Securities Law News

Oct. 18, 2024, 10:43 AM PDT

Paramount-Skydance Damages Far Exceed $1.6 Billion, Funds Say

By Mike Leonard

Documents

Brief

Docket

- First investor challenging deal did cursory math, CalSTRS says
- Case may be worth hundreds of millions to shareholder lawyers

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Paramount-Skydance Damages Far Exceed $1.6 Billion, Funds Say

By Mike Leonard 2024-10-18T13:43:20000-04:00

- First investor challenging deal did cursory math, CalSTRS says
- Case may be worth hundreds of millions to shareholder lawyers

Paramount Global investors are likely getting shortchanged in its merger with Skydance Media LLC by well more than the $1.65 billion sought in the first lawsuit over the transaction, according to a group of pension funds.

Funds led by the California State Teachers' Retirement System asked a judge Friday to take a wait-and-see approach toward a brewing battle among shareholder attorneys over the chance to lead the potentially lucrative litigation challenging the $8 billion deal, which will combine Shari Redstone's media empire and David Ellison's. The merger includes a $6 billion investment from Ellison's father, Oracle Corp. founder Larry Ellison, the world's fourth-richest man.

The first investor to sue over the transaction did only a cursory calculation that ignored the “significantly higher value” implied by other bids “and, thus, much greater potential damages,” the CalSTRS group said in a court filing. They cited a $26 billion all-cash offer from Sony and Apollo Global Management Inc. “A high-quality complaint would not simply take defendants’ word for the fair value of those shares,” according to the funds.

Their filing in Delaware’s Chancery Court came two days after the investor who won the race to the courthouse, Scott Baker, moved to lead litigation that could be worth hundreds of millions to shareholder attorneys. Baker said in his preemptive strike that separate preliminary investigations by CalSTRS and Rhode Island’s public pension fund—which are considering bringing competing cases—would only drag out the process.

Baker’s lawsuit, filed in July, called Redstone a “relentless controlling stockholder” who’s forcing through an unfair deal to bail out her own “floundering” investment after strong-arming the reunification of CBS Corp. and Viacom by stacking both boards with loyalists. The CBS-Viacom deal, which created Paramount, led to protracted litigation in the same court.

Rhode Island technically brought the first case over the Skydance deal, a lawsuit seeking internal files from Paramount under a law giving investors broad access to corporate documents if they have credible but tentative suspicions of self-dealing. But a magistrate rejected the records demand in early August—a decision that’s set to be reviewed by a more senior judge in November.

The CalSTRS group is represented by Bernstein Litowitz Berger & Grossmann LLP, Robbins Geller Rudman & Dowd LLP, Berman Tabacco, and Equity Litigation Group LLP. Baker is represented by Berger Montague PC. Rhode Island is represented by Prickett, Jones & Elliott PA and Kessler Topaz Meltzer & Check LLP.

Redstone is represented by Abrams & Bayliss LLP and Ropes & Gray LLP. Ellison is represented by Ross Aronstam & Moritz LLP. Other Paramount board members are represented by Richards, Layton & Finger PA and Cravath, Swaine & Moore LLP.

The case is Baker v. Redstone , Del. Ch., No. 2024-0790, motion filed 10/18/24 .

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This Week in Chancery Court: Oracle, Focus, BlackRock and Bolt

By Jennifer Kay 2024-10-21T05:00:00000-04:00

A pension fund will argue this week for reversal of a Delaware Chancery Court finding that Oracle Corp.'s 2016 acquisition of NetSuite Inc. was negotiated at arm's length.

More highlights from the Delaware Supreme Court and Chancery Court calendars:

Wednesday: In re Oracle Corp. Derivative Litig., Del., No. 139,2024, oral arguments 10/23/24.

At issue: The fund argues in a brief that Vice Chancellor Sam Glasscock III erred in allowing a board committee to withhold interview memos, in weighing whether Oracle founder Larry Ellison exercised control over the company and the merger, and in analyzing Ellison's plan for operating NetSuite post-closing. Ellison says in a brief that the pension fund's appeal "can only be described as a 'Hail Mary,'" while the committee argues the trial court correctly determined the fund wasn't entitled to the interview memos.

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

Oracle Wins on Attorney Fee Award in Failed NetSuite Lawsuit

Wednesday: Anchorage Police & Fire Ret. Sys. v. Adolf, Del. Ch., 2024-0354, oral arguments 10/23/24.

At issue: Ex-investors of Focus Financial Partners Inc. are suing its former CEO and COO, Stone Point Capital LLC, Goldman Sachs, and Clayton, Dubilier & Rice LLC over Focus' $7 billion sale last year to a private equity firm. The proposed class action brought by a pension fund alleges breaches of fiduciary duty in a sale that favored Focus' officers, controlling shareholder, and advisers. Goldman Sachs and the other defendants now seek to dismiss the case. "This is the story of a promising company sold at the wrong time to satisfy its controlling stockholders' desires," the pension fund said in a brief arguing the case should proceed.

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

Focus' $7 Billion Sale Hit With Proposed Investor Class Action

Thursday: In re XL Fleet (Pivotal) S'holder Litig., Del. Ch., No. 2021-0808, hearing 10/24/24.

At issue: Chancellor Kathaleen St. Jude McCormick will hear arguments over a proposed class certification in a lawsuit challenging the acquisition of XL Hybrids Inc. by Pivotal Investment Corporation II, a special purpose acquisition company. An investor in XL Fleet Corp., which specializes in converting commercial trucking fleets from gas to hybrid power, claims New York Islanders co-owner Jon Ledecky and other financiers who backed the deal ensured insiders got a windfall at the expense of public shareholders. In August, McCormick denied XL Fleet's motion for summary judgment. The case is currently scheduled to go to trial in January.

Court action: A hearing on the motion for class certification will be held in Wilmington, Del.

Ledecky, SPAC Ex-Board Facing Investor Suit Over XL Fleet Merger

Friday: Activant Ventures Adv. II LLC v. Breslow, Del. Ch., No. 2023-0721, and HS Inv. V Ltd. v. Breslow, Del. Ch., No. 2024-0918, hearing 10/25/24.

At issue: Bolt Financial Inc. has withdrawn a settlement to resolve claims that founder Ryan Breslow tried to siphon $30 million from the payments startup, but it intends to proceed with a share repurchase, according to a filing. In a parallel case, BlackRock Inc. and Hedosophia Services Ltd. seek to block a Series F financing round at Bolt that would see Breslow return as CEO. Vice Chancellor Nathan A. Cook has scheduled a hearing to consider pending issues in both cases.

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

BlackRock's Fight With Bolt Financial Escalates Ahead of Hearing

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Better Therapeutics SPAC Deal Challenge Must Proceed, Judge Says

By Jennifer Kay

- $187 million merger with SPAC took Better Therapeutics public
- Investor said proxy statement suggested expecting $10 a share

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Better Therapeutics SPAC Deal Challenge Must Proceed, Judge Says

By Jennifer Kay 2024-10-18T13:52:05000-04:00

- $187 million merger with SPAC took Better Therapeutics public
- Investor said proxy statement suggested expecting $10 a share

Mountain Crest Capital LLC must face an investor's lawsuit that claims the blank-check deal that took Better Therapeutics Inc. public resulted in a windfall for insiders, the Delaware Chancery Court ruled Friday.

The investor claimed stockholders received misleading information about the $187 million merger between the digital therapeutics business and a special purpose acquisition company. Those allegations "are not strong" yet they "lie on side of viability," Vice Chancellor Sam Glasscock III said in a 29-page opinion denying a motion to dismiss.

The case "appears to be the first to deny a motion to dismiss solely on an affirmative statement of investment value in conflict with a failure to also disclose net cash," he said.

The investor sufficiently pleaded "particularized facts from which I must draw the reasonable inference that this case involved a conflicted controller transaction," he said. Glasscock also found the investor had enough support claims "from facts from which it is reasonably conceivable that Controller Defendants had the managerial authority" over Better Therapeutics and its board "to render them controllers."

Glasscock, in October 2023, vacated his earlier default judgment against Mountain Crest affiliates, after its principals denied being served with the shareholder's April 2023 complaint.

Mountain Crest, a serial SPAC sponsor, argued in a June hearing that the high percentage of shares redeemed in the transaction showed that stockholders had enough reliable information to participate. The investor's attorney argued that the proxy statement provided for shareholders repeatedly suggested that they could expect a cash value of $10 per share—the initial public offering price of Mountain Crest Acquisition Corp. II, the SPAC that combined with Better Therapeutics.

"In light of the assertion of a $10 valuation in the Proxy, it is reasonably conceivable that a stockholder would find the cash per share figure material to the decision whether to redeem or invest in the de-SPACed company," Glasscock said. "At this pleading stage," the allegations "that the fiduciaries disclosed an investment value untethered to an undisclosed cash per share figure" are sufficient to state a claim of breach, he said.

In his signature prose, Glasscock expounded on SPAC litigation progressing "through the belly of Chancery."

"The adult anaconda, they say, eats perhaps once a year; open its belly, and you will see not what it is eating, but what is has eaten in times past," he said. "The sorting out of the fiduciary problems inherent in the SPAC form, together with other factors, has reduced the SPAC population on the ground, but the bulge of SPAC carcasses continues to be digested in equity."

The proposed class action is part of a wave of similar disputes in Chancery Court, the country's premier venue for M&A fights, which has seen a steady stream of litigation prompted by SPAC mergers. The deals, known as de-SPACs, give private businesses a shortcut to public markets by combining them with a shell entity.

Mountain Crest is represented by Dailey LLP. The shareholder, John Solak, is represented by Cooch and Taylor and Newman Ferrara.

The case is Solak v. Mountain Crest Capital LLC. , Del. Ch., No. 2023-0469, opinion .

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Payment Company Nuvei Gets Investor Suit Over Paya Deal Tossed

By Ben Miller

- Investors had alleged Nuvei refused to accept Paya shares
- Nuvei not required to buy all outstanding shares, judge says

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Payment Company Nuvei Gets Investor Suit Over Paya Deal Tossed

By Ben Miller 2024-10-18T12:49:40000-04:00

- Investors had alleged Nuvei refused to accept Paya shares
- Nuvei not required to buy all outstanding shares, judge says

Canadian payment processing company Nuvei Corp. didn't breach a merger agreement when acquiring Paya Holdings Inc. because it wasn't required to purchase all outstanding shares of the acquisition target, a Delaware federal judge said in an opinion dismissing a shareholder lawsuit.

Paya investors alleged Nuvei refused to accept tender of their stock shares at $9.75 per share after agreeing to pay them as part of its deal completed Feb. 22, 2023. But Nuvei did so after Paya shareholders had already forfeited their shares, Judge Gregory B. Williams of the US District Court for the District of Delaware said in a ruling Thursday.

Paya shares held by investors were forfeited immediately after the deal was consummated because control of the company had changed hands and the price paid per share was less than a minimum target of $15 per share, Williams said in the opinion.

Those who were able to tender their Paya shares received up to $9.75 per share, the highest consideration paid by Nuvei, but refusing to pay that amount to investors who had technically forfeited their shares aligned with the de-SPAC deal's terms, Williams said.

The investors who brought the suit in September 2023 didn't own any shares that Nuvei could have purchased after the deal was completed on Feb. 22 of that year, meaning the acquiring company didn't breach its merger agreement, which prompted Williams to dismiss the amended complaint and deny plaintiffs' bid for summary judgment.

A Nuvei spokesperson and the investors' attorney didn't immediately respond to requests for comment.

Shareholder plaintiffs, represented by Bleichmar Fonti & Auld LLP, had sought to recover more than $50 million, plus interest.

Morris, Nichols, Arsht & Tunnell LLP and Davis Polk & Wardwell LLP represent Nuvei.

The case is Abramowski v. Nuvei Corp. , D. Del., No. 1:23-cv-00965, 10/17/24 .

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Wells Fargo Wins More Than $500 Million Appeal Over Liquidation

By Martina Barash 2024-10-21T11:08:11000-04:00

Investors failed to revive a suit against Wells Fargo Securities LLC seeking more than $500 million for losses related to a 2018 portfolio liquidation when the Second Circuit ruled for the bank Monday.

The investors said that Wells Fargo, acting as a futures commission merchant to LJM Investment Fund L.P. and LJM Partners Ltd., forced the funds to liquidate their entire portfolio in response to temporary market volatility.

But those allegations don't support proposed class claims for negligence, interference with a contract or business relations, or aiding a fiduciary breach by LJM, the US Court of Appeals for the Second Circuit said. The ruling affirmed a dismissal by the US District Court for the Southern District of New York.

The case is Kafka v. Wells Fargo Sec., LLC , 2d Cir., No. 23-01281, unpublished 10/21/24 .

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Securities Litigation: A Practitioner's Guide

10b5daily.com/2024/10/21/securities-litigation-a-practitioners-guide

October 21, 2024

The author of the The 10b-5 Daily – Lyle Roberts – also is the co-editor of the new third edition of PLI's "Securities Litigation: A Practitioner's Guide." The leading treatise in this area of the law, it is a joint project between partners from A&O Shearman and Simpson Thacher.

The treatise is completely revised and offers a comprehensive, practical, and readable overview of every aspect of private securities litigation. In addition to being the editor, I also am the co-author of the chapters on "Lead Plaintiffs under the PLSRA" and "Settlement Considerations." I am confident that anyone interested in this area of the law (which presumably includes the readers of this blog!) will find it useful. The treatise is updated every year and can be ordered here.

Mitre Corp.'s $3.4 Million Retirement Fee Deal Clears Hurdle

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Litigation
Photo Illustration: Jonathan Hurtarte/Bloomberg Law; Photos: Getty Images

- Deal would cover about 12,000 participants since 2016
- 401(k) fee challenges have fared well within First Circuit

Mitre Corp. secured initial court approval for a $3.4 million settlement aimed at resolving a 12,000-person class action by workers challenging the fees and investment options in their retirement plans.

The deal is slated to provide people who participated in two Mitre retirement plans since June 2016 with between 49% and 57% of their total estimated damages in the case, according to the settlement motion.

Judge Denise J. Casper of the US District Court for the District of Massachusetts granted preliminary approval to the deal in an Oct. 18 order; she also scheduled a Feb. 20, 2025, hearing to further evaluate the agreement.

The lawsuit says Mitre, a nonprofit research and development organization, mismanaged its retirement plans by overpaying for recordkeeping services and offering overly expensive investment options.

Casper allowed the case to advance in 2023, and Mitre asked her to send that ruling directly to the US Court of Appeals for the First Circuit. According to Mitre, courts within the First Circuit have been “more lenient” than others in allowing retirement plan fee challenges to advance, and an immediate appeal is the only way to get these issues before the First Circuit given the lack of recent rulings within the circuit that have granted a motion to dismiss in one of these cases.

Casper denied the request last year without issuing a written explanation for her decision. Northeastern University and a pair of Boston hospitals saw similar bids fall flat.

Morgan, Lewis & Bockius LLP represents Mitre. Capozzi Adler PC and Muhic Law LLC represent the plan participants.

The case is Brown v. Mitre Corp. , D. Mass., No. 1:22-cv-10976, 10/18/24 .

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Meta must face Massachusetts social media addiction lawsuit

reuters.com/legal/meta-must-face-massachusetts-social-media-addiction-lawsuit-judge-rules-2024-10-18

Nate Raymond

A man walks past a logo of mobile application Instagram, during a conference in Mumbai, India, September 20, 2023. REUTERS/Francis Mascarenhas/File Photo Purchase Licensing Rights , opens new tab

BOSTON, Oct 18 (Reuters) - Meta Platforms (META.O) , opens new tab must face a lawsuit by Massachusetts alleging the social media company purposely deployed features on its Instagram platform to addict young users and deceived the public about the dangers it posed to the mental health of teenagers, a judge ruled.
Suffolk County Superior Court Judge Peter Krupp in Boston, in a decision , opens new tab made public on Friday, rejected Meta's request to dismiss claims by Massachusetts Attorney General Andrea Joy Campbell that it violated state consumer protection law and created a public nuisance.

The Facebook and Instagram operator argued the state's case was barred by Section 230 of the Communications Decency Act of 1996, a federal law that broadly shields internet companies from lawsuits over content posted by users.

Krupp said the law did not apply to false statements Meta allegedly made about the safety of Instagram, its efforts to protect its young users' well-being or its age-verification systems to ensure people under age 13 stay off the platform.

He said allegations concerning the negative impacts of Instagram's design features were likewise not barred because the state was "principally seeking to hold Meta liable for its own business conduct," not content posted by third parties.

Campbell, a Democrat, in a statement said that as a result of the judge's ruling, "we can now move forward with our claims to hold Meta accountable and continue to push for meaningful change on Meta's platforms that will protect young users."

A Meta spokesperson said the company disagreed with the ruling and that the "evidence will demonstrate our commitment to supporting young people."

The ruling came after a federal judge in California on Tuesday rejected a request by Meta to dismiss lawsuits by more than 30 states accusing it of fueling mental health problems among teens by making its social media platforms addictive.
Massachusetts was one of a handful of states that pursued separate claims in state court, rather than federal, when it sued in October 2023.

It became one of the higher profile lawsuits because of allegations it first aired about how CEO Mark Zuckerberg had been dismissive of concerns that aspects of Instagram could have a harmful effect on its users.

The lawsuit alleged that features on Instagram such as push notifications, "likes" of user posts and a never-ending scroll were designed to profit off of teens' psychological vulnerabilities and their "fear of missing out."

The state alleged that internal data showed the platform was addicting and harming children, yet top executives rejected changes its research showed would improve teens' well-being.

Reporting by Nate Raymond in Boston; Editing by Alexia Garamfalvi, Bill Berkrot and Deepa Babington

Federal Court Holds False Claim Act's Qui Tam Provisions Unconstitutional

dandodiary.com/2024/10/articles/corporate-litigation/federal-court-holds-false-claim-acts-qui-tam-provisions-unconstitutional

October 21, 2024

By Kevin LaCroix on October 21, 2024
Posted in Corporate Litigation

More than once I have had occasion to write about *qui tam* actions on this site, primarily in connection with the complicated insurance coverage questions the cases can present. Now, in unexpected and provocative ruling, a federal district court judge has held the False Claims Act's qui tam provisions to be unconstitutional. While just the opinion of a single district court judge, and therefore without precedential effect outside of the federal district in which it was rendered, the ruling nonetheless is groundbreaking and potentially significant. The potential significance of this development is discussed below. A copy of Middle District of Florida Judge Katherine Kimball Mizelle's September 30, 2024, opinion can be found here.

Background Regarding Qui Tam Actions

The False Claims Act is a civil-war era federal statute that imposes liability on individuals and companies that defraud the federal government. The statute includes so-called *qui tam* provisions that allow private individuals not affiliated with the government – known as "relators" – to file actions on behalf of the government. If the relator prevails on his or her claim, they can receive a portion of the damages recovered (typically from 15% to 30%).

In order to pursue a *qui tam* action, a prospective relator must file his or her complaint under seal, in order to allow the government time to investigate the allegations without alerting the defendant. The U.S. Department of Justice reviews the allegations and decides whether to intervene in the case. If the government elects not to intervene, the relator can continue the lawsuit independently. Because the claims are often filed against the relator's own company, relators are sometimes referred to as whistleblowers.

As of 2019, over 71% of all False Claims Act claims were filed by whistleblowers. More significantly, these qui tam lawsuits are an important part of False Claims Act enforcement. Of the $2.68 billion in False Claims Act awards the federal government recovered in 2023, more than $2.3 billion originated from qui tam suits.

The District Court Action

Clarissa Zafirov sued Florida Medical Associates and certain other medical care providers for alleged Medicare fraud. Zafirov alleged that the providers had submitted false claims by misrepresenting patients' medical conditions to Medicare. The government declined to intervene and leaving Zafirov to proceed on her own on behalf of the government, pursuant to the False Claims Act's *qui tam* provisoins. The defendants moved for judgment on the pleadings. As the Husch Blackwell law firm's October 7, 2024, memo about the court's ruling noted, there is extensive authority, much of it quite recent, holding that the qui tam provisions of the False Claims Act are constitutional.

However, Judge Mizelle reached a different conclusion, holding the *qui tam* provisions to be unconstitutional. In reaching this conclusion, Judge Mizelle noted that Zafirov herself had not suffered any direct injury from the defendants' alleged fraud. In Judge Mizelle's view, Zafirov was not seeking relief for her own private harm. Rather, she was, in the court's view, acting as an officer of the United States working on the government's behalf. As an officer of the government, Zafirov, was subject to the U.S. Constitution's Appointments Clause, which provides the President with the authority to nominate, with the advice and consent of the Senate, and appoint officers of the Unites States, with the added proviso that "Congress may by law vest the appointment of such inferior officers, as they thing proper, in the President alone, in the courts of law, or in the hands of the departments."

Because Judge Mizelle found that neither the executive branch nor a court appoints an individual as a False Claims Act relator, she concluded that the *qui tam* provision of the False Claims Act violates the Appointments Clause and therefore is unconstitutional. The court then concluded that Zafirov lacked authority to prosecute the case and accordingly dismissed the case with prejudice.

Discussion

On my first quick read of Judge Mizelle's opinion, my initial reaction was that the defense counsel certainly should get credit for creativity, in managing to come up with an constitutional argument sufficient to strike down a statutory provision that has been in effect for over 160 years.

As it turns out, however, defense counsel may not in fact deserve all of the credit for creativity. It turns out, as several law firms noted in memos discussing Judge Mizelle's opinion, that in a June 2023 dissenting opinion in *United States ex rel. Polansky v. Executive*

Health Resources, Inc., Supreme Court Justice Clarence Thomas said that there are "substantial arguments that the *qui tam* device is inconsistent with Article II," noting that "there is good reason to suspect that Article II does not permit private relators to represent the United States' interests in FCA suits." Justices Kavanaugh and Barrett added, in a concurring opinion, that "the Court should consider the competing arguments on the Article II issue in an appropriate case."

The Polsinelli law firm, in an October 8, 2024, memo about the ruling, noted that following law school and other judicial clerkships, Judge Mizelle clerked for Justice Thomas at the Supreme Court. The law firm memo also notes that in her opinion in the Zafirov case, Judge Mizelle relied heavily on the concurring and dissenting opinions in the *Polansky* case.

A second reaction I had to Judge MIzelle's opinion was that, in my humble opinion, it takes a lot of brass to declare a statute that has been around and in active use for over 160 years to be unconstitutional. As the Lowenstein Sandler law firm put it in their October 15, 2024, memo about the ruling, Judge Mizelle's opinion represents "an astonishing break from decades of False Claims Act (FCA) precedent."

Judge Mizelle addressed this concern. In seeking to oppose the defendants' motion, Zafirov argued that the *qui tam* provisions should withstand constitutional challenge because of the "historical pedigree" of the False Claims Act and its qui tam provisions going all the way back to the Civil War. Judge Mizelle dismissed this argument, saying "the Constitution prevails over practice, especially when the text is clear."

Although, as I noted at the outset, Judge Mizelle's opinion is without precedential effect outside of the Middle District of Florida, this precedential impact is not insubstantial. According to the Polsinelli law firm's memo, during the period 2016 to 2020, the Middle District of Florida had the highest number of FCA cases filed, largely due to "the prevalence of Medicare fraud cases in Florida, reflecting the state's significant health care industry and the corresponding oversight challenges."

In all probability, Zafirov will appeal the district court's ruling to the Eleventh Circuit, which potentially could create a split of authority in the Circuit courts, as several other Circuit courts have upheld the constitutionality of the qui tam provisions. Given that at least three justices have publicly expressed their interest in seeing the question of the constitutionality of the qui tam provisions taken up by the court, these issues could well end up before the court.

Judge Mizelle's opinion is likely to make waves outside the Middle District of Florida, as well. Defendants, armed with this opinion, may now seek to have the False Claims Act cases pending against them dismissed on similar grounds. As the Faegre Drinker law firm put it in their October 10, 2024, memo about the decision, Judge Mizelle's opinion signals a "new, high-stakes battle for the federal government and relators and the potential future for companies that do business with or receive payment from the federal government." The decision, the law firm memo states, "will likely trigger a wave of Article II challenges to qui tam suits across the country."

Interestingly, defendants seeking to challenge that actions filed against them in reliance on the same Article II arguments that prevailed in Judge MIzelle's court will face a potential procedural hurdle. As the Faegre Drinker law firm's memo notes, Fed. R. Civ. Proc. 5.1(a) requires, when a litigant challenges the constitutionality of a federal statute in which the United States (or one of its agencies or officers or employees in an official capacity) is not a party, the litigant must notify the attorney general, in order to give the attorney general a 60-day period in which to intervene. (There is an ironic twist here, because if in fact the relator is an officer within the meaning of Article II, Rule 5.1(a) notice would not be required.)

In any event, it seems likely that Judge MIzelle's opinion could have significant impact on pending and future False Claims Act cases in which the U.S. government has chosen not to intervene. There also would seem to be a substantial likelihood that the Article II issue will wind up before the U.S. Supreme Court, possibly in a relatively short time frame. If the Supreme Court were to strike down the qui tam provisions of the False Claims Act, it seems likely that False Claims Act litigation would substantially decrease, which in turn would, as the Faegre Drinker law firm memo put it, "disrupt a multibillion dollar a year revenue stream for the federal government and change the incentives for whistleblowers to come forward." The Zafirov case and its inevitable copycats "have become ones to watch in the next couple of years."

Special thanks to a loyal reader for flagging this case for me.

With Malpractice Funds Shrinking, Eckert Seamans Brokers New Settlement in Par Funding Case

law.com/thelegalintelligencer/2024/10/21/with-malpractice-funds-shrinking-eckert-seamans-brokers-new-settlement-in-par-funding-case

Amanda O'Brien

What You Need to Know

- Following mediation, Eckert Seamans is one step closer to finalizing a new settlement for its former partner's role in counseling Par Funding, a cash advance company turned Ponzi scheme that defrauded investors out of hundreds of millions of dollars in the wake of the COVID-19 pandemic.
- The firm previously arranged a $45 million settlement earlier in the year with the Par Funding receivership, although the Supreme Court's decision casting doubt on the validity of bar orders preventing further litigation threw a wrench into that proposed settlement.

Eckert Seamans Cherin & Mellott is inching closer to a $38 million universal settlement for its former partner's role in counseling Par Funding, a Philadelphia-based cash advance company designated a Ponzi scheme that defrauded investors of hundreds of millions of dollars, after months of infighting among those looking to sue the firm took a toll upon its once $50 million insurance policy.

According to a status report filed Oct. 18 in Florida federal court, the court-appointed receiver, led by Ryan K. Stumphauzer and Timothy Kolaya of Stumphauzer Kolaya Nadler & Sloman and aided by Gaetan Alfano of Pietragallo Gordon Alfano Bosick & Raspanti, has reached a master settlement agreement as part of a larger goal to make investors whole, involving Eckert Seamans and three groups of objectors who blocked previous attempts to confirm a $45 million settlement with the firm.

As part of the current, overarching settlement agreement, the receiver will add a gross total of $38 million, the balance of Eckert Seamans' "eroding" insurance limits, to be distributed among class counsel and defrauded investors, further agreeing to a separate settlement with

a group of merchants defrauded by Par Funding. Eckert Seamans, represented by Jay Dubow of Troutman Pepper Hamilton & Sanders, also agreed to separate settlements with Dean and Albert Vagnozzi, who worked with Par Funding to bring in new clients and were represented by Eckert Seamans in those efforts, as well as the Parker plaintiffs, a group of over 150 individual investors defrauded by Par Funding.
The proposed settlement and its surrounding litigation stem from a complaint filed by the U.S. Securities and Exchange Commission in the Southern District of Florida in 2020, which accused Par Funding, investment group A Better Financial Plan, and its founders and sales agents of violating securities laws, misrepresenting risk to induce investment, and ultimately defrauding investors out of hundreds of millions of dollars in the wake of the COVID-19 pandemic.

It's been over a year since hints of a potential settlement with Eckert Seamans first sprouted, and several months since the preliminary settlement proposal was thrown into jeopardy both by objectors and a Supreme Court decision that blew up a massive bankruptcy deal negotiated by opioid manufacturer Purdue Pharma, in doing so expressing disdain for universal bar orders as a settlement tools. The new Eckert Seamans settlement, the filing says, is "contingent on the entry of an opt-out … bar order and require[s] Court approval."

According to the filing, the parties were ordered to participate in a mediation led by former Florida circuit court Judge Michael Hanzman, now an alternative dispute resolution practitioner at Bilzin Sumberg, who held initial caucus sessions for each of the parties before heading into formal mediation on Oct. 7, 8 and 15.

"Any settlement discussion is strictly confidential. No settlement, tentative or otherwise has occurred. The parties have met and agreed to review further documents," attorney Clifford Haines of Haines & Associates, representing the Parker plaintiffs, said in an email Monday.

George Bochetto of Bochetto & Lentz, representing Dean and Albert Vagnozzi, and Gaetan Alfano on behalf of the receivership both declined to comment on the proposed settlement pending court approval. Dubow on behalf of Eckert Seamans did not immediately respond to a request for comment.

Karen Marston testifies before the Senate Judiciary Committee during her confirmation hearing to be U. S. District Judge for the Eastern District of Pennsylvania, on Wednesday, September 11, 2019. Photo: Diego M. Radzinschi/ALM

NEWS

Judge Shuts Down Efforts to Expand Scope of Discovery in Ozempic MDL

Judge Karen Marston held that, despite plaintiffs' arguments to the contrary, marketing discovery is not relevant to the broad legal issues the court has prioritized for early resolution.

October 18, 2024 at 02:12 PM

3 minute read

Mass Torts

By Aleeza Furman
Litigation Reporter

The original version of this story was published on The Legal Intelligencer

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What You Need to Know

- A federal judge has declined to reconsider a ruling barring plaintiffs from conducting marketing discovery early in the Ozempic MDL.
- The plaintiffs had argued that certain marketing evidence was necessary to resolve wide-reaching legal issues.
- The judge held that the material sought by the plaintiffs was not relevant to the issues prioritized by the court.

Plaintiffs in the Ozempic multidistrict litigation will have to wait to pursue discovery into the defendants' marketing practices.

On Thursday, U.S. District Judge Karen Marston of the Eastern District of Pennsylvania denied plaintiffs' request that she reconsider a ruling barring marketing discovery until later in the litigation.

Marston held that, despite plaintiffs' arguments to the contrary, such discovery is not relevant to the broad legal issues the court has prioritized for early resolution—namely, whether the labels of the defendants' products adequately warned of the injuries alleged by the plaintiffs and whether the defendants were preempted from providing additional warnings to their labels.

The plaintiffs had contended that certain marketing discovery was necessary to address those questions, but after months of dispute over the matter, the court disagreed.

Preemption and adequacy of warning were grouped together as one of two issues the court had designated to be addressed early on due to their broad applicability across the cases in the MDL, in which plaintiffs claim pharmaceutical manufacturers Novo Nordisk and Eli Lilly failed to warn that Ozempic and other similar drugs can cause stomach paralysis.

Marston ruled that those issues "could greatly inform the nature and scope of all the failure to warn claims in this MDL."

In designating the issues for motions practice, Marston cautioned the parties against conducting early discovery into the companies' marketing of their drugs.

The plaintiffs pushed back and asserted that certain marketing evidence was important to the analysis of the companies' preemption and warning adequacy defenses. They argued that the Food, Drug, and Cosmetics Act takes a broad definition of "labeling" that includes physician-centered marketing, so discovery into material the companies conveyed to medical professionals should be taken into consideration.

However, the FDCA's broad "labeling" definition was not enough to convince the court to allow the plaintiffs to seek out the defendants' communications with physicians.

"Those communications are not needed for the court to determine whether a drug's approved label already contains the warnings that plaintiffs seek to add and if not, whether the FDA would have rejected additional warnings to the approved label, such that plaintiffs' state law failure to warn claims are preempted," Marston ruled.

Marston held that, while marketing materials may be relevant to other, related, legal questions, those issues will only need to be decided if the plaintiffs' claims first survive preemption.

Still, Marston added, plaintiffs are not barred from seeking out information related to what the defendants knew about their products when they sought Food and Drug Administration approval.

"Although the court forecloses full scale marketing discovery at this stage," Marston held, "defendants are warned that they cannot forego searching files or producing relevant documents simply because they would categorize them as 'marketing.'"

Plaintiffs co-lead counsel—Paul Pennock, of Morgan & Morgan; Parvin Aminolroaya, of Seeger Weiss; Jonathan Orent of Motley Rice; and Sarah Ruane of Wagstaff & Cartmell—said in a statement that they look forward to conducting marketing discovery in the future.

"Novo Nordisk and Eli Lilly have deployed an unprecedented marketing machine to promote Ozempic, Wegovy, Mounjaro, Trulicity, and Zepbound, shaping how the risks and benefits of these drugs are perceived by doctors and the general public," they claimed.

Novo Nordisk declined to comment, and Eli Lilly did not response to a request for comment.

Read the Memorandum:

Litigation Leaders: Quinn Emanuel's Michael Carlinsky on Training Associates to Think and Act Like Trial Lawyers

law.com/newyorklawjournal/2024/10/21/litigation-leaders-quinn-emanuels-michael-carlinsky-on-training-associates-to-think-and-act-like-trial-lawyers-389-245420

Ross Todd

We hope you enjoy this excerpt from Litigation Daily, the exclusive source for sharp commentary on mega court battles, winning strategies and the issues that obsess elite litigators. Law.com subscribers can sign up for The AmLaw Litigation Daily newsletter here.

Welcome to another edition of our Litigation Leaders series, featuring the litigation practice leaders at some of the biggest and most innovative law firms in the country.

*Meet **Michael Carlinsky**, the global co-managing partner of **Quinn Emanuel Urquhart & Sullivan**, who is based in New York. Carlinsky and fellow co-managing partner **William "Bill" Burck**, who is based in Washington, D.C., took on formal management roles back in 2022 alongside firm co-founder and longtime managing partner **John Quinn**, who is now the firm's chairman. In addition to the firmwide role, Carlinsky serves as Quinn Emanuel's chair of complex litigation and co-chair of its insurance litigation practice. Carlinsky is a three-time Litigator of the Week winner, most recently for landing a market-moving $1.8 billion settlement for monoline insurer Ambac five weeks into a trial against Bank of America stemming from the mortgage meltdown.*

Lit Daily: Tell us a little about yourself—perhaps even a thing or two your partners would be surprised to learn about you.

My favorite movies are *The Godfather* and the original *Willy Wonka and the Chocolate Factory* with Gene Wilder. That might sound inconsistent, but it reflects my personality: tough guy exterior, but an emotional and empathetic softy on the inside.

Truth is: I wear my heart on my sleeve. I am passionate about winning; I can heat up quickly. And I never back down from a fight. But that emotion is what propels me to be the best I can be. I also care deeply about people—especially those less fortunate. My mother instilled in

me—and I have instilled in my three kids, two of whom are now practicing lawyers—the importance of giving back, of being charitable, and of always remembering not to judge others until you have walked a mile in their shoes.
I am also a creature of loyalty. Although I may be demanding as a boss (some might say impossible to work for), I have the longest-tenured secretary in the firm (over 30 years).

Aside from that, I exercise six days a week—always in the morning. I do aerobics and old-school weightlifting. I do it not for vanity's sake as much as for my physical and mental well-being. There is no better feeling than the release of endorphins at the start of the day. I also like to play golf, travel and collect wine and tequila.

You're the son of a cab driver, the first in your family to go to college, and you graduated from a law school outside the T14. How do you think those things have shaped you as a litigator?

I grew up in the Canarsie-Mill Basin section of Brooklyn. My dad drove a Yellow taxi. My mother worked multiple jobs to put food on the table. I have two younger siblings. I grew up in a three-family home—my grandmother and my great-grandmother lived in the apartment upstairs.

I went to public schools until college. I would describe us as lower middle class. As I have often said: "I knew we were poor growing up but didn't realize how poor until many years later." I can recall the days that my mom had to plead with ConEdison so they wouldn't turn off power in our house. I questioned whether I would ever go to college and never dreamed I would become a professional.

Growing up in Brooklyn was the greatest training ground for me and helped shape me. As a teenager, my friends and I played sports morning, noon and night—right outside on the street in front of my house. Stickball, baseball, football, hockey—they were all played on blacktop or concrete. You couldn't find a patch of grass within two miles of our house. The neighborhood where I lived was a tough place back in the 1970s and 1980s. You had to quickly figure out how to deal with people. I learned a lot growing up in that environment. I learned how to deal with conflicts and I learned how to read people. It's something I've brought with me into my career as a litigator and a trial lawyer. I often see a narrative in a case or see a legal argument that others don't see; I can also connect with judges or juries because I have that street sense that many lawyers don't have. I recently had a jury trial where the jury consultant recommended against a particular juror. In fact, the juror's profile was exactly the opposite of what we wanted. But my instinct told me to keep that juror, which I did. Turned out that juror was my client's strongest advocate.

You've been a co-managing partner at the firm for a few years now. What does that role entail?

As co-managing partner, I have responsibility for running all aspects of the firm, as you would expect, while at the same time running and managing the nearly 40 active cases on which I am the lead lawyer. So I try to find that perfect balance—which can sometimes be a challenge.

As a litigation-only firm, we have eschewed lots of bureaucracy and politics, so it makes my job a lot easier. That said, there are a number of important projects and initiatives that we have undertaken in the last few years that are intended to grow headcount and strengthen the firm while instilling in our lawyers the unique culture of excellence and camaraderie that are the hallmarks of Quinn Emanuel.

In a typical week, my management responsibilities include decisions about hiring, compensation, partner promotions, associate elevations, office productivity, resolving conflicts, evaluating new offices, approving write-offs—you name it. Some are mundane. But many are exciting and exhilarating. One of my favorite activities is speaking with partners or associates about their cases and their clients—and their wins. I try to stay in touch with as many lawyers as possible—and strongly believe in an open-door policy, where I am accessible to everyone.

It's been a very gratifying role. Our performance last year showed the tremendous strength of this firm. We saw our profits per equity partner increase nearly 40% on revenues of over $2 billion. It was truly a historic year, and I am so proud of all the people at the firm that contributed to this monumental success. In 2024, I expect us to have yet another record year. Our services continue to be very much in demand. Our existing clients as well as new clients are sending us their most significant, substantial matters. We were just voted the world's "most feared" law firm for the third year in a row. Our name and reputation have never been stronger.

That said, part of my role is to make sure we never grow complacent. We must continually strive to improve.

How do you balance the demands of that position with your busy docket of client-facing work?

This is a great question. I am first and foremost a practicing lawyer and a hardcore trial lawyer. I do three or four trials a year. I have a big portfolio of cases, and clients expect me to be the lead lawyer on them. If you know my personality or have ever gone to trial with me, you know that I devote 110% of myself to trial. I insist on knowing virtually every fact and document before I stand up and present the opening statement or conduct the first witness exam. So, my preparation for trial is relentless and I immerse myself in the case, which

consumes almost every waking moment of the day. But I am able to do so because when I am unavailable, my co-managing partner Bill Burck or firm chairman John Quinn can step up and take over my responsibilities on the management side.
As for my other cases, I am fortunate to have extraordinary talent supporting me. I can sleep at night and go to trial knowing that my cases are also in the hands of the most able, capable lawyers around. My partners and associates are the very best of the best.

I tell every client, "I am here for you 24-7." They all have my cell phone numbers, and I encourage them to call me anytime, day or night. That's true whether I am on trial or not.

How big is the firm and where are most of your litigators concentrated geographically?

We span the globe with 1,188 lawyers in 35 offices around the nation and the world. Our single biggest office is in New York City, where we have 350 lawyers. We continue to have a major presence in California, where the firm began, with hundreds of lawyers in our Los Angeles, San Francisco and Silicon Valley offices combined. Our biggest office outside the U.S. is in London, where we have 125 lawyers.

We pride ourselves on our ability to work seamlessly across our offices around the globe. Our clients' disputes often cross borders, and so does the service we provide them. We regularly field multi-office teams that combine the talents and skill sets of our U.S. offices with those of our London, German, French, Swiss, Asian and Mideast offices. I am a big believer in making sure we put the best team on the field for a given case—regardless of where the lawyers may physically reside. Right now, I have multiple cases involving lawyers from many offices across the U.S., London, Paris, Australia, China, Germany, Switzerland and elsewhere.

If there is a significant dispute happening somewhere in the world, the chances are high that Quinn Emanuel is involved. This is in large part because of our ability to build powerful, multi-office teams.

What do you see as hallmarks of Quinn litigators? What makes you different?

A combination of tenacity, creativity, intellectual firepower and raw ability. To take the last point first, we make it a point to hire the best talent. We hire junior lawyers out of law school who know they want to be litigators and trial lawyers. Unlike full-service firms where a young associate has the option of trying different practices, junior lawyers (and senior lawyers) come to Quinn because they want to be the very best litigators—and want to learn from the best.

We have a culture and firm philosophy where we start training young lawyers to think and act like trial lawyers as soon as they join. We have in-house programs, taught by the firm's best lawyers, that teach young lawyers how to think like experienced trial lawyers. We also strive to get lawyers into trial within their first two years.

The way we litigate and try cases makes us stand out from other firms, too. When we show up on a case, opposing counsel knows they are in for a fight. We are known for our trial practice, so our adversaries know we aren't "paper tigers" who always settle; rather, we send a message on behalf of our clients that we are prepared to take the case to trial.

We also litigate cases differently. I don't think it's any secret that we tend to be more aggressive and creative than other big firms. I often hear from lawyers at other firms commenting on how aggressive Quinn Emanuel lawyers tend to be, and that many view us as their most formidable and feared adversary. We recognize the job we are hired to perform and that we are expected to win. We aren't afraid to think "out of the box" in how we develop cases and create the narratives.

But while we are proud of our aggressive public image, we have a strong internal culture of camaraderie. We are intensely team-oriented and collaborative. Our lawyers don't hesitate to parachute in to help each other out on cases.

In what three areas of litigation do you have the deepest bench? (I know it's hard, but please name just three.)

This is an impossible question for me to answer. It's like asking me to pick my favorite child. We excel in every kind of dispute, whether it's complex commercial litigation, intellectual property, white collar defense, bankruptcy, class-action, antitrust—you name it. I really can't pick three.

What were two or three of the firm's biggest in-court wins in the past year, and can you cite tactics that exemplify your firm's approach to success?

Because we have nearly 1,200 litigators, there are so many cases—and so many wins to choose from.

In terms of generating headlines, it's hard to top the Alec Baldwin case. My partners **Alex Spiro** and **Luke Nikas** led a team that secured a truly stunning victory for Baldwin. The judge in New Mexico who was overseeing the case dismissed it with prejudice after finding that the state had withheld evidence that could have shed light on how live rounds got onto a film set where the cinematographer was fatally shot. After some exceptional courtroom lawyering by Luke and Alex, the judge said, "There is no way for the court to right this wrong." It's hard to imagine a more decisive victory than that.

Sometimes, our best victories don't occur in court. One example from the past year is the result we achieved for Ken Griffin, the founder of hedge fund Citadel. Our team, led by Bill Burck, **AJ Merton** and **Peter Fountain**, got the IRS to issue a public apology to Griffin for leaking his personal tax information. It's unheard of for the IRS to do that.

The apology came as part of a settlement the IRS reached in a lawsuit we brought on behalf of Griffin seeking to hold the IRS accountable for willful and intentional failures to safeguard taxpayers' personal information. The government initially said the leak could have resulted from the actions of a "hostile foreign state actor," but it came out that a former IRS contractor was disclosing tax return information without authorization.

What does the firm's coming trial calendar look like?

As busy and high-stakes as ever. In Washington, D.C., we are representing the heads of a tech company called Next Jump in a white-collar case involving allegations they bribed the Navy's second highest-ranking admiral. That's a fascinating case that should come to trial fairly soon. My partner and co-managing partner Bill Burck is handling that one. And speaking of white-collar cases, we of course are representing Mayor Eric Adams in his case. Alex Spiro is leading that one, with help from Bill and some others.

In terms of my upcoming trial docket, I just finished back-to-back trials that lasted nearly two months. At one point recently, I actually had to cross-examine a witness in trial in New York on a Monday, take the Acela train to Delaware that evening so that I could put on a witness on Tuesday, then return that evening to New York to cross-examine an expert witness on Wednesday. While this is not typical, my trial schedule is hectic. I have four trials currently scheduled for next year, with a large IP jury trial in federal court, a trial in Delaware Court of Chancery and jury trials in two other commercial cases.

It's a crazy, thrill-filled profession, and it can be grueling at times. But, to lift a quote from *The Godfather Part II*: "This is the business we've chosen." Truth is, I can't think of a better job.

Legal services

Top UK law firms raise hourly rates by 40% in five years

Inflation and growth of US firms in London push up charges at British counterparts, according to PwC survey

The group of UK-based international firms surveyed by PwC has been grappling in recent years with high inflation and a renewed war for talent © Hollie Adams/Reuters

Suzi Ring in London YESTERDAY

The top 10 UK law firms are charging clients almost 40 per cent more per hour than they were five years ago, a survey has found, as inflation and the growth of US firms in London pushed up fees.

The biggest UK-headquartered firms by revenue charged an average of £449 per hour in 2024, compared with £321 in 2019, according to PwC's annual law firm survey published on Monday, with double-digit growth in average rates across the whole of the top 100 UK firms.

The increase in hourly pricing came as the 10 biggest firms notched up more billable hours at every level from trainee to partner, as lawyers benefited from a pick-up in deals and a busy litigation market last year. That resulted in UK fee income for the most recent financial year rising by an average of 11.6 per cent in the top group.

The group of UK-based international firms surveyed by PwC has been grappling in recent years with high inflation and a renewed war for talent, driven by the expansion of wealthy US firms in London. That pressure has triggered a sharp rise in salaries, as international firms based in the City try to remain competitive.

However, one upside of heavy US investment in the UK capital has been an increase in rates. US firms tend to charge more per hour than British firms, which has allowed UK outfits to increase their prices. According to recruiters, US firms now charge more than $2,000 an hour at the top end, while top partners at their UK rivals are charging more than £1,000 an hour.

"The UK's top 10 law firms have successfully increased rates . . . through a combination of increasing specialist services, inflation and the post-pandemic boost to the corporate and deals market," said Mark Anderson, PwC's global legal and professional services sector leader. "The influence of US firms building teams in London has also been a key factor."

The UK's top law firms have made the largest fee gains over the past five years

Total rate per chargeable hour (£)

FINANCIAL TIMES

Source: 2024 PwC Law Firms' Survey

Anderson cautioned, however, that while rates remain below top-tier US firms on average, the pace of growth will be hard for UK firms to sustain. Clients are likely to push back against any steep increases as they attempt to manage their own costs.

Meanwhile, firms' salary costs are on the rise — UK "magic circle" outfits Freshfields Bruckhaus Deringer, Linklaters, Clifford Chance, A&O Shearman and Slaughter and May all increased salaries for newly qualified lawyers by 20 per cent this year to £150,000.

PwC found that cyber risks were the number one concern for law firms this year, with 90 per cent of the 100-strong group either extremely or somewhat concerned about it. The response signalled a change from last year when macroeconomic volatility was the top issue.

Law firms are an attractive target for hackers due to the large amounts of data they hold. Legacy Allen & Overy, now A&O Shearman, suffered a cyber attack on its systems last November, which was attributed to the hacking group LockBit.

Firms are also investing heavily in artificial intelligence, with almost 90 per cent of the top 100 outfits stating that they have trialled or implemented generative AI tools, compared with 55 per cent in 2023, the report found.

LPB Network

Business Law Prof Blog

Blog Posts from Business Law Professors

OpenAI Stuff

By Ann Lipton on October 19, 2024

Hi, everyone – welcome to BLPB at the new place! As you can see, we've imported our old posts over here but in the process, the authors got scrambled for a lot of the older ones … we'll work that out eventually. So! Moving on –

OpenAI's been in the news, again, and there are some interesting things to talk about.

First, apparently both OpenAI, and Anthropic before it, have been raising funds through SPVs. The SPV formally invests in the company; the SPV raises the funds from the real investors.

The purpose of that is the securities laws. If OpenAI/Anthropic have too many investors, they'll have to make public filings. But each SPV counts as a single investor. So, by taking investment through SPVs, OpenAI and Anthropic can keep their formal investor count below the threshold of becoming a public company, while in fact raising capital from a dispersed group.

That said, it only works if OpenAI/Anthropic are *not* the ones organizing the SPVs. If they are, they're evading the statutory limit on the number of investors a private company can take on. The SEC's view is that this trick only works if the SPVs are organized independently of the issuer. I had a blog post on this way back when it was relevant to Uber.

When Uber did this, the impression I got was that investment banks created the SPVs to please clients who wanted access to a hot startup, and who were wealthy but didn't, individually, have the kind of cash that attracts the attention of venture-backed companies. But OpenAI's SPVs are not being organized by investment banks; they're being organized by large venture capital firms, who have preexisting investments in OpenAI.

According to Anat Alon-Beck and John Livingston, this is becoming increasingly common, suggesting we've come a long way from investment banks trying to please clients who want access, and now this is just an alternative way to meet the capital raising needs of startup companies while allowing them to stay private. OpenAI, we know, has *enormous* need for capital.

Point being, I wonder in these situations just how "independent" the SPV capital raises are, which is supposed to be a precondition to avoid counting their investors as investors in the issuer. After all, VC firms often get governance rights along with their investments, they provide counseling/guidance to their portfolio firms, so in some sense they "are" the issuer, potentially going out and organizing an SPV so that they can funnel money to the firm while staying under the securities laws' radar. That whole process not only exposes perhaps smaller investors to increased risks, but also permits large and societally important firms to stay dark, without exposing their operations to public scrutiny.

But that's not the only interesting OpenAI news! There are also reports that it may abandon its current structure – an LLC, where investors can receive only a capped profit, operated by a nonprofit – in favor of a public benefit corporation.

That fact itself tells you something about the toothlessness of the public benefit corporation structure, but one of the weirder things is that apparently they're claiming the public benefit form will help fend off activist attacks.

As I've previously discussed, there's nothing about the benefit corporation form that, in fact, does prevent activism. OpenAI is still a private company, and I imagine is quite a long ways from going public, which means it's insulated from activist attacks currently. Even if it does go public, I find it difficult to imagine it wouldn't have a multi-class share structure that would be sufficient to fend off activists, and since the benefit corporation form itself doesn't do that work, I view the choice of the benefit corporation form as greenwashing, i.e., an attempt to put a happier face on the fact that the company is abandoning the nonprofit mission that was supposed to protect humanity, or whatever.

But maybe I'm wrong about that. This is an interesting question, we could ask, post ***Coster v. UIP Cos***. In *Coster*, the Delaware Supreme Court laid out the framework for assessing defenses that interfere with shareholder voting:

> When a stockholder challenges board action that interferes with the election of directors or a stockholder vote in a contest for corporate control, the board bears the burden of proof. First, the court should review whether the board faced a threat "to an important corporate interest or to the achievement of a significant corporate benefit." The threat must be real and not pretextual, and the board's motivations must be proper and not selfish or disloyal. As Chancellor Allen stated long ago, the threat cannot be justified on the grounds that the board knows what is in the best interests of the stockholders.

> Second, the court should review whether the board's response to the threat was reasonable in relation to the threat posed and was not preclusive or coercive to the stockholder franchise. To guard against unwarranted interference with corporate elections or stockholder votes in contests for corporate control, a board that is properly motivated and has identified a legitimate threat must tailor its response to only what is necessary to counter the threat. The board's response to the threat cannot deprive the stockholders of a vote or coerce the stockholders to vote a particular way.

Is there an argument that benefit corporation directors have more leeway to interfere with shareholder voting, say, if an activist wants to run a proxy contest, than they would in an ordinary corporation? After all, *Coster* says a defense cannot be motivated by the directors' belief they know what is best for stockholders – but what if the defense were motivated by the directors' belief that the stockholders' interests must not be permitted to overwhelm a stakeholder's interest in a corporation established to advance that interest?

My suspicion is, it shouldn't matter. The form itself represents a *choice* by investors to pursue a social mission; which means that ultimately the mission rests in their hands. Plus, Delaware amended its statute to permit conversion to, and away from, the benefit corporation form with a mere 50-percent vote (rather than a supermajority), and also removed statutory provisions that would have granted shareholders in ordinary corporations appraisal rights upon conversion to a benefit corporation. All of which suggests that the principle that the "shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests" remains just as intact in a benefit corporation as it does with any other corporation, which means there should be no special license to interfere with shareholder voting. I mean, if shareholders can convert to ordinary corporation status with a mere 50% vote, surely directors can't interfere with shareholders' choice to do that kind of thing.

Plus, given how weak the enforcement rights are in benefit corporations alleged to have strayed from their social missions, I suspect that if Delaware courts were to rule that the form grants directors more leeway to fend off activists, suddenly corporate America would discover a new love of social purpose.

But, I suppose this is an issue lurking around that Delaware may one day have to confront.

And another thing. New ***Shareholder Primacy*** podcast is up! This time, me and Mike Levin talk SEC climate change rules, and the activist attack at Pfizer. Available at Apple, Spotify, and YouTube.

Securities Law News

Oct. 18, 2024, 2:37 PM PDT

US Audit Board Member Says Alarm Over Inspections Unwarranted

By Amanda Iacone

Bloomberg Law News 2024-10-21T10:25:42395214544-04:00

US Audit Board Member Says Alarm Over Inspections Unwarranted

By Amanda Iacone 2024-10-18T17:37:53000-04:00

A member of the US accounting oversight board challenged the assessment from a pair of senators that audits are falling short of their promise to protect investors and accused the lawmakers of trying to "silence" her.

"The Senators' alarmism is unwarranted," Christina Ho, a member of the Public Company Accounting Oversight Board, said in a statement posted to her LinkedIn account Thursday. "The sky is not falling."

Sens. Elizabeth Warren (D-Mass.) and Sheldon Whitehouse (D-R.I.) earlier this month called out the 46% deficiency rate from the PCAOB's 2023 inspections cycle, calling the findings "profoundly troubling" and "exorbitantly high."

- Despite those deficiencies, auditor opinions on the reliability of their clients' financial statements were incorrect in just 5% of the audits inspected in 2023, Ho said in her post, arguing that innovation would bolster audit quality, not enforcement. The board routinely examines a sample of auditors' work to ensure compliance with its requirements—the process forms the backbone of the Enron-era regulator's oversight.
- In their letter, the lawmakers chastised Ho for "downplaying and misdirecting attention from these atrocious findings." Ho said the lawmakers tried to "stifle" her dissenting views.
- The board said it would respond to the senators directly and shared their goal of protecting shareholders. Ho didn't respond to a request for comment.

To contact the reporter on this story: Amanda Iacone in Washington at aiacone@bloombergtax.com

To contact the editor responsible for this story: Amelia Gruber Cohn at agrubercohn@bloombergindustry.com

Securities Law News

Oct. 18, 2024, 10:29 AM PDT

Wamco Clients Are Quizzed by DOJ as Ken Leech Probe Ramps Up

By Ava Benny-Morrison and Silla Brush

- Fidelity, SEI Investments among firms asked for information
- Authorities haven't indicated the firms are also being probed

Bloomberg Law News 2024-10-21T10:26:07714841524-04:00

Wamco Clients Are Quizzed by DOJ as Ken Leech Probe Ramps Up

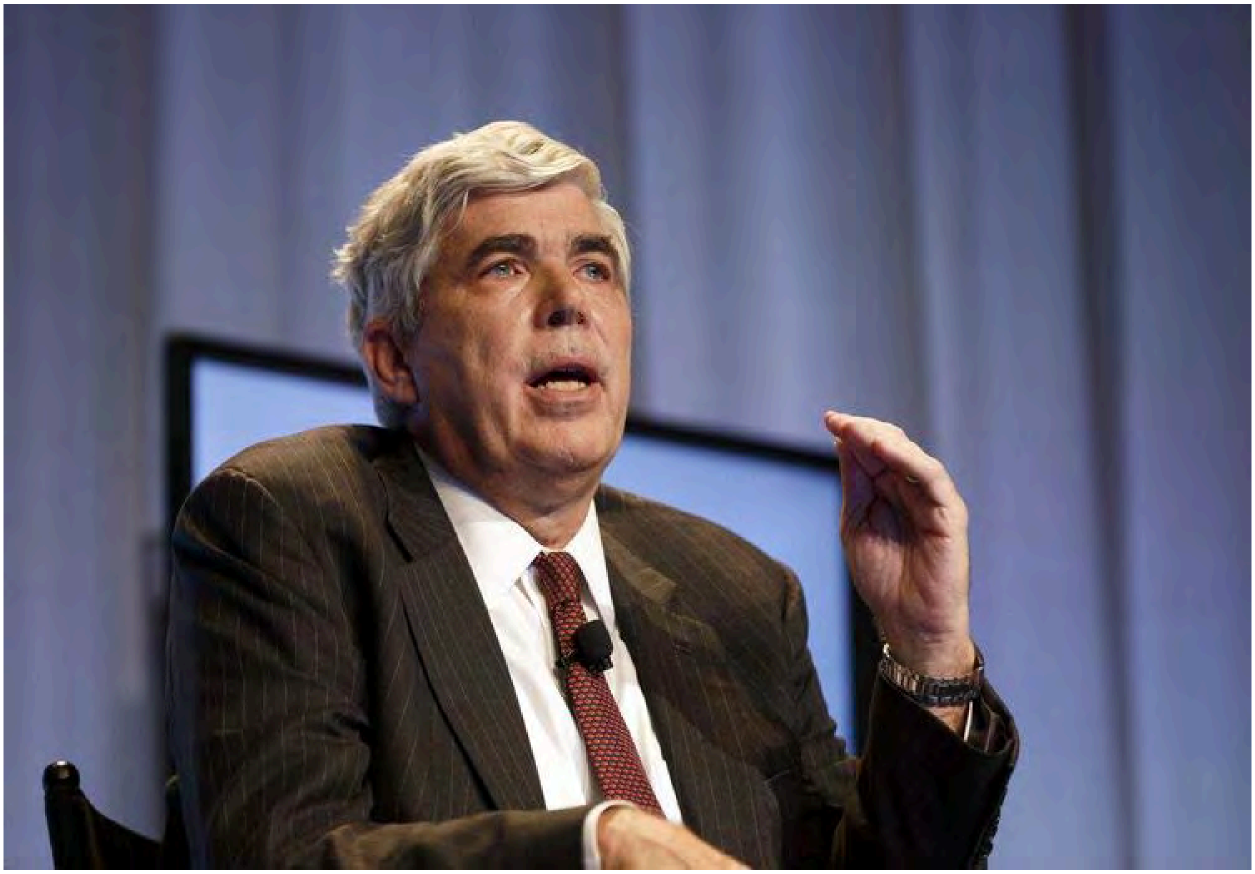
By Ava Benny-Morrison and Silla Brush2024-10-18T13:29:29796-04:00

- Fidelity, SEI Investments among firms asked for information
- Authorities haven't indicated the firms are also being probed

Money managers that used Western Asset Management Co. to help invest their bond portfolios are being pressed about their dealings with the firm, as US authorities ramp up their investigation of how once-star trader Ken Leech allocated winning bets.

Fidelity Investments, Russell Investments and SEI Investments Co. are among the firms that received information requests from federal prosecutors in recent months, according to people familiar with the inquiries. As a force in the bond market for decades, Wamco has overseen money for institutional investors and fixed-income allocations for other money managers.

The US Attorney's Office in Manhattan asked what investors were told about how Wamco allocated trades, said the people, who asked not to be identified because the probes are confidential. Authorities haven't suggested the firms receiving the requests were involved in any wrongdoing.



Ken Leech in 2016.
Photographer: Patrick T. Fallon/Bloomberg

US authorities are examining whether Leech parceled out winning trades to favored clients at the expense of others — a practice known as cherry-picking. Investors have pulled billions of dollars from Wamco funds since the firm disclosed criminal and civil investigations earlier this year. Leech took a leave of absence as co-chief investment officer in August after the Securities and Exchange Commission warned he could face a potential enforcement action.

Leech hasn't been sued by the SEC or charged by prosecutors. Investigations by the Justice Department and SEC can end without any charges being brought.

A representative for Leech didn't respond to requests for comment. Wamco declined to comment. Representatives for the US Attorney's Office for the Southern District of New York and the SEC declined to comment, as did spokespeople for Fidelity, SEI Investments and Russell Investments.

Founded in 1971, Wamco has been a major bond market player, managing major accounts for institutional investors as well as being picked by other investment firms to handle fixed-income allocations in their own funds. At times, Wamco rivaled the likes of BlackRock Inc. and Pacific Investment Management Co. in size, but its streak of lackluster performance over the past three years prompted an investor exodus.

Pasadena, California-based Wamco, which is owned by Franklin Resources Inc., has previously said it's cooperating with the SEC and DOJ after launching its own investigation into about 17,000 trades made by Leech over three years. The transactions were spread across 38 accounts and three strategies, Bloomberg previously reported.

Read More: Wamco's Longtime Bond King Thrust Into Spotlight He Shunned

Russell Investments and SEI also previously disclosed that they're ending relationships with Wamco, which oversaw money for several investment funds offered by the two money managers. Fidelity Investments' Strategic Advisers Core Income Fund pared its allocations to Wamco's Core Plus Bond Fund over several quarters, according to data compiled by Bloomberg.

Franklin Resources said on Oct. 9 that Wamco clients pulled $37 billion total in the quarter ended Sept. 30, and the data show assets in the firm's flagship Core and Core Plus mutual funds have plunged. As of the end of the period, Wamco managed about $353 billion, which is roughly one-fifth of Franklin's overall assets.

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Anthony Aarons, Peter Eichenbaum

Musk to face questions on Tesla's robotaxi bets on results day

reuters.com/business/autos-transportation/musk-face-questions-teslas-robotaxi-bets-results-day-2024-10-21

Akash Sriram, Abhirup Roy

The logo of a Tesla electric vehicle is placed on a car outside a dealership in Drogenbos, Belgium November 25, 2023. REUTERS/Yves Herman/File Photo Purchase Licensing Rights, opens new tab

Oct 21 (Reuters) - Tesla's investors and analysts will get a chance to grill CEO Elon Musk on his robotaxi plans on Wednesday when the electric automaker reports its quarterly results, after a much-hyped unveil this month that lacked key details and slammed shares.
Musk's roughly 20-minute introduction to the self-driving vehicle, which is expected to underpin Tesla's (TSLA.O), opens new tab future, offered no time for questions.
The disappointing event is more a reason why investors would want to know whether the automaker's main business of selling cars is improving.

Tesla is expected to report that third-quarter profit margin on auto sales fell, squeezed by lucrative incentives to lure electric vehicle buyers.

A first-ever drop in annual deliveries is also likely as demand for its aging lineup faces competition from cheaper EVs in China as well as traditional U.S. automakers with fresh electric models.

Here's what Wall Street is looking at:

ROBOTAXI DETAILS AND FULL SELF-DRIVING

A lot of Tesla's $700 billion valuation is tied to Musk's promises that its Autopilot software will form the basis of its robotaxi business. Analysts are likely to head into the post-earnings call with questions on production timelines and sales strategy.

Musk said the robotaxi would go into production in 2026 and cost less than $30,000 to buy, adding that unsupervised operation of Tesla's Full Self-Drive software would start next year in California and Texas.

In a sign of concern for the autonomous software plan, the U.S. auto safety regulator on Friday opened an investigation into 2.4 million Tesla vehicles equipped with FSD software after four reported collisions, including a fatal crash in 2023.
Tesla cars drove more than 1.6 billion miles using FSD, including the latest version of the advanced driver assistance software, Tesla had said at the end of the second quarter. It is offering interest-free financing for those who buy FSD during their purchase of Model 3 or

Model Y cars.

MARGIN

Some Wall Street analysts, however, have shifted their focus from the Cybercab event. "With Tesla's Robotaxi Day passed, we believe the focus for Tesla at least for now shifts back to fundamentals," Barclays analysts said in a note last week.

Wall Street expects Tesla to report 14.9% automotive gross margin, excluding regulatory credits, for the three-month period ended Sept. 30, according to 23 analysts polled by Visible Alpha. In the second quarter, Tesla recorded 14.6%.

The company has cut prices to stimulate demand amid high interest rates, but with limited success. It has offered incentives and low-cost financing options, especially in China.

Analysts expect this to hurt its margin, a metric in which Tesla long had an edge over traditional automakers.

Tesla's auto gross margin slides as price cuts weigh

ANNUAL DELIVERIES

Tesla's challenge is to beat last year's delivery numbers, and it is expected to update its annual forecast.

Unless Tesla hands over more than 516,000 vehicles in the fourth quarter - typically the strongest period for U.S. car sales - it is likely to post a slight drop in annual deliveries.

Deliveries could slip 0.3% to 1.8 million units this year, according to 18 analysts polled by LSEG.

"I think Tesla will get close to last year's delivery total, but not quite achieve it," said Alexander Johns, who owns Tesla shares.

A graphic showing Tesla on course for first drop in annual deliveries

CHINA

The company faces strong competition in China from domestic players such as BYD (002594.SZ), opens new tab, (1211.HK), opens new tab, which offer several cheaper models.
Still, Tesla's sales in China rose 66% to 72,000 units in September, marking its best month this year. Its third-quarter sales in the country were up 12%, helped by financing deals and trade-in subsidies by local governments.

The trend could continue.

"With some wind in its sails it wouldn't be a surprise to see Tesla beat last year's China sales record" in the fourth quarter, said Matt Britzman, senior equity analyst at Hargreaves Lansdown.

Reporting by Akash Sriram in Bengaluru and Abhirup Roy in San Francisco; Editing by Sayantani Ghosh and Arun Koyyur

Akash Sriram
Thomson Reuters

Akash reports on technology companies in the United States, electric vehicle companies, and the space industry. His reporting usually appears in the Autos & Transportation and Technology sections. He has a postgraduate degree in Conflict, Development, and Security from the University of Leeds. Akash's interests include music, football (soccer), and Formula 1.

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Paramount-Skydance Merger Triggers Class Atty Fight In Del.

By **Jeff Montgomery**

Law360 (October 18, 2024, 6:23 PM EDT) -- A five-firm stockholder attorney team investigating the proposed $7 billion Paramount Global-Skydance Media LLC merger has urged Delaware's Court of Chancery to put the brakes on another firm's motion for co-lead plaintiff appointment for a deal challenge, arguing that the move would reward a rush to the courthouse.

In a letter filed Thursday, the group, led by the California State Teachers' Retirement System, questioned Paramount stockholder Scott Baker's filing of a Chancery complaint based "solely on public information" while also seeking an interim class counsel appointment in a letter filed on July 24, less than three weeks after the announcement of the Paramount deal.

Baker, represented by Berger Montague PC, was joined by the Baerlocher Family Trust. The two stockholders, CalSTRS observed, have "neither filed a complaint nor sought to intervene" in parallel litigation.

"The CalSTRS group and other sophisticated Paramount Global stockholders have all followed the court's guidance" regarding presuit investigation, "which is why no one else has yet filed a plenary complaint," CalSTRS said.

Other stockholders joining in the objection to the Paramount deal with CalSTRS are PG Asset Management NV, Park Employees Annuity & Benefit Fund of Chicago, and George Douglas Ross.

Counsel for the CalSTRS suit include Bernstein Litowitz Berger & Grossmann LLP, Robbins Geller Rudman & Dowd LLP, Berman Tabacco and Equity Litigation Group LLP.

"The Baker group, alone, rushed to court. Now, it asks the court to resolve leadership" before basic court filings are complete "before other stockholders have completed their investigations, and before the Skydance transaction closes," CalSTRS argued.

Paramount and Skydance announced their definitive agreement to merge in a two-step transaction on July 7, ending months of negotiations and speculation.

Under the deal, the Skydance Investor Group, a consortium that includes Skydance CEO David Ellison's family and RedBird Capital Partners Management LLC, would buy Paramount's parent company, Sheri Redstone's National Amusements Inc., for $2.4 billion in cash. After that, Skydance will merge with Paramount. The deal included a 45-day "go-shop period" for other bidders to make offers.

Paramount's special committee of independent directors and National Amusement, as Paramount's controlling shareholder, have approved the deal.

Class litigation over the merger was complicated by Magistrate in Chancery Selina E. Molina's dismissal on Aug. 2 of a books and records demand suit focused on the deal, filed by Rhode Island's treasurer on behalf of the state's employees retirement system.

The magistrate's decision, now headed for review by Vice Chancellor J. Travis Laster, declared that reliance on articles that quote anonymous sources or "people familiar with the situation" without attributable facts "share a common indicia of unreliability."

In exceptions to Magistrate Molina's ruling, Rhode Island's pension fund argued that the court's refusal to consider any anonymously sourced material is contrary to Delaware law.

"Controlling stockholders who are seeking to use their control to extract benefits for themselves from those interested in a transaction involving the controlled company do not publicly advertise their intentions and actions," a Rhode Island brief detailing the exceptions said.

Also mulling a challenge to the Paramount deal is Gabelli 25 Value Fund, which owns 12.5% of Paramount's Class A shares and is conducting its own books and records review, according to a letter it docketed Sept. 24.

"Delaware case law is consistently critical of shareholders who fail — as Mr. Baker has done here — to use their available rights pursuant to 8 Del. C. § 220 ('Section 220') to conduct a pre-complaint investigation before rushing to the courthouse," Gabelli 25 wrote.

The Baker complaint asserts, as do arguments in support of books and records demands, that the Paramount-Sundance deal lacked a requirement for approval of a majority of the unaffiliated minority stockholders, "transactional features that could have ensured a fair deal."

Instead, the complaint says, National Amusements agreed to use its control to push through the deal by written consent, under terms that include a $400 million fee if the deal is terminated.

The Paramount-Skydance deal includes a buyout of National Amusements for $2.4 billion. National Amusements controls Paramount through its ownership of 77% of the voting shares but only 10% ownership interest in the company.

National Amusements itself is controlled by Redstone, daughter of the late media mogul Sumner Redstone.

All the proposed class claims have asserted that Redstone drove the Paramount-Skydance deal under terms that assured her a premium for her Paramount shares.

The California State Teachers' Retirement System, APG Asset Management NV, Park Employees' Annuity & Benefit Fund of Chicago and George Douglas Ross are represented by Gregory V. Varallo, Daniel E. Meyer, Jeroen van Kwawegen, Christopher J. Orrico and Edward J. Timlin of Bernstein Litowitz Berger & Grossmann LLP, Chad Johnson, Noam Mandel and Jonathan Zweig of Robbins Geller Rudman & Dowd LLP, Nathaniel L. Orenstein and Justin Saif of Berman Tabacco and Joel Fleming, Lauren Godles Milgroom and Amanda Crawford of Equity Litigation Group LLP.

Scott Baker and the Baerlocher Family Trust are represented by Russell D. Paul, Michael Dell'Angelo, Lawrence Deutsch, Jacob M. Polakoff, John R. Timmer and Radha Nagamani Raghavan of Berger Montague.

The Paramount directors are represented by Blake Rohrbacher, Elizabeth J. Freud and Nicholas F. Fastria of Richards Layton & Finger PA and Gary A. Bornstein and Helam Gebremariam of Cravath Swaine & Moore LLP.

Shari Redstone and National Amusements are represented by A. Thompson Baylis, Adam K. Schulman and Caleb R. Volz of Abrams & Bayliss LLP and Peter Welsh, William Roberts, Martin J. Crisp and Ani-Rae Lovell of Ropes & Gray LLP.

Skydance Media and David Ellison are represented by David E. Ross and S. Michael Sirkin of Ross Aronstam & Moritz LLP.

The Rhode Island General Treasurer's Office is represented by Michael Hanrahan, Corinne Elise Amato, Eric J. Juray, Stacey A. Greenspan, Jason W. Rigby and Seth T. Ford of Prickett Jones & Elliott PA and Lee D. Rudy, Eric L. Zagar, Grant D. Goodhart, Cameron N. Campbell and Michael W. McCutcheon of Kessler Topaz Meltzer & Check LLP.

Paramount is represented in the Rhode Island case by Jon E. Abramczyk, D. McKinley Measley, Alexandra M. Cummings and Louis F. Masi of Morris Nichols Arsht & Tunnell LLP and Jonathan K. Youngwood and Meredith Karp of Simpson Thacher & Bartlett LLP.

Gabelli 25 Value Fund is represented by Farnan LLP.

The Baker case is Scott Baker v. Shari Redstone et al., case number 2024-0790, in the Court of Chancery of the State of Delaware.

The Rhode Island case is Rhode Island Office of the General Treasurer on behalf of the Employees Retirement System of Rhode Island v. Paramount Global, case number 2024-0457, in the Court of Chancery of the State of Delaware.

--Editing by Brian Baresch.

Law360 MVP Awards Go To Top Attys From 74 Firms

law360.com/articles/1888229/law360-mvp-awards-go-to-top-attys-from-74-firms

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Law360(October 20, 2024, 8:02 PM EDT) · Listen to article -- The attorneys chosen as Law360's 2024 MVPs have distinguished themselves from their peers by securing hard-earned successes in high-stakes litigation, complex global matters and record-breaking deals.

Competition for the MVP distinction was fierce this year, with editors reviewing more than 900 submissions to determine the winners. Beginning this week, Law360 will profile the 2024 class of MVPs, which consists of 157 attorneys from 74 firms and 34 practice areas.

Latham & Watkins topped the list this year, with MVPs in 10 practice areas. Paul Weiss and Sullivan & Cromwell tied for second with showings in eight practice areas, and Gibson Dunn and Sidley Austin took third place with seven wins.

Congratulations to this year's Law360 MVPs. Here's the full list of winners:

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Weedmaps' Parent Co. Faces Investor Suit After SEC Fine

By **Sydney Price**

Law360 (October 18, 2024, 7:39 PM EDT) -- The parent company of cannabis tech company Weedmaps was hit with an investor's proposed class action alleging shareholders were damaged following the U.S. Securities and Exchange Commission's announcement that it fined the company $1.5 million for allegedly making misleading statements about its monthly active users.

According to the suit filed by shareholder Seret Ishak on Thursday, before and after going public through a merger with a special purpose acquisition company, Weedmaps inflated its monthly average users metric. According to a **cease-and-desist order** issued by the SEC last month, a "large and increasing" percentage of users of WM Technology's website were actually people who visited a third-party site and were automatically shown WM Technology's site, but did not engage.

In addition to WM Technology, several of the company's current and former officers, including its former CEO Christopher Beals and former Chief Financial Officer Arden Lee, are parties in the investor's suit.

The suit's class period begins May 25, 2021, the day WM Technology filed an amended registration statement. Both the registration statement and a proxy statement filed the next day overstated monthly revenue from clients, the suit alleges.

Through the beginning of 2022, WM Technology "willfully inflated" metrics by reporting the company had at least 4.5 million active users each month.

For several months, WM Technology continued to manipulate the key financial statement, the suit alleges, but the truth began to emerge on Aug. 9, 2022, when the company disclosed in an SEC filing that its board of directors had received an internal complaint regarding "the calculation, definition, and reporting of [its] MAUs."

"Our internal data suggests that the vast majority of users who are directed to [the website] via pop-under advertisements close the site without clicking on any links," WM Technology said in a statement that day.

On this news, WM Technology shares declined 87 cents each, or about 25%, to close at $2.59 per share that day.

The truth did not fully emerge, the suit alleges, until last month when the SEC announced its $1.5 million settlement with WM Technology. The SEC alleged that Beals and Lee were repeatedly advised of declining user trends on WM Technology's site, but negligently continued signing the company's SEC filings and making public statements that included non-engaging users when discussing the company's purportedly growing user base, according to the complaint.

On this news, WM Technology shares declined approximately 2 cents, or about 2%, to close at 92 cents on Sep. 25.

Ishak accuses the defendants of acting with scienter, or actual knowledge of wrongdoing or reckless disregard, and violating the Securities Act and Exchange Act. He seeks damages on behalf of the proposed class.

Counsel for Ishak and a representative of WM Technology did not immediately respond to requests for comment on Friday.

Ishak is represented by Laurence M. Rosen of The Rosen Law Firm PA.

Counsel information for the defendants was not immediately available on Friday.

The case is Ishak v. WM Technology Inc. et al. case number 2:24-cv-08959, in the U.S. District Court for the Central District of California.

--Additional reporting by Katryna Perera. Editing by Vaqas Asghar.

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Credit Suisse, PwC Fight Bondholders' Separate Merger Suits

By **Katryna Perera**

Law360 (October 18, 2024, 7:58 PM EDT) -- Credit Suisse and PwC have urged a New York federal judge to toss a proposed class action alleging that they concealed the impact of quarterly losses and the bank's inability to retain client funds leading up to its takeover by UBS AG, saying the plaintiff launched the suit to circumvent its rejected bid to be lead plaintiff in a similar suit.

Credit Suisse and PwC filed separate dismissal motions on Thursday, saying the issues raised in the current action are almost identical to those raised in Diabat v. Credit Suisse Group AG et al .

The **Diabat action** alleges that Credit Suisse and several current and former executives made misleading statements or failed to disclose to investors that the bank was experiencing significant outflows throughout 2022 and that its internal controls had material weaknesses.

The Diabat suit 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, U.S. District Judge Colleen McMahon dismissed PwC from the litigation altogether **in September**, ruling that the complaint failed to show fraudulent intent or recklessness on the part of the accounting giant.

In its Thursday dismissal **motion**, Credit Suisse argued that the plaintiff in the current action, Core Capital Partners Ltd., moved to be named lead plaintiff in the Diabat action but was rejected.

Now Core Capital is trying to get around that rejection with a **new suit** in which it seeks to represent the same class of purchasers of Credit Suisse's additional tier-one bonds it sought to represent in Diabat, the bank argued.

But even if the court wanted to consider the adequacy of Core Capital's complaint, the suit should still be dismissed for several reasons, the bank said.

First, Core Capital's suit fails to plead loss causation. According to the motion, Core Capital attributed its losses not to Credit Suisse's alleged fraud or any disclosure made by the bank but to an independent order issued by the Swiss regulator FINMA for Credit Suisse to write down the value of all outstanding AT1 bonds to zero.

The investment group also does not allege that it sold its AT1 bonds after the write-down directive was issued, the motion said.

"Thus, regardless of any fluctuations in the price of Credit Suisse's AT1 bonds ... Core Capital would have ended up in exactly the same place as a result of FINMA's write-down directive," the motion stated. "This constitutes not only a failure to plead loss causation but a rare instance of a complaint affirmatively pleading the absence of loss causation."

The suit also fails to plead any actionable false or misleading statements and instead contains "puzzle pleading," the bank argued, and most of the challenged statements were already tossed by the court in the Diabat action.

"This court has already stated that, '[t]o the extent that plaintiff alleges in the Core Capital complaint that specific statements made by defendants were false and misleading, the court is going to rule in this case in exactly the same manner as [it] did in Diabat,'" the motion said.

"Thus, putting aside the puzzle-pleading nature of the Core Capital complaint, most of the alleged misstatements purportedly identified are inactionable in any event for the same reasons this court found such statements to be inactionable in Diabat," the motion stated.

The bank also argued that the suit failed to plead scienter, or knowledge of wrongdoing, and control person liability.

PwC's arguments for dismissal rest on the fact that it has already been removed from the Diabat action, but the accounting firm further argued that Core Capital's allegations against it are "far flimsier" than those in the Diabat action.

"By contrast with the allegations in Diabat ... the complaint barely mentions PwC AG," the **motion** stated. "There are no allegations whatsoever about the conduct of the subject audits or reviews, much less contemporaneous facts. There are no 'red flags' alleged. The 'scienter' section of the complaint includes zero factual allegations related to PwC AG's conduct or mental state, referring to PwC AG only in passing."

Core Capital filed its complaint last year, claiming it purchased Credit Suisse AG's tier-one bonds, also called AT1 bonds or contingent convertibles, at artificially inflated prices. AT1 bonds act as shock absorbers to protect a bank if its capital levels fall below a certain threshold, according to the complaint.

Credit Suisse's AT1 bondholders, who held about 16 billion Swiss francs ($17 billion) at the time in the securities, learned in early 2023 that their investments were written down to zero in connection with the UBS merger, the complaint said.

Core Capital Partners filed the lawsuit on behalf of investors who purchased the bonds in the U.S. between Feb. 18, 2021, and March 20, 2023. Between the start of the class period and November 2022, Credit Suisse assured investors that its internal disclosure controls and procedures were effective, according to the suit. In October 2022, Credit Suisse experienced a "sharp increase" in withdrawals of client funds after a series of quarterly losses and risk and compliance failures, the suit stated.

The impact of these customer losses began to emerge beginning Nov. 23, 2022, Core Capital said, when Credit Suisse announced in its financial results for the fourth quarter of 2022 that customers had withdrawn approximately 10% of all assets under management as of the end of 2022's third quarter and that it expected to incur a loss of approximately 1.5 billion Swiss Francs in the fourth quarter of that year.

In response to this news, three different series of Credit Suisse's AT1 bond prices fell approximately 3% on Nov. 23, the complaint stated.

On Feb. 9, 2023, the truth about Credit Suisse's financial woes "fully emerged" when it reported customer outflows of 110.5 billion Swiss francs in the fourth quarter of 2022, a figure that "far exceeded" market expectations, according to the complaint.

In late February 2023, media outlets reported the Swiss Financial Market Supervisory Authority, also known as FINMA, was reviewing the validity of comments made by then-CEO Axel P. Lehmann a couple of months earlier regarding customer outflows. In a December 2022 interview, Lehmann told The Financial Times that outflows had not only "completely flattened out" but "partially reversed," according to the complaint.

On the news of the review, three different series of Credit Suisse's AT1 bond prices fell approximately 4% on Feb. 21, the complaint alleged.

The suit alleged that bondholders continued to be damaged throughout March 2023 as news emerged that Credit Suisse lacked sufficient internal controls and that FINMA had approved UBS to take over

Credit Suisse **through a merger**. That month, investors learned AT1 bonds would be written down to zero in connection with the merger, the suit stated.

On this news, three different series of Credit Suisse's AT1 bond prices fell over 80% on March 20, the complaint alleged.

In April 2023, investors who held over 4.5 billion Swiss francs of Credit Suisse bonds **sued FINMA** for its decision to wipe out their investment as part of the UBS takeover.

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

Core Capital is represented by Jeremy A. Lieberman, J. Alexander Hood II, Thomas H. Przybylowski and James M. LoPiano of Pomerantz LLP and Peretz Bronstein of Bronstein Gewirtz & Grossman LLC.

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

PwC is represented by Michael G. Bongiorno, Andrew Rhys Davies and Brad E. Konstandt of Wilmer Cutler Pickering Hale and Dorr LLP.

The case is Core Capital Partners Ltd. v. Credit Suisse Group AG et al., case number 1:23-cv-09287, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Sydney Price. Editing by Rich Mills.

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Chancery Keeps Better Therapeutics SPAC Suit Alive

By **Katryna Perera**

Law360 (October 18, 2024, 8:40 PM EDT) -- A Delaware vice chancellor on Friday refused to dismiss a suit challenging the take-public merger of now-defunct Better Therapeutics, saying the investors have sufficiently pleaded direct breach of fiduciary duty claims against the medical technology business' special purpose acquisition company partner and its directors.

Vice Chancellor Sam Glasscock III issued a **memorandum opinion** stating that plaintiff John Solak had sufficiently **alleged** that the 2021 merger between Better Therapeutics and blank check company Mountain Crest Acquisition Corp. II was pushed through because it created a "windfall" for the SPAC's sponsor and insiders, while simultaneously being detrimental to public stockholders.

However, before explaining his reasoning behind rejecting the defendants' dismissal motion, Vice Chancellor Glasscock took the time to compare the volume of SPAC matters before the Chancery Court to an anaconda's eating habits.

"The adult anaconda, they say, eats perhaps once a year; open its belly, and you will see not what it is eating, but what it has eaten in times past. So too with the progress of litigation through the belly of Chancery," the vice chancellor said. "The sorting out of the fiduciary problems inherent in the SPAC form, together with other factors, has reduced the SPAC population on the ground, but the bulge of SPAC carcasses continues to be digested in equity."

Turning to the defendants' **dismissal motion**, the vice chancellor said Solak's allegations are "not strong" compared with other SPAC matters that have come before the court and survived dismissal, but nonetheless, he finds "the causes of action pled to lie on side of viability."

In determining that Solak had stated a claim for breach of fiduciary duty, Vice Chancellor Glasscock used Delaware's entire fairness standard of review after finding that the suit involved a conflicted controller transaction.

"The controller defendants were incentivized to discourage redemptions [of the SPAC's shares] to 'ensure greater deal certainty.' The [SPAC] sponsor thus 'effectively competed with the public stockholders for the funds held in trust,'" he said. "Because of these conflicts between the controller defendants and the public stockholders, this transaction triggers entire fairness review."

Under the entire fairness standard, the defendants, as fiduciaries, must demonstrate that the merger was entirely fair to both the corporation and stockholders.

The proxy statement for the merger between Better Therapeutics and Mountain Crest valued the SPAC's shares at $10 per share, but Solak alleges that was misleading since the proxy also failed to disclose the net cash per share that Mountain Crest would contribute to the deal — which was less than $7.50 per share, according to the motion.

Solak argued that this omission of the net cash value was highly material to stockholders' redemption decisions.

Vice Chancellor Glasscock noted that case law dictates that failure to disclose net cash per share is not, in itself, a breach of duty, but in the current action, the proxy statement both misstates an investment value of $10 per share and also fails to disclose that the actual amount of cash being placed into the merger was 25% less than disclosed.

It is "reasonably conceivable" that a stockholder would find the cash per share figure material to their redemption decision "in light of the assertion of a $10 valuation in the proxy," the vice chancellor said, and at the current pleading stage, it is enough to state a claim.

"I find these allegations — that the fiduciaries disclosed an investment value untethered to an undisclosed cash per share figure — sufficient to state a claim of breach, since it is 'reasonably inferable' under the facts alleged 'that a rational ... investor would simply look to the $10 per share consideration and assume that net cash per share roughly matched this figure,'" the opinion said.

According to the opinion, the defendants argued that the proxy could not have been misleading since roughly 84% of eligible shares were redeemed. The vice chancellor acknowledged that this suggests a lack of material omission, but he still found Solak's allegations sufficient to state a breach of fiduciary claim.

The vice chancellor also noted that this case appears to be the first in which a dismissal motion is denied solely on an "affirmative statement of investment value in conflict with a failure to also disclose net cash."

"But as defendants conceded at oral argument, nothing in the case law suggests that such a claim, adequately pled and considered alone, could not survive a motion to dismiss," the vice chancellor said. "Again, the allegations here may ultimately not support a finding of unfairness, but plaintiff has met his pleading burden to survive a motion to dismiss."

Vice Chancellor Glasscock also said on Friday that Solak had adequately pleaded a nonexculpated claim and unjust enrichment claims against the defendants.

Mountain Crest merged with the prescription digital therapeutics platform Better Therapeutics in October 2021, and the business combination created a company that kept the Better Therapeutics name and traded on the Nasdaq exchange as BTTX.

In March, Better Therapeutics announced that it had terminated all of its employees and was exploring strategic alternatives, including an assignment for the benefit of creditors or a wind-down of the company.

Solak sought to amend his complaint in response, but Vice Chancellor Glasscock **denied the motion** in May, saying the motion to dismiss was already fully briefed.

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

Solak is represented by Blake A. Bennett of Cooch and Taylor PA, and Jeffrey M. Norton and Benjamin D. Baker of Newman Ferrara LLP.

The defendants are represented by Andrew H. Sauder, Daniel S. Atlas and Ryan J. Levan of Dailey LLP.

The case is John Solak v. Mountain Crest Capital LLC et al, case number 2023-0469, in the Court of Chancery of the State of Delaware.

--Additional reporting by Rose Krebs. Editing by Alex Hubbard.

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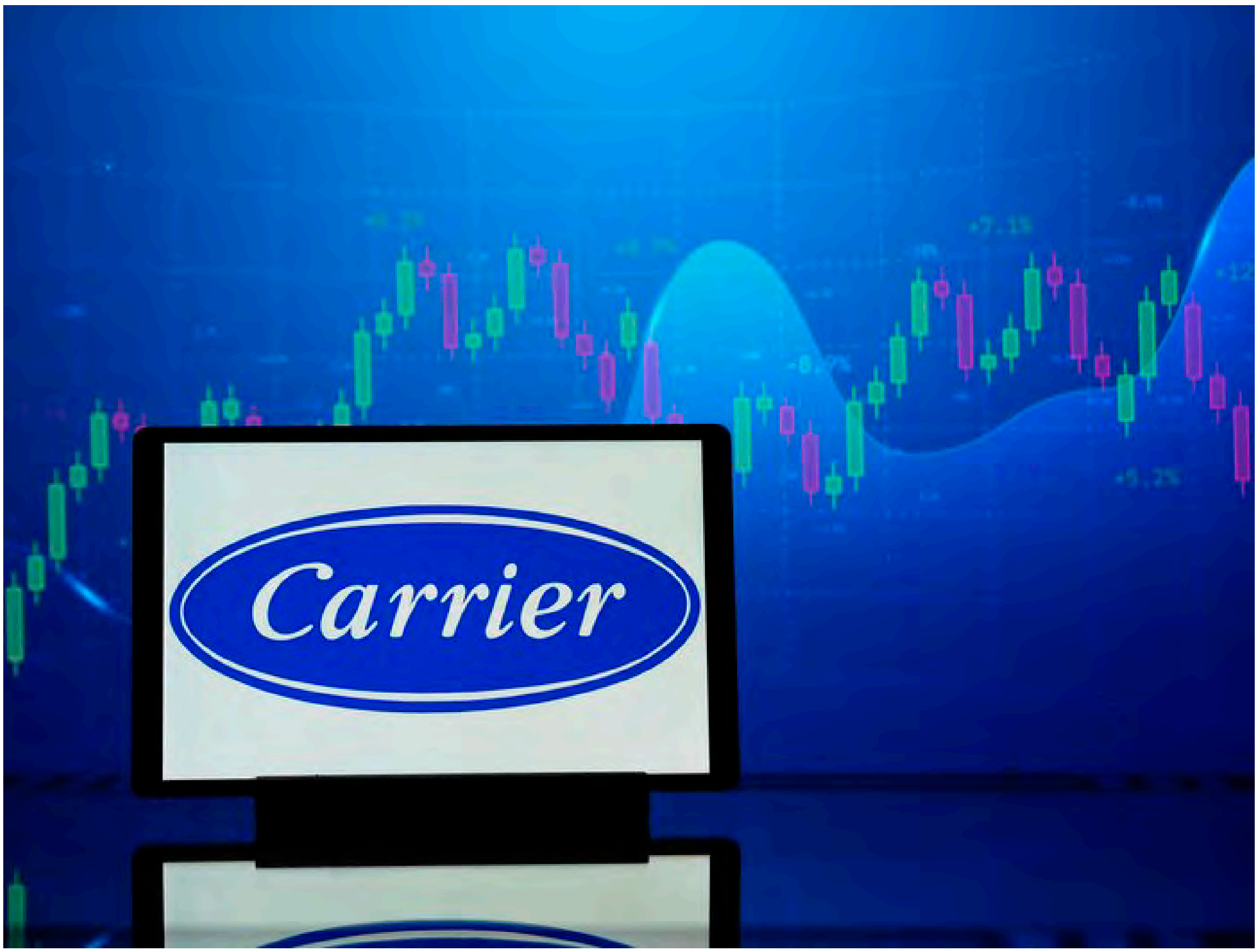
Carrier To Pay $615M Over Kidde-Fenwal Fire Foam Claims

By **Lauren Berg**

Law360 (October 18, 2024, 11:35 PM EDT) -- Carrier Global Corp. revealed in a U.S. Securities and Exchange Commission filing Friday that it will pay at least $615 million as part of a settlement in connection to its ownership of bankrupt Kidde-Fenwal Inc., which faces multidistrict litigation arising from its manufacture of firefighting foam with deadly "forever chemicals."



Even though Carrier Global Corp. has entered into three settlement agreements relating to the manufacture of firefighting foam with deadly "forever chemicals," the company said it has not admitted any liability or wrongdoing. (Photo by Igor Golovniov / SOPA Images/Sipa USA) *(Sipa via AP Images)

In a **Form 8-K** filing, Carrier explained it will enter three distinct settlement agreements: one with Kidde-Fenwal — now known as KFI Wind-Down Corp.; a second with the official committee of unsecured creditors appointed in KFI's bankruptcy case; and a third with the co-leads of the plaintiffs' executive committee appointed in the **firefighting foam MDL** in South Carolina federal court.

Kidde-Fenwal **filed for bankruptcy** in May 2023 because of the thousands of lawsuits it faces from firefighters, water suppliers, governmental entities and others over its aqueous film-forming foam, which is used to put out fires.

Claimants assert that the product contains per- and polyfluoroalkyl substances, or PFAS, that are dangerous to public health and the environment. The company was facing more than $1 billion in claims when it entered Chapter 11.

The first of Carrier's proposed settlements relates to estate claims, the filing states.

"Upon bankruptcy court approval, the estate claims settlement will permanently resolve all present and future claims that Carrier is responsible for any liabilities of KFI, including all liabilities arising from KFI's manufacture and sale of" the firefighting foam, Carrier said.

The other two proposed settlements relate to a "substantial amount" of direct claims against Carrier on allegations that United Technologies Corp. — which was spun-off as part of Carrier's separation from the company in April 2020 — engaged in conduct separate from KFI that harmed MDL claimants, according to the filing. As part of their split, Carrier said it had agreed to indemnify UTC for the direct claims.

Carrier emphasized in the filing that it is not admitting liability or wrongdoing by entering into the settlement agreements.

Under the agreements, Carrier will pay $615 million in cash over five years; all net sale proceeds from the sale of KFI's assets, which are estimated to be $115 million; and contribute a portion of the right-to-recover proceeds under insurance policies. Carrier will receive up to $2.4 billion of proceeds from such insurance policies and will contribute the first $125 million to the direct claim settlements, the filing states.

Carrier said it expects the insurance payments it receives, on the whole, to cover the full amount required under the proposed settlements.

A representative for the company did not immediately respond to a request for comment late Friday.

In August, Carrier announced that it had inked an **agreement to sell** its commercial and residential fire units to an affiliate of Lone Star Funds at an enterprise value of $3 billion, completing the company's strategic plan to sell off several business units and focus on its core ventilation business.

Paul Weiss Rifkind Wharton & Garrison LLP and Linklaters LLP are guiding Carrier on the deal, which is expected to close by the end of the year, subject to regulatory approvals and other customary conditions, Carrier said.

The sale is the final piece of a plan Carrier disclosed when it agreed to buy Viessmann Climate Solutions **in April 2023** in a roughly $13.2 billion deal. At that time, the company said it would exit its fire, security and commercial refrigeration businesses.

Before that deal, Carrier agreed to sell its **industrial fire business** to Sentinel Capital Partners for about $1.4 billion; the **security business** to Honeywell at an enterprise value of about $5 billion; and the **commercial refrigeration business** at a $775 million enterprise value.

--Additional reporting by Al Barbarino and Vince Sullivan. Editing by Michael Watanabe.

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Consumer Capital One-Discover Suit Paused For Gov't Review

By **Bryan Koenig**

Law360, Alexandria, Va. (October 18, 2024, 9:34 PM EDT) -- A Virginia federal judge hit pause Friday on a private cardholder proposed class action challenging Capital One's planned $35 billion acquisition of Discover Financial Services, agreeing with the companies that it's best to let still-pending review by banking regulators play out first.

Ruling from the bench, U.S. District Judge Anthony J. Trenga stayed the case "in all respects" until government bodies, such as the Federal Reserve, the Office of the Comptroller of the Currency and the U.S. Department of Justice, have given the merger the all-clear. If the deal receives government approval and the cardholders still want to proceed, Judge Trenga said he could get the case ready for trial relatively quickly.

The credit card giants had sought to **toss or at least pause** the suit precisely because those government reviews were still ongoing, arguing that while they believed the deal to be competitively harmless if not beneficial, the prospect of any government pushback or forced changes made the current suit premature.

"Once that happens, there is a new circumstance that can be presented to the court," David Gelfand of Cleary Gottlieb Steen & Hamilton LLP, an attorney for Capital One Financial Corp., said during the hearing on the motion.

Judge Trenga, for his part, signaled potential trouble ahead for the cardholder suit, speaking to "very substantial issues as to the adequacy of the pleading."

Amanda F. Davidoff of Sullivan & Cromwell LLP, an attorney for Discover, argued Friday that the lawsuit is grounded entirely in speculation on the post-deal-reality, including allegations that Visa and Mastercard bribed Capitol One with higher transaction interchange fee shares from what merchants pay, in exchange for the degrading of the Discover network. She similarly assailed allegations based on Capital One's plans to distribute cards for Discover's network and Visa and Mastercard, noting that the distribution agreements with Visa and Mastercard already exist and describing it as nonsensical that those agreements would suddenly become illegal after the challenged transaction.

Davidoff said the credit card companies have nowhere near the market share for credit card issuers needed to raise concentration issues and that the transaction would actually deconcentrate the market by empowering Discover to take market share from Visa and Mastercard.

Two Capital One cardholders **launched the suit in July**, claiming the merger would drive down competition and further consolidate the already concentrated credit card market.

Yavar Bathaee of Bathaee Dunne LLP, an attorney for the cardholders, had pushed to keep the case going Friday, arguing that while trial can wait until after the deal receives regulatory approval, discovery should move forward now. Pointing to Capital One CEO Richard Fairbank's plans for the merger — which Gelfand described as innocuous — Bathaee said, "it's very clear" the deal will change the market structure in a way that would allow anticompetitive collusion.

Bathaee also argued that combining Discover and Capital One takes away competitive pressure to reduce prices. He also argued that regardless of how the deal would impact concentration, the transaction is occurring in an already concentrated market where Discover is among just four companies operating in domestic credit card payment processing.

As for ripeness, Bathaee said tossing the suit now would essentially cut off any chance of challenging it after closing, thanks to a quirk of how U.S. law handles banking mergers. Gelfand disputed that point Friday, saying any potential plaintiffs would have between 15 and 30 days from regulatory approval to deal closing in which they could file a challenge.

Judge Trenga seemed somewhat sympathetic to the plaintiffs' arguments. While the judge questioned if the prospects of a deal created sufficient injury for standing to sue, he said the wording of the law appears open to filing suit earlier.

The plaintiffs are represented by Brian J. Dunne, Edward M. Grauman, Andrew M. Williamson, Yavar Bathaee and Andrew C. Wolinsky of Bathaee Dunne LLP and John Jeffrey Eichmann.

Capital One is represented by Ryan A. Shores, David Gelfand, Kenneth Reinker, Nowell Bamberger and Jacob M. Coate of Cleary Gottlieb Steen & Hamilton LLP, John S. Moran, Emily E. Kelley and Bryan A. Fratkin of McGuireWoods LLP and Ryan McLeod, Christina Chu Ma and Adam Goodman of Wachtell Lipton Rosen & Katz.

Discover is represented by Daniel J. Richardson, Amanda F. Davidoff, Joseph J. Matelis and Elizabeth A. Rose of Sullivan & Cromwell LLP.

The case is Baker et al. v. Discover Financial Services Inc. et al., case number 1:24-cv-01265, in the U.S. District Court for the Eastern District of Virginia.

--Additional reporting by Katryna Perera. Editing by Drashti Mehta.

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Teva Signs Deal With Indirect Buyers In Effexor Antitrust Suit

By **George Woolston**

Law360 (October 18, 2024, 7:42 PM EDT) -- A class of consumers and third-party payers have reached a deal with Teva Pharmaceuticals to resolve antitrust litigation over a purported scheme to delay generic competition for the antidepressant drug Effexor XR, according to a court filing.

James E. Cecchi of Carella Byrne Cecchi Brody & Agnello PC, counsel for the indirect purchaser plaintiffs in the litigation, said Wednesday in a letter to the U.S. District Court for the District of New Jersey that the class has reached an "agreement in principle" to resolve litigation more than a decade old, and that the parties are documenting the proposed settlement.

Discovery on the class's claims is now paused, and the parties have until Jan. 24 to file a motion seeking approval of a settlement or a letter advising the court as to the status of their efforts to prepare one, according to a text order on Thursday.

The indirect purchaser class sued Teva Pharmaceutical Industries Ltd., Teva Pharmaceuticals USA Inc. and Pfizer Inc. subsidiary Wyeth and affiliated companies in 2012 alleging that the two pharmaceutical manufacturers engaged in an anticompetitive scheme to roadblock the approval and marketing of generic versions of Effexor XR, a prescription antidepressant used to treat anxiety disorder in adults.

The class previously **reached** a $25.5 million settlement with Wyeth earlier this year.

The class includes consumers and insurance carriers, such as providers of health, welfare and pension benefit plans, Taft-Hartley funds and municipalities in 21 states that purchased, paid or provided reimbursement for Effexor XR or AB-rated generic versions of Effexor XR from June 14, 2008, through May 31, 2011.

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

The indirect purchaser plaintiffs are represented by James E. Cecchi and Caroline F. Bartlett of Carella Byrne Cecchi Brody & Agnello PC, by Michael F. Buchman of Motley Rice LLC, by James R. Dugan II, Douglas R. Plymale and David Scalia of Dugan Law Firm PLC, by Kenneth A. Wexler, Justin N. Boley and Bethany R. Turke of Wexler Boley & Elgersma LLP, by Jeffrey L. Kodroff and John Macoretta of Spector Roseman & Kodroff PC, by Richard J. Burke of Quantum Legal LLC, and by Marvin A. Miller, Lori A. Fanning and Matthew E. Van Tine of Miller Law LLC.

Teva is represented by William H. Trousdale and Jared Paul DuVoisin of Tompkins McGuire Wachenfeld & Barry LLP.

The case is In re: Effexor XR Antitrust Litigation, case number 3:11-cv-05479, in the U.S. District Court for the District of New Jersey.

--Editing by Karin Roberts.