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SEC Charges Former CEO and Company with Fraud for Denying Reputational Impact on Business

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SeaWorld and two of its former executives, including the CEO, agreed to pay more than $5 million to settle fraud charges. The SEC alleged that the company failed to inform investors about the impact of the documentary film *Blackfish* on the company's reputation, and ultimately its business.

Released in July 2013, the film criticized SeaWorld's treatment of killer whales. In the **complaint**, the SEC alleged that the CEO failed numerous times to tell investors about the "*Blackfish* effect" on the company's reputation, which he "should have known" by the end of the year was having a negative impact on the company's reputation, even though revenue grew and attendance declines were modest by that point.

News articles begin to speculate as early as August 2013 that there may be a link between the film and the company's declining attendance. That fall, the company's annual reputation study conducted by its communications department found that its score had fallen by more than 12% from the prior year. This finding was presented to the strategy committee that included the CEO, but was excluded from materials for a later meeting that the chairman of the board attended.

Musical acts and promotional partners started to cancel performances or withdraw from their marketing arrangements, which the SEC believes "should have provided confirmation" that the company's reputation had been materially damaged by the film. Instead, in articles around the same time, the CEO expressly stated that he could not "connect anything" between the film and any effect on the company's business. The company also stated in other media that there was "no truth" to the suggestion that the company's reputation had suffered.

In early 2014, the company's marketing staff conducted consumer surveys and decided that *Blackfish* was impacting the public's perception of the parks, and the company offered special promotions to offset declining attendance. Around the same time, on an earnings call, the CEO told analysts that the company's business saw "no noticeable impact" and that its surveys did not "reflect any shift in sentiment" about consumer intent to visit the parks.

A Form S-1 registration statement in March included a risk factor that an "accident or injury" at the park that "is the topic of a book, film, documentary" "*may harm our brands or reputation*" (the SEC complaint added the emphasis). The SEC determined that the disclosure was untrue or misleading by being framed as a hypothetical event that "may" occur. The SEC staff has given similar warnings about cyber breach disclosure in other contexts.

At the same time that the CEO unequivocally denied in various news articles that the film was having an impact, during earnings calls and to underwriters conducting due diligence in a secondary offering, attendance had fallen 13% and materials prepared for the first quarter board meeting noted that *Blackfish* was one of the causes. Other internal documents showed that attendance declines were at least attributable in part to *Blackfish* along with poor weather and holiday break schedules, but reports of the first quarter results failed to mention the impact from the film entirely.

The company filed an 8-K in August 2014 acknowledging declining attendance, which was, "among other factors, partially caused by negative publicity" connected to the film, and the stock price fell 33%.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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