STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
APPEAL NO. 2018AP1889

GABRIEL YANDOLI, Individually and on Behalf of All Others Similarly Situated,

PLAINTIFF-RESPONDENT,

v.

REV GROUP, INC., TIMOTHY W. SULLIVAN, DEAN J. NOLDEN, PAUL BAMATTER, JEAN MARIE CANAN, DINO M. CUSUMANO, CHARLES DUTIL, JUSTIN FISH, KIM A. MARVIN, JOEL M. ROTROFF, DONN J. VIOLA, GOLDMAN, SACHS & CO., MORGAN STANLEY & CO. LLC, ROBERT W. BAIRD & CO. INC., and AIP CF IV, LLC,

DEFENDANTS-PETITIONERS.

APPEAL FROM THE SEPTEMBER 18, 2018 ORDER OF THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HON. MICHAEL O. BOHREN, PRESIDING
CASE NO. 2018-CV-1163

NON-PARTY BRIEF OF THE WISCONSIN CIVIL JUSTICE COUNCIL AND METROPOLITAN MILWAUKEE ASSOCIATION OF COMMERCE

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTRODUCTION 1
ARGUMENT 4
I. The Circuit Court's Decision Will Harm Wisconsin Businesses by Opening the Floodgates for Duplicative Class Action Securities Litigation in Wisconsin.......... 4
II. Increased Copycat Shareholder Litigation Will Impose Significant Costs on Wisconsin Businesses and Discourage Investment. 9
III. Permitting This Duplicative Class Action to Proceed Contravenes the Purpose of the Commercial Court Pilot Project. 14
CONCLUSION 18
CERTIFICATION 19
CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12) 20

TABLE OF AUTHORITIES

Other Authorities

Cyan, Inc. v. Beaver County Emps. Ret. Fund,
138 S. Ct. 1061 (2018)..7

Data Key Partners v. Permira Advisers LLC,
2014 WI 86, 356 Wis. 2d 665, 849 N.W.2d
693 13

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit,
547 U.S. 71 (2006) 7

No. 16-05,
2017 WI 33 at (Wis. April 11, 2017)...............................15

Precision Erecting, Inc. v. M & I Marshall & Ilsley Bank,
224 Wis. 2d 288, 592 N.W.2d 5 (Ct. App.
1998)..11

Regulations

Wis. Stat. § 809.19(12)..20

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Other Authorities

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Private Securities Litigation Reform Act, 109 Stat. 737 5

INTRODUCTION

The Wisconsin Civil Justice Council ("WCJC") and Metropolitan Milwaukee Association of Commerce ("MMAC") collectively represent a broad spectrum of the Wisconsin business community. WCJC's mission is to promote fairness and equity in Wisconsin's civil justice system, with the ultimate goal of making Wisconsin a better place to live and work. MMAC represents approximately 2,000 member businesses located in metro Milwaukee. Its mission is to improve metro Milwaukee as a place to grow businesses, invest capital, and create jobs. WCJC and MMAC submit this *amicus* brief to offer a broader perspective on the deleterious effects the decision below, if left uncorrected, will have for Wisconsin businesses.

The Defendants-Petitioners' Opening Brief persuasively argues that the circuit court's decision denying the motion to stay was flawed. In short, the circuit court ignored that the putative class in the case below is the same class, asserting the same claims, based on the same facts, as

earlier-filed cases that have been consolidated in the United States District Court for the Eastern District of Wisconsin. Wisconsin law required the circuit court to stay the case below in favor of the federal litigation, and the circuit court's denial of the stay contravened both Wisconsin law and the strong federal policy in favor of uniformity in securities litigation.

WCJC and MMAC submit this brief to make three additional points concerning the broader policy impacts of the decision below. First, history amply demonstrates that when the balance of carefully-calibrated federal and state securities litigation policy is erroneously tilted in favor of class action plaintiffs' lawyers, the result is a deluge of meritless, copycat lawsuits. These lawsuits benefit no one except opportunistic law firms.

Second, such duplicative and vexatious securities litigation creates substantial costs and risks for Wisconsin businesses. If the decision below stands, any Wisconsin business seeking to raise capital through a public offering will

face duplicative litigation in multiple venues. The cost of defending these lawsuits will be borne by shareholders – the very same ones in whose names the lawsuits are purportedly brought. The end result is a "litigation tax" on public companies, increasing the costs for Wisconsin companies to access public capital markets and raise funds needed for growth, while making it more difficult for Wisconsin to attract, nurture, and retain such companies.

Third, the decision below runs counter to the express goals of the Commercial Docket in which it was rendered. The Commercial Docket Pilot Project was created by the Wisconsin Supreme Court to make Wisconsin courts more efficient and predictable for the resolution of business disputes. The circuit court's decision promotes the opposite result. If the decision below is left to stand, Wisconsin businesses will see higher litigation costs, needless duplicative cases, and unpredictable outcomes. Correcting this important Commercial Docket case is all the more

important now, as the Commercial Docket became available to all litigants statewide on April 1, 2019.

It is the objective of both WCJC and MMAC to make Wisconsin a more competitive business environment – including within its courts. The circuit court's decision runs counter to that agenda by encouraging the filing of baseless, duplicative shareholder lawsuits that will hurt Wisconsin businesses. This Court should reverse the decision below and grant the stay sought by the Defendants-Petitioners.

ARGUMENT

I. THE CIRCUIT COURT'S DECISION WILL HARM WISCONSIN BUSINESSES BY OPENING THE FLOODGATES FOR DUPLICATIVE CLASS ACTION SECURITIES LITIGATION IN WISCONSIN.

The circuit court held, in a nutshell, that the case below should not be stayed because the named plaintiff in this matter differs from the named plaintiff in earlier-filed federal litigation, even though the claims, the class, and the underlying facts are identical.

The significance of this holding should not be understated. It means that no class action filed in Wisconsin courts should ever be stayed in favor of an earlier-filed federal class action because the named plaintiffs in separate class actions will never be the same.[1] Yet the parallel state court proceeding serves no purpose. The class will be adequately represented by lead counsel appointed by the federal court in accordance with the Private Securities Litigation Reform Act, 109 Stat. 737 ("PSLRA"), in the federal litigation, the same relief is sought in both proceedings, and the federal court can resolve every claim brought by the class.[2]

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[1] As explained in the Defendants-Petitioners' Opening Brief, the court-appointed lead plaintiff in a federal securities class action has no incentive to also serve as lead plaintiff in a parallel state court action because the federal court has jurisdiction to resolve all of its claims.

[2] WCJC and MMAC are aware that there is a motion pending in the federal action in which the federal lead plaintiffs seek to drop altogether the 1933 Act claims at issue in this state court lawsuit from the federal litigation. WCJC and MMAC agree with the Petitioners that this court should nevertheless decide this appeal because the federal plaintiffs' motion has not been decided, and therefore, the 1933 Act claims remain part of the federal litigation. Moreover, regardless of the outcome of the pending motion in federal court, resolution of the narrow (but important) issue presented here will help to foster efficient administration of justice in class action lawsuits involving Wisconsin-based businesses.

The circuit court's holding, if permitted to stand, will encourage an endless parade of plaintiffs' attorneys, purporting to represent the exact same class, to file duplicative state law class actions in order to get their piece of the pie.

The threat of copycat litigation is not unfounded speculation. It is instead the continuation of a longstanding pattern in American courts. Courts and businesses across the country have long been plagued by copycat securities litigation, and recent data suggests the wave, rather than ebbing, continues to surge.[3] In 2016, one in twelve S&P 500 companies was targeted in a securities class action. Stanford Clearinghouse, Securities Class Action Filings: 2016 Year in Review, 23 (2017).

Any company planning an IPO, merger, or acquisition must plan for an immediate slew of securities lawsuit filings.

[3] A recent report from Cornerstone Research found that the number of securities class action lawsuits filed in 2018 was 99 percent higher than the annual average of filings between 1997 and 2017. Cornerstone Research, *Securities Class Action Filings Remain Near Record High in 2018 (January 30, 2019)*, https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2018-Year-in-Review.

And as relevant here, Wisconsin's public companies can expect multiple securities class actions upon news of a fall in their stock price. These lawsuits often serve to benefit opportunistic plaintiffs' law firms, who hope to coerce quick settlements, rather than the members of the class the attorneys purport to represent. Rather than compensating aggrieved shareholders, settlements in securities class actions result in a mere redistribution of wealth from current shareholders (who must pay for the settlement) to the select former shareholders who are part of the class – with a large premium, of course, absorbed by plaintiffs' counsel.

Congress, therefore, enacted the PSLRA to stem "perceived abuses of the class-action vehicle in litigation involving nationally traded securities." *Cyan, Inc. v. Beaver County Emps. Ret. Fund*, 138 S. Ct. 1061, 1062 (2018) (quoting *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006)). As the congressional findings in connection with its enactment reflect, lawyers representing "professional plaintiffs" with nominal holdings were

routinely filing abusive "strike" suits against deep-pocketed defendants hoping to obtain quick settlements. H.R. Rep. No. 104-369, at 31–32 (1995) (Conf. Rep.).

Variations in state law that favor putative class action plaintiffs, moreover, are quickly taken advantage of by plaintiffs' firms. Plaintiffs' attorneys naturally file lawsuits in venues where it is more favorable to do so, particularly in "hellhole" or "magic" jurisdictions "where judges in civil cases systematically apply laws and court procedures in an unfair and unbalanced manner, generally to the disadvantage of defendants." *See generally*, American Tort Reform Association, *Judicial Hellholes 2017-18* (2017), http://www.atra.org/wp-content/uploads/2017/12/Judicial-Hellholes.pdf. For instance, courts in Madison County, Illinois have historically handled one-third to one-half of all the asbestos cases in the nation, with an average rate of lawsuits filed per population nearly eight times higher than the Illinois average. Illinois Civil Justice League, *Litigation*

Imbalance III: Madison County Strikes Back, 3 (April 2015), http://www.icjl.org/icjl-litigationindex3.pdf.

A blanket rule that state court securities lawsuits may not be stayed in favor of earlier-filed federal lawsuits is a windfall for opportunistic plaintiffs' law firms. The decision below thus opens the doors of Wisconsin courthouses to duplicative and vexatious shareholder litigation, dramatically increasing the exposure of Wisconsin companies to such lawsuits. These lawsuits represent more than an inconvenience to Wisconsin businesses: they impose real and substantial costs and risks on growing companies, which are in turn passed on to shareholders, employees, and consumers.

II. INCREASED COPYCAT SHAREHOLDER LITIGATION WILL IMPOSE SIGNIFICANT COSTS ON WISCONSIN BUSINESSES AND DISCOURAGE INVESTMENT.

Wisconsin businesses, and their shareholders, officers, and directors, depend on the fairness, efficiency, and predictability of Wisconsin courts for resolving shareholder litigation. The increase in duplicative shareholder litigation portended by the decision below would, therefore, impose a

significant cost on Wisconsin businesses and present an array of risks.

Most obviously, it would force Wisconsin businesses to defend numerous identical lawsuits in different venues. As this case demonstrates, the proliferation of copycat securities litigation is exemplified by identical cases filed on behalf of the same putative class by different plaintiffs' attorneys looking for a piece of the action. The parallel tracks serve no beneficial function. The class's interest will be amply represented by the appointed class counsel in the federal litigation; there is no relief available to the class in this case that is unavailable to it in the federal litigation. Yet while the benefits of the copycat state litigation for plaintiffs are illusory, the costs are real. Wisconsin businesses subjected to such litigation necessarily will be fighting two (or more) lawsuits in two (or more) different venues, needlessly multiplying litigation costs and risk. Settlement costs will be borne by current shareholders, as will be the added costs of insurance to mitigate the risks of securities litigation.

Those risks are enormous. According to one study cited during the legislative debate over the PSLRA, the average securities fraud claim was $40 million, with 10 percent of the cases seeking more than $100 million in damages. S. Rep. No. 104-98, at 21.

Parallel litigation in which the same claims are being adjudicated by different factfinders also carries an irreducible risk of inconsistent results. Wisconsin courts long have recognized that wise public policy requires avoidance of "inconsistent decisions on the same set of facts." *Precision Erecting, Inc. v. M & I Marshall & Ilsley Bank*, 224 Wis. 2d 288, 301-02, 592 N.W.2d 5 (Ct. App. 1998).

The ultimate effect of this added cost and risk is to increase the cost to businesses of raising capital and going public. This, in turn, disincentivizes corporate and economic growth, ultimately harming not only shareholders, but also the employees and consumers of the affected businesses whose growth has been stymied, not to mention the broader economy.

Businesses and investors regard the proliferation of class action securities litigation as a "litigation tax" on public companies, making litigation an important variable in corporate decision-making. This variable, through no fault of the company or its shareholders, can adversely impact decisions such as whether companies go public, whether and how to make voluntary disclosures, and whether to make key investments in public companies. According to a 2015 survey, 85 percent of attorneys at U.S. companies say a state's lawsuit environment is likely to impact important business decisions at their company, including where to locate or expand. *U.S. Chamber of Commerce Institute for Legal Reform, 2017 Lawsuit Climate: Ranking the States: A Survey of Fairness and Reasonableness of State Liability Systems, 3 (Sept. 2017)*, https://www.instituteforlegalreform.com/uploads/pdfs/Harris-2017-Executive-Summary-FINAL.pdf.

Meanwhile, business leaders consistently cite the litigious environment as a basis for staying out of capital

markets. H.R. Rep. No. 104-50, at 20 (1995) ("Fear of [securities] litigation keeps companies out of the capital markets."); Commission on the Regulation of U.S. Capital Markets in the 21st Century, *Report and Recommendations* 30 (March 2007) ("[I]nternational observers increasingly cite the U.S. legal and regulatory environment as a critical factor discouraging companies and other market participants from accessing the U.S. markets.").

Shareholder litigation, which (as here) often targets directors and officers, also discourages qualified candidates from serving in such roles. This problem has been recognized by the Wisconsin Legislature and the Wisconsin Supreme Court. *See Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 55, 356 Wis. 2d 665, 849 N.W.2d 693 (noting that Wisconsin enacted statutory provisions requiring director indemnification "because directors often were sued for actions taken on behalf of corporations and that litigation was causing directors to resign and to refuse to serve on boards of directors.") Discouraging qualified board members from

serving has an obvious direct negative impact on businesses and, moreover, can lead to further securities lawsuits.

The risk of duplicative and meritless shareholder litigation thus hurts the broader Wisconsin economy by imposing unnecessary costs on businesses, hampering the ability of businesses (and especially those businesses seeking to boost growth) to raise capital by offering securities on the public market, and to attract high-quality directors and officers. Businesses choosing where to grow and invest seek a fair and predictable litigation environment. The circuit court's decision takes Wisconsin in the opposite direction.

III. PERMITTING THIS DUPLICATIVE CLASS ACTION TO PROCEED CONTRAVENES THE PURPOSE OF THE COMMERCIAL COURT PILOT PROJECT.

As described above, the decision below sets a costly precedent for Wisconsin businesses, particularly those in growth mode that are seeking to raise capital through public offerings. Ironically and unfortunately, the decision comes out of the Waukesha County Commercial Docket, part of the Commercial Docket Pilot Project put into effect in 2017 for

the express purpose of "improv[ing] the quality and predictability of justice in connection with business disputes" and to "make Wisconsin a desirable forum for resolving business disputes." *In re creation of a pilot project for dedicated trial court judicial documents for large claim business and commercial cases*, No. 16-05, 2017 WI 33 at 3 (Wis. April 11, 2017) ("Order"). By increasing costs and risks for businesses and diminishing predictability, the decision below will have the exact opposite effect.

The Commercial Docket Pilot Project was approved on April 11, 2017, by Order of the Supreme Court of Wisconsin. The Order approved a petition filed by the Business Court Advisory Committee, convened by Chief Justice Roggensack, which requested creation of a three-year pilot project for large claim commercial cases in Waukesha County Circuit Court and the circuit courts of the Eighth Judicial Administrative District. The Waukesha County Commercial Docket opened for new cases on July 1, 2017.

The petition recognized that "a business court has the potential to make Wisconsin circuit courts a more favorable forum for resolving business disputes by expeditiously resolving business cases and reducing litigation costs," would "promote predictable outcomes, which are important to business decision makers," and "will contribute to greater efficiency in the court system, and will lessen delays in the court system." Petition submitted by the Business Court Advisory Committee at 6 (attached to R.4, Exhibit A).

WCJC and MMAC continue to support the Commercial Docket Pilot Project, and they believe the Project has significant potential to streamline business litigation, develop a deep bench of experienced commercial law judges, and make Wisconsin a superior venue for business disputes – all in accordance with its stated goals. On April 1, 2019 the Commercial Docket became available to litigants statewide, further heightening its importance to Wisconsin businesses. *See* Guidelines for Transferring a Case to the Commercial Docket,

https://www.wicourts.gov/services/attorney/docs/guidelinestr ansfercomdocket.pdf.

But the decision below threatens to undermine the progress achieved by the Commercial Docket Pilot Project. Bizarrely, the circuit court observed that its decision was consistent with "the principle and the policy behind the [Pilot] Program." (R. 187:16, App. 227.) The circuit court was quite mistaken. Rather than promoting efficiency and eliminating delay, the decision below increases duplicative litigation and costs. Rather than increasing predictability for business, it diminishes it. And, at bottom, rather than making Wisconsin state courts a favorable forum for resolving business disputes (and thereby making Wisconsin a better place to do business), it makes Wisconsin courts a place that businesses will strive to avoid – including those businesses making decisions about where to locate their headquarters. The recent expansion of the Commercial Docket only increases the need for this Court to align it with its original vision.

The decision below, and its downstream effects, will make Wisconsin a worse place to do business, with negative consequences for Wisconsin businesses, shareholders, and employees.

CONCLUSION

For the reasons stated above, WCJC and MMAC respectfully request that the Court reverse the decision of the court below and grant the stay sought by the Defendants-Petitioners.

Dated this 15th day of April, 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the requirements of Wis. Stat. §§ 809.19(8)(b) and (c), for a brief produced with a proportional font. The length of this brief is 2,782 words.

Dated this 15th day of April, 2019.

/s/ Andrew Cook
ANDREW COOK

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 15th day of April, 2019.

/s/ Andrew Cook
ANDREW COOK

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