

Shareholder Representative Provision Precludes Discovery From Selling Shareholders

Alert

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Buyers in M&A transactions should now carefully review the rights and responsibilities of a shareholder representative and whether the terms of a shareholder representative provision preclude discovery against individual selling stockholders. On May 14, 2020, the Delaware Court of Chancery denied defendant Allergan's motion in *Fortis Advisors LLC v. Allergan W.C. Holding Inc.* for an order requiring the former stockholders of Oculeve, Inc. to participate in discovery as real parties in interest and to be subject to trial subpoenas as parties. In the alternative, Allergan sought to compel the stockholders' agent, plaintiff Fortis Advisors LLC, referred to as Fortis or the Shareholder Representative, to procure and produce documents and testimony from the stockholders. The court's reasoning was based on its conclusion that the stockholders' appointment of Fortis as Shareholder Representative made Fortis the real party in interest to the litigation, not the stockholders themselves.

The case began when Fortis, as Shareholder Representative, asserted that Allergan had materially breached the parties' 2015 merger agreement under which Allergan purchased Oculeve. Fortis accused Allergan of failing to make an Enhanced Product Labeling Milestone payment, and failing to use commercially reasonable and good faith efforts to achieve the Enhanced Product Labeling Milestone before March 31, 2018.

Allergan's initial document requests defined "sellers" as each of the sellers named in Schedule I to the merger agreement, together with certain related parties. The definition included over fifty individual selling stockholders. Fortis objected to the requests on the basis that they were directed to "sellers" who were not parties to the litigation.

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The merger agreement appointed Fortis as the stockholders’ “sole, exclusive, true and lawful agent, representative and attorney-in-fact of all sellers...with respect to any and all matters relating to, arising out of, or in connection with, this agreement.” In particular, Allergan agreed that Fortis would “act for the sellers with regard to all matters pertaining to the...Contingent Payments” (which included the Enhanced Product Labeling Milestone). The merger agreement did not empower Fortis to compel stockholder participation in litigation; rather, it appointed Fortis to litigate in the stockholders’ stead.

According to the court, the contractual appointment of a shareholder representative to bring certain actions makes that representative the real party in interest in those actions. This structure is helpful to both buyers and sellers, as it “enables each side to resolve post-closing disputes efficiently.” Buyers also benefit from the fact that the structure makes a judgment against the representative binding on all the stockholders, eliminating the risk of inconsistent judgments. The opinion states the court has been reluctant to disregard the clear contractual authority of a stockholders’ representative at the behest of a party.

The court held the merger agreement specified Fortis was to act for the sellers with regard to all matters pertaining to the contingent payments. Allergan consented to the shareholder representative structure as formulated in the merger agreement, which did not include the discovery rights it sought to enforce, and which limited itself to the enumerated rights. The fact that the merger agreement did not give Fortis control over the stockholders and their discovery was not Fortis’s “fault” or “problem”—it was a result that Allergan bargained for.

For more information on shareholder representative provisions, please contact [Steve Quinlivan](#), Ashlee Germany, Timothy Joyce, [Jennifer Cooke-Yin](#), Jennifer Moyer, [Jack Bowling](#), [Scott Gootee](#), [Patrick Respeliens](#) or the Stinson LLP contact with whom you regularly work.

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