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Delaware Court of Chancery Finds Sale of Controlled Company Was Entirely Fair Despite Imperfect Sale Process

In *In re BGC Partners, Inc. Derivative Litigation*, the Delaware Court of Chancery, in a post-trial opinion by Vice Chancellor Will, found BGC Partners Inc.'s 2017 acquisition of Berkeley Point Financial LLC from an affiliate of Cantor Fitzgerald LP was entirely fair, despite an "imperfect" sale process in which BGC's controller (who also controlled Cantor) played a role. The court acknowledged several flaws in the deal process, including that the controller initiated the deal, had incentive to cause BGC to overpay for Berkeley Point, identified advisors for the special committee, asked the co-chairs of the committee to serve and had one-off discussions with one of the co-chairs. Nonetheless, the court found that the process was entirely fair. The special committee and its advisors were independent and had the information they needed to negotiate on a fully informed basis. The controller extracted himself from the committee's deliberations after it was fully empowered, the committee members were engaged and diligent and obtained meaningful concessions, and the one committee member who had the one-off discussions with the controller pushed back when needed and "worked tirelessly on the committee's behalf." In addition, the price the committee agreed to was consistent with the range of fairness determined by its advisors.

Delaware Court of Chancery Holds that Directors Were Beholden to CEO; Allows Challenges to Stock Offering to Proceed

In *In re Carvana Co. Stockholders Litigation*, Chancellor McCormick of the Court of Chancery declined to dismiss breach of fiduciary duty claims brought against Carvana's chairman and CEO who, along with his father, controlled the company. The claims related to a 2020 $600 million direct stock offering that was not offered to the public, but instead only to certain "handpicked" investors, including the controllers, at the outset of the pandemic when the company's stock price was significantly depressed. The company allegedly did not need the funds generated by the offering to operate. Plaintiffs alleged that the CEO and his father breached their fiduciary duties by orchestrating the offering at a time when the company's stock was below fair value. The court held that two of Carvana's six directors were beholden to the CEO and his father through business and personal relationships – in one case, a professional relationship of over 30 years in which the CEO's father "allegedly saved [the director's] career," and in the other case, a similarly decades-long professional and familial relationship involving employment of each other's children and equity compensation granted to no other Carvana director, from which the director has realized over $24 million. As half of the board was compromised (the CEO and two beholden directors), pre-suit demand was excused and plaintiffs' claims could proceed. In addition, the Chancellor declined to dismiss for failure to state a claim because although the CEO abstained from the vote on the stock offering, he allegedly "shepherded" the offering from "conception to its execution over the course of a few hurried days."

Delaware Court of Chancery Dismisses *Caremark* Claims Related to "Mission Critical" Aspect of the Company's Business

The Delaware Court of Chancery, in an opinion by Chancellor McCormick in *City of Detroit Police and Fire Retirement System* v. *Hamrock*, dismissed *Caremark* claims brought against the board of NiSource, Inc. following an incident involving explosions in the pipeline system of one of the company's natural gas distribution subsidiaries that caused one fatality and other personal and property damage. The plaintiff alleged that the directors breached their oversight duties by failing to implement a reporting and monitoring system relating to pipeline safety, which was "mission critical" to the company, violating positive law in pursuit of profit and ignoring "red flags" regarding repeated violations of pipeline safety laws. The court found, however, that the board in fact had a committee tasked with overseeing safety issues, which met regularly, received safety-related reports and was actively engaged in attempting to improve safety practices, that the plaintiff did not adequately allege a "degree of lawlessness" sufficient to plead an oversight claim, and that the red flags were "simply too general or disconnected from the root causes of the [explosions] to place a reasonable observer on notice of the corporate trauma that ensued."

Delaware Court of Chancery Applies *MFW* Framework to Dismiss Claims Challenging Charter Amendment

In *City Pension Fund for Firefighters and Police Officers in The City of Miami Beach* v. *The Trade Desk, Inc.*, the Delaware Court of Chancery, in an opinion by Vice Chancellor Fioravanti, applied the framework set forth in *Kahn* v. *M&F Worldwide Corp.* ("*MFW*") (discussed here) to dismiss claims challenging a charter amendment extending the sunset of a company's dual-class stock structure. The company had a charter provision that had a requirement that the company's Class B high-vote shares (which were entitled to ten votes per share) comprise at least ten percent of the total outstanding common stock of the company. If the ten percent threshold was not met, the Class B shares would convert to single-vote Class A shares. At a time when the Class B shares comprised 10.7 percent of the total outstanding shares, the company's founder, chairman and CEO, who held 98% of the Class B shares, proposed a charter amendment to eliminate the ten percent threshold requirement, thereby extending the duration of the company's dual class structure and prolonging the founder's voting control. From the outset, the proposal was conditioned on the approval by a special committee of disinterested and independent directors and a majority of the minority stockholders. After the charter amendment was adopted, the plaintiff challenged its approval as a breach of the founder's fiduciary duties, alleging that the special committee lacked independence and the minority stockholders were not fully informed. The court disagreed, however, holding that the protections of *MFW* were properly implemented, and therefore, business judgment review applied to the transaction, warranting dismissal of the claims.

Delaware Court of Chancery Finds LLC Agreement's Use of the Word "Void" Makes Purported Transfer Incurably Void Despite Inequitable Result

In *XRI Investment Holdings LLC* v. *Holifield*, the Delaware Court of Chancery strictly construed a transfer restriction in a limited liability company agreement that rendered "void" any transfer of units in violation of the restriction. The member had purported to transfer units to an entity he controlled, believing the transfer complied with a permitted transfer exception to the LLC agreement but which, in fact, was technically non-compliant. Key individuals at the company were aware of the transfer when it occurred, and the company's governing board was later advised by counsel that the transfer violated the LLC agreement, but the board made a business decision not to challenge it. More than two years after the disputed transfer, the company sought and obtained a strict foreclosure of the units (which had served as security for an unpaid loan to the member) by intentionally sending notices to the member at an address the company knew to be defunct. The validity of the foreclosure hinged on whether the units had been validly transferred or not – if they had been, then the member no longer owned them and the notice had been sent to the wrong party, but if the transfer had been void from its outset such that the member actually remained the owner all along, then the foreclosure procedures would have been followed correctly. The member also argued the units were worth significantly more than the loan they secured. The Court of Chancery wrote that, in ordinary circumstances, it would have found the company's conduct sufficient to constitute acquiescence to the transfer, but Vice Chancellor Laster nevertheless ruled that the transfer was "incurably void" under the Delaware Supreme Court's 2018 decision in *CompoSecure, L.L.C.* v. *CardUX, LLC*, which held that when an LLC agreement labels a noncompliant action as void, the action is void from its outset and immune to equitable defenses like acquiescence. The Delaware Court of Chancery went on to suggest that the Delaware Supreme Court reconsider *CompoSecure* in connection with any appeal of this decision, so that parties to LLC

agreements cannot inequitably invoke their own internal failures merely because the contract labeled a particular breach as void.

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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.

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