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Restaurant Software Co. Brass Face Suit Over Sunken Deal

By **Katryna Perera**

Law360 (May 26, 2023, 8:30 PM EDT) -- A stockholder of restaurant software company Olo Inc. has sued several of the company's current and former board members and executives in Delaware Chancery Court alleging they breached their fiduciary duties by failing to disclose that a partnership with Subway would be ending, which allegedly led to a stock price decline.

Shareholder Cashondra Floyd filed a complaint on Thursday against Olo's CEO Noah Glass, its Chief Financial Officer Peter Benevides, co-founder Brandon Gardner and several current and former board members. Floyd claims the defendants breached their fiduciary duties to shareholders between August 2021 and August 2022.

Olo is a software company that provides restaurants with online ordering and food delivery coordination services through third-party applications, such as DoorDash and Uber Eats. According to the complaint, during the relevant period, the company touted its "active locations" as a key metric of its performance and growth, as the number reflected Olo's ability to attract and monetize customers and drive revenue.

The company also represented that when a restaurant brand signed up with Olo, all of its corporate and franchised locations were obligated to adopt and use Olo's technology, according to the complaint.

Floyd says that, throughout the relevant period, Olo reported a growth in its number of active locations or participating restaurants. Investors were told that the 400 brands with roughly 74,000 active locations in August 2021 had increased to more than 500 brands with about 76,000 active locations by the end of September 2021. By the end of August 2022, Olo reported that the number of active locations had grown to roughly 82,000.

The complaint states that more than 50% of Olo's active locations at the start of the relevant period were from eight brands: Subway, DairyQueen, Jimmy John's, Jack-in-the-Box, Panda Express, Five Guys, Denny's and IHOP.

Olo announced in February 2020 that it had entered into a partnership with Subway under which more than 20,000 of the sandwich chain's U.S. restaurants would use one of Olo's modules to process orders from third-party applications, the complaint states. Under this partnership, Floyd says Subway became the company's biggest client, comprising about 27% of Olo's active locations.

However, according to Floyd, it was later revealed that the number of active locations Olo had been reporting throughout the relevant period was inflated since Olo had prematurely included locations — many of which were Subway stores — that had not started using any of Olo's modules.

Additionally, Floyd says investors learned that Olo had failed to remove inactive locations from its location count, so locations that had stopped using Olo products were improperly counted as active. Furthermore, it was disclosed that contrary to representations made by the company, not all brand locations started using Olo's modules after the brand entered into agreements with the company.

Finally, it was also revealed that the individual defendants had failed to disclose to investors that, in early 2022, Subway had informed Olo that it was terminating its partnership by either the end of the year or early 2023.

Floyd alleges that the individual defendants continued to tout the company's growth prospects even after learning of the failed Subway deal.

"During a Feb. 23, 2022, earnings call … defendant Peter J. Benevides, the company's chief financial officer, stated that Olo's expectation was that it would grow the number of new active locations by the same number as in 2021. There was no mention of the termination of the company's partnership with Subway or the loss of more than a quarter of the company's current active locations during that call, or the adverse impact it would have on Olo's ability to increase the number of active locations," the complaint states.

Floyd also alleges that Benevides and Glass engaged in insider trading by selling Olo shares for $1.5 million and $8.6 million, respectively, while knowing that the Subway partnership would be terminated.

When the truth about the Subway partnership was finally disclosed in August 2022, investors also learned that the remaining Subway locations would be removed by the end of the fourth fiscal quarter of 2022 or the first quarter of 2023, meaning that there would be "very little or no active location growth in 2022," the complaint states.

As a result of this news, Floyd says Olo significantly lowered its fiscal year 2022 guidance and the price of the company's common stock dropped from $12.99 per share on Aug. 11, 2022, to a closing price of $8.26 per share on Aug. 12, 2022, a 36% decline.

Floyd seeks damages, restitution from the individual defendants, improvements to the company's corporate governance and internal procedures and attorney fees.

Shortly after the August 2022 stock drop, a securities class action against Olo was filed in the Southern District of New York. The Pompano Beach Police and Firefighters' Retirement System claims that Olo's failure to disclose the possible termination of its Subway partnership led to the wipeout of $480 million in shareholder value.

Olo attempted to **toss the suit** in February, but its motion was denied in April.

Representatives for the parties did not immediately respond to requests for comment on Friday.

Floyd is represented by Seth D. Rigrodsky, Gina M. Serra and Herbert W. Mondros of Rigrodsky Law PA and Joshua H. Grabar of Grabar Law Office.

Counsel information for the defendants was not immediately available.

The case is Cashondra Floyd v. Noah Glass et al., case number 2023-0560, in the Court of Chancery of the State of Delaware.

--Additional reporting by Katherine Smith. Editing by Dave Trumbore.