

In re The Mills Corporation Securities Litigation

COURT: United States District Court, Eastern District of Virginia
CASE NUMBER: 06-cv-00077
JUDGE: Hon. Liam O'Grady
CLASS PERIOD: 01/01/2000 - 12/31/2005
CASE CONTACTS: Hannah Ross

On December 24, 2009, the Honorable Liam O'Grady granted final approval of all settlements reached with Mills Defendants, with Mills' auditor, Ernst & Young, and the KanAm Defendants, for a total recovery of \$202.75 million plus interest obtained for the class. This settlement represents the largest recovery ever achieved in a securities class action in Virginia, and the second largest ever achieved in the Fourth Circuit Court of Appeals.

Background

On July 27, 2007, BLB&G and Mississippi Public Employees' Retirement System ("Mississippi PERS") filed an Amended Complaint against The Mills Corporation ("Mills" or the "Company"), a former real estate investment trust, certain of its current and former senior officers and directors, its independent auditor, Ernst & Young LLP, and its primary joint venture partner, the KanAm Group.

The gravamen of this Action is that, during the Class Period, Mills issued financial statements that materially overstated the Company's actual financial results and engaged in accounting improprieties that enabled it to report results that met or exceeded the market's expectations and resulted in the announcement of a restatement. Based on the Company's disclosures, the restatement was expected to significantly reduce Mills' net income and funds from operations ("FFO") for the fiscal years 2000 through 2005. In particular, Lead Plaintiff alleged that every financial statement issued by the Company for the years 2000 through 2004 and the first three quarters of 2005 was materially false and misleading, and that the net income reported for 2003, 2004 and the first nine months of 2005 was overstated by 158%.

Mills conducted an internal investigation into its accounting practices, which resulted in the retirement, resignation and termination of 17 Company officers and concluded, among other things, that: (a) there had been a series of accounting violations that were used to "meet external and internal financial expectations"; (b) there were a set of accounting errors that were not "reasonable and reached in good faith" and showed "possible misconduct"; and (c) the Company "did not have in place fully adequate accounting information systems, personnel, formal policies and procedures, supervision, an internal controls." In addition, the Company disclosed that the U.S. Securities and Exchange Commission has commenced a formal investigation into the Company's accounting.

On September 14, 2007, Defendants filed motions to dismiss the Amended Complaint. On December 5, 2007, the Court held a hearing on Defendants' motions to dismiss. During the hearing, the Court dismissed the Amended Complaint without prejudice, and requested that Lead Plaintiffs file a second amended complaint providing additional information regarding Lead Plaintiffs' investigation, including the identification of Lead Plaintiffs' confidential witnesses and thus, dismissed the Amended Complaint without prejudice. On January 18, 2008, Lead Plaintiffs' filed a Second Amended Consolidated Complaint ("SAC"). Defendants filed their motions to dismiss the SAC on February 22, 2008; Lead Plaintiffs filed their opposition briefs to those motions to dismiss on March 21, 2008; and Defendants filed their reply briefs in further support of their motions to dismiss on April 4, 2008. Oral argument on Defendants' motions to dismiss was held on April 16, 2008. At oral argument, Judge O'Grady denied from the bench each of the Defendants' motions to dismiss, including the motions of each of the Executive Officers and Directors, the Company's outside auditor, Ernst & Young, and the Company's primary joint venture partner, KanAm.

Shortly thereafter, discovery commenced. During the discovery process, over 4 million pages of documents were produced and over 30 depositions were taken.

On August 15, 2008, Lead Plaintiffs filed a motion for class certification. Defendants opposed that motion, arguing that: (1) Class should not include any purchasers of Mills' preferred stock because it did not trade in an efficient market and, therefore, could not take advantage of the fraud-on-the-market theory of reliance; and (2) the Class Period should end in either January or February of 2006. Oral argument on the class certification motion was held on February 26, 2009. At oral argument, the Court granted Lead Plaintiffs' motion for class certification and refused, as the Defendants had argued, to truncate the Class Period.

On January 14, 2009, Lead Plaintiffs, on behalf of themselves and the other members of the Class, and the Mills Defendants, on behalf of themselves and for the benefit of the other Released Parties, entered into a Stipulation and Agreement of Settlement in full and final settlement of each and every Settled Claim against the Mills Defendants and the other Released Parties as defined therein (the "Mills Settlement"). The Mills Settlement, which provides for the payment of \$165,000,000 in cash plus interest into escrow for the benefit of the Class, was preliminarily approved by the Court by Order dated March 4, 2009 (the "March 4, 2009 Order"). The March 4, 2009 Order also directed that notice of the Mills Settlement be given to the Class within thirty days of entry of that Order and scheduled a Settlement Hearing for final approval of the Mills Settlement for June 18, 2009.

On April 1, 2009, Lead Plaintiffs and E&Y reached an agreement in principle to settle the claims asserted by Lead Plaintiffs, on behalf of themselves and the other members of the Class, against E&Y for \$29,750,000. In light of the agreement with E&Y, Lead Counsel requested, with the consent of the parties, that notice of the Mills Settlement not be sent as previously ordered, but instead that one notice informing the Class of the two proposed settlements be sent after the settlement with E&Y was fully documented.

On May 11, 2009, Lead Plaintiffs reached an agreement to settle the claims asserted by Lead Plaintiffs, on behalf of themselves and the other members of the Class, against the KanAm Defendants, the last remaining defendants in the Action, for \$8,000,000.

On December 24, 2009, the Honorable Liam O'Grady of the United States District Court for the Eastern District of Virginia granted final approval of the settlements. In order to be eligible to share in the benefits of the settlement, class members were required to submit a completed and signed Proof of Claim Form postmarked no later than December 31, 2009.