WINTER 2022

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Delaware M&A Quarterly

Court of Chancery Holds Stockholder Is Not Third-Party Beneficiary Under Merger Agreement and Buyer Was Not Controller

In *Crispo* v. *Musk*, the Delaware Court of Chancery, in an opinion by Chancellor McCormick, held that the plaintiff stockholder of Twitter, Inc. was not a third-party beneficiary under the company's merger agreement with Elon Musk and therefore lacked standing to sue for specific performance ordering Musk to close the merger. In so holding, the court emphasized that Delaware courts are reticent to recognize stockholders as third-party beneficiaries to corporate contracts due to Delaware law's deference to the board's authority to manage the corporation and its litigation assets and that other, limited circumstances where the courts have found stockholders to be third-party beneficiaries to merger agreements were clearly distinguishable. In addition, the court dismissed fiduciary duty claims against the buyers, Elon Musk and his affiliates, holding that they did not constitute a control group where Musk individually owned less than 10% of the company's stock, the alleged group owned 26.8% of the stock, Musk did not exercise his rights under the merger agreement to veto board action and only had an alleged personal relationship with one of the 11 board members.

Court of Chancery Applies *MFW* to Dismiss Claims Challenging Controlling Stockholder Merger

In *Smart Local Unions and Counsels Pension Fund* v. *Bridgebio Pharma, Inc.*, the Court of Chancery, in an opinion by Vice Chancellor Fioravanti, held that the merger, pursuant to which controlling stockholder BridgeBio Pharma, Inc. acquired the remaining shares of Eidos Therapeutics, Inc. that it did not own, satisfied the requirements of *Kahn* v. *M&F Worldwide Corp.* (*MFW*). The transaction was therefore subject to business judgment review, warranting dismissal of the plaintiff's claims against BridgeBio and three Eidos directors who also served as officers or directors of BridgeBio at the time of the merger. The plaintiff made the threshold argument that *MFW* was inapplicable because a third party had made an offer to acquire the company at a premium to BioBridge's offer price, but the court rejected this argument, noting that a controller is not obligated to sell to a third party and plaintiff cited no legal authority that would render *MFW* inapplicable in such circumstances. In applying *MFW* to the merger, the court found that, despite plaintiff's arguments to the contrary, the special committee was fully empowered to select its advisors and reject the transaction and met its duty of care, and that the stockholder vote was uncoerced and fully informed, including on issues relating to the third party's proposals.

Court of Chancery Dismisses Claims Against Special Committee in Take-Private Merger

In *Ligos* v. *Tsuff*, the Delaware Court of Chancery, in an opinion by Vice Chancellor Glasscock, dismissed post-closing money damages claims against the special committee in connection with a take-private merger because the plaintiff failed to plead a breach of the duty of loyalty. In earlier proceedings, the court declined to dismiss claims against all defendants under *MFW*, ruling that the stockholder vote was not fully informed. The special committee members separately moved to dismiss due to the exculpation provision in the company's certificate of incorporation, arguing that they could not be liable for money damages for

any breach of their duty of care and the plaintiff failed to state a claim that they breached their duty of loyalty. The plaintiff alleged, however, that the members of the special committee negotiated in bad faith and were not independent from the company's controlling stockholder, who also controlled the buyer. Despite the merger process failing to satisfy the conditions for dismissal under *MFW* and therefore remaining subject to entire fairness review, the court ruled that the plaintiff did not plead any reasonably conceivable claims that the special committee members lacked independence, were self-interested or acted in bad faith with respect to the merger negotiations or dissemination of the company's proxy statement. Accordingly, the court granted the special committee members' motion to dismiss.

Court of Chancery Sustains Claims Against PE Sponsor, Principals and Company in DeSPAC Merger

The Court of Chancery issued a series of opinions and orders between September 2022 and November 2022 by Vice Chancellor Laster in *In re P3 Health Group Holdings, LLC* relating to claims brought against P3 Health and its private equity sponsor by the company's second largest unitholder, Hudson Vegas Investments SVP LLC, challenging the company's deSPAC merger as having violated Hudson's various contractual rights. While the court dismissed the majority of the claims against the company, sponsor and the SPAC, it held that certain of Hudson's claims survived, including that the sponsor's right to designate directors to the post-deSPAC public company board should have triggered Hudson's consent rights over affiliate transactions and that distributing the SPAC's shares at their $10 deal price valuation, instead of their immediate post-deSPAC trading price of less than $10, violated the waterfall in the company's governing documents and Hudson's priority distribution thereunder. In addition, in separate opinions and orders, the court ruled that certain sponsor personnel, who did not have formal director or officer roles at P3 Health, faced potential liability in connection with the merger. For example, in one opinion, the court held that a principal of the sponsor, who was not a named manager, director officer or employee of P3 Health, but who was charged with overseeing the sponsor's investment in P3 Health, was nonetheless an "acting manager" of P3 Health with potential liability for his actions in connection with the merger, as he made decisions on behalf of the company, directed the company's management and advisors, instructed outside counsel that he should approve company documents and had broad access to company information. In another opinion, the court held that P3 Health's general counsel was an "acting manager" facing potential liability, and although it was not possible to determine at the pleadings stage whether her role was ministerial as she claimed, it appeared that she may have materially participated by giving advice and materials to the board, working with outside counsel and taking similar actions. In another set of orders (found here and here), the court held that two principals at the sponsor, who were also directors or officers at the company, may have violated their fiduciary duties to P3 Health by entering into a side deal to invest in another SPAC formed by the founder of the SPAC with which the company merged. The court reasoned that, by making the investment during the transaction process and without disclosure to the P3 Health board, these fiduciaries not only potentially violated their duties to the company, but also may have caused the company to breach its contractual obligations to Hudson.

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M&A Markets

The following issues of *M&A at a Glance*, our monthly newsletter on trends in the M&A marketplace and the structural and legal issues that arise in M&A transactions, were published this quarter. Each issue can be accessed by clicking on the date of each publication below.

October 2022 November 2022 December 2022

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