

Alcon Shareholder Litigation

COURT: United States District Court, Southern District of New York
CASE NUMBER: 10 CV 139
JUDGE: Hon. Victor Marrero
CASE CONTACTS: Mark Lebovitch

On January 7, 2010, BLB&G filed a shareholder class action lawsuit in the Southern District of New York, on behalf of the Erica P. John Fund, Inc. and similarly situated minority shareholders of Alcon, Inc. ("Alcon"), against Novartis AG ("Novartis"), Nestlé, S.A. ("Nestlé"), and certain members of the Alcon Board of Directors. The complaint alleged, among other things, breach of contract, aiding abetting a breach of contract, tortious interference with a contract, promissory estoppel, breach of fiduciary duty and unjust enrichment.

Since 2008, Novartis had sought to acquire Alcon, which had been majority-owned by Nestlé. Novartis owned roughly 25 percent of Alcon's outstanding stock pursuant to an April 2008 purchase from Nestlé. At the same time, Novartis secured an option to buy Nestlé's remaining 52 percent Alcon stake, beginning January 1, 2010. This call option, coupled with a stockholder agreement between Nestlé and Novartis, effectively made Novartis Alcon's controlling shareholder, via its effective control of Nestlé's equity stake. Nestlé transferred control of Alcon to Novartis by pledging support for Novartis Board candidates; allowing Novartis candidates to replace Nestlé representatives on the Alcon Board; and pledging to vote in favor of Novartis' initiatives at Alcon.

On January 4, 2010, Novartis announced that it had exercised its option to purchase the remainder of Nestlé's Alcon stock. The consideration to be paid by Novartis to Nestlé amounted to approximately \$180 per share in cash, representing a total purchase price of roughly \$28.1 billion for the 52 percent of the Company. At the same time, Novartis announced that it intended to squeeze out the remaining 23 percent interest in Alcon held by public minority shareholders for non-cash consideration consisting of 2.8 shares of Novartis stock, which, as of January 6, 2010, amounted to only approximately \$147 per share of Alcon (the "Public Offer"). In light of the \$180 price that Novartis proposed paying Nestlé for its shares in Alcon, the Public Offer was patently inadequate. Alcon's public shareholders, moreover, were unable to protect their own interests or rebuff the offer because of Novartis and Nestlé's control over the Company. Novartis and Nestlé also carefully structured the Public Offer to deprive Alcon's minority shareholders of any protection or legal redress, and Novartis stated as much. In this regard, Novartis suggested that Alcon's public shareholders had no remedy at law - stating that the Public Offer was not subject to NYSE tender offer rules despite Alcon's NYSE listing. Novartis further stated that Swiss law does not protect minority shareholders. Alcon's independent directors publicly called Novartis' actions coercive and in violation of applicable restrictions in Alcon's corporate foundational documents. However, because Novartis made clear its intent and will to remove the independent directors if they dared oppose Novartis' predatory conduct, the independent directors could not - absent judicial intervention - act to protect Alcon's minority shareholders from consummation of the Nestlé deal and the Public Offer, at terms wholly unfair to the Alcon minority shareholders. Plaintiff, therefore, sought a preliminary injunction to enjoin the deal.

On January 13, 2010, the Court consolidated certain related actions in the Southern District of New York, and appointed BLB&G as Co-Lead Interim Class Counsel. On January 21, 2010, BLB&G filed a consolidated complaint. The Court held an initial case management conference on January 29, 2010.

On March 29, 2010, Novartis filed a motion to dismiss the case on the grounds of forum non conveniens. On April 20, 2010, Plaintiffs filed their opposition to Novartis' motion to dismiss on grounds of forum non conveniens. On May 10, 2010, Novartis filed its reply memorandum in further support of its motion to dismiss on grounds of forum non conveniens.

The court issued an order conditionally dismissing the action on May 24, 2010. On June 2, 2010, Plaintiffs filed a motion requesting that the Court reconsider its May 24th order.

On June 15, 2010, Judge Marrero held a hearing on Plaintiffs' Motion to Reconsider. On June 17, 2010, the Court denied Plaintiffs' Motion to Reconsider.

On July 14, 2010, Plaintiffs filed a notice of appeal. On August 27, 2010, Plaintiffs submitted their appellate brief.

On December 15, 2010, Novartis agreed to increase the consideration to be paid to Alcon's minority shareholders in connection with the Public Offer to \$168 per share - a total increase of approximately \$1 billion for Alcon's minority shareholders. The increase in merger consideration secured the approval of Alcon's independent directors, mooting Plaintiffs' promissory estoppel and declaratory relief claims.

On January 6, 2011, Plaintiffs dismissed their appeal.