant and the source that prohibited trading based on the source's nonpublic information," missing from Panuwat's case, Pacheco said. He added that Panuwat merely possessing confidential information did not create a fiduciary-type relationship.

Pacheco added that Orrick erred by granting the SEC's request to block Panuwat from introducing any testimony about Medivation's policies that did not arise from conversations with the defendant. The attorney wrote that such testimony would have shown why

Medivation's insider trading policy was ambiguous to Panuwat and allowed Medivation's CEO to attest that the company's insider trading policy did not prohibit employees from trading in the securities of third-party companies with which it had no business dealings.

Unconvinced by Pacheco's arguments, Orrick said he did not instruct the jury that it could find that Panuwat had a duty to Medivation based only on the receipt of nonpublic information. "I instructed the jury that one way it could find such a duty is if it found that Medivation had entrusted Panuwat, as its employee, with confidential information," the judge said. He added that such a fiduciary duty could arise from several sources, including when an employer entrusts its employee with confidential information.

As to the argument that the court improperly excluded testimony, Orrick said defense witnesses could not speculate or speak to the legal meaning of Medivation's policies without laying a proper foundation. "I did not allow them to testify in hindsight about their understanding of Medivation's policies concerning trades like Panuwat's Incyte trades if they had not talked to Panuwat about them, not done trainings or been trained on them, or not enforced them. I wanted to avoid post hoc rationalizations, which would be irrelevant," the judge said.

#380888

Sunidhi Sridhar

Daily Journal Staff Writer
sunidhi_sridhar@dailyjournal.com

Securities Law News

Sept. 9, 2024, 3:18 PM PDT

Apollo, Fidelity Win Look at Discovery in Ex-Judge Scandal Case

By James Nani

- Sanchez lenders can see existing discovery, can't participate
- Judge questioned US Trustee standing to claw back firm's fees

Bloomberg Law News 2024-09-10T12:55:49914609303-04:00

Apollo, Fidelity Win Look at Discovery in Ex-Judge Scandal Case

By James Nani 2024-09-09T18:18:41000-04:00

- Sanchez lenders can see existing discovery, can't participate
- Judge questioned US Trustee standing to claw back firm's fees

Apollo Global Management and Fidelity Management & Research Co. can look at but not participate in discovery related to a Justice Department unit's efforts to claw back millions of dollars in fees earned by a Texas law firm as part of a bankruptcy court scandal.

Apollo and Fidelity can review existing and ongoing discovery in the US Trustee's challenges to fees that Jackson Walker LLP collected following revelations that the firm didn't disclose a romantic relationship between former judge David R. Jones and ex-Jackson Walker bankruptcy partner Elizabeth Freeman, US Bankruptcy Judge Marvin Isgur ruled at a hearing Monday.

The ruling opens the door for Apollo and Fidelity to get more information to bolster their potential claims for damages against Jones, Freeman, and Jackson Walker for concealing the romantic relationship. But Isgur's limitation to not fully participate in ongoing discovery could hamper their case.

Apollo and Fidelity were part of a group of lenders to the former Sanchez Energy Co. oil and gas company before and during its Chapter 11. They've now questioned a key 2020 settlement during the bankruptcy, which the lenders say cost them hundreds of millions of dollars.

Jones, while a sitting judge, mediated the settlement but didn't disclose his relationship with Freeman. She was a bankruptcy partner at the time while Jackson Walker represented Sanchez as co-counsel.

Isgur—Jones' friend and former colleague who is handling the Sanchez case—raised concerns Monday about the lenders going on a "fishing expedition" that they have yet to fully support in court records.

The reorganized oil driller, Mesquite Energy Inc., can fully participate in discovery, Isgur ruled. He also ordered Jackson Walker to disclose information it has about how Jones was suggested to be the mediator in the settlement.

The ruling is part of an expansive web of litigation related to Jackson Walker and Jones, who resigned as a Houston bankruptcy judge last year after admitting to a relationship with Freeman. She left Jackson Walker at the end of 2022.

While delivering a mixed ruling for Apollo and Fidelity on Monday, Isgur said he has doubts about the US Trustee's power to claw back fees from Jackson Walker at all, saying that he thinks the office "can get all sort of things, but not money."

Isgur said he's been frustrated at how slow the US Trustee's actions against Jackson Walker have been proceeding, and Isgur signaled he wants to quickly determine what the unit's standing is and schedule trials in the challenges he controls.

"We need to vindicate the integrity issues that the US Trustee is so importantly is defending," Isgur said.

The lenders were represented by Willkie Farr & Gallagher LLP. Jackson Walker was represented Norton Rose Fulbright US LLP. Mesquite was represented by Gibson, Dunn & Crutcher LLP.

The case is Sanchez Energy Co., Bankr. S.D. Tex., No. 19-34508, hearing 9/9/24 .

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

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

Securities Law News
Sept. 9, 2024, 7:02 AM PDT

B. Riley Confirms Talks on Asset Deals to Cope With Debt (1)

By Rick Green and Donal Griffin

Bloomberg Law News 2024-09-10T12:59:45971057655-04:00

B. Riley Confirms Talks on Asset Deals to Cope With Debt (1)

By Rick Green and Donal Griffin2024-09-09T10:02:29705-04:00

B. Riley Financial Inc., the embattled broker-dealer and investment firm, outlined preliminary plans to sell assets and round up financing to cope with its debt burden and shore up its balance sheet.

The Los Angeles-based firm confirmed it's in talks to sell a majority stake in Great American Group, known for advising troubled retailers, and has a non-binding commitment for financing of its B. Riley and bebe brands businesses. Both deals are tentative and still subject to reaching definitive agreements, the company said in a statement Monday.

If the talks succeed, the two transactions are expected to raise about $410 million of gross cash proceeds, the company said. B. Riley intends to use those funds to pay down what it owes under a facility arranged by key lender Nomura Holdings Inc. to about $125 million by the end of 2024, according to the statement. The shares advanced as much as 17% in New York.

Easing the debt load of more than $2 billion has become an added concern on top of federal inquiries into B. Riley's financial reporting, writedowns on key holdings and a massive loss for the second quarter. The company still hasn't released results for that period. B. Riley eliminated its dividend last month, citing the need to put a priority on cutting leverage.

Debt Overhaul

By using cash on hand and proceeds from other asset sales, the firm expects to repay its outstanding February 2025 senior notes. B. Riley also confirmed it expects to announce an amended and restated credit agreement with Nomura.

"Given the opportunities we have in our core middle market financial-services businesses, we believe it is the right time to monetize these assets and leverage the proceeds to accelerate debt repayment," Chairman and Co-Chief Executive Officer **Bryant Riley** said in Monday's statement.

Bloomberg News previously reported that Oaktree Capital has been in negotiations to buy a stake in Great American, and that B. Riley was in talks with lenders about a debt amendment.

Special Committee

The company's setbacks have devastated B. Riley's stock, and Riley has made an informal offer to take his company private for $7 a share. The firm said Monday it established a special committee consisting of independent directors to evaluate the proposal. Riley didn't disclose who would provide financing when he made his offer.

Federal regulators are investigating whether B. Riley adequately disclosed the risks embedded in some of its assets, Bloomberg has reported. The US Securities and Exchange Commission is also seeking information on the interactions between Riley and longtime business partner **Brian Kahn**, the former chief executive of Franchise Group Inc., people familiar with the matter said.

Read More: SEC Probes B. Riley Deals With Client Tied to Failed Fund

Riley told investors during an Aug. 12 conference call that he and the company received subpoenas in July from the SEC seeking information about B. Riley's dealings with Kahn. The latter has faced controversy over his alleged role in events that led up to the collapse of a hedge fund he advised, Prophecy Asset Management. Riley and Kahn have said they haven't done anything wrong, and B. Riley has said it didn't have anything to do with Kahn's activities at Prophecy.

“We are responding to the subpoenas and are fully cooperating with the SEC,” Bryant Riley said during last month’s call.

Great American

Great American Group is the former name for what is today B. Riley’s appraisal and asset-disposition businesses. B. Riley has described its so-called Brands unit as home to retail clothing brands — including Scotch & Soda, Hurley and Justice — that other businesses pay royalties to use, according to a December 2023 presentation. Bebe stores inc., meanwhile, is a women’s clothing chain that B. Riley controls.

In the past, bebe stores has struck deals with Kahn, the US businessman at the center of much of the controversy swirling around B. Riley. The SEC has sought information about bebe stores, Bloomberg reported in January.

Nomura arranged a $500 million term loan for B. Riley last year that helped the firm orchestrate the FRG takeover, some $456 million of which was outstanding at the end of March, a regulatory filing shows. The Tokyo-based bank committed about $240 million of its own funds to the deal, more than any other lender, Bloomberg has previously reported.

This loan has since proved controversial. While B. Riley put up assets it said were worth about $1.5 billion as collateral, they included a stake in FRG worth about $200 million and a loan for a similar amount that it had made to Kahn — which itself was secured against more FRG shares. B. Riley now intends to write down the value of these assets by up to $370 million, according to an Aug. 12 statement.

A team of external advisers encouraged Nomura bankers to write down the value of its loan to B. Riley, citing the allegations against Kahn and warning that the collateral may be tainted by fraud, Bloomberg reported in January. Bankers at the Japanese lender declined to take any action then.

A spokesperson for Nomura declined to comment.

(Updates shares in the third paragraph.)

--With assistance from **Gillian Tan** and **David Voreacos**.

To contact the reporters on this story:
Donal Griffin in London at dgriffin10@bloomberg.net;
Rick Green in New York at rgreen18@bloomberg.net

To contact the editors responsible for this story:
Rick Green at rgreen18@bloomberg.net

Steve Dickson

Bloomberg Law News 2024-09-10T14:49:28112044198-04:00

Matt Levine's Money Stuff: The Fastest Options Are the Most Fun

By Matt Levine 2024-09-10T14:20:32954-04:00

Single-stock 0dtes

Some of the work in the financial industry involves finding and fostering bad counterparties. If you are a stock market maker — you buy stock from customers who want to sell, and sell to customers who want to buy — and your customers are mostly huge sophisticated hedge funds, you will have a lot of unpleasant days. They are smart and large; when they buy stock from you, it will mostly go up and you will regret selling; when they sell stock to you, it will mostly go down and you will regret buying.

On the other hand, if you have customers who like a gamble and are always wrong, that's great! When they sell stock to you, it will mostly go up, and you will make money. The obvious business model is:

- 1. Find more of those people.
- 2. Take them out to steak dinners, be nice to them, and generally make them feel like valued customers.
- 3. Proactively work to offer them trading opportunities that satisfy their urge to gamble, that give them more chances to be wrong, and that have a lot of profit built in for you.
- 4. Do as many trades as possible with them, though preferably not so many that you blow them up entirely. You want them to have enough fun that they keep coming back for more.

This business model is obvious in part because it is the actual well-known business model of a casino: nice dinners, fun games and lots of edge.

In finance, we talk a lot about " payment for order flow," which is an important way that US equity market makers try to find bad counterparties: If you trade stock on the stock exchange, you run the risk of trading with sophisticated hedge funds, but if you trade exclusively with the customers of a retail brokerage, you know that all of your counterparties are retail traders. So market makers pay those brokerages to trade with their customers, and in fact there is evidence that the market makers discriminate even among retail customers: Some retail brokers’ customers are more sophisticated than others’, so market makers should pay more to trade with the unsophisticated ones.

But you don’t have to just take your counterparties as you find them; you can work to encourage and develop bad ones. This is often a matter of product development: If you build a product that does nothing for sophisticated professionals but that is really good for noisy addicted gamblers, you will attract exactly the right sort of counterparty. This arguably explains much of crypto.

Anyway the the Wall Street Journal reports:

A popular, fast-paced trade has boosted the options market to record volumes in recent years. Now, Wall Street is looking to push it even further.

Zero-day-to-expiry options let investors bet on whether a particular stock-market index will rise or fall by the end of the day. They have drawn an enthusiastic following among amateur investors, even as skeptics call them a form of gambling. They are sometimes known by the hashtag #0dte.

So far, the #0dte boom has been limited to options tied to indexes such as the S&P 500 or Nasdaq-100. The next frontier could be options on stocks such as Tesla or Nvidia. …

Michael McCaskill, a 48-year-old day trader and volleyball-programs coordinator in Louisville, Ky., trades short-dated options in hopes of hitting the jackpot. He’s intrigued by the prospect of more-frequent expirations on single-stock options.

“The percentage gains are incredible,” said McCaskill, who has previously made profitable bets on GameStop, Netflix and PayPal. “It’s the short-dated options that give you that, whether it’s weekly or daily.”

I am sorry, I am sure he has lots of profitable trades and I don’t mean to be rude, but just, statistically speaking, for equity market makers, there are few more beautiful phrases in the English language than “day trader and volleyball-programs coordinator.” If you walk into the offices of Susquehanna International Group and say “hi I am a day trader and volleyball-programs coordinator from Louisville, Ky., and I love short-dated options but I wish they were shorter-dated, can you help,” they will treat you like a celebrity and give you anything you ask for. You are their muse.

As it happens, Susquehanna is salivating over single-stock 0dtes but Robinhood, less so:

In closed-door industry meetings, retail brokerages such as Robinhood Markets, Schwab, Tastytrade and Morgan Stanley’s E*Trade have advocated for a cautious approach, concerned they could face a customer backlash if investors’ options trades blow up, the people said.

Other firms—including Susquehanna International Group, a huge options-market maker, and Nasdaq—have actively promoted bringing daily expirations to single-stock options, the people said. Both market makers and exchanges stand to benefit from the volumes that could come from further growth in the #0dte phenomenon.

The retail brokers *basically* make money if their customers are happy; the market makers *basically* make money by trading against them. There is an overlap in their interests, but it is not complete. If Robinhood gives its customers new ways to lose money faster, that’s probably bad for Robinhood in the long term, but it’s very good for whoever is on the other side of those trades.

Keurig

The basic theory of “ everything is securities fraud” is this. A US public company does a bad thing, or a bad thing happens to it. When the bad thing becomes public, the stock drops. Shareholders sue, saying “we didn’t know about the bad thing, so we bought the stock, and then it dropped, so that was fraud.”

This is a general enough pattern that I often write that any bad thing that a public company does is also securities fraud. But this is not strictly true, and there are at least two cases that do not fit this pattern:

- 1. Technically, the fraud lawsuit requires some sort of misrepresentation. It is generally very easy to find this sort of misrepresentation — the company’s public filings say “we have a code of ethics,” the company’s chief executive officer does something bad, the lawsuit says “you disclosed you had a code of ethics, which made us think the CEO wouldn’t do something bad” — but there could be exceptions. If a public company's disclosures included a prominent risk factor saying "our CEO does mixed martial arts and if he gets punched in the face that will be bad for our business," and then the CEO gets punched in the face, and the company puts out a press release 15 seconds later saying "he got punched in the face really hard and that's bad," and the stock drops, then it's hard — not impossible, but hard — for shareholders to argue that they were deceived. If the disclosure is really good, even if a bad thing happens and the stock drops, that is probably not securities fraud.

- 2. Conversely, if the disclosure is *bad*, and then it is corrected, and the stock *doesn't* drop, then nobody is going to sue. If the company has a risk factor saying "our CEO does mixed martial arts," and then it puts out a press release saying "actually we just pretended he does mixed martial arts to make him seem cool, he doesn't really, really he enjoys crocheting," and the stock goes *up*, then who is going to sue?

I suppose the answer to that last question is "the SEC"? If a public company says something in its public disclosures, and that thing is *wrong*, but not in a way that is material to investors — it doesn't affect the stock price — that is still potentially a violation of the rules, and the US Securities and Exchange Commission could still get involved.

Sometimes it obviously will: If the company is just making up its financial results, the SEC will punish it, even if it turns out that investors don't care about the financial results. Other times it obviously won't: If there's a typo in the middle name of a director in the proxy statement, the SEC won't care; its job is to protect investors from material misrepresentations, not to fact-check every line of the disclosure.

But there's a middle category of things that the SEC thinks investors *should* care about, even if they *don't*. The SEC mandates disclosure about conflict minerals, for instance, and it is possible that that rule is more about the US government's political concerns than it is about investors' financial concerns. If a company's conflict minerals disclosure says "we make sure that none of our materials were mined in an unethical way," and it is lying, *its shareholders might not care*, but the SEC probably will.

Or we have talked about the SEC's efforts to require climate-related disclosures. Broadly speaking those disclosures are probably of interest to investors, but it's not clear that *all* of them will be *financially material*. If a company says "we use only clean energy to run our computers," and in fact it uses dirty energy, and the truth comes out, the stock might not drop. But the SEC will be concerned, not purely because of its mandate to protect investors, but because it cares about climate disclosure. It cares enough to propose the new rules. A company that flouts those rules will annoy the SEC, even if investors don't care.

Today the SEC fined Keurig Dr Pepper Inc. $1.5 million for making hard-to-recycle coffee pods:

The Securities and Exchange Commission today charged Keurig Dr Pepper Inc. with making inaccurate statements regarding the recyclability of its K-Cup single use beverage pods. To settle the SEC's charges, Keurig agreed to pay a $1.5 million civil penalty.

According to the SEC's order, in annual reports for fiscal years 2019 and 2020, Keurig stated that its testing with recycling facilities "validate[d] that [K-Cup pods] can be effectively recycled." But Keurig did not disclose that two of the largest recycling companies in the United States had expressed significant concerns to Keurig regarding the commercial feasibility of curbside recycling of K-Cup pods at that time and indicated that they did not presently intend to accept them for recycling. In fiscal year 2019, sales of K-Cup pods comprised a significant percentage of net sales of Keurig's coffee systems business segment, and research earlier conducted by a Keurig subsidiary indicated that environmental concerns were a significant factor that certain consumers considered, among others, when deciding whether to purchase a Keurig brewing system.

"Public companies must ensure that the reports they file with the SEC are complete and accurate," said John T. Dugan, Associate Director of the Boston Regional Office. "When a company speaks to an issue in its annual report, they are required to provide information necessary for investors to get the full picture on that issue so that investors can make educated investment decisions."

There is no suggestion that this was material to any investor's financial decisions, or even that the stock dropped. (There was a *consumer* class action that reached a $10 million settlement in 2022, so this really did cost the company some money, though the SEC doesn't mention it.) It's not even technically an "everything is securities fraud" case: Keurig is charged, not with *fraud*, but with violating the rule requiring it to file annual reports.

But it is close enough. If you are a public company, and you say stuff about your environmental record, and it's wrong, investors might not care. But in the US, the SEC is the all-purpose meta-regulator, and it cares a lot about public companies' environmental records. So if a company makes claims about recycling that are wrong, the securities regulator will get involved.

News

The point of dual-class stock is to prevent shareholder activism. If you run a company, and you own

10% of the economic value of the stock but 60% of the votes, you can kind of do what you want. And if a big activist hedge fund buys some stock and starts agitating for change, you can just say no. "Replace the chief executive officer, give me three board seats, do a stock buyback and consider strategic alternatives," the activist will say, and you'll say no. What can the activist do? Run a proxy contest to replace the board? You have 60% of the votes; you'll win. Mount a hostile takeover offer? You have 60% of the votes, you can block it.

Still hope springs eternal:

Activist investor Starboard Value said News Corp should eliminate its dual-class share structure, saying it gives too much influence to the family of Rupert Murdoch.

The dual-class structure isn't in the best interest of shareholders and doesn't reflect best-in-class corporate-governance practices, Starboard, which has a stake in The Wall Street Journal parent, said in a letter to shareholders. …

Starboard said it believes there is a path to achieve majority support for its proposal and send a message to the media company's board. "If the board refuses to listen, we can then take further action," it added.

Here is the letter. I suppose there are two points here:

- 1. Public companies are susceptible to pressures other than shareholder votes. If Starboard makes a very persuasive case to eliminate the dual-class stock, maybe Murdoch will read it and say "huh yeah let's do it." (Because, to be clear, the very persuasive case would be something like "this company will be worth more without dual-class stock," which would be good for Murdoch too.) Or maybe News Corp.'s outside shareholders and independent directors will read it and be persuaded, and will push Murdoch to do it, and he'll find it annoying and embarrassing to say no. Even though he can't be *outvoted*, he can be pressured into doing what Starboard wants.
- 2. Actually he can be outvoted! The Murdoch family controls about 40.5% of the voting stock, so if every other voting shareholder voted with Starboard then it would win the vote. In general people assume that a 40% voting bloc is functionally equivalent to controlling the company — not everyone votes, etc. — but maybe sometimes it isn't. Starboard is proposing a non-binding advisory vote, so even if it wins News Corp. won't have to get rid of the dual-class structure. But winning a non-binding vote would send the message that, if News Corp. *doesn't* get rid of the dual-class structure, the next

step will be Starboard mounting a proxy fight to take over the board — and if it can win the non-binding vote then it can also win the proxy fight.

Whistleblowers

At this point my model of the US Securities and Exchange Commission is that it is mostly looking for stable recurring revenue streams. This is a weird model! You could have a model of the SEC that is like "when people do fraud, the SEC fines them," but that is a lumpy and uncertain revenue stream. (What if no one does fraud, or the SEC doesn't catch them?) Or you could have a model like "the SEC tries to keep people from doing fraud in the first place, and every time it fines someone for a successful fraud that is a bad outcome," but where's the money in that?

But instead two of the SEC's marquee enforcement initiatives these days are:

- 1. If a financial services firm has employees who have texted about work on their personal cell phones, the SEC fines the firm millions of dollars. Because this is *every firm*, the SEC can reliably keep extracting these fines.
- 2. If a company has ever asked an employee or customer to enter into a nondisclosure agreement, the SEC fines it for violating the whistleblower protection rules. This also appears to be *every company* — not just financial services companies, either! — so it is a *very* reliable source of revenue.

The nondisclosure-agreement stuff tends to generate smaller fines than the cell phone stuff, or actual fraud, so it is steady but boring work. Still it seems to be ramping up. Here's a case from last week against Nationwide Planning Associates Inc.:

According to the SEC's order, from May 2021 through February 2024, Nationwide, NPA, and Blue Point collectively asked 11 retail clients to sign confidentiality agreements in connection with payments made by the entities to the clients' investment accounts. The payments were intended to compensate the clients for losses caused by the firms' alleged breaches of federal or state securities laws. The order finds that the agreements contained provisions that impeded clients from reporting potential securities law violations to the SEC by permitting communications only where the SEC first initiated an inquiry. As described in the order, some of the agreements further required the clients to represent that they had not reported the underlying dispute to the SEC or to another securities regulator and would forever refrain from such reporting.

Not allowed to do that! We have talked about this a few times before. There is an SEC whistleblower protection rule that makes it illegal to "impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement," and the SEC interprets that rule to mean that it is illegal to *have* a confidentiality agreement — if you are a public company or a securities firm — unless it says "but of course you're allowed to report possible securities law violations to the SEC, that's not prohibited by this agreement." (And you have to write the language exactly right.) If you settle a customer complaint by paying the customer money in exchange for a confidentiality agreement, that is just going to cost you more money, when the SEC finds out about it. And the SEC will find out, because somebody — the customer, or one of your employees — can probably get a whistleblower reward for reporting it to the SEC.

Meanwhile here's a collection of cases from yesterday against a random grab bag of companies, most of them *not* in the financial industry:

The Securities and Exchange Commission today announced settled charges against seven public companies for using employment, separation, and other agreements that violated rules prohibiting actions to impede whistleblowers from reporting potential misconduct to the SEC. To settle the SEC's charges, the companies agreed to pay more than $3 million combined in civil penalties.

Many of these seem to have involved employment agreements where the employees had to waive their right to get any whistleblower rewards from the government, and I have to say I sympathize with the employers there? Like imagine that you are a good, upstanding, but *large* company. One of your employees discovers that another employee is doing something bad. The good employee has two choices:

- 1. Immediately try to stop the bad behavior and report it to compliance, so that the company can quickly eliminate bad behavior and continue to be good and upstanding.
- 2. Say "ehh let's see where this goes," watch the bad behavior fester for a while, and then, when it's bad enough, report it to the SEC to extract a big fine. And then take a cut of that fine as a whistleblower award.

The first choice is better for the company, and probably for the world, so the company wants to encourage it. The second choice is more remunerative for the employee, and for the SEC.

Tether

Tether's USDT stablecoin is an obviously desirable product: It's a US dollar bank account that is not subject to US banking regulation. Lots of people want US dollar bank accounts, to move money internationally or to pay for things. Many people cannot get US dollar bank accounts, though. Sometimes this is because they do not live in the US and lack convenient access to the US banking system, and sometimes it is because they are terrorists:

A giant unregulated currency is undermining America's fight against arms dealers, sanctions busters and scammers. Almost as much money flowed through its network last year as through Visa cards. And it has recently minted more profit than BlackRock, with a tiny fraction of the workforce.

Its name: tether. The cryptocurrency has grown into an important cog in the global financial system, with as much as $190 billion changing hands daily. ...

Wherever the U.S. government has restricted access to the dollar financial system—Iran, Venezuela, Russia—tether thrives as a sort of incognito dollar used to move money across borders.

Russian oligarchs and weapons dealers shuttle tether abroad to buy property and pay suppliers for sanctioned goods. Venezuela's sanctioned state oil firm takes payment in tether for cargoes. Drug cartels, fraud rings and terrorist groups such as Hamas use it to launder income.

Yet in dysfunctional economies such as Argentina and Turkey, beset by hyperinflation and a shortage of hard currency, tether is also a lifeline for people who use it for quotidian payments and as a way to protect their savings.

Tether is arguably the first successful real-world product to emerge from the cryptocurrency revolution that began over a decade ago.

That seems right. The central promise of crypto is arguably "code is law," a new financial system freed from legacy regulation, and the first successful real-world crypto product is essentially a *way* *around US regulation*. You might like that! You might argue that the US abuses the power of the dollar to cut off people it doesn't like — including ordinary Russians and Venezuelans — from convenient access to the global financial system. Or you might dislike it! You might argue that a lot of people who are sanctioned by the US really *should* be cut off from the global financial system. But Tether really has succeeded in setting itself up as a US-dollar-based alternative to the US dollar system.

Elon Musk conglomerate

A plausible simple model of Elon Musk is:

- You can predict he will create a lot of value for investors, but
- You can't predict *which* investors.

If you buy Tesla Inc. stock and Tesla builds cutting-edge fully self-driving cars, that's probably good, unless Tesla just decides to allocate the revenue for those cars to xAI, Musk's entirely separate private artificial intelligence company. If you invest in SpaceX, Musk's private space company, and it makes a lot of money by sending good rockets into space, that's probably good for you, but it gets riskier if SpaceX lends its profits to Musk so he can buy Twitter. There is a large loosely organized conglomerate of Elon Musk companies with different shareholders, and Musk keeps getting new ideas, and he will probably implement those ideas at the (existing or new) company that will be best for *him* , and if you're a shareholder of one company there's no guarantee that you'll continue to get his best ideas.

As an investor, if you believe this model, I suppose the best you can do is:

- 1. Invest a lot of money with Musk,
- 2. Spread it out among all of his businesses,
- 3. Stay as close to him as possible so that, if he starts a new business, you'll get to invest in that one too.

Here's a Wall Street Journal story about John Hering, a Musk-friendly venture capitalist:

To win Musk's attention, and ensure access to funding rounds of his startups, Hering and Alexander Tamas, a German tech financier, have essentially committed their venture firm, Vy Capital, to serving the world's richest man.

Such venture giants as Valor Equity Partners and Sequoia Capital also have invested large sums, but none are as far out on a limb as Vy Capital. More than half of its $8 billion in reported assets is parked in Musk's startups.

Hering, 41 years old, donates most of his working hours to aiding Musk startups and holds company ID badges to grant him entry.

Also, though, this is the sort of investor that *Musk* should want. An investor who invests across Musk's empire won't care much about corporate formalities or complain if Musk does shift resources from one company to another, and if any Musk companies need capital that investor will provide it without asking too many questions. He goes wherever Musk needs him, and brings money.

This is why I like the idea of the Musk Mars Conglomerate in which all of Musk's random ideas are owned by a single corporation, but I suppose that has downsides. I mentioned a big one yesterday: It is good to pay the *employees* of each business in that business's own separate stock, to motivate them to build rockets or cars or AI or brain implants or tunnels or whatever their particular business does. But "half a dozen separate companies, all with pretty much the same shareholders" might be the best available compromise.

Things happen

Fed to Cut Biggest Banks' Capital Hike by Half in Overhaul. Multi-manager hedge funds suffer outflows as investor frenzy fades. Private Equity Fights Insurance for $15 Trillion Retirement Prize. Southwest Airlines Chairman to Step Down Amid Elliott Battle. Squarespace Gets Sweetened $7.2 Billion Offer From Permira to Go Private. PwC to parachute in UK partner to run scandal-hit China business. Bank of America Raises Minimum Wage to $24 on Way to $25 an Hour. Maduro Blows Through Venezuela's Dollar Stockpile in New Threat to Regime. China's future bankers battle 'shame' over derided profession. "It's a segment of reef we have access to." Greed, Gluttony and the Crackup of Red Lobster.

If you'd like to get Money Stuff in handy email form, right in your inbox, please subscribe at this link. Or you can subscribe to Money Stuff and other great Bloomberg newsletters here. Thanks!

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. Or I once wrote about sports gamblers who get "limited" by bookmakers: Many bookmakers don't want to take large bets from sophisticated winning bettors, so if you look like a winning bettor they won't take large bets from you. I mentioned that I don't know of too many directly analogous cases from traditional finance — a market maker explicitly limiting a counterparty because the counterparty was too good — but that's mostly because people tend to keep that quiet. After I wrote that, I got some emails to the effect of "I was too good at trading in my retail account, so my broker kicked me out," or "I worked at a market maker and, when retail traders were too good, we got them kicked out."
- 2. This would be an odd situation, but not impossible. A few months ago, the Financial Times reported that BF Borgers, which at the time audited Trump Media & Technology Group, "had repeated run-ins with regulators and faced criticism for its failure to live up to professional standards in the US and Canada." And I wrote that that cannot possibly have been material to investors, because Trump Media does not trade on its financial results: "If Trump Media put out a report tomorrow saying 'actually our revenue was only $2 million, not $4 million,' the market would shrug." And then in fact Borgers was banned from doing auditing and Trump Media needed to get a new auditor, though there are no claims that there was anything wrong with Trump Media's own accounts. If Trump Media's accounts *had* been wildly wrong, though, you could easily imagine (1) investors not caring and (2) the SEC nonetheless fining the company.
- 3. It's very weird. "As a result of the conduct described above," says the SEC order, "Keurig violated Section 13(a) of the Exchange Act and Rule 13a-1 thereunder, which, among other things, require every issuer of a security registered pursuant to Section 12 of the Exchange Act to file with the Commission complete and accurate annual reports." Neither Section 13(a) nor Rule 13a-1 says anything about the reports being complete and accurate. Normally if they're not accurate you get *charged with fraud*, but that's not quite what is happening here.
- 4. This is debatable: Starboard points out that the Murdoch family owns about 14% of the economic interest of News Corp., but about 41% of the votes. It's plausible that the economic value of its voting rights is greater than 14% of the value it could add to the company by getting rid of them, so simply moving to a single class of stock would be good for *other* shareholders but bad for the Murdochs. In that case I suppose they could negotiate a premium to give up control, but that's tricky

too.

https://www.wsj.com/articles/keurig-dr-pepper-said-its-k-cups-could-be-recycled-not-so-says-sec-3766e992

SUSTAINABLE BUSINESS

Keurig Dr Pepper Said Its K-Cups Could Be Recycled. Not So, Says SEC

The company will pay a $1.5 million penalty after being charged with making inaccurate statements

By H. Claire Brown

Sept. 10, 2024 2:45 pm ET | WSJ PRO

Keurig Dr Pepper violated the Securities Exchange Act, which requires companies to make accurate disclosures, according to the U.S. Securities and Exchange Commission. PHOTO: BLOOMBERG

Keurig Dr Pepper has agreed to pay a civil penalty to settle U.S. Securities and Exchange Commission charges over claims made by the beverage company that its single-serve pods, or K-Cups, could be "effectively" recycled.

The statements were misleading, the SEC said. Keurig Dr Pepper neither denied nor admitted the regulator's findings in the $1.5 million settlement agreement.

The SEC said Keurig Dr Pepper wrote in annual reports in 2019 and 2020 its K-Cup pods could be "effectively" recycled, but didn't mention that two of the largest recycling companies in the U.S. expressed concerns about that and said they didn't intend to recycle the pods.

The omission violated the Securities Exchange Act, which requires companies to make accurate disclosures, the regulator said.

Keurig Dr Pepper changed the type of plastic used in the K-Cup pods in 2020, saying that made them easier to recycle. However, many recycling facilities still don't accept the new packaging, which is made of polypropylene plastic.

A spokesperson said the company encourages consumers to check with their local recycling facilities about the pods, "as they are not recycled in many communities."

Keurig Dr Pepper announced plans to launch compostable pods earlier this year. "We remain committed to a better, more standardized U.S. recycling system," the spokesperson added.

K-Cup sales made up a significant portion of the company's coffee sales in 2019 and 2020, and internal company research showed environmental concerns about pod disposal were a significant factor for consumers thinking about buying Keurig machines, according to the SEC.

"A lot of recycling companies are actually faced with issues of 'wishful-cycling,' as it's called," said Yuliya Strizhakova, an associate professor of marketing at Rutgers School of Business-Camden who has studied single-serve beverage pods. "Consumers tend to recycle more things, and they hope they can be recycled… when in fact, they cannot, for various reasons."

The settlement comes as regulators take a hard look at green claims made by companies. The European Commission recently sent warning letters to 20 airlines about overstating the use of low-carbon fuels. In the U.S., the Federal Trade Commission, which regulates advertising, in coming months is expected to release updated guidelines for marketers regarding green claims. The SEC has proposed a rule requiring companies to disclose greenhouse gas emissions, though the rollout has been paused pending legal challenges.

"On the positive side, it's good to see that they're following through," said Frank Maguire, vice president at the advertising exchange Sharethrough, of recent regulatory actions. “On the other side, I think brands and major companies are still hesitant to talk about sustainability efforts for a number of reasons, one of which is just the fear of being called out for saying the wrong thing.”

As part of the settlement, Keurig Dr Pepper also agreed to a cease-and-desist order, according to the SEC, meaning the company will abide by the law when publishing annual reports.

“Hopefully the big takeaway is for other companies to be much more careful with using recyclable claims or green claims, and be more accountable for what they claim,” Strizhakova said.

Write to H. Claire Brown at claire.brown@wsj.com

Bloomberg Law News 2024-09-10T14:47:14517640425-04:00

Keurig Settles SEC Charges of Deceptive K-Cup Recycling Claims

By David Hood 2024-09-10T13:15:37000-04:00

- SEC said Keurig misrepresented feasibility of curbside recycling
- Keurig neither admitted nor denied the agency's findings

Keurig Dr. Pepper Inc. paid $1.5 million to settle a SEC charge that it was deceptive in claims about recylcing options for its single-use K-Cups, the agency announced Tuesday.

The company said in annual reports for fiscal years 2019 and 2020 that its testing with recycling facilities "validated" that K-Cups could be recycled. The company omitted, however, that two of the largest recycling companies in the US expressed doubt that the pods for single cups of coffee and other drinks could be be processed.

The Securities and Exchange Commission charged the company with making false or inaccurate statements, misleading consumers that the pods could work for curbside recycling. The saga shows how the agency scrutinizes environmental, social, and governance statements by companies.

"When a company speaks to an issue in its annual report, they are required to provide information necessary for investors to get the full picture on that issue so that investors can make educated investment decisions," said John Dugan, associate director of the SEC's Boston Regional Office, in a press release.

Keurig agreed to a cease-and-desist order and to pay the civil penalty, without admitting or denying the findings of the investigation.

The company did not immediately respond to a request to comment.

To contact the reporter on this story: David Hood in Washington at dhood@bloombergindustry.com

To contact the editors responsible for this story: Jeff Harrington at

Related Articles

SEC's Gensler Sees ESG Plans Thwarted as Biden's Term Nears End

SEC Charges Keurig With Inaccurate Pod Recyclability Statements

SEC Watches All Corporate ESG Claims for Accuracy, Official Says

Securities Law News

Sept. 9, 2024, 12:50 PM PDT

Crypto Fraud Increased 45% Last Year to $5.6 Billion, FBI Says

By Olga Kharif

- The FBI received more than 69,000 complaints from users
- Most money was lost in investment scams, the FBI found

Bloomberg Law News 2024-09-10T12:54:48957541594-04:00

Crypto Fraud Increased 45% Last Year to $5.6 Billion, FBI Says

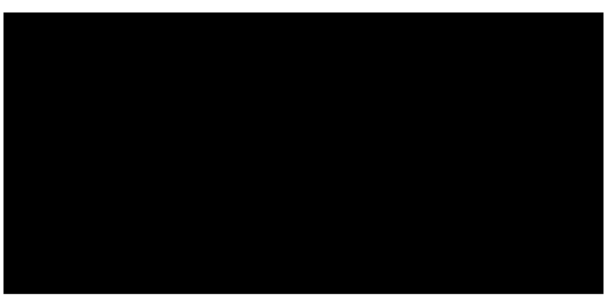
By Olga Kharif2024-09-09T15:50:57337-04:00

- The FBI received more than 69,000 complaints from users
- Most money was lost in investment scams, the FBI found

Consumers lost more than $5.6 billion last year through cryptocurrency-related fraud, according to an estimate from the US Federal Bureau of Investigations — a 45% jump from 2022.

The FBI Internet Crime Complaint Center received nearly 69,500 complaints from consumers in the US and abroad last year, according to a report published Monday. While the number of cryptocurrency-related complaints represented about 10% of the total number of financial fraud complaints, associated losses added up to almost 50% of the total losses, according to the report.

Following a crypto market downturn in 2022, token prices began to rally last year, triggering renewed interest from criminals. Bitcoin more than doubled last year, and has risen about 35% in 2024.



“As the use of cryptocurrency in the global financial system continues to grow, so too does its use by criminal actors,” Michael Nordwall, assistant director of the FBI Criminal Investigative Division, wrote in the report.

Use of cryptocurrency by criminals was most pervasive in investment scams, where losses accounted for almost 71% of the total, according to the report. Call center frauds, such as government impersonation scams, accounted for about 10% of cryptocurrency losses.

To contact the reporter on this story:
Olga Kharif in Portland at okharif@bloomberg.net

To contact the editors responsible for this story:
stacy-marie ishmael at sishmael@bloomberg.net

Dave Liedtka

Glencore

Ex-Glencore executives appear in court on corruption charges

Commodity trader's billionaire former head of oil Alex Beard plans to plead not guilty to charges, say lawyers

Alex Beard faces two counts of conspiring to make corrupt payments to government officials and officials of state-owned companies in Nigeria to benefit Glencore between 2010 and 2014 and Cameroon between 2007 and 2014 © Chris J. Ratcliffe/Bloomberg

Suzi Ring and **Tom Wilson** in London 6 HOURS AGO

Glencore's billionaire ex-head of oil and five other former executives appeared in a London court for the first time to face corruption charges over the UK-listed commodity trader's business in Africa.

Alex Beard, 57, who became a billionaire when Glencore listed in 2011, was in the dock at Westminster magistrates' court on Tuesday alongside former colleagues Andrew Gibson, Paul Hopkirk, Ramon Labiaga, Martin Wakefield and David Perez after the UK Serious Fraud Office announced the charges last month.

The hearing was the first time charges against Perez, 53, have been made public. The UK's SFO has brought a variety of five charges against the defendants.

Beard faces two counts of conspiring to make corrupt payments to government officials and officials of state-owned companies in Nigeria to benefit Glencore between 2010 and 2014 and Cameroon between 2007 and 2014. Hopkirk, 50, and Labiaga, 55, each face one charge in relation to the alleged conduct in Nigeria.

Wakefield, 64, and Gibson, also 64, are both charged with three and four counts respectively of conspiring to make corrupt payments in Nigeria and Cameroon, as well as in the Ivory Coast between 2007 and 2010, while Perez faces two charges in relation to the alleged conduct in Cameroon and the Ivory Coast. Wakefield, Gibson and Perez are also charged with one count of falsifying documents between 2007 and 2011.

Andrew Gibson outside Westminster magistrates' court on Tuesday © Jaimi Joy/Reuters

The charges come after a years-long investigation into bribery at Glencore by the SFO over allegations connected to its London-based west Africa desk, which sourced and traded crude oil across the continent.

It is the latest in a series of cases brought by European and US prosecutors against commodities trading companies or their executives.

Glencore was founded in 1974 by Marc Rich, widely viewed as the godfather of the modern commodities trading industry, who fled to Switzerland when faced with US criminal charges in 1983 for trading with Iran.

Based in the Swiss town of Baar and listed in London, Glencore has evolved into a commodities giant with mines and trading operations around the world.

From 2002 to 2021, the company was run by former chief executive Ivan Glasenberg, who remains its biggest shareholder.

Lawyers for Beard, Gibson and Hopkirk told the court that their clients were planning to enter not guilty pleas to the charges. The remaining defendants have not yet indicated their pleas.

The group spoke only to confirm their names, ages and addresses as the charges were read out in court and all of them were released on unconditional bail. The case has been sent to Southwark Crown Court for the next hearing in October.

According to a copy of the charges, the officials allegedly involved in the corrupt payments in Nigeria worked for the Nigerian National Petroleum Corporation. The Cameroon charges are linked to public oil and gas company the Société Nationale des Hydrocarbures and refinery Société Nationale de Raffinage (Sonara).

In the Ivory Coast, officials from oil companies the Société Ivoirienne de Raffinage (SIR) and the Société Nationale d'Opérations Pétrolières de la Côte d'Ivoire (Petroci) were allegedly involved. All of the companies did not immediately respond to requests for comment.

The UK prosecutor said in court filings last month it was planning to charge two more individuals in relation to the investigation who the agency said at the time were "currently outside the jurisdiction". Perez is one of the two cited in that filing.

Swedbank AB

Prison for former Swedbank chief over money-laundering scandal

Birgitte Bonnesen becomes first banker jailed over Estonia money-laundering affair

Birgitte Bonnesen, centre, led Sweden's oldest bank from 2016 until she was fired by its board in 2019 © TT News Agency/Reuters

Ortenca Aliaj and **Owen Walker** in London 3 HOURS AGO

Former Swedbank chief executive Birgitte Bonnesen is facing 15 months in prison after a Swedish appeals court convicted her of spreading misleading information about the bank's money laundering problems in Estonia.

Bonnesen, who led Sweden's oldest bank from 2016 until she was fired by its board in 2019, was convicted of "gross swindling" by the Svea Court of Appeal, making her the highest-ranking Swedish banker to go to jail over the scandal.

She had previously been in charge of the bank's Baltic business.

"The court has assessed several statements that the CEO has made to the press and equity analysts", the court said in a statement on Tuesday.

"The court has concluded that two of the statements have been incorrect or mis-represented facts in a way that they have been misleading in the sense of the Swedish Criminal Code."

Bonnesen intended to appeal against the verdict, her lawyer, Per Samuelsson, told TT, a Swedish news agency. She was acquitted of other charges brought against her.

The conviction relates to one of Europe's biggest money-laundering scandals. Both Swedbank and Denmark's Danske Bank were alleged to have been part of a system that allowed Russian oligarchs and criminals to move money through their Baltic branches and into the western financial system.

The Swedish court said on Tuesday that Bonnesen "disseminated misleading statements" in newspaper and TV interviews in relation to the bank's third-quarter results in 2018.

"The statements conveyed the misleading message that there did not exist any suspicious money laundering links to the operations in Estonia of another bank," the court said.

"The misleading information was liable to influence the assessment of the Swedish bank from a financial point of view, and thereby cause a loss."

Sweden's economic crime authority charged Bonnesen with fraud and market manipulation in January 2022.

Swedbank commissioned a report into the matter by law firm Clifford Chance, which found that the bank had carried out €37bn of transactions with a high risk for money laundering between 2014 and 2019.

An internal Swedbank report, seen by public broadcaster SVT, found about €80bn of money flowed through the non-resident client business of the bank in the Baltics from 2008 until 2013, most of it from Russia and other ex-Soviet states.

Swedbank cancelled Bonnesen's severance pay in March 2020 following the publication of the Clifford Chance report. The document judged that statements Bonnesen made in late 2018 and early 2019, as the scandal was developing, were "inaccurate or presented without sufficient context".

However, the bank decided not to pursue any legal case of its own against Bonnesen or her predecessor Michael Wolf, who was in charge from 2009 until 2016.

Securities Law News
Sept. 9, 2024, 11:45 AM PDT

Justice Alito's Stock Portfolio Stands Apart on US Supreme Court

By Emily Birnbaum

Eye on the Bench

- Stock holdings are allowed, but force numerous case recusals
- Alito is the only justice with a stake in dozens of companies

Bloomberg Law News 2024-09-10T12:52:59415531472-04:00

Justice Alito's Stock Portfolio Stands Apart on US Supreme Court

By Emily Birnbaum2024-09-09T14:45:00791-04:00

- Stock holdings are allowed, but force numerous case recusals
- Alito is the only justice with a stake in dozens of companies

Justice Samuel Alito is the only US Supreme Court member with a stake in more than two dozen individual companies, a distinction that threatens to sideline him from major business cases.

Alito or his wife own tens of thousands of dollars of stock in companies including Raytheon Co., ConocoPhillips and a subsidiary of Johnson & Johnson. The holdings may force him to recuse as oil companies challenge lawsuits blaming them for climate change and J&J tries to settle talc lawsuits by placing a subsidiary into bankruptcy.

Samuel Alito
Photographer: Erin Schaff/The New York Times/Bloomberg

Alito’s 2023 financial disclosure report was publicly released last week and shows he continues to own stock in over two dozen companies. Supreme Court disclosures extend to financial interests of spouses and dependent children. In Alito’s case, the filings don’t clarify whether the stocks are owned by the justice or his wife.

Supreme Court justices are allowed to hold individual stocks, but ethics rules deem they should disqualify from cases involving the companies. In the past, more justices held shares in individual companies, but that has become rare. Meanwhile, scrutiny of the judicial ethics has increased after revelations that Justice Clarence Thomas, and to a lesser degree Alito, accepted undisclosed gifts and travel from billionaire benefactors.

“It’s a question not of ethics, but of judgment,” said **Steven Lubet**, emeritus professor at Northwestern University Pritzker School of Law, who focuses on legal and judicial ethics. “Not everything that’s legal is a good idea.”

The justice did not respond to requests for comment through the court’s public information office.

Alito has recused from 64 cases involving corporations he owns shares of since 2021, according to Fix the Court, an advocacy group that supports court reform, including judicial term limits. During the last term, he recused from 15 cases due to stock ownership, far outstripping the number of recusals from all of his colleagues, according to the group’s data. Justices are not required to say why they disqualified themselves from a particular case but the tally is based on the publicly available information.

Chief Justice John Roberts, who previously owned stocks in many individual companies, has sold all but two. Justice Stephen Breyer owned a multitude of stocks before he stepped down from the bench in 2022. Most of the current justices own mutual funds, which do not create a conflict under the court’s ethics code unless the the justice is involved in the fund’s management.

Justice Alito's Stock Holdings Led to Recusals

Supreme Court jurist bowed out of cases involving some of the companies

Company	Stock Value	Recusals
Abbott Laboratories	$15-50K	X
AbbVie Inc.	$15-50K	X
Boeing Co.	$15-50K	X
Caterpillar Inc.	$15-50K	X
Mondelez International Inc.	$15-50K	
OGE Energy Corp.	$15-50K	X
Phillips 66	$15-50K	X
Procter & Gamble Co.	$15-50K	X

Source: Justice Alito's annual financial disclosures
Note: Some of the companies in which Alito and/or his wife invested.

Bloomberg

Business Friendly

As a reliably pro-business vote, Alito and his family’s stock holdings could make a difference in major cases over the coming years.

“He’s got major holdings in consumer products, oil and gas, aviation, beverages, and chemicals,” said Gabe Roth, executive director of Fix the Court. “These are industries where there’s a ton of lawsuits making their way through the lower courts.”

Alito has already recused from a pending bid by oil companies to quash a lawsuit alleging they contributed to global warming, likely because he owns stock in ConocoPhillips and Phillips 66, two of the companies involved in the suit. The case, Sunoco LP v. City and County of Honolulu, centers on whether state and local governments can sue fossil fuel companies for damages over harmful greenhouse gas emissions.

Alito didn't take part in June when the court asked the Biden administration for input on whether to take up the case.

Alito's recusal leaves the oil companies without a friendly face on the court. Alito has been a critic of federal environmental regulations for decades, and he has a long history of siding with the Chamber of Commerce, which filed in support of the oil companies in the climate change case. Alito last term agreed with the Chamber of Commerce in 73% of cases where the business group weighed in, according to the left-leaning Constitutional Accountability Center.

Johnson & Johnson said in July it would ask the high court to revive the company's plan to use a bankruptcy maneuver to settle tens of thousands of talc cancer lawsuits. In the time since, the company has continued to engage in settlement talks. A J&J spokesperson did not respond to a request for comment.

Since 2021, the Supreme Court has turned away multiple
appeals from the drugmaker over cases involving its liability for selling products that caused cancer and other illnesses. Alito has recused from those cases, likely due to his stock ownership.

Alito last year exchanged his Johnson & Johnson stock for stock in Kenvue Inc., a former subsidiary of J&J that was spun off. It's unclear if that exchange will allow Alito to take part in future cases involving the drugmaker.

Justice Brett Kavanaugh also may recuse from any case involving the company, as his father, Edward Kavanaugh, was a cosmetic industry lobbyist whose organization fought efforts to require warnings on talc products.

Code of Ethics

Alito's dozens of recusals create tension with the Supreme Court's own voluntary code of ethics, which it adopted in November amid the swirl of ethical scandals.

The code encourages Supreme Court justices to try to avoid recusals when they can because there are only nine members and "much can be lost when even one Justice does not participate in a particular case." The Supreme Court needs four votes to accept a case, so even one recusal can have a "distorting effect" and require the petitioner to get "four votes out of eight instead of four out of nine," according to the code.

"It's right there in the court's commentary on the code of conduct: recusal is to be avoided if possible," said **Lubet**.

Alito has faced criticism for declining to recuse from two cases related to the 2020 presidential election. Democratic lawmakers last term asked Alito to recuse from the cases connected to the Jan. 6 Capitol riot after the New York Times reported that flags associated with election deniers flew in front of two Alito residences. The justice later said his wife flew the flags and he did not know they were associated with the election.

Throughout his time on the court, Alito has chosen to sell off particular stocks in order to partake in upcoming cases. He sold his stake in Exxon in 2016 after years of recusals related to the company, including a 2008 case when the court ruled in a split opinion to reduce the punitive damage award for the 1989 Valdez oil spill to $507.5 million from $2.5 billion. Alito's absence left the court divided 4-4 on a separate line of argument that might have reduced the award even further.

He also sold his stock in Oracle Corp. in 2019 to take part in the company's copyright case against Alphabet Inc.'s Google.

There have been a few instances in which Alito has failed to recuse from a case involving a company in which he owns stock. He initially failed to recuse from a 2017 case involving Merck & Co. despite owning stock in the company; he then sold his shares and participated in the case.

In 2011, Alito acknowledged an unintentional conflict of interest, saying a staff oversight led him to take part in a 2009 ruling involving Walt Disney Co.'s ABC News even though his children held Disney stock. Alito voted against ABC in the case, joining a 5-4 majority that revived US efforts to crack down on televised vulgarities.

On at least one occasion, the timing of one of Alito's trades appeared political in nature. In August of 2023, Alito or his wife sold shares of beer giant Anheuser-Busch InBev SA, which coincided with the timing of a conservative-led boycott of the Bud Light maker over a promotional marketing partnership with a transgender social media influencer. Alito sold shares valued at between $1,000 and $15,000. He bought shares of rival beer maker Molson Coors Brewing Co. on the same day, according to a financial disclosure filing for the justice.

--With assistance from Greg Stohr.

To contact the reporter on this story:
Emily Birnbaum in Washington at ebirnbaum3@bloomberg.net

To contact the editors responsible for this story:
Sara Forden at sforden@bloomberg.net

Elizabeth Wasserman

US politics & policy

Conservative activist launches $1bn crusade to ‘crush’ liberal America

Leonard Leo was architect of effort to secure conservative supermajority on the Supreme Court

Leonard Leo: ‘We’ll direct resources to build talent and capital formation pipelines in the areas of news and entertainment, where leftwing extremism is most evident’ © Erin Schaff/New York Times/Redux/eyevine

Alex Rogers in Washington SEPTEMBER 8 2024

The conservative activist who led the crusade to overhaul the US legal system is making a $1bn push to “crush liberal dominance” across corporate America and in the country’s news and entertainment sectors.

In a rare interview, Leonard Leo, the architect of the rightward shift on the Supreme Court under Donald Trump, said his non-profit advocacy group, the Marble Freedom Trust, was ready to confront the private sector in addition to the government.

“We need to crush liberal dominance where it’s most insidious, so we’ll direct resources to build talent and capital formation pipelines in the areas of news and entertainment, where leftwing extremism is most evident,” Leo told the Financial Times.

"Expect us to increase support for organisations that call out companies and financial institutions that bend to the woke mind virus spread by regulators and NGOs, so that they have to pay a price for putting extreme leftwing ideology ahead of consumers," he said.

Leo has spent more than two decades at the influential Federalist Society, guiding conservative judges into the federal courts and the Supreme Court itself. In 2018, conservative justice Clarence Thomas joked that Leo was the third most important person in the world.

Leo's efforts culminated under Trump's presidency, when three Federalist Society-backed judges were appointed to give conservatives on the Supreme Court a 6-3 supermajority, and profound influence over US law. The court has since then ruled to overturn the right to an abortion, among other long-sought rightwing causes.

In 2020, after Trump lost the election, Leo stepped back from running the daily operations of the Federalist Society, while remaining its co-chair.

The following year, Leo founded Marble, with a $1.6bn donation from electronic device manufacturing mogul Barre Seid, to be a counterweight to what he said was "dark money" of the left. He spent about $600mn in its first three years, according to public financial disclosures.

Leo said his goal was to find "very leveraged, impactful ways of reintroducing limited constitutional government and a civil society premised on freedom and personal responsibility and the virtues of western civilisation".

The $1bn money machine is now funding the conservative mission against private institutions, opposing diversity, equity and inclusion policies, climate and social concerns in investing and the "debanking" of politically conservative customers, in addition to taking on the public sector.

The non-profit is increasingly interested in launching campaigns against "woke" banks and China-friendly companies involved in everything from food production to autonomous vehicles in the US and potentially Europe.

Leo also intends to invest in a US local media company in the next 12 months, although he has not decided which, and is building conservative coalitions through groups such as Teneo Network, a club with chapters across the country.

He also confirmed that Marble had since 2021 helped fund organisations that launched campaigns against companies with DEI, ESG and other initiatives, including BlackRock, Vanguard, American Airlines, Coca-Cola, State Farm, Major League Baseball and Ticketmaster.

This year, Marble aided a variety of conservative groups in their campaigns against TikTok on the grounds that it was a threat to children and US national security. President Joe Biden signed a bipartisan bill to force TikTok's Chinese parent company to divest from the video-sharing platform.

Leo's rise to be among the US's most powerful conservatives has drawn scrutiny from liberal attorneys and Democratic politicians. Earlier this year, he refused to comply with a subpoena from Senate Democrats investigating undisclosed gifts to Thomas and Justice Samuel Alito revealed by ProPublica.

In 2020, Leo joined the for-profit public advocacy firm CRC Advisors. Bloomberg has reported that an array of non-profits have paid CRC at least $69mn since Leo became its co-owner and chair.

While Marble funds Trump-aligned advocacy groups, it is not donating money to sway the 2024 presidential election, Leo said. The non-profit is instead helping the Republican effort to end the Democratic majority in the Senate, which confirms judges and justices.

"The political environment is more topsy-turvy and more uncertain than it's ever been in my lifetime," said Leo. "Political investing is not as good a bet as it used to be."

LAW360

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

Court Won't Nix Flyers' Case Over JetBlue-American Pact

By **Matthew Perlman**

Law360 (September 9, 2024, 6:14 PM EDT) -- A New York federal court has refused to toss a proposed class action from airline passengers who allegedly overpaid for flights while an agreement was in place between JetBlue and American Airlines, an alliance the airlines dropped after a successful government challenge.

U.S. District Judge Ann M. Donnelly issued a **decision and order** Friday denying a motion from the airlines seeking to **dismiss the case** or to strike the class allegations, based on arguments that the flyers agreed to a class action waiver when purchasing their tickets.

JetBlue and American offered screenshots of their websites that purport to show that the flyers assented to the waiver when buying the tickets, but the judge said the airlines never mention when the screenshots were taken or if they reflect what the flyers in the case saw when purchasing their tickets.

"The court cannot rely on the undated screenshots of the defendants' websites, unaccompanied by any affidavit attesting to their origin, to determine whether the plaintiffs had notice of the [waiver] or assented to the ... terms when they bought their tickets," the order said. "The court declines to dismiss or strike the class action allegations at this stage of the litigation."

In addition to rejecting the screenshots, the judge also said the airlines have not shown that the service contracts, referred to as their contracts of carriage, are incorporated by reference in the complaint, since the flyers do not allege that the contracts were breached. This means the airlines can offer the waiver as an affirmative defense later on, but not as a reason to dismiss the case, the order said.

JetBlue abandoned its so-called Northeast Alliance with American last year after a Massachusetts federal court agreed with the U.S. Department of Justice that the pact was effectively **an illegal merger** that allowed the airlines to combine their operations at airports in the New York City and Boston regions.

American has appealed the ruling to the First Circuit, which heard **oral arguments** in June but has yet to issue a decision.

The flyers in the private case allege they overpaid for flights covered by the alliance while it was in place between 2020 and 2023.

A representative for American Airlines told Law360 on Monday that the company is disappointed with the court's ruling allowing the private case to proceed.

"We continue to strongly disagree with the negative characterizations of the Northeast Alliance," the statement said. "As we have made clear in our prior filings, there has never been a finding that the NEA resulted in higher fares."

JetBlue and American also argued in their dismissal bid that the Northeast Alliance needs to be evaluated by the court to determine if its benefits outweigh any harm it caused through a rule-of-reason analysis.

The flyers alleged that the pact would be considered anticompetitive under the rule-of-reason, but also argue that it should be condemned as a per se antitrust violation, meaning there's no need to consider the effects.

Judge Donnelly wrote in Friday's order that the DOJ did not allege that the alliance was a per se violation, so the court in Massachusetts performed a rule-of-reason analysis. U.S. District Judge Leo T. Sorokin in May 2023 had found that the agreement was in fact anticompetitive and called it "just the sort of 'unreasonable restraint on trade' the Sherman Act was designed to prevent."

Judge Sorokin also explained that core features of the Northeast Alliance closely resemble restraints that courts have determined are per se violations, since the agreement resulted in the airlines allocating routes between themselves, according to Friday's order.

"At this stage of the litigation, the court cannot determine that the per se rule is entirely inapplicable," the order said. "The Supreme Court has repeatedly observed that 'territorial restraints' among competitors, like the NEA route allocation at issue here, generally remain subject to per se analysis."

Representatives for the flyers and JetBlue did not respond to requests for comment Monday.

The flyers are represented by David W. Mitchell, Alexandra S. Bernay, Arthur L. Shingler III and Robert M. Rothman of Robbins Geller Rudman & Dowd LLP, Israel David, Blake Hunter Yagman, Hayley Lowe and Madeline Sheffield of Israel David LLC, Kathleen M. Donovan-Maher, Steven L. Groopman, Kristie A. LaSalle, Christina L. Gregg, Todd A. Seaver and Matthew D. Pearson of Berman Tabacco.

American Airlines is represented by Marguerite M. Sullivan, Allyson M. Maltas, Seung Wan Paik, Jesse A. Vella and Kimon Triantafyllou of Latham & Watkins LLP.

JetBlue Airways Corp. is represented by Richard Schwed, Matthew L. Craner, Jessica K. Delbaum and Brian Hauser of Allen Overy Shearman Sterling.

The consolidated action is Berger v. JetBlue Airways Corp. et al., case number 1:22-cv-07374, in the U.S. District Court for the Eastern District of New York.

--Additional reporting by Bryan Koenig, Chris Villani and Linda Chiem. Editing by Rich Mills.

LAW360

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

Baltimore Strikes $80M Opioid Settlement With Teva

By **Ali Sullivan**

Law360 (September 9, 2024, 5:29 PM EDT) -- Teva Pharmaceuticals will pay Baltimore $80 million to resolve claims that the company inflamed the city's opioid crisis, the city of Baltimore announced Monday ahead of a trial slated to begin next week against the remaining defendants in the Maryland state court litigation.

Mayor Brandon M. Scott called the settlement "another major victory for the city of Baltimore." The deal is the fourth to be announced by the city, following a **settlement with Cardinal Health** for $152.5 million and deals with CVS and **Allergan for $45 million** each.

"Nothing can undo the harm that they caused or bring back the lives lost, but we are determined to implement these resources in a way that helps move our city's fight against this epidemic forward," Scott said in a statement. "It is my hope that these funds will help save lives and ensure that fewer families and communities have to endure the pain of losing loved ones to opioid overdose."

The settlements come after Baltimore opted out of broader settlements with various pharmaceutical companies — a decision that the city said has paid off. Had the city opted into Teva's nationwide settlement, it would have received $11 million from the company over 13 years, the mayor's office said in a statement.

The statement said that under the $80 million settlement, Teva will pay $35 million by the end of the year and the rest by July 2025.

The trial against remaining defendants — which the release said "made up over half the market share of the opioids that flooded Baltimore" — is set to start Sept. 16.

City Solicitor Ebony Thompson in a statement lauded the "extraordinary amount of work" put into the case by the Baltimore City Department of Law and outside counsel from Susman Godfrey LLP.

"We are very thankful that Susman Godfrey's willingness to assume the financial risk in this case allowed us to turn down the grossly inadequate national settlements and pursue the resources our city needs to address this epidemic," Thompson said.

Teva did not immediately return a request for comment on Monday.

Baltimore is represented by Sara Gross and Thomas Webb of the Baltimore City Department of Law and Bill Carmody, Seth Ard, Sy Polky, Michael Kelso, Rocco Magni, Adam Carlis, Cory Buland, Geng Chen, Krisina Zuñiga, Max Straus, Betsy Aronson, Katherine Drews, Jeff Melsheimer and Tom Boardman of Susman Godfrey LLP.

Counsel information for Teva wasn't immediately available Monday.

The case is Baltimore v. Purdue Pharma LP et al., case number 24-C-18-000515, in the Circuit Court of Maryland for Baltimore City.

--Editing by Emily Kokoll.

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

Catching Up With Delaware's Chancery Court

By **Leslie A. Pappas**

Law360 (September 9, 2024, 3:52 PM EDT) -- Delaware's Court of Chancery made some expensive decisions last week, ranging from a $130 million stockholder award and a freeze on $450 million in equity financing to a whopping $1 billion bill for fraud and breach of contract damages. New cases aimed at Virgin Galactic, settlements pulled in Hemisphere Media Group Inc. and court hearings involving Apollo Global Management heated up. In case you missed it, here's the roundup of news from Delaware's Court of Chancery.

In the Courtroom

An attorney for Apollo Global Management Inc. **pushed back at a hearing** in Wilmington on stockholder claims that former company chairman and former CEO Leon Black and two others dominated the business in the run-up to a $570 million payout to the three insiders in 2021.

A courtroom face-off over who would lead a stockholder class action that accuses directors of biopharmaceutical company Taysha Gene Therapies Inc. of insider trading got edgy after one of the plaintiff-side legal teams contended that the other's case was irreparably hobbled by conflicts of interest.

A pension fund invested in financial technology company nCino Inc. **urged** Delaware's Supreme Court to revive its Chancery Court suit against company directors and investment firm Insight Venture Partners over a $1.2 billion acquisition, arguing that the trial court "missed the mosaic for the tiles" by dismissing the case.

Decisions

Vice Chancellor Lori W. Will **found** that Johnson & Johnson owes more than $1 billion to former stockholders of Auris Health Inc. for breach of contract, breach of the implied covenant of good faith and fair dealing, and fraud related to a milestone reached during the development of Auris' iPlatform robotic surgical device.

Vice Chancellor Morgan T. Zurn **dismissed** BuzzFeed Media Enterprises Inc.'s lawsuit against the last six of 85 former employees who sought to arbitrate a stock conversion right, concluding that the six workers BuzzFeed sued were under similar employment agreements as the others she **previously dismissed** from the case.

In a far more lucrative decision, Vice Chancellor Zurn **awarded $130 million** to former shareholders of biopharmaceutical company Syntimmune Inc. 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 response to a derivative lawsuit from affiliates of Hedosophia Services Ltd., BlackRock Inc. and Untitled Investments LP, Vice Chancellor Nathan A. Cook **granted a temporary restraining order** preventing Bolt Financial Inc. from moving forward on $450 million in equity financing.

New Cases

A Virgin Galactic stockholder **sued** the aerospace and space tourism company's founder Richard Branson and top executives, alleging the billionaire profited by selling off equity at an inflated price while failing to publicly disclose his knowledge of purportedly pervasive safety issues.

An OSOM Products Inc. stockholder **sued** the crypto-focused former cellphone-maker for books and records access, citing allegations that its CEO and controlling stockholder Jason Keats has diverted company assets for personal use and other undisclosed dealings.

A stockholder of Navidea BioPharmaceuticals Inc. **alleged** that a five-year run of "extreme and unconscionable self-dealing" has left 62% of the company's equity in the hands of a single stockholder-director, with the company now deregistered and currently without a viable product.

Settlements

Leaders of Hemisphere Media Group Inc. and former controlling investor Searchlight Capital Partners LP **proposed a $15 million payment to settle** a **suit** filed by Hemisphere's former stockholders over a contested $7-per-share merger.

Fees, Fees, Fees

Attorneys for Sweden's state pension fund manager proposed a **$15 million attorney fee** for a portion of their work in a stockholder suit that seeks retroactive fixes for defects in the terms of Activision Blizzard Inc.'s $68.7 billion acquisition by Microsoft Corp. last year.

Quotable

"I'm excited. I think in 10 or 20 years, we may look back and think this was really the beginning of Texas becoming a legitimate alternative to Delaware's primacy." – Brad Foster, a partner at Haynes and Boone LLP, in an interview to Law360, on the **prospects** a newly created Texas Business Court might have for competing with Delaware's Court of Chancery.

--Additional reporting by Jeff Montgomery, Spencer Brewer, and Hannah Albarazi. Editing by Kelly Duncan.

LAW360

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

Biotech Execs Face Investor Suit Over Medicare Claims

By **Sydney Price**

Law360 (September 9, 2024, 7:58 PM EDT) -- Executives and directors of biopharmaceutical company Ardelyx have been hit with a shareholder derivative suit in Massachusetts federal court alleging the company misled investors over its intentions and ability to apply for a Medicare reimbursement program for its kidney disease treatment.

According to the complaint filed on Friday by shareholder Ian Mofrad, Ardelyx obtained approval to distribute Xphozah, an oral therapy used to treat adults with chronic kidney disease on dialysis, in October 2023. Mofrad alleges that Ardelyx misled investors about its plan to apply for a program under which the Medicare and Medicaid programs would pay for Xphozah, telling investors that the successful distribution of the drug would depend in part on its inclusion in the program.

Ardelyx announced in July that would not request that the drug be included in the program, causing shares to fall by nearly a third of their value, according to the suit.

In addition to nominal defendant Ardelyx, the suit's individual defendants include Ardelyx CEO Michael Raab, Chief Financial and Operations Officer Justin Renz and several directors.

In addition to its Exchange Act claims, the complaint also accuses Raab and Renz of making approximately $2.5 million in insider sales during the relevant period, which begins Oct. 31, 2023.

On the first day of the relevant period, Ardelyx filed its third-quarter financial results with the U.S. Securities and Exchange Commission. In the filing, Ardelyx stated that the success of Xphozah would rest partially on the Centers for Medicare & Medicaid Services' Transitional Drug Add-on Payment Adjustment. This program was introduced in 2016 to pay for new end-stage renal disease therapies not already accounted for under its other dialysis payment program.

In the filing, and several others throughout the relevant period, Ardelyx indicated that it would apply to include Xphozah in TDAPA, the complaint states. But in reality, the suit alleges, the company had not yet reached a decision on whether to apply, and could not decide until after it first reviewed a rule issued by CMS that was not announced until June 27, 2024.

On July 2, 2024, Ardelyx declared that it had chosen not to apply to include Xphozah in TDAPA due to restrictions set forth by the rule issued by CMS the previous month, according to the complaint. Ardelyx said the rule would effectively eliminate all patient access to the drug, the suit states.

"Our decision not to apply for TDAPA reflects our steadfast commitment to preserving patients' access to our medicines and provides the best optionality for us to continue to explore alternatives to protect all patients," Ardelyx said in its statement that day, according to the complaint.

Following the announcement, shares of Ardelyx fell $2.29 each, or about 30%, to close at $5.28 on July 2, according to the suit.

The complaint also notes that Ardelyx is facing a securities class action over its decision to abstain from applying to include Xphozah in TDAPA.

Counsel for Mofrad and a representative of Ardelyx did not immediately respond to requests for comment on Monday.

Mofrad is represented by Timothy J. MacFall of Rigrodsky Law PA, Joshua H. Grabar of Grabar Law Office and Mitchell J. Matorin of Matorin Law Office LLC.

Counsel information for Ardelyx and the individual defendants was not immediately available on Monday.

The case is Mofrad v. Raab et al., case number 1:24-cv-12302, in the U.S. District Court for the District of Massachusetts.

--Editing by Jay Jackson Jr.

LAW360

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

Bancor Protocol Operators Beat Investor Class Action

By **Katryna Perera**

Law360 (September 9, 2024, 10:40 PM EDT) -- A Texas federal judge has dismissed a securities class action against the operators of a cryptocurrency protocol known as the Bancor, agreeing with a magistrate judge's report and recommendation that the plaintiff's challenged transactions don't meet the requirements of a domestic transaction under the so-called Morrison standard set by the U.S. Supreme Court.

U.S. District Judge Robert Pitman adopted U.S. Magistrate Judge Mark Lane's **report and recommendation** to dismiss, without prejudice, investors' suit against BProtocol Foundation, LocalCoin Ltd. and their operators. The suit alleges that investors lost money in Bancor Protocol, an automated online platform for trading crypto assets run by the defendants.

The defendants moved for dismissal, arguing that the operative complaint should be dismissed for lack of personal jurisdiction and because U.S. securities laws do not apply to their extraterritorial conduct, among other things, according to Judge Lane's July report.

In his report, Judge Lane first said the investors have sufficiently alleged that Bancor Protocol's alleged contacts with the U.S. can be attributed to LocalCoin and BProtocol, but they cannot be attributed to the individual defendants since there are no allegations that any of the individual defendants had direct contact with the U.S. in relation to the exchange.

Additionally, the suit's argument that the individual defendants have "effective day-to-day control over Bancor" is conclusory, and "generic and conclusory allegations of control over a company are insufficient as a matter of law to plead specific jurisdiction," Judge Lane said.

Personal jurisdiction can still not be exercised over LocalCoin and BProtocol, Judge Lane said, since none of the plaintiffs specifically allege that they were injured by the defendants' contacts with the U.S.

Plaintiffs do not claim to have been persuaded to invest or moved investments around after attending conferences hosted by the defendants, or conferences where the defendants spoke, and there are no claims that the defendants specifically targeted U.S. citizens, according to the report.

"Besides the conferences, all of [the defendants's] communications described in the first amended compliant consist of social media posts, available to nearly the entire world," the report states.

Judge Lane also agreed with the defendants that the plaintiffs' investments are not domestic transactions subject to federal securities laws since they do not meet the requirements under the "Morrison test" established by the U.S. Supreme Court's 2010 ruling in Morrison v. National Australia Bank Ltd. , which held that federal securities laws only apply to "securities listed on domestic exchanges, and domestic transactions in other securities."

According to the report, the defendants argue that the plaintiffs' investments do not meet the Morrison standard since the complaint does not allege any facts showing that irrevocable liability or title of the investments passed within the U.S.

The plaintiffs, meanwhile, argue that when they invested from the U.S. and clicked the "accept" button on their computer screens, they entered into domestic investment contracts.

However, Judge Lane said in his report that the plaintiffs' rationale "would turn any online transaction into a domestic transaction."

The plaintiffs also allege the relevant transactions are recorded on the Ethereum blockchain, and "the nodes that validate transactions are clustered more densely in the United States than in any other country," rendering them domestic transactions.

But Judge Lane said that while similar arguments were enough for the court to rule that transactions in Williams v. Binance were domestic, "the Binance court noted it might not always be appropriate to determine whether a transaction was domestic based solely on server location."

Finally, Judge Lane said the defendants "have not run awry from the authority of all jurisdictions."

"The individual defendants are Israeli citizens, LocalCoin is an Israeli corporation, and [BProtocol] is a Swiss entity," the report states. "Given the lack of law on this issue, the undersigned is reluctant to create new law when plaintiffs do in fact have another forum in which they can likely pursue their grievances."

Judge Lane ended his report by acknowledging that the case is not an "easy" one and that both the personal jurisdiction and the extraterritoriality issues are "close calls."

"These are not easy issues because U.S. law has not yet caught up to online, global crypto asset exchanges," he said. "While the court has little patience for foreign entities that cause American investors to lose money, that does not give the court authority to extend American law to cover foreign defendants who operate an unregulated, global, decentralized, online crypto asset exchange. That role belongs to the legislature."

"If American investors want the certain protections of the United States' laws and courts, they should limit their investments to those that are clearly within the scope of those laws," he added.

Counsel for the defendants declined to comment on Monday, and counsel for the investors did not immediately respond to requests for comment.

The investors are represented by Margaret B. Hoppin and Timothy W. Grinsell of Hoppin Grinsell LLP, Ian W. Sloss, Steven L. Bloch and Johnathan P. Seredynski of Silver Golub & Tietell LLP and Joe Kendall of Kendall Law Group PLLC.

The defendants are represented by Kayvan B. Sadeghi, Joanna Wright, Andrew J. Lichtman and Emily S. Mannheimer of Jenner & Block LLP and Gary Ewell of Ewell Brown Blanke & Knight LLP.

The case is Basic et al. v. BProtocol Foundation et al., case number 1:23-cv-00533, in the U.S. District Court for the Western District of Texas.

--Editing by Jay Jackson Jr.

LAW360

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

GM Can't Arbirtrate Claims Engines Were 'Engineered To Fail'

By **Law360 Staff**

Law360 (September 10, 2024, 12:01 PM EDT) -- General Motors LLC cannot arbitrate class claims that certain engines were "engineered to fail," an Ohio federal judge has ruled, citing recent Sixth Circuit guidance on when a party waives the right to resolve disputes out of court.

U.S. District Judge Charles E. Fleming's Monday order invoked the federal appeals court's March 27 **decision** rejecting a mortgage broker's bid to arbitrate a deaf former software developer's disability bias suit. The Sixth Circuit held that United Wholesale Mortgage's extensive discovery practice suggested an intent not to try to arbitrate the case by Jason Schwebke.

"Like Schwebke, these actions and their associated timeline are inconsistent with reliance on any potential arbitration right defendant may have," Judge Fleming's order in the GM case said, noting that the auto giant waited 20 months after receiving the arbitration agreement from named plaintiff Lisa Mae Jennings in March 2022 to file its motion to compel.

Meanwhile, GM engaged in motion practice by opposing the plaintiffs' class certification bid and seeking to scrap their experts' testimony and opinions, the order said. Further, GM never explained the delay in attempting to compel arbitration and therefore waived any right to that remedy.

In their **complaint** filed in 2020 in the Northern District of Ohio, drivers accused GM of knowingly selling vehicles with engines "engineered to fail" due to a defective oil system.

The drivers said their 2013 Chevrolet Silverados consumed excessive oil, leading to damage to several engine components. They seek to represent a class of drivers of Chevrolet models Avalanche, Silverado, Suburban or Tahoe or a GMC model Sierra, Yukon or Yukon XL, model years 2011-14. The class vehicles need to have been purchased in Ohio for personal use and have a Generation IV 5.3-liter V8 Vortec 5300 LC9 engine that wasn't properly repaired to address the alleged defects.

GM **contends** there's no proof the engine guzzles oil. The arbitration agreement it cited is folded into the purchase agreement between Jennings and the GM-authorized dealership in Marysville, Ohio, where Jennings bought her vehicle, according to GM's November 30 motion to compel.

GM said it had asked her to provide all documentation pertaining to the sales contract, but she did not produce that agreement until 2022, after the court had dismissed some of the claims and Jennings had been deposed and moved for class certification.

In a January 12 opposition brief, Jennings said that only she or the dealership could invoke the arbitration clause, and also argued that GM waived its right to arbitrate because it "participated fully in discovery" and delayed the motion to compel.

Claims over alleged defects with that engine model fetched a $102.6 million **verdict** against GM in 2022.

Representatives for the parties didn't immediately respond to a request for comment Tuesday.

Jennings is represented by Mark A. DiCello, Justin J. Hawal, Adam J. Levitt, John E. Tangren, Daniel R. Ferri and Blake Stubbs of DiCello Levitt LLP and W. Daniel "Dee" Miles III, H. Clay Barnett III and J. Mitch Williams of Beasley Allen Crow Methvin Portis & Miles PC.

GM is represented by Rachel P. Raphael of Morgan Lewis & Bockius LLP and Denise A. Dickerson of Sutter O'Connell.

The case is Airko Inc. et al. v. General Motors LLC, case number 1:20-cv-02638, in the U.S. District Court for the Northern District of Ohio.

–Additional reporting by Ryan Harroff and Mike Curley.

LAW360®

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

Ohio Train Derailment Plaintiffs Seek Final OK Of $600M Deal

By **Mike Curley**

Law360 (September 9, 2024, 4:55 PM EDT) -- Residents and others affected by the Norfolk Southern train derailment and toxic chemical spill in East Palestine, Ohio, last year are asking an Ohio federal court for final approval of a $600 million settlement, including a $162 million payout for their attorneys.

In a **memorandum** filed Friday, the plaintiffs urged the U.S. District Court for the Northern District of Ohio to sign off on the deal despite objections filed last week, saying they've provided evidence that the settlement is reasonable and do not need to wait until remediation is complete to evaluate the costs that Norfolk Southern and others would pay.

The memorandum also pushes back on claims that class counsel had withheld information, saying the objector who made that claim relied on a "discredited" whistleblower and other information was under seal by the courts.

And while some objectors had challenged the distribution plan's structure of paying based on household rather than by individual, the plaintiffs told the court that the payouts were designed to address damages faced by entire households, and that doing so reduces processing time.

Some objectors had challenged the voluntary exposure settlement, which allows class members to release their personal injury claims for a payout now, but the plaintiffs argued that these objectors misunderstood that this was an additional benefit that was not compulsory, and that any plaintiffs who wished to wait until symptoms present themselves could do so.

In a statement released Monday, class counsel touted the support the settlement has received, including nearly 55,000 claims filed as of last week, with only 0.083% of the estimated 451,672 total household class members opting out, and 97% of East Palestine residents filing claims for the voluntary exposure payment.

"With a $600 million settlement on the table, we have an opportunity to start rebuilding our lives and community," Rick Feezle, a class representative, said in the statement. "I will never forget what Norfolk Southern did to our community, and I doubt I will ever fully forgive them, but this settlement is a step in the right direction for East Palestine."

The deal, first announced **in April**, received preliminary approval **in May**, with U.S. District Judge Benita Y. Pearson finding it a fair and reasonable settlement reached without collusion that outweighed the risks of continued litigation.

The deal aims to resolve all class claims, including negligence, strict liability, nuisance and trespass, from residents, businesses and property owners, and other plaintiffs within 20 miles of the derailments, as well as personal injury claims for residents within 10 miles of the derailment through the voluntary exposure settlement.

The suit alleged numerous harms such as lost income, property damage, contamination at residences and workplaces, and increased risk of serious and potentially fatal illnesses, including cancer and organ damage, necessitating ongoing medical monitoring, according to court documents.

The settlement would also end the plaintiffs' claims against co-defendants Oxy Vinyls LP, Trinity

Industries Leasing Co., GATX Corp. and its subsidiary General American Marks Co., which owned or leased cars involved in the derailment, but does not include Norfolk Southern's third-party claims against those defendants.

In a separate **memorandum** filed Friday, class counsel asked the court to award $162 million in fees, or 27% of the total relief, plus $18 million in class expenses and $15,000 in service awards for each class representative.

The attorneys argued that their percentage-of-the-fund calculation was reasonable in light of the significant benefits to the class, as well as their taking the case on contingency basis, and society's stake in rewarding attorneys who take on cases like this.

The attorneys also touted their skills and experience, saying it allowed them to tackle the complex and novel litigation and achieve the settlement.

Norfolk Southern was also hit with **claims** over the derailment from the U.S. Environmental Protection Agency and the State of Ohio **seeking** reimbursement for government funds spent in the cleanup. According to a statement from the plaintiffs' counsel, Norfolk has settled the claims with the EPA for $25 million.

Representatives for the defendants could not immediately be reached for comment Monday.

The plaintiffs are represented by M. Elizabeth Graham of Grant & Eisenhofer PA, by Jayne Conroy of Simmons Hanly Conroy LLP, by Seth A. Katz of Burg Simpson Eldredge Hersh & Jardine PC, by Michael Morgan of Morgan & Morgan PA, by Michelle L. Kranz of Zoll & Kranz LLC, and by Mark P. Chalos, Patrick I. Andrews and Christopher Coleman of Lieff Cabraser Heimann & Bernstein LLP.

Norfolk Southern is represented by Alan Schoenfeld, Davina Pujari, Christopher Rheinheimer and Albinas Prizgintas of WilmerHale, and by J. Lawson Johnston, Scott D. Clements, Aaron Ponzo and Paul A. Roman Jr. of Dickie McCamey & Chilcote PC.

GATX is represented by Hariklia Karis, Robert B. Ellis, Jonathan O. Emmanuel and Sydne K. Collier of Kirkland & Ellis LLP, and by Joseph A. Castrodale and Meggan A. Louden of Benesch Friedlander Coplan & Aronoff LLP.

Trinity Industries is represented by Jeffrey A. Bartolozzi of Barnes & Thornburg LLP, by Ronald W. Breaux, Bradley W. Foster and Carrington M. Giammittorio of Haynes and Boone LLP, and by Sean Gallagher, John Byars, John Fitzpatrick, Nora Eccles and Lindley Brenza of Bartlit Beck LLP.

Oxy Vinyls is represented by Alycia N. Broz, Kimberly Weber Herlihy, Emily J. Taft and Claire A. Halffield of Vorys Sater Seymour and Pease LLP.

The consolidated case is In re: East Palestine Train Derailment, case number 4:23-cv-00242, in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Ryan Harroff, P.J. D'Annunzio and Linda Chiem. Editing by Karin Roberts.

LAW360

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

Norfolk Southern CEO Shaw Faces Misconduct Probe

By **Linda Chiem**

Law360 (September 9, 2024, 7:16 PM EDT) -- Norfolk Southern Corp. is investigating CEO Alan Shaw over allegations of misconduct, casting uncertainty over his future at the rail giant just months after a proxy fight with an activist investor.

The Atlanta-based rail giant said in a late Sunday statement that its board of directors had hired a law firm to conduct an independent investigation into alleged conduct by Shaw that's "inconsistent with the company's Code of Ethics and company policy."

"Norfolk Southern holds all its team members to the highest standards," the railroad said. "In line with the company's Code of Conduct and company policy, allegations of misconduct are thoroughly investigated."

The railroad did not respond to inquiries seeking further details of the probe, such as which law firm it hired.

"The board of directors' audit committee has retained a law firm to conduct an independent investigation of the allegations and is committed to a complete and reliable examination of all pertinent facts," the statement said. "To ensure a fair investigation, the company and the board cannot comment further until the investigation is complete."

The investigation into Shaw comes months after a hard-fought **proxy battle**. Norfolk Southern in May fended off a board takeover attempt by an Ohio-based investor group led by Ancora Catalyst Institutional LP and EdgePoint Investment Group Inc.

The Ancora group had fervently pushed to replace Shaw as CEO and blasted Norfolk Southern's "ineffective strategy, which has driven industry-worst customer delivery times, severe derailments and persistent share price underperformance." Ancora, however, succeeded in getting three of its nominees elected to Norfolk Southern's 13-member board.

Shaw took over as Norfolk Southern's CEO following the retirement of former chief executive James A. Squires in May 2022. Shaw was Norfolk Southern's executive vice president and chief marketing officer but has nearly three decades of experience in marketing, operations and finance roles with the railroad.

But in early 2023, the railroad was thrown into tumult when a train carrying hazardous materials derailed in East Palestine, Ohio. The disaster, triggered by an **overheated wheel bearing** on a tank car, released large volumes of contaminants, set tank cars ablaze and prompted the evacuation of nearly 2,000 residents.

The National Transportation Safety Board concluded in a June **final report** that Norfolk Southern's decisions contributed to missteps during the response to the derailment, including a controversial and ultimately unnecessary decision to conduct a controlled vent and burn of highly flammable vinyl chloride.

Called before Congress, Shaw repeatedly **apologized** for the disaster and pledged to **support** affected communities. Norfolk Southern has rolled out a variety of safety initiatives since the derailment as it also grapples with ongoing litigation.

An Ohio federal judge is currently **considering** whether to give final approval on a proposed **$600**

million settlement between the rail giant and thousands of residents and businesses in consolidated class litigation. The **deal** was **tentatively approved** in May.

--Editing by Alanna Weissman.
