

Business Law Prof Blog

lawprofessors.typepad.com/business_law/2024/09/zymergen.html

Saturday, September 28, 2024

Zymergen

By Ann Lipton

The SEC recently settled an enforcement action against Zymergen for making false projections about its business. Prior to its IPO in April 2021, many of these projections were given directly to analysts. Zymergen did not include the projections in its registration statement, because companies are strictly liable to investors for false statements in a registration statement under Section 11 of the Securities Act, and so they generally try to avoid making projections that may turn out to be overly optimistic. Instead, Zymergen gave the false projections to analysts, so the analysts would take the projections, and use them in building their models, which they would pass on to investors with a recommendation of some sort.

One question then, is, if the SEC had not brought an enforcement action, could Zymergen have been liable to investors for passing on bad info to analysts?

The answer is, *maybe not*. Certainly not under Section 11, which only applies to information in a registration statement. And maybe not under Section 10(b), the general antifraud statute, because *Stoneridge v. Scientific-Atlanta* holds that public investors are not deemed to “rely” on behind-the-scenes conduct that’s filtered to the public through the false statements of another entity. (But see *Janus Capital Group, Inc. v. First Derivative Traders*, raising the possibility, without deciding, that statements to analysts are public for 10(b) purposes).

Could the *analysts themselves* be liable for passing on targets based on false projections? Certainly not under Section 10(b), unless they knew or were reckless about falsity, because Section 10(b) only applies to intentional frauds.

What about under Section 12, which imposes negligence liability for anyone who distributes a false offer for the sale of securities (which could theoretically apply to Zymergen, as well?)

It’s complicated. The Supreme Court has narrowed the application of Section 12 in ways that are somewhat convoluted, and might preclude liability here, though in the pre-IPO context it’s hard to say. But a second issue concerns whether the research report could be considered an offer in the first place. Maybe so, except in the JOBS Act of 2012, Congress legislated an exception to the definition of offer, so that any research report is not an offer if it

concerns an IPO of an emerging growth company. So, because Zymergen (like most IPOs) was an emerging growth company, the *analysts themselves* were free to distribute Zymergen's false information, without fear of Section 12 liability; they could only be liable if *they themselves acted intentionally* under Section 10(b).

The combination creates some... well, troubling incentives, especially for analysts who work for investment banks that are part of the selling group and therefore may feel some pressure to offer positive coverage. The analyst report itself won't trigger negligence liability as a false Section 12 prospectus (because of the carveout), shareholders who read the analyst report (probably) can't sue Zymergen under 10(b) (because of *Stoneridge*), and neither Zymergen, nor the underwriters who might even employ the analyst, will be liable under Section 11 for false statements in the registration statement, because those false statements were by hypothesis carved out of the registration statement to be farmed out by the analysts instead.

Now, after the dot com scandals of the early 2000s, the SEC procured settlements from the largest investment banks to separate their underwriting and research segments and new FINRA rules also required such separation but, you know, the Zymergen situation does raise the question whether this is the correct balance, especially since I gather it is fairly common practice for pre-IPO firms to share revenue guidance with analysts, in the expectation those analysts will present the information to investors.

On this point, I note that Zymergen's registration statement contains the following standard language:

We are responsible for the information contained in this prospectus. We and the underwriters have not authorized anyone to provide any information or to make any representations other than those contained in this prospectus or in any free writing prospectuses prepared by us or on our behalf. We and the underwriters take no responsibility for any other information that others may provide you.

The SEC doesn't mention it; still, it's *weird* to me that these companies are permitted to filter their projections through analysts in hopes of flogging an IPO, while simultaneously publicly disclaiming any of that analysis.

That said, investors did, in fact, identify some allegedly false statements that were directly included in Zymergen's registration statement, and those are the subject of an ongoing securities case under Section 11. So ... all's well that ends well?

And finally, the latest *Shareholder Primacy* podcast is up. This time me and Mike Levin talk TripAdvisor (pending before the Delaware Supreme Court) and 14a-4 shareholder proposals. Available on Spotify, Apple, and YouTube.

American Airlines Hit With Investor Suit Over Sales Strategy

By Mike Vilensky

- **COURT:** N.D. Tex.
- **TRACK DOCKET:** [No. 4:24-cv-00918](#) (Bloomberg Law subscription)

Bloomberg Law News 2024-09-30T09:57:58259327302-04:00

American Airlines Hit With Investor Suit Over Sales Strategy

By Mike Vilensky 2024-09-27T19:06:28000-04:00

- **COURT:** N.D. Tex.
- **TRACK DOCKET:** [No. 4:24-cv-00918](#) (Bloomberg Law subscription)

American Airlines Group Inc. executives are facing a lawsuit claiming they made positive statements to investors about a failing post-pandemic sales strategy.

The derivative complaint was filed by an American shareholder, George Leon, Thursday in the US District Court for Northern District of Texas.

In 2022 the company pushed customers away from corporate booking agencies and towards buying through American's website in an effort to pare down debts accrued during the pandemic, the complaint says. But the strategy backfired by alienating the company's most lucrative customers, creating a drop in revenue, the complaint says.

Between 2023 and May 2024, American's top brass told investors the company was well-positioned despite the declining revenue, the complaint claims. Chief executive Robert Isom issued a public statement saying demand was strong, the complaint cites as an example.

After American announced the termination of its chief commercial officer, Isom said in May that the company had driven some customers away, and its stock price then fell 13%, the suit says.

The complaint brings claims of Exchange Act violations, fiduciary breach, and unjust enrichment. Leon is asking the court to order American to reform its corporate governance. The complaint also seeks damages, attorneys' fees, and costs.

An American spokesperson said: "We are reviewing the complaint, which we believe is without merit."

Judge Mark Pittman is assigned to the case.

The airline is also facing a proposed class action lawsuit from a separate investor in a Texas federal court, also alleging misleading statements over the sales strategy.

The Brown Law Firm represents Leon.

The case is Leon v. Isom , N.D. Tex., No. 4:24-cv-00918, complaint filed 9/26/24 .

To contact the reporter on this story: Mike Vilensky at mvilensky@bloombergindustry.com

To contact the editor responsible for this story: Adam Ramirez at aramirez@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

**Bloomberg
Law**[Request a Demo](#)[Login](#)[Securities Law News](#)

Sept. 27, 2024, 3:28 PM PDT

Owlet Investors' Baby Sock Suit Shorn of Pre-Merger Statements

By Martina Barash

Bloomberg Law News 2024-09-30T09:58:17432373439-04:00

Owlet Investors' Baby Sock Suit Shorn of Pre-Merger Statements

By Martina Barash 2024-09-27T18:28:04000-04:00

The investor leading a suit against Owlet Inc. for allegedly making misleading statements about its Smart Sock baby monitoring product lacks standing to assert claims over statements before the company went public, a federal court ruled.

A recent appeals court decision compels that result, Judge Fernando L. Aenlle-Rocha said Thursday for the US District Court for the Central District of California. The judge granted Owlet's request for reconsideration of a previous ruling allowing all the claims against the monitor maker to proceed.

- The suit alleges Owlet misled investors by saying it didn't need the Food and Drug Administration to approve the monitor as a medical device, and that its stock price fell after it received an FDA warning letter
- Owlet went public in 2021 by merging with a special purpose acquisition vehicle
- The Aug. 8 decision of the US Court of Appeals for the Ninth Circuit in *In re CCIV/Lucid Motors Securities Litigation* has similar de-SPAC merger facts and bars plaintiff Thomas Tweito's claims over statements by Owlet's pre-merger predecessor, Aenlle-Rocha said

Kessler Topaz Meltzer & Check LLP is lead counsel for the investors. Latham & Watkins LLP represents Owlet.

The case is *Butala v. Owlet, Inc.*, 2024 BL 339997, C.D. Cal., No. 2:21-cv-09016, 9/26/24.

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

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Squarespace Stockholders Sue for Records Over \$7 Billion Deal

By Bloomberg Law Automation

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [2024-1005](#) (Bloomberg Law subscription)

Bloomberg Law News 2024-09-30T09:54:58734129408-04:00

Squarespace Stockholders Sue for Records Over \$7 Billion Deal

By Bloomberg Law Automation 2024-09-27T14:50:38000-04:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [2024-1005](#) (Bloomberg Law subscription)

Squarespace Inc. was hit with a stockholder lawsuit seeking to inspect its books and records over potential fiduciary breaches related to its \$7 billion merger agreement with affiliates of private equity firm Permira Advisers LLC.

Nathan Gross and Stephanie Smith seek information related to the purchase of the website builder's outstanding stock for \$44 per share in cash and Permira's Sept. 9 proposed tender offer, which increased it to \$46.50 per share for a value of nearly \$7.2 billion, according to a lawsuit filed Thursday in Delaware's Chancery Court.

The agreement and offer "appear to have been orchestrated from start to finish" by Squarespace's chief executive officer, board chair, and controlling stockholder, Anthony Casalena, the lawsuit says.

Casalena allegedly sought to take Squarespace private while keeping a significant financial stake in the company and retaining operational control, the lawsuit says. After Casalena and Permira engaged in private meetings for over a year, Squarespace's directors formed a special committee that "could only consider transactions" to accommodate Casalena's interests, the lawsuit says.

The process resulted in a "plainly insufficient price" of \$44 per share, Gross and Smith say. Proxy advisory firm Institutional Shareholder Services recommended Squarespace stockholders to vote against the merger, the lawsuit says. As a result, Permira increased the offer price to \$46.50 per share in cash, the lawsuit says.

Gross and Smith seek an order compelling Squarespace to produce the requested books and records. They also seek to recover the costs and expenses of the action, including attorneys' fees.

The company didn't immediately respond Friday to an email seeking comment.

Bronstein Gewirtz & Grossman LLC and Grant & Eisenhofer PC represent the shareholder.

The case is Gross v. Squarespace, Inc. , Del. Ch., No. 2024-1005, complaint filed 9/26/24 .

This story was produced by Bloomberg Law Automation.

To contact Bloomberg Law Automation: automation@bloombergindustry.com

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

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

Bloomberg Law News 2024-09-30T14:17:01090997622-04:00

Bed Bath & Beyond Investor Class Denied in Meme-Stock Suit (1)

By Martina Barash 2024-09-30T08:29:00000-04:00

- Claims against Ryan Cohen, his investment firm at issue
- Investors failed to show classwide reliance on statements

Bed Bath & Beyond Inc. shareholders suing activist investor Ryan Cohen can't represent a class on pump-and-dump claims stemming from the meme stock craze, a federal court ruled.

They can't show would-be class members all relied on the alleged misrepresentations in the same way because the market for Bed Bath's stock wasn't efficient, Judge Trevor N. McFadden said Sept. 27 for the US District Court for the District of Columbia.

But "nothing here should suggest that short squeezes offer a green light to market fraudsters to engage in pump-and-dump schemes without fear of class actions," he said. Here, the lead plaintiff simply didn't show market efficiency, he said.

Belgian investment company Bratya SPRL and other shareholders sued Bed Bath, its CEO Sue Gove, Cohen, and Cohen's RC Ventures LLC firm. The investors alleged that Cohen and his firm acquired nearly 10% of the home goods retailer's stock in March 2022. But after his proposal that the company sell subsidiary store Buy Buy BABY failed, Cohen allegedly attempted to boost the stock price by influencing his thousands of social media followers to buy or hold their shares.

He ultimately sold his entire stake in August of that year, causing the retailer's share price to plummet, the investors said.

In July 2023, McFadden [paused](#) the claims against Bed Bath, by then in bankruptcy, and dismissed the claims against Gove. But Cohen and his firm were still potentially liable for insider trading and misleading investors, the judge said.

Lead investor Bratya sought to represent a class of Bed Bath investors allegedly harmed by Cohen's and RC Ventures' actions.

Bratya satisfied some of the requirements for class certification, including adequacy of representation and typicality of its claims to those of the class, McFadden said in his new ruling.

But the investor hit a snag with showing that common issues predominate over individualized ones, he said. To employ a presumption of classwide reliance on a misrepresentation used in securities suits, a plaintiff can point to an efficient market—where “a stock trades in an efficient market if that market is *informationally* efficient,” meaning that prices respond so quickly to new information that it’s impossible to profit on that basis, he said.

“But these were not normal circumstances,” McFadden said of the time period at issue. Cohen’s law and economics expert, Daniel Fischel, “marshals considerable evidence showing that the market for BBBY stock was in wild flux in the weeks before and during the Class Period,” the judge said.

Fischel persuasively testified that market for Bed Bath securities “was so volatile and subject to such unusual market dynamics during the Class Period that it cannot possibly have ‘reflected all public, material information’ including Cohen’s alleged material misstatements,” McFadden said.

Fischel presented convincing evidence that Bed Bath “was undergoing a ‘short squeeze’ during the Class Period,” undermining factors that would show an efficient market, the judge said.

Even if the stock were trading in an efficient market, Fischel testified that an allegedly misleading tweet by Cohen had no impact on BBBY’s price, rebutting the presumption, McFadden said.

Attorneys for the investors included Pomerantz LLP. Williams & Connolly LLP represented Cohen and RC Ventures.

The case is [Bratya SPRL v. Bed Bath & Beyond Corp.](#) , D.D.C., No. 1:22-cv-02541, 9/27/24 .

(Updated with additional reporting beginning in fourth paragraph.)

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

To contact the editors responsible for this story: Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com; Brian Flood at bflood@bloombergindustry.com

After standing up SEC twice, Musk will sit for 3rd deposition, lawyer says

DJ [dailyjournal.com/articles/381194-after-standing-up-sec-twice-musk-will-sit-for-3rd-deposition-lawyer-says](https://www.dailyjournal.com/articles/381194-after-standing-up-sec-twice-musk-will-sit-for-3rd-deposition-lawyer-says)

Securities

Share

Sep. 30, 2024

Elon Musk skipped the last deposition date with the Securities and Exchange Commission to attend a SpaceX launch in Florida but will appear this week, his lawyer assured a judge overseeing a case involving his purchase of Twitter, now X.

Despite twice skipping out on scheduled depositions with the U.S. Securities and Exchange Commission -- including one this month to attend a SpaceX launch -- Elon Musk will testify this week, his counsel assured a federal judge in San Francisco on Friday.

"What can we do to make sure the stipulation is complied with? It was violated," U.S. District Judge Jacqueline Scott Corley asked Quinn Emanuel Urquhart & Sullivan LLP partner Christopher G. Michel.

"The short answer, your honor, is that Mr. Musk will appear on Oct. 3 for his deposition and the court does not need to do anything else to compel that. He accepts that he is subject to the court order and will be there," Michel said.

He appeared at Friday's hearing in place of Quinn Emanuel partner Alex Spiro, who was in New York City to defend Mayor Eric Adams against bribery and wire fraud charges. Spiro is a longtime lawyer for Musk and has represented several high-profile figures.

The SEC, investigating Musk's 2022 purchase of Twitter for possible securities law violations, said it was informed on the morning of the Sept. 10 deposition that the SpaceX founder had to travel to Florida for a satellite launch.

"Musk's excuse itself smacks of gamesmanship," the SEC's filing read, adding that the agency may seek sanctions against the billionaire investor and inventor.

Michel told Corley that he disagreed that Musk violated the court's order.

"It contemplates emergencies and rescheduling by consent ... I think it would be hard to read the order to contemplate that, in the middle of an emergency, there has to be express consent," he said, giving examples of a car accident or hospitalization.

The SEC could have been notified about a pre-planned SpaceX launch, Corley countered. The judge also asked Michel to confirm that Spiro's work on Adams' defense would not interfere with Musk's deposition on Thursday.

"Mr. Musk will be there on Oct. 3," Michel responded.

Musk sat for two videoconference depositions in July 2022 but has resisted sitting for a third, despite the SEC saying it has since received thousands of new documents related to Musk's purchase of Twitter shares before buying the social media site. *Securities and Exchange Commission v. Musk*, 3:23-mc-80253-JSC (N.D. Cal., filed Oct. 5, 2023).

SEC in-house attorney Robin Andrews said he was concerned that Musk may not tell his attorneys about any potential conflicts, noting that the Tesla CEO told Spiro himself on the morning of the launch.

Andrews recalled an incident last year when Musk canceled on Spiro and Quinn Emanuel associate Rachel G. Frank after the attorneys flew to San Francisco for a deposition.

Musk's "assurances about what he will or won't do don't provide us a lot of comfort," he said.

Also on Friday, Senior U.S. District Judge Charles R. Breyer in San Francisco granted class certification to a group of investors suing Musk for alleged securities violations after he bought Twitter for \$44 billion in October 2022. The judge said during the hearing that he would issue a written order soon. *Pampena et al. v. Musk*, 3:22-cv-05937-CRB (N.D. Cal., filed Oct. 10, 2022).

Led by Cotchett Pitre & McCarthy LLP and Bottini & Bottini Inc., the plaintiffs accused Musk of making misleading statements and posts to create doubt and drive down Twitter's stock to either back out of the sale or re-negotiate the buyout price.

"Musk's market manipulation worked -- Twitter lost \$8 billion in valuation after the buyout was announced," Cotchett partner Mark C. Molumphy and Bottini attorney Francis A. Bottini Jr. wrote in the complaint, adding that Musk made \$156 million by failing to submit a Form 13G to the SEC on time. This form reports a party's ownership of stock that exceeds 5% of a company's total stock issue.

"Musk's disregard demonstrates how one can flaunt the law and the tax code to build their wealth at the expense of other Americans," they wrote.

Musk has said the \$44 billion he paid for Twitter was too much.

Tesla Defeats Investor Lawsuit Over Musk's Autopilot Marketing

B [bloomberglaw.com/bloombergtterminalnews/bloomberg-terminal-news/SKN1KXDWRGG0](https://www.bloomberglaw.com/bloombergtterminalnews/bloomberg-terminal-news/SKN1KXDWRGG0)

By Rachel Graf

(Bloomberg) --

Tesla Inc. won dismissal of a shareholder lawsuit alleging misleading statements about self-driving capabilities propped up its stock price, though the company still faces numerous other complaints and regulatory investigations of its marketing.

Tesla Chief Executive Officer Elon Musk declared in April that Tesla is “going balls to the wall for autonomy” while committing the car maker to a next-generation, self-driving vehicle concept called the robotaxi. The billionaire entrepreneur has touted autonomy for over a decade, and has persuaded customers to pay thousands of dollars for its Full Self-Driving, or FSD, feature.

The name is a misnomer — FSD requires constant supervision and doesn’t render vehicles autonomous — but Musk has repeatedly predicted it’s on the verge of measuring up to the branding. The company is embroiled in numerous lawsuits over the feature, including from Tesla investors who claim they were misled.

In her ruling Monday, US District Judge Araceli Martínez-Olguín rejected shareholders’ allegations that Musk overstated Tesla’s self-driving technology with assurances that drivers could “go to sleep” in their car by 2020, among other promises. She found that some of the alleged overstatements concerned future plans, while others weren’t necessarily false.

“Plaintiffs fail to connect Musk’s hands-on management with any information that he allegedly learned rendering his statements false or misleading,” the judge wrote. However, she gave the investors until Oct. 30 to file an updated version of their complaint.

Investors claimed they were harmed when the truth about Tesla’s shortcomings came to light and its stock price fell, according to the complaint, which alleged that Musk sold \$39 billion in stock before then.

Tesla consumers are moving ahead with a separate proposed class action over the company’s self-driving marketing, while Tesla earlier this year settled a high-profile lawsuit involving a fatal crash while Autopilot was engaged.

Meanwhile, the company faces federal probes into whether Autopilot defects have contributed to fatal crashes, as well as investigations by federal prosecutors and the Securities and Exchange Commission into whether Tesla made misleading claims about the

feature to the public. Similar claims brought by the California Department of Motor Vehicles were allowed allowed to move forward earlier this year.

The case is Lamontagne v. Tesla Inc., 23-cv-00869, US District Court, Northern District of California (San Francisco).

To contact the reporter on this story:

To contact the editors responsible for this story:

Peter Blumberg, Steve Stroth

[Securities Law News](#)

Sept. 27, 2024, 1:13 PM PDT; Updated: Sept. 27, 2024, 5:01 PM PDT

Twitter Investors Suing Elon Musk Granted Class Certification (1)

By Quinn Wilson

Documents

-  [Motion](#)
-  [Response](#)
-  [Docket](#)
-  [Order](#)
-  [Order](#)

-
- Plaintiffs have met the standard for class certification
 - Investors allege they lost more than \$558K on stock sales

Bloomberg Law News 2024-09-30T09:52:29670426038-04:00

Twitter Investors Suing Elon Musk Granted Class Certification (1)

By Quinn Wilson 2024-09-27T16:13:56000-04:00

- Plaintiffs have met the standard for class certification
- Investors allege they lost more than \$558K on stock sales

Thousands of Twitter investors received class certification Friday in their lawsuit alleging Elon Musk fueled uncertainty about his proposed buyout of the company to drive down the stock price.

Judge Charles R. Breyer said he was satisfied that the plaintiffs met the federal standards for class certification during a motion hearing at the US District Court for the Northern District of California. He appointed Cotchett Pitre & McCarthy LLP and Bottini & Bottini Inc. as the class counsel and Nancy Price, John Garrett, and Brian Belgrave as the class representatives.

The investors allege Musk violated the Securities Exchange Act when he took steps to lower Twitter's stock price in an attempt to renegotiate the buyout price of \$54.20 per share. The plaintiffs allege they suffered large financial losses when they sold Twitter stock at artificially depressed prices.

The class will consist of all people and entities who sold publicly traded Twitter stocks, call options, or purchased put options between May 13, 2022, and Oct. 4, 2022, Breyer said. Other people who suffered similar damages to the plaintiffs are also eligible.

The plaintiffs asked Breyer for certification in May, arguing that certification was appropriate because the class is sufficiently numerous, the lead plaintiffs "are more than adequate representatives," and their claims are common to the class.

Musk pushed back at this argument in a Sept. 2 brief opposing certification, contending that the class failed to establish predominance, that the lead plaintiffs are atypical and inadequate, and that the class' definition and damages model fall short of Rule of Federal Procedure 23.

But Breyer disagreed, ruling that the predominance requirements are satisfied and that Musk has failed to show evidence rebutting the plaintiffs' position, according to his order. Breyer did agree that plaintiff Steve Garrett's allegations were atypical and precluded him from being a class representative, but said the rest of the plaintiffs satisfied Rule 23(a).

The plaintiffs allege Twitter's stock price artificially lowered when Musk failed to disclose when his Twitter holdings exceeded 5% and by his public statements saying he'd put the buyout deal on hold. Investors Steve Garrett, John Garrett, Price and Belgrave allege they collectively sold 28,389 shares of Twitter stock during the class period at artificially deflated prices and suffered losses of over \$558,000.

The US Securities and Exchange Commission is also seeking information about Musk's purchase of Twitter stock and statements he made about his investments ahead of his \$44 billion purchase of the social media platform in a separate lawsuit.

Breyer also granted the plaintiffs the ability to seal excerpts from a deposition of Steve Garrett, portions of an expert testimony, and the plaintiffs' trading records, according to a separate order. Breyer also ordered the unsealing of deposition excerpts from John Garrett, Price, and Belgrav, as well as redacted portions of Musk's opposition brief.

Cotchett Pitre & McCarthy LLP and Bottini & Bottini Inc. represent the class. Quinn Emanuel Urquhart & Sullivan LLP represents Musk.

The case is *Pampena v. Musk*, N.D. Cal., No. 3:22-cv-05937, 9/27/24 .

(Paragraphs 7 and 10 were updated with additional information from Breyer's orders.)

To contact the reporter on this story: Quinn Wilson in Washington at qwilson@bloombergindustry.com

To contact the editor responsible for this story: Adam Ramirez at aramirez@bloombergindustry.com

**Bloomberg
Law**[Request a Demo](#)[Login](#)[Securities Law News](#)

Sept. 27, 2024, 1:20 PM PDT

Musk Agrees to Meet SEC After Ditching Meeting for Rocket Launch

By Rachel Graf

Bloomberg Law News 2024-09-30T09:52:03963159101-04:00

Musk Agrees to Meet SEC After Ditching Meeting for Rocket Launch

By Rachel Graf2024-09-27T16:20:01341-04:00

Elon Musk's lawyers assured a judge in San Francisco that the mercurial billionaire will show up next week to be questioned by securities regulators investigating his 2022 acquisition of Twitter Inc., after Musk ditched an earlier meeting to attend a rocket launch.

The US Securities and Exchange Commission is seeking information about Musk's purchases of Twitter stock and statements he made about his investments before buying the social media platform for \$44 billion. Regulators sent Musk a letter asking about the delayed disclosure of his Twitter stake.

In July 2022, Musk testified twice in the case, but he's now failed to show up two times for follow-up questioning, according to the SEC. The most recent was earlier this month, when he attended the launch of a rocket by SpaceX, one of his companies. The move apparently surprised his own lawyers, who had traveled to Los Angeles to observe the scheduled testimony.

Musk's lawyers "clearly don't have control over their client," SEC attorney Robin Andrews told the judge at a hearing Friday.

One of the billionaire's attorneys, **Alex Spiro**, is defending New York City Mayor Eric Adams, who was arraigned Friday in a Manhattan federal court on corruption charges. The judge overseeing the SEC case said Friday that Musk won't be able to delay next week's testimony — now scheduled for Oct. 3 — even if Spiro is "otherwise engaged" with Adams.

The case is Securities and Exchange Commission v. Musk, 23-mc-80253, US District Court, Northern District of California (San Francisco).

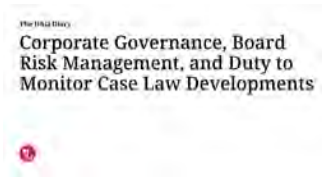
To contact the reporter on this story:

Rachel Graf in San Francisco at rgraf27@bloomberg.net

Corporate Governance, Board Risk Management, and Duty to Monitor Case Law Developments

K [dandodiary.com/2024/09/articles/corporate-governance/corporate-governance-board-risk-management-and-duty-to-monitor-case-law-developments](https://www.dandodiary.com/2024/09/articles/corporate-governance/corporate-governance-board-risk-management-and-duty-to-monitor-case-law-developments)

September 30, 2024



By Kevin LaCroix on September 30, 2024

Posted in Corporate Governance



In last Thursday's post, I noted recent case law developments in which federal court breach of the duty of oversight claims against the boards of Wells Fargo and Abbott Laboratories had survived motions to dismiss, at least in part. I also noted that these

decisions have important implications for board governance processes and documentation. As I have continued to consider the implications of these recent decisions and other developments concerning the so-called *Caremark* duties relating to board members' fiduciary duties of oversight, I developed further thoughts on the steps well-advised boards will want to take to put themselves in a better position to defend themselves against these kinds of claims. I have set out my thought below.

Background

First, by way of background, it is worth noting that so-called *Caremark* claims based on alleged breaches of the duty of oversight or duty to monitor have been around since at least the Delaware Court of Chancery's 1996 decision. For many years, Delaware's courts emphasized that duty of oversight claims involve "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."

However, in a line of cases beginning with the Delaware Supreme Court's 2019 decision in *Marchand v. Barnhill*, Delaware courts have sustained various plaintiffs' assertion of breaches of the duty of oversight. The high water mark for these kinds of cases arguably was the Boeing 737 Max air crash case, which survived a motion to dismiss and ultimately settled for \$237.5 million. As I noted in last week's post, federal courts, applying Delaware law, recently sustained at least in part breach of the duty of oversight claims against the boards of Wells Fargo and Abbott Laboratories.

As case law has developed, the Delaware courts have identified two “prongs” that characterize the requirements of the duty of oversight. The first prong has to do with companies’ “mission critical” operations and functions, for which boards should have reporting mechanisms enabling the directors to monitor these critical operations. The second prong has to do with “red flags” that should alert the boards that there are key developments that boards should be monitoring.

Risk Management

These developments have important implications for corporate boards. At a minimum, boards will want to consider what steps they should take in order to make sure that if they are hit with one of these kinds of breach of the duty of oversight claims, that they are in a position to defend themselves and to attempt to refute the claims. Even more importantly, well-advised and well-intentioned boards will want to ensure that they have mechanisms in place to monitor their companies’ “mission critical” operations and functions and to oversee their companies’ responses to “red flags” that emerge.

Based on these considerations there are important steps that well-advised boards will want to consider.

First, the boards should undertake a risk assessment process, in order to make sure the board has identified the most important risks the company faces, as well as how those risks are being monitored, by management and by the board. The boards will also want to understand what processes are in place to identify emerging risks, including regulatory developments and industry changes, as well as how frequently the emerging risks are being evaluated and assessed. Timeliness and regular reporting are key considerations.

Second, boards should identify and assess the systems that are in place to collect and report information related to key compliance areas, and in particular the board will want to understand the procedures for escalating important issues to the board. Relatedly, the board will want to understand the internal processes for addressing audit findings or whistleblower reports, particularly how these items are communicated to the board.

Third, the board will want to understand how critical business functions and operational issues are being overseen by the board and relevant committees. The board will want to understand where the ongoing responsibilities for monitoring these key business functions and operational issues reside, and in particular, determine whether there are dedicated committees responsible for overseeing key areas, as well as how frequently these committees are reporting to the full board. (With respect to this latter point, it is important to note that in both the Wells Fargo and Abbott Laboratories cases, the court considered it highly significant that the respective boards lacked specialized committees to oversee mission critical operations and functions.)

Fourth, in light of the fact that the board is dependent on management's actions in elevating issues and reporting on key developments, the board will want to understand the standards in place for elevating issues, as well as how frequently management will provide the board with updates on critical issues and potential concerns. Along those same lines, the board will want to assess the management's response to key issues and developments. By the same token, the board will want to set expectations for management to escalate to the board considerations relevant to critical issues.

Fifth, in order to be able to substantiate the board's efforts, directors will want to ensure that board discussion and decisions on the key risk issues are well documented in board and committee minutes. In addition, from a board governance perspective, directors should regularly review its oversight and monitoring practices and procedures, and make adjustments as necessary. The ultimate question is how the board makes sure that the directors are adequately informed about the company's critical operations and risks.

Sixth, boards should be particularly aware of and sensitive to "red flags" that may arise and that could indicate serious concerns and that could require additional investigation. Relatedly, the board will want to understand management's protocols for elevating potential red flags to the board.

Finally, and as a general matter, it is important for directors to keep in mind that, no matter what, potential claimants may later emerge, who, armed with the benefit of hindsight, may seek to question both the board's actions and motivations. Boards will want to be in a position to demonstrate that they made good faith efforts to monitor and respond to developments involving the company's key operations and functions.

No risk management can ever ensure that lawsuits will not arise. However, well-advised companies will take steps to try to ensure that if they do attract the unwanted attention of the plaintiffs' lawyers, they are in the best position to try and defend themselves.

Securities Law Prof Blog

 lawprofessors.typepad.com/securities/2024/09/new-securities-law-articles-in-print-1.html

Monday, September 30, 2024

New Securities Law Articles in Print

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

Dhruv Aggarwal, Albert H. Choi & Yoon-Ho Alex Lee, *The Meme Stock Frenzy: Origins and Implications*, 96 S. Cal. L. Rev. 1387 (2024).

Adam B. Badawi, *How Informative Is the Text of Securities Complaints?*, 39 J. L. Econ. & Org. 801 (2023).

Stephen J. Choi, Jessica M. Erickson & A.C. Pritchard, *The Business of Securities Class Action Lawyering*, 99 Ind. L.J. 775 (2024).

Jill E. Fisch & Adriana Z. Robertson, *What's in a Name? ESG Mutual Funds and the SEC's Names Rule*, 96 S. Cal. L. Rev. 1417 (2024).

Elizabeth J. Kennedy, *Sustainable Labor Rights*, 45 Berkeley J. Emp. & Lab. L. 55 (2024).

Menesh S. Patel, *Secondary Trading Crypto Fraud and the Propriety of Securities Class Actions*, 96 S. Cal. L. Rev. 1571 (2024).

Elizabeth Pollman, *Adventure Capital*, 96 S. Cal. L. Rev. 1341 (2024).

Katherine Stromin, Comment, *Investment DAOs and Crowdfunding: A Solution to Securities Law Challenges*, 58 U.S.F. L. Rev. 297 (2024).

**Bloomberg
Law**[Request a Demo](#)[Login](#)[Securities Law News](#)

Sept. 30, 2024, 2:00 AM PDT

This Week in Chancery Court: AMC Stock Conversion Settlement

By Jennifer Kay

Bloomberg Law News 2024-09-30T09:56:51352631973-04:00

This Week in Chancery Court: AMC Stock Conversion Settlement

By Jennifer Kay 2024-09-30T05:00:02000-04:00

The AMC Entertainment Holdings Inc. stock conversion plan, completed last year amid bitter opposition from its retail investors, is once again up for discussion at the Delaware Chancery Court.

Here are the highlights from the court's calendar this week:

Tuesday: TA Dispatch LLC v. Svindland, Del. Ch., No. 2022-1043, bench ruling 10/1/2024.

At issue: Vice Chancellor Nathan A. Cook will make a bench ruling on a motion by former Celadon Group Inc. executives to dismiss a lawsuit from Alabama trucking and transport management company TA Dispatch LLC, which bought Celadon's assets shortly before the transport and logistics company went bankrupt. The former executives argued that TA Dispatch is trying to re-cast claims that already failed in an Indiana state court. TA Dispatch said it "has alleged facts sufficient to state claims for negligent misrepresentation and statutory suppression under Alabama law, tortious interference, and common law negligent misrepresentation."

Court action: Cook will deliver his bench ruling via teleconference.

Bankrupt Celadon, TA Dispatch Reach \$3.25 Million Settlement

Wednesday: Simons v. AMC Ent. Holdings Inc., Del. Ch., No. 2023-0835, oral arguments 10/2/24.

At issue: The Delaware Supreme Court upheld a settlement allowing AMC to proceed with the stock conversion opposed by its meme stock base. Preferred shareholder Michael Simons says the deal shortchanged APE holders like him, while AMC says Simons's amended complaint seeking damages should be dismissed because he "sat back and let the Conversion and sSettlement Payment happen" without trying to stop their completion. Simons argues the timing of his lawsuit was reasonable and the case should proceed because AMC deprived preferred stockholders of their anti-dilution rights. Separately, one of the 3,000 retail investors who objected to the settlement has asked the US Supreme Court to overturn the series of rulings that allowed the movie theater chain to recapitalize.

Court action: Oral arguments on the motion to dismiss will be heard before Vice Chancellor Morgan T. Zurn in Wilmington, Del.

AMC Investor Challenges Court-Approved APE Stock Conversion Plan

Friday: Entrepology LLC/C Lawrence LLC v. Palladium Equity Partners LLC, Del. Ch., No. 2022-0063, teleconference 10/4/2024.

At issue: Zurn is expected to deliver a ruling approving a settlement Palladium Equity Partners LLC reached with the founders of the CircusTrix, Rockin' Jump, and Sky Zone trampoline parks. The proposed accord would resolve litigation alleging the private equity firm duped minority members of the parks' umbrella parent company into a self-dealing refinancing during the early days of the pandemic. The founders' attorneys seek a \$3.5 million fee award.

Court action: Zurn will deliver her bench ruling via teleconference.

Palladium Sued by Trampoline Park Founders Over Refinancing Deal

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

To contact the editor responsible for this story: Alex Clearfield at aclearfield@bloombergindustry.com

© 2024 Bloomberg Industry Group, Inc. All Rights Reserved

New York towns seek to revive claims against the state over opioid settlement fund

 [courthousenews.com/new-york-towns-seek-to-revive-claims-against-the-state-over-opioid-settlement-fund](https://www.courthousenews.com/new-york-towns-seek-to-revive-claims-against-the-state-over-opioid-settlement-fund)

Nika Schoonover

Several New York towns said the state deprived them of their constitutional rights by establishing a settlement fund that extinguished their existing claims against pharmaceutical companies for fueling the opioid epidemic.



Medications slated for destruction are shown in a locked storage area of the police department in Barberton, Ohio, on Sept. 11, 2019. (AP Photo/Keith Srakocic, File)

MANHATTAN (CN) — New York state overreached its authority by establishing an opioid settlement fund that extinguished existing claims against pharmaceutical companies that perpetuated the epidemic, towns impacted by the crisis told the Second Circuit Friday.

In 2019, towns on Long Island including Brookhaven, Hempstead and Oyster Bay sued pharmaceutical companies that sold and distributed opioids in an attempt to hold them responsible for the financial harm the towns sustained.

The pain medications, such as fentanyl and oxycodone, are highly addictive contributed to a stark increase in drug addiction and overdose deaths. According to the U.S. Center for Disease Control and Prevention, nearly 645,000 people have died from an opioid-related overdose since 1999.

But before the towns could pursue financial relief, New York reached its own settlement with the pharmaceutical companies and signed into law in 2021 an opioid fund that would facilitate these settlements and retroactively extinguish claims against the opioid producers and distributors. The towns then filed suit against New York Attorney General Letitia James in 2022, claiming the state overreached by creating the fund since it barred them from pursuing their own claims against the pharmaceutical companies.

“The consequences are real and they matter: the towns will struggle to replace their aging fleets of emergency medical services vehicles, they will struggle to fund efforts to recruit employees and volunteers, they will struggle to purchase the medications and equipment

that those employees and volunteers need to serve on the front line of the battle against the opioid crisis,” the towns say in their brief.

The towns say a lower court erred in its decision to dismiss the towns’ claims against the state, and disagreed with the court’s finding that they don’t have standing to sue the state on this issue.

But Friday’s panel seemed hesitant to side with the towns, asserting that the U.S. Supreme Court has historically not allowed towns to sue in federal court on constitutional grounds.

“Under the Supremacy clause, neither we nor any federal court has allowed a municipality to sue a state in federal court on a constitutional violation,” U.S. Circuit Judge Joseph F. Bianco, a Donald Trump appointee, said Friday.

The towns argue they were deprived of their property rights to seek relief from the pharmaceutical companies for the damages they incurred as a result of the opioid epidemic, which should allow them to stake a claim under the 14th Amendment.

“The Legislature has recognized that municipalities have property rights that merit respect,” Nathan Holcomb, an attorney representing the towns, said Friday.

A lawyer for the New York Attorney General’s Office, further argued that the towns lack the right to sue the state for constitutional violations. “The municipalities don’t have enforceable constitutional rights vis-à-vis the state, and that’s the principle animating all of these decisions,” attorney Steven Yanni said.

U.S. Circuit Judge Steven Menashi, a Donald Trump appointee, questioned if that’s true in instances in which a state law takes away the town’s previously held constitutional rights.

Menashi presented a hypothetical in which the state of New York passes a law to prevent the Town of Hempstead from passing a local anti-discrimination law.

“You’re saying Hempstead could not sue New York, and Hempstead says we think you’re eliminating our legislative powers based on an invidious purpose, that it’s unconstitutional,” Menashi said Friday. “You’re saying Hempstead would not be able to challenge that?”

Yanni agreed, citing current Supreme Court precedent.

U.S. Circuit Judge Eunice Lee, a Joe Biden appointee, was also present in Friday’s panel. The judges did not indicate when they would rule.

Follow @NikaSchoonover

Categories / Appeals, Business, Government, Health

Attorney General announces over \$8M funding for combating opioid crisis

 legalnewsline.com/stories/664620990-attorney-general-announces-over-8m-funding-for-combating-opioid-crisis

September 30, 2024

State AG



Attorney General Phil Weiser | Facebook Website

The Colorado Department of Law has allocated \$8.25 million to address the opioid crisis across the state and within county jails, as announced by Attorney General Phil Weiser at the third Colorado Opioid Abatement Council Conference in Loveland.

Nineteen organizations received Opioid Response Strategic Impact Grants, while five jails were awarded \$50,000 each for their efforts in providing medications for opioid use disorder (MOUD) and supporting individuals post-release. Weiser also committed to supporting the Naloxone Bulk Purchase Fund to ensure continued availability of this treatment in Colorado.

“Our approach to managing opioid settlement funds is widely hailed as one of the best in the country, and that’s thanks to the tireless work of leaders across Colorado,” said Weiser. “As we move forward, our mission is clear –to improve and save lives by working to make treatment available when and where it’s needed as well as preserving access to life-saving naloxone, which can reverse an opioid overdose. Together, we will continue to innovate, collaborate, and build stronger, safer communities across Colorado.”

Providing MOUD in criminal justice settings has proven effective in reducing overdose death rates. In Rhode Island, a 61% decrease in post-release overdoses was observed within a year of offering MOUD in jails.

In Colorado, 20 county jails were nominated for recognition by various stakeholders for their work in providing MOUD and post-release care. Grants were awarded to sheriff’s offices in Summit, Moffat, Morgan, Pueblo (pending), and Arapahoe (pending) counties.

During his keynote address at the conference, Weiser highlighted his administration's commitment to ensuring naloxone's availability. Starting summer 2025, the department will provide one-time funding for the Naloxone Bulk Purchase Fund with details on the amount yet to be finalized. The office will also work with state agencies on strategies to secure resources for this initiative.

The Opioid Response Strategic Impact Grant supports government and community organizations fighting Colorado's opioid crisis. The application process began in January 2024 with 83 applications requesting nearly \$48 million by March 2024. Grants were awarded to organizations focusing on several critical areas:

1. ****Increase support for people in recovery****:

- ****5280 High School****: \$500,000
- ****North Colorado Health Alliance****: \$750,000

2. ****Provide substance use prevention, treatment****, and recovery services respecting cultural differences:

- ****Antelope Recovery LLC****: \$150,000
- ****Northwest Colorado Community Health Partnership****: \$675,000
- ****United Way of Southwest Colorado****: \$140,000

3. ****Expand access to MOUD****, naloxone******, and other proven services:

- ****Clinica Family Health****: \$225,000
- ****Colorado Health Network Inc.****: \$625,000
- ****Denver Recovery Group LLC****: \$450,000
- ****The Naloxone Project****: \$600,000 (pending)
- ****Porch Light Health****: \$475,000
- ****San Luis Valley Area Health Education Center****: \$295,000
- ****Sobriety House****: \$130,000
- ****Young People in Recovery****: \$200

4. Bolster housing options for people with substance use disorder:

- Addiction Research and Treatment Services: **\$675k**

– This organization will establish two recovery residences that offer access to MOUD & on-site peer support.

– CO Coalition for Homeless: **\$300k**

– The Family Opioid Impact Project will provide peer recovery support families struggling w/ substance use apartment complexes across four counties.

5.) Offer family peer support & treatment pregnant/new mothers struggling addiction:

– CO Perinatal Care Quality Collaborative: **\$685k**

– This project help pregnant/postpartum individuals access evidence-based culturally responsive care including MOUD/peer recovery support.

– University CO Denver College Nursing: **\$700k**

– The Recovery Coach Doula Program train doulas lived experience support individuals substance use disorder during pregnancy/postpartum.

6.) Judi's House: **\$300k**

– program provide mental health treatment youth/caregivers experienced family death addressing bereavement complications such as substance misuse/mental health concerns.

7.) Encourage workplaces support employees recovery:

– Recovery Friendly Leader: **\$125k pending**

– This program support workplace leaders creating recovery-friendly environments offering training/resources reduce stigma/support employees affected substance use.

Funding these grants stems lawsuits against drug manufacturers/distributors w/CO track receive:\$787m initiative targets 10%opioid settlement funds allocated state/all funds must used abate opioid crisis outlined joint opioid framework agreement between state/local governments.

ORGANIZATIONS IN THIS STORY

Attorney General Phil Weiser

Bankruptcy 'Opt-Out' Conflict Emerges Among Judges After Purdue

By Evan Ochsner 2024-09-30T04:45:02000-04:00

- Texas judges clashed on consent question in quick succession
- Emerging landscape considers case facts, contracts law

After the US Supreme Court threw out Purdue Pharma's bankruptcy plan, judges—including two in the same district—have reached opposing answers to the big question the high court left unresolved.

The justices in a 5-4 June decision [held](#) that liability shields for the Sackler family members who own Purdue were illegal because they were granted without the consent of opioid victims and other creditors. But in his majority opinion, Justice Neil M. Gorsuch [declined to say](#) what qualifies as "consent" when creditors are voting on a bankruptcy plan.

His omission has led bankruptcy judges to produce a varied landscape, which could make it more difficult for lawyers to discern which venues they should file bankruptcies in.

"It does complicate the venue question," Tom Califano, a restructuring partner at Sidley Austin LLP, said.

The main front in litigating consent is whether "opt-out" releases, through which creditors voting on a plan are deemed to accept releases unless they check a box on their ballot explicitly stating otherwise, can be considered consensual. Creditors should have to affirmatively consent to a release for a court to grant it, the Justice Department's bankruptcy watchdog, the US Trustee, has said.

Though the opt-out issue had been floating around bankruptcy courts before the *Purdue* ruling, the issue will heat up as more courts are forced to address it.

The specifics of a company's release provision will matter, and decisions could come down to details like notice procedures for creditors. Aside from the minutia of opt-out provisions, courts will also have to decide which legal standard is the right one for the consent question.

“Whether courts accept an opt-out provision will be developed in the case law in the coming years,” John D. Penn, a bankruptcy partner at Perkins Coie LLP, said. “During that time, the views of the different circuits will continue to be one of the venue factors considered by debtors’ attorneys.”

Two Views in Texas

The recent tension between consent standards is perhaps no clearer than in the US Bankruptcy Court for the Northern District of Texas, where judges reached conflicting answers a month apart from each other.

“It just shows you how controversial it is,” Califano, who represented the debtor in each of those Texas cases, said.

The *Purdue* decision rendered opt-out liability shields impermissible for the committee representing creditors, the post-bankruptcy company, lenders, and others released by Ebix Inc.'s plan, Judge Scott W. Everett of the Northern District of Texas ruled last month. When he struck down those releases in the software and e-commerce services provider’s bankruptcy plan, Everett acknowledged that his interpretation conflicted with prior rulings within his own district.

“I respectfully part ways with my colleagues,” he said in an [Aug. 2 oral ruling](#).

Just a month later and a few steps down the hall, one of those colleagues, Judge Stacey Jernigan, returned to the opposite interpretation. Opt-out releases in Eiger Biopharmaceuticals’ bankruptcy plan were legal even after *Purdue*, she held on Sept. 5.

She noted that she had approved the opt-out mechanism in the past but came back to the issue when the US Trustee raised it following *Purdue*.

Jernigan overruled the government’s objection to Eiger’s releases, but said “there are questions that remain regarding consensual releases and what constitutes consent.”

The Texas judges noted that they’re not the only bankruptcy court to have internal division on the legality of “opt-outs.” Judges in Delaware and the Southern District of New York have also split on the issue, Everett said.

In Delaware, Judge Craig T. Goldblatt in a Sept. 25 opinion said the judges of that court “have long expressed differing views on what constitutes consent.”

Contracts v. Class Actions

To some, including the US Trustee, consent should be determined under the standards of contracts law, which often requires an affirmative act by a party.

Goldblatt, in [his opinion](#) on Smallhold Inc.'s bankruptcy plan, held that some release provisions met the requirement for consent established by *Purdue*. Creditors were given “clear and conspicuous” instructions, the ballot had a simple mechanism for opting out of releases, and the act of voting on the plan constituted an affirmative act, Goldblatt held.

However, he said creditors that don't vote on the plan can't be considered consenting to the releases. He indicated that the propriety of opt-out provisions may be case-specific.

“The Court does conclude that after Purdue Pharma, in a case like the one now before the Court, a creditor cannot be deemed to consent to a third-party release without some affirmative expression of the creditor's consent,” he wrote.

In the Ebix case, Everett agreed that contracts law should guide bankruptcy courts.

“Nothing in the bankruptcy code or rules contemplates or authorizes the deemed release of a non-debtor's claims against another non-debtor, so the matter is more accurately construed as one of contract between those non-debtor parties,” Everett said.

If contracts law is applied, then opt-outs become harder to approve, Everett said. Opt-out releases rely on the silence of creditors and call it consent, but silence doesn't equal consent under Texas contracts law, he said.

The US Trustee's arguments for contracts law were less successful in Jernigan's courtroom. She determined that a comparison to class actions is more appropriate.

In Eiger's case, more than 100 creditors opted out of the plan's releases, showing that the opt-out

method worked, Jernigan said.

US Trustee attorney Elizabeth Ziegler Young said the Justice Department is pursuing a uniform standard across the country. Eiger had sophisticated creditors with experienced bankruptcy counsel who knew to look for an opt-out box. Other cases will include individual creditors who don't have lawyers to assist them, Ziegler Young said.

Despite ruling in favor of Eiger's opt-out releases, Jernigan said debtors "shouldn't assume it's always going to get approved" and that the facts of individual cases will matter.

Judges will focus on the mechanism for demonstrating consent after the *Purdue* decision, Andrew Troop, a bankruptcy partner at Pillsbury Winthrop Shaw Pittman LLP, said.

"I think it's going to take some time for judges themselves to come to their own criteria for opt-ins and opt-outs," he said.

But if contracts law is the standard, which it has been in multiple courts, then states will have different answers to the consent question because of variations in their contracts laws, Troop said. Instead, the question should be one of federal bankruptcy law, he said.

"I don't think it should be driven by the venue in which the federal bankruptcy court sits," he said.

Reaching Small Cases

In cases that have smaller pools of creditors and a clear idea of the claims against a company, third party releases aren't as important.

In *Ebix*, for example, the company quickly removed the releases from the plan after Everett struck them down. The judge then approved the new version.

Third party releases can play a role in some smaller cases, Gregory Jones, of Stradling Yocca Carlson & Rauth LLP, said. He recently worked on a small business bankruptcy where plaintiffs alleged that the company's products contained cancer-causing talc powder.

The case showed that *Purdue's* reach extends beyond giant tort cases, such as the sex abuse claims against the [Boy Scouts of America](#) and Catholic dioceses.

“Sometimes the companies are in such bad shape that the only way to have a plan to pay these victims is to have contributions from the people who own the companies, but they’re not going to contribute that money unless they get something out of it,” Jones said.

To contact the reporter on this story: Evan Ochsner in Washington at eochsner@bloombergindustry.com

To contact the editors responsible for this story: Maria Chutchian at mchutchian@bloombergindustry.com; Rob Tricchinelli at rtricchinelli@bloombergindustry.com

23andMe data breach settlement opposed by some 5,000 intervenors, filing says

DJ [dailyjournal.com/articles/381191-23andme-data-breach-settlement-opposed-by-some-5-000-intervenors-filing-says](https://www.dailyjournal.com/articles/381191-23andme-data-breach-settlement-opposed-by-some-5-000-intervenors-filing-says)

Litigation & Arbitration,

Class Action

Sep. 30, 2024

The gene testing company's proposed settlement threatens to stop class members from pursuing ongoing private arbitrations unless they affirmatively opt out within a narrow timeframe, the prospective intervenors say.

A group of proposed intervenors opposed a 23andMe Inc. data breach settlement and argued the proposed class action injunction would wrongfully strip away the rights of those who have had pending arbitration claims in the case for months.

"The proposed settlement ... threatens to enjoin class members, including intervenors and claimants, from pursuing ongoing private arbitrations unless and until they affirmatively opt out within a narrow timeframe set by the settlement. There is no basis to enjoin these ongoing arbitrations," Milberg Coleman Bryson Phillips Grossman PLLC partner Alex R. Straus wrote in a motion filed Thursday.

Straus represents three proposed intervenors who say they are among some 5,000 claimants who provided notices to the genetic testing company and have had ongoing arbitration proceedings related to the security breach claims since February.

"Faced with the reality that 23andMe's own arbitration process no longer benefitted 23andMe, 23andMe now seeks to avoid the very dispute resolution process it created," Straus wrote.

"In other words, if 23andMe thought it could avoid liability through the arbitration process, there is no doubt 23andMe would seek to invoke that arbitration clause to kill a lawsuit. But now that the arbitration clause no longer serves to benefit 23andMe, it has completely disavowed that clause and rushed to reach a class wide settlement to impair the contractual rights of claimants and class members."

Neither of the lead attorneys in the case responded to inquiries seeking comment about the motion by press deadline Friday.

Earlier this month, a \$30 million nationwide settlement was reached between the plaintiffs and company to resolve claims related to a 2023 cyberattack that exposed the genetic and ancestral information of millions of people to the dark web. A motion for preliminary approval of the agreement is pending before U.S. District Judge Edward M. Chen, who scheduled a hearing on the matter for next month in San Francisco. *In re: 23andMe Inc. Customer Data Security Breach Litigation*, 3:24-md-03098 (N.D. Cal., filed April 16, 2024).

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

The proposed intervenors argued this provision required "strict compliance with a convoluted opt-out process" that unfairly burdened the claimants. "The proposed injunction here would stop thousands of arbitrations that are already in progress, including those filed by the intervenors. No class settlement has been approved. Nor has any final judgment been entered. Enjoining these arbitrations is therefore not a proper exercise of the All Writs Act," the motion stated.

The All Writs Act is a federal statute, 28 U.S.C. Code 1651, that authorizes district judges to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

In his motion, Straus claimed the plaintiffs said in a memo that the provisions were necessary due to 23andMe's "limited funds" and the claimants in the case could "easily opt out" and effectively seek relief in arbitration.

However, Straus said these were contradictory representations that were not backed by any evidence.

"The record is devoid of any documentation that 23andMe is incapable of providing the more extensive monetary and non-monetary relief sought by intervenors and claimants," Straus wrote. "These intervenors and claimants have an immediate right to arbitrate. Their claims have been pending in the arbitral forum for months and, under the [Federal Arbitration Act], 'stays of arbitration are disfavored.'"

The proposed intervenors asked to be heard on their motion before Chen on Oct. 17.

#381191

US judge to hold hearing on family objections to Boeing plea deal

 [reuters.com/legal/us-judge-hold-hearing-family-objections-boeing-plea-deal-2024-09-27](https://www.reuters.com/legal/us-judge-hold-hearing-family-objections-boeing-plea-deal-2024-09-27)

David Shepardson

By David Shepardson

September 27, 2024 2:36 PM PDT Updated 3 days ago

Item 1 of 2 Family members hold photographs of Boeing 737 MAX crash victims lost in two deadly 737 MAX crashes that killed 346 people as they wait for then Boeing CEO Dennis Muilenburg to testify before a Senate Commerce, Science and Transportation Committee hearing on “aviation safety” and the grounded 737 MAX on Capitol Hill in Washington, U.S., October 29, 2019. REUTERS/Sarah Silbiger/File Photo

[1/2] Family members hold photographs of Boeing 737 MAX crash victims lost in two deadly 737 MAX crashes that killed 346 people as they wait for then Boeing CEO Dennis Muilenburg to testify before a Senate Commerce, Science and Transportation Committee hearing on “aviation safety” and the grounded 737... [Purchase Licensing Rights](#) , opens new tab [Read more](#)

- Judge to consider objections from crash victims' families and Polish airline LOT
- Families argue \$487 million fine is too low, seek harsher penalties
- LOT seeks same rights as families

Sept 27 (Reuters) - U.S. District Judge Reed O'Connor said Friday he will hold a hearing on Oct. 11 to consider objections from relatives of those killed in two Boeing (BA.N) , opens new tab 737 MAX crashes to the planemaker's agreement to plead guilty to criminal fraud conspiracy.

On July 24, the planemaker finalized an agreement to plead guilty to conspiring to defraud the Federal Aviation Administration and pay up to \$487 million after breaching a 2021 deferred prosecution agreement.

Family members of some of the 346 people killed in two Boeing 737 MAX crashes in 2018 and 2019 argue the fine is too low and raised other objections to the plea deal. O'Connor will also consider objections to the agreement filed by Polish national airline LOT before he decides whether to accept the plea deal.

LOT previously argued it should have the same rights in the case as victims' families, and said it sustained at least \$250 million in damages related to the 14 737 MAX aircraft it owned and leased at the time that model was grounded worldwide in March 2019 following the two crashes.

Boeing and the Justice Department did not immediately comment on O'Connor's announcement. The Justice Department in August urged the judge in Fort Worth, Texas, to accept the deal it says "is a strong and significant resolution that holds Boeing accountable and serves the public interest."

Family members have cited O'Connor's statement in a February 2023 ruling in seeking harsher penalties: "Boeing's crime may properly be considered the deadliest corporate crime in U.S. history."

The planemaker allowed potentially risky work at its factories and did not ensure key airplane record-keeping was accurate or complete, the Justice Department said in July in outlining why it believed Boeing violated the 2021 agreement.

The finding followed a January in-flight panel blowout on an Alaska Airlines (ALK.N) [✈](#), opens new tab 737 MAX that exposed continuing safety and quality issues at Boeing, just two days before the 2021 agreement shielding it from prosecution expired.

The plea deal requires Boeing to spend \$455 million to strengthen its compliance, safety and quality programs over three years of court-supervised probation. Boeing will also face oversight from an independent monitor for three years.

O'Connor can also decide to require Boeing to pay restitution, which could include compensation to victims' families beyond what many have already received in settlements or as part of \$500 million for relatives under the 2021 agreement.

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

Reporting by David Shepardson; editing by Jonathan Oatis

Apple must face narrowed privacy lawsuit over its apps

 [reuters.com/legal/apple-must-face-narrowed-privacy-lawsuit-over-its-apps-2024-09-27](https://www.reuters.com/legal/apple-must-face-narrowed-privacy-lawsuit-over-its-apps-2024-09-27)

Jonathan Stempel

By Jonathan Stempel

September 27, 2024 8:50 AM PDT Updated 3 days ago

Item 1 of 2 The new iPhone 16 is showcased as Apple holds an event at the Steve Jobs Theater on its campus in Cupertino, California, U.S. September 9, 2024. REUTERS/Manuel Orbegozo/File Photo

[1/2] The new iPhone 16 is showcased as Apple holds an event at the Steve Jobs Theater on its campus in Cupertino, California, U.S. September 9, 2024. REUTERS/Manuel Orbegozo/File Photo [Purchase Licensing Rights](#) , opens new tab

Sept 27 (Reuters) - A federal judge narrowed a lawsuit accusing Apple (AAPL.O) , opens new tab of violating the privacy of iPhone, iPad and Apple Watch users by collecting their personal data through proprietary apps such as the App Store, Apple Music and Apple TV. U.S. District Judge Edward Davila in San Jose, California, dismissed nearly all claims based on the "Allow Apps to Request to Track" setting on Apple mobile devices, but let some claims proceed over the "Share [Device] Analytics" setting.

Mobile device users said Apple violated their user agreements and several privacy and consumer protection laws by assuring that disabling the settings would limit its collection, storage and use of their data - only to then ignore their choices and collect, store and use that data.

The lawsuit seeking unspecified damages is one of many accusing technology companies such as Apple, Alphabet's (GOOGL.O) , opens new tab Google and Meta Platforms' (META.O) , opens new tab Facebook of allowing the collection of user data without consent.

In a 39-page decision late Thursday, Davila said Apple made clear to users that the "Allow Apps to Request to Track" setting applied to "other companies' apps and websites."

He said that made it "implausible" for reasonable people to believe that by turning the setting off, they were withdrawing consent for Apple to collect their data through its own apps.

But the judge said users plausibly alleged they withdrew such consent by disabling the "Share [Device] Analytics" setting, citing Apple's disclosure that users may "disable the sharing of Device Analytics altogether."

The Cupertino, California-based company has said it collects data through that setting to improve its products and services.

Lawyers for the plaintiffs did not immediately respond to requests for comment on Friday. Apple and its lawyers did not immediately respond to similar requests.

The case is In re Apple Data Privacy Litigation, U.S. District Court, Northern District of California, No. 22-07069.

Reporting by Jonathan Stempel in New York; Editing by Richard Chang

California judge cores privacy class action against Apple

 [courthousenews.com/california-judge-cores-privacy-class-action-against-apple](https://www.courthousenews.com/california-judge-cores-privacy-class-action-against-apple)

Matt Simons

Only misrepresentation claims based on a Apple device setting that claims to let users to toggle off sharing analytics to Apple can continue, since Apple continues to collect data when the setting is turned off.

SAN JOSE, Calif. (CN) — A federal judge axed a majority of Apple users' claims that Apple collected private user data taken from the company's app lineup, but allowed several claims based on an analytics sharing setting on their phones to live on.

In their November 2022 class action, the plaintiffs hone in on two settings found on every iPhone, iPad and Apple mobile device: "Share Analytics" and "Allow Apps to Request to Track."

They argue that by disabling both these settings, Apple promised that users could disable the sharing of their data altogether — a trait that attracts many consumers specifically to Apple products.

They accused Apple of misleading them, since Apple continues to collect and save their personal data and link to their iCloud even when toggled off through apps like the App Store, Apple Music, Apple TV, Books and Stocks.

While U.S. District Judge Edward Davila dismissed most of the claims — citing consent obtained through Apple's required software license agreement — some of the plaintiffs' contract claims survive on the grounds that a reasonable consumer could believe that once they turned off the "Share Analytics" setting on their phone, Apple would stop collecting their data.

"It is plausible that a reasonable consumer would (1) believe that disabling the "Share [Device] Analytics" setting meant Apple would not collect the data at issue, and (2) rely on the "Share [Device] Analytics" setting," Davila wrote in his 39-page decision issued Thursday.

The seven surviving counts — including the contract claim, along with several consumer fraud claims — only revolve around the "Share Analytics" setting.

However, claims based on "Allow Apps to Request to Track," which Davila determined did not necessarily withdraw their consent for tracking, are dismissed. The judge agreed with Apple's argument that those collection practices fall well within their privacy policy.

Among other arguments, Apple contends that because users are told multiple times how Apple uses their data, they argued that the plaintiffs could not establish there was an “unexpected recording” of their data.

"Plaintiffs have not plausibly alleged they withdrew consent by turning off the 'Allow Apps to Request to Track' setting because that setting unambiguously applies only to tracking of activity across Apps or websites which app developers 'don't own,' Davila wrote. "Thus, any misrepresentation claims based on that setting fail because plaintiffs only allege improper collection of their data on Apple's Apps."

Davila also dismissed invasion of privacy claims against Apple, saying the plaintiffs didn't have any reasonable expectations of privacy based on their consent agreements.

Among other dismissals of various fraud claims based on consumer protection laws in New York, New Jersey and Illinois, Davila also dismissed a claim that Apple violated the California Invasion of Privacy Act, calling the plaintiffs' definition of some data being shared as "communication" — like the device's screen resolution, keyboard language, or how the user was connected to the internet — akin to “shoehorning.” He went on to say that such a definition “strain[ed] credulity.”

The ruling comes more than six months after the parties argued on the motion to dismiss in March.

Davila allowed plaintiffs 30 days to refile with an amended complaint for the dismissed claims.

Attorneys for either party did not immediately respond to requests for comment.

Apple is no stranger to lawsuits. Over the last decade, the Silicon Valley tech giant has repeatedly battled claims that it violated consumers' privacy rights by letting third-party applications collect and profit from users' personal information on Apple devices without their knowledge.

Categories / Consumers, Technology

San Mateo County, San Jose sue oil companies, claim price-fixing with OPEC

DJ [dailyjournal.com/articles/381198-san-mateo-county-san-jose-sue-oil-companies-claim-price-fixing-with-opec](https://www.dailyjournal.com/articles/381198-san-mateo-county-san-jose-sue-oil-companies-claim-price-fixing-with-opec)

Environmental & Energy,

Civil Litigation,

Antitrust & Trade Reg.

Share

Sep. 30, 2024

San Mateo County, San Jose sued major oil companies in New Mexico, claiming they had an agreement with OPEC to slow down their production, even after oil prices skyrocketed in 2022.

U.S. oil companies engaged in a price-fixing scheme with the Organization of the Petroleum Exporting Countries by slowing down their own production, even after oil prices skyrocketed following Russia's invasion of Ukraine in 2022, a California city and county claimed in an antitrust complaint.

While innovations in drilling technologies made shale drilling and fracking profitable, leading to the fastest increase in domestic crude oil production in U.S. history, American shale oil producers coordinated with OPEC to keep production down and prices up in violation of the Sherman Act, according to a lawsuit filed Thursday by Cotchett, Pitre & McCarthy LLP.

"It is absolutely clear that there is blatant price fixing on the price of gasoline between OPEC and the shale oil producers," Cotchett, Pitre & McCarthy founder Joseph W. Cotchett said in a phone interview Friday.

The alleged scheme has been investigated by the Federal Trade Commission and has been referred to the U.S. Department of Justice, according to the complaint. *In re: Shale Oil Antitrust Litigation*, 24-MD-03119 (D. N.M., filed Sept. 26, 2024).

San Mateo County and the city of San Jose are the plaintiffs. The defendants include Exxon Mobil Corp., Hess Corp., Chesapeake Energy Corp. and Occidental Petroleum Corp. Many major law firms represent the oil companies, which could not be reached for comment as of

press time.

"Defendants' conspiracy has had and continues to have the purpose and effect of fixing, raising, and maintaining the price of crude oil in and throughout the United States of America," Karin B. Swope, a Cotchett partner, wrote in the complaint filed in the District of New Mexico.

U.S. District Judge Matthew L. Garcia, an appointee of President Joe Biden, has been assigned to the case.

#381198

Craig Anderson

Daily Journal Staff Writer

craig_anderson@dailyjournal.com

Class certification granted in dispute over Nestlé's sustainability labeling

DJ [dailyjournal.com/articles/381199-class-certification-granted-in-dispute-over-nestle-s-sustainability-labeling](https://www.dailyjournal.com/articles/381199-class-certification-granted-in-dispute-over-nestle-s-sustainability-labeling)

A federal judge granted class certification in a lawsuit that accuses Nestlé of misleading consumers about sourcing cocoa from plantations in Africa that allegedly use slave labor.

On Thursday, U.S. District Judge M. James Lorenz dismissed Nestlé's claims that the plaintiff lacked sufficient evidence to prove deception or damages resulting from purchases of chocolate products labeled as sustainably sourced.

"Plaintiff testified that had she known that the sustainability representations were false, she would not have purchased defendant's products," Lorenz wrote. "She also testified that she lost money by purchasing the products. Plaintiff was willing to, and did, pay a premium because of the sustainability representations on the labels. This testimony is sufficient to establish statutory standing."

Plaintiff Marie Falcone is represented by attorneys from Schonbrun Seplow Harris Hoffman & Zeldes LLP, including Helen I. Zeldes, Joshua A. Fields and Aya Dardari in San Diego, as well as Paul L. Hoffman and John C. Washington in Hermosa Beach.

"The court's certification of the classes in this matter is a significant victory for consumers, allowing plaintiff's deceptive labeling claims to move forward on a class wide basis," Zeldes said in an email on Friday. "California consumer protection laws can be powerful tools in stopping deceptive practices and we look forward to litigating these claims on the merits."

Theodore J. Boutrous Jr., Christopher Chorba, Perlette M. Jura and Timothy W. Loose of Gibson, Dunn & Crutcher LLP of Los Angeles represent Nestlé. Requests for comment from the team on Friday were forwarded to Nestlé's external communications department.

"This ruling is purely procedural in nature and is in no way reflective of the merits of the plaintiff's allegations, which remain unproven," an email from Nestlé said Friday. "To be clear, child labor is unacceptable, and we remain unwavering in our dedication to combatting child labor in the cocoa industry and to our ongoing work with partners in government, NGOs and industry to tackle this complex, global issue. Access to education and enhancing farming methods and livelihoods are crucial to fighting child labor risk in cocoa production. Addressing the root causes of child labor is part of the Nestlé Cocoa Plan and will continue to be the focus of our efforts in the future."

Falcone sued Nestlé over labels on its chocolate products claiming they were sustainably sourced and purporting to "support farmers for better chocolate" and "help improve the lives of cocoa farmers," according to an amended complaint filed in 2022. *Falcone v. Nestlé USA Inc.*, 3:19-cv-00723 (S.D. Cal., filed April 19, 2019).

"Notwithstanding knowing full well that its cocoa is primarily procured from farms using the worst forms of child labor, Nestlé slaps bogus 'seals' on its products claiming its cocoa is 'sustainably sourced,' 'certified,' and 'supports' or 'helps' farmers when it knows the opposite is true," the complaint reads. "It is abhorrent to equate slavery and child labor to a 'sustainable' practice."

In their opposition to class certification Nestlé argued that Falcone can't provide evidence of class wide deception or damages, making refunds unfeasible.

"Much of Falcone's motion is preoccupied with technical allegations about things like traceability in Nestlé USA's supply chain," the opposition read. "But for any of that to matter in this false advertising case, Falcone must first show that she and other consumers uniformly saw the representations she challenges, interpreted them as making promises about the supply chain, and relied on those supposed promises when making purchases."

In his ruling, however, Lorenz found that full refunds are appropriate if "a product is shown to be worthless" or having "only de minimis value," quoting from *Lambert*, 870 F.3d at 1174, 1183.

"Defendant disputes that a full refund recovery is appropriate in a case such as this, where the consumer was able to use the product. This argument is unavailing because 'the economic harm--the loss of real dollars from a consumer's pocket -- is' not erased even if 'a court might objectively view the products as functionally equivalent,'" he wrote, citing *Kwikset*, 51 Cal.4th at 329.

#381199

Skyler Romero

Daily Journal Staff Writer
skyler_romero@dailyjournal.com

Hair relaxer class action over reimbursement for products can move forward, judge says

 [reuters.com/legal/litigation/hair-relaxer-class-action-over-reimbursement-products-can-move-forward-judge-2024-09-30](https://www.reuters.com/legal/litigation/hair-relaxer-class-action-over-reimbursement-products-can-move-forward-judge-2024-09-30)

Diana Jones

The logo of French cosmetics group L'Oreal is seen on a company building in Paris, France, February 7, 2024. REUTERS/Sarah Meyssonier/File Photo Purchase Licensing Rights , opens new tab

Sept 30 (Reuters) - The judge overseeing the sprawling litigation over claims that chemical hair relaxer products made by L'Oreal USA, Revlon and others cause cancer refused to dismiss a proposed class action brought by consumers seeking reimbursement for products they say they would not have purchased had they known of the risks.

U.S. District Judge Mary Rowland in Illinois on Friday largely rejected L'Oreal, Revlon, Namasté Laboratories and other companies' bid to dismiss the consolidated consumer class action, which seeks economic damages for the products purchased, punitive damages and medical monitoring funds for some plaintiffs who say they are at increased risk for uterine cancer and other health problems because of their use of the products.

The class action represents a different prong of the litigation over hair relaxer products, which includes thousands of lawsuits filed by women who say the products caused their uterine cancer and other health problems.

The proposed economic damages class would cover any U.S. consumer who purchased the products. The medical monitoring class would cover consumers in certain states who used the products at least four times a year and had not been diagnosed with uterine or ovarian cancer.

Attorneys for the companies did not immediately respond to requests for comment on Monday, nor did attorneys for the consumers.

The products, which include chemicals to permanently straighten textured hair, are typically marketed to women of color. The first lawsuits hit court dockets after the October 2022 publication of a National Institutes of Health study that found women who used the products multiple times a year were more than twice as likely to develop uterine cancer.

In a statement posted online after the first lawsuits were filed, L'Oreal said it was "confident in the safety of our products and believe the recent lawsuits filed against us have no legal merit."

A Revlon representative previously told Reuters the company did not “believe the science supports a link between chemical hair straighteners or relaxers and cancer.”

Rowland has already rejected the companies’ separate effort to dismiss the injury claims in the litigation, which includes 8,500 lawsuits, according to recent data from the Judicial Panel on Multidistrict Litigation.

In November, Rowland said the plaintiffs had put forward sufficient facts to support their allegations accusing the companies of negligence, defective design of the products and failure to warn customers of the risks.

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

Reporting by Diana Jones

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

Diana Novak Jones
Thomson Reuters

Co-author of the Daily Docket, Reuters' daily legal industry newsletter. Diana reports on litigation, mass torts and the plaintiffs' bar. She previously worked at Law360 and the Chicago Sun-Times.

- 
- 
- 



Diandra "Fu" Debrosse of DiCello Levitt. Courtesy photo

RESEARCH

'That's Disappointing': Only 11% of MDL Appointments Went to Attorneys of Color in 2023

"If you think that diversity in all of its forms is important in determining excellence, equity, these MDLs are great opportunities for people to learn, have a

practice," U.S. District Judge William Orrick said in an interview.

September 30, 2024 at 02:33 PM

🕒 7 minute read

Diversity



Amanda Bronstad

staff reporter

In the multidistrict litigation over Juul electronic cigarettes, U.S. District Judge William Orrick asked the lawyers to provide a demographic breakdown of exactly which lawyers were doing what in the cases.

Nine months ago, he got the report: Of the 62 plaintiffs' firms involved in the case, there were no Black or Hispanic lawyers working on the litigation. He told lawyers at a hearing, "You have to do better. The courts have to do better."

"I wanted to see who was taking the deposition, who was doing the hard work in the case," Orrick told Law.com. "Although women were doing a lot of the heavy lifting and in the trial, the lead lawyers were two extraordinarily talented women, there were no Blacks and very few Latinos that had done any work."

The Juul multidistrict litigation was created in 2019, when only 7% of leadership appointments went to nonwhite attorneys, according to Law.com's statistics. That number rose to 16% in 2021 but has been falling over the past two years. In multidistrict litigation created in 2023, according to Law.com's exclusive data, only 11% of leadership appointments went to nonwhite attorneys, down from 13% in 2022. The ethnic makeup of 1% of lawyers in the 2023 data could not be determined.

"That's disappointing to me to hear that," Orrick said of the declining numbers. "If you think that diversity in all of its forms is important in determining excellence, equity, these MDLs are great opportunities for people to learn, have a practice."

'Not An Easy Task'

The 2023 statistics remain higher than the historic average when it comes to attorneys of color appointed in multidistrict litigation. From 2016 to 2019, white attorneys dominated with 95% of appointments, according to Law.com's statistics.

But the figures remain stubbornly low. In fact, of the 19 multidistrict litigation dockets created in 2023 that had appointment orders, eight of them were headed by all-white men and women. Those eight dockets made up nearly 25% of the total number of lawyers appointed to leadership posts last year.

One glaring exception was the multidistrict litigation over hair straighteners, which lawsuits have linked to reproductive cancers. Of the 35 lawyers appointed, 12 were attorneys of color. That case alone, in which many of the plaintiffs are Black women, might have even caused a "spike" in the numbers, Diandra "Fu" Debrosse, who was appointed co-lead counsel of the hair relaxer multidistrict litigation, said.

"It's the only one I've known of with that many people of color, that many diverse lawyers," said Debrosse, of DiCello Levitt in Birmingham, Alabama. And that includes not just the position of lead counsel, which she shares with three other lawyers including Ben Crump, of Ben Crump Law in Tallahassee, Florida, but the plaintiffs' steering committee, plaintiffs' executive committee and the leadership development committee. "It's significantly people of color."

Larry Taylor, of the Cochran Firm in Houston, said 2021 and 2022 were "heavy years" for mass torts. But he also noted that the attorneys of color with the most appointments in 2023 were managing partners or



Civil Rights attorney Ben Crump.
Courtesy Photo

namesakes at their firms. Of the 30 lawyers who got two or more appointments in 2023, only three weren't white: Taylor, Crump and Gregory Cade, of the Environmental Litigation Group in Birmingham, Alabama. Taylor was appointed to plaintiffs' executive committees in the multidistrict litigation over hair relaxers and C.R. Bard Inc.'s implanted port catheter device. Crump, in addition to the hair relaxer lead counsel role, serves on the plaintiffs' executive committee in the antitrust multidistrict litigation over insulin pricing, and Cade is on the plaintiffs' steering committees of

the same two dockets.

"When you take a look at that, part of the issue could be looking at the financing of these firms," Taylor said. "To be in leadership is not an easy task or a cheap task."

And judges have increasingly asked lawyers in their case management orders to provide information on whether they have accepted litigation financing in the cases, he said.

"I'm not saying orders are being handed down, but that is a way to keep the entry of women and minority firms from entering into the market or, better yet, what's the term I'm looking for, continuing to grow within the industry?" he said. "And it's lopsided. You don't ask someone about their shareholders. You don't ask someone about their corporate structure or where they're getting their financing from on the defense side when you're representing Johnson & Johnson. And so things like that could potentially weigh in on the number of minorities you see within the industry."

That means many of the lawyers getting the most appointments in 2023 remain at the same "legacy firms" as they've been for years: Hausfeld topped the list with seven appointments, including Washington D.C. partner Swathi Bojedla's lead counsel spot in the RealPage software antitrust multidistrict litigation. DiCello Levitt, including Debrosse's lead counsel role, came in No. 2 with six appointments.

'A Failure of Will and Priority'

Not all the lawyers who get appointed need to have the same level of financial resources, of course. But Orrick acknowledged that judges, who approve the leadership teams, play a big role in diversifying the plaintiffs' bar before them.

"The judge does the selection, so the judge has the critical role in doing that," he said. "You have to analyze the needs of the case, the people who have applied, whether there are people who haven't applied who you know by reputation or otherwise who would be good to add.

"And if you have a big products case where people are going to be affected around the country that's going to hit a wide swath of the American public," Orrick added, "then you ought to care about the diversity, ethnicity, race, all those things to create a team that will be excellent and able to address the problems of the communities suffering from the alleged problem."

Having judges speak out helps, Debrosse said, because it motivates a firm's leaders to know they'll be held accountable.

But another factor, she said, is that many of the older and more experienced attorneys of color already have appointments on other multidistrict litigation cases. The key, she said, is to have more options.



Judge William Orrick III of the U.S.
District Court for the Northern
District of California

"There's a higher number of white lawyers who've been in this space to get appointed," she said. "Part of what we're doing is have that pipeline so it's not the same lawyers of color being appointed over and over again."

Debrosse and Crump are the founders of Shades of Mass, which held its annual meeting this month in Houston. Shades of Mass, founded two years ago, aims to improve the number of attorneys of color in mass torts.

Orrick said the findings of his Juul demographic report, which he plans to make public, show that the plaintiffs' firms "didn't have much depth in their bench."

"And to me that's a failure of will and priority," he said. "So, I think those firms ought to be thinking and prioritizing hiring lawyers who are not white to train them and raise them up."

That training also applies to lawyers of color already established in mass torts. Taylor said he often picks up the phone, calling prominent plaintiffs'

firms to encourage them to put their nonwhite attorney up for leadership. Lawyers of color already in lead counsel positions, he said, should mentor younger attorneys. And with enough of those discussions, he hopes to boost the numbers back up in 2025.

"I don't think for the most part it's any ill will," he said. "We just need to have more discussions to move the needle forward, and diversity brings better results for everyone."

NOT FOR REPRINT

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

You Might Like



RIP To Human First Pass Document Review?

A abovethelaw.com/2024/09/rip-to-human-first-pass-document-review

Joe Patrice

September 30, 2024

Technology

Using actual humans to perform an initial review isn't gone yet, but the days are numbered.

By Joe Patrice

on September 30, 2024 at 12:12 PM



Lawyers are still using real, live people to take a first crack at document review, but much like the “I’m not dead yet” guy from Monty Python and the Holy Grail, it’s a job that will be stone dead soon. Because there are a lot of deeply human tasks that AI will struggle to replace, but getting through a first run of documents doesn’t look like one of them.

At last week’s Relativity Fest, the star of the show was obviously Relativity aiR for Review, which the company moved to general availability. In conjunction with the release, Relativity pointed to impressive results the product racked up during the limited availability period including Cimplifi reporting that the product cut review time in half and JND finding a 60 percent cut in costs.

“We’ve used Relativity aiR for Review on multiple live projects with tremendous success,” said Mike Cichy, Regional Manager of Litigation Support at Foley & Lardner LLP. “In one case, we had an extremely tight production deadline; aiR for Review completed the review, which would have taken over 15 people and three weeks of time, in less than one week, all while delivering results that far outperformed what we’ve seen in traditional human review.”

A recurring tale among early users was a belt-and-suspenders approach to first pass review, maintaining a team of human reviewers as a quality assurance measure. It’s a natural response for a terminally overcautious profession, but it’s also one that multiple early adopters said they ultimately would abandon as unnecessary. In fact, more than one said the humans were just... more wrong.

Not released to the general public yet — but coming soon — Relativity also previewed its aiR for Privilege product capable of identifying privileged documents and drafting a consistent, single voice privilege log. Troutman Pepper, already using the limited availability product, anticipates it will cut privilege review time by more than 50 percent. One testimonial provided at the keynote shared that the product correctly found a clutch of hundreds of privileged documents that the human reviewers had missed.

Turning over first pass to the computers isn’t entirely new. We’ve had TAR procedures that could tackle this for some time, but lawyers spent the last decade performatively bad mouthing tech review in the courts. Now, armed with generative AI, attorneys seem to have discovered a new level of trust. Especially senior lawyers who are actually engaging with discovery platforms for the first time.

How long will attorneys keep humans in the loop for their own peace of mind? As Relativity’s CAO/CLO Adam Weiss told me, “the more ubiquitous this technology becomes, the runway gets shortened considerably.” In other words, lawyers won’t let AI take the wheel out of the gate, but the more customers are willing to say “trust us, we did the same thing and you’ll soon realize it’s costly and useless,” it’s going to get harder to justify keeping the human first pass reviewers around.

Which is good news for clients and attorneys trying to do more and higher level work. It’s not particularly great news for folks working as contract attorneys to pick up work on brute force review projects. There’s still a market for alternative legal service providers — collecting and loading up documents remains a skill that outside consultants can perform better and cheaper than a law firm. But anyone out there with a business model reliant on throwing hundreds of bodies at a problem should start rethinking.



Joe Patrice is a senior editor at Above the Law and co-host of Thinking Like A Lawyer. Feel free to email any tips, questions, or comments. Follow him on Twitter or Bluesky if you're interested in law, politics, and a healthy dose of college sports news. Joe also serves as a Managing Director at RPN Executive Search.

Topics

AI Legal Beat, Artificial Intelligence (AI), eDiscovery, Relativity, Relativity Fest, Technology

Ohio teachers' pension fund moves to hire firm that staff say has no qualifications

ohiocapitaljournal.com/2024/09/30/ohio-teachers-pension-fund-moves-to-hire-firm-that-staff-say-has-no-qualifications

By Morgan Trau

September 30, 2024



The entrance to the Ohio State Teachers Retirement System headquarters in Columbus. (Photo by Marty Schladen, Ohio Capital Journal.)

The Ohio retired teachers' pension fund is, once again, moving to hire a firm that allegedly has a lack of experience and personal ties to the board leaders, according to senior staff.

In an exclusive 45-minute interview, State Teachers Retirement System (STRS) Acting Executive Director Lynn Hoover explained her concerns about the board's latest hiring process. Through records requests, we obtained the documents that back up her allegations.

A (somewhat long) recap

STRS is in chaos. In summary, there has been constant fighting, two board resignations and allegations of both a public corruption scheme and mishandling of funds. As of this week, there has been a dismissal and two senior staff resignations.

In May, Attorney General Dave Yost filed a lawsuit to remove two members of STRS, stating they are participating in a contract steering "scheme" that could directly benefit them. Yost started the investigation after documents prepared by STRS employees alleged that Wade Steen and Chair Rudy Fichtenbaum have been doing the bidding of investment firm QED.

QED was started by former Deputy Treasurer Seth Metcalf and consultant Jonathan (JD) Tremmel. In 2020, they set their eyes on STRS, according to the 14-page memo Yost received.

The documents claim that they — despite having no clients and no track record — tried to convince STRS members to partner with them.

They couldn't impress the board members, mainly because of their lack of experience and also because QED was not registered as a broker-dealer or investment adviser. The men also didn't own the technology to "facilitate the strategy," the documents say.

Steen and Fichtenbaum had allegedly been bidding continuously, pitching QED's direct documents to board members and proclaiming the company's talking points to other staff.

Yost's case said the pair should be removed because they broke their fiduciary duties of care, loyalty and trust when "colluding" with QED.

This fight began from a debate on how STRS should invest money — through the current system of actively managed funds versus an index fund. Active funds try to outperform the stock market, have more advisors and typically cost more. Index funds perform with the stock market, are seen as more passive, and typically cost less.

In short, "reformers" want to switch to index funding, while "status quo" individuals want to keep actively managing the funds. Recent elections have allowed the "reform-minded" members to have a majority of the board.

Reformers want a cost-of-living adjustment, or COLA. The COLAs were suspended for more than 150,000 retired Ohio teachers for five years starting in 2017. They were reinstated, but there has been a suspension of increases, significant for retirees who need this money and are dealing with inflation.

STRS staff have explained that they know the COLA is essential and are working to get it back. They added that the system is functioning well — better than any of the other pension systems in the state. A report done by the Ohio Retirement Study Council found that STRS has a higher return than any of the four other state pension systems.

The reformers also believe that this is a "sham" investigation meant to prevent democratically elected individuals from choosing what they want to do with their pension money.

Steen and Fichtenbaum have repeatedly brought up how quick the turnaround time was between Yost receiving the memo and filing the civil suit. It is unclear the total timeline, but the documents were received by government officials in early May. Yost said he was

investigating on May 9, and by May 14, a lawsuit had been filed in Franklin County Court of Common Pleas.

In late August, Yost filed a slew of subpoenas against QED and others allegedly involved in this scheme.

The same month, QED spoke out for the first time and so did the AG.

As of now, Steen has termed off his board seat, and got a tearful goodbye from pensioners in September.

DeWine has now appointed attorney Jon Allison to the board, a former top aide for Former Gov. Bob Taft.

GET THE MORNING HEADLINES DELIVERED TO YOUR INBOX

Governance, or lack thereof

Back in May, consulting giant Aon pulled out of STRS. They provided board governance advice and services. This was the blow that made STRS staff sound the alarms to state executives about possible corruption.

STRS staff, in the anonymous letter, believed Aon left due to the possible hiring of QED and the instability of the board.

Two months later, McLagan, a data and analytics company that had been providing compensation advice, also quit.

Although the company did not provide any reasoning, it should be noted that they specifically consulted on performance-based incentives (PBIs). In June, the STRS board blocked staff from getting these PBIs, which can be referred to as bonuses. Then, McLagan quit. Two weeks after they quit, the PBIs were restored because the board was informed that they would be breaking the law by not having them.

We asked Hoover if she also thought the consultants left due to the chaos.

“Their termination speaks for itself,” she responded. “But that is disheartening to lose a good governance consultant... investment compensation consultant.”

This means that for the past four months, there has not been a main consultant advising the board on how to govern. But — the search to find a replacement is near its end.

Several firms applied. The staff selected Segal and Global Governance Advisors (GGA), the two that they believed were most qualified. Fichtenbaum had asked to bring a Hackett Group forward, as well, according to STRS.

Through records requesting, we obtained the due diligence document that vetted each firm.

Both Segal and GGA had strong references for their governance consulting for pensions across the country. Segal estimated they would cost about \$163,000 per year, while GGA estimated \$110,000 per year.

But Hackett was different.

Hackett

Hackett costs triple, with a flat-year price of \$385,000. Of the three references they included, only one responded. The employer was from a decade ago and had only hired them to do an audit, not consulting.

They applied to the Ohio Retirement Study Council (ORSC) for a role to do a fiduciary audit of both STRS and Ohio Police & Fire (OP&R) in 2021, and once again, their references were unreachable or unable to be considered.

Of the five references they provided, four had “bad phone numbers/email addresses,” according to the document. Hackett hadn’t done work for the fifth reference, so they could not provide feedback.

The ORSC found that their proposals were “lacking in the governance component.”

The Council ended up going with a different group but made sure to point out that if they didn’t have the winner, they would have solicited more proposals, known as reissuing the RFPs.

Still, Fichtenbaum said they are the ones he is leaning toward.

“If you really think somebody is a lot better, then paying more can be worth it,” Fichtenbaum said.

We asked about the lack of references, and he responded that he wasn’t familiar with the process of references in a non-academic setting.

“I don’t know how it works in this pension consultant space,” he said. “I don’t know whether they asked or whether they just put these people down.

So why would the board choose a firm that is significantly more expensive and may have a lack of experience?

“I thought their presentation was impressive,” Fichtenbaum said.

But Hoover isn't convinced. The evaluation also brought up concerns with one of Hackett's principals — Chris Tobe.

"I would expect professional behavior or a professional consultant that's gonna be on our engagement," Hoover said. "The actions, whether it's things on member forums — even since August's presentation — this individual has done that, I'll be very upfront, that's disturbing to me."

Tobe is one of the most vocal critics online of STRS, accusing staff of "hiding corruption" and "doing anything to protect their excessive compensation," according to social media posts. He has also blasted state officials and others who don't agree with him, according to the dozens of screenshots inside the vetting document.

"Comments on social media made by Hackett's Chris Tobe called into question the independence of the firm," according to the ORSC.

The same complaint was made in the STRS analysis.

"Based on public statements by Hackett's Chris Tobe regarding STRS Ohio, there are concerns regarding the objectivity of the firm," the document states.

It goes on to list online posts made about the board, management, stakeholder groups and politicians. Another concern was the close relationship between Tobe and Edward Siedle, who investigates pension funds and is currently in litigation with STRS to release records. The pair co-authored a book together on pension fraud.

"I don't see those as disqualifying," Fichtenbaum said. "I don't have any problem with that."

For the board chair, it could be a fresh view.

"He has some familiarity with the pension and with what's going on and that could turn out, maybe, to be an asset," he said.

This is now the second firm Fichtenbaum wants to hire that Hoover says doesn't have the expected knowledge or background to complete the job.

We reached out to Tobe and Toni Hackett Antrum, president of Hackett, but they declined to speak as of now.

A previous records request we did showed that Fichtenbaum did speak with QED continually, so now we are awaiting a new one requesting communication between him, Tobe and Hackett.

"I don't have any personal relationship at all with him," the chair said.

We found that the pair are friends on social media and engage in the same groups. When asked, Fichtenbaum responded that if the request seems like it might be STRS-related, he “almost always accepts.”

“But hundreds of the people who are Facebook friends are not ‘real friends...’ Just because someone is a Facebook friend does not mean I have a personal relationship with them,” he continued. “Tobe falls into that category.”

Could there be ulterior motives for STRS to bring up Tobe? Fichtenbaum thinks it could be possible.

“Obviously, there’s a lack of trust,” he said. “I understand that consultants have to work with our staff, but ultimately they are our consultants.”

STRS staff don’t have to want or even like Hackett, but that isn’t their problem, he suggested.

“We are hiring them in a sense to get what amounts to a second opinion, another set of ears,” the chair said. “I think a lot of [it] is, maybe, to try and influence consultants, they have their own agenda.”

Fichtenbaum has asked for the team to contact Hackett to try to get actual references but said that they may not be necessary.

“If we can’t get references, then, obviously each board member will have to take that into consideration,” he said.

Payments

First, there was QED, and now there is Hackett, Hoover sighed.

But — there are still concerns about the lawsuit payments. Let’s backtrack.

Originally appointed by John Kasich, Steen was *the* outspoken reformer. He was reappointed by DeWine, but the governor asked him to resign in 2023. Steen refused, so DeWine removed him.

Steen filed a motion in Ohio’s 10th District Court of Appeals demanding to be reinstated — and he was. He returned to his job in April 2024.

We first reported that the Ohio Retirement for Teachers Association (ORTA) had put together a fund with Steen in 2023 to pay his legal fees to fight the governor.

"I communicated with Wade," Rayfield said in an interview in May. "I said, 'Well, do you wanna fight this?' And he goes, 'Let me think about it because fighting the governor is a tough thing to do...' But nonetheless, we stood with Wade and I said, 'Well, ORTA could potentially help you fight this.'"

ORTA leader Robin Rayfield said they ended up raising more than \$80,000 for Steen — but they recently started fundraising for Fichtenbaum due to the AG's lawsuit involving him as well as Steen.

Earlier this week, ORTA finally filled out the lobbying expenditures requirement. It showed that, in total, they spent about \$115,000 to support the two men. About \$87,000 went to Steen and \$27,000 went to Fichtenbaum.

"In 23 years of reviewing lobbying expenditures, this is a complete outlier — we've seen nothing comparable," Legislative Inspector General Tony Bledsoe said.

Bledsoe is the executive director of the Joint Legislative Ethics Committee, which all lobbyists have to register with.

"In 2003, the legislature had to enact reforms because of scandals involving the public pensions, and we created this entire category of retirement system lobbying reporting so the public was aware of what was being spent to influence these systems," Bledsoe continued. "And certainly — we've never seen anything like this as far as amounts."

Rayfield, Steen and Fichtenbaum have all denied that the exchange of this money was inappropriate.

"I'm not concerned about the money because I think ORTA is not an organization that is doing business with STRS," Fichtenbaum answered. "It's no different in my mind than when people are running for the board and various organizations contribute to their campaign. And they, of course, come before the board and advocate for things; they take positions on things... but it's not a business relationship with the board."

"It's the same thing if a member says, 'Hey, if you don't vote for this on the board, I'm not gonna vote for you.'"

What makes the big difference for him is that ORTA is a nonprofit, he said.

That depends on who you ask.

Ohio ethics laws do cover both campaign contributions and lobbying gifts — but they are not the same thing. Campaign contributions are made directly to campaign accounts, not directly to the individual, according to the Ohio Revised Code.

“The official or employee cannot solicit or accept ‘anything of value,’ such as a gift, travel expenses, employment, substantial meals, or other things of significant value from anyone if the thing of value could improperly influence the official,” the Ohio Ethics Commission writes.

Improper gifts could be if they are from someone seeking to do business with the public agency, someone regulated by their public agency, or someone interested in matters before the public agency.

Whether the payments are improper or not is for the Ethics Commission to decide.

This article was originally published on News5Cleveland.com and is published in the Ohio Capital Journal under a content-sharing agreement. Unlike other OCJ articles, it is not available for free republication by other news outlets as it is owned by WEWS in Cleveland.

SUPPORT NEWS YOU TRUST.

Our stories may be republished online or in print under Creative Commons license CC BY-NC-ND 4.0. We ask that you edit only for style or to shorten, provide proper attribution and link to our website. AP and Getty images may not be republished. Please see our republishing guidelines for use of any other photos and graphics.

Keywords in Google lawyer ads spark lawsuits, ethics concerns

 [reuters.com/legal/transactional/column-keywords-google-lawyer-ads-spark-lawsuits-ethics-concerns-2024-09-27](https://www.reuters.com/legal/transactional/column-keywords-google-lawyer-ads-spark-lawsuits-ethics-concerns-2024-09-27)

Jenna Greene

A person types on a laptop computer in Manhattan, New York City, U.S., September 11, 2020. REUTERS/Andrew Kelly/File Photo Purchase Licensing Rights , opens new tab

Sept 27 (Reuters) - Let's say you've seen billboards, social media promos and TV spots by a local personal injury lawyer for years, and then, bam, you're hit by a bus.

You survived with a few broken bones and some massive medical bills, and you need legal representation fast. Because of all those ads, you think you know just whom to call.

But when you Google the lawyer's name, the top results are "sponsored" ads by other attorneys angling for your business. You have to scroll down to find information on the lawyer or firm you're looking for, assuming you don't mistake the ads for the real thing.

The question now for courts and bar associations is whether such so-called competitive keyword ads -- where a search for lawyer A yields ads for lawyer B -- are misleading or unethical, allowing lesser-known attorneys to piggyback on the reputations of their more prominent peers.

Or is it just a sly but savvy way to attract new clients in the internet age?

As my Reuters colleague David Thomas reported last week, plaintiffs' giant Morgan & Morgan, which with more than 1,000 lawyers boasts it's the biggest injury firm in the U.S., sued , opens new tab a would-be rival over its keyword advertising, alleging that the similarly named Morgan Law Group breached a 2020 settlement agreement not to use such tactics.

In recent years, Morgan & Morgan has sued more than 15 firms over their use of keyword ads linked to its name, partner Damien Prosser told me, and has sent out "hundreds" of cease-and-desist letters. "It's truly the wild, wild West" of advertising, he said.

Morgan Law Group did not respond to requests for comment.

Other lawyers are suing over keywords, too. In Colorado, Franklin D. Azar & Associates (locals might know him as "The Strong Arm") sued the Slocumb Law Firm, alleging the Alabama-based defendant used keyword advertising to trick potential Azar clients into hiring Slocumb instead.

According to court papers [\[link\]](#), opens new tab, Azar claims Slocumb's ads included deceptive "click-to-call" links that connected would-be clients to operators who evaded questions about which firm had been reached.

Neither Azar nor Slocumb responded to requests for comment.

The case, which alleges violations of Colorado's consumer protection law, trademark infringement and unjust enrichment, is headed for trial in January, according to the Pueblo County District Court docket.

A Google spokesperson told me that the company doesn't restrict the use of trademarks as keywords, though it does require advertisers to abide by local trademark laws and prohibits infringement. Ads that conceal or misstate information about the advertiser's business, product or service are also not allowed, the spokesperson said.

As for the cost of keyword ads, the short answer is, it depends. Per Google, the company holds lightning-fast "ad auctions" for each Google search to decide which ads will appear for a specific query and in which order. Would-be advertisers set a bid telling Google Ads the maximum amount they're willing to pay for a click on their ad.

The formula is complicated, but one thing is clear: Keyword ads are a lot cheaper than building name recognition via TV, radio, billboard and other conventional advertising, which lawyers tell me can cost millions of dollars per year.

Aside from questions of legality – both the Morgan & Morgan breach of contract claim and Azar's allegations of consumer deception involve unusual fact patterns – there's a broader question for bar associations to consider: Is it ethical for lawyers to use competitive keyword ads in general?

Ohio and North Carolina say no.

Purchasing another lawyer's name as a keyword "displays a lack of professional integrity," the Ohio Board of Professional Conduct concluded in 2021 [\[link\]](#), opens new tab. Doing so is "designed to deceive" a consumer into selecting the advertising lawyer's website rather than the intended lawyer or firm.

A handful of other bar associations including New Jersey, Texas, South Carolina and Florida, however, say the practice is allowed, provided it's clear the sponsored links are advertisements and there are no surreptitious attempts to re-route the user to the advertising firm.

In Colorado, the state bar ethics committee considered the propriety of competitive keyword ads but failed to reach a consensus, voting last year not to issue an advisory opinion one way or the other, committee member Charles Luce Jr. told me.

A director at Fennemore Craig and frequent author on the impact of technology on legal ethics, Luce said he favors allowing the ads (provided they're truthful and not misleading), likening them to the Yellow Pages of yore.

A consumer who leafed through the Yellow Pages in search of a particular lawyer would also see display ads from competitors, who in some instances would pay extra for placement next to a rival. "Nobody back then screamed murder," Luce said.

Consumers today searching via Google are sophisticated enough to recognize sponsored links as ads, he said. Indeed, Luce added, consumers might find it helpful to see promos from lawyers offering similar services as a way to comparison shop.

Even if they do click an ad by mistake, he said, there's an easy solution. "Hit the back button."

But fellow Colorado ethics committee member Jack Tanner, a director at Fairfield and Woods and lecturer on legal ethics, opposes the use of competitive keyword ads by lawyers as deceitful.

"Why would you pay money to use somebody else's name" in search results, Tanner asked. "You're paying for your competitor's name, hoping the consumer clicks on the first thing that pops up."

To him, that demonstrates an intent to deceive. It doesn't matter if the consumer falls for it or not, he told me. "The intent is enough."

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

Reporting by Jenna Greene

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

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

Jenna Greene
Thomson Reuters

Jenna Greene writes about legal business and culture, taking a broad look at trends in the profession, faces behind the cases, and quirky courtroom dramas. A longtime chronicler of the legal industry and high-profile litigation, she lives in Northern California. Reach Greene at jenna.greene@thomsonreuters.com

Look Like a Loser, Then Win

Published: Mon Sep 30 14:47:40 EDT 2024

By Matt Levine

(Bloomberg Opinion) --

Getting the money down

There's a guy in Kentucky whose job is running volleyball tournaments and whose hobbies are (1) day-trading stocks and options and (2) talking to the media about it. I once wrote about him:

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.

This was a joke, in several respects. For one thing, he apparently did make a ton of money on GameStop, so who am I to criticize. Also, though, it's not clear how much equity market makers can *really* target the most lucrative-seeming customers. Ideally, if you were a market maker in stocks or options, you'd ask retail brokers to send you orders from their most degenerate customers, the ones who frequently trade in large size and lose money. But practically speaking you get all the orders and you do the best you can to trade with them profitably. There are things you can do — you can give better prices to brokers whose customers are, on average, worse at trading; you can get the brokers to kick out retail traders who are too sophisticated; you can develop products that appeal to gamblers — but this is a regulated business and you have some obligation to treat all orders fairly. You can't just trade with the people you most want to trade with. But the people you most want to trade with are, of course, the ones who trade a lot and tend to lose money.

One thing that I like about legal online gambling in the US is that it is not subject to so many constraints, so it can be clarifying about how markets work. Online bookmakers, like stock market makers, prefer to interact with customers who will bet a lot of money and lose. They prefer *not* to interact with customers who will bet a lot of money and win. How can they tell the difference between those two categories? Well, in the long run, the ones who win will mostly win, and the ones who lose will mostly lose, and you'll try to keep the losers around and ban or limit the winners.

But in the short run things are less obvious. There is a lot of randomness in sports betting. If someone bets a lot of money and wins, do you want to cut them off there, or do you want to let them keep playing to see if they lose it all back? The answer is basically that there are a lot of behavioral tells that, to a bookmaker, signal either “this is a sophisticated advantage player who will keep winning” or “this is a degenerate gambler who got lucky once and will mostly lose.”¹ And then if you are a bookmaker in a lightly regulated industry, you act on those signals. If a lucky degenerate wins, you congratulate him and encourage him to bet more. If a sophisticated advantage player wins, you shut down her account.

And then there is a further game in which the sophisticated advantage players try to figure out what those signals are, and then they *send* the “I’m a degenerate” signals, in order to fool the bookmakers into letting them play more. Bloomberg’s Ira Boudway reports:

Pro bettors have recently added a wrinkle to their priming routines: They’re acting like gambling addicts. Isaac Rose-Berman recently described the practice in his How Gambling Works newsletter:

“One pro bettor I know set up a bot which logs in to his accounts every day between 2 and 4 a.m., to make it seem like he can’t get through the night without checking his bets. Another withdraws money and then reverses those withdrawals so it looks like he can’t resist gambling.”

Simulating addictive behavior, says [professional bettor Rufus] Peabody, is an effective way to get online sportsbooks to send you bonus money and keep your accounts open. This isn’t necessarily because operators are targeting problem bettors, he says; they’re simply looking to identify and encourage customers who are likely to spend—and lose—the most. This just happens to be a good way to find and enable addicts, too.

I assume that some of these things must be urban legends and not every bookmaker is necessarily watching your account to see if you log in at 3 a.m., but the broader point is that, yes, there are some behaviors that correlate with losing a lot of money on sports betting, and bookmakers do watch for those behaviors, and if you can mimic those behaviors the bookmakers will like you, and if you can mimic those behaviors *and also win* then that’s a good business.

Dish/DirecTV

Here’s a somewhat unusual deal, a merger with a negative price:

DirecTV and Dish have agreed to combine in a deal that will create the biggest pay-TV provider in the US with about 18 million subscribers.

Under the terms of the transaction, DirecTV will acquire Dish TV and Sling TV from EchoStar Corp. for a nominal consideration of \$1 plus the assumption of about \$9.75 billion of debt, according to a statement on Monday that confirmed previous Bloomberg News reporting.

The deal is contingent upon Dish's bondholders agreeing to take a haircut on the principal amount of the company's debt of at least \$1.568 billion, the statement shows.

Dish is currently part of EchoStar. It has \$9.75 billion of debt and a business that is, apparently, worth about \$8.2 billion. If DirecTV paid EchoStar zero dollars for Dish, it would be getting a bad deal. Somebody has to pay DirecTV \$1.6 billion to take Dish. Who will pay? Not EchoStar: Dish's debt is not guaranteed by EchoStar, so it is in some rough sense not EchoStar's problem. EchoStar could just hand Dish over to its creditors without putting another penny into it.

On the other hand, if the creditors — the holders of that \$9.75 billion of Dish bonds — got Dish, what would they do with it? Probably not turn it around and make it worth *more* than \$8.2 billion. And so those bonds have traded at low prices. Bloomberg tells me that the 5.125% bonds due 2029 (\$1.5 billion of the total) were trading at about 56 cents on the dollar a week ago. The math is something like “this business is worth less than the amount of debt it has outstanding, nobody will pump more money into it, and eventually it will go bankrupt and not have enough assets to pay off the debt.”

And then along comes DirecTV, which also operates a pay-TV network, wants to add Dish, and is as far as I know worth more than \$0:

DirecTV is owned by AT&T Inc. and joint-venture partner TPG Inc. In connection with Monday's deal, TPG will acquire the 70% stake in DirecTV that it doesn't already hold from AT&T in a \$7.6 billion in cash transaction.

That suggests that DirecTV is worth about \$11 billion. Maybe, under DirecTV's management, the Dish business could be worth more than zero too. But right now it's worth less than zero, so someone needs to pay DirecTV to take it. And the obvious candidates are Dish's creditors: If they're willing to take a haircut on their bonds, to accept less than 100 cents on the dollar, then the deal can work. And since the bonds are worth 56 cents on the dollar *without* a deal, there is some room to negotiate.

And so that's the plan: Dish and DirecTV announced this deal, but it is contingent on the Dish bondholders taking a haircut. They launched a bond exchange offer, and DirecTV can abandon the deal if not enough bondholders take it. The way the exchange offer works is that you exchange \$100 of old Dish bonds into \$100 of new Dish bonds, *but* if the merger actually closes (getting through regulatory review, etc.), then your \$100 of new bonds poof into some lesser amount of new, post-merger bonds. In the case of those 5.125% bonds due 2029, they poof into \$60 of post-merger

bonds. (Shorter-dated bonds have less of a haircut; the 5.25% bonds due 2026 get back 93 cents on the dollar. If every single bond takes the exchange offer, the total haircut would be about \$1.86 billion, so the required \$1.57 billion would be about an 85% success rate.)

Also there are “exit consents”: To take the deal, bondholders will have to vote to strip the *old* bonds of collateral, guarantees and “substantially all of the covenants and certain events of defaults.” And so if you *don’t* take the exchange offer (and the haircut), you are left with 100 cents on the dollar of much worse bonds.

And so for the Dish bondholders, the choices are (1) take the deal, get a haircut, but have a better chance of getting your (post-haircut) money back eventually or (2) reject the deal and take your chances with Dish on its own.² Sixty cents on the dollar is more than 56, so maybe there’s a deal to be done, though Bloomberg tells me those bonds traded at around 66 today so maybe not.

We have talked around here about the “capital solutions” business, a jolly euphemism for credit investors helping finance companies by taking value from other credit investors: A hedge fund will go to a company and say “I’ll lend you more money if you agree not to pay back some of your previous lenders.” This can often seem messy and zero-sum, but it isn’t always. The core idea of it is that there is some valuable business here, and giving it more financing will help it survive and thrive and create value and employ workers and so forth. And the way to generate that financing is at the expense of other, previous lenders who maybe had too optimistic a view of how much the business was worth. This is that, but for mergers and acquisitions.

OpenAI

The place you want to reach in your career is where you work for a company and you are like “you know what, I am just so rich, I don’t want you to pay me anymore, it’s fine, I’ll work for free,” and your bosses are like “nope, sorry, we insist, we cannot allow you to work here for less than \$10 billion.” And then you’re like “ohhhhhhhh fine, fine, fine, I do love working here, and if there’s really no other way, I guess I will take the \$10 billion.” Nothing remotely like this has ever happened to me in my life but here’s Sam Altman:

On Thursday, Altman told some employees that there were “good reasons” he shouldn’t take equity, though he didn’t elaborate. And he said investors were pushing for an equity grant to align his financial interests with those of OpenAI, said someone who heard the comments.

Altman also said a Wednesday news report that he might get a 7% stake in the new OpenAI was “ludicrous.”

We talked about this last week: There have been reports that, as OpenAI becomes a for-profit company, it might give Altman (its co-founder and chief executive officer, who currently owns no equity) a 7% stake worth about \$10 billion. I surmised that this was not something he wanted, but something the investors wanted: “He is the founder and CEO of a hot startup, and the founder and CEO of a hot startup is supposed to own equity. Not just for his sake — not just so that he can be rich — but to align incentives.” And here is Altman saying that: *He* doesn’t want the \$10 billion, but the investors are insisting.

Nobody in history has ever been better at, like, business negging than Sam Altman. He got OpenAI to a \$150 billion valuation in part by going around saying “oh no, nobody should allow us to build our product, we’re going to destroy humanity,” and now he is allegedly going to get handed a \$10 billion stake in OpenAI because he’s going around saying “oh no, nobody should give me equity, that’s ludicrous.”

Dentist tax shelter

A crude way to think about it is that there are mass-market financial products, like index funds, that are marketed to middle-class investors and are fine. And there are high-end financial products, like hedge funds and venture capital, that are marketed to institutions and the very rich, and are fine. And then there are the bad versions of high-end financial products, like investing in bad hedge funds and bad private companies, which have the cost and opacity of high-end finance but with bad performance. Those are marketed to dentists. I mean, that is the stereotype, and I have indulged in it before, and it’s rude, and every so often dentists email me to object. But it’s the stereotype for a reason. If you are rich and sophisticated, but not *too* rich or *too* sophisticated, then you are in the sweet spot for a lot of people who want to market complicated, expensive, terrible financial products to you.

Usually these products are private investment opportunities, but the Wall Street Journal reports:

Ryan Ulibarri, a family dentist in Fort Collins, Colo., is in tax trouble that could take a big bite of his time and money.

In late August, a Denver grand jury indicted him on six criminal counts for using an “abusive-trust tax shelter” to hide more than \$3.5 million of taxable income he earned from 2017 to 2022. He allegedly underpaid more than \$1 million of tax over that period. ...

While most Americans aren’t in the market for tax shelters, the allegations in this case are a reminder of what can happen when taxpayers ignore professional advice and common sense on taxes. They also show how easy it can be for people who want to slash their taxes to delude themselves.

“People see a complex structure and think, ‘This is what rich people do to reduce their taxes,’ ” says Bryan Skarlatos, a criminal tax attorney with Kostelanetz. “But a complex structure with no business purpose is often a sign of fraud to the IRS.”

From the indictment:

To use the Abusive-Trust Tax Shelter, clients nominally assigned nearly all of their business income to a sham business trust to create the illusion that the income assigned to the sham trust was not earned by the client. In reality, however, the client continued to retain full use and control over the income assigned to the sham business trust. The sham business trust then distributed its income to a second sham trust (referred to as a “family trust”), which, in turn, distributed its income to a third sham trust (referred to as “charitable trust”). On trust tax returns, each trust in the series reported deductions and distributions matching or exceeding its income, and the sham charitable trust purportedly “donated” any remaining income to a purported tax-exempt private family foundation. Finally, funds “donated” to the private family foundation would be “loaned” to the client’s business, business trust, or family trust so that the client could retain full control and beneficial use of those funds. As a result, the clients avoided paying income taxes on nearly all of their business income.

Uh, right, sure, if you earn all of your income through a business, and that business assigns all its profits to a trust, and that trust assigns all of its money to another trust, and that trust assigns all its money to a third trust, and that trust “donates” all its money to a foundation, and that foundation “lends” all of its money to you, then (1) you still have all the money and (2) you have said many of the words that people actually say when they are setting up functioning tax shelters. But not all of them, and not in the right order. You have a thing that looks like a tax shelter that a sophisticated billionaire might use, but isn’t.

Is private equity unethical?

Not, you know, all the business stuff. Just the recruiting. Here’s Jamie Dimon:

“I know a lot of you work at JPMorgan, you take a job at a private equity shop before you even start with us,” Dimon told a crowd of undergraduate business school students. “I’m going to say something a little different, okay, because I didn’t talk about character. The most important thing about people’s character, I think that’s unethical. I don’t like it.”

What percentage of incoming JPMorgan investment banking analysts will have jobs lined up at private equity firms within their first month of starting at JPMorgan? Not *100%*, I mean, but a lot, including most of the really good ones? I see where Dimon is coming from: It *is* weird to start a new

job having already committed to leaving it in two years, and JPMorgan probably does want some of its best new analysts to stick around to become senior bankers. But at this point the market structure sort of is what it is, and it is odd for Dimon to go around saying “oh yes most of our junior bankers are unethical.”

Blockchain blockchain blockchain

If you walk into a bank chief executive officer’s office and shout “AI, AI, AI,” will she throw money at you? There do seem to be a lot of artificial intelligence-driven projects at banks and financial firms. That, you know ... do stuff? Broker chatbots? Foreign exchange market making? It seems plausible to think that there are a lot of pattern-recognition-type problems in finance that could efficiently be addressed by modern artificial intelligence technologies

Meanwhile. In 2017 if you shouted “blockchain!” at a bank CEO she would *definitely* fling money at you, and people respond to incentives, so a lot of people shouted “blockchain!” at a lot of financial industry CEOs, and a lot of financial blockchain projects were announced. But it was often very hard to articulate what a blockchain could *do*, for traditional financial firms, that a regular database couldn’t. And now for the next few years you will read occasional articles to the effect of “remember that blockchain project? lol no.” Here’s one:

Two years ago, a behind-the-scenes giant in U.S. financial markets went live with one of Wall Street’s biggest and most ambitious blockchain initiatives.

Known as Project Ion, the effort aimed to use blockchain to revolutionize settlement of stock trades, when buyers fork over the cash and get share certificates. Firms ranging from big banks like JPMorgan Chase to trading app Robinhood got involved. But it didn’t catch on, a person familiar with the project said, and the firm at the center of the effort, the Depository Trust and Clearing Corp., quietly ended the effort late last year.

Sure. On the other hand, “DTCC announced a pilot in which firms used U.S. Treasuries as collateral on a blockchain, showing that counterparties in trades could take legal possession of collateral instantly if the other side of a trade defaulted,” so hope springs etc.

Pointsmaxxing

We talked on Thursday about the indictment of New York City Mayor Eric Adams for bribery, in which the bribes were paid in the form of business-class travel on Turkish Airlines. I mentioned that, as bribes go, this is an unusually non-fungible and limited-use currency: Business-class flights on Turkish Airlines are a nice way to get to Turkey, but they are not a great way to get to, for instance,

Paris (where Adams actually flew via Istanbul), or *Easter Island* (where he tried). And they're an even worse way to, like, pay for housing or whatever. I wrote:

I am sure some of my pointsmaxxing readers will reply "oh man I could retire early and buy a mansion with unlimited free Turkish Airlines flights," but for normal people like me and Eric Adams, unlimited free Turkish Airlines flights wouldn't even cover all of our *air travel* needs.

But the Wall Street Journal did this joke better and actually called up some pointsmaxxers to get them to make fun of Adams's Turkish Airlines flights:

"It's mind-blowing to someone in the points and miles world that this is the business class you would go out of your way to fly," said [Adam] Morvitz, founder and CEO of point.me, a points and miles search aggregator and booking service. "We're talking about a business class where if you're in a window seat you still have to step over your neighbor to get to the bathroom." ...

"If you're going to get indicted in large part because you were taking illicit upgrades to business class, at least do it with an airline that has a better product," said Jason Rabinowitz, a New Yorker who co-hosts an aviation podcast for the plane-tracking site Flightradar24, on X.

I feel like they are missing the point? It's not like someone came to Adams and handed him a sack full of money and he had to use the money as efficiently as possible to book business-class travel to Europe. Someone (allegedly) came to Adams and handed him *free Turkish Airlines flights*, and he had to turn those flights into bribery as efficiently as possible. It's a harder problem!

Things happen

New titans of Wall Street: How trading firms stole a march on big banks. The Giant Hedge Fund That Hates Risk and Still Wins. Harvard's Not-So-Smart Money: Two Decades of Poor Returns and Rich Pay. The Mavericks of Metals Are Back, Rocking a \$15 Trillion Market. Epic Games Sues Google, Samsung Over Alleged App-Store Scheme. Quant Hedge Funds Face More Margin Calls as Chinese Stocks Surge. The \$1.7 Billion Takeover Brawl Fueled by a Fear of China. Lombard Odier Dumped Entire China Allocation, Won't Buy Rebound. Fidelity Slashes Mobile Deposit Limits Following Fraud Wave. The Big Shift From Salaries to Bonus-Based Pay. *Industry* and ESG.

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. Nate Silver's new book has a very fun discussion of how professional gamblers try to beat these limits by looking like amateurs.
2. Those are the choices for the bondholders as a whole. For individual bondholders, "reject the deal" means *either* (1) there's no deal or (2) there *is* a deal, because 85% of bondholders accept it even though you don't, in which case you end up with 100 cents on the dollar of a weird old bond with its covenants stripped out.

Steward Health CEO who refused to testify to US Senate will step down

 [reuters.com/world/us/steward-health-ceo-who-refused-testify-us-senate-will-step-down-2024-09-28](https://www.reuters.com/world/us/steward-health-ceo-who-refused-testify-us-senate-will-step-down-2024-09-28)

Reuters

St. Elizabeth's Medical Center, Boston, May 6, 2024. REUTERS/Nate Raymond Purchase Licensing Rights , opens new tab

WASHINGTON, Sept 28 (Reuters) - Ralph de la Torre will step down as CEO of troubled Steward Health Care next week, the company said on Saturday, after he was held in criminal contempt by the U.S. Senate for refusing to testify about cost-cutting decisions at the group's 31 hospitals before it filed for bankruptcy.

In a statement, the Dallas-based company said de la Torre would no longer serve as its CEO and chairman as of Oct. 1 as part of an agreement in principle reached earlier this month.

A spokesperson for de la Torre confirmed that the former heart surgeon "has amicably separated from Steward on mutually agreeable terms," and "he will continue to be a tireless advocate for the improvement of reimbursement rates for the underprivileged patient population."

The Senate unanimously voted on Wednesday to hold de la Torre in criminal contempt of Congress after he declined to attend a Sept. 12 hearing before the Senate Committee on Health, Education, Labor and Pensions, which was probing Steward's financial troubles. De la Torre had been subpoenaed to attend the hearing.

Steward, the largest privately owned hospital network in the U.S., filed for bankruptcy in May, seeking to sell all of its hospitals and address \$9 billion in debt. The company has sold several hospitals since that filing.

"Dr. de la Torre urges continued focus on this mission and believes Steward's financial challenges put a much-needed spotlight on Massachusetts' ongoing failure to fix its healthcare structure and the inequities in its state system," his spokesperson said.

A number of hospitals affected by Steward's financial troubles were based in Massachusetts.

The Reuters Daily Briefing newsletter provides all the news you need to start your day. Sign up [here](#).

Reporting by Lucia Mutikani; Editing by Paul Simao

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

**Bloomberg
Law**[Request a Demo](#)[Login](#)[Securities Law News](#)

Sept. 27, 2024, 2:13 PM PDT

Convicted Corporate Raider Charged With Conspiracy and Fraud

By Bloomberg Law Automation

Bloomberg Law News 2024-09-30T09:55:28151146311-04:00

Convicted Corporate Raider Charged With Conspiracy and Fraud

By Bloomberg Law Automation 2024-09-27T17:13:22000-04:00

A corporate takeover specialist has been indicted for his years-long avoidance of a judgment—now exceeding \$180 million—to the Securities and Exchange Commission while running a cannabis and lifestyle brand company, the Justice Department announced Friday.

According to the DOJ, the SEC in 1989 brought a civil action against Paul Bilzerian based on the same securities violations that led to his criminal conviction in the US District Court for the Southern District of New York, for which he was sentenced to four years in prison. In 1993, the SEC obtained civil judgments totaling approximately \$62.3 million against Bilzerian. Since then, Bilzerian has evaded enforcement of the judgments.

The DOJ said Bilzerian, Scott Rohleder, and Ignite International Brands conspired to impede the SEC from collecting on the judgments. To do so, Bilzerian operated numerous shell companies while concealing his interest in and control over those companies by using various nominee owners. Bilzerian—with Rohleder's help—funneled millions of dollars of his assets through his shell companies to fund Ignite while concealing his role in the company's ownership and management. Meanwhile, to avoid paying the SEC judgments, Bilzerian falsely represented that he was indigent, including by providing false financial disclosures that omitted his considerable assets.

The DOJ said despite Bilzerian's prominent leadership role at Ignite, the defendants concealed his involvement, including by omitting his name in publicly filed disclosures. After learning that federal law enforcement had become aware of Bilzerian's involvement in Ignite, the company also issued a press release that misleadingly characterized Bilzerian and Rohleder as "unpaid consultants" for Ignite.

This story was produced by Bloomberg Law Automation.

To contact Bloomberg Law Automation: automation@bloombergindustry.com



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

Disney Warns Investor Streaming Suit Could Chill Innovation

By **Rachel Scharf**

Law360, Los Angeles (September 27, 2024, 9:00 PM EDT) -- Allowing securities litigation over The Walt Disney Co.'s underperforming streaming service to go forward would discourage companies from trying "new, risky business plans," counsel for the entertainment giant told a California federal judge in an attempt to toss the suit Friday.

The arguments came during an afternoon hearing before U.S. District Judge Consuelo B. Marshall, who is overseeing a putative class action alleging Disney and its top executives **juiced share prices** with lies about the expected profitability of the new Disney+ streaming platform in 2020. According to investors, stocks later plummeted when earnings reports revealed Disney+ had fallen far short of its subscriber and revenue predictions.

Disney's lawyers are now **asking to dismiss** the suit, with Wes Earnhardt of Cravath Swaine & Moore LLP warning on Friday about the negative commercial effects of punishing Disney for trying out a new business model.

"Companies should be encouraged to try new, risky business plans if it's in the best interest of shareholders," Earnhardt told Judge Marshall. He said this won't be the case if "anytime a company tries something new and fails, they'll have to face a securities fraud claim."

"That is simply not the law," added Earnhardt.

The investors, led by a union pension fund, allege that Disney used a number of fraudulent accounting practices to hide its streaming platform's financial troubles from the marketplace. In one example, the company allegedly aired Disney+ shows on its traditional cable network for a single day in order to spread production costs across multiple divisions.

But Earnhardt argued Friday that Disney never misled investors about its business practices. In fact, he said, investors were explicitly on notice about the cost-shifting strategy for Disney+ shows.

"[Disney] disclosed every single month exactly what those costs were," Earnhardt told the judge.

A lawyer for the proposed class, Jessica Shinnfield of Robbins Geller Rudman & Dowd LLP, countered that Disney only provided investors with "generic" and incomplete disclosures that were not sufficient under the law.

"Once a company chooses to speak on a topic, it must speak truthfully on it," Shinnfield said. "You can't talk glowingly about a topic and not disclose adverse factors."

The parties also dueled Friday about allegations in the complaint that Disney CEO Bob Iger engaged in insider trading when he sold more than \$375 million of his company stock during the alleged stock-inflation scheme.

Earnhardt argued that this claim can't go forward because it was improperly grouped into other causes of action within the complaint, while Nicole Gilliland of Robbins Geller said this type of pleading conforms with securities laws.

Judge Marshall said she would issue a written opinion on the motion to dismiss. The two sets of

lawyers declined to comment as they exited the courtroom.

The investors are represented by Daniel S. Drosman, Ryan A. Llorens, Jessica T. Shinnelfield, Jeffrey J. Stein, Nicole Q. Gilliland and Jessica E. Robertson of Robbins Geller Rudman & Dowd LLP and Vincent F. Pitta and Marcelle J. Henry of Pitta LLP.

Disney and its executives are represented by J. Wesley Earnhardt, Helam Gebremariam, Lauren Rosenberg and Ming-Toy A. Taylor of Cravath Swaine & Moore LLP and John W. Spiegel and John M. Gildersleeve of Munger Tolles & Olson LLP.

The case is Local 272 Labor-Management Pension Fund v. The Walt Disney Co. et al., case number, 2:23-cv-03661, in the U.S. District Court for the Central District of California.

--Editing by Peter Rozovsky.

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



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

Pharma Co. Amarin Beats Class Action Over Patent Issues

By **Katryna Perera**

Law360 (September 27, 2024, 6:44 PM EDT) -- A New Jersey federal judge has tossed a proposed class action against pharmaceutical company Amarin and its top brass, alleging they misled shareholders about their products and the prospects of related patent litigation, saying the investors have failed to plead any actionable misleading statements or omissions made by the defendants.

U.S. District Judge Robert Kirsch issued an **opinion** on Wednesday saying the suing shareholders have not adequately alleged that any of the defendants' statements about litigation in Nevada over its lead product's patent, the product's characteristics or Amarin's financial prospects are actionable since they are all opinions accompanied by appropriate disclosures.

According to the opinion, the defendants argued in their dismissal motion that statements made regarding their "belief" that certain patents for their product, Vascepa, would be upheld following litigation in Nevada were simply beliefs and nothing more.

Judge Kirsch agreed on Wednesday, saying the fourteen challenged statements related to this aspect of the suit are "plainly opinions." The judge noted that before a decision was handed down in the litigation, the defendants' statements characterized the proceedings as going "very favorably" for Amarin. Even as the company lost and appealed to the Federal Circuit, the statements continued expressing optimism about the litigation's potential outcome, the opinion states.

"These statements about the litigation ... put forward Amarin's belief about the strength of their patents, rather than asserting positive knowledge of what the outcome of the litigation would be," the opinion states. "These statements were accompanied, often contemporaneously but also in Amarin's SEC filings from around the same time, with meaningful, specific warnings disclosing specific risks, such as that [John Thero, Amarin's CEO] 'can't make any predictions [about the Nevada litigation] other than stating that we intend to defend our patents vigorously.'"

Regarding statements made about Vascepa's "unique" properties, Judge Kirsch called them "inactionable puffery."

"Statements that a drug product is 'unique,' 'far superior' to other generic drugs, should do 'very well' and will be 'well received' are puffery because they are 'not the kind of statements that a reasonable investor would have relied upon,'" the judge said.

Judge Kirsch also held that challenged statements about Amarin's financial prospects are not materially false or misleading for similar reasons, that they express the defendants' "belief in the scope of Vascepa's success."

He also found that the suit fails to plead a strong inference of scienter, or knowledge of wrongdoing by the individual defendants.

"Plaintiffs' allegations that the individual defendants were focused on Vascepa and winning the Nevada litigation does not carry the inference that they therefore knew or recklessly disregarded the patents' vulnerabilities," the opinion states. "The fact that a company officer makes a statement about a topic does not necessarily support the inference that he knows all facts relevant to that topic."

Additionally, several executives' departures from Amarin following the loss of the patent for Vascepa do not support an inference of scienter, the judge said.

"The amended complaint does not allege that the departures were either contemporaneous with the announcement of bad news or accompanied by any punishment," the opinion states. "Amarin's loss in the Nevada litigation did not 'reveal' any wrongdoing ... therefore, the fact that two individual defendants' departures from the company followed the court decisions, absent any allegation that they were in any way punished or censured, does not evidence scienter."

The suit, filed in 2021, alleged that Amarin and three of its officers made misleading statements and omissions about Vascepa, its patent and the company's financial prospects, which caused Amarin's share price to remain artificially high. When Amarin lost litigation over certain of its patents for Vascepa, the company's share price dropped, damaging investors, according to the complaint.

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

The investors are represented by Christopher A. Seeger and Christopher L. Ayers of Seeger Weiss LLP and by Jeffrey J. Stein, Jennifer N. Caringal and Kenneth P. Dolitsky of Robbins Geller Rudman & Dowd LLP.

Amarin and the individual defendants are represented by Eric T. Kanefsky and Martin B. Gandelman of Calcagni & Kanefsky LLP and by Meredith Kotler, Peter J. Linken, Boris Feldman, Becky Lockert and David Howard of Freshfields Bruckhaus Deringer US LLP.

The case is Dang v. Amarin Corporation PLC, case number 3:21-cv-19212, in the U.S. District Court for the District of New Jersey.

--Editing by Vaqas Asghar.

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



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

2nd Circ. Won't Revive Danimer Investors' 'Greenwashing' Suit

By **Jessica Corso**

Law360 (September 27, 2024, 8:00 PM EDT) -- The Second Circuit on Friday upheld the dismissal of a lawsuit accusing Danimer Scientific Inc. of over-hyping the environmentally friendly nature of a plastics alternative it produced, with the appellate court saying that there was no proof that company executives purposefully misled investors.

A three-judge panel of the appellate court issued a seven-page summary order affirming the dismissal of the proposed class action lawsuit handed down by U.S. District Judge Hector Gonzalez last year.

Danimer's chief legal officer, Stephen Martin, said in a written comment to Law360 Friday that the company was pleased with the decision.

"The court's ruling that plaintiffs had failed to state an actionable claim is a vindication of the company and the individual defendants and confirms the plaintiff's allegations were baseless," Martin said. "With this case behind them, Danimer looks forward to continuing to develop and bring to market its innovative solutions to the plastic waste problem."

Investors, led by James Swanson, said that the company's representatives made false statements about Danimer's key product, Nodax, being 100% biodegradable when the product does not fully break down in certain environments, such as most modern landfills. They accused the company of "greenwashing," or making claims that their product was more environmentally friendly than it actually was.

They alleged that at least some of the false representations were made in order to secure a merger with special purpose acquisition company Live Oak Acquisition Corp., which purchased the bioplastics company in order to take it public in 2021.

But suing investors did not prove that Danimer's executives intentionally misled investors in statements about the product, according to the Second Circuit.

Simply alleging that Nodax was the company's 'key product' and that executives should have known that 'core information' about the product was wrong is not enough to plead scienter, the court said.

"The complaint says nothing specific about why Nodax would be central or key to the company's operations, such as being a central revenue stream; nor does it allege with specificity that the limitations on Nodax's biodegradability were known to anyone at the time of the alleged misrepresentations," the court said.

The court also ruled that Swanson had not proven that executives had personal motivations for pushing through the de-SPAC transaction or that they stood to uniquely benefit from the deal.

"Indeed, the individual defendants' alleged motives are no different than the 'generalized desire to achieve a lucrative acquisition proposal' and could be attributed to the directors and officers of any corporation looking to complete an acquisition transaction," the court held.

Danimer had also asked the Second Circuit to declare that the statements Swanson pointed to were actually not inaccurate, but the appellate court said it was not necessary to reach that issue given

that Swanson failed to plead scienter.

Attorneys for the investors did not immediately respond to a request for comment Friday.

Circuit Judges Barrington Parker, William Nardini and Beth Robinson sat on the panel for the court.

Swanson is represented by Reed Kathrein, Lucas Gilmore, Steve Berman and Kevin Green of Hagens Berman Sobol Shapiro LLP and Jeffrey Campisi of Kaplan Fox & Kilsheimer LLP.

Danimer is represented by Brian Lutz and Jonathan Fortney of Gibson Dunn & Crutcher LLP.

The case is *In re Danimer Scientific Inc. Securities Litigation*, case number 23-7674, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Vaqas Asghar.

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



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

Juul Stockholder Class Sues In Del. Over Controller Windfall

By **Jeff Montgomery**

Law360 (September 27, 2024, 8:40 PM EDT) -- Two stockholders of e-cigarette venture Juul Labs Inc. sued the company's controllers and board on Friday in a proposed class derivative action seeking damages for an alleged top stockholder scheme to avoid huge liabilities under terms said to have cost the company billions.

According to the complaint, the allegedly self-interested arrangement resulted in a 1.19 billion-share windfall for the controllers potentially worth triple the cost they incurred for "backstopping," or guaranteeing, a company settlement in multidistrict class litigation tied to claims the company's marketing fed nicotine addiction and helped create a youth "vaping" crisis.

In all, according to the complaint, the top stockholders increased the value of their holdings by an estimated \$771 million, at the expense of terms that would otherwise have meant more than \$3 billion for Juul. The company is privately held and not publicly traded, but accredited investors can buy on secondary markets.

At issue in part was a controller move to trigger a debt-to-equity conversion of \$2 billion in long-term notes before investing \$1.23 billion in the company as a backstop for the settlement. The arrangement included company authorization of hundreds of millions of unissued new shares that diluted overall values, allowing the controllers to secure more stock for their backstop payout at a low price.

"The controlling stockholders have admitted that the only reason" to create the new unissued shares immediately before completing the backstop "was to ensure that they, unlike the rest of Juul's stockholders, were not diluted by any later decision" to increase the amount of stock issued, the complaint, filed by shareholders Adam Bower and David Munoz, said.

Identified as controllers were company founders Adam Bowen and James Monsees along with Nicholas Pritzker and Riaz Valani.

Named in the suit, in addition to the controllers, are investment vehicles under their control as well as members of the company's board.

The complaint includes four causes of action: breaches of fiduciary duty against the company's directors; breaches of fiduciary duty and aiding and abetting breaches of fiduciary duties by the controlling stockholders and investment vehicles; and unjust enrichment against the investment vehicles.

Behind the funding moves, the suit said, were threats to Juul's solvency resulting from a flurry of lawsuits targeting the company's marketing practices and actions by state regulators and the U.S. Food and Drug Administration.

When Juul began contemplating bankruptcy, the suit said, the controllers worked to take the company in a different direction because their liability exposure, arising from "significant involvement in company operations," would not be shielded by Chapter 11.

In addition, bankruptcy could have ended company-funded litigation coverage and subjected the controllers to clawback of special dividends and other gains from an Altria Group Inc. \$12.8 billion

investment in 2018, when Juul was valued at \$38 billion.

As an alternative, the controllers steered the company into a \$1.23 billion settlement under terms that also covered claims against themselves, in exchange for their guarantee of the payout.

Controller-led "investment vehicles" deposited the \$1.23 billion into a company escrow, but those involved then effectively refinanced the settlement under a new plan based on debt-to-equity conversion and called for issuance of new shares for an employee equity incentive plan that tripled the company's authorized shares.

Sought in the case, in addition to judgments against those named, is cancelation or return of all shares issued to the investment vehicles or imposition of a constructive trust over the shares, among other demands.

Also called for are damages to be determined at trial, disgorgement by the investment vehicles of unjust enrichment, attorney fees, and pre- and post-judgment interest.

The stockholders are represented by Norman M. Monhait, Jessica Zeldin, William T. Reid IV, Joshua J. Bruckerhoff, Ryan M. Goldstein and D. Benjamin Thomas of Reid Collins & Tsai LLP.

The case is Adam Bower and David Munoz v. Nicholas Pritzker et al., case number 2024-0985, in the Court of Chancery of the State of Delaware.

--Editing by Philip Shea.

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



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

Twitter Investors Win Cert. In Suit Over Musk's Backpedaling

By **Bonnie Eslinger**

Law360 (September 27, 2024, 11:21 PM EDT) -- A California federal judge on Friday certified a class of thousands of Twitter investors over claims Elon Musk fraudulently tweeted about the social media company's alleged bot problem to get out of his \$44 billion acquisition, rebuffing the billionaire businessman's contention that individual issues in the suit eclipse common questions.

During a short Zoom hearing Friday morning, U.S. District Judge Charles R. Breyer told the parties that he "was satisfied" that the investors had met the standard for class certification. He also appointed the law firms of Bottini & Bottini Inc. and Cotchett Pitre & McCarthy LLP as class counsel and three investors — Nancy Price, John Garrett and Brian Belgrave — as class representatives. The judge added that his order will set forth his reasons for certifying the class.

The class consists of investors who sold the publicly traded stock or call options, or purchased put options of Twitter Inc., from May 13, 2022, through Oct. 4, 2022, and who say they suffered losses due to Musk's statements.

The investors suing Musk **alleged in an amended complaint** in June 2023 that Twitter entered into a deal to be acquired by a Musk-owned entity in April 2022. They said that Musk pledged billions of dollars of his Tesla stock to raise cash, but that Tesla's stock tanked by about \$1,000 in the days after the Twitter deal was announced. Musk then took to Twitter on May 13, 2022, tweeting that the deal was "temporarily on hold pending details" concerning spam accounts on the social media platform.

Musk stated during a tech conference in Miami on May 16, 2022, that fake and spam accounts made up at least 20% of Twitter's users, the investors said, adding that Musk tweeted that the information about the number of bot accounts was "fundamental" to the company's financial health.

Musk tweeted the next day that the actual number of bot accounts on Twitter could be "much" higher and said the deal "cannot move forward" until Twitter showed proof that the number was less than 5%.

The investors asserted that Musk made those statements to drive Twitter's stock price down — and it did.

The lead plaintiffs allege that they sold 28,389 shares of Twitter common stock during the proposed class period at artificially deflated prices and collectively suffered losses of over \$558,000, according to their **motion for class certification** filed in May.

That motion noted that 60.6 million shares traded weekly throughout the proposed class period, and there were approximately 796 million shares outstanding during the class period.

"From these facts, it is readily apparent that there are thousands of members of the class — far more than needed to satisfy the numerosity requirement," the investors stated.

The investors also argued that the proposed class members raise virtually all the same common questions of law or fact. The common questions include whether Musk's May 13, 2022, tweet that the "Twitter deal [is] temporarily on hold pending details supporting calculation that spam/fake accounts do indeed represent less than 5% of users" contained material misrepresentations and omissions, and whether Musk's May 2022 statements that bogus accounts made up at least 20% of Twitter's

users were false and misleading.

Musk disagreed with that assertion in his Sept. 2 opposition to the class certification bid, arguing that individual issues in the litigation predominate over common ones. That's because there are investors who understood the terms and conditions of the merger agreement and those who purportedly could not, Musk said.

"Although they plead — and the court has accepted — that certain reasonable shareholders may have been unable to decipher Mr. Musk's rights under the public merger agreement and thus were confused and misled by Mr. Musk's statements, they also plead that the alleged falsity of Mr. Musk's statements is decipherable within the four corners of the merger agreement," the motion opposing class certification said.

In other words, the motion said, there would need to be individualized inquiries of each Twitter shareholder's knowledge of Musk's rights during the class period to determine who understood the terms of the merger agreement, who didn't react to Musk's statements "and who was purportedly misled."

Sophisticated investors who understood the merger agreement were the ones who established the market price of Twitter's stock, Musk asserted.

"Thus, Mr. Musk's alleged misrepresentations could not have impacted Twitter's price because any statement describing his rights was not new but was integrated into Twitter's stock price when the merger agreement was made public in April 2022 — and only 'new' information can impact stock price," the filing argued.

The statements related to the bots were not new to the market and could not have impacted the price, Musk added.

In addition, the class definition is also improperly overbroad because it includes investors who profited from the alleged deflation by buying stock during the class period, the filing contended.

In August, Judge Breyer **denied** the latest bid by Musk to escape the shareholder suit, saying Musk leaned on arguments that had already been rejected.

In his order, Judge Breyer said he had already ruled when **refusing to toss** the proposed class action in 2023 that Twitter investors plausibly alleged a securities violation as to three statements Musk made after entering into a deal to acquire the social media company.

The shareholders are represented by Aaron P. Arnzen, Francis A. Bottini Jr. and Albert Y. Chang of Bottini & Bottini Inc. and Mark C. Molumphy, Joseph W. Cotchett and Tyson C. Redenbarger of Cotchett Pitre & McCarthy LLP.

Musk is represented by Alex Spiro, Jesse A. Bernstein, Jonathan E. Feder, Michael T. Lifrak, Joseph C. Sarles, Alex Bergjans and Nathan Archibald of Quinn Emanuel Urquhart & Sullivan LLP.

The case is Giuseppe Pampena et al. v. Elon Musk, case number 3:22-cv-05937, in the U.S. District Court for the Northern District of California.

--Additional reporting by Hailey Konnath, Dorothy Atkins and Rae Ann Varona. Editing by Dave Trumbore.



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

Musk Skirts Sanctions In Missed Twitter Deposition, For Now

By **Gina Kim**

Law360 (September 27, 2024, 8:35 PM EDT) -- A California federal judge on Friday declined to sanction Elon Musk, for now, after he skipped a deposition over his \$44 billion Twitter takeover, allowing the parties to resolve the issue and advising them to wait to see if he appears for the deposition that's been rescheduled for this coming Friday.

During a videoconference, U.S. District Judge Jacqueline Scott Corley said she won't order sanctions against Musk over his failure to show up to a deposition on Sept. 10 with the U.S. Securities and Exchange Commission and instead traveling to Florida for the launch of SpaceX's Polaris Dawn mission.

The SEC wrote in a joint brief on Sept. 20 that it intended to **seek sanctions against Musk** for repeatedly skipping the interviews, arguing that Musk "has now failed to appear before the SEC twice: first in September 2023, in defiance of a lawful administrative subpoena, and last week, in defiance of a clear court order."

The court's order, issued in May, required that Musk **seek written consent** from the SEC or an order of the court to change his deposition date.

Judge Corley nonetheless pointed out that Musk did violate her court order, remarking that the parties had stipulated the deposition could be rescheduled through a court order or with permission from the SEC, neither of which happened here.

If there's an emergency, the defense could ask for a rescheduling, and they won't need a court order to get one, she said. The judge added that she'll allow Musk's team to work out the sanctions issue with the SEC to ensure his compliance with the stipulation.

Musk's counsel, Christopher Michel of Quinn Emanuel Urquhart & Sullivan LLP, promised that his client will show up on Friday for his testimony and assured the judge that she won't have to do anything else to compel his appearance.

Michel remarked that the defense has a "different view" of the court's order and whether Musk violated it but said there's no need for further discussion as the parties resolved their differences. Michel reiterated that the court's order contemplates emergencies along with the ability to seek rescheduling with consent, which he said is what happened here.

Judge Corley replied that it was clear from her order that the SEC could've been put on notice that there was a possibility Musk might be unavailable for his deposition. "It's not like all of a sudden this launch occurred and nobody had any idea," she said.

"That's what the problem is," the judge continued. She said she wanted to make the order clear that the deposition shouldn't be postponed again, due to the unavailability of Musk's other attorneys who might be engaged with different matters.

Michel assured the judge that won't be the case. He added that he spoke with co-counsel Alex Spiro, who'd ask Michel to convey to the judge his apologies for not being present during Friday's conference, as he's in New York City **representing Mayor Eric Adams** in his criminal proceedings.

Judge Corley told the SEC that she won't issue sanctions against Musk for the time being, while saying that his own lawyers didn't know that their client wasn't going to show up at the deposition earlier this month.

"I won't order them — this is an informal discovery conference," the judge said. Judge Corley said the parties could submit a joint letter if they can't come to an agreement but advised that the SEC could perhaps wait to see what happens on Oct. 3.

The SEC's Robin Andrews said the judge is correct that it was a surprise to Musk's team that he left the state and was unavailable, arguing that this wasn't the first time Musk skipped out on a deposition. Andrews added that the SEC sincerely hopes that Musk will appear next week.

Musk's attorneys showed up to San Francisco for a scheduled deposition with the SEC a year ago, only to find out two days before testimony that Musk wouldn't be coming, Andrews reminded the judge.

"That's twice within a year counsel was surprised that their client won't appear," Andrews argued, pointing out that Musk's own attorneys have no control over their client nor have any assurance of what he'll do.

Friday's hearing is the latest development in the SEC's **civil action** commenced last October demanding that Musk answer questions regarding his acquisition of Twitter stock in 2022 — the year he bought 9% of the company, and then closed a \$44 billion buyout — arguing that Musk refused to cooperate with the investigation.

Last week the parties filed a joint statement laying out their respective positions, with the SEC asking Judge Corley to "consider meaningful conditional relief" to ensure Musk will abide by her May order forcing him to testify again in the agency's case over his takeover of Twitter, now named X Corp.

"The court must make clear that Musk's gamesmanship and delay tactics must cease," the SEC said last week. Meanwhile, Musk contended that he sought to reschedule the deposition for the key Polaris Dawn spacecraft launch and argued that this latest round of testimony with the SEC wasn't urgent.

The SEC is represented in-house by Monique C. Winkler, Bernard B. Smyth and Robin Andrews.

Musk is represented by Alex Spiro and Rachel G. Frank of Quinn Emanuel Urquhart & Sullivan LLP.

The case is Securities and Exchange Commission v. Elon Musk, case number 3:23-mc-80253, in the U.S. District Court for the Northern District of California.

--Editing by Dave Trumbore.



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 Derailment Victims' Attys Get \$162M After \$600M Deal

By **Rae Ann Varona**

Law360 (September 27, 2024, 11:34 PM EDT) -- A federal judge said Friday that she signed off on a \$162 million award to attorneys for a class of residents and others affected by last year's Norfolk Southern train derailment and toxic chemical spill in East Palestine, Ohio, partly because of the "historic participation" in the \$600 million settlement.

U.S. District Judge Benita Y. Pearson in the Northern District of Ohio granted the attorney fee award on Wednesday but said in a **Friday order** explaining her reasons that what the settlement provides to households, families and local businesses alone was an "outstanding result" for settlement class members.

She also praised the court-approved notice plan for ensuring that a vast majority of the settlement class members knew about the settlement, as well as the "quick, straightforward" claims process that secures claims verification without being too burdensome on the class members.

"The success of the notice plan and claims process are reflected in the settlement's historic participation, which has to date seen over 54,000 filed claims," Judge Pearson wrote.

She said that the number of filed claims represents roughly 28.1% of the estimated class member households — almost three times what she said is typical in class action administrations.

"These unprecedented claims rates are perhaps the greatest evidence that the process ensured that a vast majority of class members would receive relief," Judge Pearson wrote.

The deal stems from **consolidated litigation** alleging harms from the Feb. 3, 2023, derailment that caused evacuations and the release of toxic chemicals. The release of **vinyl chloride** has been central to lawsuits, with plaintiffs noting the chemical's link to cancer.

The settlement, first **announced in April** and **preliminarily approved in May**, resolves all claims — including negligence, strict liability, nuisance and trespass — from residents, businesses, property owners and others within 20 miles of the derailment. The deal also resolves personal injury claims for residents within 10 miles of the derailment through a voluntary exposure settlement.

It also ends claims against co-defendant entities 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. The deal, however, does not include Norfolk Southern's third-party claims against those defendants.

Class plaintiffs had sought final approval of the settlement **earlier** this month.

Judge Pearson granted final approval of the settlement and attorney fees on **Wednesday**.

In deeming the attorney fees reasonable, Judge Pearson considered the value of the benefits rendered to the class, a factor she noted has been widely considered the most important of six factors taken from the 1974 Sixth Circuit ruling in **Ramey v. Cincinnati Equirer Inc** .

The deal provides \$600 million in non-reversionary cash. Judge Pearson commended that as a "substantial result for the people and businesses of East Palestine and the surrounding community."

She further lauded the deal for being able to provide financial relief to settlement class members before the two-year anniversary of the derailment.

But the result is "even more impressive" when compared to the total underlying value of residential property in the affected area, the judge wrote.

She said that the total value of all residential property within 1 mile of the derailment was only about \$100 million, meaning the deal recovered "six times of the entire residential value in the most affected area."

Judge Pearson said that even if the radius were extended to 5 miles, the total residential value increases to roughly \$650 million.

"The settlement therefore recovers nearly 100% of that as well," she wrote.

Extending further to a 10-mile radius, she said the settlement then recovers approximately one-fourth of the entire residential value.

"This is an excellent result for settlement class members," Judge Pearson wrote.

In a shorter order also filed Friday, Judge Pearson said that the settlement itself was "fair, reasonable, and adequate and in the best interest" of the settlement class members.

Among factors she said backed the court's determination were the "significant relief" provided to the class members; the risks of going forward with litigation, trial, and appeal; the extensive discovery already completed; and the settlement class members' "positive reactions."

The class members, she wrote, "overwhelmingly" support the deal. She said that roughly 28.1% of households located within 20 miles of the derailment filed a claim, including about 80% of homes within 2 miles of the site. She said that only 47 businesses opted out. And of the 463,271 household class members, only 370 chose to opt out, she wrote.

According to the case's docket, an interested party, the Rev. Joseph Sheely, also on Friday, filed a notice of appeal of the settlement's final approval to the Sixth Circuit.

According to the case documents, Sheely is a class member in the case and had objected to the preliminary settlement in July.

The plaintiffs are represented by M. Elizabeth Graham of Grant & Eisenhofer PA, Jayne Conroy of Simmons Hanly Conroy LLP, Seth A. Katz of Burg Simpson Eldredge Hersh & Jardine PC, Michael Morgan of Morgan & Morgan PA, Michelle L. Kranz of Zoll & Kranz LLC and 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 J. Lawson Johnston, Scott D. Clements, Aaron Ponzio 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 Joseph A. Castrodale and Meggan A. Loudon of Benesch Friedlander Coplan & Aronoff LLP.

Trinity Industries is represented by Jeffrey A. Bartolozzi of Barnes & Thornburg LLP, Ronald W. Breaux, Bradley W. Foster and Carrington M. Giammittorio of Haynes and Boone LLP, and 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.



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

Apple, Visa And Mastercard Want Out Of 'Tap Pay' Fee Suit

By **Rae Ann Varona**

Law360 (September 27, 2024, 9:16 PM EDT) -- Apple, Visa and Mastercard on Thursday urged an Illinois federal court to toss several retailers' proposed antitrust class action accusing the three of conspiring to restrain competition in point-of-sale transaction payment networks, saying in separate motions that allegedly unlawful agreements they entered "expressly preserve" Apple's right to compete.

Apple Inc. chided the retailers for asserting a "speculative and implausible theory" that the tech company entered into a conspiracy with payment card service companies that allegedly involved having Apple stay out of the payment network business. A group of retailers had accused Visa Inc. and Mastercard Inc. of offering Apple a "very large and ongoing cash bribe" in exchange for Apple's promise not to compete with them.

But Apple said in its **motion to dismiss** that the agreements "expressly preserve Apple's ability to do so."

It argued that the retailers, in making only conclusory allegations of an unlawful agreement, "simply have not pleaded a conspiracy in violation of [Section 1 of the Sherman Act]."

In a separate dismissal motion, Visa and Mastercard **similarly argued** that contracts the retailers referenced did not contain any alleged restraints. The court could review their contracts and "see that they contain none of these Alleged Restraints," they said.

"To the contrary, the Apple Pay Contracts expressly preserve Apple's right to compete with Visa and Mastercard," the companies wrote.

Beverage retailer Mirage Wine & Spirits Inc. had kicked off the antitrust suit in December, **alleging** that Visa and Mastercard were worried that Apple's Apple Pay feature on the iPhone, introduced in 2014, would drive down "lucrative" fees they've charged merchants "for decades." Mirage said Apple's iPhone had already displaced music players, cameras and GPS systems.

It alleged that instead of competing, Apple and the credit card companies, which Mirage referred to as "entrenched networks," agreed to allocate the market, with Apple agreeing not to use the iPhone to establish its own independent point-of-service or POS transaction payment network. It alleged that the three companies agreed to run Apple Pay transactions over Visa and Mastercard's networks.

Mirage further alleged that Apple agreed with the credit card companies to protect their market from competition by blocking third parties from accessing certain hardware in the iPhone that the third parties could have used to establish mobile-based payment solutions that could compete with the credit card companies. It alleged Apple had later reached similar agreements with American Express and Discover.

The retailer asserted that in exchange, the credit card companies agreed to pay Apple a portion of fees generated through their respective networks — payments Mirage said "initially amounted to hundreds of millions of dollars each year and are now worth billions of dollars each year."

Mirage was joined in an amended complaint filed in early August by Martlet Meadows Farm LLC, Foggy Bottoms Boys LLC, Familia Coffee and Parcelle LLC, which does business as Parcelle Organics.

In both motions to dismiss, Apple, Visa and Mastercard argued that the retailers lacked evidence proving any unlawful agreement, whether direct or circumstantial.

Apple argued in a redacted motion that nothing in the payment platform agreements it entered into before the Apple Pay launch reflected an anticompetitive agreement and that the plain language of provisions the retailers has characterized as direct evidence of conspiracy for Apple not to develop a payment network "confirm the exact opposite."

"No terms in the [payment platform agreements] prohibit Apple from trying to build its own independent payment network if it so chooses," Apple said.

As for any circumstantial evidence, Apple said that the retailers couldn't plausibly allege that its decision to build Apple Pay, instead of building its own payment network, was against its economic self-interest.

"There is nothing suspicious about a company's decision to build an entirely new product (Apple Pay) that did not then exist in the marketplace," the company said. "Nothing about that decision suggests Apple would have been better off if it had instead entered an entirely different line of business already occupied by several long-established payment networks — especially where, as Plaintiffs admit, doing so would be an extremely costly, time-consuming, and difficult endeavor."

To the retailers' contention that Visa and Mastercard "bribed" Apple, it said such an assertion did not make the conspiracy allegation any more plausible.

Visa and Mastercard similarly argued in their motion that the retailers plead no communications, meetings or other facts that could serve as circumstantial evidence.

To the "cash bribe" allegation, they said that the contracts show that they don't pay the fees but that payment-card issuing banks do. They argued that the retailers failed to plead facts supporting an inference that those fees were anything other than "ordinary compensation by issuers to Apple in exchange for Apple providing access to Apple's iPhone ecosystem.

"Plaintiffs' claim that Defendants agreed to the Alleged Restraints is supported by nothing more than bald, conclusory assertions that are directly contradicted by the Apple Pay Contracts," Visa and Mastercard said.

Counsel for the retailers declined to comment. Counsel for Apple, Mastercard and Visa did not immediately respond to requests for comment on Friday.

The retailers are represented by Stephen M. Tillery, Christopher M. Burke, Walter W. Noss, Yifan (Kate) Lv and Marc Wallenstein of Korein Tillery LLC, by K. Craig Wildfang, Thomas J. Undlin, Stacey P. Slaughter, Ryan R. Marth, Geoffrey H. Kozen, Navy A. Thompson and Caitlin E. Keiper of Robins Kaplan LLP, by David R. Scott, Patrick J. McGahan, Carmen Medici and Sean Russell of Scott + Scott Attorneys at Law LLP, by Amelia F. Burroughs of Burroughs Legal, by Jennifer W. Sprengel, Daniel O. Herrera and Kaitlin Naughton of Cafferty Clobes Meriwether & Sprengel LLP, and by Michelle J. Looby and Abou B. Amara Jr. of Gustafson Gluek PLLC.

Apple is represented by Belinda S. Lee, Sarah M. Ray, Ashley M. Bauer, Aaron T. Chiu, Alicia R. Jovais and Gary Feinerman of Latham & Watkins LLP.

Visa is represented by Michael S. Shuster, Demian A. Ordway and Zachary A. Kerner of Holwell Shuster & Goldberg LLP, and by Robert J. Vizas, Anne P. Davis, Matthew A. Eisenstein, Valerie Hays and Nicholas Zebrowski of Arnold & Porter Kaye Scholer LLP.

Mastercard is represented by Brette Tannenbaum, Nina Kovalenko, Gary R. Carney, Kenneth A. Gallo and Donna M. Ioffredo of Paul Weiss Rifkind Wharton & Garrison LLP.

The case is *Mirage Wine + Spirits Inc. v. Apple Inc. et al.*, case number 3:23-cv-03942, in the U.S. District Court for the Southern District of Illinois.



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

Claims Trimmed In Delaware Jeep Hybrid Defect Class Action

By **Mike Curley**

Law360 (September 27, 2024, 10:02 PM EDT) -- A Delaware federal judge threw out a number of claims Friday from a proposed class action against automaker FCA US LLC alleging it sold Jeep Wrangler and Grand Cherokee plug-in hybrid vehicles with a defective feature that renders electric driving unavailable, adopting the bulk of a magistrate judge's report filed in July.

In the **memorandum opinion**, U.S. District Judge Maryellen Noreika rejected only one recommendation from the report and recommendations from U.S. Magistrate Judge Sherry R. Fallon, agreeing to dismiss equitable relief claims under California's Unfair Competition Law, or UCL, as the proposed class, led by named plaintiff Jesse Crowell, did not plead they lack an adequate remedy under the state's Consumer Legal Remedies Act.

In the suit, the proposed class alleges that model year 2021–23 Wranglers and 2022–23 Grand Cherokees have a defective "Fuel and Oil Refresh Mode," or FORM, which when active renders electric-only and electric-assisted driving unavailable.

They allege that while the owner's manual said it may take up to 20 minutes for the vehicles to warm up and exit FORM in cold weather, they instead remain in FORM for months instead of minutes during cold weather.

FCA, now part of auto giant Stellantis NV, moved to dismiss, and in July, Judge Fallon released her report and recommendations, recommending that the motion be granted for fraud, breach of express warranty and violations of the Wisconsin Deceptive Trade Practices Act, as well as various consumer protection act claims premised on affirmative misrepresentations.

The report however recommended denying the motion in regard to claims for common law fraud by omission, equitable injunctive and declaratory relief under Maryland law, common law breach of implied warranty, unjust enrichment, breach of implied warranty under Georgia, Ohio and Pennsylvania law, and state consumer protection law claims premised on omissions. FCA filed objections to the report's denial recommendations, according to court documents.

In Friday's opinion, Judge Noreika agreed with the report that the fraud by omission-based claims fit a more "relaxed" standard, given that the complaint alleges the factual information about the FORM system's defect was solely within FCA's control.

While FCA argued that omission claims regarding the 2022 or later vehicles should be dismissed because it updated the owner's manual, the judge wrote that the complaint alleges that the manuals still do not disclose the full extent of the defect and that information was withheld even after the update.

And while FCA argued that the judge should examine each individual factor the plaintiffs pleaded regarding presale knowledge, Judge Noreika wrote that courts consider the totality of allegations and, taken together, allegations referring to technical service bulletins, consumer complaints, changes to the manual and other information sufficiently allege that FCA was aware of the defect before it sold the vehicles to the plaintiffs.

The judge further agreed with the report that FCA had a duty to disclose the defect as it had superior knowledge about the alleged defect, and she said defect was material information to purchasers.

Judge Noreika also declined to dismiss fraud-based claims in California, Colorado, Maryland, Michigan, Nebraska, New Hampshire, New York, Georgia, Ohio, Oregon, Pennsylvania and Wisconsin based on the economic loss doctrine, saying the issue hasn't been adequately briefed on each state's application of the doctrine.

The judge also declined to dismiss the claim for injunctive relief under the Georgia Uniform Deceptive Trade Practices Act, saying the plaintiffs have adequately pleaded ongoing harm in connection to service of their vehicles.

FCA had also asked the court to dismiss the Oregon Unlawful Trade Practices Act claims from plaintiff Michael Lindgren as time-barred, as he bought his vehicle on July 13, 2021, and the suit wasn't filed until January 2023, after the one-year statute of limitations, but the judge wrote that there is a dispute as to when he discovered the alleged defect, which would allow his claims to be tolled.

As to the California state-law claims, Judge Noreika disagreed with Judge Fallon's report regarding the UCL claims, saying a plaintiff can't maintain an equitable claim under the UCL if they have an adequate legal remedy under the Consumer Legal Remedies Act, and the plaintiffs here did not plead that they lack an adequate legal remedy.

Equitable and injunctive relief under other state law claims can go forward, however, as Judge Noreika found they can be pled in the alternative, and specific to the Maryland state law claims, the plaintiffs alleged that the Maryland subclass would be irreparably harmed without an order directing FCA to offer rescission and repurchase the vehicles at full cost.

Judge Noreika also agreed with Judge Fallon's recommendation that the breach of implied warranty claims could proceed, saying that the vehicles are not fit for their intended purpose if they cannot function in the electric-only or electric-assisted driving modes or if they carry the safety risks alleged in the complaint.

The judge also overruled FCA's objection that it lacked presuit notice under Georgia and Pennsylvania law, saying that is a question of fact and can't be decided at this stage. FCA had also objected that there was no privity to support the implied warranty claims under Georgia law, but Judge Noreika wrote that the state considers privity of contract to exist if there is an express warranty, and the plaintiffs do allege FCA extended an express warranty.

Finally, Judge Noreika adopted the recommendation to allow nationwide allegations to go forward, saying that FCA's objections are better suited to the class certification stage.

Representatives for the parties could not immediately be reached for comment Friday.

The plaintiffs are represented by Peter Bradford deLeeuw of deLeeuw Law LLC; Dan E. Gustafson and David A. Goodwin of Gustafson Gluek PLLC; Nicholas A. Migliaccio, Jason S. Rathod and Mark D. Patronella of Migliaccio & Rathod LLP; Scott David Hirsch of Scott Hirsch Law Group PLLC; Gretchen Freeman Cappio and Ryan McDevitt of Keller Rohrbach LLP; and E. Powell Miller, Sharon S. Almonrode and Dennis A. Lienhardt of The Miller Law Firm PC.

FCA is represented by Patrick M. Brannigan and Jessica L. Reno of Eckert Seamans Cherin & Mellott LLC and Stephen A. D'Aunoy and Scott H. Morgan of Klein Thomas Lee & Fresard.

The case is *Crowell et al. v. FCA US LLC*, case number 1:23-cv-00013, in the U.S. District Court for the District of Delaware.

--Editing by Andrew Cohen.

Sick Juror Goes Virtual To Keep Cognizant Trial On Track

By **Craig Clough**

Law360 (September 27, 2024, 10:03 PM EDT) -- A California federal judge proposed an "outside the box" idea Friday after a juror in a trial considering allegations that Cognizant Technologies is biased in favor of Indian workers came down with COVID-19, allowing the juror to view the proceedings from home via video.



A juror was able to view proceedings remotely of the trial in a race discrimination case against Cognizant Technologies after she tested positive for COVID-19. (iStockPhoto/Rawf8)

A spokesperson for the Central District of California told Law360 he is unaware of a juror or jury ever participating in a trial virtually in the district before, but said that if it had occurred before it was rare.

The case already resulted in one **mistrial in 2023** when the first jury deadlocked. The current trial began with eight jurors but already lost one earlier in the week to a non-COVID issue, so losing another would leave the court with six, which is the fewest allowed.

After learning of the juror's illness, Cognizant counsel Richard J. Doren of Gibson Dunn & Crutcher LLP proposed taking the day off to give the juror time to recover and cut down the chance that if another juror is already infected, the virus would continue to spread among the jurors.

But after an attorney for the workers told U.S. District Judge Dolly Gee his side preferred to proceed that day with six jurors, and also expressed concern that taking the day off would affect the availability of later witnesses, Judge Gee proposed a solution.

"I'm thinking outside the box at the moment, but what if we ask juror number seven if she could listen to the evidence virtually?" Judge Gee said.

After both sides agreed, Judge Gee said that if the juror was not fully recovered by Monday the court may be able to continue with the virtual setup to keep the trial on track, which **began on Tuesday** with an estimated 10-day length.

"I can tell you that I once had a trial where I was the only person who fell ill from COVID, and I was the only person presiding over the trial virtually, and it worked beautifully because I could cough and mute myself at the same time," Judge Gee, chief judge of the Central District, told the attorneys.

The U.S. Centers for Disease Control and Prevention recommends people with COVID-19 isolate themselves until they have gone 24 hours with improving symptoms and no fever, and for the following five days to avoid being around people and wear a well-fitting mask.

The World Health Organization recommends isolating for 10 days from the onset of symptoms.

Doren did say that his side stipulated to the setup for the single juror but would need to reconsider if more than one juror tested positive and the trial could only proceed with a "hybrid" jury.

It took court staff about an hour to get the videoconference set up to allow the virtual juror to view the evidence and the witnesses at the same time, but the rest of the court day proceeded without technical holdups.

Judge Gee's clerk did not respond to a question asking if the judge is aware of a virtual juror ever being used before in the district.

Although **virtual bench trials** occurred early in the COVID-19 pandemic, and remote hearings and remote appearances by witnesses have become common, the use of virtual jurors for a federal trial appears to be rare.

The country's first federal videoconference **patent trial** occurred in **Washington federal court** in early 2021, with jurors and all parties tuning in remotely for proceedings that resulted in the jury finding Valve Corp. willfully infringed a patent of Ironburg Inventions Ltd. and awarding \$4 million.

In the Southern District of New York, **some accommodations** were made early in the pandemic for grand juries to convene remotely, but virtual jury trials were never approved.

Some state-level virtual trials have occurred. The nation's **first trial with remote jurors** came in August 2020 in Florida and resulted in a \$354,000 award for a strip club dancer who said she was beaten by the club's bouncers.

As in the first trial, the jury in the Cognizant retrial will decide whether Cognizant engaged in a pattern of discrimination, but any compensatory or punitive damages would be decided at a second phase.

According to the suit, Cognizant, which has more than 40,000 employees in the U.S., contracts with companies to provide information technology services. Once it signs a contract with a client, it fills jobs to serve that client using internal and external candidates.

When a task ends or employees are removed from an assignment, the employees are "benched," the workers say. Cognizant terminates employees who have been on the bench for more than five weeks and haven't been reassigned, according to the suit.

The workers say non-South Asians and non-Indian employees are disproportionately relegated to the bench, or they're abruptly pushed out of projects that are reassigned to South Asian employees. The workers also claim that the company has a policy of favoring South Asian and Indian employees for whom it has secured H-1B visas.

The class period spans Sept. 8, 2013, through Oct. 27, 2022.

The trial resumed Friday with Doren completing his cross-examination of Ronil Hira, a Howard University associate professor who **testified Thursday** as an expert witness for the class and gave his opinion that

Cognizant has a cultural preference for Indian nationals.

Jean-Claude Franchitti also testified on Friday. He is a French national and an associate professor of computer science at New York University, and said he worked at Cognizant starting in 2007 and was fired in 2016 when he raised concerns that included the purported bias toward South Asian and Indian workers. He also **testified at the previous trial**.

Franchitti is **being sued by Cognizant** in New Jersey federal court alleging he breached his employment contract by obtaining confidential data after leaving the company. Franchitti also filed a **whistleblower action** against Cognizant in New Jersey federal court in August 2017 alleging the company defrauded the work visa program. That action is also pending.

Michele L. Maryott of Gibson Dunn cross-examined Franchitti and sought to show that his issues with Cognizant are not relevant to the case, as he said he was never placed on the company's bench and was not terminated while on the bench.

Class representative Vartan Piroumian also testified, and said that he was fired from the bench in 2017 after working there since 2012. Piroumian **testified at the previous trial** and is also a co-defendant along with Franchitti in the suit filed by Cognizant.

Piroumian, who is white, on Friday said that he believed he was discriminated against while at Cognizant by being excluded from meetings and functions.

"I felt unwanted, like they didn't want me there," Piroumian said.

Piroumian was undergoing cross-examination when the proceedings ended for the day.

The class is represented by Daniel Low, Daniel Kotchen and Lindsey Grunert of Kotchen & Low LLP.

Cognizant is represented by Karl G. Nelson, Theodore J. Boutrous Jr., Richard J. Doren, Katherine V.A. Smith, Lauren M. Blas, Michele L. Maryott, Elizabeth A. Dooley and Matthew T. Sessions of Gibson Dunn & Crutcher LLP.

The case is Christy Palmer et al. v. Cognizant Technology Solutions Corp. et al., case number 2:17-cv-06848, in the U.S. District Court for the Central District of California.

--Additional reporting by Daniel Siegal, Cara Salvatore and Pete Brush. Editing by Brian Baresch.



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

Ex-CEO To Pay SEC Fine For Pre-SPAC Disclosure Failures

By **Sydney Price**

Law360 (September 27, 2024, 9:08 PM EDT) -- The U.S. Securities and Exchange Commission announced Friday it has reached a settlement with the former CEO of an electric vehicle battery company who allegedly concealed its supply chain issues ahead of its merger with a blank check company, leading to a nearly 20% drop in the company's share price once the shortage was revealed.

According to the SEC's complaint, also filed on Friday in California federal court, Lionel Selwood Jr. created an "unrealistic and misleading" depiction of Romeo Systems' ability to manufacture batteries and meet its revenue targets as CEO for several months in 2020. By October 2020, Selwood projected that Romeo Power — the post-merger combined entity — would generate \$139 million in revenue in 2021, a figure the SEC said Selwood knew or should have known would be virtually impossible to obtain.

Without admitting or denying wrongdoing, Selwood has agreed to pay a \$150,000 civil penalty and to refrain from serving as an officer or director of a publicly traded company for three years. The settlement is subject to court approval.

The SEC alleges that in the months leading up to Romeo System's October 2020 merger with special purpose acquisition company RMG Acquisition Corp., Selwood received "substantial and reliable" information concerning the deteriorating market for cells, suppliers' inability to provide cells to the company and the eventual shortage.

"Selwood failed to act as a reasonable person would under the circumstances," the SEC said. "The registration and proxy statement stated that Romeo's financial condition and business 'could' be harmed by its suppliers' inability to provide cells or a cell shortage, when in fact, Selwood had substantial, reliable information that this was already happening."

Prior to the close of the merger, Selwood learned of serious problems affecting Romeo's suppliers that would prohibit it from delivering the volume of cells Romeo needed to meet its 2021 revenue projections, the SEC said.

For example, on Sep. 21, 2020, Romeo Systems' chief financial officer raised a potential supply issue in an email chain involving Selwood, according to the complaint. Another high-level employee in the email chain noted increased competition for a supplier's cells and another supplier's confirmation that it would not be able to supply the cells Romeo needed for its largest customer in 2021 and 2022, according to the SEC.

After the merger closed in January 2021, Selwood received even more information regarding the cell shortage and the suppliers' inability to provide cells to Romeo, the SEC alleges.

The market learned that Romeo would not meet its financial projections on March 21, 2021, when the company announced it was revising its 2021 revenue expectations downward from \$139 million to a range of \$18 million to \$40 million, according to the complaint. Selwood also disclosed that Romeo was "making material updates to our production and revenue outlook for 2021" and that "the impact to [Romeo's] ability to generate revenue in 2021 is significant," the complaint states.

On this news, Romeo's share price declined \$2.04 per share, or approximately 20%, to close at \$8.33.

The SEC did not immediately respond to a request for comment on Friday.

The SEC is represented in-house by Ruth C. Pinkel.

Counsel information for Selwood was not immediately available on Friday.

The case is Securities and Exchange Commission v. Selwood Jr., case number 2:24-cv-08336, in the U.S. District Court for the Central District of California.

--Editing by Vaqas Asghar.

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



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

FTX Users Say Binance Manipulated Market To Spark Collapse

By **Aislinn Keely**

Law360 (September 27, 2024, 9:18 PM EDT) -- Users of the now-defunct cryptocurrency exchange FTX told a Florida federal judge that social media posts by competing exchange Binance still manipulated markets to cause the collapse of FTX and harm users even if the statements themselves weren't false.

FTX users told the Florida federal court on Thursday that Binance shouldn't escape securities claims in the multidistrict litigation despite former Binance CEO Changpeng Zhao's arguments that the statements he posted in the run-up to FTX's collapse were truthful.

According to the FTX users, Zhao and Binance owned a 20% stake in FTX's proprietary token FTT and "used that leverage to create a run on FTX in violation of securities laws" when Zhao announced on the social platform X that the firm planned to sell its holdings in the days before FTX suffered a catastrophic liquidity shortage.

"The facts and circumstances here are akin to a pump and dump situation, with the variation that the dumping involved was of a competitor's equity," the FTX users said.

Binance and Zhao argued in **their motion to dismiss** that the FTX users, led by plaintiff Nir Lahav, were wrongly attempting to recoup their frozen funds from Binance when FTX was ultimately brought down by the misappropriation of customer funds by its own executives, including FTX CEO Sam Bankman-Fried, who was sentenced to 25 years over the conduct. Though Zhao posted about selling Binance's stake in FTT and shared that it was in talks to acquire FTX only to walk away from the deal, those statements were "truthful," Zhao and Binance argued.

However, Lahav said Thursday that securities violations don't require a false statement, noting that the statute says a violation can result from misleading representations or market manipulation. Binance's narrative ignores "the massive amount of related evidence and pleadings that place those tweets into the unique context in which they were made," Lahav argued.

"Binance timed their offload of FTX equity with public disclosures to ensure maximum damage to FTX," Lahav said. "The public disclosures were made after successfully pocketing the proceeds at a high value, and then plummeting FTX into bankruptcy."

Though Zhao and Binance have also argued they're beyond the court's reach, Lahav said Zhao's tweets "targeted, at least in part, cryptocurrency users and, thus, FTX customers in the United States."

Furthermore, Lahav said Binance's stateside entity Binance.US, also named a defendant, is enough to link Zhao and Binance itself to the U.S. since Zhao allegedly maintained an 80% share in the U.S. arm. Binance.US has long maintained its business is separate from Binance, and the firm argued in its own motion to dismiss that it had no role in Zhao's posts. However, Lahav reiterated Thursday that Zhao's alleged control of both entities is enough to tie Binance.US to the case.

Binance's former CEO just completed **a four-month sentence** for failing to implement an effective anti-money laundering program at the firm. His guilty plea and resignation were part of **a \$4.3 billion settlement** between Binance, the U.S. Department of Justice and other federal agencies to resolve the alleged compliance failures.

Lahav's proposed class action against Zhao and the Binance businesses was consolidated into the multidistrict litigation over FTX's collapse, which addresses claims against **executives**, **promoters** and **others** who did business with FTX for their alleged roles in enabling the fraud that preceded its downfall.

Counsel for Binance and Lahav did not immediately respond to a request for comment Friday.

Lahav is represented by Deepali A. Brahmbhatt and Timothy Devlin of Devlin Law Firm LLC.

Zhao and Binance Holdings Ltd. are represented by Samson A. Enzer, Herbert S. Washer, Tammy L. Roy and Miles C. Wiley of Cahill Gordon & Reindel LLP.

Binance is additionally represented by Aaron S. Weiss, Benjamin M. Stoll and John L. Gibbons of Carlton Fields PA.

BAM Trading Services Inc. and BAM Management US Holdings Inc. are represented by Daniel T. Stabile, Gabriela A. Plasencia, Jeffrey L. Steinfeld and Thania Charmani of Winston & Strawn LLP.

The MDL case is In re: FTX Cryptocurrency Exchange Collapse Litigation, case number 1:23-md-03076, in the U.S. District Court for the Southern District of Florida. The class action is Nir Lahav v. Binance Holdings Ltd. et al., case number 4:23-cv-05038, in the U.S. District Court for the Northern District of California.

--Editing by Drashti Mehta.

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



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

Early Trump Media Backer Dumps Shares As Lockup Expires

By **Tom Zanki**

Law360 (September 27, 2024, 7:13 PM EDT) -- An early investor in former President Donald Trump's social media platform has unloaded most of its stake, marking the first divestiture following the expiration of a lockup period that restricted sales after Trump's entity went public earlier this year.

United Atlantic Ventures LLC now beneficially owns 100 shares of Trump Media & Technology Group Corp., according to a U.S. Securities and Commission filing late Thursday. The new total is down from 7.525 million shares that UAV owned in the parent of Trump's Truth Social platform after the business **went public** on March 25 following a merger with a special purpose acquisition company, the filing shows.

UAV's ownership total disclosed in March amounted to a 5.5% stake in Trump Media. A more recent SEC filing in August reported that UAV owned 10.97 million shares in Trump Media.

The latest SEC filing did not disclose how much UAV made from its sale, though Trump Media closed at \$13.98 per share on Thursday, meaning that the value of UAV's stake would have surpassed \$100 million in value.

UAV's managing member is Andrew Litinsky, who in 2004 appeared on "The Apprentice," a reality TV show that was hosted by Trump.

The filing comes as backers of Trump's company are free to sell shares following the expiration of a six-month lockup period after it began trading. Lockups are designed to prevent heavy selling that could sink a company's stock price shortly after it goes public.

Trump Media's biggest investor is Trump himself, who owns a nearly 57% stake in the company, or 114.75 million shares, which are worth about \$1.7 billion based on Friday's closing stock price of \$14.55. Trump recently posted on Truth Social that he has no intention of selling shares, saying that he supports the company.

Trump Media's stock has swung wildly since the company went public, surpassing \$66 in April. Shares then declined steadily, especially in recent weeks leading to the lockup expiration on Sept. 19, though the stock has rallied since Sept. 23.

The stock's volatility persists as Trump Media has yet to turn consistent profits, and reports scant revenue compared with social media heavyweights like X, formerly Twitter.

UAV is a partnership consisting of Litinsky and Wes Moss, who co-founded the social media company with Trump in 2021 and were key backers on Trump Media's path to a public listing.

ARC Global Investments II LLC, a backer of Digital World Acquisition Corp., the SPAC that acquired and took Trump's platform public, also owns a sizable stake in Trump Media. ARC owns 11 million shares, or 5% of the company, according to an August SEC filing.

Trump's relations with ARC, backed by Digital World's first CEO, Partick Orlando, and UAV have recently frayed as the parties **engaged in legal disputes** regarding their stakes in the publicly listed company following its merger with Digital World.

SPACs, also known as blank check companies, are shell vehicles that raise money through a public offering and then use the funds to take a private company public, providing an alternative to a traditional initial public offering.

But SPACs in general have spotty histories, as many acquisition targets have performed poorly after going public. Several post-merger targets have **filed for bankruptcy** in recent years. The SEC in July **enacted stricter rules** governing SPACs, purportedly to place investor protections on par with traditional IPOs.

Representatives for Trump Media did not immediately respond to a request for comment.

Shares of Trump Media rose 77 cents on Friday to close at \$14.75, an increase of 5.5%.

--Editing by Alanna Weissman.

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