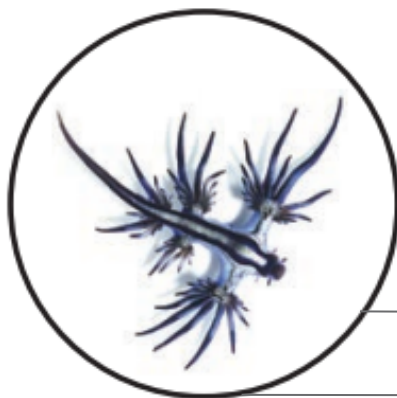




GLAUCUS RESEARCH GROUP

"[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."

- **Oliver Wendell Holmes**

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COMPANY: National Beverage Corp. | Nasdaq: FIZZ
INDUSTRY: Beverage

Price (as of close
09/27/2016):

US\$ 46.48

Market Cap:

US\$ 2.2 billion

Daily Volume:

296,096 shares
(avg. 3mo)

Float (shares):

11.6 million

GRG Valuation:

US\$ 16.15



National Beverage Corp. (NASDAQ: FIZZ) ("FIZZ" or the "Company") manufactures and distributes low-priced sodas and carbonated beverages, including brands such as Faygo, Shasta, Rip It energy drinks, and LaCroix sparkling water.

On the strength of LaCroix sparkling water, which is responsible for over 100% of FIZZ's growth, FIZZ's share price has doubled in the past year and its market capitalization has skyrocketed from \$1 billion to a recent peak of \$3 billion. FIZZ has [become](#) a faddish stock-market darling du jour, but records produced as part of recent litigation paint a darker picture and suggest, in our opinion, that FIZZ has achieved its remarkable history of financial performance in part by manipulating earnings.

- **Alleged CEO Admission of Earnings Manipulation and Fraud in Federal Court Deposition and Complaint:** Recently [un-redacted](#) complaint by a former attorney for FIZZ's CEO and Chairman Nick Caporella **alleged that Caporella admitted to manipulating FIZZ's earnings using a "little jewel box" and by directing his son to create fake invoices.**
- **Attempted Take-Private Killed By Refusing Asahi Access to Due Diligence:** Records produced in a 2014 litigation indicate that Caporella refused to allow a potential acquirer to perform adequate due diligence on the Company, which appears to be a contributing factor in the failure of the deal. According to letters written by Caporella, counsel for the potential acquirer either stated or implied that Caporella's fear of due diligence indicated that he was hiding something at FIZZ.
- **Ludicrous Corporate Governance Structure:** FIZZ's CEO and CFO are not paid or directly employed by FIZZ. Rather, they are compensated by a privately held company, Corporate Management Advisors, ("CMA") owned by the CEO. In exchange for 1% of FIZZ's revenue, CMA oversees FIZZ's legal, audit and financial operations. Shareholders have no visibility into CMA, creating a structure ripe for fraud.
- **Alleged Undisclosed Related Party:** A complaint brought by FIZZ's former marketing director for one of its premier brands alleges that he was instructed to set up a corporate entity in order to be paid as an independent contractor. The Company denies he was an employee, even though he had business cards, full access to the facility and a corporate email address.
- **Alleged Undisclosed Related Party Distributor:** A plaintiff alleged that a FIZZ employee was physically present at, operated, directed and managed an independent distributor not listed as a subsidiary or related party in any of the Company's filings, raising the specter that such entities are used to hide costs or, per insider allegations, create fake invoices to boost sales. This is reminiscent of Valeant and Philidor.
- **Undisclosed "Stock Gift":** Testimony from a 2014 deposition indicates that an employee received a "stock gift" of 150,000 shares (and a cash payment to cover the attendant taxes) from FIZZ's CEO and majority shareholder even though such a stock transfer was never reflected in the Company's SEC filings.
- **Falsifying Documents:** Former Company counsel (and convicted criminal) Scott Rothstein testified that he and former FIZZ general counsel "fudged facts" on behalf of FIZZ in a previous litigation. In addition, we believe that records raise credible allegations that Company officers did so again in a recent case.

Without subpoena power, it is difficult to determine the extent of the inappropriate conduct. Therefore, we conservatively value FIZZ at \$16.15 per share. That said, we believe that government regulatory and enforcement agencies with subpoena power should launch a full investigation of the Company, its accounting and its practices, creating a reasonable probability of further downside.

1. **Inexplicable Operating Margins.** The Company sells regional brands at a ~40% ASP discount to its larger peers (e.g. Coca-Cola (“KO”), Pepsi (“PEP”) and Dr. Pepper Snapple (“DPS”)), and as a result, reports anemic gross margins ~40% lower than its larger rivals. Inexplicably, despite its smaller size and market share, FIZZ reports comparatively incredible operating leverage. FIZZ supposedly spends only 21% of revenues on SG&A compared to ~37-39% for KO, PEP and DPS. Even more suspiciously, FIZZ’s revenue grew 36% (by \$188 million) from 2006-2016, yet reported shipping and marketing costs have supposedly remained flat. How does a small, regional beverage manufacturer which sells discounted brands report such low operating expenses relative to its peers? In our opinion, the answer is simple: either FIZZ has revolutionized the beverage business or it is falsifying its reported financial performance. We believe it’s the latter.
2. **Former Attorney Alleges that CEO Admitted to Earnings Manipulation and Fraud.** In 2012, David Mursten sued Nick Caporella in federal court for breach of contract alleging that Caporella failed to pay him for work on the potential sale of FIZZ to Asahi, the Japanese conglomerate. Mursten was an attorney and advisor to Caporella. The two men were close. The court noted that Mursten thought of Caporella as a father figure and that Caporella shared the sentiment. Yet in a recently [un-redacted complaint](#), **Mursten alleged that Caporella admitted to him that FIZZ always hit earnings targets because if the Company was short, Caporella would reach into his “little jewel box” to manipulate earnings.** Mursten also alleged that Caporella admitted to him that Caporella’s son and FIZZ President (Joseph) once fabricated invoices to distributors in order to fraudulently inflate the Company’s reported financial performance. **Mursten declared in his deposition, under oath and under penalty of perjury, that he believed Caporella was admitting to illegal conduct.** Mursten alleges he was fired after stating he would commence an internal investigation of the CEO’s startling admissions. Caporella categorically denies making any such statements. But we believe that these allegations are credible, and explain FIZZ’s seemingly miraculous ability to hit its earnings forecasts and report inexplicable operating leverage, despite its smaller scale and low ASPs.
 - a. **Fear of Due Diligence by an Acquirer.** Mursten’s case produced a host of exhibits available to investors, including a series of bizarre letters in which Caporella attempted to entice Asahi back to the table after the deal fell apart. The letters reveal that Caporella did not allow Asahi to perform sufficient due diligence, and that Asahi (or its lawyers) either stated or implied that Caporella’s prevented Asahi from conducting adequate due diligence because he was hiding something. Longs looking for a potential acquisition should take note that one such deal fell through because apparently Caporella was afraid of an acquirer’s due diligence. In our opinion, such letters support Mursten’s allegations and further enhance our conviction that extensive due diligence by an acquirer would have revealed instances of earnings manipulation or accounting fraud.
3. **Suspicious Use of Off-Balance Sheet Entities.**
 - a. **CMA: The Little Jewel Box?** FIZZ’s operating structure creates an ideal opportunity for fraud. FIZZ outsources key management functions to Corporate Management Advisors, (“CMA”), a blandly named entity privately owned by FIZZ CEO and Chairman Nick Caporella. CMA manages FIZZ for a fee equal to 1% of net revenues and employs a handful of senior management and support staff, many of whom have been with Caporella since the 1980s. As a separate entity, shareholders have no insight into CMA’s operations despite the fact that, according to the Company’s proxy statement, CMA is responsible for the “**supervision of the Company’s financial, legal, executive recruitment, internal audit and management information systems departments.**” It warrants emphasis that the CEO and CFO of FIZZ are not actually employed or compensated by FIZZ. Additionally, financial and audit supervision are not performed by FIZZ’s employees, but by employees of CMA. We are unaware of any other beverage (or consumer products) company which has a similar structure. Shareholders have no visibility into CMA, creating a structure ripe for fraud.
 - b. **Undisclosed Related Parties Used for Expenses and as Sales Distributors?** Other key FIZZ and CMA executives are also executives listed in the filings of separate entities controlled by Caporella that are not listed as FIZZ subsidiaries in its 10-K. Some share the same address as the Company. Two additional recent lawsuits allege that the Company transacts with undisclosed related parties.
 - i. **Rosenthal – Alleged Undisclosed Related Party Cost Center.** A complaint brought by FIZZ’s former marketing director for one of its premier brands alleges that he was instructed to set up a corporate entity in order to be paid as an independent contractor. The Company denies he was an employee, but he had business cards, full access to the facility and a corporate email. In light of insider allegations, our suspicion is that such an arrangement could allow FIZZ to move costs off of the Company’s books.
 - ii. **Maverick – Alleged Undisclosed Related Party Distributor.** A 2015 wrongful termination suit alleged that a FIZZ employee was physically present at, operated, directed and managed an independent distributor not listed as a subsidiary or related party in any of the Company’s filings. We believe that this undisclosed arrangement raises the specter that such entities are used to hide costs or, per insider allegations, potentially create fake invoices to boost sales.

4. **Undisclosed Stock Gifts and the Obscurity of Ownership.** Depositions under oath also indicate that Caporella gave a “gift” of 150,000 shares of FIZZ’s stock to an employee of CMA in 2011. Yet FIZZ’s public filings never reflect such a change in shareholding, indicating that the compensation was kept off the Company’s books and records. We believe that securities rules require disclosure of this transaction. Such gifts also highlight that investors have little transparency as to the ownership structure of the Company. Caporella claims to own FIZZ through a complicated structure involving IBS Management Partners. Yet FIZZ has failed to provide any transparency regarding the ownership structure of this entity, leaving shareholders to wonder if it is being used to compensate FIZZ’s employees (or CMA’s) and keep expenses off of the Company’s books.
5. **Falsifying Documents and Fudging Facts.** We have found at least two instances in which lawyers or employees have apparently fudged facts or falsified documents for FIZZ in a litigation. In the first instance, convicted criminal Scott Rothstein admitted under oath that he and former FIZZ general counsel David Boden intentionally “fudged facts” on behalf of FIZZ in a 2006 case against Broward county. In the second instance, records from the Mursten litigation raise a credible allegation that FIZZ managers produced a bogus, back-dated employment letter. Such instances are frankly stunning, and, in our opinion, show a culture of unethical behavior and a complete lack of respect for the integrity of the courts.
6. **Other Red Flags.** Two other red flags are worth noting. The first is a bizarre, mysterious and (in our view) abusive issuance of high-interest preferred stock to management in January 2013. The Company paid down cheap corporate debt with the proceeds of expensive financing from a mysterious team of executives, which is obviously detrimental to shareholders. The second red flag is allegations that Caporella and FIZZ violated campaign finance laws by reimbursing employee donations for political candidates. Both instances scream for the use of the government’s subpoena power to find out the truth.

Valuation. The situation reminds us of Valeant: how do you value a Company when you believe that the management team manipulates reported financials but that nonetheless possesses some decent assets? In this case, that means valuing LaCroix. In July 2014, an acquirer [purchased a 25% stake in the parent company of Vita Coco](#), the top-selling coconut water brand in the U.S., at a valuation of 2.2x sales. This may be an overly generous comparison to LaCroix, because coconut water is a premium-priced, high-margin beverage, but we believe it represents the top end of the brand’s valuation.

The rest of FIZZ’s business is labored with slumping and unhealthy regional brands. Analysts estimate that sales from FIZZ’s non-LaCroix beverages are declining. Therefore, we assign a 0.5x sales multiple to FIZZ’s non-LaCroix business, the same [multiple](#) used for the purchase of branded juice maker American Beverage by [Harvest Hill](#) in March 2015.

A sum of the parts yields a Glaucus valuation of \$16.15 per share.

FIZZ GRG Valuation Estimate

Figures are in \$mm		Valuation
FIZZ Reported Net Sales (TTM ending 1Q'17)	\$	736.50
<i>EV/Sales Acquisition Multiples</i>		
LaCroix Sales Estimate - 51% of Total	\$	375.62
Vita-Coco - Comp to LaCroix		2.2x
Implied LaCroix Valuation	\$	826.35
Non-LaCroix Sales Estimate - 49% of Total	\$	360.89
American Beverage - Comp to non-LaCroix		0.5x
Implied Non-LaCroix Valuation	\$	180.44
Total Valuation	\$	1,006.80
Corruption Discount		25%
Corruption Discounted Valuation	\$	755.10
Shares Outstanding (mm)		46.767
FIZZ Value per Share	\$	16.15
Current Price (as of 9/27/2016)	\$	46.48
Downside		-65%

Applying a 25% corruption discount to our valuation is also conservative. We believe that the evidence presented in this report warrants the full exercise of the government’s subpoena power, and that the SEC and other agencies should investigate the Company’s practices. This could put further downward pressure on FIZZ’s shares.

INEXPLICABLE FINANCIAL PERFORMANCE

FIZZ is a Florida based producer and distributor of low-priced soft drinks and carbonated beverages, such as regional sodas Faygo and Shasta, LaCroix sparkling water, Rip It energy drinks, Everfresh juice, and a mix of other small private label brands.



FIZZ is run by CEO Nick Caporella, his son, Joseph Caporella, President of FIZZ, and CFO George Bracken, an associate of Caporella for over 30 years. Nick Caporella allegedly owns 74% of FIZZ's shares through a limited partnership called IBS Partners, Ltd., although as we will discuss in detail in this draft, the ownership amount and structure are murky. After changing auditors from PwC in 2006, FIZZ has been audited by RSM US LLP.

To fully understand FIZZ and what we believe is an unethical corporate culture, investors must understand its origin. In 1976, Nick Caporella was [appointed](#) the President and CEO of Burnup & Sims ("Burnup"), an installer of cable television and telecommunications systems. In 1984, the government charged Burnup with a "**pervasive pattern of private and public corruption**" in a forty-nine count indictment.¹ At its core, the government alleged that Burnup participated in a scheme to fraudulently sell telecommunications equipment and services to San Diego and Fresno between 1978 and 1984 through the "payment of bribes and sexual favors, pandering, money laundering, and influence peddling." Burnup ultimately pleaded no contest to the racketeering charges and had to pay a fine, almost \$1 million in prosecution costs, and \$3.5 million in restitution to the City of San Diego.²

Burnup then engaged in a bitter takeover battle with a corporate raider, which led to Caporella to create FIZZ using the proceeds from a quasi-reverse merger with Burnup to purchase its first regional soda brand (Shasta).

Fast forward to 2016 and according to Nielsen data, FIZZ's share of US carbonated soft drink sales is 0.6%.³ FIZZ sells these sodas at very low price points. According to July 2016 Nielsen data, the average retail price per unit of FIZZ's soda brands was \$0.33 vs \$0.53 for Coca-Cola's soda brands, 37% cheaper (see table below). FIZZ's ~40% ASP discount to its significantly scaled peers calls into question the long term financial viability of its business.

Nielsen Carbonated Soft Drink ASPs

Company Name	7/16/2016	Premium to FIZZ
Coca-Cola Company ("KO")	0.53	59%
PepsiCo Inc. ("PCP")	0.55	65%
Dr. Pepper Snapple ("DPS")	0.51	54%
National Beverage ("FIZZ")	0.33	-

Source: Nielsen Data: 7/16/2016

ASPs: Average Selling Price per unit

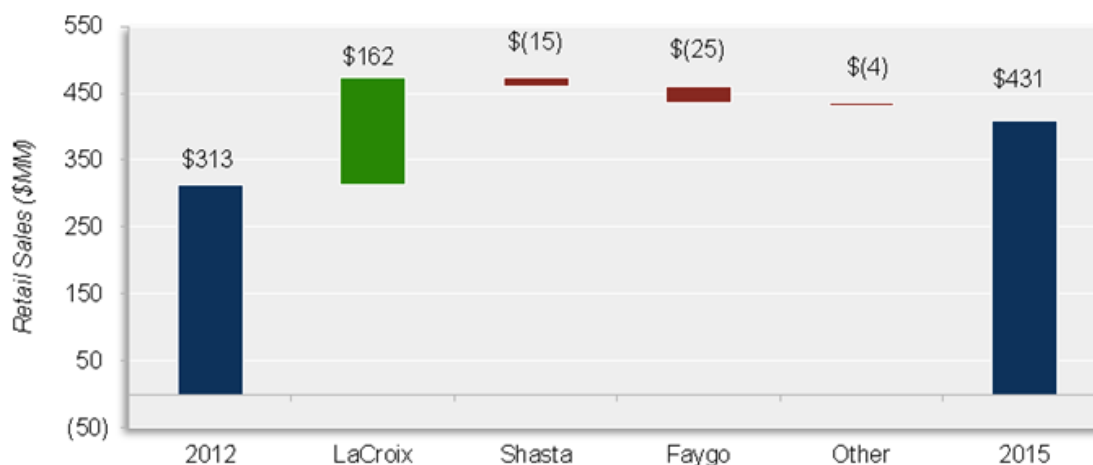
Moreover, FIZZ's historic strength, its Shasta and Faygo soda brands, appears to be withering. Since 2012, analysts estimate that Shasta, Faygo and the Company's other brands have experienced negative growth.

¹ 24 F.3d 42 TELINK, INC.; Burnup & Sims, Inc., Petitioners-Appellants, v. UNITED STATES of America, Respondent-Appellee, County of Fresno, County of San Diego, Intervenor-Appellees. No. 93-50034. (Burnup later appealed this conviction but it was denied).

² <http://openjurist.org/24/f3d/42/telink-inc-v-united-states>

³ This figure excludes energy drinks.

National Beverage Retail Sales Contribution Bridge



Source: Nielsen xAOC+C, Credit Suisse.

Source: Credit Suisse FIZZ Initiation Report – September 15, 2016

The jewel of FIZZ's portfolio is undoubtedly LaCroix sparkling water. LaCroix is responsible for 100% of FIZZ's TTM growth and, some analysts estimate, over 50% of the Company's sales.⁴ We will discuss the value of LaCroix in the valuation section, but the key point is that like the Company's other brands, LaCroix sells at a low price point.

With sub-scale primary products that are losing share (except for LaCroix) and sell at a ~40% lower price point than competitors, FIZZ's unit economics are suboptimal. This is reflected in its gross margins, which are ~40% lower than its larger peers (e.g., Coke, Pepsi, Dr. Pepper Snapple).

Margin Comparison - Last FY

	FIZZ	KO	PEP	DPS	COT FY'13
Sales (US\$ mm)	705	44,294	63,056	6,282	2,094
Gross Margin	34%	61%	55%	59%	12%
SGA % of Revenue	21%	37%	39%	37%	8%
Operating Margin	13%	20%	13%	21%	4%
D&A	2%	4%	4%	4%	5%
EBITDA Margin	15%	24%	17%	24%	9%

Source: Bloomberg

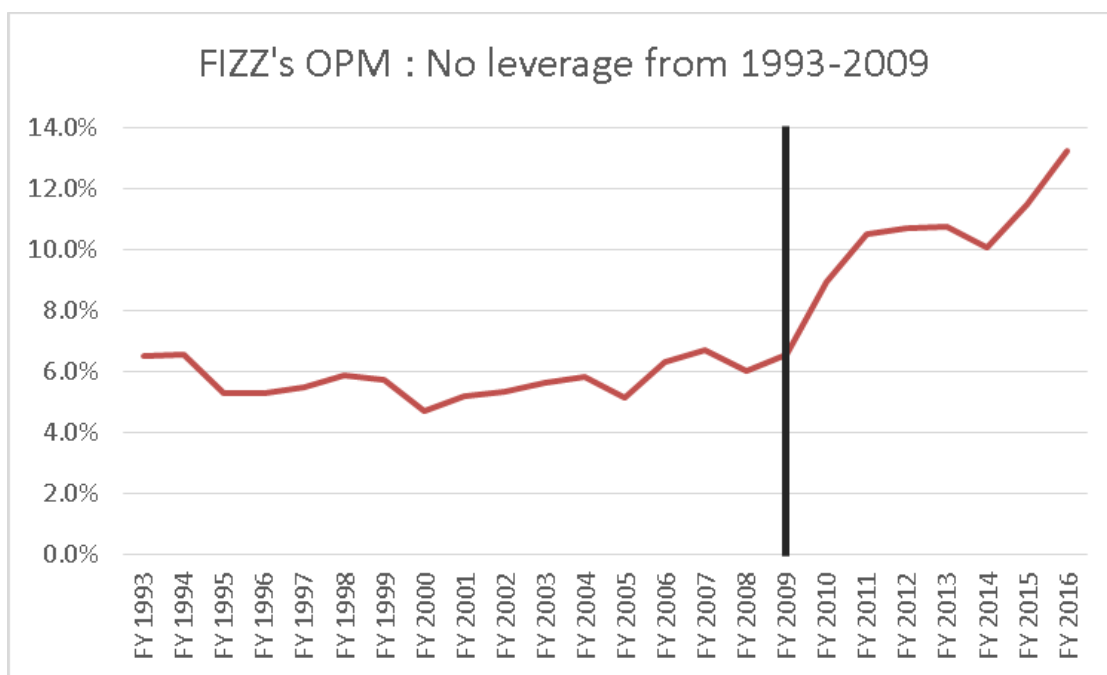
Note: We use COT FY 2013 because prior to the DSS acquisition in 2014, COT was a private label and branded beverage business and is included as a basis of comparison to the national soft drink brands.

Due to FIZZ's lack of scale and market share (\$0.7bil in TTM sales vs \$43.2bil for KO), common sense would dictate FIZZ's operating leverage would be significantly lower than peers. However, according to FIZZ's reported financial performance, this is not the case.

FIZZ reportedly spends only 21% of revenue on SG&A while KO, PEP, and DPS each spend 37-39%. Also, one would think FIZZ's strategy of branded products at near private label prices would produce margins similar to COTT Corporation's ("COT") private label business. But FIZZ's reported operating margins were 19% in Q1 FY 2017 versus 4% for the COT business.

⁴ In what will become a common refrain, shareholders and investors have no transparency into the performance of individual brands. Estimates vary widely as to the actual sales of LaCroix, yet the Company refuses to disclose even basic details of the performance of its beverages.

The peculiarities in FIZZ's operating expenses are hard to ignore. From 1993-2009, FIZZ's operating margins held within 100 bps of ~5-6%. Yet seemingly out of nowhere, in 2009, the business started to produce operating leverage, with operating margins increasing to 8.7% in FY 2010 and 10.5% in FY 2011. FIZZ did not diversify beyond its core beverage business, did not undergo any major cost restructuring, did not significantly increase capex spending, or say anything to suggest why this fixed margin business would start to produce operating leverage.



Source: Company 10-K's

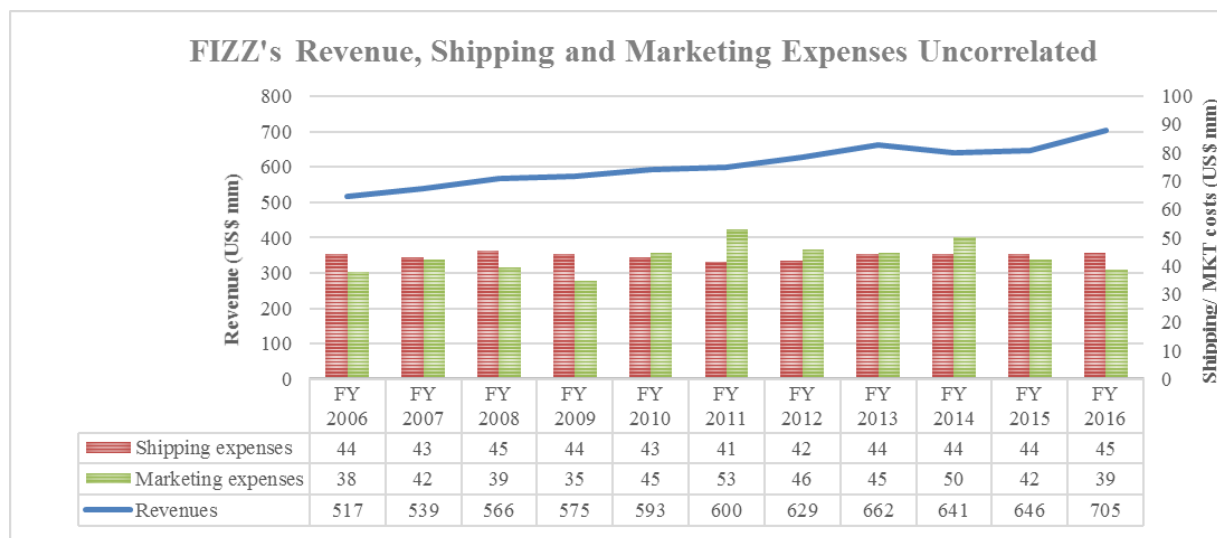
The only significant change around the time of its dramatic and impressive increase in operating leverage was a change in FIZZ's auditor.

FIZZ changed auditors from PriceWaterhouse Coopers ("PwC") to McGladrey & Pullen (now RSM) for its 2007 Annual Report. Investors should note that 2007 was the first year that Sarbanes-Oxley required auditors to sign off on the strength of a public company's internal controls. We find it very curious that FIZZ switched from PwC to RSM as soon as internal controls were going to be scrutinized.⁵

Marketing and shipping costs are variable, and should increase commensurately with selling more beverages. Inexplicably, FIZZ claims that such variable costs have been flat for ten years despite a significant uptick in revenue. Indeed, FIZZ's reported SG&A is basically flat since 2006.

FIZZ has grown revenue from \$517 million in 2006 to \$705 million in 2016, a 36% increase. During this same period, shipping costs and marketing costs have been inexplicably flat. Shipping costs were \$44 million in 2006, and \$45 million in 2016. Marketing expenses were \$38 million in 2006 and \$39 million in 2016. FIZZ provides no rationale for its stunning ability to ship and sell more product at no additional variable cost.

⁵ Credit Suisse, in a recent initiation report on the Company, posited that FIZZ enjoys higher operating margins on sales of LaCroix (200-300 bps), and that as the sparkling water brand began to make up a larger share of the Company's revenue mix, it may drag operating margins up with it. But this cannot explain the Company's ~500 bps operating margin expansion when LaCroix was a much smaller part of its revenue mix in 2010-2012. *Credit Suisse Equity Research Report, September 15, 2016.*



Source: Company Filings

FIZZ's Revenue and SG&A

US\$ mm	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
Revenues	517	539	566	575	593	600	629	662	641	646	705
Shipping costs	44	43	45	44	43	41	42	44	44	44	45
Marketing expenses	38	42	39	35	45	53	46	45	50	42	39
CMA Expenses	5	5	6	6	6	6	6	7	6	7	7
Other SG&A	48	46	48	47	51	56	52	51	52	52	58
Total SG&A	135	137	138	132	145	156	146	146	153	145	148

Source: Company Filings

FIZZ's inexplicable ability to sell more with almost no variability in shipping costs is, in our opinion, deeply suspicious. Additionally, the decrease in marketing costs from a high of \$50 million in 2014 to \$39 million in 2016, defies logic considering the increases in sales during that time. Oddly, FIZZ's SG&A appears uncorrelated to its reported revenues. In our opinion, this means one of two things. Either FIZZ has revolutionized the beverage industry or its manipulating its financial statements to hide costs.

Ultimately, FIZZ's financials beg an obvious question: how can a subscale player in a highly competitive industry with half the gross margins of its competitor's report operating margins close to its larger peers who are selling better known products at higher prices?

We believe that once investors consider allegations of earnings manipulation, FIZZ's poor corporate governance structure and the other evidence discussed in this report, they will conclude, like we have, that FIZZ's results are not what they seem.

CEO ALLEGEDLY ADMITTED TO EARNINGS MANIPULATION AND FRAUD

In 2012, former CMA in-house counsel David Mursten sued Nick Caporella in federal court for breach of contract. Mursten had worked for Caporella on and off as an advisor, consultant and attorney. Mursten worked as an assistant corporate counsel of CMA until 2008 and later advised FIZZ's CEO on potential mergers and acquisitions.

The two men appeared to be close. The court adjudicating the matter noted that “over time, Mursten came to view Caporella as something of a father figure—a sentiment Caporella shared.”⁶ Joseph Caporella (Nick's son and President of FIZZ) noted in the email below that his father Nick had set aside wealth for Mursten.⁷

Subj: Re: follow-up
Date: 8/17/2008 3:49:44 PM Eastern Daylight Time
From: jcaporella@nationalbeverage.com
To: fizaction@aol.com
Sent from the Internet (Details)

I believe 1,2 and 3 will happen. Nick has told me repeatedly that he has a new deal for you and he has also put some wealth aside for you.

Your call.

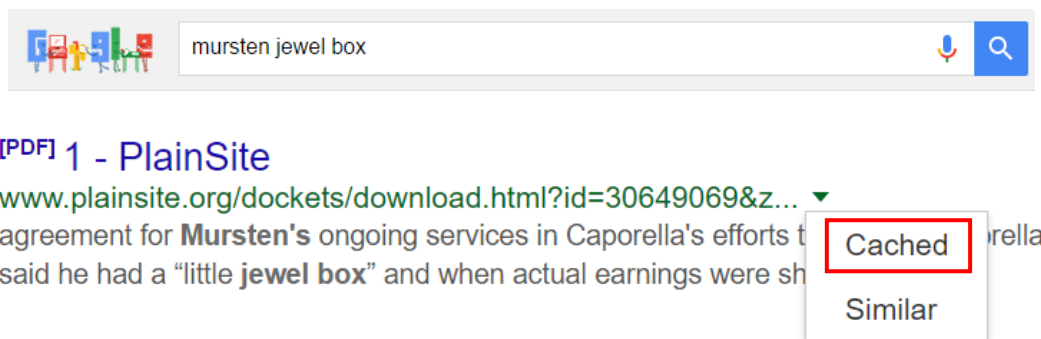
PS. Safe travels. Always.

Source: Exhibit filing. David B. Mursten vs. Nick A. Caporella Case 0:14-cv-60014-JIC Document 122-4, p. 2.

According to Mursten, Caporella hired him in 2010 to advise and assist in the sale of FIZZ to a Japanese beverage conglomerate, Asahi.⁸ The deal ultimately fell through (for reasons we will discuss below). On December 12, 2012, Mursten filed a complaint against Caporella seeking to collect payment for his work on the deal. The claim was dismissed and then refiled in 2014. Ultimately, the court found against Mursten on the grounds that he had an attorney-client relationship with Caporella and as a result, any compensation agreement or contract must be in writing to be enforceable.

The outcome of the case is less interesting to investors than Mursten's account of the statements allegedly made to him by CEO and Chairman Nick Caporella.

The complaint was originally redacted,⁹ but an [un-redacted](#) copy is publicly available in Google and on the website “[PlainSite](#),” if you simply search for it.¹⁰ The un-redacted complaint can be viewed by any investor who enters the search terms “Mursten jewel box” into Google and selects Google's html “cache” of the PlainSite link.



Source: <https://www.google.com/#q=mursten+jewel+box>

⁶ Order Granting Defendant's Motion for Summary Judgment, Mursten v. Caporella. Case 0:14-cv-60014-JIC Document 171.

⁷ Mursten vs. Caporella; Case 0:14-cv-60014-JIC Document 122-4.

⁸ Throughout the Mursten case, the acquirer is referred to as Company A, but Mursten's deposition (Document 86-4, p. 173) explicitly states that Company A is Asahi.

⁹ It appears from Mursten's deposition, Mursten vs. Caporella 0:14-cv-60014-JIC Document 86-4, p. 254, that Mursten filed the complaint in redacted form. Although that is simply our inference from the record.

¹⁰ <http://webcache.googleusercontent.com/search?q=cache:ZMe9mZxOpmAJ:www.plainsite.org/dockets/download.html%3Fid%3D30649069%26z%3D51c75661+&cd=1&hl=en&ct=clnk&gl=us>

The alleged admissions are a bombshell, and the complaint should be read in full by any interested shareholder or investor. The key details are as follows.

Mursten and Caporella flew to Mexico in November 2011, in a private jet owned by FIZZ. On November 16, 2011, Caporella hosted a birthday dinner for Mursten at Caporella's luxury villa. During the course of this trip, Mursten allegedly asked Caporella the "secret" to his "success," particularly with respect to FIZZ's great record of performance with earnings and tremendous dividends.

According to Mursten, Caporella told him that when actual earnings were short of where he wanted, Caporella would go into his "**little jewel box**." Caporella also allegedly bragged that he got "his son Joseph – the President of National Beverage – to arrange for the company's distributors to receive made-up invoices. Presumably, when rejected by the distributors, these invoices would be credited back to their accounts, but the reported earnings – inflated by the fictitious invoices – would not be restated."¹¹

50. The day after arriving in Mexico, on Monday, November 14, 2011, Caporella

and Mursten were talking in Caporella's rented luxury villa overlooking the Sea of Cortez.

51. During the conversation, Mursten happened to ask Caporella about the

maintenance on Caporella's jet. Caporella said he had instructed his son Vincent Caporella to falsify the aircraft maintenance logs to show all mandatory maintenance work had been completed on time, and, after the deadline, to make arrangements with cooperative airplane technicians to do the required work.

52. Caporella's revelation stunned and concerned Mursten. But this was not the only stunning confession made by Caporella.

53. During the conversation, Mursten asked Caporella the secret of Caporella's success and great record of performance with earnings and tremendous dividends.

Caporella said he had a "**little jewel box**" and when actual earnings were short of where he wanted earnings to be, Caporella would go to his "**little jewel box**." Caporella also told Mursten about a time when the difference between actual earnings and where he wanted earnings to be was a gap too big for his "**little jewel box**." Caporella bragged that he fixed the problem by getting his son Joseph the President of National Beverage to arrange for the company's distributors to receive made-up invoices. Presumably, when rejected by the distributors, these invoices would be credited back to their accounts, but the reported earnings inflated by the fictitious invoices would not be restated.

¹¹ Initial [complaint](#), David B. Mursten vs. Nick A. Caporella Case 0:12-cv-62474- Document 1, p. 14-16.

54. Connecting the dots, Mursten believed the reasons why Caporella wanted to minimize Company A's due diligence and why he demanded, in negotiations, that his company's management of National Beverage and his son (National Beverage President Joseph Caporella) remain in place after Company A's purchase – all to control the financial information which could reach Company A.

55. Notably, National Beverage announced in a recent press release (September 6, 2012) that it was reporting 20 consecutive quarters of revenue and net income growth. As the press release put it: "Wars, droughts, imploding governments, runaway commodities, *You Name It* crisis — and we scramble, juggle, switch gears — yes, we do it all and successfully advance revenues and profits."

56. During the course of this conversation, Caporella also revealed a scheme he created to enable selected individuals to intercept selling-shareholders' dividends. Finally, Caporella even disclosed that his prior General Counsel (David Boden) had raised concerns about campaign fundraising tactics used by Caporella. Caporella was getting contributions in the form of personal checks payable to the campaign of two thousand dollars each from National Beverage and CMA employees and then reimbursing the employees for "their" campaign contributions.

57. Mursten was greatly disturbed by these revelations. Caporella had admitted to conduct that could interfere with the sale of the company, defraud Company A, or defraud past and present shareholders.

58. On Wednesday, November 16, Caporella hosted a birthday dinner for Mursten at the luxury villa Caporella had rented in the Cabo San Lucas resort.

59. Two nights later, Mursten received a call in his hotel room from Caporella. Mursten advised Caporella that he would not be continuing on the trip to Houston, Caporella's next planned stop. Mursten said he wanted to be back in the National Beverage office on Monday morning in order to work with certain of National Beverage's executives and counsel to review some of the things Caporella had said earlier in the week.

60. Caporella asked Mursten what he meant. Mursten told Caporella he was referring to the earnings issues, the legality of the "dividends" scheme, and the other issues disclosed by Caporella. Mursten also said he would feel uncomfortable flying on the Falcon 2000-EX airplane.

61. Caporella was agitated and angry and ended the telephone call.

Mursten claims that he was greatly disturbed by these allegations and told Caporella that he had to return to FIZZ's headquarters to review Caporella's revelations. According to Mursten, Caporella became irate and fired him a few days later.

Mursten also declared, under oath and under penalty of perjury, that he believed Caporella was admitting to illegal conduct.

8 | Q. What is the little jewel box?

9 | A. The little jewel box is a phrase that refers

10 | to managing the earnings of the -- as I understand

11 | it, came to understand it, refers to managing the

12 | earnings of the company.

~~~~~

10 | Q. And that was something untoward or illegal or

11 | improper or violative of some SEC rule or regulation;

12 | is that your testimony, whatever was revealed to you?

13 | A. If you leave out the part of some SEC rule or

14 | regulation and just say it was --

15 | Q. Illegal?

16 | A. I didn't -- I was -- I was saying not -- yes.

17 | Q. Let's be clear.

18 | A. I'll just say yes. Yes, we'll be clear.

Source: Mursten deposition. David B. Mursten vs. Nick A. Caporella Case 0:14-cv-60014-JIC Document 86-4, p. 251-252

Caporella denies that this conversation with Mursten ever took place and insists that Mursten fabricated the entire story in order to extort money from the CEO and his company. It is up to investors to decide for themselves the credibility of Mursten's allegations.

We believe Mursten's account is credible for the following reasons. His declaration that Caporella's conduct was illegal was made under oath, under penalty of perjury. As a lawyer, he would understand the gravity of his statements. Then there is the close relationship between the men. They flew down with Caporella on a Company-owned private jet to Mexico where they celebrated his birthday. After the alleged conversation took place, Mursten was persona non grata at a company where he had worked on and off with his quasi father figure for years.

In our view, the behavior allegedly admitted by Caporella to Mursten also explains the puzzle presented by FIZZ's inexplicable operating leverage, the suspicious consistency with which the Company [reported](#) revenue and net income growth, and its shipping and marketing costs which appear uncorrelated with rising sales. The allegations also explain why a CEO of a public company would fear due diligence by a potential acquirer.

### 1) Fear of Due Diligence by a Potential Acquirer

In August 2010, FIZZ received an acquisition proposal letter from Asahi. By January 2011, the deal had stalled. By April 2011, all talks of the acquisition had been cut off completely.

Yet documents produced in discovery show that Caporella desperately wanted to sell his Company to Asahi, and that he wrote many strange and rambling letters to Asahi in a bid to entice the Japanese conglomerate to re-engage in

acquisition talks.<sup>12</sup> These letters give investors some insight into why the acquisition fell through, despite Caporella's apparent desperation to sell the Company. We have included these exhibits (which are freely available on [Pacer](#)) as an appendix.

In the letter excerpted below, Caporella references a comment by an Asahi advisor (or attorney) implying that Caporella refused to allow Asahi to conduct sufficient due diligence because he was "trying to hide something."

**The truth is, one of [REDACTED] principals was given to me to protect and I was attempting to do it. I am sure, you all would feel shamed by these things!! Recently, a comment was made by your advisors that my worry of how much diligence would occur, was due to us trying to hide something. Well, one can tell from that remark that extreme ignorance exists where that remark came from. You and your entire team should be profoundly concerned that the more time that you allow to pass the greater the risk that: 1. a leak will occur, or 2. the gap will reduce relative to the spread in our common stock value due to continuing performance. Normally, conventional wisdom and a far better relationship between us, would have lowered this risk to you. All of the correspondence between us acknowledged that I would help to lead the way, as you asked.**

*Source: Mursten vs. Caporella, Case 0:14-cv-60014-JIC Document 129-2*

A plain reading of the letter reveals that Caporella became highly defensive at this accusation, arguing instead that due diligence would create a greater risk of the news leaking or that the stock price of FIZZ would appreciate. This is an odd excuse, considering that as a public company, FIZZ had a duty to find the highest reasonable stock price for its shareholders, and that an appreciation of FIZZ's stock price would only benefit Caporella, its largest shareholder.

Consistent with "trying to hide something," Caporella also exhibited a vehement and irrational hatred of the lawyers involved in the transaction. He called a lawyer representing Asahi an "ugly litigator" that was "harassing the intimate corporate family:"

**The ugly litigator, that harasses the intimate corporate family, whose only sin was to make our lovely company a *one-of-a-kind* . . . was not how I envisioned my final chapter -- as Founder, Chairman/CEO and Corporate Patriarch. If I could protect everyone, including [REDACTED], allowing only myself to bear in harms way -- then the chapter would be served, as I would have willed it. This *was*, more than . . . possible!**

~~~~~

[REDACTED] did not utilize prudent advice and must re-evaluate their courage and goals. Further, in the future when attempting to acquire a recipe that *MAY* taste as good as it *LOOKS*. . . experienced companies do not hire antagonists to harass the recipe's creator.

This practice is outlawed in acquiring companies . . . my *experience*, certainly!!

Source: Mursten vs. Caporella, Case 0:14-cv-60014-JIC Document 129-2

In another damning and almost inconceivable statement, Caporella expressed anger at the insinuation by Asahi's representatives that Caporella could do "underhanded things or that **something in my past (so terrible would come out during litigation)**."

¹² The letters are exhibits produced by Mursten. Our understanding of the letters is that they were sent by Caporella to Asahi, but one of them is labelled "draft" so we cannot be sure that all of the letters were actually sent.

In the CEO's own words:

your business dealings with us, is very hard to adapt to. If you, [REDACTED] others heard the cruel remarks or read insinuations that I or my Board could do underhanded things or that something in my past (so terrible would come out during litigation) that's why I was being so sensitive about it.

Source: *Mursten vs. Caporella, Case 0:14-cv-60014-JIC Document 129-2*

From the letters, we can infer that Asahi attorneys made statements to Caporella stating directly or insinuating that he was refusing to allow proper due diligence of FIZZ because he was hiding something.

In addition to the lack of diligence made available, Asahi was uncomfortable with FIZZ's proposed post-acquisition operating structure.

The priority that should be foremost on your mind is the ultimate success of your Alliance in North America, not the structure designed to comfort you. Because

Source: *Mursten vs. Caporella, Case 0:14-cv-60014-JIC Document 129-2*

As we understand it, Caporella was insisting on a post-acquisition structure in which he and his son maintained control over the books, records and operations of FIZZ for at least a year.¹³

Unsurprisingly, Asahi was not comfortable with a company that refused to allow sufficient diligence and that seemingly would not give them an intimate look at the real financials until a year after acquisition.

While we do not know exactly how things ended, from the record we infer that Asahi cut off all contact with FIZZ and that Asahi (or its counsel) did not believe Caporella's reasons for allowing so little diligence. Even so, Caporella continued to badger Asahi with letters, all of which apparently went unanswered. These letters are an excellent read and we encourage everyone to review the CEO's own words.

Vickie Carcaise, FIZZ's lawyer from May 2003 until March 2015, apparently was so concerned about this information becoming public that she asked for discovery (and the related motions) to be held off the record.

1 I UNDERSTAND THAT THERE IS A CONFIDENTIALITY ORDER IN PLACE FOR
2 DISCOVERY. BUT IF THERE IS A TRIAL MY UNDERSTANDING IS, IT'S
3 NOT NECESSARILY OFF THE RECORD. FOR A PUBLICLY TRADED A
4 DISCLOSURE OF ANY PAST DISCUSSIONS FOR THIS COMPANY COULD BE
5 DETRIMENTAL TO THE POINT IT COULD NOT BE REPAIRED.
6 THIS IS SO SERIOUS THAT I'M STANDING UP, WHICH I NEVER
7 DO.

Source: Court transcript, *Mursten v. Caporella, Case 0:14-cv-60014-JIC Document 76, p. 68-69.*

For any longs touting a prior sale process as being somehow indicative of a potential privatization, the details suggest the opposite to be true. Caporella frantically tried to sell FIZZ to Asahi, but Asahi was apparently highly uncomfortable that Caporella refused to allow adequate due diligence and insinuated that he refused because he was hiding something.

Caporella is adamant that Mursten is a liar, that he never admitted to accounting fraud and that Mursten's lawsuit was an attempt at a naked money grab. Yet, if Mursten's allegations were not true, why would Caporella resist an acquirer's attempt to conduct due diligence, all while writing embarrassingly gushy letters to Asahi in a misguided attempt to woo them back to the table?

¹³ Our understanding of this proposed structure comes from the 2012 Mursten complaint.

Large acquisitions of public companies can take place quickly while also satisfying due diligence requests from potential acquirers, so Caporella's excuse that speed was of the essence appears, in our view, to be bogus.

Additionally, Caporella's letters clearly demonstrate a defensiveness and hostility towards Asahi's lawyers, who at least according to Caporella, stated or insinuated that he was hiding something.

Ultimately, we believe that the CEO's letters corroborate Mursten's allegations of accounting manipulation. When considered in conjunction with FIZZ's ludicrous operating structure and its relationships with a number of off-balance entities, we believe that such allegations only appear more credible.

SUSPICIOUS USE OF OFF-BALANCE SHEET ENTITIES

1) CMA: Little Jewel Box?

FIZZ has a ludicrous governance structure which in our opinion presents an ideal opportunity for earnings manipulation and accounting fraud. FIZZ outsources key management functions of its Company to Corporate Management Advisors, (“CMA”), a blandly named entity privately owned by FIZZ CEO and Chairman Nick Caporella.

CMA manages FIZZ for a fee equal to 1% of FIZZ’s net revenues (plus a discretionary bonus) and employs a handful of senior management and support staff, many of whom have been with Caporella since the 1980s.¹⁴

As a separate entity, FIZZ’s shareholders have no insight into CMA’s operations whatsoever despite the fact that, according to the Company’s proxy statement, CMA **“provides the services of and compensates the Company’s Chief Executive Officer, Chief Financial Officer and senior and other corporate personnel, who provide management, administrative and creative functions to the Company” including “supervision of the Company’s financial, legal, executive recruitment, internal audit and management information systems departments.”**¹⁵ It warrants emphasis, that FIZZ’s CEO and CFO are not actually employed or compensated by FIZZ. Additionally, financial and audit supervision is not performed by FIZZ’s employees, but by employees of outside consulting company CMA.

The SEC took issue with the Company’s disclosures regarding compensation paid to CEO Caporella and CFO George Bracken by CMA in a series of correspondences in 2009. The SEC requested in multiple letters that the Company disclose the amount of compensation received by Caporella and Bracken from CMA, but oddly, the Company resisted. Comparing its relationship to CMA to the relationship between a REIT and an asset manager, FIZZ [dug in its heels](#) that it was not necessary to include the exact amount of compensation paid by CMA to its CEO and CFO in its public filings.

This is a ridiculous analogy. Some REITs hire external management teams because a REIT’s portfolio of assets do not require intense day-to-day management (e.g., a portfolio of commercial real estate properties or pipelines). But even in the REIT space, external management teams are controversial, as was evident in the instance of RESI and AAMC, which was plagued by governance concerns highlighted by Glaucus in our March 2014 short opinion on AAMC (available [here](#)).

Although such arrangements exist in the REIT sector, it is virtually unheard of in the beverage and consumer products sector where managing brands, developing product and growing sales requires the full time attention of a management team.

FIZZ’s analogy that it was like a REIT and that CMA was like a REIT’s external managers is also problematic because FIZZ provides no disclosures on CMA’s operations. Does CMA manage other businesses? Does it offer similar services to other beverage companies? If, as we suspect, CMA is a private company which provides legal, audit and management services exclusively (or almost exclusively) for FIZZ, then we see no value in keeping the entity off the books, unless the purpose was to use CMA as a “little jewel box” to manipulate earnings.

FIZZ eventually acquiesced to the SEC’s demands, but only partially. Instead of breaking out how much compensation CMA pays to Caporella, FIZZ simply stated that Caporella was the beneficiary of the entire management fee.¹⁶

Shareholders and investors should also question why FIZZ dug in its heels with the SEC. As a public company, FIZZ has a duty to be transparent with the markets. Disclosing the compensation of its top officers seems a basic part of fulfilling this duty.

¹⁴ <https://www.sec.gov/Archives/edgar/data/69891/000095012309021608/filename1.htm>

¹⁵ https://www.sec.gov/Archives/edgar/data/69891/000143774916038140/fizz20160824b_def14a.htm

¹⁶ <https://www.sec.gov/Archives/edgar/data/69891/000095012309032294/filename1.htm>

2) Other Undisclosed Entities

George Bracken, Margaret Madden, Linda Crawford, and Joseph Caporella are all key FIZZ and CMA executives (or employees) over the past two decades. To the add to the opacity of FIZZ's governance structure, these executives are also listed in the corporate filings of separate Nick Caporella entities that are not listed as FIZZ subsidiaries in its 10-K, as we outline in the table below.¹⁷

Entities Related to FIZZ Personnel with Unknown Business Purpose							
Name of Entity	N. Caporella	J. Caporella	G. Bracken	M. Madden	G. Cook	D. McCoy	L. Crawford
Broad River Aviation, Inc.	x		x	x			
Hayward Enterprises, Inc.	x	x	x	x			
LDH Acquisition Corp	x		x				
Freek Energy Inc	x	x	x		x		
Fountain of Youth Beverage Compan	x	x	x		x		
8100 Partners LLC			x	x			x
Related Entities that do not appear in 10-K as subsidiaries but appear in 2011 Credit Agreement							
National Productions, Inc.	x	x	x		x		
Faygo Sales Company ¹	x	x	x		x		
Shasta Midwest, Inc. ²	x	x	x			x	

Note: 1. Disappeared from the list of subsidiaries after FY 2002 10-K
2. Disappeared from the list of subsidiaries after FY 2006 10-K

Some of these entities list 8100 SW 10th, Suite 4000, Plantation, Florida, as their principal place of business.¹⁸ This is the same registered address as the Company.¹⁹

While normally the presence of such entities may not be a major red flag, in light of Mursten's accusations that the Company's earnings are manipulated, mysterious undisclosed related party entities could easily be used to either hide costs or inflate sales. Two recent lawsuits both allege that the Company operates through undisclosed related parties.

a) Rosenthal

In a 2014 lawsuit between FIZZ and former employee Hugh Matthew Rosenthal,²⁰ Rosenthal alleged that he was hired as the Director of Marketing at Faygo Beverages ("Faygo") in October 1992 and served in that capacity until his termination in July 2012.

Rosenthal states that upon hiring, he was instructed by FIZZ to incorporate a separate entity, Rosenthal & Company Advertising ("RCA"), to receive payments from FIZZ. Faygo then entered into an agreement with RCA in order to pay Rosenthal as an independent contractor, not an employee.

According to Rosenthal's complaint, despite his nominal status as an independent third party, he was for all intents and purposes under the direct control and employment of Faygo.

Specifically, Rosenthal stated that FIZZ "maintained the ability to control the manner and means by which [his] duties were accomplished, including, but not limited to the following: providing [Rosenthal] with business cards and a name badge identifying him as "Faygo Director of Marketing;" paying [Rosenthal] a regular salary plus a bonus; requiring [Rosenthal] to attend weekly management meetings; prohibiting [Rosenthal] or Rosenthal and Company from working for any other companies; providing [Rosenthal] with an office, computer, and company e-mail; setting [Rosenthal]'s hours and working conditions; subjecting him to employment policies and training; and directing members of its management to supervise [Rosenthal]."²¹

FIZZ fired Rosenthal in 2012, after 20 years of working with the Company. He sued for wrongful termination alleging the Company discriminated against him for his age. The district court ruled against Rosenthal (granting FIZZ's motion

¹⁸ <https://www.floridareg.com/company/P94000051896/fountain-of-youth-beverage-company>

¹⁹ <https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=national+beverage+8100+SW+10th>

²⁰ Rosenthal vs. National Beverage Corp. and Faygo Beverages, Case 4:14-cv-12384-MAG-DRG Document 1. All court document records referenced hereafter are publicly available through the Pacer system. <https://www.pacer.gov/>

²¹ Rosenthal v. National Beverage Corp., Case 14-CV0123840, Document 1.

for summary judgment) on the grounds that Rosenthal failed to shoulder his burden to prove an issue of material fact that his age was the motivating factor behind his termination.²² Rosenthal has appealed this decision.

9. Pursuant to an agreement made upon Plaintiff's hire, he incorporated "Rosenthal and Company" to receive payment from Defendant on October 5, 1992.

10. The reason for the incorporation of Rosenthal and Company was so that Plaintiff could obtain advertising agency discounts for Defendant's benefit.

11. Faygo then entered into an agreement with Rosenthal and Company on October 6, 1992, thereby creating a vehicle for Faygo to treat Plaintiff as an independent contractor instead of an employee.

12. Plaintiff was an employee of Defendants.

13. Defendants maintained the ability to control the manner and means by which Plaintiff's duties were accomplished,

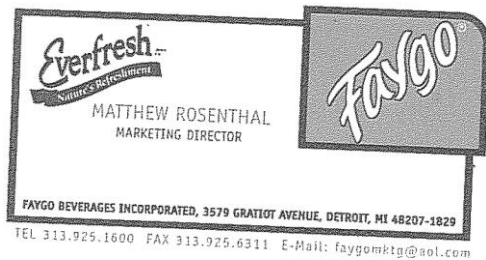
including, but not limited to the following: providing Plaintiff with business cards and a name badge identifying him as "Faygo Director of Marketing;" paying Plaintiff a regular salary plus a bonus; requiring Plaintiff to attend weekly management meetings; prohibiting Plaintiff or Rosenthal and Company from working for any other companies; providing Plaintiff with an office, computer, and company e-mail; setting Plaintiff's hours and working conditions; subjecting him to employment policies and training; and directing members of its management to supervise Plaintiff.

Initial complaint. Rosenthal vs. National Beverage Corp. and Faygo Beverages, Inc. Case 4:14-cv-12384-MAG-DRG Document 1 p. 2-3.

What is fascinating for investors is not the merits of the discrimination claim, but Rosenthal's description of his employment arrangement with the Company. He claims that upon hiring, he was instructed to set up an entity so that the Company could pay him as a third party, yet for all intents and purposes he claims he was employed as the Director of Marketing of Faygo, one of FIZZ's cornerstone brands.

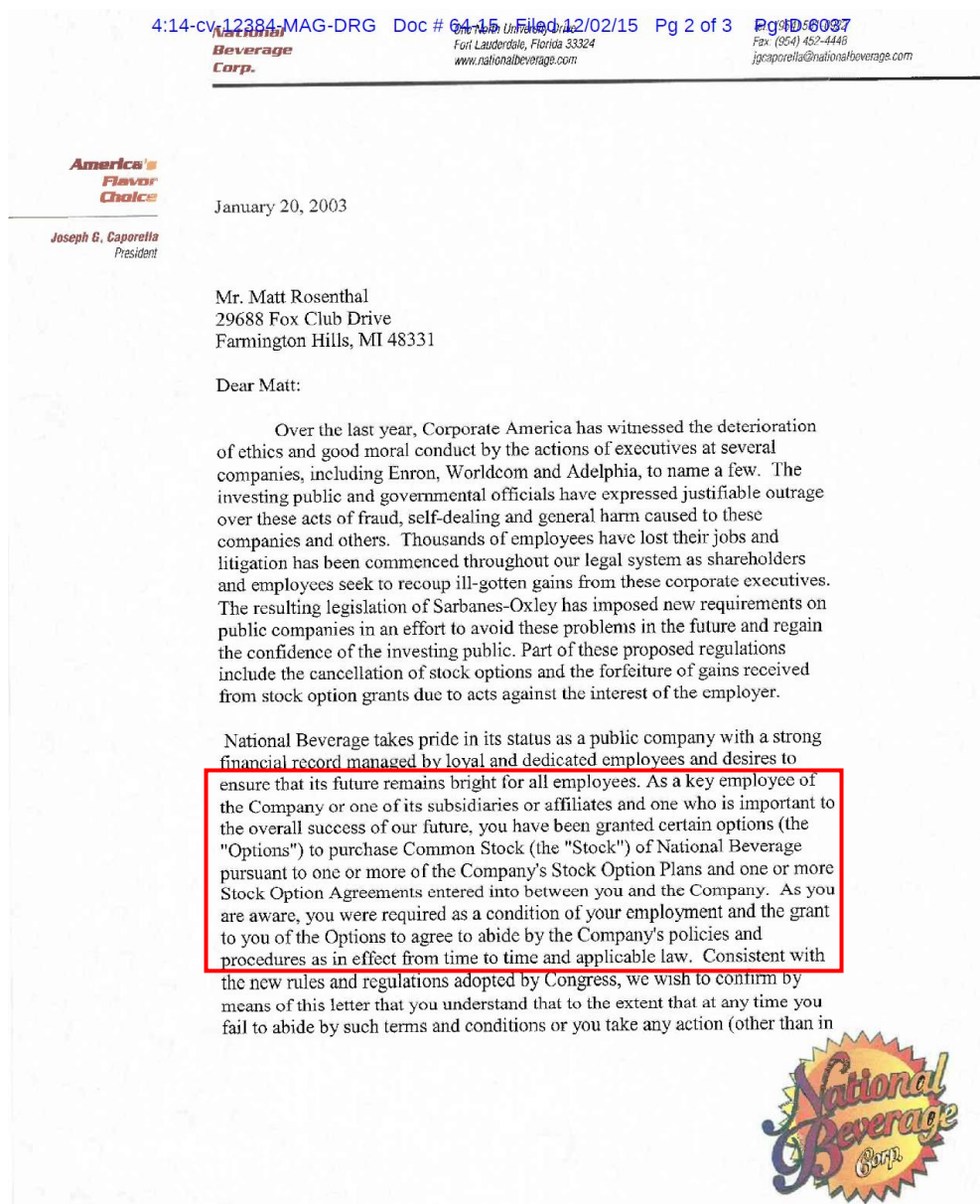
FIZZ, for its part, adamantly denies that Rosenthal was an employee, but in our view, the evidence supports Rosenthal's contention. For example, Rosenthal produced business cards stating he was Faygo's director of marketing.

²² Rosenthal v. National Beverage Corp., Case 14-CV0123840, Document 71.



Source: *Rosenthal v. National Beverage Corp.*, Case 14-CV-0123840, Document 64-4

Equally damning is a January 2003 letter addressed to Rosenthal by FIZZ's President (Joseph Caporella) discussing stock options granted to Rosenthal as "a key employee of the Company or one of its subsidiaries or affiliates."



Source: *Rosenthal v. National Beverage Corp.*, Case 14-CV0123840, Document 64-15.

In addition, Faygo HR manager Janette Emerson sent an email in 2010, addressed to “Faygo Management,” to Rosenthal and a number of Faygo managers. The email asked the recipients to complete and return an I-9 (Employment Verification Form).²³ The district court even noted that Faygo paid RCA (Rosenthal’s supposedly independent entity) a check for services twice a month, an amount which was reduced when Rosenthal started working part time. To us, this looks like a paycheck, not some “monthly retainer” to an outside entity, as the Company claimed in the litigation.

Rosenthal had a Company email address, a security badge, full access to the Faygo facility, and an office at the Faygo offices (with phone and computer). He even conducted interviews for positions at FIZZ, a duty not consistent with a third party entity.²⁴

The court never ruled on whether Rosenthal was an employee, and any interested investor should draw their own conclusion by reviewing the evidence produced in the litigation, which is available on Pacer. FIZZ waged a brutal fight trying to prove that he was not an employee, and did present some evidence supporting their position (such as Rosenthal’s tax returns and his ERISA status).

But in our opinion, if it looks like a duck, quacks like a duck, it’s a duck. Rosenthal had business cards, he interviewed potential employees for positions at FIZZ, he received emails addressed to “Faygo management,” and (indirectly) received what to us appears to be twice monthly paychecks.²⁵

Ultimately, we do not know if payments to Rosenthal’s RCA were accounted for properly by the Company as SG&A. But in the context of Mursten’s allegations, this arrangement is a significant red flag. In analyzing FIZZ’s financials, the Company’s reported operating leverage is inexplicable. We suspect that the Company uses off the books entities to bury expenses to maintain the illusion of profitability. Rosenthal’s case supports this suspicion, because even though (in our opinion) he was clearly an employee of the Company, his compensation could be easily kept off the Company’s books. Such arrangements could explain why FIZZ reports such low administrative and operating expenses relative to its larger, more well established peers.

Rosenthal’s case also raises deeper questions. How many other quasi-employees does FIZZ “retain” with similar arrangements? How did FIZZ account for payments to RCA?

b) Maverick Distributing Company

Not only do we believe that expenses are run through off the books entities, but there is also evidence to suggest that FIZZ runs sales through undisclosed related parties. In *Thornell vs National Beverage Corp.*, a 2015 wrongful termination litigation in Texas state court, Thornell was employed by a beverage distributor, Maverick Distributing Company (“Maverick”).

Thornell’s complaint names FIZZ as a co-defendant on the grounds that FIZZ owns, funded and effectively operates Maverick. Maverick has never been listed as a subsidiary of FIZZ in any of its filings, so if Thornell’s allegations are true, it would be another example of FIZZ working through an undisclosed related party. FIZZ, unsurprisingly, denies that it ever employed Thornell, denies owning Maverick and denies that it in any way funds, controls or operates the distributor.

We obviously have no view on whether Thornell’s claims of discrimination or wrongful termination have any merit, but Thornell’s description of the relationship between FIZZ and Maverick bears consideration by investors.

According to the complaint, a FIZZ employee named Ricardo Leyva, worked out of the Maverick office and directed the operation of Maverick’s business as well as the day-to-day duties and responsibilities of Thornell, a sales representative.

²³ *Rosenthal v. National Beverage Corp.*, Case 14-CV0123840, Document 64, Exhibit 10.

²⁴ *Rosenthal v. National Beverage Corp.*, Case 14-CV0123840, Document 57.

²⁵ Laughably, FIZZ claims that Rosenthal did not participate in an end-of-year bonus plan, even though they admit his Company, received an “extra year end payment from Faygo.” Do independent third parties typically receive a year end special bonus? This plainly looks like a year-end bonus for employees. *Rosenthal v. National Beverage Corp.*, Case 14-CV0123840, Document 57.

Facts Supporting Relief

5.1 Maverick was created to support National Beverage in the Houston and Harris County Area.

5.2 National Beverage provided funding and the product to be used and distributed by Maverick.

5.3 Maverick hired Mr. Thornell as a Sales Representative in February of 2014.

5.4 Tracy Bush long-time business acquaintance recruited and hired Mr. Thornell.

5.5 At the time Mr. Thornell was hired, Mr. Bush told Mr. Thornell that his sales territory would be primarily within a sixty-five (65) mile radius of his home in South Houston.

5.6 Despite this promise, Maverick began to assign Mr. Thornell to accounts in far northwest, north, and northeast Houston as well as the Beaumont/Port Arthur areas.

5.7 An employee of National Beverage, Ricardo Leyva, worked out of the Maverick office.

5.8 Mr. Leyva exercised control over Mr. Thornell's employment and had the power to supervise and discipline Mr. Thornell.

5.9 Mr. Leyva provided Mr. Thornell with particular routes and provided him with assignments and duties.

5.10 Mr. Leyva was not engaged in a distinct operation or business, but instead was operating Maverick's business and directing Mr. Thornell in the day-to-day duties of employment.

Source: *Thornell vs National Beverage Corporation Case # 201551725-7 Document BL-1*

There are parts of Thornell's complaint we could verify. We located a Ricardo Leyva on Facebook who claims to be a Houston based employee of National Beverage Corp. Maverick is registered to a [Gina Troy](#). Troy's other distribution businesses include Stampede Beverage and Best Brands International. [Stampede's](#) website indicates that it distributes a number of the Company's brands.

In September 2016, the court granted FIZZ's motion for summary judgment, and dismissed Thornell's claims against the Company. But the merits of Thornell's discrimination claims are less interesting from an investor's point of view than his description of the day-to-day operations of a supposedly independent distributor.

The credibility of Thornell's statements is up to investors to decide. But Thornell's description of a FIZZ employee's day-to-day management of an independent distributor, is in our opinion, credible in its specificity.

In our view, the fact pattern alleged in *Thornell* supports the accusations of Mursten. By directing and controlling distributors which are supposedly independent, FIZZ would have an ideal opportunity to manipulate its earnings and boost reported sales by creating fake invoices or by channel stuffing.

This reminds us of Valeant and Philidor,²⁶ where Valeant employees stationed at its supposed independent purchaser indicated that the distributor was actually a related party, controlled and operated for the benefit of the public company but kept off its books.

It is up to investors to decide the credibility of litigants, but the facts alleged in both the *Thornell* and *Rosenthal* lawsuits point to a pattern: that FIZZ's employees set up or control seemingly independent third party entities through which they transact with the Company.

This creates a climate ripe for abuse. As these entities are *off the books*, they escape the scrutiny of the Company's auditors and give shareholders no visibility as to their operations and profitability. Such arrangements also bolster the credibility of Mursten's accusation that Caporella claimed he had a *little jewel box* with which to manipulate earnings and create fake invoices. Manipulating earnings would be easy with so many expenses carried at undisclosed related parties, and faking invoices would be likewise easy with FIZZ's employees controlling and directing the operations of a supposedly independent distributor.

²⁶ <http://www.reuters.com/article/us-valeant-investigation-idUSKCN10L2RG>;
<http://www.cbsnews.com/news/valeant-ceo-defends-ties-with-mail-order-pharmacy/>

UNDISCLOSED STOCK GIFT

The revelations of a “stock gift” continue this pattern of hidden transactions and call into question the structure of Caporella’s ownership of the Company.

Margaret Madden is a CMA employee who has worked for Caporella for years. In a deposition of Madden during the Mursten case, it was revealed that in 2011, **she received 150,000 shares of FIZZ’s stock as a gift** from Caporella and \$951,337 in cash to cover the related taxes.

12	Q	(By Mr. Crockett) Ms. Madden, in addition to
13		receiving 150,000 shares of NBC stock in 2011, did
14		you also receive \$951,337 in cash in order to pay the
15		tax on those shares?
16	MR. CAMPBELL:	Same instruction. I'm not
17		instructing you not to answer, but I'm telling
18		you I think it's right to privacy.
19	THE WITNESS:	Correct.

Source: Mursten vs. Caporella Case 0:14-cv-60014-JIC Document 113-2, p. 9

This issue is complicated because only a partial transcript of Madden’s deposition is available to the public, as the rest was redacted. Madden initially refused to answer questions about the payment, citing her right to privacy. But the context of the deposition and subsequent case pleadings indicate in our opinion that she received the shares.

The issue was contentious and ultimately went to the court under a motion to compel Madden to answer questions about her “gift.” In the court’s ruling on the motion, the judge explicitly references that Madden received the shares in explaining why she had to answer questions regarding them.

Court Order

"Management Group." During his deposition, Mr. Bracken was directed not to identify the participants or beneficial owners of 8100 LLC, nor permitted to explain the economics of the transaction, or the business purpose of the transaction. He also was told not to answer questions regarding a multi-million dollar award made in 2011 of NBC stock to Ms. Madden. Ms. Madden was given the same instruction, both regarding her participation in the LLC and the stock distribution to her. The 2011 distribution to Ms. Madden, like the one promised to Plaintiff, consisted of stock plus cash necessary to pay the taxes which would be owed.

Source: Mursten v Caporella, Case 0:14-cv-60014 Document 145; Court Order, p. 2.

We can infer from the court order that Madden received the shares discussed in her deposition. To our knowledge, the dispossession of 150,000 shares of stock by Caporella was never and has never been reflected in a change in ownership in any SEC document. In addition to the lack of any filing stating a change in ownership, see proxies excerpted below:

2010 Proxy

<i>Name of Beneficial Owner</i>	<i>Amount and Nature of Beneficial Ownership</i>	<i>Percent of Class</i>
Nick A. Caporella	34,241,529 ¹	74.2%
Joseph G. Caporella	387,164 ²	*
Cecil D. Conlee	26,240	*
Samuel C. Hathorn, Jr.	134,676 ³	*
Joseph P. Klock, Jr.	14,652 ⁴	*
Stanley M. Sheridan	26,704 ⁵	*
George R. Bracken	117,043 ⁶	*
Edward F. Knecht	80,980 ⁷	*
Dean A. McCoy	65,250 ⁸	*

All Executive Officers and directors

as a group (9 in number) 35,094,238⁹ 76.0%

¹ Includes 33,302,246 shares held by IBS. The sole general partner of IBS is IBS Management Partners, Inc., a Texas corporation. IBS Management Partners, Inc. is owned by Mr. Nick A. Caporella. Also includes 24,000 shares held by the wife of Mr. Caporella, as to which Mr. Caporella disclaims beneficial ownership.

Source: [FIZZ 2010 Proxy Statement](#)**2011 Proxy**

<i>Name of Beneficial Owner</i>	<i>Amount and Nature of Beneficial Ownership</i>	<i>Percent of Class</i>
Nick A. Caporella	34,244,585 ¹	74.0%
Joseph G. Caporella	395,744 ²	*
Cecil D. Conlee	26,240	*
Samuel C. Hathorn, Jr.	138,816 ³	*
Joseph P. Klock, Jr.	17,712 ⁴	*
Stanley M. Sheridan	26,704 ⁵	*
George R. Bracken	118,129 ⁶	*
Dean A. McCoy	66,609 ⁷	*
Edward F. Knecht	19,944 ⁸	*

All Executive Officers and directors as a

group (9 in number) 35,054,483⁹ 75.8%

¹ Includes 33,302,246 shares held by IBS. The sole general partner of IBS is IBS Management Partners, Inc., a Texas corporation. IBS Management Partners, Inc. is owned by Mr. Nick A. Caporella. Also includes 27,056 shares held by the wife of Mr. Caporella, as to which Mr. Caporella disclaims beneficial ownership.

Source: [FIZZ 2011 Proxy Statement](#)**2012 Proxy**

<i>Name of Beneficial Owner</i>	<i>Amount and Nature of Beneficial Ownership</i>	<i>Percent of Class</i>
Nick A. Caporella	34,244,585 ¹	74.0%
Joseph G. Caporella	409,408 ²	*
Cecil D. Conlee	29,680 ³	*
Samuel C. Hathorn, Jr.	142,640 ⁴	*
Joseph P. Klock, Jr.	21,856 ⁵	*
Stanley M. Sheridan	33,264 ⁶	*
George R. Bracken	119,740 ⁷	*
Dean A. McCoy	68,527 ⁸	*
John R. Hagan, Jr.	—	*

All Executive Officers and directors as a

group (9 in number) 35,069,700⁹ 75.7%

¹ Includes 33,302,246 shares held by IBS. The sole general partner of IBS is IBS Management Partners, Inc., a Texas corporation. IBS Management Partners, Inc. is owned by Mr. Nick A. Caporella. Also includes 27,056 shares held by the wife of Mr. Caporella, as to which Mr. Caporella disclaims beneficial ownership.

Source: [FIZZ 2012 Proxy Statement](#)

The court records indicate that Caporella paid an employee a substantial “stock gift” without disclosing it in any SEC filings. Like the use of related parties, stock gifts to employees provide another way for FIZZ to use off the books transactions to present a false picture of the Company’s costs and expenses to investors.

Separately, the absence of change of ownership disclosure highlights the muddy structured through which Nick Caporella owns FIZZ. Caporella supposedly owns ~74% of FIZZ through IBS Partners Ltd. (a Texas limited partnership) whose general partner is IBS Management Partners, Inc. (a Texas Corporation). From the proxy, all we know is that Caporella controls the general partner IBS Management Partners, Inc. (“IBS”). Yet shareholders are not given any specific information about the structure of such ownership or if the amount owned by Caporella has changed. This double layered ownership structure mirrors the obfuscation of the Company’s operating expenses through CMA.

We know the obfuscation extends beyond Caporella because FIZZ CFO and CMA employee George Bracken signs for IBS (see below). Given that Bracken controls the books at FIZZ, CMA, and IBS, we believe that key members of management are well aware of the stock gift from Caporella to Madden.

Filing Number: 800075301

Texas Franchise Tax Public Information Report
To be filed by Corporations, Limited Liability Companies (LLC) and Financial Institutions
This report **MUST** be signed and filed to satisfy franchise tax requirements

05-102 (Rev. 9-11/30)
Tcode 13196 Franchise

■ Taxpayer number: 3 2 0 0 5 0 9 7 8 9 7 ■ Report year: 2 0 1 5

IBS MANAGEMENT PARTNERS, INC.

Mailing address: 8100 SW 10TH ST STE 4000
City: PLANTATION State: FL ZIP Code: 33324 Plus 4
Secretary of State (SOS) file number or Comptroller file number: 0800075301

☐ Blacken circle if there are currently no changes from previous year; if no information is displayed, complete the applicable information in Sections A, B and C.

Principal office: _____
Principal place of business: _____

Please sign below! Officer, director and manager information is reported as of the date a Public Information Report is completed. The information is updated annually as part of the franchise tax report. There is no requirement or procedure for supplementing the information as officers, directors, or managers change throughout the year.

SECTION A Name, title and mailing address of each officer, director or manager.

Name	Title	Director	Term expiration
JOSEPH G CAPORELLA	SECRETARY	☐ YES	m m d d y y
Mailing address: 8100 SW 10TH ST STE 4000	City: PLANTATION	State: FL	ZIP Code: 33324
NICK A CAPORELLA	DIRECTOR	☒ YES	m m d d y y
Mailing address: 8100 SW 10TH ST STE 4000	City: PLANTATION	State: FL	ZIP Code: 33324
JOSEPH G CAPORELLA	VICE PRESIDENT	☐ YES	m m d d y y
Mailing address: 8100 SW 10TH ST STE 4000	City: PLANTATION	State: FL	ZIP Code: 33324

SECTION B Enter the information required for each corporation or LLC, if any, in which this entity owns an interest of 10 percent or more.

Name of owned (subsidiary) corporation or limited liability company	State of formation	Texas SOS file number, if any	Percentage of ownership
Name of owned (subsidiary) corporation or limited liability company	State of formation	Texas SOS file number, if any	Percentage of ownership

SECTION C Enter the information required for each corporation or LLC, if any, that owns an interest of 10 percent or more in this entity or limited liability company.

Name of owned (parent) corporation or limited liability company	State of formation	Texas SOS file number, if any	Percentage of ownership
Name of owned (parent) corporation or limited liability company	State of formation	Texas SOS file number, if any	Percentage of ownership

Registered agent and registered office currently on file. (see instructions if you need to make changes)
Agent: JERRY B. MABRY
Office: 14102 MANDERLY DRIVE City: HOUSTON State: TX ZIP Code: 77077

The above information is required by Section 171.203 of the Tax Code for each corporation or limited liability company that files a Texas Franchise Tax Report. Use additional sheets for Sections A, B, and C, if necessary. The information will be available for public inspection.

I declare that the information in this document and any attachments is true and correct to the best of my knowledge and belief, as of the date below, and that a copy of this report has been mailed to each person named in this report who is an officer, director or manager and who is not currently employed by this, or a related, corporation or limited liability company.

Sign here: George Bracken Title: Electronic Date: 08-06-2015 Area code and phone number: (954) 581 - 0260

Source: Texas Secretary of State Filings - <http://www.sos.state.tx.us/Corp/sosda/index.shtml>

Given that the apparent gift to Madden was not reflected in SEC filings, we suspect that the CEO may have been compensating employees and possibly related parties via undisclosed share gifts that would be more appropriately recognized as compensation or operating expenses. We further infer that Caporella is using the layered ownership structure to alleviate himself of reporting requirements.

There is another possibility as well. If Caporella is giving stock gifts to employees without reporting it, what is to say he is not compensating distributors or suppliers with similar gifts, removing expenses off of the Company’s books and presenting a materially false picture of the Company’s ownership structure and profitability to investors?

FALSIFYING DOCUMENTS AND “FUDGING” FACTS

In uncovering the corrupt history tracing back to the Burnup days, evidence of earnings manipulation and the presence of undisclosed related parties, we have also found instances where FIZZ’s counsel or employees apparently falsified facts or documents in litigation. In our opinion, these examples illustrate management’s complete disregard for the truth and lack of respect for the integrity of the court system.

1) David Boden and Scott Rothstein

The Ponzi Scheme cases of David Boden, former [general counsel](#) for FIZZ, and Scott Rothstein, former outside counsel, highlights the extremely unethical and criminal people that worked for the Company. If you are unfamiliar with these men, Rothstein and Boden together perpetrated a \$1.2 Billion Ponzi Scheme in South Florida between 2005 and 2009.²⁷

Rothstein is currently serving a 50-year prison sentence and Boden an 18-month prison sentence, handed down in 2015.

Boden is very closely tied to the history of FIZZ; he held the position of Secretary on CMA’s oldest filings with the state of Florida and has at times held power of attorney for FIZZ.²⁸ Boden even represented FIZZ while actively involved in the Ponzi scheme that began in 2005.



**NATIONAL BEVERAGE CORP.
PROXY FOR ANNUAL MEETING OF SHAREHOLDERS —
SEPTEMBER 29, 2006
SOLICITED BY THE BOARD OF DIRECTORS OF THE COMPANY**

The undersigned hereby constitutes and appoints David J. Boden and Dean A. McCoy, and each of them, with full power of substitution, attorneys and proxies to represent and to vote all of the shares of Common Stock which the undersigned would be entitled to vote, with all powers the undersigned would possess if personally present, at the Annual Meeting of the Shareholders of NATIONAL BEVERAGE CORP. to be held at the Hyatt Regency Orlando International Airport, 9300 Airport Boulevard, Orlando, Florida 32827 on September 29, 2006 at 2:00 pm local time and at any adjournments or postponements thereof, on all matters coming before said meeting in the manner set forth below:

Source: [FIZZ 2006 Proxy Statement](#)

I, the undersigned David J. Boden, do hereby certify
that this Resolution of the Board of Directors of Corporate Management Advisors, Inc.
a corporation duly organized and existing under the laws of the State of Delaware
was duly adopted on March 17, 2000.

Resolved, that Corporate Management Advisors, Inc., organized
and existing in the State of Delaware, hereby adopts the
name CMA OF DELAWARE, INC. for use in Florida.

Dated: 3/17/00


Signature of at least one director

Source: CMA 1999 Filing with Florida

²⁷ <http://www.forbes.com/sites/jordanmaglich/2014/10/31/on-fifth-anniversary-of-rothsteins-1-2-billion-ponzi-scheme-questions-remain/#622d096a570f>

²⁸ <http://search.sunbiz.org/Inquiry/CorporationSearch/ConvertTiffToPDF?storagePath=COR%5C2000%5C0418%5C60197826.TIF&documentNumber=F00000002080>

In Rothstein's deposition transcripts,²⁹ which are thousands of pages in length, we have found explicit ties between Rothstein, Boden and Caporella. The two criminals met through their work together on a FIZZ case. Moreover, working for FIZZ was the first time the two would break the law together, according to Rothstein.

After he had already agreed to [cooperate](#) with law enforcement, Rothstein testified that he and Boden "fudged facts to aid Mr. Caporella" in litigation against Broward county and assisted with certain "campaign issues."

8 Q How did you meet David Boden?

9 A I met him -- he was the general counsel
10 for a client of mine, National Beverage.

11 Q And I assume that means that you did work
12 with him?

13 A Yes. I represented Nick Caporella and
14 National Beverage, and I met David Boden that way.

15 Q Approximately, what year?

16 A You'd have to go back and look at that.
17 It was litigation against Broward County, and I
18 don't remember the year.

~~~~~

8 Q Okay. Was the sub-Ponzi scheme Boden's  
9 first involvement in illegal activity with you, when  
10 he joined the firm?

11 A No.

12 Q What did he do before that?

13 A There were certain parts of the National  
14 Beverage litigation that we had talked about where  
15 we were, I would say, fudging facts to aid  
16 Mr. Caporella.

17 And then there was something else that he  
18 was involved in.

19 THE WITNESS: Mr. Lavecchio, can I get  
20 into that?

21 MR. LAVECCHIO: Can I have one moment?

22 MR. LICHTMAN: Yes.

23 A And he, also -- on the legal side, he  
24 assisted us with certain campaign issues.

Source: [Deposition](#) of Scott W. Rothstein taken December 23, 2011 Volume I – p.10, p. 13

<sup>29</sup> <https://www.scribd.com/document/77039302/2011-12-23-Rothstein-Scott-AM>

1 BY MR. LICHTMAN:  
2 Q Campaign contributions?  
3 A Various types of campaign issues.  
4 Q Okay. With respect to the National  
5 Beverage litigation, are you saying that he  
6 knowingly fudged facts or allowed facts that were  
7 untrue to be used in connection with that  
8 litigation?  
9 A Yes.  
10 Q So we can go to the record and find what  
11 those could possibly be?  
12 A If you give me the record, I could  
13 probably, more than likely, than not, point out for  
14 you what was created by him and I or what was not.

Source: [Deposition](#) of Scott W. Rothstein taken December 23, 2011 Volume I – p.14

Rothstein is a convicted criminal, scumbag and fraud, but we see very little incentive for him to lie about his previous work for FIZZ, considering it was not in the ambit of the government's investigation and he already agreed to cooperate with the government. So we believe it is credible when Rothstein admitted under oath that he and Boden "knowingly fudged facts or allowed facts that were untrue to be used in connection" with a case for the benefit of Caporella and FIZZ.

That David Boden, FIZZ's former general counsel and one of its longest serving advisors, was allegedly "fudging facts" for Caporella and running a Ponzi Scheme should tell investors a lot about the ethical standards of FIZZ's core group.

## 2) The Fabricated Retention Letter?

In addition to the Boden & Rothstein case, we believe that FIZZ's management fabricated another document in the Mursten case. During discovery of the first litigation (Mursten dismissed and refiled his claim), Caporella produced a letter supposedly sent by CMA to Mursten's consulting company, Cornam Corporation ("[Cornam](#)"). The Cornam letter purported to show the terms of an agreement reached between Caporella and Mursten in July 2010, specifically with regard to Mursten's fees on the Asahi deal.

In addition, George Bracken and Linda Crawford, FIZZ's HR Director, both signed sworn affidavits that this putative retention letter slash employment agreement was real. These affidavits are included in the appendix.

Corporate Management Advisors, Inc.  
8100 SW Tenth Street  
Suite 4000  
Fort Lauderdale, Florida 33324  
Tel: 954/581-0260  
Fax: 954/475-8780

July 15, 2010

Cornam Corporation  
Attn: David B. Mursten  
311 East Park Avenue  
Tallahassee, FL 32301

Re: Research & Consulting Services

Dear David,

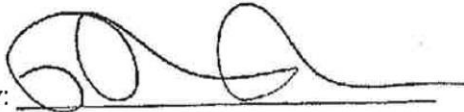
This letter will confirm our telephone conversation regarding the performance of research and consulting services by your firm, Cornam Corporation, for a confidential and significant business transaction under review by Corporate Management Advisors, Inc. ("CMA"). As discussed, the research and consulting services your firm will perform includes advising on cultural issues of an international nature; profiling foreign and domestic legal advisors and investment bankers; providing special assistance in enabling international communications; and other related matters.

Due to the sensitive and confidential nature of this research, please carefully manage access to the information you will provide. Although the facts you will gather will be of a public nature, the creation of these reports will create confidential information which may only be disclosed to CMA. CMA will instruct you on the media by which to communicate periodic reports, which may include personal presentations, written reports or telephone conferences.

Please begin this assignment as soon as possible and have it completed no later than November 30, 2010. Your firm has agreed to perform this project at a rate of \$250 per hour, with the understanding that the total consulting fee will not exceed \$27,500 (plus ordinary and necessary expenses), to be paid at the conclusion of the project.

Sincerely,

Corporate Management Advisors, Inc.

By: 



Unfortunately for Bracken and Crawford, the retention letter was dated July 15, 2010, but Cornam was not formed until January 21, 2011.<sup>30</sup>

**Florida Profit Corporation**

CORNAM CORPORATION

**Filing Information**

|                        |              |
|------------------------|--------------|
| <b>Document Number</b> | P11000007167 |
| <b>FEI/EIN Number</b>  | APPLIED FOR  |
| <b>Date Filed</b>      | 01/21/2011   |
| <b>Effective Date</b>  | 01/15/2011   |

Source: Florida Sunbiz records

Mursten accused Caporella, Bracken and Crawford of fabricating the letter. The evidence certainly seems to support this reading. The letter produced by Caporella's team and sworn to by two of FIZZ's executives pre-dates the formation of Cornam, indicating that the letter was simply a back-dated fabrication. In addition, Caporella admits that his first payment to Mursten went to another consulting company, Integrated Research, in December 2010. It was only in January 2011 that CMA paid Mursten through Cornam, after Florida records indicate that Cornam was registered.<sup>31</sup> This was well after the letter was supposedly sent to Cornam.

Given the testimony that FIZZ's former general counsel David Boden fudged facts in a previous FIZZ case, it certainly seems plausible that certain underlings tried again.

There is more evidence. Mursten had to re-file his case to fix jurisdictional issues, and the seemingly bogus "letter" mysteriously disappeared during the second round of discovery and was not produced again by Caporella.

Mursten's legal team highlighted the failure to produce this seemingly critical document in the second round of discovery, bolstering their contention that the letter was an outright fabrication and an attempt at fraud on the court.

11. The cited affidavits are false and the Cornam letter is a back-dated fabrication. In the text of the Cornam letter are included some of the tasks I would ultimately perform for Caporella with respect to the Japanese transaction, supposedly to be performed for a maximum of \$27,500. There was no such discussion with Bracken at any time; no telephone calls of the sort imagined in the fabricated letter; the Cornam letter is simply fabricated out of whole cloth. I had no knowledge of the proposed acquisition transaction as of July 15, 2010. Further, Cornam Corporation was not even in existence as an active corporation at the time (having been dissolved more than seventeen years earlier, in 1992); it had no bank account; and I would not have used its name for a consulting agreement with CMA. I never reported to Bracken with respect to any efforts with respect to the Japanese transaction, and Bracken would never (as he testified) enter into an agreement with me without the approval of Nick Caporella.

*Mursten affidavit. David B. Mursten vs. Nick A. Caporella Case 0:14-cv-60014-JIC Document 122-1 pages 5-6*

<sup>30</sup><http://search.sunbiz.org/Inquiry/CorporationSearch/SearchResultDetail?inquirytype=EntityName&directionType=Initial&searchNameOrder=CORNAM%20P110000071670&aggregateId=domp-p11000007167-b7c4e881-6cfe-4541-9385-1a273b0a233f&searchTerm=cornam%20corporation&listNameOrder=CORNAM%20G177910>

<sup>31</sup> Caporella Motion for Summary Judgment, Mursten v Caporella, C: 14-CIV-600014, p. 5-6.

The following excerpt from the court transcript also provides a good summary of the allegations.

4           Now, in the depositions in this case there is really a  
5 compelling record that this is nothing other than a fraudulent  
6 and back-dated document that was attempted as a fraud on the  
7 court, and I do not say that lightly Your Honor.

8           Linda Crawford, who signed an affidavit in 2013 that  
9 said she participated in negotiating the agreement, when I  
10 deposed her, she said that did not happen, and moreover she  
11 denied even signing the affidavit, notwithstanding that it was  
12 notarized by an employee within her office.

13           The defendant Nick Caporella denied knowing anything  
14 about the Cornam agreement, and George Bracken, who did sign  
15 it, so he did say he had signed it, but he couldn't explain  
16 anything about it.

17           He couldn't say what was discussed. He couldn't say  
18 who approved it. He couldn't say why the document was not  
19 found.

20           So essentially, you know, and if you look at the  
21 document, Your Honor, there is many, many indications of fraud.

*Court transcript, Mursten lawyer speaking. David B. Mursten vs. Nick A. Caporella Case 0:14-cv-60014-JIC Document 136, p.17*

For their part, Caporella's attorneys denied any such fabrication and argued that the letter was immaterial. Investors are free to decide for themselves if Caporella's cronies forged a back dated letter, but we think the evidence supports this conclusion.

## OTHER RED FLAGS

Two other red flags are worth noting, both by investors and by government agencies with subpoena power of FIZZ's books and records. The first is a bizarre, mysterious and (in our view) abusive financing in January 2013. The second are allegations that Caporella and FIZZ violated campaign finance laws by reimbursing employee donations to political candidates.

### 1) 8100 Partners and the Unexplained Series D Financing

In February 2011, as the potential Asahi acquisition was beginning to derail, FIZZ paid a special dividend of \$106.3 million. As a 74% owner of the Company, Caporella got a good chunk of these funds.

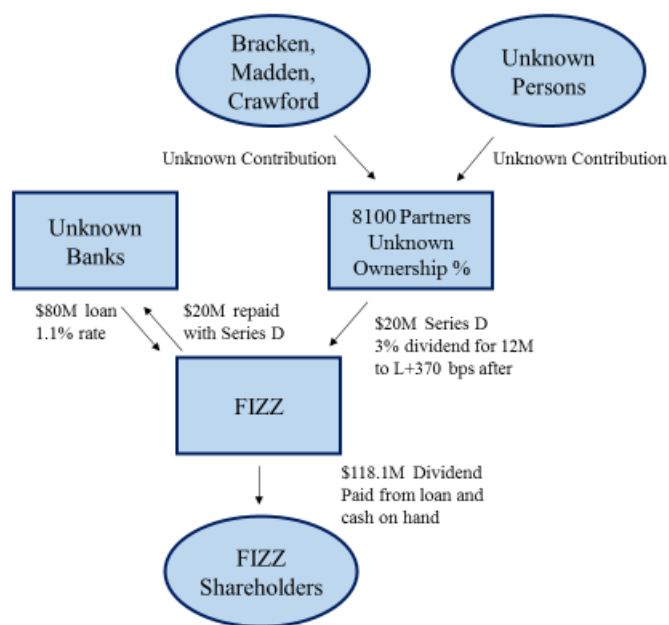
On December 27, 2012, a few weeks after Mursten sued Caporella, FIZZ paid a special dividend of \$118.1 million by raising ~\$80 million in debt from unnamed banks with a weighted average interest rate of 1.1%.

On January 25, 2013, FIZZ conducted a \$20 million Series D round of financing, issuing 400,000 preferred shares that accrued a 3% dividend for 12 months and paid interest at 370 bps above the 3-month LIBOR thereafter, rates significantly higher than FIZZ's existing debt.

It was opaquely described in the accompanying 8-K, which we have included in the appendix, as "a private placement with a Management Group that includes a trust previously established by" Caporella.

Only in the subsequent 10-Q did investors discover that FIZZ used the \$20 million to re-pay part of the lower cost debt borrowed under its credit facility.<sup>32</sup>

This transaction makes little financial sense. Why would the Company repay cheap debt using the proceeds of high interest financing raised from its management team? This transaction seems obviously detrimental to shareholder interests while unjustly enriching insiders.



*Graphic representation of the transactions which occurred between October 2012 and February 2013*

<sup>32</sup> FIZZ, 2013 Q-3 10-Q, p. 10 "the net proceeds of \$19.7 million were used to repay borrowings under the credit facilities." The Company 10-Q states that it borrowed \$60 million on the credit facility for the quarter, so we calculate that if \$20 million in proceeds from the preferred shares were used to repay credit facility debt, the original amount of borrowings before such repayment was \$80 million.

The \$20 million was raised from an entity known as 8100 Partners (FIZZ's address is 8100 SW 10TH St., Plantation, FL) which has FIZZ's CFO, George Bracken, as well as Linda Crawford listed in the corporate records.<sup>33</sup> From deposition testimony we learnt that Margaret Madden also holds an interest in 8100 Partners but that neither Nick nor Joseph Caporella is included in the management group.<sup>34</sup>

Suspiciously, in deposition testimony, George Bracken, through his lawyer, refused to answer a single question about the transaction, including regarding who funded it. Presumably if the management group funded the \$20 million, this would be a rather easy question to answer.

4 Q (By Mr. Crockett) All right. The form AK  
5 that is Exhibit 57 indicates that 400,000 shares of  
6 preferred stock were given to the 81 Partners, LLC in  
7 exchange for \$20 million; is that correct?  
8 A Yes, it was sold for 20 million.  
9 Q Did that happen?  
10 A Yes, it happened.  
11 Q Who paid the \$20 million?  
12 MR. CAMPBELL: I think that would be  
13 confidential as well, so don't answer it.  
14 MR. CROCKETT: So you're directing him not  
15 to answer.  
16 MR. CAMPBELL: Yes. I mean, the document  
17 speaks for itself. It has nothing to do with  
18 this case in the least bit.  
19 Q (By Mr. Crockett) Did you pay personally for  
20 any of the preferred stock or was it paid on your  
21 behalf?  
22 MR. CAMPBELL: Don't answer.  
23 Q (By Mr. Crockett) Who are the members of the  
24 management group which benefited from the issuance of  
25 8100 Partners stock?

1 MR. CAMPBELL: Don't answer.  
2 Q (By Mr. Crockett) What was the business  
3 purpose for the issuance of this stock from NBC's  
4 point of view?  
5 MR. CAMPBELL: Don't answer it.  
6 MR. CROCKETT: You're directing him not to  
7 answer?  
8 MR. CAMPBELL: Yes. I mean, he's not NBC.  
9 MR. CROCKETT: He's only the CFO, Mr.  
10 Campbell.

David B. Mursten vs. Nick A. Caporella Case 0:14-cv-60014-JIC Document 113-1 p.7-8

3 Q (By Mr. Crockett) "It closed a private  
4 placement with the management group", right? Do you  
5 see that?  
6 A Okay.  
7 Q And you're included in the management group,  
8 correct?  
9 A Yes.  
10 Q Nick Caporella is not included in the  
11 management group, correct?  
12 A Correct.  
13 Q And Joe Caporella is not included in the  
14 management group, correct? He said that in his  
15 deposition.  
16 MR. CAMPBELL: If this is confidential  
17 information, I'm going to instruct him not to  
18 answer.  
19 MR. CROCKETT: That's fine. So I -- we  
20 can't find out who is in the management group.  
21 MR. CAMPBELL: I think it's confidential.

David B. Mursten vs. Nick A. Caporella Case 0:14-cv-60014-JIC Document 113-1 p.11

<sup>33</sup> <http://search.sunbiz.org/Inquiry/CorporationSearch/SearchResultDetail?inquirytype=EntityName&directionType=Initial&searchNameOrder=8100PARTNERS%20L130000115290&aggregateId=flal-113000011529-47a0e1c4-fee2-4ea7-a206-ab9337448362&searchTerm=8100%20Partners&listNameOrder=8100PARTNERS%20L130000115290>

<sup>34</sup> Mursten vs. Caporella Case 0:14-cv-60014-JIC Document 113-2

Through her lawyers, Margaret Madden similarly chose to not answer any questions related to 8100 Partners.

| Deposition of Margaret Madden |                                                   | David B. Mursten vs. Nick A. Caporella |                                                       |
|-------------------------------|---------------------------------------------------|----------------------------------------|-------------------------------------------------------|
| 16                            | Q (By Mr. Crockett) Okay. Do you have any         | 1                                      | relating to the transaction, what you paid, what you  |
| 17                            | interest in the LLC 8100 Partners?                | 2                                      | received, what your interest is, you know, you can do |
| 18                            | A Yes, sir.                                       | 3                                      | that, and that will just --                           |
| 19                            | Q What is your percent interest?                  | 4                                      | A Yes, I would like to do that.                       |
| 20                            | MR. CAMPBELL: Again, this is a question           | 5                                      | MR. CROCKETT: I don't agree with you, but             |
| 21                            | of right of privacy. If you want you can          | 6                                      | understand I'm going to accept it for today;          |
| 22                            | answer it, but if not you can assert right of     | 7                                      | and as they say correctly, the court will             |
| 23                            | privacy.                                          | 8                                      | decided.                                              |
| 24                            | Q (By Mr. Crockett) If you want, if you're        | 9                                      | Okay. So this is a good time for a break              |
| 25                            | going to assert right or privacy on all questions | 10                                     | for lunch.                                            |

David B. Mursten vs. Nick A. Caporella Case 0:14-cv-60014-JIC Document 113-2 p.10-11

In a subsequent response motion, Caporella's lawyers admitted that Caporella paid Bracken and Madden "compensation in various forms"<sup>35</sup> and said that this is "unremarkable."

embarrass the Defendant. What Plaintiff seeks to establish is the unremarkable fact that George Bracken and Margaret Madden receive compensation in varying forms from their employer(s)-non-parties NBC and CMA based, in part, on their extraordinarily long length of service. This is unnecessary, as there is no dispute that these witnesses receive compensation from their employers. If this Court were to accept Plaintiff's argument that every detail of an employee's

Caporella response. David B. Mursten vs. Nick A. Caporella Case 0:14-cv-60014-JIC Document 119, p. 2

It seems unfeasible that these management members could have funded the financing given their compensation. Bracken, the highest paid member of the group, had pre-tax total compensation of \$2.3 million in the 6 years leading up to the preferred stock issuance. After taxes and normal annual expenses, how did Bracken and a couple colleagues come up with \$20 million to lend the Company at a high interest rate?

#### Total Compensation - George Bracken from FIZZ Proxy

| Figures are in US\$ | FY 2008 | FY 2009 | FY 2010 | FY 2011 | FY 2012 | FY 2013 | Total     |
|---------------------|---------|---------|---------|---------|---------|---------|-----------|
| George R. Bracken   | 284,285 | 304,250 | 306,995 | 325,400 | 351,400 | 626,320 | 2,198,650 |

Source: FIZZ Proxy Statements

Mursten's lawyers argued that the financing was an incentive to key executives to ensure their loyalty, but we have no view on the credibility of those accusations.

It is likely something much simpler. Our sense is that the 8100 Partners financing is an example of more off-the-books compensation to the Company's executives. We believe National Beverage should fully explain the logic of this transaction, the beneficiaries of 8100 Partners as well as the source of the original financing.

This episode also presents an ideal use of subpoena power. The Company has kept investors in the dark regarding this transaction. But it is indisputable that the Company repaid cheap debt with expensive financing sourced from a group of FIZZ executives who, based on their reported compensation, should not have had the liquid cash to fund such a vehicle. This transaction was clearly not in the best interests of FIZZ or its shareholders, yet benefited at least the three executives that have been with Caporella for decades and that are associated with a number of other mysterious unaffiliated entities.

Because the Series D has now been repaid in full, shareholders have the right to know how management benefitted from this and why the Company used such expensive financing to repay cheap borrowings from its credit facility.

<sup>35</sup> Mursten vs. Caporella Case 0:14-cv-60014-JIC Document 119

## 2) Campaign Finance

Mursten's complaint raised the issue that FIZZ and Caporella may have violated campaign finance laws and that FIZZ's previous attorney, convicted criminal David Boden, was concerned about the conduct.

56. During the course of this conversation, Caporella also revealed a scheme he created to enable selected individuals to intercept selling-shareholders' dividends.

Finally, Caporella even disclosed that his prior General Counsel (David Boden) had raised concerns about campaign fundraising tactics used by Caporella. Caporella was getting contributions in the form of personal checks payable to the campaign of two thousand dollars each from National Beverage and CMA employees and then reimbursing the employees for "their" campaign contributions.

*Initial [complaint](#), David B. Mursten vs. Nick A. Caporella Case 0:12-cv-62474- Document 1*

Scott Rothstein, the Ponzi scheme mastermind, also alluded to campaign issues under oath when discussing David Boden's involvement with past illegal activities.

|    |                                                      |
|----|------------------------------------------------------|
| 8  | <b>Q</b> Okay. Was the sub-Ponzi scheme Boden's      |
| 9  | first involvement in illegal activity with you, when |
| 10 | he joined the firm?                                  |
| 11 | A No.                                                |
| 12 | <b>Q</b> What did he do before that?                 |
| 13 | A There were certain parts of the National           |
| 14 | Beverage litigation that we had talked about where   |
| 15 | we were, I would say, fudging facts to aid           |
| 16 | Mr. Caporella.                                       |
| 17 | And then there was something else that he            |
| 18 | was involved in.                                     |
| 19 | THE WITNESS: Mr. Lavecchio, can I get                |
| 20 | into that?                                           |
| 21 | MR. LAVECCHIO: Can I have one moment?                |
| 22 | MR. LICHTMAN: Yes.                                   |
| 23 | A And he, also -- on the legal side, he              |
| 24 | assisted us with certain campaign issues.            |

1 BY MR. LICHTMAN:

2 Q Campaign contributions?

3 A Various types of campaign issues.

4 Q Okay. With respect to the National  
5 Beverage litigation, are you saying that he  
6 knowingly fudged facts or allowed facts that were  
7 untrue to be used in connection with that  
8 litigation?

9 A Yes.

10 Q So we can go to the record and find what  
11 those could possibly be?

12 A If you give me the record, I could  
13 probably, more than likely, than not, point out for  
14 you what was created by him and I or what was not.

*[Deposition](#) of Scott W. Rothstein taken December 23, 2011 Volume I – p.13-14*

Campaign finance laws are byzantine, but we believe the issue could be the prohibition against so-called conduit contributions. The Federal Election Campaign Act (FECA) broadly prohibits corporations from directing employees to make campaign contributions and then reimbursing them for the expense. Both the Federal Election Commission and the Justice Department have prosecuted companies and individuals for civil and criminal violations of this provision.<sup>36</sup>

Mursten alleged that Caporella directed CMA and FIZZ employees to make donations to political campaigns and then reimbursed them for their “personal” contributions. We are no experts in election law, but if true, this seems like a violation of the conduit prohibition in campaign laws. At least two separate sources flagged campaign financing issues with respect to the Company, so we categorize it as another significant red flag.

<sup>36</sup> Election law is in a state of uncertainty following the Supreme Court’s *Citizens United* decision, but there is a consensus that laws and prohibitions against conduit contributions by corporations remain in place. <http://www.nationallawjournal.com/id=1202753889461/Time-to-Brush-Up-on-Campaign-Finance-Laws?slreturn=20160822113150>

### 3) Shareholder Financed Private Jet

Mursten also alleged in his initial complaint that Vincent Caporella, another son of Nick's, falsified aircraft maintenance logs for the corporate Falcon 2000-EX jet at Nick's request. There is not much evidence either way to support these allegations, but we have included a picture of the jet below for reference and bet a number of shareholders didn't even realize that they paid for such a thrifty form of transportation. The fixed costs (including maintenance) for Falcon 2000 [average](#) ~\$750,000 a year. The Company plane even has a tail number of "N1NC," presumably in honor of their #1 CEO Nick Caporella (NC).



*Paid for by Shareholders: Caporella's Corporate Jet*

FIZZ asserted to the SEC that the plane has never been used for personal reasons.<sup>37</sup> Photos posted [online](#) by jet aficionados indicate more than one visit to Geneva, Switzerland, as well as a stop in Amsterdam. Moreover, Mursten alleged that they took N1NC to Mexico. We do not believe that FIZZ sells many cans of LaCroix or its other brands internationally, so perhaps the government will be interested in inquiring as to the bona fide business purpose of these trips.

Related to the plane, another undisclosed Caporella entity shows up. Caporella, Bracken and Madden are all officers of Broad River Aviation,<sup>38</sup> the entity we have discovered through which CMA owns 20% of the jet and FIZZ owns 80%.<sup>39</sup> Another layered, off the books transaction.

<sup>37</sup> March 15, 2011 SEC Correspondence. <https://www.sec.gov/Archives/edgar/data/69891/000143774911001558/filename1.htm>

<sup>38</sup> <http://search.sunbiz.org/Inquiry/CorporationSearch/SearchResultDetail?inquirytype=OfficerRegisteredAgentName&directionType=Initial&searchNameOrder=MADDENMARGIE%20F990000026183&aggregateId=forp-f99000002618-faf0eeb5-7e2d-4b23-b405-c64b46af241c&searchTerm=MADDEN%20MARGIE&listNameOrder=MADDENMARGIE%208513193>

<sup>39</sup> FIZZ 2015 Proxy p.18 - [https://www.sec.gov/Archives/edgar/data/69891/000143774915016654/fizz20150826\\_def14a.htm](https://www.sec.gov/Archives/edgar/data/69891/000143774915016654/fizz20150826_def14a.htm)

## VALUATION

FIZZ's reported financial performance is inexplicable. It sells regional brand sodas and carbonated beverages for a ~40% ASP discount compared to its peers, and as a result struggles with gross margins ~40% below its comps. Yet it reports comparatively amazing operating leverage, despite its smaller size and weaker brands. Suspicious details abound. Despite sales increasing 36% from 2006-2016, its reported advertising and shipping costs have not changed. Indeed, FIZZ's reported SG&A has remained almost flat since 2006. Has FIZZ so revolutionized the beverage business so that variable costs such as shipping and marketing are uncorrelated with rising sales? How could FIZZ report greater operating leverage than larger peers like Coca-Cola or Pepsi, who should benefit from economies of scale and greater brand capital?

We believe that the answer, based on our analysis of the evidence discussed in this report, is that FIZZ manipulates its reported earnings.

Mursten, a former attorney and trusted advisor of the CEO, as a lawyer, alleged in a federal complaint that CEO Nick Caporella admitted to him that he manipulated earnings using a "little jewel box" and by creating fake invoices. He declared under oath and under penalty of perjury that he believed that Caporella's alleged use of the "little jewel box" was illegal. We believe that this insider account is credible, given Mursten's status as an attorney, his history with the Company, and his close relationship with the CEO.

Other evidence corroborates his allegations. Letters produced in discovery indicate that Caporella refused to allow Asahi, a potential acquirer, to conduct adequate due diligence of the Company. The CEO even admits that Asahi's lawyers either stated or insinuated that his fear of due diligence indicated he was hiding something.

FIZZ's very operating structure presents an ideal opportunity for earnings manipulation. FIZZ outsources legal, accounting and audit functions to CMA, a private company under the control of insiders. FIZZ's CEO and CFO are not even paid by the Company. There are also a number of other suspicious entities which are never disclosed as subsidiaries in SEC filings but which are registered or apparently controlled by FIZZ's executives. The purpose and function of these entities is unclear, although such arrangements present an ideal opportunity to hide costs, inflate sales and otherwise manipulate earnings.

The credibility of FIZZ's management team is less than zero. In one instance, FIZZ's former lawyer admitted to "fudging facts" in a litigation on behalf of the Company. The Company's former general counsel (Boden) and outside counsel (Rothstein) were convicted in a Ponzi scheme. Unpacking the Burnup days in the 70s and 80s also shows a dark history of corruption.

This does not even touch on the unrecorded stock gifts, the murky ownership structure, the allegations regarding campaign finance contributions, and the questionable equity issuance that further undermine our confidence in the integrity of the management team and the Company's financial statements.

The situation reminds us of Valeant: how do you value a Company when you believe that the management team manipulates reported financials but that nonetheless possesses some decent assets? In this case, that means valuing LaCroix. In July 2014, an acquirer [purchased a 25% stake in the parent company of Vita Coco](#), the top-selling coconut water brand in the U.S., at a valuation of 2.2x sales. This may be an overly generous comparison to LaCroix, because coconut water is a premium-priced, high-margin beverage, but we believe it represents the top end of the brands valuation.

The rest of FIZZ's business is labored with slumping and unhealthy regional brands. Analysts estimate that sales from FIZZ's non-LaCroix beverages are declining. Therefore, we assign a 0.5x sales multiple to FIZZ's non-LaCroix business, the same [multiple](#) used for the purchase of branded juice maker American Beverage by [Harvest Hill](#) in March 2015.

A sum of the parts yields a Glaucus valuation of \$16.15 per share.

**FIZZ GRG Valuation Estimate***Figures are in \$mm*

|                                                   | Valuation          |
|---------------------------------------------------|--------------------|
| <b>FIZZ Reported Net Sales (TTM ending 1Q'17)</b> | <b>\$ 736.50</b>   |
| <i>EV/Sales Acquisition Multiples</i>             |                    |
| LaCroix Sales Estimate - 51% of Total             | \$ 375.62          |
| Vita-Coco - Comp to LaCroix                       | 2.2x               |
| <b>Implied LaCroix Valuation</b>                  | <b>\$ 826.35</b>   |
|                                                   |                    |
| Non-LaCroix Sales Estimate - 49% of Total         | \$ 360.89          |
| American Beverage - Comp to non-LaCroix           | 0.5x               |
| <b>Implied Non-LaCroix Valuation</b>              | <b>\$ 180.44</b>   |
| <b>Total Valuation</b>                            | <b>\$ 1,006.80</b> |
|                                                   |                    |
| <b>Corruption Discount</b>                        | <b>25 %</b>        |
| <b>Corruption Discounted Valuation</b>            | <b>\$ 755.10</b>   |
|                                                   |                    |
| Shares Outstanding (mm)                           | 46.767             |
| <b>FIZZ Value per Share</b>                       | <b>\$ 16.15</b>    |
|                                                   |                    |
| Current Price (as of 9/27/2016)                   | \$ 46.48           |
| <b>Downside</b>                                   | <b>-65%</b>        |

Applying a 25% corruption discount to our valuation is also conservative. We believe that the evidence presented in this report warrants the full exercise of the government's subpoena power, and that the SEC and other agencies should investigate the Company's practices. This would put further downward pressure on FIZZ's shares.



APPENDIX**Letters to Asahi from Nick Caporella<sup>40</sup>**

First Letter on January 22, 2011:

**Jan. 22, 201**  
**N.A. Caporella**  
**CONFIDENTIAL**

On Oct 18, 2011 you sent me a letter in which you shared 'feelings'. . . and because of it, our companies are on course - to reignite the momentum, that will propel [REDACTED] towards it's Global destiny. Below, an excellent paragraph from that letter:

" I regret if the distance of space and time has muted my voice and betrayed my sincere feelings and passion. As my sempai, please show us the way forward. This has been a long journey for the both of us and I too sincerely hope that we have not come to the end of the road. We have a saying in Japan that "hard work and suffering are the seeds of happiness"

(苦は楽の種) and I have faith that this wisdom will prove true in the context of our efforts to achieve a successful outcome. There is nothing that I would like to see more than for our two families to unite in a historic transaction that we could both celebrate and be proud of for many healthy years to come."

I accepted your invitation to be the Senpai. You had the faith in me - to ask my guidance and leadership that got us here . . . Do not doubt it at the Finish line!

---

<sup>40</sup> Case 0:14-cv-60014-JIC Document 129-2.

One cannot engage in a 'transformation, relative to the future, on the basis of theory - there must be sound business judgement and profoundness - utilized to plot the course.

Consultants and Lawyers are not in business to promote tomorrow's growth opportunities by - risking today's investment for the future. They provide 'theory based risk' assessment, paid by hourly rates or fees that they collect - now.

Usually they are far away on another case when tomorrow's reality - smacks the bottom line.

Tell me [REDACTED] . . . can you predict growth and profits - by some sort of theory?

One had better apply their experience and invest with calculated risk - plus the money and energy, or competition will take the related profits away for - themselves.

I want to meet you quickly and finalize the Go - NoGo decision. You may not have the necessary political backing to get [REDACTED] in the North American soft drink business - but you did say, "you were steering the boat to where the fish are. "

Your deck appears to be crowded with Consultants. No room for fishermen!

My Board is meeting Tuesday 25th - Wednesday 26th . . . I will update them and advise them we are ' holding ' until a meeting can take place between you and I.

Respectfully Yours,

Nick

2<sup>nd</sup> letter on April 4, 2011:

Dear [REDACTED]

We have come to a place where I must seek *your* counsel. As your Senpai, I see that you no longer have faith in me and this *hurts* too much; my honor demands that you grant me leave of that responsibility.

When you bestowed that honor upon me, I had no understanding of it. [REDACTED] and others explained the cultural significance! Impacted by your personal disclosure and relative to your responsibility for creating the Global Company that [REDACTED] committed to achieve, I sincerely accepted to help you.

Now, you allow misguided risk to frighten away your opportunistic destiny. Why? At a minimum you owe me debate on this issue! I led the way at your request and put myself and others in harms way for a cause you must no longer believe in. I owe them the same promise and *face-saving* that I have afforded you -- and *now*, my [REDACTED] friends leave me stranded -- alone! Not fair!!!

The priority that should be foremost on your mind is the ultimate success of your Alliance in North America, not the structure designed to comfort you. Because it is not fully understood by [REDACTED] . . . does not make it wrong. North America and its success, should be of profound significance to [REDACTED] destiny and if you desire a *guarantee* . . . you should be screaming out for this one. Absolutely!!

My whole being has focused on your achieving this masterful success. The mood and excitement of Team National should be of paramount interest to [REDACTED]. Having a court's detrimental opinion of how the Deal was done, negatively impacting [REDACTED]'s initial USA presence -- should be avoided. The consensus that [REDACTED] would be the same considerate partner that allowed for the Minority to opine -- when it wasn't legally required, would be very beneficial to [REDACTED] future distributor and retailer relationships. The significant trust and great PR that would follow the more acceptable transaction, was designed for [REDACTED] welfare (organically expansion and future acquisition-marketing benefits). Cultural variations may not allow for these issues . . . to be fully understood. Finally and selfishly, I wanted my reputation and dignity to pass onto an entity that my personal principles, warmly endorsed. All this encompasses -- my ingenuous intentions!!

██████████ could not possibly advise or care , as much as I  
--relative to the foregoing). But, ██████████ should care -- tremendously!!

██████████ has chosen to skew its values . . . the fundamental *KEY* to *ALL* of ██████████  
future (western hemisphere) markets, rests with its success in North America. This  
is my personal conviction, and I do place my life's reputation -- on it!!!

The ugly litigator, that harasses the intimate corporate family, whose only sin  
was to make our lovely company a *one-of-a-kind* . . . was not how I envisioned my  
final chapter -- as Founder, Chairman/CEO and Corporate Patriarch. If I could  
protect everyone, including ██████████, allowing only myself to bear in harms way -- then  
the chapter would be served, as I would have willed it. This *was*, more than . . .  
possible!

Contrite . . . Certainly,

3<sup>rd</sup> letter on April 8, 2011:

April 8, 2011

**Champions – Practice like *Champions*, but Play like . . . *Olympians*!!**

The [REDACTED]

As time will often allow . . . passion is eroding and soon, what we desired – will *only* be a memory. For me, well – when you approached my house and knocked on the door . . . I did not know you; my home was where I contently lived. For you, a gigantic difference – you were worried about a compelling *need* and, more importantly, my house is located where Champion soft drink companies practice. It's a very good thing to practice with the best; experts are created! Your timidity in years prior, where my home is located, resulted in embarrassing returns – for a number one product and a number one company, like yours.

Before [REDACTED] officially releases me as his and [REDACTED] friend, I am going to give you my opinions – as a businessman who was *once* respected enough to be called . . . Senpai!

First, let's get something out of the way, so *you* can read these comments without any preconceived prejudices . . . DON'T BUY MY HOME!!

Your goal to come into North America was, and is, a mandatory one. Your executive management's writings about competing in the global marketplace will be only words – if you do not. Converting to all forms of soft drinks is a mandatory thing to do in order to become a world class beverage company, but . . . and this is a BIG, BIG – but, the company *must* be set up and operated properly or there is too much focus on ALL, and not enough on each. Custom, taste, lifestyle and demographics affect sales dynamically – so a hard, set-in-concrete philosophy, like [REDACTED] will have to be modified, or confusion and failure will abound.

Acquisitions are very, very difficult; first to find (good ones) and, more importantly, to make them produce again and again, as they were doing before they were acquired. [REDACTED] must focus very hard here or failures will surely outnumber successes . . . certainly!! People like to do business with people they like. Making acquisitions successful is an art – of all the ones I completed, four failed and yet, for me, that was too many.

For [REDACTED] to become a world class beverage company (my humble opinion) and this is solely based on my firsthand experience . . . they have to undergo a hard transition – parting with some custom and tradition. In my case [REDACTED] handled themselves in a manner that downplayed *opportunity* and good business judgment – while over-valuing protocol and form. Provoking tender feelings –

When a company, any company, seeks expansion through acquired opportunity – the qualifications and judgment for *opportunity* are extremely more important than the opportunity itself. If one does not believe this – failure upon failure will occur. Track record is the only true barometer . . . if you are content with yours – great! Remember, having a successful record breeds confidence within, but, more importantly, it is a magnet for additional conquests – success is contagious. [REDACTED] has not exercised their potential in their relationship with me and lacked compatible opportunists on their team; engaging antagonists instead. This was *an extremely important marriage* – in the making. For Team National yes . . . should have been even more so – for [REDACTED]

Often, learning on the job, while maneuvering to successfully conclude an endeavor – unfortunately can result in catastrophe. We may have this condition.

Owners will *always* have a more urgent view as to resolution. Employees must, first and foremost, protect their jobs; owners must first protect their company!! When I was just a boy, I overheard my Grandfather express a view; “What comes first” – he was asked, “family or business?” Well, he said, “If it's a family business, it's *business* – because without it, there is NO family!!!”

NBC is a family business . . . [REDACTED] too – different family culturally, different values!

[REDACTED], we started this at a dinner in Miami, just an ordinary dinner. Nice. . . then it began to go off course (circumstances some called it) I never thought it was. I stated within this letter my views. If I were a major shareholder of [REDACTED], I would not be much of a man, notwithstanding my principles as an investor, if my comments did not include this:

██████ did not utilize prudent advice and must re-evaluate their courage and goals. Further, in the future when attempting to acquire a recipe that *MAY* taste as good as it *LOOKS* . . . experienced companies do not hire antagonists to harass the recipe's creator.

This practice is outlawed in acquiring companies . . . my *experience*, certainly!!

Thank you for the Honor of being your Senpai . . . I wish a bountiful future for the ██████ family.

Most Respectfully,

Nick-san

Champions, are born to be . . . *Olympians*, compete to be!

4<sup>th</sup> letter on April 13, 2011:

Dear Mr. [REDACTED]

I sent you on April 4th, an email asking your advice and my 'instincts' remind me – that no response to my question leaves me to think that I was right. It's important that I do not misinterpret this. Additionally, your advisors may try to guide your actions now, but the protocol that you and I have utilized *is* what it is. Pregnancy does not go away; sleeping in separate rooms today.

I *so* wish that you and your advisors could understand; legitimizing the pregnancy and giving respectability to the ceremony is mandatory, so later, everyone can walk – heads high with dignity. One would think that of all people . . . the traditional humility of your heritage would demand this.

No warm relationship cultivating has ever occurred sufficiently, to help create a wonderful trusting relationship . . . and the ridged cultural abstaining, in some of your business dealings with us, is very hard to adapt to. If you, [REDACTED] others heard the cruel remarks or read insinuations that I or my Board could do underhanded things or that something in my past (so terrible would come out during litigation) that's why I was being so sensitive about it.

The truth is, one of [REDACTED] *principals* was given to me to protect and I was attempting to do it. I am sure, you *all* would feel shamed by these things!! Recently, a comment was made by your advisors that my worry of how much diligence would occur, was due to us trying to hide something. Well, one can tell from that remark that extreme ignorance exists where that remark came from. You and your entire team should be profoundly concerned that the more time that you allow to pass the greater the risk that: 1. a leak will occur, or 2. the gap will reduce relative to the spread in our common stock value due to continuing performance. Normally, conventional wisdom and a far better relationship between us, would have lowered this risk to you. All of the correspondence between us acknowledged that I would help to lead the way, as you asked.

One extremely important part at the core of Team National's philosophy is – "*People like to do business with . . . People they like.*" Team National is quite confused as to ongoing use of this philosophy, should there be an Alliance.

A month ago, we wrote to each other relative to the tragedy that had occurred, we all were so very worried . . . we prayed for the safety of our [REDACTED] friends. I expressed to you that [REDACTED] marching on with our project was remarkable and your wonderful words expressing – strength was so very gracious. I put two key people on a special project obtaining bottled water (ours and others – closer) and was preparing to have it shipped to Japan. [REDACTED] suggested this may not be necessary. We are all mournful and saddened by the tragic events and wish we could do more than express with words and prayers.

[REDACTED] I have struggled hard to guide this Alliance to a bountiful resolution. Every action from me and my advisors is for the ultimate benefit – that a positively successful company is what [REDACTED] begins with, here in America. But, I sense that you have stranded me in my attempt to insure your success. Not that there is malice intended, but you can rely on false or extremely weak advice . . . I don't have that option, if my commitment to have us both travel the *High Road* is ultimately achieved! You don't know the soft drink industry here in America; you don't know the consumer and demographics, or the soul and spirit of Team National or how cruel the wrong kind of PR can be on a business here. I experienced the years in court, life threats, attempts to hurt my children and humiliation from the wars. I am trying to steer you in a great direction so you can avoid, Joe and Team National paying for your education. We should be working *together* in this effort . . . not having your advisors *test* my courage and experience. National Beverage is a one-of-a-kind and it's going to stay that way, if I have anything to do with it.

When I wrote to [REDACTED], it was to solicit insight, as to the man who was taking Asahi to the Global racetrack, and how he planned the course. Not to solicit help in negotiating anything; same with yourself. I am going to try your way, I have never had advisors do my bidding before – but maybe this time it will work. So with that said, I will allow, for the first time in nearly 52 years, for the advisors to respond to your letter of April 8, 2011.

I would like to close by asking your support for a high level meeting as soon as practical to finalize direction and your most honorable commitment for the remedy, relative to Paternity charge, we have been working hard to avert!!!

Respectfully,

## Series D Financing 8K



**NASDAQ: FIZZ**  
**For Immediate Release**  
**Contact: Office of the Chairman, Grace Keene**

**NATIONAL BEVERAGE CORP.**  
**CONTINUES**  
**SHAREHOLDER ACCRUEMENT**

FORT LAUDERDALE, FL, January 25, 2013 . . . National Beverage Corp. (NASDAQ:FIZZ) announced today that it closed a private placement with a Management Group that includes a trust previously established by its Chairman and Chief Executive Officer, Nick A. Caporella. National Beverage sold 400,000 shares of Special Series D Preferred Stock to the Management Group for an aggregate purchase price of \$20 million.

This sale is part of the program of shareholder enhancement that began with an announcement in November referencing a special dividend. A cash payment of \$2.55 per share was paid on December 27, 2012.

"The pledge to continuously enhance shareholder value is reflected by the Board's action today," stated Nick A. Caporella. "Our balance sheet strength entitles our shareholders to a class of credit and provides the Company opportunistic advantages in many ways, certainly one of which is shareholder comfort and security."

"Having a Management Group purchase this Special Preferred further enhances the alliance of management and shareholders. Who better knows the Company and the industry than those who have been part of National Beverage for many, many years? Most importantly, the cost and timeliness of this private placement aided the Company in its desire to have the January 26, 2013 balance sheet reflect the completion of this transaction. The Special Committee and the Board were assisted and advised by Houlihan Lokey Financial Advisors," concluded Caporella.

-more-



8100 SW Tenth Street  
 Suite 4000  
 Fort Lauderdale, Florida 33324

Phone: 877-NBC-FIZZ  
[www.nationalbeverage.com](http://www.nationalbeverage.com)

National Beverage Corp.  
 Page 2

National Beverage's iconic brands are the genuine essence . . . of America. Our company is highly innovative as a pace-setter in the changing soft-drink industry, featuring refreshment products that are geared toward the lifestyle/health-conscious consumer. Shasta® - Faygo® - Everfresh® and LaCroix® are aligned with Rip It® energy products to make National Beverage . . . America's Flavor•Favorite - soft-drink company.

*"Patriotism" - If Only We Could Bottle It!*

*Fun, Flavor and Vitality . . . the National Beverage Way*

This press release includes forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995. Such forward-looking statements involve known and unknown risks, uncertainties and other factors which may cause actual results, performance or achievements of the Company to be materially different from any future results, performance or achievements expressed or implied by such forward-looking statements. Such factors include fluctuations in costs, changes in consumer preferences and other items and risk factors described in the Company's Securities and Exchange Commission filings and the Company disclaims an obligation to update any such factors or to publicly announce the results of any revisions to any forward-looking statements contained herein to reflect future events or developments. The securities referenced in this private placement have not been registered under the Securities Act of 1933.



8100 SW Tenth Street  
 Suite 4000  
 Fort Lauderdale, Florida 33324

Phone: 877-NBC-FIZZ  
[www.nationalbeverage.com](http://www.nationalbeverage.com)

**Employment Agreement and Accompanying Affidavits which in our opinion, appear to be forged.<sup>41</sup>**

Corporate Management Advisors, Inc.  
8100 SW Tenth Street  
Suite 4000  
Fort Lauderdale, Florida 33324  
Tel: 954/581-0290  
Fax: 954/475-8780

July 15, 2010

Cornam Corporation  
Attn: David B. Mursten  
311 East Park Avenue  
Tallahassee, FL 32301

Re: Research & Consulting Services

Dear David,

This letter will confirm our telephone conversation regarding the performance of research and consulting services by your firm, Cornam Corporation, for a confidential and significant business transaction under review by Corporate Management Advisors, Inc. ("CMA"). As discussed, the research and consulting services your firm will perform includes advising on cultural issues of an international nature; profiling foreign and domestic legal advisors and investment bankers; providing special assistance in enabling international communications; and other related matters.

Due to the sensitive and confidential nature of this research, please carefully manage access to the information you will provide. Although the facts you will gather will be of a public nature, the creation of these reports will create confidential information which may only be disclosed to CMA. CMA will instruct you on the media by which to communicate periodic reports, which may include personal presentations, written reports or telephone conferences.

Please begin this assignment as soon as possible and have it completed no later than November 30, 2010. Your firm has agreed to perform this project at a rate of \$250 per hour, with the understanding that the total consulting fee will not exceed \$27,500 (plus ordinary and necessary expenses), to be paid at the conclusion of the project.

Sincerely,

Corporate Management Advisors, Inc.

By: 



<sup>41</sup> Case 0:14-cv-60014-JIC Document 122-8

AFFIDAVIT

STATE OF FLORIDA     )  
                                           ) SS  
 COUNTY OF BROWARD    )

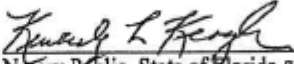
BEFORE ME, the undersigned authority, personally appeared Linda Crawford to me well known, who, after being duly sworn, deposes and states:

1. My name is Linda Crawford and I am over the age of eighteen (18), am otherwise *sui juris*, and am a resident of the State for Florida.
2. In my capacity as office manager/administrative officer of CMA, I assisted David Mursten and George Bracken, Senior Financial Officer of CMA, in the negotiation leading to the formal arrangement detailed in a letter dated July 15, 2010.
3. Mr. Mursten and I discussed in detail his performance and payment.

FURTHER AFFIANT SAYETH NAUGHT.

  
 LINDA CRAWFORD

SWORN TO AND SUBSCRIBED before me by Linda Crawford this 9 day of April, 2013, who is personally known to me, or who has produced the following identification: \_\_\_\_\_

  
 Notary Public, State of Florida at Large

My Commission expires:

Sept. 29, 2014

Personally Known ☒  
 Produced Identification: \_\_\_\_\_  
 Type of Identification Produced: \_\_\_\_\_

NOTARY PUBLIC-STATE OF FLORIDA  
 Kimberly L. Keagler  
 Commission # EE030686  
 Expires: SEP 29, 2014  
 BONDED THROUGH ATLANTIC SURETY CO., INC.

[1355843/1]



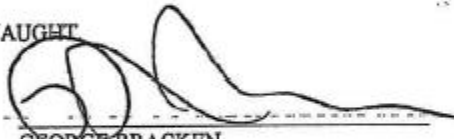
**AFFIDAVIT**

STATE OF FLORIDA     )  
                                   ) SS  
 COUNTY OF BROWARD    )

BEFORE ME, the undersigned authority, personally appeared George Bracken to me well known, who, after being duly sworn, deposes and states:

1. My name is George Bracken and I am over the age of eighteen (18), am otherwise *sui juris*, and am a resident of the State for Florida.
2. In my capacity as Senior Financial Officer of CMA, I negotiated with Mr. David Mursten for his services as set forth in the letter dated July 15, 2010.
3. Mr. Mursten, acting as a lawyer, prepared the document and I executed it.

FURTHER AFFIANT SAYETH NAUGHT

  
 GEORGE BRACKEN

SWORN TO AND SUBSCRIBED before me by George Bracken this 9th day of April, 2013, who is personally known to me, or who has produced the following identification: \_\_\_\_\_

  
 Notary Public, State of Florida at Large



Personally Known ☒  
 Produced Identification: \_\_\_\_\_  
 Type of Identification Produced: \_\_\_\_\_

[1355846/1]



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