

Court Decision Helps REITs Strategize for Successful Acquisitions in the Face of Shareholder Litigation

Following the announcement of the sale of a public company, stockholders with minimal holdings now routinely file litigation seeking an injunction of the stockholder vote, in hopes that a company will bow to the pressure to settle, given the stakes.

A recent decision involving one such suit against a Maryland REIT may prove helpful to other REITs facing similar litigation.

In December 2014, Maryland REIT Hudson Pacific Properties ("Hudson") announced that it had entered an asset purchase agreement with Blackstone Group L.P. ("Blackstone").

The transaction required the approval of Hudson's stockholders because equity securities to be issued as consideration in the transaction exceeded 20% of the total Hudson common stock and operating partnership units at the time.

In public filings Hudson explained that the transaction would not give rise to a change-in-control and Blackstone would only possess a 9.8% stake in Hudson post-transaction.

In January 2015, plaintiff Fundamental Partners filed suit against Hudson, Hudson's directors, Blackstone, and a financial advisor, alleging that the directors' decision to enter into the purchase agreement constituted a breach of their fiduciary duties, among other claims.

Shortly after filing the lawsuit, Fundamental Partners filed for a temporary restraining order, followed by a motion for preliminary injunction seeking—on an *ex parte* basis—to enjoin the

stockholder vote. Fundamental Partners scheduled the *ex parte* hearing two days before the stockholder vote.

Ultimately, the court denied the motion for preliminary injunction in its entirety on four independently sufficient grounds.

First, the court held that Fundamental Partners improperly availed itself of *ex parte* procedures in bringing its motion.

Second, Fundamental Partners lacked standing because, under Maryland law, breach of fiduciary duty claims must be brought derivatively on behalf of and in the name of the company.

Third, Fundamental Partners failed to establish a substantial likelihood of prevailing on the merits of its underlying cause of action.

Finally, the court concluded that the balance of harms did not weigh in Fundamental Partners' favor because it would not suffer any irreparable injury absent a preliminary injunction.

Appreciating the fact that these cases are being filed regularly in an effort to force a settlement, and understanding the substantive bases upon which the court relied in this case, could prove helpful to other REITs that are considering a substantial acquisition involving equity consideration, even if the transaction does not result in a change-in-control.



BY JULIAN KLEINDORFER, ESQ.

Julian Kleindorfer is a Partner at Latham & Watkins and a global Co-chair of the firm's REIT Industry Group.



BY MICHELE D. JOHNSON, ESQ.

Michele Johnson is a Partner at Latham & Watkins. She is a member of the firm's Executive Committee and the former Managing Partner of the Orange County office.



BY BRIAN T. GLENNON, ESQ.

Brian Glennon is a Partner in the Los Angeles office of Latham & Watkins. He Co-chairs the Securities Litigation and Professional Liability Practice and is a member of the White Collar and Government Investigations Practice.



BY SARAH E. DIAMOND, ESQ

Sarah Diamond is an Associate in the Orange County office of Latham & Watkins. Ms. Diamond's practice focuses on complex business litigation, with an emphasis on M&A, securities and commodities fraud, professional liability and class action litigation.



BY NATHAN M. SAPER, ESQ.

Nathan Saper is an Associate in the Los Angeles office of Latham & Watkins and a member of the firm's Litigation Department. Mr. Saper's practice focuses on securities and complex business litigation, white collar defense and investigations, and intellectual property disputes.

ABOUT LATHAM & WATKINS

Latham & Watkins is a global law firm with approximately 2,100 lawyers in its offices located in Asia, Europe, the Middle East and the United States. The firm has internationally recognized practices in a wide spectrum of transactional, litigation, corporate and regulatory areas.