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Litigator of the Week: Using Shareholder Litigation to Push for Policy Changes and a \$310M, 10-Year Commitment to Diversity at Google's Parent Company

"I'm excited to see the opportunities that are created for women because of this settlement," says Julie Goldsmith Reiser of Cohen Milstein Sellers & Toll.

By Ross Todd
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When Google parent company Alphabet announced a \$310 million commitment to diversity, equity and inclusion efforts over the next 10 years, it marked what, if approved, could be the largest ever shareholder derivative settlement and largest #MeToo-related settlement all at once.

The deal, which also bars Google affiliates from forcing employees with harassment claims into arbitration and limits the reach of non-disclosure agreements, would resolve shareholders derivative claims related to allegations that the tech giant's board members violated their fiduciary duties by enabling a double standard allowing executives to sexually harass and discriminate against women without consequence. It comes a little less than two years after The New York Times reported, among other things, that the company's board approved a \$90 million exit package for Andy Rubin, the executive who headed the development of the Android mobile operating system, after an internal investigation found a credible sexual harassment claim had been made against him.

Julie Goldsmith Reiser of **Cohen Milstein Sellers & Toll**, one of four plaintiffs' counsel appointed to lead the global settlement negotiations who focused on the corporate reforms, drew on her prior experience working on shareholder derivative litigation that netted a \$90 million settlement and significant corporate reforms at Wynn Resorts tied to allegations that founder, CEO and Chairman Steve Wynn engaged in a longstanding pattern of sexually harassing and assaulting employees on company property. The Lit Daily asked this week's Litigator of the Week what steps were taken to make sure the settlement not only addresses past instances of harassment but prevents future ones.

Litigation Daily: Who were your clients and what was at stake?



Courtesy photos

Cohen Milstein's Julie Goldsmith Reiser

Julie Goldsmith Reiser: The impetus for this case was a bombshell article written in The New York Times reporting that Google had protected, praised and rewarded Android platform founder Andy Rubin despite an internal investigation finding that he had been credibly accused of sexual harassment. It prompted a 20,000 global employee walkout over the company's handling of sexual harassment and generated immense public scrutiny. Over the next year, new reports described that more of Alphabet's executives had engaged in sexual misconduct and received large severance packages or modified their 10b5-1 trading plans to leave the company with tens of millions of dollars and no corrective action taken against them.

In early January 2019, our clients, Northern California Pipe Trades Pension Plan and Teamsters Local 272 Labor Management Pension Fund filed suit. Our clients filed this derivative lawsuit to challenge a culture of concealment and entitlement among Alphabet's high-powered male executives. Derivative lawsuits allow shareholders to

step into the shoes of the company when its leaders have breached their fiduciary duties. Our clients were appointed co-lead plaintiffs, along with individual investor James Martin, to act as co-lead plaintiffs on behalf of all Alphabet stockholders by Hon. Brian C. Walsh of Santa Clara County Superior Court.

Through derivative lawsuits, shareholders seek to remedy harms to the company, most powerfully by demanding corporate governance reforms. In this case, the stockholders alleged that defendants pursued their own interests above the interests of the company (and its investors) by participating or acquiescing in a long-standing pattern of sexual harassment, discrimination and retaliation. As a result, the company failed to protect its workforce, risking one of its most valuable assets, its talent.

In pursuing this case, stockholders felt strongly that these issues negatively affected Google's ability to retain employees or recruit new talent, which compromised their investment. They filed suit reflecting that their interests are aligned with those employees who participated in the 2018 walkout—to make Google a better, safer, and more equitable and inclusive workplace.

Who all was on your team and how did you divvy up the work?

A remarkable team of lawyers was involved in the litigation. In addition to having the privilege of leading the reform component of the settlement negotiations, I also was fortunate to work with attorneys who recognized the important public policy issues the case raised. Other members of our working group included **Louise Renne**, a trailblazer and former San Francisco City Attorney who sued a private golf club for race and gender discrimination on behalf of the city; **Ann Ravel**, who litigated a pioneering affirmative action case for women in the workplace before serving as Santa Clara County Counsel and now running for California State Senate; and, **Frank Bottini**, who has had tremendous success representing shareholders in derivative actions and is one of only a few plaintiffs' lawyers to have been hired by a corporation's Special Litigation Committee to pursue claims on the corporation's behalf.

The Cohen Milstein team supporting me was exceptional. My colleague **Molly Bowen's** unwavering tirelessness and passion was contagious during some of the more contentious negotiations. I benefited from the insight of a colleague who worked in tech and recruiting prior to law school and had been immersed in the implications of programmer culture from the start of her career. I also received tremendous guidance from members of our civil rights

practice group, which is one of the leading practices in the country. As with all complex litigation, the success would not have been possible without a stellar team.

My leadership focused on the settlement reforms, including changes to workplace policies and procedures, the Diversity, Equity and Inclusion Advisory Council and the \$310 million Workplace Initiative. I have a history of working on employment discrimination cases and also settled a derivative lawsuit on behalf of Wynn Resorts based on #MeToo allegations that provided me with the foundation for assessing employment practices and whether they are consistently and fairly applied in a workforce. In negotiating these aspects of the settlement, I worked with Professor Suzanne B. Goldberg of Columbia Law School to absorb the current research and best practices in preventing and addressing sexual harassment, discrimination and retaliation. And, it was important to adapt that research to the specifics of the tech industry and Google's unique culture. It also involved learning from other large institutional investors who have pursued these sorts of reforms for years, to get their input on which reforms would have the greatest and most enduring impact on long-term valuation. That work has paid off with a precedent-setting, best in class, settlement.

My role was complemented by Frank's expertise in board-level governance reforms and structuring complex settlements, which enabled us to get buy-in from 18 different firms representing numerous institutional and individual investors as we were negotiating the settlement terms. Ann and Louise also were instrumental in developing terms of the settlement that we hope will catalyze change.

Why was the shareholder derivative lawsuit the appropriate vehicle to address these issues at Alphabet?

Employment-related sexual misconduct thrives when a dual standard permits high-powered male executives to believe they are so important as to be exempt from company policies. Shareholders are owners of the company and have the ability to rein in executives who otherwise avoid accountability through corporate engagement which, in turn, can lead to derivative litigation.

In this case, the employees had tried to call for change, asking for Alphabet to waive mandatory arbitration across all of its entities, for transparency with respect to instances of sexual harassment, greater disclosure about salaries of executives, and having the Chief Diversity Officer report directly to the Board of Directors. Their demands led to limited reforms and that's where our clients came in.

As shareholders who were challenging whether the Board

had breached its fiduciary duties, our clients had the leverage to insist on far more sweeping changes to ensure that the company instituted holistic reforms that set the tone from the top and forced accountability at all levels of the company. This is why the settlement features reporting from management and the independent members of the DEI Advisory Council to the Board. Transparency from the settlement also extends to other stakeholders by requiring the company to provide public updates on its efforts in its Annual Diversity Report. Alphabet's record-breaking \$310 million financial commitment for these goals over the course of 10 years is designed to create a mechanism for enduring change.

Why was ending mandatory arbitration in harassment, discrimination and retaliation-related disputes brought by members of the Alphabet workforce a crucial part of this settlement?

Ending mandatory arbitration across Alphabet was crucial for two reasons. First, it was one of the demands made by the organizers of the Google Walkout in 2018. At the time, Alphabet refused to make its Other Bets (like Waymo and Verily) comply with the demand. We felt like we had an opportunity to amplify the workers' demands and wanted to do that. Second, mandatory arbitration is an inherently unfair process to impose on employees who accept a job without ever knowing what future workplace issue might arise and whether the arbitration process will be fair. Frequently employers are repeat players in arbitration and can use that fact to their advantage, especially because the company and arbitrator have the benefit of benchmarking claims and outcomes whereas arbitration, unlike court, remains private and so conceals that sort of benchmarking information from victims.

How does the deal limit the use of non-disclosure agreements and how do you expect that to benefit shareholders?

Non-disclosure agreements have been widely criticized for silencing victims and enabling perpetrators. Ultimately, whether they have been used at Twenty-First Century Fox, the Weinstein Company, Wynn Resorts or Google, there is a point of reckoning and scandals result when women decide to speak. I believe the company now understands that sexual harassment is a manifestation of an abuse of power in the company's name that cannot be tolerated.

Google's agreement to limit the use of non-disclosure agreements will certainly reduce the likelihood of scandals for the company. This is because wrongdoers will be deterred from engaging in sexual misconduct if they understand that the company won't protect them and

prevent the allegations from coming to light. That term of the agreement also sends a strong message to employees that shareholders won't trade off their safety for short-term profit gains.

What are the implications of this settlement for the broader tech industry and, beyond tech, to other public companies with allegations of misconduct in their ranks?

To Alphabet and the Special Litigation Committee's credit, throughout the negotiations they not only understood that the scope of the settlement would have broad implications for the tech industry and large employers, but also viewed the scope of the reforms as an opportunity for leadership.

I have a great deal of respect and admiration for the lawyers on the other side who could have resisted an industry-leading settlement but instead embraced it every step of the way. The settlement terms strengthen Google's ability and commitment to respond effectively, appropriately, and lawfully to complaints and incidents sexual harassment, sexual misconduct, retaliation, discrimination, and pay equity in its workforce. Significantly, they do so by first setting the tone at the top, as reflected in CEO Sundar Pichai's wise decision to participate in the DEI Advisory Council for the first year. No other CEO has made such a commitment to his workforce in rectifying #MeToo abuses.

What role will the company's new advisory council have in making sure the company is living up to its commitments as part of the deal? And how were its outside members chosen?

I'm excited to see how the DEI Advisory Council's role evolves. We've really just created a framework, and it is up to the Council to decide how it can best effect change. By design, the framework we negotiated recognizes that the commitment to workplace equity begins with the board of directors and executive management setting the tone at the top. But, it is equally important that leadership secure the trust of employees, shareholders and other stakeholders. Here, that was a challenge because our complaint alleged that a sub-committee of the board had authorized large severance packages despite knowing (or not being told) of the fact that departing executives had been credibly accused of sexual misconduct. We recognized that the Board, and senior executives who also had been accused of enabling their peers' misconduct, might have less credibility in their commitment to the reforms if there was no mechanism for external influence.

By contrast, if we had insisted on an ombudsperson or compliance monitor to oversee the reforms, we might

foster an adversarial system which would cause insiders to resist change rather than embracing it. Similarly, a more adversarial process for selecting external members (say, each side choosing two) might have caused a sort of entrenchment in positions for a group that is meant to collaborate with Alphabet's directors and executive leadership to influence the environment. Our hope is that the DEI Advisory Council develops the commitment, knowledge, expertise and accountability within the leadership team and among the Board of Directors to foster an enduring commitment to antidiscrimination and inclusiveness. We have a great deal of confidence in the external members who were jointly selected to positively impact change at Alphabet.

How important was the duration of Alphabet's commitment to reforms to the ultimate resolution?

Clearly in a situation like this, the hope is that the reforms endure far beyond the term of the agreement. So, the issue in terms of duration focused on the need to earn the trust of the various stakeholders and also being able to adapt to future circumstances. Five years made sense in that respect. The Workplace Initiative will span twice as long, and that is a function of needing a longer horizon when it comes to expanding the pool of technologists from underrepresented groups.

I know they're not your clients, but have you had any reaction from the settlement from the Alphabet employee-community? If so, what have you heard from them?

We have heard from the employee community in a limited way. I think it is fair to express their sentiment as cautiously optimistic.

What will you remember most about this matter?

While negotiating the settlement terms, I read a report by McKinsey & Company and Melinda Gates called Rebooting Representation. The premise is that although the tech industry will continue offering economic power and social growth to members of its workforce, there have been substantial barriers to entry and retention for women, particularly women from underrepresented groups. The report noted that the tech industry is steeped for growth, uniquely positioned for innovation and that there is a compelling business case for making diversity, equity and inclusion a priority, yet efforts so far have lacked a comprehensive approach and that the stereotypical tech culture only makes things worse.

There are several lawyers involved in both sides of the settlement who have young daughters, and I sent the report to each of them noting that we all should be exposing our girls to coding. The demand for programming skills is predicted to grow by 90% over the next 15 years. There will be a shortfall of technologists in just three years, and yet currently, women comprise only 26% of the workforce and 11% of senior leadership roles in the tech industry. It struck me that if we could work together to dismantle the barriers that keep women from going into tech careers and that cause them to leave the field prematurely, then we could set women and the technology companies they work for up for success. It became sort of a mantra of mine that we needed to negotiate a truly comprehensive settlement that addressed every aspect of the employment process so that the settlement would have an enduring impact.

Ultimately, I'm most proud of the fact that the settlement creates a number of pathways for women to be successful in tech. The Workforce Initiative and \$310 million funding commitment is dedicated to expanding the pool of technologists and to increasing their representation in hiring, progression, and retention. The reporting that is required in the Annual Diversity Report will incentivize Google to track its diversity initiatives centrally and consider how they work together holistically. The DEI Advisory Council will have the ability to work with the company to determine the right mix of philanthropic programming relative to internal diversity, equity and inclusion initiatives.

I'm excited to see the opportunities that are created for women because of this settlement.

Ross Todd is the Editor/columnist for the Am Law Litigation Daily. He writes about litigation of all sorts. Previously, Ross was the Bureau Chief of The Recorder, ALM's California affiliate. Contact Ross at rtodd@alm.com. On Twitter: @Ross_Todd.

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