

THE REVIEW OF
**SECURITIES & COMMODITIES
REGULATION**

AN ANALYSIS OF CURRENT LAWS AND REGULATIONS
AFFECTING THE SECURITIES AND FUTURES INDUSTRIES

Vol. 55 No. 21 December 14, 2022

BUZZFEED CASE HIGHLIGHTS NEW TRENDS IN SPAC LITIGATION

In this article, the authors discuss the Buzzfeed case as an exemplar of emerging trends affecting SPAC transactions.

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Special purpose acquisition companies (“SPACs”) have been under the microscope this year. As markets cooled, shareholders have sought to recoup investments in these “blank check” companies by lobbing accusations of securities fraud, breach of fiduciary duty, breach of contract, and violations of state-specific blue-sky laws.¹

One highly publicized example is the litigation over a business combination transaction between BuzzFeed, Inc., a digital media company (“Old BuzzFeed”) and 890 5th Avenue Partners, Inc. a SPAC (“890”). When the intended transaction was publicly announced in mid-2021, the market was at first excited because 890 had about \$287.5 million in its trust account from the proceeds of its public offering and private placement. However, most public shareholders of 890 redeemed

their shares in connection with the transaction and about \$271.3 million from the trust account was returned to those investors, leaving approximately \$16.2 million in the trust account available to the combined company at the closing.² The lawsuit that followed highlights emerging trends affecting SPAC transactions, including the difficulty of handling employee-shareholder disputes and the importance of clear arbitration agreements.

BACKGROUND

Founded in 2006, Old BuzzFeed grew from a website of digital lists into a digital-media conglomerate. Its ability to engage younger audiences gained the attention of more traditional media outlets. For example, in 2016, NBCUniversal invested \$200 million in Old BuzzFeed at a valuation of \$1.7 billion. This allowed Old BuzzFeed to expand beyond its original website to entities such as BuzzFeed News, HuffPost, Complex Networks, and Torando Labs.

This success led to an increasing interest in bringing the company public. In mid-2021, at the peak of the SPAC trend, Old BuzzFeed announced it would merge with 890. The SPAC had two subsidiaries created for the

¹ See, e.g., *In re MultiPlan Corp. S’holders Litig.*, 268 A.3d 784 (Del. Ch. 2022) (establishing a heightened standard for evaluating the fairness of acts by SPAC officers and directors due to inherent conflicts that exist between them and public stockholders); *In re Romeo Power Inc. Sec. Litig.*, No. 21 Civ. 3362 (LGS), 2022 WL 190788 (S.D.N.Y. June 02, 2022) (addressing the application of the “forward-looking statements” defense to a securities lawsuit if asserted by a SPAC); *Jedrzejczyk v. Skillz Inc.*, No. 21-cv-03450-RS, 2022 WL 231688 (N.D. Cal. July 5, 2022) (requiring proof of falsity and scienter in a securities fraud lawsuit against a SPAC).

² https://www.sec.gov/ix?doc=/Archives/edgar/data/1828972/000110465921148188/tm2134844d1_8k.htm.

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transaction, called Merger Sub I and Merger Sub II.³ The merger involved two transactions. First, Old Buzzfeed would merge with Merger Sub I and become the surviving entity and a wholly-owned subsidiary of 890. Second, Old Buzzfeed then merged into Merger Sub II, with Merger Sub II becoming the surviving company. The transaction also included an acquisition of Complex Networks, a global youth entertainment network spanning major pop culture categories. At the closing, Merger Sub II was renamed BuzzFeed Media Enterprises, Inc. and remained as a wholly-owned subsidiary of 890, which was renamed BuzzFeed, Inc. (“New Buzzfeed”).

The transaction was announced by Old Buzzfeed in June 2021. Highlights of the deal were that 890 had approximately \$288 million in its trust account, \$150 million financing was secured, the implied valuation at the closing for Old Buzzfeed would be approximately \$1.5 billion, and Old Buzzfeed would acquire Complex Networks before the closing.⁴ Despite initial excitement, the ensuing months saw investors sour on the deal, and union issues plagued the digital-media company. In connection with the closing, \$271.3 million was redeemed by public shareholders of 890 and only \$16.2 million in the trust account was made available to New Buzzfeed at the closing.

The business combination was approved by shareholders of 890 in late 2021. Common stock and warrants of New Buzzfeed remain listed and traded on Nasdaq Capital Market. After an initial price bump, the company’s shares plummeted. Old Buzzfeed employees who owned shares in the company claim they lost millions in the transaction.

BUZZFEED’S SPAC LITIGATION

In early 2022, Buzzfeed employees launched two arbitrations against New Buzzfeed.⁵ They claim that

³ The company is named after the fictional address for the mansion of the “Avengers” in the Marvel cinematic universe.

⁴ https://www.sec.gov/Archives/edgar/data/1828972/000110465921085218/tm2120621d1_ex99-3.htm.

⁵ Plaintiffs’ Opposition to Defendants’ Motion to Dismiss the Verified Complaint on Jurisdictional Grounds at *1, *Buzzfeed*,

New Buzzfeed and its directors (1) should not have approved the merger and (2) should have better informed employees about how to sell their shares.

New Buzzfeed opposed arbitration and wanted to litigate in state court. In *Buzzfeed, Inc. v. Hannah Anderson*, Docket No. 2022-0357 (Del. Ch. Apr 22, 2022), the company asked the court to stay the arbitration and allow the parties to proceed in court. The employees moved to dismiss, arguing that their employment contracts required arbitration.⁶ The court has not yet decided the issues.

ANALYSIS

Buzzfeed presents a good example of the complexity of employee-shareholder disputes in SPAC transactions and the importance of clear arbitration agreements. The court will have to decide whether this dispute is an employment matter or shareholder matter, and whether New Buzzfeed is the right party to the lawsuit.

Do the claims touch on the Employment Agreements?

For the first issue — whether the arbitration clause of the employment agreement applies — the decision will turn on whether “alleged causes of action ‘touch on’ a contractual right in the [underlying agreement].” *Halpern Med. Servs., LLC v. Geary*, 2012 WL 691623, at *2 (Del. Ch. Feb. 17, 2012). The question will therefore be whether the claims of breach of fiduciary duty and securities fraud against New Buzzfeed touch on the employment agreements that granted the shares (as

footnote continued from previous column...

Inc. v. Hannah Anderson, Docket No. 2022-0357 (Del. Ch. Apr 22, 2022).

⁶ Affidavit of Rhonda Powell in Support of Plaintiffs’ Motion for Summary Judgment dated June 16, 2022, ¶ 5, *Buzzfeed, Inc. v. Hannah Anderson*, Docket No. 2022-0357 (Del. Ch. Apr 22, 2022); Katie Robertson, *BuzzFeed argues that employee dispute should be moved to a court*, N.Y. TIMES (April 25, 2022), <https://www.nytimes.com/2022/04/25/business/media/buzzfeed-employees-stock.html>.

the employees assert), or are an unrelated, standard shareholder lawsuit (as New BuzzFeed claims).

The courts have not provided a clear answer. In *Halpern*, the court found that some of the plaintiffs' claims needed to be arbitrated while others did not. The plaintiffs in *Halpern* were two companies involved in medical services. The first company hired the defendant to conduct the day-to-day operations and entered into an employment agreement that contained an arbitration clause. As part of an amendment to the employment agreement, the defendant earned an equity interest in the plaintiffs.

The *Halpern* defendant made a series of ill-fated decisions in managing the company, which led to a cash crunch and layoffs. Plaintiffs challenged several transactions, including at least one that involved an investment in a third-party company in which the defendant also owned a share. The plaintiffs sued. The court required the parties to arbitrate the first plaintiff's claims — breach of contract, unjust enrichment, and breach of fiduciary duty — because those claims were either expressly in the contract or arose out of implied duties in the contract. For example, the breach of fiduciary duty claim arose from obligations imposed by the employment agreement because the agreement established the defendant's equity interest and subsequent duty of loyalty. However, the court retained jurisdiction to hear claims brought by the second plaintiff because it was not a party to the employment contract that contained the arbitration clause.

Factors in *Buzzfeed* point in both directions. Employees of Old BuzzFeed who tried to redeem their shares claim they received their shares as compensation or options as part of their employment, while New BuzzFeed surmises that this is simply a shareholder dispute.⁷ If the Chancery Court determines that the employees are correct and that their negligence, misrepresentation, breach of fiduciary duty, and Section 11 of the Securities Act of 1933 claims⁸ arise from rights and obligations imposed by their employment agreements, the employees may be able to continue their arbitrations. On the other hand, a determination in favor of New BuzzFeed may result in continued Delaware litigation. Either way, the court's determination can impact the scope of employment and arbitration

agreements for any future company pursuing a SPAC merger. Furthermore, companies entering into new forum selection clauses may want to consider how they wish to handle SPAC-related disputes and try to craft the contract agreement accordingly.

Do the Employment Agreements Apply To New BuzzFeed?

The court will also decide whether the employment agreements themselves apply to New BuzzFeed. As noted above, Old BuzzFeed had merged with Merger Sub I and survived the merger and then merged with and into Merger Sub II, with Merger Sub II surviving the second merger. Merger Sub II took on all the liabilities of Old BuzzFeed. This “triangular merger” structure protected the buyer, (890/New BuzzFeed) from the target's (Old BuzzFeed) liabilities by placing them in a subsidiary rather than absorbing them into the parent.

To this end, Section 2.3(b) of the merger agreement provides:

Without limiting the generality of the foregoing, and subject thereto, at the Effective Time, all the property, rights, privileges, immunities, powers, franchises, licenses, and authority of Merger Sub II and the Surviving Entity shall vest in the Surviving Company, and all debts, liabilities, obligations, restrictions, disabilities, and duties of each of Merger Sub II and the Surviving Entity shall become the debts, liabilities, obligations, restrictions, disabilities, and duties of the Surviving Company.⁹

The employees' agreements were with Old BuzzFeed, whose liability flowed into Merger Sub II, but the employees want to hold the parent (New BuzzFeed) liable.

The court will have to decide whether a parent can be held to the employment contracts of its subsidiary. “In a corporate setting, the issue of liability rests on the amount of control the parent corporation exercises over the actions of the subsidiary. The parent will be liable for its subsidiary's activities only if the parent dominates those activities.” *J.E. Rhoads & Sons, Inc. v. Ammeraal, Inc.*, No. CIV.A. 83C-NO-98, 1988 WL 32012, at *4 (Del. Super. Ct. Mar. 30, 1988).

⁷ Plaintiffs' Opposition to Defendants' Motion to Dismiss The Verified Complaint on Jurisdictional Grounds at *47, *Buzzfeed, Inc. v. Hannah Anderson*, Docket No. 2022-0357 (Del. Ch. Apr 22, 2022).

⁸ BuzzFeed, Inc.'s August 9, 2022 Form 10-Q, Part II, Item I.

⁹ Section 2.3 of the Merger Agreement; https://www.sec.gov/Archives/edgar/data/1828972/000110465921085218/tm2120621d1_ex2-1.htm.

As a result, the court will assess whether New Buzzfeed controls the newly constituted BuzzFeed Media Enterprises. “The control must be actual, participatory, and total. Factors to consider in determining domination include ‘stock ownership, officers and directors, financing, responsibility for day-to-day operations, arrangements for payment of salaries and expenses, and origin of subsidiary’s business and assets.’” *Id.* (internal citations omitted). If New Buzzfeed owns all the stock, controls the officers and directors, controls financing, is responsible for day-to-day operations, and pays salaries and expenses, the court may hold that New Buzzfeed is liable for the employment agreements and must abide by its provisions.

CONCLUSION

Ultimately, the Chancery Court’s decision could affect future SPAC litigation. In anticipation of and following the decision, SPACs and their sponsors should conduct robust due diligence of any potential targets, including a detailed review of all employment agreements, union contracts, and agreements that grant

employees shares or options as part of their compensation. Depending on the entity’s goals, corporate bylaws and charters could include forum selection clauses, arbitration clauses, limitations of liability, and exculpatory language for officers and directors.

It remains to be seen if the Buzzfeed SPAC litigation signals a move away from SPACs by digital media companies, a rise in employee-shareholder litigation, or is simply an example of shareholder litigation stemming from SPAC transactions.

For example, Forbes Global Media Holdings Inc. (“Forbes”) had an agreement in place with SPAC Magnum Opus Acquisition Limited, but terminated said agreement.¹⁰ Through the SPAC merger, Forbes would have gone public at a \$630 million valuation.¹¹ While there may not be an explicit connection between the Buzzfeed de-SPAC transaction and Forbes’ decision to terminate its SPAC plans, many media companies are moving away from SPAC plans. Market participants should keep a close eye on *Buzzfeed* to gauge the effect of the decision. ■

¹⁰ *Forbes Announces Termination Of SPAC Transaction*, FORBES (June 1, 2022), <https://www.forbes.com/sites/forbespr/2022/06/01/forbes-announces-termination-of-spac-transaction/?sh=6d75fb737f4e>.

¹¹ Lauren Hirsch and Benjamin Mullin, *Forbes, Chronicler of Wealthy and Powerful, Will Scrap Plan to Go Public via SPAC*; N.Y. TIMES (May 31, 2022), <https://www.nytimes.com/2022/05/31/business/media/forbes-public-spac-deal.html>.