THE MERGERS & ACQUISITIONS REVIEW

ELEVENTH EDITION

Editor
Mark Zerdin

THE LAWREVIEWS

THE MERGERS & ACQUISITIONS REVIEW

The Mergers and Acquisitions Review
Reproduced with permission from Law Business Research Ltd.

This article was first published in The Mergers and Acquisitions Review, - Edition 11
(published in October 2017 – editor Mark Zerdin)

For further information please email
Nick.Barette@thelawreviews.co.uk

THE MERGERS & ACQUISITIONS REVIEW

Eleventh Edition

Editor
Mark Zerdin

THE LAWREVIEWS

PUBLISHER
Gideon Roberton

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGERS
Thomas Lee, Joel Woods

ACCOUNT MANAGERS
Pere Aspinall, Sophie Emberson,
Laura Lynas, Jack Bagnall

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCHER
Arthur Hunter

EDITORIAL COORDINATOR
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Anne Borthwick

SUBEDITOR
Hilary Scott

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-910813-75-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE SHIPPING LAW REVIEW

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PUBLIC–PRIVATE PARTNERSHIP LAW REVIEW

THE TRANSPORT FINANCE LAW REVIEW

THE SECURITIES LITIGATION REVIEW

THE LENDING AND SECURED FINANCE REVIEW

THE INTERNATIONAL TRADE LAW REVIEW

THE SPORTS LAW REVIEW

THE INVESTMENT TREATY ARBITRATION REVIEW

THE GAMBLING LAW REVIEW

THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW

THE REAL ESTATE M&A AND PRIVATE EQUITY REVIEW

THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW

THE ISLAMIC FINANCE AND MARKETS LAW REVIEW

THE ENVIRONMENT AND CLIMATE CHANGE LAW REVIEW

THE CONSUMER FINANCE LAW REVIEW

THE INITIAL PUBLIC OFFERINGS REVIEW

THE CLASS ACTIONS LAW REVIEW

THE TRANSFER PRICING LAW REVIEW

THE BANKING LITIGATION LAW REVIEW

THE HEALTHCARE LAW REVIEW

www.TheLawReviews.co.uk

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

AABØ-EVENSEN & CO ADVOKATFIRMA

ÆLEX

AGUILAR CASTILLO LOVE

AKD NV

AL TAMIMI & CO

ALLEN & GLEDHILL LLP

ANDERSON MŌRI & TOMOTSUNE

ARIAS, FÁBREGA & FÁBREGA

ASHURST LLP

AZMI & ASSOCIATES

BAKER McKENZIE

BHARUCHA & PARTNERS

BREDIN PRAT

CLEARY GOTTLIEB STEEN & HAMILTON

CMS

CORONEL & PÉREZ

CORRS CHAMBERS WESTGARTH

CRAVATH, SWAINE & MOORE LLP

CREEL, GARCÍA-CUÉLLAR, AIZA Y ENRÍQUEZ, SC

DEHENG LAW OFFICES

DITTMAR & INDRENIUS

DLA PIPER DENMARK LAW FIRM P/S

DRYLLERAKIS & ASSOCIATES

DUANE MORRIS & SELVAM LLP

ELVINGER HOSS PRUSSEN

EVERSHEDS SUTHERLAND BITĀNS

HENGELER MUELLER

HEUKING KÜHN LÜER WOJTEK

JONES DAY

LEGAL ATTORNEYS & COUNSELORS

MAKES & PARTNERS LAW FIRM

MAPLES AND CALDER

MATTOS FILHO, VEIGA FILHO, MARREY JR E QUIROGA ADVOGADOS

NISHIMURA & ASAHI

OPPENHEIM LAW FIRM

OSLER, HOSKIN & HARCOURT LLP

PEREZ ALATI, GRONDONA, BENITES, ARNTSEN & MARTINEZ DE HOZ (H)

ROJS, PELJHAN, PRELESNIK & PARTNERS

RUBIO LEGUÍA NORMAND

RUSSIN, VECCHI & HEREDIA BONETTI

S HOROWITZ & CO

SANTA MARIA LAW FIRM

SCHELLENBERG WITTMER LTD

SCHINDLER RECHTSANWÄLTE GMBH

SLAUGHTER AND MAY

TORRES, PLAZ & ARAUJO

TRIAY & TRIAY

URÍA MENÉNDEZ – PROENÇA DE CARVALHO

UTEEM CHAMBERS

WALKERS

WH PARTNERS

WHITE & CASE LLP

CONTENTS

PREFACE xi
Mark Zerdin

Chapter 1 EU OVERVIEW 1
Mark Zerdin

Chapter 2 EUROPEAN PRIVATE EQUITY 10
Benedikt von Schorlemer and Holger H Ebersberger

Chapter 3 M&A LITIGATION 18
Roger A Cooper, Meredith E Kotler and Vanessa C Richardson

Chapter 4 PRIVATE EQUITY: AN OFFSHORE PERSPECTIVE 27
Rolf Lindsay

Chapter 5 ARGENTINA 31
Santiago Daireaux and Fernando S Zoppi

Chapter 6 AUSTRALIA 39
Sandy Mak

Chapter 7 AUSTRIA 50
Clemens Philipp Schindler

Chapter 8 BRAZIL 62
Moacir Zilbovicius and Rodrigo Ferreira Figueiredo

Chapter 9 BRITISH VIRGIN ISLANDS 71
Richard May and Richard Spooner

Chapter 10 CANADA 80
Robert Yalden, Emmanuel Pressman and Jeremy Fraiberg

Chapter 11 CAYMAN ISLANDS 95
Suzanne Correy and Daniel Lee

Chapter 12 CHINA 103
Wei (David) Chen, Yuan Wang and Kai Xue

Chapter 13 COLOMBIA 115
Juan Manuel del la Rosa, Alexandra Montealegre and Lina Tellez

Chapter 14 COSTA RICA 127
John Aguilar Jr and Marco Solano

Chapter 15 DENMARK 133
Nicholas Lerche-Gredal and Sebastian Ingversen

Chapter 16 DOMINICAN REPUBLIC 144
María Esther Fernández A de Pou, Mónica Villafaña Aquino and Laura Fernández-Peix Perez

Chapter 17 ECUADOR 154
Xiomara Castro Pazmiño and Elena Donoso Peña

Chapter 18 EGYPT 162
Mohamed Gabr, Ingy Darwish and Engy ElKady

Chapter 19 FINLAND 171
Jan Ollila, Wilhelm Eklund and Jasper Kuhlefelt

Chapter 20 FRANCE 183
Didier Martin

Chapter 21 GERMANY 201
Heinrich Knepper

Chapter 22 GIBRALTAR 218
Alan Buchanan and Christopher Davis

Chapter 23 GREECE 228
Cleomenis G Yannikas, Sophia K Grigoriadou and Vassilis S Constantinidis

Chapter 24 HONG KONG 238
Jason Webber

Chapter 25 HUNGARY 247
József Bulcsú Fenyvesi and Mihály Barcza

Chapter 26 ICELAND 257
Hans Henning Hoff

Chapter 27 INDIA 264
Justin Bharucha

Chapter 28 INDONESIA 280
Yozua Makes

Chapter 29 ISRAEL 292
Clifford Davis and Keith Shaw

Chapter 30 ITALY 300
Mario Santa Maria and Carlo Scaglioni

Chapter 31 JAPAN 309
Hiroki Kodate and Yuri Totsuka

Chapter 32 LATVIA 318
Māris Vainovskis, Toms Puriņš and Justīne Ignatavičute

Chapter 33 LUXEMBOURG 329
Philippe Hoss and Thierry Kauffman

Chapter 34 MALAYSIA 344
Sharizan Bin Sarif and Lee Kin Hing

Chapter 35 MALTA 356
James Scicluna, Ramona Azzopardi and Rachel Vella Baldacchino

Chapter 36 MAURITIUS 368
Muhammad Reza Cassam Uteem and Basheema Farreedun

Chapter 37 MEXICO 379
Eduardo González, Jorge Montaño and Humberto Botti

Chapter 38 MYANMAR....389
Krishna Ramachandra and Rory Lang

Chapter 39 NETHERLANDS....405
Carlos Pita Cao and François Koppenol

Chapter 40 NIGERIA....418
Lawrence Fubara Anga and Maranatha Abraham

Chapter 41 NORWAY....422
Ole K Aabø-Evensen

Chapter 42 PANAMA....457
Andrés N Rubinoff

Chapter 43 PERU....465
Carlos Arata

Chapter 44 PORTUGAL....474
Francisco Brito e Abreu and Joana Torres Ereio

Chapter 45 QATAR....487
Michiel Visser, Charbel Abou Charaf and Eugenia Greco

Chapter 46 ROMANIA....500
Horea Popescu and Claudia Nagy

Chapter 47 RUSSIA....511
Scott Senecal, Yulia Solomakhina and Ekaterina Abrossimova

Chapter 48 SINGAPORE....535
Lim Mei and Lee Kee Yeng

Chapter 49 SLOVENIA....542
David Premelč, Bojan Šporar and Jakob Ivančič

Chapter 50 SWITZERLAND....552
Lorenzo Olgiati, Martin Weber, Jean Jacques Ah Choon, Harun Can and David Mamane

Chapter 51 TAIWAN....563
Thomas T M Chen, John C Lin and Raymond H Wang

Chapter 52 TURKEY....573
Emre Akın Sait

Chapter 53 UKRAINE....581
Viacheslav Yakymchuk and Olha Demianiuk

Chapter 54 UNITED ARAB EMIRATES....594
Mohammed Majid and John O'Connor

Chapter 55 UNITED KINGDOM....604
Mark Zerdin

Chapter 56 UNITED STATES....625
Richard Hall and Mark Greene

Chapter 57 VENEZUELA....660
Guillermo de la Rosa Stolk, Juan Domingo Alfonzo Paradisi, Nelson Borjas Espinoza and Domingo Piscitelli Nevola

Chapter 58 VIETNAM....672
Hikaru Oguchi, Taro Hirosawa and Ha Hoang Loc

Appendix 1 ABOUT THE AUTHORS....683
Appendix 2 CONTRIBUTING LAW FIRMS' CONTACT DETAILS....723

Chapter 3

M&A LITIGATION

Roger A Cooper, Meredith E Kotler and Vanessa C Richardson[1]

I INTRODUCTION

The past few years have been a time of tremendous change in Delaware merger litigation. The substantial increase since 2007 in the number of transactions litigated has been followed by dramatic changes in Delaware law that are now significantly curtailing the amount of merger litigation being brought and narrowing the kinds of claims that are likely to proceed. Those developments include a steep decline in the Court of Chancery's willingness to approve disclosure-only settlements and the emerging substantive doctrines under *Corwin* and *MFW*, which provide defendants with strong bases for dismissing many complaints. At the same time, appraisal litigation has been expanding in Delaware and providing stockholders with a different angle of attack on the adequacy of the merger price. Recent Delaware legislation and some recent decisions in Delaware courts, however, have also begun to draw limitations on these actions, and the Delaware Supreme Court is expected to provide further guidance on appraisal rights in at least two important pending appeals from appraisal cases.

II THE DECLINE OF DISCLOSURE-ONLY SETTLEMENTS

Over the past decade, merger litigation has become a standard feature of nearly every merger transaction. By 2014, over 94 per cent of deals valued at over US$100 million faced class action litigation, up from less than 40 per cent in 2007.[2] The majority of these litigations settled, and over 80 per cent of the settlements were 'disclosure-only' in nature,[3] where the defendants would agree to settle the claims by making supplemental disclosures before the stockholder vote and paying a fee to plaintiffs' counsel in exchange for broad releases, but the class would receive no economic benefit. In other words, much of this litigation has amounted to little more than an additional cost of doing a transaction.

---

1 Roger A Cooper and Meredith E Kotler are partners and Vanessa C Richardson is an associate at Cleary Gottlieb Steen & Hamilton LLP.

2 Matthew D Cain and Steven Davidoff Solomon, *Takeover Litigation in 2015* (14 January 2016), papers, papers.ssrn.com/sol3/papers.cfm?abstract_id=2715890; see also Ravi Sinha, Cornerstone Research, *Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2015 and 1H 2016 M&A Litigation* (2016), www.cornerstone.com/Publications/Reports/Shareholder-Litigation-Involving-Acquisitions-2016.pdf.

3 Olga Koumrian, Cornerstone Research, *Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2014 M&A Litigation* (2015), www.cornerstone.com/Shareholder-Litigation-Involving-Acquisitions-2014-Review.pdf.

This development did not go unnoticed by the Delaware Court of Chancery. Because merger cases are brought as class actions, the court must approve any settlement as fair, adequate and reasonable, as well as the fee to be awarded to the plaintiff's attorneys.[4] As the volume and routine nature of this litigation increased, the Delaware Court of Chancery began expressing greater scepticism and concern about the dubious value of such settlements,[5] and began to cut back on the attorneys' fees awarded for weak supplemental disclosures.[6]

The tide truly turned when Chancellor Bouchard rejected a proposed settlement in *In re Trulia, Inc Stockholder Litigation*.[7] *Trulia* sent a message that the Court of Chancery would no longer hesitate to reject disclosure-only settlements, even if unopposed by objecting stockholders. There, as had become common, multiple Trulia stockholders filed lawsuits challenging the proposed acquisition by Zillow, Inc shortly after it was announced. The actions were consolidated and then, after cursory expedited discovery, the plaintiffs moved for a preliminary injunction on the grounds that the proxy was false and misleading. However, before the preliminary injunction motion could be heard, the parties entered into an agreement-in-principle to settle the litigation in exchange for certain supplemental disclosures. The Trulia stockholders then overwhelmingly approved the merger. After confirmatory discovery, the parties executed a final settlement agreement containing 'an extremely broad release' of defendants and a provision that plaintiffs' counsel intended to seek US$375,000 in fees, which the defendants agreed not to oppose.[8]

On 22 January 2016, Chancellor Bouchard issued an opinion rejecting the proposed settlement and more importantly criticising such settlements more generally. In the opinion, he highlighted the dynamics that led to the 'proliferation of disclosure settlements', as well as concerns among academics, practitioners and members of the court, that 'these settlements rarely yield genuine benefits for stockholders and threaten the loss of potentially valuable claims that have not been investigated with rigor'.[9] In addition, he noted evidence that supplemental disclosures seldom change stockholders' votes, and that the broad releases obtained by defendants (often before meaningful discovery) could preclude viable claims.[10]

---

4 Delaware judges have an independent duty to award a fair and reasonable fee. *See In re PAETEC Holding Corp S'holders Litig*, No. 6761-VCG, 2013 WL 1110811, at *5 (Del Ch 19 March 2013) (quoting *In re Sauer-Danfoss Inc S'holders Litig*, 65 A3d 1116, 1117 (Del Ch 2011)).

5 See, e.g., *Acevedo v. Aeroflex Holding Corp,* CA No. 7930-VCL (Del Ch 8 July 2015) (transcript) ('I don't think this relief is sufficient to support an intergalactic release'); *In re Medicis Pharm Corp S'holders Litig*, CA No. 7857-CS (Del Ch April 4, 2014) (transcript) ('The difficulty I have with this is [that] it looks like there was no 'there' there for any claims at all, but we're giving a release [...] this is getting to where I just don't see enough value here that it's worth the release'); *In re Transatlantic Holdings Inc S'holders Litig*, CA No. 6574-CS, 2013 WL 1191738, at *2 (Del Ch 8 March 2013) ('[I]n this situation, what the class is getting is of so little apparent utility that the option value of having some more diligent plaintiff be able to come forward with a damages action in the future, if there is something that arises, frankly, that option value exceeds this').

6 See, e.g., *In re Riverbed Tech, Inc S'holders Litig*, CA No. 10484-VCG, 2015 WL 5458041 (Del Ch 17 September 2015); *In re Gen-Probe Inc S'holders Litig*, CA No. 7495-VCL (Del Ch 10 April 2013) (transcript); *In re Amylin Pharm Inc S'holders Litig*, CA No. 7673-CS (Del Ch 5 February 2013) (transcript).

7 *In re Trulia, Inc S'holder Litig*, 129 A3d 884 (Del Ch 2016).

8 Id. at 889-90.

9 Id. at 887, 891, 896.

10 Id. at 895.

He also criticised the lack of an adversarial process in the presentation of settlements, which could enable the judiciary to evaluate the materiality of disclosures with the benefit of arguments from attorneys assisted by financial advisers.[11]

Based on these considerations, Chancellor Bouchard said that future disclosure claims should be adjudicated outside the non-adversarial settlement context in at least two ways.[12] First, the materiality of disclosures could be determined in the context of a contested preliminary injunction motion, where plaintiffs would bear the burden of demonstrating a substantial likelihood that the alleged misrepresentation or omission in the disclosure would have been viewed by the reasonable investor as having significantly altered the 'total mix' of available information. Second, if defendants chose to moot the disclosure claims by issuing supplemental disclosures before the stockholder vote, their materiality could be addressed in the context of an application by plaintiffs' counsel for a mootness fee award, where defendants would be incentivised to oppose fee requests they view as excessive, which is in contrast to the settlement context, where the prospect of gaining broad releases incentivises defendants not to contest materiality.[13]

The Court of Chancery indicated that it would be 'increasingly vigilant in scrutinising the 'give' and the 'get' of disclosure-only settlements.[14] More specifically, it advised that 'disclosure settlements are likely to be met with continued disfavor in the future unless [i] the supplemental disclosures address a plainly material misrepresentation or omission, and [ii] the subject matter of the proposed release is narrowly circumscribed to encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process, if the record shows that such claims have been investigated sufficiently.'[15] By 'plainly material', Chancellor Bouchard said he meant that 'it should not be a close call that the supplemental information is material as that term is defined under Delaware law'.[16]

Applying this 'plainly material' test to the proposed settlement, the Court of Chancery found that none of the supplemental disclosures (all of which related to minutiae regarding the analysis by Trulia's financial adviser) 'were material or even helpful to Trulia's stockholders.'[17] Accordingly, Chancellor Bouchard found the disclosures did not constitute a sufficient 'get' to justify the 'give' of the releases, and declined to approve the settlement.

11 *Trulia*, 129 A3d at 893-94.

12 Id. at 896-97.

13 Although in the mootness scenario defendants would not obtain the benefit of a release, Chancellor Bouchard suggested that any remaining claims may be amenable to dismissal and that alternatively, after 'some discovery to probe the merits' of such claims, plaintiffs may stipulate to dismiss their claims without a class-wide release, likely ending the case 'as a practical matter'. Id. at 897-98.

14 Id. at 887.

15 Id. at 898.

16 Id.; see also *Skeen v. Jo-Ann Stores, Inc*, 750 A2d 1170, 1172 (Del 2000) (explaining the materiality standard under Delaware law) (quoting *Loudon v. Archer-Daniels-Midland Co*, 700 A.2d 135, 142 (Del 1997)).

17 *Trulia*, 129 A3d at 901-07.

III THE EFFECTS OF TRULIA ON MERGER LITIGATION

Since *Trulia*, there has been a sharp decline in the number of lawsuits filed in the Delaware Court of Chancery challenging mergers, with only 73 per cent of all public deals valued at over US$100 million facing litigation during 2016, below the rate in 2009.[18]

Plaintiffs have responded to *Trulia* in several ways. First, some plaintiffs have attempted to file suits in other fora that they hope will be more receptive to approving disclosure-only settlements. Some state courts have indicated that they will adopt *Trulia*'s enhanced scrutiny of disclosure-only settlements,[19] but the response has been mixed.[20] These attempts have also been hampered by exclusive forum by-laws, which require challenges to mergers and acquisitions to be brought in a designated forum. Now that exclusive forum by-laws have been held to be valid and enforceable by the Delaware Supreme Court and are specifically authorised by statute,[21] they have been widely adopted by corporations,[22] and such by-laws have had the intended effect: for the first time since 2008, the majority of transactions litigated in 2014 and 2015 involved filings in a single court, compared to 2012, when over 60 per cent of litigated transactions involved lawsuits in at least two jurisdictions, and suits in three or more jurisdictions were not uncommon.[23] Although there is speculation that some corporations may be willing to waive an exclusive forum by-law in the hope of securing a quick, disclosure-only settlement in another forum, early research has thus far found no evidence of such willingness.[24]

Second, some plaintiffs have attempted to file claims in federal court under the Exchange Act of 1934. The number of securities class actions alleging federal disclosure violations skyrocketed in 2016.[25] Exclusive forum by-laws cannot require that these claims be brought in the Delaware Court of Chancery because the claims are based on federal law. However, in a recent decision from the Seventh Circuit, Judge Posner was highly critical of

18 Matthew D Cain, *et al.*, *The Shifting Tides of Merger Litigation*, at 5-6, 18 (13 March 2017), papers.ssrn.com/sol3/papers.cfm?abstract_id=2922121.

19 See, e.g., *Stein v. UIL Holdings Corp*, No. X08FSTCV156025536S, 2017 WL 1656891, at *3 (Conn Super Ct 10 April 2017); *In re NewBridge Bancorp S'holder Litig*, No. 15 CVS 10047, 2016 WL 6885882, at *1 (NC Super Ct 22 November 2016); *Drulias v. 1st Century Bancshares, Inc*, Case No. 16-CV-294673 (Cal Super Ct 18 November 2016); *Vergiev v. Aguero*, Docket No. L-2276-15 (NJ Sup Ct June 6, 2016).

20 See, e.g., *Gordon v. Verizon Commc'ns, Inc*, 148 AD3d 146 (1st Dep't 2017) (refusing to apply *Trulia* and reversing the rejection of the disclosure settlement); see also *Roth v. Phoenix Companies, Inc*, 50 NYS3d 835, 838 n4 (Sup Ct NY Cty 24 March 2017) (noting that the New York test 'cannot be viewed as anything other than an outright rejection of Trulia's 'plainly material' standard').

21 A 2015 amendment to Section 115 of the Delaware General Corporation Law specifically authorised Delaware corporations to include a Delaware forum selection provision. The legislation codified the Delaware Court of Chancery's decision in *Boilermakers Local 154 Retirement Fund v. Chevron Corp*, 73 A3d 934 (Del Ch 2013), which upheld the validity of a board-adopted forum-selection by-law.

22 Roberta Romano and Sarath Sanga, 'The Private Ordering Solution to Multiforum Shareholder Litigation' (10 January 2016), www.law.nyu.edu/sites/default/files/upload_documents/2015-12_24-Roberta-Romano-Forum-Clauses.pdf (finding that nearly 750 US public corporations had adopted such by-laws).

23 Sinha, footnote 2.

24 Cain, footnote 18, at 5-6, 29-30, 34 (finding no evidence of this behaviour).

25 Stefan Boettrich and Svetlana Starykh, NERA, 'Recent Trends in Securities Class Action Litigation: 2016 Full-Year Review' (23 January 2017), www.nera.com/content/dam/nera/publications/2017/PUB_2016_Securities_ Year-End_Trends_Report_0117.pdf; see also Cornerstone Research, Securities Class Action Filings: 2016 Year in Review (2017), https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2016-YIR.

disclosure-only settlements and endorsed the 'plainly material' standard set forth in *Trulia*.[26] This has led to a willingness by many plaintiffs to agree to a quick dismissal of their individual claims in exchange for supplemental disclosures and a small mootness fee paid to plaintiffs' counsel.

Defendants, on the other hand, have responded to *Trulia* by increasingly using supplemental disclosures to unilaterally moot any disclosure claims – even when not part of a settlement.[27] In such circumstances, plaintiffs' counsel may seek a mootness fee reflecting the 'benefit' achieved for stockholders from the additional disclosures. Where the parties agree on a mootness fee, no court approval is necessary – unlike in a settlement situation with the award of attorneys' fees. Otherwise, applications to the court for mootness fees are subject to a lower standard under Delaware law: a disclosure that is merely 'helpful' and 'provides some benefit' to stockholders may support a mootness fee award, even if it is not material.[28] Where contested, defendants are still more likely to oppose mootness fee applications by challenging the materiality of the supplemental disclosures, and, in such situations, the Court of Chancery will continue to carefully review mootness fee applications to ensure that they do not simply replace disclosure-only settlements.[29]

IV THE EMERGING CORWIN DOCTRINE

Over the past few years, the Delaware courts have also underscored the deference afforded to merger transactions approved by an informed, disinterested and uncoerced stockholder vote. In *Corwin v. KKR Financial Holdings*,[30] the Delaware Supreme Court unanimously affirmed Chancellor Bouchard's dismissal of a post-closing damages action, holding that the business judgment rule applies in post-closing damages suits involving mergers not subject to entire fairness and that have been approved by a fully informed, uncoerced majority of the disinterested stockholders.[31] In *Singh v. Attenborough*, the Delaware Supreme Court reiterated that such stockholder approval has a cleansing effect on a merger transaction and makes it subject to the irrebuttable business judgment rule, which extinguishes all claims except those

26 *In re Walgreen Co S'holder Litig*, 832 F.3d 718 (7th Cir 2016). There are also other challenges for plaintiffs attempting to file such claims in federal court. *See* Jill E Fisch, Sean J Griffith and Steven Davidoff Solomon, 'Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform', 93 *Texas Law Review* 557, 597 (2015) (noting that federal law contains certain safeguards against frivolous litigation that may frustrate attempts to use federal court litigation as a substitute for litigation in the Delaware Court of Chancery).

27 See Cain, footnote 18, at 23-26.

28 *In re Xoom Corp S'holder Litig*, CA No. 11263-VCG, 2016 WL 4146425, at *3 (Del Ch Aug. 4, 2016); see also *La Mun Police Emps' Ret Sys v. Black*, CA No. 9410-VCN, 2016 WL 790898, at *7 n53 (Del Ch 19 February 2016) (noting that 'mootness dismissals do not pose the same sorts of systemic concerns as court-approved disclosure settlements').

29 *In re Xoom Corp S'holder Litig*, 2016 WL 4146425, at *4-5 (awarding only US$50,000 for fees and costs in ruling on the plaintiffs' application for a US$275,000 fee); *In re Keurig Green Mountain, Inc S'holders Litig*, CA No. 11815-CB (Del Ch 22 July 2016) (transcript) (denying application for a mootness fee award because the supplemental disclosures only confirmed things that had previously been disclosed); *In re Receptos, Inc S'holder Litig*, No. 11316-CB (Del Ch 21 July 2016) (transcript) (reducing the mootness fee from US$350,000 to US$100,000).

30 125 A3d 304 (Del 2015).

31 *In re KKR Fin Holdings LLC S'holder Litig*, 101 A3d 980, 1003 (Del Ch 2014).

for waste.[32] The court explained that it is reluctant to interfere with a stockholder decision on approving a merger, because '[w]hen the real parties in interest – the disinterested equity owners – can easily protect themselves at the ballot box by simply voting no, the utility of a litigation-intrusive standard of review promises more costs to stockholders in the form of litigation rents and inhibitions on risk-taking than it promises in terms of benefits to them'.[33] Relying on these long-standing principles recently rearticulated in *Corwin* and *Singh*, the Court of Chancery has repeatedly dismissed post-closing challenges to non-controller stockholder-approved transactions at early stages of the litigation.[34]

The Delaware courts have also extended this protection to transactions that are 'approved' by fully informed, uncoerced stockholders tendering a majority of shares in a two-step merger pursuant to Section 251(h).[35] In finding that the business judgment rule irrebuttably applied, Vice Chancellor Montgomery-Reeves held that stockholder approval by tendering a majority of shares in a two-step merger pursuant to Section 251(h) can invoke the same highly deferential standard of review as a 'vote in favour of a merger by a fully informed, disinterested, uncoerced stockholder majority.'[36] Because the first-step tender offer of a merger consummated under Section 251(h) 'essentially replicates a statutorily required stockholder vote in favour of a merger', the Court of Chancery held that they should be treated no differently in post-closing damages actions after a majority of fully-informed, uncoerced stockholders approved the transaction.[37]

The Court of Chancery has cautioned, however, that the safe harbour of stockholder approval will apply only when a vote is not coerced and is fully informed.[38] It has also cautioned that not all conduct may be cleansed by a stockholder vote, although it has declined to draw a clear line: 'The policy underlying *Corwin* [...] was never intended to serve as a massive eraser, exonerating corporate fiduciaries for any and all of their actions or inactions preceding their decision to undertake a transaction for which stockholder approval is obtained.'[39] Future cases likely will continue to develop a framework for determining whether any disclosed acts or omissions are so problematic that they cannot be cleansed through approval by informed and disinterested stockholders. However, these cases show that robust and timely disclosures of

32 137 A3d 151, 151-52 & n3 (Del 2016).

33 *Corwin*, 125 A3d at 313.

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

35 *In re Volcano Corp S'holder Litig*, 143 A3d 727 (Del Ch 2016), *aff'd* 2017 WL 563187 (Del February 9, 2017) (table).

36 Id. at 748.

37 Id. at 744.

38 *Sciabacucchi v. Liberty Broadband Corp,* CA 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'holder Litig*, CA No. 10697-VCS, 2017 WL 1201108, at *8, 14 (Del Ch 31 March 2017), as revised (11 April 2017) (determining that the plaintiff adequately pleaded that a vote was coerced and was not fully informed, and refusing to dismiss).

39 *In re Massey Energy Co*, CA No. 5430-CB, 2017 WL 1739201, at *20 (Del Ch 4 May 2017).

conflicts or deficiencies in sales processes generally should be sufficient to prevent post-closing damages awards, although controlling stockholder transactions will still be subjected to a high degree of scrutiny (as discussed in the next section).

V GOING PRIVATE TRANSACTIONS WITH CONTROLLING STOCKHOLDERS

This year, the Delaware courts also clarified certain issues regarding the framework adopted in *Kahn v. M&F Worldwide Corp* (*MFW*) for reviewing 'going private' transactions by controlling stockholders.[40] In *MFW*, the Delaware Supreme Court held that the business judgment rule would provide the operative standard of review if the transaction satisfied the following requirements:

a from the initial proposal, the controller conditions the transaction on the approval of both a special committee and a majority vote of the minority stockholders;
b the special committee is independent;
c the special committee is empowered to freely select its own advisers and to definitively say no;
d the special committee meets its duty of care in negotiating a fair price;
e the vote of the minority is informed; and
f there is no coercion of the minority.[41]

In *In re Books-A-Million, Inc Stockholders Litigation*, Vice Chancellor Laster applied *MFW* and found that a controlling stockholder's proposal to take a company private had complied with the conditions set forth in *MFW*, which subjected it to the business judgment level of review.[42] The case demonstrated that defendants may prevail on a motion to dismiss even where the transaction involves a controlling stockholder, and thus avoid costly and time-consuming discovery and a trial.

Books-A-Million also confirmed that a controlling stockholder has no obligation to sell its shares or otherwise facilitate a third-party offer. Nor does a controlling stockholder breach its fiduciary duties simply by offering to acquire the minority's shares – even at a price lower than the price that might be available from a third-party bidder – so long as the price offered is within a rational range.[43] The Court of Chancery further noted that although special committees are not required to solicit offers from third parties in the face of a statement by the controlling stockholder that it is not willing to sell its shares, a 'committee goes one better when it takes the additional step of gathering additional information through a market canvas' and that doing so 'allowed the [c]ommittee to test the [controller's] conviction about not being a seller'.[44] The Court of Chancery added that any third party offer 'would be a data point in any post-closing appraisal action, giving the [controller] a reason to bump their offer'.[45]

40 88 A3d 635 (Del 2014).
41 Id. at 645.
42 CA No. 11343-VCL, 2016 WL 5874974 (Del Ch 10 October 2016).
43 Id. at *15-16.
44 Id. at *18.
45 Id.

The Delaware Supreme Court recently affirmed *Books-a-Million* in a one-page order. In a separate opinion, the Delaware Supreme Court also strengthened the safe harbour provided to controlling stockholders by *MFW* by noting that 'the pleading stage is an appropriate point to determine if a transaction complied with *MFW*'s procedural requirements'.[46]

VI THE RISE OF APPRAISAL ACTIONS

With the developments in Delaware merger litigation disfavouring disclosure-only settlements and clarifying the standards for dismissal of complaints, both the frequency and size of separate appraisal actions has grown dramatically.[47] In an appraisal action, the stockholder receives the appraised fair value in cash, plus interest at a rate of 5 per cent over the federal discount rate (compounded quarterly) from merger closing until payment. This means that even if the appraisal action determines that the fair price was the same as the deal price, a stockholder seeking an appraisal can take advantage of the statutory interest rate in order to still turn a profit. As a result, over the past decade hedge funds have been engaging in appraisal arbitrage, where a fund buys shares just before a merger closes in order to exercise the appraisal rights.[48]

To combat this appraisal arbitrage, certain provisions of the Delaware General Corporation Law governing appraisal proceedings were amended in June 2016. First, appraisal claims in respect of less than 1 per cent of the total outstanding shares of any class or less than US$1 million in consideration will now be dismissed, except where the transaction is a short-form merger.[49] Second, corporations may now make preliminary payments in respect of appraisal claims, thus cutting off statutory interest on the amount of the preliminary payment.[50] However, the General Assembly did not adopt other proposals intended to reduce 'appraisal arbitrage', such as preventing investors who purchase their shares after the announcement of a merger agreement from exercising appraisal rights.

Furthermore, the developments in *Trulia* and *Corwin* have, not surprisingly, led to an increased reliance by plaintiffs on appraisal actions as a backstop for pricing imperfections.[51] However, in several recent cases, Delaware courts have determined that the merger price is the fair value for the purposes of the appraisal proceeding.[52] Indeed, some scholars have

46 *Emps Ret Sys of the City of St Louis v. TC Pipelines GP, Inc*, No. 291, 2016, 2016 WL 7338592, at *2 n9 (Del 19 December 2016).

47 See Charles R Korsmo & Minor Myers, 'Appraisal Arbitrage and the Future of Public Company M&A', 92, *Washington University Law Review* 1551, 1553 (2015) (describing a 10-fold increase in appraisal litigation from 2004 to 2013).

48 Wei Jiang, et al., 'Appraisal: Shareholder Remedy or Litigation Arbitrage?', 59 *Journal of Law and Economics* 697 (2016) (finding actions brought by hedge funds made up three-quarters of appraisal volume measured by dollars).

49 8 *Del C* Section 262(g).

50 8 *Del C* Section 262(h).

51 Cain, footnote 18, at 11 (finding that '[b]oth 2015 and 2016 were record years with respect to both the number of deals challenged and number of petitions filed').

52 See, e.g., *In re Appraisal of PetSmart, Inc*, CA No. 10782-VCS, 2017 WL 2303599 (Del Ch 26 May 2017) (deferring to the deal value where the deal price was the product of a process reasonably designed and appropriately implemented to achieve a fair value); *Merion Capital LP v. Lender Processing Servs, Inc*, CA No. 9320-VCL, 2016 WL 7324170, at *33 (Del Ch 16 December 2016) (giving '100% weight to the transaction price' where '[t]he Company ran a sale process that generated reliable evidence of fair value.'); *Huff Fund Inv P'ship v. CKx, Inc*, CA No. 6844-VCG, 2013 WL 5878807 (Del Ch 1 November 2013),

made the controversial suggestion that the Delaware courts should establish a presumption that the merger price represents the fair value when the facts suggest that the deal price is a reliable indicator of the fair value for appraisal purposes.[53] Two recent appraisal decisions have, however, found that the fair value was higher than the merger price. In one opinion, Vice Chancellor Laster found that Dell's fair value was 28 per cent higher than the merger price (already a 30 per cent premium to the market price);[54] in the other opinion, Chancellor Bouchard found that DFC's fair value was 7 per cent higher than the merger price.[55] In contrast, another recent appraisal decision found that the fair value was actually lower than the merger price.[56] *DFC* and *Dell* are currently on appeal to the Delaware Supreme Court, and these cases are expected to provide additional guidance regarding appraisal rights.[57]

aff'd, No. 348, 2014, 2015 WL 631586, at *15 (Del 12 February 2015) (finding 'the sales price to be the most relevant exemplar of valuation available'); *In re Appraisal of Ancestry.com*, *Inc*, CA No. 8173-VCG, 2015 WL 399726 (Del Ch 30 January 2015) (same).

53 See., e.g., Guhan Subramanian, Using the Deal Price for Determining 'Fair Value' in Appraisal Proceedings (6 February 2017), papers.ssrn.com/sol3/papers.cfm?abstract_id=2911880 (arguing that 'in a true arms-length deal with meaningful price discovery, there should be a strong presumption that the deal price represents fair value in an appraisal proceeding'); but see *Brief of Law, Economics and Corporate Finance Professors as Amici Curiae in Support of Petitioners-Appellees and Affirmance*, *DFC Global Corp v. Muirfield Value Partners*, LP, No. 518, 2016 (Del 3 February 2017), www.chancerydaily.com/documents/589a4ed825b0e (*amicus* brief opposing such a default rule).

54 *In re Appraisal of Dell Inc*, CA No. 9322-VCL, 2016 WL 3186538 (Del Ch 31 May 2016) (finding that even where merger process would pass a traditional fiduciary duty analysis, the deal price still may not be the best measure of value).

55 *In re Appraisal of DFC Global Corp*, CA No. 10107-CB, 2016 WL 3753123 (Del Ch 8 July 2016) (asserting that the merger price 'is reliable only when the market conditions leading to the transaction are conducive to achieving a fair price' using the discounted cash flow model, comparable company analysis and the transaction price).

56 In re Appraisal of SWS Grp, Inc, CA No. 10554-VCG, 2017 WL 2334852 (Del Ch 30 May 2017).

57 *In re Appraisal of DFC Global Corp*, notice of appeal, CA No. 10107-CB (Del Ch 21 October 2016); *In re Appraisal of Dell Inc*, notice of appeal, CA No. 9322-VCL (Del Ch 22 November 2016).

Appendix 1

ABOUT THE AUTHORS

ROGER A COOPER

Cleary Gottlieb Steen & Hamilton LLP

Roger Cooper is a partner at Cleary Gottlieb Steen & Hamilton LLP based in the New York office.

Mr Cooper's practice focuses on complex civil litigation, with an emphasis on disputes arising out of securities, M&A and derivative transactions, as well as on corporate governance issues.

Mr Cooper has been recognised by *The Legal 500 US*, and has written for numerous publications including *New York Law Journal: Complex Litigation, New York Law Journal Litigation*, *US Law Week*, *Derivatives*, *White Collar Crime and Derivatives Litigation in Business* and *Commercial Litigation in Federal Courts*.

Mr Cooper joined the firm in 2003 and became a partner in 2011. He received a JD from Columbia University School of Law, a PhD in political philosophy from Duke University and an undergraduate degree from the University of Wisconsin. He also served as a law clerk to the Honourable B Avant Edenfield of the US District Court for the Southern District of Georgia.

Mr Cooper is a member of the Bar of New York, and is currently a member of the Committee on Securities Litigation of the Bar Association of the City of New York and a member of the Board of The Fund for Modern Courts.

MEREDITH E KOTLER

Cleary Gottlieb Steen & Hamilton LLP

Meredith Kotler is a partner at Cleary Gottlieb Steen & Hamilton LLP based in the New York office.

Ms Kotler's practice focuses on securities, M&A, general commercial and shareholder derivative litigation, in federal and state trial and appellate courts. She regularly represents clients in securities class actions and a host of corporate governance matters.

Ms Kotler has been recognised as a leading lawyer by *Chambers USA* and *The Legal 500 US*, and has spoken on securities issues and other topics before the Practising Law Institute, the SEC Institute and the Compliance, Governance and Oversight Council. Her writings on the latest developments in Delaware courts and deal litigation have been published in the Harvard Law School Forum on Corporate Governance and other outlets.

Before entering private practice, Meredith served as an assistant US attorney in the Southern District of New York from 1998 to 2004. During the last year and a half of her tenure, she was the Deputy Chief Appellate Attorney in the Civil Division.

Ms Kotler joined the firm as a partner in 2009. She received a JD from Harvard Law School and an undergraduate degree from Princeton University. She also served as a law clerk to the Honourable Barbara S Jones of the US District Court for the Southern District of New York.

Ms Kotler is a member of the Bar of New York.

VANESSA C RICHARDSON

Cleary Gottlieb Steen & Hamilton LLP

Vanessa Richardson is an associate at Cleary Gottlieb Steen & Hamilton LLP based in the New York office.

Ms Richardson's practice focuses on litigation, with an emphasis on M&A and shareholder derivative litigation, as well as on corporate governance issues.

Ms Richardson joined the firm in 2014. She received a JD from New York University School of Law, where she was a Robert McKay scholar and the managing editor of the *New York University Law Review*. Additionally, she was awarded the Daniel G Collins Prize for Excellence in Contract Law. She received an undergraduate degree from American University, where she was a presidential scholar. She also served as a law clerk to the Honourable Leo E Strine, Jr of the Delaware Supreme Court and the Delaware Court of Chancery.

Ms Richardson is a member of the Bar of New York.

CLEARY GOTTLIEB STEEN & HAMILTON

Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2
Building 3
Moscow 115054
Russia
Tel: +7 495 660 8500
Fax: +7 495 660 8505

Cleary Gottlieb Steen & Hamilton LLP
One Liberty Plaza
New York, NY 10006-1470
United States
Tel: +1 212 225 2000
Fax: +1 212 225 3999
racooper@cgsh.com
mkotler@cgsh.com

www.clearygottlieb.com

Strategic Research Sponsor of the
ABA Section of International Law

Law
Business
Research

ISBN 978-1-910813-75-1