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CLIENT ALERT

Delaware Year-End Review: M&A and Shareholder Litigation

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AUTHORS

Sameer Advani | Charles D. Cording | Todd G. Cosenza | Shaimaa M. Hussein
Jeffrey B. Korn | Tariq Mundiya | Martin L. Seidel | Vanessa C. Richardson

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As with most things in 2020, M&A litigation in the Delaware courts was significantly impacted by the COVID-19 pandemic. The onset of the pandemic earlier in the year, and the lockdown orders and other restrictions that followed, not only disrupted the courts' dockets and the conduct of litigation generally, but also gave rise to a host of disputes between merger parties, including some that presented novel issues for the Delaware courts to address. In particular, the first of the broken deal cases to reach judgment held, among other things, that while the pandemic did not constitute a material adverse effect under the parties' agreement, operational changes made by the target in response to the pandemic, even if reasonable under the circumstances, breached an interim covenant to operate in the ordinary course of business consistent with the target's past (non-pandemic) practice. Although many of the broken deal cases that were filed in light of the pandemic were ultimately consensually resolved (through a revised transaction or a walk away), a few remain pending and decisions in those cases, which are scheduled for trial this year, will likely provide further guidance on these issues.

Notwithstanding the initial disruption created by the lockdowns, litigation activity soon picked back up as evidenced by the increased number of new cases filed and opinions issued by both the Court of Chancery and the Delaware Supreme Court in the latter half of 2020. Those opinions touched on a number of key areas including a landmark decision by the Delaware Supreme Court affirming the power of Delaware corporations to adopt charter provisions mandating that federal securities class actions lawsuits be filed exclusively in federal court. Last year also saw cases addressing various issues relating to controller transactions, including continued refinement of the contours within which business judgment protection afforded by the dual prongs of *MFW* would apply to such transactions and the factual circumstances under which stockholders may be deemed "controllers" of the corporation. Meanwhile, Court of Chancery decisions reaffirmed that exculpatory charter provisions remained a potent defense in *Revlon* cases, necessitating dismissal absent allegations that the directors acted in bad faith or otherwise breached their duty of loyalty. Although attempts to plead *Caremark* derivative claims continued to face significant obstacles, one decision in 2020 joined the small, but growing, list of cases in the last few years in which a plaintiff was found to have adequately plead a failure of oversight claim under *Caremark*. Finally, in the Courts' evolving jurisprudence under Section 220 of the Delaware General Corporation Law ("DGCL"), the Delaware Supreme Court clarified that, contrary to certain prior Court of Chancery decisions, a stockholder seeking books and records need not show that the alleged wrongdoing is actionable or identify its intended use of those materials.

As deal activity continues to be robust, and poised to accelerate as the economy gradually reopens, we expect deal litigation in Delaware in 2021 to keep pace. This year will also see the appointment of a new Chancellor after Chancellor Bouchard retires from the bench at the end of April 2021.

Broken Deal Litigation, MAE Provisions, and Ordinary Course Covenants

It would be an understatement to say that this was an extraordinary year for broken deal litigation. As the growing disruptions caused by the COVID-19 pandemic continued to roil markets across the globe, an increasing number of deal parties began to revisit the terms of transactions that were signed before the onset of the pandemic. In some cases, the parties were able to reach agreement on revised terms without resorting to litigation.[1] In others, however, one or both of the parties sought judicial intervention to terminate or specifically enforce their transaction agreements. Although the allegations in these cases raised issues that often arise in broken deal litigation, including with respect to the application of material adverse effect ("MAE") clauses and ordinary course covenants, the cases were also novel insofar as those recurring issues were now being analyzed through the lens of an unprecedented global pandemic.

Of the cases that were filed in the Court of Chancery (and not subsequently settled), only one to date has substantively addressed these issues on the merits, ***AB Stable VIII LLC v. Maps Hotels and Resorts One LLC***.[2] In that case, the parties' $5.8 billion transaction, involving the sale of a portfolio of luxury hotels, was scheduled to close in April 2020, but the buyer refused asserting, among other things, that the seller had suffered an MAE as a result of the COVID-19 pandemic and that "extraordinary" changes made by the seller to its business practices as a result of the pandemic breached the ordinary course covenant. After an expedited trial, conducted remotely by videoconferencing, the Court of Chancery held that the buyer could walk away from the deal. As to the MAE, the Court continued its general practice of interpreting such clauses narrowly and held that the seller did not suffer an MAE because, although the agreement did not specifically carve out adverse effects of a "pandemic" or "epidemic" from the MAE definition, those effects were

1 *See, e.g.*, Ben Klayman & Ankit Ajmera, *Auto Parts Maker BorgWarner on Track to Close Delphi Buyout This Year*, REUTERS (May 6, 2020), https://reut.rs/35VVxY2.

2 C.A. No. 2020-0310-JTL, 2020 WL 7024929 (Del. Ch. Nov. 30, 2020).

nevertheless excluded by a specified exception for "calamities." The Court also found that several "Seller-friendly" features of the MAE definition (including an exception for occurrences of which the buyer had knowledge pre-signing and the absence of a "disproportionate effects" exclusion) also supported its conclusion that risks from the pandemic were properly allocated to the buyer. Nonetheless, the Court held that the significant changes implemented by the seller in response to the pandemic breached the ordinary course covenant. In reaching that conclusion, the Court rejected the seller's argument that the pandemic "necessitated an extraordinary response" and, therefore, the test should be "what is ordinary during a pandemic." Rather, based on prior Delaware precedent and the language of the parties' covenant—which required the seller to act consistent with ***the seller's*** "past practice"—the Court ruled that the parties created a standard that looked "exclusively to how the [seller's] business has operated in the past" and not "how other companies responded to the pandemic or operated under similar circumstances."

The decision in *AB Stable*, which contained helpful language for both buyers and sellers locked in disputes over their transactions, may not be the last word on these important issues as there remain a number of pending COVID-19-related broken deal lawsuits that are currently making their way to trial over the course of 2021.

Beyond the COVID-19-related cases, in August 2020, the Court of Chancery handed down its much-anticipated opinion in the ***In re Anthem-Cigna Merger Litigation***.[3] Anthem and Cigna agreed to merge in July 2015, in a transaction valued at over $54 billion. The Merger Agreement contained covenants that the parties use "reasonable efforts" to close the Merger (the "Efforts Covenants") and take "all necessary actions" to avoid any legal impediment to the Merger. But after signing, the relationship began to deteriorate, as the parties clashed over who would lead the merged entity. The US Department of Justice eventually blocked the merger on antitrust grounds. Anthem claimed that Cigna breached the Efforts Covenants in trying to "derail" the merger by: "(i) conducting a covert communications campaign against the Merger, (ii) withdrawing from integration planning, (iii) opposing a divestiture, (iv) resisting mediation, and (v) undermining Anthem's defense in [subsequent antitrust lawsuits.]" Cigna countersued, and sought the $1.8 billion reverse termination fee. Running more than 300 pages, the opinion describes the "corporate soap opera" in detail. Vice Chancellor Laster held that although Cigna breached the Efforts Covenants, the merger more likely than not still would have been enjoined on antitrust grounds, so Anthem was not entitled to damages. He also rejected Cigna's claims, and held that it was not entitled to the reverse termination fee. Thus, "[n]either side can recover from the other. Each must deal independently with the consequences of their costly and ill-fated attempt to merge."

Federal Forum Selection Clauses

2020 also saw the Delaware Supreme Court issue a landmark decision in response to the proliferation of putative securities class actions filed against Delaware corporations in state courts across the country following the United States

[3] C.A. No. 2017-0114-JTL, 2020 WL 5106556 (Del. Ch. Aug. 31, 2020).

Supreme Court's 2018 ruling in *Cyan, Inc. v. Beaver Cnty Employees Ret. Fund*. In ***Salzberg v. Sciabacucchi***, the Delaware Supreme Court held that corporate charter provisions requiring stockholders to bring claims under the Securities Act of 1933 exclusively in federal court are facially valid.[4] In reversing the Court of Chancery's decision finding such clauses invalid under Section 102(b)(1) of the DGCL, the Supreme Court explained that Section 102(b)(1) is "broadly enabling" and "allows immense freedom for businesses to adopt the most appropriate terms for the organization, finance, and governance of their enterprise." The Court stressed the importance that Delaware places on private ordering and permitting corporations to adapt to new situations such as the costs and burdens imposed by the rise in Securities Act lawsuits being filed in state courts, often in parallel with similar lawsuits in federal courts. Thus, the Court concluded that responding to these lawsuits was an "intra-corporate" matter that fell within the plain language of Section 102(b)(1), and that the Court of Chancery erred when it determined that the statute's scope was restricted only to matters that would be governed by Delaware law under the internal affairs doctrine.

Transactions with Controlling Stockholders

Challenges to transactions with controlling stockholders continued to be a focus of litigation in 2020. In particular, the Court of Chancery further refined the contours in which business judgment protection can be afforded to controllers who implement the dual-pronged *MFW* framework.[5] The Court also addressed circumstances under which minority stockholders are deemed to be "controllers" under Delaware law and when the presence of a controller in a transaction might trigger entire fairness review. Finally, the Court held that parent company control over a spin-off of a wholly owned subsidiary did not release the subsidiary from its contractual obligations as a result of procedural or substantive unconscionability.

The Scope of MFW's Application to Controller Transactions

Underscoring the central role to be played by the special committee under the *MFW* framework as an "independent negotiating agent" on behalf of minority stockholders, the Court of Chancery rejected defendants' invocation of *MFW* in ***In re Dell Technologies Inc. Class V Stockholders Litigation*** because the committee had an impermissibly narrow mandate and was subsequently "bypassed" by the controller when it proceeded to negotiate directly with stockholders.[6] The transaction at issue in *Dell* was a proposed redemption of certain Class V shares issued by Dell in connection with its 2016 acquisition of EMC Corporation, which also included EMC's 82% ownership of publicly traded VMware Inc. Class V shares, which were designed to track the performance of Dell's indirect ownership stake in VMware, were subject to, among other features, Dell's right to forcibly convert the shares pursuant to a pricing formula if Dell subsequently listed its Class C shares on a national exchange. As part of Dell's exploration of options for consolidating its ownership of

[4] 227 A.3d 102 (Del. 2020).

[5] *Kahn v. M&F Worldwide Corp*., 88 A.3d 635 (Del. 2014). Willkie represented the special committee in the *MFW* litigation.

[6] Consol. C.A. No. 2018-0816-JTL, 2020 WL 3096748 (Del. Ch. Jun. 11, 2020).

VMWare, the company proposed a redemption of the Class V shares and, pursuant to *MFW*, conditioned the redemption (or similar transaction) on approval by a special committee of the board and a majority of the unaffiliated Class V stockholders. Significantly, the Court noted that Dell simultaneously "reserved the right to bypass the *MFW* process" by engaging in a forced conversion. The special committee approved a redemption, but it was met with opposition from large Class V stockholders and, as a result, Dell bypassed the committee and began negotiating directly with the objectors. Those negotiations ultimately led to a revised deal, which received approval from the special committee and a majority of the unaffiliated Class V holders. In denying defendants' motions to dismiss the plaintiffs' breach of fiduciary duty claims, the Court held that *MFW* did not apply because Dell excluded the forced conversion from the special committee's mandate and therefore "deprived the Special Committee of the full power to say 'no' that is necessary for *MFW* to function." Further, the Court found Dell's decision to "bypass" the committee and negotiate directly with the objecting stockholders was inconsistent with *MFW's* central tenet that the special committee "must continue as the primary negotiator." The Court also found that the complaint sufficiently alleged that the looming threat of a forced conversion "created a coercive environment," that the two special committee members lacked independence from the controller and that the proxy statement was materially misleading, all of which further precluded *MFW* protection for the transaction.

The timing of adoption of the *MFW* framework continued to be an obstacle for some defendants who were found to have engaged in substantive merger-related activity prior to putting the *MFW* protections in place. In ***In re HomeFed Corporation Stockholder Litigation***,[7] Jeffries, the 70% stockholder of HomeFed, initially discussed a squeeze-out merger with HomeFed in the fall of 2017, at which point HomeFed formed a special committee to negotiate the potential transaction. Jeffries broke off discussions in early 2018, but was alleged to have continued direct discussions about a potential deal with HomeFed's second-largest stockholder, Beck, Mack and Oliver LLC ("BMO"). Only after securing BMO's support did Jeffries formally propose a transaction. The preexisting special committee was "reauthorized" and ultimately negotiated and approved the transaction, which also received approval from HomeFed's minority stockholders. Although the plaintiffs raised a number of *MFW* challenges, the Court held that Jeffries's failure to condition the transaction *ab initio* upon compliance with *MFW* was dispositive. In particular, the Court agreed with the plaintiffs that the 2019 offer was "part of the process" that began in 2017, but even if it did not, the plaintiffs had sufficiently alleged that Jeffries engaged in substantive pre-offer economic discussions with BMO, which included the specific exchange ratio that the Court found "ultimately dictated the final price" that HomeFed stockholders received in the transaction.

In ***Salladay v. Lev***, the Court of Chancery applied *MFW's ab initio* requirement in the context of a non-controller take-private transaction involving Intersections, Inc.[8] In that case, defendants conceded that a majority of the Intersections board was conflicted, but argued that the involvement of an independent special committee cleansed any conflict such that business judgment review (rather than entire fairness) applied under *Trados II*.[9] In analyzing that issue, the Court

[7] Consol. C.A. No. 2010-0592-AGB, 2020 WL 3960335 (Del. Ch. July 13, 2020).

[8] C.A. No. 2019-0048-SG, 2020 WL 954032 (Del. Ch. Feb. 27, 2020).

[9] *In re Trados Inc. S'holder Litig.*, 73 A.3d 17 (Del. Ch. 2013).

ruled that the rationale underpinning the *ab initio* requirement in the *MFW* controller context—that a controller disables itself from bypassing the special committee at the outset—applied equally in the context of a majority-conflicted board. Applying the guidance provided by the Delaware Supreme Court that any special committee must be in place before "substantive economic negotiations" begin, the Court found the formation of Intersections' special committee came too late. In particular, the special committee was formed after the board's chair disclosed to the buyer a price range he believed the board would be willing to accept, which the Court found "essentially formed a price collar that 'set the field of play for the economic negotiations to come.'" As evidence, the Court pointed to the fact that the buyer's opening bid was at the low end of the range and the transaction's final price was at the middle of the range.

Presence of a Controller

Where a controlling stockholder stands on both sides of a transaction, and does not agree to implement *MFW's* dual protections, Delaware courts apply entire fairness as the governing standard of review. That seemingly settled proposition was the subject of considerable dispute among the parties to litigation challenging the merger between Viacom Inc. and CBS Corporation, ***In re Viacom Inc. Stockholders Litigation***.[10] The lawsuit, brought by former Viacom stockholders, alleged that the controlling stockholders of both Viacom and CBS (the "NAI Parties") caused Viacom and CBS to merge in a transaction that allegedly benefited the NAI Parties' owner (Shari Redstone) to the detriment of Viacom and its public stockholders. The merger was not subject to the *MFW* framework, though the Court noted that the NAI Parties' "refusal to agree to implement the *MFW* protections" was not indicative of fiduciary wrongdoing. Although *MFW* did not apply, the defendants argued that business judgment review was nevertheless appropriate because absent facts showing that the NAI Parties received a benefit at the expense of the minority stockholders, the NAI Parties' "mere presence" on both sides of the transaction was not sufficient to trigger entire fairness review. Although acknowledging that the case law revealed some support for defendants' argument, the Court ultimately concluded that it need not decide the issue because the complaint adequately alleged that the NAI Parties were conflicted with respect to the merger. Specifically, the Court found a reasonable inference from the plaintiffs' allegations that Ms. Redstone received a unique benefit from the merger at the expense of Viacom's minority stockholders, namely, consolidation of her control over the combined entity, which was sufficient to trigger entire fairness.

The Definition of "Control"

In ***In re Tesla Motors, Inc. Stockholders Litigation***, the Court of Chancery denied dueling motions for summary judgment in litigation concerning Tesla's 2016 merger with SolarCity Corporation.[11] The Court previously held, at the motion to dismiss stage, that plaintiffs had sufficiently alleged that Elon Musk, who owned 22% of Tesla, was a controlling stockholder. Following completion of discovery, defendants argued that plaintiffs had not produced any evidence showing

[10] C.A. No. 2019-0948-JRS, 2020 WL 7711128 (Del. Ch. Dec. 29, 2020).

[11] Consol. C.A. No. 12711-VCS, 2020 WL 553902 (Del. Ch., Feb. 4, 2020).

Musk "actually coerced" the stockholder vote and, therefore, the plaintiffs' fiduciary duty claims failed because the fully informed, uncoerced vote of Tesla's disinterested stockholders in favor of the merger warranted application of the business judgment rule rather than entire fairness. In denying the defendants' motion, the Court acknowledged the novelty of their argument but ultimately concluded that for the purpose of the controlling shareholder inquiry, a plaintiff need not show actual control, only the ability to control given Delaware law's longstanding "recognition that a controller's influence is 'inherently coercive.'" As there remained genuine disputes of material fact as to whether Musk is Tesla's controlling stockholder, resolution of that issue, under an entire fairness standard, must be undertaken at trial.

In ***Gilbert v. Perlman***, the Court of Chancery held that two minority stockholders of Connecture, Inc. were not part of a control group with the majority stockholder and therefore did not owe fiduciary duties to Connecture and its stockholders.[12] The case involved a cash-out merger proposed by the majority stockholders of Connecture (the "FP Investors"). In connection with the transaction, two minority stockholders of Connecture (chairman David Jones and Chrysalis Ventures II, L.P.) rolled over their Connecture equity. Plaintiffs allege that the FP Investors, Chrysalis, and Jones worked together as a "control group" to enter into a transaction that was unfair to the minority stockholders and that each violated its fiduciary duties owed to Connecture and its stockholders. Although the Court acknowledged that it was "possible to conceive of a theoretical situation" where a majority stockholder with voting control joined forces with minority stockholders to form a control group, a plaintiff advancing this "unusual theory" must plead facts showing (1) an arrangement between the controller and the minority stockholders "to act in consort to accomplish the corporate action" and (2) the "controller must perceive a need to include the minority holders to accomplish the goal, so that it has ceded some material attribute of its control to achieve their assistance." The Court held that the plaintiffs failed to meet that standard. Even accepting the plaintiffs' allegations concerning a voting agreement and other "coordinated efforts" among the parties, no control group was established in the absence of facts showing FP Investors' "sharing or material self-limiting of its control powers" to obtain the minority stockholders' participation. Merely permitting those stockholders to roll over their equity was insufficient inasmuch as it would make, contrary to Delaware law, any rollover minority shareholder a controlling fiduciary.

Parent Company Control Over Terms of Spin-Off

In a closely watched litigation between a spun-off subsidiary (The Chemours Company) and its former corporate parent (DuPont) that raised fundamental questions of how corporations contract with wholly owned subsidiaries, the Court of Chancery upheld the terms of an agreement requiring the arbitration of their dispute concerning the spin-off, ***The Chemours Company v. DowDupont Inc., Corteva, Inc. and E.I. Du Pont de Nemours and Company***.[13] In its lawsuit, Chemours argued that DuPont had unfairly assigned it certain environmental liabilities in the spin-off, and that the arbitration provision in the spin agreement should not be enforced because it was substantively and procedurally

[12] C.A. No. 2018-0453-SG, 2020 WL 2062285 (Del. Ch. April 29, 2020).

[13] C.A. No. 2019-0351, 2020 WL 1527783 (Del. Ch. Mar. 30, 2020).

unconscionable due to DuPont's "domination" of the subsidiary. Chemours argued that, in light of that alleged "domination," it could not have consented to the arbitration provision in the agreement. Vice Chancellor Glasscock rejected the argument, concluding that "such a finding cannot be squared with settled Delaware law that '[w]holly-owned subsidiary corporations are expected to operate for the benefit of their parent corporations; that is why they are created.'" The Court went on to explain that a heightened level of consent for an arbitration provision in such a context is not practical because "a rule that requires an elevated level of consent for purposes of an arbitration agreement where state contract law otherwise recognizes the consent as sufficient would [deviate] from Delaware law contract principles." The Court of Chancery's decision and analysis was upheld by the Delaware Supreme Court in a one-page order.[14]

Revlon Claims

Post-closing damages actions under *Revlon* brought by stockholders seeking to challenge a non-controller acquisition continued to face significant hurdles at the pleadings stage given the potent protection afforded by exculpatory charter provisions as the Delaware Supreme Court recognized in 2015 in the seminal *Cornerstone* decision.[15] As demonstrated in two cases this past year, where directors are exculpated from liability for damages under the company's charter, a complaint cannot survive dismissal, even where *Revlon* applies, absent facts showing that the directors acted in bad faith or otherwise breached the duty of loyalty.

In ***In re USG Corp. Stockholder Litigation***, plaintiffs sued the directors of USG Corporation after the company's 10% stockholder, Gerb. Knauf KG, acquired the company for $44.00 per share following negotiations with USG and one of its largest stockholders Berkshire Hathaway (which owned approximately 31% of the company).[16] Even though the transaction was approved by an overwhelming majority of USG's disinterested stockholders, the Court found that the transaction could not receive *Corwin* cleansing because plaintiffs had adequately pleaded that the proxy was materially incomplete or misleading for not disclosing that the board believed USG's intrinsic value to be $50 per share. Nevertheless, the Court still dismissed the case, after finding that plaintiffs had not adequately alleged interestedness, a lack of independence or bad faith sufficient to plead a non-exculpated breach of the duty of loyalty. In reaching that conclusion, the Court held it was not sufficient to show, as plaintiffs contended, that the directors failed to satisfy their *Revlon* duty to achieve the best price, nor could bad faith be inferred from the plaintiffs' showing that the proxy statement omitted material information.

14 *The Chemours Co. v. DowDuPont Inc. et al.*, C.A. No. 147-2020, 2020 WL 7378829 (Del. Dec. 15, 2020).

15 *In re Cornerstone Therapeutics Inc., Stockholder Litig.*, 115 A.3d 1173 (Del. 2015).

16 Consol. C.A. No. 2018-0602-SG, 2020 WL 5126671 (Del. Ch. Aug. 31, 2020).

Likewise, in ***Rudd v. Brown***, stockholders of Outerwall, which operates Redbox, Coinstar and other self-service kiosks, challenged the sale of the company, alleging that the price was inadequate and that the directors and the company's CFO pursued the sale disloyally "to avoid a looming proxy contest and in pursuit of other personal interests."[17] In granting the motions to dismiss, the Court held that the threat of a proxy contest from an activist investor alone was insufficient to render director defendants conflicted. Nor was it sufficient to allege that certain of the directors stood to receive monetary payments post-closing (in the form of accelerated vesting of options and other change-of-control benefits) given longstanding Delaware authority that substantial equity ownership by a director aligns that director's interests with that of the company's other stockholders.

Although this pleading burden is substantial, it is not insurmountable, as the Court of Chancery explained in denying motions to dismiss in ***In re Mindbody Inc. Shareholders Litigation***. That case arose out of the take-private acquisition of Mindbody, Inc. by a private equity firm.[18] Plaintiffs alleged that the CEO and chairman of Mindbody, whose personal wealth was concentrated in the company's stock, was motivated by personal liquidity needs and the prospect of lucrative future employment with the post-transaction company, and therefore tilted the sale process in the buyer's favor. Defendants moved to dismiss arguing, among other things, that the involvement of an informed board and *Corwin* ratification of the merger by a fully informed, uncoerced stockholder vote defeated any claim for liability arising from the merger. The Court denied the motion to dismiss as to the CEO, holding that the allegations were well pleaded and that the complaint "tracks the paradigmatic *Revlon* plotline" where a CEO has material conflicts that he failed to disclose to the board and tilted the sale process in favor of the buyer. In such "fraud-on-the-board" cases, the "sins of just one fiduciary can support a viable *Revlon* claim" if plaintiffs adequately plead that "one conflicted fiduciary failed to provide material information to the board or that the board failed to oversee the conflicted fiduciary."

The ruling in *Mindbody* drew heavily from the Delaware Supreme Court's decision in ***City of Fort Myers General Employees' Pension Fund v. Haley***, which reversed dismissal of stockholder claims against the Chairman and CEO of Towers Watson & Co ("TW") in connection with TW's "merger of equals" with Willis Group Holdings.[19] Plaintiffs in that case alleged that the CEO failed to disclose to the TW board of directors that he had received a proposal from a significant stockholder of Willis regarding a potential fivefold increase in the CEO's executive compensation as the CEO of the post-merger entity. Because the merger was structured as a stock-for-stock transaction, the business judgement rule (rather than enhanced scrutiny under *Revlon*) provided the applicable standard of review. In reversing the Court of Chancery's dismissal, the Delaware Supreme Court held that plaintiffs successfully rebutted the business judgment presumption by adequately alleging that (i) the CEO was materially self-interested in the transaction, (ii) he failed to

17 C.A. No. 2019-0775-MTZ, 2020 WL 5494526 (Del. Ch. Sept. 11, 2020).

18 Consol. C.A. No. 2019-0442-KSJM, 2020 WL 5870084 (Del. Ch. Oct. 2, 2020).

19 235 A.3d 702 (Del. 2020).

disclose such interest to the TW board of directors, and (iii) a "reasonable board member" would have found the material interest to be a significant fact in the evaluation of the proposed transaction.

Although decided under different standards of review, *Mindbody* and *Haley* underscore the importance of directors taking affirmative steps to identify and address potential management conflicts of interest in the sale process.

Aiding and Abetting Claims

Generally, a claim for aiding and abetting breach of fiduciary duty will fail if a plaintiff cannot allege an underlying breach of fiduciary duty for the simple reason that there is no breach of duty to aid and abet. But following the seminal *Rural Metro* decision in 2015,[20] the Delaware courts have grappled with cases where professional advisors have allegedly misled or otherwise acted disloyally towards their clients, rendering the alleged primary violator, in effect, the victim of the alleged aider and abettor's misconduct. Several notable decisions this year continued to develop what plaintiffs must plead for an aiding and abetting claim to survive a motion to dismiss.

In ***Morrison v. Berry***,[21] the Court of Chancery held that an aiding and abetting claim against an advisor to the board may survive a motion to dismiss even where the fiduciary duty of care claims against a target company's board of directors are exculpated, if the advisor is alleged to have knowingly misled the board and prevented it from running a reasonable sales process. The case arose out of a two-step going-private transaction in which Apollo Management investment funds acquired a specialty grocery chain called "The Fresh Market." Plaintiffs brought aiding and abetting claims against, among others, the target's financial advisor alleging that it influenced the bid in Apollo's favor, including by channeling "inside information" about the bid process. Vice Chancellor Glasscock denied the financial advisor's motion to dismiss, finding a reasonable inference that it "intentionally disguised" its communications with Apollo, knowingly deceived the board about its ongoing conflicts, and thus prevented the board from running a reasonable sales process. Even though the directors themselves were exculpated, the Court concluded that "[t]he advisor is not absolved from liability simply because its clients' actions were taken in good-faith reliance on misleading and incomplete advice tainted by the advisor's own knowing disloyalty." The plaintiffs' aiding and abetting claims against Fresh Market's legal advisor, however, were dismissed because it was not alleged to have knowingly concealed information about the alleged misconduct, even though it drafted the challenged disclosure documents. Likewise, Apollo faced no aider and abettor liability because the complaint did not allege that Apollo knew that the financial advisor failed to disclose the back-channel discussions to The Fresh Market's board.

[20] *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816 (Del. 2015).

[21] C.A. No. 12808-VCG, 2020 WL 2843514 (Del. Ch. June 1, 2020).

In ***In re Oracle Corp. Derivative Litigation***, the Court of Chancery dismissed aiding and abetting claims against the fiduciaries of a target company.[22] The case arose out of Oracle's acquisition of NetSuite. Plaintiffs alleged that Oracle's founder Larry Ellison verbally agreed with executives of NetSuite (which he also founded and controlled) to acquire the company at too high a price. Plaintiffs alleged that the target executives intentionally did not publicly disclose the communications, and that if they had, the Oracle special committee might have realized that the company was overpaying. The Court noted that an aiding and abetting claim against the executives of a target company was hypothetically possible, saying that "in the infinite garden of theoretical inequity, such a flower may bloom." However, because plaintiffs only alleged that Oracle had overpaid, that was not enough to support a viable aiding and abetting claim against target company executives – after all, target fiduciaries have a duty to their own shareholders to maximize price. To succeed on its aiding and abetting claims, the plaintiff needed to show that (1) the NetSuite defendants intentionally breached a duty owed to NetSuite and its stockholders, and (2) in doing so substantially assisted a breach of duty by the Oracle fiduciaries to Oracle. In granting the NetSuite defendants' motion to dismiss, Vice Chancellor Glasscock explained, "it is not reasonably conceivable that by their silence [the target executives] provided substantial assistance to [Ellison's] alleged breaches of fiduciary duty" because the information did come to light after NetSuite disclosed it to one of its largest investors and then publicly in two SEC filings. Thus, "regardless of whether the NetSuite Defendants' disclosures of the Price Collar Discussion comported with their fiduciary duties to NetSuite, the NetSuite Defendants' actions cannot have provided substantial assistance . . . because the alleged attempt that the NetSuite Defendants made to keep the Price Collar Discussion secret from Oracle failed."

Pleading Shareholder Derivative Claims

The high pleading burden facing a stockholder seeking to assert derivative claims on behalf of a corporation remains a significant obstacle at the motion to dismiss stage. In particular, Delaware courts have consistently held that stockholder derivative claims based on a board's failure to discharge its duty of oversight, known as *Caremark* claims, are "possibly the most difficult theory" upon which a plaintiff can hope to prevail.

Nevertheless, a significant, emerging trend in Delaware jurisprudence in recent years has been the courts' greater receptivity to entertaining *Caremark* claims, at least at the pleadings stage. ***Teamsters Local 443 Health Services & Insurance Plan et al. v. Chou, et al.*** was the latest case reflecting that trend where, following a corporate trauma, plaintiffs were found to have alleged facts sufficient to survive a motion to dismiss.[23] In this case, plaintiffs brought derivative claims against the directors of drug wholesale company AmerisourceBergen Corp. ("ABC"). The alleged misconduct underlying the oversight claims was egregious: employees in an ABC subsidiary were alleged to have implemented a practice of illegally salvaging overfill chemotherapy drugs and then pooling, repacking, and selling them,

[22] Consol. C.A. No. 2017-0337-SG, 2020 WL 3410745 (Del. Ch. June 22, 2020).

[23] C.A. No. 2019-0816-SG, 2020 WL 5028065 (Del. Ch. Aug. 24, 2020).

sometimes adulterated, for a 100% profit. Unlike many of the recent cases where the Delaware courts have sustained *Caremark* claims,[24] ABC was not a monoline company. Indeed, the relevant subsidiary accounted for only a modest percentage of ABC's revenues. Nevertheless, Vice Chancellor Glasscock found that the plaintiffs adequately pleaded that the board had ignored numerous "red flags" of potential misconduct, including: (i) a report by an outside law firm that had concluded that substantial gaps existed in ABC's compliance mechanisms, including because they failed to encompass the relevant subsidiary; (ii) a *qui tam* (whistleblower) action filed by a former executive in federal court identifying the illegal business practices; and (iii) subpoenas and search warrants disclosed in ABC's securities filings. Notably, the court credited the allegations that ABC directors did nothing in response to these red flags, rejected exculpatory explanations proffered by the defendants as too factual to be resolved at the pleadings stage, and rejected the argument that the retention of counsel in response to the subpoena, without more, sufficed to discharge the directors' oversight duties. Because the directors likely faced a substantial risk of liability for consciously disregarding their duties, the Court found that they lacked independence such that demand was excused.

Chou notwithstanding, other Delaware decisions in 2020 highlight that it remains difficult for a stockholder to plead a *Caremark* claim in the absence of alleged bad faith conduct by directors. For example, in ***Richardson v. MoneyGram International***, the Court of Chancery dismissed claims that the board failed to ensure compliance with anti-money laundering requirements, which led to more than $225 million in fines.[25] There, the Court wrote that "bad oversight is not bad-faith oversight, and bad oversight is the most that these facts could plausibly imply." The Court added that "the mere implementation of an unsuccessful program cannot support liability for lack of oversight," because that would create "a perverse incentive" for directors to do nothing rather than risk personal liability.

The Court has also been wary of efforts by plaintiffs to avoid this onerous pleading burden by disavowing the assertion of any *Caremark* claims in the hopes of surviving dismissal. In ***In Re GoPro, Inc. Stockholder Derivative Litigation***, stockholders of GoPro, Inc. brought a derivative suit alleging that the board had breached its fiduciary duties by failing to disclose that the company would not be able to reach its previously issued revenue guidance following problems with the rollout of a new drone.[26] Although the plaintiffs disclaimed any effort to plead a *Caremark* claim, the Court found it "difficult to ignore the allegations in the Complaint that walk and talk like *Caremark*," including that the board failed to respond to "red flags" showing that the company's previously issued guidance would not be attainable. As to those allegations, the Court concluded that the complaint pleaded no facts supporting a reasonable inference, as needed for *Caremark* liability, that the board knew the company would "miss its guidance or consciously disregarded risk." Rather, the plaintiffs' theory was merely an attempt to impermissibly "equate a bad outcome with bad faith."

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[24] *See Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019) (claims related to listeria outbreak at Blue Bell); *In re Clovis Oncology Inc. Deriv. Litig.*, C.A. No. 2017-0222-JRS, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019) (claims relating to efficacy of key cancer drug).

[25] C.A. No. 2019-1015-SG, 2020 WL 7861335 (Del. Ch. Dec. 31, 2020).

[26] Consol. C.A. No. 2018-0784-JRS, 2020 WL 2036602 (Del. Ch. April 28, 2020).

Finally, one other Court of Chancery decision in 2020, involving a derivative claim outside of the *Caremark* context, bears note. In ***United Food and Commercial Workers Union v. Zuckerberg***, stockholders claimed that Facebook's board of directors breached its fiduciary duties by approving and pursuing a reclassification of Facebook's shares that would have enabled founder Mark Zuckerberg to retain voting control of the company despite donating a significant portion of his shares to charity (the reclassification was withdrawn on the eve of a related trial and has not gone into effect).[27] Although acknowledging that demand futility for such allegations would typically be assessed under the longstanding two-pronged *Aronson* test for affirmative board decisions, Vice Chancellor Laster declined to do so, finding that the *Aronson's* "analytical framework is not up to the task." In particular, because of *Aronson's* focus on the risk of liability for the directors who approved the challenged transaction, the test "does not provide guidance" with respect to a director who abstained from the decision or one who joined the board later, even if those directors "suffer[ed] from other conflicts that renders [them] incapable of considering a demand." In light of these shortcomings, and echoing calls from numerous commentators eschewing further use of the *Aronson* test, the Court chose instead to apply the more flexible *Rales* test, while still drawing "upon *Aronson*-like principles" to evaluate whether a majority of Facebook's directors (i) received a material personal benefit from the reclassification; (ii) faced a substantial likelihood of liability as a result of having approved the reclassification, or (iii) lacked independence from someone who received such a benefit or faced a substantial likelihood of such liability. Applying that test, the Court concluded that the plaintiff failed to establish that demand would be futile because six of Facebook's nine directors were able to exercise independent and disinterested business judgment to consider a demand. Although Vice Chancellor Laster's application of a unified demand futility test brings simplicity and clarity to this important area of law, it remains to be seen whether other judges on the Court of Chancery and the Delaware Supreme Court will likewise adopt this novel approach going forward.

Books and Records Actions Under DGCL § 220

Stockholder books-and-records demands have emerged as a significant and routine aspect of Delaware practice, whether as a precursor to derivative actions, post-merger damages suits, shareholder reform proposals, or other shareholder actions. Section 220 of the DGCL permits a stockholder to inspect corporate books and records for a "proper purpose" that is reasonably related to their interests as a stockholder. In 2020, the Delaware courts issued several important decisions addressing key issues with respect to shareholder inspection rights.

In ***AmerisourceBergen Corp. v. Lebanon Cty. Employees' Retirement Fund***, the Delaware Supreme Court—which rarely weighs in on Section 220—held that so long as the stockholder has a "credible basis" to suspect possible wrongdoing, then a demand "need not identify the particular course of action the stockholder will take if the books and records confirm the stockholder's suspicion of wrongdoing."[28] More significantly, resolving an "apparent tension" between two lines of authority at the Court of Chancery level, the Delaware Supreme Court further clarified that a stockholder is not

[27] C.A. No. 2018-0671-JTL, 2020 WL 6266162 (Del. Ch. Oct. 26, 2020) (Notice of Appeal filed Nov. 23, 2020).

[28] Del. Supr. No. 60, 2020, 2020 WL 7266362 (Del. Dec. 10, 2020).

required to establish that the alleged corporate wrongdoing would be "actionable" in order to obtain the books and records. So long as the stockholder establishes a "credible basis" for wrongdoing, courts may not consider merits-based defenses—for instance, that the potential claims sought to be investigated are exculpated—when determining whether to grant statutory inspection rights. Partially overruling and distinguishing prior cases, the Delaware Supreme Court noted that interjecting merits-based defenses "interferes" with the purpose and nature of Section 220 proceedings, which are intended to be "summary" and thus "managed expeditiously." Notably, the Delaware Supreme Court held that in a "rare case" where the shareholder's sole purpose was to conduct litigation and the anticipated lawsuit would be "dead on arrival" due to a "purely procedural obstacle," such as standing or the statute of limitations, a court may be justified in denying inspection.

In ***Pettry, et al. v. Gilead Sciences, Inc.***, a group of stockholders sought corporate records to investigate wrongdoing in the development, marketing and sale of HIV drugs.[29] To establish the "credible basis" for their request required by the statute, the stockholder-plaintiffs cited certain recent lawsuits and government investigations, including allegations that Gilead had violated antitrust laws, committed mass torts, infringed on government patents, and defrauded government programs in its efforts to protect the market for one of its HIV drugs. The Court of Chancery held that even though these unverified allegations may not be "substantiated or even probable," they were sufficient to meet plaintiffs' low burden of demonstrating a credible basis for their investigation. In reaching its decision, the Court also noted "a trend" in which defendants are "increasingly treating Section 220 actions as 'surrogate proceedings to litigate the possible merits of the suit[.]'" The Court of Chancery reiterated that merits-based defenses to stockholder-plaintiffs' Section 220 demands are not appropriate, a decision cited approvingly by the Delaware Supreme Court in the *AmerisourceBergen* case discussed above. Furthermore, the Court *sua sponte* granted leave for plaintiffs to move for their expenses, including attorneys' fees, incurred in connection with their efforts to obtain the books and records.

In re WeWork **Litigation**

Finally, several interesting opinions have come out of the ***In re WeWork Litigation***, which involved disputes over certain agreements between WeWork and SoftBank, pursuant to which SoftBank was to, among other things, purchase up to $3 billion of WeWork's stock in a tender offer.

- First, on August 21, the Court of Chancery considered a case of first impression, and held that management of a corporation could not block members of the board of directors from gaining access to the company's privileged information.[30] The dispute arose after SoftBank terminated the proposed tender offer claiming that certain closing conditions had not been satisfied. The WeWork special committee that negotiated the transaction filed an action to enforce the agreement. In response, the WeWork board, which included a majority of SoftBank designated

[29] C.A. No. 2020-0173-KSJM, 2020 WL 6870461 (Del. Ch. Nov. 24, 2020).

[30] Consol. C.A. No. 2020-0258-AGB, 2020 WL 4917593 (Del. Ch. Aug. 21, 2020).

directors, authorized management to identify two candidates for temporary appointment to the board to serve on a new special committee, which then requested dismissal of the lawsuit. The original special committee sought discovery about formation of the new committee, which management opposed. Nevertheless, the Court of Chancery noted that directors have an "essentially unfettered" right to access legal advice rendered to the company or the board, with only few exceptions. The Court reasoned that "because 'directors are responsible for the proper management of the corporation' … they should 'be treated as a joint client when legal advice is rendered to the corporation through one of its directors or officers.'" Thus, the original special committee was entitled to receive the privileged documents.

- Then, on December 14, the Court of Chancery considered another case of first impression, when it rendered a decision on a motion by the new committee to dismiss the complaint filed by the original special committee.[31] The Court denied the motion to dismiss, following an analysis "akin" to test set forth in *Zapata v. Maldonado*[32] for special litigation committees, which entails a two-part assessment of (a) testing the independence, good faith and reasonableness of the committee's investigation, and (b) the court's own independent judgment as to whether dismissal should be granted. In so doing, the Court denied the new committee's motion because it found that "significant shortcomings and errors exist in [the new committee's report] that undermine the court's confidence in the reasonableness of its investigation and many of its conclusions." The Court also wrote that it would be "fundamentally unfair to the minority stockholders who tendered shares into the Tender Offer to dismiss this case now, less than three months before trial," particularly because the breach of contract case was "clearly viable."
- Finally, on December 22, the Court compelled SoftBank to produce allegedly privileged WeWork documents because those documents were sent by SoftBank employees who also worked for Sprint (which was then 84% owned by SoftBank) using their Sprint email accounts.[33] The Court held that the Softbank employees could not have had a reasonable expectation of privacy for those Sprint email accounts and, therefore, those communications were not privileged. This decision emphasizes the risks associated with sending confidential corporate communications to outside directors who use their own companies' email account or accounts that otherwise are subject to third-party access or monitoring.

[31] C.A. No. 2020-0258-AGB, 2020 WL 7346681 (Del. Ch. Dec. 14, 2020).

[32] 430 A.2d 779 (Del. 1981).

[33] C.A. No. 2020-0258-AGB, 2020 WL 7624636 (Del. Ch. Dec. 22, 2020).

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

Sameer Advani 212 728 8587 sadvani@willkie.com	**Charles D. Cording** 212 728 8154 ccording@willkie.com	**Todd G. Cosenza** 212 728 8677 tcosenza@willkie.com	**Shaimaa M. Hussein** 212 728 8638 shussein@willkie.com
Jeffrey B. Korn 212 728 8842 jkorn@willkie.com	**Tariq Mundiya** 212 728 8565 tmundiya@willkie.com	**Martin L. Seidel** 212 728 8385 mseidel@willkie.com	**Vanessa C. Richardson** 212 728 8445 vrichardson@willkie.com