THE MONITOR

A Quarterly Publication by Johnson Fistel, LLP • Summer 2022

Johnson Fistel, LLP Secures Sweeping Reforms With Potential Value in the Hundreds of Millions of Dollars for The Southern Company

On June 9, 2022, The Hon. Mark H. Cohen granted final approval of a shareholder derivative settlement which resolved consolidated shareholder lawsuits pending in the United States District Court for the Northern District of Georgia as well as a related shareholder lawsuit pending in Georgia superior court.

Johnson Fistel, court-appointed lead counsel, negotiated the settlement that commits The Southern Company, through its Board and/or committees of the Board or duly authorized officers of The Southern Company, to adopt and/or maintain for a minimum period of five years a comprehensive package of oversight and internal controls reforms designed to address the alleged lapses in Board- and management-level supervision of large capital projects that the plaintiffs contend contributed to the project's failure and caused The Southern Company significant losses. In approving the settlement, Judge Cohen praised Johnson Fistel for its diligence and efforts in the case which resulted in beneficial and long-lasting changes in the company's corporate governance. More specifically, he stated that "the Settlement is the product of hard-fought, arm's-length negotiations by prepared, skilled, and experienced counsel" who are "nationally recognized leaders in shareholder litigation" and that the "decision to lock in the Settlement's guarantee that the Reforms will be implemented and maintained for at least half a decade, rather than to sacrifice that benefit in order to pursue the remote possibility that a monetary recovery might exceed the Reforms' value, is eminently reasonable." The corporate reforms obtained by Johnson Fistel in the settlement were valued by one expert as having the potential to contribute hundreds of millions of dollars in value to the Company.

The actions, brought on behalf of nominal defendant The Southern Company and against certain current and former directors and officers of the company, arose from The Southern Company's construction and subsequent decommissioning of a commercial-scale integrated gasification combined cycle lignite coal-fired power plant in Kemper County, Mississippi. Specifically, the actions alleged these directors

(Continued on Page 2)

In This Issue

Attorney Insights

(Continued from Page 1)

and officers breached fiduciary duties of loyalty and care owed to The Southern Company and its stockholders by: (i) failing to exercise oversight over the design, planning and construction of the Project; (ii) failing to establish effective systems for monitoring and controlling Project design and construction, budget and schedule estimates, actual costs and schedules, and mitigation plans to address design and construction problems, cost overruns, and schedule delays; (iii) failing to ensure accurate and timely disclosure of material Project developments and changes in key Project assumptions, including material increases in actual and estimated costs and schedules, escalating risks to achievement of operational and financial objectives, qualification for government-funded incentives, and prospects for ratepayer recovery, and sustained declines in current and projected natural gas prices; and (iv) failing to prevent billions of dollars in foreseeable losses resulting from, inter alia, forfeited government incentives, rejected applications for ratepayer cost recovery, and excess construction and decommissioning costs by scuttling the Project's IGCC component years earlier, if not prior to commencement of construction.

Attorneys Michael I. Fistel, Jr., William W. Stone, and Adam J. Sunstrom led the prosecution of the litigation for Johnson Fistel and helped achieve this superb result on behalf of plaintiffs and The Southern Company.

In re Southern Company Shareholder Derivative Litigation, No. 1:17-cv-00725-MHC (N.D. Ga.).

Did the U.S. Supreme Court Send the Ever-Controversial California PAGA Claim Down the River for Good?

On June 15, 2022, the United States Supreme Court issued an 8-1 opinion in the highly anticipated *Viking River Cruises, Inc. v. Moriana*, addressing whether the Federal Arbitration Act (FAA) preempts California law prohibiting mandatory arbitration of claims brought under California's Private Attorneys General Act of 2004 (PAGA). Justice Thomas was the sole dissenter. In a victory for California employers, the United States Supreme Court held that the FAA preempts the California Supreme Court's central holding in *Iskanian v. CLS Transportation Los Angeles LLC*, that actions brought under PAGA could not be divided into individual and representative claims through an agreement to arbitrate. In other words, the United States Supreme Court ruled that individual PAGA claims can be compelled to arbitration, and once compelled, the non-individual PAGA claims brought on behalf of other individuals cannot be maintained for lack of standing and must be dismissed. This landmark opinion means that, at least for now, arbitration agreements with waivers of the right to bring representative PAGA claims for violations suffered by other alleged "aggrieved employees" will be enforced—just like class action waivers.

PAGA authorizes California employees to file lawsuits to recover civil penalties on behalf of themselves, other employees, and the State of California for violations of California's Labor Code. Previously, claims brought under PAGA could avoid arbitration due to the 2014 *Iskanian* decision. Thus, a plaintiff who brought PAGA claims on behalf of themselves (individual claims) and on behalf of other "aggrieved employees" (representative claims) could not be forced to arbitrate either category of claims, and the individual and representative claims could not be split into separate actions through an agreement to arbitrate.

In 2018, a former sales representative sued Viking River Cruises, Inc. on behalf of hundreds of workers over a slew of alleged wage and hour law violations. The plaintiff had signed an arbitration agreement that included a representative action waiver, but she avoided arbitration by bringing the claim under PAGA. A Los Angeles County trial court denied Viking River's motion to compel arbitration and an appellate court agreed, relying on *Iskanian*. The California Supreme Court denied Viking River's petition for review. However, the United States Supreme Court agreed to review the case. Employers had repeatedly attempted to obtain United States Supreme Court review of *Iskanian*, but those efforts were rejected until

(Continued on Page 3)

(Continued from Page 2)

this term.

Arguably, the key takeaway from the *Viking River* decision is that now PAGA claims can be subject to mandatory arbitration on an individual basis. However, while California employers can rest easier knowing PAGA claims are no longer entirely immune to arbitration and waiver agreements, employers should also be aware that, as Justice Sotomayor cautioned, California courts or the California Legislature may take action in the future to chip away at this holding, casting doubt on *Viking River's* potential long-term impact. For example, in her concurrence she suggested that California courts could interpret California law differently on the issue of standing or, alternatively, the California Legislature could amend PAGA by adding additional procedural protections or changing the statutory standing requirements.

For now, employees and employers alike should review and pay close attention to the language in any arbitration agreement at issue in light of the recent *Viking River* decision. For more information or questions, please contact the Johnson Fistel, LLP team.

Recent Precedent in Harassment and Retaliation Litigation: $460 Million Awarded to 2 Male Employees

On June 2, 2022, a Los Angeles County jury awarded $440 million dollars in punitive damages to two men who claimed they were forced to quit their jobs at Southern California Edison ("SCE") due to retaliation for reporting sexual and racial harassment. Attorneys for the men have stated that this is the largest victory for punitive damages for any employment verdict in U.S history.

Alfredo Martinez and Justin Page alleged that after they reported sexual harassment and racist language occurring in their workplace, upper management retaliated against them resulting in their constructive termination. Constructive termination is a form of termination where the employer makes working conditions so intolerable that the employee is forced to quit.

The complaint, which was filed in August 2017, described the "fraternity" like atmosphere that allowed and enabled constant racial and sexual harassment of employees. Page was employed at SCE in 2015. He said he witnessed multiple instances of sexual harassment directed towards women and himself, as well as derogatory racial language, and consequently submitted complaints in 2017 to the SCE ethics hotline. Martinez, who was a supervisor at SCE since 2001, stated two female employees came to him in 2017 and confided they had experienced sexual harassment. Jurors awarded $24.6 million in compensatory damages to plaintiffs, bringing the total to more than $464.6 million.

The complaint states the two women went to Martinez because "he was just about the only supervisor who could be trusted and who had not engaged himself in any of the harassment". Martinez gathered the information from the two female workers and other victims and took it to upper management in an attempt to stop the harassment. After Martinez and Page came forward to upper management, their jobs were upended by their coworkers and superiors. They were allegedly forced to work in horrible conditions consisting of disrespect, gossip, and threats due to coming forward.

The jury awarded Martinez $100 million from SCE and $300 million from its parent company Edison International. Page was awarded $10 million from SCE and $30 million from Edison International. In an unusual and symbolic twist, the jury awarded the two men $140 million more than what their attorneys suggested.

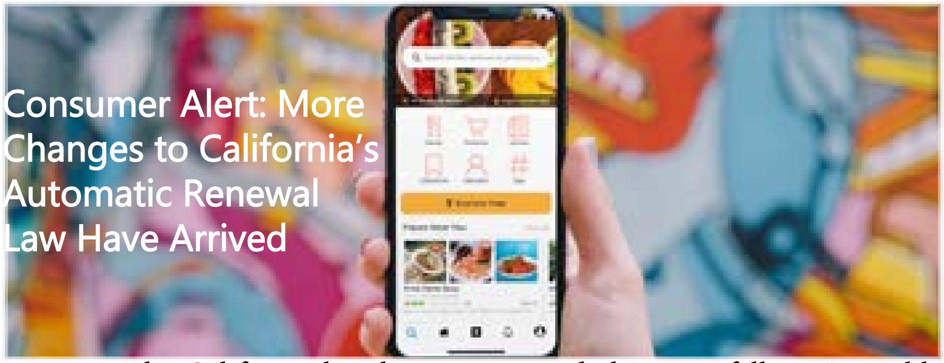
Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964 and, in California, the Fair Employment and Housing Act. Unwelcome

(Continued on Page 4)

(Continued from Page 3)

sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature may constitute sexual harassment when the conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment. Individuals of any gender can be the target of sexual harassment, which does not have to be motivated by sexual desire. It is similarly unlawful for an employer to retaliate against an individual for opposing employment practices that discriminate based on sex or for filing a discrimination charge, testifying, or participating in any way in a responsive investigation, proceeding, or litigation.

Johnson Fistel, LLP has been retained by victims of sexual harassment in the workplace and has counseled employers on the appropriate steps to take to avoid claims of harassment. If you have been illegally victimized by your employer or another person in the workplace, or if you have questions as an employer, 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.



Consumer Alert: More Changes to California's Automatic Renewal Law Have Arrived

In 2009, the California legislature passed California's Automatic Renewal Law ("ARL") to "end the practice of ongoing charging of consumer credit or debit cards … without the consumers' explicit consent for ongoing shipments of a product or ongoing deliveries of service." Despite these legislative efforts, some businesses installed creative ways to still make it difficult for consumers to cancel their memberships and avoid automatic charges showing up on their credit cards. Like many states across the country, the California legislature fought back by regularly amending the ARL. On July 1, 2022, the newest version of California's ARL took effect.

The ARL, last amended in 2018, requires businesses to: (1) clearly and conspicuously disclose notice of the recurring nature of the transaction; (2) obtain consumers' "affirmative consent" to the automatic renewal terms (i.e. opt-in to the recurring nature of the transaction); (3) provide a post-transaction acknowledgment that includes the automatic renewal terms and cancellation policy in a way that can be retained by the consumer; (4) provide consumers with an "easy-to-use mechanism for cancellation", including information about how to cancel; and (5) provide notice of material changes to any offer terms.

The recent changes to the ARL, enacted this past fall as Assembly Bill 390, build on the law's existing framework by adding new notice requirements and mandatory online cancellation options.

Notice: Businesses are now required to send a more robust notice about free, discounted, or promotional pricing that lasts more than 31 days. Specifically, the notice must clearly and conspicuously disclose that the subscription will automatically renew, the length of the renewal period, how to cancel, and the contact information for the business. If the initial trial period lasts for one year or longer, the notice must be provided between 15-¬45 days before renewal. Otherwise, notice must be given between 3-21 days.

Online Cancellation: Online consumers must have the ability to cancel their subscription immediately, and be able to do so through either (1) a "prominently located direct link or button" on the website or (2) a preformatted email that the consumer can send to terminate the subscription without taking any further steps. This requirement is more specific than the previous "easy-to-use mechanism for cancellation" and was implemented to prohibit "further steps that obstruct or delay the consumer's ability to terminate" the renewal.

Even before these changes, the

(Continued on Page 5)

(Continued from Page 4)

ARL has been a frequent focus of both private class action litigation and government enforcement actions, and there is no reason to think that will change with the ARL's latest requirements. In light of the new requirements, California consumers and businesses offering subscriptions or automatically renewing goods and services to California consumers should pay close attention to the terms and conditions of the agreements at issue to assess whether the same fall into compliance with the new ARL obligations. For more information or questions, please contact the Johnson Fistel, LLP team.

Johnson Fistel, LLP Obtains Significant Relief for Thousands of California Massage Heights Members Who Allegedly Forfeited Prepaid Massages

On June 16, 2022, the San Diego Superior Court granted final approval of a consumer class action settlement resolving allegations that Massage Heights' membership agreements with thousands of its California members caused them to forfeit prepaid massage services upon membership termination in violation of California law.

Johnson Fistel, court-appointed class counsel, negotiated the settlement following years of investigation and hard-fought litigation with the goal of obtaining a real and direct economic benefit for the class and providing them the opportunity to reinstate their lost massage credits. The settlement does just that, with benefits that include up to approximately 75% reinstatement, carrying a potential value in the several millions, and with no condition that a new membership be purchased or money otherwise be spent out-of-pocket. Johnson Fistel's creative and persistent advocacy on behalf of the class throughout the case ultimately led to the court's final approval and confirmation that the settlement fairly, reasonably, and adequately resolved the claims of the class in a manner that serves their best interests.

According to the complaint, the membership agreements at issue failed to unequivocally state that, upon termination or cancellation of membership, the prepaid massages would be forfeited, as required by California law. Thus, when a membership was terminated during the relevant period, either upon cancellation, nonrenewal, or default for nonpayment, the class members' unused prepaid massages were unlawfully forfeited, which the complaint alleges is unconscionable under Cal. Civ. Code § 1670.5 and further constitutes unlawful liquidated damages penalties in violation of Cal. Civ. Code § 1671(d).

This recent settlement follows a long line of cases in which Johnson Fistel has been a leader in consumer advocacy, and after the firm previously succeeded in similar claims against well-known, national massage chain franchisor, Massage Envy, in the wake of its alleged and publicized membership agreement legal disputes. Attorneys Frank J. Johnson and Chase M. Stern led the prosecution of the Massage Heights litigation for Johnson Fistel.

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.

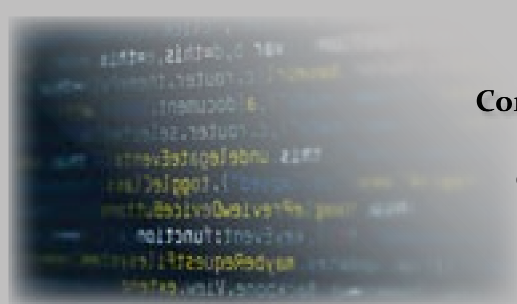
Company	Deadline
Teladoc Health, Inc.	2022-08-05
Apyx Medical Corporation	2022-08-05
Verrica Pharmaceuticals Inc.	2022-08-05
Waste Management, Inc.	2022-08-08
Tupperware Brands Corporation	2022-08-15
Yext, Inc..	2022-08-16
TerraForm Labs	2022-08-19
Inotiv, Inc.	2022-08-22
Wells Fargo & Company.	2022-08-29
Unity Software, Inc.	2022-09-05
Outset Medical, Inc.	2022-09-06

Company	Deadline
Missfresh Limited	2022-09-12
Molecular Partners AG.	2022-09-12
TG Therapeutics, Inc.	2022-09-16
Enochian Biosciences Inc.	2022-09-26

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.



In-House Monitoring

Confidential Data Protection

Complimentary Service

For more information call 619.230.0063
Click the link to learn more:
https://www.JohnsonFistel.com/stockmonitor-free-portfolio-monitoring/

JOHNSON FISTEL

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

Visit Us:
http://www.JohnsonFistel.com