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Judge Dismisses Shareholders' Suit Over Backdating

BY ANTHONY LIN

A STATE JUDGE has thrown out a shareholder derivative lawsuit over stock option backdating at Bed Bath & Beyond Inc. because the plaintiffs failed to show that demanding action from the company's board of directors would have been futile.

The decision by Manhattan Supreme Court Justice Charles E. Ramos in *Wandel v. Eisenberg*, 603665/06, adds New York to the list of jurisdictions where backdating suits have been rejected on such "demand futility" grounds.

The judge said a demand for board action would generally be futile where the majority of directors had benefited from backdating. But because most of Bed Bath & Beyond's directors had not received backdated grants, Justice Ramos said the plaintiff needed to allege with particularity why those directors also had an interest in the backdating transactions.

"The mere presence of directors on committees is not particular as to their individual participation or alleged collusion with interested directors in the backdating of stock options," the judge wrote.

Backdating involves the re-pricing of stock option grants to a date in the past when a company's stock price was lower, effectively guaranteeing the grant's recipient, usually a company executive, a gain.

Housewares retailer Bed Bath & Beyond publicly admitted backdating option grants in a report issued last October following an internal probe at the company conducted by Weil, Gotshal & Manges. The probe concluded that, though backdating had taken place, it was unintentional.

The company adopted reforms to its stock option grant policy and revised the dates of cer-



Justice Ramos

The decision
will be published
Friday.

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tain grants. It also adjusted the equity portion of its balance sheet by \$66 million and said it would take a \$7.2 million charge to its income statement in the third quarter of this year. Justice Ramos said the company's voluntary actions could have rendered the derivative suit moot.

A federal court in California recently dismissed on demand futility grounds a derivative suit over backdating against CNET, a technology media company. Other courts, notably in Delaware, have overruled defendants' demand futility claims.

Bed Bath & Beyond was represented by David Lederkramer of Proskauer Rose. The plaintiffs were represented by H. Adam Prussin of the Pomerantz law firm.

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