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Investors, Energy Co. Wrangle Over 'Entire Fairness Doctrine'

By **Aaron Leibowitz**

Law360 (November 2, 2018, 5:36 PM EDT) -- The fate of a lawsuit by investors who claim they were shortchanged in the merger of two green energy companies will likely depend on which of two standards for disputed transactions is applied, a Massachusetts federal judge said Friday.

Attorneys for the investors argued that because brothers John and George Hatsopoulos had a controlling interest on both sides of the tie-up between American DG Energy Inc., or ADGE, and Tecogen Inc., ADGE should be subject to the "entire fairness doctrine" and be forced to prove in discovery that the deal was fair. The investors say the brothers undervalued ADGE in the 2016 merger.

But attorneys for ADGE said the investors' logic is flawed. Because the brothers owned a greater percentage in ADGE than in Tecogen, they would have had no incentive to undervalue ADGE in the deal, the lawyers said. For that reason, the court should apply the "business judgment rule," giving the companies' boards the benefit of the doubt that the merger was made in good faith, and dismiss the case, the attorneys said.

"We don't think there was any improper influence at all, but there is no basis to believe they would have deliberately made ADGE take less money," ADGE attorney Andrew Solomon of Solomon & Cramer LLP, told Law360. "That would have been deliberately punishing themselves."

U.S. District Judge Leo T. Sorokin cut to the heart of the matter Friday.

"Your analysis is entire fairness applies," he told an attorney for the investors. "[ADGE's] analysis is entire fairness doesn't apply. That's the question I have to decide."

The judge seemed sympathetic to ADGE's case, although he reserved decision.

"In what way do the brothers benefit from [ADGE] being 37 cents a share instead of 38 cents or $3.38?" Judge Sorokin asked. "How they were incentivized [to undervalue ADGE] doesn't make sense to me."

An attorney for the investors, Adam Blander of Wolf Popper LLP, said the mere fact that the Hatsopoulos brothers had a controlling interest in both companies was enough to warrant discovery under Delaware law, where the businesses were incorporated.

"The Delaware case law is clear that when a controller is on both sides of a transaction, the entire fairness doctrine must apply," Blander said.

Both companies are based in Waltham, Massachusetts. ADGE operates and distributes systems that produce electricity and heat, as well as cooling systems powered by natural gas. Tecogen makes and sells electricity generation systems.

Judge Sorokin trimmed the proposed shareholder suit in March, ruling in the brothers' favor on questions of securities violations. But he allowed the investors to pursue claims in federal court that the Hatsopouloses and their companies breached fiduciary duty under Massachusetts state law.

Leading up to the merger, the Hatsopoulos brothers had a $5.6 million stake in ADGE and a $17.9 million stake in Tecogen. The ADGE investors, Lee Vardakas and William Chase May, claimed the brothers and the management teams at both companies began outlining a merger in January 2016 without telling either company's board of directors. After months of informal planning, they alleged, the insiders informed the boards of an intent to merge in a deal that significantly undervalued the ADGE shares.

After the merger, Tecogen shareholders were allotted approximately 81 percent of the combined company, while ADGE shareholders were left with 19 percent. Yet ADGE contributed nearly half of the assets and just over half the shareholder equity in the merger, according to the suit.

Attorneys for the investors were not immediately available for comment Friday.

The investors are represented by Nathaniel L. Orenstein and Norman Berman of Berman Tabacco and by Carl L. Stine, Robert S. Plosky and Adam J. Blander of Wolf Popper LLP.

John and George Hatsopoulos, ADGE, Tecogen and managers Charles T. Maxwell, Deanna M. Petersen, Christine Kalskin, John Rowe, Joan Giacinti, Benjamin Locke and Elias Samaras are represented by Paul E. Summit of Sullivan & Worcester LLP and Andrew T. Solomon of Solomon & Cramer LLP.

The case is Vardakas v. American DG Energy Inc. et al., case number 1:17-cv-10247, in the U.S. District Court for the District of Massachusetts.

--Additional reporting by Dorothy Atkins. Editing by Jill Coffey.
