

Clouded Picture: Xerox CEO Resigns Following Decision by NY Court to Temporarily Halt Proposed Merger With Fujifilm

On Friday, April 27, 2018, New York State Supreme Court Judge Barry R. Ostrager granted a preliminary injunction which blocked Xerox Corporation's ("Xerox") potential transaction with Fujifilm Holdings Corporation ("Fuji") based on breaches of fiduciary duties. If consummated, the \$6.1 billion transaction would have resulted in Fuji merging into U.S.-based Xerox, with Fuji owning 50.1% of the new Xerox entity. In the days following Judge Ostrager's decision, Xerox reached an agreement with activist investors Carl Icahn and Darwin Deason to remove CEO Jeff Jacobson and six other board members from their positions, effectively ceding control of the company to Icahn and Deason. Icahn and Deason have since placed new directors on the board. These new directors will meet to reevaluate Xerox's relationship with Fuji. Fuji has indicated that it will appeal the ruling and that it believes Xerox's new board has an obligation to perform under the existing agreement.

Background

In January 2018, Xerox and Fuji entered into a complex merger that would have resulted in Fuji shareholders owning 50.1% of the combined entity with Xerox's then-CEO, Jacobson, remaining on as CEO. After the deal was announced two of Xerox's three largest shareholders, Icahn and Deason, filed motions to enjoin the transaction, arguing it grossly undervalued Xerox's worth.

Jacobson, Xerox's primary negotiator for the Fuji transaction, had previously been told by Icahn that Icahn wanted Xerox sold in an all-cash transaction and that Icahn would suggest Jacobson's removal from the company if he failed to finalize such a transaction. Other members of Xerox's board also indicated that

they wanted a new CEO and went so far as to hire a recruiting company to find replacement CEO-candidates. According to Judge Ostrager, the facts "clearly show that Jacobson, having been told on November 10 that the [b]oard was actively seeking a new CEO to replace him, was hopelessly conflicted during his negotiation of a strategic acquisition transaction that would result in a combined entity of which he would be CEO."

In light of these facts, the court found that the plaintiffs demonstrated a likelihood of success on their breach of fiduciary duties claims and issued a preliminary injunction to allow for a proxy contest between the current board and candidates nominated by Icahn and Deason. Additionally, the court found that Fuji may have aided and abetted the fiduciary duty breaches by Jacobson and the Xerox directors.

Our View

Judge Ostrager's decision raises several questions, which may remain unanswered, as the replacement of Xerox's board may effectively prevent the matter from moving forward. First, if this action would have been raised in Delaware, would the court have permitted the transaction to move forward to the stockholders' vote, possibly with additional disclosures?

In addition, the court's preliminary ruling that Fuji may have aided and abetted the Xerox directors' breach is notable and may be challenged by Fuji on appeal. While the court found the record sufficient to support a finding of aiding and abetting liability, many dealmakers might view Fuji's behavior here as simply consistent with that of a buyer seeking to protect its interests and secure the best deal possible.

While we do not necessarily think that the court's decision should give M&A participants pause in continuing to conduct negotiations in a manner consistent with market practice, we do think the decision will force companies to discuss with M&A practitioners unusual situations like the one that Xerox and Fuji faced.



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