

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

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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 U.S. Securities and Exchange Commission (SEC) issued guidance regarding disclosure considerations for SPACs. See SEC Division of Corporation Finance, CF Disclosure Guidance: Topic No. 11 (Dec. 22, 2020) (cited hereinafter as “SEC Guidance”), available [here](#). 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 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 (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 [here](#)). 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 road map 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. 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). 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. 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 regarding the future employment and directorship of the Company's officers and directors, including who participated in all such communications"). The complaints also frequently allege inadequate 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. 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).

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. 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. In these instances, the SPAC filed supplemental amended disclosures regarding the de-SPAC transaction, mooted the allegations in the complaint in advance of the shareholder votes and closings. See, e.g., Haymaker Acquisition Corp. II, Definitive Proxy Statement Relating to a Merger or Acquisition (Form DEF14A) (Nov. 6, 2020), available [here](#); Haymaker Acquisition Corp. II, Schedule 14A Definitive Additional Materials (Form DEFA14A) (Dec. 3, 2020), available [here](#).

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. See, e.g., *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 899–907 (Del. Ch. 2016). Although New York courts have also been critical of disclosure-only settlements 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. 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).

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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Alice Hsu is a partner in the corporate practice at Akin Gump Strauss Hauer & Feld LLP, where she focuses on capital markets and corporate governance matters. Ms. Hsu advises boards of directors, issuers, underwriters and investors in public offerings and private placements of equity and debt securities and general corporate matters. She also regularly counsels companies regarding SEC reporting and disclosure issues, stockholder meetings, proxy statements and proxy mechanics. In addition, Ms. Hsu advises public companies with respect to defensive review matters, including implementation of shareholders rights plans and related matters.

Ms. Hsu is the co-head of Akin Gump's social media task force and a member of the New York office's hiring committee.

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Bob Pees handles commercial litigation and domestic and international arbitration arising from securities offerings and corporate transactions.

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Doug Rappaport is a litigator focusing on complex commercial and securities disputes. In recent years, he has served as counsel in trials involving disputes over secured assets, partnership interests, securities fraud, breaches of fiduciary duty, trade secrets, options backdating, tax appraisals and the fraudulent sale of securities. Doug has won numerous dispositive motions and appeals in both state and federal court. On a daily basis, Doug advises clients on matters of regulatory compliance and corporate governance. He also provides advice on activist investing issues, devising strategies regarding the solicitation of board seats, the displacement of existing corporate management and contests for corporate control.

Doug also regularly represents investment funds, corporations and individuals in regulatory and internal investigations. His experience extends to matters before the Securities and Exchange Commission (SEC), the Financial Industry Regulatory Authority (FINRA) and state and foreign securities agencies.

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Jackie Yecies leads the firm's funds litigation initiative, a cross-practice group of lawyers representing clients from fund formation to maturity. The team provides investment funds, including hedge, sovereign wealth and endowment funds, and private equity firm clients with compliance advice, representation in investment-related civil litigation and trials, and guidance through regulatory proceedings.

Jackie regularly represents institutional clients, including investment funds, private equity firms and international banks, as well as individual clients, in U.S. and cross-border investigations. On behalf of her clients, Jackie has presented to various U.S. civil and criminal regulatory agencies, including the Securities and Exchange Commission (SEC) and the Department of Justice. She also represents clients in investigations by Asian and European banking and commercial regulators.

In her global practice, Jackie consistently manages key client relationships on multibillion-dollar litigations, and she has led multiple trial teams to victory, including in federal court in the Southern District of New York (S.D.N.Y.) and in U.S. Bankruptcy Court in Delaware. Jackie has also led arbitrations and mediations, run significant investigations and presented to senior regulatory agencies.

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Stephanie Lindemuth represents clients in complex commercial litigation, with an emphasis on securities, shareholder, and consumer class action defense, including litigation involving or relating to special-purpose acquisition companies (SPACs). She has developed an expertise in litigating and advising clients regarding corporate governance, limited liability company member, and contractual disputes. Stephanie also has experience in bankruptcy litigation, internal, regulatory, and criminal investigations, and matters concerning employment, labor, cybersecurity, privacy and insurance defense.

Stephanie has substantial experience litigating cases in both state and federal courts.

She also is well-versed in assessing litigation risks in potential investments, including analyzing pending securities and derivative suits as well as related regulatory and governmental investigations.

Stephanie joined Akin Gump in 2015. Prior to joining the firm, she was a litigation associate at a prominent New York law firm for approximately two years, focusing on privacy, data security, right of publicity, insurance defense and class action matters. She also served as a law clerk to the Honorable Martin Glenn of the United States Bankruptcy Court for the Southern District of New York.

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