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

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

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INTRODUCTION

The Wisconsin Civil Justice Council ("WCJC") represents a broad spectrum of the Wisconsin business community. Its 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. WCJC submits this *amicus* brief to offer a broader perspective on the potentially deleterious effects of the decision below for Wisconsin businesses.

The Defendants-Petitioners' memorandum in support of their petition for leave to appeal lays out the reasons 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. Under Wisconsin law, a stay of the case below was appropriate, 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 submits this brief to make three additional points concerning the broader policy impact 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 fail to benefit anyone other than 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 the prospect of 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, making it more

expensive for Wisconsin companies to access public capital markets and raise funds needed for growth.

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.

WCJC's mission includes making Wisconsin a more competitive business environment – with a focus on 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 grant leave to appeal.

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 is adequately represented by lead counsel (appointed by the federal court in accordance with the Private Securities Litigation Reform Act,

[1] As explained in the Defendants-Petitioners' Memorandum, 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.

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.

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.[2] Any company planning an IPO, merger, or acquisition must plan for an immediate slew of securities lawsuit filings. And as relevant here, Wisconsin's

[2] A recent report from Cornerstone Research found that securities class action lawsuits were filed at "near record levels" in the first six months of 2018 with 204 securities class actions lawsuits filed, which would represent a 101 percent increase over the annual average of filings between 1997 and 2017. Cornerstone Research, *Securities Class Action Filings Continue at Historic Pace through First Half of 2018* (July 25, 2018), https://www.cornerstone.com/Publications/Press-Releases/Securities-Class-Action-Filings-Continue-Historic-Pace-through-H1-2018.

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.

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. S. Rep. No. 104-98, at 4 (1995); H.R. Rep. No. 104-369, at 31–32 (1995) (Conf. Rep.).

Variations in state law that are more favorable to 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 is 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.

The risks inherent to shareholder litigation are potentially 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 potentially 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, what 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, 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 hereto as Exhibit A).

WCJC continues to support the Commercial Docket Pilot Project, and it believes 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.

But the decision below threatens to undermine the progress represented by the Commercial Docket Pilot Project. Rather than promoting efficiency and eliminating delay, it 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.

The end result will be to make Wisconsin a worse place to do business, with negative consequences for Wisconsin businesses, shareholders, and employees.

CONCLUSION

For the reasons stated above, WCJC respectfully requests that the Court accept the Defendants-Petitioners' Petition for Review, reverse the decision of the court below, and grant the stay sought by the Defendants-Petitioners.

Dated this 16th day of October, 2018.

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 2,423 words.

Dated this 16th day of October, 2018.

/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 16th day of October, 2018.

/s/ Andrew Cook
ANDREW COOK

APPENDIX