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Subject: Cooperman Insider Trading Settlement
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SECURITIES LITIGATION ALERT MAY 24, 2017

Cooperman Insider Trading Settlement Proves You Often Get Better Results by Fighting the SEC than by Settling Quickly

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Leon Cooperman just proved that fighting SEC charges is better than settling quickly, by reaching a favorable SEC insider trading settlement after a fierce Court battle. Cooperman fought his SEC insider trading case in Court, and got part of it thrown out on a motion to dismiss.[1] He leveraged that victory into a settlement approved on May 22, 2017, which did not impose any industry bar or suspension, rare for an insider trading settlement. In stark contrast, the SEC had earlier sought a five-year industry bar against Cooperman.[2] Cooperman's settlement highlights the importance of retaining counsel that is ready to fight the SEC in Court to achieve the best outcome.

The Cooperman settlement shows the SEC is often unwilling to reach a reasonable settlement until its allegations face the cold reality of failure in Court. This is particularly true in insider trading and large fraud cases, where the SEC has investigated for years before engaging in settlement discussions. By that time, it is harder for the SEC to remain objective about the case; and internal SEC pressure for higher sanctions increases. Thus, the more serious the SEC charges are, the more it pays to fight the SEC in Court.

I. The SEC's Claims Against Cooperman Were Flawed From Inception By Relying

on Vague "He-Said, She-Said" Allegations of an Oral Promise of Confidentiality

As noted in our September 23, 2016 Alert, the SEC's claim against Cooperman was flawed because it relied on vague, "he-said, she-said" allegations that Cooperman orally promised that he would not trade on information obtained from an executive at Atlas Pipeline Partners, L.P. ("APL"). The SEC alleged that on a phone call with "APL Executive 1," Cooperman orally "agreed that he could not and would not use the confidential information ... to trade APL securities."[3] But the SEC could not pin down the date of the oral agreement - and, importantly, specify whether this agreement was made before or after the Executive disclosed inside information. Instead, the SEC alleged that Cooperman orally agreed not to trade "during one of [three] conversations" on July 7, 19, and 20, 2010.[4] This left the SEC's complaint vulnerable to a motion to dismiss for failure to plead fraud with particularity, as required by Federal Rule of Civil Procedure 9(b).

Indeed, the SEC had notice from the Mark Cuban case that relying on "he said-she said" allegations of an oral promise of confidentiality can lose at trial. In *Cuban*, the SEC alleged that Cuban engaged in insider trading by selling Mamma.com stock after an alleged phone call oral agreement with *Mamma.com's* CEO "that [Cuban] would keep whatever information the CEO intended to share with him confidential," and not trade on it.[5] The *Cuban* jury rejected the "he-said, she-said" allegation, and found that Cuban never agreed not to trade on the information he learned on the phone call.[6]

Another problem with the SEC's case was it filed its Complaint in the Eastern District of Pennsylvania, which was not a proper venue for two, non-insider trading claims that the SEC made part of its case. The SEC appears to have filed the action in the Eastern District of Pennsylvania to get a more favorable jury for the insider trading claims - because APL's main offices are in Philadelphia. In contrast, Leon Cooperman is a popular public figure in New York City, particularly in financial circles. But the SEC also included in its Complaint claims that Cooperman failed to file timely Form 4 and Schedules 13D to disclose significant stock holdings. For these latter claims, the SEC failed to allege that Cooperman engaged in shareholder activism involving a company whose stock holdings he failed to timely disclose.

II. Cooperman's Motion to Dismiss Exploits the Flaws in the SEC's Case

Cooperman promptly exploited the weaknesses in the SEC's complaint, by filing a motion to dismiss. *First*, Cooperman argued that the SEC's Complaint was defective because it failed to specify whether the alleged oral confidentiality agreement was made after or before the Executive disclosed inside information. Cooperman argued this required dismissal, because a post-disclosure oral confidentiality agreement should not give rise to insider trading liability.

The Court agreed with Cooperman that the SEC's possible reliance on a post-disclosure oral agreement raised "a novel issue" which "no court ha[d] squarely addressed" previously. 2017 WL 1048376, at *4. Nevertheless, the Court held that the SEC's allegations were sufficient to plead a "plausible" insider trading claim, at least at the pleading stage. *Id*. at *7. The Court reasoned that the language of Rule 10b-5 governing insider trading provides that a duty not to trade can arise "'whenever a person agrees to maintain information in confidence,'" including after disclosure. *Id*. at *4 (quoting 17 C.F.R. § 240.10b5-2(b)(1).) Further, the Court relied on the principal that the securities anti-fraud provisions should be read "broadly, not technically" as a basis to keep the SEC's claims alive. *Id*. at *6.

Although the Court kept the SEC insider trading allegations alive at the pleading stage, these allegations would have faced major credibility hurdles if the case proceeded to summary judgment or trial. For example, the SEC's inability to pin down the date of the oral agreement means that the APL Executive could not remember which call involved the alleged Cooperman oral agreement not to trade. This called into question his memory of other details, such as whether there was any agreement not to trade. Thus, as in *Cuban*, a jury might not have believed the APL Executive's testimony that there was ever an oral agreement.

Similarly, the APL Executive had a clear motive to lie to avoid his own (and APL's) liability. He may have freely shared confidential information about the APL merger to induce Cooperman to hold onto the APL stock that Cooperman had held before the phone calls (which Cooperman was threatening to sell). If the APL Executive leaked this information to Cooperman without obtaining a confidentiality agreement, APL would have been liable for

damages under the SEC's Regulation FD. *Id.* at *6 (citing 17 C.F.R. § 243.100(a), (b)(2).) In turn, the APL Executive would be liable to APL for causing APL's liability by breaching its confidentiality. Likewise, the APL Executive could himself be liable for insider trading tipping if it was shown that he tipped Cooperman to obtain a personal benefit of keeping his job and increasing his compensation by inducing Cooperman not to sell - and indeed buy - APL stock.[7] Accordingly, the APL Executive's lack of recollection and clear motive to lie meant that the SEC would have a hard time proving its insider trading claims against Cooperman if it went to trial.

Second, Cooperman moved to dismiss for improper venue two claims for violating Sections 13(d) and 16(a) of the Securities Exchange Act of 1934 for failing to timely file S.E.C. filings to disclose holdings of over 5% and 10% of stock of eight different companies on 40 different occasions. Cooperman argued that venue was improper because these violations did not involve any "act or transaction constituting the violation" or Cooperman "transact[ing] business" in the Eastern District of Pennsylvania, as required for venue under the securities laws. *Cooperman*, 2017 WL 1048376, at *7. The Court agreed, and dismissed these two claims.

The Cooperman Court reasoned that the failure to make proper S.E.C. filings did not involve conduct in the Eastern District of Pennsylvania, because the filings were required to be filed with the SEC in Washington D.C. Even though two of the eight companies at issue had offices in Philadelphia, the Court held that they key act constituting the violation was the failure to file a timely form in Washington, D.C. *Id*. Further, the Court held that Cooperman did not engage in "continuous and substantial" business in the Eastern District of Pennsylvania, because he was not engaged in ongoing activism in the district at the time the Complaint was filed. *Id*. at *8. Although Cooperman had held stock in three companies with offices in the district, he was not engaged in any ongoing shareholder activist role with those companies at the time the Complaint was filed. Thus, the Court dismissed the § 13(d) and 16(a) claims for improper venue - even though the insider trading claim was properly brought in the district - because it held that "'each separate cause of action'" is required to be brought in the proper venue.[8]

III. The SEC Gives Up its Demand for an Industry Bar, After Two of Its Claims Are Dismissed

Just two months after the Court dismissed part of the SEC's Complaint, the SEC settled with Cooperman without requiring an industry bar or suspension. Under the settlement, Cooperman and his firm Omega Advisors neither admit nor deny any wrongdoing. Cooperman and Omega agreed to (i) $1,759,049 in disgorgement for the insider trading claim - reduced from the $4.1 million of disgorgement the SEC originally sought; (ii) $1,759,049 in civil penalties; (iii) $429,041 in prejudgment interest; and (iv) permanent injunctions against violating § 10(b) and Rule 10b-5 in the future. Cooperman also individually agreed to pay another $1,000,000 civil penalty for the §§ 13(d) and 16(a) claims, and to a permanent injunction against future violations of those statutes. Finally, Cooperman and Omega agreed to hire an independent consultant for five years to monitor their insider trading practices and policies, and to hire a nationally-recognized law firm to monitor their S.E.C. filings as to their stock holdings.[9]

The SEC's decision to settle the Cooperman case without an industry bar or suspension is very rare.[10] In recent years, the SEC has routinely demanded a bar or suspension as part of an insider trading settlement. Even the Steven A. Cohen settlement involved a bar of almost two years against Mr. Cohen associating in a supervisory capacity with any broker-dealer or investment adviser.[11] Such a bar was obtained even though much of the SEC's case was undermined by the Second Circuit's decision raising the standards for proving tipper-tippee insider trading liability in *U.S. v. Newman*, 773 F.3d 348 (2d Cir. 2014).

Accordingly, the Cooperman settlement is a major setback for the SEC. This is particularly true considering that the SEC originally demanded a 5-year bar of Cooperman. And the SEC's case had been bolstered by promising facts, including that Cooperman (i) asserted his right against self-incrimination during his SEC investigative testimony when asked about his "trading in APL securities," which some courts hold can justify an adverse inference at trial,[12] and (ii) allegedly tried to cover up his conduct by calling an APL Executive after receiving an SEC subpoena to seek assurance that the Executive did not share confidential information.[13] To walk away with no bar or suspension despite these facts must be

disappointing for the SEC.

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In sum, the Cooperman settlement proves that fighting the SEC in Court often leads to a better result than quickly reaching a settlement. Only by going to Court - or even an SEC administrative law judge - can you get an independent ruling on the merits of SEC allegations. And it is more difficult for the SEC to acknowledge the weakness of its cases alleging insider trading or similarly high-profile claims. So it is crucial for clients to retain counsel that is both ready and experienced at fighting the SEC in court to achieve the best outcome from an SEC investigation.

If you have questions about this *Alert*, please contact Sam Lieberman at [redacted] or [redacted].

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[1] *S.E.C. v. Cooperman, et al.*, 2017 WL 1048376, at **7-9 (E.D. Pa., Mar. 20, 2017).
[2] "Omega's Leon Cooperman Settles Insider Trading Case," Wall St. J. (May 18, 2017, *available at* https://www.wsj.com/articles/omegas-leon-cooperman-settles-insider-trading-case-1495143460.
[3] *S.E.C. v. Cooperman, et al.*, Compl. ¶ 34, No. 16-cv-05043-JS (E.D. Pa., filed Sept. 21, 2016).
[4] *Id.*
[5] Compl. ¶ 14, *S.E.C. v. Cuban*, No. 3-08-cv-2050-D (N.D. Tex., filed Nov. 17, 2008).
[6] *S.E.C. v. Cuban,* No. 3-08-cv-2050-D (N.D. Tex.),Jury Charge at 13, dkt. No. 278 (Oct. 16, 2013).
[7] *Salman v. U.S.*, 137 S. Ct. 420, 427 (2016).
[8] *Id.* at *9 (quoting *High River Ltd. P'ship v. Mylan Laboratories, Inc.*, 353 F. Supp. 2d 487, 493 (M.D. Pa. 2005)).
[9] *Cooperman*, 16-cv-05043, dkt. nos. 51-52 at 1-11; "Statement on Leon Cooperman Settling Insider Trading Charges (S.E.C. Pub. Statement, May 18, 2017), *available at* https://www.sec.gov.
[10] This firm recently obtained a similarly rare insider trading settlement of no bar or suspension, after getting part of the S.E.C.'s claims dismissed. *See* https://www.sec.gov/litigation/admin/2015/33-9795.pdf.
[11] *In the Matter of Steven A. Cohen*, Ad. Pro No. 3-15382, IA Rel. 4307 at 12 (Jan. 8, 2016), *available at* https://www.sec.gov/litigation/admin/2016/ia-4307.pdf.
[12] Cooperman Compl. ¶ 59. *Compare, e.g., S.E.C. v. Dibella*, 2007 WL 1395105, at *3 (D. Conn. May 8, 2007) (instructing jury that it may draw adverse inference from invoking Fifth Amendment in S.E.C. investigative testimony), *with S.E.C. v. BIH Corp.*, 5 F. Supp. 3d 1342, 1347 (M.D. Fla. 2014) ("The Court . . . declines to draw the requested adverse inference" because the defendant "was subsequently deposed and there is no indication in the record that he asserted the Fifth Amendment during his testimony").
[13] Cooperman Compl. ¶¶ 57-58.

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