

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 90565 / December 4, 2020

ADMINISTRATIVE PROCEEDING
File No. 3-20158

In the Matter of

**THE CHEESECAKE
FACTORY INCORPORATED,**

Respondent.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 21C OF THE SECURITIES
EXCHANGE ACT OF 1934, MAKING
FINDINGS, AND IMPOSING A CEASE-
AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”), against The Cheesecake Factory Incorporated (“Cheesecake Factory” or “Respondent”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondent’s Offer, the Commission finds¹ that:

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

SUMMARY

1. This matter concerns material misstatements by Cheesecake Factory regarding the impact of the Novel Coronavirus Disease 2019 (“COVID-19”) on its business operations and financial condition. The disclosures were included in press releases attached to Forms 8-K furnished to the Commission on March 23 and April 3, 2020, respectively.

RESPONDENT

2. **The Cheesecake Factory Incorporated**, a Delaware corporation based in Calabasas Hills, California, operates restaurants across the United States and internationally through licensees. Cheesecake Factory has stock registered under Section 12(b) of the Exchange Act and traded on the Nasdaq Global Select Market under the ticker symbol CAKE.

FACTS

3. In mid-March 2020, Cheesecake Factory faced an unprecedented challenge to its business arising from the impact of the COVID-19 pandemic. In that context, the company issued several disclosures regarding the effect of, and its response to, the pandemic. As described below, certain of those disclosures failed to adequately inform investors of the extent of COVID-19’s impact on the company’s operations and financial condition in the period of late-March through mid-April 2020, when the company obtained additional financing.

4. During this time period, the company began taking steps to conserve cash and increase liquidity in the near-term. Among other things, on March 18, 2020, the company sent a letter to its landlords saying that it would not be paying April rent due to the “severe decrease in restaurant traffic [due to COVID-19 that] has severely decreased our cash flow and inflicted a tremendous financial blow to our business,” noting that it “hope[d] to resume our rent payments as soon as reasonably possible.”

5. In addition, on March 23, 2020, the company drew down the last \$90 million on a revolving line of credit. As of the start of the second quarter on April 1, 2020, the company had approximately \$65 million of cash and cash equivalents.

6. By at least March 23, 2020, the company was actively seeking additional liquidity through either the incurrence of debt through lenders or the issuance of equity to private equity investors with the goal of raising at least \$100 million. In presentations shared with lenders and potential private equity investors, Cheesecake Factory disclosed its cash position and projected that the company had cash to support approximately 16 weeks of operations under the prevailing circumstances. During this time period, internal Cheesecake Factory documents noted that the company was experiencing a negative cash flow rate of \$6 million per week.

7. On March 23, 2020, Cheesecake Factory furnished a Form 8-K to the Commission disclosing, among other things, that it was withdrawing previously-issued financial guidance due to economic conditions caused by COVID-19. Cheesecake Factory furnished, as an exhibit to the

Form 8-K, a copy of its public press release dated March 23, 2020 that provided a business update regarding the impact of COVID-19. According to the press release, Cheesecake Factory announced that it was transitioning to an “off-premise model” (i.e., to-go and delivery) that was “enabling the Company’s restaurants to operate sustainably at present under this current model.”

8. The press release further disclosed the \$90 million draw down on its revolving credit facility, that it had curtailed planned unit growth, and that it was “evaluating additional measures to further preserve financial flexibility.” Cheesecake Factory’s March 23 Form 8-K and the attached press release did not disclose the landlord letters or the company’s negative cash flow rate.

9. Two days later, on March 25, 2020, press articles reported that Cheesecake Factory had sent a letter to each of its restaurants’ landlords on March 18 stating that it was not going to pay its rent for April 2020, and included a copy of one of the landlord letters.

10. On March 27, 2020, following media reports of the landlord letter, Cheesecake Factory furnished information in another Form 8-K disclosing that it was not planning to pay rent in April and that “it was in various stages of discussions with its landlords regarding ongoing rent obligations, including the potential deferral, abatement and/or restructuring of rent otherwise payable during the period of COVID-19 related closure.” The company also disclosed that, effective as of April 1, 2020, it had reduced compensation for executive officers, its Board of Directors, and certain employees. The company also announced that it had furloughed approximately 41,000 employees, but allowed them to retain their benefits and insurance until June and provided them with a daily complimentary meal from their restaurant.

11. On April 3, 2020, Cheesecake Factory furnished a Form 8-K to the Commission that attached a copy of an April 2, 2020 public press release as an exhibit. The April 2 press release provided a preliminary Q1 2020 sales update given the impact of COVID-19. Among other things, Cheesecake Factory again disclosed in the press release that “the restaurants are operating sustainably at present under this [off-premise] model.”

12. Cheesecake Factory’s disclosures on March 23 and April 3 regarding the sustainability of its restaurant operations did not disclose that Cheesecake Factory was excluding expenses attributable to corporate operations from its claim of sustainability; that the company was, in fact, losing approximately \$6 million in cash per week; and that it had only approximately 16 weeks of cash remaining, even after the \$90 million revolving credit facility borrowing.

13. In addition, Cheesecake Factory’s March 23, 2020 disclosure that it was “evaluating additional measures to further preserve financial flexibility” did not disclose the March 18, 2020 landlord letters stating that the company would not pay April rent.

14. Based on the foregoing, Cheesecake Factory’s March 23 and April 3, 2020 Forms 8-K were materially false and misleading.

15. On April 20, 2020, Cheesecake Factory announced a \$200 million subscription agreement for the sale of convertible preferred stock to a private equity investor, enhancing the company's liquidity position.

VIOLATIONS

16. As a result of the conduct described above, Cheesecake Factory violated Section 13(a) of the Exchange Act and Rules 13a-11 and 12b-20 thereunder, which collectively require every issuer of a security registered pursuant to Section 12 of the Exchange Act to file with the Commission accurate current reports on Form 8-K that contain material information necessary to make the required statements made in the reports not misleading.

CHEESECAKE FACTORY'S COOPERATION

17. In determining to accept the Offer, the Commission considered the cooperation afforded the Commission staff.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent Cheesecake Factory's Offer.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondent Cheesecake Factory cease and desist from committing or causing any violations and any future violations of Section 13(a) of the Exchange Act and Rules 12b-20 and 13a-11 thereunder.

B. Respondent Cheesecake Factory shall, within 15 days of the entry of this Order, pay a civil money penalty in the amount of \$125,000.00 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717.

Payment must be made in one of the following ways:

- (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
- (2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or
- (3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Cheesecake Factory as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Melissa R. Hodgman, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F St., NE, Washington, DC 20549.

Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Vanessa A. Countryman
Secretary