

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK

BREAN MURRAY, CARRET & CO.,

Plaintiff,

-against-

MORRISON & FOERSTER LLP,

Defendant.

Index No.

SUMMONS

Plaintiff designates New York County as  
 the place of trial.

The basis of venue is CPLR § 503

To the above-named defendants:

YOU ARE HEREBY SUMMONED and required to serve upon plaintiffs undersigned attorneys an answer to the complaint in this action within twenty (20) days after the service of this summons, exclusive of the day of service (or within thirty (30) days after the service is complete if this summons is not personally delivered to you within the State of New York), and in the case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: New York, New York  
 February 26, 2016

OLSHAN FROME WOLOSKY LLP

By: /s/ Thomas Fleming  
 Thomas J. Fleming  
 Nicholas S. Hirst  
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 Carret & Co.*  
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COMPLAINT

Plaintiff Brean Murray, Carret & Co. (“Plaintiff”), for its complaint against defendant Morrison & Foerster LLP (“Morrison & Foerster” or “Defendant”), alleges:

Parties

1. Plaintiff Brean Murray, Carret & Co. is a Delaware corporation with its principal place of business located at 1345 Avenue of the Americas, New York, New York.

2. Defendant Morrison & Foerster LLP is a California limited liability partnership, with its principal New York office located at 250 West 55th Street, New York, New York.

Morrison & Foerster is an international law firm with over 1,000 lawyers operating out of 17 offices throughout the United States, Europe, and Asia.

Jurisdiction and Venue

3. Jurisdiction is proper pursuant to CPLR § 301, because Morrison & Foerster resides, and regularly does or transacts business, in the State of New York and because this action arises out of tortious conduct committed by Morrison & Foerster within the State of New York.

4. Venue is proper pursuant to CPLR § 503 because plaintiff and Morrison & Foerster both reside in New York County.

## Background

5. In December 2010, Puda Coal, Inc. (“Puda”) hired plaintiff, along with Macquarie Capital (USA) Inc. (“Macquarie”), as co-lead underwriters, to underwrite an offering of Puda stock in the U.S. market (the “Offering”).

### A. The Retention of Morrison & Foerster to Provide Legal Advice

6. Through Macquarie, plaintiff engaged Morrison & Foerster to serve as underwriter’s counsel in connection with the Puda Offering and to perform each and every one of the duties customarily performed by counsel, including, among other things, to provide legal advice regarding the Offering and to conduct legal due diligence. Puda’s operations were in China, and Morrison & Foerster held itself out as having substantial China-related expertise that would enable it to provide services consistent with the standard of care needed in performing due diligence on a company such as Puda. Indeed, Morrison & Foerster claims, among other things, (i) that it is among the first U.S. law firms to establish an office or become locally qualified to practice in China’s business centers; (ii) that it has a well-established practice in China including more than 70 multilingual legal professionals; and (iii) that it provides comprehensive coverage for investment, finance, and regulatory matters to a wide spectrum of clients doing business in China.

7. Based on Morrison & Foerster’s representations, plaintiff understood that Morrison & Foerster was an expert in the handling of China-based offerings, including the proper methodology for the performance of legal due diligence in China, and therefore decided to engage Morrison & Foerster as underwriter’s counsel. Plaintiff relied on Morrison & Foerster to do its job and properly conduct legal due diligence.

B. Morrison & Foerster's Failure to Meet its Responsibilities as Underwriter's Counsel

8. The role and responsibilities of underwriter's counsel charged with conducting legal due diligence are clearly understood by participants in the securities industry.

Underwriter's counsel are retained for their experience and expertise in carrying out the necessary tasks and analysis to ensure the bona fides of a transaction, including, among other things, identifying, obtaining, and reviewing the appropriate corporate and governmental records.

9. Here, Morrison & Foerster accepted its charge to conduct the proper and appropriate legal due diligence on Puda, and played a key role in the entire due diligence effort. Specifically, Morrison & Foerster was tasked with obtaining, reviewing, and analyzing, among other things:

- (i) The ownership and corporate structure of Puda and its subsidiaries, and Puda's relevant organizational documents;
- (ii) Stock and securities ownership books and records for Puda and its subsidiaries, including Shanxi Coal;
- (iii) Puda's by-laws, as well as Board Minutes and related materials addressing, *inter alia*, any related party transactions; and
- (iv) All material filings and correspondence concerning Puda and its subsidiaries with Chinese regulators.

Fundamentally, Morrison & Foerster was charged with gaining a full understanding of the operating and ownership structure of Puda and its subsidiaries in order to confirm that Puda was what it claimed to be, and bringing any information to the contrary to the attention of plaintiff and other underwriters. If it could not obtain any information relevant to this assignment, Morrison & Foerster was duty bound to so advise both plaintiff and Macquarie, as co-lead underwriters.

10. Especially in light of Morrison & Foerster's purportedly extensive expertise in China-related offerings, and given that confirming Puda's ownership structure was at the very heart of the due diligence it was retained to perform, Morrison & Foerster should have undertaken all necessary steps to carry out this task. Specifically, at the time of the Offering Morrison & Foerster knew, or should have known, that public filings regarding the ownership of Puda's subsidiaries, including Shanxi Coal, were available in China. Accordingly, Morrison & Foerster should have obtained these records independently, or, at a minimum, ensured that it received certified copies of the records directly from Puda. Morrison & Foerster did neither, and never, as it should have, advised both plaintiff and Macquarie of the existence of such records, and of the consequences of Morrison & Foerster's failure to request the official ownership records of Shanxi Coal and independently verify Puda's statements regarding the ownership of Shanxi Coal.

11. From the outset of the due diligence process, however, Morrison & Foerster created the appearance that it was performing its legal due diligence obligations. For example, Morrison & Foerster communicated with Puda's counsel (based both in the U.S. and China) concerning, *inter alia*, Puda's ownership structure and subsidiaries. However, Morrison & Foerster never took the requisite steps to actually independently verify Puda's ownership of Shanxi Coal, something that was a critical element of Morrison & Foerster's representation of Macquarie.

12. In addition, Morrison & Foerster worked closely with Puda's counsel - including its China-based lawyers, the Shanxi Bingyu law firm - to obtain an appropriate opinion letter, prepared for plaintiff and other underwriters, attesting to, among other things, Puda's 90% purported ownership of Shanxi Coal. Morrison & Foerster's work on the Shanxi Bingyu opinion

letter was in addition to Morrison & Foerster's own representations to plaintiff and other underwriters in its Opinion Letter, including that "nothing has come to [Morrison & Foerster's] attention that leads [it] to believe" that either the Registration Statement or Prospectus "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein . . . not misleading." Morrison & Foerster knew or should have known that delivery of these opinion letters was necessary for plaintiff and other underwriters to participate in the Offering, and would serve to confirm to plaintiff that the legal due diligence investigation had been carried out with proper care.

13. Further, throughout the legal due diligence process, Morrison & Foerster also worked with Puda's U.S. counsel - Goodwin Procter LLP ("Goodwin Procter") - to obtain relevant due diligence information, including obtaining information from Puda regarding its corporate records. Morrison & Foerster was well aware that this work needed to be carried out in a diligent, thorough manner so as to ensure that the relevant, accurate information regarding Puda was collected and reviewed by its legal professionals in a competent manner.

14. In performing its role as underwriter's counsel, including its required review of Puda's ownership records and its work with Puda's counsel at Shanxi Bingyu and Goodwin Procter, Morrison & Foerster was obligated to meet the standard of professional care required of legal professionals. This included using its superior knowledge - including, but not limited to, its legal expertise and access to its own on-the-ground lawyers in China-to conduct a thorough review of Puda's ownership structure and to alert plaintiff and its co-lead underwriters, to any and all material issues arising in the due diligence process. Yet, in failing to properly verify Puda's ownership structure and uncover Puda's fraud, Morrison & Foerster egregiously failed in that regard.

C. Morrison & Foerster's Deficient Legal Advice and Due Diligence

15. The Prospectus for the Offering stated, among other things, that Puda's "operations are conducted exclusively by an entity in China, Shanxi Puda Coal Group Co., Ltd. ('Shanxi Coal'), which [Puda] controls through 90% indirect equity ownership." Prior to September 2009, this statement would have been accurate: Puda indirectly owned a 90% equity interest in Shanxi Coal. Ownership of the remaining 10% of Shanxi Coal was divided between two individuals. The first individual, Ming Zhao ("Zhao"), served as the Chairman of Puda's Board of Directors and a major Puda shareholder. Zhao owned 8% of Shanxi Coal. The second individual was his brother, Yao Zhao ("Y. Zhao"), who owned the remaining 2% and served as the legal representative of Shanxi Putai Resources Limited - the company through which Puda owned Shanxi Coal.

16. Although unknown to Macquarie at the time of the Offering, as reflected in Chinese records concerning the ownership of Shanxi Coal, on or around September 3, 2009 - more than a year prior to the Offering and Morrison & Foerster's legal due diligence related thereto - Zhao and his brother caused Puda's 90% ownership in Shanxi Coal to be transferred to Zhao personally, leaving Puda with no ownership interest in Shanxi Coal.<sup>1</sup> Morrison & Foerster failed to investigate Puda's ownership structure and inform plaintiff, or the other underwriters, of these critical facts. Instead, throughout the due diligence process Morrison & Foerster continued to check items off its due diligence list and reported to the underwriters, including plaintiff that everything was proceeding in due course, failing to raise any flags concerning Puda's ownership of Shanxi Coal.

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<sup>1</sup> Also pursuant to Chinese records, at this time Y. Zhao also divided his 2% interest in Shanxi Coal, transferring 1% to a Shanxi Coal employee - Wei Zhang - and 1% to his brother, leaving Zhao with a 99% ownership interest in Shanxi Coal.

17. Had Morrison & Foerster conducted proper legal due diligence, it would have advised plaintiff and other underwriters that Puda had no ownership interest in Shanxi Coal or that it had been unable to properly complete the work it needed to do to verify Puda's ownership structure, and plaintiff would have withdrawn from the Puda engagement and ceased all work on the Offering. Instead plaintiff proceeded with the underwriting under the false belief that Morrison & Foerster had conducted reasonable due diligence as it promised that it would, and represented that it had.

D. Morrison & Foerster's Receipt of the Kroll Report

18. Prior to the Offering, the underwriters also engaged Kroll Inc. ("Kroll"), an international private investigation firm, to investigate the character, integrity, and reputation of the individuals associated with Puda.

19. Kroll completed its investigation and issued a report on December 2, 2010 (the "Kroll Report"). The Kroll Report contained, among other things:

- (i) The statement that "according to records, [Shanxi Coal] currently has RMB500 million in registered capital. Zhao Ming is its legal representative, sole executive director, and 50% shareholder";
- (ii) A chart in a section entitled "Chinese Corporation Registration Information" citing records identifying the shareholders of "Shanxi Puda Coal Group Co., Ltd" as Zhao Ming (50%), Zhang Wei (1%), and OTIC Trust (49%); and
- (iii) An appendix, entitled "Changes to Shanxi Puda Coal Group, Ltd's registration records," that reflected registered capital, paid-in capital, Puda's "business scope" as well as the changes of Puda's shareholders on March 25, 2010, April 14, 2010, April 26, 2010, and July 22, 2010 that were engineered by Zhao.



20. Upon information and belief, Macquarie, as co-lead underwriter, emailed the report to Morrison & Foerster so that Morrison & Foerster could review the report for any information relevant to Morrison & Foerster's tasks. Morrison & Foerster was duty bound to review the Kroll Report as part of its obligations as underwriter's counsel.

21. Despite these obligations, no one at Morrison & Foerster ever responded to either Macquarie or plaintiff concerning any aspect of the Kroll Report, including the information referred to in paragraph 19 above, which information was inconsistent with Puda's statements regarding its ownership of Shanxi Coal. Had its attorneys reviewed the Kroll Report with the appropriate level of professional care, they immediately would have reacted to the revelations regarding Shanxi Coal's ownership. Morrison & Foerster's failure to review and/or react to the Kroll Report itself constituted legal malpractice.

22. Indeed, just the day before receiving the Kroll Report, Morrison & Foerster was actively engaged in revising the opinion letter from Puda's Chinese law firm that itself attested to Puda's purported 90% ownership of Shanxi Coal. Morrison & Foerster was therefore in a unique position to react to the information referred to in paragraph 19 above as it knew that the ownership issue was critical, and that the opinion letter from the Chinese firm on that issue was necessary for Macquarie to proceed with underwriting the Offering. Nonetheless, Morrison & Foerster either ignored or failed to react to the contradictory information it received the very next day.

23. Prior to the closing of the Offering, Morrison & Foerster had several additional opportunities to sound the alarm concerning Puda's misstatements. Those opportunities included, among other things, bring-down due diligence calls, repeated communications with the underwriters deal team both by phone and over email, and its review of Puda's draft Prospectus

and the draft press release announcing the Offering that incorrectly identified Shanxi Coal as a 90% subsidiary of Puda.

E. Morrison & Foerster's False Opinion Letter

24. The culmination of Morrison & Foerster's work on the Offering, and provision of legal advice in connection therewith, was its issuance of the Opinion Letter, also known as a negative assurance letter or 10b-5 opinion, confirming its diligence findings and its comfort with the contents of the Prospectus and Registration Statement. As Morrison & Foerster was well aware, plaintiff would not proceed with underwriting the Offering without a negative assurance letter from counsel, and it is essential that the letter be accurate to assure underwriters that the proper legal due diligence has been completed. Morrison & Foerster knew and intended that plaintiff, as a co-lead underwriter for the Offering, would rely on the Opinion Letter.

25. In the Opinion Letter, Morrison & Foerster stated, among other things, that: "nothing has come to our attention" that caused Morrison & Foerster to believe that the Registration Statement or Prospectus "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein ... not misleading." In fact, as explained above, Puda's lack of any ownership interest in Shanxi Coal was discoverable by legal professionals such as those at Morrison & Foerster had they reviewed the operative corporate and governmental records. However, having failed to competently carry out its due diligence duties, Morrison & Foerster proceeded to issue the false Opinion Letter.

26. The Opinion Letter itself was addressed to "Macquarie Capital (USA) Inc. as Representative of the several Underwriters." Plaintiff, as the co-lead underwriter, held a position comparable to Macquarie in the underwriting syndicate. Morrison & Foerster knew and intended that plaintiff would rely on the Opinion Letter. Not only did Morrison & Foerster provide

negative assurance to plaintiff by way of the Opinion Letter but, in addition, Morrison & Foerster affirmatively represented to plaintiff that the firm had completed the work necessary in order to form its opinion. At no time did Morrison & Foerster inform plaintiff -- or Macquarie -- that Morrison & Foerster had failed to (i) request the official ownership records relating to Shanxi Coal and (ii) read and/or react to the Kroll Report. Nor did Morrison & Foerster otherwise raise any issue as to the ownership of Shanxi Coal. Had Morrison & Foerster competently performed its duties as underwriter's counsel and alerted plaintiff and other underwriters to the ownership issues within Puda, plaintiff would not have underwritten the Offering, which caused injury to plaintiff.

#### Post-Offering Events

##### A. Uncovering of Puda's Fraud in 2011

27. Subsequent to the Offering, Puda's fraud was uncovered and made public by the financial press in April of 2011. Thereafter, the value of Puda's stock dropped precipitously, and by September 22, 2011, Puda was de-listed from the New York Stock Exchange.

##### B. Suit Against Macquarie by Investors

28. On April 15, 2011, just days after the public revelation of the Puda fraud, a class action complaint was filed in the Southern District of New York, Civil Action No. 11-CIV-2598 (the "Southern District Action"), which included claims against plaintiff for violations of sections 11 and 12(a)(2) of the Securities Act and eventually added a claim against Macquarie for violation of section 10(b) of the Securities Exchange Act. The Southern District Action was later consolidated with other similar investor actions and currently is pending before the Honorable Denise Cote. In connection with defending against the allegations in the Southern District Action, plaintiff has paid significant legal fees and related costs and has agreed to a

settlement under which it will pay \$1.2 million. The settlement was preliminarily approved on February 19, 2016, but final approval is pending.

CAUSE OF ACTION  
(Legal Malpractice)

29. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

30. Morrison & Foerster, a law firm hired to represent plaintiff, provide plaintiff with legal advice in connection with the Puda Offering, and conduct due diligence on plaintiff's behalf as underwriter's counsel for the Puda Offering, failed to exercise the care, skill, and diligence commonly possessed and exercised by members of the legal profession in negligently and incompetently conducting the legal due diligence it had undertaken in connection with the Offering.

31. Morrison & Foerster also failed to exercise the care, skill, and diligence commonly possessed and exercised by members of the legal profession in submitting the Opinion Letter at the Offering's closing and affirmatively representing to plaintiff that Morrison & Foerster had completed the work necessary in order to form its opinion.

32. Morrison & Foerster's incompetent due diligence, and false assurances to plaintiff, constituted legal malpractice.

33. Morrison & Foerster's issuance of the Offering's formal Opinion Letter, and its failure to otherwise advise plaintiff of any issues regarding Puda's stated ownership of Shanxi Coal, constituted legal malpractice. Indeed, the Opinion Letter stated that nothing had come to Morrison & Foerster's attention that caused it to believe the Prospectus contained an untrue statement of material fact, including Puda's statements regarding its ownership interest in Shanxi Coal, notwithstanding that Morrison & Foerster knew of, or should have known of, documents

explicitly stating that Puda's ownership interest in Shanxi Coal was not what Puda purported it to be.

34. Morrison & Foerster's failure to perform the task it was hired to perform (i.e., inter alia, conduct due diligence on Puda) constituted legal malpractice.

35. As a direct and proximate result of Morrison & Foerster's legal malpractice, plaintiff has suffered actual damages, including costs and fees associated with defending the Southern District Action, and costs and certain payments associated with related investigations, as well as settlement in the Southern District Action, in an amount to be determined at trial.

#### PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully demands judgment against Defendant as follows:

- (a) Awarding Plaintiff actual damages in an amount to be determined at trial (plus prejudgment interest), including, but not limited to, costs and fees associated with defending, as well as any damages or settlement costs that may be incurred in, the Southern District Action, and costs and certain payments associated with related investigations; and
- (b) Awarding Plaintiff its costs, expenses, and reasonable attorneys' fees in connection with this action; and
- (c) Awarding Plaintiff such other and further relief as this Court may deem just and proper.

Dated: New York, New York  
February 26, 2016

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