

Delaware Court of Chancery Strictly Construes Right to Discovery of Stockholders Represented By a Contractually Created “Shareholder Representative”

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Merger agreements involving acquisitions of private companies often contain terms creating post-merger obligations or “earnouts” in favor of certain classes of selling stockholders. To address potential claims that may arise from such post-merger arrangements, selling stockholders typically designate a “shareholder representative” to handle such claims on their behalf pursuant to specifically delineated rights and duties. In [*Fortis Advisors, LLC v. Allergan W.C. Holding, Inc.*](#), 2020 Del. Ch. LEXIS 181 (Del. Ch. May 14, 2020) (Zurn, V.C.), the [Delaware Court of Chancery](#) addressed the scope of such rights and duties in the context of a discovery dispute. The Court considered the shareholder representative to be distinct from the selling stockholders on whose behalf the representative is acting, such that the selling stockholders were not deemed to be “parties” to a claim pursued by the representative. Thus, in a letter ruling, the Court held that the defendant could obtain discovery of the selling stockholders only through third-party discovery, not through party discovery directed to the shareholder representative. The Court based its decision on a strict reading of the terms of the agreements establishing the shareholder representative and negotiated information rights contained therein.

In *Fortis*, Allergan acquired the private company Oculeve, Inc. (“Oculeve”). As relevant here, the merger agreement designated plaintiff Fortis Advisors LLC (“Fortis”) as the “sole, exclusive, true and lawful agent, representative and attorney-in-fact” with respect to “any and all matters relating to, arising out of, or in connection with” the merger agreement, including contingent payments that may become due to the former stockholders of Oculeve (the “Shareholders”). After the merger, a dispute arose regarding whether Allergan owed the Shareholders a payment for satisfying a post-closing milestone under the merger agreement, which resulted in Fortis filing suit against Allergan.

The issue before the Court was whether Allergan was entitled to “party” discovery from the Shareholders or, if not, whether Fortis was required to produce records in the custody and control of the Shareholders. The Court denied Allergan’s motion to compel. The Chancery Court explained its decision by noting that: (i) the parties specifically designated Fortis as the real party-in-interest in connection with the post-merger claims; (ii) Allergan was granted access to certain specified categories of documents from Oculeve under the merger agreement, which it had been provided; (iii)

nothing in the merger agreement granted Fortis control over the Shareholders' documents; and (iv) Allergan was not prejudiced by the ruling because it could seek to obtain the documents through third-party discovery.

Delaware law is historically very deferential to contractual arrangements between sophisticated parties. As noted by Vice Chancellor Zurn, "Allergan consented to the shareholder representative structure as formulated in the Merger Agreement, which does not include the discovery rights it seeks to enforce, and which limits itself to the enumerated rights." To the extent that contracting parties seek greater or more expansive rights vis-à-vis their counterparts, they should specify such rights in their agreements.

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National Law Review, Volume X, Number 150

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