

Judge: Schools Can Sue Social Media for Expenses Related to Addicted Students

LAW [law.com/nationallawjournal/2024/10/25/judge-schools-can-sue-social-media-for-expenses-related-to-addicted-students-398-144161](https://www.law.com/nationallawjournal/2024/10/25/judge-schools-can-sue-social-media-for-expenses-related-to-addicted-students-398-144161)

Amanda Bronstad



Credit: insta_photos/Adobe Stock

U.S. District Judge Yvonne Gonzalez Rogers, who is overseeing multidistrict litigation in the Northern District of California, allowed negligence claims brought by school districts to move ahead against Meta Platforms, which owns Facebook and Instagram, and the parent companies of TikTok, Snapchat and YouTube.

October 25, 2024 at 05:16 PM

🕒 5 minute read

Social Media



By Amanda Bronstad

staff reporter



The original version of this story was published on The Recorder

A federal judge has allowed school districts to sue social media sites, including Instagram and TikTok, for expenses they incurred dealing with students who are addicted to their platforms.

U.S. District Judge Yvonne Gonzalez Rogers, who is overseeing the social media addiction multidistrict litigation in the Northern District of California, allowed negligence claims brought by school districts and local governments to move ahead against Meta Platforms, which owns Facebook and Instagram, and the parent companies of TikTok, Snapchat and YouTube.

"Defendants principally contend the school district and local government entities' alleged injuries are too remote or attenuated for the law to redress," Rogers wrote in a Thursday opinion. "In most ways, the court disagrees."

The economic impact on schools of students becoming addicted to social media was foreseeable, she concluded.

Concerns from the social media companies that allowing such claims would create a "limitless pool of potential plaintiffs," she wrote, is "a dramatic overstatement."

"Today's ruling is a significant victory for schools, teachers, and administrators who are on the front lines of the nation's youth mental health crisis," wrote co-lead plaintiffs' counsel Lexi Hazam, of San Francisco's Lieff Cabraser Heimann & Bernstein, and Motley Rice's Previn Warren in Washington, D.C. "Because of the addictive design of Instagram, Snapchat, TikTok, and YouTube, students are struggling. That means schools are struggling—their budgets are stretched and their educational missions are diverted as they shoulder the added responsibility of supporting kids in crisis."

Montgomery, Alabama-based Beasley Allen, which represents hundreds of school districts, said in a separate statement that expenses for its clients include hiring mental health professionals and resources, and limiting social media use during school hours.

"We are encouraged by Judge Gonzalez Rogers' decision to allow these important claims to proceed," said Beasley Allen's Joseph VanZandt, who is state liaison counsel in the multidistrict litigation. "This ruling affirms the serious nature of the allegations and the need for accountability from these companies."

In June, Los Angeles Superior Court Judge Carolyn Kuhl, who is overseeing related cases in California state courts, dismissed four complaints by school districts against the same four social media defendants.

A spokesperson said Meta disagreed with Thursday's ruling.

"We've developed numerous tools to support parents and teens, and we recently announced that we're significantly changing the Instagram experience for tens of millions of teens with new Teen Accounts, a protected experience for teens that automatically limits who can contact them and the content they see," according to Meta's statement.

"Providing young people with a safer, healthier experience has always been core to our work," José Castaneda, a spokesperson for Google, which owns YouTube, said in a separate statement. "In collaboration with youth, mental health and parenting experts, we built services and policies to provide young people with age-appropriate experiences, and parents with robust controls. The allegations in these complaints are simply not true."

Snapchat parent Snap Inc. referred requests for comment to its website, which, earlier this month, flagged new features that protect teenager users from "bad actors."

"We take our responsibility to protect teens very seriously," the company said on its website.

A representative of ByteDance, which owns TikTok, did not respond to a request for comment.

'The Alleged Injuries Here Are Distinct'

Gonzalez Rogers already issued two prior orders refusing to dismiss other claims against the social media defendants. Last year, the judge allowed some product liability claims relating to design defects by individual plaintiffs to move ahead. And, earlier this month, she green-lighted consumer claims brought by attorneys general in more than 30 states against Meta.

In Thursday's order, Gonzalez Rogers found that, as in her prior decisions, the school district claims that focused on certain features of the social media sites, such as the age verification process, parental controls and other protective limits, were not barred by the Communications Decency Act's Section 230, which immunizes tech companies from the actions of third parties, or the First Amendment. Other features, such as algorithms to promote addictive users, are protected, she concluded.



U.S. District Judge Yvonne Gonzalez Rogers of the Northern District of California. Photo: Jason Doiy/ALM

She also found that the injuries to students were not derivative to those against school districts but, in fact, distinct.

"The alleged injuries here are distinct and borne exclusively by the school districts," she wrote. "Defendants notably do not argue that minor students bear the cost of increased expenditures of healthcare resources at their schools."

Her ruling did not address separate claims for public nuisance, which would come out in a separate order.

School districts and individual plaintiffs will be the subjects of the first bellwether trials. At a Friday status hearing, Gonzalez Rogers outlined procedures for experts, whose reports are due May 16.

"Causation issues are going to be critical," she said.

She also said she would have four consecutive bellwether trials, two selected by plaintiffs counsel and two by defense counsel, designed to "stop some of the gamesmanship" that comes in the bellwether process in multidistrict litigation.

"If you start buying people off or dismissing because you didn't have a good plaintiff, it's on you," she said. "But you won't get your bellwethers at the expense of the other side."

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New Suit - Trademark

Dale Siebert was hit with a trademark infringement lawsuit on Oct. 27 in Illinois Southern District Court. The court case, brought by Fisherbroyles LLP on behalf of firearms manufacturer Watchtower Firearms, pursues claims against the defendant for the ongoing use of the 'Apachee trigger' mark for component parts for guns. The

Second Circuit Weighs Whether Bristol-Myers Delayed Cancer Drug

By Nyah Phengsitthy

Documents

 [Docket](#)

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- Investors claimed manufacturer misled them on payout
 - Court analyzes Covid-19 impact during drug approval

Bloomberg Law News 2024-10-28T10:24:21795030614-04:00

Second Circuit Weighs Whether Bristol-Myers Delayed Cancer Drug

By Nyah Phengsitthy 2024-10-25T12:34:24000-04:00

- Investors claimed manufacturer misled them on payout
- Court analyzes Covid-19 impact during drug approval

FDA drug approvals during the Covid-19 pandemic fueled questions from the Second Circuit on Friday in a shareholder class action alleging Bristol-Myers Squibb Co., misled them about a payout dependent on the approval of cancer drugs.

At issue before a three-judge panel in the US Court of Appeals for the Second Circuit is whether a lower court was right to toss a class action alleging Bristol-Myers misled investors about a payout. The payment was dependent on the Food and Drug Administration's approval of three cancer therapy drugs—Liso-cel, Idecel, and Ozanimod—tied to Bristol-Myers' 2019 acquisition of another pharmaceutical company, Celgene.

Bristol-Myers agreed, as part of its multibillion-dollar merger with Celgene, to issue contingent value rights to Celgene shareholders that would pay out \$9 per CVR—\$6.4 billion in total—but only if all three of Celgene's milestone drugs received FDA approval by certain dates.

A CVR is a security payable only if a future event occurs.

The FDA approved one of the three drugs after the deadline—the lymphoma drug Liso-cel. The CVRs then expired and were considered worthless.

The investors alleged Bristol-Myers slow-rolled the FDA approval process in order to avoid making payments under the CVRs.

Michael B. Eisenkraft, who represents the investors and is a partner at Cohen Milstein Sellers & Toll PLLC, said that while Bristol-Myers used the pandemic to support why the FDA approval was delayed, “Bristol was doing many other drug approval processes during the same time period.”

“Covid didn’t fail to fill out the application properly. Covid didn’t assign a junior person to a senior person’s job,” Eisenkraft said. “It was just this one drug that suffered mishap after mishap.”

But Judge Pierre N. Leval, appointed by President Bill Clinton, wasn’t too convinced by Eisenkraft’s Covid-19 argument.

“I’m not sure I find what you’re saying now very persuasive,” Leval said. “Covid turned everything upside down. People were no longer working in the offices during Covid. People were working from home. They were dispersed. The amount of dislocation that Covid caused is hard to describe.”

Bristol-Myers argued that the FDA ultimately approved all three drug applications during disruptions from the pandemic. The agency approved the Liso-cel application 36 days after its Dec. 31, 2020, milestone date, and therefore, the CVRs expired without value in accordance with their terms.

“Do we feel good about the process? Yes, we got it approved. Was it approved by December 31? Unfortunately not. Why? Because of Covid,” said John J. Clarke Jr., a partner at DLA Piper LLP representing Bristol-Myers. “BMS was candid. It kept the market informed of developments.”

The US District Court for the Southern District of New York in March 2023 dismissed the class because the investors failed to plead scienter, which would have shown that the company or its officers intended to deceive, manipulate, or defraud.

The investors filed an amended complaint, which alleged violations of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5, but that claim was dismissed in March 2024 because there was still no showing of scienter.

Bristol-Myers argued that the lower court’s decision was right because the investors could not specify how the statements they challenged were false or misleading.

But Leval said the relationship between scienter and falsity is “unusual” in this case because “the falsity and the scienter are identical to one another.”

Leval also said he couldn’t agree with Bristol-Myers’ claims that the investors haven’t alleged any contrary fact.

"The contrary fact that they're alleging is the intention not to have the prospect where they say we're on track and we're working closely with the FDA to get it done on time."

Chief Judge Debra Ann Livingston, appointed by President George W. Bush, and Judge Alison J. Nathan, appointed by President Joe Biden, also sat on the panel.

The case is SM Merger/Arbitrage, L.P. v. Bristol Myers Squibb Co., 2d Cir., No. 24-826, oral argument 10/25/24 .

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This Week in Chancery Court: TripAdvisor Appeal, Trade Desk

By Jennifer Kay

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This Week in Chancery Court: TripAdvisor Appeal, Trade Desk

By Jennifer Kay 2024-10-28T05:00:02000-04:00

TripAdvisor Inc. will argue this week for the reversal of a Delaware Chancery Court opinion allowing shareholders to pursue damages over the travel review and booking website operator's planned reincorporation in Nevada.

A look at what else is coming up in Chancery Court and the Delaware Supreme Court this week:

Tuesday: In re SwervePay Acquisition LLC, Del. Ch., No. 2021-0447, trial 10/28/24.

At issue: SPOSC Investment Holdings LLC allege Blue Star Innovation Partners and New Mountain Capital defrauded them during negotiations to buy SwervePay LLC's payment facilitator technology in 2020 for \$10 million plus post-closing earnouts. Former top executives at SwervePay say in a brief that non-compete agreements they signed in the deal are unenforceable because of fraudulent statements made about the revenues of a financial software maker the investment firms planned to combine with SwervePay. The investment firms, the buyers in the deal, say in a pretrial brief that the sellers misrepresented the stability of SwervePay's relationship with its most important vendor, and they missed post-merger milestones for the earnout payments.

Court action: A five-day trial begins Monday in Wilmington, Del.

Blue Star, New Mountain Sued for Fraud by SwervePay Ex-Leaders

Wednesday: Maffei v. Palkon, Del., No. 125,2024, oral arguments 10/30/24.

At issue: TripAdvisor and its controlling shareholder, George Maffei, will argue to the high court that moving under Nevada's stronger litigation protections for fiduciaries doesn't constitute a material benefit requiring stricter judicial review, as the Chancery Court decided Feb. 20. Nevada argues in an amicus brief supporting TripAdvisor that its critics exaggerate the differences in policy decisions between the states. The investors challenging TripAdvisor's relocation plans say in a brief that the move wasn't approved by an independent special committee and was "overwhelmingly rejected by minority stockholders."

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

TripAdvisor Argues Delaware's Relocation Standards Are Too High

Wednesday: AG Mobile Holdings LP v. H.I.G. Mobile LP, Del. Ch., No. 2023-1103, oral arguments 10/30/24.

At issue: Audax Group LP countersued its private equity rival H.I.G. Capital LLC in November 2023, about a week after H.I.G. brought fraud claims in Delaware Superior Court over a \$915 million telecom-software deal. H.I.G. seeks to dismiss the Chancery Court case, arguing in a brief that it's "a tactical ploy to distract" from the other litigation that claims executives at Audax affiliates artificially inflated Mobileum Inc.'s revenues before selling a majority stake in the venture to H.I.G. Audax says in a brief that almost from the beginning of the partnership, H.I.G. "ran the business like its own private fiefdom."

Court action: Oral arguments on the motion to dismiss will be heard in Wilmington, Del., before Delaware Superior Court Judge Meghan A. Adams, who is also presiding over a related case.

Audax Countersues H.I.G. Over \$915 Million Deal Fraud Claims

Wednesday: Gunderson v. Trade Desk Inc., Del. Ch., No. 2024-1029, oral arguments 10/30/24.

At issue: Vice Chancellor Paul A. Fioravanti Jr. fast-tracked litigation alleging that billionaire Jeff Green's plan to move Trade Desk Inc.'s corporate home to Nevada is an effort to avoid Delaware laws that restrict insider self-dealing. The shareholder suing Green and other board directors wants Fioravanti to block the reincorporation until the advertising tech company obtains supermajority approval for the plan from its stockholders, according to a brief supporting a motion for summary judgment. Green and the directors also have filed a motion for summary judgment, arguing in a brief that the relocation "requires only a majority vote."

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

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

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Alibaba to Pay \$433 Million to Settle Antitrust Investor Suit

By Isaiah Poritz

Documents

 [Settlement Memo](#)

 [Docket](#)

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- Payment would be among the 50 largest class action settlements
 - Investors also claimed Alibaba misled about related firm's IPO success

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Alibaba to Pay \$433 Million to Settle Antitrust Investor Suit

By Isaiah Poritz 2024-10-25T19:22:15000-04:00

- Payment would be among the 50 largest class action settlements
- Investors also claimed Alibaba misled about related firm's IPO success

Alibaba Group Holding Ltd. on Friday announced that it will pay \$433.5 million to settle a securities fraud class action in Manhattan federal court.

The accord resolves a consolidated case from shareholders who allege the Chinese e-commerce conglomerate misled investors about its monopolistic practices as well as the collapse of Ant Group Co.'s initial public offering, a fintech company in which Alibaba had substantial equity.

The all-cash payment is one of the 50 largest securities class actions settlements in the US since the Private Securities Litigation Reform Act of 1995 was passed, according to settlement memo filed by the shareholders in the US District Court for the Southern District of New York. The settlement must still be approved by the court.

Shareholders first sued Alibaba and two of its executives in 2020, alleging the company made materially misleading statements about the success of the planned \$34.5 billion IPO for Ant Group, best known for its digital payment platform Alipay.

The investors also alleged that Alibaba lied when it said its merchants aren't exclusively bound to its platform. The company incurred a \$2.8 billion antitrust penalty from Chinese regulators.

Judge George B. Daniels last year narrowed the case, tossing out the shareholders' claims about the botched IPO but allowing the antitrust claims to move forward.

Alibaba said in a regulatory filing on Friday that it denies any fault or liability, and that it entered into the agreement "to avoid the cost and disruption of further litigation."

Glancy Prongay & Murray LLP is lead counsel for the shareholders. Simpson Thacher & Bartlett LLP represents Alibaba.

The case is *In re Alibaba Grp. Holding Ltd. Sec. Litig.*, S.D.N.Y., No. 1:20-cv-09568, 10/25/24 .

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Alibaba to pay \$433.5 million to settle shareholder lawsuit over monopoly claims

 [reuters.com/business/retail-consumer/alibaba-pay-4335-million-settle-shareholder-lawsuit-over-monopoly-claims-2024-10-26](https://www.reuters.com/business/retail-consumer/alibaba-pay-4335-million-settle-shareholder-lawsuit-over-monopoly-claims-2024-10-26)

Reuters

Shopping trolley is seen in front of Alibaba logo in this illustration, July 24, 2022.

REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights , opens new tab

Oct 25 (Reuters) - China's Alibaba (9988.HK) , opens new tab said on Friday it had agreed to pay \$433.5 million to settle a U.S. class-action lawsuit filed by investors alleging monopolistic practices by the e-commerce giant.

Alibaba denied wrongdoing, saying it entered the settlement to avoid the cost and disruption of further litigation.

The proposed settlement was filed in federal court in Manhattan and requires the approval of U.S. District Judge George Daniels.

The lawsuit, filed in 2020, alleged that Alibaba claimed it did not violate anti-monopoly or unfair competition laws, despite requiring merchants to choose only one distribution platform.

The settlement covers investors in Alibaba's American depositary shares from Nov. 13, 2019, to Dec. 23, 2020, and resolves claims they suffered losses when the market recognized Alibaba's misleading statements and the stock price fell.

Lawyers for the plaintiffs in court papers called the proposed deal "an exceptional result," saying it vastly exceeded the median recovery in securities class actions where the investor losses exceeded \$10 billion.

The maximum damages award the Alibaba investors could have potentially sought had they continued litigating was \$11.63 billion, the lawyers wrote.

The case is in re Alibaba Group Holding Ltd Securities Litigation, U.S. District Court, Southern District of New York, No. 20-09568.

Reporting by Surbhi Misra in Bengaluru and Nate Raymond in Boston; Editing by William Mallard

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<https://www.wsj.com/articles/alibaba-agrees-to-433-5-million-settlement-in-shareholder-lawsuit-6d11a5d3>

RISK & COMPLIANCE JOURNAL

Alibaba Agrees to \$433.5 Million Settlement in Shareholder Lawsuit

The e-commerce platform denied allegations that it made misstatements about its antitrust and exclusivity practices

By [Connor Hart](#) [Follow](#)

Updated Oct. 25, 2024 7:25 pm ET



Alibaba shareholders alleged that misstatements artificially raised the company's stock price. PHOTO: TINGSHU WANG/REUTERS

Alibaba Group has agreed to pay \$433.5 million to settle a class-action lawsuit waged by shareholders that in part alleged the company hurt investors by making misstatements about its exclusivity practices.

The China-based e-commerce platform company, which denied any allegations of fault, liability, wrongdoing or damages, said in a regulatory filing Friday it entered the settlement to avoid the cost and disruption of further litigation.

The settlement is subject to a number of conditions, including court approval.

The legal action, filed in March 2023 in the U.S. District Court in the Southern District of New York, alleged that Alibaba violated federal securities laws by making numerous misstatements about its antitrust and exclusivity practices that artificially raised its stock price and eventually caused financial losses to investors.

The lawsuit was filed against Alibaba, as well as certain directors and officers, on behalf of all investors who purchased or otherwise acquired the company's American depositary shares between July 9, 2020, and Dec. 23, 2020.

During that time, the suit alleged, the company employed exclusivity practices which "required or coerced merchants to sell exclusively on Alibaba platforms," while also punishing merchants who sold on competitors' platforms.

The company continued to do so after it pledged to cease such practices as part of an agreement signed in July 2020 with the State Administration for Market Regulation, which enforces China's e-commerce and antimonopoly laws, according to the suit.

Write to Connor Hart at Connor.Hart@wsj.com

Alibaba Settles Securities Suit Over Exclusivity Practices and Ant Group's Scuttled IPO for \$433.5 Million

K [dandodiary.com/2024/10/articles/securities-litigation/alibaba-settles-securities-suit-over-exclusivity-practices-and-ant-groups-scuttled-ipo-for-433-5-million](https://www.dandodiary.com/2024/10/articles/securities-litigation/alibaba-settles-securities-suit-over-exclusivity-practices-and-ant-groups-scuttled-ipo-for-433-5-million)

October 28, 2024

The D&O Diary

Alibaba Settles Securities Suit Over Exclusivity Practices and Ant Group's Scuttled IPO for \$433.5 Million



By Kevin LaCroix on October 28, 2024

Posted in Securities Litigation



Chinese e-commerce company Alibaba, whose American Depositary Shares (ADS) trade on the NYSE, has agreed to settle a long-running securities class action lawsuit in which the company was alleged to have misrepresented its exclusivity practices and certain aspects of the planned but withdrawn IPO of its financial affiliate, Ant Group. The company has agreed to pay \$433.5 million to settle the lawsuit. The settlement is subject to court approval. As discussed below, this settlement has several interesting features.

A copy of Alibaba's October 25, 2024, filing of Form 8-K describing the settlement can be found [here](#). A copy of the plaintiffs' October 25, 2024, memorandum in support of its unopposed motion for the court's preliminary approval of the settlement can be found [here](#).

Alibaba provides services and sales channels through a variety of online platforms. Among its operating units was an online platform originally known as Alipay, which was later spun-out and renamed Ant Group. Ant Group sold a variety of financial products online, such as mutual funds and insurance. Alibaba retained a 30% controlling minority interest in Ant Group. Ant Group was planning dual IPOs on the Shanghai and Hong Kong stock

exchanges in November 2020. However, as discussed at length here, just before the IPOs were to be completed, Chinese officials and regulators essentially summoned Alibaba executives, including its Chairman and CEO at the time, Jack Ma, for a meeting in which the officials effectively barred the Ant Group IPOs from going forward. According to the subsequently filed securities lawsuit, the price of Alibaba's ADSs fell in response to this news.

As discussed here, in November 2020, Alibaba ADS investors filed the first of several securities class action lawsuit against Alibaba and certain of its executives. The actions were ultimately consolidated. The lawsuit as first filed was essentially a "failure to launch" claim against Alibaba and the individual executives with respect to the withdrawn Ant Group IPO. The consolidated amended complaint also contained allegations that Alibaba had also misrepresented its so-called "exclusivity" requirements – that it, a requirement that merchants accessing the company's platforms to sell the merchants' products had to undertake to see products exclusively on Alibaba's platforms. The defendants moved to dismiss the plaintiffs' consolidated amended complaint.

In a March 22, 2023 opinion (here), Southern District of New York Judge George B. Daniels granted in part and denied in part the defendants' motion to dismiss. Essentially, Judge Daniels granted the defendants' motion to dismiss as to the Ant IPO-related allegations, but denied the motion as to the disclosures about Alibaba's alleged exclusivity practices. Judge Daniels granted the motion to dismiss in its entirety as to Jack Ma, for lack of details that he had play "any role" in preparing the allegedly misleading statements.

After the court's ruling on the dismissal motion, the case went forward. Among other things, the plaintiffs moved for class certification. The parties also eventually launched mediation efforts, which ultimately resulted in the agreement to settle the case.

The nearly half-a-billion dollar settlement is obviously quite substantial. According to the plaintiffs' memorandum in support of the motion for preliminary court approval, the settlement is the 21st largest securities class action settlement in the Southern District of New York and is among the top 50 largest in the U.S. since Congress enacted the Private Securities Litigation Reform Act in 1995.

As to where this settlement ranks in the overall Top 50 settlements, it appears that, if it is approved, it would rank about 44th largest or so, just behind the \$434 million settlement earlier this year in the Under Armour case (which is discussed here.) As far as I know, the Under Armour settlement is also still awaiting court approval.

It is hard to tell from the outside, but it sure looks like somebody involved in this settlement *really* wanted the Alibaba settlement amount to come in just below the amount of the Under Armour settlement, although it is hard to figure why.

It is remarkable that a case like this could be settled for this massive amount and yet the settlement does not even come within the top 40 all-time settlements.

The wording of Alibaba's 8-K seems to suggest that the company itself will be funding the entire amount of the settlement. The 8-K states that "we have agreed to pay US\$433.5 million to settle the abovementioned lawsuit." There is no mention in the 8-K of any funding provided by D&O insurance. If anyone out there has any further insight into the source of settlement funds, including any D&O insurance contribution, I would appreciate it if they would let me know.

GWG Holdings Securities Suit Defendants Get Three Claims Tossed

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X62I37UG000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X62I37UG000000)

Former officers of the bankrupt bond seller GWG Holdings Inc. got three securities claims dismissed in a potential class action against them, when a federal court said the lead plaintiff didn't allege enough details about the sale and purchase of the bonds at issue.

But the win may be short lived because Judge Jane J. Boyle of the US District Court for the Northern District of Texas gave plaintiff Frank Moore 21 days to file an amended complaint correcting the deficiencies.

In 2020, GWG partnered with Beneficient Co. Group LP to issue bonds that Moore and other purchased. After GWG filed for bankruptcy protection, Moore claimed that its 2017 registration statement with the Securities and Exchange Commission contained material misstatements in violation of federal securities law. He sued GWG, its officers, and Beneficient.

Boyle on Oct. 24 granted the officers' motion to dismiss Moore's claims under Sections 11, 12, and 15 of the Securities Act.

Section 11 creates liability for anyone who publicly offers securities pursuant to a false registration statement. To have standing under Section 11, the plaintiff must alleged that he purchased securities that were the direct subject of the registration statement, Boyle said. But Moore failed to plead where and how he obtained his bonds or that they were purchased under the 2020 registration statement, and therefore didn't show statutory standing, the judge said.

Section 12 creates liability for individuals who sell a security with a prospectus containing a material misstatement. But Moore failed to allege that the defendants were statutory sellers of the bonds, and thus he lacks standing under Section 12, Boyle said.

Section 15 says that every person who controls a person liable under Sections 11 and 12 is jointly and severally liable for the controlled person's conduct. Moore's Section 15 claim failed because he didn't have standing to pursue his Section 11 and 12 claims, she said.

Moore's failure to allege statutory standing didn't appear to be incurable, Boyle said, making the dismissal without prejudice and granting him leave to amend.

Girard Sharp LLP, Malmfeldt Law Group PC, and Silver Law Group represented Moore. Thompson & Knight LLP; Winston & Strawn LLP; O'Melveny & Myers LLP; Holland & Knight LLP; S. Michael McColloch and Karen Lundskow Cook, both of Dallas; Locke Lord LLP;

Cleary Gottlieb Steen & Hamilton LLP; and Gibson, Dunn & Crutcher LLP represent the defendants.

The case is In re GWG Holdings, Inc. Sec. Litig. , 2024 BL 384339, N.D. Tex., No. 3:22-CV-0410-B, 10/24/24 .

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Tesla shareholders appeal securities case against Elon Musk

 [courthousenews.com/tesla-shareholders-appeal-securities-case-against-elon-musk](https://www.courthousenews.com/tesla-shareholders-appeal-securities-case-against-elon-musk)

Matt Simons



Elon Musk departs the Phillip Burton Federal Building and United States Courthouse in San Francisco on Jan. 24, 2023. (AP Photo/ Benjamin Fanjoy, File)

SAN FRANCISCO (CN) — Tesla shareholders argued Friday before the Ninth Circuit that jurors who heard their case against Tesla CEO Elon Musk earlier this year were improperly instructed. Investors specifically objected to the wording of the jury instructions, which they believe could have changed the outcome of the case.

"In its instructions, the court misstated the law and imposed a higher burden on plaintiff than what is required," said attorney Nicholas Porritt of Levi & Korsinsky, who represents the investors. He added that the way the court issued its instructions was confusing and bound to mislead jurors.

Musk previously faced trial in the lawsuit filed by the investors who said they were misled by a tweet on August 7, 2018, in which he said he secured financing for a Tesla buyout. That buyout never came to fruition, however, and stockholders cried foul.

"Am considering taking Tesla private at \$420. Funding secured," the South African-born multibillionaire tweeted at the time. Tesla stock jumped in value and then sank when it became clear nothing of the sort was going to happen. The tweet also cost Musk \$40 million when the U.S. Securities and Exchange Commission fined him following an investigation.

After three weeks of testimony in the Tesla securities trial, jurors in February found Musk and Tesla itself not liable on all claims of fraud and attempts to deceive investors in their efforts to take the electric vehicle company private.

Oral arguments took place before a three-judge panel in the James R. Browning U.S. Courthouse in San Francisco.

The plaintiffs wasted no time launching into their primary argument that this wording misled jurors into believing that the plaintiff had the burden of proof in demonstrating Musk acted with the intent to deceive.

"The jury instructions, both at the end of trial and the curative instruction during trial, said explicitly the plaintiff has the burden of proof to prove that Elon Musk acted knowingly when he made those tweets. That is a false statement of the law," declared Porritt.

When pressed by U.S. Circuit Judge Richard Randall Clifton on where that wording was in the instructions, the lawyer quoted the passage back to the George W. Bush appointee.

"Plaintiff must prove by a preponderance of the evidence that Elon Musk and/or Tesla acted with the necessary state of mind," he read.

The plaintiffs' attorney further argued that the instructions unnecessarily confused jurors with its phrasing. For example, the instructions asked them to assume that Musk acted with deliberate recklessness, but then in the next sentence reminded them they still had to consider whether he acted knowingly.

"That, in itself, is at a minimum confusing, or I would say a misstatement of the law," Porritt argued.

The jury instructions in the trial went through several revisions, including some the day before they were issued to jurors. This fact left some of the judges confused about which instructions plaintiffs were referring to at times, prompting them to ask for clarification at multiple points.

Meanwhile, defense attorney Ellyde Thompson of Quinn Emanuel, who represented Musk, said that the jury instructions were quite clear and claimed the plaintiffs did not file their objections by the court's deadline, but were instead 20 days late — the day before the jury instructions were issued. Therefore, she concluded the objection should not be in the record and the error was not preserved.

Preservation of error refers to raising objections, issues, and arguments during a trial and including them in the written or oral record for later review by an appellate court. Failure to preserve almost always results in a waiver or loss of one's legal arguments on appeal.

"Well, don't our cases say that an objection can still be timely, even if made before the instructions get to the jury?" asked U.S Circuit Judge Gabriel Patrick Sanchez. "Why isn't this timely under our case law?"

"Actually, standing here today, we don't even know if the court even read that filing before the instructions were given the following day," she told the Biden appointee, acknowledging the significant back and forth involved with the case's jury instructions.

Ultimately, she concluded, there was no legal error in the case. “And even if there was it was absolutely harmless,” she added.

The judges did not indicate when they would rule on the matter before they concluded.

Categories / Appeals, Business, Financial, Securities, Technology

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Court skeptical of Tesla investors' bid for new trial over Musk's 2018 tweets

 [reuters.com/legal/transactional/court-skeptical-tesla-investors-bid-new-trial-over-musks-2018-tweets-2024-10-25](https://www.reuters.com/legal/transactional/court-skeptical-tesla-investors-bid-new-trial-over-musks-2018-tweets-2024-10-25)

Nate Raymond

Tesla, X (formerly known as Twitter) and SpaceX's CEO Elon Musk attends the AI Safety Summit at Bletchley Park in Bletchley, Britain on November 1, 2023. Leon Neal/Pool via REUTERS/File photo Purchase Licensing Rights , opens new tab

Oct 25 (Reuters) - A federal appeals court on Friday appeared unlikely to disturb a jury's verdict clearing Tesla CEO Elon Musk and his company of liability over allegations they misled investors when the billionaire posted on social media in 2018 that he had "funding secured" to take the electric car company private.

A lawyer for Tesla investors told the San Francisco-based 9th U.S. Circuit Court of Appeals at Friday's oral arguments that the instructions given by the judge presiding over the trial to the jurors were flawed and confused them before they delivered their verdict in February 2023.

Nicholas Porritt, the lawyer, said a new trial was needed as the jury instructions were worded in a way that implied the plaintiffs needed to prove Musk knowingly made false statements when he wrote his posts on Twitter, the platform now known as X, following Musk's \$44 billion acquisition of it in 2022.

Porritt said U.S. District Judge Edward Chen gave that flawed instruction even though pre-trial he had held Musk's tweets were inaccurate and that he acted recklessly, making it unnecessary to prove Musk acted knowingly.

But the three-judge panel appeared skeptical of that reading of the instructions. U.S. Circuit Judge Gabriel Sanchez said the plaintiffs' own proposal on how to instruct the jury was "not much different than the jury instruction that was given."

Senior U.S. Circuit Judge Richard Clifton said jurors were told they could assume Musk acted recklessly and that, regardless, the focus of the trial was on a separate issue they had to decide, whether the false statements were material and mattered to investors.

He said it was difficult to decipher why the jury ultimately came out the way it did, because they were asked to deliver a "simple" so-called general verdict of just whether or not the plaintiffs had proved their case against Musk.

"How can we conclude there was prejudice if there's such a plausible explanation for why the jury might have rendered a general verdict," Clifton said.

Ellyde Thompson, a lawyer for Musk and Tesla at Quinn Emanuel Urquhart & Sullivan, said there was "ample evidence" to back up finding her clients not liable on materiality alone, meaning "even if there was an error, it was absolutely harmless."

The case was filed in 2018 and concerned posts on Twitter that had also led to a \$40 million securities fraud settlement later that year between Musk, Tesla and the U.S. Securities and Exchange Commission.

The SEC probe and investors' lawsuit stemmed from a tweet Musk posted on Aug. 7, 2018, saying he was considering taking Tesla private at \$420 per share, a premium of about 23% to the prior day's close, and had "funding secured."

Later that day, he tweeted: "Investor support is confirmed."

Tesla's stock price soared after the tweets and then fell again after Aug. 17, 2018, as it became clear the buyout would not happen. The shareholders' lawyers accused Tesla and Musk of misleading investors, costing them billions of dollars.

Musk's lawyers countered that his statement about "funding secured" did not differ in any material respect from the actual state of affairs at Tesla, saying there was no evidence Musk, who also heads rocket company SpaceX, would have been unable to take the company private.

The case is Littleton v. Musk, 9th U.S. Circuit Court of Appeals, No. 23-16010.

For the investors: Nicholas Porritt of Levi & Korsinsky

For Musk and Tesla: Ellyde Thompson of Quinn Emanuel Urquhart & Sullivan

Read more:

Tesla's Elon Musk found not liable in trial over 2018 'funding secured' tweets

US Supreme Court won't hear Elon Musk dispute over SEC settlement

Tesla, Musk pay \$40 million to settle Tweet charges, Musk to resign as chairman

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Reporting by Nate Raymond in Boston

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Nate Raymond
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'Training to Replace Yourself': Kessler Topaz Co-Founder Set to Retire

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Amanda O'Brien



What You Need to Know

- David Kessler, name partner of Kessler Topaz Meltzer & Check, announced he is set to retire from the firm at the end of 2024.
- According to Kessler, who estimated that his succession plan has been in the works for the past two years, his responsibilities will be shared among multiple members of the firm

David Kessler, name partner and co-founder of securities class action firm Kessler Topaz Meltzer & Check, is set to retire at the end of the year after 28 years with the firm.

At age 58, Kessler has witnessed the firm's evolution from a six-attorney boutique to a midsize firm of nearly 100 full-time attorneys, along with approximately 20 contract attorneys and 80 staff members.

Along the way, the firm's client base has shifted to support institutional investors rather than individuals as the securities class action space matured, with Kessler making the decision to retire from his firm while it's "in the best position it's ever been in."

"It's a really tough practice. We have about 180 people we have to support every year without having a single hourly billable. We don't get paid unless we win or resolve a case," Kessler said. "These cases are being taken deeper and deeper by defendants, making it more and more risky of a proposition for plaintiffs' firms to go through with the cases."

"But we're seeing more value in the cases going deeper and deeper, and we have such a deep bench of lawyers to try these cases. ... We have the best clients, the best cases, the best talent and support staff," he said.

According to Kessler, who currently serves as co-chair of the firm's securities litigation division, he recognized that it was time to step away from practicing once he achieved his three main goals established at the start of his legal career. Those were: supporting his family, developing expertise in his practice area and earning standing in the field, and ultimately creating a legacy—in this case a law firm—that can stand the test of time.

"Once I hit all three of those things, that was the time for me to step away," Kessler said. "It was a goal of mine to be done at the age of 60. I never wanted to be the person sticking around or facing performance issues. It's never interested me. So I made this plan, spoke with my partners, and it's been in the works for some time. Now, we're ready to go and ready to face these new challenges."

There is no single successor taking up all of Kessler's responsibilities. The firm doesn't allow for territoriality over clients and takes a collaborative approach to case management, Kessler said, eliminating the need to transfer clients or cases. Further, Kessler added, he had transitioned away from litigation about five or six years ago, pivoting instead toward settlement work as he took on more responsibility helping to manage the firm overall.

He declined to name individual successors to firm leadership.

"I have run my department collectively with a bunch of different people over the last couple of years," Kessler said. "And I work at the settlement juncture of cases ... we have plenty of people who can do that, and they're training someone else. ... As for management, we've had a committee running the firm since 2008. Over the last year and a half, I had someone shadowing me on the management committee, and that person will step in."

Kessler began implementing his succession plan over the past two years, beginning after his fellow name partner Mark Topaz stepped away from his practice. While watching Topaz, Kessler realized that, in his words, he didn't want to "go from working 100 miles per hour to all of a sudden just stopping."

"I was a bit concerned, but I'm no longer concerned about that," he said. "For me, the whole remote work and COVID situation prepared me a bit more for working from home and being more involved in day-to-day family life. That transition has opened my eyes to work-life balance things. ... I'm prepared to be active and be able to enjoy my retirement without being so completely worn down by my practice that I can't enjoy this."

For partners considering retirement or succession planning, Kessler encouraged them to start early and think primarily about replacement planning, rather than just retirement planning.

"I hate to say this, but you could be hit by a bus and have no plan in place, no idea who's going to replace you. We have people to support in this business. We need to have an idea on what's coming next, who is the next person to take up the reins if you can't do [something]," Kessler said. "Our training motto has always been to teach somebody to replace yourself, and then you can move on to something bigger or different. If you're always fighting on who gets to do what, you're never going to grow the organization. Training to replace yourself is the way we've done it, and it worked extremely successfully over the years."

"A lot of people fear change, but change is an opportunity," Kessler concluded. "It's about what you make of it, attacking it head on and trying to make the most of it because nothing ever stays static in a law practice and in the world in general."

Apple to settle Apple Watch defect class action for \$20 million

 [courthousenews.com/apple-to-settle-apple-watch-defect-class-action-for-20-million](https://www.courthousenews.com/apple-to-settle-apple-watch-defect-class-action-for-20-million)

Matt Simons

A first-generation Apple Watch with a 42mm display in Space Grey Aluminum. (Photo by William Hook, CC BY-SA 2.0, via Courthouse News)

OAKLAND, Calif. (CN) — A federal judge in Oakland granted on Friday preliminary approval for a class action settlement for \$20 million over claims that multiple series of Apple Watches have a defect that could potentially harm owners.

The settlement, besides lightening the tech giant's pocketbook, concludes a three-year legal battle that will ultimately release the company from all future liabilities related to the defect.

The move appears to be a victory for the plaintiffs, whose attorneys stated in their motion to approve the settlement that going to trial would run the risk of recovering much less money for the harm done to their clients or even none at all.

The \$20 million settlement is expected to cover attorney's fees plus incentive payments to the lead plaintiff, named plaintiffs of the case and payments to class members.

Class members who make a payment selection by the response deadline will receive \$20 for each relevant device they own. If there is more than \$50,000 remaining in the settlement fund after all payments have been issued, class members may receive up to \$50 per covered device.

In their agreement, the parties also proposed that any leftover funds will be donated to the Rose Foundation's Consumer Products Fund.

U.S. District Judge Haywood S. Gilliam wrote that he thought the terms appeared fair and reasonable.

The Obama-appointed judge had little to gripe about in his 15-page order, only noting a few inconsistencies in the full class notice that needed to be corrected by a final fairness hearing.

For example, the full class notice states that the attorneys may ask the court for an award of attorneys' fees of up to 30% of the settlement fund, but in their motion, they say they will apply for no more than \$5 million, or 25%.

Gilliam stressed the importance of accurately reflecting this information to class members but found that with these minor changes, the proposed class notice would have enough to conform with court requirements.

The plaintiffs' counsel is currently asking for \$5 million in attorneys' fees, \$5,000 for the lead plaintiff and up to \$2,000 for each of the remaining named plaintiffs. The attorneys' fees will ultimately be decided at the settlement's final fairness hearing.

The court has directed parties to meet within seven days of its order to confer and file a proposed schedule for future events and deadlines, including the final fairness hearing.

The plaintiffs from several different states filed the California class action in December 2021 on behalf of all Apple Watch customers, claiming that several First Generation and SE series watches contain “an undisclosed and unreasonably dangerous safety hazard.”

They claimed that sudden swelling of the watch batteries can cause the screen to detach, shatter, or crack, “exposing its razor-sharp edges and leading to operational failure of the watch and/or personal injuries.”

They said Apple did not give sufficient space within the watch to prevent the screen issue and watches have injured class members, creating a “substantial and material risk of serious injury, including lacerations, cuts, abrasions, and other injuries.”

Claims included violations of California's unfair competition, consumer and warranty laws, federal warranty law and fraud by omission under various state laws.

The plaintiffs have walked a long road to get to this settlement. After the initial 2021 complaint and an amended complaint in 2022, the lawsuit survived a motion to dismiss in 2023. The plaintiffs moved to approve the settlement in August and Apple did not oppose the motion.

Attorneys representing both sides did not respond to requests for comment by press time.

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Brazil reaches \$23 billion settlement with mining firms over 2015 environmental disaster

 [courthousenews.com/brazil-reaches-23-billion-settlement-with-mining-firms-over-2015-environmental-disaster](https://www.courthousenews.com/brazil-reaches-23-billion-settlement-with-mining-firms-over-2015-environmental-disaster)

The toxic sludge — enough to fill 13,000 Olympic-size swimming pools — flowed down the Doce River for 420 miles to the Atlantic Ocean, contaminating waterways and coastal areas in two neighboring states.

Associated Press / October 25, 2024

A car and two dogs are on the roof of destroyed houses at the small town of Bento Rodrigues after a dam burst in Minas Gerais state, Brazil, Nov. 6, 2015. (AP Photo/Felipe Dana, File)

SÃO PAULO (AP) — Brazil's federal government on Friday reached a multibillion-dollar settlement with the mining companies responsible for a 2015 dam collapse that the government said was the country's worst-ever environmental disaster.

Under the agreement, Samarco — a joint venture of Brazilian mining giant Vale and Anglo-Australian firm BHP — will pay 132 billion reais (\$23 billion) over 20 years. The payments are meant to compensate for human, environmental and infrastructure damage caused by the release of an immense amount of toxic mining waste into a major river in southeastern Minas Gerais state, killing 19 people and ravaging entire villages.

“We are fixing a disaster that could have been avoided, but wasn’t,” President Luiz Inácio Lula da Silva said in a hall of the presidential palace, surrounded by governors of the affected states, members of his administration, reporters and victims.

Lula's speech, filled with criticism of what he called the mining companies' irresponsibility in chasing profit over safety, was met with applause from the audience.

The toxic sludge — enough to fill 13,000 Olympic-size swimming pools — flowed down the Doce River for 420 miles to the Atlantic Ocean, contaminating waterways and coastal areas in two neighboring states.

The mining companies told the federal government during negotiations that they had already paid 38 billion reais (\$6.7 billion) in reparations. In a statement Friday, Samarco said the agreement allowed for the resolution of lawsuits related to the dam rupture.

Rodrigo Vilela, Samarco's president, said in the statement that the collapse was a watershed in their history, which they “deeply regret and will never forget.”

"The agreement signed today reinforces Samarco and its shareholders' commitment to people, communities and the environment, ensuring the continuation of full and definitive repair and compensation for the damages," he added.

The settlement includes compensation for more than 300,000 victims, though that figure does not account for everyone affected. Twice as many people — 620,000 — took their case to a UK court on Monday seeking reparations.

The class action lawsuit at the High Court in London seeks an estimated 36 billion pounds (\$47 billion) in damages from BHP. The case was filed in Britain because one of BHP's two main legal entities was based in London at the time.

The London suit prompted the Brazilian Supreme Court's Chief Justice, Luís Roberto Barroso, to personally seek Lula's commitment to ensure parties reached an agreement domestically.

"I spoke with Lula and said, 'Mr. President, there is a case abroad, and it will be very damaging to the Brazilian courts if this matter is resolved outside the country,'" Barroso said Friday at the presidential palace.

The Brazilian federal government said victims would receive 35,000 reais (\$6,150) each, while fishermen and farmers would be paid 95,000 reais (\$17,000) in total through monthly installments over four years.

Cristiano Sales, 42, was born and raised in Bento Rodrigues, one of the districts in the municipality of Mariana that was washed over by the sludge nine years ago. When he returned to the ruins of his house three months later, the only item he found was a jersey from his favorite soccer team, Cruzeiro.

Sales lives in a new house in a neighborhood built by the mining companies as part of compensation to his father. After filing a lawsuit, he personally received 100,000 reais (\$18,000) and is still pursuing additional reparations through the London suit.

"Money can't pay for what we've been through here," he said. "We take the money because it's our right. But to say that 100,000 or even 200,000 or 300,000 could bring back the life we had — I don't think any amount of money can do that."

Melbourne, Australia-based BHP said in a statement on Oct. 19 it believes the U.K. action is unnecessary because it duplicates matters covered by reparation efforts and legal proceedings in Brazil, but will continue to defend itself.

Pogust Goodhead, the law firm representing the plaintiffs, said Friday the settlement in Brazil shouldn't have any impact on the London case and that there will be no double compensation. The firm added that its clients were excluded from the negotiations and are

still pursuing full reparations for unresolved damages.

“The Mariana agreement signed this Friday in Brazil demonstrates that, after 9 years of negligence, the mining companies have finally decided to react to the pressure from public opinion and the trial in England, which began last Monday,” the law firm said in a statement. “Even so, the amounts defined are far from covering the profound losses suffered by the victims, who continue to fight for justice and full reparations.”

By GABRIELA SÁ PESSOA and ELÉONORE HUGHES Associated Press

Hughes reported from Bento Rodrigues, Brazil.

Categories / Environment, International

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Hershey's 'Bubble Yum' Hit With Consumer Class Action for Allegedly Containing 'Forever Chemicals'

 [law.com/therecorder/2024/10/28/hersheys-bubble-yum-hit-with-consumer-class-action-for-allegedly-containing-forever-chemicals](https://www.law.com/therecorder/2024/10/28/hersheys-bubble-yum-hit-with-consumer-class-action-for-allegedly-containing-forever-chemicals)

Mason Lawlor

A class action lawsuit filed Thursday in California state court has accused The Hershey Co. and its brand name gum, Bubble Yum, of allegedly failing to warn that its products potentially expose consumers to perfluoroalkyl and polyfluoroalkyl substances, also known as "forever chemicals."

This suit was surfaced by Law.com Radar, ALM's source for immediate alerting on just-filed cases in federal and state courts. Law.com Radar now offers state court coverage nationwide. Sign up today and be among the first to know about new suits in your region, practice area or client sector.

The complaint, filed in Los Angeles Superior Court Oct. 24, accused Hershey of omitting and failing to disclose that its Bubble Yum Original Flavor Bubble Gum Product has organic fluorine and misleadingly markets as "high quality," "sustainable" and "transparent about [their] ingredients."

Despite claims on its Hershey's and Bubble Yum's brand website pages promoting its emphasis on "our planet, our communities, our children" and "being transparent about the ingredients inside your favorite Hershey products," these claims have allegedly misled consumers. Organic fluoride can place consumers at risk of contacting with synthetic chemicals known as PFAS, which the California Legislature has deemed are "highly toxic and highly persistent in the environment," according to the complaint.

PFAS are "extremely resistant to degradation in the natural environment, including the water, the soil, the air, and our bodies, because of their carbon-fluorine bond, one of the strongest bonds known in nature." The Legislature has linked them to "severe health problems," such as cancers, hormone disruption, kidney and liver damage, thyroid disease, developmental harm, and immune system disruption, including interference with vaccines, according to California health codes.

The suit also noted the Center for Disease Control and Prevention's additional warnings on the health effects caused by PFAS, including decreased fertility and increased risk of asthma.

California Gov. Gavin Newsom signed California Assembly Bill 652, Cal. Health & Safety Code Sections 108945-108947, and Assembly Bill 1200 into law in October 2021, which prevents the sale or distribution of "juvenile products and food packaging containing regulated PFAS chemicals."

Plaintiff Abraham Mohamed commissioned independent third-party testing on the Bubble Yum product to determine whether it contained organic fluoride, which confirmed its presence in both the gum and packaging. The wrapper and gum contained 130 and 197 parts-per-million, respectively, according to Mohamed.

"Because PFAS chemicals are 'forever chemicals' and accumulate in the human body and environment, there is no safe manner or level of exposure to humans," the complaint said. "The products are particularly concerning given the fact bubble gum is marketed to and consumed by children."

Neither attorneys for the plaintiffs, Paul D. Stevens nor Lauren A. Bochorberg of Stevens in Los Angeles, has returned a request a comment. Counsel has yet to appear for Hershey.

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Latest

Trending

Litigation Surge - Antitrust | Visa

Visa was hit with a surge of antitrust cases last week. At least three federal antitrust class actions were filed in New York Southern District Court and California Northern District Court accusing Visa of monopolizing the debit card market through various means, including penalizing merchants for using alternative networks and acquiring start-up businesses to prevent competition. The suits come on the heels of an enforcement action launched by the U.S. Justice Department against Visa in Sept.

'Significant Relief': Big Law Firms Represent UFC in \$375M Antitrust Settlement Agreement

 [law.com/nationallawjournal/2024/10/25/significant-relief-big-law-firms-represent-ufc-in-375m-antitrust-settlement-agreement](https://www.law.com/nationallawjournal/2024/10/25/significant-relief-big-law-firms-represent-ufc-in-375m-antitrust-settlement-agreement)

Sulaiman Abdur-Rahman

What You Need to Know

- U.S. District Judge Richard F. Boulware II granted preliminary approval of a \$375 million settlement agreement between UFC and MMA fighters.
- Paul, Weiss, Rifkind, Wharton & Garrison and Latham & Watkins represented UFC in this antitrust class action.
- Berger Montague, Cohen Milstein Sellers & Toll and the Joseph Saveri Law Firm represented the MMA fighters.

A Nevada federal judge has approved a preliminary \$375 million settlement agreement between the Ultimate Fighting Championship and several UFC fighters who accused the mixed martial arts company of unlawful wage suppression.

Paul, Weiss, Rifkind, Wharton & Garrison and Latham & Watkins represented UFC in this antitrust class action filed in 2014 by Berger Montague, Cohen Milstein Sellers & Toll and the Joseph Saveri Law Firm.

"The settlement we helped MMA fighters achieve recovers hundreds of millions of dollars in lost compensation from the UFC," Benjamin D. Brown, managing partner of Cohen Milstein and co-chair of its antitrust practice, said Wednesday in a press statement.

"We are extremely pleased by the court's decision," Eric L. Cramer, chair of Berger Montague and co-chair of its antitrust department, said Wednesday in a press statement. "It is a monumental achievement that will provide significant relief to hundreds of deserving MMA fighters."

U.S. District Judge Richard F. Boulware II granted preliminary approval of the settlement agreement Tuesday.

"This decision is welcome news for both parties," a UFC spokesperson said Thursday in a statement provided to the National Law Journal. "We are pleased to be another step closer to bringing the Le case to a close."

Counsel for MMA fighters Cung Le, Nathan Quarry and Jon Fitch filed the antitrust class action against the UFC in 2014 followed by an amended complaint in 2015 that included additional plaintiffs Brandon Vera, Luis Javier Vazquez and Kyle Kingsbury. The amended complaint accused the UFC of wage suppression and maintaining an unlawful monopoly through "anticompetitive, illicit and exclusionary acts" in violation of the Sherman Act.

Fighters who competed in UFC bouts in the United States from December 2010 through June 2017 could be eligible for settlement funds if the court grants final approval. Settlement funds would be allocated to class members who submit valid claims, and the minimum recovery amount would be \$15,000.

Another antitrust class action filed against UFC in 2021 remains active in Nevada federal court.

UFC is a registered trademark of Zuffa LLC, a Nevada limited liability company headquartered in Las Vegas. The company agreed to settle claims in the matter, which was captioned *Le v. Zuffa*.

J&J's \$8.2 Billion Talc Settlement Faces January Court Test

By Jef Feeley2024-10-28T10:50:01607-04:00

- Lawyers are sparring over the voting that backed the accord
- A federal judge in Houston to rule on the 15-year legal battle

The fate of Johnson & Johnson's latest push to use bankruptcy courts to end thousands of cancer lawsuits tied to its iconic baby powder now hinges on a high-stakes trial in January.

After months of wrangling, a federal judge in Houston early next year will decide whether J&J's bid to quickly settle the claims with an \$8.2 million payout can move ahead. A lead attorney for holdouts insists a vote by claimants in support of the deal was rigged, a charge that J&J denies.

J&J has struggled to end the 15-year-long litigation over its talc-based baby powder, which the company insists never caused cancer and is no longer available. After failing twice to resolve the claims by bankrupting a unit in New Jersey, the company is trying again through a fast-track process in Texas after saying in August that more than 75% of claimants voted for a sweetened offer.

Read More: J&J's Court-Shopping Strategy Pits New Jersey Home Against Texas

"J&J thinks it can get this done in months, but if the legitimacy of those votes is called into question, that timeline goes out the window," said Carl Tobias, a University of Richmond law professor who teaches about mass torts and is following the baby powder litigation saga.



Johnson & Johnson baby powder at a pharmacy in New York, on March 27, 2024.

Photographer: Gabby Jones/Bloomberg

The company says it's set aside \$12 billion to resolve all of its baby powder cases, including thousands of ovarian cancer claims in the settlement that US Bankruptcy Judge Christopher Lopez will rule on. J&J is now facing more 60,000 claims overall.

Careful Counting

Andy Birchfield, a lawyer representing thousands of alleged victims, this month accused another plaintiff's attorney of improperly changing votes. He also claimed the firm overseeing the process facilitated the switch at the behest of J&J.

"We view this so-called vote as another fraudulent effort by J&J to manipulate the bankruptcy process and minimize the legitimate claims of ovarian cancer victims," said Birchfield, an Alabama-based lawyer.

Birchfield's lawyers say EPIQ, a consulting firm hired by J&J to run the pre-bankruptcy vote, and another plaintiffs' lawyer, Allen Smith, improperly switched 11,434 votes from "reject to accept." Lopez will now have to determine whether the votes were wrongfully counted and should be switched back.

Read More: J&J Lifts Baby Powder Settlement Bid to More Than \$8 Billion

J&J's worldwide head of litigation Erik Haas said EPIQ's actions were consistent with the solicitation and voting rules, and that the company negotiated with Smith in good faith to get a faster resolution.

"We are confident in the voting process, which showed that the proposed bankruptcy plan is indeed what claimants want to end this litigation in a fair and timely manner," Haas said in a statement. "The plan constitutes one of the largest settlements ever reached in a mass tort bankruptcy case."

Lawsuits and Infighting

Smith, a Mississippi-based lawyer who's notched several [wins](#) against J&J, was once part of Birchfield's inner circle. They jointly represent more than 11,000 clients. Smith changed the votes of those clients to support the deal after his former partner lodged them against the offer.

Birchfield, who sued his former colleague in September over who had the power to cast the votes, argued Smith sold out the ex-baby powder users because he was facing \$240 million in litigation-finance debt. Smith filed a countersuit denying the allegations. He didn't return calls seeking a comment.

In an August letter to colleagues, Smith said "continuing to fight against J&J is no longer justified."

"As the attorney that started this litigation fifteen years ago and who has fought against J&J inside and outside the courtroom as vigorously as anyone in the country, I can finally say for the first time this revised plan provides adequate compensation for our clients," Smith wrote.

Changing Votes

Birchfield argues EPIQ violated J&J's ground rules for allowing the switch and should be removed from overseeing claims, which could generate millions in fees. EPIQ officials didn't return emails seeking comment.

In court filings, EPIQ officials said they switched Birchfield's no votes after lawyers for J&J's unit told them to "incorporate the votes reflected on the Smith firm's master ballot, superseding the votes submitted" by his former colleague.

J&J counters Birchfield lodged questionable no votes, and says his firm should be removed from its leadership position in the case. The six firms opposing the settlement, including Birchfield's, haven't provided a meaningful alternative to it and have yet to recover any money for their clients, the company said.

Those lawyers also will benefit financially if the bankruptcy doesn't go through, J&J said. It agreed to pay \$650 million to cover the cost of the common legal work done on behalf of all the plaintiffs as part of the settlement. They are now covered by a percentage of the money gained from each resolved case, which goes into a pool controlled by a select group of attorneys. The size of the pool without the bankruptcy could be substantially higher than the pre-set figure, depending on final figures.

Speedy Resolution

Lopez – who denied Birchfield's request to send the bankruptcy back to New Jersey – said he plans to take a close look at the balloting, which was done without court supervision.

"We have some hard decisions here," Lopez said during a September hearing.

The judge agreed Oct. 21 to put all trials focused on whether J&J's talc-based baby powder caused ovarian cancer on hold while the bankruptcy plan is debated. The company still faces juries weighing whether powders tainted with asbestos caused cancer. Earlier this month, a Connecticut jury ordered J&J and some units to pay \$15 million to a real estate developer who blamed his cancer on the product.

J&J is arguing the enhanced settlement and subsequent bankruptcy is the only way to fairly deal with future cancer lawsuits without decades of litigation.

If approved, the accord would resolve nearly all talc cases against J&J in the US and bind everyone to the same terms – even those who voted against it and women who develop cancer in the future. A trust would be set up to deal with later-developing cancers.

“Sign-off on the settlement may lead to resolution of the talc litigation around year-end, though an appeal would be expected,” wrote Larry Biegelsen, an analyst at Wells Fargo, in a note to clients.

The case is Red River Talc, 24-90505, US Bankruptcy Court for the Southern District of Texas (Houston).

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'Tremendous Outcome': Duane Morris and Blank Rome Reach \$102M Settlement With DOJ in Baltimore Bridge Collapse

[law.com/nationallawjournal/2024/10/25/tremendous-outcome-duane-morris-and-blank-rome-reach-102m-settlement-with-doj-in-baltimore-bridge-collapse](https://www.law.com/nationallawjournal/2024/10/25/tremendous-outcome-duane-morris-and-blank-rome-reach-102m-settlement-with-doj-in-baltimore-bridge-collapse)

Sulaiman Abdur-Rahman



What You Need to Know

- Duane Morris and Blank Rome represent Singapore-based shipping companies seeking to limit their liability in the Baltimore bridge collapse.
- The shipping companies reached a \$102 million settlement with the U.S. Department of Justice.
- Dozens of remaining parties demand damages from Grace Ocean Private Ltd. and Synergy Marine Group.

Duane Morris and Blank Rome have reached a \$102 million settlement with the U.S. Department of Justice on behalf of the operators of the Dali cargo ship that struck and destroyed an iconic Baltimore bridge in March.

U.S. attorneys and counsel for Singapore-based Grace Ocean Private Ltd. and Synergy Marine Group filed the notice of settlement late Thursday afternoon in Maryland federal court.

"This resolution ensures that the costs of the federal government's cleanup efforts in the Fort McHenry Channel are borne by Grace Ocean and Synergy and not the American taxpayer," Benjamin C. Mizer, principal deputy associate attorney general, said Thursday in a press statement.

Another Justice Department official, Brian M. Boynton, described the settlement as a "tremendous outcome that fully compensates the United States for the costs it incurred in responding to this disaster."

At least 45 parties have filed timely claims against Grace Ocean and Synergy following the March 26 collapse of the Francis Scott Key Bridge that killed six highway maintenance workers.

Duane Morris and Blank Rome on behalf of the international shipping companies filed a petition in Maryland federal court April 1 seeking exoneration or limited liability for any losses or damage caused by the deadly incident. The companies in their petition expressed a willingness to pay nearly \$44 million or an open-ended "stipulation with sufficient surety" to the court.

The Justice Department said the settlement resolves its claims seeking more than \$103 million in civil damages and that the settlement funds will go to the U.S. Treasury and the federal agencies directed affected by the bridge collapse.

U.S. District Senior Judge James K. Bredar ordered all parties in this litigation to "meet and confer in advance" and file a joint status report ahead of an Oct. 29 status and scheduling conference.

A joint status report filed Tuesday shows the shipping companies oppose two class actions in the case, describing those claims as "fundamentally improper on several grounds" and "violative of basic principles underlying a limitation of liability action."

All of the claimants seeking damages in the bridge collapse agree Grace Ocean and Synergy "are not entitled to exoneration or limitation of liability," according to the joint status report. "The Claimants have self-ordered and stand ready to litigate cooperatively toward that end."

It will cost at least \$1.7 billion to replace the Key Bridge by 2028, according to Maryland's claim, which seeks damages and statutory penalties for alleged environmental violations. The estimated rebuilding costs are far greater than the \$350 million Maryland received in compensation from its bridge insurance policy.

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ESG-Related Due Diligence Is Paramount for Financial Investors

- *Sullivan & Cromwell experts examine ESG factors in dealmaking*
- *Sponsors must know regulations, target's compliance framework*

Bloomberg Law News 2024-10-28T10:26:1316549941-04:00

ESG-Related Due Diligence Is Paramount for Financial Investors

By Rita O'Neill and June Hu2024-10-28T04:30:04000-04:00

- *Sullivan & Cromwell experts examine ESG factors in dealmaking*
- *Sponsors must know regulations, target's compliance framework*

As the environmental, social, and governance landscape shifts from a patchwork of voluntary frameworks to globally expanding regulatory requirements, dealmakers must be alert to ESG considerations, even in deals with non-obvious ESG issues.

The EU, the US, California, and other jurisdictions have adopted sweeping ESG regulations applicable to many public and private companies. These regulations require in-scope entities to monitor and disclose the ESG impacts of their own operations, together with those in their value chains—suppliers, customers, investors, investees, and other business partners.

When vetting targets for a potential acquisition or investment, sponsors need to consider the ESG regulations applicable to the target, the robustness of the target's compliance and governance frameworks, and the ESG implications of the potential transaction for the sponsor.

Not only could these considerations impact a sponsor's assessment of a target's attractiveness, but they also may warrant the sponsor seeking contractual protections, including through representations, warranties, indemnities, and covenants. In this new ESG environment, sponsors should be prepared to address several factors.

Sustainability reporting requirements. Many companies—including certain sponsors and their potential acquisition targets—are or will soon be subject to sustainability reporting requirements.

In the EU, large EU and non-EU companies will need to report detailed sustainability information under the Corporate Sustainability Reporting Directive beginning as early as 2025. In the US, although the Securities and Exchange Commission's climate rules for US and foreign registrants have been stayed pending judicial review, new laws in California will require comprehensive climate reporting starting as early as 2026 for larger companies (both public and private) that "do business" in the state.

The emergence of these requirements heightens the importance of a target's ESG disclosure controls and procedures in three key ways.

First, if a target is or will be subject to these reporting regulations, the sponsor should understand whether the target has the internal framework to support compliance. If internal controls are weak and claims regarding significant ESG benefits are unsubstantiated, the target could draw "greenwashing" scrutiny from investors and regulators in addition to liability under the applicable regulation.

EU and US lawmakers have recently adopted laws that make it easier for public and private litigants to bring lawsuits challenging the accuracy of "green" claims. These include California's Assembly Bill 1305, which allows any California state or local enforcement official to sue any company operating in California for failing to publicly substantiate claims that the company, or its products or affiliates, significantly reduce greenhouse gas emissions.

Second, if the sponsor itself is or will be subject to these regulations, it should evaluate the target's potential impact as part of the sponsor's value chain, as many key regulations cover Scope 3—that is, value chain—emissions and other value chain disclosure requirements.

Today, the analysis often focuses on whether the target's emissions or other impacts would become a notable portion of its value chain impacts—either quantitatively or qualitatively. As sponsors enhance their own Scope 3 reporting and assurance processes to meet emerging requirements, it may make sense for some of them to develop due diligence protocols to assess whether a target has implemented data collection and verification processes that align with those used by the sponsor and expected by its assurance provider.

Third, the target is likely in the value chain of other entities, such as key customers. It will be helpful to understand what disclosures, representations, or other commitments the target has made to those entities—either voluntarily or because of regulatory requirements.

In addition to due diligence, it might be appropriate for a sponsor to seek contractual protection against third-party liability in some cases, given the active greenwashing litigation and enforcement landscape.

Rapid evolution of ESG requirements. The ESG regulatory landscape continues to develop. For example, the EU recently adopted the Corporate Sustainability Due Diligence Directive, which goes well beyond disclosure requirements to mandate that in-scope EU and non-EU companies identify, assess, prevent, and mitigate adverse human rights and environmental impacts in their operations and value chains.

Failure to comply could result in significant liability, including penalties up to 5% of the target's net worldwide turnover. Given the broad and complex changes that are expected under the directive, as well as the current lack of regulatory guidance, sponsors should work closely with legal teams to monitor and assess the directive's potential impacts on dealmaking—including efforts to introduce model contracting clauses.

“Anti-ESG” movement. In the US, sponsors must pay attention to “anti-ESG” laws and regulations emerging in many Republican-controlled states. A number of asset managers have faced scrutiny from state officials for how ESG factors are incorporated into investment and dealmaking decisions. Some stakeholders also have put pressure on companies to reverse their ESG commitments.

As ESG regulations evolve, sponsors will need to build ESG-related considerations into the dealmaking process to support overall regulatory compliance and reduce transaction risks. This will necessitate a closer cross-functional collaboration on ESG issues for many sponsors, including between the deal team and compliance team, as well as legal, accounting, and other advisers.

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

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Celsius Judge Allows Legal Notices Via NFTs to Digital Wallets

By Evan Ochsner

- Celsius administrator aims to recover asset transfers
- Judge likens notice procedure to email, social media

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Celsius Judge Allows Legal Notices Via NFTs to Digital Wallets

By Evan Ochsner 2024-10-25T15:49:35000-04:00

- Celsius administrator aims to recover asset transfers
- Judge likens notice procedure to email, social media

Celsius Network's litigation administrator can notify defendants accused of holding fraudulently transferred assets by dropping non-fungible tokens into their digital asset accounts, a bankruptcy judge ruled.

The method protects the defendants' due process rights and can reasonably be expected to provide information about a legal proceeding brought by the Celsius administrator, Judge Martin Glenn of the US Bankruptcy Court for the Southern District of New York said in a written decision Thursday.

The litigation administrator is looking to provide notice of lawsuits that aim to undo allegedly fraudulent digital asset transfers.

Each digital wallet is held by a single person, and only that person has the key to it, Glenn said in his ruling. Therefore, it's unlikely that service via NFT will reach anyone other than the person the NFT is targeting, he held.

"Service via NFT therefore seems akin to—if not superior to—service via email," Glenn wrote, noting that courts have in the past approved service via email and through X, formally known as Twitter.

Other judges have approved notice via NFT, Glenn wrote.

The NFTs distributed by Celsius will contain links to to a website “containing copies of the complaints and any other necessary legal documents,” according to the ruling.

The creative service method is necessary because the Celsius litigation administrator doesn’t have any other means of notifying the accounts’ owners, Glenn ruled.

The litigation administrator, Mohsin Meghji, is tasked by Celsius’ restructuring plan with pursuing lawsuits on behalf of Celsius’ creditors.

The litigation administrator is represented by White & Case LLP and ASK LLP. Celsius is represented by Latham & Watkins LLP and Kirkland & Ellis LLP.

The case is Celsius Network LLC , Bankr. S.D.N.Y., No. 22-10964, 10/24/24 .

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SEC Seeks Court Order Sanctioning Elon Musk for Testimony No-Show

LAW [law.com/therecorder/2024/10/28/sec-seeks-court-order-sanctioning-elon-musk-for-testimony-no-show](https://www.law.com/therecorder/2024/10/28/sec-seeks-court-order-sanctioning-elon-musk-for-testimony-no-show)

Ellen Bardash



The SEC has asked a San Francisco federal court to sanction Elon Musk for failing to show up to testify about his 2022 acquisition of Twitter as scheduled in September.

Both SEC attorney Robin Andrews and Musk's attorney, Alex Spiro of Quinn Emanuel Urquhart & Sullivan, submitted statements to the court on Friday.

Spiro said that reimbursing the SEC for counsel's duplicative travel expenses is a fair resolution, but Andrews argued that adding a finding that Musk violated a court order to appear is a needed deterrent.

The proposed sanctions in question are linked to testimony scheduled for Sept. 10, a date rescheduled from a year earlier, when Musk also did not appear. On Sept. 9, three SEC attorneys flew to Los Angeles but were allegedly informed by email the morning of Sept. 10 that Musk had flown to Florida for a SpaceX rocket launch and would not be testifying that day.

The SEC claims Musk knew of the launch and should have informed counsel of his change of plans more than three hours before he was scheduled to testify.

"Only after the SEC sought court intervention (again) and stated its intent to seek sanctions did Musk finally appear," the SEC's statement read. "The court should make clear that disregard for court orders comes with real consequences."

Spiro's statement says the rescheduling was due to an emergency, as the rocket launch was dependent on changing weather conditions and wasn't guaranteed to go forward until shortly before the launch was scheduled.

Musk has stipulated to pay just under \$3,000 for the SEC's September travel expenses, which Spiro wrote is enough to resolve the issue without court intervention. A finding that Musk violated a court order isn't warranted on top of the reimbursement, Spiro wrote, because the court order in question stated testimony could be rescheduled with written consent, a requirement that had been met.

During a brief hearing on Sept. 27, U.S. District Judge Jacqueline Scott Corley confirmed Musk's deposition was rescheduled for Oct. 3. The latest filing confirms Musk showed up to testify for roughly four hours at the SEC's Los Angeles office on that date.

"As a practical matter, the answer is straightforward: there is no sound reason to decide whether Mr. Musk violated the court's order given that he has now complied with that order and offered all of the compensation the SEC seeks," Spiro wrote.

"Only ordering reimbursement of travel costs would not serve as a real deterrent for many individuals considering violating a court order—much less someone of Musk's extraordinary means," Andrews wrote. "Reimbursement of the SEC's travel costs is inadequate because it does not fully address Musk's conduct and is inconsequential to him."

The SEC first turned to the court seeking enforcement of its investigative subpoena in October 2023. In its petition to the court, the SEC indicated a private investigation into whether Musk's 2022 acquisition of what was then Twitter violated federal securities laws had been going on since April 2022, when Musk first announced he was seeking to acquire the company. A deal was ultimately reached Oct. 27, 2022.

The commission claimed Musk had agreed in May 2023 to testify that September but said two days before the scheduled hearing that he would not be appearing, with part of his objection being to holding the hearing in San Francisco. Musk, according to the petition, refused the SEC's offer to have him instead testify in Fort Worth, Texas, in October or November 2023.

As of Oct. 28, Corley had not issued a ruling or scheduled a hearing on the sanctioning dispute.

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Law Firms Mentioned

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Musk's bold 2025 prediction on Tesla sales faces skepticism, scrutiny

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Abhirup Roy

Item 1 of 3 Model Y cars are pictured during the opening ceremony of the new Tesla Gigafactory for electric cars in Gruenheide, Germany, March 22, 2022. Patrick Pleul/Pool via REUTERS/File Photo

[1/3]Model Y cars are pictured during the opening ceremony of the new Tesla Gigafactory for electric cars in Gruenheide, Germany, March 22, 2022. Patrick Pleul/Pool via REUTERS/File Photo Purchase Licensing Rights , opens new tab

- Analysts skeptical of Musk's 20-30% growth forecast
- Global EV sales growth slowing, competition rising
- Musk's politics and public statements impact Tesla's brand

Oct 28 - Tesla (TSLA.O) , opens new tab CEO Elon Musk stunned investors and analysts with plans to grow vehicle sales by 30% next year, buoyed by a new, cheaper model and enthusiasm for self-driving software, but delivering on that promise would surprise much of Wall Street.

Musk's 2025 forecast and improving profit margins sparked the biggest jump in Tesla shares since May 2013, when the company posted its first quarterly profit, and encouraged investors that, even as he works on a years-out robotaxi, he is focusing on the basics of his business.

Musk faces flagging demand for Tesla's sparse and aging lineup, a global slowdown in EV sales growth, and rising competition in key markets such as China and the U.S., analysts and industry experts said.

His forecast of 20-30% growth, after a negligible bump this year, is roughly double what Wall Street has been expecting. Deutsche Bank, after Musk's forecast, predicted 12% growth next year, even with a sub-\$30,000 new model and a refreshed Model Y. RBC analysts maintained their 13% growth forecast.

"There's hardly an analyst anywhere in the world who's going to agree with 20% growth in the company next year" even with a lower cost model, said Sam Fiorani, vice president at research firm AutoForecast Solutions. "Tesla, aside from this quarter, has been seeing a slowdown in its demand for its products. And one quarter is not a trend."

Tesla did not respond to a request for comment.

Global electric vehicle sales have fallen short of lofty expectations and growth has moderated in recent years. But competition is heating up.

The International Energy Agency estimates global EV sales to grow about 23% to 17 million this year, down from a 35% rise last year and over 50% growth in 2021.

China is the biggest market, accounting for nearly two-thirds of the sales this year, followed by Europe with over a fifth and the U.S. with about 10% of sales.

While U.S. tariffs are likely to keep Chinese models out of Tesla's main market, players including China's BYD (002594.SZ) , opens new tab dominate their domestic market and are targeting Europe. U.S. carmakers fear being undercut by Chinese prices, and the focus of Tesla's next model is its relatively low price. "Being able to beat BYD at its own game, I just would say that to me is a non-trivial undertaking," said Pat Ryan, founder of car shopping platform CoPilot. "It's really strategic for them, but it's not going to be easy." Affordability for customers will continue to be a challenge next year, Ryan said, with auto loans expected to be expensive despite interest rate cuts. That will be made worse if Donald Trump becomes U.S. President and cuts tax incentives for EV buyers, which are as much as \$7,500 a vehicle, Ryan said.

Tesla's own lineup includes its best-selling Model Y, which is due for a refresh and the iconoclastic, trapezoidal Cybertruck pickup, which is seeing rising production.

Musk has also increased promotions and marketing for Tesla's advanced driver assist software - called Full Self-Driving - expecting adoption of the technology to stimulate sales in 2025.

Cybertruck production has hit volume levels and is profitable, in a good sign for next year, but analysts including Bernstein, which forecasts 16% growing next year, say 2025 depends on the design of the mystery affordable cars and how fast that production can ramp up.

Following years of rapid growth, Tesla sales declined in the first two quarters of 2024. Incentives and financing deals have lured some back, but Musk has said Tesla will deliver only a few more vehicles this year than the record 1.8 million in 2023.

Musk himself, a powerful personality, has turned off some potential buyers as controversies surrounding his increasingly right-wing politics and public statements weigh on Tesla's brand and demand. Nearly a third of consumers surveyed by Edmunds in August said they were less likely to consider purchasing a Tesla because of Elon Musk.

Investors are focusing on deliveries, margins and the new affordable cars, watching quarter by quarter said Will Rhind, CEO of global ETF issuer GraniteShares. Shareholders, as he put it, will be "making sure that the company delivers on what it says it's going to deliver on."

The U.S. Has Given Top Secret Clearance to Elon Musk and Over \$19 Billion in Contracts, Ignoring His Illegal Drug Use and Phone Chats with Putin as His SpaceX Puts Spy Satellites into Orbit

 wallstreetonparade.com/2024/10/the-u-s-has-given-top-secret-clearance-to-elon-musk-and-over-19-billion-in-contracts-ignoring-his-illegal-drug-use-and-phone-chats-with-putin-as-his-spacex-puts-spy-satellites-into-orbit

By Pam Martens and Russ Martens: October 24, 2024 ~

American taxpayers are footing the bill for 17 U.S. intelligence agencies. Those agencies allowed Donald Trump to become Commander in Chief in 2017, despite multiple women charging him with sexual assaults, his six business bankruptcies and a long history of inflating his wealth to defraud banks. These same 17 intelligence agencies then sat back for four years and allowed Donald Trump to receive Top Secret intelligence briefings and purloin dozens of boxes of classified government documents as he angrily left office after a failed insurrection at the Capitol building.



Elon Musk

Now, yet another billionaire, Elon Musk, has shown these intelligence agencies to have little bark and no bite when it comes to confronting powerful, ultra wealthy men. The Wall Street Journal reported last week that Elon Musk, who as CEO of SpaceX holds a Top Secret government security clearance and is launching spy satellites into orbit under U.S. government contracts, “has been in regular contact with Russian President Vladimir Putin since late 2022.” Putin has been on a U.S. sanctions list since February 2022 for his aggressions against Ukraine.

According to a U.S. government website, Space Exploration Technologies Corp. (SpaceX) has received over \$19 billion in government contracts since 2009, with \$14.4 billion of that coming from NASA, and over \$5 billion coming from the Department of Defense. The same website shows that SpaceX received 54 new government contracts in 2023 and 32 new contracts in 2024, worth more than \$3 billion in each year. Those are the same years that the Wall Street Journal reported that Musk was communicating with Putin.

On March 16, the international wire service, Reuters, reported the following about SpaceX’s growing involvement with U.S. intelligence agencies:

“SpaceX is building a network of hundreds of spy satellites under a classified contract with a U.S. intelligence agency, five sources familiar with the program said, demonstrating deepening ties between billionaire entrepreneur Elon Musk’s space company and national security agencies.

“The network is being built by SpaceX’s Starshield business unit under a \$1.8 billion contract signed in 2021 with the National Reconnaissance Office (NRO), an intelligence agency that manages spy satellites, the sources said.”

Musk has inserted himself into the Trump presidential campaign, with the anticipation that he will get a key post to revamp the federal government if Trump wins the election. Musk, and/or his companies, are under investigation by a host of federal agencies, raising the potential that he might choose to eliminate those same agencies under the rubric of “efficiency.” On this past Sunday’s *Meet the Press*, Senator Bernie Sanders said this: “What really interests me is, if, God forbid, Trump would win, whether it would be Elon Musk running the government and Trump working for him, or the other way around.”

Musk is, on paper, the richest man in the world. In addition to heading the private company, SpaceX, Musk is co-founder, CEO and the largest shareholder of Tesla, the electric-vehicle company that trades publicly and constitutes the largest part of his wealth. Musk also heads the private companies Neuralink (brain-computer interface research), The Boring Company (tunnel construction), and X Corp. (formerly Twitter), the social media platform that is regularly accused of engaging in misinformation. As if those do not represent enough of a drain on his focus and energies, in July 2023 Musk announced the creation of his new artificial intelligence startup, xAI.

Senator Elizabeth Warren, a former law professor and long-tenured member of the Senate Banking Committee which oversees Wall Street’s regulators, was so alarmed by Musk’s sprawling conflicts, that she sent a 10-page letter in August to Tesla’s Board Chair, outlining the conflicts and suggesting that she might have to get the Securities and Exchange Commission involved if the Board continues to fail its duties to shareholders.

Prior to the Journal’s bombshell last week revealing Musk’s conversations with Putin over two years, in January and February of this year, the Wall Street Journal ran two separate articles revealing Musk’s use of illegal drugs – which, if confirmed, should have stripped him of his government security clearances and put SpaceX’s government contracts under immediate investigation.

The Wall Street Journal’s January 6, 2024 (*paywall*) article carried this assessment of Musk’s drug use:

“The world’s wealthiest person has used LSD, cocaine, ecstasy and psychedelic mushrooms, often at private parties around the world, where attendees sign nondisclosure agreements or give up their phones to enter, according to people who have witnessed his drug use and others with knowledge of it. Musk has previously smoked marijuana in public and has said he has a prescription for the psychedelic-like ketamine.”

As far as we are aware, the Journal has not been sued by Musk on the basis that it falsely reported his drug use 10 months ago.

In a November 2022 article, *Wall Street On Parade* called out Musk's reckless behavior as follows:

"...Musk has smoked marijuana on a widely circulated podcast and called the Securities and Exchange Commission 'bastards' at a TED conference because it charged Musk in 2018 with fraud for falsely Tweeting that he had secured financing for taking Tesla private at \$420 per share. The SEC case was quickly settled with Musk and Tesla each paying \$20 million in penalties. Musk was also removed as Tesla's Chairman as part of the SEC settlement and the Board was forced to 'establish a new committee of independent directors and put in place additional controls and procedures to oversee Musk's communications.' "



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MVP: Robbins Geller's Shawn Williams And Mark Solomon

By **Daniel Connolly**

Law360 (October 25, 2024, 2:21 PM EDT) -- Shawn Williams and Mark Solomon, managing partners at Robbins Geller Rudman & Dowd LLP, represented a British pension fund in a shareholder lawsuit against one of the deepest-pocketed companies in the world, Apple Inc. After years of litigation, Apple agreed in March to **settle the case for \$490 million**, an outcome that landed both Solomon and Williams on the list of the **2024 Law360 Securities MVPs**.







Shawn Williams and Mark Solomon

Robbins Geller

In an interview with Law360, the pair said the Apple litigation outcome is a testament to Robbins Geller's resources and the quality of its lawyers and support personnel.

"And because we have a number of former prosecutors and even federal defenders, guys and gals who have tried a lot of cases, that when we say that we are preparing for trial, we really mean it," Williams said. "And that makes a difference in both the timing and the size of the recoveries that we can get for our clients."

Their biggest accomplishment:

The partners are both based in California — Solomon in San Diego and Williams in San Francisco. Solomon has been in practice for over 35 years, while Williams has been practicing for nearly 30.

In the Apple litigation, the two represented the Norfolk County Council, the administering authority of the Norfolk Pension Fund, which covers pensions for local government retirees and other pensioners in the Norfolk, England, area.

Robbins Geller specializes in security lawsuits and has more than 200 attorneys in 10 offices around the U.S. The firm had previously represented the Norfolk Pension Fund in a successful federal securities trial against Puma Biotechnology Inc., alleging that the company had overstated the effectiveness of a breast cancer drug.

Solomon said that trial, **which took place in 2019**, helped him build a personal connection to a Norfolk Pension Fund representative — the person from the fund with whom he'd been liaising had attended the trial.

"He had given evidence in the trial itself. He had given the deposition before. He'd overseen our prosecution of the case, and so he had a very positive experience," Solomon said.

"And it just so happened that Shawn got in touch with me, and I can't remember the details of how, but he told me that he was looking at the case against Apple, and that Norfolk Pension Fund had a significant loss in the case," Solomon added.

The lawsuit against Apple also began in 2019, but with a different retirement system — from the city of Roseville, Michigan — as plaintiff. Roseville's retirement system remained a plaintiff throughout the case but didn't seek the lead position, Solomon said, and Norfolk Pension Fund later took over that role.

The plaintiffs alleged that, in November 2018, Apple CEO Tim Cook and Chief Financial Officer Luca Maestri had made misleading statements overstating the strength of the company's sales in China and its financial outlook.

The suit said that, a short time later, in January 2019, Apple unexpectedly announced that sales in China had slowed, and its stock price dropped dramatically. The plaintiffs argued that the defendants had made public misrepresentations and failed to disclose material facts.

In June 2020, Robbins Geller **won its bid to act as lead plaintiffs' counsel** in the complex case.

Their proudest moment:

Litigation continued, and the plaintiffs and Apple entered into settlement negotiations.

Those talks took place over multiple sessions, both online and in Newport Beach, California, with former U.S. District Judge Layn R. Phillips acting as mediator.

Williams said it was such a gradual, back-and-forth negotiation process that he doesn't recall the exact moment he learned the deal was reached.

He said the team was happy with the terms, though he said a pretrial settlement can lead to a feeling of deflation, too, since attorneys are getting ready for a trial.

"I don't know if I would characterize it as emotional, just sort of we were happy that we were able to put a certain level of risk behind us while also recovering a lot of money for our clients," he said.

In September, U.S. District Judge Yvonne Gonzalez Rogers approved the \$490 million settlement, an amount that included about \$110.5 million in fees and costs of litigation to be shared among attorneys from Robbins Geller and Labaton Keller Sucharow LLP.

Solomon said Apple never would have agreed to settle if the plaintiffs hadn't been willing and able to take the lawsuit to trial.

"You can't maximize [the value of the case] unless you have a credible, real trial threat and a threat of winning the trial," Solomon said. "And believe it or not, even though there are hundreds of cases filed every year, there's probably been less than a dozen cases ever tried successfully to a jury since the [Private Securities Litigation Reform Act of 1995], and only a handful in the last 15 years."

"We search, in a sense, the best opportunities to try cases, because that's the only way we want to do it," Solomon said.

That approach increases the value of all cases, said Solomon, pointing to the **\$1.575 billion his firm recovered** in a case against HSBC's U.S. subsidiary Household International in 2016, following a jury verdict and on the eve of a second trial, as well as the over \$54 million retrieved following the verdict for plaintiffs in the Puma Biotechnology case in Santa Ana, California.

"Taking such cases through trial and taking the likes of the Apple case to the brink of trial demonstrates a commitment and a capability that sends precisely the right message to all of our adversaries," Solomon said.

Williams said the effort to litigate the Apple case was much harder than it might seem from the outside, and that he and Solomon didn't do it alone.

A team of about 18 people — attorneys, secretaries, clerks, accountants and other professionals — worked intensely on the case for about five years and often sacrificed time with their families, he said.

"You know, the amount of effort and resources put into presenting something that's very persuasive, that makes some of the biggest, most powerful and resourced companies in the world say, 'You know what? We should probably talk about whether we can both reach an agreement here,'" Williams said.

"That's not easy, and that's not something that happens overnight," he added.

Why they're securities attorneys:

Solomon grew up in Luton, England, which is near London. Between the ages of 18 and 22, he worked as a police officer.

"Having been a police officer, I'd seen in those days in the late '70s, early '80s, a fair amount of questionable conduct, and just thought that being a criminal defense barrister with the insights I had would be a worthwhile exercise," he said.

In England, he completed undergraduate studies in law at Trinity College Cambridge and legal studies in London at Inns of Court School of Law — now known as The City Law School.

He ended up leaving the U.K. and coming to the U.S. for a master's in law at Harvard University, after which he met his wife, qualified for the bar in the U.S. and continued a practice in this country. He got into securities law through defending such cases at Jones Day and Stroock & Stroock & Lavan LLP.

Williams grew up in New Rochelle, a suburb of New York City, and said that even during his early days of college at State University of New York at Albany, he wasn't sure he would become a lawyer.

"My sister, however, had gone to law school several years before me, and she talked about how much she enjoyed it, and she enjoyed the intellectual challenges of it, and just how studying law kind of changed her outlook on everything," he said.

He ended up completing law school at the University of Illinois College of Law and returned to Manhattan to work as a state-level prosecutor handling mostly street crimes, and later, financial ones.

He said that job required assistant prosecutors to be independently responsible for their cases.

"You had the responsibility of drafting the complaints, interviewing the witnesses — including police officers and experts — with felonies, presenting those cases to the grand jury and trying the cases," Williams said.

It helped him build a strong foundation of investigating and preparing cases with the goal of actually trying them, he said.

This foundation would serve him well when he joined a predecessor firm of Robbins Geller in 2000, Williams said.

What motivates them:

"Holding the powerful and corrupt accountable by helping defrauded pensioners is inspiring — and it means there's never a dull day," Solomon said.

Williams said, "As I mentioned earlier, I'm motivated by the importance of what we do for our clients and the appreciation we feel when we recover losses for them and their constituents."

Their advice for junior attorneys:

Both Solomon and Williams said they would encourage young attorneys to consider securities law.

"If they're thinking about it already, that hopefully is because they're passionate about it, and if they are passionate about it, then take the brakes off," Solomon said. "It's a great practice. You have to work very hard, but if it's your passion, who cares?"

Williams said, "I think that if you are interested in working on helping people, and you're not doing work in the sort of traditional public sector, this work can be very rewarding, intellectually challenging and obviously provide a lengthy career doing good."

"I mean, the people that benefit from the work we do, like Norfolk Pension Fund, these are pensioners. These are regular working-class people who have put their money into pension funds in hopes that that money would grow and be there when they hit retirement age," Williams added. "And when that sum is negatively impacted by fraud, somebody has got to do something about it in a way that helps to put some of that money back in their pockets. And you know, we strive to do that. We're pretty good at it. ... So it can be a rewarding field of practice."

--As told to Daniel Connolly. Additional reporting by Dorothy Atkins and Jessica Corso. Editing by Melissa Treolo.

Law360's MVPs are attorneys who have distinguished themselves from their peers over the past year through high-stakes litigation, record-breaking deals and complex global matters. A team of Law360 editors selected the 2024 MVP winners after reviewing nearly 900 submissions.



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Social Media MDL Judge Rips Meta, AGs' Agency Doc Fight

By **Dorothy Atkins**

Law360 (October 25, 2024, 9:24 PM EDT) -- A California federal judge Friday slammed counsel for Meta and dozens of state attorneys general during a contentious hearing in multidistrict litigation over claims social media is addictive for not reaching agreements on Meta's demands for documents from 275 state agencies, telling both sides' attorneys, "we should've never gotten here."

U.S. District Judge Yvonne Gonzalez Rogers' comments came during a daylong hearing in Oakland, California, in the consolidated personal injury litigation **launched in 2022** against social media giants including Snap Inc., Meta Platforms Inc., TikTok Inc. and YouTube LLC.

The MDL involves hundreds of claims by parents, school districts and dozens of state attorneys general who claim that the companies' social media platforms — such as Instagram and Facebook, which bring in billions of dollars annually in ad revenues — are designed to be addictive, to the detriment of minors' mental health and well-being.

The state attorneys general **separately assert** a variety of consumer protection, fraudulent concealment and other claims brought under their state statutes, and earlier this month Judge Gonzalez Rogers trimmed some allegations but **refused to throw out** the claims entirely.

Meanwhile, last month, U.S. Magistrate Judge Peter H. Kang, who is presiding over discovery disputes in the MDL, issued a 285-page order requiring the state attorneys general offices to hand over to Meta documents from 275 state agencies.

The state attorneys general appealed Judge Kang's decision to the district judge, and during a hearing on their appeal Friday, dozens of state attorneys general took turns arguing why Judge Kang wrongly found that their offices have legal control over documents held by other state agencies.

Many of the other state attorneys argued that the attorney general offices don't have the statutory legal authority under their respective state laws to force state agencies to hand over documents, and they underscored that the offices don't specifically represent the targeted state agencies or name the agencies in their lawsuits against the tech companies. Although some agencies have agreed to voluntarily cooperate with the state attorney general offices, that doesn't mean the offices control those agencies' documents, the state attorneys argued.

They also noted that some attorney general offices, like the Arizona attorney general's office, have contentious relationships with certain state agencies, and the state attorneys anticipate those agencies will not comply with a demand from the attorney general's office regardless of the court's order, which puts those offices at a loss as to what to do.

Additionally, multiple state attorneys argued that Meta's document demands seeking state agency documents are overbroad and irrelevant to the claims against the tech giants.

Bianca Miyata of the Colorado Department of Law asserted that Judge Kang's order is ultimately unprecedented.

"It's so sweeping it would apply to any of the dozen agencies or elected officials or judicial officers that the AG is oftentimes statutorily required to represent," she said.

She noted some state agencies are specifically represented by outside counsel, and not their attorney general's office. She added that the ruling is so broad it suggests that Covington & Burling LLP, which represents Meta in the MDL, has legal control over Meta's documents.

But Judge Gonzalez Rogers repeatedly noted that she's only reviewing Judge Kang's order for legal error, and she said it's not clear there's any state law precedent that bars the federal court from requiring the state attorney general offices from compelling state agencies to hand over documents.

She also stressed that the dispute is taking a "huge" amount of court time and is a waste of judicial resources when the parties would be better off negotiating with each other.

"I understand that this is difficult, hence the 285-page decision," Judge Gonzalez Rogers told counsel for the attorney general offices. "I understand that it may represent some challenges, but... the reality is that we should've never gotten here. You all should have figured out a process."

The judge stated that the states are suing the companies for "hundreds of millions of dollars that you want to go into the state coffers," and the MDL is a streamline approach, so there aren't dozens of cases simultaneously progressing in various other jurisdictions.

"You will have your day in court, and perhaps you will get hundreds of millions of dollars in state coffers," she said. "And yet, you want this to be one-sided. In the past, parties have figured this out, they have figured out a way to make this more fair ... [the magistrate judge] tried to figure out a way to resolve this problem for you all, if you could not resolve on your own."

In response, many of the state attorneys noted that their attorney general offices are not seeking damages, and most states are only seeking civil penalties or disgorgement of profits. Some state attorneys also accused Meta's counsel of abruptly stopping document negotiations with state agencies who had agreed to cooperate, which prompted a sharp reaction by the judge, who quickly asked Meta's counsel repeatedly, "Why?"

"Why is that? Doesn't that in fact hinder the progress of this litigation?" Judge Gonzalez Rogers asked Gregory L. Halperin of Covington & Burling LLP, who represents Meta.

Halpern replied that Meta stopped negotiating with state agencies in September after Judge Kang issued his order because it would be more efficient to negotiate with 35 attorney general offices, rather than with 200 state agencies.

But Judge Gonzalez Rogers told Meta it was taking a "pretty big risk" by stopping negotiations, and "you may find yourself back at ground zero if I [disagree with the magistrate judge]."

"There's a much more efficient way to do it than you all have chosen to do," she added.

Judge Gonzalez Rogers also noted that she could sanction state agencies for not producing relevant docs, but "sanctions must be commensurate with the issue," and she cautioned Meta that she won't sanction states if Meta or the other defendants are "asking for something that has absolutely nothing to do with this."

"The issue of sanctions is not lost on me, and the issue of overreach is not lost on me," she said. "The question is, where is the balance?"

During the discussion, Halperin also accused the Pennsylvania state agencies of "dumping" documents on Meta, but that accusation didn't go over well with the judge.

"Oh, and you all don't know what dumping documents is like?" She replied. "It was gratuitous. I understand. Sit down."

At the end of the hearing, the judge took the arguments under consideration.

In addition to the attorney general offices' motion, Judge Gonzalez Rogers told Boies Schiller Flexner LLP she wouldn't let it disrupt the MDL by allowing the firm to proceed in a different court with a proposed class action it filed against Meta in August claiming Instagram's designs addicted and

harmed a 10-year-old girl and others.

"I'm not going to let Boies Schiller come in here with a class action that you think does something different," the judge said. "You all don't really do anything different."

She added that the firm's arguments against relating the case to the MDL don't do justice to work that has already been done in the MDL, which has been pending for two years.

"I can't force you to dismiss [your complaint], but you can't get in here and disrupt [the MDL]," she told the firm's counsel. "You are not going to assert yourself in your own way [claiming] that [your lawsuit] does something different. It does not."

The personal injury plaintiffs were represented during the hearing by Lexi J. Hazam of Lieff Cabraser Heimann & Bernstein LLP and Previn Warren of Motley Rice LLC.

Delaware is represented by Ryan T. Costa of the Delaware Department of Justice.

California is represented by Joshua E. Olszewski-Jubelirer of the California Department of Justice's Office of Attorney General.

Wisconsin is represented by Colin Stroud of the Wisconsin Department of Justice.

Montana is represented by Megan M. Wold of Cooper & Kirk PLLC.

Florida is represented by Donna Cecilia Valin of the Florida Office of the Attorney General, Consumer Protection.

Arizona is represented by Nathan E. Whelihan of the Arizona Attorney General's Office, Consumer Protection and Advocacy.

Colorado is represented by Bianca Miyata of Colorado Department of Law.

Pennsylvania is represented by Jonathan Burns of the Pennsylvania Office of Attorney General.

Louisiana is represented by L. Christopher Styron of the Louisiana Department of Justice's Office of the Attorney General, Public Protection Division.

Maryland is represented by Phil Ziperman of the Maryland Attorney General's Consumer Protection Division.

Connecticut is represented by Tess Shaw of the Connecticut Office of the Attorney General, Consumer Protection.

Ohio is represented by Kevin R. Walsh of the Ohio Attorney General's Office.

Minnesota is represented by James Van Buskirk of the Minnesota Attorney General's Office.

South Carolina is represented by Clark Cassidy Kirkland Jr. of the South Carolina Attorney General's Office.

North Carolina is represented by Charles G. White II of the North Carolina Department of Justice's Consumer Protection Division.

Virginia is represented by Joelle Gotwals of the Virginia Office of the Attorney General.

West Virginia is represented by Ann Lindsay Haight of the West Virginia Attorney General Office.

Rhode Island is represented by Stephen Nicholas Provazza of the Rhode Island Office of the Attorney General.

New Jersey is represented by Kashif Chand of the New Jersey Division of Law.

Indiana is represented by Corinne Gilchrist of the Office of the Indiana Attorney General, Consumer Protection.

New York is represented by Kevin Wallace of the Office of the New York State Attorney General.

The Meta entities are represented during the hearing by Gregory L. Halperin, Gavin Jackson, Christopher Yeung, Ansel Carpenter and Ashley M. Simonsen of Covington & Burling LLP.

The case is In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation, case number 4:22-md-03047, in the U.S. District Court for the Northern District of California. The lawsuit filed by Boies Schiller is Abraham v. Meta Platforms Inc. et al., case number 3:24-cv-04723, in the U.S. District Court for the Northern District of California.

--Editing by Kristen Becker.

Update: This story has been updated to include additional counsel for the personal injury plaintiffs.

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Judge Chides Bid To Swap Credit Suisse Suit's Lead Plaintiff

By **Emilie Ruscoe**

Law360 (October 25, 2024, 4:40 PM EDT) -- A New York federal judge has rejected an investor's bid to supersede the current lead plaintiff in a securities fraud suit over Credit Suisse's 2023 collapse, saying the petitioning investor had "jumped at the opportunity to sell out his fellow class members" with the replacement motion and criticizing his lawyer too.

In a **Thursday order**, U.S. District Judge Colleen McMahon found that Credit Suisse investor Mehmet Resit As's claim that the court's September **decision trimming the case** should disqualify Ali Diabat, the current lead plaintiff in the consolidated proposed class action, from representing the shareholder class is "meritless."

"Within days of a decision that had reduced the remaining class period to an extremely limited span of time, As jumped at the opportunity to sell out his fellow class members by advancing the entirely meritless argument that the court has shortened the class period to remove from its ambit the largest single-day drop in the stock price of Credit Suisse — all in the interest of divesting Diabat and standing and making himself lead plaintiff," Judge McMahon said.

The judge also said As' attempt to become lead plaintiff suggested to her that he may not have the best interests of his fellow class members at heart — and that his lawyers may be more in control than their client.

"In my mind, the fact that As's lawyer made a meritless argument that is harmful to the interests of the class as a whole in order to try to divest the lead plaintiff of standing raises the strong inference that he did so to further his own interest, rather than the interests of the class. That is the antithesis of client-driven litigation," Judge McMahon said.

In an Oct. 2 attempt to oust Diabat, As **claimed** Diabat hadn't made any Credit Suisse share purchases during a time frame As described as the cases' new operative class period following Judge McMahon's decision partially granting Credit Suisse's **dismissal bid**: Oct. 27 2022 through March 14 2023.

"Consequently, Professor Diabat lacks standing to continue as lead plaintiff or named plaintiff," As argued.

Judge McMahon disagreed Thursday, citing Diabat's opposition brief asserting that since As had been "quick to interpret the court's order in a way that guts the recoverable damages for the class ... raising serious questions about whose interest [they are] really seeking to protect."

"On the evidence before me, I find that 'there is at least a potential that the presumptively most adequate lead plaintiff [As] ... will not fairly and adequately protect the interests of the class,'" Judge McMahon said.

The latest version of the suit alleges Credit Suisse concealed enterprise-threatening struggles in the leadup to its government-backed rescue by its former rival UBS Group AG.

In September, Judge McMahon's order significantly narrowed the suit's claims, including by tossing allegations against co-defendant PwC.

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

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

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

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

The consolidated case is Diabat v. Credit Suisse Group AG et al., case number 1:23-cv-05874, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Katryna Perera, Sydney Price and Jon Hill. Editing by Lakshna Mehta.

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9th Circ. Dubious Of Tesla Investors' Appeal Of \$12B Trial Loss

By **Rachel Scharf**

Law360 (October 25, 2024, 6:55 PM EDT) -- Ninth Circuit judges appeared skeptical Friday of Tesla investors' argument that an erroneous trial instruction improperly led a jury to reject their \$12 billion claim over Elon Musk's 2018 tweets that he had "funding secured" to take the electric car giant private.

A three-judge panel heard oral arguments on the shareholders' **bid for a new trial** in the class action against Tesla, Musk and multiple board members. A California federal jury **cleared** all the defendants of liability following a three-week trial in February 2023.

The investors said this verdict stemmed from an improper instruction that told the jury they must decide whether Musk knowingly lied in his tweets about the ultimately unsuccessful go-private transaction, even though U.S. District Judge Edward M. Chen had already **granted summary judgment** on the issue of scienter ahead of trial.

But the Ninth Circuit panel seemed unconvinced Friday, pointing out that this instruction was in the context of possible damages apportionment only and that Judge Chen clearly told jurors they should assume Musk acted with reckless disregard for the truth. U.S. Circuit Judge Richard R. Clifton noted that the bulk of the trial focused on the undecided issue of whether Musk's tweets affected Tesla share prices.

"My sense is not that the jury's verdict turned on scienter because that wasn't what was really teed up for them to consider," Judge Clifton told the investors' attorney, Nicholas Porritt of Levi & Korsinsky LLP. "The arguments suggest that it was much more a fight over materiality. So why should we assume that what you've described as a defective instruction on scienter was the problem?"

"Because defense counsel literally said that is what this entire case is about, is Mr. Musk's state of mind," responded Porritt, referring to the closing argument given by Alex Spiro of Quinn Emanuel Urquhart & Sullivan LLP.

Another Quinn Emanuel attorney, Ellyde Thompson, countered in her Ninth Circuit argument on Friday that Spiro's statement was clearly made in the context of damages apportionment and materiality.

Thompson said a new trial is unwarranted because Judge Chen's jury instructions correctly stated the law on scienter. Regardless, she argued, this language came from the investors' own proposed instructions and were not challenged in a timely manner.

"That dooms any argument that plaintiff is trying to raise here," Thompson told the judges.

Porritt and Thompson did not immediately return Law360's requests for comment following oral arguments.

The 2023 trial stemmed from a series of August 2018 tweets in which Musk said he had "funding secured" to take Tesla private at \$420 per share. Musk said at the time that he had been engaged in go-private negotiations with Saudi Arabia's sovereign wealth fund but that the kingdom backpedaled after his tweets.

The Tesla investors alleged they lost \$12 billion when shares crashed after Musk said funding was not, in fact, secured. Musk spent **three days on the witness stand** during the trial, saying he was earnestly trying to keep shareholders informed about what he believed to be a solid handshake deal.

Jurors deliberated for less than a day before returning a verdict in the defendants' favor. In a later opinion denying a new trial, Judge Chen said there was **substantial evidence** for jurors to find Musk's tweets weren't material to trading decisions.

Musk **previously agreed** to pay a \$20 million U.S. Securities and Exchange Commission fine and step down as Tesla's chairman because of the 2018 tweets.

U.S. Circuit Judges Richard R. Clifton, Jennifer Sung and Gabriel P. Sanchez sat on the panel for the Ninth Circuit.

The investor class is represented by Nicholas I. Porritt, Adam M. Apton and Alexander A. Krot of Levi & Korsinsky LLP.

Tesla, Musk and the board members are represented by Michael Lifrak, Alex Bergjans, Alex Spiro, Ellyde R. Thompson and Andrew J. Rossman of Quinn Emanuel Urquhart & Sullivan LLP.

The case is In re: Glen Littleton v. Elon Musk et al., case number 23-16010, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Bonnie Eslinger. Editing by Michael Watanabe.

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Alibaba Agrees To \$433.5M Deal In Nearly 4-Year Investor Suit

By **Rae Ann Varona**

Law360 (October 25, 2024, 11:27 PM EDT) -- Alibaba Group has agreed to shell out \$433.5 million to resolve a proposed class of investors' allegations it made misstatements about its exclusivity practices and the planned \$34 billion initial public offering of a fintech affiliate, the Chinese e-commerce company said in a U.S. Securities and Exchange Commission filing on Friday.

With the suit approaching nearly four years of litigation, Alibaba, which has denied the allegations, said in the SEC filing that it entered into the settlement to "avoid the cost and disruption of further litigation."

Meanwhile, investors said in an unopposed motion for preliminary approval also filed Friday that the nonreversionary settlement amounts to more than double the median recovery of estimated damages in securities class actions from 2021 through 2023, and "vastly" exceeds the median recovery in securities class action deals during the past decade where investor losses exceed \$10 billion.

The maximum amount of damages potentially available in the case was \$11.6 billion, according to the motion.

The investors said that the deal is also the 21st largest securities class action settlement in the Southern District of New York and among the top 50 largest in the U.S. since the Private Securities Litigation Reform Act was enacted in 1995.

But the proposed deal is "all the more noteworthy" in light of the investors' risks in continuing with litigation, they said, noting that the court had already dismissed an entire theory of liability concerning fintech company Ant Group, in which Alibaba owned a large equity stake, as well their loss causation allegations concerning Alibaba's alleged use of merchant exclusivity practices in violation of Chinese laws.

Alibaba founder and former CEO Jack Ma had also been **dismissed** from the suit in March 2023 for lack of details he played "any role" in preparing the allegedly misleading statements.

And while the investors had not secured **class certification**, they said that even if they did, they'd still have to prevail at summary judgment, trial, or on any appeals.

"The risk of losing at any of these phases was very real," the investors wrote in their motion. "Plaintiffs would be litigating against a corporate defendant represented by highly skilled defense counsel."

Key documents and witnesses were also all located in China, "significantly complicating discovery," they said.

"In short, Plaintiffs faced years of costly litigation ahead, with a very strong possibility that the case could yield little or no recovery in the future," the investors wrote.

Three proposed class actions were filed in the SDNY beginning in **November 2020** and were consolidated in April 2021.

Their most recent complaint filed in April 2022 alleged that they were damaged in December 2020

when trading prices for Alibaba's American depository shares fell by about 13% after Chinese regulators announced they were looking into the company's allegedly monopolistic practices.

While dismissing Ma from the case in March 2023, the court sustained an antitrust claim against Alibaba, its CEO Daniel Yong Zhang, and its former Chief Financial Officer Maggie Wu for alleged misstatements about the company's exclusivity practices.

In October 2023, investors moved for class certification. Alibaba, in **opposition**, asserted in January that the investor class failed to establish that class questions predominated over individual questions, saying there was evidence that challenged misstatements didn't affect the ADS market price. The investors, it argued, couldn't bank on the December 2020 ADS price drop to "salvage class certification."

In **another** opposition brief filed in May, Alibaba said that the alleged misstatements didn't cause its stock price to inflate and that information the investors alleged was fraudulently concealed was actually "widely reported" during the putative class period.

According to the investors' Friday motion for preliminary approval of the settlement, the parties had begun exploring settlement and had a mediation session in May as discovery and class certification briefing was happening.

They said that they landed on the \$433.5 million after roughly two months of additional negotiations.

Counsel for the investors did not immediately respond to a request for comment late Friday, nor did Alibaba.

The investors are represented by Kara M. Wolke and Melissa C. Wright of Glancy Prongay & Murray LLP, Jeremy A. Lieberman, Jonathan D. Park and Patrick V. Dahlstrom of Pomerantz LLP, Peretz Bronstein of Bronstein Gewirtz & Grossman LLC, Frank R. Cruz of The Law Offices of Frank R. Cruz, and Lesley Portnoy of The Portnoy Law Firm.

Alibaba, Zhang and Wu are represented by Jonathan K. Youngwood, Stephen P. Blake and Bo Bryan Jin of Simpson Thacher & Bartlett LLP.

The case is *In re Alibaba Group Holding Ltd. Securities Litigation*, case number 1:20-cv-09568, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Emilie Ruscoe, Katryna Perera and Sydney Price. Editing by Emily Kokoll.



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3 Firms Seek \$17.6M Fee For Military Borrower Class Deal

By **Katherine Smith**

Law360 (October 25, 2024, 8:39 PM EDT) -- Smith & Lowney PLLC, Hagens Berman Sobol Shapiro LLP and Balley Puryear PLLC have asked a North Carolina federal court to award them \$17.6 million in fees for the work they did to secure a \$64 million settlement from USAA on behalf of borrowers who served in the military.

The attorneys argued in their **filings** Thursday they were able to reach a "favorable resolution" for the 200,000 former and current military borrowers, despite the risky and "daunting nature" of the proposed class action accusing a major financial institution of overcharging for interest and fees. The proposed class counsel fee represents 27.5% of the gross settlement amount.

"All told, class counsel demonstrated skill and dedication in zealously litigating this matter while also repeatedly engaging in good faith mediation," the firms wrote. "The result is a settlement that confers a substantial benefit on class members, most or all of whom USAA Bank contends suffered no damages."

U.S. District Judge Terrence W. Boyle **granted preliminary approval** to the deal between USAA and its subsidiary, USAA Federal Savings Bank, and the proposed class in September, one month after the proposed class — led by Philip Bulls, Dean Brink, Carmin Nowlin, Nicholas Padoa and Raphael Riley — **sought approval** of the settlement.

Under the terms they reached, at least \$33 million in settlement funds will be given to class members who were eligible for remediation payments from USAA but weren't able to cash or deposit them. A final approval hearing has been slated for Jan. 7, 2025.

USAA did not admit any liability in agreeing to settle.

The borrowers' attorneys argued in the motion that they faced many legal challenges in the multi-state lawsuit, including their efforts to get access to thousands of withheld documents and to certify the proposed class, a bid that was "aggressively challenged" by USAA.

Additionally, the borrowers faced a genuine risk of failing to recover any relief at all, as the financial services company issued payments to many class members a year before the suit was filed — as part of a consent order with the Office of the Comptroller of the Currency concerning the bank's compliance with Servicemembers Civil Relief Act and Military Lending Act policies.

USAA had asserted that the consent order and previous payments fulfilled its obligations to the borrowers, and the proposed class would have received zero recovery if the court had accepted the argument, the attorneys said.

The proposed class said in 2021 that USAA failed to properly adjust the interest rates on interest-bearing accounts that the customers had at the bank.

The named plaintiffs **alleged in an amended complaint** brought in a 2022 that they were told by the USAA bank they were being charged reduced interest rates due to their military service, but were actually getting charged higher rates with no accounting or additional explanation as to why they were being overcharged.

USAA **moved to dismiss** the suit and asked for partial summary judgment in 2023, but its motions were never decided on after both sides requested a stay to engage in settlement discussions.

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

USAA is represented by F. Hill Allen of Tharrington Smith LLP and Daniel T. Plunkett, Andrew M. Albritton, Megan S. Ben'Ary and Jeffrey R. Seewald of McGlinchey Stafford PLLC.

The proposed class is represented by Knoll D. Lowney, Claire Tonry, Marc Zemel and Alyssa Koepfgen of Smith & Lowney PLLC, Steve W. Berman and Shayne C. Stevenson of Hagens Berman Sobol Shapiro LLP and Matthew D. Ballew and Paul J. Puryear Jr. of Ballew Puryear PLLC.

The case is Bulls et al. v. USAA Federal Savings Bank et al., case number 5:21-cv-00488, in the U.S. District Court for the Eastern District of North Carolina.

--Editing by Covey Son.

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OpenAI, Authors Battle Over Execs' Texts And Proof Of Harm

By **Hannah Albarazi**

Law360 (October 25, 2024, 11:14 PM EDT) -- California labor law doesn't shield OpenAI from producing CEO Sam Altman's and President Greg Brockman's texts and social media messages relevant to a copyright infringement lawsuit, authors alleging OpenAI and Microsoft illegally used their copyrighted works to train artificial intelligence program ChatGPT have told a New York federal judge.

In a letter to U.S. Magistrate Judge Ona T. Wang on Wednesday, the author plaintiffs urged the court to order the San Francisco-based company to produce in discovery text messages and direct messages on the platform X, formerly known as Twitter, sent by certain employees who used their personal phones or their social media accounts for work, "as is clear from their public posts."

In addition to Altman's and Brockman's messages, OpenAI must also produce relevant messages of head of product Nick Turley and technical staff member Chelsea Voss, who used social media for work purposes and whose messages likely contain information relevant to the copyright infringement claims, the authors said.

The authors told the court that OpenAI must also collect and search the text messages — including via messaging applications such as WhatsApp, iMessage and Signal — of Brockman, Altman and Mira Murati, the latter of whom announced her departure from the company in September after serving as its chief technology officer.

OpenAI submitted its own letter to the court on Wednesday. In it, OpenAI said the plaintiffs have refused to respond to discovery requests regarding the supposed harm they've suffered as a result of the alleged use of their works by OpenAI to train ChatGPT. OpenAI said plaintiffs have asserted "boilerplate objections" and refused to identify any documents in response to their request.

"The discovery OpenAI seeks goes directly to the harm plaintiffs claim to have suffered, which is relevant not only to plaintiffs' claims for damages but also to OpenAI's fair use defense," the company wrote. "Whether and the extent to which plaintiffs have actually been harmed, as they claim, is directly relevant to plaintiffs' claims for both statutory and actual damages."

The Authors Guild, which represents thousands of writers, sued OpenAI for copyright infringement on behalf of its members in New York in September 2023. That suit was **consolidated** with another brought by non-fiction authors. Meanwhile, OpenAI is facing copyright infringement claims from news publishers, including The New York Times, in New York as well as **similar claims** brought by authors in California federal court.

In its letter to the court Wednesday, the authors slammed OpenAI's assertion that it lacks control of its employees' social media and its assertion that California Labor Code Section 980 prohibits it from asking for its employees' social media materials.

"That is incorrect," the authors wrote. "This is a case in federal court under federal law. Federal discovery rules apply. If a state statute conflicts with federal discovery rules, the federal rules preempt that statute. In any event, [Section] 980 does not even apply here, since it applies only to 'personal social media.'"

The authors said the California labor code "does not shield OpenAI from producing its employees'

social media" and argued the accounts in question were used for work so are therefore not personal in nature.

In their letter, the authors said OpenAI has repeatedly refused to say whether it's searching its employees' direct messages and texts, which "jeopardizes the timely completion of discovery."

"To streamline discovery, OpenAI should be required [to] disclose to plaintiffs which of its custodians use texts or social media for work, so that the parties can have informed conversations about searching those files," the authors said.

The authors urged the judge to "order OpenAI to search these repositories and provide the requested information."

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

The Authors Guild is represented by Rohit Nath of Susman Godfrey LLP, Rachel Geman of Lieff Cabraser Heimann & Bernstein and Scott J. Sholder of Cowan DeBaets Abrahams & Sheppard LLP.

Microsoft is represented by Annette Louise Hurst of Orrick Herrington & Sutcliffe LLP and Jared B. Briant of Faegre Drinker Biddle & Reath LLP.

OpenAI is represented by Allison Levine Stillman, Andrew Gass, Joseph Richard Wetzel Jr., Sarang Damle, Luke Budiardjo and Elena Nightingale Dawson of Latham & Watkins LLP, Joseph C. Gratz, Rose Lee and John R. Lanham of Morrison & Foerster LLP and Michelle Ybarra of Keeker Van Nest & Peters LLP.

The cases are Authors Guild et al. v. OpenAI Inc. et al., case number 1:23-cv-08292, and Alter et al. v. OpenAI Inc. et al., case number 1:23-cv-10211, both in the U.S. District Court for the Southern District of New York.

--Editing by Janice Carter Brown.



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'Starting Point' Algorithm Enough To Fix Prices, DOJ Says

By **Bryan Koenig**

Law360 (October 25, 2024, 6:41 PM EDT) -- The Justice Department is using the first algorithmic price-fixing case to reach an appeals court to argue that just because an algorithm only set "starting points" doesn't make its use legal, in a Ninth Circuit amicus brief backing efforts to revive a room rate lawsuit against Las Vegas casino hotels.

Weighing in on **a case** that's "the first of its kind to reach a U.S. Court of Appeals," the U.S. Department of Justice pushed for a precedent that could guide its own and private cases by arguing that a Nevada federal judge wrongly focused on the nonbinding aspect of software company Cendyn Group's pricing algorithm.

"In dismissing plaintiffs' second cause of action challenging the set of agreements between Cendyn and each hotel, the court held that the agreements could not be 'in restraint of trade' because Cendyn's prices were mere starting points," said the DOJ's Antitrust Division. "That holding contravenes settled antitrust principles ... and, if affirmed, could stymie meritorious antitrust claims involving pricing algorithms by taking well-established legal theories off the table."

The DOJ similarly pushed for the revival of the first proposed class action claim alleging an agreement among the hotel owners whose Las Vegas strip properties include Caesars Palace, Treasure Island, Wynn Las Vegas, The Cosmopolitan and Virgin Hotels. While the judge's reasoning for dismissing that claim, the DOJ said, "is more ambiguous," to the extent it's also based on the defendants not making a "commitment to final prices," it's also wrong.

"Although the district court identified several reasons for finding such an agreement implausible, the court mentioned numerous times that the hotels were not required to follow Cendyn's prices," the DOJ said. "That condition is not necessary for illegality, as an agreement among competitors to use certain pricing algorithms to generate default or starting-point prices is per se illegal even if there is no further agreement on final prices."

Combating pricing coordination **facilitated by algorithms** that set or at least recommend pricing on a wide range of goods and services has become a major priority for both private plaintiffs and antitrust enforcers, including through the Justice Department's own civil case accusing Agri Stats of helping major chicken, pork and turkey processors to exchange sensitive pricing and production information, as well as through **government amicus briefs** weighing in on various cases.

Key to enforcers' arguments is that companies cannot do through an algorithm what they'd be banned from doing through human interaction.

Cases have so far met with mixed results, including U.S. District Judge Miranda M. Du's **May decision** in the instant case finding that named plaintiffs Richard Gibson and Roberto Manzo failed to sufficiently allege there was a "tacit agreement" to fix room rates between Cendyn, its subsidiary Rainmaker Unlimited Inc. and Caesars Entertainment Inc., Blackstone Inc., Treasure Island LLC and Wynn Resorts Holdings LLC.

Months later, a New Jersey federal judge said that a room-rate proposed class action against Atlantic City casino-hotels, which drew government amicus support, had **the same failings** that doomed the case over room prices on the Las Vegas Strip.

Pushing Thursday to revive the Las Vegas case, and enshrine a precedent that could aid future litigation, the DOJ argued that "concerted action" among competitors, as prohibited by the Sherman Antitrust Act, can take multiple forms and need not be a "formal" agreement.

Agreements between direct, horizontal competitors, the DOJ noted, are considered per se or automatically illegal, while vertical agreements, like the one alleged here between software maker and individual hotels, are considered under the harder-to-prove rule of reason standard that balances anticompetitive conduct against potential justifications.

Looking at the horizontal claims in the instant case, the DOJ argued it wouldn't matter if competitors didn't actually institute the prices called for.

"Black-letter antitrust law prohibits horizontal price-fixing agreements without regard to whether the agreement is carried out at all. The agreement itself is the violation," the DOJ said in a brief that frequently cited allegations that Cendyn touted the wide acceptance of its pricing recommendations and encouraged its hotel clients not to intervene against the defaults recommended by the algorithm.

In rejecting allegations because the Cendyn algorithms weren't binding, the DOJ said, the district court made a mistake that "could have significant consequences in today's economy."

"Competitors' joint use of pricing algorithms can have anticompetitive effects even where the algorithms' prices are not binding," the DOJ said. "Such prices create a baseline for competitive decisions, and they can distort the competitive process by maximizing price increases, minimizing price decreases, aligning prices among competitors, creating price floors, discouraging discounts, or increasing sellers' pricing power."

Nor should there be any distinction drawn between "starting-point prices and final prices" for the horizontal claims, according to the amicus brief.

"The per se rule also prohibits a horizontal agreement on default or starting-point prices, even if the competitors retain the freedom to depart from those prices," the DOJ said. "And where the object of the alleged conspiracy is to jointly use certain algorithms to set starting-point prices ... the fact that the prices are only starting points does not prevent a finding of concerted action — but rather changes the nature of the concerted action alleged."

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

The government is represented by Alice A. Wang, Yixi (Cecilia) Cheng, Spencer D. Smith, Daniel E. Haar, Nickolai G. Levin, Stratton C. Strand and John J. Sullivan with the DOJ's Antitrust Division.

The proposed class is represented by Steve Berman and Rio Pierce of Hagens Berman Sobol Shapiro LLP.

Cendyn Group LLC is represented by Jon C. Williams of Campbell & Williams and Sadik H. Huseny, Timothy L. O'Mara, Brendan A. McShane and Anna M. Rathbun of Latham & Watkins LLP.

The Rainmaker Group Unlimited Inc. is represented by Nicholas J. Santoro of Holley Driggs and Alicia Rubio-Spring of Goodwin Procter LLP.

Caesars Entertainment Inc. is represented by Boris Bershteyn of Skadden Arps Slate Meagher & Flom LLP and Adam Hosmer-Henner, Jane Susskind and Chelsea Latino of McDonald Carano Wilson LLP.

Treasure Island LLC is represented by Patrick J. Reilly, Arthur Zorio and Eric D. Walther of Brownstein Hyatt Farber Schreck LLP.

Wynn Resorts Holdings LLC is represented by Mark C. Holscher, Tammy Tsoumas and Matthew Solum of Kirkland & Ellis LLP.

Blackstone Inc. and Blackstone Real Estate Partners VII LP are represented by Daniel R. McNutt and

Matthew Wolf of McNutt Law Firm PC and Matthew L. McGinnis of Ropes & Gray LLP.

The case is Gibson et al. v. Cendyn Group LLC et al., case number 24-3576, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Isaac Monterose, George Woolston and Jared Foretek. Editing by Jay Jackson Jr.

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