



# Board of Retirement Regular Meeting

## Sacramento County Employees' Retirement System

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### Agenda Item 17

**MEETING DATE:** January 15, 2020

**SUBJECT:** Education: Securities Litigation

**SUBMITTED FOR:**  Consent  Deliberation and Action  Receive and File

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### **RECOMMENDATION**

Staff recommends the Board receive and file this securities litigation educational report.

### **PURPOSE**

This item supports the 2019-20 Strategic Management Plan by providing Board educational sessions to improve effective oversight and management of the investment program.

### **DISCUSSION**

The Board last received a report about SCERS' securities litigation activity at the February 2018 meeting. This presentation provides a wide-ranging overview and update on the following topics:

- The different ways (both passive and active) in which SCERS can recover investment losses through securities and antitrust litigation;
- The types of service-providers associated with these methods of recovery;
- An update on SCERS' recent claims-filings and pending securities litigation; and,
- Staff recommendations regarding approaches to securities litigation.

### **ATTACHMENT**

- Securities Litigation Presentation
- Securities Litigation Policy

Prepared by:

Reviewed by:

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Stephen Lau  
General Counsel

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Eric Stern  
Chief Executive Officer

# SECURITIES LITIGATION UPDATE

January 15, 2020



**SCERS**

SACRAMENTO COUNTY  
EMPLOYEES' RETIREMENT SYSTEM

Presented By:  
Stephen Lau  
General Counsel

# OVERVIEW

- As an institutional investor, SCERS sometimes experiences investment losses caused by the misconduct of the securities issuer and/or other actors.
- Such issuer misconduct might consist of a failure to disclose material information to shareholders, failure to disclose material information, market manipulation, etc.



# OVERVIEW

- There are several ways for SCERS to recover damages for such losses through the court system, both in the U.S. and internationally.
- Generally, such recovery activities fall into six categories.
  - Three are passive (low effort and low risk).
  - Three are active (greater effort and greater risk).
  - Historically, SCERS has used the generic term “securities litigation” to cover all of these activities, but that term is somewhat imprecise and misleading.



# PASSIVE RECOVERY

## 1. Claims-Filing in Settled U.S.-based Securities Class Actions

- Filing claims in securities class action lawsuits that have already been settled and resolved. Largely administrative.

## 2. Claims-Filing in U.S.-based Antitrust Class Action

- Filing claims in class actions relating to monopolies and other forms of market manipulation. This type of recovery is more complex due to the nature of the damages.

## 3. Claims-Filing in Non-U.S.-based “Group Litigation”

- Similar to filing claims in U.S.-based settled class actions



# ACTIVE RECOVERY

4. Serving as Lead/Representative Plaintiff in a U.S. Class Action or Non-U.S. “Group Litigation”
  - Representing a class of injured shareholders; taking the lead on briefing, discovery, and other litigation activity
5. Opting Out of Class and Filing Individual Suit (U.S.)
  - Filing suit for recovery individually instead of accepting outcome of settled class actions
6. Joining Non-U.S. “Group Litigation” in a Non-Lead Capacity
  - Joining non-U.S. group litigation as a non-lead party and taking on varying degrees effort and risk



## NON-U.S. BASED SECURITIES “GROUP LITIGATION”

- Generally, European laws do not provide for U.S.-style class actions with completely passive, non-risk-taking claimants.
- Instead, any claimant seeking to recover damages through “group litigation” must join as a party and potentially take on discovery and/or attorney’s fees.
- Depending on the jurisdiction, claimants could take on varying degrees of risk and effort.
  - Example 1: SCERS’ action against Volkswagen in Germany
  - Example 2: Recent Danske Bank opportunity in Denmark



## SCERS' SERVICE-PROVIDERS

SCERS currently has contracts with:

- Financial Recovery Technologies (since 2014; renewed in September 2019)
- Grant & Eisenhofer P.A. (since 2008)
- Kessler Topaz, Meltzer & Check LLP (since 2014)
- Bernstein Litowitz Berger & Grossmann LLP (since 2008)





# FINANCIAL RECOVERY TECHNOLOGIES

- FRT's services to SCERS revolve around the three categories of passive recovery activities:
  - “Settled Class Action Recovery”
  - “Anti-Trust Litigation Recovery”
  - “Passive Group Litigation Recovery”
- FRT monitors court dockets around the world for passive recovery opportunities, analyzes SCERS' eligibility, and submits claims on SCERS' behalf.
- FRT's fee is \$45,000 per year, plus 20% of recovery on antitrust claims.



## FINANCIAL RECOVERY TECHNOLOGIES

- From 2015 to 2019, FRT filed **80** claims, **29** of which have been paid. SCERS' relationship with FRT has yielded a net recovery of **\$633,326.15**.
- State Street and some law firms provide free or low-cost services related to passive recovery activities. However, such claims-filing is secondary to their core business and less exhaustive than FRT's.
- In contrast, FRT provides a comprehensive, turnkey approach, along with responsive customer service.



## “PORTFOLIO MONITORING” LAW FIRMS

- SCERS currently has contracts with three law firms: Grant, Kessler, and Bernstein.
- These firms have business models that revolve around active class action litigation, both in the U.S. and abroad.
  - Example: Kessler represents SCERS in the *Volkswagen* securities fraud group litigation in Germany.
- These firms have business models analogous to contingency fee-based plaintiff’s lawyers: They are always looking for a few good cases.



## “PORTFOLIO MONITORING” LAW FIRMS

- SCERS has ongoing contracts with these three firms for free “portfolio monitoring” services.
  - The firms send periodic reports and alerts to SCERS about U.S. and non-U.S.-based litigation opportunities relating to SCERS’ investment losses. General Counsel keeps a close eye on these reports.
- As with most free services, this arrangement benefits the service-provider as well. The firms get access to SCERS’ portfolio to facilitate their search for litigation opportunities and participating plaintiffs.



## “PORTFOLIO MONITORING” LAW FIRMS

- These firms often recruit SCERS to participate in active recovery opportunities in U.S. and abroad.
- If SCERS chooses to participate, the firm would typically represent the SCERS and other participating plaintiffs on a contingency fee basis.
  - That is, the firm would finance and run the litigation, and later take its fees, costs, and expenses out of any recovery.
  - Even in European group actions, where pure contingency fee arrangements are technically prohibited, the firms would set up a quasi-contingent fee arrangement.



## APPROACH TO SECURITIES LITIGATION

- SCERS' fiduciary duty includes a duty to recover damages for investment losses caused by the unlawful conduct of others.
- However, securities litigation typically yields a net recovery that is a small percentage of the actual investment loss.
- In addition, staff has finite time and resources, and litigation can divert those resources from SCERS' core business.



# APPROACH TO SECURITIES LITIGATION

- Recommendation: SCERS should take maximum advantage of passive recovery opportunities, which it has done by engaging FRT.
- Recommendation: SCERS should continue to exercise restraint in taking part in active litigation, even if the law firms promise low-risk/low-effort participation.



## APPROACH TO SECURITIES LITIGATION

- This conservative approach is already embedded in the current Securities Litigation Policy, which sets a \$2 million loss threshold before active litigation would even be considered. This is a high threshold, but appropriate.
- Staff is not recommending any amendments to the Securities Litigation Policy at this time.







# QUESTIONS OR COMMENTS?

