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Rejects literal reading of "no survival" and "no third-party beneficiaries" provisions at pleading stage to allow introduction of parol evidence to determine parties' intent

INTRODUCTION

Merger agreements governing the purchase of publicly traded corporations ("*public merger agreements*") typically differ from transactional documents for other merger and acquisition transactions in several significant respects. Among these distinguishing items are: (i) the actual sellers in interest—the stockholders of the publicly traded corporation—are *not* parties to the merger agreement, and (ii) the vast majority of the operative provisions of the merger agreement do *not* survive the effectiveness of the merger.

The parties to public merger agreements generally include only the target company, the acquiring company, and a newly formed, wholly owned subsidiary of the acquiring company that disappears in the merger. Target company stockholders, the recipients of the merger consideration, are not named as parties to, and do not sign, the public merger agreement. Further, public merger agreements usually specify that there are no "third-party beneficiaries" entitled to enforce any provision thereof (with the frequent exception of target company directors and officers who, while not parties, are expressly given the right to enforce provisions granting them rights to continued indemnification and insurance protections post-merger).

Although the target and acquiring companies make numerous representations and warranties to each other, and agree to perform various covenants for each other's benefit, public merger agreements generally specify these provisions do *not* survive the effectiveness of the merger (subject to narrow and specified exceptions). This stands to reason, because the target company usually emerges from the merger as a wholly-owned subsidiary of the acquiring company. As such, neither company has any interest in initiating proceedings against the other for post-merger breaches of any of these representations, warranties, and covenants. Even if the target company stockholders were given rights to enforce provisions of the public merger agreement, those provisions would not be enforceable by anyone post-merger.

Notwithstanding the disavowal of covenant survival and third-party beneficiary rights, there are circumstances in which publicly traded targets bargain for post-merger covenants in public merger agreements. For instance, where a significant amount of acquiring company stock is used as merger consideration, the public merger agreement may contain post-merger covenants required of the acquiring company relating to so-called "social issues." These may include representation of members of the target board of directors on the acquiring company board, identification of post-merger senior management, location of company headquarters, etc. It is rare, however, to see enforcement provisions relating to these social issues in a public merger agreement.

It is noteworthy, therefore, that the enforceability of a post-merger covenant in a public merger agreement was precisely the issue before the Delaware Court of Chancery (the "*Chancery Court*") in *Dolan v. Altice USA, Inc.*, C.A. No. 2018-0651-JRS, 2019 WL 2711280 (Del. Ch. June 27, 2019) ("*Dolan*"). In *Dolan*, Vice Chancellor Joseph R. Slights III refused to dismiss at the pleading stage an effort by former target company stockholders to enforce certain promises made by an acquiring company in a public merger agreement, despite the absence of provisions either (i) providing for the post-merger survival of these promises or (ii) granting third-party enforcement rights to the former stockholders. The Vice Chancellor, declaring the public merger agreement "ambiguous," opted to give the former stockholders an opportunity to introduce "parol evidence" at a late stage of the proceedings to defeat the acquiring company's contention the post-merger promises were "nothing more than nugatory placation."

I. FACTUAL BACKGROUND

A. Cablevision and Altice Sign a Merger Agreement

Members of the Dolan family (the "*Dolans*") were the founders and controlling stockholders of Cablevision Systems Corp., "one of the largest cable operators in the United States" ("*Cablevision*" or the "*Company*"). On September 16, 2015, Cablevision and Altice N.V. (together with its affiliated companies, "*Altice*") signed an Agreement and Plan of Merger ("*Merger Agreement*") calling for Altice to pay $34.90 for each share of Cablevision stock, "resulting in total merger consideration of $17.7 billion" (the "*Merger*"). The Dolans received over $2.2 billion, or approximately 20% of the Merger consideration.

Prior to the Merger, the Dolans owned 33.3% of Cablevision's stock. In early 2015, "Altice and the Dolan family began discussing Altice's possible acquisition of Cablevision." The Dolans initially sought to exclude News12 Networks LLC ("*News12*"), "a cohesive group of regional cable news television channels" operating in the New York City tri-state area, from the Merger. Instead, the Dolans proposed to spin off News12 into an entity they controlled. At the insistence of Altice, the Dolans ultimately relented "in exchange for assurances in the Merger Agreement that Altice would operate News12 in a manner that preserved its employee base, quality reporting and programming." Reassured by this commitment, the Dolans agreed up-front to vote their controlling interest in favor of the Merger Agreement.

The assurances with respect to News12 were memorialized in Section 6.4(f) of the Merger Agreement ("*News12 Assurances*"), which called upon Altice to operate News12 "substantially in accordance with the existing News12 business plan . . . through at least the end of plan year 2020." The existing News12 business plan, incorporated by reference into the Merger Agreement, "provide[d] for News12 to employ a full-time equivalent headcount of 462 employees for a five-year period" ending in 2020, and "confirm[ed] that Altice [would] not materially modify News12's content or decrease any of the budgeted expenses."

However, two other provisions of the Merger Agreement seemed to undercut the News12 Assurances. Section 9.8 ("*no third-party beneficiary provision*") "disclaim[ed] the existence of third-party beneficiaries" by stipulating the Merger Agreement "is not intended to, and does not, confer upon any Person other than the parties hereto any rights or remedies." Further, Section 9.1 ("*no survival provision*") did not include the News12 Assurances in the narrow list of Merger Agreement sections excepted from the general provision stating that "[a]ll other representations, warranties, covenants and agreements in this Agreement shall not survive the consummation of the Merger."

B. Altice Reneges on News12 Assurances

In spring 2017 after the merger closed, Altice began the process of terminating News12 employees, thereby reducing operating expenses "to levels under the allocations in" the News12 budget incorporated into the Merger Agreement. While Altice explained this was "necessary to give News12 a 'fresh look,' " the Dolans complained this strategy would "negatively affect News12's ability to maintain its historic level of quality and hyperlocal news content."

On September 4, 2018, the Dolans asked the Chancery Court to specifically enforce the News12 Assurances and enjoin Altice from breaching the Merger Agreement. Altice moved to dismiss, arguing (i) the Dolans had no third-party beneficiary status under the Merger Agreement entitling them to enforce the News12 Assurances, and (ii) the News12 Assurances were not included among the covenants specifically excluded from the no survival provision. The Dolans countered by pointing out (i) the News12 Assurances by their terms extended beyond effectiveness of the Merger to at least 2020, and (ii) the Dolans were "either parties to the Merger Agreement, even though not identified as such, or third-party beneficiaries" entitled to enforce the News12 Assurances, regardless of the no third-party beneficiary provision.

Having none of this, Altice proclaimed the News12 Assurances were merely "an aspirational, albeit unenforceable, expression of then-present intent" and, to the extent the Dolans had relied thereon, "they negotiated a 'bad deal.' "

II. VICE CHANCELLOR SLIGHTS'S ANALYSIS

Vice Chancellor Slights denied Altice's motion to dismiss the Dolans' breach of contract claim. In so ruling, the Vice Chancellor focused on the ambiguity inherent in three related provisions of the Merger Agreement: (1) the News12 Assurances, which "expressly contemplate[ ] that Altice will have performance obligations that extend well beyond closing," (2) the no survival provision, "which suggests the [News12 Assurances] did not survive the closing of the Merger," and (3) the no third-party beneficiary provision, which technically precludes the Dolans from enforcing the News12 Assurances. Only the admission of "parol evidence" at a later stage of the proceedings could help to resolve this puzzle.

A. *Dolans Adequately Pled Third-Party Beneficiary Status*

Vice Chancellor Slights began his analysis by considering whether the Dolans had standing to bring contractual claims as third-party beneficiaries of the Merger Agreement. According to the Vice Chancellor, at the pleading stage, this required the pleading of facts allowing a "reasonable inference" that:

(i) the contracting parties [ ] intended that the third party beneficiary benefit from the contract, (ii) the benefit [was] . . . in satisfaction of a pre-existing obligation to that person, and (iii) the intent to benefit the third party [was] a material part of the parties' purpose in entering into the contract.

The Vice Chancellor determined the Dolans "well pled each of the three requisite elements to establish third-party beneficiary status" by alleging they would not have agreed to include News12 in the Merger and vote their Cablevision shares in favor of the Merger Agreement without Altice agreeing to include the News12 Assurances in the Merger Agreement.

Vice Chancellor Slights also recognized, however, the no third-party beneficiary provision ran headlong into the Dolans's claim of third-party beneficiary status. Because the related Merger Agreement provisions could not be "harmonize[d] . . . by looking only within the four corners of the Merger Agreement," extrinsic evidence was required to determine what the News12 Assurances "intended to mean and how, if at all, it is to be enforced."

B. Dolans Adequately Alleged News12 Assurances Survived Merger

To defeat Altice's motion to dismiss, the Dolans needed to establish as "reasonably conceivable" that the no survival provision did not apply to the News12 Assurances. In this regard, Vice Chancellor Slights considered the "conflicting interpretations" offered by the Dolans and Altice.

For their part, the Dolans could not conceive "why else . . . such a detailed, heavily negotiated provision with an accompanying schedule and five-year life span be included in the Merger Agreement?" Altice asserted, on the other hand, inclusion of the News12 Assurances "was simply a goodwill gesture and was in no way meant to bind Altice before or after the Merger closed." The Dolans rejected this contention, noting the News12 Assurances were "not drafted as an expression of good will," but rather as an affirmative "obligation—[Altice] . . . will operate News12 in accordance with the existing News12 business plan" (emphasis omitted).

While recognizing Altice's "construction fairly tracks the plain language" of the no survival provision, the Vice Chancellor was concerned this construction would render the News12 Assurances "superfluous in the sense that it is entirely unenforceable—by anyone . . . an arguably 'absurd result.' "As such, because Altice's interpretation was not "the only reasonable construction" of these provisions, it was not entitled "as a matter of law" to dismissal at the pleading stage.

CONCLUSION

As Vice Chancellor Slights's decision in *Dolan* demonstrates, parties to a public merger agreement cannot count on Delaware courts to interpret so-called "boilerplate" provisions—such as "no survival" and "no third-party beneficiary" clauses—literally. Context matters, and Delaware courts prefer to enforce and sustain all provisions of a contract between sophisticated parties. Thus, they will not lightly accept an acquiring company's characterization of an express post-merger covenant as "aspirational, albeit unenforceable."

Of course, in the case of widely held target companies, it is unlikely there will be a stockholder with the inclination or resources to pursue litigation to enforce a "social issue" covenant negotiated into a public merger agreement. However, the Dolans were not ordinary public company stockholders, placing Altice in the position of having to explain why an express post-Merger promise should not be enforced. If Altice never intended to live by the News12 Assurances, its counsel likely should have given more consideration to the drafting of provisions frequently, but not wisely, dismissed as "boilerplate."