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ORBIT/FR INC: Loses Bid to Dismiss Claim in Stockholders Suit

Vice Chancellor Sam Glasscock, III, of the Court of Chancery of Delaware denies the Defendants' motion to dismiss a claim in the lawsuit styled IN RE ORBIT/FR, INC. STOCKHOLDERS LITIGATION, Case No. 2018-0340-SG (Del. Ch.).

Before the Court is an unusual motion to dismiss. Unusual, in that it comes after years of litigation. And unusual, in that it seeks to dismiss a claim that is not actually pled, Vice Chancellor Sam Glasscock, III, points out.

The Plaintiff is a former stockholder (and representative of a putative class of such stockholders) of a Delaware corporation. The minority stockholders were squeezed out in a controller acquisition. Resulting is an entire fairness review. The Plaintiff has filed an amended complaint, to add an allegation that among the assets of the corporation at the time of the merger was an inchoate

claim for breach of duty against the controller and the board, which should be accounted for in the entire fairness analysis.

The Defendants, in their motion, seek to characterize this as a Primedia claim; having done so, they seek to dismiss it (In re Primedia, Inc. Shareholders Litigation, 67 A.3d 455 (Del. Ch. 2013)). But the alleged pre-existing breach of duty claim is not a derivative cause of action acquired by a third-party buyer, a la Primedia, Vice Chancellor Glasscock notes. It is a component of a straightforward entire fairness analysis of the price and process of the acquisition. The motion to dismiss, accordingly, is denied, for reasons that follow.

The litigation is a putative class action by a former stockholder of a Delaware corporation, Orbit/FR, Inc. ("Orbit"). From 2008 through 2018, the controller and holder of a majority of Orbit stock was a French company, currently known as Microwave Vision, S.A. ("Micro" or the "Controller"). In April 2018, the minority stockholders were squeezed out in a merger, in which Micro acquired Orbit. A former stockholder, Minerva Group, LP, brought an action challenging the fairness of the merger. The matter withstood a motion to dismiss. Eventually, the parties reached an agreement and

proposed a settlement, including cash consideration to be paid to minority stockholders.

Current Plaintiff, AB Value Partners, L.P. ("Partners") objected to the settlement and sought to take over the litigation from Minerva. Partners was the largest minority blockholder of Orbit, and held a majority of the minority stock prior to the merger. After consideration of the proposed settlement and the objection, Vice Chancellor Glasscock allowed Partners to assume lead-plaintiff status and continue the litigation upon the posting of a bond representing the cash component of the proposed settlement together with Minerva's attorneys' fees and costs requested in connection with the proposed settlement.

Vice Chancellor Glasscock held that Partners could file an amended complaint, asserting certain elements of the purportedly unfair nature of the transaction, without prejudice to the right of the Defendants (Micro and certain Orbit fiduciaries) to oppose any amendment under Rule 15. Partners filed the required bond, as well as an amended complaint styled the Substitute Complaint (the "SC"). The Defendants have moved to dismiss the SC, as out of compliance with Rule 15, as barred by laches, and for failure to state a

claim.

Regarding the laches/Rule 15 argument, the Defendants, in briefing and oral argument, have clarified that they do not necessarily believe the matter should be dismissed entirely, but instead that Partners should be limited to litigating the old Minerva complaint, simply substituting Partners as lead plaintiff. They allege that the SC states an "entirely new" complaint, since it raises allegations that the Controller had looted Orbit pre-merger, and then acted to extinguish the resulting inchoate litigation asset via the unfair merger.

Vice Chancellor Glasscock disagrees that the gravamen of the SC is entirely new, however. Both the Minerva complaint and the SC state a single cause of action--that the merger was unfair in price and process. The additional facts alleged in the SC clarify one supposed asset that they characterize as unfairly valued; that does not change the nature of the claim. The claim in both complaints arises out of the merger, and, thus, the SC relates back to the time of filing of the Minerva complaint.

Vice Chancellor Glasscock opines that the new allegations create no

unfairness to Micro or Orbit's former directors, Philippe Garreau, Per Iversen, Arnaud Gandois, and Douglas Merrill (collectively the "Director Defendants"). Accordingly, neither the strictures of laches nor Rule 15 bar Partners' claims.

As stated, the rest of the motion to dismiss, invoking failure to state a claim, is procedurally odd, Vice Chancellor Glasscock says. Specifically, the motion seeks to "dismiss," or remove from the SC, allegations that Micro used its control to loot Orbit before the merger, then used the merger as a device to avoid liability, effectively destroying the value of an Orbit asset--the inchoate litigation claim Orbit had against Micro regarding the alleged looting. The SC contends that a tool of looting was an agreement between Orbit and its controller, Micro (the "Management Agreement").

The Defendants (and the Plaintiff, as well, in briefing) have treated these allegations as an attempt to state a so-called Primedia claim, Vice Chancellor Glasscock notes. But Primedia does not fit this scenario. The question in Primedia was whether a litigation asset being pursued derivatively--a Brophy insider trading claim against Primedia fiduciaries--was extinguished by

sale of the company to a third party, who had no interest in pursuing the claim and did not value it as an asset in the merger (Brophy v. Cities Serv. Co., 70 A.2d 5 (Del. Ch. 1949)). The Primedia court noted that corporate assets--like the derivative claim at issue--passed to the buyer, extinguishing the derivative claim as such, but found that the former derivative claim could be asserted by former stockholders as transmogrified into a direct claim that the merger was unfair. The Primedia court imposed appropriately stringent standards for such a proceeding, in light of the general rule that the derivative asset had transferred to the acquiror, and was not retained by the former stockholders.

Here, there was no pending derivative action, or even a substantial threat of litigation, as of the time of the merger, Vice Chancellor Glasscock notes. The Management Agreement features heavily in the factual allegations of the SC, which suggests breaches of duty in here in the conduct of the controller pursuant to the Management Agreement. The Defendants argue that, analyzed under the lens of Primedia, the allegations of the SC must be dismissed. But this, in the Court's view, is not the claim stated in the SC. The Plaintiff has not attempted to state a Primedia claim, and the analysis by the court in Primedia is not applicable here, Vice Chancellor

Glasscock holds.

Vice Chancellor Glasscock holds that the matter is an entire fairness case in which the controller stands on both sides. There are two counts in the SC, one against the controller and one against the Director Defendants, both alleging a single cause of action; that the merger was unfair in both price and process. Those counts are adequate to state a claim under the circumstances pled, and are not seriously challenged by the Defendants.

Vice Chancellor Glasscock finds that a stand-alone breach of fiduciary duty claim concerning the Management Agreement was not filed here. Instead, the Plaintiff's allegation is that the Controller, aided by the Director Defendants, effected an unfair merger. Among the allegations of the SC is that the Controller had systematically looted Orbit, creating a chose-in-action as an asset belonging to Orbit, for breach of fiduciary duty. The Controller then purchased Orbit at an unfair price, in part because the controller bought out its own liability for no value.

Whether such allegations are true, and to what extent they may be cognizable as indicia of unfairness of process or price, is a

matter for this case on a record, Vice Chancellor Glasscock notes. But to the extent the existence of a pre-merger litigation asset, held by Orbit, contributes to a finding of the unfairness of the merger, that unfairness is not extinguished via the merger; it is created by the merger.

The real relief the Defendants seek here appears to be a kind of backdoor protective order, foreclosing discovery based on a directive that no Primedia claim exists, Vice Chancellor Glasscock says. But such a limitation is not appropriate on a motion to dismiss. Vice Chancellor Glasscock finds that the allegations of the SC, sounding in entire fairness review, are sufficient to withstand a motion to dismiss. Discovery pursuant to that review should proceed.

Because this matter has proceeded here as a motion to dismiss, Vice Chancellor Glasscock has not considered whether limitations to discovery regarding the purported litigation asset are appropriate. Nothing in this decision precludes the Defendants from seeking a protective order, on grounds of relevance, proportionality, or otherwise, limiting discovery into the purported litigation asset.

To recapitulate succinctly: The Plaintiff has pled an adequate claim involving a controller transaction invoking entire fairness; the resulting review will assess fairness in light of all assets of the acquired entity; those assets are alleged to include a litigation asset, a chose-in-action based on prior breaches of duty by the controller; the viability and value of that and other assets of the acquired entity, and the fairness of the process, must be assessed on a record. Accordingly, Vice Chancellor Glasscock holds the Defendants' motion must be denied.

For these reasons, the Defendants' motion to dismiss is denied. To the extent the foregoing requires an Order to take effect, Vice Chancellor Glasscock so ordered.

A full-text copy of the Court's Memorandum Opinion dated Jan. 9, 2023, is available at https://tinyurl.com/4tzw2c5u from Leagle.com.

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