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Termination Fee Not Buyer's Exclusive Remedy for Breach of No-Solicitation Provision

Recently in *Genuine Parts Company* v. *Essendant Inc.*, the Delaware Court of Chancery declined to dismiss the damages claims of Genuine Parts Company ("GPC"), a would-be acquirer of Essendant Inc., based on Essendant's alleged breach of their merger agreement, despite its payment of the termination fee to accept a superior proposal. The court, in an opinion by Vice Chancellor Slights, concluded that GPC's allegations adequately pled a claim of material breach of the no-solicitation provision and that the termination fee was not GPC's exclusive remedy in such circumstances. Among other things, plaintiffs alleged that Essendant breached the no-solicitation provision by encouraging a pre-signing bidder (and Essendant's ultimate merger partner) to make a post-signing offer and by failing to inform GPC of such bidder's pre-signing and initial post-signing offers. In addition, the fact that the competing bidder's second post-signing bid improved on its first post-signing bid only with assurances that the offer may be increased after confirmatory diligence, but was nevertheless then found to be a superior offer by the Essendant board, provided circumstantial evidence that Essendant "directly or indirectly" shared its preferences with the bidder in violation of the no-solicitation provision. For the opinion, click here.

Court of Chancery Reviews Advance Notice Bylaws

The Delaware Court of Chancery has recently addressed issues relating to a dissident stockholder's compliance with advance notice requirements in two separate rulings. In the first, the court held in *Saba Capital Master Fund, Ltd.* v. *Blackrock Credit Allocation Income Trust* that information sought in a director questionnaire regarding the nominees of a dissident stockholder was overbroad based on the specific language set forth in the advance notice provision of the subject funds' bylaws. Specifically, Vice Chancellor Zurn held that the information sought by the 100-question, 47-page questionnaire was not, as required by the advance notice bylaw, "reasonably requested" or "necessary" to determine whether the stockholder's nominees met the relevant director qualifications. Therefore, the court did not enforce the five-business-day deadline for the stockholder to respond to the questionnaire and ordered that votes be counted as to the dissident nominees at the annual meeting. For the opinion, click here.

In a bench ruling in *Bay Capital Finance* v. *Barnes and Noble Education Inc.*, Vice Chancellor McCormick enforced an advance notice provision to preclude the inclusion of nominees of an unsolicited acquirer in the company's proxy. The advance notice provision required that nominations be submitted between

90 and 120 days prior to the anniversary of the prior year's annual meeting, and that the party making the nominations must be a record holder as of the notice deadline to nominate directors. In this case, although the unsolicited acquirer submitted timely nominations, it was a beneficial owner at the time of the deadline, and therefore, the company rejected its nominations. The court upheld the company's decision to enforce the advance notice bylaw, noting that the unsolicited acquirer had been reminded four times by its advisor of the record holder requirement. For a transcript of the relevant hearing, click here.

Court of Chancery Continues Line of Appraisal Decisions

We highlight three appraisal opinions this quarter, two of which relied on the merger price as the best indicator of appraisal fair value, and one of which relied on the target's unaffected market price. Despite these seemingly disparate outcomes, these decisions remain in line with the Delaware Supreme Court's recent decisions, including earlier this year in *Veriton Partners Master Fund Ltd.* v. *Aruba Networks, Inc.* (discussed here), that have urged the Court of Chancery to rely upon deal price (less synergies in the appropriate case) as the most reliable evidence of a corporation's fair value where there is a sufficiently robust sale process.

Vice Chancellor Laster in *In re Appraisal of Columbia Pipeline Group, Inc.* (see here) and in *In re Appraisal of Stillwater Mining Company* (see here) found the deal price to be the most reliable measure of fair value. In doing so, Vice Chancellor Laster pointed to similar indicia of fairness in the sale process in both transactions, including that the transactions were arm's length, the boards were not conflicted, potential buyers had opportunities to make competing offers, but did not do so, and there were robust negotiations. Further, in both cases, the court held that the parties failed to meet their burden to justify a downward adjustment to deal price to account for synergies, and therefore, no synergies figured into the fair value determination in either case. Unlike these two cases, however, earlier this quarter, the Court of Chancery in *In re: Appraisal of Jarden Corporation* (discussed here) appraised the fair value of Jarden Corporation to be the unaffected market price of the company's shares, which was approximately 18% less than the merger price. Vice Chancellor Slights rejected the merger-price-less-synergies metric as an indicator of fair value due to flaws in the deal process and uncertainties in estimating synergies. That decision is an indicator that the Court of Chancery will scrutinize closely the relevant sale process and the particular facts of each appraisal case.

Delaware Supreme Court Declines to Create Presumption of Confidentiality for Books-and-Records Productions

The Delaware Supreme Court recently declined in *Tiger* v. *Boast Apparel, Inc.* to create a presumption of confidentiality for books-and-records productions made under Section 220 of the General Corporation Law of the State of Delaware. In an opinion by Justice Traynor, the court held that some justification of confidentiality is necessary for the court to impose a confidentiality restriction, and that the court "must assess and compare benefits and harms when determining the initial degree and duration of confidentiality." With regard to duration, the court noted that indefinite confidentiality should be the exception and not the rule, and while it may be reasonable in a given case, parties seeking books and records under Section 220 "need not show exigent circumstances for a court to grant something less than indefinite confidentiality." As a result of the court's decision in *Tiger*, parties may be required to more carefully consider the scope and duration of confidentiality restrictions in connection with Section 220 demands, particularly in view of the importance that Delaware courts have placed upon such demands in connection with stockholder derivative suits. For the opinion, click here.

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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.

- July 2019
- August 2019
- September 2019

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:

Matthew W. Abbott
+1-212-373-3402
Email

Scott A. Barshay
+1-212-373-3040
Email

Ariel J. Deckelbaum
+1-212-373-3546
Email

Ross A. Fieldston
+1-212-373-3075
Email

Andrew G. Gordon
+1-212-373-3543
Email

Jaren Janghorbani
+1-212-373-3211
Email

Jeffrey D. Marell
+1-212-373-3105
Email

Robert B. Schumer
+1-212-373-3097
Email

Taurie M. Zeitzer
+1-212-373-3353
Email

Counsel Frances F. Mi and legal consultant Cara G. Fay contributed to this memorandum.

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