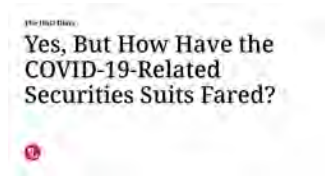


Yes, But How Have the COVID-19-Related Securities Suits Fared?

K [dandodiary.com/2024/10/articles/coronavirus/yes-but-how-have-the-covid-19-related-securities-suits-fared](https://www.dandodiary.com/2024/10/articles/coronavirus/yes-but-how-have-the-covid-19-related-securities-suits-fared/)

October 2, 2024



By Kevin LaCroix on October 2, 2024
Posted in Coronavirus



As readers know, since the initial outbreak of COVID-19 in the U.S. in March 2020, plaintiffs' lawsuits have hit dozens of companies with pandemic-related securities suits; indeed, even though we are now well into the fifth year since the outbreak, plaintiffs' lawyers continue to file COVID-related securities suits. But while these kinds of suits have proven to be popular with plaintiffs' lawyers, how have they fared? Recent developments in two of these COVID-related securities suits underscore the fact that the results in these cases have been mixed.

Peloton

The securities class action lawsuit filed in November 2021 against exercise equipment company Peloton and certain of its directors and officers in its own way exemplified a separate category of COVID-related securities suits. This category of cases, and the Peloton suit itself, involve companies whose fortunes soared at the outbreak of the pandemic but whose results later flagged as pandemic conditions changed. The plaintiffs' initial securities suit complaint against Peloton was based upon the company's alleged misrepresentations about the company's ability to sustain its pandemic-related sales boost.

As discussed here, in March 2023, Southern District of New York Judge Andrew L. Carter Jr. granted the defendants' motion to dismiss the Peloton complaint without prejudice. Among other things, Judge Carter found that several of the allegedly misleading statements on which the plaintiffs sought to rely were forward-looking and accompanied by meaningful precautionary language, and therefore came with the safe harbor for forward-looking statements. Judge Carter found that other statements on which the plaintiffs sought to rely were "inactionable corporate puffery." Finally, Judge Carter found with respect to certain other statements that the plaintiffs had not sufficiently alleged that the challenged statements were false.

While granting the dismissal motion, Judge Carter also allowed plaintiffs leave to seek to file an amended complaint, which the plaintiffs subsequently did. The defendants then renewed their motion to dismiss.

In order dated September 30, 2024, Judge Carter granted the defendants' renewed motion to dismiss, this time with prejudice. Judge Carter again found that the forward-looking statements on which the plaintiffs sought to rely were accompanied by meaningful cautionary language, observing that the disclosures sufficiently warned investors of the uncertainty of future subscriber growth. Judge Carter found with respect to two additional statements on which the plaintiffs sought to rely in their amended complaint that no reasonable investor could have been misled by these statements because "they were, in fact, true." Judge Carter found that the plaintiffs had failed to plead any actionable statements or omissions.

Talis Biomedical

If the lawsuit against Peloton represented one kind of COVID-related securities suit, then the securities lawsuit filed in January 2022 against Talis Biomedical Corporation represented another – that is, lawsuits against vaccine development or diagnostic testing companies whose fortunes soared after the companies announced they had products or services that would be beneficial in responding to the pandemic, but whose fortunes flagged when the companies failed to fulfill their pandemic related promise.

Talis develops diagnostic tests for infectious diseases. Talis completed an IPO in February 2021. At the time of the IPO, the company had a request for Emergency Use Authorization (EUA) for its COVID-related diagnostic test. In March 2021, just after its IPO, the company withdrew its EUA request and implemented an updated validation testing timeline. The company's share price declined. In a series of subsequent statements, the company further lengthened its validation testing timeline; at each additional statement, the company's share price declined further. As discussed here, plaintiffs' lawyers filed a securities suit in January 2022. The defendants moved to dismiss the complaint.

As discussed here, in December 2022, Northern District of California Judge Susan Illston granted the defendants' motion to dismiss the complaint, albeit without prejudice. She found that the allegedly misleading pre-IPO statements were based on confidential witness statements that were conclusory, vague, or based on hearsay or rumors. With respect to the allegedly misleading post-IPO statements, Judge Illston found that the plaintiffs had failed to sufficiently allege that the statements were false when made. Judge Illston granted the plaintiffs lead to file an amended complaint, which they subsequently did. The defendants renewed their dismissal motion.

In a brief April 2023 order (here), Judge Illston found that the plaintiffs' revised allegations plausibly alleged that the IPO documents contained false and misleading statements, as the amended complaint alleges with specificity why the challenged statements were false when made. Earlier this year, Judge Illston granted the plaintiffs' motion for class certification.

On an October 1, 2024, joint filing (here), the parties to the Talis Biomedical securities lawsuit petitioned the court for approval of their agreement to settle the action for \$32.5 million. In seeking judicial approval, the parties' noted the company's declining financial state, as well as the rapidly diminishing amount of D&O insurance remaining. According to a Law360 article about the settlement, of the \$32.5 million settlement amount, \$27.5 million is to come from the company and \$5 million is to come from D&O insurance.

Discussion

The dismissal motion grant in the Peloton case is not unusual; dismissal motions have been granted in a significant number of the COVID-related securities suits – although it is worth noting that the dismissal motion had initially been granted in the Talis Biomedical case, but the subsequent amended complaint managed to survive the dismissal motion.

The settlement in the Talis case is substantial and noteworthy. It seems that while many COVID-related securities suits, like the one filed against Peloton, have not fared particularly well, the cases against one class of litigants does seem to have fared better. There have been a number of significant settlements of COVID-related cases filed against diagnostic testing and vaccine development companies. These cases typically alleged that the diagnostic testing or vaccine development company was positioned to profit from the pandemic, leading to a share price increase, followed by a share price decline with the promised prosperity failed to materialize. Several of these kinds of cases, including among others the one filed against Talis, resulted in significant settlements.

Among other settlements of cases of this type, in December 2023, the parties to the COVID-related securities suit filed against vaccine development company Novavax announced that the case had settled for \$47 million. (As discussed here, the Novavax lawsuit survived the defendants' dismissal motion.) Similarly, securities lawsuit filed against vaccine development company settled for \$12.015 million. Diagnostic testing company Chembio settled its COVID-related securities lawsuit for \$8.1 million. Readers are encouraged to point out to me any other related settlements that I may have missed.

The bottom line on the COVID related litigation is that it has been a mixed bag. Many of the cases have been dismissed, with a smaller number surviving the dismissal motion stage and moving on to the settlement stage. All of that said, the plaintiffs' lawyers appear to remain interested in these kinds of lawsuits as they continue to file them, even at this late date.

Biogen and its investors both want US appeals court to clarify class certification

 [reuters.com/legal/government/column-biogen-its-investors-both-want-us-appeals-court-clarify-class-2024-10-02](https://www.reuters.com/legal/government/column-biogen-its-investors-both-want-us-appeals-court-clarify-class-2024-10-02)

Alison Frankel

A sign marks a Biogen facility in Cambridge, Massachusetts, U.S. January 26, 2017.

REUTERS/Brian Snyder/File Photo Purchase Licensing Rights , opens new tab

Oct 2 (Reuters) - In a rare – and possibly unique – turn of events, both pharmacy company Biogen (BIIB.O) , opens new tab and its shareholders have asked a federal appeals court to grant mid-case review of a trial court decision certifying investors to bring class wide fraud claims.

Both sides contend that U.S. District Judge William Young of Boston misapplied the U.S. Supreme Court's 2021 precedent , opens new tab from Goldman Sachs v. Arkansas Teachers Retirement System when he agreed on Sept. 5 to allow shareholders to band together to litigate their fraud claims. And both told the 1st U.S. Circuit Court of Appeals that companies and investors desperately need appellate guidance on how to interpret the Supreme Court's instructions in the Goldman Sachs case.

Here's some background on these dueling petitions. Young initially tossed the investors' case in 2023, but revived , opens new tab it in March 2024 after shareholder lawyers cited a Congressional report on the U.S. Food and Drug Administration's unusual approval process for Biogen's controversial Alzheimer's drug Aduhelm.

Young allowed investors to proceed only with allegations that Biogen executives deceived the market when they said in June 2021 that Medicare coverage "is automatically presumed" after the FDA's approval of Aduhelm.

According to shareholders, that was a lie: Biogen, they assert, knew at the time of those statements that Medicare would almost surely refuse to cover the cost of the medication for all Alzheimer's patients.

Biogen, on the other hand, contends that the market already expected Medicare to conduct a special review to determine the scope of coverage it would provide for the medication. According to Biogen, investors cannot claim to have been defrauded by allegedly false statements about presumptive Medicare coverage because doubts about the scope of coverage were already baked into the company's share price.

Young certified a shareholder class in a docket-entry order on Sept. 5. He did not issue any accompanying opinion to explain his reasoning.

The judge's order significantly shortened the class period proposed by investors' lawyers at Block & Leviton.

The shareholder firm alleged that Biogen's fraud was not fully revealed until January 2022, when Biogen's share price fell by nearly 7% in response to the government's announcement that Medicare would provide Aduhelm coverage only to a narrow set of patients. Biogen's lawyers at Skadden countered that Medicare's announcement of a special review in July 2021 put investors on full notice of the risk of narrowed coverage.

Young apparently agreed, ruling that the class period would end on the date of the Medicare announcement, not on the January 2022 date proposed by shareholders.

The judge's order gave both sides something to complain about.

In its petition [opens new tab](#) for review by the 1st Circuit, Biogen argued that Young should not have certified the investor class at all because the alleged misstatements did not affect its share price. Under Goldman precedent, Biogen said, it succeeded in rebutting the presumption of market reliance by showing that the purported misstatements had no price impact.

Biogen urged the appeals court to grant review to remind trial judges that Goldman precedent leaves no room for them to ignore or postpone consideration of the link between allegedly false statements and share price, even if that consideration overlaps with questions about the merits of investors' claims.

"The Supreme Court's recent decision in Goldman Sachs affirmatively requires that a court confront the price impact question on a motion for class certification," Biogen said. "If alleged misstatements had no price impact, a class cannot be certified."

Shareholder lawyers at Block & Leviton, meanwhile, asked [opens new tab](#) the 1st Circuit to review Young's redefinition of the class period.

Like Biogen, shareholders said the trial judge misread Goldman. But they argued that Young gave too much consideration to price impact, not too little. According to Block & Leviton, once the judge concluded that the alleged misrepresentations affected Biogen's share price – as he clearly did, or he could not have certified the class – Young erred by apparently delving into the merits of shareholders' allegations to conclude that the price impact dissipated after Medicare's announcement of a review.

Shareholders told the 1st Circuit that under Goldman precedent, price impact must be a binary question at the class certification stage of securities class actions: Either alleged misstatements affected the share price or had no price impact.

Any refinement of the class period, Block & Leviton said, should instead be considered at the dismissal or summary judgment stages.

Goldman precedent does not give trial judges license for a roving examination of the market impact of allegedly fraudulent statements throughout the class period, the shareholder petition said. "Any such inquiry misunderstands the concept of 'price impact' and corrupts class certification into a merits-stage determination," argued Block & Leviton.

Both sides filed their answers to the other side's petition this week. Biogen argued [\[link\]](#), opens new tab that price impact is not a binary question when it comes to class certification. Trial judges are supposed to define the classes they are certifying, Biogen said, not simply adopt shareholders' class definition.

Shareholder lawyers at Block & Leviton urged [\[link\]](#), opens new tab the 1st Circuit to grant both petitions. The case, shareholders said, is an excellent vehicle for the appeals court to clarify that the Supreme Court's Goldman precedent did not fundamentally change "the class certification analysis of price impact."

Neither Biogen nor its lawyers at Skadden responded to my email query on the dueling 1st Circuit petitions. Biogen, incidentally, ended a post-approval study of Aduhelm in January 2024. It took a \$60 million charge in the fourth quarter of 2023 to reflect its decision to end the study and cease sales efforts for the drug.

Shareholder lawyer Jacob Walker of Block & Leviton said in an email statement that trial courts need clarity on Goldman's application.

"Defendants across the country have been trying to use the Supreme Court's decision in Goldman to improperly shoehorn the merits issues of loss causation and materiality into the concept of 'price impact,' under the mistaken premise that Goldman upended a decade of straightforward precedent," Walker said. "We hope the 1st Circuit addresses this trend."

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Reporting By Alison Frankel

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Alison Frankel
Thomson Reuters

Alison Frankel has covered high-stakes commercial litigation as a columnist for Reuters since 2011. A Dartmouth college graduate, she has worked as a journalist in New York covering the legal industry and the law for more than three decades. Before joining Reuters,

eXp Board Sued Over Sex Assaults at Booze-Fueled Company Parties

By Mike Leonard

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-0998](#)

Bloomberg Law News 2024-10-03T10:38:08237628419-04:00

eXp Board Sued Over Sex Assaults at Booze-Fueled Company Parties

By Mike Leonard 2024-10-02T13:19:32000-04:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** No. 2024-0998

eXp World Holdings Inc. senior leaders turned a blind eye while some of its top “influencers” drugged and raped real estate agents at alcohol-soaked company events, according to an unsealed lawsuit.

Two pension funds are suing board members and top executives of the online brokerage, saying they schemed to cover up years of “heinous” wrongdoing by two top influencers—David Golden and Michael Bjorkman—who would allegedly dose women with date rape drugs, sexually assault them in hotel rooms, and blackmail them into joining their revenue “downline” at the company, which operates on a pyramid-like model.

The fast-growing eXp is known for a work-hard, play-hard culture that revolves around “alpha agents,” the superstar influencers under them, and the glamorous recruiting parties the company sponsors. Those open-bar events allegedly led to the widening scandal that burst into view after the victims began coming forward with sex-trafficking claims in 2023.

Although the top brass knew about the pattern of assaults for years, a board loyal to founder Glenn Sanford opted to “bury the allegations” and “protect the assailants, prioritizing the profits that inflated executive bonuses over agent safety and compliance with the law,” according to the shareholder suit. “Sanford forced out any board member who spoke out.”

eXp said through a spokesperson Wednesday that the alleged assaults were perpetrated by “independent real estate agents,” that the company handled the reports “with seriousness and deep respect,” and that it “will continue to do its best to ensure we create a safe environment.”

“We take our responsibility to foster a safe and inclusive environment very seriously,” the company said in a statement. “eXp Realty has zero tolerance for abuse, harassment, or misconduct of any kind—including by the independent real estate agents who use our services.”

‘Prioritized Their Bonuses’

According to the court complaint made public early Wednesday, eXp initially had no meaningful sexual harassment policies and no viable way for its agents to report the misconduct. Although it later adopted a hotline and other reporting mechanisms, they were allegedly a fig leaf.

The company’s diversity director, for instance, said he was told not to process complaints and, when he pushed for changes, “that he did not understand the real estate business,” the suit says. Another senior executive allegedly said that “no one made complaints if they valued their job.”

Despite those obstacles, women allegedly began coming forward internally by September 2020. The widespread problem “went far beyond the allegations against Golden and Bjorkman,” including assaults involving dozens of men who lined up outside hotel rooms, according to the lawsuit.

Rather than immediately fire Golden and Bjorkman, the board allowed their lucrative revenue-sharing agreements to vest before terminating them, according to the complaint. The company allegedly didn’t extend the same courtesy to one of their accusers, referred to as Jane Doe 3, who forfeited her revenue-sharing rights when she left after her report was ignored.

Meanwhile, Sanford allegedly exploited his control of the company to secure above-market compensation, including a 1,182% base salary increase in 2020. “Defendants prioritized their bonuses and boys’ club over the basic safety of the company’s workers,” the suit says. It was originally filed under seal Sept. 25 in Delaware’s Chancery Court.

The pension funds are represented by Bernstein Litowitz Berger & Grossmann LLP, Labaton Keller Sucharow LLP, and the Los Angeles city attorney’s office.

The case is L.A. City Emp. Ret. Sys. v. Sanford , Del. Ch., No. 2024-0998, complaint unsealed 10/2/24 .

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Securities Law News

Oct. 2, 2024, 5:04 PM PDT

Symbotic CEO Sued by Shareholders Over Alleged False Statements

By Mike Vilensky

- **COURT:** D. Mass.
- **TRACK DOCKET:** No. [1:24-cv-12523](#) (Bloomberg Law subscription)

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Symbotic CEO Sued by Shareholders Over Alleged False Statements

By Mike Vilensky 2024-10-02T20:04:15000-04:00

- **COURT:** D. Mass.
- **TRACK DOCKET:** No. [1:24-cv-12523](#) (Bloomberg Law subscription)

Symbotic Inc. chief executive Richard B. Cohen and other company directors were hit with a lawsuit Wednesday claiming they made misleadingly positive statements about the supply chain automation company's financial health to stockholders.

The derivative complaint was filed by two Symbotic shareholders, Mukesh Kukreja and Timothy Welsh, in the US District Court for the District of Massachusetts.

In a 2024 proxy statement and on an earnings call, Symbotics executives indicated the company was on a path toward improved profitability, the complaint says. But in July the company released information showing a net loss of \$14 million, and its stock price fell 23.52%, the complaint says.

The statements "induced shareholders to vote in favor of the election of the Director Defendants to the Board, thereby allowing them to continue breaching their fiduciary duties," the complaint alleges.

The suit brings claims for breach of fiduciary duty, gross mismanagement, and violations of the Exchange Act, among other claims. The shareholders are seeking damages and a court order directing the company to improve its corporate governance.

Cohen built a \$21 billion fortune at C&S Wholesale Grocers before becoming head of Symbotic LLC in 2017. Symbotic, a warehouse automation specialist, went public via a merger with a special purpose acquisition company in 2022.

A Symbotic spokesperson didn't immediately respond to requests for comment on the suit.

Michael P. Utke of Pepperell, Massachusetts, and Gainey McKenna & Egleston represent the shareholders.

The case is Kukreja v. Cohen , D. Mass., No. 1:24-cv-12523, complaint filed 10/2/24 .

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Forward-Looking Statements Don't Support Securities Case Against Peloton Following Pandemic Spike

 [law.com/newyorklawjournal/2024/10/02/forward-looking-statements-dont-support-securities-case-against-peloton-following-pandemic-spike](https://www.law.com/newyorklawjournal/2024/10/02/forward-looking-statements-dont-support-securities-case-against-peloton-following-pandemic-spike)

Ellen Bardash

Peloton store inside The Mall in Columbia, Maryland, in 2021. Photo: Diego M. Radzinski/ALM

U.S. District Judge Andrew L. Carter Jr.'s opinion ends nearly three years of stock-price drop litigation which shareholders filed after Peloton's 2021 announcement that its demand growth had slowed more than previously projected. Latham & Watkins represented Peloton in the case.

October 02, 2024 at 02:27 PM

Securities Litigation



Ellen Bardash



U.S. District Judge Andrew L. Carter Jr. has dismissed with prejudice securities claims against the exercise technology company Peloton in the Southern District of New York, concluding that statements made about the company's postpandemic growth were true and protected under federal law.

The opinion, issued Monday, ends nearly three years of stock-price drop litigation which shareholders filed after Peloton's 2021 announcement that its demand growth had slowed more than previously projected. Latham & Watkins represented Peloton in the case.

Peloton, like other companies offering home-based products and services that require little to no in-person contact, saw a surge in demand during the pandemic.

The plaintiffs, represented by Grant & Eisenhofer as lead class counsel, claimed Peloton's leadership, rather than attributing the surge to the temporary circumstances of the pandemic, stated that the growth the company was seeing in 2020 would continue indefinitely. The shareholder plaintiffs alleged that Peloton ramped up supply chain investments to keep up with a demand at a pace no longer necessary once COVID-19 vaccines became widely available in 2021.



U.S. District Judge Andrew L. Carter Jr. of the Southern District of New York. Photo: Rick Kopstein/ALM

Carter wrote that the plaintiffs had failed to fix the issues he identified when dismissing their first amended complaint, only including in the second amended complaint forward-looking statements protected under the Private Securities Litigation Reform Act. Additionally, he wrote, Peloton had buffered those forward-looking statements by cautioning that they may not line up exactly with actual results, including how demand for Peloton's products and subscriptions might change during or after the pandemic.

The opinion said the shareholder plaintiffs also hadn't shown that any of the statements they challenged were false.

"In balance, no reasonable investor could have been misled by these purportedly false statements, because they were, in fact, true," Carter said. "Peloton told investors what it expected demand to be through its quarterly sales guidance, how it planned to build inventory to meet demand, and then met or exceeded that guidance throughout the class period."

Attorneys for the plaintiffs and a spokesperson for Peloton did not immediately respond for comment.

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Freshworks Fails to End Investors' Suit Tying Report to Losses

By Martina Barash

- Company challenged timing of revelation, recoverable loss
- Investors can proceed on allegations of two-week causation

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Freshworks Fails to End Investors' Suit Tying Report to Losses

By Martina Barash 2024-10-02T12:37:18000-04:00

- Company challenged timing of revelation, recoverable loss
- Investors can proceed on allegations of two-week causation

Freshworks Inc. investors overcame the software company's argument that they can't trace the cause of their stock losses to a rosy financial filing made before the shares' initial public offering, a federal court ruled.

Although Freshworks is correct about the legal standards the investors must meet, it hasn't shown that the case can't succeed on the facts alleged, Judge Charles R. Breyer said Tuesday for the US District Court for the Northern District of California.

Freshworks, which operates a customer communications platform for small and mid-sized businesses, made overly optimistic statements before its Sept. 22, 2021, IPO, according to the complaint. Disappointing results allegedly then followed on Nov. 2 of that year and caused a 70% skid in the price of Freshworks stock over a period of months, sinking below the \$36.00 offering price on Nov. 15 during its downward trajectory.

Breyer trimmed the suit in 2023 to a claim for nondisclosure of "known trends" under Item 303 of Securities and Exchange Commission Regulation S-K before the IPO. Freshworks argued that even that claim should be dismissed because the stock price remained above the offering price when the market reacted to the disappointing Nov. 2 results, and that later stock drops weren't caused by that revelation.

But arguments by the company and members of its leadership who were also named as defendants “would require the Court to conclude as a matter of law that their alleged omission of trends reflected in the Q3 2021 numbers had no negative impact on Freshworks stock as soon as November 15, 2021—the first day that Freshworks stock dropped below its offering price,” Breyer said.

At this stage of the suit, Breyer said he couldn’t conclude that the “alleged Item 303 violation no longer affected Freshworks’s financial state a mere two weeks after Defendants disclosed the Q3 2021 numbers.”

Expert testimony will likely be needed to resolve the question, he said in denying the company’s request for judgment on the pleadings.

Scott & Scott Attorneys at Law LLP is lead counsel for the investors. Cooley LLP and Latham and Watkins LLP represent Freshworks and the individual defendants.

The case is Sundaram v. Freshworks Inc. , 2024 BL 347511, N.D. Cal., No. 22-cv-06750, 10/1/24 .

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

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Hayward Holdings Defeats Investor Suit Over Pool Supply Sales

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X9B8OMF0000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X9B8OMF0000000)

Hayward Holdings Inc. and two major shareholders persuaded a federal court to dismiss a proposed investor class action alleging the pool supply company misrepresented its handling of inventory and sales.

The allegations about the company's statements as the supply chain challenges of the Covid-19 pandemic eased, resulting in \$100 million worth of unsold inventory, aren't specific enough, Judge William J. Martini said Wednesday for the US District Court for the District of New Jersey. The investors' claims against two investment companies that were majority shareholders—on the basis that directors affiliated with them signed forms containing challenged statements—are also dismissed, Martini said.

- The investors alleged pool supply distributors “loaded up” on inventory as supply-chain difficulties set in following a strong early-pandemic market, but that Hayward wasn't transparent about its “stuffed” distribution channels
- Martini took issue with block quotes in the complaint, saying that identifying the claims “should not be conjecture”
- The investors will have another chance to plead their case, which isn't the only one over a “boom and bust” in the pool supply industry during the pandemic

Scott & Scott Attorneys at Law LLP were lead counsel for the investors. Latham & Watkins LLP represented Hayward.

The case is *City of Southfield Fire and Police Ret. Sys. v. Hayward Holdings, Inc.*, D.N.J., No. 2:23-cv-04146, 10/2/24 .

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Securities Law News

Oct. 2, 2024, 9:54 AM PDT

Cannabis Company Tilray Gets Investor Suit Over Merger Tossed

By Ben Miller

- Proposed class action dismissed again, without chance to amend
- Suit alleged marketing deal before merger was misrepresented

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Cannabis Company Tilray Gets Investor Suit Over Merger Tossed

By Ben Miller 2024-10-02T12:54:46000-04:00

- Proposed class action dismissed again, without chance to amend
- Suit alleged marketing deal before merger was misrepresented

Tilray Inc. and its former CEO beat a proposed investor class action after a New York federal judge ruled the plaintiffs didn't sufficiently allege that the cannabis company intended to defraud shareholders before a 2019 merger.

The would-be class who brought the suit were unable to show that Tilray or ex-CEO Brendan Kennedy knowingly acted to mislead investors about the company's financials and aspects of a co-marketing deal with Authentic Brands Group LLC, Judge Mary Kay Vyskocil of the US District Court for the Southern District of New York said.

Investors had filed three amended complaints, each alleging that the downstream merger with majority shareholder Privateer Holdings Inc. was a scheme to ensure that executives including Kennedy wouldn't be taxed twice when offloading Tilray shares.

A past iteration of the suit had sufficiently alleged the marketing deal with Authentic Brands was an attempt to halt a falling stock price, and that statements describing the potential value of that deal were misleading, Judge Paul Crotty of the Southern District of New York said in a 2022 ruling. Crotty formerly handled the case before it was transferred to Vyskocil in April 2024.

Despite Crotty twice granting leave to replead the case and cure deficiencies to show that Tilray and Kennedy had motive and consciously defrauded the investors, the third amended complaint was plaintiffs' final opportunity to fix those issues, Vyskocil said in her Monday opinion dismissing the case without a chance to further amend.

The suit also fails to explain why, even though Kennedy sold some of his stock during the premerger period at issue, the former executive chose not to sell most of his shares until after corrective disclosures were issued, according to Vyskocil. The company and former CEO's quest for control and power in the cannabis industry is more plausibly one of "ambition, and perhaps greed, but not fraud," she said.

The plaintiffs' counsel declined to comment. Tilray didn't immediately respond to requests for comment.

Rosen Law Firm represents the proposed class of shareholders, who alleged losses of more than \$2 million, and New York City-based Thomas G. Amon represents the lead shareholder plaintiff.

Tilray and Kennedy are represented by Baker & Hostetler LLP.

The case is Kasilingam v. Tilray Inc., S.D.N.Y., No. 1:20-cv-03459, 9/30/24 .

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AMC's APE Stock Conversion Affirmed Again by Delaware Court

By Jennifer Kay

- Delaware Supreme Court upheld AMC's unpopular stock conversion
- APE shareholder said conversion violated anti-dilution provisions

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AMC's APE Stock Conversion Affirmed Again by Delaware Court

By Jennifer Kay 2024-10-02T16:19:59000-04:00

- Delaware Supreme Court upheld AMC's unpopular stock conversion
- APE shareholder said conversion violated anti-dilution provisions

AMC Entertainment Holdings Inc. prevailed Wednesday over a preferred shareholder's challenge to the stock conversion plan it enacted last year amid bitter opposition from its meme stock base.

The Delaware Chancery Court dismissed the investor's lawsuit claiming the conversion of preferred stock, known as APEs, to common shares violated anti-dilution provisions. The movie theater chain's APE-holders "got exactly what they were entitled to" in the conversion, Vice Chancellor Morgan T. Zurn said in a bench ruling.

Zurn approved the conversion plan in August 2023, in a settlement that included extra shares for individual investors. That ruling capped months of unusually fervent attempts by thousands of AMC's retail investors to persuade the court to reject the plan to secure new financing. The conversion took place Aug. 25, 2023, with the settlement paid out three days later.

The Delaware Supreme Court affirmed Zurn's ruling in May. One retail investor who originally objected to the settlement continues to pursue an appeal to the US Supreme Court, seeking to overturn Zurn's rulings that allowed AMC to recapitalize.

The preferred shareholder argued the terms of the settlement was ambiguous. "This is not a well-written document. There are clear holes here," Russell Paul of Berger Montague PC, the investor's attorney, told Zurn Wednesday, who disagreed.

AMC argued against undoing the court-approved settlement, particularly one the APE shareholders had wanted. "It takes some nerve to on the one hand want the conversion badly, and then to come back afterwards and say, 'You violated our rights,'" said AMC's attorney, John Neuwirth of Weil Gotshal.

AMC also is represented by Richards Layton & Finger.

The case is *Simons v. AMC Ent. Holdings Inc.*, Del. Ch., No. 2023-0835, bench ruling 10/2/24 .

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Talis Biomedical Agrees to Settle Investor Suit for \$33 Million

By Martina Barash

- Company accused of botching FDA emergency use application
- Recovery percentage much greater than average, investors say

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Talis Biomedical Agrees to Settle Investor Suit for \$33 Million

By Martina Barash 2024-10-02T15:59:01000-04:00

- Company accused of botching FDA emergency use application
- Recovery percentage much greater than average, investors say

Talis Biomedical Corp. and investors who allege it misled them about the progress of its Covid-19 testing system have agreed to a nearly \$33 million settlement, according to a federal court filing.

The deal merits preliminary approval, the investors told the US District Court for the Northern District of California on Tuesday. The settlement amount consumes more than half of the biomedical company's remaining cash as it heads toward Chapter 11 bankruptcy, they said.

Lead investor Martin Dugan alleged that the company wasn't capable of producing the testing platform, Talis One, to scale, and that Talis botched its application for an emergency use authorization from the Food and Drug Administration.

Judge Susan Illston granted class certification in February, limited to investors who purchased shares within the initial public offering lock-up period.

The proposed settlement amount represents 20% of the plaintiffs' high-end estimation of maximum recoverable damages—\$162 million—and 72% of their low-end estimate of \$44.6 million, according to the request for approval. By contrast, the median recovery in Securities Act cases from 2014 through 2023 was 7.5%, they said.

Talis would contribute \$27.5 million, and directors' and officers' insurance \$5 million, to the \$32.5 million settlement fund, the investors said.

Talis had about \$60 million on hand as of June 30 and has diminished since then the investors said.

Pomerantz LLP and Bleichmar Fonti & Auld LLP are lead counsel for the class. Cooley LLP represents Talis.

The case is In re Talis Biomedical Sec. Litig. , N.D. Cal., No. 22-cv-00105, motion 10/1/24 .

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Newsom Signs Lemon Law Changes Into Law, Averting Threatened Tort War

[law.com/therecorder/2024/10/01/newsom-signs-lemon-law-changes-into-law-averting-threatened-tort-war](https://www.law.com/therecorder/2024/10/01/newsom-signs-lemon-law-changes-into-law-averting-threatened-tort-war)

Cheryl Miller



Credit: Mario Beauregard/Adobe Stock

News

Gov. Gavin Newsom's approval of AB 1755 means business groups will stop threatening to place a contingency fee cap initiative before voters in 2026 and plaintiffs attorneys won't reciprocate with their own ballot measure.

October 01, 2024 at 07:08 PM

🕒 3 minute read

Legislation



Cheryl Miller



Gov. Gavin Newsom signed legislation this week revamping California's auto lemon law and averting an initiative tort war, at least for now.

Newsom's approval of AB 1755 means both consumers and automakers will have new deadlines to meet and procedures to follow when dealing with unfixable clunkers.

It also means business groups will stop threatening to place a contingency fee cap initiative before voters in 2026 and plaintiffs attorneys won't reciprocate with their own ballot measure. The political truce was part of the late-in-the-legislative-session deal crafted by lobbyists for the Consumer Attorneys of California and General Motors.

But while the governor's signature quells the skirmish between Big Business and trial lawyers, it will not end a larger debate over the future of the state's car buyer protection law.

In a message that accompanied his signature on AB 1755, Newsom said the bill's legislative authors have agreed to quickly amend the new law early next year to allow auto manufacturers who don't like the latest changes to opt out and abide instead by the lemon law rules in effect now.

"I also encourage the Legislature to consider whether additional changes to the Lemon Law are needed in light of the transition to electric vehicles and significant advancements in automotive technology," Newsom wrote.

"The Lemon Law was enacted in 1970, before cars were equipped with a single computer (today they have as many as 100 separate computers and related electronic sensors) and decades before the first mass-produced electric vehicle," the governor continued. "While this issue was not the focus of AB 1755, I encourage the Legislature to consider whether additional updates to the Lemon Law are warranted."

Although advocates of AB 1755 said the new law's requirements will thwart those attorneys who try to draw out lemon law litigation to secure higher damages, more than a dozen vehicle makers, including Toyota, Tesla and Honda—companies that were shut out of the bill's drafting negotiations—opposed the legislation for not making more substantial changes.

"The flaws in the bill are so pervasive, they can't and shouldn't be addressed in clean-up [legislation] next year," Kerry Cordill Fowler, senior managing counsel for American Honda Motor Co., said in testimony before the Assembly Judiciary Committee in late August.

Fowler urged lawmakers to instead engage in "meaningful, thoughtful and inclusive dialog" in 2025 and come up with different changes to the lemon law.

Honda spokesperson Alvin Tsang said the company appreciates "that Governor Newsom recognizes the flaws in California's new lemon law and is willing to collaborate on a path forward. We support revisions that will ensure it works as intended: safeguarding consumers,

ensuring fair dispute resolution, and promoting public safety."

Consumer groups opposed the bill and the ensuing signing message by the governor.

"No other state has allowed auto manufacturers to opt in or out of lemon law procedures, so that looks like it would be uncharted territory," said Rosemary Shahan, a long-time advocate of the consumer protection law and president of Consumers for Auto Reliability and Safety.

Key provisions of the new bill take effect in April.

Updated on 10/2/2024 with comments from a representative from American Honda Motor Co. Inc..

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Brita Defeats Deception Suit Over Filters' Contaminant Removal

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Brita Products Co. convinced a federal judge to dismiss a proposed class action alleging the company misleads buyers into thinking its water filters removes hazardous contaminants or reduces them to below detectable limits.

The product labels say “the filters will ‘reduce’ the contaminants—and do—without any guarantee that they are completely removed,” Judge Dolly M. Gee of the US District Court for the Central District of California said Sept. 30. “There is no information in Brita’s labeling that would be likely to mislead a reasonable consumer,” she added.

- Gee rejected the plaintiff’s argument that Brita’s performance data sheets mislead consumers
- She said the products “claim to reduce contaminants, not remove them, consistent with the common definitions of ‘reduce’ versus ‘remove’”
- Claims for unlawful business practices under California consumer protection statutes were dismissed without prejudice, while misrepresentation, omission, warranty, and unjust enrichment claims were dismissed with prejudice

The plaintiff was represented by Clarkson Law Firm PC. Brita was represented by Patterson Belknap Webb & Tyler LLP and Carlton Fields LLP.

The case is Brown v. The Brita Prods. Co. , C.D. Cal., No. 2:23-cv-07851, 9/30/24 .

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Meta Hit With Class Action for Allegedly Using Pirated Books to Train AI Models

 [law.com/therecorder/2024/10/02/meta-hit-with-class-action-for-allegedly-using-pirated-books-to-train-ai-models](https://www.law.com/therecorder/2024/10/02/meta-hit-with-class-action-for-allegedly-using-pirated-books-to-train-ai-models)

Kat Black

What You Need to Know

- Meta was hit with a class action in California federal court accusing it of stealing hundreds of thousands of copyrighted books to train Llama, its AI large language model set.
- Meta allegedly downloaded and copied almost 200,000 works from a trove of pirated books.
- Meta was previously sued on similar copyright infringement claims in 2023 by a class of authors, including comedian Sarah Silverman.

Facebook parent Meta Platforms Inc. is the latest target of litigation aimed at Big Tech companies that allegedly use copyright-protected books to train their artificial intelligence models without the authors' consent.

Lieff Cabraser Heimann & Bernstein and Cowan, DeBaets, Abrahams & Sheppard filed a class action on behalf of lead plaintiff Christopher Farnsworth, author of the "Nathaniel Cade" fiction series, against Meta on Tuesday, claiming that it stole "hundreds of thousands" of copyrighted books from a pirated online collection to build "Llama," its large language model set. The complaint, filed in the U.S. District Court for the Northern District of California in San Jose, alleged copyright infringement under 17 U.S.C. §501. Counsel has yet to appear for the defendant.

Meta first launched its flagship LLM family, then stylized as LLaMA, in February 2023 in the Big Tech race to compete with the debut of OpenAI's trailblazing generative AI chatbot ChatGPT in November 2022. Meta released "Llama 2" for commercial use in July 2023 and its latest iteration, "Llama 3," to build its AI assistant "Meta AI," on April 18, 2024.

According to the complaint, Meta downloaded and copied almost 200,000 copyrighted books from "Books3," a library of copyrighted works scraped by developer Shawn Presser from the pirated book website Bibliotik. Books3 is part of "The Pile," an open-source online dataset hosted by nonprofit EleutherAI that was specifically designed to train LLMs. LLMs are conditioned to simulate human communication by ingesting and processing massive quantities of data that effectively "teach" it to generate predictive written responses. The complaint claims that Meta publicly disclosed that it used data from Books3 to train its LLMs in a February 2023 research paper.

Meta and the plaintiff's counsel did not immediately respond to requests for comment.

"These platforms are operating on the principle 'move fast and break things and pay for it later,'" said Sullivan & Worcester partner Mike Palmisciano, who specializes in transactional intellectual property matters. "Let's develop these products, become kind of essential in the marketplace, and then figure out how we go from there."

This is not the first time Meta has faced allegations of stealing copyrighted material from Books3 for AI training purposes. A coalition of writers, including comedian Sarah Silverman, sued both Meta and OpenAI in California federal court in July 2023 on similar claims of copyright infringement. The Associated Press reported on Sept. 27 that Meta CEO Mark Zuckerberg will be deposed as part of the class action against Meta.

Lieff Cabraser, along with co-counsel at Susman Godfrey, are also representing the plaintiffs in a class action filed in August that accuses the AI startup Anthropic of misappropriating the texts on Books3 to train its own LLM collection, "Claude."

Palmisciano said that these types of copyright infringement claims will continue to escalate until a regulatory solution or court judgment "sets the guidelines for what's permissible in the AI context."

"I think the fair-use argument that's being made in the defense is hard to square with decades of case law on copyright fair use," he said. "That being said, I would assume at some point we will get a ... Supreme Court ruling on what constitutes fair use in the AI context and whether this type of large dataset ingestion is transformative in a way that protects the providers."

Until the high court rules on the fair-use issue, Palmisciano predicts that companies targeted by the litigation will continue to reach one-off settlements and monetary agreements.

"That seems to be what a lot of early financing for platforms like OpenAI is earmarked toward," he said. "They have their tech development, of course, but they're also reaching these really expensive and extensive licensing agreements for content that they've already ingested into their platform."

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Top Ten Corporate FCPA Settlements

 fcpaprofessor.com/top-ten-corporate-fcpa-settlements-3

October 3, 2024

Set forth below is the current top ten corporate FCPA settlements of all-time actually secured by U.S. law enforcement (in other words net FCPA settlement amounts).

In reviewing this list, it is interesting to note that approximately 15 years ago, the largest FCPA settlement of all-time was \$44 million.

Unlike certain other lists, the below list is calculated after consistently accounting for certain credits or deductions in several enforcement actions involving foreign companies and/or related foreign law enforcement actions.

1. Goldman Sachs

- 1.66 billion
- (\$1.263 billion DOJ)(\$400 million SEC)
- 2020

2. Ericsson

- 1.27 billion
- (\$727 million DOJ)(\$540 million SEC)
- 2019 / 2023

3. MTS

- \$850 million
- (\$750 million DOJ)(\$100 million SEC)
- 2019

4. Siemens

- \$800 million
- (\$450 million DOJ)(\$350 million SEC)
- 2008

5. Alstom

- \$772 million
- (\$772 million DOJ)
- 2014

6. KBR/Halliburton

- \$579 million
- (\$402 million DOJ)(\$177 million SEC)
- 2009

7. Teva Phrama

- \$519 million
- (\$283 million DOJ)(\$236 million SEC)
- 2016

8. Telia

- \$483 million
- (\$275 million DOJ)(\$208 million SEC)
- 2017

9. Glencore

- \$443 million
- (\$443 million DOJ)
- 2022

10. Och-Ziff

- \$412 million
- (\$213 million DOJ)(\$199 million SEC)
- 2016

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Oct. 2, 2024, 1:43 PM PDT

Trial Court Reversals Track Party of Judges in Cases, Study Says

By Suzanne Monyak

Eye on the Bench

- Study finds appellate reversal rates align with party affiliation
- Alignment shows 'evidence of polarization'

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Trial Court Reversals Track Party of Judges in Cases, Study Says

By Suzanne Monyak 2024-10-02T16:43:24000-04:00

- Study finds appellate reversal rates align with party affiliation
- Alignment shows 'evidence of polarization'

Federal appellate court panels are more likely to uphold rulings by trial court judges if they were appointed by presidents of the same political party, a new study found.

The study, published Wednesday by the National Bureau of Economic Research, concluded the political affiliations of the members of three-judge appeals court panels "have a significant impact" on whether the underlying trial court decision is reversed.

Following an analysis of precedential cases, the researchers found that appellate panels of judges appointed by Democratic presidents are more likely to reverse trial judges appointed by Republican presidents than those appointed by Democrats. Similarly, panels of Republican-appointed judges are less likely to reverse Republican-appointed trial judges, the study said. This trend applies to panels where all three appeals court judges are appointed by presidents of the same party, as well as when two of the three are appointed by presidents of the same party.

"We find that Federal judges' decisions do, in fact, show evidence of polarization," the study said.

The study examined about 400,000 published and unpublished circuit court decisions between 1985 and 2020. This trend was less pronounced in cases before 2000 or in unpublished decisions, but the results do appear in both ideological and non ideological cases, and in decisions judges who were appointed before 2000, the study said.

The study was done by Alma Cohen, a professor of empirical practice at Harvard Law School and economics professor at Tel Aviv University, and Rajeev Dehejia, a professor at New York University's public policy school.

The findings come amid heightened scrutiny into the judiciary and judges' compliance with ethics rules, and political gridlock in Congress over judicial nominations.

Cohen said in an interview that the findings show that "polarization is now happening almost everywhere."

"What we want to do is just to provide this information out there so people will be aware of it," she said. What can be done to address this polarization would be a "totally different paper."

Dehejia added that the study is a "reminder" to voters that the president they vote for in November affects not just Supreme Court rulings, but lower court litigation as well.

"You have a whole other layer of the judiciary," he said. "The impact of the president will be on that layer for years to come."

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US Judge in Credit Card Late Fee Rule Case Viewed as No-Nonsense

By Suzanne Monyak

Eye on the Bench

- Mark Pittman is known for direct style, focus on decorum
- Texas judge now hearing challenge to credit card fee rule

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US Judge in Credit Card Late Fee Rule Case Viewed as No-Nonsense

By Suzanne Monyak 2024-10-03T04:45:00000-04:00

- Mark Pittman is known for direct style, focus on decorum
- Texas judge now hearing challenge to credit card fee rule

A Trump-appointed judge in Fort Worth known as a “stickler” for local rules and courtroom decorum isn’t afraid to be at odds at times with other conservative judges and litigants.

Mark Pittman, one of two active judges in his courthouse, has twice tried to send an industry-backed challenge to the Biden administration’s rule capping credit card fees out of his courtroom, questioning its ties to Texas. But he’s been twice thwarted by the conservative appeals court above him.

Pittman has accused the industry groups challenging the Consumer Financial Protection Bureau rule, which include the D.C.-based US Chamber of Commerce, of trying to “pick and choose” a venue like a “continental breakfast.”

His approach to the case appears to be part-and-parcel for the Northern District of Texas judge, who’s known among the local bar for his directness from the bench and emphasis on courtroom decorum.

“He is no-nonsense, and he didn’t like other people to engage in nonsense,” said Chief Justice Bonnie Sudderth of Texas’ Second Court of Appeals, who served with Pittman on the state appellate court before he joined the federal bench.

Pittman has more than 1,600 words worth of rules for attorneys specific to his courtroom, including nearly 500 on courtroom decorum. And he's known to instruct lawyers in his courtroom to review the codes of professional conduct if he sees their manner as inefficient or unbecoming of the position, lawyers said.

Conservative Voice

Pittman, who didn't respond to an interview request left with his chambers, received his lifetime appointment to the federal bench in 2019 while in his mid-40s. He spent two years on a Texas state appellate court and two years on a state trial court before that.

Born in Big Spring, Texas, he was described at his US Senate nomination hearing as a sixth generation Texan, who grew up in East Texas, earned his undergraduate degree from Texas A&M and his law degree from the University of Texas School of Law.

Pittman came to the seat with the conservative bona fides typical of Trump nominees to red-state courts. He was a vice president and founding member of the Fort Worth Chapter of the conservative Federalist Society, and he ran for his seats as a state court judge as a Republican.

Early in his career, he clerked for the late Judge Eldon Mahon of the Northern District, a Nixon appointee who served decades on the bench and for whom the district's Fort Worth courthouse is named. Pittman told the Senate in 2019 that Mahon is "the type of judge I aspire to be."

Before becoming a judge, Pittman worked as a government lawyer for various federal agencies, including the Securities and Exchange Commission and the Federal Deposit Insurance Corp. He also had criminal and civil roles at the US attorney's office for the Northern District.

His rulings have generally shown him to be conservative.

Pittman has struck down the Biden administration's student loan forgiveness plan and a state law prohibiting 18-to-20-year-olds in Texas from carrying handguns outside the home. And this year, he blocked a federal agency that aims to promote growth in minority-owned business from considering race when deciding eligibility for assistance.

Pittman also denied a request by workers at United Airlines Inc. to block the carrier's policy placing employees with religious objections to its Covid-19 vaccine mandate on unpaid leave.

'Be Prepared'

Lawyers in Fort Worth said the judge is known as a straight shooter with low tolerance for procedural or etiquette violations in his courtroom.

"He's perceived as a stickler for the rules and the law," said Caroline Harrison, an officer with the Tarrant County Bar Association, which includes Fort Worth. She also described Pittman as well-respected and fair.

Pittman's rulings frequently cite a 1988 en banc decision by the Northern District of Texas known as *Dondi*, which set a standard of conduct for Texas lawyers in civil cases.

Lawyers in this area "don't have to read the *Dondi* opinion," Pittman said in a 2015 interview with the local bar association less than a year after becoming a state court judge. "I expect the same thing for myself as I do attorneys: Show up at hearings on time, be prepared, and treat each other with respect."

Pittman said in one federal case that he was "flabbergasted" by a plaintiff who violated local rules three times when filing suits against an airline, and said they were "highly encouraged" to read the *Dondi* ruling if they filed again.

In a sexual harassment case against a Texas community college, Pittman ordered lawyers last year to read the *Dondi* ruling, as well as two other guides for professional conduct for Texas lawyers. He also told them to certify they had done so in affidavits due three days later.

But the order came as an ice storm hit Fort Worth, and lawyers for the college submitted unsworn declarations instead. Pittman fined them each \$250, ordered them to refile, and then took them to task in a court order a few months later.

The "targeted audience" for the law permitting unsworn declarations in place of affidavits is prisoners and foreign litigants without access to a notary, Pittman wrote, "not lazy lawyers in glass towers who wish to skirt an explicit court order."

The New Orleans-based US Court of Appeals for the Fifth Circuit reversed Pittman's sanctions order after finding he'd abused his discretion. It's one of several instances of the appeals court overturning his orders reprimanding attorneys as heavy-handed.

Court Scrutiny

Pittman sits on a court that has come under scrutiny as a destination for conservative litigants hoping to "forum-shop," or the practice of filing in certain courts in hopes of getting—or to be guaranteed—a certain judge.

The district's assignment structure allows litigants to file in single- or double-judge divisions, effectively allowing them to select who'll hear their case.

In Fort Worth, Pittman and Judge Reed O'Connor, a George W. Bush appointee, are the only two active judges and each are assigned 45% of civil cases filed there, while Senior Judge Terry Means, a George H. W. Bush appointee, is assigned 10%. His division is one of seven in the district, which also encompasses the Amarillo courthouse, where Judge Matthew Kacsmaryk, a Trump appointee, is the only active judge.

As a result, the Northern District has become a magnet for "big-ticket cases" challenging national policies, Fordham Law School professor Pamela Bookman said.

For the judges on the court, “depending on who you are, I guess you see this as a challenge or an opportunity,” she said. “It increases your caseload, it probably increases the number of controversial or high-profile cases before you. Those cases may be challenging, difficult, complicated. You’re under a lot of scrutiny.”

Pittman has acknowledged his court’s heavy caseload. After a Fifth Circuit panel found Pittman “did not act promptly” on a request to block the credit card fee rule and set a 10-day deadline for a decision, he responded that the court “must respectfully disagree with its appellate court colleagues.”

He called the imposed deadline “a usurpation of the Court’s docket-management authority.” And in a footnote in that May order, Pittman noted that he opened and resolved 232 and 307 cases respectively since October 2023, the second most of the 16 judges still hearing cases in the Northern District, after O’Connor.

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Matt Levine's Money Stuff: Dish Bondholders Don't Want a Haircut

By Matt Levine

Opinion

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Matt Levine's Money Stuff: Dish Bondholders Don't Want a Haircut

By Matt Levine 2024-10-02T14:58:56409-04:00

Dish

We talked on Monday about the proposed merger between DirecTV and Dish Network, in which DirecTV will pay \$1 for Dish and also assume its \$9.75 billion of debt. Except not quite: The deal is contingent on the holders of that debt agreeing to get paid back less than \$9.75 billion. Either they collectively agree to accept \$1.568 billion of haircuts (that is, cut the debt to about \$8.2 billion), or the deal is off. Effectively DirecTV wants to buy Dish for less than zero dollars; Dish's bondholders have to agree to pay DirecTV \$1.568 billion to take over the company.

Will they? Well, Dish's bonds were trading at somewhat distressed levels before the deal, so they might. On the other hand, after the deal was announced, the bonds traded up *above* the proposed deal price, so they might not. Bloomberg's Reshmi Basu and Jill R Shah report:

Creditors to US satellite television firm Dish Network plan to block a distressed exchange that's a key part of its tie-up with rival DirecTV, according to people familiar with the matter.

A group of steering committee investors has gained a blocking position in order to negotiate with the company, the people said. They may even explore a better outcome through litigation, said some of the people.

Creditors are banding together after Dish and DirecTV agreed on Monday to create the biggest US pay-TV provider under the control of private equity firm TPG. Before the plan can go ahead, Dish needs consent from its bondholders to exchange old debts for notes issued out of the new combined entity.

The debt restructuring plan would leave bondholders with nearly \$1.6 billion of losses, after imposing haircuts as high as 40% of face value. ...

Those who support the restructuring point out that Dish is providing a coupon bump to consenting lenders and a premium to market trading levels before the deal was announced. The combined entity will also carry less debt, have higher ratings and generate more cash, according to these people who also declined to be identified because the discussions are private.

As speculation around a Dish-DirectTV merger swirled, Dish bonds rallied last week on the hopes that a deal would be favorable to creditors. Though they've since given back some gains, some of the bonds are still trading above the proposed exchange price, which is where investors see a chance for sweetened terms.

Also, last week, Dish announced that it had "engaged in negotiations with certain holders" of some bonds about exchanging them for new bonds at a haircut to their face value (but a premium to their market trading prices), but they "did not reach an agreement with respect to a transaction." Presumably last week Dish wasn't telling the bondholders about the potential merger, but the point is that it recently tried the "hey would you take a haircut on your bonds?" approach and the bondholders said no.

By the way: Dish is currently owned by EchoStar Corp., Charlie Ergen's public company. DirectTV is currently majority-owned by AT&T Inc., another public company. TPG Inc., the private equity fund, owns the other 30%. As part of this deal, TPG would buy out the rest of DirectTV for cash, and DirectTV would then acquire Dish, so TPG would end up owning all of it.

You could have a crude model that is like "a large part of the value created by private equity consists of taking value from creditors, and the crucial skill of a private equity firm is negotiating fiercely with creditors." When we have talked about liability management transactions — where companies reduce their debt burden by extracting value from one set of creditors to give to another — I have quoted a Diameter Capital Partners note saying that those deals "should really be thought of as sponsor-on-creditor violence, with select creditors being offered a choice between being killed or doing something about it." Diameter didn't say "company-on-creditor violence"; it said "sponsor-on-creditor," because everyone understands that the private equity sponsors are the tough skillful repeat players in this business.

So you kind of see the trade here, right? You are a public company, you have some bondholders, you would like to renegotiate your debt. You call them up and say "hey can we give you 65 cents on the dollar" and they say "nope." Then you get a call from a private equity sponsor who sort of cracks its knuckles and says "we know how to deal with bondholders, we can probably get them down to 60 cents." And so you sell the company to the sponsor for \$1, because the sponsor can make the company worth more — by making the bonds worth less — than you can.

Unicredit

I just want to emphasize how weird this is. Here are some trades you can do:

1. We sign an agreement saying that you will sell me one million shares of XYZ stock for \$100 each a year from now. That is, in a year, I will pay you \$100 million, and you will give me the million shares. This is commonly called a “forward,” but we could with reasonable accuracy call it a “physically settled total return swap.” No money changes hands now: \$100 is the fair price for this stock, so I don't pay you for this contract, and you don't pay me.

- 2. We sign an agreement, called a “put option,” giving me the right, but not the obligation, to sell you one million shares of XYZ for \$95 each a year from now. That is, in a year, if XYZ is below \$95, I will give you the million shares and you will give me \$95 million. If XYZ is above \$95, we won't do that, because I'd rather keep the stock. I pay you some money now for this option.
- 3. We sign an agreement, called a “call option,” giving you the right, but not the obligation, to buy one million shares of XYZ from me for \$105 a year from now. That is, in a year, if XYZ is above \$105, you will pay me \$105 million and I'll give you the million shares. If XYZ is below \$105, we won't do that, because you'd rather keep the money. You pay me some money now for this option.

Each of these trades is very normal. The combination of Trades 2 and 3 — the put and call — is also very normal; it is called a “collar.” (Often it is structured so that the money I pay you for Trade 2 exactly offsets the money you pay me for Trade 3, so no money changes hands now.) It is a way for me to hedge my exposure to XYZ: If the stock goes down a lot, I can't lose more than 5%, but in exchange I can't make more than 5% if the stock goes up. (The actual *width* of the collar is negotiable; perhaps we'd rather do \$90 and \$110, or \$80 and \$120, or \$99 and \$101.)

The combination of all three, though, is a little weird. Think about what happens in a year if we do all three trades:

If the stock is below \$95, I buy it from you at \$100 (the forward, Trade 1) and sell it to you at \$95 (the put, Trade 2). The net result is that I pay you \$5 million and get no stock. (You *also* get no stock, since you also buy and sell exactly offsetting amounts.)

- If the stock is above \$105, I buy it from you at \$100 (the forward) and sell it to you at \$105 (the call). The net result is that I get \$5 million and no stock. (Again, you also get no stock.)
- If the stock is between \$95 and \$105, I pay you \$100 million and get a million shares of stock (Trade 1), and the collar doesn't matter. If the stock is at \$103, I get a bit of a good deal on the stock: I pay \$100 million for stock worth \$103 million. If the stock is at \$98, I get a bit of a bad deal: I pay \$100 million for stock worth \$98 million. But I never make or lose *that* much money, because the collar takes care of the extreme cases.

Essentially this combination is, for me, sort of a very low-leverage bet that the stock will go up. If the stock goes up, I will make a bit of money, capped at 5% of my notional investment (\$5 million on the \$100 million I commit to the trade). If the stock goes down, I will lose a bit of money, floored at 5%. If the stock stays flat, I will pay \$100 million to get roughly \$100 million worth of stock.

Fine, whatever, people make bets. But let me ask this question. If we actually did these three trades today — if I bought the stock forward, bought the put and sold the call — would you say that I bought the stock today? I mean, I didn't *literally* buy the stock today, but have I done something roughly economically equivalent? No, right? I have very little economic exposure to the stock: If it goes up a lot, I won't make much money, and if it goes down a lot, I won't lose much money.

More to the point, let's say a year goes by and I really want to own the stock. Did doing this trade help me? Not really? Again, consider the three possibilities:

If the stock is below \$95 in a year, I pay you \$5 million, I get no stock, and I have to *go buy the stock*. I pay whatever the price is — say it's \$80, so I pay \$80 million — for a net cost of \$85 million.

- If the stock is between \$95 and \$105 in a year, these trades get me what I want: I pay you \$100 million and get the stock. My net cost is \$100 million, regardless of whether the stock is at \$98 or \$100 or \$103.
- If the stock is above \$105, you pay me \$5 million, I get no stock, and I have to go buy the stock. I pay whatever the price is — say it's \$140, so I pay \$140 million — for a net cost of \$135 million.

That is: When you combine the three trades (forward, put, call) with *a need to get the stock in a year*, the total trade is sort of a low-leverage hedge against the stock going up. If the stock goes up, I will have to buy it at the market price, but I'll get roughly a 5% discount. If the stock goes down, I will get to buy it at the market price, but I'll have to pay roughly a 5% premium. If the stock stays flat, I will buy it at the fixed price of the forward, which is *close* to the market price though not quite. I have done very little to lock in today's price; if, in a year, I really need to buy the stock, I will mostly have to pay whatever the market price is.

I don't know. Last week I wrote sort of a weird column about UniCredit SpA and Commerzbank AG. UniCredit has been mulling a run at taking over Commerzbank, and as part of that mulling it had bought some Commerzbank stock in the open market, and via derivatives, and in an auction of part of the German government's stake. And then there were some big stories about how "UniCredit SpA Chief Executive Officer Andrea Orcel moved to more than double the lender's stake in Commerzbank AG," buying derivatives to add about 11.5% of Commerzbank to the 9% it already owned.

And I wrote: Well, did it? If you looked at UniCredit's disclosure, what it said is that it had bought the stock via derivatives, but also hedged the stock via derivatives, and I pointed out that those trades offset. I wrote:

It's not much of a transaction! You buy stock on swap because you want economic exposure to a stock without owning it. You hedge a stock with a collar because you want to own the stock without much economic exposure. When you combine those transactions you get *not owning the stock and not having much economic exposure to it*. (In particular, if Commerzbank's stock doubled, would UniCredit have to pay more than today's price to acquire that 11.5% stake? It would if it has collared the stake.)

Why would you do that? What is the point of owning the stock on swap and hedging it? Well. This is the most efficient way to *accurately tell everyone* that you have bought 11.5% of the stock. ... Doing this lets you announce a 11.5% stake whenever you feel like it, which is nice if you are, for instance, trying to build public pressure to acquire the company.

That was all sort of speculative and it was possible that I had completely misinterpreted what happened; at least one reader emailed to argue that UniCredit probably hadn't collared its Commerzbank stake. But today the Financial Times published an "Anatomy of a trade: how UniCredit built its Commerzbank stake" and here you go:

At the core of the transaction are contracts UniCredit entered with Barclays and Bank of America, according to voting rights disclosures and bankers familiar with the deals.

Both investment banks struck so-called total return swap agreements with UniCredit, in effect committing to replicate the economic performance of Commerzbank's stock. If the German lender's shares go up, or the bank pays its dividend, the counterparties will pay the change in value to UniCredit. If the stock goes down, UniCredit must cover the difference.

Barclays and BofA also committed to physically deliver the Commerzbank shares to UniCredit later, should the Italian lender still want them. While the banks have bought a few Commerzbank shares directly, they hedged their trade mostly through put and call options, according to disclosures. ...

Total return swaps can come with risks. During the 2008 financial crisis, large drops in VW and Continental shares left Porsche and Schaeffler Group exposed to huge losses when their derivative stakes lost billions of euros in value.

Orcel has eliminated that risk with another layer of financial engineering, said people familiar with the transaction. He is using a so-called collar to hedge the Commerzbank position against share price declines, while also waiving large parts of the upside.

The structure — consisting of opposing call and put options — in effect locks in last week's Commerzbank share price.

I just feel like a crazy person reading this? I mean, I have done approximately the same trade as Orcel:

1. I am not exposed to any risk of a decline in the price of Commerzbank stock, because I don't own any.
- 2. I have waived the upside in Commerzbank stock, because, again, I don't own any.
- 3. If, in the future, I want Barclays and BofA to deliver Commerzbank stock to me, they will, because they are in the stock trading business and will happily sell me some Commerzbank stock at whatever the market price is at the time.
- 4. Barclays and BofA have not bought much Commerzbank stock to hedge the possibility that they will need to deliver me the stock in the future, because if I call them up later and say "I'd like to buy Commerzbank at the market price" they can just go out and buy it then.

Similarly, in raising UniCredit's reported Commerzbank stake from 9% to 21%, Orcel has managed to (1) not buy any Commerzbank stock, (2) keep open the possibility of buying some Commerzbank stock later and (3) not particularly lock in the price he will pay later? "Think what you may but this is just beautifully done," said one Frankfurt-based banker to the FT, and I can't really disagree.

FanDuel

In general, you would rather make more money from a customer than less. You'd rather make a fair amount of money than a tiny amount of money, you'd rather make an excessive amount of money than a fair amount of money, you'd rather make an astonishingly excessive amount of money than a normal excessive amount of money. There is, however, some cap. If you make *too* much money from a customer, the customer will call you up and say "ah come on, give us that money back." And you might say "oh fine this is too much money, here, have it back," but you might instead say no, because you like money.

And then the customer will sue, and the lawsuit will say in essence "ah come on, they made *so much money* from us, that can't possibly have been on the up-and-up." And that argument is *pretty effective*. Maybe the customer will win the lawsuit, and a jury will say "ah come on, you made too much money, give it back." Or maybe your legal agreements are ironclad and the customer will lose, but the publicity of making too much money from the customer will be bad for business. It is not a good look, for your *other* customers, or for your regulators, if you are making too much money from customers.

I have some familiarity with this point because of my former career as a derivatives structurer at an investment bank. Pricing of over-the-counter derivatives is pretty opaque — the customer doesn't just pay you a negotiated fee — and there are lots of levers you can use to make more money on a trade. Some derivatives customers are very sophisticated and will bid everything out and fight you on price down to the last basis point; other customers will pay you any number you want. The latter customers are great! You will want them to pay you a large number! But not too large.

In the general case there does not seem to be a lot of science to deciding how much is too much. If you find yourself emailing your colleagues "hahaha we really ripped those muppets' faces off," probably it was too much, though also probably keep that off of email. Maybe send that as a text on your personal phone, hahaha just kidding definitely don't do that.

We have talked a few times recently about sports betting, where US legal online sportsbooks are relatively lightly regulated and so have a lot of freedom to (1) discourage "bad" customers (ones who win a lot) and (2) encourage "good" customers (ones who *bet* a lot and lose). "Good customers," in this sense, means something uncomfortably close to "gambling addicts." And so if you are a legal sportsbook you will have a business model built on getting repeated large bets from people who mostly lose, but you will also have policies designed to discourage gambling addicts from using your services.

And those policies and that business model will be in uncomfortable conflict. People who lose a lot of money are your best customers, in that they provide a lot of your money, and also your worst customers, in that they are bad for your public and regulatory relations.

And sometimes they sue:

FanDuel Inc. was sued by a former Jacksonville Jaguars executive who admitted to stealing more than \$22 million from the team, but says the website knew he was an addicted gambler and offered him more than \$1 million in credits and “lavish” gifts to make sure he continued to place bets.

The complaint by Amit Patel, who pleaded guilty in December and was sentenced to 78 months behind bars in March, alleges that FanDuel ignored its own responsible gaming protocols and “actively and intentionally targeted and preyed” on him with incentives to feed his addiction. The suit in federal court in New York is seeking more than \$250 million in damages. ...

In his suit, Patel says that he gambled more than \$20 million on FanDuel between late 2019 and early 2023 and was given VIP status in 2021. He was then assigned a host who communicated with him constantly and lured him to gamble more with “relentless financial incentives, lavish trips, event tickets and other gifts” — including more than \$1 million in FanDuel credits and all-expenses-paid trips to a Formula One race in Miami, the college football national championship game and the Masters golf tournament.

Yes right someone with the capacity and desire to lose \$20 million on a sports betting website is an *incredibly attractive customer*, and paying him \$1 million of credits and incentives to keep his business is a high-return trade. The long-run value of doing that is more ambiguous though.

Here is the complaint. I have no idea how well it will work, and I am not sure that a guy who stole \$22 million to bet on sports is all that sympathetic a plaintiff. On the other hand, I mean, you can't really argue that he *wasn't* a gambling addict; in some ways the fact that he's in prison for it makes his case stronger.

One intriguing argument suggests that, because FanDuel did not do enough to check to make sure that he wasn't gambling with stolen money, it should have to give him back the money that he stole to gamble on FanDuel:

Part of Defendants' predatory gambling practice was intentionally ignoring its own responsible gaming protocol, and knowing and/or taking intentional steps to avoid knowing that the money gambled by Plaintiff was stolen or otherwise not from a legitimate source. Defendants circumvented its own Know Your Customer (KYC), anti-money laundering (AML), and customer due diligence (CDD) standards and requirements -- again to ensure that Plaintiff continue depositing and gambling in massive amounts and frequencies. ...

In or about early 2023, the Defendants' identified one or more of the Plaintiff's transactions as suspicious. ...

Plaintiff's VIP host informed Plaintiff that Defendants' AML department required a verification of his source of funds.

Days later, and without Plaintiff providing verification of any kind, Defendants informed Plaintiff that “Defendants got around it” and “you owe me big time” or words to that effect, and that Defendants were no longer requesting verification. ...

Defendants knew, or at least suspected and took steps to intentionally ignore, that the Plaintiff was using a corporate credit card to make frequent massive deposits with Defendants.

This argument is interestingly generalizable: A lot of financial institutions (including, for these purposes, FanDuel) really do have obligations to check that the money their customers deposit is not ill-gotten, but I don't think I've ever seen these obligations used *for the benefit of the customer*. If you put a lot of money in an online brokerage and then lose it all trading options, can you get it back by saying “oh I got that money from dealing drugs and you didn't check, so you really weren't allowed to take it”?

Also there is a personal cell phones angle:

The Plaintiff's preoccupation with gambling, including but not limited to engaging in as many as 100 text messages per day with his VIP host [Brett Krause] between late 2019 and early 2023 was a fundamental and visible symptom of problem gambling.

At all times relevant, Defendants were aware of Plaintiff's preoccupation with gambling through as many as 100 text messages per day with his VIP host between late 2019 and early 2023.

Krause moved certain of his text messages with Plaintiff to Krause's personal cell phone to avoid detection by FanDuel's compliance personnel, while instructing Plaintiff to fabricate additional back-and-forth dialogue on his FanDuel phone to make sure it appeared to FanDuel that their communication remained frequent.

We talked the other day about how professional gamblers try to trick sportsbooks into thinking they're gambling addicts (and thus giving them more credits and higher limits) by logging in at 2 a.m. every night; I suppose texting the sportsbook 100 times a day would have a similar effect. But Patel was doing it for real.

Things happen

OpenAI Has Closed New Funding Round Raising Over \$6.5 Billion. Lazard, King of Emerging-Market Debt, Faces a New World Order. JPMorgan Plans to Open Around 100 New Branches in Low-Income Areas. Hedge Funds That Bet Big on China Score 25%-Plus September Gains. Bain joins battle for control of world's biggest zinc smelter. Manhattan Homebuyers Are Starting to Favor Mortgages Over Cash. “Dogecoin ... has become surprisingly popular among businesses looking to accept crypto for real-world purchases.” Adam Neumann's Latest Project Is a WeWork Competitor.

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- 1. There's a satellite precedent: In 2017, Intelsat announced a merger with OneWeb contingent on a debt exchange offer designed to reduce Intelsat's debt by \$3.6 billion. It failed, the merger was called off and Intelsat eventually filed for bankruptcy.
- 2. *I mean, I'm assuming \$100 is the right forward price. Depending on the particular structure maybe I pay you some running financing rate.*
- 3. This might require making the collar asymmetric, so like a \$95 put but a \$103 call or something.
- 4. Again I am making the numbers symmetric in the text for ease of use, but they don't have to be.
- 5. I mean 5% of the collar notional, less than 5% of the price when I'm actually buying, since the stock has gone up. The 5% is, again, just an arbitrary number I made up; the collar could be significantly wider.
- 6. I am cheating by using a 95/105 collar in my hypothetical example; one assumes UniCredit's is wider (though the FT says it "in effect locks in last week's Commerzbank share price"), and arguably there's only so much Commerzbank can go *up* at this point. If UniCredit does end up buying it you'd expect the deal to come at a premium to its early open market purchases, but maybe that was mostly priced in at the time it did these trades.
- 7. Before that, I was a mergers and acquisitions lawyer, where fees tend to be more clear and explicit so it's harder to get in trouble like this. But not impossible! Elon Musk is right now suing my old firm for making too much money from Twitter.
- 8. I like that the bond market sort of has a rule of thumb that markups of more than 5% are excessive. No science to that, and not even a really bright line, but something to go by.

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Anti-ESG Shareholder Proposals Swell in Number but Lose Support

By David Hood

- Bids from DEI opponents more than tripled in one year
- Support for proposals like these remained in single digits

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Anti-ESG Shareholder Proposals Swell in Number but Lose Support

By David Hood 2024-10-02T14:48:11000-04:00

- Bids from DEI opponents more than tripled in one year
- Support for proposals like these remained in single digits

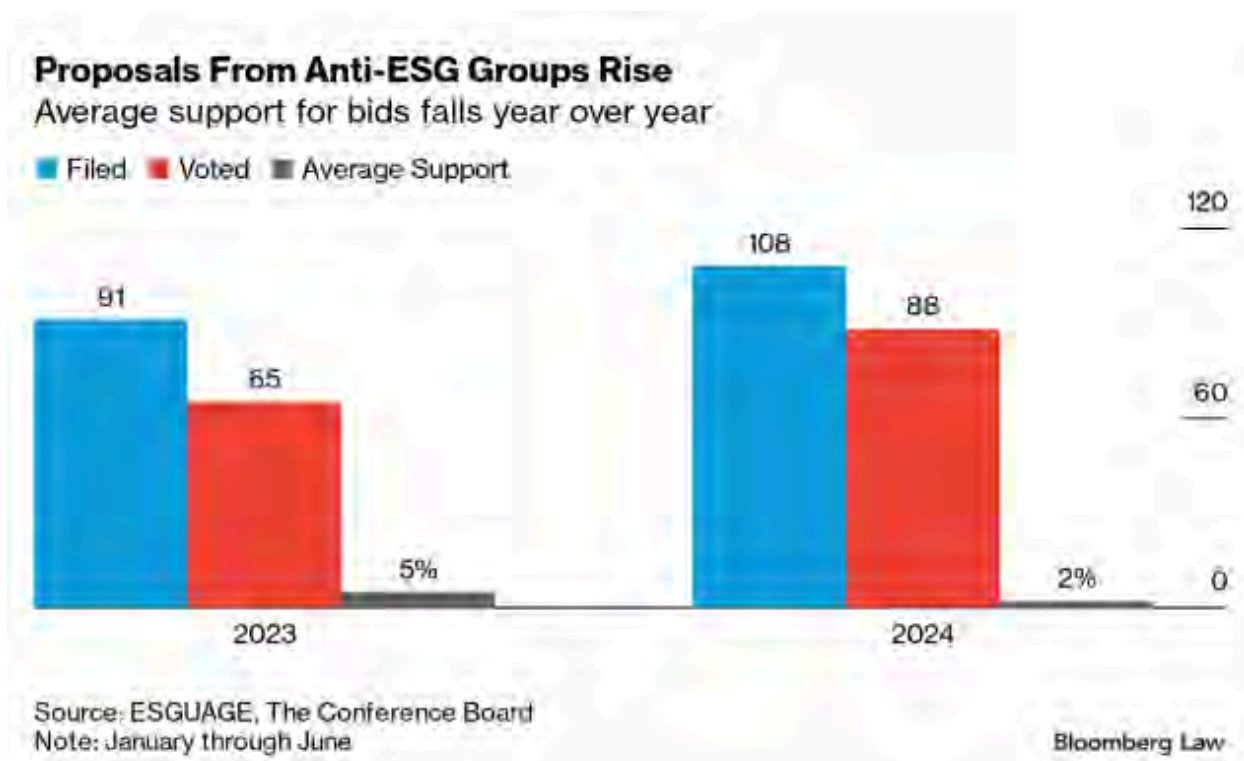
The number of shareholder proposals asking companies to scale back their diversity, equity, and inclusion practices is growing rapidly, though support for such proposals remains low, a new study found.

Investors filed 17 bids opposing companies' DEI efforts during this year's proxy season from Jan. 1 through June 30, up from five during the same time period in 2023, the nonpartisan research and trade group The Conference Board found in a report released Wednesday. The report was produced with environmental, social, and governance analytics firm ESGAUGE, Russell Reynolds Associates, and Rutgers University's Center for Corporate Law and Governance.

The DEI-related proposals were part of a broader pushback against corporate ESG initiatives. In total, anti-ESG groups filed 108 shareholder bids in 2024's proxy season and 88 of them went to an investor vote. That's compared with 91 anti-ESG proposals submitted while 65 received votes in 2023, according to the data.

Support for anti-ESG proposals remained extremely low, however, declining to 2% from 5% in 2023, the report found.

Proposals from opponents of climate initiatives were also up, with 15 submitted in the first half of 2024 compared with six in the same period in 2023.



The uptick in anti-ESG proposals in 2024 reflects the increased politicization of the once-arcane investing term during a US election year. Corporate America has also faced conservative pressure to dismantle DEI initiatives that proliferated as part of a movement to grow more diverse and inclusive following George Floyd's murder by police in May 2020.

Shareholders submitted 918 proposals overall at Russell 3000 companies compared to 836 in the same period in 2023, the analysis found. The number of bids filed through the end of June this year surpassed the 881 proposals filed throughout all of 2022.

The increase in the number of submitted proposals that receive votes is mostly because of a policy enacted by the Securities and Exchange Commission in late 2021 that weakened companies' ability to keep shareholder bids off their ballots, emboldening shareholders to weigh in using the proxy process.

"Companies should maintain an active off-season engagement program to foster strong investor relationships," said Rutgers Law School professor Matteo Gatti, in a statement. "This involves identifying and being transparent about any potential governance changes or issues, as well as continuously educating shareholders on existing governance practices and policies to prevent misunderstandings."

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Keurig's SEC Penalty Shows Company ESG Disclosures Still Matter

- *Liz Soltan argues that SEC scrutiny is good for investors*
- *Companies need to stay on top of ESG transparency*

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Keurig's SEC Penalty Shows Company ESG Disclosures Still Matter

By Liz Soltan 2024-10-02T10:00:00000-04:00

- *Liz Soltan argues that SEC scrutiny is good for investors*
- *Companies need to stay on top of ESG transparency*

A recent settlement between the Securities and Exchange Commission and Keurig Dr. Pepper Inc. shows that despite significant recent setbacks, the SEC is still focusing on environmental, social, and governance issues.

The SEC announced a settlement with Keurig in September over allegations that the company's annual reports claiming K-cup pods could be recycled were inaccurate. In response, Keurig agreed to pay a \$1.5 million civil penalty.

According to the allegations, the 2019 and 2020 reports claimed that tests validated that K-Cup pods, the single-use plastic cups used to brew coffee in a Keurig machine, "can be effectively recycled." In truth, Keurig had heard from two of the largest American recycling companies that they couldn't feasibly handle K-cups in curbside recycling.

The SEC pursued Keurig for violating Section 13(a) of the Securities Exchange Act of 1934 and Rule 13a-1, which requires companies file accurate annual reports. So how "recyclable" must a product be to pass as accurate for SEC disclosures?

Curbside collection in the US accepts only certain types of plastics, and even the ones that make it to a recycling center aren't all reprocessed. In the end, only about 10% of plastics in the US get recycled, according to the National Academies of Sciences, Engineering, and Medicine. Should any company producing plastic be able to claim in filings that its product is green?

But Keurig's SEC filings say the company did testing to confirm that K-cups are recyclable, which seems aimed to reassure investors that the company could continue to sell K-cups to an increasingly climate-conscious public.

In 2021, the SEC rolled out a task force dedicated to investigating ESG-related misconduct by issuers. But last month, word began to spread that the SEC seemed to have surreptitiously untasked the force.

The ESG task force website disappeared from the newly redesigned SEC site. ESG was conspicuously absent from the SEC's Division of Examinations' priorities list for 2024 after appearing on the list for several years running.

In March, the SEC published climate disclosure rules that were years in the making. The rules were significantly watered down from their original form after strong corporate resistance. Nonetheless, there was a predictable slew of litigation challenging the rules, and the SEC voluntarily stayed their effect in April. Litigation is ongoing.

Still, there are lots of good reasons for ESG enforcement to stay on the SEC's radar. Investors increasingly want to know whether the companies they invest in are being fully transparent about their ESG commitments. When companies talk a big game about their ESG accomplishments but fail to live up to them, that can mislead investors who are trying to evaluate where to put their money.

The SEC has had some blockbuster ESG cases. There was a \$55.9 million settlement with Brazilian mining company Vale, which put out sustainability reports touting its supposedly safety-certified dams. The settlement alleges that a Vale dam that broke in 2019, killing 270 people, didn't meet international safety standards.

There was also a \$19 million settlement with a Deutsche Bank subsidiary that claimed to consider ESG in its investment strategies while failing to live up to the evaluation processes it touted.

There are other signals, beyond the Keurig case, that the SEC is still keeping an eye on ESG misconduct. In February, Gurbir Grewal, the director of the SEC's Division of Enforcement, described holding companies to their public statements about ESG as a way to protect investors and restore faith in the markets.

While acknowledging that the SEC is "not an environmental regulator" and "not the values police," he explained that the commission remains dedicated to ensuring that corporate ESG disclosures are truthful. He noted, "We are here to protect investors, and if they care [about ESG], then we care."

Let's hope the Keurig case, however small it may be, is a sign that the SEC is still going after misleading ESG claims by corporations and ensuring that investors have accurate information. We need ESG enforcement that's stronger than decaf.

This article does not necessarily reflect the opinion of Bloomberg Industry Group, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.

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Collecting All The Embarrassing Nonsense Your Adversaries (Or Employees) Put Online

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Joe Patrice

October 2, 2024

Technology

There's a lot more online these days. Lawyers need to get at it.

By Joe Patrice

on October 2, 2024 at 2:28 PM

Not every case turns on some damning, against interest post an adversary dropped on a Reddit board. Or, worse, that the client's CEO placed there. But some matters will and it's increasingly critical to have a comprehensive plan to scour web footprints of key individuals.

And to make sure that data is retained.

While there's undoubtedly a junior attorney or paralegal out there hunting and pecking and screenshotting their way through Facebook, there are much better methods to gather — and more importantly, authenticate — someone's web data.

Page Vault provides a software solution designed specifically for legal professionals to collect and preserve web content easily.

Page Vault's primary customers are law firms, with around 125 of the Am Law 200 firms using the software to automate the collection of online content. There's no need to manually capture full social media profiles or scroll through websites for relevant posts or comments. Page Vault can gather a complete Facebook, Instagram, or TikTok profile — with all comments, pictures, and videos — as well as searching full websites (up to thousands of URLs), Wayback Machine, marketplace activity, and video platforms. And the results are not limited to basic screenshots, with Page Vault offering the content in multiple formats such as PDFs or HTML.

Which can then be loaded into eDiscovery platforms for further analysis.



Each collection includes crucial metadata — capture date, URL, post timestamps, etc. — and a SHA256 hash value, a critical feature for ensuring that the data’s integrity remains intact for legal admissibility. Page Vault also boasts built-in compliance with Federal Rules of Evidence 902(13), allowing Page Vault to provide a certification authenticating the captured content. By taking the user out of the chain of custody, Page Vault provides a valuable tool for maintaining the integrity of this collected content.

The legal tech world may be saturated with generative AI conversations, but as I attend these conferences, the big — non-AI — issue that keeps coming up is developing more and more robust and efficient methods of gathering data. Whether it’s phones or an individual’s web footprint, “getting data” is a problem everyone still has that AI isn’t going to fix.

And, sure, you’re going to lose the billable hour of whichever junior you’d sent off to make screenshots, but Page Vault seems like a much better option in the long run.



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.

Grifols Owners Risk Losing Control of Drugmaker in Short Seller Attack

Published: Wed Oct 02 00:01:27 EDT 2024

By Clara Hernanz Lizarraga and Rodrigo Orihuela

(Bloomberg Businessweek) --

Illustration: Ard Su for Bloomberg Businessweek

For more than eight decades, the descendants of Josep Antoni Grifols Roig ran the pharmaceutical company he founded in the wake of the Spanish Civil War. But following a critical report from New York short seller Gotham City Research in January, shares in Barcelona-based Grifols SA tumbled by a third—and today the family is on the cusp of losing control.

Grifols had long been dogged by concerns about shoddy governance and a lack of transparency, but some investors overlooked those issues because the company is one of three that dominate the global business of collecting blood plasma and turning it into treatments for diseases such as hepatitis and hemophilia. Today, though, investment firm Brookfield Asset Management is in talks with the founder's descendants, who own more than a third of the company, to take the business private. "It's a desperate situation for the family," says Xavier Brun of Trea Asset Management, "a turning point to save their ownership."

The short seller's attack, one of Europe's biggest in the past decade in terms of the decline in the target's market value, highlights the risks family-owned companies face when listing on global markets. Many such enterprises are eager to tap into the money and visibility that comes with being traded in New York or London, but they don't always shed their old ways and fully embrace Wall Street rules. "The family wants to retain control, preserve a legacy, and that's not always compatible with maximizing value for shareholders," says Cristina Cruz, who leads the IE Center for Families in Business in Madrid. "Family business leaders are not used to making decisions that are mutually agreed upon with outside investors."

Grifols headquarters near Barcelona; the descendants of the founder risk losing control.

Photographer: Angel Garcia/Bloomberg

Víctor Grifols Roura, a grandson of the founder, oversaw Grifols' 2006 listing in Madrid and New York. He's also an owner of Scranton Enterprises BV. The investment firm is Grifols' second-largest shareholder—and a focus of the short seller's accusations questioning the company's accounts and

its dealings with the founding family.

Spain's regulator on Sept. 25 said it will fine Grifols for sharing "misleading" information in various financial reports and announced it has opened disciplinary proceedings against Gotham for alleged market manipulation. Grifols has sued Gotham in New York, denying any wrongdoing, and says the regulatory fine will be less than €1 million (\$1.1 million). Gotham, the family and Scranton all declined to comment.

From 2000 to 2018, Grifols spent \$8 billion-plus on more than a half-dozen acquisitions, reinforcing its position as Europe's largest manufacturer of plasma-derived products and bolstering its American operations. With plasma in short supply, acquiring US collection centers made sense, because the country is one of just a handful where it's legal to pay people for their blood. While the purchases spurred a fivefold increase in Grifols' collection centers, the company's debt grew by a factor of at least 12 in the same period.

On Dec. 31, 2018, the company quietly announced that Scranton had bought a pair of blood collection companies Grifols had purchased earlier that year. The price was exactly what Grifols had paid a few months before, and Gotham sharply criticized the transaction in its January report. Initially, investors weren't fazed. Grifols' shares climbed almost 50% over the next two years, giving it a market value topping €20 billion—and boosting the family's fortune to some €6 billion.

In 2021, Grifols borrowed €2 billion to buy Germany's Biotest AG. This time, shareholders got spooked. While Biotest owned some promising drugs, it operated at a loss. And with the pandemic easing and interest rates ticking up, investors suddenly focused on Grifols' growing debt.

About the same time, analysts say, the company's communication with investors, always lacking, got worse, with quarterly profit reports ending and the investor relations team typically shutting down by midafternoon. José María Cánovas, a former equity analyst at JB Capital who now manages money for wealthy individuals, says the financial community grew increasingly concerned about the family's management and the cozy ties between Grifols and Scranton. "In the years since the IPO, everybody knew the company had a very serious governance problem," Cánovas says. "They didn't care about investors."

Grifols' board at a June shareholder meeting; analysts say the company's communication with stock owners has gotten worse in recent years.

Photographer: Josep Lago/Getty Images

To address those worries, Grifols in 2022 hired its first nonfamily executive chairman, Steven Mayer, a veteran of Cerberus Capital Management. During his first earnings presentation in the new job, Mayer acknowledged the Grifols family's failings. "I'm not pointing a finger to the past," he said,

before hinting that the former management lacked follow-through and focus. “I think we need to reinstill that in the organization a bit,” he said.

Mayer left just four months later, citing health issues, and was succeeded by Thomas Glanzmann, a longtime board member. A few months afterward, Glanzmann was also appointed chief executive officer, replacing two family members who’d served as co-CEOs. But none of that was enough for Gotham, which issued its report just after the new year, triggering the collapse in Grifols’ shares. In April, former Olympus Corp. US chief Nacho Abia took over as CEO, and Glanzmann now serves exclusively as nonexecutive chairman.

This summer, Brookfield and Grifols confirmed reports of a preliminary agreement that would cede control of Grifols to the Toronto-based financial giant, which manages \$1 trillion in assets worldwide. (Mark Carney, chair of Brookfield Asset Management, is also chair of Bloomberg Inc.) Other private equity firms have considered bids, and some may still be looking into the idea, according to people familiar with the situation who asked not to be named discussing private conversations. While the family is likely to maintain some role at Grifols, “their stake is going to be cut, no doubt,” says Patricia Cifuentes, an analyst at Bestinver Securities in Madrid. “It’s much better for them to lose control of a company that has the potential to be worth more than to control a company that’s destined for trouble.”

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Carbon Offset Pioneer Charged With \$100 Million Fraud Scheme (1)

By Chris Dolmetsch

- US Says Ken Newcombe faked data for carbon credits, investment
- Goldman, World Bank veteran Newcombe denies allegations

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Carbon Offset Pioneer Charged With \$100 Million Fraud Scheme (1)

By Chris Dolmetsch2024-10-02T18:06:28569-04:00

- US Says Ken Newcombe faked data for carbon credits, investment
- Goldman, World Bank veteran Newcombe denies allegations

A pioneer in developing carbon offsets was accused by federal prosecutors of faking emissions-reduction data as part of a scheme to obtain millions of carbon credits and secure more than \$100 million in investment.

Former C-Quest Capital LLC Chief Executive Officer **Kenneth Newcombe**, who stepped down as CEO in February, was indicted Wednesday in New York on wire fraud and commodities fraud charges. He faces up to 20 years in prison if convicted on the most serious charges.

C-Quest develops emission-reduction projects to earn carbon credits that can then be sold to companies or other entities that wish to offset their own emissions. Newcombe, a onetime Goldman Sachs Group Inc. managing director and World Bank official, founded C-Quest in 2008.

The charges are a blow to the carbon offset development industry, in which Newcombe and C-Quest were leading players. The investors Newcombe allegedly deceived weren't identified by prosecutors, but C-Quest lists on its website Macquarie Group and Temasek Holdings' GenZero as among its backers.

A spokesman for Newcombe, 77, denied the allegations in a statement and also said the former CEO was dying of cancer. "He is confident that if he lives to see a jury hear this case, that jury will reject these false charges and return his good name to him," the spokesman said.

Prosecutors claim Newcombe and other C-Quest employees manipulated data to make it seem that certain of the firm's projects were more successful than they actually were. Many of its projects involved providing cooking stoves in African and Asian countries that were touted as lowering emissions. Newcombe allegedly sought aggressive growth in these projects but also covered up data showing they reduced emissions by a lower amount than anticipated.

Tridip Goswami, C-Quest's former head of carbon and sustainability accounting, was charged along with Newcombe. Goswami is in India and couldn't immediately be reached for comment. Prosecutors said another executive, former Chief Operating Officer Jason Steele, has pleaded guilty and agreed to cooperate with the government.

The Commodity Futures Trading Commission separately sued Newcombe earlier on Wednesday.

C-Quest said in July that it had reported Newcombe to law enforcement for alleged wrongdoing in obtaining millions of carbon credits. Verra, the leading issuer of carbon credits, said at the time it was suspending C-Quest projects and reviewing the matter.

Prosecutors said Wednesday they declined to charge C-Quest itself because the company self-reported the alleged wrongdoing and cooperated.

The case is US v. Newcombe, 24-cr-567, US District Court, Southern District of New York (Manhattan).

(Updates with detail on charges.)

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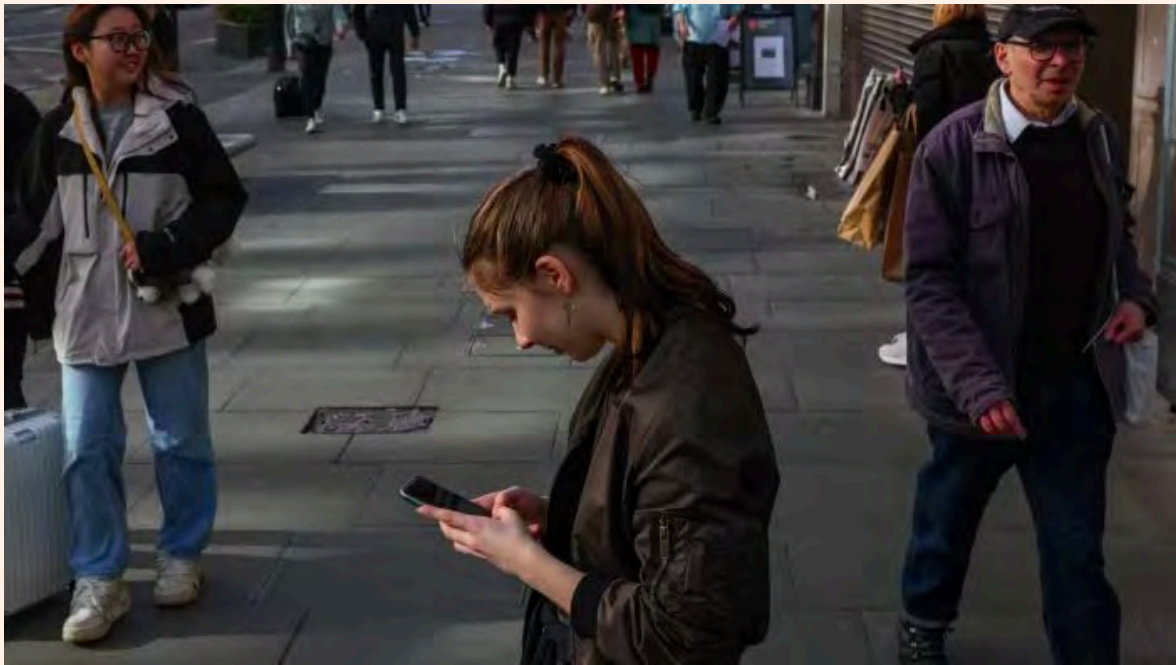
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Revolut Ltd

Revolut urges Meta to share cost of reimbursing fraud victims

Financial and tech groups at odds about how to tackle and pay for the problem



Britons lost £460mn to authorised push payment fraud last year © Daniel Leal/AFP via Getty Images

Akila Quinio in London AN HOUR AGO



UK fintech Revolut has called on Meta to share the cost of compensating fraud victims with banks and criticised its [fraud prevention](#) efforts, in a sign of rising tension between financial and tech groups about how to tackle and pay for the problem.

The fintech on Thursday took aim at a UK initiative that Meta launched the day before to allow banks to share transaction data with the platform in a bid to prevent fraud.

“These plans are baby steps, when what the industry really needs is giant leaps forward,” said Revolut’s head of financial crime, Woody Malouf.

“These platforms share no responsibility in reimbursing victims, and so they have no incentive to do anything about it, he said, adding Meta’s latest solution “simply isn’t good enough”.

The criticism comes as the tech sector faces scrutiny over its role in enabling “authorised push payment” fraud, where victims are tricked into sending money to fraudsters from their bank accounts.

Britons lost £460mn to APP fraud last year, according to trade body UK Finance, 70 per cent of which involved goods that were ordered online by consumers but not received.

According to Revolut data, 69 per cent of scams that UK customers reported to the fintech in the first half of this year originated on Meta platforms — such as Facebook and Instagram — up from 67 per cent in the second half of last year.

From October 7, UK banks and payment companies will be liable for refunding fraud victims on claims worth up to £85,000. Bankers and politicians argue that making tech companies contribute to compensation costs would give them an incentive to do more to tackle fraud.

Before it was elected in July, the country’s ruling Labour party said that tech companies “contribute very little” to tackling online fraud or compensating victims, in a [document seen by the Financial Times](#) that sets out plans to make them contribute to compensation costs.

“What is urgently needed now is for Meta and other social media companies to commit to supporting victims of fraud in the same way financial institutions do,” said Malouf.

Meta’s global head of counter-fraud Nathaniel Gleicher told the Financial Times on Wednesday that the social media group had significant incentives to root out fraud, including creating a “safe” community for its users and complying with regulation.

Facebook and Instagram are signatories to the UK’s online fraud charter, a voluntary agreement drawn up last year between tech companies and the government to try to reduce fraud.

Social media companies must also take down fraudulent ads under the Online Safety Act. Media regulator Ofcom can fine those that fail to comply.

Meta said: “Fraud is a multi-sector spanning issue that can only be addressed by working collaboratively. Our pilot Fraud Intelligence Reciprocal Exchange programme (FIRE) is designed to enable banks to share information so we can work together to protect people using our respective services. We encourage banks including Revolut to join in this effort.”

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SEC Appeals \$125 Million Judgment in Ripple Labs XRP Lawsuit (1)

By Chris Dolmetsch

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SEC Appeals \$125 Million Judgment in Ripple Labs XRP Lawsuit (1)

By Chris Dolmetsch2024-10-02T18:19:30695-04:00

The US Securities and Exchange Commission appealed a court decision ordering Ripple Labs Inc. to pay a \$125 million civil penalty for improperly selling its XRP token, a fraction of the \$2 billion the regulator sought in a long legal battle with the cryptocurrency company.

Ripple Labs was sued in 2020 by the SEC, which claimed the company broke the law when it raised money by selling the digital token without registering it as a security. The case has been closely watched because of its implications for the SEC's regulatory power over crypto.

Last year, US District Judge Analisa Torres found XRP was covered by securities law only when sold to institutional investors, a ruling hailed as a major victory for the industry. The SEC, led by Chair Gary Gensler, has several major cases against crypto exchanges and issuers, accusing them of offering unregistered securities.

Torres in August issued an injunction barring Ripple from committing further violations of securities laws. But she denied the SEC's bid for Ripple to disgorge profits from its sales. The regulator had sought more than \$876 million in disgorgement and more than \$198 million in interest, along with an \$876 million civil penalty. Ripple argued it shouldn't have to pay more than \$10 million.

"If Gensler and the SEC were rational, they would have moved on from this case long ago," Ripple Chief Executive Officer **Brad Garlinghouse** said in a post on X.com. "It certainly hasn't protected investors and instead has damaged the credibility and reputation of the SEC. Somehow, they still haven't gotten the message: they lost on everything that matters. Ripple, the crypto industry, and the rule of law have already prevailed."

The SEC, in a statement, said "the district court decision in the Ripple matter conflicts with decades of Supreme Court precedent and securities laws."

The case is SEC v. Ripple Labs Inc., 20-cv-10832, US District Court, Southern District of New York (Manhattan).

(Updates with SEC statement.)

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Tesla's Top Data Executive Is Leaving as Robotaxi Event Looms

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Oct. 3, 2024, 9:27 AM PDT

Ed Ludlow

Bloomberg Editorial

Dana Hull

Bloomberg Editorial

- Employees were told of Chief Information Officer Saldi's exit
- Long-serving executive oversaw build-out of new data centers

By Ed Ludlow and Dana Hull

(Bloomberg) --

Tesla Inc. employees have been told that Chief Information Officer Nagesh Saldi is leaving the company, days before it's set to unveil a new robotaxi at a splashy event in California, according to people familiar with the matter.

Saldi reported directly to Chief Executive Officer Elon Musk. News of his departure was shared with employees this week, the people said, asking not to be identified discussing private personnel matters.

The long-serving executive had been involved in the build-out of Tesla's new data centers in Texas and New York, two of the people said. The company is bulking up its computing capacity to accelerate breakthroughs in artificial intelligence to power autonomous driving.

Tesla is expected to show off its recent technological advancements at an event dedicated to its new, driverless robotaxi on Oct. 10 at Warner Bros. Discovery Inc.'s movie studio lot in Burbank, California.

Musk, Saldi and representatives for Tesla didn't respond to requests for comment.

Saldi joined Tesla in 2012 from HP Inc., according to his LinkedIn profile. He became the Tesla CIO in 2018, when the company was in the throes of ramping up the Model 3 sedan. A CIO is typically in charge of all information technology and security strategy, including data centers.

Other executives have departed this year as the company has shifted its focus. Senior Vice President Drew Baglino and Rohan Patel, its government affairs head, left in April. Tesla's top human resources executive, Allie Arebalo, also departed.

Tesla only has three named executive officers: Musk, Chief Financial Officer Vaibhav Taneja and Tom Zhu, senior vice president of automotive.

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'Netflix Of China' Beats Investor Suit Over Inflated User Claims

By **Katryna Perera**

Law360 (October 2, 2024, 6:35 PM EDT) -- China-based streaming service iQIYI, dubbed the "Netflix of China," and another streaming service, Baidu Inc., have beaten proposed shareholder class action suits alleging the companies falsely beefed up iQIYI's user metrics, causing stock price drops when the truth was later revealed in a short seller report.

U.S. District Judge Diane Gujarati issued a **memorandum and order** Monday, finding that the investors of both suits have failed to plead scienter, or knowledge of wrongdoing, by the defendants, and they have failed to plead any material false statements or misrepresentations.

Judge Gujarati's order covers two complaints filed against iQIYI and Baidu in March 2024. The investors allege in the operative complaints that the defendants lied about iQIYI's growth numbers even before its 2018 initial public offering.

A report published by Wolfpack Research on April 7, 2020, accused iQIYI of inflating its various financial statements and metrics for years, including its total revenue, number of daily active users and membership growth, among other things. Wolfpack estimated that iQIYI's revenue numbers were inflated by 27% to 44% and that it overstated its users by about 42% to 60%. Following the report, the suits say iQIYI's stock fell by more than 4.5% in April 2020.

In her order Monday, Judge Gujarati focused mainly on the investors' scienter claims and said they have failed to state a claim for scienter against any of the defendants.

She said the investors seem to rely on the assertion that they adequately alleged circumstantial evidence of conscious misbehavior or recklessness rather than motive and opportunity in support of scienter claims.

According to the order, the investors allege the individual defendants, which include iQIYI CEO Yu Gong and Chief Financial Officer Xiaodong Wang, reviewed information contrary to public statements issued by iQIYI, knew about the inflated user numbers and deferred revenues because those facts were "critical to iQIYI's core operations," and waited months to tell investors about regulatory investigations launched against the company.

But Judge Gujarati said, viewed holistically, these allegations do not demonstrate strong circumstantial evidence of conscious misbehavior or recklessness.

"Although plaintiffs allege that the [defendants] admitted to monitoring iQIYI's [daily active users], that iQIYI's management periodically met with iQIYI's audit committee to review and discuss iQIYI's financial statements, and that Baidu's management periodically met with Baidu's audit committee, plaintiffs do not allege that any defendant ... was presented with specific internal DAU data or reports contradicting defendants' public statements," the order states.

The judge also said the investors' argument that the defendants' scienter is supported by the fact that they "had a duty" to monitor iQIYI's revenue and DAUs is "unavailing."

Furthermore, Judge Gujarati said the complaints' reliance on the defendants' alleged delay in disclosing regulatory investigations is also unavailing.

"As an initial matter, plaintiffs do not sufficiently allege that defendants had a duty to disclose such investigations," the order states. "Moreover, any purported delay in disclosing investigations does not support a strong inference that defendants were 'trying to downplay the [short seller report] by making investors think the allegations from the report were untrue,' — a more compelling inference is that defendants did not believe it was necessary to immediately address the report."

Judge Gujarati also found Monday that the investors have failed to allege any material false statements allegedly made about iQIYI's DAUs or deferred revenue, and have failed to plead control person liability claims, among other things.

iQIYI's stock continues to trade below the \$18 per share mark, where it was priced when it debuted on the Nasdaq in March 2018. On Wednesday, the stock was trading around \$3. In the Skadden Arps Slate Meagher & Flom LLP-led IPO, the company **raised about \$2.2 billion** amid what then was a wave of Chinese issuers tapping U.S. markets.

Backed by technology conglomerate Baidu, iQiyi said it planned to spend its proceeds on expanding content offerings and capturing a bigger slice of China's online entertainment market. The company, which said it was the largest internet video-streaming service in China based on user time spent, collaborates with Hollywood studios, TV networks and Netflix on its media.

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

The investors in both suits are represented by Laurence M. Rosen, Phillip Kim, Jing Chen, Daniel Tyre-Karp and Jonathan Stern of The Rosen Law Firm PA, Michael P. Canty, Michael H. Rogers, David J. Schwartz, James T. Christie and Philip J. Leggio of Labaton Keller Sucharow LLP and Robert M. Rothman and William J. Geddish of Robbins Geller Rudman & Dowd LLP.

The defendants are represented by Robert A. Fumerton, Steve Kwok, Scott D. Musoff, Beatriz Paterno, Michael C. Griffin, Ian C. Lerman and Sophie T. Nguyen of Skadden Arps Slate Meagher & Flom LLP and Jonathan Rosenberg and William J. Sushon of O'Melveny & Myers LLP.

The cases are In re iQIYI Inc. Securities Litigation, case number 1:20-cv-01830, and In re Baidu Inc. Securities Litigation, case number 1:20-cv-03794, in the U.S. District Court for the Eastern District of New York.

--Editing by Jay Jackson Jr.



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EXp Investors Accuse Execs Of Ignoring Sex Assault Culture

By **Dorothy Atkins**

Law360 (October 2, 2024, 11:16 PM EDT) -- Shareholders of eXp World Holdings Inc. have hit the real estate brokerage company's top-brass with a derivative lawsuit in Delaware Chancery Court Wednesday, claiming they intentionally ignored repeated reports that its top "influencers" were drugging and sexually assaulting real estate agents at company events, thereby exposing the company to millions in liabilities.

In a partially redacted, Sept. 25 derivative complaint that was unsealed Tuesday, two pension funds accuse the company's executives, including its CEO Glenn Sanford and Chief Legal Counsel James "Jim" Bramble, of knowing by at least September 2020 that its top agents — dubbed influencers — were regularly assaulting eXp real estate agents at corporate events.

Instead of taking immediate action and investigating the alleged widespread sexual misconduct, the executives and board members chose to cover up and deny the claims, the pension funds claimed.

"Defendants orchestrated a cover-up to protect the assailants, prioritizing the profits that inflated executive bonuses over agent safety and compliance with the law — as well as basic human decency," the suit said.

The accused influencers include former top agents Michael Bjorkman and David Golden and eXp's former head of U.S. growth, Dave Conord, and dozens of others, the suit said.

The lawsuit claimed that Golden and Bjorkman regularly sponsored eXp recruitment events and ensured that those events were "wellstocked with alcohol and 'date rape' drugs, such as Rohypnol or 'roofies' and gamma-hydroxybutyric acid, or 'GHB.'"

At the events, the pair allegedly held parties in their hotel rooms where they purportedly drugged and assaulted unconscious women, and it was allegedly known among some agents that if women didn't leave the party by 11 p.m., they would be locked in the room for the night and potentially assaulted, the suit claimed.

Conord, who is married, is accused of witnessing at least one of these alleged sex parties in a hotel room, the suit said. Conord left eXp in 2021 after he was accused of having an affair with a subordinate and sending sexually explicit pictures to other subordinates to pressure them into having sex with him, according to the suit.

As support for the claims, the lawsuit cited eXp's former director of diversity and employee success, who was with the company from November 2019 until June 2021, and confirmed that sexual misconduct at eXp conferences and events was widespread, and that people were afraid to report it. The director's name is redacted from the complaint, but he claimed that eXp's response to the allegations was by implementing a vague, confusing "policy Jenga."

"According to the diversity director, it was very clear that women were being drugged and sexually assaulted," the suit said. "Another realtor told him that 'dozens of people went into that room,' further corroborating ... women being drugged and successively assaulted or raped by multiple assailants."

The two pension funds — the Los Angeles City Employees' Retirement System and the Building

Trades Pension Fund of Western Pennsylvania — alleged that board members and its executives were repeatedly told about the alleged assaults, which were eventually reported in news outlets.

But Sanford allegedly said the assaults weren't the company's problem and the allegations "would be simply a three-to-five-day newspaper phenomenon and then would disappear," according to the complaint.

As a result, the board intentionally never included the sexual assault allegations in their board meeting minutes and never put the item on their agenda, while the company continued to pay the influencers millions of dollars in bonuses, even after they left the company, the suit alleged.

The pension funds claimed that the board's "cover-up" approach was adopted so that the executives could continue to rake in profits from its so-called downline recruitment scheme, which operated like a Ponzi structure, awarding older agents — including those accused of misconduct — bonuses from money collected from the new agents they recruited.

The pension funds alleged that under Sanford's leadership the company even ousted a board member, Eugene "Gene" Frederick, who is also named as a defendant, for demanding to see the company's "real" books.

"This misconduct is part and parcel of defendant Sanford's longstanding practice of stacking the board with loyalists, maximizing his own personal profits, and ousting anyone who opposes him," the complaint said.

The board's alleged years-long cover-up and refusal to take action exposed eXp to millions of dollars in liability, as assault victims have pursued claims against the company and its former agents in state and federal court, according to the complaint.

The three-count complaint asserted derivative claims of breaches of fiduciary duties against Sanford, Bramble and Frederick, as well as current board members Randall Miles — referred to as Stanford's "fixer" — and Dan Cahir, and former board member Jason Gesing.

The lawsuit also seeks the "immediate disgorgement" of all profits, benefits and other compensation paid out by the company as a result of the alleged breaches, as well as damages tied to the alleged breaches, plus interest, attorneys' fees and costs.

The company said in a statement Wednesday that it takes its responsibility to provide a safe and inclusive environment very seriously, and eXp has "zero tolerance for abuse, harassment or misconduct of any kind," including by the independent real estate agents who use the company's services.

"The claims in this case stem from alleged assaults by independent real estate agents — which we handled with seriousness and deep respect, in line with our company values, policies, and procedures," the statement said. "The company will continue to do its best to ensure we create a safe environment that provides an opportunity for our employees and agents to succeed."

Counsel for the pension funds didn't immediately respond to a request for comment Wednesday.

The derivative suit comes as the company is in the midst of fighting **two separate lawsuits** filed in California federal court last year by multiple individuals who claim eXp agents drugged and assaulted them. The company was also sued in Nevada over similar claims, but that case has since settled.

In one California **case**, agents Golden and Bjorkman were accused of enticing the women to travel to networking events, and drugging and sexually assaulting them while promising to advance their careers. The women alleged that this behavior goes back at least 20 years, but their case focuses on the period between July 2018 to August 2020.

The suit also accused eXp of knowing about the assaults but doing nothing because the two men were big recruiters for the agency. The two women who alleged assaults in August 2020 said that they told the agency what happened, but that it took no action, according to their lawsuit. Bjorkman was arrested in 2021 on a charge of assaulting one of the accusers, but the charge was later

dismissed. Neither Bjorkman nor Golden is with the company.

The pension funds are represented by Gregory V. Varallo, Benjamin M. Potts, Hannah Ross, Rebecca E. Boon, Christopher J. Orrico and Caitlin C. Bozman of Bernstein Litowitz Berger & Grossmann LLP, Ned Weinberger, Mark D. Richardson, Domenico Minerva, John Vielandi and Nina M. Varindani of Labaton Keller Sucharow LLP and Hydee Feldstein Soto, Joshua Geller, Miguel Bahamon and Gina Di Domenico of the Office of the Los Angeles City Attorney.

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

The instant derivative shareholder case is Los Angeles City Employees' Retirement System v. Glenn Sanford et al., case number 2024-0998, in the Court of Chancery of the State of Delaware.

The California cases are Acevedo et al. v. eXp Realty LLC et al., case number 2:23-cv-01304, and Anya Roberts v. eXp Realty LLC et al., case number 2:23-cv-10492. Both are in the U.S. District Court for the Central District of California.

The settled case is Carter v. Chris Nevada et al., case number 3:24-cv-00025, in the U.S. District Court for the District of Nevada.

--Editing by Dave Trumbore.

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Chancery Drops Curtain On AMC Stock Dilution Suit

By **Jeff Montgomery**

Law360 (October 2, 2024, 4:20 PM EDT) -- A Delaware vice chancellor dismissed on Wednesday a proposed class action seeking damages or additional shares for former AMC Entertainment Corp. preferred stockholders who say the value of their shares was wrongly reduced last year in a deal that settled a hotly contested share conversion and reverse split.

Vice Chancellor Morgan T. Zurn, ruling from the bench, rejected arguments from attorneys for former AMC preferred equity holder and proposed class representative Michael Simons that AMC should have issued additional antidilution share rights to the holders of AMC preferred equity units before their holdings converted to common stock on Aug. 25, 2023.

The decision followed arguments by Russell D. Paul of Berger Montague PC, an attorney for the class, that focused in part on the phrase "deemed to be issued" in AMC's settlement. Simons argued that under the wording, AMC's multistep, multiday settlement should have resulted in a conversion of the preferred shares into a larger, adjusted number of common shares for preferred equity holders before a per-share payout.

John A. Neuwirth of Weil Gotshal & Manges LLP, arguing for AMC, told the vice chancellor that the class complaint "cannot identify any gaps in the express language" of the agreement, "and the terms that plaintiff does seek simply would contradict the express terms" of the deal, while giving the holders of preferred equity additional compensation.

Observing at one point that the document involved was "not well written," the vice chancellor nevertheless rejected the proposed class claims, ruling that AMC did not subvert the agreement and finding that the settlement "puts clear, unambiguous" constraints on the antidilution provisions.

AMC argued that the settlement payment was intended to compensate holders of common stock for alleged harm resulting from conversion of preferred shares into common stock, with the settlement payable only after the conversion took place.

Under the plan, the common-stock holders were to be paid a special distribution of one new share for every 7.5 Class A shares before a 1-for-10 reverse stock split. Holders of preferred shares, however, did not see their shares converted to common under the reverse split until after the 1-per-7.5 distribution had been completed.

"We have to follow the law, which says preferred-stock holders were harmed by the settlement distribution, and have a right to recovery," Paul told the vice chancellor.

In arguing for dismissal, Neuwirth told the vice chancellor that the complaint was filed shortly before the settlement was completed, but no immediate action was taken to pursue the claim.

"Here, the preferreds were clamoring for the conversion. The reason they wanted the conversion to happen was the preferred was trading at a steep discount to the common stock, so the preferreds were cheering," Neuwirth said.

Counsel for preferred-share holders argued that wording of the agreements at issue stated that antidilution protections for preferred shares applied if "dilutive common stock is 'issued (or deemed to be issued)' prior to the conversion of preferred stock into common stock."

Vice Chancellor Zurn noted that counsel for the shareholders fell back on allegations that AMC had

breached the implied covenant of good faith and fair dealing in their efforts to avoid triggering antidilution protections.

But "the covenant cannot be properly applied to give particular contractual protections" to the holders of preferred shares that "they failed to give themselves at the bargaining table."

The particular sequence and record dates for the settlement transactions, the vice chancellor said, are not relevant to the dispute.

Vice Chancellor Zurn spent considerable court time over the past two years presiding over a public, complex and sometimes passionate battle over AMC Entertainment Inc.'s efforts to push through a reverse stock split and preferred equity conversion in 2022 in order to raise cash as it struggled to keep making money in a changing media world. She **approved the settlement** on Aug. 11, 2023.

In a rare testament to the concerns, a court security officer watched over proceedings Wednesday, without explanation.

Michael Simons and the proposed class are represented by Russell D. Paul, Michael Dell'Angelo and Andrew Abramowitz of Berger Montague PC.

AMC Entertainment Inc. is represented by Raymond J. DiCamillo, Kevin M. Gallagher, Matthew W. Murphy and Edmond S. Kim of Richards Layton & Finger PA, and by John A. Neuwirth, Joshua S. Amsel, Matthew S. Connors and Tanner S. Stanley of Weil Gotshal & Manges LLP.

The case is Michael Simons et al. v. AMC Entertainment Holdings Inc., case number 2023-0835, in the Delaware Court of Chancery.

--Editing by Karin Roberts.

Update: This article has been updated with additional comments from Wednesday's hearing.



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Tilray Gets Investor Stock Suit Scrubbed For Good

By **Mike Curley**

Law360 (October 2, 2024, 1:42 PM EDT) -- A New York federal judge has dismissed with prejudice an investor suit alleging cannabis company Tilray Inc. and its officers misled investors about a co-branding agreement's prospects, saying the latest amended complaint fails to show that the company's CEO had intent to defraud or other nefarious motives.

In an **order** filed Monday, U.S. District Judge Mary Kay Vyskocil said the plaintiffs, now led by Saul Kassin, failed to add to their latest complaint any allegations that would change the court's findings on previous complaints that were dismissed, saying the law of the case doctrine applies even though the case has been transferred.

According to the motion, the plaintiffs attempted to plead scienter, or motive to commit fraud, through stock sales made by CEO Brendan Kennedy around the time of the agreement, but the prior order dismissing the complaint found those allegations insufficient, and the latest complaint doesn't change things.

The only new factual allegation is that the U.S. Securities and Exchange Commission recently amended its rules to require a 90-day cooling off period between the adoption of a trading plan and the first planned sale, but the SEC changing the rules after Kennedy's sales does not make Kennedy's then-legal sales suspicious, the judge wrote.

In addition, the judge wrote that the complaint fails to show why Kennedy chose not to sell the vast majority of shares available to him until after the stock dropped, suggesting that he's among the people harmed by the alleged scheme.

And Kennedy's aim to "be the leader of the cannabis world" through acquisitions is not any better evidence of an intent to defraud, Judge Vyskocil wrote, saying such motives are generally possessed by most corporate officers and can be attributed to normal ambition and greed rather than fraud.

Investors of the pharmaceutical and cannabis company initially sued in 2020, alleging Tilray, Kennedy and Chief Financial Officer Mark Castaneda overstated the advantages of a January 2019 agreement with Authentic Brands Group LLC agreement and made misrepresentations in annual reports, U.S. Securities and Exchange Commission filings and press releases in order to deceive the public and artificially inflate the market price for Tilray securities.

After Tilray disclosed a \$321.2 million net loss for 2019, Tilray's stock price fell \$2.33 per share, or more than 15%, to close out at \$13.02 per share the next day, according to the complaint.

In September 2021, U.S. District Judge Paul A. Crotty **dismissed** the suit without prejudice, then a year later partially dismissed the second amended complaint. Tilray asked for a reconsideration **in October 2022**, arguing the judge had applied a lower pleading standard than the law required.

In August 2023, Judge Crotty **granted that reconsideration**, and the plaintiffs filed another amended complaint last September.

In Monday's order, Judge Vyskocil further found that the plaintiffs failed to show that Tilray or its officers were reckless or consciously misbehaving, saying the complaint can't support its allegation that Kennedy was "personally" responsible for an inventory report to the SEC that they allege disclosed a weakness in the company's internal controls and thus must have known that public-facing statements were false.

If anything, the judge wrote, Tilray's disclosure in that report of a remedial plan undermines the recklessness theory, because it shows that the company was taking prudent action to address a problem.

The plaintiffs had also pointed to a statement by Tilray that it would not be writing off byproduct at the end of one year as showing that the company knew it was worthless beforehand, but the judge wrote the more compelling inference is that the market changes and a new policy of valuing trim — parts of a cannabis plant that do not have enough THC to be smoked — at \$0 drove the change.

As to alleged misrepresentations about the ABG deal, the judge wrote that the complaint's allegations, trimmed as they are from prior complaints, don't include the required factual allegations to show that Tilray or Kennedy subjectively did not believe their own statements.

Even if, as the plaintiffs allege, the deal came together in days instead of weeks, the complaint fails to show that Kennedy did not believe the deal was properly vetted to the point of recklessness.

The judge added that being wrong about a deal's prospects does not constitute fraud.

"It is just as, if not more, likely, based on the allegations in the third amended complaint, that defendants were erroneously but genuinely optimistic about the promise of regulatory developments and their impact on Tilray's operations, such as the possibility of selling trim in Canada," the judge wrote. "Similarly, defendants may have been overzealous in predicting the success of the ABG agreement in a nascent U.S. CBD market."

Finally, the judge denied leave to amend, noting that on the prior dismissal, Judge Crotty said the plaintiffs' amended complaint would be their final opportunity to fix its deficiencies.

An attorney for the investors declined to comment Wednesday.

Representatives for Tilray could not immediately be reached for comment Wednesday.

The investors are represented by Jonathan Horne and Laurence M. Rosen of The Rosen Law Firm PA.

Tilray and the other defendants are represented by Douglas W. Greene, Zachary R. Taylor and Genevieve G. York-Erwin of BakerHostetler.

The case is Kasilingam et al. v. Tilray Inc. et al., case number 1:20-cv-03459, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Katryna Perera, Jack Queen and Sarah Jarvis. Editing by Alyssa Miller.



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Freshworks Can't End Investors' IPO Disclosure Suit

By **Sydney Price**

Law360 (October 2, 2024, 10:38 PM EDT) -- A California federal judge has told software company Freshworks it cannot escape a proposed investor class action alleging it omitted information from U.S. Securities and Exchange Commission filings when it made its initial public offering, saying the court cannot currently decide if its alleged omissions damaged investors.

U.S. District Judge Charles R. Breyer said on Tuesday that the questions remaining in the suit are better suited for summary judgment or trial, "likely with the assistance of expert testimony."

The investors allege that six weeks after Freshworks went public in September 2021, its third-quarter earnings revealed declining revenue growth. Lead plaintiff Mohan Sundaram says that this shows Freshworks was experiencing worsening finances at the time of the IPO, and should have been disclosed to investors earlier.

In a motion to dismiss the suit last June, Freshworks said that although its revenue growth had declined to 46% in the third quarter of 2021, this was not a dramatic departure from its previous results. The company said the allegation that this was a "staggering" drop is "every bit as wrong as it sounds."

In September 2023, Judge Breyer told the investors that they can proceed on their claim that Freshworks' offering documents did not disclose known revenue and calculated billing growth deceleration, and that they can amend their claims that the company failed to disclose the decelerating growth rates prior to the IPO and statements in the offering documents created a false impression of Freshworks' financial situation.

Freshworks filed a motion for judgment on the pleadings in July, saying the investors had suffered no recoverable damages.

Judge Breyer said on Tuesday that Freshworks is correct that the Securities Act does not permit the investors to recover for stock price declines above the IPO price, and that the investors will ultimately need to prove that any stock price declines below the IPO price were in fact caused by offering document omissions.

"Defendants do not carry their heavy burden of establishing beyond doubt that Plaintiff is not entitled to relief," Judge Breyer said. "Defendants' arguments would require the Court to conclude as a matter of law that their alleged omission of trends reflected in the Q3 2021 numbers had no negative impact on Freshworks stock as soon as Nov. 15, 2021 — the first day that Freshworks stock dropped below its offering price."

All 17 involved underwriters are named as defendants in Sundaram's suit, along with Freshworks' CEO and board chairman, Rathna Girish Mathrubootham; Tyler Sloat, the chief financial officer, and several other board members.

Counsel for the investors declined to comment on Wednesday. Counsel for the defendants did not immediately respond to requests for comment.

Sundaram is represented by John T. Jasnoch, Hal Cunningham, William C. Fredericks, Mandeep S. Minhas, Rhiana Swartz and Thomas L. Laughlin IV of Scott + Scott Attorneys at Law LLP and Brian J. Schall of The Schall Law Firm.

Freshworks and its executives are represented by Patrick E. Gibbs, Shannon M. Eagan, Sarah M. Lightdale, Linh Khahn Nguyen and Brian M. French of Cooley LLP and Claire A Holton-Basaldua of Latham & Watkins LLP.

The underwriters are represented by Alexander K. Talarides, Darrell S. Cafasso and Jennifer M. Keighley of Orrick Herrington & Sutcliffe LLP.

The case is Sundaram v. Freshworks Inc. et al., case number 3:22-cv-06750, in the U.S. District Court for the Northern District of California.

--Editing by Peter Rozovsky.

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Bard Agrees To Individualized Deals In Hernia Mesh Litigation

By **Hailey Konnath**

Law360 (October 2, 2024, 11:22 PM EDT) -- Tens of thousands of plaintiffs alleging they were injured by hernia mesh implant devices could resolve their claims against C.R. Bard Inc. under a settlement process unveiled Wednesday, a "decisive step" toward addressing the claims in both state and federal courts, counsel for the plaintiffs said in their announcement.

The program would allow existing plaintiffs to receive "highly individualized" settlement offers based on their specific injuries, conditions and treatments, according to Jonathan D. Orent, a Motley Rice LLC lawyer representing plaintiffs in Rhode Island state court litigation. The terms of the deal are otherwise confidential and there's no specific dollar amount available at this time, he told Law360 on Wednesday.

"In negotiating this agreement, we wanted to ensure that the most money would go to the most injured individuals," Orent said. "To get there we created an objective and transparent process that will treat everyone fairly."

Orent said he and the other attorneys involved in negotiating will be sharing the full details of the program with individual case counsel across the country in the coming days and weeks.

The program will be available to more than 25,000 plaintiffs in sprawling multidistrict litigation centralized in Ohio federal court as well as to plaintiffs in consolidated litigation in Rhode Island state court. It covers more than 30 of Bard's hernia mesh products, according to a joint statement issued by co-lead counsel for the plaintiffs.

"The agreement establishing the process marks a major legal milestone after seven years of relentless litigation for these individuals and their loved ones who faced formidable challenges," co-lead counsel said in the statement.

Bard's parent company Becton Dickinson & Co. said in its own statement that the deal could resolve the "vast majority of its existing hernia litigation." The settlement does not involve any admission of liability or wrongdoing, it said.

"The aggregate amount payable pursuant to this settlement is within the company's current product litigation reserve for this matter and will be paid out over a multi-year period," the company said.

It added that it believes the agreement "is in the best interest of all parties and is structured to eliminate uncertainty for all stakeholders related to the settled cases."

Orent said that plaintiffs still have the option to reject their individual settlement offer and continue to fight in court. In that event, Becton Dickinson said it would continue to "vigorously defend itself" in any cases not resolved through the agreement.

Don Migliori, another Motley Rice attorney and one of the lead negotiators, said in Wednesday's statement that the biggest challenge to reaching a deal was the number of plaintiffs across multiple jurisdictions.

"This agreement is unique in the way that it creates a path forward for everyone," Migliori said.

The deal was reached after three **bellwether trials** in the MDL, two of which resulted in verdicts **in favor of the plaintiffs**. After the two wins for plaintiffs, the judge overseeing the litigation removed a fourth bellwether trial case from the calendar and ordered the parties to work on reaching a settlement, according to the statement.

A \$4.8 million verdict in favor of a plaintiff in state court was another factor in reaching the settlement, the attorneys said.

Fleming Nolen & Jez LLP lawyer Kelsey Stokes, who represented plaintiffs in the MDL, said in the statement that the deal "is a real testament to the resilience and determination of all plaintiffs and the hard work of all parties involved."

"We look forward to sharing more details directly to all plaintiffs soon," Stokes said.

In July, U.S. District Judge Edmund A. Sargus Jr. **refused to seal a settlement motion** from Bard and hundreds of hernia mesh implant claimants, saying the parties hadn't given a good reason to keep their deal secret.

The settling parties had also argued that the terms of their deal are not of public interest and would undermine the privacy of the parties if disclosed.

The plaintiffs are represented by Tim O'Brien of Levin Papantonio, Kelsey Stokes of Fleming Nolen & Jez LLP, Don Migliori and Jonathan Orent of Motley Rice LLC and Michael A. London of Douglas & London PC.

Bard is represented by Eric Alexander of Holland & Knight LLP, Michael K. Brown of Reed Smith LLP and William D. Kloss Jr. of Vorys Sater Seymour and Pease LLP.

The cases are In re: Davol Inc./C.R. Bard Inc. Polypropylene Hernia Mesh Products Liability Litigation, case number 2:18-md-02846, in the U.S. District Court for the Southern District of Ohio, and In re: Davol/C.R. Bard Hernia Mesh Multi-Case Management, case number PC-2018-9999, in Rhode Island Superior Court.

--Additional reporting by Ryan Harroff and Mike Curley. Editing by Jay Jackson Jr.



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Colo. Judge Sees No Injuries In Health Data Breach Class Suit

By **Daniel Ducassi**

Law360 (October 2, 2024, 8:38 PM EDT) -- A Colorado federal judge has dismissed a proposed class action alleging a software company waited nearly three months to tell data breach victims about hackers accessing personal and medical information for more than 250,000 people, concluding the plaintiffs' allegations weren't enough to give them standing.

The lawsuit filed in March 2023 against Colorado software company Reventics Inc. alleged the company failed to properly safeguard their data, but Reventics asked for the case to be tossed, arguing there were no actual injuries alleged and that they couldn't be fairly traced to the data breach.

Chief U.S. Magistrate Judge Michael E. Hegarty wrote in his order Monday that the case "wades into the muddy waters that is Article III standing in the context of data breach cases."

Judge Hegarty observed that the caselaw around standing in data breach litigation is mixed, with some circuits finding that data breach victims have suffered an injury that gives them standing to sue based solely on the disclosure of their information to hackers, citing decisions by the federal appellate courts for the Sixth and Seventh Circuits, though found other courts have noted those decisions typically involved allegations of data being actually misused.

On the other side were decisions by the courts of appeals for the Second, Third, Eighth and Eleventh circuits finding plaintiffs didn't suffer actual injuries simply because their data was accessed by hackers.

And while the U.S. Court of Appeals for the Tenth Circuit hasn't decided on this issue, Judge Hegarty wrote, district court judges in the circuit have.

"These sister districts have all followed the view that a plaintiff does not suffer an injury in fact where their [personally identifiable information] is accessed through a data breach but no direct harm results," Judge Hegarty wrote. "This court is persuaded to follow the same reasoning."

Judge Hegarty as a result found injuries alleged by plaintiffs based solely on the disclosure of private information weren't enough to give them standing. Similarly, he found that plaintiffs spending money to mitigate the increased risks resulting from the disclosure of their data, such as time spent monitoring their credit, also doesn't count.

"Courts have repeatedly rejected the argument that such costs constitute injuries in fact as they are costs incurred due to a plaintiff's own apprehension of speculative future harms," Judge Hegarty wrote.

That same reasoning applied to alleged emotional distress, Judge Hegarty wrote, finding such feelings are "based on hypothetical, future harm that is not certainly impending."

He also rejected the argument that plaintiffs lost the benefit of their bargain when their data was exposed, writing that there was no alleged contract with Reventics since the plaintiffs provided their data to medical providers that then provided the data to Reventics.

Judge Hegarty said courts have also found increased spam calls and emails aren't injuries in fact, but

even if they were, the plaintiffs haven't plausibly alleged that increase in spam would not have happened but for the data breach.

The judge further found the alleged "loss in value" of the data couldn't give plaintiffs standing, even if he disregarded his skepticism that such data has "independent monetary value."

"Even assuming it does, plaintiffs' conclusory allegations do not plausibly show how they suffered a concrete injury through any loss in value — such as through an inability to sell their personal information or a lower price offered in such a sale," Judge Hegarty wrote.

Specific allegations of fraud by several plaintiffs failed, too, the judge found, because they weren't plausibly connected to the data breach or because they were acts to mitigate speculative future harm. For example, allegations of fraudulent debit card charges or an attempt to open a fraudulent credit card account didn't fit because the plaintiffs hadn't alleged the type of data necessary to do such things was part of the breach.

Judge Hegarty found that without allegations of an injury in fact, there was no federal jurisdiction to hear the case.

"We disagree with and will be appealing the ruling," interim lead counsel for the proposed class, Scott Edward Cole of Cole & Van Note, wrote in an email to Law360 on Wednesday.

Counsel for Reventics and Omega Healthcare did not immediately respond to a request for comment Wednesday.

The proposed class is represented by Scott Edward Cole of Cole & Van Note and Joseph M. Lyon of The Lyon Law Firm LLC.

Reventics and Omega Healthcare are represented by David M. Ross, Kimberly A. Viergever and Ryan A. Williams of Wilson Elser Moskowitz Edelman & Dicker LLP, and Michael J. Stortz of K&L Gates LLP.

The case is Paula Henderson et al. v. Reventics LLC et al., case number 1:23-cv-00586, in the U.S. District Court for the District of Colorado.

--Editing by Kelly Duncan.



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Hyundai, Kia Drivers' \$145M Car-Theft Deal Wins Final OK

By **Linda Chiem**

Law360 (October 2, 2024, 8:42 PM EDT) -- A California federal judge has signed off on a \$145 million settlement that closes out consolidated consumer claims alleging Hyundai and Kia knowingly sold defective vehicles with design flaws that spawned a car-theft crime wave following a viral TikTok trend that popularized tips for breaking into their cars.

U.S. District Judge James V. Selna on Tuesday **granted final approval** to the \$145 million settlement reached between consumers and Hyundai Motor Co., Kia Corp, and their respective American subsidiaries in sprawling multidistrict litigation. The MDL accuses the automakers of pursuing profits over safety by failing to outfit millions of model year 2011–2022 vehicles with industry-standard immobilizers to ensure cars can't be started without their keys.

The MDL centers on allegations that the thefts committed by "amateur thieves" and "teenagers" gained momentum after 2020 when users of TikTok and other social media began sharing viral videos offering tips and techniques to easily break into Hyundai and Kia vehicles **using just a USB cable**.

Judge Selna concluded Tuesday that the consumers' settlement is fair, reasonable and adequate, overruling a spate of objections from individuals claiming the settlement was insufficient and that it "should be uncapped, provide billions of dollars in compensation, and that defendants should be 'fully liable' for all alleged losses." In a separate **order** on Monday, Judge Selna approved the consumer class counsel's request for **\$13.4 million in attorney fees**, and \$244,526 in litigation expenses.

The consumers' settlement was **initially reached** in May 2023 and **tentatively approved** in October 2023, clearing the way for notices to be sent out to class members. The settlement provides up to \$145 million in cash payments to customers with out-of-pocket losses — with certain individual claims caps — as well as a free software upgrade for certain class vehicles to address the lack of an immobilizer.

Under the settlement, class members who experienced vehicle theft will be eligible for reimbursement up to 60% of the Black Book value of their vehicle, including licensing fees, sales tax paid, registration fees and other expenses. Class members who experienced vehicle damage and/or stolen personal property due to an attempted theft will be reimbursed up to 33% of the Black Book value of their vehicle or \$3,375 per claim, whichever is greater.

There is a \$375-per-claim cap for paid insurance deductibles and increased insurance premiums for policies that include theft coverage resulting from a "qualifying theft or qualifying theft attempt." There is a \$250-per-claim cap for out-of-pocket expenses incurred due to a "qualifying theft or theft attempt," for things such as rentals, towing, speeding fines, and reimbursement for lost income and childcare expenses relating to getting the software upgrade.

Meanwhile, class members with vehicles that aren't eligible to receive the software upgrade may seek reimbursement of up to \$300 per vehicle for the purchase of a steering wheel lock, a glass breakage alarm or similar anti-theft system, or another aftermarket modification designed to deter or prevent theft so long as that purchase was made when the class vehicle was ineligible for the software upgrade.

Steve W. Berman of Hagens Berman Sobol Shapiro LLP, an attorney for the consumer plaintiffs, said in a Wednesday statement that "a lot of class members have had serious economic losses and need

this recovery, so we are pleased we are one step closer to cutting checks for them."

A spokesperson for Hyundai said in a Wednesday statement that the settling parties appreciated the court's decision to grant final approval.

"Our customers remain our top priority, and we continue to take comprehensive actions to assist customers and communities affected by the persistent thefts of certain model year 2011-2022 vehicles that, while fully compliant with federal anti-theft requirements, were not equipped with push-button ignitions and engine immobilizers," the Hyundai spokesperson said in the statement. "Chief among these measures is the development and validation of a no-cost software upgrade for the owners of these vehicles to prevent the theft mode popularized on social media."

Eligible vehicles that cannot accommodate the software upgrade are offered installations of ignition cylinder protectors at no cost to customers, and all Hyundai vehicles produced since November 2021 are equipped with an engine immobilizer as standard equipment, the spokesperson said.

Moreover, Hyundai has provided no-cost anti-theft solutions to more than 1.4 million affected vehicles, continues to work with over 1,200 police departments, providing thousands of no-cost steering wheel locks for distribution and connecting law enforcement agencies with local dealers in their area who perform the software upgrade, among other things.

A Kia spokesperson said in a Wednesday statement that the company was pleased that the court has approved this agreement.

"As we said nearly 18 months ago when this agreement was first finalized, we appreciate that it will allow customers whose vehicles have been targeted by criminals using methods of theft popularized on social media to receive additional benefits," the Kia spokesperson said. "This agreement is just one step in a series of comprehensive actions Kia has taken to support our customers."

More than 1.2 million customers have received a free, Kia-developed software security upgrade, the company has distributed more than 375,000 steering wheel locks to customers at no cost, and continues to make an ignition cylinder protection sleeve available for eligible customers, according to the spokesperson. Kia vehicles manufactured since late 2021 are equipped with an engine immobilizer and the specific models subject to the settlement agreement comply fully with the requirements outlined in applicable Federal Motor Vehicle Safety Standards, according to the spokesperson.

"Kia will continue to work with law enforcement agencies across the country to combat criminal car theft and the role social media has played in encouraging it, and we remain fully committed to supporting our customers," the spokesperson added.

The MDL also encompasses claims from various U.S. cities, municipalities and insurers, which are still pending. The cities and municipalities have lobbied **public nuisance and negligence claims** alleging the car thefts have siphoned off scarce resources from local law enforcement and first responders. And hundreds of insurers are **suing to recover** at least some of the more than \$1 billion they contend they paid in claims and adjustments in response to the unprecedented crime spree inspired by social media.

The consumer class plaintiffs are represented by Steve W. Berman of Hagens Berman Sobol Shapiro LLP, Elizabeth A. Fegan of Fegan Scott LLC, Kenneth B. McClain of Humphrey Farrington & McClain PC and Roland Tellis of Baron & Budd PC.

The governmental entities are represented by Gretchen Freeman Cappio of Keller Rohrback LLP and Rick L. Ashton of Allen Stovall Neuman & Ashton LLP, among others.

The insurance companies are represented by Elliott R. Feldman, Nathan M. Dooley and Kevin P. Caraher of Cozen O' Connor, William Hoffmann, Adam Romney and Susan Benson of Grotfeld Hoffmann, Timothy E. Cary of Stutman Law and Craig S. Simon of Berger Kahn.

Hyundai and Kia are represented in the consumer and governmental entities' suits by Shon Morgan, Steven G. Madison and Justin Griffin of Quinn Emanuel Urquhart & Sullivan LLP and in the insurers'

suits by Peter J. Brennan, Michael T. Brody, Kate T. Spelman, Alice S. Kim, Madeline P. Skitzki and Jenna L. Conwisar of Jenner & Block LLP.

The MDL is In re: Kia Hyundai Vehicle Theft Litigation, case number 8:22-mj-03052, in the U.S. District Court for the Central District of California.

--Editing by Emily Kokoll.

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Meta Facing Another Author Class Action Over LLM Training

By **Ivan Moreno**

Law360 (October 2, 2024, 6:31 PM EDT) -- Another author has launched a proposed class action against Meta Platforms Inc. in California federal court alleging the social media giant swiped material from hundreds of thousands of copyrighted books to train its series of large language models named Llama.

Meta was motivated to take copyrighted works without authorization to train its LLMs "to compete in the [artificial intelligence] arms race that has developed over the last few years," lead plaintiff Christopher Farnsworth says in the complaint, filed Tuesday. Farnsworth is the author of a series of books about a vampire who is president of the U.S. and another series about a psychic troubleshooter.

Meta is already facing **a similar proposed class action** from comedian Sarah Silverman and others in California federal court. Authors in the suit include Ta-Nehisi Coates, Junot Díaz and Andrew Sean Greer. In that suit, Meta is advancing a fair use defense against copyright infringement.

Farnsworth is the only plaintiff listed in his suit. He says that what Meta has allegedly done to train its models is not fair use.

"Meta's commercial copying of plaintiff's work and works owned by the proposed class was manifestly unfair use, for several reasons. Many AI companies have described the AI training process as 'teaching' a model human language, much in the way a human learns," Farnsworth said. "While this self-serving anthropomorphizing of LLMs is misplaced, at a minimum, humans who learn from books buy them, borrow them from libraries that buy them, or otherwise procure them lawfully, thus providing at least some measure of compensation to authors and creators."

A media representative from Meta did not immediately respond to a request for comment Wednesday.

Farnsworth alleges Meta accessed the material in his book by downloading a dataset called Books3, which includes "a trove of pirated books."

"Instead of willfully downloading and reproducing a notorious trove of pirated material, Meta could have lawfully purchased copies of books then negotiated a license to reproduce them," the complaint says. "Alas, Meta did not even bother to pay the purchase price for the books it illegally downloaded, let alone obtain a license for their reproduction."

Farnsworth argues that Meta's actions are harming the market for authors.

"Meta, in taking authors' works without compensation, has deprived authors of books sales and licensing revenues," his suit says.

Farnsworth is represented by Daniel M. Hutchinson, Elizabeth J. Cabraser, Reilly T. Stoler and Rachel Geman of Lieff Cabraser Heimann & Bernstein LLP and Scott J. Shoulder and CeCe M. Cole of Cowan Debaets Abrahams & Sheppard LLP.

Counsel information for Meta was not immediately available.

The case is Farnsworth v. Meta Platforms Inc., case number 3:24-cv-6893, in U.S. District Court for the Northern District of California.

--Editing by Brian Baresch.

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Pfizer Didn't Warn Of Tumor Risks In Depo-Provera, Suit Says

By **Gina Kim**

Law360 (October 2, 2024, 8:50 PM EDT) -- Pfizer Inc. faces a product liability and negligence suit filed Tuesday in California federal court alleging it distributed the hormonal contraceptive drug Depo-Provera without adequately warning patients and doctors about the risk of brain tumors associated with its use, a danger that has been widely published in scientific journals for years.

In a 58-page complaint, Kristina Schmidt accused Pfizer Inc. and co-defendants Greenstone, Viatrix and Prasco of failing to alert patients who take the hormonal birth control Depo-Provera about the risks of developing brain tumors associated with consistent use of the product.

"Despite the fact that defendants knew or should have known based on information generally accepted within the scientific community that Depo-Provera with its higher than needed progestin dosage caused unreasonable and dangerous side effects, they continue to promote and market Depo-Provera without providing adequate clinically relevant information and data or recommending patients be monitored," the complaint said.

Schmidt alleges that she had been using Depo-Provera for 16 years, until 2021, and had subsequently developed intracranial meningioma which she had to get removed following a highly-invasive procedure in 2022.

The suit alleges that for the last several years, medical and scientific communities have published studies indicating that progesterone, its synthetic analogue progestin, and Depo-Provera, in particular, could significantly contribute to the development of meningioma.

"Nevertheless, defendants failed to warn, instruct, advise, educate or otherwise inform Depo-Provera users and prescribers about the risk of intracranial meningioma or the need for monitoring for resultant symptoms," the Oct. 1 suit said.

Depo-Provera is a prescription drug that's used for birth control and endometriosis treatment that's administered via an injection into the muscle every three months either on the upper arm or buttocks, according to Schmidt.

"To date, the U.S. label for Depo-Provera still makes no mention of the increased risk to patients of developing intracranial meningiomas despite the fact that the European Union (EU) and the United Kingdom labels now list meningioma under the 'special warnings and precautions for use' section and advise EU patients to speak with their doctors before using Depo-Provera if they have any history of meningioma," Schmidt's complaint said.

Schmidt was 20 when she started using Depo-Provera, and received about 64 injections over the 16-year period, according to the complaint. She said she started experiencing vertigo, dizziness and severe headaches over time, and a subsequent MRI scan revealed she developed a tumor.

Schmidt had undergone a highly invasive right craniotomy to remove the mass in Oct. 2022, and the post-recovery caused her to miss over a month of work, the suit alleged.

"The location of plaintiff's meningioma in the 'Sylvian fissure' is in the sphenoidorbital region of the brain which is the exact location that progesterone-mediated meningiomas have been found to develop the most often," the complaint alleged. "Plaintiff was unaware until very recently, following

publicity associated with a large case control study in France published in March 2024 that Depo-Provera had any connection to her meningioma."

The link between progesterone and meningioma has been known for years, and defendants have a duty to keep up-to-date with relevant emerging studies and literature to monitor their products for any possible safety concerns, the suit said. Corporations should also conduct follow-up research efforts and long-term studies on the products after they are released into the market, Schmidt said.

The medical and scientific communities have known about the high number of progesterone receptors on meningioma cells since at least the early 1980s; for example, researchers released a report in the European Journal of Cancer and Clinical Oncology that found progesterone was involved in the incidence, mediation, and growth rate of tumors approximately a decade before Depo-Provera scored U.S. Food and Drug Administration approval for contraceptive use in 1992, the suit alleged.

"In those nine years before Depo-Provera was approved for contraception, and in the 32 years since — more than 40 years in all — defendants have seemingly failed to investigate the effect of their high-dose progesterone Depo-Provera on the development of meningioma," Schmidt alleged.

More recently, researchers have also found that prolonged use of progesterone and progestin, namely Depo-Provera, was linked to higher rates of developing intracranial meningioma, Schmidt added.

The defendants didn't warn patients about the risks associated with high-dose injections of Depo-Provera, didn't study adverse effects of the drug and the risks of developing tumors, and didn't disclose health risks on the product's labels, Schmidt argued.

For example, the label for Depo-Provera has been modified more than a dozen times since 2003, with the most recent update issued in July. That means there have been at least 14 versions of the label, but all are absent of any warning or information on the increased risk of developing intracranial meningioma, Schmidt alleged.

Pfizer modified the label in the EU and the U.K., and nothing's stopping it from adding similar language to the label and insert for the products that are disseminated throughout the U.S., Schmidt argued.

Schmidt asserts several causes of action against the defendants, including strict liability for failure to warn and design defect, negligence, negligent failure to warn, negligent design defect, negligent misrepresentation, fraudulent misrepresentation, and breach of express and implied warranties.

Schmidt asks the court to order the defendants to pay compensatory, general and punitive damages, along with attorney fees and costs.

"The company believes that the claims lack merit and we intend to vigorously defend against them," a Pfizer spokesperson told Law360 in an emailed statement on Wednesday afternoon.

Representatives for Pfizer's co-defendants did not immediately return inquiries seeking comment Wednesday.

"Weitz & Luxenberg is proud to be taking the lead in this important litigation," said Brendan A. McDonough of Weitz & Luxenberg PC, counsel for Schmidt, in an emailed statement to Law360 Wednesday. "The makers of Depo-Provera have had the knowledge and means to warn unsuspecting women like Kristina Schmidt of the abnormally high risk of meningioma associated with high dose intramuscular Depo-Provera for decades, but they utterly failed to warn patients and doctors."

Pfizer and its partners could've also recommended pivoting to a safer lower dose alternative of subcutaneous versions of Depo-Provera, also known as DepoSubQ Provera 104, on the advice of published experts, the statement continued.

"Kristina Schmidt is not alone. We represent many other women who have suffered intracranial surgeries to remove Depo-Provera related meningiomas. Women like Ms. Schmidt deserve compensation for their injuries, and that is what this lawsuit intends to achieve," McDonough said.

Schmidt is represented by Melinda Davis Nokes, Ellen Relkin and Brendan A. McDonough of Weitz & Luxenberg PC.

Counsel information for the defendants was not immediately available.

The case is Kristina Schmidt v. Pfizer Inc. et al., case number 3:24-cv-06875, in the U.S. District Court for the Northern District of California.

--Editing by Jay Jackson Jr.

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TikTok Can't End Browser Privacy MDL

By **Lauraann Wood**

Law360 (October 2, 2024, 5:27 PM EDT) -- An Illinois federal judge on Tuesday held TikTok and parent company ByteDance to multidistrict litigation in which users claim the video platform's in-app browser illegally tracks activity on third-party sites, and gave the plaintiffs a chance to replead one claim under California law.

U.S. District Judge Rebecca Pallmeyer **said** she wouldn't dismiss the lawsuits against TikTok and ByteDance because the plaintiffs have plausibly alleged the platform's in-app browser illicitly uses JavaScript code to collect users' clicks and keystrokes on third-party websites.

However, while the plaintiffs' claims under California's Unfair Competition Law are enough to establish an Article III injury, they don't appear to be enough to plead a violation of the law, Judge Pallmeyer said. They will have to replead that claim with facts supporting the law's economic injury requirement, she said.

The outcome is different from a case in California, where a judge **dismissed** similar privacy claims targeting Meta's in-app browser partly as "a matter of simple disagreement" over how much detail the plaintiffs should include to pass the dismissal phase, Judge Pallmeyer said.

The judge in that case acknowledged but didn't heed the "chicken and the egg" problem frequently arising in data privacy cases, in which plaintiffs don't often know when or how a platform is using their information at first and need discovery to nail that down, the judge said. "Given this informational asymmetry, this court is not inclined to require plaintiffs to provide detailed facts about the time and circumstances of their injury at the pleading stage," she said.

TikTok and ByteDance cited other data-tracking privacy cases whose vague personal allegations couldn't support a plausible claim, but Judge Pallmeyer said the "sticking point" in each case is the plaintiff didn't have enough detail about the compromised data's content to plausibly infer any law was broken.

"No such problem exists here," since the plaintiffs' claims are based on allegedly illegal data interceptions during online transactions, she said. Their allegations do skirt close to being too bare, an issue **plaintiffs hit** in litigation over Google's voice-activated virtual assistant, but "again, however, context matters," Judge Pallmeyer said.

The Google-assistant plaintiffs, for instance, targeted technology that could allegedly capture all conversations, but were allowed to claim protection over those reasonably expected to be private, according to Judge Pallmeyer's order. But "here, while the TikTok in-app browser could in theory be used to browse the internet for non-transactional purposes, plaintiffs have provided sufficient background to plausibly suggest that this is unlikely," she said.

Representing the plaintiffs, Roland Tellis of Baron & Budd PC told Law360 on Wednesday they are pleased with Judge Pallmeyer's "thoughtful ruling on a number of novel and complex issues."

"Unfortunately, the case is yet another example of the lengths to which TikTok and other social media companies will go to secretly collect valuable consumer data," he said. "The order now allows us to focus our discovery efforts on exposing the alleged data collection scheme."

Counsel for TikTok and ByteDance declined to comment on Wednesday.

The 13 lawsuits targeting TikTok's in-app browser were added to an already-consolidated MDL targeting biometric privacy accusations the platform eventually settled for \$92 million. TikTok argued the settlement should have covered the browser claims, but **Judge Pallmeyer disagreed**.

The plaintiffs' claims are based on a blog post in which the author also included disclaimers stating he had no way of verifying "the full details" of what precise data the in-app browser was using and how, and drew a distinction between recording browser interaction data and what happens with that data, according to the order.

TikTok and ByteDance argued those qualifications make it implausible they could have acquired any plaintiff's personal data through its in-app browser, but Judge Pallmeyer disagreed.

The blog post may be central to the plaintiffs' claims, but they're not bound to its purported admissions, she said. Nor do the disclaimers completely absolve TikTok of liability, she said, since they don't alter his central finding that TikTok's in-app browser "subscribes to all keyboard inputs ... and every tap on the screen," she said.

TikTok's implausibility assertion is also not strong enough to defeat the plaintiffs' federal wiretap claim — yet, the judge said. Multiple courts have rejected wiretap liability for the use of "keylogger" software, but several seem to recognize that a nonparty's keylogger use could violate the law under certain circumstances. The plaintiffs will eventually have to confront whether TikTok's in-app browser fits those circumstances to keep their wiretap claims, she said.

The plaintiffs' state law wiretap claims can proceed for many of the same reasons, Judge Pallmeyer said. Plaintiff Steven Berrios' Florida Security of Communications Act claim may need more examination after the plaintiffs address whether the in-app browser does any more than capture a user's movements, but the claim otherwise passes for now, she said.

Judge Pallmeyer also rejected TikTok's argument that the plaintiffs consented to any browser data collection under its terms of service and privacy policy, saying the record isn't developed enough to assess that defense at the dismissal stage.

Law firms representing the plaintiffs include Baron & Budd PC, Herman Jones LLP, Chicago Consumer Law Center, Kessler Topaz Meltzer & Check LLP, Lockridge Grindal Nauen PLLP and Scott + Scott Attorneys at Law LLP.

TikTok is represented by Mayer Brown LLP, Wilson Sonsini Goodrich & Rosati PC and Mandell Menkes LLC.

Byte Dance is represented by Mayer Brown, Wilson Sonsini Goodrich & Rosati, Lavin Coleman O'Neil Ricci Finarelli & Gray and King & Spaulding LLP.

The case is In Re: TikTok, Inc., In-App Browser Privacy Litigation, case number 1:24-cv-02110, in the U.S. District Court for the Northern District of Illinois.

--Editing by Philip Shea.