



# THE MONITOR

A Quarterly Publication by Johnson Fistel, LLP • Winter 2022



## Farmers Insurance Hit With \$155 Million Jury Verdict for Retaliation Under FEHA

In yet another shot across the bow to California employers who blithely submit their workers' claims under California's Fair Employment and Housing Act (FEHA) to jury disposition, a Los Angeles Superior Court jury has awarded a terminated insurance company executive a verdict of \$155.4 million—including \$150 million in punitive damages.

The plaintiff, who worked for Farmers Insurance as a trial lawyer and senior vice president, was fired in 2016 following his participation in an investigation of a pay equity class action against Farmers. Farmers claimed it had a number of legal bases for terminating the executive, including allegations that he had made sexist comments at work, failed to take remedial action in response to employee complaints of female underrepresentation in Farmers' management, and for violations of the company's document preservation policies.

But the plaintiff alleged that Farmers' proffered bases for firing him were pretextual, and, among other claims, that his termination was retaliatory under FEHA for giving deposition testimony against his employer in the pay equity dispute. The jury agreed with his retaliation allegations, awarding him \$5.4 million in compensatory damages and another \$150 million in punitive damages.

The case reflects the potential for colossal exposure on the part of California employers who engage in workplace practices proscribed under FEHA, which does not have damage caps for compensatory or punitive damages.

If you have been illegally victimized by your employer or another person in the workplace, please contact us for a free consultation and case evaluation. You may telephone us at (619) 230-0063 or e-mail us at [contactus@johnsonfistel.com](mailto:contactus@johnsonfistel.com).

### In This Issue

#### Attorney Insights

- | Pg. | Topic   |
|-----|---|
| 1   | Farmers Insurance Hit With \$155 Million Jury Verdict for Retaliation Under FEHA  |
| 2   | Ripple Effect: How the SEC is Trying to Regulate Cryptocurrencies, DeFi, and NFTs   |
| 3   | 2022 – A New Year Estate Planning Review  |
| 4   | Attorney Profile: Q&A with Jonathan M. Scott  |
| 5   | Johnson Fistel Names New Partner: Mary Ellen Conner   |
| 6   | Johnson Fistel Preserves Company Funds and Secures Valuable Corporate Governance Reforms for Synchronoss Technologies, Inc. |
| 7   | How an ILIT is Like a Country Song, but Backwards   |

#### News & Events

- 11 Upcoming Lead Plaintiff Deadlines

#### Firm Information

- 10 Employment and Labor Litigation
- 12 Portfolio Monitor—Free Portfolio Monitoring
- 13 About the Firm and Contact Information

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## Ripple Effect: How the SEC is Trying to Regulate Cryptocurrencies, DeFi, and NFTs

Many people are still trying to understand how cryptocurrency works. To add another layer of confusion, people debate whether and how current laws and regulatory structures are equipped to address the legal issues that have arisen in this space. This confusion could be a reason that the cryptocurrency market is so volatile. With market volatility, many entrepreneurs have seen opportunity and forged ahead with mining new cryptocurrencies and minting non-fungible tokens (“NFTs”). The U.S. Securities and Exchange Commission (“SEC”) has pressed its case for bringing the industry under its oversight, with SEC Chairman Gary Gensler stating “very many [cryptocurrencies] are” securities and cryptocurrency exchanges should register with the SEC as securities trading platforms.<sup>1</sup>

1 Rakesh Sharma, How SEC Regs Will Change Cryptocurrency Markets, Investopedia, updated Nov. 7, 2021, <https://www.investopedia.com/news/how-sec-regs-will-change-cryptocurrency-markets/> (last visited Dec. 21, 2021).

So far, there has been a focus on the Howey Test to define securities, but the SEC also points to other definitions of securities in the 1933 Securities Act to bring cryptocurrencies under its ambit.

The SEC’s position on cryptocurrencies is being played out right now and will likely provide more clarity when it comes to civil litigation in the digital asset space. As one example, the SEC is currently suing Ripple, the company behind the XRP cryptocurrency, alleging that Ripple was conducting an unending initial coin offering (“ICO”) and flouting the Howey Test. The SEC argues that XRP is a security that should have been registered with the SEC and that Ripple’s insiders (who also held a significant percentage of XRP) created an information vacuum with total unilateral control about what information should be disclosed about Ripple and XRP.<sup>2</sup> Unlike Bitcoin

2 Paul Vigna, SEC Sues Ripple Over XRP Cryptocurrency, The Wall Street Journal, December 22,

and Ethereum, which the SEC says are not securities, XRP allegedly exists wholly as a speculative asset, not a currency, and that it was marketed and sold as such.<sup>3</sup> Ripple responds that “XRP is a fully functional ecosystem and real use case as a bridge currency that does not rely on Ripple’s efforts for its functionality or price.”<sup>4</sup> It is interesting to note that the SEC’s action against Ripple was done in the waning days of now former Chairman Jay Clayton’s tenure, with Ripple’s CEO stating “Clayton did this with one foot out the door. Rather shamefully, he has decided to sue Ripple, and leave the legal

2020, <https://www.wsj.com/articles/ripple-to-face-sec-suit-over-xrp-cryptocurrency-11608598800> (last visited Dec. 21, 2021).

3 *Id.*

4 Rakesh Sharma, Crypto Company Ripple Faces SEC Lawsuit, Investopedia, <https://www.investopedia.com/crypto-company-ripple-faces-sec-lawsuit-5093444> (last visited Dec. 21, 2021).

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(Continued from Page 2)

work to the next chair.”<sup>5</sup> Empower Oversight, a non-governmental organization recently accused the SEC of bias against Ripple. The bias action against the SEC helped shape the present outlook from investors - that the Company will prevail against the SEC.<sup>6</sup> Although the outcome is far from certain, there will be a ripple effect that will give more clarity as to how cryptocurrencies may fall under SEC regulation, if at all.

The SEC is also facing significant pushback on other fronts. Stemming from the creation of decentralized cryptocurrencies or decentralized finance (“DeFi”), buyers, sellers, lenders, and borrowers can now interact peer to peer or with strictly software-based middlemen. They have avoided the need to utilize a company or financial institution to facilitate the transaction.<sup>7</sup> In other words, they have the ability to mint digital assets and transact business without involving regulated intermediaries because the exist-

5 *Id.*

6 Ekta Mourya, Ripple Long-Term Investors Bet on XRP, Expect Bias Lawsuit Against SEC to Succeed, FXStreet, <https://www.fxstreet.com/cryptocurrencies/news/ripple-long-term-investors-bet-on-xrp-expect-bias-lawsuit-against-sec-to-succeed-202112210859>, Dec. 12, 2021 (last visited Dec. 21, 2021).

7 Rakesh Sharma, Decentralized Finance (DeFi) Definition, Investopedia, <https://www.investopedia.com/decentralized-finance-defi-5113835>, updated Dec. 20, 2021 (last visited Dec. 20, 2021).

ing framework of regulations does not appear to address these types of assets or transactions. The SEC has taken the position that individuals who mint non-fungible tokens, or NFTs, are doing the same thing as issuing securities. Recently, Terraform Labs (“TFL”) -- a DeFi company led by a South Korean national residing in Singapore -- was served with an SEC complaint alleging that it had issued and sold unregistered securities. Despite significant jurisdictional issues at play, these recent events provide a glimpse at how the SEC intends to regulate DeFi. However, many argue that the SEC has not adequately explained how creating software enabling others to mint NFTs is the same as selling and issuing securities.

The outcomes for Ripple and TFL are unknown at this time, but the SEC has taken aggressive steps to declare that cryptocurrencies and DeFi companies are actually issuing securities subject to regulation under the federal securities laws. On one hand, the SEC could prevail and bring cryptocurrencies and DeFi under its regulation – causing enforcement problems due to decentralization. On the other hand, the SEC’s gambit could implode, leaving this new asset class largely unregulated. Either way, many argue that the existing regulatory structure does not sufficiently address how, or even if, this new asset class should be regulated.



## 2022 – A New Year Estate Planning Review

Last year was a memorable year in many ways, and we saw many new developments that may have had significant effects on your estate plan, including the Tax Cuts and Jobs Act (TCJA), the Coronavirus Aid, Relief and Economic Security Act (CARES ACT), the American Rescue Plan (ARP), the pending Build Back Better Plan (BBB Plan) and other changes proposed by the Biden administration.

The TCJA has probably had the most significant effects on overall tax planning due to all of the different areas it touched, including structural changes to individual and corporate income tax, international taxation, deductions for pass-through income, and the elimination of certain itemized deductions. Most importantly for estate planning purposes, the TCJA doubled the estate, gift and generation-skipping transfer (GST) tax exemptions. As of now, many of the changes imposed under the TCJA are scheduled to sunset after December 31, 2025, with the exemptions currently scheduled to revert back to pre-TCJA levels. Given the uncertain political landscape, we continue to view this temporary increase in exemption amounts as an unprecedented opportunity for structural estate

(Continued on Page 4)

(Continued from Page 3)

planning, tax mitigation and asset protection.

As we reflect on 2021 and look forward to 2022, the only thing we can be certain of is that there is no better time than now to protect your assets and family with a comprehensive and integrated estate plan. As Benjamin Franklin is credited in saying, “if you fail to plan, you are planning to fail.” All too often, people fail to take the time to create a will or a trust indicating how they would like their assets handled after they pass away. Such a failure to plan results in a significant amount of their assets paid to courts, lawyers, and other costs as family members fight over the assets in probate court, all of which can be avoided with proper planning. The Wall Street Journal recently ran a story titled Zappos Founder Tony Hsieh’s Friends, Family Feud Over His \$500 Million Estate. Mr. Hsieh died without a will or a trust and, as a result, the WSJ reported that “[i]t could take several years for Mr. Hsieh’s estate to be settled” while his friends and family fight each other over what they claim to be their share of his estate.

Even if you already have a plan, now is a good time to review it with Johnson Fistel’s seasoned tax and financial professionals to make sure you are taking advantage of all of the recent changes and opportunities. While the permanency of the TCJA and estate tax exemptions remains uncertain, the current environment is optimal for protecting the things you care about the most.

## Attorney Profile: Q&A with Jonathan M. Scott



1. Where were you born and what makes that city special?

I was born and raised in Missoula, Montana. Everything about Missoula is special. I love that I can fly-fish on the rivers in the summer and drive twenty minutes to the nearest ski hill in the winter.

2. What activities or hobbies do you enjoy the most?

I enjoy going on adventures with my fiancé, Brooke, and our dog Sophie. I also love boating on the lake, spending time with my family, and trying new restaurants.

3. What did you do prior to graduating law school?

I attended Gonzaga University where I received an MBA, and then worked as a financial analyst in Whitefish, MT.

4. What inspired you to pursue the legal field?

My dad is an attorney, so I was always familiar with the profession—I grew up watching him practice and even went to work with him (dressed in a suit) as a kid. After my brother went to law school, I decided it was my turn to join the family profession.

5. How long have you been a practicing attorney?

I have been an attorney for almost three years.

6. Up to this point in your life, what is the achievement you are most proud of?

The achievement I am most proud of is getting my amazing fiancé, Brooke, to say yes to marrying me.

7. How would you describe yourself as a person?

I would say I am an intellectually curious person and am always trying to learn about something new.

8. What makes you feel accomplished?

I feel most accomplished when I spend time solving a complex problem and am able to see the results of my effort.

9. If you could be any kind of animal, what would you be?

My dog, Sophie. She runs our house and has the best life.

## Johnson Fistel Names New Partner: Mary Ellen Conner



The firm is pleased to announce that Mary Ellen Conner has been elevated to partner effective January 1, 2022. Mary Ellen is based in the firm's Marietta, Georgia office. "Since joining the firm, Mary Ellen has been a key member of the Johnson Fistel team, often being called upon to work on the firm's largest and most complex matters, and consistently driving results for our clients," said Michael I. Fistel, Jr., one of the firm's founding partners and managing partner of the firm's Marietta, Georgia office. Frank Johnson, co-founder and the firm's managing partner added: "Mary Ellen embodies our firm's P.R.I.D.E. mantra—Professionalism, Respect, Integrity, Determination, and Excellence. I am proud to have a partner like Mary Ellen by my side representing our clients."

Prior to joining Johnson Fistel, Ms. Conner practiced law at Jones Day, a full-service law firm with more than 2,500 lawyers and 43 offices around the world, representing Fortune 500 companies in complex commercial and securities litigation. Ms. Conner also previously

represented numerous businesses, healthcare providers (including hospitals, physician groups, laboratories, Durable Medical Equipment supply companies, and ambulatory surgery centers), and individuals in government investigations and litigation brought by the Department of Justice and Office of Inspector General for alleged violations of the False Claims Act, federal securities and commodities fraud statutes, and insider trading laws at a boutique civil litigation and criminal defense firm.

Additionally, Ms. Conner served on the faculty of Atlanta's John Marshall Law School where she taught Civil Procedure I and II; Legal Research, Writing, and Analysis I; and Legal Communications and Process. She also served as the Faculty Adviser to the Moot Court and co-directed the school's Oral Advocacy Competition.

Ms. Conner has received multiple industry and national recognitions, including the Martindale-Hubbell AV Preeminent peer rating—the highest possible rating in both legal

ability and ethical standards based upon peer reviews—for 2019, 2020, 2021, and 2022. Ms. Conner was also recognized as a member of the General Litigation Department of the Year, awarded by The Daily Report, for the years 2013 and 2014. She also received the Safe Haven Award for Excellence in Pro Bono Representation in 2012.

Ms. Conner graduated from the University of North Carolina at Chapel Hill as a Public Service Scholar with a B.A. in English and Psychology. She received her J.D. from the University of North Carolina School of Law with Honors in 2011, where she served on the editorial board for The North Carolina Law Review and received the Gressman-Pollitt Award for Excellence in Oral Advocacy from the Holderness Moot Court. While in law school, Ms. Conner also served as a summer clerk to The Honorable Judge Robert J. Conrad, Jr., Chief Judge for the Western District of North Carolina.



## Johnson Fistel Preserves Company Funds and Secures Valuable Corporate Governance Reforms for Synchronoss Technologies, Inc.

On December 13, 2021, the Honorable Freda L. Wolfson, U.S. District Court Judge for the District of New Jersey, granted final approval of a stockholder derivative settlement which resolves stockholder derivative litigation pending in the U.S. District Court for the District of New Jersey, the Court of Appeals for the Third Circuit, and Delaware Court of Chancery. Johnson Fistel serves as co-lead counsel for plaintiffs in the consolidated demand refused derivative action pending in the District of New Jersey.

The derivative actions were brought against certain current and former directors and officers of Synchronoss and allege that these individuals breached their fiduciary duties by, among other things, improperly recognizing revenue, engaging in related party transactions with friends and family of the Company, and issuing materially false and misleading statements about the Company's business and related party transactions, including the terms of a perpetual licensing agreement with a related party,

the performance of a cloud-computing content managing company and service provider acquired by Synchronoss, and the terms of the Company's divestiture of its Activation Business. The derivative actions also allege that certain defendants sold their Synchronoss stock before the truth was finally revealed to the investing public.

The settlement approved by the Honorable Freda L. Wolfson resolves all the derivative actions by providing releases to the defendants named in the derivative actions in exchange for the Company's agreement that Company funds will not be used to resolve the related securities class action lawsuit pending against the Company and certain of its executives, as well as robust corporate governance reforms tailored to address and prevent the recurrence of the alleged misconduct, including, among other things: (1) annual review of the Chairperson of the Board, and in the event the positions of CEO and Chairperson of the Board are not separated, the creation of the role of a Lead

Independent Director, who shall be evaluated annually by the independent members of the Board; (2) mandatory approval by the Audit Committee of Board members' service on the board of another public company and confirmation that remaining Board members do not object; (3) enhanced Board oversight of stock repurchases; (4) significant enhancements to the Company's Disclosure Committee, including that it be comprised of senior members of pertinent departments and modifications to its Charter to include responsibilities geared toward assisting the Company with overseeing and evaluating its disclosure controls and procedures; (5) substantial improvements to the Audit Committee, including requiring the Audit Committee to meet at least six times annually and review with the Disclosure Committee the Company's financial statements, earnings guidance, and earnings releases, including recommendations by internal and external auditors; (6) requiring the CCO to be a non-Section 16 officer responsible for various specified tasks in connection with the su-

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pervision of corporate governance policies and fostering a culture of compliance; (7) the requirement that the Audit Committee review all related party transactions to ensure they are conducted at arm's-length, in connection with which the Audit Committee shall be afforded broad authority; and (8) reporting by Synchronoss's CFO on the Company's financial condition, including material increases in expenses and liabilities and material decreases in revenues and earnings, with the full Board.

The prosecution of the derivative actions was also a factor in the Company's decision to review and revise its Insider Trading Policy with outside counsel. Indeed, in approving the settlement, Judge Wolfson stated that the reforms achieved through the settlement were "substantial and tailored" to the alleged harm and "strike the balance in curbing future issues that are the subject of [the] actions."

Attorneys Frank Johnson, Michael Fistel, Jr., Mary Ellen Conner, and Adam Sunstrom led the prosecution of the litigation for Johnson Fistel and helped to achieve this outstanding result for plaintiffs on behalf of Synchronoss.

*In re Synchronoss Technologies, Inc. Stockholder Derivative Demand Refused Litigation*, Lead Case No. 3:20-cv-07150-FLW-LHG (D.N.J.).

*In re Synchronoss Technologies, Inc. Derivative Litigation*, No. 3:17-cv-07173-FLW-LHG (D.N.J.).  
*Daniel v. Waldis*, No. 2019-0189-JTL (Del. Ch.).



## How an ILIT is Like a Country Song, but Backwards

What do you get when you play a country song backwards? Your dog, job and trailer back. This joke actually has some interesting parallels to one of the best estate planning and asset preservation strategies that you may have never heard of – the ILIT.

If your estate is greater than the current estate/gift tax exemption, the legacy you leave for your beneficiaries may become a nightmare to manage and will be greatly reduced if you do not plan properly. State and federal estate taxes can reduce the assets you have worked to preserve for your family by as much as 60%. Without proper planning, your beneficiaries may need to immediately liquidate closely held assets to cover such a tax bill that. For

example, if you have a business and real estate assets that exceed the gift tax exemption by \$5 million, your beneficiaries may need to come up with \$3 million to cover the estate tax burden you left them. If they do not have that amount in cash, they may need to conduct an immediate fire sale of the family business, real estate or sentimental heirlooms just to pay Uncle Sam.

One way to avoid this tax burden is an Irrevocable Life Insurance Trust ("ILIT"). An ILIT can be designed to provide needed liquidity and a host of other benefits as well. Generally, an ILIT is an extremely useful estate-planning tool for high-net-worth individuals and estates that need a flexible source of liquidity upon the death of the in-

(Continued on Page 8)

(Continued from Page 7)

sured party. An ILIT is a separate, irrevocable entity that owns and controls a life insurance policy that covers the life of a separate insured person or multiple people. An ILIT is responsible for managing the policy and distributing the proceeds after the death of the insured person, and because it's a separate entity, the ILIT death benefit proceeds are not included in the taxable estate of the insured party. An ILIT can include one or several policies, including individual second to die policies. Second to die life insurance covers two separate lives and is only distributed when both individuals have passed.

An ILIT is comprised of several important parties: the grantor(s), the trustee(s), and beneficiary(ies). The grantor is the individual who establishes and funds the ILIT. Because an ILIT is irrevocable, all material transfers to the ILIT are permanent, and the grantor is essentially giving up control of the ILIT to the trustee. The trustee manages the ILIT for the grantor, and the ILIT beneficiaries receive the insurance death benefit distributions after the death of the grantor (or covered person if different than grantor).

There are some very important considerations to keep in mind when forming and managing the ILIT. It is essential that the ILIT grantor avoid any incidental ownership in the life insurance policy that is owned by the ILIT – it must remain completely separate from the grantor. The ILIT premiums should be paid from a checking account that is owned by the ILIT (and not the grantor). Additionally,



if a grantor attempts to transfer an existing life insurance policy to the ILIT, there is a three-year look-back period, meaning that if the grantor dies within three years of the transfer, the entire ILIT death benefit could be included in the grantor's taxable estate. There can also be gift tax considerations if the life insurance policy being transferred to the ILIT has significantly appreciated. The insurability of the grantor and the issuance of a policy in the name of the trust may add some layers of complexity to the ILIT process.

ILITs can serve a multitude of estate planning purposes, including the following:

#### **Minimizing Estate and Gift Taxes**

Generally, the proceeds of a normal life insurance policy are includ-

ed in the taxable estate of the insured party when they die. Thus, while the proceeds of a life insurance policy are not taxable to the beneficiaries, the value of the estate in excess of the gift tax exemption is taxable. In 2021 the gift tax exemption is \$11.7 million, but that figure has the potential to be significantly reduced by proposed legislative changes. Under at least one proposal, the gift tax exemption could be reduced to \$1 million. Hypothetically, if the gift tax exemption is \$1 million and you leave a business and real estate assets worth \$5 million and an insurance policy that yields a death benefit of \$1 million, your estate will be valued at \$6 million, \$5 million of which can be taxed at up to 60% and your beneficiaries would then need to find a way to pay \$3 mil-

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lion in taxes. However, if you have a life insurance policy owned by an ILIT with adequate coverage to pay the estate taxes based on the value of your estate, the death benefit distributions would be separate from your estate and thus exempt from state or federal estate taxes (saving your beneficiaries the \$3 million tax bill and allowing them to avoid a chaotic and upsetting fire sale).

ILITs can also reduce or eliminate gift tax consequences altogether since contributions by the grantor can be used to pay insurance premiums and are considered gifts to the beneficiaries of the ILIT. Grantors can gift \$15,000 annually, and currently up to \$11.7M during their lifetimes to ILIT beneficiaries without gift tax consequences.

### **Government Benefits**

ILITs can protect the eligibility of beneficiaries who are receiving government benefits, such as Social Security disability or Medicaid, by managing how distributions from the trust are classified and used by the beneficiary.

### **Asset Protection**

ILITs can provide excellent asset protection for large estates, making it almost impossible for creditors to reach the assets held by the ILIT. Distributions from the ILIT can be protected from creditors of the ILIT beneficiaries, but this will require some strategic planning by the grantor and trusted advisors.

### **Retained Financial Control**

ILIT grantors can give the trustees discretionary control over the timing and amount of distributions to beneficiaries. ILIT proceeds can be

paid out immediately, or grantors can specify when and how much of the ILIT benefit their beneficiaries will receive. Trustees can also be provided with the discretion to make distributions when beneficiaries attain predetermined goals, such as school graduation, starting a business, purchasing a home, or having a child. This strategic planning can be useful in ensuring the your beneficiaries use the insurance proceeds for meaningful purposes, as well as protecting children who are minors or who are from prior marriages.

### **Tax and Legacy Planning**

The cash value and death benefit of a life insurance policy are free from taxation, so there are no tax issues with having a policy owned in an ILIT. This can be important when it comes to tax planning for large estates with multiple generations. In addition to estate tax, generation skipping tax (GST) can impose a 40% tax on younger generations. Since ILIT proceeds are excluded from the grantor's taxable estate, multiple generations may be able to avoid the GST.

### **The Take Away**

Break out the six string and fire up the fiddle! ILITs can provide your estate with necessary liquidity, asset protection, and estate/gift tax mitigation that will enable your heirs to keep the dog, house and family business, and then some. The estate planning/asset protection group at Johnson Fistel would be happy to help you explore the benefits of adding an ILIT to your comprehensive and integrated estate plan.

## Employment and Labor Litigation

The attorneys at Johnson Fistel have obtained successful and efficient results for both employers and employees in litigating employment disputes, negotiating separations and severances, and evaluating employment policies, practices, and contracts.

Johnson Fistel can help employers and employees with the following issues:

- Minimum Wage & Overtime Pay
- Misclassifications (Employee/Independent Contractor)
- Discrimination, Harassment, & Retaliation
- Employment Contracts, Severance & Separations, & Restrictive Covenants.

Whether you're an employee or an employer, please contact us today to determine whether we may be able to assist you.

Please visit our website for FAQs about employment law: <https://www.johnsonfistel.com/faq/>



## Upcoming Lead Plaintiff Deadlines

Johnson Fistel is investigating many potential cases arising under the federal securities laws. If you would like more information, or if you wish to participate in an action, please contact us as soon as possible to ensure that your rights are fully protected. Listed on this page are matters that the firm is investigating and the applicable deadlines for filing a motion with the court to be appointed as a “lead plaintiff” under the Private Securities Litigation Reform Act of 1995.

Company	Deadline
Playtika Holding Corp.	2022-01-24
Alfi, Inc.	2022-01-31
IQIYI Inc.	2022-01-31
Berkeley Lights, Inc.	2022-02-07
Cloopen Group Holding Limited	2022-02-08
Paysafe Limited	2022-02-08
Exicure Inc	2022-02-11
Marathon Digital Holdings, Inc. f/k/a Marathon Patent Group, Inc	2022-02-15
Chegg, Inc.	2022-02-18
Reata Pharmaceuticals, Inc.	2022-02-18

Company	Deadline
DocuSign, Inc.	2022-02-22
KE Holdings, Inc.	2022-02-28
Instadose Pharma Corp	2022-02-28
Meta Materials Inc. f/k/a Torchlight Energy Resources, Inc.	2022-03-04
Bright Health Group, Inc.	2022-03-07
First Solar, Inc.	2022-03-08
Talkspace, Inc.	2022-03-08
Discovery, Inc.	2022-03-08
Oak Street Health, Inc.	2022-03-11

# Portfolio Monitor

Johnson Fistel recognizes that there are inherent risks when investing in the stock market. But the risks that an investor assumes do not, and should not, include the risk that the company or its officers and directors will make false and misleading statements to artificially inflate the company's stock price or sell their own stock based on insider information.

Our Portfolio Monitor is designed to alert institutional and individual investors when one of their investments may be affected by securities fraud, corporate waste, or other wrongdoing. Our Portfolio Monitor is available to both U.S. and foreign investors. There are no minimum portfolio requirements or costs to participate.



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# Partners



Frank J. Johnson

Michael I. Fistel, Jr.

Brett M. Middleton

Mary Ellen Conner

# Associates & Counsel



Jeff A. Berens

Enoch P. Hicks

Tiffany R. Johnson

Richard A. Nervig

Kristen L. O'Connor

Seth. M Schechter



Jonathan M. Scott

Chase M. Stern

William W. Stone

Ralph M. Stone

Adam J. Sunstrom

Oliver S. tum Suden

# Support Team



Jim Baker

Tyler Baker

Ashley Lane

Serena Lee

Luz Lopez

Bridget Morrell

Jennifer Sanders

Savannah Vasquez

# Contact Us

## San Diego Office

501 West Broadway, Suite 800  
 San Diego, California 92101  
 T: 619.230.0063  
 F: 619.255.1856

## Georgia Office

40 Powder Springs Street  
 Marietta, Georgia 30064  
 T: 470.632.6000  
 F: 770.200.3101

## New York Office

1700 Broadway, 41st Floor  
 New York, New York 10019  
 T: 212.292.5690  
 F: 212.292.5680

## Contact Us:

[ContactUs@JohnsonFistel.com](mailto:ContactUs@JohnsonFistel.com)

## Visit Us:

<http://www.JohnsonFistel.com>

