



## Recent SPAC Shareholder Suits in New York State Courts: The Beginning Wave of SPAC Litigation

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### Key Points

- Between September 2020 and March 2021, at least 35 SPACs have been hit with one or more shareholder lawsuits filed in New York state court.
- These lawsuits generally allege that SPAC directors breached their fiduciary duties to shareholders by providing allegedly inadequate disclosures regarding proposed de-SPAC mergers. Some of these lawsuits also assert claims against the SPAC itself, as well as the target company and its board of directors, for allegedly aiding and abetting the SPAC directors' breaches.
- Although these cases are in their early stages and assert claims that are limited in scope, they signify that the plaintiffs' bar is actively monitoring and pursuing SPACs. As additional de-SPAC transactions are announced and close, SPAC shareholder lawsuits are likely to multiply, potentially subjecting SPACs, their boards and sponsors to more significant civil risk and exposure.

For months, lawyers and industry experts have been expecting a surge of litigation and regulatory proceedings related to publicly traded special purpose acquisition companies (SPACs). Thus far, litigation and regulatory enforcement activity in the SPAC space has been relatively infrequent. However, recent activity in New York state court evidences that the wave is beginning.

In December 2020, the Division of Corporation Finance of the United States Securities and Exchange Commission (SEC) issued guidance regarding disclosure considerations for SPACs.<sup>1</sup> Since then, plaintiffs' attorneys have seized upon this roadmap and have been energized in turning their attention to the SPAC market, building an initial wave of New York state court shareholder lawsuits. Tracking the SEC disclosure guidance in part, these lawsuits generally allege that SPAC directors breached their fiduciary duties to shareholders by providing allegedly inadequate disclosures regarding proposed de-SPAC mergers. Some of these lawsuits

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<sup>1</sup> See SEC Division of Corporation Finance, CF Disclosure Guidance: Topic No. 11 (Dec. 22, 2020) (cited hereinafter as "SEC Guidance"), available at <https://www.sec.gov/corpfin/disclosure-special-purpose-acquisition-companies>.

also assert claims against the SPAC itself, as well as the target company and its board of directors, for allegedly aiding and abetting the SPAC directors' breaches.

Although these New York state lawsuits are in their early stages and assert claims that are limited in scope, they signify that the plaintiffs' bar is actively monitoring and pursuing SPACs. As additional de-SPAC transactions are announced and close, and the SEC continues to issue guidance and statements regarding SPACs,<sup>2</sup> SPAC shareholder lawsuits are likely to multiply, potentially subjecting SPACs, their boards and sponsors to more significant civil risk and exposure. We anticipate increased SPAC litigation in federal courts, including complaints asserting claims under various provisions of federal securities laws, including, for example, Sections 10(b), 14(a) and 20(a) of the Exchange Act alleging the relevant registration or proxy statement was false or misleading. A handful of complaints asserting these types of claims have already been filed in federal courts between January and mid-March of this year. We also anticipate increased SPAC litigation in the Delaware Court of Chancery under Delaware corporate law, including books and records demands and claims seeking application of the more arduous "entire fairness" standard to the SPAC directors' conduct.

## Overview of Recent New York State Court SPAC Litigation

Between September 2020 and March 2021, at least 35 SPACs have been hit with one or more shareholder lawsuits filed in New York state court. Some of the lawsuits were filed on an individual basis and others on behalf of a putative class. These lawsuits share a few key similarities.

First, the majority of the complaints were filed after the SEC's December 2020 disclosure guidance, which appears to have provided a roadmap for some of the allegations repeatedly made in these complaints. Like the SEC's guidance, the complaints focus on the SPAC's disclosures regarding a proposed de-SPAC business combination. Specifically, the complaints generally allege inadequate disclosures, targeting certain categories of information that are allegedly materially misleading or incomplete in the publicly filed initial SPAC merger announcement.<sup>3</sup> The SEC's December 2020 SPAC disclosure guidance covers some of these categories of allegedly misstated or omitted information. For example, the complaints track the SEC's disclosure guidance regarding the continued relationship, if any, the SPAC's directors or officers may have with the combined company, potentially giving rise to conflicts of interest with the interests of public shareholders.<sup>4</sup> The complaints also frequently allege inadequate

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<sup>2</sup> The SEC's Division of Corporation Finance has also issued a recent staff statement concerning SPACs. SEC Division of Corporation Finance, Staff Statement on Select Issues Pertaining to Special Purpose Acquisition Companies (Mar. 31, 2021), available at <https://www.sec.gov/news/public-statement/division-cf-spac-2021-03-31>.

<sup>3</sup> See, e.g., Complaint, *Truesdale v. Altimar Acquisition Corp.*, et al., Index No. 650337/2021 (Sup. Ct. N.Y. Cnty. Jan. 18, 2021), Dkt. No. 1, ¶¶ 27-39 (alleging S-4 Registration Statement failed to disclose information regarding the sale process, the post-transaction employment of any SPAC directors or officers, the financial advisors' engagement, compensation, and/or analyses or opinions, and certain financial projections and/or specific line items in projections that were disclosed); Complaint, *Acker v. Churchill Capital Corp II*, et al., Index No. 650892/2021 (Sup. Ct. N.Y. Cnty. Feb. 8, 2021), Dkt. No. 1, ¶¶ 24-30 (alleging S-4 Registration Statement failed to disclose information regarding the sale process, the post-transaction employment of any SPAC directors or officers, the financial advisors' engagement, compensation, and/or analyses, and certain line items in projections that were disclosed).

<sup>4</sup> Compare SEC Guidance, at 4 (suggesting SPACs should consider disclosing information relating to "any continuing relationship [the sponsors, directors, officers, or their affiliates] will have with the combined company"); with Complaint, *Ezel v. GigCapital3, Inc.*, et al., Index No. 650245/2021 (Sup. Ct. N.Y. Cnty. Jan. 12, 2021), Dkt. No. 1, ¶ 28 (alleging S-4 Registration Statement failed to disclose "the timing and nature of all communications

disclosures relating to the SPAC's financial advisor's compensation, including whether any portion is contingent upon consummation of the de-SPAC transaction, and potential conflicts of interest arising from the financial advisor's past services for any parties to the transaction. Although the SEC guidance focuses on the underwriters involved in the SPAC initial public offering (IPO) and/or de-SPAC merger, the substance of the guidance relating to underwriters is nearly identical to the allegations related to financial advisors in the complaints.<sup>5</sup>

Second, these New York state court complaints to date are limited to state law tort claims. The complaints assert breaches of fiduciary duty against the SPAC directors, and a majority of the complaints assert claims for aiding and abetting those breaches by the SPAC, and often the target of the de-SPAC business combination and its board. The complaints to date do not assert any state or federal securities claims.

Third, these shareholder lawsuits were filed after the de-SPAC transaction was announced, but prior to the shareholder vote and subsequent closing. The suits seek preliminary injunctive relief to enjoin the shareholder vote and/or de-SPAC merger. To date, these lawsuits have not resulted in any substantive proceedings. Indeed, plaintiffs have voluntarily discontinued a number of these lawsuits.<sup>6</sup> In these instances, the SPAC filed supplemental amended disclosures regarding the de-SPAC transaction, mooting the allegations in the complaint in advance of the shareholder votes and closings.<sup>7</sup>

## Why New York State Court?

This recent trend in SPAC-related New York state court filings suggests that the plaintiffs' bar may be purposefully filing in New York to capitalize on certain benefits unavailable in other forums.

For example, plaintiffs may be filing in New York to avoid unfavorable precedent in Delaware relating to disclosure-only class settlements. In a disclosure-only settlement, the target company provides the shareholders with supplemental disclosures prior to the closing of the transaction and plaintiffs' counsel with a substantial award of attorney's fees to resolve the class claims. These class settlements, requiring court approval, were popular until the Delaware Court of Chancery made clear in 2016 that disclosure-only settlements will not be approved absent certain conditions.<sup>8</sup> Although New York courts have also been critical of disclosure-only settlements

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regarding the future employment and directorship of the Company's officers and directors, including who participated in all such communications").

<sup>5</sup> Compare SEC Guidance, at 4 (suggesting SPACs should consider disclosing underwriter's compensation, "including the amount of fees that is contingent upon completion of a business combination transaction," scope of engagement and services to be provided, and conflicts of interest), with Complaint, *Quarles v. InterPrivate Acquisition Corp.*, et al., Index No. 657263/2020 (Sup. Ct. N.Y. Cnty. Dec. 23, 2020), Dkt. No. 1, ¶ 24 (alleging S-4 Registration Statement failed to disclose details of financial advisor's compensation, including if any is contingent upon the consummation of the proposed transaction, and prior engagements that could give rise to conflicts of interest).

<sup>6</sup> See, e.g., Notice of Voluntary Discontinuance, *Bushansky v. Haymaker Acquisition Corp. II*, et al., Index No. 656268/2020 (Sup. Ct. N.Y. Cnty. Jan. 14, 2021), Dkt. No. 3.

<sup>7</sup> See, e.g., Haymaker Acquisition Corp. II, Definitive Proxy Statement Relating to a Merger or Acquisition (Form DEFM14A) (Nov. 6 2020), available at <https://www.sec.gov/Archives/edgar/data/1771908/000119312520288015/d935242ddefm14a.htm>; Haymaker Acquisition Corp. II, Schedule 14A Definitive Additional Materials (Form DEFA14A) (Dec. 3, 2020), available at <https://www.sec.gov/Archives/edgar/data/1771908/000119312520309628/d88039ddefa14a.htm>.

<sup>8</sup> See, e.g., *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 899-907 (Del. Ch. 2016).

given that such settlements offer little value to the allegedly injured shareholders, a disclosure-only settlement may still be a viable option in New York.<sup>9</sup>

Thus far, however, these lawsuits have not been settled using a disclosure-only settlement. Indeed, none of the lawsuits have been litigated, and those that have been resolved were done so through early voluntary discontinuances pursuant to New York Civil Practice Law and Rules Section 3217. Given that the overwhelming majority of these lawsuits are still pending, it remains to be seen whether any of these lawsuits will take advantage of New York's disclosure-only settlement precedent.

## Conclusion

The recent flurry of lawsuits in New York state courts is the beginning wave of SPAC-related litigation. The plaintiffs' bar appears focused on SPACs, and that focus will likely augment as the popularity and spike in SPAC activity continues. More is yet to come in the world of SPAC litigation—including increased activity in state and federal courts and more expansive claims—presenting significant civil risk and exposure.

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<sup>9</sup> See *Gordon v. Verizon Commc'ns, Inc.*, 148 A.D.3d 146, 153-66 (1st Dep't 2017) (reversing denial of final approval of disclosure-only settlement); *but see generally City Trading Fund v. Nye*, 59 Misc. 3d 477, 489-515 (N.Y. Sup. Ct. 2018) (denying motion for final approval of disclosure-only settlement).