

District of Nevada: Denies Dismissal of Claims That Company and its Founder Made Misrepresentations in the Wake of Sexual Misconduct Allegations

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On July 28, 2021, the District of Nevada denied in part the dismissal of a securities fraud class action alleging that a casino resort company, its founder/former CEO and certain officers and directors concealed alleged misconduct by the founder and made material misrepresentations or omissions in concealing the alleged misconduct. *Ferris v. Wynn Resorts*, 2021 WL 3216462 (D. Nev. 2021) (Gordon, J.). The court held that plaintiffs adequately alleged that two sets of statements were actionable: (i) the founder's and the company's responses to a *Wall Street Journal* article revealing allegations against the founder of a decades-long pattern of sexual misconduct and sexual harassment; and (ii) company press releases responding to a cross claim made by the founder's ex-wife in a separate litigation alleging that the founder engaged in serious misconduct and misused company resources to support his lifestyle without effective board oversight.

Founder Statement Calling Allegations “Preposterous” Sufficiently Pleaded as False Where Complaint Alleged Multiple Instances of Misconduct

In response to the WSJ article, the founder stated that, “The idea that I ever assaulted any woman is preposterous.” The founder argued that his statement was not false because he is not required to admit wrongdoing and none of the accusations against him have been proven true. The court disagreed, determining that “the statement would give a reasonable investor the impression that the allegations against [the founder] were preposterous, when the [complaint] alleges several instances of sexual assault by [the founder].” The court held that plaintiffs sufficiently alleged the falsity of the statement at this stage and denied the founder's motion to dismiss on this basis.

Response Casting Allegations as Fabricated Sufficiently Pleaded as False Where Company Received Multiple Misconduct Complaints

The company's response to the WSJ article cast the allegations as part of a “negative public relations campaign” against the founder by his ex-wife.^[1] Defendants argued that the statement was puffery, not capable of objective verification, and that it was not false because it did not deny the misconduct described in the WSJ article. The court disagreed, denying the motion to dismiss and determining that plaintiffs sufficiently alleged the falsity of this statement because “a reasonable investor would get the impression that the allegations are false and

fabricated by [the founder’s ex-wife] as part of her negative public relations campaign to tarnish [the founder]” and force a revised divorce settlement. The court noted that the complaint alleged that “a materially different state of affairs existed because the Company had received multiple complaints about [the founder’s] sexual misconduct by that point and various Company executives were aware of that.”

Responses to the Cross Claim Allegations Sufficiently Pleaded as False Where Court Interpreted Statements as Broad Denials and Company Received Multiple Misconduct Complaints

Plaintiffs alleged that defendants made material misrepresentations in response to a cross claim by the founder’s ex-wife in a separate litigation and her press release regarding the same. The court characterized defendants’ statements[2] as including “broad denials” of the cross claim allegations. Defendants contended that the statements were too vague to be false and did not explicitly address the founder’s misconduct. However, the court denied dismissal with respect to these statements and held that plaintiffs sufficiently pleaded the falsity of these statements. The court explained that while the statements did not explicitly refer to the alleged sexual misconduct, they referred generally to the ex-wife’s allegations regarding the board, of which the founder was the chairman. The court determined that these “statements would give a reasonable investor the impression that the Company denied all of [the] allegations, which addressed [the founder’s] serious misconduct against an employee and a resultant multi-million dollar settlement.” The court noted that plaintiffs alleged that by the time this statement was made, the company had received multiple sexual misconduct complaints and that multiple executives were aware.

[1] The statement read, “The recent allegations about [the founder] reflect allegations made in court hearings by [the founder’s] ex-wife [] in her legal battle with him and the company. It is clear that [the founder’s] ex-wife has sought to use a negative public relations campaign to achieve what she has been unable to do in the courtroom: tarnish the reputation of [the founder] in an attempt to pressure a revised divorce settlement from him.”

[2] For example, “[The ex-wife’s] allegations regarding our Board, its composition and its independence are simply not true and are rehashed from her previous, unfounded statements made during her proxy campaign.” And, “Neither her nor the company’s recent filings contain any new facts or revelations, as she so passionately claims. [The ex-wife’s] comments regarding our Board of Directors, their independence and their actions in this matter are false.”

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