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**MERGERS AND ACQUISITIONS**

**Commercial Division Enjoins Xerox-Fujifilm Deal Resulting in Resignation of Xerox's CEO**



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On April 27, 2018, Justice Barry Ostrager of the New York Commercial Division enjoined a no-cash transaction that would have granted Fujifilm (“Fuji”) a 50.1 percent controlling interest in Xerox. Just days after the Court’s decision an agreement was reached whereby the CEO of Xerox, Jeff Jacobson, and six other current Xerox board members would step down from their positions, ceding control of the company to representatives of investors Carl Icahn and Darwin Deason. Shortly thereafter, Xerox reversed course, indicating publicly that Jacobson would stay on as CEO. However, ultimately Xerox entered into a settlement agreement with Icahn and Deason resulting in the resignation of Jacobson and the scuttling of the Fuji deal.

The litigation reached the Commercial Division on separate motions for preliminary injunctions brought by Deason (the third largest shareholder of Xerox) and

certain pension funds that hold shares in Xerox. According to court documents, Icahn is sharing the costs of prosecuting the litigation with Deason. *See In Re: Xerox Corporation Consolidated Shareholder Litigation*, Index No. 650766/18, NYSECF Doc. No. 488 at 2-3. Deason and the pension funds sought to enjoin a transaction that would have allowed Fuji to acquire a 50.1 percent controlling interest in Xerox and would have permitted Jacobson to stay on as CEO of the combined entity.

The case provides Commercial Division practitioners with a useful review of the standards which control fiduciary duty claims and whether the business judgment rule applies in certain corporate transactions.

**Background**

Currently, Fuji owns a 75 percent interest in a joint venture with Xerox that distributes Xerox products throughout Asia, Australia, and New Zealand. *Id.* at 1. That venture accounts for approximately 25 percent of Xerox’s total revenues. *Id.* Per the Commercial Division’s decision, the joint venture agreement between Fuji and Xerox contains a number of provisions that make it difficult for Xerox to engage in transactions with parties other than Fuji. For example, Xerox is prohibited from selling more than 30 percent of its outstanding shares to a competitor of Fuji without canceling the joint venture and losing the rights to the technology that Xerox contributes to the joint venture. *Id.*

In early 2017, Fuji’s CEO, Shigetaka Komori, inquired about whether Xerox would be interested in being acquired by Fuji. Xerox’s CEO, Jacobson, responded that Xerox would only consider a deal if Fuji’s offer reflected an “appropriate premium to our current trading price,” and, importantly, provided “our shareholders 100 percent cash consideration.” *Id.* at 6 (emphasis added). Fuji eventually informed Xerox that a cash purchase of all of Xerox’s shares would be too expensive for Fuji. *Id.* at 7.

Following these initial negotiations, Jacobson met with Icahn, a Xerox investor. Icahn informed Xerox’s

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CEO that he did not believe Jacobson to be the right person to serve as CEO of Xerox. Thereafter, Jacobson and Xerox's investment banking advisor, Centerview Partners, developed a transaction structure that would allow Fuji to make a cashless acquisition of Xerox. *Id.* Icahn informed the Xerox Board that he opposed this transaction and requested that a search committee be formed to identify a replacement CEO. The Xerox Board agreed and began identifying potential candidates to replace Jacobson. *Id.* at 8.

In November 2017, the Xerox Board informed Jacobson that he might be replaced as CEO and told him to stop any discussions regarding a combination between Fuji and Xerox. Jacobson communicated this instruction to his Fuji counterparts. Nonetheless, with the authorization of Robert Keegan, the Chairman of Xerox's Board, Jacobson continued negotiations for Fuji's cashless acquisition of Xerox. *Id.* at 9. Despite having pursued a replacement CEO, the Xerox Board eventually insisted that Jacobson remain the company's CEO following any Fuji transaction; and Fuji readily conceded this point, given that Jacobson "was the person who had delivered cash-free control of Xerox to Fuji." *Id.* at 11.

As the negotiations continued, Jacobson communicated with individuals at Fuji about attempts by Icahn and the Xerox Board to fire him as CEO. The Fuji representatives responded with statements of their support and loyalty to Jacobson. *Id.* at 13. Specifically, Jacobson sent a number of messages indicating that his loyalties were aligned with Fuji—not with the Xerox Board. *Id.*

Ultimately, once the cashless transaction was scheduled for a shareholder vote, Deason and the pension plaintiffs sought a preliminary injunction from the Commercial Division preventing any further action on the Fuji transaction.

### Justice Ostrager's Opinion

#### 1. Breach of Fiduciary Duty by Jacobson and Other Xerox Directors

Justice Ostrager ruled that plaintiffs were likely to succeed on the merits of their fiduciary duty claim against Jacobson and the other Xerox Board directors and granted a preliminary injunction. In deciding the injunction request, Justice Ostrager focused on the inability to logically separate Jacobson's potential termination as Xerox's CEO with his pursuit of a deal with Fuji. Under New York law, when a corporate director "has an interest in a decision, the business judgment rule does not apply." *Id.* at 17 (quoting *In re Croton River Club Inc.*, 52 F.3d 41, 44 (2d Cir. 1995)). Justice Ostrager readily determined that the business judgment rule did not apply here because Jacobson plainly was self-interested in seeing Fuji complete a deal with Xerox because it would have enable him to stay on as the company's CEO. *See generally id.* at 18.

Having put the business judgment rule on the side, Justice Ostrager evaluated the potential Fuji deal under the "entire fairness" standard. [*Id.* Under the "entire fairness" standard, courts must evaluate "fair dealing and fair price. The fair dealing prong of the entire fairness inquiry relates to how the transaction is structured and negotiated. The fair price prong relates to the economic and financial considerations of a proposed merger." *Id.* at 18-19 (quoting *In re: Viacom Inc. Shareholder Deriv. Litig.*, 2006 WL 6663987, at \*7 (N.Y. Sup. Ct. N.Y. Co. June 23, 2006)).

In reviewing the Fuji transaction, Justice Ostrager observed that Jacobson and the other Xerox directors had "acted in bad faith in structuring and negotiating the proposed transaction" because of their interest in obtaining future directorship positions on a new Xerox board. *Id.* at 19. Specifically, the Court found that the transaction undervalued Xerox despite giving majority control to Fuji. *Id.*

#### 2. Aiding and Abetting Breach of Fiduciary Duty by Fuji

Justice Ostrager also held that plaintiffs were likely to succeed on their claim that Fuji aided and abetted the director defendants' breach of fiduciary duty. Under New York law, "a claim for aiding and abetting fiduciary duty requires (1) a breach by a fiduciary of obligations to another; (2) that the defendant knowingly induced or participated in the breach; and (3) that the plaintiff suffered damage as a result of the breach." *Id.* at 19-20 (quoting *Higgins v. New York Stock Exch., Inc.*, N.Y.S. 2d 339, 364 (N.Y. Sup. Ct. 2005)). Importantly, an individual may be held liable for aiding and abetting a breach of fiduciary duty even when they have no independent fiduciary obligation to the injured party. *Id.* at 20.

Justice Ostrager concluded that the Fuji directors were aware that Jacobson was under enormous pressure from both Icahn and the Xerox Board. In fact, in the words of one Fuji representative, the situation with Jacobson "enabled Fuji to take control of Xerox without spending a penny." *Id.* The Commercial Division determined that Jacobson and Fuji were aligned in such a way that Fuji could consummate the deal on favorable terms and Jacobson could maintain his position as CEO. *Id.*

### Conclusion

Justice Ostrager's opinion in Xerox applies the well-established principles that govern fiduciary duty and interprets the business judgment rule which typically controls shareholder litigation under New York law. The Xerox decision, together with the resulting agreement, highlights the high stakes that are involved in the sorts of shareholder disputes that are litigated in the Commercial Division.