COHEN MILSTEIN HELPS INVESTORS IN THREE CASES OBTAIN FAVORABLE RULINGS

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Investors in one of the world's largest gaming companies, a bankrupt energy producer and a drug manufacturer have recently won significant procedural victories in matters in which Cohen Milstein holds court-appointed leadership positions. Here are brief summaries of the cases at issue.

In the ***In re Wynn Resorts, Ltd. Derivative Litigation***, lead plaintiffs scored an important ruling against the Wynn Resorts Board of Directors ("Board") and certain of its senior executives when the District Court of Clark County, Nevada, denied defendants' motion to dismiss the case, allowing lead plaintiffs to pursue claims against the Board and executives for failing to prevent founder and director Steve Wynn's pattern of sexual harassment when the Board had knowledge of his improper conduct, but decided to the look the other way.

Cohen Milstein is representing lead plaintiffs Thomas P. DiNapoli, Comptroller of the State of New York, as Administrative Head of the New York State and Local Retirement System Fund and Trustee of the New York State Common Retirement Fund, and a group of nine New York City public pension funds.

In denying the motion, the court found that it would have been futile for lead plaintiffs to make a pre-suit demand on the Board to pursue their claims because lead plaintiffs' allegations raised a reasonable doubt as to whether a majority of the Board faced a substantial likelihood of liability for breaching their duty of loyalty to Wynn Resorts for "knowingly failing to take action in the face of credible and corroborated reports that Steve Wynn sexually harassed and abused Wynn Resorts employees" while they "profit[ed] on this information through insider trading that came at the Company's and shareholders' expense."

This ruling is significant in that it is the first time a derivative suit has survived a motion to dismiss on futility grounds by challenging a board of directors' role in failing to combat sexual harassment.

In another case, ***Cosby v. Miller et al.***, a federal judge in Tennessee has allowed plaintiffs to proceed with claims that auditor KPMG violated federal securities laws when it signed off on years of financial statements in which its client, now-bankrupt Miller Energy Resources, fraudulently overvalued oil and gas properties by hundreds of millions of dollars.

In an August 2 order on defendants' motion to dismiss, Chief District Judge Thomas A. Varlan said investors had properly pleaded that the auditor "deliberately ignored 'highly suspicious facts'" about the inflated assets,

IN *COSBY V. MILLER*, CHIEF DISTRICT JUDGE THOMAS A. VARLAN SAID INVESTORS HAD PROPERLY PLEADED THAT THE AUDITOR KMPG "DELIBERATELY IGNORED 'HIGHLY SUSPICIOUS FACTS'" ABOUT THE INFLATED ASSETS, INCLUDING TWO SEC INQUIRY LETTERS, WHEN IT GAVE "CLEAN" AUDITS FOR MILLER ENERGY'S FY2011-2015 FINANCIALS.

IN *MYLAN*, THE SOUTHERN DISTRICT COURT OF NEW YORK ADDRESSED THE "DISAGREEMENT" AMONG COURTS IN THE SECOND CIRCUIT OVER WHETHER CAUTIONARY STATEMENTS CAN GIVE RISE TO LIABILITY WHEN THE STATEMENTS DISCLOSE THE FUTURE RISK OF A PRESENT FACT. THE COURT CLARIFIED THAT THE APPROPRIATE INQUIRY IS "NOT WHETHER A STATEMENT OF RISK IS *PER SE* ACTIONABLE, BUT RATHER WHETHER MYLAN'S STATEMENT OF RISK COULD HAVE MISLED A REASONABLE INVESTOR."

including two SEC inquiry letters, when it gave "clean" audits for Miller Energy's FY2011-2015 financials. The judge also rejected defendants' arguments that the claims were filed outside the statutes of limitations and that plaintiffs had failed to link shareholders' losses to the alleged wrongdoing.

In subsequent settlements with the Securities and Exchange Commission, both Miller Energy, by then in bankruptcy, and KPMG admitted to securities law violations relating to the falsified financial statements.

By prevailing on the motion to dismiss, investors cleared a major hurdle in their effort to recover some of their losses. The Sixth Circuit, where the Eastern District of Tennessee is located, has a particularly high bar for successfully pleading auditor accountability.

Attorneys at Cohen Milstein are now undertaking discovery to further bolster the case, which was filed on behalf of purchasers of Miller Energy common and preferred shares from August 29, 2011 through October 1, 2015, and investors who bought preferred shares in various preferred stock offerings.

Finally, in the ***In re Mylan N.V. Securities Litigation***, lead plaintiffs overcame a motion to dismiss the case when the Southern District Court of New York ruled they sufficiently pleaded that drug manufacturer Mylan and certain of its officers knowingly or at least recklessly made misleading statements to investors concerning their knowledge of the misclassification of the EpiPen as a generic drug for purposes of the Medicaid Drug Rebate Program, the regulatory risks associated with the misclassification, and their anticompetitive activities in the market for generic drugs.

In reaching its ruling, the court made several findings that will be helpful to investors pursuing these types of claims in the future. Specifically, the court addressed the "disagreement" among courts in the Second Circuit over whether cautionary statements can give rise to liability when the statements disclose the future risk of a present fact. The court clarified that the appropriate inquiry is "not whether a statement of risk is *per se* actionable, but rather whether Mylan's statement of risk could have misled a reasonable investor." The court sided with lead plaintiffs in finding that Mylan's risk disclosures concerning governmental authority taking a contrary position to Mylan's classification of the EpiPen as a generic drug and the potential for Mylan to be subject to an investigation as misleading because a reasonable investor "could have concluded from Mylan's statement that although the government 'may' disagree with Mylan, and 'could' open an investigation, such unfavorable events had not yet occurred" when, in fact, governmental entities *had already notified* Mylan that the EpiPen was misclassified and the Department of Justice *had already begun an investigation*. ■

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