DELAWARE CHANCERY COURT REJECTS FRAUD-BASED AND UNCAPPED INDEMNIFICATION CLAIMS OF GREAT HILL PARTNERS AGAINST THE FOUNDERS OF PLIMUS

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In a case arising out of the purchase by Great Hill Partners of Plimus (now known as BlueSnap, Inc.), the Delaware Court of Chancery, after a 10-day trial and extensive post-trial briefing and oral argument, recently rejected all of the fraud-based claims made by Great Hill against the two founders of Plimus, Messrs. Daniel Kleinberg and Tomer Herzog (the “founders”), who were also directors and major shareholders of Plimus at the time of the transaction.[1] The Court's decision is notable for its rejection of several claims Great Hill pressed for years after initiating the litigation in September 2012.

Plimus's business was to facilitate, as a reseller, transactions between online vendors of digital goods and persons purchasing those goods with their credit cards. As part of that business, Plimus had relationships with various payment processors, who processed the credit card payments.

In the litigation, Great Hill alleged that it was the victim of a fraudulent scheme in its purchase of Plimus based on “four major interrelated components.” As alleged by Great Hill, these components consisted of misrepresentations or concealment as to (1) the termination by one payment processor (Processor A) of its relationship with Plimus; (2) Plimus's risk monitoring systems and history of allegedly violating payment processor or credit card company rules and practices; (3) “earn-out” agreements under which Plimus's then CEO, in the event of a sale of the company to Great Hill or another buyer, would be paid defined sums of money by the founders and a private equity investor (which was the other major shareholder of Plimus at the time of the Great Hill transaction); and (4) a fine imposed on Plimus as a result of processing the transactions of a certain vendor through Processor B and Processor B's threat to terminate its relationship with Plimus.

The Court rejected all of Great Hill's fraud claims, with one exception. The Court concluded that Plimus's then CEO knowingly failed to disclose the Processor B related fine and a threat by Processor B to terminate its relationship with Plimus, although the Court also determined that Great Hill in fact "knew there was, at least, some issue with” the Processor B relationship despite its position to the contrary.

The Court rejected all fraud-based claims against the founders, the representatives of the private equity investor on Plimus's board, and Plimus's then Vice President of Financial Strategy and Payment Solutions. Among other things, the Court concluded that the founders had no awareness of and gave no assistance to any purported fraud against Great Hill and therefore did not aid and abet or conspire in any such fraud. The Court rejected Great

Hill's claim that the "earn-out" agreements were some kind of bribe to Plimus's CEO to misstate or conceal information with respect to Great Hill and instead found those agreements to be legitimate pre-existing business arrangements. The Court also rejected Great Hill's claim that it was not aware of a linkage between resolution of the founders' dispute with the CEO over the amount of his earn-out payment and the CEO's "roll-over" of his Plimus equity into the new company. In that regard, the Court found not credible the testimony of one of Great Hill's witnesses that Great Hill was not aware of that link.

The Court also rejected Great Hill's position regarding the scope of the obligation of the founders (and the other selling stockholders) to indemnify Great Hill under the terms of the merger agreement. The founders and other selling stockholders undertook in the merger agreement to indemnify Great Hill, up to their respective *pro rata* shares of the escrow amount, as the exclusive remedy for, among other things, breaches of representations made by the company in the merger agreement. Great Hill argued that the exception in the exclusive remedy provision for "fraud" meant that even non-culpable selling stockholders would have uncapped indemnification liability for any fraud committed by *another* party. The Court rejected Great Hill's argument, and determined that the founders and other selling stockholders were not obligated to indemnify Great Hill for any fraud committed by another party and that their respective indemnification obligations were indeed capped as provided for in the merger agreement. According to the Court, this "limited liability made sense from the point of view of the" selling stockholders, because "many of them would have limited or no opportunity to verify the representations and warranties personally."

The Court deferred a decision as to the amount of damages and Great Hill's "unjust enrichment" claim against the founders and the other selling stockholders. The Court did, however, note that the "Plaintiffs face a formidable barrier to recovery under a theory of unjust enrichment, because our courts have consistently held that a plaintiff may not pursue unjust enrichment 'aris[ing] from a relationship governed by contract' – here, the Merger Agreement."

The founders of Plimus are represented by K&L Gates LLP and Morris James LLP in this matter.

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[1] *See Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, No. 7906-VCG, 2018 WL 6311829 (Del. Ch. Dec. 3, 2018).

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