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Mark Zerdin

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PREFACE

While the previous edition of *The Mergers & Acquisitions Review* highlighted some causes for optimism for growth in the M&A market, the resilience of companies has been severely tested in 2020 in light of the covid-19 pandemic. Political uncertainty and economic shifts have taken a back seat to the wide-reaching global effects of the pandemic, which are leaving many jurisdictions and sectors in dire straits.

The figures for the first half of 2020 reflect this, as global deal value fell by 53 per cent and deal volume by 32 per cent (compared with the first half of 2019), while megadeals (over US$10 billion) were down by 48 per cent.[1] The global deal value figure is the lowest half-yearly total since the first half of 2010. The priority for many businesses in the wake of the crisis has been to conserve cash and protect their revenue streams rather than seeking to invest in M&A.

The Americas saw the largest fall in share of global M&A, as its value fell to 33.4 per cent from 52.8 per cent in 2019.[2] The US is facing not only political uncertainty with the upcoming presidential election and protests across the country, but also a sharp decline in economic productivity due to the lockdown enforced by the covid-19 crisis. M&A deal activity in the US fell to lower levels than the 2008 global financial crisis, with higher value deals particularly affected. Despite the bleak figures for the first half of 2020, though, there are signs that some sectors, notably the technology sector, are rebounding. This is perhaps unsurprising as the future of many industries will depend on technology services.

European M&A saw its lowest quarterly value since 2009 in the second quarter of 2020 of just US$83.6 billion. There was also a drop of 30.6 per cent in the value of European M&A in the first half of 2020 when compared with the figures in the first half of 2019. With economies beginning to open up towards the end of the first half of 2020, there are early signs as to where the focus of M&A activity will likely be in the aftermath of the crisis. Private equity buyouts have accounted for almost 20 per cent of deals targeting Europe, up from 18.9 per cent in 2019.[3] In Europe, as in the Americas, the tech sector is continuing to attract interest and reached a total of US$27.8 billion across 477 deals in the first half of 2020. By contrast, the consumer sector has been severely impacted and has fallen to its lowest value since 2009.

Looking forward to the remainder of 2020 and beyond, there are some reasons to be optimistic that the global M&A market will show some signs of recovery. There has already

1 Mergermarket, 'Global & Regional M&A Report 1H20'.
2 ibid.
3 ibid.

been a resurgence since the first half of 2020, with the third quarter seeing 36 deals worth US$5 billion-plus, making it the busiest third quarter on record.[4] The challenges caused by restricted international travel, less physical diligence and almost no face-to-face meetings are, for the most part, being surmounted. It is also anticipated that private equity funds will begin to put their dry powder to use as further clarity emerges on the duration and effects of the pandemic.

I would like to thank the contributors for their support in producing the 14th edition of *The Mergers & Acquisitions Review*. I hope the commentary in the following 42 chapters will provide a richer understanding of the shape of the global markets, and the challenges and opportunities facing market participants.

Mark Zerdin
Slaughter and May
London
December 2020

4 *Financial Times*, 'Dealmaking rebound drives busiest summer for M&A on record'.

Chapter 2

M&A LITIGATION IN THE UNITED STATES

Roger A Cooper, Mark E McDonald and Pascale Bibi[1]

I INTRODUCTION

M&A litigation in the United States continued to evolve in the past year. The Delaware courts continued to refine substantive doctrines under *Corwin* and *MFW* (discussed further in Sections II and III, respectively), which provide defendants with strong bases for dismissing many complaints. At the same time, Section 220 'books and records' actions are being filed more and more as a means for stockholders to obtain pre-lawsuit discovery in order to plead a complaint that may stand a stronger chance of withstanding a motion to dismiss (discussed in Section IV).

Meanwhile, the federal courts continued to see large numbers of M&A lawsuits challenging disclosures contained in merger proxy statements under the federal securities laws (discussed in Section V). Although such actions are almost always settled for supplemental disclosures of dubious value to stockholders and attorneys' fees for the plaintiff's lawyers, at least one court signalled that this trend need not continue.

By contrast, the frequency of appraisal litigation in Delaware continued to decline, and a Delaware Supreme Court decision affirming a fair value award 18 per cent below the deal price will likely only hasten that trend (discussed in Section VI).

This past year also saw a number of M&A cases not filed by stockholder plaintiffs, most notably involving 'busted deals' that were due to close after the covid-19 pandemic shut down much of the economy, in which the Delaware courts grappled with arguments over the meaning of key merger agreement provisions such as the definition of 'material adverse effect' and interim operating covenants (discussed in Section VII).

II POST-CLOSING DAMAGES CLAIMS: THE CORWIN DEFENCE

As we have written in previous versions of this chapter, the Delaware courts have underscored the deference afforded to merger transactions approved by a fully informed, disinterested and uncoerced stockholder vote. In *Corwin v. KKR Financial Holdings*, the Delaware Supreme Court unanimously held that arms-length transactions (i.e., ones that do not involve a controlling stockholder on both sides of the deal, as in a minority buyout) approved by a fully informed, uncoerced vote of a majority of the disinterested stockholders will be reviewed under the deferential business judgment rule.[2]

1 Roger A Cooper and Mark E McDonald are partners and Pascale Bibi is an associate at Cleary Gottlieb Steen & Hamilton LLP.

2 *Corwin v. KKR Financial Holdings*, 125 A.3d 304, 305-06 (Del. 2015).

Since *Corwin*, the Court of Chancery has repeatedly dismissed post-closing challenges to non-controller stockholder-approved transactions at the pleading stage of the litigation.[3] Subsequent decisions clarified that *Corwin* applies to two-step mergers under Section 251(h) of the Delaware General Corporation Law (DGCL) (involving a tender offer followed by a short-form merger);[4] and that the fully-informed, uncoerced and disinterested stockholder vote extinguishes all claims relating to the merger, including aiding and abetting claims against third parties.[5]

However, some limits on the *Corwin* doctrine have emerged. First, it does not apply when the transaction involves a conflicted controlling stockholder (if so, then deference under the business judgment rule will apply only if the transaction is condition *ab initio* on the approval of disinterested stockholders and by an independent special committee, as discussed below).[6] Notably, the Court of Chancery recently ruled that, on the unique facts of the case before it, it was reasonably conceivable that a 22.1 per cent stockholder had sufficient influence over the transaction to be considered a controller, and thus *Corwin* cleansing did not apply.[7] In another case, however, the court rejected allegations that a minority blockholder was a controller, even though such stockholder succeeded in defeating the incumbent directors in a proxy contest.[8]

Second, the Court of Chancery has cautioned that *Corwin*'s cleansing effect will apply only when the stockholder vote is not coerced.[9]

Third, the stockholder vote also must be fully informed. In *Morrison v. Berry*, the Delaware Supreme Court held that the failure to disclose 'troubling facts regarding director behavior' in negotiating the deal, which 'would have helped [stockholders] reach a materially more accurate assessment of the probative value of the [company's] sale process', precluded *Corwin*-cleansing in that case.[10] The Court emphasised that plaintiffs were not required to allege that the information, if disclosed, would have made a reasonable stockholder less likely to approve the deal; rather, it was enough to plead that 'there is a substantial likelihood that

3 See, e.g., *In re Cyan, Inc S'holders Litig*, C.A. No. 11027-CB, 2017 WL 1956955 (Del. Ch. 11 May 2017); *In re Paramount Gold & Silver Corp S'holders Litig*, C.A. No. 10499-CB, 2017 WL 1372659 (Del. Ch. 13 Apr 2017); *In re Columbia Pipeline Group, Inc S'holders Litig*, C.A. No. 12152-VCL (7 Mar 2017) (order); *In re Merge Healthcare Inc S'holders Liti*g, C.A. No. 11388-VCG, 2017 WL 395981 (Del. Ch. 30 January 2017); *In re Solera Holdings, Inc S'holders Litig*, C.A. No. 11524-CB, 2017 WL 57839 (Del. Ch. 5 January 2017).

4 *In re Volcano Corp S'holder Litig*, 143 A.3d 727 (Del. Ch. 2016), aff'd, 156 A.3d 697 (Del. 2017) (table).

5 *Singh v. Attenborough*, 137 A.3d 151, 152 (Del. 2016) ('Having correctly decided . . . that the stockholder vote was fully informed and voluntary, the Court of Chancery properly dismissed the plaintiffs' claims against all parties [including the board's financial advisor].').

6 *In re Tesla Motors Inc. S'holder Litig.*, Consol. C.A. No. 12711-VCS, 2018 WL1560293 (Del. Ch. Mar. 28, 2018).

7 id. Earlier this year, the court adhered to this ruling on summary judgment. *In re Tesla Motors Inc. S'holder Litig.*, Consol. C.A. No. 12711-VCS, 2020 WL 553902 (Del. Ch. Feb. 4, 2020).

8 *In re USG Corp. S'holder Litig.*, Consol. C.A. No. 2018-0602-SG, 2020 WL 5126671, at *13-18 (Del. Ch. Aug. 31, 2020).

9 *Sciabacucchi v. Liberty Broadband Corp*, C.A. No. 11418-VCG, 2017 WL 2352152, at *2 (Del. Ch. 31 May 2017) (determining that the plaintiff adequately pleaded that a vote was structurally coercive, and refusing to dismiss); *In re Saba Software, Inc S'holders Litig*, C.A. No. 10697-VCS, 2017 WL 1201108, at *8, 14 (Del. Ch. 31 Mar 2017, revised 11 April 2017) (determining that the plaintiff adequately pleaded that a vote was coerced and was not fully informed, and refusing to dismiss).

10 *Morrison v. Berry*, 191 A.3d 268, 283-84 (Del. 2018).

a reasonable stockholder would have considered the omitted information important when deciding whether to tender her shares or seek appraisal'.[11] In *In re USG Corp Stockholder Litigation*, the Court of Chancery denied *Corwin* cleansing for similar reasons where the board, despite disclosing that it had a firm view of the company's intrinsic value during the sale process and a concurrent proxy contest, did not disclose that its view of intrinsic value was materially higher than the deal price it ultimately recommended stockholders accept.[12]

Both of these cases provide an interesting case study in what follows when *Corwin* cleansing is denied. In *Morrison*, even though the Delaware Supreme Court had rejected the defendants' *Corwin* defence based on its finding that the board failed to disclose material facts, the Court of Chancery nonetheless dismissed claims against the company's outside directors in light of the company's 'Section 102(b)(7)' provision exculpating directors from monetary liability for breaches of the duty of care.[13] Similarly, even though the court in *USG* denied the directors' *Corwin* defence, the court dismissed all claims against the directors because the complaint failed to adequately allege that they acted in bad faith, as required by the company's Section 102(b)(7) exculpation provision.[14]

But in *Morrison*, the Court of Chancery then denied a motion by the board's financial advisor to dismiss the claim that it aided and abetted a breach of fiduciary duty by the board.[15] While noting that the underlying fiduciary duty claims against the directors had been dismissed, the court explained that was not fatal to the aiding and abetting claims under *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816 (Del. 2015).[16] In that case, the Delaware Supreme Court held that an advisor who creates an 'informational vacuum' that results in the board failing to satisfy its *Revlon* duties may be liable for aiding and abetting the board's breach of fiduciary duty even if the directors themselves would be exculpated from any liability for that underlying breach of fiduciary duty (as was the case here).[17]

Of course, notwithstanding the directors' successful 102(b)(7) defence in these cases, *Corwin* remains an important tool for defendants in post-closing damages litigation (and, for example, would have resulted in dismissal of the aiding and abetting claim against the financial advisor in *Morrison*). Indeed, because of the significance of *Corwin*-cleansing, boards are routinely advised to disclose all conceivably material facts to their stockholders before they vote on a deal.

III CASES INVOLVING CONTROLLING STOCKHOLDERS

As explained in previous versions of this chapter, until 2014, all controlling stockholder buyouts were evaluated under the onerous entire fairness standard regardless of the procedural protections used in the deal process. That changed with the Delaware Supreme Court's decision in *Kahn v. M&F Worldwide Corporation*, commonly referred to as *MFW*, which held that the business judgment rule (not entire fairness) will apply if the controlling

11 id. at 286.

12 2020 WL 5126671, at *18-22.

13 *Morrison v. Berry*, C.A. No. 12808-VCG, 2019 WL 7369431 (Del. Ch. Dec. 31, 2019).

14 2020 WL 5126671, at *23-31.

15 *Morrison v. Berry*, C.A. No. 12808-VCG, 2020 WL 2843514 (Del. Ch. June 1, 2020).

16 id. at *9.

17 id. at *9-10.

stockholder buyout is expressly conditioned *ab initio* on the approval of a special committee of the independent directors and approval of a majority of the disinterested stockholders (the dual approval conditions).[18]

In October 2018, in *Flood v. Synutra International, Inc*, the Delaware Supreme Court clarified that the *ab initio* requirement is satisfied as long as the dual approval conditions were in place before the onset of substantive economic bargaining, even if they were not included in the controller's initial offer.[19] Further, in April 2019, in *Olenik v. Lodzinski*, the Delaware Supreme Court further clarified the line between preliminary discussions – which may be conducted before *MFW's* dual protections are put in place without forfeiting the ability to invoke the business judgment rule under *MFW* – and substantive economic discussions, which may not be.[20] There, the parties had engaged in a joint valuation exercise in the months before the controller conditioned its offer on the dual protections, and the Court found it was 'reasonable to infer that these valuations set the field of play for the economic negotiations to come', an inference that was further supported by the fact that, as alleged in the complaint, the offers that were subsequently made and ultimately accepted were close to the 'indicative valuations' that had been presented several months earlier.[21]

Since *Olenik*, a series of cases have addressed the *ab initio* requirement, further clarifying when that requirement is met. In all three cases, the Court of Chancery held that the parties had not met the *ab initio* requirement, confirming that the court will perform a fact-intensive analysis of discussions held before *MFW*'s dual protections are in place, and suggesting it looks at these types of discussions with a sceptical eye. In *Arkansas Teacher Retirement System v. Alon USA Energy*, the target company created a special committee and retained advisors before the parties conditioned the transaction on *MFW*'s dual protections.[22] The parties also entered into a confidentiality agreement, and several meetings took place between the controller's CEO and the target's chairman. The court found that 'structure, exchange ratio and price terms' were addressed at those meetings, thus defeating the *ab initio* requirement and expanding *Synutra*'s 'substantive economic' requirement to include not just price terms but discussions about the mix of consideration. The court also relied on the confidentiality agreement and the special committee's retention of advisers as supporting its ruling, though those facts were not enough on their own to defeat application of *MFW*.

In *Salladay v. Lev*, a confidentiality agreement was executed, due diligence began and the target indicated to the buyer a price range to which it would be receptive, all prior to the formation of a special committee.[23] The Court of Chancery found that the price indication was sufficient to defeat the *ab initio* requirement, as it 'set the stage for future economic negotiations'. Likewise in *In re Homefed Stockholder Litigation*, 2020 WL 3960335 (Del. Ch. July 13, 2020), pre-special committee discussions of an acceptable deal structure – this time between the controller and a large stockholder – led the court to conclude that *MFW*

18 *Kahn v. M&F Worldwide Corp*, 88 A.3d 635 (Del. 2014).

19 *Flood v. Synutra Int'l, Inc*, 198 A.3d 754 (Del. 2018).

20 *Olenik v. Lodzinski*, No. 392, 2018, 2019 WL 1497167 (Del. 5 April 2019).

21 id. at *9.

22 *Arkansas Teacher Retirement System v. Alon USA Energy*, 2019 WL 2714331 (Del. Ch. June 28, 2019).

23 *Salladay v. Lev*, 2020 WL 954032 (Del. Ch. Feb. 27, 2020).

protections did not apply.[24] The court reasoned that these talks, which occurred before the *MFW* protections were agreed to, effectively prevented the special committee from doing its work.

In *In re Dell Technologies Inc Class V Stockholders Litigation*, the court found other deficiencies in the defendants' attempt at following the *MFW* framework. Specifically, the court rejected application of *MFW* because it found the complaint reasonably alleged that the special committee and minority faced coercion in deciding whether to approve the transaction (including because the controller maintained the right to force an alternative transaction if they rejected the proposed transaction), among other reasons.[25]

One key point from these decisions (aside from the difficulty of effectively implementing *MFW* protections) is that courts will reject application of *MFW* where they find actions they view as restricting the special committee's negotiation capabilities, and that effectively define the contours within which the committee can work.

IV BOOKS AND RECORDS ACTIONS UNDER SECTION 220

In part in response to *Corwin* and *MFW*, which raised the bar for plaintiffs in post-closing damages actions to plead facts to survive a motion to dismiss, there has been a recent uptick in stockholder inspection demands under Section 220 of the DGCL, and actions brought in the Court of Chancery to compel the production of books and records pursuant to Section 220(c).[26] In the past year, some plaintiffs have used documents obtained in this way to plead a post-closing damages complaints that have survived motions to dismiss.

In several recent decisions, the Delaware Supreme Court has held that Section 220 may entitle stockholders to more than just minutes and other formal board materials, but only to the extent such formal materials are insufficient to satisfy the stockholder's proper inspection purpose. For example, in *KT4 Partners LLC v. Palantir Techs Inc*, the Court explained that 'if a company . . . decides to conduct formal corporate business largely through informal electronic communications [rather than through formal minutes and resolutions], it cannot use its own choice of medium to keep shareholders in the dark about the substantive information to which Section 220 entitles them'.[27] However, the Court emphasised that this 'does not leave a respondent corporation . . . defenseless and presumptively required

24 *In re Homefed Stockholder Litigation*, 2020 WL 3960335 (Del. Ch. July 13, 2020).

25 *In re Dell Technologies Inc. Class V Stockholders Litigation*, 2020 WL 3096748 (Del. Ch. June 11, 2020).

26 DGCL § 220(c) ('If the corporation . . . refuses to permit an inspection sought by a stockholder . . . or does not reply to the demand within 5 business days . . . , the stockholder may apply to the Court of Chancery for an order to compel such production. The Court of Chancery is hereby vested with exclusive jurisdiction to determine whether or not the person seeking inspection is entitled to the inspection sought.').

27 *KT4 Partners LLC v. Palantir Techs Inc*, No. 281, 2018, 2019 WL 347934, at *2 (Del. 29 Jan 2019); see also *Inter-Local Pension Fund GCC/IBT v. Calgon Carbon Corp*, C.A. No. 2017-0910-MTZ, 2019 WL 479082 (Del. Ch. 25 January 2019) (holding that a stockholder had proper purpose to inspect records, and that the stockholder was entitled to emails because they were necessary and essential for that purpose); *Schnatter v. Papa John's Int'l, Inc*, C.A. No. 2018-0542-AGB, 2019 WL 194634 (Del. Ch. 15 January 2019) (noting that '[a]lthough some methods of communication (e.g., text messages) present greater challenges for collection and review than others, . . . the utility of Section 220 as a means of investigating mismanagement would be undermined if the court categorically were to rule out the need to produce communications in these formats').

to produce e-mails and other electronic communications. If a corporation has traditional, non-electronic documents sufficient to satisfy the petitioner's needs, the corporation should not have to produce electronic documents.'[28]

A recent Court of Chancery decision providing broad latitude to Section 220 plaintiffs is currently on appeal at the Delaware Supreme Court. In *Lebanon Cty Employees' Ret Fund v. AmerisourceBergen Corp*, the Court of Chancery held that Section 220 plaintiffs are not required to identify an 'end' for their inspection request, nor establish even a credible basis for suspecting actionable wrongdoing by the directors, parting ways with other decisions of the Court of Chancery. The court also granted the Section 220 plaintiffs the right to conduct a Rule 30(b)(6) deposition of the company to explore what relevant information exists to satisfy the 220 demand (and where the information is held), in addition to ordering the company to provide core board-level materials.[29]

The Delaware Supreme Court accepted interlocutory review of this decision. The Delaware Supreme Court's decision, which remains pending, may bring some clarity to the scope of Section 220 requests and what limiting principles apply to these requests, which increasingly resemble full-fledged discovery. As it stands, *AmerisourceBergen* counsels that companies carefully consider whether to withhold core materials, as the decision suggests that a court may be inclined to award broader discovery in actions where companies have been uncooperative, and that a Section 220 stockholder only has to meet a very low burden to show it has a proper purpose for the requests and that the documents requested are 'necessary and essential' to achieve that purpose.

V FEDERAL DISCLOSURE SUITS

In recent years, most public company mergers have attracted one or more boilerplate complaints, usually filed by the same roster of plaintiffs' law firms, asserting that the target company's proxy statement contains materially false or misleading statements. These complaints usually also assert that the stockholder meeting to approve the merger should be enjoined unless and until the company 'corrects' the false or misleading statements by making supplemental disclosures. Not too long ago cases like this tended to be filed in the Delaware Court of Chancery and other state courts asserting breaches of state-law fiduciary duties, including the duty of disclosure. After the Delaware courts cracked down on these suits in the 2016 *Trulia* decision,[30] the vast majority of these cases today are filed in federal court under Section 14 of the Securities Exchange Act of 1934.

Almost none of these cases, however, are actually litigated. Instead, they usually follow a by-now-familiar pattern: after one or more complaints are filed, defendants (usually the target company and its board of directors) offer to make supplemental disclosures to 'moot' the plaintiffs' claims (even though defendants rarely believe there is any merit to the claims); perhaps after some back-and-forth negotiation (sometimes not), the plaintiffs agree to withdraw their claims in light of the supplemental disclosures; the plaintiffs' lawyers then seek a 'mootness fee', supposedly in compensation for the 'benefit' provided in the form of the supplemental disclosures; and the defendants (usually after some negotiation) agree

28 *KT4 Partners* at *12.

29 *Lebanon Cty. Employees' Ret. Fund v. AmerisourceBergen Corp.*, No. CV 2019-0527-JTL, 2020 WL 132752, at *14-19, 26-27 (Del. Ch. Jan. 13, 2020).

30 *In re Trulia S'holder Litig.*, 129 A.3d 884 (Del. Ch. 2016).

to pay the fees, which ends the case. (Because no class-wide release is obtained, the courts typically never get involved.) This practice has been widely criticised as imposing a 'merger tax' without providing any benefits to companies or stockholders. But, given the strong incentives to avoid delaying the overall transaction, as well as to minimise litigation costs and risk, most defendants elect not to litigate these cases (despite their weaknesses on the merits), and so the practice continues.

In *Karp v. SI Financial Group, Inc*, however, the defendants chose not to follow the usual playbook and actually litigated the plaintiff's Section 14 claim. The district court granted the defendants' motion to dismiss, ruling that the plaintiff had failed to plead that any statement in the proxy was rendered false or misleading by the omissions of facts the plaintiff alleged were material and not disclosed.[31]

In so ruling, the court highlighted a fundamental difficulty plaintiffs in these strike suit merger cases often have in successfully pleading a Section 14 claim. Unless a plaintiff can show that the proxy statement omitted a fact required to be disclosed by SEC regulations (which is often a tall task), the plaintiff must plead that some omitted fact renders a statement in the proxy materially misleading. Importantly, unlike Delaware duty-of-disclosure claims, the omission of a material fact alone is not enough to state a Section 14 claim. Instead, the plaintiff must plead – with particularity, not merely with conclusory allegations – how the allegedly omitted fact renders the proxy statement disclosures materially misleading. But without knowing the facts that have been omitted – and because of the discovery stay imposed by the Private Securities Litigation Reform Act (PSLRA) – plaintiffs will have difficulty obtaining such facts at the pleading stage, particularly since there is no equivalent tool to a Section 220 books and records claim under the federal proxy rules.

As *SI Financial* shows, in the typical strike suit merger case, it will be challenging for plaintiffs to plead a viable Section 14 claim. But the question remains: will this decision lead to the filing of fewer Section 14 claims in public company merger transactions, or more defendants choosing to litigate rather than settle? Given the current incentives at play, it is likely that many parties will continue to settle these cases. But that is not inevitably the best course, and parties to public company merger transactions should seriously consider whether the usual playbook is still the best approach in light of the *SI Financial* decision, among other recent legal developments.[32]

VI THE CONTINUED FALL OF APPRAISAL ARBITRAGE

In previous versions of this chapter, we discussed various factors that had begun to discourage the filing of appraisal lawsuits in Delaware, after an explosion of such filings between 2007 and 2016. Among other things, a series of decisions by the Delaware courts finding 'fair

31 No. 3:19-cv-001099 (MPS), 2020 WL 1891629 (D. Conn. Apr. 16, 2020).

32 For example, a pending decision in the Seventh Circuit may have a substantial impact on these cases. In the district court's decision that is currently on appeal, the Northern District of Illinois in *House v. Akorn, Inc.*, No. 17 C 5018, 2018 WL 4579781, at *1 (N.D. Ill. Sept. 25, 2018), ordered the plaintiff's counsel to disgorge the mootness fee that the defendants had agreed to pay based on the court's finding that the supplemental disclosures defendants agreed to make in response to the complaint did not provide any substantial benefit to the stockholders, and the mootness fee was thus unwarranted. Notably, the court reached that result even though the mootness fee was not subject to court approval (because no class claims were released). The Seventh Circuit's decision on appeal is pending. If it affirms, the incentive for plaintiffs' lawyers to file Section 14 cases would practically disappear (at least in courts within the Seventh Circuit).

value' of the shares for which stockholder petitioners sought appraisal to be equal to or lower than the deal price has made appraisal suits a less attractive value proposition to stockholders. The Delaware Supreme Court continued that trend in 2020, when it affirmed an opinion of the Court of Chancery determining the fair value of a public company to be equal to its pre-merger-announcement stock trading price (which was 18% lower than the deal price).[33] As a result of decisions like this one and other factors, the number of appraisal filings in Delaware continues to fall.

VII M&A LITIGATION WITHOUT STOCKHOLDER PLAINTIFFS

i Busted deal litigation in the covid-19 era

The covid-19 pandemic has spurred a number of lawsuits between parties to merger agreements. Buyers have attempted to terminate merger or purchase agreements for deals signed before the pandemic but that had not yet closed by March 2020, when widespread lockdowns occurred and the economy went into a recession. While the effects of the pandemic had a broad adverse impact across the economy, several industries were particularly hard hit, including retail, travel and entertainment. Many buyers refused to close, alleging that the pandemic constitutes a material adverse effect (MAE), or that the seller's response to it constituted breaches of interim operating covenants. Sellers responded by bringing actions, primarily in the Delaware Court of Chancery, to enforce the sales. Though some of these cases have settled or been dismissed, a few highly anticipated trials have been set for the second half of 2020.

Some buyers have argued that the covid-19 pandemic or its effects constitute an MAE, permitting the buyer to terminate the agreement, and have refused to close. In *Snow Phipps v. KCAKE Acquisition*, the owner of DecoPac holdings, the world's largest supplier of cake decorations, agreed to sell the company to a private equity buyer.[34] In April 2020, the buyer refused to close, arguing that the covid-19 pandemic had resulted in an MAE and that the target had been disproportionally affected. The seller sued in the Delaware Court of Chancery, seeking specific performance compelling the buyer to close and requesting an expedited proceeding in order to allow the seller to obtain a specific performance remedy before the termination of previously arranged acquisition financing. The court declined to expedite the case, citing the burden and expense of preparing for a trial on the extremely truncated timetable proposed by the seller. If the court ultimately finds in favour of the seller at trial, the court will also need to determine if specific performance remains available where the buyer's acquisition financing commitment has expired.

Similarly, in *Realogy Holdings v. Sirva Worldwide*, the seller filed suit in Delaware to enforce an agreement to sell a corporate relocation business after the buyer refused to close on the basis of an alleged MAE arising from the pandemic.[35] As in *Snow Phipps*, the seller sought to expedite the proceeding in order to allow the seller to obtain a specific performance remedy before the termination of previously arranged acquisition financing. Here, however, the court granted the motion to expedite on a more reasonable timetable, and a motion to dismiss was heard two months later on the question of whether specific performance was available as a remedy. At oral argument, the court dismissed the case, holding that seller

33 *Fir Tree Value Master Fund, LP v. Jarden Corp.*, No. 454-2019, 2020 WL 3885166 (Del. July 9, 2020).

34 *Snow Phipps*, C.A. No. 2020-0282.

35 *Realogy Holdings*, C.A. No. 2020-0311.

(plaintiff) had caused the termination of the financing by naming one of the guarantors as a co-defendant in the action, in violation of the terms of the financing agreement, and the plaintiff was, therefore, no longer entitled to specific performance.

In a third case, *Forescout v. Ferrari Holdings*,[36] the buyer alleged that the pandemic constituted an MAE disproportionately affecting the target, and that the buyer would no longer be able to obtain the necessary debt financing. The seller offered to finance the debt portion of the deal itself if that were true, but the buyer refused. The seller subsequently sued for specific performance. A week before trial, the parties agreed to complete the transaction at a reduced purchase price.

Some buyers have also alleged that sellers have breached interim operating covenants by taking certain actions in response to the pandemic. There is currently some debate as to whether ordinary course covenants require a target to continue operating in the same way it did in the past, or whether it is required to take potentially extraordinary steps to reasonably manage the business in extraordinary times, particularly where others in the industry are taking those kinds of steps. In April, in *AB Stable v. MAPS Hotels*, a seller sought to enforce the agreed sale of a portfolio of hotels in the Delaware Chancery Court.[37] The buyer refused to close, alleging (among other things) that the seller failed to continue operating the hotels in the ordinary course because it 'allowed material business relationships to deteriorate' during government-mandated quarantine orders in connection with the covid-19 pandemic. A trial was held at the end of August 2020, and the case remains pending.

SP VS Buyer v. L Brands raised the same issue. There the buyer of a group of retail brands alleged that the seller had failed to continue operating in the ordinary course, including because it had 'voluntarily furloughed' a substantial percentage of its employees, failed to sell the last season's merchandise due to the pandemic and stopped paying rent on US stores – actions that were not consistent with the company's past practice.[38] The seller countered that these actions were consistent with steps almost every other company in its industry was taking. The case settled shortly after it was filed, with the parties agreeing to walk away from the deal without either side paying any break-up fee.

Another case, *Simon Property Group, Inc v. Taubman Centers, Inc*,[39] raises the same issues, but there the buyer terminated on grounds that the seller allegedly failed to comply with the ordinary course operating covenant because it did nothing – that is, because it failed to take extraordinary steps to respond to the business and economic circumstances brought on by the pandemic. The buyer also alleged that, given that the seller's business (operating upscale malls) was particularly hard hit by the pandemic, an MAE had occurred excusing its obligation to close. This case was filed in Michigan state court and is scheduled for trial in November 2020.

36 *Forescout Technologies Inc., v. Ferrari Grp. Holdings L.P.*, C.A. No. 2020-0385 (Del. Ch. May 19, 2020).

37 *AB Stable VIII LLC v. MAPS Hotels and Resorts One LLC*, C.A. No. 2020-0310 (Del. Ch. May 20, 2020).

38 *SP VS Buyer v. L Brands*, C.A. No. 2020-0297 (Del. Ch. Apr. 22, 2020).

39 *Simon Prop. Grp., Inc. v. Taubman Centers, Inc.*, Case No. 2020-181675-CB (Mich. Cir. Ct.).

Finally, several other recent cases involved disputes over other closing conditions. In *Khan v. Cinemex*, the seller brought suit seeking to compel the sale of a chain of movie theatres where the buyer argued it could not close because it could not exercise its right to inspect the theatres due to travel restrictions imposed by local governments in response to the pandemic.[40] Shortly after the lawsuit was filed, the buyer filed for bankruptcy, and the case remains stayed. In another case, *Bed Bath & Beyond v. 1-800-Flowers.com*, the seller sued the buyer for specific performance when the buyer postponed closing due to uncertainty surrounding the pandemic.[41] The buyer argued, among other things, that it was unsure it could fulfil the remaining closing conditions as a result of the pandemic, which included an in-person closing. The companies settled the dispute, agreeing that the deal would go ahead at a reduced purchase price.

ii WeWork/SoftBank litigation

A recent decision of the Delaware Court of Chancery in the ongoing WeWork/SoftBank litigation addressed a previously unresolved question: can management withhold its communications with company counsel from members of the board of directors on the basis that these communications are privileged? Building on past Delaware decisions concerning directors' rights to communications with company counsel, including in the *In re CBS* case discussed in previous versions of this chapter, the court clarified that directors are always entitled to communications between management and company counsel unless there is a formal board process to wall off directors (such as the formation of a special committee) or other actions at the board level demonstrating 'manifest adversity' between the company and those directors.[42] In other words, management cannot unilaterally decide to withhold its communications with company counsel from the board (or specified directors management deems to have a conflict).

40 *Khan v. Cinemex Holdings USA, Inc.*, Civil Action No. 4:20-CV-1178, 2020 WL 2047645 (S.D. Tex. Apr. 27, 2020).

41 *Bed Bath & Beyond v. 1-800-Flowers.com*, No. 2020-0245 (Del. Ch. Aug. 4, 2020).

42 *In re WeWork Litigation*, C.A. No. 0258-AGB, 2020 WL 4917593 (Del. Ch. Aug. 21, 2020).

Appendix 1

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