IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

26 CAPITAL ACQUISITION CORP.,	:	
	:	
Plaintiff,	:	
	:	
v	:	C. A. No.
	:	2023-0128-JTL
TIGER RESORT ASIA LTD., TIGER RESORT, LEISURE AND ENTERTAINMENT, INC., UE RESORTS INTERNATIONAL, INC., and PROJECT TIGER MERGER SUB, INC.,	:	
	:	
Defendants.	:	

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Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Thursday, February 9, 2023
11:30 a.m.

- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

- - -

TELEPHONIC ORAL ARGUMENT AND RULINGS OF THE COURT ON PLAINTIFF'S MOTION TO EXPEDITE PROCEEDINGS

CHANCERY COURT REPORTERS
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THE COURT: Good morning, everyone. This is Travis Laster joining. Do we have a court reporter on?

THE COURT REPORTER: Yes, Your Honor. It's Karen.

THE COURT: Great, Karen. Thank you for being here, I appreciate it.

All right. Who from Delaware would like to speak up on behalf of the plaintiff, and tell me who's going to present from your side.

ATTORNEY McCARTNEY: Good morning, Your Honor. It's Brett McCartney from Bayard. Joining me on the call today is Gayle Klein and Douglas Mintz from Schulte Roth & Zabel. And with me in my office is Beth Powers. Ms. Klein will be presenting for plaintiffs today.

THE COURT: Great.

Same question for the defendants.

ATTORNEY DAVEY: Good morning, Your Honor. Brad Davey of Potter Anderson & Corroon on behalf of the defendants. I have with me in my office my colleagues Mathew Golden and Ellis Huff. And with us on the line are my co-counsel at Milbank, Dan Perry, Grant Mainland, and Chris Almon. And with Your

Honor's permission, Mr. Perry will be handling the remarks on our side.

THE COURT: All right. That's great. Ms. Klein, why don't you go ahead.

ATTORNEY KLEIN: Thank you, Your Honor.

I presume that you've read the papers, so only a brief factual predicate. This is not your classic case of SPAC litigation. It, in fact, is a classic case of seller's remorse.

Just briefly, plaintiff 26 Capital Acquisition Corporation, which is a SPAC, entered into an agreement in October 2021, converged with a company that would, in essence, give 26 Capital control of an incredibly unique and incredibly valuable new multi-billion-dollar Filipino casino and resort.

The Philippines compete with Macau for Chinese gambling patrons. They're both very close to China. And in the wake of COVID-19 restrictions in that part of the world, 26 Capital predicted in 2021 that the restrictions in the Philippines would relax prior to Macau and become an incredibly attractive area. And it was right. Since that time, stocks in gaming companies in that part of that world have

essentially tripled.

So make no mistake about it, 26 Capital has negotiated a very, very good deal for its shareholders.

Expedition of this case is necessary, appropriate, and importantly will help absolutely this deal close. All that's left is to provide information to the accountants to complete work necessary for the Form F-4, which we understand to be minimal, file the Form F-4, and hold a shareholder vote of 26 Capital shareholders. TRA must also effectuate a reorganization, which we understand it could have done months ago.

With an order from the Court directing defendants to complete these tasks -- which they are simply not doing -- the deal can absolutely close by October 20, 2023, which is when the SPAC expires. But we need an order directing the defendants to complete these tasks with the time to actually complete them.

To that end, we respectfully request that the Court can and should hold the trial as soon as possible. Discovery is incredibly limited. We need only emails, text messages, and documents and communications from five executives of the defendants;

discovery from the auditor, including as to why it resigned; and emails and presentations to the boards of the companies that prove that defendants have simply changed their minds and are dragging their feet.

With defendants' cooperation, we, in fact, think this could be trial-ready as soon as mid to late April even. The equities massively favor holding trial on the merits as soon as possible. The delay has already caused and will continue to cause a significant irreparable harm on 26 Capital's business. The extended duration of the SPAC and the associated costs of maintaining its business, which now amount to over $250,000 per month, are putting a strain on 26 Capital's resources.

Moreover, the lack of engagement from TRLEI and Okada Manila in seeking 26 Capital shareholders and the refusal to agree to a timeline have resulted in shareholder redemptions. And this has only further compounded the harm.

Of course, not only is there irreparable harm to the business itself, but if the deal doesn't close, 26 Capital and its shareholders suffer the ultimate irreparable harm which is the

entire loss of their expected investment in a company that holds a unique and valuable asset.

Not only is there no time to find another suitable investment for the SPAC before it expires, there simply is no other similar casino resort investment available, one of which will provide a return on investment to 26 Capital shareholders for years and years to come.

Notably, defendants don't say anything in their opposition about what they're doing to close the deal, because they're not. Instead, they cast unfounded aspersions on our client and say that they want to bring a motion to dismiss.

We can address those issues if Your Honor would like, but ultimately they don't really weigh in on whether expedited treatment is appropriate, which is the subject of this hearing. Accordingly, we respectfully request that Your Honor grant expedited treatment and set trial as promptly as practical.

THE COURT: So you had proposed in your form of order a three-day trial. Is that still your view?

ATTORNEY KLEIN: That is still our

view, correct.

THE COURT: And give me a sense of how you think that trial time gets used. Who shows up, who talks?

ATTORNEY KLEIN: I think that our CEO from 26 Capital will talk. We will probably present deposition testimony from UHY, the auditors, who we understand have resigned recently. We'll probably have an expert witness that will talk about how this deal can close.

And then obviously present some testimony from the other side about how we believe that they've been dragging their feet and just changed their minds, either through deposition or in person if they show up. Some of the executives are in Japan and some are in the Philippines.

THE COURT: And you gave me a sense of what you wanted in terms of documents, and it honestly went by me a little quickly. Can you just dial back to that and refresh me about what you said about the documents and depositions?

ATTORNEY KLEIN: Sure. There are five executives from the defendants, some from Universal Entertainment who are in Japan, which is the parent

company of what's known as TRLEI. And there are two executives of TRLEI that we would like information from.

We believe that those five executives have been communicating with each other regarding whether there's been reasonable best efforts to close the deal. So we would like documents and information from those three executives of Universal Entertainment, the two executives of TRLEI. And we believe that they have also been having communications --

THE COURT: Let me just interrupt you there, and I apologize. I just want to make sure I've got the count right. So I will tell you that I can't keep these letters straight. So I think of what you call TRLEI as the Operating Company.

ATTORNEY KLEIN: That's correct.

THE COURT: And it's referred to in the merger agreement as the "Company." So that's close enough for jazz and we can at least not get confused about that.

So what I hear you saying is there are two executives of the Operating Company that you want to depose; correct?

ATTORNEY KLEIN: Correct. And get documents from.

THE COURT: Yeah, yeah. And what I'm not clear is the five from the ultimate parent in Japan. Does the five include the two, or is the five in addition to the two?

ATTORNEY KLEIN: The five includes the two. There are three from the Operating Company in Japan: Toji Takeuchi, Mr. Asano, and Mr. Fujimoto.

THE COURT: Great. So then you were about to tell me that these five folks you think have been speaking with some other people that you would also want to depose?

ATTORNEY KLEIN: Not depose, just get documents and information. We believe that they've prepared board presentations and other information that went to the boards of the various companies that discuss the status of the deal and whether they intend to close.

THE COURT: All right. Anything else -- oh, I guess the other thing that I wanted to ask you. So part of what the defendants say is that there are government approvals that are necessary, I suspect, for the reorganization side of the

transaction. What is your sense of the Philippine government approval issue?

ATTORNEY KLEIN: Our sense is that they should have been seeking these approvals all along, and that they may not have been because of the breach of the obligation to close as promptly as practicable and use reasonable best efforts.

So to that end, you know, Section 6.4 of the merger agreement -- not 6.4 -- but the merger agreement does not allow the defendants to terminate on October 1 if, in fact, they are in breach. So we'd like to understand whether or not they've even sought these approvals. But we believe they should and can continue to seek the approvals throughout the pendency of this lawsuit and that they have the time to close on or before October 1 or October 20 of 2023.

THE COURT: All right.

ATTORNEY KLEIN: We don't view it as an impediment.

THE COURT: Yeah, yeah. And then, one of the things that's certainly in the back of my mind is the fact that all of your counterparties except for the merger sub are Philippine entities.

So when companies are Delaware

companies, I have a lot of things I can do. When companies are domestic U.S. entities but non-Delaware companies, I have things I can do and the Full Faith and Credit Clause backs me up.

I do have some concern about the efficacy of issuing orders to Philippine entities and what happens if we ultimately get to that point and they essentially say, you know, "Nice try, Mr. SPAC. We're not going to abide by this U.S. court in a small state in an east coast city."

What is your thought in terms of how this plays out?

ATTORNEY KLEIN: Well, Your Honor, Section 9.13 of the merger agreement regarding jurisdiction and venue says that each of the parties submits to the exclusive jurisdiction of the Chancery Court of the State of Delaware; agrees that all claims with respect to the merger agreement and any action can be determined in the Court.

THE COURT: Let me interrupt you. I get that they're here for jurisdictional purposes. No question.

ATTORNEY KLEIN: Right.

THE COURT: What I'm really asking is

the practical question -- and the fair answer is "We don't know today, we'll see what happens." But I'm looking down the road and thinking how do we avoid going through all this, and if you succeed, you getting more than just something that is a nice piece of paper to hang on your wall.

And, more importantly, if these folks turn out to be recalcitrant in terms of not obeying an order that is issued in accordance with the jurisdictional provision that you've just cited, have you thought about what tools I would have to make it happen?

ATTORNEY KLEIN: Well, certainly I think that's a good question that Mr. Perry could answer for you. But we believe that the full faith and credit of any judgment would be enforceable in the Philippines or Japan. And certainly we're willing to undertake efforts to make sure that happens.

But also, Universal is a company that does business around the world. Certainly I think that they have a vested interest in complying with a judgment from Delaware courts, otherwise no one else will want to do business with them in the future.

THE COURT: I don't know what other

Delaware entities they have, and perhaps that could be a subject of remedial discovery if we ever get there. But I was curious if you had thought about that because it is something that distinguishes this case from others in this Court where the entities have been ones that were, at a minimum, domestic U.S. entities where the coercive authority could be more readily brought to bear.

Anything else you want to tell me before I hear from Mr. Perry?

ATTORNEY KLEIN: No, Your Honor. Other than we certainly have thought about that issue, but that also ties into why we need expedited treatment of this because, of course, if defendants are going to be recalcitrant in complying, and we're looking at an October 20, 2023, date of the SPAC expiring, we need relief as soon as possible.

THE COURT: And one more question for you on that. So the SPAC got extended once. Is the SPAC extendible a second time? Presumably you'd need some type of vote for that. But is that -- I get that it's not something that's happened today and we have to live in the world that we are in today. But is there something that prevents a further extension or

is that something that, in theory at least, could happen?

ATTORNEY KLEIN: In theory it could happen. It was a very costly process to begin with and will be another costly process. And, of course, it requires a vote. And who knows what would happen then if people are getting tired of a deal that should have closed months and months ago.

THE COURT: Great. All right. Thank you so much.

Mr. Perry.

ATTORNEY PERRY: Thank you, Your Honor. I'd like to describe the transaction a little bit. Ms. Klein characterized it as control over the casino business. It is not that. This is a SPAC transaction that if there are no further redemptions would involve the deployment of $34 million in U.S. investor capital to acquire roughly 1.3 percent of the stock of the company that after the reorganizations will own Okada Manila.

There's a promote, which we'll talk about, that would go to 26 Capital and Mr. Ader. But 96 percent of the shares of the company would continue to be controlled by the Japanese parent, UEC.

This was originally a deal that contemplated a much more significant sale with $275 million in investor funds and a potential PIPE. The PIPE market, as Your Honor may be aware, for foreign SPACs of this type, it really isn't available anymore. And most of the investors, 88 percent of them, redeemed at the first available opportunity in December 2022 when they were asked to extend the life of the SPAC until October of 2023. The remaining stock, as I indicated, will be owned by UEC. That is a publicly traded company in Japan.

So what this is is not a bid for control but a very small public offering in a Manila casino business that, if things go as contemplated, will trade on the NASDAQ. There are issues there, which we'll talk about.

The implied value of the Manila casino in the transaction is roughly $2.6 billion. And if the argument is that this is a great deal for SPAC investors, money damages are certainly available. You can simply compare the value of the deal with the value of the enterprise when the deal -- if and when the deal was terminated and compensate the shareholders for the lost opportunities.

There was a little bit of back and forth about my client and their compliance. They had a right to terminate this deal on October 1st, 2022. They chose not to do so. They chose to extend in good faith based on representations made by Mr. Ader about the SPAC investors' appetite for the deal. And as a result, we obligated ourselves to work for almost another year on the deal.

Despite what 26 Capital asserts, this transaction, as it currently stands right now, is not in the interest of anyone other than Mr. Ader. Mr. Ader has a promote that will yield roughly 2.6 percent of the business. 26 Capital will not have control, but they will have the ability to appoint two of seven board members.

We say in our papers that we expect redemption rates to reach or exceed 95 percent. That's something of a guess. But it's an educated one based on the SPAC market these days. And this investment is riskier than most SPACs. Why? This is a business that remains in some turmoil.

There is a ruling from the Philippines Supreme Court, which we attached to our papers, that purports to mandate the *status quo* from 2017. So when

we talk about the reorganization that's contemplated, that that *status quo* order needs to be navigated and it needs to be navigated with care and caution. An order of the Philippines Supreme Court is, not surprisingly, punishable with contempt including criminal contempt.

This all arose from -- this was a deal that was going well until there was literally an armed takeover of the property by Kazuo Okada in May of 2022. That has spawned real uncertainty with this deal. It has also spawned litigation with the company's bondholders who are presently engaged in a foreclosure effort. There's litigation both in New York State Court and in Hong Kong.

We were successful in Hong Kong in securing an injunction against enforcement of remedies. But that injunction is pending, and it's at least plausible that they would foreclose on the stock of this entity.

So if you play this out and you were to assume 95 percent in redemptions, you'd only have 14 million in proceeds. Those would be eaten up almost entirely by professional fees.

The only real reason 26 Capital is

seeking specific performance here is because of Mr. Ader's promote. If the remaining SPAC shareholders were interested in a litigation, they could easily maintain a suit for damages. There is no -- and let me emphasize this -- there's no control premium at play here. This is not a merger where the buyer is missing out on difficult-to-value synergies. This is simply an investment opportunity for a small and likely illiquid number of shares in a Japanese-owned company.

Let me turn to the legal standards. And I'm going to suggest to Your Honor that this is almost on all fours with the *Carteret* case, which I believe Your Honor is likely familiar with. The claim for specific performance as currently pleaded is not colorable. While there is a specific performance provision in the contract, Delaware courts, including in *Carteret*, frequently will conduct their own analysis of whether specific performance is available and realistic.

And in *Carteret*, the Court found that in a merger, the contract is -- specific performance is "unavailable where the contract sued upon relates to a future, evolving complex commercial transaction."

And in that case, as in this case, the enforcement is of a good faith best efforts clause, not some more concrete contractual obligation.

Here, there's effectively -- if you look at paragraph 87 of their complaint, they list the steps that the Court -- they contemplate the Court will act as enforcer of specific performance, or it's really a monitor shift or something akin to that that they're contemplating.

The first item is the reorganization, which I briefly touched on. We are in the process of and have sought and received certain government approvals. The consents are difficult because of the presence of the SQAO. We're currently litigating in the Philippine Supreme Court. There's been collateral proceedings by the Philippine Supreme Court.

So we need to be very careful that whatever we do doesn't run afoul of an order that basically says -- it orders that the company maintain the *status quo* prior to petitioner -- that's Mr. Okada -- his removal as stockholder, director, chairman, and CEO of TRLEI in 2017.

So in order to navigate that, particularly in a case that's seeking approvals from a

Philippine entity, advice and judgments will need to be made about the applicability of that order in connection with the reorganization. But that is something that is sensitive and requires careful planning. You can't just do it and feel like you have no exposure. So that is something that keeps our management team up at night and will need to be carefully planned.

Of course, it would be a lot easier to just do this once the Philippine litigation with Mr. Okada is resolved. If this were an IPO and we had Credit Suisse as an underwriter, for example, there's no way in which this transaction would be contemplated or being pushed forward while that litigation was pending. You could literally have Mr. Okada managing this business, depending on how the Supreme Court of the Philippines comes out. Mr. Okada was effectively evicted from the company in 2017 for theft and corruption.

The second and third items in the list regard preparing for UERI's NASDAQ listing. The suggestion here is that we should assist in or adopt governance policies, obtaining insurance and the like. So it's an unspecific suggestion, things like

obtaining insurance, very difficult in the current environment for foreign SPACs. And plaintiff ignores the roles that the NASDAQ and the SEC would play in finalizing any listing. Again, it's not just you push a button and go live.

Just to underscore the point on the particular market that UREI intends to list, that's the NASDAQ global market. It's subject to Rule 5405(a)(3) which says that UERI would have to have at least 400 round lot holders -- those are shareholders that own 100 shares or more -- and that at least 50 percent of such holders have to have securities with a market value of $2,500.

We don't think they're anywhere near that right now. And, of course, that's all out of our hands in terms of compliance.

The fourth item relates to a PCAOB registered auditor, which is required to go public in the U.S. Finding a capable auditor willing to take on the engagement has been a challenge. Audit firms, the big four, will not touch a foreign SPAC in a developing country in the gaming industry. That's just a fact.

We were able to identify UHY. UHY

resigned. UHY, just by way of background, was willing to audit the 2021 financials. They had expressed concern about auditing the 2022 financials. And you don't need to imagine why. For three months, Mr. Okada was in control. He conducted an armed takeover and literally controlled a cash-intensive business that, you know, has over 5,000 employees and operates in a foreign country.

So identifying a PCAOB registered auditor over the next month or so is going to be difficult. We've committed to do that. To answer a point that Ms. Klein raised, yeah, we're committed to pushing forward with this.

We have concerns. It doesn't seem to be a doable deal right now with the litigation that's pending and the Supreme Court order and now a search for a PCAOB registered auditor.

I actually -- Ms. Klein had suggested to me in an email earlier this week that a firm called BF Borgers would be willing to do the work. And that underscores what I'll call the *Carteret* problem here. BF Borgers, if you look at their website, appears to only have two auditors. They have a significant disciplinary history with the PCAOB. An audit

director was recently banned for life, basically excluded by the PCAOB from auditing public companies. And their experience set seems to be several cannabis companies, a company researching psychedelic medicines, and a luxury goods retailer.

It underscores the problem because an auditor is -- exists to protect the public shareholders. But it also exists to protect the management team that has to prepare the financials and ultimately sign off on whatever is filed with the SEC. And so, the selection of an auditor, it needs to be a capable auditor. It needs to be someone with the relevant experience.

So that, again, is the concept here that the Court will sit in judgment of the selection of the auditor or the failure to select an auditor. There just aren't that many firms willing to do this. And we have concerns about whether they're capable firms willing to do this.

The seventh item regards financial information and, you know, whether -- and sort of working with the auditor. That's something that we intend to do.

There is also a suggestion that we

would need to cooperate or assist 26 Capital in conducting its shareholder meeting. Again, I'm not sure what that entails. But we have substantial concerns based on the current facts on the ground of being compelled to assist a shareholder process for 26 Capital.

One need only read the *Gig3* case that came down at the beginning of the year to understand that the approval process by the board of 26 Capital will need to be independent from Mr. Ader, and it will need to be searching and substantial. And so we would have concerns about whether and to what extent we're asked to, for example, make -- assist in making representations or making direct representations that aren't otherwise required under the agreements to those shareholders.

In short, an order of specific performance here would encounter all of the problems that the Court was mindful of in *Carteret*. This is a future evolving complex commercial transaction.

What we would propose -- just on irreparable harm and the equities, just very briefly. I think I covered this already, money damages suffice. You can -- this Court all the time values entities.

This is, you know, a minority, less than 5 percent stake in the company. And the equities, given all that I've set forth, are really zero equities that tip in favor of 26 Capital. This is a case about a SPAC promoter looking to get their promote.

What we would propose as a process here would be to do what the Court did in *Carteret*, and have a motion to dismiss so that the current complaint can be evaluated and the Court can evaluate whether it has the ability to give the specific performance being sought.

There is some precedent. We cited the *AbbVie* case for this just being resolved on summary judgment. We don't think that makes sense here. We think, given the issues with the complaint we -- and we're prepared to work as quickly as Your Honor wants on a motion to dismiss. To the extent that Your Honor dismisses the claim or substantially limits the relief that they can seek, that will, of course, make any subsequent trial effort more manageable and doable on an expedited time frame.

Just a word on the discovery. At least three of the witnesses are Japanese. They're people that communicate primarily in Japanese. It's a

Japanese company. The documents that are referenced are likely in Japanese. And the witnesses are going to be available in Japan where it's difficult to conduct depositions. Easier with the two folks in the Philippines; I believe Ms. Klein's referring to the CEO Byron Yip and the CFO Hans Van Der Sande. They're English speakers and that's less of an issue. But substantial issues with Japanese witnesses.

And it's really, I think, not necessary or appropriate to push forward with a trial until the Court's had a chance to evaluate the complaint and the relief that's being sought.

So I've been talking for a while. I'll stop, Your Honor, to see if you have any questions.

THE COURT: I don't. Thank you.

Any reply?

ATTORNEY KLEIN: Certainly. I'll be quite brief, Your Honor.

Number one, I just want to talk about Mr. Perry's contention that the defendants could have terminated in October 2022. They actually could not have terminated in October of 2022 because they were already in breach. They had already been dragging

their feet and had not undertaken reasonable best efforts. So we would have just been here sooner but for the extension.

And the reason we're coming now is when the extension was signed, regardless of the fact that it was an extension of a year, we were told they would close as soon as possible and that the year was just to keep us from having to go back and doing other extensions to the extent that unexpected things happened.

What you have heard instead from Mr. Perry is a litany of excuses as to why they can't close. In fact, Mr. Perry went so far to say in his argument that no one wants this deal, which is absolutely not true and is absolutely why we need expedited treatment.

Third, the SQAO order has not precluded the operation of the company. It does not conclude the merger confirmation. It's over a year old. And even if it did impact, this is a fact issue for the merits and it doesn't impact expedited treatment. At the very least, the fact that the SQAO order is a year old and they're just now thinking about the impact of the merger shows they haven't been

doing reasonable best efforts.

Fourth, again, they trashed Mr. Ader and said it matters who the shareholders are here. It doesn't matter who the shareholders are or who benefits. All of the shareholders benefit. And it's not a covenant in the merger agreement as to who the shareholders are to require a close.

Fifth, with respect to *Carteret*, I will point Your Honor to *Hexion Specialty Chemicals v. Huntsman Corp.*, 965 A.2d at 763 which clearly allows this Court to order specific performance of a merger, including a reasonable best efforts clause.

And then, finally, Your Honor, with respect to the fact that the witnesses are in Japan, certainly I see no reason why, for the convenience of everyone, they couldn't make their witnesses available in, let's say Hawaii where it's easier to take depositions in discovery. And that could be a reasonable best effort toward closing.

So, in sum, we think that there's been a lot of talk about merits. If Your Honor wants to have expedited briefing on a motion to dismiss, we'd be certainly pleased to work that into the schedule. But we definitely think that we set the standard and

we should have expedited treatment of the matter.

THE COURT: All right. Thank you both for your presentations. They've been very helpful. I'm going to go ahead and give you an answer now on the topic that is before us today, which is the motion to expedite.

We're here in a case that involves an effort by a SPAC to enforce a transaction agreement against what the SPAC alleges are recalcitrant merger partners. The governing contract is an Agreement and Plan of Merger and Share Acquisition Agreement dated October 15, 2021. De-SPAC mergers generally are complex; this one is particularly complex.

With one exception, the allegedly recalcitrant counterparties under the agreement are foreign entities. By that I mean not just non-Delaware U.S.-based entities, but literally foreign entities, which adds additional complexity.

The parties use a fairly bewildering list of acronyms to refer to the parties. This case is going to go forward in one form or another. And as I indicated to counsel, I really can't keep track of TRA, TRLEI, UERI, et cetera. I like using terms like SPAC, Operating Company, Parent, things like that.

Those also happen to correspond roughly to the terms that are in the merger agreement. So I think it would be helpful to use those.

The plaintiff is 26 Capital Acquisition Corp. It is a SPAC, so I will call it the "SPAC." It's a Delaware corporation.

The ultimate parent entity on the other side of the deal is not a party to the case. It is alleged to be Universal Entertainment Corporation, which is a publicly listed Japanese corporation.

The parent company for purposes of this deal is Tiger Resort Asia Limited, which is the entity that has been abbreviated TRA. That is what the merger agreement calls it. If I have to use one acronym, I'll go with TRA.

TRA currently owns Tiger Resort, Leisure and Entertainment, which is the unfortunately abbreviated TRLEI. It currently operates a casino resort in the Philippines and holds a license to do so. The casino is the operating business that is the subject of the de-SPAC transaction. I will, therefore, call this entity the Operating Company. The merger agreement calls it the "Company." But Operating Company helps me remember what it's there

for, and so that's why I'm using that.

UE Resorts International, Inc., is the unfortunately abbreviated UERI. That's an entity that is going to become a new intermediate holding company between TRA and the operating company. I'm going to call it "New Parent." That's close to what the merger agreement calls it, which is "Parent." It's currently a wholly owned subsidiary of the Operating Company.

The last entity is Tiger Merger Sub, Inc., which is an acquisition vehicle owned by the operating company. It will merge with the SPAC. I'll call it "Merger Sub," which is what the merger agreement calls it. It's the Delaware corporation that is the only Delaware entity on the other side of the deal.

To get New Parent into its place in the post-merger structure, the company stack on the other side of the deal is going to go through a reorganization. In summary, the Operating Company is going to transfer its ownership of New Parent to TRA, making TRA the owner of New Parent. TRA then will transfer its ownership of the Operating Company to New Parent. You thus end up with the Operating Company and New Parent swapping places in the stack. So as

you're looking down, it goes TRA, then New Parent, then the Operating Company.

Meanwhile, the SPAC is going to merge with Merger Sub and end up as a subsidiary of New Parent. The end result is that New Parent owns two subsidiaries. It may own others, but for our purposes it's the two subsidiaries. One is the Operating Company; the other is the SPAC. And New Parent is owned by TRA.

The de-SPAC merger effectively operates as a capital raise for the Operating Company. The SPAC was going to bring with it $275 million. Now it sounds like there may be some doubt about that. But the idea is that that money would be upstreamed to the New Parent.

At the same time, there would be an effort to list the depository receipts of New Parent on the NASDAQ which would allow those shares to be publicly traded.

So what we have is something that has aspects of a typical de-SPAC transaction in that there is an investment of capital that is brought from the SPAC to an operating company. There is use made of the SPAC's public listing. But here, it's more

complex because the SPAC is coming in as a subsidiary of a foreign entity, plus there's the reorganization of the other side of the transaction to help make it happen, and there's a need to list depository receipts of the New Parent rather than simply using the SPAC's existing listing.

The current outside date for the transaction is October 1st, 2023. The SPAC terminates on October 20, 2023. Counsel recognizes that the SPAC, if necessary, can seek a vote to extend its existence. But at this point, October 20 is the day when the transaction falls apart from the SPAC's perspective because it will no longer exist. October 1st is less of a hard date because if the SPAC can prove a breach before then, the right to terminate at the outside date extends.

The merger agreement contains the types of provisions you'd expect to see. There's a reasonable best efforts covenant. That covenant expressly extends to efforts to prepare the Form F-4. There is an information access covenant. There is an ordinary course covenant. Among other things, that covenant expressly calls out a series of transactions as outside the ordinary course, including sales of

assets in excess of $10 million.

The parties have radically different views of the facts. The SPAC takes the position that the only thing standing between it and the completion of the transaction is relatively minimal work by the Operating Company's auditor and the filing of the amended F-4 by New Parent. The SPAC claims that the Operating Company and New Parent have failed to operate in the ordinary course.

It's certainly true that a lot of stuff has happened since the deal was signed in October 2021. According to SPAC, its counterparties started dragging their feet in December 2021 after the filing of a preliminary F-4. At that point, they began delaying and not providing the auditors with information. The SPAC alleges that that conduct constituted an actual breach of the reasonable best efforts covenant.

Then in April of 2022, the Philippine Supreme Court entered an order reinstating a gentleman named Mr. Kazuo Okada as the chairman and CEO of the Operating Company. He is a colorful character who I won't dilate on here. The key point is that he reasserted control over the Operating Company and used

an armed force to seize its premises. The SPAC alleges with considerable force that that type of event violated the ordinary course covenant. The counterparties have cited Okada's occupation as a basis for their failures or delays to provide information to their auditors and to file necessary forms with the SEC.

In September 2022, the counterparties regained control of the operating company, but at the same time they allege that when Okada was on his way out, he took documents with him and shredded other records before being removed from the premises. It was at that point after some back and forth between the parties that they agreed to extend the outside date to its current date of October 1, 2023.

The SPAC alleges that since September 2022, the counterparties have failed to use their best efforts to move forward with the deal in violation of the reasonable best efforts covenant.

They allege that the counterparties have not provided key information to the auditor. That is a breach that they allege has already happened.

They allege that the counterparties

have not instructed the auditor to begin preparing financial statements. That is a breach they allege has already happened.

They allege that the counterparties have refused to move forward with the Form F-4. Again, that is a breach that they say has already happened. And as I pointed out at the outset, the SPAC alleges that there's very little left to do to complete the Form F-4 and the other steps necessary in the merger agreement.

The SPAC seeks specific performance of the merger agreement. As is customary, the contract specifically provides for that right.

The SPAC is here moving for expedition seeking a trial so that the Court can order closing before the outside date and before the SPAC expires. The SPAC wants to have time to make efforts to enforce any order that this Court might issue.

The test for expedition is whether there's a colorable claim and a threat of irreparable harm. I think there's clearly a colorable claim for breach. This isn't a situation of anticipatory repudiation. This is a situation where there are claims of past breaches by the other side and they are

alleged plainly in the complaint.

I also think that there is clearly irreparable harm. This is a unique investment opportunity. True, it does not involve control over a company. True, the unique investment opportunity can be framed negatively as a minority investment in an illiquid Japanese-controlled company.

The flip side of that is its uniqueness. This is not something where one can readily substitute in the market. It is an investment in what may be a privately held Philippine casino, or an investment in a Philippine casino that may end up having a depository listing on a U.S. market.

So I think there's grounds for expedition here.

The defendants have, nevertheless, offered reasons to deny the motion. The first is that they claim that the SPAC is effectively a bad SPAC and that its stockholders have redeemed their shares. They also argue that the sponsor of the SPAC is only pursuing the merger so that his carried interest vests.

This is a breach of contract case. If there's a basis to terminate the merger agreement

based on the amount of capital that the SPAC can bring or the level of redemptions that the SPAC has, the counterparties are free to invoke it. Otherwise, in terms of any SPAC-side alleged breaches of duty or self-interest, it's just not the counterparties' problem. It's not their issue to invoke. The question is whether the SPAC has enforceable contract rights, not whether, within the SPAC's structure, there is some breach of duty going on.

The counterparties' main argument is that specific performance is unavailable. And they seek to present that argument on a motion to dismiss and have it decided at the pleading stage as a matter of law. They've previewed much of that argument in their papers and today.

I am not going to decide the question of what is the proper post-trial remedy during a motion to expedite, nor am I going to decide what is the proper post-trial remedy on a motion to dismiss. I'm specifically not going to decide that on a motion to dismiss when the contract provides for the remedy explicitly and where I would have to draw all inferences in favor of the plaintiff.

I think both of those steps would

involve inappropriate predictions about what a court of equity might determine after trial to be an appropriate remedy. And I think it would also be a waste of time because of the standards that apply in these settings. The standard that I have to apply today is to credit the plaintiff's allegations, and that is the same standard that I would have to apply on a motion to dismiss.

But to engage a little more deeply, the counterparties' main argument is that there's just too much to do to close for the Court to order specific performance and that some acts would require the consent of third parties. That's a factual argument. It may prove out at trial. For purposes of today, the SPAC disputes it.

The counterparties rely on *Carteret*, which is a 1988 decision on a motion to dismiss from Chancellor Allen. That is an oldie but a goodie. It's great decision, as most of Chancellor Allen's decisions are. It's also 15 years before *IBP* ordered the specific performance of a merger agreement, and it is even more years before this Court's practice since *IBP* of not infrequently ordering specific performance of merger agreements.

As the counterparties point out, the complaint seeks specific performance of various things, and the counterparties argue that those things can be described as vague.

We're at the pleading stage. You don't have to plead your remedy. We can flesh this out through discovery and at trial. It may well be that specific performance is something that at trial I decide just doesn't make sense, notwithstanding the contractual stipulation in favor of it. But that's not a determination I'm going to make now.

And harkening to *Carteret*, the counterparties say that to grant specific performance would require some form of monitorship over the process. Courts of equity appoint monitors. Federal courts have used their equitable powers to appoint monitors for prison systems, for hospitals, for schools. Bankruptcy courts use their equitable powers to appoint monitors on a regular basis.

I wrote a decision in the *Oxbow Carbon* case. It was rendered moot because there was a reversal on contractual grounds. But in terms of the remedial decision, I explained in that opinion the ability of this Court to appoint monitors. This Court

is a court of equity. It doesn't have less equitable authority than the federal courts or the bankruptcy courts. In fact, our equitable authority is defined in the exact same way, namely, all of that authority that existed in the High Court of Chancery of Great Britain at the time of the separation of the colonies.

The fact that consents may be required from third parties like government agencies in the Philippines is a legitimate concern. If it turns out at trial that there is evidence demonstrating that that is just not something that is going to happen, I easily could decide that specific performance is not a practical remedy and that I'm not going to order a useless act. But that is a post-trial decision, not a motion to expedite decision and not a pleading stage decision.

Last, to deal with two other arguments. There's the assertion that money damages would suffice. That is not, I think, a well-founded argument. As I've suggested, this is a unique investment opportunity. It may be one that people don't view similarly. It may be one that some would disparage and could not imagine investing in themselves. But the ability to make this investment

is a unique contractual right that the SPAC has.

Yes, in theory this Court can try to value pretty much anything. The issue is how tough is it to value it, and whether in the first instance some form of equitable relief is a more apt and fitting remedy than a monetary assessment.

In this case, I think that the equitable remedy is likely to be the first choice, assuming it's feasible. A monetary remedy as a fallback may well be an option, but it is something that is going to be significantly more difficult and significantly more uncertain when we are talking about valuing what, absent the SPAC transaction, will indeed be an interest in a privately held Philippine casino owned ultimately by a publicly listed Japanese parent corporation.

I don't think any of those variables describe something that I, at least, have had to try to value before. I've valued privately held companies. I've had cases involving casinos. I've had cases involving foreign companies. But the trifecta of a privately held casino in the Philippines owned by a Japanese entity is new. Adding in the type of uncertainty that this company has had makes the

valuation exercise not something that I relish, nor something that I expect to make a first-choice remedy.

In their papers, the defendants cited *Snow Phipps* as an example of how the Court could deny expedition notwithstanding a request to enforce a merger agreement.

I don't think that's really a good case for the defendants. What happened in *Snow Phipps* was that the plaintiffs rolled in and requested a trial in two weeks during the second month of the pandemic. The Court, indeed, denied expedition at that inauspicious time and rejected that type of hyperaggressive schedule. But the Court ultimately tried the case in January 2021, nine months later. And the court issued a post-trial decision in April ordering specific performance.

So what that shows is that in the midst of the pandemic, the Court in *Snow Phipps* ordered the parties to go forward on a schedule that resulted in a trial nine months later.

During the pandemic, I held a trial in August 2020 on a case that was filed in April where the plaintiff wanted to enforce specific performance of a transaction with foreign parties on both sides.

I ultimately denied the request for specific performance, but the case was litigated and handled successfully on that time frame.

To everyone's great thankfulness and appreciation, we are no longer in the grip of the pandemic. It's still tough to litigate cases involving foreign companies. But on a relative basis, it's something that's easier to do now than it was in 2021.

I think this case should be tried in July. I'm looking at the week of July 10th. I'm going to block out all five days that week. I know the plaintiffs have only requested three days, but people may find out that things are a little more complicated than they originally believed. I'm also anticipating the potential need for some experts on foreign law. I'm not an expert on much. I'm certainly not an expert on Philippine law, and I'm definitely not an expert on Philippine transactional law and what government approvals are required and the efficacy of efforts to obtain them.

So I'm going to schedule this for then. Working backwards, that gives you a month for trial prep, a month for experts, and three months for

fact discovery.

I am not going to entertain a motion to dismiss on the grounds of the unavailability of the remedy of specific performance. I'm instead ordering the Company to answer in five calendar days. The answer will actually live up to the spirit of the rule that requires an answer to fairly meet the allegations of the complaint.

What I mean by that is that I don't want rampant denials. People seem to think if they have some epistemic doubt about the truth of an allegation across multiple states of the universe, then it should be denied, notwithstanding their confidence level about what the real state of the world is. I've seen people deny really difficult to dispute things. What I'm expecting is that the answer will fairly meet the allegations of the complaint and that it will help frame the issues in dispute.

For example, it seems like you-all both agree that Okada rolled in and took over this company using armed guards. It's probably not necessary to deny that allegation of the complaint, even if they didn't say it precisely like you would have if you had made the allegation. That's the type

of thing I'm talking about. Let's use the answer to figure out what we actually have to litigate, and then let's focus in on that.

So with that, you've got my rulings.

I'll start with the plaintiffs. Any questions or anything else we ought to talk about?

ATTORNEY KLEIN: Nothing from our perspective.

THE COURT: Okay. How about from the defendants?

ATTORNEY PERRY: Yes, Your Honor. This is Dan Perry. Thank you for the ruling.

I'm wondering if we can get more than five calendar days to prepare the answer. The only reason I ask is because the client is in the Philippines and Japan, and we -- for a pleading like that, we would prepare translations and then it's reviewed by Japanese lawyers and there's a commenting process that's typically slower than if I had an English-speaking client in the same time zone.

So I'd request ten days, if Your Honor is able to revisit that part of your ruling.

THE COURT: Ms. Klein, it seems like it's a fair point about the translation issue. What's

your thoughts on that?

ATTORNEY KLEIN: Yes, having represented clients in that part of the world, I think that's fair.

THE COURT: All right. Then that issue is settled.

I do want to exhort you all, as I know you will, to work together in terms of coordinating these types of things. And I don't want Delaware counsel just to be on the sidelines.

When we have these expedited cases, they only work when the people who are repeat players in this Court and who understand our expectations are deeply involved. I know you-all have your areas of expertise. One of the wonderful things about this job is we get to hear from some of the best lawyers in the world, as you all obviously are.

But if there's folks who have particular expertise in terms of this Court's expectations, specifically in the area of discovery where this Court's expectations are often different than what passes for acceptable practice elsewhere, it's your Delaware counsel. They are the folks who can make sure you don't get into trouble and that

things unfold well.

I appreciate everyone's time today. I'm grateful for your comments. I think the next step is for you-all to work out a schedule that moves backwards from the July dates that I've given you-all. Submit that as a stipulation, I'll be happy to enter it. And then onward we go.

So thank you again for your time, and I hope you have a good rest of your day. Goodbye.

(Proceedings concluded at 12:38 p.m.)

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CERTIFICATE

I, KAREN L. SIEDLECKI, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, and Certified Realtime Reporter, do hereby certify that the foregoing pages numbered 3 through 49 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated, except for the rulings at pages 30 through 49, which were revised by the Vice Chancellor.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington this 9th day of February 2023.

/s/Karen L. Siedlecki

Karen L. Siedlecki
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter