

## 2nd Circ. Affirms Suntrust Win In Defamation Suit

By **Erin Marie Daly**

Law360, New York (March 25, 2011) -- The Second Circuit on Friday upheld a ruling in favor of Suntrust Capital Markets Inc. over claims by the former CEO of Cyberonics Inc. that Suntrust defamed him by mischaracterizing stock options he had been given as improperly backdated.

A three-judge panel of the U.S. Court of Appeals for the Second Circuit on Friday rejected Robert P. Cummins' appeal of a lower court's summary judgment award in favor of Suntrust after finding that the 37 alleged defamatory statements were either "substantially true ... or constitutionally protected opinion."

At issue in the case are lucrative stock options given to Cummins and other executives by Cyberonics' board on June 15, 2004, the same day the U.S. Food and Drug Administration approved a Cyberonics therapy, according to court documents.

Trading in Cyberonics stock was suspended on June 15, so that the options were priced at the closing price on June 14. When trading resumed on June 16, the stock price jumped 78 percent, increasing the value of Cummins' options, which were not vested yet, by \$2.3 million. The board also allowed Cummins to distribute the other options to other executives.

Two years later, two analyst reports from Suntrust and accompanying statements to several media outlets criticized the board's options grant, calling the move unethical and comparing it to illegal options backdating.

Cummins accused Suntrust and its analysts of defaming him by accusing him of a crime. In August 2009, Judge John G. Koeltl of the U.S. District Court for the Southern District of New York disagreed, saying the reports and statements to the media were protected opinion.

On appeal, Cummins argued that a question of fact existed as to the substantial truth of the analyst reports and statements to the media concerning the options because Suntrust incorrectly reported that management, rather than the board of directors, granted the options.

He also said Suntrust failed to disclose certain facts demonstrating there was "nothing wrong" with the option grants, creating a "substantially false and defamatory impression."

But the Second Circuit disagreed, saying none of the facts identified by Cummins were material to the “gist” of Suntrust's statements, which was that Cummins’ conduct in connection with the options grant was self-interested and not aligned with the interests of shareholders.

Moreover, the appeals court said, the gist of the statements was substantiated by the undisputed facts that Cummins knew the board was granting him options at the June 14 share price, that the share price would rise the next day on favorable news regarding the FDA's approval, that other shareholders could not capitalize on this news because trading was closed, and that he accepted responsibility for distributing similarly priced options to other Cyberonics executives.

“While Cummins argues that the gist of defendants’ statements is broader, suggesting that he profited from illegal backdated options, the statements at issue are not 'reasonably capable' of such a defamatory meaning,” the appeals court said. “Even if it would have been more accurate to state that the board granted the options, the gist of defendants’ statements does not hinge on the technicality of who granted the options or their actual propriety.”

As to Cummins' contention that the district court wrongly concluded that Suntrust's characterizations of the option grants as “self-interested, abusive, unethical, unjustifiable, a manipulation of securities regulations, and akin to backdating” were nonactionable, the appeals court said those critiques constituted “subjective, nonverifiable opinions.”

“While Cummins quarrels with the negative implications of these characterizations, such implications do not transform the characterizations from expressions of opinion into statements of fact,” the appeals court said.

Jud Graves of Alston & Bird LLP said Suntrust was pleased that the appellate court agreed with the trial court that the suit "has no merit whatsoever."

"We have always believed that [Suntrust] analysts offer important, thoughtful, and principled analysis of the companies they cover, and the appellate court's ruling here is a clear demonstration of that," he said.

Attorneys for Cummins did not immediately respond to requests for comment.

Judges Pierre N. Leval, Reena Raggi and Peter W. Hall sat on the panel for the Second Circuit.

Cummins is represented by the Law Office of Julius Glickman, Carter & Bachynsky LLP and O'Hare Parnagian LLP.

Suntrust is represented by Alston & Bird LLP.

The case is Cummins v. Suntrust Capital Markets Inc. et al., case number 10-1373, in the U.S. Court of Appeals for the Second Circuit.

--Additional reporting by Pete Brush and Eric Hornbeck. Editing by Greg Ryan and Jonathan Jacobson.