FIRM NEWS

Schulte Roth & Zabel Secures Important Win for Activist Investors

Second Circuit Finds that Activist Investors Sued for Alleged Section 13(d) Disclosure Violations Can Moot the Claim by Disclosing the Complaint on its Schedule 13D, Defanging Section 13(d)'s Utility as a Weapon for Incumbent Management

May 23, 2024

In a decision that has major implications for the shareholder activism space, the United States Court of Appeals for the Second Circuit became the first circuit court in the country to hold that an investor can moot a Section 13(d) claim related to missing or inadequate disclosures by disclosing the existence of the dispute itself, making it more difficult for incumbent management to use Section 13(d) as a weapon in proxy contests.

On May 20, 2024, the Second Circuit affirmed the District Court's dismissal of a Section 13(d) claim by Nano Dimension Ltd., an Israeli 3D printing company whose shares trade as NNDM on Nasdaq, against its two largest shareholders, Murchinson Ltd. and Anson Funds, Inc., and certain affiliates.

Nano Dimension Ltd. v. Murchinson Ltd., et al., in which Schulte Roth & Zabel presented argument on behalf of all Appellees, is part of a multi-front litigation between Nano and Murchinson that is the subject of multiple pending actions in the courts of Israel, US federal courts and New York state court.

When activist investors that beneficially own more than five percent of a registered class of a public company's voting equity securities seek to effect change at the company, Section 13(d) of the Securities and Exchange Act of 1934 requires them to make certain disclosures, including whether the investor has formed a "group" with other investors. The Supreme Court has made clear that, when enacting Section 13(d), "Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or prevent large accumulations of stock which would create the potential for such attempts." (*Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975)).

Nevertheless, all too often in proxy contests, companies abuse Section 13(d) by deploying it as a weapon and suing investors for purportedly failing to make adequate disclosures under Section 13(d). When doing so, companies often accuse activist investors of forming a "group" with other investors, and seek remedies such as share divestiture and share sterilization that would provide incumbent management with a decided advantage in corporate elections. In addition, by doing so, companies seek to change the narrative, obtain discovery from the activist and subject the activist to costly and time-consuming litigation.

In keeping with Section 13(d)'s purpose, certain district courts, but no circuit court, have found that investors may moot such Section 13(d) claims by appending a copy of the complaint to an amended Schedule 13D filing and disputing the claims alleged. By doing so, the market is advised of the dispute, including the company's allegations, and therefore the informational purposes of Section 13(d) have been served. However, no circuit court had ever adopted this rule.

In January of 2023, Murchinson called a special meeting of Nano shareholders in Israel. Nano then sued Murchinson in Israeli court contesting its legal ability to call the special meeting. In advance of the special meeting, both Murchinson and Anson had been publicly critical of Nano's incumbent management. Nano then sued Murchinson and Anson under Section 13(d) in the Southern District of New York, accusing them of being an undisclosed group and moving for a preliminary injunction in which Nano sought to void votes that Murchinson and Anson had already cast at the special meeting, and to enjoin them from purchasing or selling Nano shares. Murchinson and Anson disclosed the company's allegations to shareholders by appending Nano's complaint to their respective amended Schedule 13Ds and disputing the allegations.

As the Second Circuit held on May 20, the amended Schedule 13Ds accomplished the informational purposes of Section 13(d) and the claim was thus moot: "The record here demonstrated a dispute as to whether Defendants acted as a group, and Nano presented no plausible basis in its complaint to reasonably infer that the dispute was not genuine or in good faith. Defendants' amended filings disclosed the possibility of the disputed fact, and we agree with the district court that 'Section 13(d) requires no more in this case.'" (*Nano Dimension Ltd. v. Murchinson Ltd., et al.*, No. 23-1141 (2d Cir. May 20, 2024), Doc. 101-1 at 9.)

With the Second Circuit's decision, it will be significantly harder for incumbent management to abuse Section 13(d) and use it as a weapon in proxy contests against activist investors. Activist investors now have a simple way to moot a Section 13(d) disclosure claim that they dispute in good faith. This removal of an arrow in incumbent management's quiver will make proxy contests more efficient and less expensive, and encourage proxy fights to play out in the market where they belong, rather than in the courtroom.

The Schulte litigation team was led by Michael Swartz, co-chair of the firm's Litigation Group and included partner Randall Adams, special counsel Mark Garibyan and associates Erika Simonson, Sedinam Anyidoho and Joe Pisicolo. The team was assisted by Ele Klein, co-chair of the firm's M&A and Securities Group and co-chair of the firm's Global Shareholder Activism Group, partner Adriana Schwartz and special counsel Brandon Gold.

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