



THE MONITOR

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Game Over:
California Court
Green-Lights
\$100 Million
Discrimination
Settlement with
Riot Games

A California judge has preliminarily approved a \$100 million harassment and discrimination settlement between Riot Games and women who currently or formerly worked at Riot between Nov. 2014 and Dec. 2021.

The operative complaint in the action alleges, among other indicia of a hostile work environment, that employees were subjected to unsolicited and unwelcome pictures of male genitalia, circulating e-mails with sexually explicit pictures, and rape jokes. The complaint further alleges that employee reports of misconduct were wholly ignored by Riot, and in some cases, Riot terminated workers who reported misconduct on a pretextual basis of “lack of work.” The complaint alleges that the proffered reason for the terminations was in reality a subterfuge, and that plaintiffs were fired in retaliation for lodging complaints or requesting compensation that was

commensurate to that of their male colleagues.

The settlement reflects a growing chorus of complaints within the video game industry of sweeping and systemic sexual harassment and discrimination. Ubisoft, Activision, and other game makers have, in recent history, faced similar damning allegations of sexual misconduct and gender discrimination by workers across the industry. Recently, the federal Equal Employment Opportunity Commission settled its action against Activision for sexual harassment and discrimination for \$18 million.

If you believe 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.

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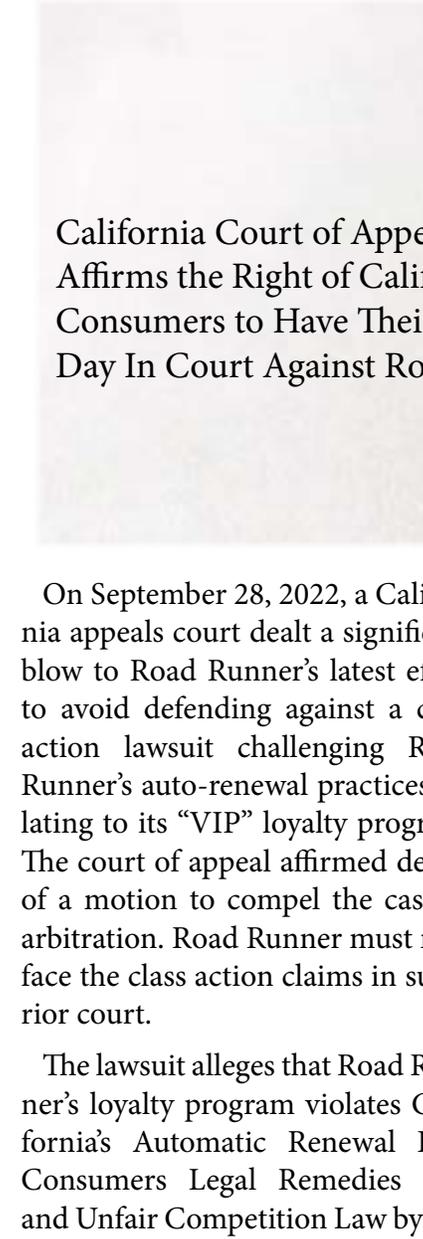
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California Court of Appeal Affirms the Right of California Consumers to Have Their Day In Court Against Road

On September 28, 2022, a California appeals court dealt a significant blow to Road Runner's latest effort to avoid defending against a class action lawsuit challenging Road Runner's auto-renewal practices relating to its "VIP" loyalty program. The court of appeal affirmed denial of a motion to compel the case to arbitration. Road Runner must now face the class action claims in superior court.

The lawsuit alleges that Road Runner's loyalty program violates California's Automatic Renewal Law, Consumers Legal Remedies Act, and Unfair Competition Law by: (1) failing to disclose clearly and conspicuously the terms of its automatic renewal loyalty program before enrolling customers; (2) failing to first obtain customer affirmative consent before automatically charging renewal fees; and (3) failing to cancel memberships upon request.

Road Runner first failed to persuade the trial court to dismiss the case. Next, Road Runner settled with the named plaintiff in an effort to have the case go away. This tactic backfired when another class member stepped forward to continue the class action. Nearly a year

after the lawsuit was filed, Road Runner moved to compel arbitration, hoping again to avoid the class claims and to get the case out of superior court. This move also failed. Road Runner argued the plaintiff had "imputed knowledge" of an arbitration provision buried in its loyalty program's terms and conditions through his attorneys, and the plaintiff "implicitly consented" to the arbitration provision by not cancelling his membership using Road Runner's preferred cancellation method. The superior court denied Road Runner's motion.

The three-judge appellate panel agreed, emphatically rejecting Road Runner's arguments and affirming the trial court's ruling.

The case will soon be back before the trial court and the litigation will resume on a classwide basis. Johnson Fistel, LLP and Blood Hurst & O'Reardon, LLP represent the plaintiff in the class action entitled *Costa v. Road Runner, et al.*, San Diego Superior Court Case No. 37-2020-00017100.



Attorney Profile: Ten Questions and Answers with Michael I. Fistel, Jr.

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

I was born in Brooklyn, New York, which is a diverse city both in terms of race and religion. Because of this diversity, Brooklyn is home to amazing music, art, and food. We moved out of Brooklyn when I was just a toddler, to "The Island", as a lot of folks do. We lived on Long Island until I was about ten years old, when we moved to Boca Raton, Florida. I've also lived in Tallahassee, Florida, Boston, Massachusetts, and now, for the last twenty or so years, Atlanta (or the surrounding areas at least), Georgia. I think each of the places in which I've lived have imparted certain characteristics in me through the years and have had a hand in making me who I am today.

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

I like hanging with my wife, kids, and pups, traveling, drinking vino, cooking (and eating!), dinner gatherings with family and friends, Formula One racing and Florida State University sports. I also have a podcast about wine with fellow oenophiles.

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3. What inspired you to pursue the legal field?

I wanted to do something that made a difference, helped people, and was challenging.

4. How long have you been a practicing attorney?

Twenty-one years. Wow, that makes me sound old!

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

My family, hands down. On a professional level, it is being part of an amazing team of people here at Johnson Fistel that are united in vision, mission, and purpose.

6. How would you describe yourself as a person?

Outgoing, friendly, caring, realistic, diplomatic.

7. Give us one or two items from your bucket list.

I would love to get paddock tickets to an F1 race for my family to enjoy the racing experience up close. I've also always wanted to write a novel.

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

A cool bird (like an eagle or a hawk).

9. What is your favorite movie?

Any of the Harry Potter movies. I am a big Harry Potter nerd!

10. If you were not a lawyer, what would you be doing?

I would be a college professor because it would allow me the opportunity to make a difference and still be on my feet in public, speaking and interacting with people.



Johnson Fistel Defeats Defendants' Motion to Dismiss in Brookdale Senior Living Inc. Shareholder Derivative Case

As court-appointed co-lead counsel representing one of two shareholder-Plaintiffs derivatively on behalf of Brookdale Senior Living, Inc. ("Brookdale") in *Anders v. Baier, et al.*, Case No. 3:21-cv-00373 (M.D. Tenn.), Johnson Fistel recently defeated Defendants' motion to dismiss Plaintiffs' operative complaint. In seeking dismissal of the complaint, Defendants argued Plaintiffs failed to adequately plead wrongful refusal of their litigation demands. In overcoming Defendants' motion, Plaintiffs accomplished a feat many courts have recognized as a "high hurdle in pleading," e.g., *Drachman v. Cukier*, C.A. No. 2019-0728-LWW (Del. Ch. Oct. 29, 2021), as it is widely regarded as a "steep[] road" to climb for plaintiffs. *City of Tamarac Firefighters' Pension Trust Fund v. Corvi*, C.A. No. 2017-0341-KSJM (Del. Ch. Feb. 12, 2019).

Specifically, on September 7, 2022, the Honorable Aleta A. Trauger, United States District Court Judge for the Middle District of Tennessee, issued an order finding that Plaintiffs had adequately pleaded that Brookdale's Board of Directors wrongfully refused Plaintiffs' litigation demands under the heightened

pleading requirements of Federal Rule of Civil Procedure 23.1, when the Board deferred its investigation of Plaintiffs' litigation demands first, pending resolution of a related securities class action lawsuit, and second (and after the conclusion of the securities class action), pending resolution of the issue of demand futility in a related shareholder derivative action. The Court reasoned that the "Board's apparent refusal to consider or take any steps in response to the demand letters—other than voting to ignore those demands for now, first for one reason and then for another—significantly undercuts the presumption that the Board was exercising ordinary business judgment, as opposed to merely seeking to frustrate shareholders' attempts to enforce accountability on the Board's own members and the executives who have the Board's support," and thus sustained Plaintiffs' claims.

Plaintiffs allege that Brookdale, the nation's largest senior-living community operator which controlled facility staffing levels from its central corporate headquarters, chronically understaffed its facilities through an internal software algo-

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rithm that generated staffing-level recommendations by significantly minimizing costs and underestimating patient and facility needs. As a result of this and other related misconduct, Plaintiffs bring claims for violations of federal and state securities laws, breaches of fiduciary duty, waste of corporate assets, and unjust enrichment against certain of the company's current and former directors and officers.

The case is captioned *Anders v. Baier, et al.*, Case No. 3:21-cv-00373 (M.D. Tenn.), and Johnson Fistel's litigation team prosecuting this action is Michael I. Fistel, Jr., Mary Ellen Conner, and Oliver tum Suden.



Recovering From a Rug Pull: Considering Service of Process on Decentralized Defendants

Web 3.0 is a new idea for an innovative iteration of the World Wide Web incorporating evolving models of decentralization, blockchain technologies, and token-based economics. Most of the exciting theoretical discussion of legal practice and the Web 3.0 universe is centered around the gray areas of how the current legal framework will work when considering cryptocurrencies and non-fungible tokens (“NFTs”). However, it is important to understand the practical and procedural underpinnings that are necessary travel partners in any potential litigation involving fraud in the Web 3.0 space. Even when it is abundantly clear that the elements of fraud have been met and an investor has suffered a loss, there are still procedural hurdles that may obviate the recovery of any assets. These are important considerations for anyone considering investing in a cryptocurrency, NFTs, or any other Web 3.0 project.

A good example of the type of fraud that can occur in the Web 3.0 space is called a rug pull scheme, which is essentially the same thing

as a pump and dump scheme in the securities litigation and enforcement space. A rug pull scheme starts with crypto developers attracting early investors to a project, often generating interest by having other investors or celebrities to market or pump the project. After the project's prices rise high enough to satisfy the people scheming the rug pull, the developers will execute the dump by quickly abandoning the project, either by taking off with the project funds or selling their pre-mined assets.

In early 2022, the largest rug pull in the history of the Solana blockchain fleeced investors to the tune of \$1.3 million. The Big Daddy Ape Club was supposed to be a collection of 2,222 ape-themed NFTs, but the NFTs never even existed.¹ In the hours running up to the mint, Big Daddy Ape Club locked and then decommissioned the project's Discord, followed swiftly by the dis-

¹ Eric James Beyer, “The Biggest Rub Pulls in NFT History” NFT NOW, July 7, 2022 (<https://nftnow.com/features/the-biggest-rug-pulls-in-nft-history/>).

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appearance of the project's Twitter account and website – not a single investor received anything in return.² Despite the Big Daddy Ape Club rug pull attracting the attention of law enforcement, that means little for duped investors.

One of the things that made the Big Daddy Ape Club rug pull sting was that the project had passed a verification check by a decentralized identity verification company, so investors may have thought there was an additional level of safety in their investment. Even if developers of an NFT project dox themselves, making identifying information available about themselves, and even if that information is trustworthy, it could still be useless in an attempt to recover assets lost in the investment. Here's why – in order to file a lawsuit against the fraudsters, a duped investor must be able to locate and serve them with notice of the proceeding, which is called service of process. Without service, a lawsuit will not survive and the investor's legal rights run the risk of dying on the vine due to statute of limitations restrictions.

When a lawsuit is initiated, a copy of the complaint and a summons must be delivered to the defendant, notifying the defendant or defendants that an action has been commenced and put them on notice of the allegations of the claims against them. Fed. R. Civ. P. 4(c). While this principle sounds simple, tracking down a fraudster can be extremely difficult, even if a plaintiff can find an address to effect service upon the defendant. Furthermore, given the decentralized nature of Web 3.0,

2 *Id.*

there is a significant probability that one or more of the defendants live outside the United States. Serving a foreign defendant can be extremely difficult due to the expense of service abroad, the amount of time it takes to effect service, and the ever-present challenge of actually locating the defendant. Service may take months or years, only to eventually fail.

Not all is lost, as a plaintiff can move for court ordered alternative service. Indeed, “[s]ervice of process under Rule 4(f)(3) is neither a last resort nor extraordinary relief. It is merely one means among several which enables service of process on an international defendant.”

³ Court ordered alternative service can take many forms, including electronically. In New York, courts have granted motions for alternative service against entities and individuals that have sought to evade service.⁴ *In Bibox Group Holdings*, 2020 WL 4586819, at *3, (S.D.N.Y. Aug. 10, 2020), the court held that service of crypto-asset exchange and related parties by email, social media, and mail to the registered agent of one of the entity defendants “does not violate the Hague Convention or applicable international law ... [and] also comports with due process.” *In Williams v. Kucoin*, 1:20-cv-02806-GBD, ECF 33 (S.D.N.Y. Aug. 13, 2020), the plaintiff's motion for al-

3 *Madu, Edozie & Madu, P.C. v. SocketWorks Ltd. Nigeria*, 265 F.R.D. 106, 115 (S.D.N.Y. 2010) (internal citation omitted).

4 *In re Bibox Grp. Holdings Ltd. Sec. Litig.*, No. 20-CV-2807 (DLC), 2020 WL 4586819, at *2 (S.D.N.Y. Aug. 10, 2020)

ternative service was granted under comparable circumstances. It suffices to say that a defendant could even be served over Discord or Twitter.⁵ Alternative service through electronic means is no guarantee, however, as courts routinely exercise wide discretion to permit alternative service.⁶

In conclusion, even though Web 3.0 remains the wild west in terms of regulation, multiple components of common law and procedural law are well equipped to handle the prosecution of fraud in the new setting, but the best advice is to consider the difficulties involved in recovering your investment when investing in a Web 3.0 project and make sure you will be able to locate the developers if something happens. If you have invested in a Web 3.0 project and suffered losses, consider contacting Johnson Fistel to pursue your claims.

5 *See, e.g., Bibox Group Holdings*, 2020 WL 4586819, at *3 (email and social media, including LinkedIn); *Oscilloscope Pictures, Inc. v. Monbo*, No. 17-CV-07458 (MKB) (ST), 2019 WL 2436296, at *2 (E.D.N.Y. Feb. 22, 2019) (Twitter).

6 *S.E.C. v. Lines*, No. 07 CIV. 11387 (DLC), 2009 WL 2431976, at *2 (S.D.N.Y. Aug. 7, 2009); *Jian Zhang v. Baidu.com Inc.*, 293 F.R.D. 508, 515 (S.D.N.Y. 2013) (same); see also *S.E.C. v. Anticevic*, No. 05 CV 6991 (KMW), 2009 WL 361739, at *3 (S.D.N.Y. Feb. 13, 2009) (Rule 4(f)(3) “provides the Court with flexibility and discretion empowering courts to fit the manner of service utilized to the facts and circumstances of the particular case.” (quoting *BP Prods. N. Am., Inc. v. Dagra*, 236 F.R.D. 270, 271 (E.D. Va. 2006))).

Is a Charitable Remainder Trust Right for You?



The charitable remainder trust (CRT) is a useful tool to generate a stream of income for a term of years or for life for yourself or others while helping you recognize a tax deduction. A CRT involves giving a gift of cash, appreciated assets, or other property to an irrevocable trust which pays a stream of income during the trust term. At the end of the trust term, a designated charity receives the remaining trust assets. There are pros and cons when considering whether to create a CRT. At Johnson Fistel, we can help you decide if a CRT is the right option for you.

What is a Charitable Remainder Trust and How Does it Work?

A charitable remainder trust is a type of “split interest” trust. It makes fixed payments to one or more income beneficiaries either for life or for a specified period of up to 20 years. Payments may be issued monthly, quarterly, semiannually, or annually. Upon the death of the income beneficiaries, or once the specified term has ended, whatever is left in the trust goes to one or

more qualified U.S. charities. That remainder must be worth at least 10% of the initial value of the trust assets.

There are two types of CRTs:

- *Charitable Remainder Annuity Trusts (CRATs)* make payments in a fixed dollar amount (between 5% and 50% of the initial value of trust assets annually). You may not make additional contributions after the trust is established.

- *Charitable Remainder Unitrusts (CRUTs)* make payments based on a percentage of the current value of the trust assets (between 5% and 50% annually). You may continue to contribute to the trust after it's established.

You establish a charitable remainder trust by donating assets. These can take various forms, such as cash, stocks, real estate, and private business interest. Once it's funded, a trustee manages the trust.

Charitable remainder trusts are often established by a living donor who is also the income beneficia-

ry, but they can also be established upon the donor's death as a way to provide income for one or more heirs.

A charitable remainder trust is irrevocable, which means that once you place an asset in the trust, you can't change your mind and take it out.

The Advantages of Charitable Remainder Trusts

Setting up a CRT can result in tax benefits. The assets you transfer to a CRT are partially tax-deductible based on the projected amount of the eventual charitable gift and other factors. Assets inside the trust enjoy tax-deferred growth. Appreciated assets donated to a CRT can be sold by the trust without incurring capital gains taxes. That said, payments to beneficiaries, are generally taxable.

A CRT can also simplify estate planning. As an irrevocable trust, the CRT is not considered part of the donor's estate. That means, for example, the remainder of the trust transfers immediately to the chari-

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table beneficiaries upon death without getting stuck in probate.

That said, charitable remainder trusts also come with some pitfalls. They can be complicated to set up and administer, and if you run afoul of certain requirements, you could retroactively lose a CRT's tax benefits. For example, the charitable remainder must equal at least 10% of the value of the trust at the time it was established. If you wind up drawing too much in income and leaving too little to the trust's charitable beneficiaries, your estate may owe additional income, gift, and estate taxes. Also, certain assets, such as S corporation stock and mortgaged real estate, are not allowed in a CRT. Their presence in the trust will disqualify it as a CRT.

Talk to a financial professional to determine if a CRT is the right choice for you and how best to take advantage of their income, philanthropic, and tax-management benefits.

SOURCES:

<https://www.irs.gov/charities-non-profits/charitable-remainder-trust>

<https://www.fidelitycharitable.org/guidance/philanthropy/charitable-remainder-trusts.html>

This article is not intended to and should not be construed as specific advice or recommendations for any individual. The opinions voiced are for general information only and are not intended to provide, and should not be relied on for tax, legal, or accounting advice. To discuss specific recommendations for any unique situation, please feel free to contact us.

Thank You All for Your Efforts in Helping Feeding San Diego!



Top Fundraiser: Frank J. Johnson
Top Fundraising Team: Johnson Fistel

Established in 2007, Feeding San Diego is the leading hunger-relief and food rescue organization in San Diego County and the only Feeding America member in the region. Every year @feedingsandiego puts on an event called Food from the Bar and San Diego's legal professionals raise funds and volunteer their time to help fight hunger. This month long campaign held in September, during Hunger Action helped people facing hunger in our community, by helping to provide two meals for every dollar raised. For the past several years Johnson Fistel has participated (and raised the most money for small firms) in Food from the Bar. This year we are proud to announce our own Frank J. Johnson was named "Top Fundraiser" and Johnson Fistel was named "Top Team". We want to thank everyone who participated and donated to help this meaningful cause. Together we can make a difference to so many children.

Recent Accomplishments

Johnson Fistel was recently appointed as lead or co-lead counsel in the following shareholder actions:

In re Amazon.com, Inc. Shareholder Derivative Litigation, Case No. C22-0559-JCC (W.D. Wash)

In re Array Technologies, Inc. Derivative Litigation, C.A. No. 2022-0683-LWW (Del. Ch.)

In re ATI Physical Therapy, Inc. Shareholder Derivative Litigation, Case No. 1:21-cv-06415 (N.D. Ill.)

In re Cerence Stockholder Derivative Litigation, Case No. 1:22-cv-10723-ADB (D. Mass.)

Treppel Family Trust v. Gonzalez, et al. (AbbVie Derivative Litigation), 1:22-cv-02718 (N.D. Ill.)

In re Quantumscope Corporation Stockholder Derivative Litigation, Case No. 2022-0490-JTL (Del. Ch.)

Employment and Labor Litigation

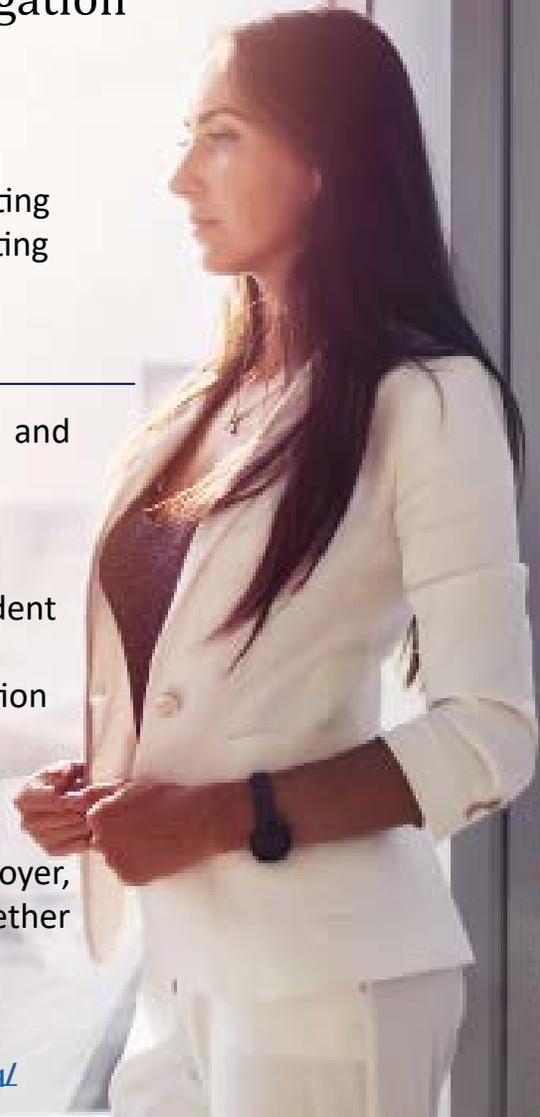
The attorneys at Johnson Fistel have obtained successful and efficient results for both employers and employees in litigating employment disputes, negotiating separations and severances, and evaluating employment policies, practices, and contracts.

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
Freshworks Inc.	2023-01-03

Company	Deadline
Twitter, Inc.	2022-11-14
Palantir Technologies Inc.	2022-11-14
Yatsen Holding Limited	2022-11-22
Centessa Pharmaceuticals plc	2022-11-28
PayPal Holdings, Inc.	2022-12-05
Opendoor Technologies Inc.	2022-12-06
Schmitt Industries, Inc.	2022-12-12
Rite Aid Corporation	2022-12-19
Argo Group Interna- tional Holdings, Ltd.	2022-12-20
U.S. Bancorp.	2022-12-26
FIGS, Inc.	2023-01-03

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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