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SUMMER 2022

Delaware M&A Quarterly

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Delaware Court of Chancery Invalidates Board's Instruction to Inspector of Elections

In *Totta* v. *CCSB Financial Corp.*, the Delaware Court of Chancery, in an opinion by Chancellor McCormick, held that a charter provision that gave the board "conclusive and binding" authority to construe the charter's terms did not alter the standard of review applicable to fiduciary duty claims related to those board decisions. The applicable charter provision prohibited a stockholder from exercising more than 10% of the company's voting power. In the face of a proxy contest, the board adopted a new interpretation of that voting limitation allowing the board to aggregate the holdings of multiple stockholders that the board determined to be acting in concert. Relying on that new interpretation, the board instructed the inspector of elections not to count any votes above the 10% limit submitted by the insurgent, its affiliates or its nominees. This instruction was outcome determinative and the insurgents brought suit to invalidate the board's instruction to the inspector of elections. The company argued that the court was required to uphold the instruction based on the board's "conclusive and binding" interpretation of the charter provision. The court rejected that argument, reasoning that a corporate charter (unlike an alternative entity's organizational documents) cannot modify the standards by which director actions are reviewed, and that the board's self-serving and new interpretation of the voting limitation in the face of a live proxy contest was inequitable because the board did not have a "compelling justification" under the *Blasius* standard of review for their interference with the election. Because the board's actions were inequitable, the court ordered the inspector of elections to disregard the board's instruction and count the insurgent's votes that had previously been excluded.

Delaware Court of Chancery Finds Tesla's Acquisition of SolarCity Entirely Fair

The Delaware Court of Chancery made a rare post-trial entire fairness ruling in *In re Tesla Motors, Inc. Stockholder Litigation*. In the opinion by Vice Chancellor Slights, the court rejected claims that Tesla's CEO Elon Musk breached his fiduciary duties as a director of Tesla in connection with the company's 2016 acquisition of SolarCity Corporation. The court held that, even assuming Musk was a controller (he owned about 22% of both Tesla and SolarCity at the relevant time) and that entire fairness therefore applied to the court's review of the transaction, the court found as fact on the trial record presented that both the price paid and process employed were entirely fair to Tesla and its minority stockholders. In particular, the court found that Musk's participation in the transaction on both sides was problematic at times, but that any control he attempted to wield in connection with the acquisition "was effectively neutralized by a board focused on the *bona fides* of the [acquisition], with an indisputably independent director leading the way." The court also found

the price to be fair based on, among other things, market indicia and the fact that the deal was approved by 85% of disinterested stockholders, which were "largely extremely sophisticated institutional investors."

Delaware Court of Chancery Holds That Buyer Could Be Liable for Not Ensuring Stolen Merger Consideration Reached Target Shareholders

In *Sorenson Impact Foundation* v. *Continental Stock Transfer & Trust Company*, the Delaware Court of Chancery denied a motion to dismiss claims that a buyer breached the merger agreement by not ensuring that final payment of the merger consideration reached the target's former stockholders after hackers gave false instructions to the paying agent and diverted a portion of the merger consideration to themselves. While the court acknowledged that the merger agreement required the buyer to pay the paying agent (and not the stockholders directly), the court held that it was reasonably conceivable that the merger agreement could be interpreted to require the buyer to ensure payment to the stockholders. The court, however, rejected the plaintiff's alternative theory that the buyer breached the letter of transmittal because the buyer was not a party to the letter of transmittal and, in any event, letters of transmittal are generally not contracts. The court also dismissed claims against the paying agent due to lack of personal jurisdiction and claims that the buyer was vicariously liable for the paying agent's breaches. The court did, however, allow unjust enrichment claims against the buyer and target to proceed.

2022 Updates to the Delaware General Corporation Law

The 2022 amendments to the General Corporation Law of the State of Delaware ("DGCL") have been passed by the Delaware General Assembly. If signed by the governor, which is likely, they will become effective on August 1, 2022. Key amendments include the following:

- Exculpation of officers. Section 102(b)(7) will be expanded to allow exculpation of officers (in addition to directors) in the company's charter. The scope of officer exculpation would largely track exculpation available for directors, except officers cannot be exculpated in actions brought by the corporation against the officer (which includes derivative actions). One key effect of this amendment will be to allow companies to afford officers the same exculpation as directors in M&A litigation, where stockholders often assert claims against directors and officers directly.

- Delegation of authority to issue stock, etc. Sections 152, 153 and 157 will be amended to allow a board to delegate to "any person or body," in addition to the board (or board committee), the authority to issue stock, sell treasury shares and issue rights and options so long as the board/committee resolution delegating the authority fixes (i) the maximum number of shares/options that the delegate is authorized to issue/sell, (ii) a time period during which the issuances/sales can occur and (iii) the minimum consideration for the issuances/sales. These three parameters generally may be made dependent on "facts ascertainable," subject to the following condition:

    - if the board/committee approves the transaction that results in issuing stock or options, then a "fact ascertainable" can be a determination by any person or body; but

    - if the board delegates to a person or body the decision to enter into the transaction that results in issuing stock or options, then determinations or actions by that same person or body cannot be "facts ascertainable" regarding the three required parameters of the delegation.

- Stockholder List. Section 219, which relates to stockholder list requirements, is being amended to remove the requirement to make the stockholder list available during stockholder meetings; and with respect to virtual meetings, to include the information required to access such list with the notice of the meeting.

- Notice of Meetings. Section 222, which relates to the requirement to give notice of stockholder meetings, is being amended as follows:

    - Section 222 is being revised to clarify that notice of a stockholder meeting must be given in accordance with Section 232, which was amended in 2019 to provide for the manner in which notice may be given (by mail,

courier or electronic mail or, with the consent of a stockholder, pursuant to other specified means of electronic transmission).

  - The amendments to Section 222 also address issues that are unique to virtual meetings, clarifying that, unless the bylaws otherwise require, when a meeting is adjourned, including due to a technical failure to convene or continue the meeting by remote communication, notice need not be given if the time, date and place of the meeting (and the means of remote communication, as applicable) are announced at the meeting, displayed during the time scheduled for the meeting on the electronic network used for the virtual meeting or set forth in the notice of meeting.

- Appraisal rights. Section 262 will be modified in a few key respects:

  - Beneficial owners will be able to demand appraisal rights directly in their own names without needing to go through brokers or DTC. Beneficial owners already are permitted to make books and records demands under Section 220 with accompanying proof of beneficial ownership, and similar proof and other procedures would be required in making appraisal demands.

  - Appraisal rights will be available in connection with any conversion of a corporation to another entity. This change is being made because the vote to approve a conversion under Section 266 is being reduced from unanimity to majority.

  - It will no longer be necessary to attach a copy of the appraisal statute to the notice of availability of appraisal rights. Instead, the corporation can provide directions to "a publicly available electronic resource" where the statutory text "may be accessed without subscription or cost."

- Domestication. Section 388, which permits the domestication of a non-U.S. entity to a Delaware corporation, will be amended to permit the domesticating entity to adopt a "plan of domestication" that, in addition to setting forth the terms of the domestication, may set forth the manner of exchanging or converting the equity interests of the non-U.S. entity. Additionally, the plan may set forth corporate action to be taken by the domesticated corporation in connection with the domestication, which corporate acts must be approved in accordance with the requirements of applicable non-U.S. law before the effectiveness of the domestication. Once that plan of domestication is approved by the non-U.S. entity, all such corporate actions will be deemed to have been authorized, adopted and approved by the domesticated corporation and its board, stockholders or members, as applicable, and will not require any further action of the board, stockholders or members of the domesticated corporation.

Other proposed DGCL amendments include changes and clarifications to dissolution and conversion procedures, as well as various other technical changes or clarifications. The Delaware General Assembly has also approved 2022 proposed amendments to the Delaware Limited Liability Company Act, Delaware Revised Uniform Limited Partnership Act and Delaware Revised Uniform Partnership Act, which proposed amendments are also awaiting signature by the governor.

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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 2022 May 2022 June 2022

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