

Robbins Geller seeks \$112 million fee in Under Armour settlement | Secondary Sources | National

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(October 04, 2024) - Attorneys representing shareholders who scored a historic \$434 million settlement in a securities class action against Under Armour Inc. are asking a federal judge to award them more than 25% of the settlement amount.

In re Under Armour Inc. Securities Litigation, No. 17-cv-388, *memo supporting motion for attorney fees filed* (D. Md. Oct. 3, 2024).

In a memo filed Oct. 3 in the U.S. District Court for the District of Maryland, Robbins Geller Rudman & Dowd LLP said that the "tremendous result" achieved for the class warrants more than \$112 million in attorney fees.

The law firm is also seeking reimbursement of \$4.2 million in attorney fees and more than \$45,000 in awards for the lead plaintiff, Aberdeen City Council as Administrating Authority for the North East Scotland Pension Fund, and two class representatives.

CEO reaped \$138 million-plus

News of the settlement emerged in June when Under Armour disclosed that it had agreed to pay \$434 million to settle the long-running securities fraud suit against the company and founder and CEO Kevin A. Plank.

The 2017 lawsuit alleged that Under Armour and Plank used accounting maneuvers to maintain a facade of consistent sales growth amid declining demand for its products.

Plank reaped more than \$138 million from insider stock sales in late 2015 and early 2016 before the company revealed slowed net revenue growth, according to the suit.

The District Court preliminarily approved the proposed settlement July 22, saying it appeared to be fair, reasonable and adequate to the class.

Aberdeen asserted in an Oct. 3 memo supporting final approval that the settlement is a "superb result" after seven years of litigation.

The agreement is among the top 50 securities class action settlements ever obtained in the U.S. and the second largest in the 4th Circuit, the memo says.

The settlement also mandates significant corporate governance reforms such as performance-based vesting for restricted stock and stock units awarded to top executives, the memo says.

'Back from the dead'

Robbins Geller echoed the significance of the settlement in the memo supporting its motion for attorney fees.

The law firm brought the case "back from the dead" after a 2019 dismissal, persuading the District Court to grant relief from the judgment, the memo says.

Robbins Geller added that it took the case on a contingency basis and has not received any compensation for the nearly 90,000 hours its attorneys devoted to the class action.

The requested fee of 25.8% of the settlement fund is on the low end of fees approved in other nine-figure settlements in the 4th Circuit, according to the memo.

A final hearing on the settlement is scheduled for Nov. 7.

Michael J. Dowd and Theodore J. Pintar of Robbins Geller represent the lead plaintiff and class representatives. James D. Wareham of Fried, Frank, Harris, Shriver & Jacobson LLP and Daniel J. Kramer of Paul, Weiss, Rifkind, Wharton & Garrison LLP represent the defendants.

By Nicole Banas

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Article: Under Armour reaches possible \$434 million settlement in investor class action 2024 SECDBRF 0122

Date: June 24, 2024

A long-running securities class action against Under Armour Inc. is on the verge of settling, with the sportswear company agreeing to pay \$434 million to resolve allegations that it concealed a sales slump in 2015.

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Business Law Prof Blog

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Saturday, October 5, 2024

A Tale of Two Meme Stock Class Certification Decisions

By Ann Lipton

This week, we got two denials of class certification in 10b-5 securities cases involving meme stocks. The first concerned Bed Bath and Beyond, the second concerned a fintech called Rocket Companies, which is not one of your more famous meme stocks, but apparently met the definition for 2 days out of a 2-and-a-half month class period. One case presented a refreshingly accurate application of current doctrine. The other presented a clarifying illustration of the doctrinal mess created by the Supreme Court's decision in *Goldman Sachs v. Arkansas Teacher Retirement System* and its subsequent interpretation by the Second Circuit.

[More under the jump]

Section 10(b), and Rule 10b-5, prohibit fraud in connection with securities transactions. Among other things, they prohibit corporate executives from publicly lying about a company, which typically causes the stock price to go up – only to crash again when the truth is revealed.

But when a plaintiff tries to sue in these cases, she confronts a fundamental problem: Fraud claims require proof of reliance. And most stock purchasers may have trouble proving they relied on any specific false statement. Maybe the investor didn't hear the statement personally; maybe they relied on analyst advice – or an index. Plus, most investor losses are too small to be worth suing over individually; the claims only make sense brought as a class action. But if each investor has to prove that she personally relied on the false statement, there are too many issues to adjudicate collectively.

The solution to this problem is the fraud on the market doctrine, adopted by the Supreme Court in *Basic, Inc. v. Levinson* (1988), and reaffirmed in *Halliburton Co. v. Erica P. John Fund, Inc.* (2014). The doctrine consists of two presumptions – I call them the “objective” presumption and the “subjective” presumption – that benefit 10b-5 plaintiffs to help them satisfy the element of reliance on a classwide basis.

The first presumption is that, in an open and developed market – wide trading, lots of analyst coverage, and so forth – material information impacts stock prices. The second presumption is that investors, subjectively, *rely* on prices as an unbiased assessment of market value

when making an investment. Together, the presumptions establish that the defendants' fraud impacted stock prices, and investors relied on those prices – so, by syllogism, investors relied on the fraud. Therefore, plaintiffs can satisfy the element of reliance at trial and – crucially – because these presumptions apply to all purchasers, plaintiffs can also get a class certified.

But, as *Halliburton* made clear, these are only presumptions; defendants are permitted to try to rebut them, and if they do so successfully, they can prevent class certification.

Which brings us to *In re Bed Bath & Beyond Securities Litigation*, 2024 WL 4332616 (D.D.C. Sept. 27, 2024).

Ryan Cohen took a 10% stake in Bed Bath & Beyond. Later, as the company ran into trouble, he issued a tweet that included a “moon” emoji, which retail investors took to mean he planned to stay in for the long haul. Other Cohen filings – a 13D, a Form 144 – also suggested he'd stand pat. Retail investors piled in, the stock price rose, but tanked when it was revealed Cohen sold his stake. A class action followed, alleging Cohen misrepresented his intentions. The court denied Cohen's motion to dismiss, leading to the motion for class certification.

In evaluating the motion, the court began by correctly identifying the objective and the subjective presumptions that comprise the fraud on the market doctrine. The court then observed that during this period, Bed Bath & Beyond's stock was going nuts. It was entirely untethered from fundamentals because it was a meme stock. Under those circumstances, Judge McFadden refused to presume that Cohen's false statement affected its price.

But think about this for a moment. The stock was erratic; you can't simply *presume* any particular piece of information is affecting prices. Yet, plaintiffs might still be able to *affirmatively prove* the statement affected prices. If so, they've satisfied the first half of the fraud on the market syllogism – the stock price was affected. So long as the second half remains intact – a presumption that investors *relied on stock prices* – they can still prove their case classwide.

In fact, that's precisely the argument I laid out before in my blog post about a case against Robinhood, *In re January 2021 Short Squeeze Litigation*.

Judge McFadden understood that, as well, because he did not rest on his conclusion that there could be no *presumption* of price impact. Though he didn't organize his reasoning the way I'd recommend, he still recognized that plaintiffs might simply introduce direct evidence that the price was impacted - but they had failed to do so. As he put it:

Bratya argues that price impact from the August 12 tweet is visible to the naked eye. Pl.'s Reply at 17. A graph of BBBY's price that day shows the price steadily rising from the market opening until 10:41 am, when Cohen sent out his tweet. Fischel Report ¶ 40. And it continues to rise at a steady rate before rising more dramatically around 12:30 pm. Id. Fischel claims that this steady, continuous rise does not register any price bump following Cohen's tweet. Id. ¶ 40. To the Court's eyes, however, the graph in fact does show a bump in BBBY's price in the hour following the tweet, with a more dramatic price increase occurring just two hours later, between 12:30 pm and 1:15 pm. But neither Fischel nor Cain offer analysis on whether these blips are significant or noise. And having been lectured by both parties on the importance of statistical rigor, the Court will not make any conclusions about price impact by eyeballing one graph.

Thus, since there could be no *presumption* of price impact, and there was not sufficient affirmative *direct* evidence of price impact, the first leg of the fraud on the market syllogism failed; so, no classwide proof of reliance, and no class certification. I'm not going to weigh in on whether McFadden correctly evaluated the weight and direction of various pieces of evidence, but I admire his clarity in identifying the correct *questions*: namely, was the market of a character such that we can presume price impact and, if not, is there other evidence of such impact?

Though McFadden did not, we could go further. Remember, the second half of the syllogism is a presumption that investors *rely on stock prices*. What does that even mean? To be honest, it's doctrinally unclear, see Donald C. Langevoort, *Basic at Twenty: Rethinking Fraud on the Market*, 2009 Wis. L. Rev. 151, but it does at minimum suggest investors believed the price to be validly set by supply and demand through honest investor assessment of information available. And it's *very difficult to say* this condition would be met for a meme stock. For a meme stock, the entire point is that retail investors collectively decide to *manipulate* the stock price to something other than what a sober assessment of the company's prospects would suggest. At bare minimum, we might say that even if *some* retail investors "relied" on stock prices, so many of them did not that we'd create individualized issues for defendants' rebuttal rights.

The upshot being, it may very well be the case that individual investors relied on Cohen's statements – and if they brought claims individually, they could prove their reliance. But it's more difficult to presume reliance on a classwide basis.

But then we turn to the second meme-stock-class-cert case, *Shupe v. Rocket Cos.*, 2024 U.S. Dist. LEXIS 178076 (E.D. Mich. Sept. 30, 2024).

Rocket Companies is a fintech that allegedly lied when it claimed that rising interest rates were having no impact on demand for its loans. When the truth of declining margins and loan volume was disclosed, its stock price dropped. Shareholders brought a 10b-5 class

action, and the court denied class certification on the ground that the defendants had sufficiently rebutted the fraud on the market presumption.

What evidence did they offer?

As with *Bed Bath & Beyond*, the defendants focused on the objective presumption – namely, the presumption that their false statements impacted market prices. To rebut that presumption, they first brought in an expert who pointed to public information about how rising interest rates were likely to harm Rocket's business, including the risk warnings included in Rocket's own SEC filings. She also demonstrated that market analysts at the time were focused on these indicators, and did not appear to rely on Rocket's statements to the contrary.

In securities litigation parlance, I find this evidence similar to what we usually call "truth on the market" evidence, namely, evidence that sufficient truthful information was swirling around to offset the impact of the defendant's lies. Except "truth on the market" evidence is *exactly the analysis* that the Supreme Court held in *Amgen Inc. v. Connecticut Retirement Plans*, 568 U.S. 455 (2013), may *not be considered* on a motion for class certification. And in *Goldman Sachs v. Arkansas Teacher Retirement System*, the Supreme Court *reaffirmed* the correctness of the *Amgen* holding.

Now, the *Goldman Sachs* decision by the Supreme Court, echoed by the Second Circuit on remand, also suggested that if the original false statement is much more "generic" than the revelation of the truth, there may be an inference that any price drops associated with the disclosure did not reflect the dissipation of artificial inflation introduced by the lie.

Is that this case?

Yes, according to the *Rocket* court. The false statements were that Rocket saw "strong consumer demand," and that its networks were "growing." The corrective disclosure was that Defendants expected "[c]losed loan volume of between \$82.5 billion and 87.5 billion"; (2) "[n]et rate lock volume between \$81.5 billion and \$88.5 billion"; and (3) "[g]ain on sale margins of 2.65% to 2.95%," – numbers that were far lower than Rocket had reported previously.

See? The defendants *told everyone things were going well*, and then disclosed *specific figures showing they were going poorly*, and the stock price tanked. How could anyone *possibly think the two were connected*?

(That was my sarcastic voice.)

This is exactly what I predicted would happen after the Second Circuit's *Goldman* decision: namely, plaintiffs and defendants would fight about whether corrective disclosures are sufficiently similar to the initial lie, untethered any determinate standard other than the trial judge's gut feeling.

Does anyone remember when, in the context of *loss causation* – which, nominally, courts may *not* consider on class certification – courts held that disclosures need not be “mirror images” of the initial lie, because that would functionally require corporate managers to admit to fraud, see *Freudenberg v. E*Trade Financial Corp.*, 712 F. Supp. 2d 171 (S.D.N.Y. 2010), and “would eliminate the possibility of 10b–5 claims altogether” *In re Williams Sec. Litig.*, 558 F.3d 1130 (10th Cir. 2009)?

And remember when the Second Circuit held in *Goldman* that “the question here—whether there is a basis to infer that the back-end price equals front-end inflation—is a different question than loss causation, and, in light of *Goldman*, requires a closer fit (even if not precise) between the front- and back-end statements....” Op. at 54 n.11?

Yeah, I remember that, too.

And another thing: New Shareholder Primacy podcast up! This time, Mike Levin and I talk 10(b) actions by shareholders of pre-merger SPACs, and the Tesla pay case (not that one - the other one). Here at Apple; here at Spotify; here at Youtube.

AMC Meme Stock Conversion Dispute Turned Down by Supreme Court

By Mike Leonard 2024-10-07T09:42:30000-04:00

- Retail holder took aim at theater chain's recapitalization
- Justices decline petition challenging class action procedures

An AMC Entertainment Holdings Inc. shareholder lost her bid to have the US Supreme Court overturn a series of rulings that let the theater chain recapitalize, a move opposed by its boisterous base of meme stock investors.

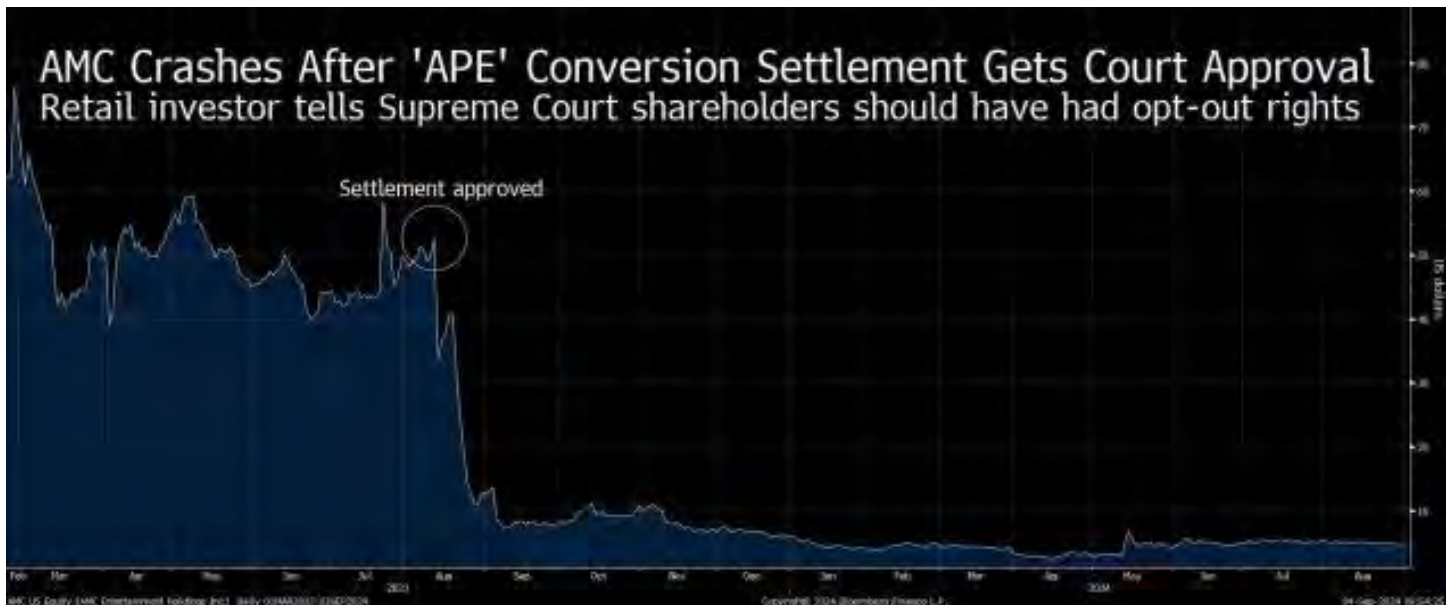
The justices declined to take up the case Monday, leaving in place decisions by the Delaware judge, who let the company convert its blank-check shares into common stock, and the state's top court, which upheld that ruling. They rejected a petition from Rose Izzo, a retail investor whose objections to the stock conversion plan initially delayed it by several weeks.

The high court's one-page concludes yet another chapter in the [sprawling legal battle](#) over the AMC Preferred Equity units, or APEs. The company created the units in 2022 to get around a share limit it couldn't raise without the approval of its unusually engaged retail investors, many of them meme stock traders who powered the surprise rally that spared AMC a pandemic-era bankruptcy.

Izzo—one of [nearly 3,000 investors](#) who wrote to a Delaware judge last year urging her to reject a settlement of litigation challenging the APE conversion—was the only one with a lawyer, an attorney who [now represents Donald Trump](#) in his own Delaware meme stock case. Their objections to the accord with a pension fund [initially prevailed](#), sending stunned arbitrageurs scrambling to unwind costly bets in favor of the conversion.

The judge ultimately [approved a revised version](#) of the settlement, which reduced the dilution of AMC's common stock by handing out an extra share for every 7.5 held. The move paved the way for the conversion to take place in August 2023. The state's top court [upheld the ruling](#)—which would have been virtually impossible to unwind—in May.

AMC's shares crashed after the settlement got the green light, [plunging 85%](#) in about a month.



The proceedings cast a spotlight on Delaware's Chancery Court, the [leading US forum for high-stakes corporate litigation](#), foreshadowing [high-profile attacks](#) on the elite legal forum this year by [Elon Musk](#). Musk moved Tesla Inc. from Delaware [to Texas](#) after its chief judge [struck down](#) his \$56 billion pay package.

The presiding judge in the AMC case [fashioned bespoke procedures](#) to handle the unusual involvement of the company's retail investors, whose letters often reflected conspiracy theories spreading online. But many of them still felt mistreated by CEO [Adam Aron](#), the pension fund that negotiated the settlement, and the legal rules that dragged them into the deal.

Izzo's appeal to the country's top court took aim at those rules. Class action procedures that force investors to participate in settlements, without any way to opt out, violate constitutional due process, according to her Aug. 20 petition. The justices have repeatedly tried to weigh in on that issue—which has divided the federal appeals courts—but they were stymied when they ended up having to reject those cases on other grounds, the filing said.

The company and the pension fund that led the litigation, the Allegheny County Employees' Retirement System, waived their right to respond.

The pension fund was represented in the lower courts by Bernstein Litowitz Berger & Grossmann LLP, Grant & Eisenhofer PA, Fields Kupka & Shukurov LLP, and Saxena White PA. AMC was represented by Richards, Layton & Finger PA and Weil, Gotshal & Manges LLP. Izzo was represented by Green Law Chartered LLC, Wright Close & Barger LLP, and Halloran Farkas & Kittila LLP.

The case is [In re AMC Ent. Holdings Inc. S'holder Litig.](#) , U.S., No. 24-197, cert. denied 10/7/24 .

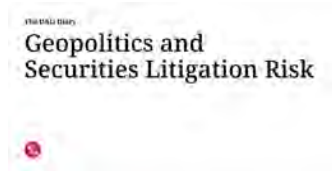
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Geopolitics and Securities Litigation Risk

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October 6, 2024



By Kevin LaCroix on October 6, 2024

Posted in Geopolitical Risk



Every participant in the world economy currently faces an environment fraught with geopolitical risk, with a war in the Middle East showing a dangerous potential to expand, a war in Ukraine that continues to flame, tensions in the South China Sea, and many other concerns. While companies' operating risks in these

environments in many cases may seem apparent, it may not always be obvious how geopolitical risks can translate into corporate and securities litigation. A recent securities class action lawsuit filed against technology company Super Micro Computer provides some insight into these litigation risks. Although the lawsuit involves a host of issues, among the principal concerns are allegations that the company misrepresented its compliance with trade control regulations restricting exports to Russia. These allegations illustrate how trade issues, for example, can contribute to securities litigation activity. A copy of the new complaint in the Super Micro Computer case can be found [here](#).

Background

Super Micro Computer manufactures server and storage devices. The company was the subject of a harsh August 27, 2024, short seller report. Among other things, the report accused the company of accounting manipulation and intra-corporate self-dealing. The report alleged that the company had engaged in improper revenue recognition and other accounting improprieties to artificially inflate the company's apparent profitability.

In addition to the accounting misconduct, the report also alleged that the company had violated U.S. export controls. The report alleged that despite the company's claims of having halted sales to Russia following the 2022 invasion of Ukraine, the company, the report alleged, had circumvented U.S. export controls between February 24, 2022, and June 30, 2024. During this period, the report alleged, the company's sales to Russia surged, allegedly with \$210 million in products shipped to the country.

The company's share price declined upon publication of the short seller's report. The next day the company announced it would delay the filing of its annual report, to assess the effectiveness of its internal controls. The company's share price declined further. On September 26, 2024, the *Wall Street Journal* reported that the U.S. Department of Justice had initiated an investigation of the company following whistleblower reports that the company had engaged in accounting violations. The company's share price declined further on this news.

The Lawsuit

On October 4, 2024, a shareholder plaintiff filed a securities class action lawsuit in the Northern District of California against the company and certain of its executives. The complaint purports to be filed on behalf of a class of investors who purchased the company's securities between February 2, 2021, and September 25, 2024.

The complaint alleges that during the class period, the defendants issued reports highlighting the company's growing revenues and shipped product volumes, while also assuring investors of the effectiveness of its internal controls over financial reporting. The company also represented that it was in compliance with relevant trade control regulations, assuring investors that it had sold no products in the Russian Federation during its 2023 and 2024 fiscal years, and that neither the company nor its subsidiaries sold products or provided services to the Russian Federal Security Service. The complaint alleges that these misrepresentations caused the company's share price to surge.

The complaint alleges that during the class period, the defendants misled investors by: "(a) materially misstating Super Micro's reported revenues, earnings, and other financial figures in violation of GAAP; (b) failing to disclose that Super Micro's internal controls over financial reporting were ineffective; (c) concealing material information about related parties and related party transactions; and (d) claiming to have been in compliance with trade control regulations restricting exports to Russia."

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

Discussion

The new complaint against Super Micro Computer contains a host of allegations, only some of which involve alleged trade control violations. There would be a serious lawsuit here even if there were no trade control violations alleged. But by the same token the trade control violations are a significant part of the complaint, as they were a significant part of the short seller report on which the complaint relies.

I emphasize this point about the significance of the trade control violations because I believe it is important to understand the extent to which geopolitical factors contributed to the facts and circumstances on which this complaint is based. I have long thought that increasing numbers and growing importance of geopolitical risks could represent not only an important area of operating risk for companies participating in the global economy, but also present companies with a significant area of securities and litigation risk as well.

This is not the first securities suit to involve problems arising out of geopolitical risk. As I discussed in a post I published late last year, in which I also addressed my concerns about litigation risk arising from geopolitical issues, I discussed the securities class action lawsuit filed against memory storage device company Seagate Technology Company, after the company agreed to a \$300 million Department of Commerce penalty for violation of export control violations pertaining to the Chinese company, Huawei. I also discussed in the prior post other examples where trade control-related allegations featured in securities class action lawsuit complaints.

The litigation risk arising from geopolitical concerns is not limited just to issues involving export controls. International trade regulatory regimes have become increasingly important for companies and their executives. These regulatory regimes include U.S. sanctions, anti-money laundering (AML), and anti-bribery and corruption laws. Recent developments, such as the War in Ukraine, trade tensions with China, and issues involving digital assets have heightened these concerns. Violations of these regimes can result in regulatory enforcement actions as well as in related civil litigation. The cases discussed above and in my prior post on the topic show how these concerns can translate into securities litigation.

As I have previously pointed out, the prospect for securities litigation arising out of trade sanctions and export control-related issues is not necessarily new; there have been examples of corporate and securities lawsuits arising out of trade sanction and export control issues over the last several years. However, in the current tense geopolitical environment, all of these concerns seem to loom larger. The increasing tensions with China and the ongoing “hot” wars in Ukraine and in Gaza heighten the concerns surrounding geopolitical risk.

I think it is important to note that many of the allegations in this complaint, including the allegations concerning Russian trade control violations, first appeared in a short seller report. For many years, I have been raising concerns about securities lawsuit complaints filed in reliance on short sellers. A recent guest post on this site ([here](#)) detailed the problems and concerns that abound when securities complaints are filed based on allegations in short seller reports; among other things, the short sellers have obvious conflicts of interest in making damaging reports concerning companies. These kinds of concerns give considerable reasons to be cautious about the allegations on which this complaint is based. Time will tell whether these allegations withstand judicial scrutiny.

One final note. I am well aware that the complaint that was filed on October 4, 2024, against Super Micro Computer – the complaint I discuss above — was not the first securities lawsuit complaint filed against the company based on the allegations in the short seller's report. There was an earlier lawsuit filed against the company in August 2024. I saw the earlier complaint at the time it was filed, and even saw the allegations in the earlier complaint about the alleged Russian export violations. I did not write about the lawsuit or the trade violations issues at the time for the simple reason that sometimes it is a lot for me to try to maintain this blog and keep up with my day job. I didn't write about the earlier complaint then, but when I saw this new complaint, it refreshed my recollection about the issues I had noted at the time of the earlier complaint's filing, and it provided me with the opportunity to write about those issues now. I hope no one takes it amiss that I am taking up an issue now that could have and maybe should have been discussed earlier. My points are, in any event, the same.

AbbVie Investors' Suit Over Rinvoq Marketing Risks Dismissed

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AbbVie Inc.'s top executives and board members dodged a shareholder derivative suit related to the pharmaceutical company's marketing of anti-inflammatory drug Rinvoq after a judge dismissed fraud claims in Illinois federal court.

The suit had alleged that AbbVie's leadership made statements creating the false impression that Rinvoq wouldn't face the same safety concerns and regulatory issues as a competitor's drug, prompting a \$15 billion market capitalization loss for the pharmaceutical giant.

Investors had also alleged that the misrepresentations brought legal scrutiny from a prior class action upon the company, but that suit was voluntarily dismissed in February 2023, Judge Georgia N. Alexakis noted in her Oct. 4 order tossing the derivative suit in the US District Court for the Northern District of Illinois.

"With that class action's dismissal, any the specter of liability for AbbVie from that suit has also disappeared," she said in the ruling. "And even if the suit were resurrected, or a similar suit were brought, defendants' best interest argument strikes the Court as a dubious one."

Rinvoq was touted as a source of new revenue for AbbVie, but the company's top brass allegedly downplayed the likelihood that the drug would need to undergo the same additional safety trials and heightened regulatory scrutiny that Pfizer Inc.'s counterpart anti-inflammatory had faced, investors said in their amended complaint.

But plaintiffs didn't make a pre-suit demand on the AbbVie board, failing to show that such an attempt would have been futile or that more than half of the directors would have been liable for the alleged fraud, Alexakis said in the ruling.

The shareholders also didn't show in the complaint that any AbbVie officers—including its board chair and CEO at the time, Richard Gonzalez—misrepresented any internal company data on Rinvoq, or that any of the company's information undercut its optimistic outlook for marketing the drug, Alexakis said in her order.

AbbVie's leadership may have failed to predict how the Food and Drug Administration would handle the Rinvoq rollout, but incorrect predictions are not legally the same as false or misleading statements sufficient to show liability, the judge said, tossing the case with leave to amend by Nov. 4.

AbbVie didn't immediately respond to a request for comment. The plaintiffs' lawyers didn't immediately respond to a request for comment.

Forde & O'Meara LLP, Robbins LLP, and Johnson Fistel LLP represent the plaintiffs.

Kirkland & Ellis LLP represents the AbbVie executives and directors.

The case is Treppel Fam. Tr. v. Gonzalez , N.D. Ill., No. 1:22-cv-02718, 10/4/24 .

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Oct. 7, 2024, 2:00 AM PDT

This Week in Chancery Court: BofA, Skechers, Warner Bros. Deal

By Jennifer Kay

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This Week in Chancery Court: BofA, Skechers, Warner Bros. Deal

By Jennifer Kay 2024-10-07T05:00:01000-04:00

Bank of America Corp.'s senior leaders want the Delaware Chancery Court to dismiss a lawsuit alleging they worsened the economic misery of the pandemic with "illegal, self-serving policies" enacted in response to a surge in fraud reports involving unemployment benefits offered through its prepaid debit cards.

Here's a look at more on the Chancery Court and Delaware Supreme Court calendars this week:

Wednesday: Seafarers Pension Plan v. Moynihan, Del. Ch., No. 2023-0787, oral arguments 10/9/24.

At issue: A pension fund hasn't shown that any board member benefited from the alleged misconduct, nor that any of them acted in bad faith or willfully ignored red flags, Bank of America argues in a brief supporting its motion to dismiss the case. The pension fund said in a brief that its complaint "strongly supports multiple reasonable inferences that all of the Defendants knowingly and purposefully violated their fiduciary duties" in connection with the disbursement of unemployment benefits through the bank's prepaid debit cards.

Court action: A hearing on the motion to dismiss will be held in Wilmington, Del.

BofA Board Sued for Pandemic Freeze of Unemployment Benefits (1)

Wednesday: Conte v. Greenberg, Del., No. 76,2024, oral arguments 10/9/24.

At issue: The Delaware Supreme Court hears an appeal of a Chancery Court ruling that rejected allegations that the Skechers USA Inc. board made no effort to police excessive personal use of its two planes by CEO Robert Greenberg, his two sons, or the COO. The shareholder who brought the litigation argues there's reason to doubt the independence of three board members. Skechers says in a brief that the shareholder failed to show that the board's compensation committee "consciously disregarded red flags of wrongdoing."

Court action: Oral arguments will be heard in Dover, Del.

Skechers CEO, Board Win Lawsuit Over Personal Use of Company Jet

Wednesday: LKQ Corp. v. Rutledge, Del., No. 110,2024, oral arguments 10/9/24.

At issue: The Delaware Supreme Court hears arguments at the request of the US Court of Appeals for the Seventh Circuit regarding non-compete agreements requiring forfeiture of financial payments when an ex-employee starts working for a competitor. The federal court wants to know how broadly to apply a Jan. 29 decision by the state's highest court finding that six former Cantor Fitzgerald LP partners were properly denied \$9 million in equity payments under forfeiture-for-competition provisions in their contracts.

Court action: Oral arguments will be heard in Dover, Del.

Delaware High Court Asked to Clarify Ruling on Noncompete Pacts

Thursday: In re Warner Bros. Discovery, Del. Ch., No. 2022-1114, settlement hearing 10/10/24.

At issue: Vice Chancellor J. Travis Laster must decide whether to approve a \$125 million settlement for investors who challenged Discovery Inc.'s merger with AT&T Inc.'s WarnerMedia unit. The attorneys who reached the accord also seek \$24.5 million to cover their legal fees. If approved by the court, the accord calls for a company owned by the billionaire Newhouse family—a major shareholder in the Discovery Channel's operator—to pay \$100 million of the settlement while ex-Discovery Chairman Robert Miron and his son must cover the remaining \$25 million. The investors had claimed company insiders gained improper benefits worth over \$1 billion in the 2022 merger.

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

Discovery Holders' Team Seeks \$24.5 Million for Warner Bros Deal

Friday: In re EngageSmart Inc. S'holder Litig., Del. Ch., No. 2023-1093, hearing 10/11/24.

At issue: Pension funds have joined an investor's challenge to EngageSmart Inc.'s planned \$4 billion take-private sale to affiliates of Vista Equity Partners LLC. The deal is led by General Atlantic LP, the software company's controlling stockholder. Laster will hear arguments on the applications to be lead plaintiff from the Genesee County Employees Retirement System and the Oklahoma Law Enforcement Retirement System.

Court action: A hearing to determine the leadership structure will be held in Wilmington, Del.

Vista's \$4 Billion EngageSmart Deal Hit With Court Challenge

Friday: Levinsohn v. The Arena Grp. Holdings Inc., Del. Ch., No. 2024-0777, oral arguments 10/11/24.

At issue: Arena Group Holdings Inc.'s former CEO seeks advancement of legal fees from the former publisher of the Sports Illustrated brand. Ross Levinsohn seeks summary judgment, saying in a brief that Arena advanced legal fees to defend him against litigation in New York, but it's refused to pay the costs he's incurred in separate lawsuits in Delaware and California. Arena has asked the court to dismiss Levinsohn's claims, arguing in a brief that any dispute related to his employment agreement must be heard in a California court.

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

Ex-Sports Illustrated Publisher Sued for Holding Brand 'Hostage'

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Genius Group-LZG Merger Enabled \$30 Million Fraud, Investors Say

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Litigation

- **COURT:** S.D.N.Y.
- **TRACK DOCKET:** 1:24-cv-07551

The heads of AI company LZG International Inc. used a merger with Genius Group Ltd. to defraud investors of \$30 million, concealing stolen funds and improperly issuing shares to themselves, according to a proposed class action.

LZGI CEO Peter Ritz and board chair Michael Moe engineered the merger even though Genius was never profitable and “has reported roughly \$70 million in losses since its inception in 2019,” Shawn Carey and several other LZGI investors say. Carey, who is a former LZGI executive, and the other shareholders filed their suit Oct. 4 in the US District Court for the Southern District of New York.

The deal wouldn’t benefit Genius either, “given that Ritz and Moe had stolen all LZGI’s funds and destroyed every company they ever acquired,” the investors say. The merger was completed in March, and the merged company trades under the GNS symbol, according to the complaint.

Genius CEO Roger Hamilton conspired with Ritz and Moe until they purported to terminate his employment, the investors say.

There are hundreds of members of the proposed class of investors who acquired GNS securities “as a result of the LZGI-GNS Merger” between Dec. 1, 2023, and Sept. 25, 2024, the complaint says.

Hamilton didn’t immediately respond to a request for comment emailed to a Genius address provided by the company’s former public relations firm. Contact information for the other defendants wasn’t available in the docket.

The investors seek damages on their securities fraud claims.

AXS Law Group PLLC and McMullin & Assocs. represent the investors.

The case is Carey v. Moe , S.D.N.Y., No. 1:24-cv-07551, complaint 10/4/24 .

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Bloomberg Law News 2024-10-07T12:38:50701016381-04:00

Trade Desk's Jeff Green Sued Over Delaware-to-Nevada Relocation

By Mike Leonard 2024-10-07T12:33:01000-04:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-1029](#) (Bloomberg Law subscription)

Billionaire [Jeff Green](#) is trying to shift [Trade Desk Inc.'s](#) corporate home to Nevada in a bid to outrun Delaware laws that restrict insider self-dealing, according to a lawsuit challenging the move.

A shareholder is suing Green and other board members, saying they're misleading investors about the approval required for several charter amendments, particularly an expansive liability shield for the tech company's leaders. Disclosures suggesting Green can make the changes nearly on his own—through his 49% voting power—will dissuade stockholders from weighing in on proposals that actually require two-thirds support, according to the proposed class action.

The court complaint, filed Oct. 4, sets up the latest in a series of legal showdowns over plans by influential corporate insiders to flee for Nevada or Texas. The states are trying to leverage their “no liability” reputations to lure major companies away from Delaware, which is home to nearly 70% of Fortune 500 companies. Delaware has faced a barrage of public attacks from [Elon Musk](#) and corporate defense advocates who say the pendulum there has swung too far toward minority investors.

Read More: [Novel Corporate Rulings Fuel Charged Debate on Delaware's Role](#)

“Public investors know that ‘Nevada is where you incorporate if you want to do frauds’ and they cast their votes accordingly,” the new suit says, quoting [a prominent law professor](#). “Given the chance, public stockholders will likely reject the reincorporation.”

Trade Desk, which is also named as a defendant, didn't immediately have a comment Monday. Green's net worth is roughly \$6.1 billion, according to the Bloomberg Billionaires Index.

Legal Road Map

Although hand-wringing over Delaware's status as America's corporate capital is a perennial favorite pastime of legal observers, [a series of court rulings](#) cracking down on insider conflicts of interest has turbocharged the debate this year. The arguments against Delaware's Chancery Court gained an unusually fierce ally after [its chief judge voided](#) Musk's record \$56 billion Tesla Inc. pay package, prompting the world's richest man to move the automaker to Texas.

About a month after the Tesla compensation decision, another Delaware judge laid out a road map in a dispute involving TripAdvisor Inc. for shareholders taking aim at corporate relocations that arguably drive down market value by reducing legal accountability. The [novel decision](#) allowed TripAdvisor to move to Nevada while leaving open the door for damages if its shares fall as a result.

Read More: [Musk Gets Blueprint for Moving Tesla With TripAdvisor Opinion](#)

It's well-known that Delaware's sophisticated corporate laws translate into higher valuations, especially for businesses that would otherwise trade at a discount because they're subject to the whims of a controlling stockholder like Green, according to the proposed class action filed by a Trade Desk investor.

Another way for controlled companies to mitigate the discount and boost their value is to adopt shareholder protections that can only be repealed or revised with significant support from minority investors, the lawsuit says. After "Trade Desk and Green took advantage of both options" before its initial public offering, they're now trying to make an end run around them, according to the court filing.

Telling investors the changes are almost a forgone conclusion—when in fact about a third of independent stockholders would have to support them—may depress shareholder turnout, the suit says. Otherwise, they're likely to follow in the steps of investors at TripAdvisor, [Sonoma Pharmaceutical Inc.](#), and Fidelity National Financial Inc., who rejected reincorporation proposals, according to the complaint.

The investor leading the litigation, Stephen Gunderson, is represented by Bernstein Litowitz Berger & Grossmann LLP, Friedman Oster & Tejtell PLLC, Equity Litigation Group LLP, and Kaskela Law LLC. Trade Desk, Green, and the other board members haven't yet made court appearances.

The case is [Gunderson v. Trade Desk Inc.](#) , Del. Ch., No. 2024-1029, complaint filed 10/4/24 .

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Arguing Class Actions: Reevaluating the Rule Against One-Way Intervention

 [law.com/nationallawjournal/2024/10/07/arguing-class-actions-reevaluating-the-rule-against-one-way-intervention](https://www.law.com/nationallawjournal/2024/10/07/arguing-class-actions-reevaluating-the-rule-against-one-way-intervention)

Adam J. Levitt

Adam J. Levitt, founding partner of DiCello Levitt. Courtesy photo

Commentary

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

October 07, 2024 at 06:00 AM

🕒 6 minute read

Class Actions

Adam J. Levitt



Before 1966, Rule 23 was silent on how to determine which class members would be bound by a judgment before it was entered. *American Pipe & Construction v. Utah*, 414 U.S. 538, 545–46 (1974). Instead, some took Rule 23 as an open invitation for potential class members to join the lawsuit without any commitments, allowing them to sit and wait until a trial was over to determine whether to definitively accept the invitation to join. If the class claims were successful, class members could intervene and reap the benefits; if the class claims failed, class members could stay on the sideline and avoid having their claims precluded. Thus, one way intervention was equivalent to "a free-agent baseball player ... [sitting] on the sidelines during the middle of the playoffs while watching the Astros and the Rangers play a game, then decid[ing] which team to sign onto only *after* that team has won." *In re Parish*, 81 F.4th 403, 413 (5th Cir. 2023) (emphasis in original). This potential right of "one-way intervention" prompted the Advisory Committee to close this perceived loophole when it significantly revised Rule 23 in 1966. *American Pipe*, 414 U.S. at 547.

Rule 23 now provides a clear mechanism for determining who will be bound by a judgment on the merits: class certification. If the proposed class is sufficiently cohesive—i.e., it meets the requirements of Rule 23(a) and at least one of the requirements of Rule 23(b)—then Rule 23 currently reflects the policy that it is both efficient and fair to bind all class members to the eventual judgment. Importantly, Rule 23(c)(1)(A) directs courts to determine "at an early practicable time" whether to certify an action as a class action. Otherwise, without such a certification, the court's ultimate findings are only binding on the named plaintiffs. See *Smith v. Bayer*, 564 U.S. 299, 315 (2011) ("Neither a proposed class action nor a rejected class action may bind nonparties.").

One of the underappreciated aspects of the modern version of Rule 23 is that, by emphasizing the early resolution of the class certification question, it moved away from an unrestrained right to one-way intervention. Courts decide the issue of class certification in advance of trial, providing plaintiffs and defendants with some certainty as to who will be bound by a judgment. In the wake of this success, however, the so-called "rule against one-way intervention" has arisen.

As the Seventh Circuit has noted, "the rule against one-way intervention prevents plaintiffs from moving for class certification after acquiring a favorable ruling on the merits of a claim." *Costello v. BeavEX*, 810 F.3d 1045, 1057 (7th Cir. 2016). Defendants commonly raise the rule in response to a plaintiff's pre-certification motion on the merits, sometimes deferring consideration of the motion until after class certification is decided. For example, in *Spring House Tavern. v. American Fire and Casualty*, 337 F.R.D. 371 (E.D. Pa. 2020), a restaurant brought a proposed class action against its insurer seeking a declaration that the insurance company wrongly denied insurance claims to recover losses that businesses suffered due to the COVID-19 pandemic. Before the court decided whether to certify the proposed class, the restaurant filed a motion on the pleadings for its individual claim. After the defendant raised the rule against one-way intervention, the court dismissed the motion, reasoning that because the rulings the plaintiff sought were generally applicable to all members of the putative class, the rule against one-way intervention was implicated, and a pre-certification ruling would be unfair to the defendant.

The Advisory Committee's notes to Rule 23 recognize that "the party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified." FED. R. CIV. P. 23 Committee Notes on Rules—2003 Amendment. In such situations, courts have held that the defendant waives the rule against one-way intervention. Thus, by filing a precertification dispositive motion, a defendant loses the potential to bind the entire class to a favorable ruling and risks subsequent suits from other plaintiffs. Moreover, even when a class has been certified, if the unnamed plaintiffs have not yet been notified under Rule 23(c)(2) of their inclusion in the class and their right to opt out, summary judgment for the defendant is not binding on them. See, e.g., *Schwarzschild v. Tse*, 69 F.3d 293, 297 (9th Cir. 1995). Rightfully so, as "post-judgment notice would present no meaningful opportunity for [unnamed] class members to make their case." *Faber v. Ciox Health LLC*, 944 F.3d 593, 602–05 (6th Cir. 2019).

The Eleventh Circuit has recently expressed skepticism of the rule against one-way intervention. In *Sos v. State Farm Mutual Automobile Insurance*, 2023 WL 5608014 (11th Cir. 2023), the court decided whether class certification was proper when the district court had previously granted the named plaintiff's cross-motion for summary judgment. Having never recognized the rule against one-way intervention, the court explained that it would significantly interfere with a district court's discretion to decide the merits of a claim

before deciding that claim's susceptibility to class certification (citing *Telfair v. First Union Mortgage*, 216 F.3d 1333, 1343 (11th Cir. 2000)). Ultimately, the Eleventh Circuit concluded that "even if we were inclined to adopt a rule against one-way intervention, [the defendant] waived its application by moving for summary judgment before the court addressed class certification."

The Eleventh Circuit's opinion stands in contrast to other opinions applying the defendant's waiver of the rule. For example, in *Nia v. Bank of America*, 2024 WL 1298004 (S.D. Cal. 2024), the court held that the plaintiff's pre-certification cross-motion for summary judgment was "untimely and unfair on the grounds of the one-way intervention rule." By filing a pre-certification motion for summary judgment, the defendant waived the possibility of a favorable summary judgment ruling having binding class-wide effect, but it did not waive its right to raise the rule in response to the plaintiff's cross-motion.

The risks motivating the rule against one-way intervention seem increasingly overstated. A finding on the merits for the named plaintiff is not guaranteed to bind the defendant as to the entire class, as certification is only proper if "the trial court is satisfied, after a rigorous analysis," that the prerequisites to class certification are met. *Wal-Mart Stores v. Dukes*, 564 U.S. 338, 350–51 (2011). As plaintiffs' lawyers are all too familiar, courts are regularly dissatisfied in this regard.

Even *if* courts are inclined to keep the rule, the defendant's waiver of the rule should be applied broadly, just as the Eleventh Circuit did. There's a simple fairness in allowing the plaintiff to file a motion for summary judgment when a defendant chooses to file one.

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Thank you to DiCello Levitt partner John Tangren and associate Eli Savage for contributing to this column.

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DirectSat Workers' Wage, Hour Class Action Properly Decertified

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Decertification of a class of satellite technicians in a wage suit against DirectSat USA LLC was proper because a class action wasn't the best device for resolving the case, the Seventh Circuit held.

The district court reached the right result despite using the wrong test to decertify the class, Judge John Z. Lee wrote Thursday for the US Court of Appeals for the Seventh Circuit.

There's a circuit split over creating issues-only classes under Rule 23(c)(4), the Seventh Circuit said. The Fifth Circuit limits Rule 23(c)(4) classes to cases where the cause of action, taken as a whole, satisfies Rule 23(b)(3)'s predominance requirement that issues must predominate over the class, it said.

But the Second, Third, Fourth, Sixth, and Ninth circuits permit certification under Rule 23(c)(4) as long as common questions predominate in resolving the individual issues to be certified. And the D.C. Circuit says the common issues must predominate over any individual ones, but requires district courts to also look at the relationship any certified issues have to the dispute as a whole, Lee said.

The Seventh Circuit followed the Second, Third, Fourth, Sixth, and Ninth circuits, saying their analysis is supported by the text and history of the civil procedure rule. But it also said that a class shouldn't be certified under Rule 23(c)(4) unless the certification would be superior to any other methods for adjudicating the controversy.

Decertified Twice

The satellite technicians were paid on a per-installation basis, but had to keep track of the time they worked so DirectSat could insure that they weren't paid below minimum wage. But they claimed that they weren't paid for time spent doing tasks such as loading their trucks and plotting routes to their calls. They sued DirectSat under federal Fair Labor Standards Act and the Illinois Minimum Wage Law.

The district court originally certified a class of all installers who worked for DirectSat from June 12, 2008, to Feb. 9, 2010, but that class was decertified after the Seventh Circuit handed down *Espenscheid v. DirectSat USA* .

In that case, the appeals court held that DirectSat's piece-rate compensation system would require thousands of individual evidentiary hearings to determine each class member's damages, Lee said.

But the district court then certified an issues-only class under Federal Rules of Civil Procedure 23(c)(4) to address 15 separate issues that could be decided on a class-wide basis, such as the definition of the technicians' work day. When the case was reassigned to another judge, she decertified the class, saying DirectSat's liability couldn't be resolved on a class-wide basis and the certified issues wouldn't generate common answers that drive resolution of the case.

The named plaintiffs settled their individual claims with DirectSat but reserved the right to challenge the decertification ruling.

On appeal, the Seventh Circuit held that the district court erred by only looking at whether common questions predominated as to the entire class action, and by trying to resolve all the liability issues "in one fell swoop." Nevertheless, proceeding to trial on the certified issues wouldn't have been superior to other methods to adjudicate the controversy, it said.

DirectSat's piece-rate pay structure raises too many individual issues and liability and damages can't be determined "by a simple formula or uncomplicated follow-on proceedings," the Seventh Circuit said. Even if the questions were answered, "doing so would not materially advance Plaintiffs' claims given the magnitude of what remains," it said.

Judge Thomas L. Kirsch II joined the opinion.

Judge Frank H. Easterbrook concurred, saying that people who settle their claims shouldn't be able to volunteer as agents of others because they lack standing, even if there is a possibility that they could get an incentive award if the suit is successful.

Stephan Zouras LLP represented the workers. Fox Rothschild LLP represented DirectSat.

The case is *Jacks v. DirectSat USA, LLC*, 2024 BL 351447, 7th Cir., No. 23-3166, 10/3/24.

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3M Told Again That PFAS Class Action Belongs in Ohio Court

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Class Action

Photo Illustration: Jonathan Hurtarte; Photos: Getty Images

The US Judicial Panel on Multidistrict Litigation told the 3M Co. again on Friday that litigation seeking to form a nationwide class of individuals with PFAS in their blood belongs in a federal district court.

The MDL panel issued its order denying 3M's motion to transfer *Hardwick v. 3M Co.* into the US District Court for the District of South Carolina, which is managing multidistrict litigation involving PFAS-enabled firefighting suppressant called aqueous film forming foam (AFFF).

The Hardwick case is "a unique action, transfer of which would unnecessarily complicate management of the MDL," the panel said in an order that keeps the class action in the US District Court for the Southern District of Ohio.

Ohio resident and firefighter Kevin Hardwick seeks to establish a nationwide class of individuals with 2 parts per billion in their blood or more of two per- and polyfluoroalkyl substances, or PFAS—perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS).

Today's order marks the third time either the panel or its clerk has ordered the Hardwick case to remain in the Ohio district court.

The cases are Aqueous Film-Forming Foams Products Liability Litigation , J.P.M.L., No. 2873, 10/4/24 and Hardwick v. 3M Co. , S.D. Ohio, No. 24-03121, Order from MDL Panel's Clerk Denying Transfer 7/18/24 .

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Dave's Killer Bread case graduates to a class action

 legalnewsline.com/stories/664467017-dave-s-killer-bread-case-graduates-to-a-class-action

October 7, 2024

Yvonne Gonzalez Rogers | cand.uscourts.gov

SAN FRANCISCO (Legal Newsline) - A lawsuit over protein in Killer Bread cleared a major hurdle, with a federal judge certifying it as a class action.

California judge Yvonne Gonzalez Rogers on Sept. 20 granted the motion for class certification of lawyers at Gutride Safier who sued Dave's Killer Bread in December 2021. The ruling takes the case toward a settlement or trial.

The lawsuit says the disclosed protein content on packages is accurate but companies are failing to account for the digestibility of the types of protein. This leads to inaccurate daily value percentages, they say.

Rogers last year denied Dave's Killer Bread's motion to dismiss the case. She was asked to certify a class of California consumers suing under state consumer protection laws, while Killer Bread wanted the declaration of the plaintiff's expert struck.

It also said plaintiff David Swartz's testimony showed he lacked standing to bring the case. Though his theory is that he wouldn't have paid as much for the bread had he known of the protein problems, he actually did buy it after filing suit.

"Plaintiff's claim is based on the allegation that he paid a price premium for a product with an unlawful label to meet his child's nutritional protein needs," Rogers wrote.

"A claim that defendants 'created demand that would not otherwise have existed,' 'causing plaintiffs to overpay' is sufficient to establish Article III standing."

Swartz said his kid had become accustomed to the taste of the bread, so he had to buy it again. He will be the lead plaintiff for a class of customers who bought the bread in California between Dec. 29, 2017, and now.

A survey will determine the price premium Dave's charged, Rogers wrote. Plaintiff expert Colin Weir has proposed a conjoint analysis and damages model to calculate damages.

Dave's tried to have his declaration struck but did not succeed. It argued Weir's survey will focus participants on protein statements and relies on undocumented interviews.

"The survey design interviews at issue are merely a tool used in a survey design, and failure to take notes does not warrant exclusion," Rogers wrote.

"Defendants may still cross-examine Weir 'about the questions in his survey,' regarding its questions, methodology and the lack of development drafts."

After the survey, Weir plans to use a market simulation tool to estimate the price premium paid as a result of front-of-package protein claims.

ORGANIZATIONS IN THIS STORY

U.S. District Court for the Northern District of California

Just 11% of Legal Departments Predict Gen AI Will Be 'Transformative,' as Its Honeymoon Phase Fades

LAW [law.com/nationallawjournal/2024/10/07/just-11-of-legal-departments-predict-gen-ai-will-be-transformative-as-its-honeymoon-phase-fades](https://www.law.com/nationallawjournal/2024/10/07/just-11-of-legal-departments-predict-gen-ai-will-be-transformative-as-its-honeymoon-phase-fades)

Greg Andrews | Trudy Knockless



Credit: Nuthawut/Adobe Stock

Analysis

New studies show successful gen AI adoption is hard work, and companies sometimes undermine their efforts by failing to set ground rules for employee use and scrimping on education and training.

October 07, 2024 at 09:03 AM

🕒 7 minute read

Artificial Intelligence

The original version of this story was published on Corporate Counsel

A study released Monday, while striking an upbeat tone about generative AI's potential to boost legal department efficiency and effectiveness, includes numerous findings that run counter to that rosy narrative.

"The legal industry is undergoing a seismic shift," says the study from the Association of Corporate Counsel and Everlaw, whose e-discovery platform employs the technology. "Generative artificial intelligence is rapidly emerging as a transformative force, reshaping the landscape of in-house legal departments."

But the 23% of in-house legal professionals the study found are using gen AI is perhaps lower than that passage might suggest. And just 11% of the 475 U.S. corporate legal department professionals surveyed said they're currently experiencing tangible benefits from generative AI (though 30% expect to within a year and 36% expect to within two years).

And, while 45% of respondents said they expect gen AI to have a significant impact on the efficiency and effectiveness of legal departments, a mere 11% foresee a transformative impact.

The study's release—which coincides with the opening of the ACC Annual Meeting in Nashville, Tennessee—comes as artificial intelligence goes through something of a reality check.

The first version of ChatGPT, rolled out by OpenAI in November 2022, dazzled the public and business community alike, causing expectations to soar. But now many legal departments say the benefits of their generative AI investments are falling short of expectations, Law.com reported in July.

During a presentation in May at the Corporate Legal Operations Consortium annual conference in Las Vegas, Suffolk University Law School Dean Andrew Perlman said that he's been speaking with law firms, in-house counsel and bar associations and across the board they tell him that no one has figured it out yet. "At the same time, I'm a big fan of this quote from Bill Gates: 'We always overestimate the change that will occur in the next few years and underestimate the next 10.'"

"I think that describes generative AI and legal services perfectly. If I came back here two years from now, we'll see some changes, to be sure. But will they be dramatic? Will they be industry-changing developments? I think the answer is no. But if you come back 10 years from now, I think the changes are going to be momentous. In light of that. I think even though there's a lot of uncertainty, don't use it as an excuse to do nothing."

The ACC/Everlaw study, along with a separate study released last month from Littler Mendelson titled "2024 AI C-Suite Survey Report," includes a wealth of findings suggesting that part of the problem is that companies aren't spending sufficient time or money to lay the foundation for successful gen AI adoption.

In the ACC/Everlaw survey, just 43% of respondents reported having a basic grasp of generative AI. Though that finding suggests a desperate need for education, just 42% of respondents said their departments were providing educational opportunities, and just 46% said their departments received dedicated resources to support gen AI implementation.

Further, just 59% of respondents said their employers had developed an AI policy, a widely recommended governance document that sets the ground rules for AI usage within a company.

Without such a framework, employees tend to adopt an "act now, ask for forgiveness later" approach to the technology that dramatically increases the risks they will land in legal and regulatory trouble, online learning platform Articulate noted in a blog post.

Given in-house attorneys' knowledge gaps and the scarcity of training to address them, it is perhaps not surprising that just 26% of respondents to the ACC/Everlaw survey agreed with the statement "My legal department is prepared for the impact of generative AI on in-house legal work."

The Littler study, which was based on a survey of 336 C-suite executives, reported on even lower level of AI policy adoption—44% vs. 59% in the ACC/Everlaw study—"and many that do lack the teeth and internal alignment needed to make them most effective."

For example, the Littler study found that one-quarter of the AI policies served merely as guidelines for employee deployment of AI, rather than rules to which workers must adhere.

The study also raised concerns that training often was not comprehensive enough. Among organizations with training programs, fewer than half include instruction on copyright violations/plagiarism, spotting hallucinations or writing effective prompts.

"The fact that only 47% of executives say their training focuses on writing effective prompts suggests that businesses may be missing an opportunity to help their employees get the most value out of using generative AI tools," the report said.

Also holding companies back, according to the report, is a lack of "internal alignment"—a reference to areas of disagreement among members of the C-suite as well as dysfunction that leaves parts of the organization unaware of what others are doing or with a mistaken impression of what they're doing.

For example, 82% of respondents who are chief human resources offices said their organization was using some form of AI in HR—such as for sourcing candidates or creating HR-related materials—while just 48% of legal chiefs said HR was using AI.

Similarly, 46% of respondents who are CEOs or CHROs said their organizations were using automated monitoring systems to track employee use of gen AI, while just 20% of GCs said that was the case.

The gap was even larger on the question of whether their organization was using audits and reviews to track gen AI usage, with 56% of CEOs and CHROs answering "yes" but only 27% of GCs doing so.

"This disconnect could be problematic, as it's difficult to create effective organization-wide policies if the C-suite team isn't aligned on how and where AI tools are being used," the report said.

The report says the gap may stem partly "by the rapid rate of change. Legal teams, for example, may not be involved in policy elements until there is a problem—and, depending on the organization, may not be part of the centralized AI decision-making group."

Marko Mrkonich, Littler shareholder and a member of the its AI and Technology Practice Group, said the divide also might partly stem from legal departments being "viewed as a little bit too rule-driven, a little bit too compliance-driven, and the businesses were anxious to get going."

He said it is important for other C-suite leaders to recognize that general counsel have a responsibility to mitigate risk and that what they "look at as foot-dragging is really compliance-driven behavior."

At the same time, he said, "CLOs and GCs need to move forward, embrace these technologies, and find effective ways to use them safely. But they can't let the perfect be the enemy of the good."

He said it's important for companies to establish their compliance framework at the start, rather than imposing it after employees already have grown accustomed to deploying AI in certain ways.

But he said a lot can go wrong during that critical step, Mrkonich said.

"What's really painful to watch is when the people designing compliance strategies are not connected to what the practical use cases are," he said.

"You need to develop policies and compliance programs around what is actually happening," he said. Otherwise, companies run the risk of creating policies that no one reads or follows.

"Better to have no policy than one that's ignored," he added. "But it's better yet to have a policy that people follow."

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SEC Whistleblower Mission Plagued by Secrecy, Commissioners Say

By John Holland

Exclusive

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- Commissioners barred from even explaining why awards are improper

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By John Holland 2024-10-07T05:00:02000-04:00

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The SEC’s five commissioners have the power to regulate financial systems, protect investors and make rules impacting more than \$100 trillion in securities trades each year.

They don’t, however, have the power to tell taxpayers or Congress why awards topping \$100 million sometimes go to whistleblowers the commissioners feel shouldn’t get paid. They can’t detail their objections publicly or provide any facts not included in sparse, heavily redacted releases announcing the awards.

“We want to put the public in the position where they can ask these questions, where they can understand whether our decisions were appropriate. But we can’t,” Commissioner Hester Peirce said in an interview with Bloomberg Law. “I can’t tell you because I can’t tell you. It’s very frustrating.”

That frustration spilled out last month in response to two whistleblower awards totaling \$122 million. Peirce and Commissioner Mark Uyeda penned an open letter alleging the agency’s excessive secrecy undermines faith in the program, and lamenting that they weren’t free to explain why the money shouldn’t have been awarded.

Created by the Dodd-Frank financial reform law of 2010, the whistleblower program forbids the Securities and Exchange Commission from releasing any information that would identify tipsters. A 2022 Bloomberg Law investigation found that the secrecy went far beyond that mandate, making it virtually impossible for Congress to provide oversight of a program that's now awarded about \$2 billion. The story showed that the agency often waived its own rules to issue awards, and that more than \$425 million went to clients of three former SEC attorneys, including one who helped create the program and one who ran it for years.

"Unnecessary redaction of final award determinations in the name of whistleblower confidentiality limits public information about the awards, and that, in turn, insulates the awards from scrutiny," Peirce and Uyeda wrote in their Sept. 19 statement. "And the whistleblower program needs scrutiny."

Uyeda didn't respond to requests for comment.



The commissioners' votes came in final orders issued on Aug. 23 and Aug. 26 that were heavily redacted. The orders made no mention of any dissent, didn't include any details of the underlying violation that prompted the investigation, and blacked out the percentage of recovery that was awarded. By law whistleblowers are awarded between 10 percent and 30 percent of any money recovered through their tips.

Peirce, in the interview, emphasized both her support for the program and the need for change.

"There were specific issues that I wanted to raise – I was opposed to those awards – but I couldn't articulate my reasoning publicly. That's not how this is supposed to work," Peirce said.

In their September statement, Peirce and Uyeda said keeping so much information hidden made the agency "immunized from effective public scrutiny."

Senator Chuck Grassley (R-Iowa), who helped write the whistleblower law, has reached out to the agency in response to the Peirce and Uyeda statement, his office said.

"There's an important balance between protecting whistleblower confidentiality and releasing information in the public interest," his office said in an email.

Questions surrounding secrecy have dogged the program for years. Whistleblowers who have been denied claims must sign non-disclosure agreements to look at records in their case, even if it involves information they supplied to the SEC. Often that information can't be used during federal court appeals challenging the denials, attorneys specializing in whistleblower cases have said.

The lack of transparency can make it difficult for the public to understand "whether the Commission is applying its rules in a reasonable and consistent matter," the commissioners wrote in their statement.

They didn't mention any cases, and Peirce said she was prohibited from doing so.

But many have come under scrutiny from courts and attorneys. Last year a federal appeals court said the SEC's decision to give a \$14 million award to activist investor Carson Block "leaves something to be desired," and said his contribution "had no ostensible impact on the investigation." And in December 2022, the SEC awarded \$20 million to a whistleblower who provided virtually no new information to an agency investigation that was more than a year old. Staff recommended the payment, and it became official 30 days later without a commission vote.

Peirce said she believes the agency can become more transparent without identifying whistleblowers if it has the will to change.

"I don't think we need a formal rulemaking process, but we should be discussing this with attorneys and others to come up with something that will be more accountable to the public, and still protect the whistleblower's identity," she said.

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Securities Law News

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Short Seller Andrew Left Asks Judge to Dismiss SEC Fraud Case

By Erik Larson

- SEC suit enforces a rule that doesn't exist, his lawyer argues
- Left is also facing criminal fraud charges over price targets

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Short Seller Andrew Left Asks Judge to Dismiss SEC Fraud Case

By Erik Larson2024-10-04T17:08:53483-04:00

- SEC suit enforces a rule that doesn't exist, his lawyer argues
- Left is also facing criminal fraud charges over price targets

Short seller **Andrew Left** said a Securities and Exchange Commission lawsuit was accusing him of breaking a rule that doesn't exist and asked a judge to dismiss the regulator's fraud claims against him.

Left, 54, is facing both criminal and civil cases alleging he and his firm, Citron Research, misled investors with inflammatory social media posts setting "extreme" target prices in hopes of nudging stock prices long enough for him to make profitable trades.

On Friday, Left moved to have the SEC suit tossed. He hasn't yet made a similar filing in the parallel criminal case. Both cases are in federal court in Los Angeles and stem from a multi-year government probe into the short-selling industry. A number of other short sellers have beefed up their disclaimers in response to the charges.

The SEC accused Left of fraud on the grounds that he failed to publicly disclose his private trades when he was making his blistering social media comments. The short seller's lawyer, James Spertus, argued in Friday's filing that there was no rule requiring such a disclosure and that Left's disclaimers already warned investors not to make assumptions.

"The SEC cannot engage in rulemaking through an enforcement action without violating due process," Spertus said. The lawyer argued that such a rule would in any case be an unconstitutional encroachment on free speech because it would "compel him to disclose his personal trading strategy for securities."

Left's argument that there is no clear rule barring his conduct could factor into his criminal defense. His lawyers could try to argue it shows that he had no intent to commit fraud, which prosecutors must prove to win his conviction. He faces a maximum of 25 years in prison if he's convicted on the most serious charge of securities fraud conspiracy.

Neither the SEC nor federal prosecutors immediately responded to request for comment on Left's filing. The SEC will have a chance to respond to the filing before the judge makes a decision.

The government has said it has extensive evidence in the form of emails and text messages seized from Left's electronic devices. They allegedly show Left working with others in advance of his public statements about companies to try to profit from his own trades, even if those trades didn't match what he was allegedly suggesting investors should do.

Left is also accused of concealing his ties to hedge funds that allegedly made trades on his behalf.

Spertus on Friday downplayed Left's impact on the market, calling "absurd" the SEC's claim that his tweets and reports had an impact on multibillion dollar companies like American Airlines Group Inc. and Tesla Inc. According to the filing, Left never concealed what he was doing.

"Reasonable investors know, even without reading Mr. Left's published disclaimers, that his strategy is to realize gains from price corrections," Spertus wrote. The lawyer also said the SEC's fraud claims fail because Left wasn't misleading investors with his estimates.

"The SEC fails to disclose that Mr. Left's published target prices were true in almost every case," Spertus said. "When the omitted facts are included, the SEC's fraud theory falls apart."

The case is SEC v. Left, 24 cv 06311, US District Court, Central District of California (Los Angeles).

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Musk's Robotaxi Needs to Come With a Time Machine: Liam Denning

By Liam Denning 2024-10-07T07:00:20341-04:00

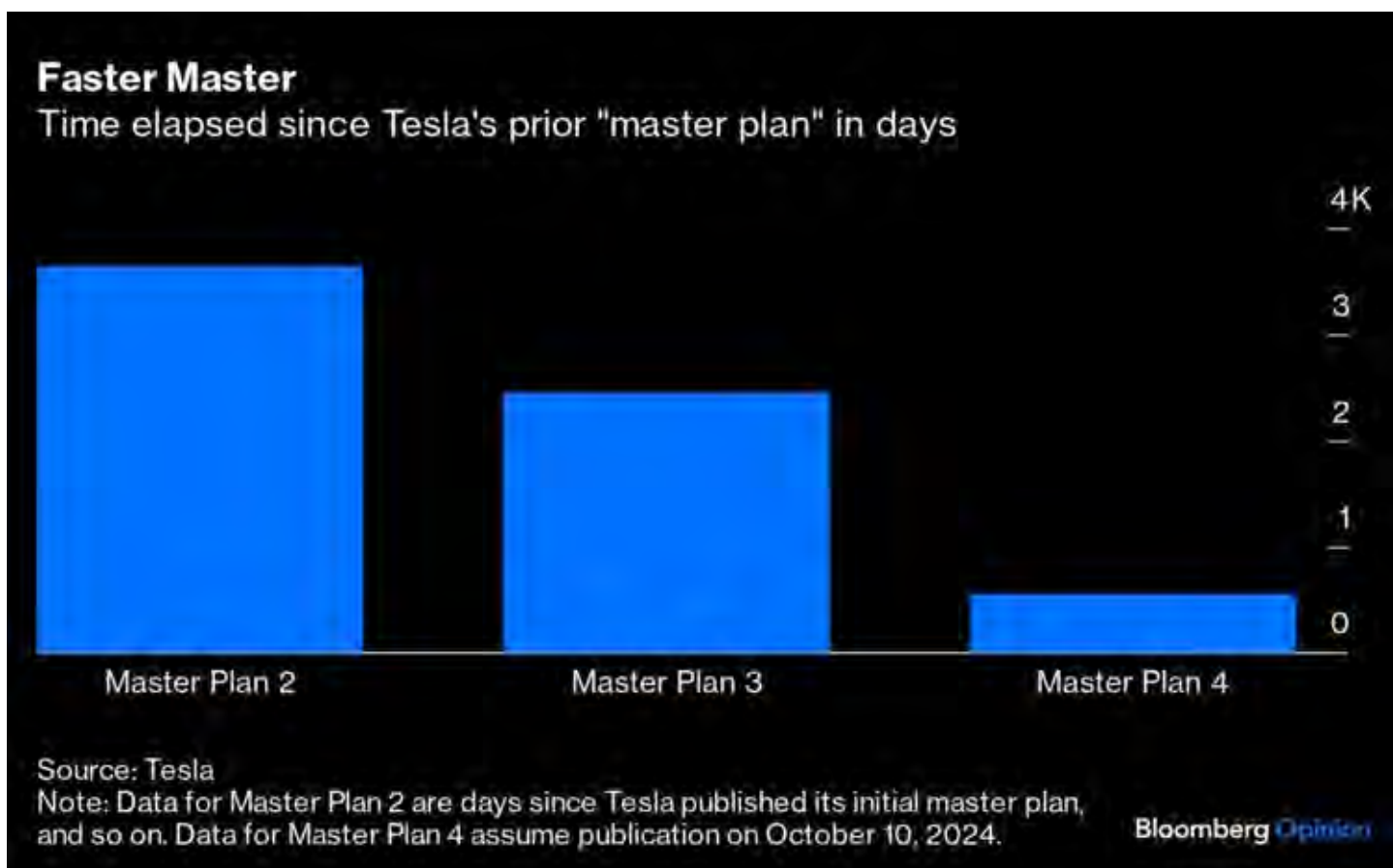
When Elon Musk hosted Tesla Inc.'s "[autonomy day](#)" in March 2019, he was crafting a narrative. When he takes the stage at Thursday's "robotaxi unveil," he will fight to keep control of that narrative.

Five years ago, Musk touted robotaxis — self-driving, self-funding wonders earning money for their owners — that would be ready by the end of 2020. Even allowing for the pandemic, they are well past due. In the meantime, Tesla's sales of electric vehicles surged fivefold but then stalled. Its market cap ballooned from less than \$50 billion to a peak of \$1.2 trillion before giving back about \$400 billion of that.

As the EV growth story faded, artificial intelligence has filled the gap. Bullish analysts, and Musk himself, routinely ascribe a fraction of Tesla's value to selling EVs, with the majority now tied to visions of robotaxis and robots instead. Musk touts Oct. 10 as a day "for the history books" under the tagline "[we, robot.](#)"

It's worth remembering that the robotaxi unveil was precipitated by, what else, a spat on X. About a year after Tesla hosted an investor day in March 2023 to present Musk's "Master Plan 3," which focused heavily on creating a low-cost EV, Reuters reported that project had been canned. Tesla's stock, weakened already by the company having abandoned its EV growth target, was hit hard. Musk accused Reuters of lying but then effectively confirmed the story by suddenly announcing a "robotaxi reveal" for Aug. 8. He later [teased](#) a new master plan.

The sound of glass breaking was unmistakable, especially as the reveal then got pushed back by two months. Assuming Musk's new blueprint gets debuted this week, the lifespan of his master plans will have been shortened mightily.



Expect Tesla's Optimus humanoid robot to feature prominently as a cameo from the future on Thursday. Yet no one should expect Tesla to announce that it has solved the problem it set out five years ago: Namely, creating a robotaxi that drives under general AI to a level where Tesla assumes liability; relies on cameras and radar rather than expensive, laser-targeting LiDAR technology; and can be switched on across millions of existing Teslas with an over-the-air software update to drive anywhere in the US.

Even Adam Jonas, the very bullish Morgan Stanley analyst, isn't expecting that. Rather, according to a recent report, he expects a "cybercab" able to drive itself around a closed course on the Los Angeles studio lot Tesla has booked. He also foresees Tesla revealing a "supervised" autonomous/FSD rideshare service," whereby Tesla owners with the Full Self Driving driver-assistance package offer rideshare services; like catching an Uber but with the driver letting the car control itself at times. Tesla would gain more data for its autonomy machine learning, no doubt, but it's hard to see why passengers would choose this — unless, of course, Tesla heavily discounts those rides to take market share (not unlike its efforts to shore up EV sales at the expense of profits).

All of this would represent a climbdown for the company, but also a means of repositioning in an autonomous vehicle sector that has seen some notable shifts of late; especially concerning the

leading operator of actual, existing robotaxis, Alphabet Inc.'s Waymo LLC.

Waymo is, in a sense, the tortoise to Tesla's hare, building its capabilities incrementally with small numbers of robotaxis deployed in limited settings and backed by remote teleoperators able to intervene. That methodical approach is safer but also inherently slower. Alex Roy, an expert on vehicle autonomy and founder of New Industry Management LLC, a venture fund, is something of a Waymo evangelist. ("I don't have to choose a setting for conversation and there's no way it will cancel.") He notes, however, that if Tesla does eventually crack generalized autonomy with its lighter hardware approach then "Waymo is in mortal danger."

In the meantime, however, Waymo is free to scale at its own pace — and is doing so cleverly. It just announced it will expand to Austin (Tesla's backyard) and Atlanta exclusively via Uber Technologies Inc.'s app, building on an existing partnership in Phoenix. Waymo gains access to a giant, established customer network managed on its behalf and can size its fleet for optimal utilization, since Uber's variable pool of human drivers can handle surges, which also reduces Waymo's unit costs. Uber, meanwhile, gets a new, differentiated source of vehicles to meet regular demand and can establish itself as a credible partner for autonomy after its in-house effort went awry.

Cracking generalized autonomy, à la Tesla, remains a formidable and time-and-money-consuming task. Philip Koopman, an associate professor and automated driving specialist at Carnegie Mellon University, believes the industry underestimates the sheer number of potential surprises out there on the roads that machines must learn to deal with, yet only rarely encounter, in order to be truly safe. "It's not how often a thing happens that's rare; [it's how many rare things there are to happen to you,](#)" he sums up.

What Tesla needs, therefore, is even more time. Roy recently penned a fascinating post on Tesla's ["narrative command."](#) This describes how the company defines how society thinks, and speaks, about EVs and autonomy by making tangible advancements in things like batteries and vehicle design while also disseminating terms like "Autopilot," "robotaxi" and "supercharger" into the vernacular. This reality-distortion field has been maintained despite numerous missed timelines and has, above all, kept Tesla's stock priced for breakneck growth even as its core business has stagnated.

The festivities in Los Angeles are all about bolstering that command in the face of undeniable progress by competitors. One useful way to do this might involve, say, Tesla releasing the data behind its claims that its driver assistance features already outdo humans significantly on safety. Another would be to reveal how many Tesla buyers are actually paying extra for FSD.

It is odd that a company which proclaims safe vehicle autonomy to be its overriding investment case won't enhance that with a few simple numbers. Somehow, I suspect Thursday will see Musk lean more heavily into spectacle rather than disclosure. As so often, the question will be whether investors are dazzled enough to forget all that was pledged previously.

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- 1. What Koopman is describing is essentially the difference between an exponential distribution of probabilities and a power law distribution. In the former, there are a lot of potential situations on the road that happen relatively frequently and then a long, thin tail of very rare surprises. The implication being that, after the machine has driven so many miles and encountered the most frequent situations, it will reach a point relatively quickly where we need not worry about the very rare occurrences, as we will have reached an acceptable level of risk. In the power law distribution, the 'tail' of relatively infrequent situations is fatter. This makes it harder to reach an acceptable level of risk, since the machine must learn about a relatively higher number of situations that aren't rare enough to dismiss but are rare enough that the machine must drive many more miles in order, statistically, to encounter them.

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Trump Media SPAC Dropped From \$20M Insider-Trading Suit

By **David Minsky**

Law360 (October 4, 2024, 8:05 PM EDT) -- A Florida federal judge dismissed a special purpose acquisition company from a shareholder complaint alleging a board member and investor made nearly \$20 million from insider trading following news of a merger with Donald Trump's social media website, saying the SPAC isn't a necessary party to the lawsuit.

U.S. District Judge Kathleen M. Williams on Thursday dismissed Digital World Acquisition Corp. from a federal lawsuit shareholder Robert Lowinger brought seeking to have board member Bruce Garelick and investor Michael Shvartsman give back nearly \$20 million they reaped from the "short-swing" sale of securities the day after the merger with Trump Media & Technology Group Corp. was announced.

"Here, DWAC does not seek to stop Lowinger from bringing this action — it simply does not want to be a named party," Judge Williams said in the **order**. "This does not contravene the statutory scheme, which expressly permits a shareholder to bring an action if the issuer fails or refuses to. Accordingly, the court finds that DWAC is not an indispensable party."

Lowinger brought his suit under Section 16(b) of the Securities Exchange Act of 1934, a provision that allows the issuer of a security to recover profits made by certain company insiders from a short-swing sale, which is the buying and selling of a stock within a six-month period. If the issuer declines, the provision allows shareholders to bring an action seeking a recovery.

The suit was initially filed in the Southern District of New York in October 2023, but transferred to the Southern District of Florida in June, court records show.

In the suit, Lowinger named Digital World, Shvartsman and Shvartsman's company Rocket One Capital LLC as defendants, all of whom reside in Miami-Dade County, as well as Garelick, Digital World's board member who resides in Broward County. Shvartsman and Rocket One are listed in the lawsuit as having agreed to make investments in founders class shares of Digital World.

Lowinger said that in June 2021, Shvartsman introduced Garelick to Patrick Orlando, Digital World's chairman and CEO. Three months later, Garelick became a member of Digital World's board of directors, according to the suit.

As a Digital World director, Lowinger said Garelick had access to "material nonpublic information" relating to the SPAC's potential merger with Trump Media.

Shortly after Garelick became a Digital World board member, in September 2021, he approved a deal for a prospective merger with Trump Media that would take the company public, according to the suit. Garelick allegedly contacted Shvartsman to tell him Digital World warrants started trading on the NASDAQ. Warrants are similar to stock options but are issued directly by the company and when exercised, allows the investor to purchase shares at a particular price in the future.

Over the course of approximately two weeks, according to Lowinger, Shvartsman purchased more than 2 million warrants through a point person identified by Garelick. Then on Oct. 17, 2021, Garelick allegedly contacted Shvartsman again after receiving a draft copy of the Digital World-Trump Media merger agreement, which was announced three days later.

One day after the announcement, Garelick sold his warrants and, through Rocket One, Shvartsman sold his, with both individuals realizing millions in profits combined, according to the lawsuit.

Digital World brought a motion to dismiss the lawsuit in March 2024, saying Lowinger failed to state a claim and filed a shotgun pleading. The company argued that it isn't a "statutory insider" or an "indispensable party."

"Plaintiff specifically stipulated that the complaint does not allege that DWAC engaged in any wrongdoing under Section 16(b)," Digital World said in its motion. "Even though any recovery plaintiff obtains will be for DWAC's benefit, plaintiff has full statutory authority to pursue this action independently of DWAC, and DWAC's absence will not impair plaintiff's ability to pursue its claim vigorously or pose a risk of multiple or inconsistent obligations."

In his March 2024 opposition, Lowinger argued a court "could order disgorgement against a non-violator of securities laws who has no legitimate claim to ill-gotten funds, and, in that context, the party is called a relief defendant or a nominal defendant."

But Judge Williams stated in her order that while Section 16(b) empowers Lowinger to sue, the lawsuit isn't "a derivative or secondary right grounded on rights and interests possessed primarily by the corporation." The judge's ruling removes Digital World from the lawsuit, although the action is still proceeding against the remaining defendants, at least for now.

Digital World representative Brad Bondi of Paul Hastings LLP told Law360 in an email Friday that he isn't aware of a ruling similar to Judge Williams'.

"This is a significant rule of first impression because it holds that issuers named in Section 16 cases are not indispensable parties," Bondi said.

Counsel for Lowinger, Shvartsman and Garelick did not immediately respond to requests for comment Friday.

Lowinger is represented by Jeffrey S. Abraham and Michael J. Klein of Abraham Fruchter & Twersky LLP and Robert J. Robbins and Stephen R. Astley of Robbins Geller Rudman & Dowd LLP.

DWAC is represented by Bradley J. Bondi, Michael D. Wheatley and Marisa Polowitz of Paul Hastings LLP.

Michael Shvartsman and Rocket One Capital LLC is represented by Andrew M. Feldman and Neil D. Kodsi of Feldman Kodsi PLLC and Tai Hyun Park of Tai Park PLLC.

Bruce Garelick is represented by Gustavo A. Bravo of Bravo Law.

The case is Robert Lowinger v. Rocket One Capital LLC, case number 1:24-cv-22429, in the U.S. District Court for the Southern District of Florida.

--Editing by Michael Watanabe.



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Top 5 Supreme Court Cases To Watch This Fall

By **Katie Buehler**

Law360 (October 6, 2024, 11:17 AM EDT) -- The U.S. Supreme Court will hear several cases in its October 2024 term that could further refine the new administrative law landscape, establish constitutional rights to gender-affirming care for transgender minors and affect how the federal government regulates water, air and weapons.

The justices have placed 43 individual cases on their October term merits docket so far — the highest number of pre-term certiorari grants in four years. The cases range from procedural questions, like whether states can require litigants to **exhaust administrative remedies** before asserting federal civil rights in local courts, to hot-button social issues, including the **regulation of ghost guns** and **bans on gender-affirming medical care** for transgender minors.

Here, Law360 looks at five of the most important cases on the Supreme Court's docket so far.

Transgender Rights

The indisputably most anticipated case of the term asks the Supreme Court to decide whether a Tennessee law banning gender-affirming treatment for transgender minors violates the 14th Amendment's equal protection clause.

President Joe Biden's administration **asked** the justices to reverse a Sixth Circuit panel decision **upholding the ban**, which found that the law is not based on sex and, therefore, isn't subject to heightened scrutiny. The law, S.B. 1, or the Prohibition on Medical Procedures Performed on Minors Related to Sexual Identity act, bans hormonal treatments for minors diagnosed with gender dysphoria but explicitly allows those same treatments for minors dealing with birth defects and delayed or early puberty.

The court's decision to wade into such a hot-button issue at a relatively early stage in litigation involving transgender rights has piqued many lawyers' interests. A decision in this case will not only show how the justices view this politicized issue but also set the scene for several other transgender rights disputes currently **percolating in lower courts**.

"One real question is why did the Supreme Court grant cert now?" Erin M. Hawley, senior counsel at Alliance Defending Freedom, said during a Federalist Society event previewing the court's new term. "There's not really a circuit split. ... There's no need for the court to take this case."

The federal government — and a trio of transgender Tennessee teens and their parents, as well as a doctor — argue the case falls "squarely within the heartland of sex-based classifications that arise from sex-based generalizations" by making the availability of medical treatments based on whether a minor has "purported discomfort or distress from a discordance" between their gender identity and sex assigned at birth. The case should be governed by the court's 2020 ruling in **Bostock v. Clayton County**, which held that Title VII of the Civil Rights Act of 1964 **prohibits discrimination based on a person's transgender status**.

Tennessee Attorney General Jonathan Skrmetti and members of the state's board of medical examiners who are defending the law haven't filed their response brief yet, but **argued against certiorari** because questions related to medical treatment for transgender minors are inherently political ones that should be determined at the ballot box. In addition, the U.S. Constitution is silent on the treatment of transgender status, they noted.

The court's more conservative members may struggle with applying Bostock's statutory analysis to a constitutional clause, Hawley said.

Transgender rights advocates are focused mainly on Chief Justice John Roberts and Justice Neil Gorsuch, who sided with their Democratic-appointed colleagues in Bostock's 6-3 decision. Justice Amy Coney Barrett, who hadn't even been nominated for the court when that decision was issued, also presents a wild card.

"I'm concerned that [Justice] Gorsuch and [Chief Justice] Roberts, who were on the right side in the 2020 case, are going to say, 'Young people are different' or not adhere to their standard in Bostock," Lanae Erickson, senior vice president for social policy, education and politics at progressive advocacy group Third Way, said during a preview of the Supreme Court's term hosted by the Center for American Progress.

The case, which hasn't been scheduled for argument yet, is *United States v. Skrmetti et al.*, case number 23-477.

Ghost Guns

A case that asks whether ghost guns, or unserialized weapons that often require assembly, are "firearms" that can be regulated by the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives will act as a bellwether case for how courts should treat agency interpretations of statutes in a post-Chevron deference world.

The Biden administration **asked** the Supreme Court to reverse a Fifth Circuit decision **vacating the ATF's 2022 rule** that states ghost gun parts kits and partly completed gun frames are "firearms" subject to various federal regulations under the Gun Control Act of 1968. Those include requirements that the guns be assigned serial numbers and that sellers of the kits conduct background checks and keep records of their transactions.

This case will allow the justices to model best practices for lower courts overseeing similar challenges after the Supreme Court last term **wiped out a long-standing doctrine** that encouraged deference to agency interpretations of ambiguous phrases, said Michael Waldman, president and CEO of New York University School of Law's Brennan Center for Justice.

The case, **set to be argued** Tuesday, "deals with curbing the opinions of agency experts, which will reverberate to other areas" of administrative law, Waldman said during a webinar previewing the court's upcoming term.

The U.S. Department of Justice argues that parts kits and partly completed frames are clearly "firearms" because they can quickly be made into working weapons, sometimes in as little as 30 minutes. Congress defined the term "firearms" in the Gun Control Act to include weapons parts that "may readily be converted to expel a projectile," and courts have a history of treating disassembled weapons and parts as regulated firearms, the government said.

But the rule's challengers — advocacy groups Firearms Policy Coalition Inc. and Second Amendment Foundation Inc., five ghost gun manufacturers and distributors, and individuals Jennifer VanDerStok and Michael G. Andren — say the Gun Control Act's legislative history and plain text belie the government's arguments. They argue that before adopting the gun law, Congress considered several bills that would have explicitly applied federal regulations to parts kits, but decided against such expansive language.

The challengers additionally contend that ghost gun parts kits are just collections of parts that cannot be used individually as weapons, which doesn't fit into the act's "firearms" definition. McGuireWoods LLP partner John S. Moran said he expects to see a strong debate among the justices over the appropriate approach to textualism.

The case could also provide some insight into how key justices deal with cases on the court's merits and emergency dockets differently, Moran said at the Federalist Society's term preview event.

So far, the Supreme Court has allowed ATF's rule to be implemented, with Chief Justice Roberts and

Justice Barrett joining their three Democratic-appointed colleagues to **grant an emergency stay** of the Fifth Circuit's ruling in August 2023.

While the emergency ruling was a procedural decision, the justices will now have to tackle the merits of the case, including highly technical questions.

"It would be most interesting if the 5-4 majority that granted the stay doesn't end up being the 5-4 majority on the merits," Moran said.

The case is *Garland et al. v. VanDerStok et al.*, case number 23-852.

Controlling Pollution

Another early indication of the state of play in the new regulatory world will come in a case that asks the justices how specific the U.S. Environmental Protection Agency must be in its Clean Water Act permits controlling pollution discharge.

The city and county of San Francisco **argue** that limits imposed by the EPA in National Pollutant Discharge Elimination System, or NPDES, permits have become too generic and that the Supreme Court should reassert the CWA's call for source-specific pollution limitations. A Ninth Circuit panel **sided with the EPA** in July 2023, finding the agency wasn't required to only provide numeric limitations on pollution, but lawyers believe the justices are poised to reverse that ruling in their continued effort to rein in the so-called administrative state.

"It's an effort to push the federal government toward being more specific and target-focused, which is something [the court] wants from administrative rule-making" in general, GianCarlo Canaparo, a senior legal fellow at The Heritage Foundation, told reporters during a press call.

San Francisco argues the EPA has returned to its pre-CWA scheme of holding individual polluters responsible for a water body's overall quality standards, something the 1972 act was specifically adopted to prevent. The practice "flies in the face of logic" and the act's carefully drafted regime, and should be curbed, it says.

But the EPA contends its permitting policy has always relied on applying the "most restrictive" requirements, whether they are the water quality standards for a body of water or specific limitations on individual polluters. The agency says it expressed that applying source-specific pollution caps won't always be sufficient to achieve certain water quality standards during the legislative deliberations that led up to the CWA's passing and in Supreme Court briefs for the subsequent decade.

Georgetown Law professor Lisa Heinzerling said it will be interesting to see how the justices approach this case at oral arguments — which are scheduled for Oct. 16 — since the briefs "fly as quickly away as possible" from concepts of statutory interpretation and mainly rely instead on policy determinations.

The economic cost of the EPA's generic water standards will also be a significant influence on the court's decision in this case, Jonathan H. Adler, a professor at Case Western Reserve University School of Law, said during the Federalist Society preview event. He noted there are myriad amicus briefs from governments across the country urging the Supreme Court to tighten NPDES limit requirements because the EPA's broader approach to water quality control imposes more costs on cities, counties and states.

"If you look at the briefs in this case, state and local governments across the board ... are all on San Francisco's side because this really matters for local governments," Adler said.

The case is *City and County of San Francisco v. Environmental Protection Agency*, case number 23-753.

Forum Shopping

The Supreme Court will get a chance to tackle forum shopping issues in a dispute over whether

changes made to a lawsuit after it has been removed from state court can rescind a federal court's jurisdiction over the case.

Pet food producers Royal Canin USA Inc. and Nestlé Purina PetCare Co. **urged** the justices to establish a clear rule stating that lawsuits removed to federal court can remain there even if plaintiffs later amend their allegations to erase any claims related to federal law. An Eighth Circuit panel, while acknowledging that it was departing from what many lawyers considered settled law, ruled in July 2023 that such amendments **can force judges to return** the case to state court.

An affirmance in this case could cause "chaos" to break out, John H. Beisner, of counsel at Skadden Arps Slate Meagher & Flom LLP, said during a preview of the court's term hosted by George Mason University's Antonin Scalia Law School.

"It would significantly undermine the defendants' right to exercise removal practices," he said, by allowing "plaintiffs to forum shop between state and federal courts without really many consequences."

The case, which is **set to be argued** Monday, involves a deceptive advertising class action filed against Royal Canin and Nestlé in Missouri state court by consumers who claim the companies conspired to falsely suggest that a prescription was needed to purchase certain types of expensive pet food. Royal Canin and Nestlé successfully removed the case to federal court after arguing that it implicated provisions of the federal Food, Drug and Cosmetic Act and involved diversity jurisdiction. But then the consumers amended their complaint, erasing any references to federal law, and sought to remand the case to state court.

Royal Canin and Nestlé argue that the Eighth Circuit was wrong to send the case back to state court and that federal courts can continue to preside over similar cases under supplemental jurisdiction. They contend that any changes the consumers made to their lawsuit after removal do not strip the federal court of its jurisdiction, which was originally established at the time of removal.

The consumers, however, argue that the Eighth Circuit properly held that amended complaints supersede their original counterparts and require courts to reassess whether they have jurisdiction over the dispute based on the updated claims. Requiring a federal judge to adjudicate purely state law claims would upset the balance of federal and state judicial responsibilities created by Congress, the consumers argue.

Bracewell LLP partner Rachel B. Goldman said the case **presents a tricky question** for the justices, one that has no clear solution.

A federal court "can't keep a case it doesn't have federal jurisdiction in," she told Law360 in an interview. "But at the same time, the policy and disfavored actions of forum shopping have to be taken into account."

However the justices decide this case, it will likely breed more gamesmanship, Skadden Arps' Beisner said. Under the Eighth Circuit's rule, defendants would be encouraged to quickly answer complaints after removing them to federal court, which would then require plaintiffs to get a judge's permission to amend the suit, he said. But under the current law, plaintiffs sucked into federal court can simply dismiss their case and refile it in state court.

The case is Royal Canin USA Inc. et al. v. Wulfschleger et al., case number 23-677.

Establishing Scienter

A cryptocurrency mining dispute that asks the justices to clarify pleading standards for securities lawsuits could lead to a sea change in that area of law, and either an influx or reduction of filings depending on the high court's answer.

Nvidia Corp. **asked** the Supreme Court to reverse a Ninth Circuit panel ruling **allowing shareholders to proceed** with their Private Securities Litigation Reform Act lawsuit that relied on expert opinions and contemporaneous facts to allege the technology company knowingly misled investors about the cause of its soaring prices. An affirmance could open courthouse doors to various

securities litigants, but a reversal could slam those doors shut with equal force, lawyers said.

This could change the way scienter, or knowledge of wrongdoing, is pled, Bracewell LLP partner Dave Shargel told Law360 in an interview.

"If you have to plead detailed factual information about internal company documents, it could be a little harder," he said. "If plaintiffs can rely on expert analysis, that could make the pleading standard a little less onerous."

Nvidia argues the PSLRA prohibits lawsuits based on inferences that a company knew it was misleading investors. A case cannot continue unless plaintiffs can establish with significant detail that the company may have lied about its securities risks. And that significant detail requirement means plaintiffs must plead the contents of any internal company documents they rely on in their complaint. The act also forbids plaintiffs to rely on inferences made by expert witnesses to prove that their lawsuit should survive the motion to dismiss stage.

Investor E. Öhman J:or Fonder AB contends Nvidia's suggested pleading standards would **bar the filing of any securities lawsuit** because investors usually can't get access to the specific content of internal documents until the discovery stage. Cases like this one, which rely on a variety of information from former employees, experts, contemporaneous reports and analyses, and other data, holistically meet the PLSRA's allegation requirements and should be allowed.

While some lawyers are hoping for a definitive answer from the Supreme Court, Robert S. Peck, founder and president of the Center for Constitutional Litigation, said he expects the court to strike some "mushy" compromise.

"I think the court is likely to give us a mushy kind of answer that doesn't get the petition everything it wants but doesn't side with the respondent" completely either, he said at the George Mason event.

The case is NVIDIA Corp. et al. v. E. Öhman J:or Fonder AB et al., case number 23-970.



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High Court Turns Away Case On Shareholder Opt-Out Rights

By **Jessica Corso**

Law360 (October 7, 2024, 9:54 AM EDT) -- The U.S. Supreme Court on Monday turned away a petition brought by an AMC Entertainment Holdings Inc. shareholder who asked the court to weigh in on whether a Delaware Court of Chancery judge violated her due process rights by blocking her from opting out of a settlement over the movie chain's controversial reverse stock split.

Rose Izzo brought the case **before the high court** after Delaware's Supreme Court **signed off** on the settlement in May, upholding Vice Chancellor Morgan T. Zurn's decision to approve the settlement on a non-opt-out basis.

The underlying case **was filed** in 2023 and accused AME of attempting to dilute, via a reverse split, the voting power of the retail shareholders who buoyed it during the height of the pandemic through the creation of preferred shares.

The settlement gave retail investors additional shares, but Izzo told the high court that her inability to opt out violated her Fourteenth Amendment right to due process, as well as a continuation of a long-standing circuit split over opt-out rights in shareholder class actions.

Both AMC and the lead shareholder in the case, Allegheny County Employees' Retirement System, waived their right to respond to Izzo's high court petition.

Rose Izzo is represented by Theodore A. Kittila of Halloran Farkas Kittila LLP, by Raffi Melkonian of Wright Close & Barger LLP, and by Jeffrey T. Green of Green Law Chartered LLC.

AMC Entertainment is represented by John Neuwirth of Weil Gotshal & Manges LLP.

The Allegheny County Employees' Retirement System is represented by Michael Barry of Grant & Eisenhofer PA.

The case is Izzo v. AMC Entertainment Holdings Inc. et al., case number 24-197, in the Supreme Court of the United States.

–Additional reporting by Jeff Montgomery and Leslie A. Pappas. Editing by Karin Roberts.

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Meta Investors Seek Sanctions Over Execs' Deleted Emails

By **Dorothy Atkins**

Law360 (October 4, 2024, 8:23 PM EDT) -- Meta Platforms Inc. shareholders suing over the Facebook Cambridge Analytica data scandal urged a Delaware Chancery Court Thursday to sanction Meta board members Jeffrey Zients and Sheryl Sandberg for allegedly spoiling evidence by using their personal email accounts to discuss the scandal and then deleting large portions of their correspondence.

In an 18-page motion, the investors claim Sandberg, Meta's chief operating officer and Zients, who is currently White House chief of staff, "knowingly and permanently" destroyed electronically stored information that purportedly included key evidence in the shareholder litigation, even though the executives received a litigation hold in 2018 that required them to preserve all relevant electronic documents "wherever it exists."

"Given the wide range of topics and recipients with whom Sandberg and Zients corresponded when using these accounts — both internally and externally, and before and after litigation commenced — plaintiffs cannot seek to obtain a discrete set of plainly identifiable documents from other sources," the motion says. "Therefore, plaintiffs are prejudiced because Sandberg and Zients have prevented plaintiffs 'from obtaining and potentially using relevant evidence.'"

The sanctions fight is the latest development in **shareholder litigation** consolidated before the Delaware Chancery Court in 2018, accusing the social media giant's top brass of violating their fiduciary duties by not establishing a comprehensive privacy program as required under a 2012 consent decree from the Federal Trade Commission.

Meta, which was once called Facebook Inc., entered into the agreement with the FTC after it and other regulators sued the company over its privacy practices.

But instead of complying with the order, investors claim Meta continued to collect granular data of its users and their friends, sharing that information with other companies in exchange for advertising dollars. Despite numerous red flags, according to the investors, the board did nothing to correct the violations, which purportedly led to the Cambridge Analytica scandal — in which an app developer was able to gather data from **millions of unwitting Facebook users** — and Meta's **2019 \$5 billion FTC settlement**.

Meta CEO Mark Zuckerberg, Sandberg, venture capitalist Marc Andreessen, PayPal co-founder Peter Thiel and several other members of Facebook's 2021 board **sought to toss** the litigation, but in May 2023, Vice Chancellor J. Travis Laster **largely rejected** the dismissal bids.

After the court's ruling, the investors' counsel repeatedly asked defense counsel about their discovery efforts, and after purportedly receiving "only evasive responses" from defense counsel, the investors served interrogatories regarding the defendants' preservation efforts, the sanctions motion says.

Defense counsel replied by disclosing that both Sandberg and Zients once used personal email accounts to "communicate about matters potentially relevant to the claims and defenses in this action," according to the sanctions motion.

Meta's counsel indicated that before the litigation began, Sandberg had a practice of regularly deleting emails from her Gmail account that were over 30 days old while Zients' email account automatically deleted emails after six months, according to the investors' motion.

Following the initial disclosure of the personal email accounts, defense counsel investigated whether the deleted emails could be recovered, but Meta eventually informed the investors' counsel that they are irretrievable, and the company's counsel refused the shareholders' demands that going forward, the board members' personal email addresses should be included in the ESI search terms, the motion says.

The investors argue in their sanctions bid that both Zients and Sandberg knew they had an affirmative duty to preserve correspondence that applied to both existing and "to-be created" documents regardless of whether they were using a corporate account.

The executives also were given an information sheet titled "FAQs Regarding Legal Holds," which emphasized their obligation to preserve "any information related to the matter," including information stored on personal devices and accounts, the motion asserts.

In light of those facts, the investors contend that both Sandberg and Zients intended to delete their emails.

The motion notes that discovery documents obtained from other potential witnesses confirm Sandberg used her personal Gmail account to evaluate topics for Meta board discussions, to prepare notes for meetings with Zuckerberg regarding the FTC and other regulators, and to communicate with the public regarding Meta's response to Cambridge Analytica, among other relevant discussions.

Meanwhile, the current evidence suggests Zients primarily used his personal email account to communicate about Meta's business, and in those communications, he discussed Meta's response to an FTC investigation into potential consent order violations, and whether Meta would publicly disclose a Russian social media company investor — Mail.ru — had siphoned Meta's data onto Russian servers before 2015, the motion says.

As forms of sanctions, the investors ask the court to impose a tougher "clear and convincing evidence" standard of proof for Sandberg and Zients' affirmative defenses, and to bar them from testifying in their defense case-in-chief about information they received through their personal email accounts.

The investors also asked the court to prohibit Sandberg and Zients from filing motions for summary judgment and to award the investors' counsel fees and costs for litigating this motion and preparing the ESI interrogatories.

Counsel for the investors declined to comment, and counsel and representatives for Meta didn't immediately respond to requests for comment Friday.

The stockholders are represented by Kevin H. Davenport, Samuel L. Closic, John G. Day, Stacey A. Greenspan, David C. Skoranski and Kirsten M. Valania of Prickett Jones & Elliott PA, Frederic S. Fox, Hae Sung Nam, Donnie Hall and Aaron Schwartz of Kaplan Fox & Kilsheimer LLP, Maxwell R. Huffman, Geoffrey M. Johnson, Justin O. Reliford, Donald A. Broggi and Jing-Li Yu of Scott + Scott Attorneys at Law LLP, Catherine Pratsinakos and Thaddeus J. Weaver of Dilworth Paxson LLP, Frank R. Schirripa, Daniel B. Rehns, Kurt M. Hunciker and Kathryn A. Hettler of Hach Rose Schirripa & Cheverie LLP, Thomas J. McKenna and Gregory M. Egleston of Gaineys McKenna & Egleston, Peter B. Andrews, Craig J. Springer, David M. Sborz and Jacob D. Jeifa of Andrews & Springer LLC, Brian J. Robbins, Stephen J. Oddo and Gregory E. Del Gaizo of Robbins LLP, Joseph J. Tabacco Jr. and Daniel E. Barenbaum of Berman Tabacco, and Joseph W. Cotchett, Mark Molumphy, Julia Peng, Tyson Redenbarger and Gia Jung of Cotchett Pitre & McCarthy LLP.

Meta is represented by David E. Ross, R. Garrett Rice, Elizabeth M. Taylor, A. Gage Whirley and Benjamin M. Whitney of Ross Aronstam & Moritz LLP, and Brian M. Lutz and Martie Kutscher Clark of Gibson Dunn & Crutcher LLP.

The case is In re: Facebook Inc. Derivative Litigation, case number 2018-0307, in the Court of Chancery of the State of Delaware.



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Credit Suisse Investors Joust Over Bids To Be Class Leader

By **Katryna Perera**

Law360 (October 4, 2024, 8:48 PM EDT) -- A Credit Suisse investor in a class action alleging the bank misled investors about its condition in the run-up to its collapse and takeover by UBS has asked a New York federal judge to toss the current lead plaintiff in favor of himself, while the current lead plaintiff shot back with an opposition.

Mehmet Resit filed a **memo** on Wednesday to be appointed lead plaintiff in the suit, arguing that the current lead plaintiff, Ali Diabat, has lost standing following a court order last month narrowing the suit's class period.

U.S. District Judge Colleen McMahon ruled on multiple dismissal bids on Sept. 19 and **cut down** the **securities fraud case** to focus on a subset of investor allegations against Credit Suisse Group AG and top executives who ran the Swiss bank, which rival UBS Group AG ended up buying last year in a government-backed rescue.

Judge McMahon's more than 300-page dismissal decision narrowed the scope of potential liability facing Credit Suisse's now-owner UBS, trimming it — with prejudice — to a more limited period from October 2022 to March 2023 that reflects the surviving challenged statements.

According to Resit, Judge McMahon's order shortened the class period from April 6, 2021, through March 20, 2023, to October 27, 2022, through March 14, 2023, and it rejected all the suit's alleged partial corrective disclosures, including one that had occurred on Feb. 9, 2023.

Resit says his initial bid for lead plaintiff was denied because he purchased all his Credit Suisse shares after the Feb. 9, 2023, partial corrective disclosure, while Diabat purchased shares before and after the alleged corrective disclosure.

Now Diabat lacks standing to continue as lead plaintiff because he did not purchase any Credit Suisse shares within the new, narrowed class period and thus suffered no losses, Resit argues.

Meanwhile, Resit says he suffered more than \$5.5 million in losses during the new class period and because the court rejected the alleged Feb. 9, 2023, corrective disclosure, the lone reason for denying Resit as lead plaintiff has been mooted.

In addition to purchasing shares and suffering losses during the new class period, Resit, identified in the memo as "Mr. As," says he has made a preliminary showing of adequacy and typicality.

"Mr. As is the owner of a grain trading business, holds a Masters degree, and has been investing for several years. Mr. As is willing and committed to prosecute and oversee this action, including sitting for deposition and testifying at trial," the memo states. "Because Mr. As has the largest financial interest and made a preliminary showing of adequacy and typicality he is the presumptive lead plaintiff."

His selection of The Rosen Law Firm should also be named lead counsel, the memo states, since the firm is highly experienced in securities class actions and has recovered millions of dollars for investors nationwide.

"The court may be assured that by approving Mr. As' selection of counsel, the members of the class

will receive excellent legal representation," the memo states.

In a **memo** filed on Thursday, Diabat shot back at Resit's bid, saying the attempt to "supplant" him as lead plaintiff is "contrary to the best interests of the putative class and relies on an overly restrictive view of this court's Sept. 19, 2024 order."

Diabat argues the court's order does not support Resit's premise that the class period now ends on March 14, 2023. According to Diabat, the order "embraces a class period that extends through March 20, 2023," and most investors' damages stem from alleged misrepresentations linked to disclosures made on March 19 and 20.

"The Court trimmed the front of the class period, holding that all alleged misrepresentations through Aug. 22, 2022, were not actionable. The class period closes on March 20, 2023, with the revelation that Credit Suisse had entered into a merger agreement with UBS at the behest of the Swiss government," the memo states. "Because Professor Diabat purchased CS stock on March 16-17, 2023, prior to the end of the class period, he has standing to pursue his claims."

Diabat also argues that he should remain lead plaintiff because he and lead counsel from Kahn Swick & Foti LLC have been working "diligently" to file a motion for class certification by December.

"Among other things, lead counsel has: worked with an economics consultant and has retained and commenced work with a testifying expert to address market efficiency; prepared a subpoena to [the Financial Industry Regulatory Authority] for documents relating to CS bonds damaged during the class period and sent it out for service; begun to work with lead plaintiff regarding initial disclosures; begun drafting lead plaintiff's first request for production of documents for defendants; and scheduled a Rule 26(f) conference with defendants," the memo states.

The surviving portion of claims in the suit is tied to public statements that Credit Suisse and three executives — former Chairman Axel Lehmann, CEO Ulrich Körner and Chief Financial Officer Dixit Joshi — made during the time from October 2022 to March 2023, when the UBS deal was announced.

In those five months, Credit Suisse was allegedly dealing with heavy customer outflows and a then-undisclosed U.S. Securities and Exchange Commission inquiry into potential control deficiencies that, according to the suit, helped render the bank's contemporaneous assurances of strength misleading.

The litigation was consolidated under Diabat after several Credit Suisse investors sued last year in the wake of the UBS merger announcement, a deal hastily put together to avoid a broader crisis when prolonged turmoil at Credit Suisse took a turn for the worse.

The operative complaint, filed last fall, named Credit Suisse and certain key executives among its defendants, alleging fraud based on more than 80 statements drawn from press releases, interviews, financial reports and other sources spanning nearly two years from April 2021 to March 2023.

The complaint also named PricewaterhouseCoopers AG, Credit Suisse's independent auditor during this period, as a defendant, alleging it had failed to scrutinize the bank closely enough and given false "blessings" to its financials as a result.

However, Judge McMahon dismissed PwC from the litigation altogether, ruling that the complaint failed to show fraudulent intent or recklessness on the part of the accounting giant.

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

Diabat and the class are represented by Kim E. Miller, J. Ryan Lopatka, Lewis S. Kahn, Craig Geraci and Matthew P. Woodard of Kahn Swick & Foti LLC.

Resit is represented by Phillip Kim and Laurence M. Rosen of The Rosen Law Firm PA.

The Credit Suisse defendants are represented by Herbert S. Washer, Jason M. Hall, Edward N. Moss, Tammy L. Roy, Nicholas N. Matuschak and Lauren Riddell of Cahill Gordon & Reindel LLP.

The case is Diabat v. Credit Suisse Group AG et al., case number 1:23-cv-05874, in the U.S. District

Court for the Southern District of New York.

--Additional reporting by Jon Hill. Editing by Alex Hubbard.

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Chancery OKs Settlement, \$3.5M Fee In PE Squeeze Suit

By **Jeff Montgomery**

Law360 (October 4, 2024, 8:55 PM EDT) -- Pointing to a derivative suit settlement that "effectively unwinds the harm" from deeply conflicted private equity financings extended to a struggling trampoline park chain during the COVID-19 pandemic, a Delaware vice chancellor on Friday approved both the deal and a \$3.5 million fee for plaintiff attorneys.

Vice Chancellor Morgan T. Zurn's settlement approval, issued by teleconference, wrapped up more than two years of litigation focused on heavily tilted terms that Palladium Equity Partners imposed for financial infusions issued to the three consolidated park businesses that Palladium brought together in 2016 and 2017.

During a sharp falloff in business during the COVID 19 pandemic, Palladium arranged and financed a new equity series rather than having the business seek better terms available under the federal government's pandemic assistance program.

The challenged "Series E" financings were described in part in a court transcript as giving Palladium — in exchange for an initial \$44 million investment — a place at the front of the line for a \$280 million "liquidation" preference before minority investors would receive any return. The three loans involved ultimately threatened to deprive the minority of any cash-out unless a company sale topped \$850 million.

Under the settlement approved on Friday, back-of-the-line investors were assured "meaningful" distributions after the Palladium Class E unitholders hit a much lower amount, although the Vice Chancellor said specifics would not be publicly disclosed.

Vice Chancellor Zurn said the parties are "adamant" that while the special litigation committee participated in mediation, it failed, adding: "The principals negotiated not only without the SLC but without counsel." Parties reached a settlement earlier this year.

The SLC's role was limited to reviewing the terms after the fact and finding them reasonable, the vice chancellor said, adding, "The 'get' here touched on the heart of the claims and cures much" of what was alleged, and resulted in terms "I could not have awarded at trial."

Vice Chancellor Zurn expressed concern earlier in the settlement review process that if the agreement anticipated future distributions, arrangements could be tripped up by the 2021 Delaware Supreme Court ruling in *Griffith v. Stein*, which declared that parties cannot release claims in a settlement if they are based on facts not present at the time of the deal.

None of the parties commented after the vice chancellor's ruling.

The suit when originally filed included breaches of fiduciary duty and aiding and abetting breaches, with the aiding and abetting count later dropped. Palladium and other affiliates were named in the suit, along with six individuals affiliated with the private equity, including partner Justin Green.

The suit was brought by founders of three trampoline ventures that combined under the CircusTrix brand, with Rockin' Jump acquired in 2017 and Sky Zone in 2018. Palladium's interest entered the scene in 2017 with investments in Circus Trix.

Pre-Palladium operators were described as aiming to develop hundreds of trampoline recreation parks across the U.S. and at locations in Europe and Asia.

Palladium consolidated the businesses under the umbrella Trampoline Acquisition Parent Holdings LLC. Circus Trix was described as hosting at its peak more than 40 million guests per year in its trampoline parks and worldwide family entertainment centers, according to its website.

Entrepology LLC, Tramp Dudez LLC, Jeffrey Platt and Andrew Wilson are represented by Kevin M. Coen and Alec F. Hoeschel of Morris Nichols Arsht & Tunnell LLP.

Grant Lyon is represented by John G. Day and Christine N. Chappelle of Prickett Jones & Elliott PA.

Trampoline Acquisition Parent Holdings LLC is represented by Todd C. Schlitz and Oderah C. Nwaeze of Faegre Drinker Biddle & Reath LLP.

Justin Green, Kelly McCarthy and Mark Canarick are represented by Blake Rohrbacher, Nicole M. Henry and Spencer V. Crawford of Richards Layton & Finger PA.

Alan Rodriguez is represented by Peter B. Ladig and Sarah T. Andrade of Bayard PA.

The Special Litigation Committee of the Board of Directors of Trampoline Acquisition Parent Holdings LLC is represented by Elena C. Norman, Richard J. Thomas, Lakshmi A. Muthu and Alex B. Haims of Young Conaway Stargatt & Taylor LLP.

The case is Entrepology LLC, et al. v. Palladium Equity Partners LLC, et al, case number 2022-0063, in the Court of Chancery of the State of Delaware.

--Editing by Alex Hubbard.



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Pool Equipment-Maker Sinks Shareholder Suit, For Now

By **Sydney Price**

Law360 (October 4, 2024, 6:33 PM EDT) -- A New Jersey federal judge Wednesday dismissed a proposed investor class action against pool supply company Hayward Holdings Inc. over claims that the company concealed it was struggling with ballooning inventory and lowered demand, saying the investors do not sufficiently explain why the alleged misstatements cited in the complaint are actionable.

In the suit, investors claim Hayward's shares fell 18% when the company "fully disclosed" that its primary customers — its channel of distributors — had far more inventory than it needed, and the channel was therefore reducing its stock of Hayward products by approximately \$150 million, hampering Hayward's sales.

According to the complaint filed in March, Hayward had long been a family-run company until a consortium led by CCMP Capital Advisors LP and MSD Partners LP, which are also defendants in the suit, acquired it in 2017. The investors say that demand in the pool industry rose at the start of the COVID-19 pandemic, and Hayward's revenue grew by about 20% in 2020, prompting an initial public offering in March 2021.

CCMP and MSD each owned over 30% of Hayward's outstanding common stock and collectively had majority voting control during the class period, according to the suit.

U.S. District Judge William J. Martini said in his opinion Wednesday that the investors' allegations that CCMP and MSD are liable for misstatements before and after the IPO solely because they control the company are fatal to the complaint, and dismissed with prejudice the claim that they violated Section 10(b) of the Exchange Act, which establishes a defendant must have "made" the alleged material misstatements.

The suit does not claim that MSD or CCMP filed Hayward's SEC filings, had ultimate authority to do so, or were liable for issuing them, the opinion stated.

"[T]hat certain Hayward officers or directors are alleged to also be affiliated with MSD or CCMP is not, as a matter of law, grounds to hold MSD and CCMP liable under 10(b) for material misstatements," Judge Martini said.

He gave the investors 30 days to amend the suit's other deficiencies.

Judge Martini said MSD and CCMP, as well as Hayward and some of the company's officers, may be liable for other violations of the Exchange Act, including the suit's claims under Section 20(A), which establishes liability for "[e]very person who, directly or indirectly, controls any person liable" for violations of the securities laws.

"Any liability theory alleging that MSD and CCMP exercised control over Hayward due to board member affiliations is based on a 'relationship of influence' that is governed by 20(a)," the opinion stated.

Additionally, Judge Martini criticized the complaint's structure and told the investors that they must distinguish the portions of the quotes that they argue are actionable.

"At the outset, the court notes that many of the false and misleading statements alleged in the [consolidated complaint] are lengthy block quotes that are at places highlighted with bold and italics," the opinion said. "This formatting leaves the court and defendants to guess whether plaintiff is claiming that only the highlighted portions are actionable misstatements or the highlighting is merely for emphasis and the entire paragraph is false or misleading."

Kevin McDonough of Latham & Watkins LLP, who represents Hayward, told Law360 in an email on Friday the firm is "very pleased" with the court's decision.

Lead plaintiff Fulton County Employees' Retirement System is represented by Matthew F. Gately and Peter S. Pearlman of Cohn Lifland Pearlman Herrmann & Knopf LLP.

Hayward Holdings is represented by Kevin McDonough, Andrew Clubok, Corey Calabrese, Eric Pettis and Larry Hong of Latham & Watkins LLP.

CCMP is represented by Marissa Edwards, Sanjay P. Ibrahim and Scott W. Parker of Parker Ibrahim & Berg LLP.

MSD is represented by Amanda L. Genovese of Seyfarth Shaw LLP.

The case is City of Southfield Fire and Police Retirement System v. Hayward Holdings Inc. et al., case number 2:23-cv-04146, in the U.S. District Court for the District of New Jersey.

--Editing by Kristen Becker.

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Class Members Who Missed Payout Won't Go Before Justices

By **Jared Foretek**

Law360 (October 7, 2024, 10:36 AM EDT) -- The U.S. Supreme Court won't hear a challenge to a secondary class action settlement distribution of more than \$5 million from two class members in an airline price-fixing suit, denying their petition to review a Ninth Circuit ruling that the objectors lacked standing to question the distribution Monday.

An individual class member, David Gould, and Colorado-based company Xanadu Corp., brought the challenge, arguing that the leftover funds from a \$104 million settlement should have gone to state treasuries for unreachable class members, rather than class counsel.

The settlement stemmed from multi-district litigation launched in 2007 accusing major airlines – including Air France, Japan Airlines, Qantas Airlines and others – of price-fixing on trans-Pacific flights.

Xanadu said it never received a first-round distribution check for more than \$500,000 because it was sent in an envelope without a city, state or ZIP code. And because it never got to cash the check, the company says it was bypassed in the second round.

The objectors **argued** that the settlement's claims administrators did the bare minimum to find the roughly 16,000 first-round claimants like Xanadu who never cashed their payouts for qualifying flight purchases, saying all the administrators did was run their information through a "TRACE database" to verify the addresses.

Additionally, they said, non-English members never got proper notice about the plan for the secondary payout – of which \$1 million went to class counsel at Hausfeld LLP as additional attorneys fees – because it was only posted to the English-language claims site.

According to Gould and Xanadu, California law, which governs the settlement, mandated that the leftover funds go to state treasuries of recipients' last-known addresses. That way, class members who never got their payouts could claim them later.

But because Gould actually cashed his first-round check, the Ninth Circuit **ruled** that he lacked standing, because he wasn't harmed by the secondary plan.

For Xanadu, the appeals panel ruled that the district court didn't err when it held that the company's settlement claims were unsupported.

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Evolve Bank Faces MDL Over Breach Of 7.6M Customers' Data

By **Hannah Albarazi**

Law360 (October 4, 2024, 10:06 PM EDT) -- Nearly two dozen proposed class actions accusing Evolve Bank & Trust of failing to adequately protect the personal information of 7.6 million customers from a cyberattack by a Russia-linked cybercrime gang will be centralized in Tennessee, the Judicial Panel on Multidistrict Litigation has ruled, expressing their confidence in the judge selected to preside over the MDL.

U.S. District Judge Sheryl H. Lipman, who was already presiding over nine actions against the Arkansas-based bank, will now oversee 22 suits against the bank over its data security practices. The panel said Friday that centralization in the Western District of Tennessee will be convenient for the parties and witnesses and that Judge Lipman "will steer this litigation on a prudent and expeditious course."

These "putative class actions present common factual questions concerning an alleged data security breach Evolve announced in June 2024 that led to the release of the personal information of over seven million consumers on the dark web," wrote U.S. District Judge Nathaniel M. Gorton, the acting chair of the JPML, in an order Friday.

"The common factual questions include how and when the breach occurred, Evolve's data security practices with respect to safeguarding personal information, the investigation into the breach, how and when Evolve provided notice of the breach, and the nature of the alleged damages," Judge Gorton wrote.

The national bank confirmed publicly that the data breach resulted from a ransomware attack carried out by the Russia-linked cybercriminal gang LockBit. The bank said the data was accessed and stolen by unauthorized third parties during a breach of Evolve's network systems that occurred between Feb. 9 and May 31.

Evolve said it was only in late May that the bank discovered that hackers had gained access to its systems.

When the bank did not pay a ransom, the criminals published 33 terabytes of proposed class members' data and information on the dark web, according to a July complaint **filed against the bank**.

In August, the bank said the compromised data included personal identifying information, or PII, for many of its customers, including names, Social Security numbers, Evolve account numbers, birth dates, and contact information, and that "a small portion of these individuals also had their debit card number affected." The affected files also included records of customers' electronic transfers, or ACH transactions, the bank said.

Plaintiffs say Evolve was slow to notice anything amiss, saying the bank detected the suspicious activity three months after the breach occurred, at which point "cybercriminals had spent months stealing consumers' PII from defendant's unsecured database," one complaint said. "Defendant then waited another 6 weeks before notifying affected individuals."

As a result, cybercriminals possessed consumers' PII for nearly five months before the bank notified victims of the data breach, that complaint says.

In recent years, Evolve's footprint has grown as it has partnered with major fintech companies such as Affirm, one of the largest U.S.-based "buy now, pay later" lenders. As a result, some of its fintech partners' customers have also been affected by the breach.

Plaintiffs say they now face substantial risk of being targeted for identity theft, fraud, phishing attempts and other illegal schemes, and that Evolve's offer of a complimentary 24-month credit monitoring program through Experian is not enough, as the risks they are facing could continue for the rest of their lives.

Earlier this year, federal prosecutors **brought charges** in New Jersey federal court against Dimitry Khoroshev, a Russian national whom they have accused of founding and heading LockBit, according to an indictment unsealed in May.

Two months after the unsealing of Khoroshev's charges, another Russian national and a dual Canadian and Russian national **pled guilty** to participating in the LockBit ransomware group.

The U.S. Department of Justice has said that between January 2020 and February 2024, "LockBit grew into what was, at times, the most active and destructive ransomware group in the world," attacking victims in at least 120 countries.

The DOJ said the group's estimated 1,800 victims in the U.S. included multinational corporations, small businesses, hospitals, schools, nonprofit organizations, critical infrastructure, government agencies and law-enforcement agencies, and that it extorted at least \$500 million in ransom payments and cost victims billions of dollars more via lost revenue and funds spent on incident response and recovery.

On Tuesday, Europol, the EU's law enforcement agency, announced the arrest of an additional four alleged members of LockBit.

Representatives and counsel for the parties did not immediately respond to requests for comment Friday.

Plaintiffs led by Patrice Perrier are represented by William F. Burns of Watson Burns PLLC and James J. Pizzirusso and Steven M. Nathan of Hausfeld LLP.

Plaintiffs led by Duncan Meadows are represented by Alexandra M. Honeycutt of Milberg Coleman Bryson Phillips Grossman PLLC and M. Anderson Berry of Arnold Law Firm CA.

Evolve is represented by Amisha R. Patel of Orrick Herrington & Sutcliffe LLP and Andrew B. Schrack and Daniel W. Van Horn of Butler Snow LLP.

The case is In Re: Evolve Bank & Trust Customer Data Security Breach Litigation, MDL no. 3127, in the U.S. District Court for the Western District of Tennessee.

--Editing by Linda Voorhis.



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JPML Agrees To Combine Snowflake, AT&T Data Breach MDLs

By **Hailey Konnath**

Law360 (October 4, 2024, 10:34 PM EDT) -- The Judicial Panel on Multidistrict Litigation on Friday centralized a slew of cases stemming from high-profile data breaches affecting customers of the Snowflake Inc. cloud platform in the District of Montana, a transfer order that includes sprawling multidistrict litigation against AT&T, one of Snowflake's customers.

The JPML transferred a number of individual cases as well as the AT&T MDL, holding that they should be consolidated or coordinated with another MDL against Snowflake. The hacks underlying the litigation targeted millions of AT&T customers' data stored on Snowflake's cloud as well as the data of **other companies** like Ticketmaster and Advance Auto Parts Inc., **also stored via Snowflake**.

The panel noted that all the actions concern breaches that occurred between April and June of this year, "when a threat actor allegedly exfiltrated the personal information of over 500 million consumers and employees whose information was stored on Snowflake's cloud platform by Snowflake clients."

Those actions "involve common questions of fact," and centralization in Montana federal court "will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation," the panel said. In all of the actions, the plaintiffs accuse Snowflake, AT&T, Ticketmaster, Advance Auto Parts and other client defendants of failing to safeguard their personal information, failing to implement adequate data security measures and failing to provide notice of the breaches in a timely manner, according to the order.

The panel agreed with Kopelowitz Ostrow Ferguson Weiselberg Gilbert attorney Jeff Ostrow, who **at a hearing last month** pushed for centralization in Montana, where Snowflake is headquartered. Ostrow, who represents plaintiffs suing Snowflake, had argued that related litigation is already pending in the state and there is a judge in the district "excited" to take on an MDL — U.S. District Judge Brian Morris.

In its order, the panel said all the cases should be handled by Judge Morris, "an experienced jurist with the willingness and ability to efficiently manage this litigation."

During oral arguments, U.S. District Judge Roger Benitez had expressed skepticism about Montana as an appropriate venue for an MDL, saying it was "a gorgeous place," but that getting there would not be "an easy experience" for many people involved in the litigation.

While several other plaintiffs' attorneys had supported consolidation into an MDL, they, too, wanted a different venue, like California, where most of Snowflake's operations and senior staff are located. Other plaintiffs' attorneys opposed consolidation altogether, particularly regarding the allegations against AT&T.

However, AT&T itself backed consolidating the cases, though the company advocated for the Eastern District of North Carolina, where data breach cases are already pending against Advance Auto Parts.

Snowflake, meanwhile, opposed consolidation, arguing that the breaches related to individual access points for each company. Those companies were responsible for their own security measures, the company argued, and there were also distinct issues regarding how hackers were able to access each company's data and the nature of the data accessed.

Ostrow told Law360 on Friday he is "pleased the panel appreciates the efficiency of centralizing these hub-and-spoke cases with common questions of fact and overlapping classes."

"I commend the panel for recognizing times have changed," Ostrow said. "Given that courts regularly host hearings by Zoom, and that lawyers typically review documents and examine witnesses virtually, the panel clearly placed less emphasis on the physical location of the courthouse."

He added, "Recognizing the District of Montana is just as deserving as any other district, it chose to transfer the cases to Chief Judge Brian Morris, who is well-respected and more than capable to oversee this large MDL."

AT&T and Snowflake didn't immediately respond to requests for comment late Friday.

The plaintiffs are variously represented by Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Fegan Scott LLC, Bleichmar Fonti & Auld LLP, The Lanier Law Firm PC, Carella Byrne Cecchi Brody & Agnello PC, Seeger Weiss LLP, Modjarrad Abusaad Said, Morgan & Morgan PA, Levin Sedran & Berman LLP, Scott + Scott Attorneys at Law LLP, Beasley Allen Crow Methvin Portis & Miles PC, Freed Kanner London & Millen LLC, Tousley Brain Stephens PLLC, Cotchett Pitre & McCarthy LLP, Audet & Partners LLP, Foster Yarborough PLLC, George Feldman McDonald PLLC, Mathias Raphael PLLC, Blood Hurst & O'Reardon LLP, Keller Rohrbach, Herman Jones LLP, Poulin Willey Anastopoulou LLC, Baron & Budd PC, Shindler Anderson Goplerud & Weese PC, Hausfeld LLP, Lief Cabraser Heimann & Bernstein LLP, DiCello Levitt, Parsons Behle & Latimer PC, Gaine McKenna & Egleston, Rhine Law Firm PC, Milberg Coleman Bryson Phillips Grossman PLLC, Zimmerman Law Offices PC, Maginnis Howard, Rossbach Law PC, Shamis & Gentile PA, Carey Danis & Lowe, Lavelly & Singer PC, Chemicles Schwartz Kriner & Donaldson-Smith LLP, Federman & Sherwood, Lynch Carpenter LLP, Cohen & Malad LLP, Stranch Jennings & Garvey PLLC, Francis Mailman Soumilas PC, Morrison Sherwood Wilson Deola PLLP, Ahdoot & Wolfson PC, Heenan & Cook PLLC, Goldenberg Schneider LPA, Leeds Brown Law PC, Paoli Law Firm, Robinson Calcagnie Inc., Kazerouni Law Group APC, Kohn Swift & Graf PC and Laukaitis Law LLC.

AT&T is represented by Gilbert S. Keteltas of BakerHostetler.

Snowflake is represented by Stephen A. Broome of Quinn Emanuel Urquhart & Sullivan LLP.

Advance Auto is represented by Joshua A. Becker of Shook Hardy & Bacon LLP.

Ticketmaster is represented by William K. Whitner of Paul Hastings LLP.

The cases are In re: AT&T Inc. Cellular Customer Data Security Breach Litigation, MDL number 3124 and In re: Snowflake Inc. Data Security Breach Litigation, MDL number 3126.

—Additional reporting by Daniel Wilson, Ryan Haroff and Lauren Berg. Editing by Emily Kokoll.



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SEC Says It's Investigating Bankrupt EV Maker Fisker

By **Hailey Konnath**

Law360 (October 4, 2024, 11:03 PM EDT) -- The U.S. Securities and Exchange Commission said Friday that it's been looking into whether electric-car maker Fisker Inc. violated securities law before it filed for Chapter 11 protection, urging a Delaware federal bankruptcy judge not to approve Fisker's proposed liquidation plan.

The SEC revealed its investigation in objection to the liquidation plan, arguing that the plan must contain language that would "adequately preserve the commission's police and regulatory powers with respect to its pending investigation." That should include the "preservation and production of corporate records" as well as "possible future actions alleging violations of the federal securities laws," the commission argued.

Notably, the SEC also took issue with a nonconsensual third-party release it said was part of Fisker's proposed plan. That release is nonconsensual when it comes to holders of equity interests "because failure by public shareholders to return an opt-out form is insufficient evidence of shareholder consent," the commission said.

Nonconsensual agreements are now prohibited under the U.S. Supreme Court's ruling this year in [Harrington v. Purdue Pharma LP](#) , the SEC noted in the filing.

California-based Fisker petitioned for **Chapter 11 protection** in June with nearly \$854 million in funded debt. The petition came in the wake of the collapse of the company's potential partnership with an unnamed major automaker that imperiled the startup's attempts to raise new financing.

At a hearing in early September, U.S. Bankruptcy Judge Thomas M. Horan gave Fisker the **go-ahead** to send its Chapter 11 liquidation plan out to creditors for voting. Two classes of Fisker creditors with claims that totaled roughly \$1.5 billion are entitled to vote on the proposal, according to court documents.

The U.S. Trustee's Office also objected to the opt-out provision to third-party releases in the plan during the hearing. Judge Horan declined to rule on the objection at the time, saying he would revisit the issue at a confirmation hearing in October.

In Friday's filing, the SEC argued that because Fisker was liquidating, it wasn't entitled to a discharge of claims. The commission said it also has an ongoing interest in Fisker's books and records because it has outstanding investigative subpoenas and may "have the need to request or subpoena additional documents in the future relating to its ongoing investigation."

While the proposed plan calls for certain assets to be transferred to specific trusts, it doesn't specify what books and records may be transferred to which trust, the SEC said.

"The commission staff has requested information from the debtors about where the debtors' books and records will be maintained and how they will be preserved post-effective date," the SEC said. "To date, the commission staff has not received any response."

Fisker and the SEC didn't immediately respond to requests for comment late Friday.

Fisker is represented by Robert J. Dehney, Andrew R. Remming, Brenna A. Dolphin, Sophie Rogers Churchill and Echo Yi Qian of Morris Nichols Arsht & Tunnell LLP and Brian M. Resnick, Darren S. Klein and Richard J. Steinberg of Davis Polk & Wardwell LLP.

The U.S. Trustee's Office is represented in-house by Malcolm M. Bates.

The bankruptcy case is In re: Fisker Inc. et al., case number 1:24-bk-11390, in the Bankruptcy Court for the District of Delaware.

–Additional reporting by Alex Wittenberg. Editing by Emily Kokoll.

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