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Mergers & Acquisitions and Corporate Governance Report

OCTOBER 2013

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Preliminary Agreements and Obligations to Negotiate in Good Faith

A preliminary agreement, usually referred to as a letter of intent, term sheet, memorandum of understanding or heads of agreement, is often used in a private M&A transaction. The preliminary agreement normally summarizes the key commercial terms of the contemplated transaction and, except for certain terms that are specified as binding (e.g., confidentiality and exclusivity), are normally stated to be "non-binding." In some cases, preliminary agreements also contain an express obligation to negotiate in good faith.

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Controlling Stockholder "Going Private" Transactions after *In Re MFW*: Reasons to Be Wary of the Path to the Business Judgment Rule

Chancellor Leo Strine's opinion in *In re MFW Shareholders Litigation* marks the culmination of an effort by the Chancellor, going back to his lengthy dicta in *In re Cox Communications Shareholders Litigation*, to arrive at a more unified standard for review of buyouts of a company's public float by a controlling stockholder. The headline conclusion is that, assuming this decision is not reversed by the Delaware Supreme Court on appeal, controlling stockholder buyouts structured as negotiated mergers may now join controlling stockholder buyouts that take the form of unilateral tender offers in having available a theoretical path that permits challenges to be dismissed on pre-trial motions.

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Preliminary Agreements and Obligations to Negotiate in Good Faith

BY CHRISTOPHER AUSTIN

Mr. Austin is a partner at Cleary Gottlieb Steen & Hamilton LLP.

A preliminary agreement, usually referred to as a letter of intent, term sheet, memorandum of understanding or heads of agreement, is often used in a private M&A transaction. The preliminary agreement normally summarizes the key commercial terms of the contemplated transaction and, except for certain terms that are specified as binding (e.g., confidentiality and exclusivity), are normally stated to be "non-binding." In some cases, preliminary agreements also contain an express obligation to negotiate in good faith.

A recent opinion from the Delaware Supreme Court – *SIGA Technologies, Inc. vs. PharmAthene, Inc.*[1] – has clarified certain issues related to obligations to negotiate in good faith in preliminary agreements. In particular, the Court concluded that, under Delaware law:

- agreements to negotiate in good faith, even in preliminary agreements, are enforceable;
- proposing deal terms that deviate materially from terms set out in a term sheet may be deemed to evidence bad faith in negotiations; and
- if an obligation to negotiate in good faith is breached, and the aggrieved party is able to establish that a final, binding agreement would have been reached absent the other's bad faith negotiations, the aggrieved party is entitled to "expectation" or "benefit of the bargain" damages (e.g., lost profits) rather than simply "reliance" damages (e.g., costs and expenses of the failed negotiation).

Background

SIGA Technologies held rights to an antiviral drug with promise in treating smallpox. SIGA did not have sufficient resources to develop the drug and entered into discussions with PharmAthene for a licensing arrangement. These discussions resulted in PharmAthene making a bridge loan to SIGA and, subsequently, the parties entering into a merger agreement pursuant to which PharmAthene would acquire SIGA. Both the bridge loan and the merger agreement provided that, if the acquisition was not completed, the parties would negotiate in good faith a license of the drug from SIGA to PharmAthene in accordance with terms set forth in a term sheet attached to the merger agreement.

Because of delays in obtaining SEC clearance of the merger proxy statement, the merger agreement terminated and the parties commenced negotiations on the terms of the license agreement. The Court noted that there was some indication that by this time SIGA was experiencing "seller's remorse" as a result of its receipt of a large grant from the National Institutes of Health that ameliorated SIGA's near-term funding issues. The parties did not reach agreement on the terms of a license agreement, and litigation followed. The Supreme Court affirmed the trial court's finding that SIGA had negotiated in bad faith, noting that the trial court had found that SIGA had "virtually disregarded" the term sheet when proposing terms for the license agreement.

The Supreme Court then affirmed the trial court's findings that (1) an obligation to negotiate in good faith means that the parties must propose and negotiate terms that are "substantially consistent" with those set out in the preliminary agreement and (2) absent SIGA's bad faith negotiations, the parties would have entered into a license agreement and therefore PharmAthene was entitled to "expectation" damages, including lost profits so long as PharmAthene could prove such losses with "a reasonable degree of certainty."

Implications and Practice Notes

- ***Drafting*.** The Supreme Court's decision in *SIGA* confirms (again) the importance of getting the drafting right, including provisions that are often dismissed as "boilerplate." A key question that should be considered when drafting any preliminary agreement is how to deal with "change of mind" risk – i.e., does each party have the right, without any litigation or liability risk, to decide not to proceed and terminate negotiations for any or no reason. If that is the agreed position, the preliminary agreement (1) should not include any obligation to negotiate in good faith and (2) should expressly disclaim any obligation to proceed on the commercial terms set forth in the preliminary agreement (in addition to customary "non-binding language"), as follows:

> "Each of parties agrees that unless and until a definitive agreement for the matters contemplated by the Term Sheet is executed and delivered, neither party, nor any of their respective affiliates, is under any obligation, express or implied, to propose or complete any such transaction or to negotiate in good faith toward a binding contract and any such party may at any time and for any or no reason determine not to proceed with further consideration of any such transaction."

On the other hand, if the parties do intend that the terms in the preliminary agreement are to be the basis of good faith negotiation, such an obligation should of course be included expressly.

- ***Choice of Law*.** In its opinion in *SIGA*, the Supreme Court surveyed applicable law in a number of other jurisdictions, including New York, and distinguished several other cases on the basis that Delaware law did not apply. The opinion reinforces the importance of considering the impact of selecting the relevant law to govern an agreement, since the choice could have real-world consequences.

- ***Facts Matter*.** The facts in the *SIGA* matter, as determined by the trial court, could be viewed as egregious. In particular, the court concluded that, notwithstanding the inclusion of a binding agreement to negotiate the license terms in good faith based on the term sheet, SIGA viewed the term sheet as simply a "jumping off point" and continued to insist on terms that were significantly more favorable to SIGA than those contained in the term sheet. (For example, the term sheet provided for a $3 million upfront license payment and up to $10 million of milestone payments, but SIGA proposed an upfront payment of $100 million and milestone payments of up to $235 million.) On those facts, the Court affirmed the trial court's finding that SIGA acted in bad faith, noting that bad faith "contemplates a state of mind affirmatively operating with furtive design or ill will."

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For more information, please contact Christopher Austin at +1 212 225 2434 (caustin@cgsh.com), resident in our New York office.

1 No. 314, 2012, 67 A.3d 330 (Del. 2013).

Enhancing the Promise of Exclusive Forum Clauses by Having Stockholders Consent to the Jurisdiction of the Selected Forum

BY MITCHELL LOWENTHAL

Mr. Lowenthal is a partner at Cleary Gottlieb Steen & Hamilton LLP.

The multiplicity of cases brought on behalf of the same stockholder group (or as derivative actions) against the same defendants based on the same conduct and asserting the same fiduciary duty claims is now well documented. The benefits of consolidating such litigation in a single forum have also been well established.[1]

Most such litigation takes place in state courts, particularly where the litigation concerns transformative corporate events like mergers. Within the federal system, there is a specialized tribunal – the Judicial Panel on Multidistrict Litigation – charged with allocating business among the different federal district courts when the same or similar cases are pending in several such courts. There is nothing similar, however, in the state court systems that can allocate cases among courts of different states.

In the recent *Chevron/Federal Express*[2] decision, Chancellor Strine found to be valid under Delaware law a bylaw provision designating Delaware as the exclusive forum to hear internal affairs claims involving Delaware companies. Unless overturned on appeal, Delaware companies are accordingly now able to reduce the transactional and related costs of multi-forum litigation of the same case by adopting provisions in organic corporate documents selecting an exclusive forum (presumably, Delaware) where internal corporate affairs disputes can be heard.[3]

But the real test of these provisions will be whether they are respected by courts outside of the state of incorporation. They should be. It is a well-accepted principle of conflicts of laws jurisprudence that the substantive law of the state of incorporation applies to internal affairs disputes, and courts outside of the place of incorporation are expected to faithfully apply it. Nevertheless, whether (and if so, how quickly) this will come to pass is at best unclear.

Powerful economic interests have led to virtually every merger valued in excess of $500 million (96% in 2012) being challenged by stockholder plaintiffs, who file suits outside the target company's state of incorporation (whether or not suits are also filed in that state) almost 85% of the time.[4] Despite the Chancellor's thoughtful and compelling opinion, it is likely that some plaintiffs will bring internal affairs claims in "foreign" courts and seek to convince those courts to reject the applicability or validity of forum selection clauses. One can imagine arguments, for example, that the exclusive forum clauses are procedural rules that affect how (or more specifically where) lawsuits are brought and should therefore yield to statutes or common law policies that, for example, atmospherically or otherwise favor retaining cases in the "foreign" court (for example, in a state where the named plaintiffs are residents or the defendant corporation is headquartered). Such statutes and policies often frustrate (or outright preclude) efforts to dismiss or stay cases under the *forum non conveniens* doctrine, which is the primary method (in the absence of an exclusive forum clause) for channeling intra-corporate internal affairs claims into a single state forum. In the long run, those arguments should not be successful, but they will likely be tried, as may others.[5] Moreover, boards may have discretion under forum selection clauses to waive the exclusivity of the forum selected in the clause – leaving room for the possibility that there may be circumstances where, in the exercise of their fiduciary duties, board members may deem it appropriate for a litigation to proceed outside of the selected forum. Motivated stockholder plaintiffs who file suit in foreign courts may seek to exploit this "fiduciary out," contending that invoking the forum selection clause in the particular circumstances of a given case would itself violate a board's fiduciary duties and that the initial decision should not itself be subject to the exclusive forum clause. Thus, until the decisional law outside of Delaware (or other state of incorporation) accepts the validity of exclusive forum clauses, and the circumstances become well-defined where fiduciary duties require suits outside of the selected forum to continue there, the very uncertainty and inefficiencies that forum selection clauses are designed to address will to a meaningful degree remain.

Issuers considering adopting an exclusive forum clause – a provision providing that claims involving a corporation's internal affairs can only be brought in specified courts[6] – should consider the potential benefits of including a related provision that stockholders are deemed to consent to the personal jurisdiction of such courts with respect to actions to enforce such clauses.

The same analysis that supports the validity of a forum selection clause should also support the validity of a jurisdictional consent clause. Because, as Chancellor Strine held, Delaware law permits bylaws to include forum selection clauses that bind all shareholders, jurisdictional consents permitting those clauses to be enforced against shareholders in the selected courts should also be valid. Further, since consent is a well-recognized basis for conferring personal jurisdiction, the same mechanism that is sufficient to confer consent to a forum selection clause should also satisfy any due process requirements for conferring personal jurisdiction for the purpose of enforcing them.

Jurisdictional consent provisions would have the limited, but powerful, effect of permitting the corporation or affected fiduciaries[7] – the defendants in the foreign forum – to bring suit in the exclusive forum, and litigate there the enforceability of the exclusive forum clause. Thus, to the extent litigation is brought in violation of the exclusive forum clause, the company or the defendant fiduciaries need not go to the foreign court to enforce the clause; rather, they can bring suit for a declaration and injunction in the court selected in the clause against the plaintiff in the foreign court, directing that the stockholder plaintiff dismiss the foreign action. A permanent injunction in such a proceeding should be entitled to full faith and credit in any court in the United States. Such injunctions would likely be quickly granted as the issues are straightforward and determined by the forum selection clause itself, and the nature of the claims asserted in the foreign court as set forth in the relevant pleading. If the stockholder plaintiff in the foreign court chooses to appear and defend the forum selection clause enforcement case, then jurisdiction over him in that court is unquestionably established. And if he defaults, the only open questions would be whether there is such jurisdiction in the selected state under the law of that state and, if so, whether the exercise of such jurisdiction is constitutional – questions that do not implicate policies such as those hostile to *forum non conveniens*.

Once the validity of exclusive forum clauses gains widespread acceptance, the rationale for jurisdictional consent clauses may be largely eliminated. Until then, though (and perhaps thereafter as well), the promise of reducing the costs, inefficiencies, and potential of conflicting rulings provided by exclusive forum clauses will likely be enhanced and accelerated by the adoption of jurisdictional consent clauses.

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For more information, please contact Mitchell Lowenthal at +1 212 225 2760 (mlowenthal@cgsh.com), resident in our New York office.

1 *See generally* Joseph A. Grundfest & Kristen A. Savelle, *The Brouhaha Over Intra-Corporate Forum Selection Provisions: A Legal, Economic, and Political Analysis*, 68 BUS. LAW. 325 (2013).

2 *Boilermakers Local 154 Ret. Fund, et al. v. Chevron Corp., et al.*, C.A. No. 7220-CS, 2013 WL 3191981 (Del. Ch. June 25, 2013).

3 Under Chancellor Strine's reasoning, exclusive forum clauses can likely be validly adopted by companies chartered under the corporate law of other states (the relevant state corporation law, however, would of course need to be reviewed).

4 Robert Daines & Olga Koumrian, *Shareholder Litigation Involving Mergers and Acquisitions*, Cornerstone Research (February 2013 Update), available at: http://www.cornerstone.com/files/upload/Cornerstone_Research_Shareholder_Litigation_Involving_M_and_A_Feb_2013.pdf.

5 Indeed, in the one instance where a foreign court was presented with a forum selection clause, it refused to enforce it – though this was before Chancellor Strine's explication of Delaware law. *See Galaviz v. Berg*, 763 F. Supp. 2d 1170 (N.D. Cal. 2011).

6 See Cleary Gottlieb's June 27 memorandum, "Should Your Company Adopt A Forum Selection Bylaw?" on relevant considerations with respect to the adoption of forum selection clauses.

7 Corporations or directors likely will not bring claims against stockholders lightly, if for nothing else than reputational reasons. That said, the only potential stockholder defendants in forum selection clause enforcement proceedings would be those who have already violated that clause and brought suit elsewhere against the corporation or its fiduciaries. Moreover, such clauses can be drafted also to permit other stockholders (such as those who have brought similar suits in the proper forum) to utilize such consent to jurisdiction to enforce the forum selection clause.

Traps to Consider: Delaware's Merger Statute and Ratification Amendments

BY ETHAN KLINGSBERG

Mr. Klingsberg is a partner at Cleary Gottlieb Steen & Hamilton LLP.

During its most recent session, the Delaware legislature enacted various amendments to the Delaware General Corporation Law effective August 1, 2013. Two provisions – one relating to defective corporate authorizations and the other to mergers – are of particular interest, as are the potential traps that may arise in connection with the merger statute amendment.

1. DGCL Section 204 formalizes and streamlines a ratification process for curing defective corporate acts (i.e., corporate acts purported to have been validly taken but which turn out to have been defectively authorized, including issuances of shares in excess of the number authorized in the charter and equity issued where the acquirer or grantee believes the issuance to be valid but there was a defect in the authorization process). One important qualification: Stockholders must receive notice of all Section 204 ratifications and thereafter would be permitted to bring actions in Chancery Court to challenge Section 204 ratifications as inequitable.

2. Paragraph (h) of DGCL Section 251 (the merger statute) permits an immediate second-step merger (no stockholder vote, no proxy statement, no need for a top-up option; just the quick filing of a certificate of merger) immediately following any negotiated tender offer or exchange offer for a public company's shares that results in the bidder owning at least the number of shares necessary to approve a merger (typically 50.1%). This provision may well change the landscape of M&A structuring by pushing many more deals to the two-step structure (where, significantly, ISS and Glass Lewis normally do not make recommendations). Three potential traps to consider:

   a) **Relationships Between the Bidder and Significant Stockholders May Limit Use of Section 251(h).** To be eligible for new Section 251(h), the bidder may not be an "interested stockholder" under DGCL Section 203 at the time the target board approves the merger agreement. This restriction is broader than a provision that merely states that the second-step merger may not be with a party that is subject to Section 203. Most insiders that own at least 15% of an issuer's shares are exempt from Section 203 due to the board's pre-approval of their acquisitions of shares. But these 15% holders, notwithstanding their exemption from Section 203, still fall within the definition of "interested stockholder" and therefore would not be entitled to take advantage of Section 251(h). Moreover, most practitioners (due to the dearth of Section 203 case law and the breadth of the statutory language) have typically adopted a broad reading of the concept of "ownership" for purposes of the definition of "interested stockholder" under Section 203. As a result, understandings and arrangements between the bidder and a 15% stockholder may result in the bidder itself being an "interested stockholder." Even though these understandings and arrangements may be pre-approved by the target board and therefore exempt the bidder from Section 203, the bidder's transaction would still be rendered ineligible for Section 251(h) if any of these understandings or arrangements were to arise before the target board's approval of the merger agreement. Although a support agreement between the bidder and a 15% stockholder (where the stockholder would make undertakings relating to voting, transferring and tendering for the benefit of the bidder) could cause the bidder to itself be an "interested stockholder," Section 251(h) should still be available so long as the support agreement is not signed prior to the target board's approval of the merger agreement and prior to that time there was no understanding between the bidder and the stockholder that resulted in the bidder being deemed an interested stockholder.

b) **Equity Rollovers under Section 251(h).** In some merger structures, certain stockholders will have their shares converted into different consideration than the other stockholders. This is common, for example, in connection with financial sponsor transactions where all stockholders other than management receive cash consideration and management "rolls over" its equity into shares of the sponsor's acquisition vehicle. To avoid risks under the SEC's "best price rule" (which requires that the same consideration per share be paid in tender offers, but not in second-step mergers), rollovers may be done in a second-step merger when a two-step, all-cash tender offer structure is employed. But one of the requirements of the new Section 251(h) is that the second-step merger must squeeze-out the untendered shares for the same per share consideration as paid in the tender offer. Thus, a "best price rule"-compliant exchange or other alternative to a second-step merger will have to be relied upon for implementing rollovers in an otherwise all-cash transaction if the parties are to preserve access to the expedited Section 251(h) structure.

c) **Funding Conditions.** We've seen a number of heavily leveraged acquisitions by relatively small-cap acquirers in recent months. If these acquirers, as well as financial sponsor LBO buyers, are pushed toward the two-step structure as a result of Section 251(h), there may be renewed pressure from the SEC staff, based on recent informal statements, to require bidders to hold tender offers open for five business days after satisfaction of a funding or disbursement condition to the tender offer (which condition is often included in highly leveraged tender offers). The staff's purpose in putting forth this position would be to protect those holders who were waiting to see whether this condition would be satisfied before tendering (by giving those holders the opportunity, during these extra five business days, to tender once they have learned that this funding condition to the offer would be satisfied). Despite the good intention of the SEC staff here, such a requirement may not be workable since it would require that the bidder assume the risk that the lending banks would fail to fund the debt financing for some reason that would not also permit the bidder to refuse to close the tender offer. More importantly, given that the non-tendering holders will be cashed out pursuant to the new Section 251(h) promptly after the closing of the tender offer, and at the tender offer price, this requirement is not needed to protect the non-tendering holders. Nonetheless, this is an issue for leveraged acquirers (and their targets) to consider carefully before committing to a two-step structure using the new Section 251(h).

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For more information, please contact Ethan Klingsberg at +1 212 225 2588 (eklingsberg@cgsh.com), resident in our New York office.

Controlling Stockholder "Going Private" Transactions after *In Re MFW*: Reasons to Be Wary of the Path to the Business Judgment Rule

BY ETHAN KLINGSBERG, VICTOR LEWKOW AND NEIL WHORISKEY

Mr. Klingsberg, Mr. Lewkow and Mr. Whoriskey are partners at Cleary Gottlieb Steen & Hamilton LLP.

Chancellor Strine's opinion in *In re MFW Shareholders Litigation*[1] marks the culmination of an effort by the Chancellor, going back to his lengthy dicta in *In re Cox Communications Shareholders Litigation*,[2] to arrive at a more unified standard for review of buyouts of a company's public float by a controlling stockholder. The headline conclusion is that, assuming this decision is not reversed by the Delaware Supreme Court on appeal, controlling stockholder buyouts structured as negotiated mergers may now join controlling stockholder buyouts that take the form of unilateral tender offers in having available a theoretical path that permits challenges to be dismissed on pre-trial motions.

About ten years ago, a series of Chancery Court opinions, the most prominent of which was then-Vice Chancellor Strine's opinion in *In re Pure Resources Shareholders Litigation*,[3] laid out safeguards that would qualify a unilateral tender offer by a controlling stockholder as non-coercive and entitled to dismissal of challenges based on pleadings prior to a trial or an evidentiary hearing. The most important of these safeguards were the presence of both:

- the existence of an independent special committee process at the target board;

and

- the unwaivable conditioning of the tender offer on acceptance by a majority of the shares held by the "minority" (i.e., those holders unaffiliated with the controlling stockholder or the target; of course, these "minority" holders may in some instances constitute a majority if the controlling stockholder and its affiliates own less than 50% of the voting power).

MFW lays out a path, similar to that spelled out in *Pure Resources*, for controlling stockholder buyouts to follow in the context of negotiated mergers. The Court held that, notwithstanding prior precedents that had been read by many practitioners and academics to the contrary, a merger agreement for a controlling stockholder buyout will be subject to deferential business judgment review when the transaction arises from an offer by the controlling stockholder that, from the outset, commits both to proceed only on terms negotiated with and approved by an independent special committee *and* to inclusion in the merger agreement of an unwaivable condition that approval by a majority of the shares held by the "minority" shall have been obtained. Before *MFW*, the only pathway to dismissal pre-trial of challenges to a controlling stockholder buyout was for the parties to follow the *Pure Resources* route of a unilateral tender offer. If, instead, the transaction included the execution of a merger agreement, the transaction would always be subject to heightened "entire fairness" review.

Although the presence of procedural safeguards (including special committee approval or a majority-of-the-minority condition) could be sufficient to shift the burden to the plaintiffs in stockholder suits, dismissal pre-trial was virtually impossible in the face of the strict standards of entire fairness. In a recent article,[4] cited approvingly in *MFW*, some of us surveyed controlling stockholder buyout transactions from 2006 to 2010 to assess the impact that this pre-*MFW* state of the case law was having on deal structuring. We found that 70% of the controlling stockholder transactions chose to negotiate a merger agreement with a special committee of independent directors rather than follow the *Pure Resources* tender offer route, even though this approach made the deal subject to "entire fairness" review. Why were most controlling stockholders going out of their way to avoid the *Pure Resources* route and embrace an approach that would be subject to a more stringent standard of review? One of the article's conclusions was that, from the perspective of controlling stockholders, the execution risks that arise from a majority-of-the-minority condition (which condition *must* be included in a unilateral tender offer under the *Pure Resources* approach) – especially in a market that is increasingly dominated by hedge funds and institutional investors willing to follow their leads in threatening to block stockholder approvals – often outweighs the benefits of having an opportunity to win on a pre-trial motion in Chancery Court. Another of the article's conclusions, based on review of the data about these four years of controlling stockholder transactions, was that the rate of litigation and, more importantly, the costs of settling "entire fairness" challenges to controlling stockholder buyouts structured as negotiated mergers without majority-of-the-minority conditions (less than half the negotiated mergers had such conditions) were not meaningfully different than the litigation rate and settlement costs for controlling stockholder buyouts structured as unilateral tender offers that appeared to satisfy the *Pure Resources* criteria. Moreover, not a single one of the litigation challenges to unilateral tender offers that appeared to satisfy the *Pure Resources* criteria was dismissed on the pleadings – i.e., the controlling stockholder defendants in these unilateral tender offers (with majority-of-the-minority conditions) found settlement to be a more attractive option even when deferential review should have been available and then they appeared to end up settling on terms not meaningfully more burdensome than if they had taken the "entire fairness" route of negotiated mergers with special committees, but without majority-of-the-minority conditions.

The Chancellor now suggests in *MFW* that controlling stockholders are more likely to start embracing unwaivable majority-of-the-minority conditions in negotiated mergers if, as a result, the presumption of the business judgment rule will be available. But there is a good chance that some controlling stockholders will prefer to take their chances on "entire fairness" review of a buyout negotiated with a special committee (and without a majority-of-the-minority condition), rather than embracing the carrot of the business judgment rule offered in *MFW*, for the following reasons:

- ***Costs of extensive discovery will still apply.*** Even if the approach outlined in *MFW* is followed closely, dismissal before extensive discovery is unlikely to be available. This decision and others lay out roadmaps for plaintiffs to follow to insulate their complaints from being tossed on a motion to dismiss before extensive discovery. Allegations that challenge the independence of the directors on the special committee, the adequacy of the disclosure in the proxy statement, the fulfillment of the duty of care by the committee members, and the criteria for determining which stockholders belong in the "minority" for purposes of the majority-of-the-minority condition, are all likely to be fair game for insulating a complaint in this context from dismissal before discovery.
- ***Costs/Risks of majority-of-the-minority may be high.*** As the Court in *MFW* notes and experienced advisors are well aware, the execution risks that arise from subjecting the buyout to an unwaivable majority-of-the-minority condition are potentially high.
- ***Settlement of entire fairness claims may be feasible without significant cost above the cost of settling business judgment rule claims.*** As Chancellor Strine alludes in *MFW* and as the data in the article referenced above show, plaintiffs and their counsel are often quick to settle even if they have the entire fairness standard on their side, especially if there appears to have been an effective special committee process or a bump in the price (as there inevitably is) following the initial proposal by the controlling stockholder.
- ***Victory at trial on entire fairness claims is achievable where an effective special committee handled negotiation of the merger agreement.*** For those controlling stockholders and target directors with the fortitude to go to trial to defend against entire fairness claims, there are precedents for victory by the defendants even in the absence of unwaivable majority-of-the-minority conditions. See, e.g., the post-trial decisions by then-Vice Chancellor Strine in *In re Cysive, Inc. Shareholders Litigation*[5] and by former Chancellor William Chandler in *In re John Q. Hammons Hotels, Inc. Shareholders Litigation*[6] - both transactions involving controlling stockholders (*Cysive* was a buyout of the public float, while *Hammons* involved a sale of the company where the controlling stockholder received differential consideration) where the entire fairness claims failed after trial even in the absence of majority-of-the-minority conditions.
- ***The MFW approach requires a "promise" upfront that may limit a controlling stockholder's flexibility for an undefined period.*** The *MFW* opinion requires that, as a condition to business judgment rule treatment, the controlling stockholder must make a "promise," in its initial proposal, to the requisite procedural safeguards, including the existence of a majority-of-the-minority condition in a special committee-endorsed merger agreement. On its face, the consequence of this promise would appear to be

that the controlling stockholder must simply stand down and abandon its plans for a buyout if either the special committee rejects its proposals or if the majority-of-the-minority stockholder approval cannot be obtained. Accordingly, before controlling stockholders attempt to adhere to the roadmap for buyout proposals laid out in *MFW*, they ought to consider the open questions relating to the extent to which this initial "promise" would later be enforceable by the target company or its public stockholders if the controlling stockholder were to elect to deviate from its commitments to these safeguards in consideration of an increase in the offer price; in a switch to a *Pure Resources*-compliant tender offer; or in a new proposal some weeks or months after an impasse in negotiations with the special committee led to a withdrawal of the original proposal.

* * *

For more information, please contact Ethan Klingsberg at +1 212 225 2588 (eklingsberg@cgsh.com), Victor Lewkow at +1 212 225 2370 (vlewkow@cgsh.com) or Neil Whoriskey at +1 212 225 2990 (nwhoriskey@cgsh.com), all resident in our New York office.

1 67 A.3d 496 (Del. Ch. 2013).

2 879 A.2d 604 (Del. Ch. 2005).

3 808 A.2d 421 (Del. Ch. 2002).

4 Suneela Jain et al., *Examining Data Points in Minority Buy-Outs: A Practitioners' Report*, 36 DEL. J. CORP. L. 939 (2011), available at: https://clients.clearygottlieb.com/rs/alertmemos/Examining Data Points in Minority Buy-Outs_A Practitioners' Report.pdf.

5 836 A.2d 531 (Del. Ch. 2003).

6 C.A. No. 758-CC, 2011 WL 227634 (Del. Ch. Jan. 14, 2011).

CLEARY GOTTLIEB

Offices

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www.clearygottlieb.com

New York
One Liberty Plaza
New York, NY 10006-1470
T: 1 212 225 2000
F: 1 212 225 3999

Washington
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: 1 202 974 1500
F: 1 202 974 1999

Paris
12, rue de Tilsitt
75008 Paris, France
T: 33 1 40 74 68 00
F: 33 1 40 74 68 88

Brussels
Rue de la Loi 57
1040 Brussels, Belgium
T: 32 2 287 2000
F: 32 2 231 1661

London
City Place House
55 Basinghall Street
London EC2V 5EH, England
T: 44 20 7614 2200
F: 44 20 7600 1698

Moscow
Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: 7 495 660 8500
F: 7 495 660 8505

Frankfurt
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: 49 69 97103 0
F: 49 69 97103 199

Cologne
Theodor-Heuss-Ring 9
50668 Cologne, Germany
T: 49 221 80040 0
F: 49 221 80040 199

Rome
Piazza di Spagna 15
00187 Rome, Italy
T: 39 06 69 52 21
F: 39 06 69 20 06 65

Milan
Via San Paolo 7
20121 Milan, Italy
T: 39 02 72 60 81
F: 39 02 86 98 44 40

Hong Kong
Bank of China Tower, 39th Floor
One Garden Road
Hong Kong
T: 852 2521 4122
F: 852 2845 9026

Beijing
Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: 86 10 5920 1000
F: 86 10 5879 3902

Buenos Aires
CGSH International Legal Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires,
Argentina
T: 54 11 5556 8900
F: 54 11 5556 8999

São Paulo
Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299

Abu Dhabi
Al Sila Tower, 27th Floor
Sowwah Square, PO Box 29920
Abu Dhabi, United Arab Emirates
T: +971 2 412 1700
F: +971 2 412 1899

Seoul
Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210, Korea
T: +82 2 6353 8000
F: +82 2 6353 8099