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Delaware Court of Chancery Permits Buyer to Terminate Merger Due to Target's Failure to Operate in the Ordinary Course; But Finds No MAE Due to COVID-19

In *AB Stable VIII LLC* v. *MAPS Hotels and Resorts One LLC, et al.*, the Delaware Court of Chancery held that the COVID-19 pandemic did not result in a Material Adverse Effect ("MAE") on the target because pandemics fall within the plain meaning of the MAE's exception for "natural disasters and calamities." Nevertheless, the buyer was excused from its obligation to close the transaction, and was ultimately justified in terminating the sale agreement, because the target had made significant changes to its business post-signing as a result of the pandemic, and therefore violated its covenant to operate its business in the ordinary course consistent with past practices. Although the court, in an opinion by Vice Chancellor J. Travis Laster, acknowledged that these changes were "reasonable responses to the pandemic," precedent and the language of the ordinary course covenant required the court to evaluate the target's actions exclusively based on how it had operated in the past, and not whether they were reasonable in view of the pandemic. According to the court, management cannot "take extraordinary actions and claim that they are ordinary under the circumstances." Although this decision was dependent on the specific contractual language at hand, the court's interpretation of MAE and ordinary course covenants generally deserves the attention of M&A parties and practitioners. For more, click here.

Delaware Court of Chancery Allows *Revlon* Claims Against Officers to Proceed

In *In re MINDBODY, Inc. Stockholders Litigation*, the Delaware Court of Chancery, in an opinion by Vice Chancellor Kathaleen St. J. McCormick, allowed shareholder breach of fiduciary duty claims to proceed against the former CEO and CFO of Mindbody that related to the company's sale to Vista Equity Partners Management LLC. Plaintiffs alleged that the defendants breached their *Revlon* duties and failed to obtain the best price reasonably available in the sale of control as a result of several conflicts of interests, including the CEO's personal need for liquidity and the prospect of future employment with Vista. The court found that it was reasonably conceivable that the fiduciaries were subjectively affected by the alleged conflicts. In addition, according to the court, it was reasonably conceivable that the CFO was grossly negligent and breached his duty of care by delivering lowered earnings guidance at the CEO's direction and failing to provide a substantive data room to potential bidders during the go-shop period. The court also concluded that a *Corwin* defense was unavailable at the pleadings stage because plaintiffs sufficiently alleged that the shareholder vote was not informed. For the opinion, click here.

Delaware Court of Chancery Provides New Guidance on the Standard for Analyzing Demand Futility

In *United Food and Commercial Workers Union* v. *Zuckerberg*, the Delaware Court of Chancery signaled a potential shift in the standard applicable to motions to dismiss derivative cases for failure to plead demand futility—the more common basis for seeking dismissal of such cases in Delaware. In his opinion, which dismissed a stockholder derivative suit against directors of Facebook, Inc., Vice Chancellor J. Travis Laster eschewed a longstanding test for such motions in favor of a more flexible director-by-director analysis. The court held that the plaintiff, who failed to make a pre-suit demand on Facebook's board, had not adequately pleaded that a majority of directors were incapable of exercising independent judgment in responding to a demand. Rather than apply the longstanding demand futility test set forth in *Aronson* v. *Lewis*—which requires the court to consider not only director independence and disinterestedness but also whether the challenged board decision was a valid exercise of business judgment—the court instead examined the allegations concerning each director to determine whether a majority of directors were improperly conflicted or had acted in bad faith. The opinion echoes growing skepticism that the *Aronson* test is not viable, and is the first opinion to expressly decline to apply *Aronson* because its "analytical framework is not up to the task." For more, click here.

Delaware Supreme Court Holds that Appraisal Action is Not a "Securities Claim" Under D&O Insurance

In *In re Solera Insurance Coverage Appeals*, the Delaware Supreme Court held that an appraisal action was not a "Securities Claim" within the meaning of Solera's D&O insurance policy, reversing the prior holding of the Delaware Superior Court. In an opinion discussed here, the Delaware Court of Chancery appraised the fair value of Solera to be $53.95 per share, an amount less than the merger price of $55.85 paid by its acquirer in 2016. The Court of Chancery ordered Solera to pay the appraised amount plus pre-judgment interest of $38.3 million, and the company incurred legal fees of over $13 million in defending the action. Solera sought reimbursement from its D&O insurers for the pre-judgment interest award and the defense fees, and the insurers denied coverage, arguing that the appraisal action was not a "Securities Claim" under the policy because it was not a "violation" of any federal, state or local statute, regulation or rule pertaining to securities. In an opinion (found here), the Delaware Superior Court agreed with Solera and held that the policy provided coverage for both the pre-judgment interest amount and the defense costs, and the insurers appealed. In reversing the Superior Court's holding, the Delaware Supreme Court, in an opinion by Justice Karen L. Valihura, analyzing the definition of "Securities Claim" under the terms of the specific policy, held that the appraisal action was not a claim for a "violation" and therefore was not a "Securities Claim" under the policy. This interpretation, the Court ruled, was "compelled by the plain meaning of the word 'violation,' which involves some element of wrongdoing, even if done with an innocent state of mind," as well as "by [the Delaware appraisal statute's] historical background, its text, and by a long, unbroken line of cases that hold that an appraisal under [the statute] is a remedy that does not involve a determination of wrongdoing." For the opinion, click here.

Delaware Supreme Court Affirms Court of Chancery's Determination that Deal Price was Best Indicator of Fair Value in Appraisal Action

In the appraisal action *Brigade Leveraged Capital Structures Fund Ltd.* v. *Stillwater Mining Company*, the Delaware Supreme Court, in an opinion by Justice Tamika R. Montgomery-Reeves, affirmed the Delaware Court of Chancery's determination that deal price in Stillwater's sale to Sibanye Gold Ltd. was the most persuasive indicator of Stillwater's fair value at the time of the merger. The Delaware Supreme Court agreed with the Court of Chancery's opinion (discussed here) that Stillwater's sale process presented "objective indicia" to support the conclusion that the merger consideration reliably indicated fair value in this instance. Further, the Supreme Court observed that the lower court had discretion in selecting the valuation model best tailored to the circumstances. Quoting an earlier decision, the Court wrote, "'[i]n the end, the trial

judge must determine fair value, and 'fair value is just that, 'fair.' It does not mean the highest possible price that a company might have sold for.'" For the Delaware Supreme Court's opinion, click here.

Delaware Court of Chancery Permits Insolvent Corporation to Transfer all of its Assets to Secured Creditors Without Stockholder Approval

In *Stream TV Networks, Inc.* v. *Seecubic, Inc.*, the Delaware Court of Chancery enforced an agreement pursuant to which the corporation agreed to transfer all of its assets to an entity owned by its secured creditors without complying with Section 271 of the DGCL, which requires stockholder approval for a "sale, lease or exchange" of "all or substantially all" of a corporation's assets. Plaintiff sought a preliminary injunction seeking to prevent the enforcement of the agreement on several grounds, including that it did not comply with Section 271. The court, in an opinion by Vice Chancellor J. Travis Laster, found that the transfer to the secured assets did not constitute a "sale" or "exchange" under Section 271 because the transaction contemplated by the agreement did not fit within the plain meaning of these terms, as it functioned as a transfer of assets to the corporation's secured creditors in lieu of a formal foreclosure proceeding. Moreover, the court found that the legislative history of Section 271 did not support a finding that the transaction required stockholder approval. 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.

- October 2020
- November 2020
- December 2020

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