

## **Court of Chancery Addresses Direct-Derivative Suit Distinction in The Context of A Merger Transaction**

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In *Brokerage Jamie Goldenberg Komen Rev Tru v. Breyer*, C.A. No. 2018-0773-AGB (Del. Ch. June 26, 2020), the Delaware Court of Chancery (the “Court”) held that the plaintiff shareholder’s (the “Plaintiff”) claims were derivative in nature and that Plaintiff lacked standing to bring such claims. Accordingly, the Court dismissed the complaint for failure to state a claim for relief.

In March 2019, Twenty-First Century Fox, Inc. (“Old Fox”) closed a transaction in which it spun off its broadcasting business to the newly created Fox Corporation (“New Fox”), and sold its remaining businesses to The Walt Disney Company (“Disney”) for \$71.6 billion (the “Transaction”). Plaintiff was originally an owner of Old Fox common stock and subsequently became an owner of New Fox and Disney stock as a consequence of the Transaction. Initially, Plaintiff brought a derivative suit on behalf of Old Fox against Old Fox and certain executives and directors of Old Fox (the “Defendants”) challenging a compensation plan created and implemented by Defendants. After the closing, Plaintiff amended the pleading to bring the claims directly or, in the alternative, derivatively on behalf of New Fox, against New Fox and the Defendants.

As part of the compensation plan, approved by Old Fox in February 2018, certain executives and employees would receive a special grant of restricted stock units and modified performance stock awards. The purpose of the compensation plan was “to incentivize key employees who might consider leaving Old Fox and its successors due to uncertainty about their future roles” at the company. In response to the compensation plan, Plaintiff brought suit alleging a breach of fiduciary duty and unjust enrichment against Defendants. Plaintiff argued the compensation plan “faithlessly allow[ed] the [Defendants] to extract from Old Fox’s sale process unique benefits.”

Upon Defendant’s motion to dismiss, the issue before the court was whether Plaintiff was permitted to bring the suit as a shareholder under Delaware law. First, the Court analyzed whether Plaintiff’s claims were direct or derivative. The Court explained that in order for a shareholder to bring a direct claim in the context of a merger transaction, the shareholder plaintiff must “allege facts showing that the side payment improperly diverted proceeds that would have [otherwise] ended up in the consideration paid to the target [shareholders].” Here, Plaintiff contended its claims were direct because Defendants diverted Old Fox assets during the Transaction that reduced the overall

consideration paid to Old Fox shareholders. The Court found that Plaintiff failed to adequately plead that Defendants influenced the sale process in such a way that “caused anything to be taken off the table that otherwise would have gone to [the Old Fox shareholders]”, and therefore Plaintiff’s claims are derivative. The Court reasoned that Plaintiff’s allegations did not support an inference that the proceeds for the compensation plan, but for Defendant’s improper interference, would have been paid out to shareholders.

Having determined Plaintiff’s claims were derivative in nature, the Court then decided whether Plaintiff had standing to bring a derivative suit. Plaintiff conceded it did not have contemporaneous ownership of the New Fox stock, and instead argued the exception applied where contemporaneous ownership is not necessary if the merger is “merely a reorganization.” The Court rejected this argument by contending that New Fox is “vastly different” from Old Fox, as it only contains a portion of Old Fox’s assets and certain liabilities, and thus does “not come close to satisfying the ‘mere reorganization exception.’” Therefore, the Court granted Defendant’s motion to dismiss Plaintiff’s complaint because the claims were derivative and Plaintiff did not have standing to bring such claims.

[Brokerage Jamie Goldenberg Komen Rev Tru v. Breyer, C.A. No. 2018-0773-AGB \(Del. Ch. June 26, 2020\)](#)

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