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UPDATE

Sina Corporation: Court awards billion dollar judgment

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Mr Justice Parker of the Cayman Islands Grand Court handed down his eagerly awaited decision in *Sina Corporation* (**Sina** or the **Company**), finding that the merger price of US$43.30 per share significantly undervalued the Company. The correct price was US$105.26 per share leading to a judgment of US$1,005,938,693 plus interest. This decision represents the highest award to date under the section 238 jurisdiction.

Background

Sina was the first Chinese internet company to be listed on the NASDAQ. In addition to its online media content and micro lending business, Sina had a controlling interest in Weibo Corporation (**Weibo**), a Chinese microblogging platform (similar to Twitter/X), together with long-term investments, the most significant of which was TuSimple Holdings Inc. (**TuSimple**), an autonomous trucking company.

On 6 July 2020 an initial offer of US$41.00 per share was made by New Wave MMXV Ltd (**New Wave**), a company owned and controlled by Mr Charles Chao, Sina's CEO and Chairman. New Wave held 7,150 Class A Preference Shares which afforded Mr Chao in excess of 55.5 per cent of the Company's voting power. Together the Buyer Group had 61.6 per cent of the Company's voting power.

The merger was announced on 6 July 2020 (the **Announcement Date**), and New Wave's best and final offer of US$43.30 per share was accepted on 28 September 2020. The EGM was held on 23 December 2020 (the **Valuation Date**) and the merger closed on 21 March 2021. The dissenting shareholders of the Company (the **Dissenters**) exercised their section 238 dissent rights and on 18 May 2021 Sina presented a petition to the Court seeking a determination of the fair value of the Dissenters' shares held by them.

As with all section 238 trials, there were three distinct issues: (i) the reliability of the merger price; (ii) the reliability of the market trading price; and (iii) the valuation issues.

Merger price

Mr Chao stated in the initial offer letter that he was not interested in selling his stake in Sina and made clear his intention to veto any alternative transaction. Given this position, the Court found that (i) there was no realistic and fair opportunity for alternative bidders to pursue a potential deal, and (ii) the Company was taken private by Mr Chao where he had a clear majority stake and evident self-interest in the outcome and the price arrived at. Accordingly, the Court concluded there was no mechanism for price discovery and no reliance should be placed on the merger price.

Market trading price

The issue of market price traversed both Sina and Weibo, given Sina's controlling stake in the latter.

Sina

With respect to Sina, the Dissenters' expert, Professor Bilge Yilmaz, completed a rigorous set of tests applying a conventional event study methodology and concluded that Sina's stock price reactions did not provide sufficient evidence for the existence of semi-strong form market efficiency.

By contrast Sina's expert, Mr Sid Jaishankar eschewed the conventional test and instead put forward what he described as a '*qualitative analysis*' of efficiency.

Amongst the many difficulties arising from this approach was the fact that Mr Jaishankar had failed to determine whether on a particular news day, the stock price moved in the expected direction. It followed that he had failed to establish any basis to conclude whether the price movement he observed was consistent with efficiency or inefficiency.

The Court found that there was no academic or practitioner support for Mr Jaishankar's test and that, in contrast to Professor Yilmaz, he had failed to produce an empirical analysis of the cause-and-effect relationship between information surprises and price movement. As a result, the Company had not discharged its burden to prove that the market for Sina shares was semi-strong efficient.

Leaving aside efficiency, the Court found that there was evidence of material non-public information and evidence that Sina had not recovered from the effects of COVID, such that reliance on Sina's share price was unreliable.

Weibo

With respect to Weibo, the experts agreed that up to the Announcement Date, the market for Weibo's shares was semi-strong efficient. However, the experts disagreed as to whether Weibo's share price was reliable as at the Valuation Date or whether the share price had been tainted by the announcement and expectations surrounding the Sina merger. Ultimately, the Court concluded that Weibo's market price had been tainted and therefore was not probative of fair value.

Valuation

The Court looked at the sum of the parts (**SOTP**) analysis prepared by the experts. An SOTP analysis consists of determining the value of each of a company's individual business units or assets and then summing them to arrive at the company's total value. This approach is particularly useful for companies that operate in multiple industries, where each segment might have different growth prospects, risk profiles, or valuation multiples.

Weibo and Sina

The Court valued Sina and the company's interest in Weibo using a Discounted Cash Flow (**DCF**) methodology. With respect to Sina, the Dissenters argued that given deficiencies in the company's privatisation projections, DCF was not a reliable method. The Court adopted a number of the Company's inputs, leading to a valuation of these parts more in line with the value proposed by the Company.

Long-term investments

Both Sina and Weibo combined had about 100 long-term investments (**LTIs**). Sina's expert applied a lack of marketability discount (**DLOM**) of 30 per cent to about 90 of the LTIs and a discount of between 10 per cent to 20 per cent to the rest.

The Court found that Mr Jaishankar had not applied sufficient rigour to his analysis of the discounts and that he had failed to recognise that where an investment is a private investment a DLOM is priced in and no further discount should be applied. Accordingly, the Court found that discounts should be applied only to the three public investments which were subject to an IPO lock-up period or other disposal restrictions, and, in those cases, consistent with the empirical evidence provided by the Dissenters' expert, a DLOM of only 6 per cent should be applied.

TuSimple

Sina held a 29.8 per cent stake in TuSimple. On 15 April 2021, TuSimple completed an IPO achieving a valuation of US$7 billion, having made a confidential Form S-1 filing with respect to its proposed IPO on the Valuation Date.

Mr Jaishankar valued Sina's stake in TuSimple at US$12.73 per share based on the last round of TuSimple financing (at US$14.14 per share plus a 10 per cent DLOM). He also relied on a report prepared by external advisors to TuSimple (for tax reporting purposes with respect to employee stock options and not for the purpose of a valuation of the IPO), to conclude that (i) the likelihood of an IPO at the Valuation Date was not higher than 50/50; and (ii) that in an IPO scenario TuSimple was worth US$3 billion. The Company did not call any evidence with respect to this report.

Professor Yilmaz, by contrast, undertook a careful and detailed valuation of TuSimple, yielding a value of US$6.6 billion as at the Valuation Date. He then used empirical data to assess the likelihood of an IPO at the Valuation Date at 90 per cent. After further appropriate adjustments, he concluded that TuSimple was worth US$30.53 per share as at the Valuation Date.

The Court found that the expected IPO was knowable at the Valuation Date and found that looking at the value of the IPO as at 15 April 2021 did not involve impermissible hindsight. Having considered the competing approaches, the Court rejected Mr Jaishankar's position and concluded that the Dissenters' expert's analysis was to be preferred, save that the probability of an IPO should be 80 per cent rather than 90 per cent.

HoldCo Discount

The final issue for the Court to determine was whether a 'HoldCo' Discount should be applied.

Mr Jaishankar arrived at a SOTP valuation of US$85.66 per share after which he applied discounts and DLOMs to reduce the value to US$73.75 per share. After this he applied an additional 42.5 per cent HoldCo discount over all of Sina's assets to reduce his valuation by a further US$31.34 to US$42.41.

Mr Jaishankar suggested that this represented the difference between the value of Sina as reflected by its market capitalization driven by its market trading price and the calculated *en bloc* value. He set a number of criteria to explain such a discount, including (i) lack of control, (ii) a complex or opaque multi player structure, (iii) investment in publicly traded shares where investors could choose to invest directly, and (iv) long term investments where it may be necessary to apply a DLOM.

The Court found that the Company's approach was fundamentally flawed. None of the criteria advanced led to a conclusion that such discount was justified. No case law or legal commentary had been advanced to support such a discount and, tellingly, Mr Jaishankar had never in his professional career applied such a discount.

The Court went on to find that discounts should be assessed by reflecting constraints and frictions that the investor actually faces, in the economics of the component part of the business or asset/investment under consideration. A rigorous and systematic assessment of any applicable discount to any asset and investment grounded in justifiable and measurable economic force was required. It did not make sense, the Court concluded, from an economics standpoint, not to have identified a substantive and principled explanation for any such discount, before it is applied across the board to a SOTP valuation. Accordingly, no HoldCo discount was to be applied.

Minority Discount

Having dismissed the HoldCo discount, the Court found that a minority discount of 2 per cent should apply.

Comment

Once the Court's rejection of the Company's position on DLOM, Tusimple and the Hold Co discount are calculated, a share price of US$105.26 (as against merger price of US$43.30) is arrived at leading to an uplift of US$1,005,938,693 plus interest. This represents the highest award in section 238 history.

The lengthy judgment reinforces the Court's commitment to adjudicating fair value for any dissenting shareholder regardless of whether they are 'arbitrage' investors or not. Whilst the judgment follows familiar legal principles, it deals with interesting valuation issues and affirms the importance of a rigorous and structured approach to the valuation methodologies.

Mourant acted for the largest dissenter group in these proceedings.

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