



ORBIT/FR INC: Merrill's Bid to Dismiss Stockholders Suit Granted

In the case, IN RE ORBIT/FR, INC. STOCKHOLDERS LITIGATION, C.A. No. 2018-0340-SG (Del. Ch.), the Court of Chancery of Delaware grants Douglas Merrill's Motion to Dismiss.

The Memorandum Opinion is the latest incarnation of a long-running class action, asserting that a merger between a Delaware corporation, Orbit, and its controller Microwave Vision, S.A. ("Micro"), was unfair to the class of minority stockholders. The Lead Plaintiff is former stockholder AB Value Partners, L.P. ("Partners"). It replaced original lead Plaintiff Minerva Group L.P. and filed an amended complaint, styled the Substitute Complaint (the "SC"), on May 13, 2022.

Orbit was a Delaware incorporated, Pennsylvania based corporation that was in the business of testing the performance of microwave emitting devices. In 2008, Orbit stock traded on FINRA's

Over-the-Counter Bulletin Board. The company merged into Defendant Micro in 2018 following a cash only freeze-out originally -- but not ultimately -- conditioned on approval of an independent special committee and majority of the minority vote.

Defendant Philippe Garreau was Saitmo S.A.'s principal from 1996 until its reorganization as Micro. Following the reorganization, he served as Micro's CEO.

Defendant Per Iversen was Satimo's Chief Technology Officer from 1998 until its reorganization and served Micro in the same capacity following Satimo's reorganization. Following Satimo's 2008 purchase of a controlling stake in Orbit, Iversen served on the Board and as Orbit's CEO.

Merrill "lived a couple of houses" away from Iversen in 2004, and the two became friends when they "bonded" over mountain biking. At Iversen's request, he served on the Board starting in 2008. He served as a member of the two person special committee designated to evaluate the sufficiency of the Merger consideration.

Partners is a former Orbit stockholder squeezed out in the Merger.

Your account



It held Orbit shares continuously from 2011 until the Merger and at the Merger's effective date, Partners held 71.6% of the minority block.

Your account



The Complaint alleges that in August 2009, Orbit and Micro executed a services agreement whereby Orbit was to pay Micro to run its operations. The Services Agreement, which was renewed "by tacit agreement" yearly, allegedly allowed Micro to "tunnel cash flow to itself" and cancellation would have been all downside to Micro.

Minerva brought a class action on behalf of the minority shareholders challenging the fairness of the merger. It named Merrill as a defendant but dismissed him without prejudice on Aug. 16, 2022. The original complaint withstood a motion to dismiss, and eventually, the parties reached an agreement and proposed a settlement, which included cash consideration for the minority stockholders. However, Partners, holder of a majority of the minority of Orbit stock, objected to the settlement seeking to take over the litigation.

After consideration of the proposed settlement and the objection, the Court of Chancery allowed Partners to assume lead-plaintiff

status and continue the litigation upon the posting of a bond representing the cash component of the settlement together with Minerva's requested attorney's fees and costs. Partners filed the required bond. The Court of Chancery 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 15.63 Partners did so in the SC.

A slew of motions to dismiss followed. The Court of Chancery held oral argument on these motions as well as motions to stay discovery on Oct. 26, 2022. It granted Merrill's motion to stay discovery but denied the other Defendants' similar motion. In its memorandum opinion of Jan. 9, 2023, the Court of Chancery denied Micro, Garreau, and Arnaud Gandois' as well as Iversen's motions to dismiss. Merrill seeks dismissal on other grounds; this decision addresses only Merrill's motion.

The Court of Chancery explains that among the original Defendants was the movant, Merrill. Merrill is a former director of Orbit who served on the special committee that negotiated sale of Orbit to Micro. Minerva, however, voluntarily dismissed Merrill without

Your account



prejudice. The SC, by contrast, again named Merrill as a defendant.

That is understandable, as the SC alleges that Merrill was, in addition to serving as a supposedly independent director, an executive of Orbit whose job depended, or had depended, on the continued patronage of Orbit's controller, Micro. In other words, per Partners, Merrill was not independent, and given his dependence on Micro, he reasonably could be inferred to have facilitated an unfair sale to placate that entity.

The problem with this argument, according to the Court of Chancery, is that it is based on a fundamental error. It opines that the Plaintiff's counsel, confronted with this error at oral argument, forthrightly admitted that counsel had misread a document, which (upon casual reading) could be read to support a conclusion that Merrill served as an Orbit "President of Manufacturing and Supply Chain Strategies."

Partners now concedes that there are no facts from which the Court of Chancery may infer that Merrill was employed by Orbit or otherwise dependent on Micro. The Plaintiff, nonetheless, points to a personal relationship with another Defendant, Iverson, as overcoming the presumption of Merrill's independence. Iverson was a

Your account



member of the Orbit board, and a senior executive of both Micro and Orbit. According to the complaint, in the past Iverson and Merrill were neighbors, their children were contemporaries, and Iverson and Merrill frequently went for bicycle rides together. Iverson was responsible for Merrill becoming a board member. That is the substance of the remaining claim against Merrill.

To survive a motion to dismiss, in light of Orbit's exculpation clause, the Court of Chancery says the SC must allege facts that make it reasonably conceivable that Merrill breached his duty of loyalty to Orbit and its stockholders in his conduct while on the Special Committee. The SC does not suggest that Merrill had a personal interest in the transaction at issue, however. Nor does it allege facts suggesting that he acted in bad faith. The Plaintiff, accordingly, is reliant on the alleged fact that Iverson had divided loyalties as a fiduciary of both Orbit and Micro, and that the Court of Chancery should thus infer that Iverson wanted Micro to acquire Orbit in a process and for a price that were unfair to the Orbit minority stockholders.

The Plaintiff then attempts to imply that the relationship between Iverson and Merrill was so close and meaningful that the Court of

Your account





Chancery should infer that Merrill ignored his duty of loyalty in order to benefit Iverson's employer, Micro. If the Court of Chancery could make such an inference reasonably, that would presumably state a cause of action for an unexcused breach of duty against Merrill.

In other words, the Plaintiff's logic is sound and consonant with our case law. The allegations of fact, however, are an inadequate foundation to support the inferential load that the Plaintiff asks them to bear. The facts concerning the Iverson/Merrill relationship, even looked at in the manner most favorable to the Plaintiff, do not imply that Merrill allowed his fiduciary obligations to be overborne by a personal loyalty to Iverson or Micro. Instead, they represent a rather casual sharing of interests between neighbors.

Because the Court of Chancery cannot reasonably infer that Merrill's loyalty to Orbit was corrupted by his personal relationships, and since the SC does not allege that he was interested in the transaction and does not plead facts implying Merrill's bad faith, the Motion to Dismiss must be granted.

The Court of Chancery notes, for the casual reader, that a fiduciary duty action has been adequately pled against Micro and the individual Defendants associated with Micro. The action, therefore, will go forward. Based on the current pleadings, however, it must do so without Special Committee member Merrill.

Your account



For the foregoing reasons, the Court of Chancery grants Merrill's Motion to Dismiss. The parties should provide a form of order.

A full-text copy of the Court's Jan. 24, 2023 Memorandum Opinion is available at <https://tinyurl.com/ys92bnja> from Leagle.com.

A. Thompson Bayliss -- Bayliss@AbramsBayliss.com -- E. Wade

Houston

-- Houston@AbramsBayliss.com -- and G. Mason Thomson --

Thomson@abramsbayliss.com -- of ABRAMS & BAYLISS LLP, in

Wilmington, Delaware, Attorneys for Plaintiff AB Value Partners,

L.P.

Ashley R. Altschuler -- aaltschuler@mwe.com -- Ethan H. Townsend

--

ehtownsend@mwe.com -- Harrison S. Carpenter -- hcarpenter@mwe.com

-- and Kevin M. Regan -- kregan@mwe.com -- of McDERMOTT WILL &
EMERY LLP, in Wilmington, Delaware, Attorneys for Defendants
Microwave Vision S.A., Phillippe Garreau, and Arnaud Gandois.

Your account



Daniel M. Silver --- dsilver@mccarter.com -- Benjamin A. Smyth --
dsilver@mccarter.com -- and Travis J. Ferguson --
tferguson@mccarter.com -- of McCARTER & ENGLISH, LLP, in
Wilmington, Delaware, Attorneys for Defendant Douglas Merrill.

Henry E. Gallagher Jr. -- hgallagher@connollygallagher.com -- and
Shaun Michael Kelly -- skelly@connollygallagher.com -- of CONNOLLY
GALLAGHER LLP, in Wilmington, Delaware, Attorneys for Defendant

Per

Iversen.

*Class Action Reporter Copyright 1994 - 2023 Bankruptcy Creditors' Service, Inc. and Beard Group,
Inc. All Rights Reserved*