OFFICIAL COURT NEWSPAPER OF SOUTH FLORIDA
DailyBusinessReview.com
An ALM Publication VOL. 94, NO. 155 $2.00
DAILY BUSINESS REVIEW

Real Estate Brokerage EWM Loses Fight for Commission on School Deal

by Lidia Dinkova

GOOGLE

Miami-Dade County deed and appraiser records show Somerset Academy bought the school site and adjacent property for $2.65 million.

Big-name South Florida real estate brokerage Esslinger-Wooten-Maxwell Inc. lost its fight for a commission on the sale of a 9-acre school site.

EWM, based in Coral Gables, argued the Lones family owed the brokerage a 6% commission for the lease and sale of its property, which became Somerset Academy Bay Middle School, a public charter school in Miami's Kendall neighborhood.

The Third District Court of Appeal disagreed Wednesday and upheld the trial court's summary judgment in favor of the seller, the Lones Family LP.

The appellate panel rejected EWM's arguments that it introduced the buyers to the Loneses and was entitled to the fee under the state procuring cause doctrine.

EWM appellate attorneys Lauri Waldman Ross and Theresa Girten of Ross

SEE EWM, PAGE A2

Wife of Ex-Panthers Star Luongo Sued in Pedestrian's Personal Injury Case

by Raychel Lean

Catherine Darlson and Michael Hersh of Kelley|Uustal in Fort Lauderdale are litigating a personal injury lawsuit against the wife of retired Florida Panthers hockey star Roberto Luongo, after a woman was hit by a car in front of their house.

Plaintiff Jessica Provost, 52, was walking through her Parkland neighborhood on Dec. 19, 2018, when she approached Gina Luongo's new multimillion-dollar home on Stonegate Boulevard, which was being built from the ground up and having its driveway paved by Broward company Terence Cudmore Builder Inc.

The lawsuit, filed Jan. 9 in Broward Circuit Court, claims there was no warning sign or a safe walkway for pedestrians to get past Luongo's blocked driveway, allegedly leading to disastrous consequences for the plaintiff.

"As soon as she was forced from the safety of the sidewalk into the road, she was struck from behind," Darlson said.

Provost suffered life-threatening injuries, including brain swelling, warranting emergency surgery. She also fractured her hip, femur and arm, according to the complaint.

SEE LUONGO, PAGE A6

PUBLIC NOTICES & THE COURTS

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Daily Business Review is published daily Monday through Friday, except legal holidays, by ALM Media, LLC, 1 SE 3rd Ave., Suite 1750, Miami, FL 33131, (305) 377-3721.

Subscription Rates: One year (253) issues - basic (individual and small firms) $575.88 plus tax; discounted group rates available. Single copies (M-F) - $2.
Back issues when available (M-F) - $6. Periodicals postage paid at Miami, FL.
POSTMASTER: Send address changes to Daily Business Review,
1 SE 3rd Ave, Suite 1750, Miami, FL 33131

Cyber, Data Privacy, Diversity Top List of Risky Concerns for General Counsel This Year

by Sue Reisinger

Corporations in America entered a new decade facing several heightened risks in finance, securities and corporate governance that should concern general counsel, says attorney Lori Zyskowski.

Zyskowski is a partner in the New York office of Gibson, Dunn & Crutcher and is co-chairwoman of its securities regulation and corporate governance practice. She also has a perspective gained from 13 years working in-house at major companies, including most recently as executive counsel for corporate, securities and finance at General Electric Co.

Zyskowski recently spoke with Corporate Counsel about the trends she sees and the challenges they present for general counsel in 2020. Here are excerpts from that conversation, edited for clarity and brevity.

What are some of the top trends you see in terms of securities enforcement that impacts the job of the general counsel?

One trend we are seeing is a significant focus on cyber-related misconduct. It's important for general counsel to be very concerned about this. Not only could their companies be a victim of cyber misconduct, but also because actors around them may have liability issues.

Lori Zyskowski, co-chairwoman of Gibson, Dunn & Crutcher's securities regulation and corporate governance practice, has a perspective gained from 13 years working in-house at major companies.

SEE TRENDS, PAGE A2

Attorneys Clash Over Parnas' Bid to Release More Info to Impeachment Managers

by Tom McParland

Lev Parnas and another indicted ex-associate of Rudy Giuliani are battling over whether additional evidence from their Manhattan criminal prosecution should be turned over to Congressional impeachment investigators.

In a series of court filings made public Tuesday, Parnas' attorney, Joseph A. Bondy, asked a judge's approval, for the third time, to provide new materials to House impeachment managers, who have been making their case in the Senate for removing President Donald Trump from office.

The request came after Parnas, a Soviet-born businessman accused of federal campaign-finance violations, gave interviews to MSNBC and CNN earlier this month, in which he implicated Trump, Vice President Mike Pence and U.S. Attorney General William Barr in a wide-ranging effort to pressure Ukraine's government to announce a corruption investigation of Joe Biden.

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ON APPEAL

Would Roberts Need to Recuse in Any Trump Suit Challenging Bolton?

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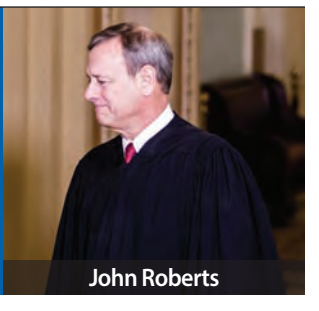

John Roberts

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PARNAS

Parnas has also been keen to cooperate with subpoena from the House Permanent Select Committee on Intelligence, which has led the impeachment investigation in Congress. Bondy has told the New York Law Journal that he hopes to use his client's efforts to help mitigate any sentence he may receive, if convicted in the Southern District of New York.

According to the filings, the latest request involved materials from Parnas' iCloud account that Apple Inc. had produced to prosecutors. Though it was not clear precisely what type of information Parnas sought to provide, Bondy said in a Jan. 17 letter that it was "essential to the committee's ability to corroborate the strength of Mr. Parnas's potential testimony."

The request was opposed by Parnas' less-outspoken co-defendants, as well as Manhattan federal prosecutors, who argued that public disclosure risked the "privacy and privilege interests of third parties and co-defendants."

U.S. District Judge Paul Oetken ordered a hearing for Thursday afternoon to consider Parnas' request.

Parnas' co-defendant, Igor Fruman, is also an ex-associate of Giuliani, Trump's personal lawyer.

Parnas and Fruman are accused of funneling foreign funds into U.S. elections in order to buy political influence. Both men have pleaded not guilty to conspiracy, falsifying records and lying to the Federal Election Commission. Two other defendants, Andrey Kukushkin and David Correia, have pleaded not guilty to related charges.

The latest filings highlighted divisions among defense attorneys over the handling of evidence and strategy in the case.

Todd Blanche, a Cadwalader, Wickersham & Taft partner who represents Fruman, said the materials at issue contained information that also belonged to his client, and asked the court to "claw back" evidence that had already been turned over to the committee related to his client.

"That is unacceptable," he said in a Jan. 22 filing.

Blanche continued: "My obvious concern is that Mr. Bondy's hasty efforts to find a forum (beyond MSNBC and CNN) for someone—anyone—to listen to his client's version of events caused him to irresponsibly produce materials to the HPSCI."

Bondy responded in a Jan. 24 filing that common-law privileges, like the attorney-client protection, did not prevent Parnas from complying with the Congressional subpoena, and said the demands of impeachment investigators required information to be turned over "sooner rather than later."

"Mr. Blanche's request, if granted, would have the effect of suppressing the flow of materials to Congress that are detrimental to the president and his attorneys through misplaced reliance on tools related to criminal, adversarial proceedings," he said.

Prosecutors said they had not objected to allowing Parnas to produce his own materials, but noted that the new petition was different.

"The materials at issue include records that, as far as the government knows, were never in Parnas' possession. For instance, the data produced by Apple includes deleted records (which may only exist because of the Government's preservation requests), account usage records and other information to which a subscriber would not necessarily have access," Assistant U.S. Attorneys Rebekah Donaleski, Nicolas Roos and Douglas Zolkind wrote.

To the extent that he wished to provide his own texts, emails and photographs, they said, Parnas could simply download his own iCloud account. However, other materials should be identified ahead of time to give the other defendants the chance to raise privilege or privacy concerns prior to their release.

Gerald Lefcourt, who represents Kukushkin, said his client did not specifically object to Parnas' request, except to maintain his claim of attorney-client privilege.

"If all privileged materials can be removed from Mr. Parnas' iCloud account prior to production to HPSCI, or the iCloud account can be produced to HPSCI in some other manner that preserves Mr. Kukushkin's privileges, we have no objection to the application," he said.

A hearing was set for 2:30 p.m. Thursday in Manhattan.

Bondy said late Tuesday that he and Parnas had been cleared through Sen. Chuck Schumer's office to attend the Senate impeachment trial Wednesday, as senators prepare to vote on whether to hear witness testimony.

In a letter, Bondy asked Oetken to modify his client's travel restrictions and allow the removal of Parnas GPS monitoring bracelet so he could watch the proceedings from the Senate gallery. The government, Bondy said, did not oppose Parnas' request to attend, but did object to removing his ankle bracelet.

Tom McParland of New York Law Journal can be contacted at tmcparland@alm.com. Follow him on Twitter @TMcParlandALM.

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EWM

& Girten declined comment. Pete DeMahy of DeMahy Labrador Drake & Cabeza, who represented EWM in Miami-Dade Circuit Court was in trial and had no comment.

The Lones family attorney Henry Marinello said this was a long, hard-fought battle to prove EWM wasn't entitled to a commission.

"The courts were very clear that we were on the right side of the battle," he said.

The Lones family and EWM signed a one-year contract in January 2010 for EWM to lease or sell the property on behalf of the family for a 6% commission on the gross deal value. The agreement included protection for EWM covering the commission if a deal closes within a year of the agreement's expiration and the buyer is someone EWM brought in.

The property includes the school, a 9-acre vacant lot and a single-family home at 9500 and 9790 SW 97th Ave.

During the contract, EWM found potential buyers, brothers Ignacio and Fernando Zulueta, but no deal closed.

In June 2013 after the contract and one-year protection clause expired, the Lones family leased the property to Somerset Academy Inc., which purchased it in 2017.

Miami-Dade County deed and appraiser records show Somerset Academy bought the school site and adjacent property for $2.65 million. Records list the home at 9790 SW 97th Ave. in the name of the Lones family.

EWM sued Lones Family LP and family members Lee Lones and Judy Lones for breach of contract, arguing the Zuluetas and Somerset essentially are the same buyers. EWM said it was purposefully excluded from the deal to get out of the commission payment.

EWM also argued the procuring cause doctrine covered the commission because it was the one to introduce the Loneses and the Zuluetas.

The Loneses countersued EWM and filed a third-part complaint against the family's broker at the time the Somerset deal closed, World Business Brokers Inc., which was paid a 7.5% commission. Because EWM was claiming an entitlement to this commission, the Lones family had to bring in WBB as EWM would have had to go after WBB for the fee, Marinello said. WBB turned around to sue EWM and the Loneses.

The trial court dismissed all of these claims once it determined EWM is owed no commission and the appellate panel affirmed this.

Miami-Dade Circuit Judge Mavel Ruiz granted the Lones family a motion for summary judgment against EWM and denied EWM's summary judgment motions in 2018.

Although EWM submitted evidence showing the Zuluetas once were on the Somerset board, the brothers hadn't been on the board since 2005 and didn't own the corporation.

The three-judge panel agreed with Ruiz that the procuring cause doctrine doesn't apply because the two sides had a special contract with its own provisions and protections for EWM.

"This exclusive right of sale contract was for an express period of twelve months and contained a twelve-month protection provision to commence upon expiration of the listing period. EWM contends there is no evidence that the parties intended to supersede the procuring cause doctrine by writing a twelve-month protection period into their agreement," Judge Monica Gordo wrote for the unanimous panel. "Yet, by its terms, the agreement explicitly limited EWM's right to recover commission for any sale or lease of the property for a specified period."

Judges Thomas Logue and Edwin Scales III concurred.

They also upheld the trial court's conclusion that the lease and sale of the property happened after both EWM's contract and one-year protection period expired to exclude it from a commission.

"We decline to apply this equitable doctrine to a sale that was effectuated six years after the expiration of the protection period, where there is no evidence of a deliberate delay, where there was an intervening broker, and where the ultimate buyer was a completely different entity," Gordo wrote.

Lidia Dinkova covers South Florida real estate for the Daily Business Review. Contact her at LDinkova@alm.com or 305-347-6665. On Twitter @LidiaDinkova.

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TRENDS

In addition, the [U.S. Securities and Exchange Commission's] division of enforcement teams seem to be focusing more on cyber-related financial fraud. Enforcement is also focusing on investment advisers. This SEC is trying to benefit Main Street investors. It is very much looking at advisers who may have conflicts of interests or are not acting in best interests of retail investors.

What can general counsel be doing in this area?

Cyber and data privacy are among the top risks, especially with all the uncertainty still around the new California privacy act [the California Consumer Privacy Act went into effect Jan. 1, though its final regulations won't be finalized until July. As risks continue to change, it's important to do tabletop exercises, for example, in the event of a breach. Companies must continually be reevaluating what is needed.

And the board's oversight of risk is another area. Just make sure that the company has an appropriate process around overseeing risk.

You mentioned there were several heightened risks. What's another area?

A very big focus for many general counsel in the coming year is ESG [environment, social and governance] and sustainability. ESG is just such an important lens to look at how companies do business. It includes human capital management [for example, workforce diversity and gender pay equity]. And it includes climate change.

There was [BlackRock Inc. CEO] Larry Fink's recent letter to CEOs urging improved disclosure for shareholders on climate change and on sustainability. BlackRock is changing how it does investments, making sustainability the center. Fink recommended that companies look to the Sustainability Accounting Standards Board and to the Task Force on Climate-Related Financial Disclosures. BlackRock will be looking for companies that align their disclosures to the standards of both.

How important are diversity issues in the coming year?

More diversity continues to be something very important. We are starting to see reporting requirements around board makeup. California has a law requiring a certain number of female directors while other states, like New York, are requiring reports on board diversity. Institutional investors are very focused on these disclosures as well, as are proxy advisory companies.

Is there any other risk area you'd like to mention?

I think audit committee oversight. The SEC in December issued a reminder to audit committees on what they should be focused on, such as auditor independence, generally accepted accounting practices and substantial engagement with the auditor on critical audit matters, or so-called CAMS. The fiscal year ended in December is first time these CAMS will be reflected in audit reports. It's important that general counsel understand what these CAMS are and make sure that the audit committee has a process to evaluate them. I spoke more about this last week as part of a Gibson Dunn panel on the 16th Annual Challenges in Compliance and Corporate Governance.

Sue Reisinger covers general counsel and white-collar crime for Corporate Counsel, an ALM affiliate of the Daily Business Review. Contact her at sreisinger@alm.com.

FLORIDA LEGAL REVIEW

Federal Appeals Court Weighs Florida Law on Felon Voting Rights

by Bobby Caina Calvan and Kate Brumback

Lawyers for the electoral battleground state of Florida asked a federal appeals court to set aside a ruling that allowed some felons to regain access to the ballot box despite owing fines and other legal debts.

Florida Republicans, led by Gov. Ron DeSantis, argue that only felons who have completed all conditions of their sentences should be allowed to vote. He and GOP lawmakers say that to regain the right to vote, felons must not only serve their time but also pay all fines and other legal financial obligations.

The case before the Atlanta-based 11th U.S. Circuit Court of Appeals could be consequential because of the razor-thin margins that sometimes decide election contests in Florida, a perennial battleground state.

"This Court's answer to that question will have far reaching effects, as it will determine whether the State must comply with the court's injunction in upcoming elections of national, state, and local significance in 2020," Florida's brief says.

At issue before the appellate court is Amendment 4, a ballot measure approved by voters in 2018, allowing felons to regain the right to vote ahead of the March 17 primaries and November's crucial presidential balloting.

In response to Amendment 4, the Republican-controlled Legislature passed a bill — later signed by DeSantis — stipulating that felons must pay all fines, restitution and other financial obligations to complete their sentences.

Voting rights groups immediately sued and asked for a temporary injunction that would let felons continue registering to vote and cast ballots until the merits of the law can be fully adjudicated. A full trial is expected to begin in April.

In October, a federal judge in Tallahassee called Florida's voter registration process an "administrative nightmare" and suspended the law for plaintiffs who could not afford to pay their outstanding debts. He agreed with voter rights advocates that imposing the debt requirement amounted to a poll tax.

Although that ruling directly benefited only the 17 plaintiffs in the cases, the case could have broad implications for thousands of other felons.

During arguments Tuesday, a three-judge panel of the 11th Circuit asked tough questions of both sides, many of them focusing on very technical legal issues. But they seemed skeptical of some of the state's arguments.

Senior Judge Lanier Anderson repeatedly brought up a hypothetical scenario of two people convicted of the same crimes and sentenced to the same punishment, but one can afford to pay the financial obligations and has the right to vote restored while the other can't afford to pay and remains unable to vote.

ZACH PORTER

Judge Lanier Anderson repeatedly brought up a hypothetical scenario where the only difference between two felons regaining access to the ballot box was their ability to pay fines and other legal debts.

Pete Patterson, a lawyer representing the state, argued that justice would have been completed in the first case but not in the second.

One of the plaintiffs, Rosemary McCoy, traveled to Atlanta for the hearing. At a news conference afterward, she spoke passionately about regaining her right to vote.

"How long do you have to pay? We served our time. We made a mistake," she said. "It shouldn't be forever."

State officials predicted "irreparable harm" if the temporary injunction stands and disputed that the financial requirement is a poll tax.

"The criminal restitution, fines, and fees that Plaintiffs have not paid are not any type of tax on the right to vote; they are aspects of punishment for their crimes that they have not fulfilled," the state argues in its appeal.

As many as 1.6 million felons who have completed their prison sentences regained voting privileges under Amendment 4, which was passed overwhelmingly by Florida voters in November 2018.

In a brief contesting the state's appeal, the Southern Poverty Law Center, which is representing some of the felons, said the legislation that stripped voting rights was "one in a long string of examples of Florida's outright hostility towards voting rights, especially when it comes to people with felony convictions."

With a stroke of the governor's pen, 80% of the state's felons reenfranchised through Amendment 4 were again ineligible to vote, according to attorneys representing the former inmates.

Earlier this month, the Florida Supreme Court issued a non-binding advisory opinion agreeing with the Republican governor.

With the Feb. 18 deadline looming to register for the presidential primary, the three-member appellate panel is expected to quickly deliver a ruling.

Bobby Caina Calvan and Kate Brumback report for the Associated Press.

Church, Local Official Gun Bills Backed by House Panel

by Jim Saunders

With supporters pointing to attacks on churches and synagogues, a House panel approved a measure that would allow people to carry concealed weapons at religious institutions that share properties with schools.

The House Criminal Justice Subcommittee also approved a separate bill that would allow county commissioners, school board members and elected city officials to be armed at their public meetings.

State law generally allows people to carry concealed weapons at religious institutions, but it bars being armed on school properties. That has effectively meant that people cannot carry guns to churches or synagogues that meet at places with schools.

The measure (HB 1437) approved Tuesday would allow religious institutions to authorize people with concealed-weapons licenses to carry guns at such locations.

"Right now, if a church was located on the same property as, say, a preschool, and that preschool met from Monday through Friday, people at that church would not be allowed to carry concealed on Sunday and Wednesday night during those services, and this bill would change that," bill sponsor Jayer Williamson, R-Pace, said.

Brevard County Sheriff Wayne Ivey supported the proposal, saying he considers it a "property rights bill" instead of a gun bill.

"Right now, we see religious institutions across the country being attacked by those with evil in their heart," Ivey said. "And what we know with absolute certainty is that our citizens have to have the right to be the first line of defense in protecting them, their families and those around them in those places of worship."

But Rep. Jennifer Webb, D-Gulfport, said she has talked with churches and synagogues in her Pinellas County district and they did not see a need for people to carry concealed firearms in their facilities.

Lawmakers have considered similar proposals in the past, but the measures have not been approved. Also, a Senate version of Williamson's bill has not been filed for this year's legislative session.

ROBERT HUNTER/FLORIDA HOUSE OF REPRESENTATIVES

Bill sponsor Jayer Williamson says the measure would allow people to carry concealed weapons at religious institutions that share properties with schools.

The issue of safety at religious institutions, however, has drawn heavy attention in recent years after mass shootings at churches and synagogues in places such as Texas and Pennsylvania.

The other gun-related bill (HB 183) approved Tuesday by the House panel would allow local elected officials to bring weapons to their public meetings if they have concealed weapons licenses. Under current law, people, including elected officials, are not allowed to bring guns to such meetings.

"Every day, we get threats. We have people stalking our staffs and our commissioners," Okaloosa County Commissioner Graham Fountain said in supporting the bill, proposed by Rep. Mel Ponder, a Destin Republican who is running for the Okaloosa County Commission this year.

It remains unclear whether always-controversial gun legislation will pass during this year's session.

The Senate has started moving forward with a gun-control bill (SB 7028) that includes proposals such as eliminating the gun-show "loophole" on background checks and creating a record-keeping system for private gun sales. House Speaker Jose Oliva, R-Miami Lakes, said last week the Senate measure "probably will not move very far here in the House, if at all."

Jim Saunders reports for the News Service of Florida. NSF Assignment Manager Tom Urban contributed to this report.

FROM THE COURTS

SCOTUS Gives No New Guidance to 11th Circuit on Grand Jury Secrecy

by Jonathan Ringel

The federal appeals court in Atlanta will decide whether district court judges have inherent power to order the disclosure of grand jury materials without new guidance from the U.S. Supreme Court, which turned away a chance to rule in a similar case.

The justices on Jan. 21 let stand a ruling by the U.S. Court of Appeals for the D.C. Circuit that said judges don't carry that authority. The justices' inaction means lower court precedents will remain conflicted on the issue.

The full Eleventh Circuit is weighing a case of a historian's efforts to examine records from the grand jury that investigated the 1946 lynching of two African American couples at the Moore's Ford Bridge in Walton County, Georgia. The killings are considered one of the precursors to the civil rights movement.

Judge Marc Treadwell of the U.S. District Court for the Middle District of Georgia in 2017 ordered the release of the Moore's Ford grand jury transcript, but the U.S. Justice Department appealed.

Last year, an Eleventh Circuit panel split 2-1 to uphold Treadwell's ruling, based in part on a 1984 precedent known as Hastings, 735 F.2d 1261. The panel allowed the release of grand jury records in an "exceptional situation"—the indictment of then-District Judge Alcee Hastings of Miami. Courts have also released grand jury transcripts in historically significant cases, including those involving Julius and Ethel Rosenberg, President Richard Nixon and union leader Jimmy Hoffa.

One of the two judges in last year's majority, Adalberto Jordan, noted he was bound by precedent but was concerned its holding over a judge's power to release grand jury records was "too open-ended." The full Eleventh Circuit voted to reconsider the case and last October heard arguments over whether the court should scrap the *Hastings* precedent.

DIEGO M. RADZINSCHI

Justice Stephen Breyer urged the federal judicial rules committee to revisit the question whether district courts retain authority to release grand jury material outside situations that are specifically enumerated.

As the Eleventh Circuit pondered its decision, the Supreme Court shied away from the question last week, with only Justice Stephen Breyer offering his thoughts on the matter. He wrote that the D.C. Circuit's ruling "is in conflict with the decisions of several other Circuits, which have indicated that district courts retain inherent authority to release grand jury material in other appropriate cases."

"Whether district courts retain authority to release grand jury material outside those situations specifically enumerated" in the federal judicial rules "is an important question," Breyer added. He urged the federal judicial rules committee to revisit the question.

Ashwin Phatak of the Constitutional Accountability Center, which in an amicus brief backed the historians seeking unsealed grand jury materials in the Eleventh Circuit and the high court cases, said it was disappointing that the justices declined to hear the case. "[T]he text and history of the Federal Rules make clear that district courts have the inherent authority to disclose historically significant grand jury materials," he said.

A denial of certiorari "is not a ruling on the merits," he added, arguing the Eleventh Circuit need not wait to see whether the judicial rules advisory committee takes up Justice Breyer's suggestion that it clarify its position.

"The Advisory Committee has consistently stated for decades that district courts have this authority, as have numerous courts," he said.

David Karp of Carlton Fields in Miami, who represents a historian and a foundation pushing for the records to be unsealed in the Georgia case, said Breyer's comment "reinforces our argument that the Rules Committee already recognizes the inherent power of federal courts to release grand jury material in cases of exceptional historical importance."

"We were also heartened to see Justice Breyer recognize that this issue presents an important question," added Karp. "The process of confronting our nation's past is vital to democracy and to progress. Federal courts can and should further these values, rooted in the First Amendment, by exercising sound discretion to release grand jury records in appropriate cases of exceptional historical importance."

A lawyer for the Department of Justice did not respond to a request for comment.

Joseph Bell, a New Jersey lawyer who represents the historian in the Eleventh Circuit case, echoed those who said the judicial rules committee already allows judges to unseal grand jury information in extraordinary cases.

During the Eleventh Circuit argument, one judge told Bell that, if he lost the case, the records could still come via the Civil Rights Cold Case Records Collection Act of 2018, which allows a review board to authorize the release of records from cases like the Moore's Ford lynching.

Bell noted this week that the new law gives veto authority to the U.S. attorney general, so "I may never get the transcripts."

Mike Scarcella of ALM's Supreme Court Brief contributed to this report.

Jonathan Ringel is managing editor of the Daily Report, an ALM affiliate of the Daily Business Review. Contact him at jringel@alm.com. On Twitter: @jonathanringel.

K&L Gates Refused Accommodations for ADHD, Anxiety: Lawsuit

by Lizzy McLellan

A former business development staffer for K&L Gates has sued the firm for discrimination, alleging that his manager failed to meet his needs related to anxiety and ADHD, then fired him because of his requests for accommodations.

Frank Krastman filed a complaint Monday in the U.S. District Court for the Western District of Pennsylvania. He worked in K&L Gates' Pittsburgh office from August 2016 to March 2019, most recently as a CRM specialist, with many of his duties related to the firm's client relationship management system.

According to the complaint, Krastman was diagnosed with generalized anxiety disorder and attention deficit hyperactivity disorder in June 2018. He told his manager, associate director of marketing Eileen Mallin, in November 2018, and explained that he was easily distracted by the noisy work environment.

Krastman requested the ability to get a laptop for his job and work from home, the complaint said, but later learned from a human resources director that his manager had denied the request.

A few days later, Krastman alleged, Mallin informed him that he would be limited to working 39.5 hours each week going forward, and that he would have to get approval before working any overtime. The same week, he received a negative performance review from Mallin for the first time, he alleged.

Krastman made another request to work from home part-time in December 2018, and again it was denied, he alleged.

"Mallin told the plaintiff that she was concerned that other employees would want to work from home if she granted his request," the complaint said. "However, other similarly situated employees without disabilities were permitted to work from home. Further, the plaintiff's request was a request for an accommodation related to his disability, not merely for his convenience."

DIEGO M. RADZINSCHI

A former staffer is suing Pittsburgh-based K&L Gates for discrimination, alleging his manager refused to make disability accommodations and then fired him over his requests.

Instead, the complaint said, the firm provided Krastman with noise-reducing headphones to wear in the office in January 2019. The same month, Mallin "expressed her 'concerns' regarding the plaintiff's work and productivity" and asked that he begin providing her with daily reports detailing everything he did that day.

According to the complaint, Krastman felt additional pressure to complete more work because of the daily report requirement, and he began working off the clock to get work done without exceeding his weekly hours.

In March 2018, he was accused of overstating the amount of work he had done in a daily report, and he was fired.

"The reason given for the plaintiff's termination was a pretext; the real reason for his termination was because of his disability and the employer's refusal to provide a reasonable accommodation," Krastman alleged.

The Equal Opportunity Employment Commission issued him a right to sue in December.

A spokesman for K&L Gates did not immediately respond to a request for comment Tuesday.

Krastman is represented by Pittsburgh lawyer Michael Bruzzese.

Lizzy McLellan writes about the legal community and the business of law at firms of all sizes. Contact her at lmclellan@alm.com. On Twitter: @LizzyMcLell.

More Regulation Reason Lawyers Will Send Work to Outside Counsel

by Dan Clark

Even chief legal officers and general counsel who plan on hiring more in-house attorneys anticipate a significant amount of work will go to law firms because of the complex regulatory landscape, according to the Association of Corporate Counsel's 2020 Chief Legal Officers Survey published on Tuesday.

"In general, it is becoming a much more complex world," Susanna McDonald, the ACC's chief legal officer, said in an interview. "As the CLO of an organization, public or private, you are going to have to make strategic decisions based on the current challenges as well as your current mix of talent."

Of all the general counsel and chief legal officers who plan on hiring more in-house attorneys, approximately 44% expect to increase the amount of work they send to law firms. Thirty-three percent of general counsel and chief legal officers at private companies plan on increasing the amount of work they send to outside counsel.

Increasing regulation appears to be the reason more menial work is sent to law firms, so in-house counsel can work on more complicated tasks. Sixty-two percent of respondents expect the regulation relevant to their industry to increase in the next year. According to the report, 58% of respondents said their departments' expenditures increased because of regulatory compliance.

Speaking from experience, McDonald said that when she had to hire a deputy general counsel, she looked at the talent she already had in the legal department and put it up against the challenges the ACC faced in the future. She said at the time those challenges included complex regulatory demands surrounding cyber management and data security.

"I made sure I hired someone with a lot of experience in those areas," McDonald said. "That both helped reduce outsourcing and also freed up some dollars to spend on outsourcing when needed."

Regulation is becoming a more and more complex issue throughout all industries, McDonald said. One regulatory category affecting legal leaders across industries is cybersecurity and data privacy, especially with laws such as the European Union's General Data Protection Regulation and the California Consumer Privacy Act.

McDonald said board members are increasingly asking chief legal officers and general counsel about cybersecurity.

"That crosses industry. Everyone has a customer and all of that data has to be protected," McDonald said. "Everyone has employees, and all of that data has to be protected."

The data in the report is based on responses from 1,007 chief legal officers and general counsel spanning 20 industries and 47 countries.

Dan Clark covers cybersecurity, legal operations and intellectual property for Corporate Counsel, an ALM affiliate of the Daily Business Review. Contact him at dclark@alm.com. On Twitter: @Danclarkalm.

"In general, it is becoming a much more complex world," says Susanna McDonald, the Association of Corporate Counsel's chief legal officer.

Troubled MoneyGram Names Villaseñor as Permanent General Counsel

by Sue Reisinger

MoneyGram International Inc. has named interim general counsel Robert Villaseñor to the permanent position as well as corporate secretary.

Villaseñor has served in those posts at the Dallas-based money transfer company since October, when former general counsel Aaron Henry left to become chief legal officer at CoreLogic Inc., also in the Dallas area. Villaseñor previously served as Henry's associate general counsel since joining MoneyGram in July 2018.

MoneyGram chairman and CEO Alex Holmes said in a statement, "Robert has proven to be a valuable asset to MoneyGram throughout the recent evolution of our capital structure and as we continue to execute on our digital transformation. His knowledge of our business combined with his prior experience, including working at consumer-centric global brands like Starbucks, will help ensure MoneyGram is well-positioned as we continue to evolve our company."

Villaseñor, who was not immediately available for comment, previously worked at three other public companies, including Starbucks Corp., Lennox International Inc., and Celanese Corp. He also worked in private practice at Hunton & Williams; Davis Polk & Wardwell; and Gibson, Dunn & Crutcher. He graduated cum laude from the University of Michigan Law School.

As general counsel, he takes on a host of legal issues at a company struggling to become profitable again. Its latest financial filing covering the third quarter of 2019 showed a $7.7 million loss, an improvement from the nearly $21 million loss for the same quarter the year before.

As general counsel, Robert Villaseñor takes on a host of legal issues at MoneyGram, the Dallas-based money transfer company struggling to become profitable again.

The most notable legal headache for Villaseñor is navigating an extended deferred prosecution agreement with the U.S. Department of Justice, which accused the company of knowingly aiding and abetting wire fraud and willfully failing to implement an effective anti-money laundering program.

The original 2012 agreement was extended in 2018 for at least three more years after a whistleblower compliance lawyer said the company was violating terms of the deal. The revised deal included extending a corporate monitor's term and paying a $125 million penalty, in which the final $55 million must be paid by May 8.

Other legal issues facing Villaseñor, according to recent financial reporting statements, include:

- Class action and shareholder derivative lawsuits over alleged compliance failures relating to the extension of the prosecution agreement.
- A related ongoing inquiry by the New York Department of Financial Services.
- An inquiry by the U.S. Department of the Treasury's Office of Foreign Assets Control of possible violations of sanctions regulations. The inquiry is based on a voluntary self-disclosure filed by MoneyGram.
- A workforce reduction of 70 to 90 jobs by the end of the first quarter of 2020.
- A fight in the U.S. Tax Court with the Internal Revenue Service challenging the disallowance of some tax deductions. MoneyGram paid the taxes but is trying to win a refund. If it were to lose the case, the company has said it could owe an additional $20 million in state taxes.

Sue Reisinger covers general counsel and white-collar crime for Corporate Counsel, an ALM affiliate of the Daily Business Review. Contact her at sreisinger@alm.com.

LEGAL EDUCATION

Political Turmoil Fueling Law School Demand

by Karen Sloan

DIEGO M. RADZINSCHI

With impeachment proceedings underway, a Kaplan Test Prep survey finds the political climate is contributing to higher law school application rates.

Politics are continuing to push some would-be lawyers into law school.

Fully 84% of the 101 law school admission officials recently surveyed by Kaplan Test Prep said that the current political climate was a "significant factor" in the 3% increase in applicants during the previous admissions cycle. Among those respondents, 26% described politics as "very significant" in the growing interest in law school. Meanwhile, 41% of the more than 400 prelaw students Kaplan surveyed separately said that politics impacted their decision to pursue a juris doctor.

Each of those metrics shows slight declines from the previous year. Last year, 87% of admissions officials cited politics as fueling more interest in law school, while 45% of prelaw students said it was influencing their educational choices. Still, the newest results indicate that upheaval in Washington is having a multiyear impact on the law school admissions landscape.

"It's getting harder and harder for people to come together over basic policies, and as a result, those with less influence are being forgotten," one prelaw respondent said. "I want to be a lawyer in large part to bring a voice back to these individuals and fight for equality under the law."

Kaplan decided to start surveying admissions officials and prelaw students about the influence of politics in decision-making after seeing speculation in 2017 that the political climate was prompting more people to consider law school, said Jeff Thomas, executive director of admissions programs at Kaplan Test Prep. The number of people applying to law school in 2018 spiked nearly 9%.

"We now have an answer: the impact remains significant and appears to have staying power," Thomas said of the influence of politics in law school admissions. "As law school admissions officers point out, caring about politics alone is not a strong enough reason to attend law school. Your career in law will outlive any particular presidency. A term in the House lasts two years, law school lasts three years, and a presidency can be as short as four years, but your career will last decades."

Hence, Kaplan advises students to consider their long-term career goals before applying, he added.

The latest survey results also show that a large portion of aspiring law students want to attend a school with like-minded classmates. Among the respondents, 46% said it's important to go to a school where fellow students generally share their political and social beliefs.

Karen Sloan is the legal Education editor and senior writer at ALM. Contact her at ksloan@alm.com. On Twitter: @KarenSloanNLJ.

FROM PAGE A1

LUONGO

Darlson, her attorney, points to Parkland's ordinances, the Florida Department of Transportation's construction standards and the Florida Building Code, which dictate that individuals or businesses involved in property construction are in charge of providing pedestrian walkways and directional barricades.

"The city can't be responsible for maintaining appropriate walkways for every avenue of construction that happens anywhere in the city or the country, so it's really on the owners and the construction companies to make sure that their construction sites are safe for pedestrians," Darlson said.

Canadian Roberto Luongo is not involved in the lawsuit because the property, its permit and the construction work is solely under his wife's name. The couple own other properties jointly, according to Darlson, who said it's not yet clear why the ownership structure of the Parkland house is different.

The co-defendant is Cudmore Builders. Both defendants have retained attorneys Gregory Anderson and Kera Hagan, of Anderson, Mayfield, Hagan and Thron in West Palm Beach. The attorneys did not immediately respond to a request for comment.

Catherine Darlson of Kelley|Uustal in Fort Lauderdale represents the plaintiff in a Broward lawsuit against the wife of former Florida Panthers star Robert Luongo.

Roberto Luongo is commonly considered the most popular Panthers player in history, and his club took the unprecedented step of retiring his jersey number when he left the National Hockey League last year after 19 seasons as a goaltender. He also played for the New York Islanders and Vancouver Canucks.

Cases such as this are common in the personal injury realm, according to Darlson, who said defendants have often cut corners and dodged rules, codes or ordinances because doing so was easier or cheaper.

"I think they generally think, 'What's the big deal? It's only for a short period of time, or nothing's really going to happen,'" Darlson said. "Unfortunately, those are always the cases we see where somebody totally innocent ends up hurt."

The attorney said her client is still recovering, and will likely require significant surgery and therapy in the future. The lawsuit accuses the defendants of negligence, and seeks damages that could reach into the millions.

Raychel Lean reports on South Florida litigation for the Daily Business Review. Send an email to rlean@alm.com, or follow her on Twitter via @raychellean.

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EDITORIAL
Editor-in-Chief, Regional Brands & Legal Themes: Hank Grezlak
hgrezlak@alm.com 215-557-2486
Managing Editor: Catherine Wilson
cwilson@alm.com 305- 347-6611
Engagement Editor: Thomas Phillips
tphillips@alm.com

BUSINESS
Vice President / Public Notice Operations: Jeff Fried
jfried@alm.com 305- 347-6615
National Sales Director of ALM Events/Sponsorships: Donald Chalphin
dchalphin@alm.com 215- 557-2359
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Director / Operations & MIS: Guillermo Garcia
ggarcia@alm.com 305- 347-6658

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FOCUS LATIN AMERICA

Mexico Tries to Sell Presidential Jet to Canada; Raffle Next

Associated Press

Mexico is trying to sell its luxurious presidential jet to Canada, but will raffle the plane off if the Canadians don't want it, President Andrés Manuel López Obrador said.

The offer marks the latest chapter in a desperate effort to unload the large and lavish Boeing 787 Dreamliner that López Obrador views as wasteful.

He said Tuesday that the plane bought for more than $200 million by his predecessor would be a step up for Canada's prime minister.

"We learned that Canadian Prime Minister Trudeau's airplane had problems, and we offered it to them, but there hasn't been an agreement yet," López Obrador said. "The truth is that it is bigger than the Canadian prime minister's, and better."

Officials have said Mexico would accept $130 million for the plane.

López Obrador presented a prototype of the lottery-style ticket that would be issued for the jet if the raffle idea goes ahead. He said he hoped business owners would buy huge blocks of the 500-peso ($25) tickets. The government hopes to sell 6 million tickets and use the proceeds to buy medical equipment.

More than a white elephant, the plane now seems to be an albatross. Some Mexicans said they wouldn't want to win it.

"I would not buy it," Mexico City resident Lidia Flores said of the possible raffle tickets, saying she would have no idea of what to do with the hulking airliner is she won.

SHUTTERSTOCK

President Andrés Manuel López Obrador that the plane bought for more than $200 million by his predecessor would be a step up for Canada's prime minister.

Even López Obrador expresses doubts about the idea, saying he worries that greed or envy could wreck the life of anyone who won the jet in a raffle.

"I don't want to bear the guilt, because I would be responsible," he said Tuesday. "It worries me. It"s the only thing holding me back, how to prevent something bad befalling the person who wins."

Others see the raffle proposal as a distraction from Mexico's real problems, such as crime, violence and economic stagnation.

"This is a smoke screen," said Eliseo Ochoa, a lawyer in Mexico City. "This is just a joke at the expense of the public."

The austerity-minded López Obrador takes commercial flights and has refused to step foot on the presidential jet, which was purchased by the previous president, Enrique Peña Nieto.

López Obrador says the jet is too luxurious for a country where half the people are poor.

The plane failed to find a buyer after a year on sale at a U.S. airstrip, where it piled up about $1.5 million in maintenance costs.

The jet is expensive to run and is configured to carry only 80 people, with a full presidential suite with a bedroom and private bath. Experts say it would be too expensive to reconfigure back into a commercial airliner that normally carries as many as 300 passengers.

Previously, López Obrador had suggested bartering the plane in exchange for U.S. medical equipment or selling it in shares to a group of businessmen for executive incentive programs. He has also offered to rent it out by the hour, in hopes of paying off the remainder of outstanding loans on the plane.

Mexican Twitter users are posting ideas about where they would park the huge jet if they won it (clue: in the yard, because it won't fit in the garage). They fantasize about the kind of parties they would throw aboard it (beer-filled trips to the Super Bowl appears popular) and what colors they would paint it (one user suggested bright purple).

But the most popular idea for using the jet appears to be turning it into a stationary restaurant or taco stand.

Scotiabank CEO Seeks Help for Troubled Venezuela in Op-Ed

by Doug Alexander

Calling Venezuela one of "the most corrupt nations on Earth," Bank of Nova Scotia Chief Executive Officer Brian Porter urged governments around the world to seize assets tied to wrongdoing and use them to support democracy in the troubled South American country.

The CEO of Canada's third-largest lender, which has significant operations in Latin America, took the unusual step of weighing in on Venezuela's political and humanitarian crisis through an op-ed piece published in the National Post on Tuesday.

"Once the richest and most stable democracy in Latin America, Venezuela's democracy, economy and society have collapsed in recent years, in that order," Porter wrote. "The time has come for governments around the world to take strong action by naming and shaming the perpetrators of the crimes committed against the Venezuelan people and by standing with Venezuela's beleaguered democratic movement."

Porter's op-ed comes as Venezuelan opposition leader Juan Guaido seeks international support for the ouster of President Nicolas Maduro, whose government is facing painful sanctions and economic collapse. In his piece, Porter referred to Guaido as "Venezuela's legitimate president" who "has shown tremendous courage" in asking for help from other nations.

"Now we must heed that call and stand with the Venezuelan people," Porter wrote.

Porter urged governments throughout the Americas and Europe to both support Venezuelan refugees and initiate a coordinated effort to identify and seize assets from corrupt regime officials. The proceeds, along with additional aid, should be used to provide financial support to the democratic movement in Venezuela, he wrote.

Scotiabank, based in Toronto, does business in more than 30 countries, with significant operations in Latin America and the Caribbean, and a focus on on the Pacific Alliance countries of Mexico, Chile, Colombia and Peru.

The bank also has a history in Venezuela. In 1997, it opened a representative office in Caracas and agreed to spend $88 million for a 25% stake in Venezuelan lender Banco del Caribe. In 2014, Scotiabank took a $98 million write-down on the Venezuelan investment as the country suffered hyper-inflation and economic turmoil, which led to government restrictions that limited the bank's ability to repatriate cash and dividends from the country.

In its annual report last year, Scotiabank disclosed $507 million in cross-border exposure to Venezuela and Uruguay, without breaking the countries out separately. The total was described as mostly an "investment in subsidiaries and affiliates," with $96 million of the amount in loans tied to those countries.

In his op-ed Tuesday, Porter cited the European Union for having "strongly condemned" Maduro's regime and supporting Guaido. Closer to home, he praised Canadian Deputy Prime Minister Chrystia Freeland and Foreign Minister Francois-Philippe Champagne for showing "tremendous courage and leadership" for "unambiguously condemning the Maduro regime's abuses."

Doug Alexander reports for Bloomberg News.

Keiko Fujimori Returns to Peru Jail Pending Laundering Trial

by John Quigley

Opposition leader Keiko Fujimori will be returned to jail while she's investigated for money laundering, less than three months after she'd been freed by Peru's top court on the grounds that her constitutional rights had been violated.

In Tuesday's ruling, the court said Fujimori should be arrested immediately and jailed preventively for 15 months, arguing it was a proportional measure to safeguard the probe. With Fujimori incarcerated into April 2021, prosecutors should have time to charge her and put her on trial, Judge Victor Zuniga said, according to video broadcast by state television.

Prosecutors told the court they have new evidence that Fujimori took cash from companies including Brazilian builder Odebrecht SA for her 2011 presidential campaign and sought to disguise it as donations from individuals. They also said there's a serious risk that Fujimori will seek to obstruct the investigation.

The 44-year-old daughter of Peru's disgraced autocrat Alberto Fujimori was jailed in 2018, only to have the Constitutional Court annul the sentence 13 months later. In his summing up, Zuniga said that decision isn't binding.

The ruling is a fresh blow to her party, Popular Force, which received a drubbing in congressional elections Sunday, losing a majority it won in 2016. President Martin Vizcarra dissolved Congress four months ago following clashes with the opposition over anti-graft reforms.

Minutes before the judge concluded his verdict, Fujimori walked into the courtroom with her American husband Mark Vito Villanella and took a seat next to her lawyer.

In a prerecorded video posted on her Facebook page following the ruling, she said she's a victim of "political vengeance promoted by many interests," including the media and "a government who wants to concentrate power to avoid" scrutiny. Her husband will take her case to "foreign governments," she said.

Fujimori hasn't been formally charged and denies any wrongdoing. She said last month she'll take a break from political activity to face the investigation.

Odebrecht is at the center of Peru's biggest bribery probe after the company admitted to financing candidates and bribing officials across Latin America.

John Quigley reports for Bloomberg News.

PRACTICE FOCUS / REAL ESTATE

Board: Be Mindful of FCCPA When Collecting Past Due Condo Assessments

Commentary by
Carolina Sznajderman Sheir


Sheir

The ability to collect assessments from unit owners on a timely basis is a key component to the financial health and stability of a community association. An association's governing documents, as well as the applicable community association statutes (i.e., Chapter 718 for condominiums, Chapter 720 for HOAs and Chapter 719 for co-ops) provide several enforcement mechanisms to assist associations with their collection efforts, including lien and foreclosure rights, late fees, interest, fines, suspension of use and voting rights and the ability to demand rental payments from units occupied by tenants. However, an association must proceed with caution when implementing these valuable tools or risk running afoul of the protections provided to consumers under the Florida Consumer Collection Practices Act (FCCPA), and its federal counterpart the Fair Debt Collection Practices Act (FDCPA).

Facing the challenges of increased delinquencies, board members often take an aggressive stance against a delinquent unit owner, and try to creatively encourage owners to bring their accounts current. An association's governing documents and the Florida Statutes provide specific procedures that must be followed in connection with attempts to enforce the collection of assessments. However, we often see associations employing alternative methods. Some of these creative methods are subtle, involving the disconnect of utilities and cable, shutting off FOBs or other access cards to the property, denying services such as valet or denying access to amenities. Other methods involve public discussion of a particular unit owner's delinquencies, calls to owners, employers and relatives of owners regarding delinquencies, and other instances of public shaming. Such alternative or creative methods may run afoul of the FCCPA and the FDCPA, subjecting the association, board members or property management companies to potential liability.

BOARD OF CONTRIBUTORS

Both the FCCPA and the FDCPA regulate consumer protection in Florida. However, the Florida and federal statutes are not identical and a violation one statute does not necessarily constitute a violation of the other. Regarding the collection of association assessments, both the FCCPA an FDCPA consider assessments a "debt" or "consumer debt."

The FCCPA prohibits persons from engaging in certain prohibited practices while attempting to collect a consumer debt. Under the FCCPA, a debt or consumer debt is defined as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment."

Recently, the First District Court of Appeal confirmed that condominium assessments are consumer debts that fall within the purview of the FCCPA. Specifically, in *Kelly v. Duggan*, a condominium unit owner sued an association's president for violations of the FCCPA. A separate suit was filed in federal court against the association.The unit owner in *Kelly* alleged that the president of the association locked him out of his storage units, made public derogatory statements and disclosed information about the unit owner's reputation to a vendor.

The recent decision in *Kelly v. Duggan* is a reminder to all associations, board members and management companies to proceed with caution when attempting to collect past due assessments. It's recommended that associations work with their management team and legal counsel to develop collections policies and procedures to ensure that efforts undertaken to combat delinquencies do not place the association at risk of violation of the consumer protection statutes.

Carolina Sznajderman Sheir is a partner at Eisinger, Brown, Lewis, Frankel & Chaiet. She focuses her practice on real estate law, community association law, commercial litigation and developer representation and can be reached at 954-894-8000 ext. 238 or csheir@eisingerlaw.com.

FROM THE COURTS

Litigation Funder Legalist Backs Atari's Copyright Campaign

by Christopher Niesche

Litigation finance firm Legalist is funding game development company Atari Interactive in its ongoing trademark and copyright infringement lawsuits.

"We respect intellectual property, and fighting copyright infringement is important," Frederic Chesnais, CEO of Atari SA, said in a statement. "Partnering with Legalist enables us to bring that effort to the next level."

Legalist invests in commercial litigation by using algorithms that scrape state and federal court records to source and help underwrite investments. The firm exclusively focuses on midmarket cases that require less than $1 million in funding.

A press release from Atari earlier this year indicated that Legalist is providing $991,926 in funding to Atari.

"Legalist is proud to aid a revolutionary gaming brand like Atari in litigating its claims in federal court," Legalist CEO and co-founder Eva Shang said in a statement. "Legalist's unique combination of technology and human expertise is what allows us to underwrite David vs. Goliath cases quickly and efficiently."

SHUTTERSTOCK

Atari has sued a string of companies with copyright claims, including online retailer Redbubble, retailer Target and chocolate maker Nestlé.

Atari was originally founded in Sunnyvale, California, in 1972. It is now based in Paris. In 2014, under the new leadership of Chesnais, Atari SA and its subsidiaries Atari Interactive and Atari Inc. began a new corporate strategy to rekindle the Atari brand, Legalist said.

Atari SA had an annual operating income of $2.76 million in the 12 months ended March 21, 2019, according to its annual financial report. Data from Yahoo Finance puts its total market capitalization at $84 million, according to data from Yahoo Finance.

The company has sued or is suing online retailer Redbubble for allegedly selling counterfeit and copyright-infringing products; retailer Target for developing a game called Foot Pong, which the firm alleged was like its own game Pong; chocolate maker Nestle, alleging a Kit Kat video game advertisement violates the copyright and trademark rights of its 1975 arcade game Breakout; among others.

Christopher Niesche reports for Law.com International, an ALM affiliate of the Daily Business Review. Contact him at cniesche@alm.com. On Twitter: @ChrisNiesche.

In Kobe Bryant Helicopter Crash, Could a Lawsuit Be Coming?

by Amanda Bronstad

The cause of the helicopter crash that killed retired Los Angeles Lakers basketball player Kobe Bryant, his 13-year-old daughter and seven other people, remains unknown. The National Transportation Safety Board is investigating the crash, which occurred on a foggy Sunday morning in Los Angeles.

Could there be a lawsuit?

The Recorder talked to former U.S. Department of Transportation Inspector General Mary Schiavo, a partner at Motley Rice, whose firm brought a lawsuit over a crash of the U.S. Army's Black Hawk helicopter, a Sikorsky similar to the one that was taking Bryant and the other passengers to his daughter's basketball game.

Schiavo told me what lawyers were watching.

This article has been edited for length and brevity.

MICHAEL NAGLE/BLOOMBERG NEWS

Former U.S. Department of Transportation Inspector General Mary Schiavo, a partner at Motley Rice, said that lawyers would be looking at multiple facts, including the conversation between the air traffic control and the pilot just before Sunday's crash, which killed the former LA Lakers star Kobe Bryant and eight others.

What can you tell us about this helicopter?

This one was a 1991 helicopter, so it's got some years on it. To me, it was interesting it was circling downtown Los Angeles at a very low altitude. To me that says fog, or some kind of problem. Then they headed to Calabasas. Then they turned left and headed to a wooded non-populated area. Those might suggest you're having mechanical [problems], or they were desperately trying to get out of the fog.

When you look at maintenance records, what it was used for in the meantime, what was the reason they went "visual flight rules," instead of IFR [instrument flight rules]? In the Black Hawk Sikorsky case, there were everything from problems with the rotor, the rotor pitch failed, one problem was the seat came loose.

What about the pilot?

It's looking bad at this point for the piloting, but we don't know yet. But taking off in limited visibility on a visual flight rule plan, that call will be questioned by the NTSB. Why didn't they go instrument flight rules, which means air traffic control? So here, the second avenue of examination will be the pilot's performance and whether this is pilot error, which brings us to the third thing lawyers will look at: What is this holding company?

Which holding company?

This aircraft was titled, owned, by a company called Island Express. Island Express is south of Los Angeles, Orange County, and runs visual tours, air tours. They take people out over Catalina Island. And they have a few dozen employees, and they were looking for more employees when this happened, and they took their website down.

They have a number of pilots and do tours. So the media reports that this was Kobe Bryant's helicopter, but the registration does not say that. It says it belongs to Island Express. That will bring us into the legal conundrum of:

- Were the pilots also Island Express pilots?
- What kind of coverage does Island Express have? and
- Were there any special circumstances? Did Kobe or anyone on that plane put pressures on the pilot?

They'll be looking at what kind of flight control Island Express had on this flight. It looks like they owned it, it looks like it's their pilot, so why weren't they more careful? Does Mr. Bryant's estate have any financial interest in this Island Express, or did he turn over ownership of his helicopter to maintain it?

What do you make of the air traffic controller's conversation with the pilot?

I've only heard snippets of air traffic control. The U.S. government runs air traffic controls. They said they were going to follow the aircraft on radar. But then they said, "No, you're way too low." They said, "We can't climb any higher because we're in the clouds." They were really low for LA. That's a little surprising. So they said, "We can't provide you flight forwarding anymore. We can't watch you on radar, you're too low." What we need to hear is the next few sentences. What came next? Did they give them any more instruction?

Why is that?

That's really important, because it is possible air traffic control made a mistake. If that's the case, the U.S. of America foots the bill. ... We don't know what the FAA told them next. If they said climb to 2,000 feet and turn left, and there was a mountain in their path, the government is liable. If the next thing is you are not legal, you are in the clouds, you are flying VFR without visual reference, you have to get out of there, you are flying illegally, it's on the pilot. Those next sentences could be billion dollar words.

Is there any circumstance here in which there might not be a lawsuit?

I don't see it.

Amanda Bronstad is the ALM staff reporter covering class actions and mass torts nationwide. Contact her at abronstad@alm.com.

COMMERCIAL REAL ESTATE

SOUTH FLORIDA TRANSACTIONS

DEAL OF THE DAY

Deerfield Beach Office, Professional Services Building Trades for $1.6M

Address: 1983 W. Hillsboro Blvd. in Deerfield Beach
Property type: This is a 4,403-square-foot professional services building that could be providing medical services or the line. It was constructed in the 1980s on a 1.8-acre lot, according to the Broward County Property Appraiser's office.
Price: $1,570,000
Seller: Consuelo E. Coquis and Roberto P. Coquis, as co-trustees of the Consuelo E. Coquis Revocable Trust Agreement dated April 17, 2019
Buyer: Enagoda LLC
Past sale: $594,300 in May 1993

GOOGLE

These reports are based on public records filed with the clerks of courts. Building area is cited in gross square footage, the total area of a property as computed for assessment purposes by the county appraiser.

New Industrial Supply Finally Outpaces Demand

by Erika Morphy

Last year new supply in the industrial market finally surpassed demand and is expected to continue to do so for the next two years, according to a report from Cushman & Wakefield. However, industrial will remain a hotly-contested asset class by investors with North American absorption forecasted to be a healthy 459.9 million square feet through 2021 and a vacancy that will remain anchored around the 5% mark, C&W says. Meanwhile, asking rents are expected to increase by 6.8% and reach a new nominal high of $6.95 per square foot by year-end 2021—up from $6.51 psf in 2019.

In addition, it adds that "Over the next several years, we expect underlying industrial market liquidity to continue to grow as investors seek to deploy record levels of capital with an increasingly favorable allocation directed towards industrial assets."

INDUSTRIAL COOLED OFF IN 2019

There were several factors that led to the tipping point for industrial supply-demand last year, in which new supply registered 336.3 million square feet compared to 262.1 million square feet, respectively. Last year also saw a rough start with weather-related construction delays causing a ripple effect throughout the rest of the year, thus slowing tenant occupancy, C&W says. Also, a lack of quality vacant space continues to restrict net occupancy growth.

Additionally, at the start of 2019, some owner-occupiers were concerned that the market would slow after the banner year of 2018—concerns that likely caused some of the slowdown, C&W says. Also, it notes, because 2018 was a record year for industrial absorption, absorption numbers for 2019 appeared low compared to the past few years.

THE YEARS AHEAD

C&W projects pressure to remain high on industrial occupancy and rent growth levels across North America, driven by a combination of strong consumer confidence, wage inflation, low unemployment, and an anticipated increase in e-commerce spending at multiple times the rate of overall spending.

C&W also projects that new leasing activity will be driven in large part by traditional and online retailers as well as third-party logistics providers as consumers demand for goods at a grander and faster scale.

Some trends from 2019 and previous years will still remain in play, though. C&W also predicts that "some of the hottest and most talked about facilities types in the industrial world" will include cold-storage facilities, in-fill/last mile facilities, and multistory warehouses.

Erika Morphy reports for GlobeSt.com.

Advocates: Crucial Bank Law Softened Under Trump Proposal

by Ken Sweet and Christopher Rugaber

The Trump administration is proposing changes to a decades-old law designed to keep banks from discriminating against the poor and disadvantaged, but critics argue the changes could make it easier for banks to potentially ignore under-served communities.

The Community Reinvestment Act has over the past four decades spurred hundreds of billions of dollars in lending to low- and middle-income communities. But it's out of date and in need of an overhaul.

Some community advocates say the changes the administration is proposing will allow banks to meet the law's criteria without making the types of loans that are most beneficial to the communities they serve. Worse, critics argue that discrimination against poor and communities of color by the banking industry could increase under the proposal.

The Community Reinvestment Act was passed in 1977, when bank branches were one of the few ways to measure a bank's presence in a community, and last revised in the mid-1990s, when online banking barely existed. In addition, the law rewards banks that make mortgages and small business loans in their communities but is murky about what other types of loans or activities can count as "community reinvestment." Bankers, regulators and activists alike have all called for an overhaul.

The Trump proposal aims to broaden the definition of what constitutes a bank's community — taking into account that online banking now exists — while broadening the types of loans and services that would qualify under CRA. Under the administration's new proposal, banks could get credit for other types of lending to low-income customers like credit cards and personal loans — a move that would greatly benefit the largest of the country's banks because they already dominate these lines of business.

The regulations would also give banks credit, under certain circumstances, for loans they make to build or improve facilities such as sports stadiums and hospitals.

It's the broadening of what would qualify under CRA that has community groups upset.

"We all agree there needed to be a list. The problem is what the OCC has put on that list," said Jesse Van Tol, CEO of the National Community Reinvestment Coalition, an umbrella group for dozens of community groups who try to get banks to do more work in low-income neighborhoods.

Joseph Otting, the Comptroller of the Currency, took heat from Congressional Democrats on Wednesday during a scheduled appearance before the House Financial Services Committee. A significant number of the Democrats on the committee are black, including Chairwoman Maxine Waters, and consider CRA to be a critical tool to help black and minority communities.

"CRA was, and still is, a Civil Rights bill," said Rep. Gregory Meeks, D-New York. "Your proposal would undermine that."

The OCC regulates the banking industry along with the Federal Reserve and the Federal Deposit Insurance Corporation.

Ken Sweet and Christopher Rugaber report for the Associated Press.

BANKING/ FINANCE

Private Equity Takes on Friendly Activists at Own Game

by Ed Hammond

SHUTTERSTOCK

Since hedge fund Starboard Value announced a "strategic investment" agreement with Papa John's International Inc., the pizza maker has settled with its obstreperous founder, John Schnatter, enlisted NBA superstar Shaquille O'Neal to join its board, and named a new CEO.

Activist investors have worked hard to improve their image over the past few years. The hooligans of corporate America have swapped saber-rattling for soft power and found that there is still money to be made.

Take Starboard Value. The hedge fund sounded loved up last year when it announced a "strategic investment" agreement with Papa John's International Inc. Within months Papa John's settled with its obstreperous founder, John Schnatter, enlisted NBA superstar Shaquille O'Neal to join its board, and named a new CEO. For Starboard, nice worked: Papa John's shares have since soared almost 60%. Yet it's unlikely the activist would have gotten the chance to show that soft side had it not spent years savaging companies and their directors.

The same could be said of Dan Loeb, who once compared the auction house Sotheby's to an "Old Master painting in desperate need of restoration" but more recently told investors in his Third Point hedge fund that he favors a "collaborative" approach. The numbers tell the story. In 2016, activists waged at least 333 "impactful" public campaigns against U.S. corporations, ranging from drug maker Abbvie Inc. to Yahoo Holdings Inc. Last year, that figure fell by almost a quarter to 258, according to data from research firm Activist Insight.

This convivial vibe has caught the attention of other reformed barbarians, who are starting to see opportunities on the activists' turf. Private equity giant KKR & Co. disclosed this month that it had amassed an active 10% stake in pizza-and-pinball chain Dave & Buster's Entertainment Inc., a rare public investment for the firm.

Others are not far behind. Rival buyout firm TPG is raising a new fund to do roughly the same thing, Bloomberg reported this month. One Wall Street rumor could explain why KKR filed now: it wanted to be the first. Whatever the motivation, the arrival of the private equity giants raises an urgent question for traditional activist investors: what are you for?

If you are a hedge fund offering expertise to the board or management, top-tier private equity has more of that; if you're investing to help sell the company, it's more persuasive if you also have the money to buy it. In short, private equity seems better equipped than activists for the 'kindly take our cash and listen to our ideas, we're experts' model of investing. This is especially pertinent for those activists who have done most to embrace kindliness. ValueAct Capital, for example, says it invests to "learn from management teams as they innovate, grow, transform business models, reduce cost structures, manage crises and transact M&A".

In one sense, private equity's entrance validates the maturing of activism: by leveraging their reputations to get the same results playing nice, the once enfants terribles are gaining mainstream imitators. But by attracting larger, more experienced competitors to the field, traditional activists also risk their own demise.

Announcing the D&B investment, KKR said upfront that it wasn't interested in making trouble at the company and wouldn't be going hostile. Rather, it said it was looking for "constructive dialogue," perhaps the most hackneyed expression of modern activism.

Usually just being friendly doesn't work for first timers. Even the politest activists tend to get results only because there is a chance they may turn nasty, they have previous, after all. But KKR is big enough and looks enough like a prospective buyer of D&B to make it compelling.

The paradox of friendly activism only works so long as richer, friendlier competitors don't show up. Now they have and there is reason to think they'll stay.

The buyout industry has struggled to find investments for the vast amounts of capital it has attracted since the financial crisis (the $1.5 trillion of trapped dry powder sitting in private equity funds is an all-time record). As such, it has tended to run hard at strategies where it can eke out a good return, whether that's buying warehouses, selling insurance, or learning from management teams. If TPG and KKR start winning on the activists' turf, others will be tempted to follow.

None of this should matter to the more riotous activists, those such as Carl Icahn, who have rejected the vogue for pleasantry as being either less lucrative or less fun, or both. Rather, their reformist peers could be pushed to start fighting again or risk losing their differentiation.

In this scenario, private equity emerges into the interesting role of least worst engaged investor. For a board member, KKR filing a 13D may get you, ultimately, to exactly the same place as Icahn would (unemployed) but it won't cause you ego death.

The private equity kings of the 1980s started out as brilliant bruisers who ended up deciding they could make a lot more money being nice. They may be about to deny their disruptive heirs the same opportunity.

Ed Hammond reports for Bloomberg News.

Trader Blamed for 2010 Flash Crash Gets No Jail for Spoofing

by Liam Vaughan and Nick Baker

The British man whose bogus trades may have contributed to a $1 trillion sell-off in global stock markets during the 2010 Flash Crash will avoid prison because he provided "extraordinary cooperation" to the government in identifying other market cheats.

Navinder Sarao, 41, must serve a year of home detention in London, U.S. District Judge Virginia Kendall said Tuesday in Chicago. The sentence is a remarkable outcome for Sarao, who was initially charged with 22 criminal counts carrying a combined maximum sentence of 380 years.

But even the U.S. Department of Justice asked the judge to spare Sarao from serving more time behind bars, after he spent four months in a London jail following his arrest in April 2015. The government cited Sarao's Asperger's syndrome diagnosis and the fact that he admitted to his crimes as soon as he was caught.

"I was totally addicted to trading," Sarao told the judge as he read softly from a piece of paper. "I made more money than I could ever have imagined." With that wealth came "pressure to live a different life," he said. "I learned first hand money doesn't buy happiness."

In a 41-page court filing earlier this month, Sarao's attorney described him as a guileless mathematical savant who plays markets like a computer game in his bedroom, collects stuffed animals and prefers the company of children to adults.

Sarao apologized "to all those affected by my spoofing" and to his family because his actions had "hurt our good name." He pledged to continue cooperating with authorities investigating illegal spoofing trades "for as long as they want."

While the judge acknowledged the unusual nature of the government's request in such a case, she said the severity of the crime required some kind of punishment in the form of house arrest.

"Your actions contributed to abusing the integrity of the market, something that's essential to maintaining a healthy economy," Kendall told Sarao.

The judge said she agreed to a lesser punishment because Sarao had "accepted responsibility," agreed to forfeit almost $13 million, and immediately after his arrest "began cooperating with government agents, helping them with other cases and understanding this complicated crime."

At Tuesday's hearing, a probation officer told Kendall that her order of home detention in the U.K. may not be enforceable by U.S. authorities. Details of Sarao's supervision weren't immediately available, though the judge said it would involve random calls from probation officers.

Sarao was among the world's biggest traders of futures contracts tracking the S&P 500 Index, regularly placing orders worth tens of millions of dollars, while using a computer in the bedroom of his parents' house, where he'd lived since childhood.

But he also used an illegal market-influencing technique known as spoofing, in which he placed huge orders and then canceled them before they could be executed. His massive bogus trades helped start the flash crash on May 6, 2010, which erased $1 trillion in market value in minutes, authorities said.

The case had originally appeared to involve a criminal mastermind who was manipulating the market for financial gain, Kendall said. Instead, Sarao has Asperger's and "lives with his parents in a bedroom that looks like it has not been changed since he was 13 years old, with stuffed animals," the judge said.

Sarao pleaded guilty to wire fraud and spoofing in 2016 and helped prosecutors build cases against other alleged market cheats, according to the government.

"The defendant's keen insights and explanations regarding both general and specific patterns of deceptive and manipulative trading have illuminated the government's understanding of similar spoofing," the DOJ wrote in its sentencing memo. "As a result, he has substantially assisted and informed the government's nationwide efforts to detect, investigate, and prosecute these crimes."

Liam Vaughan and Nick Baker report for Bloomberg News.

BANKING/ FINANCE

Santander Expects Higher Capital After Botin Boosts Profit

by Charlie Devereux

SHUTTERSTOCK

While Santander's international reach has allowed it to mitigate the effect of low interest rates in its home market of Spain, investors often point to its capital levels as an area of concern.

Banco Santander SA expects to reach the higher end of its target for capital this year as the Spanish lender seeks to dispel persistent concerns that it needs to boost its financial strength.

The bank forecasts that its phased-in Common Equity Tier 1 capital ratio, a closely watched metric, will rise to close to 12% this year after gaining to 35 basis points in the fourth quarter to 11.65%. The lender made the capital estimate after earnings jumped in the fourth quarter, beating estimates on rapid growth in Latin America and the sale of a unit.

While the bank's international reach has allowed it to mitigate the effect of low interest rates in its home market of Spain, investors often point to its capital levels as an area of concern. As of the end of September, the lender had one of the lowest CET1 ratios among its European peers and the lowest surplus over European Central Bank capital requirements among 10 banks reviewed by Bloomberg.

Chairman Ana Botin has argued that Santander's core capital levels are appropriate for a business focused on lending rather than more volatile investment banking. The company also points out that its earnings volatility is among the lowest among other major banks. It targets a range of between 11% and 12% for the ratio.

Spanish banks have struggled to meet ECB demands that they provide financial buffers to protect the financial sector against another crisis. Santander said that of the record 97 basis points in organic capital growth generated last year, 62 basis points were swallowed up by tougher regulatory requirements.

"We're very confident that we're in a good place, not just with the level but also with the buffer," Botin said in a Bloomberg TV interview. "Generating 97 basis points of capital shows the model is working."

In a sign that the bank is still cautious on capital, Santander said that about a third of its second dividend for 2019 will be paid in shares rather than cash. The bank is offering 0.13 euros per share, of which 0.03 euros per share will paid through a so-called scrip dividend.

"A CET1 beat and capital confidence that will begin to remove solvency fears, we suspect. Along with a solid but unexciting set of full-year results, this should stem, and potentially begin to unwind, the sector's near-20% underperformance during the past 12 months," says Georgi Gunchev, a Bloomberg Intelligence banking analyst.

Santander is increasingly leaning on Latin America's growing economies to bolster earnings amid lacklustre growth in Europe. South America and Mexico combined accounted for 42% of the group's underlying profit for the full year while Europe delivered 47% and the U.S. 7%. The bank is investing more of its capital in the regions, buying out minority shareholders in Mexico and snapping up smaller rivals in Brazil.

Meanwhile, it's cutting costs in Europe, shuttering branches in the U.K., Poland and Spain. Underlying profit was flat in the U.K. as net interest income fell 5%. Santander UK has been particularly hard hit by regulations that force banks to separate retail and investment-banking operations, which inadvertently created more competition in the country's mortgage market.

In a sign that negative rates are biting in Spain, net interest income was down 11% in the bank's home market. Profit and fees both fell 2% in the country.

The bank's earnings were boosted by a capital gain of $782 million, primarily from the sale of its custody business to Credit Agricole SA, which agreed in April to take over Santander's main custody and asset-servicing operations. That created a joint venture with $3.71 trillion of assets under custody.

Here are some highlights from Santander's earnings report:

- Full year net income fell 17% to $7.2 billion; full-year underlying profit rose 2% to $9.1 billion euros.
- Bank had record year in revenues of $54.5 billion.
- Net interest income for the group fell 2%; fee income rose 0.2%.
- CET1 ratio strengthened by 35 basis points to 11.65%; if future IFRS9 requirements are applied, the rate would be 11.42%.

Charlie Devereux reports for Bloomberg News.

SEC Exam Division Releases Cybersecurity, Data Loss Best Practices

by Melanie Waddell

DIEGO M. RADZINSCHI

The U.S. Securities and Exchange Commission's Office of Compliance Inspections and Examinations says it encourages market participants to review their practices, policies and procedures with respect to cybersecurity and operational resiliency.

The U.S. Securities and Exchange Commission's exam division released a guide to best practices it's observed in exams to combat cybersecurity infractions, data loss and privacy breaches.

In its 13-page Cybersecurity and Resiliency Observations report, the Office of Compliance Inspections and Examinations details practices examiners have observed in the following areas: governance and risk management; access and controls, data loss prevention; mobile security; incident response and resiliency; vendor management; and training and awareness.

In sharing the staff observations, OCIE said that it encourages market participants to review their practices, policies and procedures with respect to cybersecurity and operational resiliency.

"We believe that assessing your level of preparedness and implementing some or all of the … measures will make your organization more secure," the report states.

"As markets, market participants, and their vendors have increasingly relied on technology, including digital connections and systems, cybersecurity risk management has become essential," the report adds.

"Indeed, in an environment in which cyber threat actors are becoming more aggressive and sophisticated — and in some cases are backed by substantial resources including from nation state actors — firms participating in the securities markets, market infrastructure providers and vendors should all appropriately monitor, assess and manage their cybersecurity risk profiles, including their operational resiliency."

In the area of mobile security, for instance, "mobile devices and applications may create additional and unique vulnerabilities," the report notes.

OCIE has observed the following mobile security measures at organizations using mobile applications:

- **Policies and procedures.** Establishing policies and procedures for the use of mobile devices.
- **Managing the use of mobile devices.** Using a mobile device management (MDM) application or similar technology for an organization's business, including email communication, calendar, data storage and other activities. If using a "bring your own device" policy, ensuring that the MDM solution works with all mobile phone/device operating systems.
- **Implementing security measures.** Requiring the use of multi-factor authentication for all internal and external users. Taking steps to prevent printing, copying, pasting or saving information to personally owned computers, smartphones or tablets. Ensuring the ability to remotely clear data and content from a device that belongs to a former employee or from a lost device.
- **Training employees.** Training employees on mobile device policies and effective practices to protect mobile devices.

Melanie Waddell covers regulatory and compliance issues for ThinkAdvisor, an ALM affiliate of the Daily Business Review. Contact her at mwaddell@alm.com. On Twitter: @Think_MelanieW.

BANKING/ FINANCE

Alexa, Read Me a Story: Audio Content for Kids on the Rise

by Leanne Italie

SHUTTERSTOCK

Audiobooks and music for kids have been around awhile, but podcasts made for the 3-to-12 set are relatively new, driving more parents to choose one-stop platforms that include all formats.

Melanie Musson in Belgrade, Montana, does a lot of driving with her four girls. Juggling a broad age range, 1 to 9, she's forever searching for ways to keep them all entertained without relying entirely on video.

While she still adores paper and tablet books for her kids, Musson said: "I think when they hear without seeing, they have to make up visuals in their heads. That's so good. They have to be engaged and get more out of it."

There are plenty of quality audiobooks, podcasts and music for the young, she noted, but weeding through thousands of selections and jumping from platform to platform is a challenge since audio content has exploded over the last few years.

Dad blogger Balint Horvath in Zurich agreed after trying to make sense of kid options for his 14-month-old daughter.

"I couldn't find any resource that would organize podcasts according to different criteria. Information without proper searchability is like looking for a needle in a haystack," said Horvath, who works as a productivity coach for research and development teams.

Audiobooks and music for kids have been around awhile, but podcasts made for the 3-to-12 set are relatively new, driving more parents to choose one-stop platforms that include all formats.

Demand is "primarily driven by parents who are podcast listeners or audiobook fans," said Frannie Ucciferri, associate managing editor for the nonprofit Common Sense Media.

With a huge bump in podcasts overall, the value of audio content for kids hasn't been lost on companies large and small.

Spotify recently launched a new ad-free app, Spotify Kids, as a free extension for premium family subscribers. Not yet available in the U.S., it's packed with singalongs, soundtracks and stories for children as young as 3. A platform called Pinna is among the latest to launch ad-free with a variety of content and ages in mind, at $7.99 a month or $79.99 a year. Others stick to podcasts alone, while Amazon's FreeTime Unlimited allows parents to customize a child's experience to provide the most relevant books, videos, apps and more without ads, starting at $2.99 a month.

Old-school broadcasters are also getting into the act. Boston's WGBH, for instance, widely shares free of cost two of its top podcasts for young people: "Molly of Denali," based on the TV series about a girl in Alaska, and "The Creeping Hour," for ages 8 to 12. More are planned as part of the public affiliate's "ongoing exploration of audio storytelling," said WGBH spokeswoman Jeanne Hopkins.

Bonnie Way of Vancouver, British Columbia, has five kids, ranging from 2 to 12, and like Musson, she pulls a lot of travel time with her brood. She reaches for audiobooks to keep them happy, even on short trips, and relies a lot on her local library for free selections.

"Yes, it can be challenging to find books that everyone is happy listening to. My 4-year-old is probably exposed to things that her older sisters wouldn't have heard at that age. We started with short stories like Robert Munsch and 'Curious George,' and moved to longer stories like the 'Chronicles of Narnia,'" she said.

Some of her kids are prone to motion sickness, and listening rather than reading helps, Way said. She sees other benefits as well.

"Audiobooks create a shared experience. We're able to discuss the books after we've listened to them, which has been a lot of fun," she said.

Maggie McGuire is a former teacher who has been in children's media for more than 20 years. She's now CEO of Pinna, which is backed by the Graham Holdings Co., formed from what remained of The Washington Post Co. after the Post itself was sold to Jeff Bezos five years ago.

Pinna both curates and creates for kids ages 3 to 12. It offers more than 2,000 audiobooks, podcasts and songs while also producing original podcasts, all ad-free and in compliance with federal standards aimed at protecting children's privacy and safety online, McGuire said. It's available as an app and usable off the Pinna.fm website.

Podcasts, McGuire said, are a "fresh new format that everyone's very excited about."

The company worked with parents and teachers to understand what they were looking for in audio content. Among their priorities were a "one-stop solution" and a high level of curation to ensure quality and that all content was tucked into a safe platform exclusively for kids.

"There's a real desire now to figure out how the media diet in a kid's day, in a kid's week, can include things that aren't wholly screen-based," McGuire said.

Last year, Pinna produced 25 podcasts of its own, and plans to grow that number this year. Its slate of originals accounts for half the listening among its consumers, McGuire said. The company plans to launch curated playlists this month. Not unlike other streamers, Pinna will mix new content with classic stories and other familiar standards.

Included is Pinna's Peabody-winning podcast, "The Unexplainable Disappearance of Mars Patel," a serial mystery performed by middle graders for middle graders. Another popular original is "Grimm, Grimmer, Grimmest," a series of fairy tales retold. It was written and produced by Adam Gidwitz, bestselling author of "A Tale Dark and Grimm."

For younger kids, Pinna partnered with Random House Children's Books to turn the publisher's popular Ron Roy book series, "A to Z Mysteries," into a podcast. Mo Willems and Rick Riordan are among top names in the company's audiobook lineup on Pinna, along with music from Kidz Bop, They Might be Giants and Ralph's World.

The Amazon-owned Audible.com, a dominant force in audiobooks, is also reaping benefits from the increased interest in kid content. In 2019, the company said, Audible listeners downloaded 40 percent more such content than they had in 2018. The company offers more than 30,000 titles for kids among more than 475,000 overall.

"Parents and families are excited about listening together before bedtime. They're listening on road trips. They're listening while they're making dinner," said Diana Dapito, a senior vice president of content at Audible.

Leanne Italie reports for the Associated Press.

737 Max Costs Double, Boeing Posts First Loss in 2 Decades

by David Koenig

Boeing, an icon in American manufacturing, suffered its first annual financial loss in more than two decades while the cost of fixing its marquee aircraft after two deadly crashes doubled to more than $18 billion.

New CEO David Calhoun on Wednesday stood by his estimate that regulators will certify changes Boeing is making to the 737 Max by mid-year.

Calhoun criticized the company's prior leadership for not immediately disclosing a trove of damning internal communications that raised safety questions about the Max. He promised to be more transparent.

"I have to restore trust, confidence and faith in the Boeing Co.," he told Wall Street analysts.

Boeing reported a loss of $1 billion in the fourth quarter as revenue plunged 37% due to the grounding of the Max. The company suspended deliveries of the plane last spring and hadn't expected the stoppage to last this long.

The company lost $636 million for all 2019, compared with a profit of nearly $10.5 billion in 2018. It was the first annual loss since 1997, when Boeing was roiled by parts shortages, production delays, and expenses from merging with McDonnell Douglas.

Boeing's problems aren't limited to the Max.

Slowing demand for larger jets led the company to announce it will reduce production of the 787 Dreamliner, and a decision on whether to build a new mid-size plane to compete with a model from rival Airbus has been delayed.

Revenue in the company's defense and space business fell 13% and it took a $410 million charge in case NASA requires another unmanned flight of Boeing's Starliner — the spacecraft that failed to reach the International Space Station during a test flight in December.

The company's focus, however, is on fixing the Max.

The plane was grounded worldwide last March, after two crashes within five months killed 346 people in Indonesia and Ethiopia. The crisis torpedoed sales and deliveries of new jetliners, leaving Boeing far behind Airbus. It caused a shutdown in Max production, layoffs at suppliers, and led to the firing of CEO Dennis Muilenburg.

U.S. airlines that own Maxes — Southwest, American and United — don't expect it back until after the peak of the summer travel season. It is anyone's guess about how willing passengers will be to fly on the plane.

The head of the Federal Aviation Administration, Stephen Dickson, told U.S. airline officials late last week that he was content with Boeing's progress toward getting the Max back in the year, raising the possibility that the plane could fly sooner than Boeing has estimated.

David Koenig reports for the Associated Press.

BANKING/ FINANCE

Apple Holiday Season Tops Projections as iPhone Bounces Back

by Michael Liedtke

SHUTTERSTOCK

Apple's fortunes appeared to be sliding just a year ago amid declining sales for the iPhone, its marquee product for the past decade.

Apple is still reaping huge profits from the iPhone while mining more moneymaking opportunities from the growing popularity of its smartwatch, digital services and wireless earbuds.

That combination produced a banner holiday season for a company whose fortunes appeared to be sliding just a year ago amid declining sales for the iPhone, its marquee product for the past decade.

Apple's fiscal first-quarter results, released Tuesday, provided the latest proof that the fears hanging over the consumer electronics icon might have been unfounded.

Apple's profit and revenue for the October-December period topped analysts' projections, providing another boost to a stock that has more than doubled in less than 13 months.

The shares surged more than 1% to $322.14 in extended trading after the numbers came out. That's up from $142 in January 2019 after Apple warned that consumers weren't buying as many new iPhones as they once were, especially in China, the company's biggest market outside the U.S. and Europe. China is also where Apple makes most of its iPhones and several other products.

If the shares move similarly in Wednesday's regular trading session, they will flirt with a new all-time high for the stock and further cement Apple's position as the most valuable company in the U.S., with a market value of $1.4 trillion.

A deadly viral outbreak in China, which has curtailed travel and threatens the world economy, looms as a potential concern for Apple. But investors for now are focusing on what looks like an even more prosperous road ahead for a company that turned a $55 billion profit in its past fiscal year.

In a conference call Tuesday, CEO Tim Cook said the coronavirus outbreak has already caused some of Apple's suppliers in China to delay reopening their factories closed for the Lunar New Year holiday from the end of this month until Feb. 10. And some stores in China selling Apple products already have temporarily closed or reduced their operating hours because fewer customers are shopping as virus worries escalate.

"The situation is emerging and we're still gathering lots of data points and monitoring it very closely," Cook said.

Apple got off to a fast start for fiscal 2020, with a first-quarter profit of $22.2 billion, or $4.99 per share, on revenue of $91.8 billion. Analysts polled by FactSet had predicted earnings of $4.54 per share on revenue of $88.5 billion.

As usual, the iPhone remained Apple's marquee attraction. Boosted by the release of the iPhone 11 heading into the holiday season, the product generated sales of $56 billion, an 8% increase from the previous year's disappointing showing.

Besides rolling out high-end phones with more cameras and a starting price of $1,000, Apple sold a more basic model starting at $700 — a $50 drop from a comparable version released in 2018.

Apple's division that includes its app store, product warranties, music streaming and a new Netflix-like video service delivered revenue of $12.7 billion, up 17% from the previous year. Apple is hoping its service division will produce revenue of at least $50 billion this year, doubling its output in just four years.

The services division is feeding into all iPhones, iPads, Macs and other Apple products already being used, which the company said Tuesday now totals 1.5 billion devices, up by 100 million from the previous year.

"We see this as a powerful testament to the satisfaction, engagement and loyalty of our customers — and a great driver of our growth across the board," Cook said.

The Apple TV Plus video streaming service, which Apple launched amid great fanfare in October, is supposed to help that cause, but it may not be a huge contributor this year. That's because Apple is initially selling it for just $5 per month to help drum up interest. That's less than half the price of Netflix's most popular plan.

What's more, Apple is giving away a free year of Apple TV Plus to anyone who buys a new iPhone or several other devices, a promotion that means tens of millions of people aren't paying anything for the service yet. Apple hasn't released subscription numbers for the video service.

Meanwhile, the Apple Watch, which the company began selling nearly five years ago, continued to gain new converts, and the latest version of its wireless earbuds, AirPods, emerged as a hot commodity during the holiday season.

Apple introduced the AirPods after removing the headphone jack from the iPhone in 2016, but the product picked up more momentum in October with a next-generation set designed to fit better in people's ears. That version, called AirPods Pro, proved so popular that Apple had trouble keeping it in stock. The AirPods Pro also cost more at $250, compared with $160 to $200 for the previous models.

All those factors helped Apple's "wearables, home and accessories" category garner sales totaling $10 billion in the past quarter, a 37% increase from the previous year. That prompted Cook to hail it as a "blowout" quarter for the wearables and accessories division, which is now Apple's fastest growing category.

Michael Liedtke reports for the Associated Press.

Beyond Meat Tests New KFC Nugget That's More Like Chicken

by Deena Shanker

Beyond Meat Inc. and KFC are expanding their test of faux chicken nuggets after the success of an initial trial in Atlanta, this time aiming to offer a product that looks and tastes like it's made from meat sliced right off a bird.

Starting Feb. 3, Beyond Fried Chicken will be available in about 70 KFC locations in Charlotte, North Carolina, and Nashville, Tennessee, the companies said. The test is scheduled to run until Feb. 23 or while supplies last.

The trial marks an advance in Beyond Meat's technology. While eager Atlanta customers last summer were served a product that was ground, formed, breaded and fried, the new offering represents an upgrade, a nugget made to replicate a real cut of breast meat. The company's shares rose more than 3% to $124 on the news, reversing declines in premarket trading.

"If you look at what we launched with in Atlanta versus what we're doing today, we all agreed that we need to get that muscle-like structure," said Ethan Brown, chief executive officer of Beyond Meat, who proceeded to tear open a nugget to show off the interior. "I just can't stop pulling this apart."

Since Beyond Meat's initial public offering last May, one of the most successful IPOs of the year, the company has been racking up major fast-food partnerships.

Its burgers are found in all U.S. Carl's Jr. and Hardee's restaurants, and are being tested in McDonald's in Canada, while its sausages are available at more than 9,000 Dunkin' locations. The Atlanta test with KFC sold out in less than five hours.

Beyond Meat, based in El Segundo, California, isn't alone in its quest to deliver a less-meaty diet. Impossible Foods Inc. has its soy-based burgers in more than 7,000 Burger Kings nationally, as well as White Castles and Red Robins around the country. Major food companies such as Nestle SA and Conagra Brands Inc. are making their own plant-based burgers, too.

But the looming question is how long the excitement can last, with consumers and retailers.

Earlier this month, amid dropping Impossible Whopper sales, Burger King began a two-for-$6 promotion, almost half the earlier suggested price of $5.59 per sandwich. And Tim Hortons in Canada has dropped both the Beyond Burger and Beyond breakfast sandwich with faux sausage.

Gauging the post-novelty drop-off is part of the test, said Andrea Zahumensky, chief U.S. marketing officer of KFC, a division of Yum! Brands Inc.

"We very specifically have gotten sufficient supply to be able to have this test run for multiple weeks so that we start to really understand what does this product do over time," Zahumensky said. "Are people going to come back for it? Is it just going to be new people coming in? All of that is going to lead into, what is an acceptable level over time?"

There's another wrinkle to the latest announcement for the booming plant-based industry, one that may disappoint vegans and vegetarians. While the products will be made by Beyond Meat, including having been marinaded and breaded with their flavorings, they will be fried in oil that has been used with KFC chicken.

KFC says it will provide full information on its website and train employees to answer questions appropriately.

Brown says that while he's aware of the issues facing Burger King, it's been sued for claiming the Impossible Whoppers are meat-free when they are cooked on the same grill as beef Whoppers, patrons at Carl's Jr., which does the same, haven't complained.

"It's an education process," Brown said.

Deena Shanker reports for Bloomberg News.

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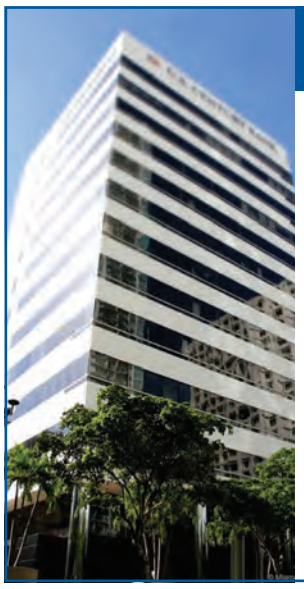

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Would Roberts Need to Recuse in Any Trump Suit Challenging Bolton?

by Marcia Coyle

DIEGO M. RADZINSCHI

The Senate may overrule Chief Justice John Roberts if there is an objection to his decision and a majority vote by the senators.

U.S. Supreme Court justices generally are reluctant to step aside from cases and leave their colleagues in potential deadlocks. But Chief Justice John Roberts Jr. may have little choice if President Donald Trump heads to court to restrict current or former administration officials from testifying at his impeachment trial.

Trump has suggested he may seek to assert executive privilege to protect the office of the presidency if his former national security adviser, John Bolton, is called on to testify at the ongoing Senate impeachment trial. The possibility of such a move has spurred considerable attention in recent days, as legal scholars weigh the novelty of an executive privilege claim arising in the context of impeachment.

"It's complicated," Mark Rozell of George Mason University, an executive privilege scholar, said in an interview. "We're in uncharted territory."

As Trump's legal team wraps up its trial presentation, attention is expected soon to focus on the possibility of witnesses, including Bolton, who has reportedly asserted in a draft manuscript that Trump told him he wanted to withhold military aid to Ukraine until leaders there announced investigations of Democrats. That claim undercuts Trump's contention that there is no witness directly saying Trump's squeeze on Ukraine was done for personal benefit. Trump's lawyers have denied he pressured Ukraine to help him politically.

There is some dispute about whether Roberts directly can order Bolton to appear to testify. Under Senate impeachment rules, Roberts has the authority to rule on evidentiary matters, which include documents and witness testimony. The Senate may overrule Roberts if there is an objection to his decision and a majority vote by the senators.

Under one scenario, any Bolton testimony is resolved within the Senate proceeding itself—he is either commanded to appear and testify, or he is not. Roberts may or may not play any role in that decision.

But under a different scenario, the Trump administration would take the whole dispute to court, arguing that executive privilege should outright prohibit Bolton from testifying. Such a case would play out in a trial court—and if one party presses it, possibly the Supreme Court itself.

That's where Roberts might have to weigh stepping aside, especially if he played any role in commanding Bolton to appear in the first place. In such a scenario, the justices would be weighing a decision that involved Roberts. In any evenly divided Supreme Court case, were an issue to so split the justices, a tie keeps in place the underlying federal appeals court decision.

"If Justice Roberts were to recuse himself, the country might face the specter of a Supreme Court deadlocked on the critical question of whether a sitting president undergoing an impeachment trial has the right to assert executive privilege to block witnesses at his own trial," Claire Finkelstein of University of Pennsylvania Carey Law School wrote in a recent New York Times op-ed.

Several legal scholars, speaking in interviews, said they doubted federal courts would spend much time with an assertion of executive privilege arising in impeachment. Some scholars have described the would-be claim as "weak," while others said courts would quickly want to avoid ruling on a "political" question best left to lawmakers to sort out.

Trump "would be asking a district judge and then perhaps the circuit to 'overrule' the chief while the Senate trial was on hold," said Stephen Gillers of New York University School of Law. Gillers said Roberts likely would recuse in any scenario where the justices are being asked to resolve whether or not he made a correct decision.

Michael Gerhardt of the University of North Carolina School of Law said: "Any effort to appeal just runs up against *Walter Nixon v. United States*, which increases the likelihood a court would treat it as a (non-justiciable) political question."

Frank Bowman of the University of Missouri School of Law noted that the Framers intentionally did not want the Supreme Court to be the venue for matters of impeachment. The Framers, he said, were concerned an impeached official might subsequently be charged in criminal court and that case could work itself up to the very body that found him guilty or not guilty on impeachable conduct.

"Whether Roberts would feel obliged to disqualify himself—part of it might depend on procedurally how the claim would be postured," Bowman said. "My guess is Roberts would recuse himself for reasons of appearance, probably confident his colleagues have no desire to get into this at all."

Both scholars believe the courts would quickly dismiss any privilege appeal arising out of the impeachment trial as a political question committed to the other branches and so not justiciable.

Rozell offered four factors why a Trump privilege appeal in these circumstances was unlikely to succeed in the courts even if it got over the political question hurdle. First, Bolton is a private citizen, no longer a part of the Trump administration, Rozell said.

"Second, Bolton would presumably be asked questions about allegations of wrongdoing in the White House which are not protected by executive privilege," Rozell continued. "Third, he is going public. There is a manuscript in circulation so claiming privilege over publicly available information is extremely complicated. Fourth, the president himself has made utterances on Twitter on the very topic over which he would claim privilege, which ultimately makes his case weaker."

Executive privilege has never been considered an absolute privilege, said Rozell, and a balancing test has been used to determine if the privilege prevails. The need for information in an investigation into wrongdoing, he added, "strikes me as the most compelling circumstance weighing against a successful executive privilege claim here. The *U.S. v. Nixon* standard—while the cases are not exactly similar—does carry weight."

In the next few days, Roberts may be asked to reveal his own views on the privilege issue if he is pressed to issue a subpoena to Bolton.

Marcia Coyle, based in Washington, covers the U.S. Supreme Court. Contact her at mcoyle@alm.com. On Twitter: @MarciaCoyle.

3rd Circ.: Ineffective Counsel Claim Must Be Resolved Before Deportation

by P.J. D'Annunzio

A federal appeals court has ruled that an African immigrant facing deportation over a drug trafficking conviction cannot be removed until his ineffective assistance of counsel claim has been addressed.

The U.S. Court of Appeals for the Third Circuit on Tuesday vacated a Middle District of Pennsylvania judge's ruling that it did not have jurisdiction to review petitioner Euphrem Dohou's removal order. In addition to his ineffective counsel claim, Dohou challenged claims that he resisted agents' attempts to deport him.

Third Circuit Judge Stephanos Bibas wrote in the court's precedential Tuesday opinion that the district court had jurisdiction over the issue, but noted that a finding of whether Dohou's administrative remedies were exhausted had to be made.

"Before remanding, we confront an unsettled question of law. Under 8 U.S.C. Section 1326(d), an alien must clear three hurdles before collaterally attacking a removal order when prosecuted for illegal reentry," Bibas said. "He must (1) 'exhaust[] any administrative remedies that may have been available to seek relief against the order'; (2) show that his removal proceedings 'improperly deprived [him] of the opportunity for judicial review'; and (3) show that 'the entry of the [removal] order was fundamentally unfair.' Do these same three hurdles apply to Section 1252(b)(7) as well, even though that provision does not specify them?"

Bibas said that was not for the Third Circuit to decide at the moment, since a federal court had not yet reviewed Dohou's claims.

"No Article III court has yet reviewed the validity of Dohou's removal order, so it has never been 'judicially decided.' Under 8 U.S.C. Section 1252(b)(7), he can thus collaterally attack it in his hindering-removal prosecution. Also, Section 1252(a)(2)(C) poses no bar to his collateral attack: it lacks the broad language of other jurisdiction-stripping provisions, and the presumption of judicial review also favors reading it narrowly," Bibas said.

"So we will vacate the district court's finding that it lacked jurisdiction and remand Dohou's ineffective-assistance claim," Bibas continued. "On remand, the district court must find facts and decide whether Dohou's immigration lawyer provided ineffective assistance, making his removal order (and thus his criminal prosecution based on it) fundamentally unfair. It must also consider whether the statute requires exhaustion, whether prudentially to require exhaustion, and if so whether that violation was clear enough to excuse prudential exhaustion."

The U.S. Attorney's Office for the Middle District of Pennsylvania did not respond for a request for comment.

Quin M. Sorenson of the Office of the Federal Public Defender in the Middle District of Pennsylvania represents Dohou and declined to comment.

Reporter at the Legal Intelligencer covering public corruption, federal courts, and breaking news.