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Delaware M&A Quarterly

Delaware Court of Chancery Will Require Supplemental Disclosures to Be “Plainly Material” to Justify Mootness Fee Awards

In [Anderson v. Magellan Health, Inc.](#), the Delaware Court of Chancery drastically reduced a plaintiff’s mootness fee request and held, in an opinion by Chancellor McCormick, that, moving forward, plaintiffs can justify a mootness fee only if they obtain supplemental disclosures that are “plainly material.” In so holding, the court split with prior Court of Chancery precedent requiring that such disclosures be merely “helpful” to support a mootness fee. The result is that the standard required for supplemental disclosures in the context of a mootness fee award is now higher and in line with the “plainly material” standard established for disclosure-only settlements in *Trulia* (discussed [here](#)). *Magellan* also provides helpful guidance around the dollar value of mootness fee awards based on supplemental disclosures. The plaintiff also sought a mootness fee award based on the loosening of deal protections (specifically, the waiver of “don’t-ask-don’t-waive” standstill provisions), and while the court acknowledged that such waivers could result in a compensable corporate benefit by increasing the likelihood of a topping bid, the waivers here achieved “little-to-no value,” and therefore did not justify a fee award. For more on the *Magellan* opinion, see [here](#).

Delaware Court of Chancery Upholds High/Low Vote Structure Based on Stockholder Identity

In [Colon v. Bumble, Inc.](#), the Delaware Court of Chancery held that a provision in the charter of a Delaware corporation granting the company’s founder and financial sponsor high voting power within the same class of stock also issued to the public shareholders was valid under the DGCL. The provision, which, in simplified terms, provided that a share carried ten votes if held by the founder or sponsor (or anyone else party to a particular stockholder agreement), but only one vote if held by others, was consistent with longstanding Delaware precedent enforcing charter provisions providing for formula-based allocations of voting power. Because the DGCL permits voting rights to be made dependent upon “facts ascertainable” outside of the charter, such “identity-based voting” is permissible under Delaware law. This decision validates a structure that may be of particular interest to those companies seeking to go public with a high/low vote structure, as it allows the maintenance of voting control with only one class of registered, liquid shares, without the need for an illiquid second class of stock. For more, see [here](#).

Delaware Supreme Court Holds That Charter Provision Could Not Be Applied to Exculpate for Duty of Loyalty Breaches

In [CCSB Fin. Corp. v. Totta](#), the Delaware Supreme Court, in an opinion by Chief Justice Seitz, affirmed the Court of Chancery’s invalidation of a charter provision purporting to

make good faith board decisions regarding a stockholder voting limitation “conclusive and binding upon the Corporation and its stockholders.” The voting limitation capped at 10% the stock that could be voted by a “person” (including stockholders acting in concert therewith) in any stockholder vote, as determined by the board. The Supreme Court held that the Court of Chancery must first test the board’s decision under the provision itself, and then apply enhanced judicial review under established standards. Here, the company argued that the charter provision “eliminat[ed] the first step, and requires business judgment rule for the second step.” While the court acknowledged that such a provision could be included in the organizational documents for a Delaware limited liability company or limited partnership, it could not for a corporation because the provision was an attempt to exculpate directors from a breach of the duty of loyalty, which is inconsistent with Section 102(b)(7) of the Delaware General Corporation Law and Delaware public policy. Moreover, the court concluded that there was no equitable basis for the board’s decision to direct the election inspector not to count votes in favor of an insurgent slate under the voting limitation, affirming the Court of Chancery’s findings in this regard.

Delaware Court of Chancery Declines to Enforce Non-Compete in Employment Agreement

In [Centurion Service Group, LLC v. Wilensky](#), the Delaware Court of Chancery held that a non-competes provision in an employment agreement was unenforceable. The court first addressed the parties’ Delaware choice of law provision, which the court noted was “not necessarily binding.” While Illinois had a materially greater interest in the issue than Delaware given that the company is an Illinois limited liability company with its principal place of business in Illinois, the former employee is an Illinois resident and the alleged breach occurred in Illinois, Delaware and Illinois law were largely in step on the enforceability of restrictive covenants, and therefore the court saw no basis to disturb the Delaware choice of law. The court then addressed the terms of the two-year non-competes. The court found the provision’s restricted area, which included any area within the United States or abroad where the company is currently actively soliciting or engaging in its business (or actively planning to solicit or engage in) its business, to be overly broad. The court has now declined to enforce or blue-pencil noncompetes provisions in three key contexts, including the sale-of-business ([Kodiak Building Partners, LLC v. Adams](#)), forfeiture-for-competition/partnership ([Ainslie v. Cantor Fitzgerald, L.P.](#), discussed [here](#)) and now employment ([Centurion](#)).

Delaware Court of Chancery Denies Dismissal of Claims Against Officers of LLC for Failing to Make Disclosures Despite Competing Duty of Obedience to the Board

In [Cygnus Opportunity Fund, LLC v. Washington Prime Group, LLC](#), the Delaware Court of Chancery declined to dismiss breach of fiduciary duty claims against the officers of a Delaware limited liability company for failing to make adequate disclosures in connection with a tender offer by the controller and a subsequent squeeze-out of the minority. Specifically, in connection with the tender offer, plaintiffs alleged that the controller and board did not make any recommendation, that the controller disclosed that the consideration might not reflect fair value and that no financial information was provided to the minority. With regard to the squeeze-out merger, the plaintiffs alleged that the related disclosure was missing key information. As the court framed it, the disclosure documents “disclosed *what* the Squeeze-Out Merger was, but did not disclose any information that would explain *how* the Company made its decision or *why* this was an appropriate course of action.” Plaintiffs asserted breach of fiduciary duty claims against the board, officers and controllers for the inadequate disclosures, and against the board and controller for approving an unfair transaction. The court dismissed the claims against the board and controller because the relevant LLC agreement contained a fiduciary duty waiver. The waiver did not, however, encompass company officers, and the court denied the dismissal of the breach of the duty of disclosure claims against the officers. Such disclosure duties for an officer, the court concluded, may be analogous to the duties owed by company directors and, depending on the circumstances, may require disclosure in connection with the tender offer, and also in connection with the squeeze-out merger, “even in the absence of request for action.” The court did acknowledge that the officers’ “competing duties” to the stockholders in this regard and their duty of obedience to the board created a “conundrum.” Nonetheless, the court noted that “[i]t is reasonably conceivable that a duty of disclosure could exist in connection with a severely underpriced tender offer such that fiduciaries for the entity and its investors would have a duty to say something.” In addition, the court also denied dismissal of claims against the board, controller and officers for breach of the implied covenant of good faith and fair dealing in connection with their failure to make adequate disclosures about the transactions, failure to seek a vote of the minority under the LLC agreement and providing an inadequately low price in the squeeze-out merger.

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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 2023](#)

[August 2023](#)

[September 2023](#)

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