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Delaware Finds That Officers Have Oversight Duties

By Samuel J. Adams

INSIDE THIS ISSUE

In a case of first impression, the Delaware Court of Chancery found, for the first time, that corporate officers owe a duty of oversight. The Court held that, under Delaware law, corporate officers owe the same fiduciary duties as corporate directors, which logically includes a duty of oversight. Director oversight duties are commonly referred to as "*Caremark* duties," after the seminal opinion of Delaware law issued in *In re Caremark International Inc. Derivative Litigation*. Critically, the Court also found that officers who breach their duty of oversight can be held liable in derivative litigation brought by stockholders.

The case at issue involves a derivative action brought by stockholders of McDonald's Corporation against David Fairhurst, McDonald's former Head of Human Resources, among others. The action, *In re McDonald's Corporation Stockholder Derivative Litigation*, was filed in the wake of a series of high-profile employee walkouts in protest of allegedly widespread incidents of sexual harassment and retaliation at McDonald's restaurants. The action also alleges that Fairhurst contributed to a "boys' club" culture at corporate headquarters, where alcohol use was permitted, and human resources allegedly turned a blind eye to executive misconduct. In addition, the plaintiffs pointed out that Fairhurst himself had been accused of three separate incidents of sexual harassment during his tenure as Head of Human Resources at McDonald's.

The plaintiffs' derivative lawsuit alleged that Fairhurst breached his fiduciary duties by allowing a corporate culture to develop that condoned sexual harassment and misconduct. They assert that Fairhurst breached his oversight duties because he did not make a good faith effort to establish an information system necessary to manage the company's human resources responsibilities, including the responsibility to monitor and respond to allegations of sexual harassment. The plaintiffs also alleged that Fairhurst failed in his obligation to address or report upward to the company's Board of Directors or CEO any "red flags" regarding sexual harassment that came to his attention. Finally, the plaintiffs alleged that Fairhurst's repeated acts of sexual harassment constituted a breach of duty in themselves.

Faced with these allegations, Fairhurst argued that no court in Delaware had ever explicitly found that officers owe oversight duties. However, the Court concluded that the plaintiffs stated a claim against Fairhurst, due to both his failure to exercise proper oversight and his own alleged misconduct.

In rejecting Fairhurst's arguments, the Court looked to the history of *Caremark*. First, the Court noted that, as a practical matter, responsibility for managing the operations of a corporation is shared between the officers and the directors, with the officers tasked with managing the day-to-day operations of the corporation. In light of the seriousness of these roles, the Court found that oversight duties should apply with equal force to both officers and directors. The Court added that directors only meet a handful of times per year, adding to the importance of officers rigorously complying with their fiduciary duties.

Samuel J. Adams, Of Counsel

Second, the Court noted that directors can only fulfill their own oversight duties if corporate officers have a commensurate oversight duty to gather information and bring any red flags to the attention of the board of directors. Logically, if officers did not have oversight duties, the entire system of corporate governance would break down and there would be no mechanism in place to ensure that directors received the information required to effectively oversee company management and the company. In short, failing to confirm that officers owe oversight duties would undermine the directors' ability to fulfill their own statutory obligation to direct and oversee the business and affairs of the corporation.

While officers and directors owe the same duties, the Court added that the oversight duty is "context-driven" and will vary depending on the role of the individual and

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the facts of the case. By way of example, CEOs and directors have company-wide areas of responsibility, while other executives may have responsibilities that are more limited. The Head of Human Resources may only be responsible for overseeing HR, while a CFO has responsibility for financial reporting. In those cases, the officer's obligation to establish an oversight system aligns only with their area of responsibility. However, if an officer becomes aware of a red flag, that officer still has an obligation to address the red flag and report it internally, even if the red flag does not concern their particular area of responsibility at the corporation.

Here, the Court found that the plaintiffs had adequately pled an oversight claim against Fairhurst based on a "red flags theory," noting allegations that Fairhurst had consciously failed to address red flags and "permitted a toxic culture to develop at the Company that turned a blind eye to sexual harassment and misconduct." The Court also determined that Fairhurst's alleged sexual harassment is itself a breach of the fiduciary duty of loyalty, noting that "[w]hen engaging in sexual harassment, the harasser engages in reprehensible conduct for selfish reasons. By doing so, the fiduciary acts in bad faith and breaches the duty of loyalty."

Will the *McDonald's* opinion open a floodgate of stockholder litigation against corporate officers? Perhaps not. Claims against corporate officers arising from alleged misconduct are generally derivative in nature, meaning that the claim against the officer belongs to the corporation and not to the stockholders. As such, before a stockholder can pursue a derivative claim against an officer of a corporation under Delaware law, a stockholder-plaintiff must first either make a pre-suit demand on the board to commence litigation against the officer, or else explain in their own lawsuit why making such a litigation demand on the board would have been futile. This is a high burden for a stockholder to clear under Delaware law. The Court also noted that oversight claims against officers will be subject to the same bad faith standard that applies to corporate directors in the context of an

Caremark Revisited

Given the large percentage of companies that are incorporated in Delaware, and the Chancery Court's outsized role in interpreting corporate duties, the impact of the Delaware Chancery Court's 1996 ruling in *Caremark* was felt far beyond that state's borders. The ruling holds directors individually liable if they fail to supervise and monitor their company's information and reporting systems.

The *Caremark* derivative suit, filed in 1994, claimed that the members of Caremark's board of directors breached their fiduciary duty of care to Caremark in connection with alleged violations by Caremark employees of federal and state laws and regulations applicable to health care providers.

As a result of the alleged violations, Caremark was investigated for a period of four years by the United States Department of Health and Human Services and the Department of Justice ("DOJ") and, in 1994, the company was charged with multiple felonies. Caremark subsequently entered into agreements with the DOJ and had to spend approximately $250 million to settle its federal lawsuits and repay third parties.

On the heels of the DOJ indictment, five stockholder derivative actions were filed in the Delaware Chancery Court that sought, on behalf of the company, to recoup these losses from the individual defendants who constituted Caremark's board of directors. The separate suits were later consolidated.

Defendants and plaintiffs agreed to settle the claims and the proposed settlement was submitted to the Delaware Court of Chancery for approval, which it received. It was in his ruling on the matter that then-Chancellor William T. Allen handed down two precepts that have largely defined the duty of care of corporate directors to this day:

- that "the core element of any corporate law duty of care inquiry [is] whether there was good faith effort to be informed and exercise judgment."
- that "a director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards."

As Gustavo F. Bruckner, Pomerantz Partner and head of the Firm's Corporate Governance practice, wrote in his *Monitor* article, "Director Oversight: Seeking the Holy Grail.":

> "A *Caremark* claim is possibly the most difficult type to pursue in corporate law, as most do not even survive the pleading stage. To survive a motion to dismiss, the complaint must plead specific facts demonstrating that the board totally abdicated its oversight responsibilities. Even the court in *Caremark*, a case which involved indictments for Medicaid and Medicare fraud, could not conclude that such a breach had occurred in that case."

oversight liability claim.

At a minimum, the *McDonald's* opinion could lead to an increase in officers being named as additional defendants in derivative lawsuits seeking to hold directors accountable for violating their own oversight duties. As the *McDonald's* Court noted, "it seems likely that if a court found a board liable for breach of an oversight obligation, then the officers with responsibility for that area also would be liable…" Accordingly, Delaware may see an increase in senior members of management being forced to answer for their conduct in derivative litigation against directors.

In addition, the opinion invites boards that have been duped by executives to commence litigation against the former officers. *McDonald's* notes that where an officer was not providing adequate oversight, but the directors did not have reason to know this, the board may have relied on the officer in good faith. In that scenario, *McDonald's* makes clear that a board would be in a position to pursue oversight claims against the officer without facing liability for oversight claims themselves. It remains to be seen whether boards will utilize the playbook provided to them in *McDonald's* to sue former officers on their own initiative following instances of misconduct and officer oversight violations.

Pomerantz Expands Securities Litigation Practice Group

Pomerantz is proud to announce the promotions of Omar Jafri and Brian Calandra to Partner and the addition of Justin D. D'Aloia as a Partner in the Firm's Securities Litigation Practice Group.

Omar Jafri

Since joining Pomerantz in its Chicago office in 2016, Omar Jafri has appeared on behalf of investors in over two dozen securities cases, authored over 50 pleadings and briefs, taken and defended over two dozen depositions, and argued numerous substantive motions in the U.S. District Courts as well as multiple appeals in the U.S. Courts of Appeals.

In a securities fraud class action against Chicago Bridge & Iron Co., N.V., Omar's contributions were instrumental in defeating the defendants' Motion to Dismiss. He was a drafter of the amended complaint and deposed witnesses that included the senior executives at the company's finance department, the head of the company's Power Division with direct oversight of the power plants, the company's outside auditors, and other important third parties. The court denied the defendants' motions for summary judgment on virtually every claim in August 2021. The defendants settled the Class's claims for $44 million on the eve of trial in February 2022, even though the corporate defendant and its parent had declared bankruptcy while the case was pending.

In 2021, Omar was Co-Lead Counsel in a securities fraud action against Nabriva Therapeutics Plc for false representations about a new drug application pending before the FDA. After the case was dismissed, Omar drafted a second amended complaint, bolstering allegations of scienter with documents received from the FDA and with experts' opinions. After discovery, the case settled for $3 million, or between 21% and 30% of total class-wide damages -- an exceptionally high percentage for a securities class action.

"Omar operates at a high level," said Partner Joshua B. Silverman. "His tenacity and knowledge of securities law make him formidable in the courtroom, and a good example for younger lawyers."

Omar has an active *pro bono* criminal practice representing individuals charged with the most serious crimes in the State courts of Illinois. He successfully defended a client against charges of first-degree murder by persuading the State to offer time served and forgo a retrial. In another first-degree murder case, he persuaded the trial court and the Illinois Supreme Court to allow a *Frye* hearing on the admissibility of fingerprint evidence for the first time in the history of Illinois.

In 2021, 2022 and 2023, Omar was recognized by Super Lawyers® as a Rising Star in Securities Litigation. In 2021, he was named to the *National Law Journal's* inaugural list of Rising Stars of the Plaintiffs' Bar under the age of 40, a new category in the Elite Trial Lawyers competition for lawyers who "demonstrated repeated success in cutting-edge work on behalf of plaintiffs over the last 18 months [and] possess a solid track record of client wins over the past three to five years."

Omar graduated *magna cum laude* and Order of the Coif from the University of Illinois College of Law, where he was a Harno Scholar and a recipient of the Rickert Award for Excellence in Advocacy and won first place for best Oral Advocate in the semi-final round of the Midwest Moot

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CORPORATE GOVERNANCE ROUNDTABLE

HOSTED BY

POMERANTZLLP

Please join corporate governance professionals from around the globe at Pomerantz's first European Roundtable.

JOIN US

October 23, 2023
Rome, Italy

WITH SPECIAL GUEST SPEAKER

Former Prime Minister Sir Tony Blair

Pomerantz is pleased to announce that on October 23, 2023, it will host its next Corporate Governance Roundtable in Rome, Italy. This will be the Firm's first Roundtable in Europe. With offices in New York, Chicago, Los Angeles, Paris, Tel Aviv – and most recently, London – Pomerantz is committed to serving its clients wherever they are based.

Pomerantz is known for presenting remarkable special guest speakers at its Roundtables and this year is no exception. Speaking at Pomerantz's Roundtable in Rome will be the former British Prime Minister, the Right Honourable Sir Tony Blair.

Sir Tony was born in Edinburgh, Scotland and, after studying law at Oxford University, he practiced law in the U.K. as a Barrister. Sir Tony served as Prime Minister of Great Britain and Northern Ireland from 1997 to 2007, the only Labour leader in the party's 100-year history to win three consecutive elections. As Prime Minister, Sir Tony helped bring peace to Northern Ireland, securing the historic *Good Friday Agreement* in 1998. A passionate advocate of an interventionist foreign policy, Sir Tony created the Department for International Development, tripled the UK's foreign aid to Africa, and introduced landmark legislation to tackle climate change.

Since leaving office, Sir Tony devotes most of his time to helping governments deliver effectively for their people, working for peace in the Middle East, and countering extremism. In 2016, he established the Tony Blair Institute for Global Change, whose global team works in more than 20 countries across four continents to support leaders with strategy, policy and delivery. They contribute fresh analysis, practical policy solutions and embedded support in response to such challenges as Covid-19, the war in Ukraine, the tech revolution and the net-zero transition.

Pomerantz's Roundtables gather institutional investors from around the world to share knowledge and engage with leading experts in the areas of corporate governance, ESG, regulatory policies, and other issues that affect the value of the funds they represent.

Seating at the Rome Corporate Governance Roundtable is limited. To express interest in this one-day event, kindly email:

pomerantzroundtable2023@pomlaw.com

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Court Competition.

Learn more directly from Omar as the featured subject of this issue's Q&A on page 7.

Brian Calandra

After serving as Of Counsel in Pomerantz's Securities Litigation Practice Group, Brian Calandra has been promoted to Partner. Brian is based in the Firm's New York office.

Brian has extensive experience in securities, antitrust, complex commercial, and white-collar matters in federal and state courts nationwide. Before joining Pomerantz, Brian represented issuers and underwriters in securities class actions involving the financial, telecommunications, real estate, and pharmaceutical industries. He also represented financial institutions in antitrust class actions concerning foreign exchange; supra-national, sub-sovereign and agency bonds; bonds issued by the government of Mexico; and credit card fees.

Since joining Pomerantz in 2019, Brian has helped recover millions of dollars for investors in securities fraud class actions against issuers in the pharmaceutical, cannabis, and interactive technology industries. In 2022, Brian led Pomerantz's securities litigation class actions against DouYu International Holdings Limited, China's largest game-centric live streaming platform, and 22nd Century Group, Inc., a biotechnology company working to genetically engineer reduced-nicotine tobacco products and reduced-THC cannabis-based products.

In *DouYu*, Brian achieved a $15 million global settlement of securities fraud claims arising out of the company's $775 million debut on the Nasdaq in 2019. Plaintiffs alleged that *DouYu* withheld information from its IPO investors, including that its virtual currency "Yuchi" and "lucky draw" gifting feature ran afoul of Chinese gambling regulations.

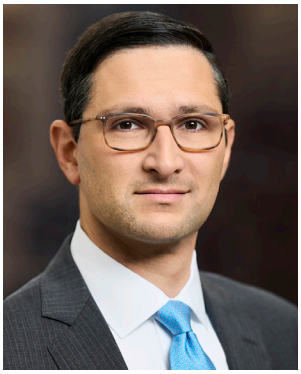
In *22nd Century*, Brian and Managing Partner Jeremy A. Lieberman convinced the 2nd Circuit to reverse, in part, the district court's decision to dismiss the plaintiffs' complaint with prejudice when the lower court found that defendants had no duty to disclose either the use of paid stock promotions or an SEC investigation into the company. Brian and Jeremy successfully argued that the district court erred because the court overlooked that omitting the existence of the SEC investigation made statements about the accounting weaknesses and defendants' subsequent denials of the investigation misleading.

"Brian brings creative critical thinking and a deep knowledge of the law to each of his cases," said Partner Murielle Steven Walsh. "He is a staunch defender of investors' rights."

Brian has written on developments in securities law and other topics, including co-authoring an overview of insider trading law and enforcement for *Practical Compliance & Risk Management for the Securities Industry*, co-authoring an analysis of anti-corruption compliance risks posed by sovereign wealth funds for *Risk & Compliance*, and authoring an analysis of the effects of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act on women in bankruptcy for the *Women's Rights Law Reporter*.

In 2021, Brian was honored as a Super Lawyers® "Top-Rated Securities Litigation Attorney."

Brian graduated from Rutgers School of Law - Newark in 2009, *cum laude*, Order of the Coif. While at Rutgers, Brian was Co-Editor-in-Chief of the *Women's Rights Law Reporter* and received the Justice Henry E. Ackerson Prize for Distinction in Legal Skills as well as the Carol Russ Memorial Prize for Distinction in Promoting Women's Rights.



Justin D. D'Aloia

Justin D. D'Aloia has joined Pomerantz as a Partner in the Securities Litigation Practice Group in the Firm's New York office.

Prior to joining Pomerantz, Justin was counsel at a large international law firm where he litigated high-profile securities cases in federal and state courts across the country. He has represented issuers, underwriters, and senior executives in matters involving a range of industries, including the financial services, life sciences, real estate, technology, and consumer retail sectors. Justin's practice covers the full spectrum of proceedings from pre-suit demand through settlement.

Justin has received awards for his commitment to *pro bono*

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service, including the considerable hours he spent representing a wrongfully convicted man during special proceedings held in connection with his exoneration.

"Justin brings to Pomerantz a wealth of experience in securities litigation on both sides of the V," said Managing Partner Jeremy A. Lieberman. "The Firm and its clients will benefit from the breadth and depth of Justin's knowledge and his dedication to justice."

Justin earned his undergraduate degree from Rutgers University with a concentration in Business and Economics. He received his J.D. from Fordham University School of Law, where he was Editor-in-Chief of the *Fordham International Law Journal*. Among Justin's published articles is "From Baghdad to Bagram: The Length & Strength of the Suspension Clause After Boumediene." This predictive Note aimed to define the outer contours of the Suspension Clause by looking through the Boumediene prism to determine who may invoke the protections of the Suspension Clause and in what contexts outside of Guantánamo Bay those protections apply.

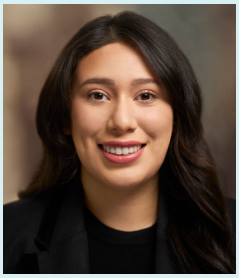
Justin served as a law clerk to Judge Mark Falk of the United States District Court for the District of New Jersey.


Jeremy A. Lieberman


Jennifer Pafiti


Dr. Daniel Summerfield


Janalee Spencer


Kaylan Perez


Jordan Lurie


Marc I. Gross

NOTABLE DATES ON THE POMERANTZ HORIZON

IF YOU WILL BE ATTENDING ANY OF THESE EVENTS AND WOULD LIKE TO MEET WITH US, SEND US A MESSAGE AT: EVENTS@POMLAW.COM

From March 4-7, **KAYLAN PEREZ** will attend the **CALAPRS General Assembly** in Monterey, California.

JENNIFER PAFITI will attend the **Council of Institutional Investors' Spring Conference** in Washington, DC from March 6-8.

On March 8, **DR. DANIEL SUMMERFIELD** will chair the panel, **"The SPAC Boom and Meltdown: Lessons for Investors"** at the **ICGN Conference** in Stockholm, Sweden; **JEREMY LIEBERMAN** will be a panelist.

JENNIFER and DANIEL will speak on **"The Globalisation of Securities Litigation"** at the **SPS Local Authority Pension Fund Investment Conference** in London, United Kingdom on March 14.

JANALEE SPENCER will attend the **GAPPT Annual Conference** in Buford, Georgia from March 20-23, and the **TEXPERS Annual Conference** in Austin, Texas from April 2-5**.**

JORDAN LURIE will be a panelist at the **ABA Tort Trial & Insurance Practice Motor Vehicle Product Liability Conference** in Scottsdale, Arizona from April 19-21.

On April 21, **MARC GROSS** will participate in **Loyola University Chicago School of Law**'s conference on **Financial Regulation Under Siege** in Chicago, Illinois.

Omar Jafri

Omar Jafri, a Partner in the Firm's Chicago office, recently spoke to *the Monitor* about his securities practice and his *pro bono* work in criminal justice.

The Monitor: What led you to a career in law?

Omar Jafri: In college, I double majored in Government and Asian History at the University of Texas at Austin, while taking overlapping pre-law courses on the origin and development of the United States Constitution and the structure and powers of the federal government. Studying the Constitution as an undergraduate sparked my interest in the law. I was keenly interested in business and finance, but against corporate malfeasance and the abuse of corporate power. The Enron and WorldCom scandals were in full swing at the time. That's when I knew I wanted to be a securities lawyer.

M: Why the plaintiffs' bar instead of defense?

OJ: Principally because it allows me to pursue cases that align with my values and beliefs, but there are other reasons. As master of the complaint, the plaintiff sets the stage for the litigation and can control the narrative. Having worked at a corporate defense firm before joining Pomerantz, I have seen a world of difference between the two sides in terms of day-to-day litigating. As a junior associate in Big Law, I rarely had client contact. As an associate at Pomerantz, I was sometimes the Firm's main point of contact with the client. The actual litigation experiences on the plaintiffs'-side are also unparalleled. For example, some of my peers and colleagues in Big Law have never argued a federal appeal and never will, because their firm's Appellate and Supreme Court practice is responsible for handling that aspect. I am on track to have argued, by the end of 2023, nearly half a dozen federal appeals in different Circuits in the last few years alone, and I do not consider myself to be an appellate specialist. This would not be possible without the support of the Firm's Partners, who allowed me to gain so much litigation experience even as an associate.

M: What about securities fraud litigation continues to motivate you?

OJ: Our practice is unique in that when a case is filed, we barely have more than a theory of what went wrong yet are required to comply with the heightened pleading standards of the Private Securities Litigation Reform Act ("PSLRA"). The PSLRA requires plaintiffs to plead an inference of fraud that is as compelling as an inference of innocence yet simultaneously kneecaps plaintiffs by preventing them from engaging in any discovery until a court concludes that the applicable pleading standard has been met. No other litigant in any other area of law is required to comply with a similarly onerous scheme. Despite this asymmetry of information that was created by a statute intended to kill securities lawsuits, we still prevail in about 50% or more of the cases we file and litigate. This requires persistence, creativity and doggedly running down every possible lead to uncover indicia of falsity and scienter. That is true in every case regardless of whether it involves the same subject matter or the same industry or even the same defendants. Every win is a victory against the PSLRA and its corporate apologists.

M: What is your proudest achievement as a securities litigator so far?

OJ: The most satisfying results come in extremely hard cases where, despite the onerous standards of the PSLRA and its built-in disadvantage for investors in securities lawsuits, courts allow the litigation to proceed to discovery, or the litigation results in a significant recovery. For example, in one of our recent cases, defendants' knowledge of contemporaneous falsity did not initially appear to be strong. Then, days before an amended complaint was due, the defendants unexpectedly filed a new document with the SEC, in which they made a series of admissions that contradicted whatever they had told investors for the last two years. The case literally changed overnight. The district court denied the defendants' motion to dismiss in large part based on the same post-class period admissions and concurred that the later-emerging admissions demonstrated the falsity of defendants' prior representations.

M: Please tell us about your *pro bono* work in criminal justice.

OJ: I have represented criminal defendants *pro bono* from the time I started practicing law. My first *pro bono* client was an innocent person wrongfully convicted because his trial attorney failed to put ten unimpeachable alibi witnesses on the stand for reasons that I still cannot fathom. He served ten years in prison before his conviction was reversed by the United States Court of Appeals for the Seventh Circuit for ineffective assistance of counsel. I have continued to represent clients charged with serious crimes in the State of Illinois, *pro bono*, while at Pomerantz. In one of my recent cases, the client was charged with extremely serious offenses. My co-counsel and I thoroughly investigated the case, shared our findings with the Cook County State's Attorney's Office, and convinced the prosecutors both that a mistake had been made and that our client was erroneously overcharged. The client is now expected to plead to a much lesser offense that allows him to remain free, whereas the original charges could potentially have led to decades behind bars. I remain committed to devoting time to *pro bono* criminal defense. Effective representation is crucial, and there are so many defendants that either cannot afford or do not receive it.

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THE LAW FIRM THAT INSTITUTIONAL INVESTORS TRUST FOR SECURITIES LITIGATION AND PORTFOLIO MONITORING

Pomerantz is acknowledged as a global leader in securities and corporate governance litigation. Pomerantz monitors the portfolios of some of the most influential institutional investors and financial institutions worldwide, monitoring assets in excess of $9 trillion. Founded by Abraham L. Pomerantz, who was known as the "dean of the class action bar," the Firm pioneered the field of securities class actions. For 85 years and counting, Pomerantz has continued the tradition that Abe Pomerantz established, fighting for the rights of victims of securities fraud, breaches of fiduciary duty, and corporate misconduct. Prior results, however, do not guarantee a similar outcome in future cases.

NEW YORK
600 Third Avenue, New York, NY 10016 Tel: +1 212 661 1100 Fax: +1 9174631044
CHICAGO
10 South LaSalle Street, Suite 3505, Chicago, IL 60603 Tel: +1 312 377 1181 Fax: +1 312 377 1184
LOS ANGELES
1100 Glendon Avenue, 15th Floor, Los Angeles, CA 90024 Tel: +1 310 405 7190
LONDON
Central Court, 25 Southampton Buildings, London WC2A 1AL, United Kingdom Tel: +44 (0)20 3709 9345
PARIS
68, rue du Faubourg Saint-Honoré, 75008 Paris, France Tel: +33 (0) 1 53 43 62 08
TEL AVIV
HaShahar Tower, Ariel Sharon 4, 34th Floor, Givatayim, Israel 5320047 Tel: +972 (0) 3 624 0240

CONTACT US:

We welcome input from our readers. If you have comments or suggestions about *The Pomerantz Monitor*, or would like more information about our firm, please visit our website at www.pomlaw.com or contact:

Jennifer Pafiti, Esq. jpafiti@pomlaw.com +1 310 432 8494 **OR** **Jeremy A. Lieberman, Esq.** jalieberman@pomlaw.com +1 212 661 1100