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CLIENT ALERT

Delaware Supreme Court Holds that the Business Judgment Rule Will Protect Redomestication on a "Clear Day"

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On February 4, 2025, the Delaware Supreme Court issued its highly anticipated decision in *Palkon v. Maffei*, C.A. No. 2023-0449-JTL, regarding a challenge to TripAdvisor's conversion from a Delaware corporation into a Nevada corporation. The ruling reversed the Court of Chancery's opinion subjecting the redomestication to entire fairness review based on allegations that moving to Nevada's more "protective" legal regime for fiduciaries would provide a non-ratable benefit to the controlling stockholder and members of the company's board of directors. The Supreme Court's opinion clarified that, under Delaware law, the deferential business judgment rule (rather than the more onerous and exacting entire fairness standard) will protect a fiduciary's decision to move a Delaware corporation elsewhere, so long as the redomestication takes place on a "clear day"—i.e., at a time when the redomestication will not materially benefit the fiduciary as a result of pending claims or litigation.

The Delaware Court of Chancery's Opinion

The complaint in *Palkon* alleged that, in April 2023, the board of directors of TripAdvisor decided to pursue redomestication in Nevada. TripAdvisor's board materials and proxy statement presented various reasons for the redomestication, which included the potential for "greater protection" against "unmeritorious litigation," and noted that TripAdvisor believed that "Nevada law provides greater protection to our directors, officers, and the Company than Delaware law." In June 2023, stockholders voted to approve the move, but the vote would not have been successful without the vote of the controlling stockholder.

Stockholder plaintiffs sought to enjoin the redomestication. Although the Court of Chancery refused to grant the injunction, it nevertheless allowed the plaintiffs to seek damages under the theory that damages could be calculated through, among other things, an analysis of the company's trading price before and after the announcement of the conversion. The Court of Chancery also noted that because, as the stockholders pleaded, "Nevada law provides greater protection to fiduciaries" and the move impaired the litigation rights of minority stockholders, the redomestication conferred a material, non-ratable benefit to TripAdvisor's controlling stockholder. According to the Court of Chancery, TripAdvisor could have insulated the redomestication from judicial review by implementing the dual procedural protections of approval by a disinterested and independent special committee and a majority-of-the-minority stockholder vote.

The Delaware Supreme Court's Opinion

The Delaware Supreme Court unanimously reversed, reasoning that Delaware law generally has exempted from entire fairness review certain kinds of transactions that provide protection to directors from future liability exposure, including procuring D&O insurance policies, adopting advancement and indemnification bylaws, and adopting Section 102(b)(7) provisions exculpating fiduciaries for violations of duties of care. The Delaware Supreme Court held that redomestication should be treated similarly. Thus, a decision to redomesticate will receive the protection of the business judgment rule so long as that decision was made on a "clear day" — such that it did not extinguish any existing potential liability for past conduct. In so holding, the Delaware Supreme Court explained that the "hypothetical and contingent impact of Nevada law on unspecified corporate actions that may or may not occur in the future is too speculative to constitute a material, non-ratable benefit triggering entire fairness review." Here, because the plaintiffs had not "alleged any past conduct that would lead to litigation," the Delaware Supreme Court held that the business judgment rule applied. Finally, though not a basis for reversal, the Delaware Supreme Court noted that its decision furthered the goals of comity by "declining to engage in a cost-benefit analysis of the Delaware and Nevada corporate governance regimes." Such an exercise, the Court ruled, "risks intruding on the value judgments of state legislators and directors of corporations" and is one that courts are "ill-equipped" to undertake.

Conclusion

The Delaware Supreme Court's decision in *Palkon* unquestionably limits potential challenges to redomestication transactions and provides important guidance to corporations that no longer wish to be governed by Delaware law and/or be subject to legal proceedings in the Delaware courts. However, the decision does not eliminate the possibility of such challenges altogether. Stockholders attacking a conversion may be able to survive a legal challenge if they can sufficiently allege that the redomestication will confer a concrete, material benefit to a board of directors or other corporate fiduciaries. Corporate boards who are considering redomestication should accordingly remain vigilant that the record supporting their decision to convert from a Delaware entity sufficiently reflects that the change is taking place on a "clear day," and they should consult counsel as early as possible regarding the redomestication process.

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

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