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Delaware M&A Quarterly

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Delaware Courts Continue to Clarify Limits of *Corwin* Doctrine

This quarter, the Delaware courts have continued to clarify the jurisprudence surrounding the doctrine set forth in *Corwin* v. *KKR Financial Holdings LLC* (*i.e.*, that a fully informed and uncoerced stockholder vote invokes the business judgment standard of review in the third-party merger context). For more on *Corwin*, click here. Developments relating to the *Corwin* doctrine this quarter include the following:

- Delaware courts have focused on defining the contours of a fully informed and uncoerced vote under *Corwin*.
    - In *Sciabacucchi* v. *Liberty Broadband Corporation*, Vice Chancellor Glasscock of the Court of Chancery found that the vote at issue (which approved both stock issuances and the grant of a voting proxy to the company's largest stockholder) was "structurally coerced" and therefore insufficient to cleanse board action and invoke business judgment review under *Corwin*. The court determined that while "inherent coercion" did not exist because the large stockholder did not control the company, the vote was nevertheless structurally coerced as the stockholders were essentially forced to approve those transactions to avoid a detriment, and not because the transactions themselves were beneficial to the corporation. For more on the *Sciabacucchi* decision, click here.
    - In an order in *Chester County Retirement System* v. *Collins*, the Delaware Supreme Court upheld the lower court's opinion to apply *Corwin* on the basis that the stockholder vote at issue was fully informed and uncoerced, despite the absence of disclosures that the chairman of the special committee was considering joining the committee's outside counsel as a partner. Although the Supreme Court noted that the failure to disclose the chairman's decision to join the outside counsel's firm was troubling and should have been brought to light earlier, the court concluded that this fact was not material. For the Supreme Court's order in *Collins*, click here.
- Delaware courts have continued to dismiss stockholder suits based on *Corwin*.
    - As noted above, in *Collins*, the Delaware Supreme Court upheld the Court of Chancery's decision to dismiss a stockholder suit

based on *Corwin*. Additionally, in *In re Paramount Gold and Silver Corp. Stockholders Litigation*, Chancellor Bouchard applied *Corwin* to dismiss stockholder claims that directors had rushed the sale process, failed to negotiate for an adequate pre-signing auction of the company or post-signing go-shop provision, acted in bad faith by agreeing to unreasonable deal protections and provided stockholders with inadequate disclosures. The court also disagreed with plaintiffs that a royalty fee to be paid by the acquirer was essentially a second termination fee, thereby rejecting plaintiffs' *Unocal* claims because the merger agreement termination fee on its own was reasonable (as conceded by plaintiffs). Because the court found the termination fee to be reasonable, it did not address plaintiffs' argument that *Unocal* would continue to apply to the court's review of defensive measures notwithstanding a cleansing vote under *Corwin*. For the decision, click here.

- In *In re Cyan, Inc. Stockholders Litigation*, Chancellor Bouchard of the Delaware Court of Chancery applied the business judgment rule under existing principles of Delaware case law to dismiss a fiduciary duty claim and a request for a quasi-appraisal remedy in connection with a mostly stock-for-stock merger transaction. While the case was not dismissed based on *Corwin*, the court noted that the dismissal was further reinforced under the *Corwin* doctrine because the target's shareholders had voted to approve the deal. For more on *Cyan*, click here.

Delaware Court of Chancery Appraisal Decisions Continue to Highlight Reliance on Deal Price to Determine Fair Value Absent a Problematic Sale Process

Two decisions by the Delaware Court of Chancery this quarter reached seemingly disparate outcomes on fair value for the companies involved, but together stand for the general trend of recent appraisal decisions that deal price is the best indicator of fair value if the price resulted from a fair and robust sale process. However, the court will rely on other methods to determine fair value if the record suggests that the process could not have resulted in a deal price that is a reliable indicator of fair value (for example, where there were board conflicts or other indicia of a tainted process). In those situations, the valuation most often used is a discounted cash flow ("DCF") analysis but only if reliable management projections are available. Further, because synergies are statutorily required to be excluded for appraisal purposes, the court recently found a fair value that was approximately 8% lower than the deal price due to the high synergies in that strategic transaction.

In the first decision, *In re Appraisal of PetSmart, Inc.*, Vice Chancellor Slights found that the merger price, negotiated following a robust auction process, provided the most reliable indicator of fair value. The court rejected the petitioners' DCF analysis, which suggested a company value 45% greater than the deal price, reasoning that the analysis was based on aggressive and unreliable management projections. In the second decision, *In re Appraisal of SWS Group, Inc.*, Vice Chancellor Glasscock found that the merger price was not a reliable indicator of fair value due to, among other things, the acquirer's partial veto power over competing offers under a credit agreement. Instead, the court applied a DCF analysis to derive a fair value that was approximately 8% below the merger price. For more, click here.

Delaware Court of Chancery Dismisses Breach of Fiduciary Duty Claims Because Merger Resulted in Loss of Standing

In *In re Massey Energy Company Derivative and Class Action Litigation*, Chancellor Bouchard of the Delaware Court of Chancery recently dismissed shareholders' derivative and putative direct claims alleging that Massey's former directors

and officers caused the company to willfully disregard safety regulations. Despite finding that shareholders had stated a "viable" claim that the directors had breached their duty of oversight under *In re Caremark International, Inc. Derivative Litigation* – claims that are difficult to plead successfully – the court found that they nevertheless lacked standing because they no longer held shares of the corporation due to an intervening merger. For more, click here.

Delaware Court of Chancery Holds That Stockholder Vote on Equity Incentive Plan Ratifies Later Awards

In *In re Investor Bancorp, Inc. Stockholder Litigation*, Vice Chancellor Slights of the Delaware Court of Chancery held that a fully informed stockholder vote approving adoption of an equity incentive plan also ratified subsequent equity awards to individual directors under the plan. The court found that the plan included limits on grants to directors as a beneficiary group, as opposed to "generic" limits applicable to all plan beneficiaries. In dismissing the shareholder derivative suit, the court applied the business judgment standard of review to the directors' decision to make the awards to themselves. For more, click here.

2017 Amendments to the Delaware General Corporation Law

The Delaware General Assembly has approved legislation proposing amendments for 2017 to the Delaware General Corporation Law ("DGCL"). The amendments, if signed by the governor, will be effective on August 1, 2017, except for the amendments relating to stockholder action by written consent, which will be effective only as to actions taken by written consent having a record date on or after August 1, 2017. The proposed 2017 amendments to the DGCL relate, among other things, to the following:

- Use of "blockchain" or "distributed ledger" technology – The proposed amendments aim to provide statutory authority for the use of "blockchain" or "distributed ledgers" to create and maintain corporate records. Blockchain or distributed ledger technology allows for the creation of a ledger of transactions shared among a network of participants and may be well suited to the maintenance of a stock ledger, as it could allow for the timely and accurate settlement of stock issuances and transfers. Most of these amendments relate to Sections 219 and 224 of the DGCL (as well as other minor amendments throughout the DGCL) and address the fact that a distributed ledger does not involve a central database.

- Elimination of the requirement that each stockholder consent bear the date of signature – The 2017 amendments address the concerns stemming from the Court of Chancery's 2003 decision in *H-M Wexford LLC* v. *Encorp*, pursuant to which the court denied a motion to dismiss claims challenging the validity of stockholder consents that were not individually dated by the executing stockholders, but instead had preprinted dates. According to the court, the failure to date each consent ran afoul of Section 228(c)'s requirement that every written consent *shall* bear the date of signature of the stockholder. The 2017 proposed amendments to Section 228 eliminate this requirement that each consent be individually dated, but require that the requisite number of consents be delivered to the corporation within 60 days from the date that the first consent is *delivered* to the corporation.

- Consolidations and mergers with non-U.S. entities – The 2017 amendments to the DGCL clarify that mergers or consolidations with non-Delaware entities are permitted under Delaware law so long as the laws of the non-Delaware jurisdiction "do not prohibit" (rather than requiring the foreign jurisdiction to "permit" or not "forbid") such mergers or consolidations. Either the Delaware corporation or the non-U.S. entity may be the survivor of such a merger.

- Effective time of Section 203 "opt-out" – The 2017 proposed amendments clarify that an amendment to a corporation's certificate of incorporation to opt out of the restrictions on business combinations under Section 203 of the DGCL (Delaware's anti-takeover statute) becomes effective when such amendment to the certificate of incorporation (i) becomes effective under Section 103 of the DGCL (in the case of a corporation that has never had a class of voting stock listed on a national securities exchange or held of record by more than 2,000 stockholders and that has not elected through its original certificate of incorporation or any amendment thereto to be governed by Section 203) or (ii) twelve months after the effective date and time of such amendment (in the case of all other corporations). With regard to (ii) above, the amendment electing not to be governed by Section 203 will not apply to any business combination between the corporation and any person who became an interested stockholder of the corporation before, in the case of an amendment to the certificate of incorporation, the date and time at which the certificate filed in accordance with Section 103 becomes effective or, in the case of an amendment to the bylaws, the date of the adoption of such amendment.

- Annual reports – The 2017 proposed amendments amend Section 374 of the DGCL to simplify the annual reporting requirements for corporations organized in another jurisdiction that are qualifying to do business in Delaware. Relatedly, 8 *Del. C.* § 502 is proposed to be amended to clarify the information required to be disclosed in annual reports filed by Delaware corporations with the Delaware Secretary of State.

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M&A Markets

The following issues of M&A at a Glance, our monthly newsletter on trends in the M&A marketplace and the structural and legal issues that arise in M&A transactions, were published this quarter. Each issue can be accessed by clicking on the date of each publication below.

- April 2017
- May 2017
- June 2017

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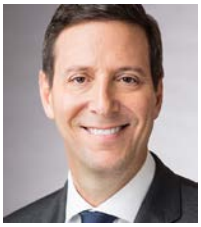
This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:



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