

Published By: **Kevin M. LaCroix**

THE D&O DIARY

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Investor Files Sexual Misconduct-Related D&O Claim Against Wynn Resorts Board

By Kevin LaCroix on February 7, 2018
Posted in Director and Officer Liability



Amidst the fallout following the latest high-profile set of revelations of sexual misconduct at the highest levels of business, the media, and politics, Steve Wynn has resigned his position as Chairman and CEO of Wynn Resorts. However, as we have seen with in other instances of this type of high profile

sexual misconduct, the accountability process at Wynn Resorts will not be limited to attempting to hold Wynn himself to account, but may include other senior company officials as well. According to a lawsuit filed today in Nevada state court, officials at Wynn's company allegedly knew for years of his sexual misconduct and failed to investigate.

Background

The story about Wynn's misconduct was first disclosed in a blockbuster January 27, 2018 *Wall Street Journal* article entitled "Dozens of People Recount Pattern of Sexual Misconduct by Las Vegas Mogul Steve Wynn" (here). Among other alleged incidents reported in the article was Wynn's supposed payment of \$7.5 million to a manicurist who worked at his

company's casino and who in 2005 Wynn allegedly forced to have sex with him without her consent. The article also referred to the reporters' investigative findings that according to the article "amounted to a decades-long pattern of sexual misconduct" by Mr. Wynn that, among other things, included instances of his "pressuring employees to perform sex acts."

The article quoted Wynn as saying the allegations are "preposterous" and as unfortunate product of a "nasty" lawsuit between Wynn and his ex-wife.

After the *Journal* article appeared, Wynn Resorts said that its board had formed a special committee to investigate the allegations of sexual misconduct against Wynn. The Wynn Resorts board was already under fire for its executive- compensation and corporate governance practices.

Among other things that came to light after the Journal's initial article was a very unusual February 5, 2018 article in the *Las Vegas Review-Journal* in which the paper reported that in 1998 the paper had "killed" a story that would have years earlier brought to light the issue of Wynn's sexual harassment of Wynn Resort employee. The newspaper killed the story after its representatives met with attorneys representing Wynn Resorts.

In the immediate aftermath of the initial story, Wynn stepped down from his position as Finance Chairman of the Republican National Committee. Then on February 6, 2018, the company issued a press release stating that the company had accepted Wynn's resignation as the company's CEO and Chairman of the Board of Directors.

The Lawsuit

On February 7, 2018, a Wynn Resorts shareholder filed a derivative lawsuit in Clark County, Nevada, against Wynn and the Wynn Resorts board of directors. The complaint, a copy of which can be found here, and which was filed by the Norfolk County (Massachusetts) Retirement System, alleges that the board knew of Wynn's misconduct for years and failed to investigate. The complaint reportedly alleges that a board representative was advised of Wynn's misconduct in 2009 by Wynn's then-wife, Elaine. The complaint also alleges that the board the payments made to or on behalf of the manicurist and "allegations of patently egregious misconduct" at least as of 2015 yet failed to investigate.

The complaint alleges with respect to Wynn himself that "Wynn knowingly and intentionally breached his fiduciary duties by engaging in a pattern of intentional egregious misconduct." The complaint also alleges that "The board knowingly turned a blind eye to allegations of patently egregious misconduct by Mr. Wynn involving the company, taking no action to protect the company and its suitability for regulatory compliance and to discharge the directors' known fiduciary duties to the company to do otherwise until the WSJ report shed light to the public, and even then the board is merely conducting an internal investigation."

Tom Hals's February 7, 2018 *Reuters* report regarding the complaint can be found here.

Discussion

The new lawsuit against the Wynn Resorts board is the latest D&O lawsuit to arise in the wake of revelations as part of the current wave of revelations of sexual misconduct. As I noted in connection with the recent lawsuit and settlement involving allegations of sexual misconduct at the Fox News affiliate of 21st Century Fox, this lawsuit represents yet another statement that the current, ongoing revelations of sexual misconduct will mean not only that the

individual bad actors will be held accountable, but also that corporate executives and company officials who permitted the behavior or turned a blind eye may also be called to account as well.

The significance of this lawsuit and the others of its type that have gone before is that in the current wave of sexual harassment revelations represents more than just a vulnerability of the bad actor individuals to having their misconduct exposed; the ongoing revelations also represents a potential liability exposure for the bad actors' companies and the companies' executives.

The theme of organizational accountability is not limited just to this context. We have also seen the fallout for the board members of USA Gymnastics, the US Olympic Committee, and even for the President of Michigan State University in the wake of the Larry Nassar sex-abuse scandal. The drive toward holding organizational officials accountable seems likely to continue.

Indeed, the scrutiny of the Wynn Resorts board is not limited just to the recently filed lawsuit. A February 8, 2018 Wall Street Journal article entitled "Scrutiny Shifts to Wynn Directors" (here) recounts how the company and its board is now facing searching questions from the Gaming Commission in Massachusetts, where the company has a \$2.4 billion casino project in the works. In the Massachusetts regulatory investigation, the Wynn Resorts executive leadership team faces questions relating to "suitability" requirements for casino operators. The article quotes the gaming commission's chair as saying that a central question is what the Wynn Resorts board of directors and executives knew about the \$7.5 settlement with the manicurist and associated allegations, and when they knew it. Massachusetts regulators stressed that they are investigating not just Mr. Wynn but also his board and the company, and that they are investigating the group's broader pattern of conduct as opposed to any one specific allegation.

In any event, the depressingly steady drumbeat of revelations of sexual misconduct shows no sign of slowing down. This trend has obvious implications for the possibility of increased claims for sexual harassment or sexual discrimination. But the lesson from the recent Wynn Resorts lawsuit is that the kind of misconduct that can give rise to claims by the victims of the misconduct can also give rise to claims by shareholders and others that company officials permitted an atmosphere in which the misconduct could take place, or turned a blind eye. I expect that we will see more of these kinds of claims ahead as the year progresses.

Special thanks to a loyal reader for sending me a copy of the complaint.

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