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Delaware M&A Quarterly

In This Issue:

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Other Practices
Professionals
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Delaware Supreme Court Validates Federal Forum Selection Provision

Recently, in an *en banc* decision in *Salzberg* v. *Sciabacucchi*, the Delaware Supreme Court held as facially valid a forum selection provision in the charter of a Delaware corporation that required claims under the Securities Act of 1933 ("33 Act") to be brought in federal court. The opinion by Justice Valihura reversed an earlier decision of the Court of Chancery in the same matter. State court litigation related to 33 Act claims had increased in the wake of the U.S. Supreme Court's holding in *Cyan, Inc.* v. *Beaver County Employees' Retirement Fund* (discussed here), which held that state and federal courts have concurrent subject matter jurisdiction over 33 Act claims. For the opinion, click here.

Delaware Supreme Court Requires Stockholders to Comply or Object to Supplemental Information Requests by Deadline in Nominating Directors

In *BlackRock Credit Allocation Income Trust* v. *Saba Capital Master Fund, Ltd.*, the Delaware Supreme Court held that two publicly traded, closed-end fund trusts were not required to count votes for director nominees submitted by a dissident stockholder at their annual meetings because, even though the stockholder submitted its initial nominations to the trusts on time, it failed to respond or object to supplemental information requests regarding its nominees within a five-business-day deadline imposed by the trusts' bylaws. The opinion by Justice Valihura emphasized that the five-business-day deadline was unambiguous, that the BlackRock trusts adopted the requirements "on a clear day" and that Saba admitted that at least one-third of the questions were proper (even though at least another third were overly broad). The Supreme Court's *Saba* decision demonstrates the usefulness and importance of all aspects of these so-called "advance notice" bylaws, which are used by the vast majority of public companies to set notice and information requirements for stockholders to submit proposals and director nominations at annual or special meetings, thereby allowing the company sufficient time and information to make recommendations to the stockholders generally. For more, click here.

Delaware Court of Chancery Provides Guidance around Special Committee Approvals in Non-Controller Conflicted Transactions

The Delaware Court of Chancery recently confirmed in *Salladay* v. *Lev* that conditioning a conflicted (but non-controller) transaction upon approval by a fully empowered, disinterested and independent special committee can restore the business judgment standard of review for the transaction (rather than the more burdensome entire fairness standard that would otherwise apply). However, the court (in an opinion by Vice Chancellor Glasscock) found that such

special committee "cleansing" works only if the special committee protections are put in place prior to the commencement of discussions about what might constitute an acceptable price. In *Salladay*, the court held that the company chairman's discussions with the acquirer regarding price created a price collar before the special committee was formed that set the tone for future negotiations, and, therefore, the special committee's approval of the transaction did not restore the business judgment standard of review. For more, click here.

Delaware Court of Chancery Denies Refund of Appraisal Prepayment

In *In re Appraisal of Panera Bread Co.*, the Court of Chancery denied Panera Bread a refund of the difference of the appraised fair value and deal price, which it had prepaid to the appraisal petitioners without having secured a clawback provision if the court determined fair value to be less than what the company paid. The court, in an opinion by Vice Chancellor Zurn, determined that the best evidence of fair value of the company was deal price less synergies due to the reliable sale process and that any alleged flaws in the process did not undermine its reliability. Thus, the petitioners were entitled to $303.44 per share (after deducting $11.56 from the deal price of $315.00). As permitted by Delaware's appraisal statute, the company prepaid the deal price to petitioners in an effort to lessen the amount of interest accruing during the pendency of litigation. The court noted, however, that the statute does not expressly provide for recourse if the company overpays the petitioners without having negotiated a clawback provision, and, therefore, the company was not entitled to a refund of the amount it overpaid. For the opinion, click here.

Delaware Court of Chancery Holds That Minority Members Owed Fiduciary Duties and Exercised Actual Control of LLC

In *Skye Mineral Investors, LLC* v. *DXS Capital (U.S.) Limited*, the Delaware Court of Chancery held, on a motion to dismiss, that it was reasonably conceivable that minority members of a limited liability company, aided and abetted by their non-member affiliates, breached their fiduciary duties to Skye Mineral Partners ("SMP") and other members by intentionally using their contractual veto rights under SMP's LLC agreement to drive the company's subsidiary into bankruptcy to acquire its valuable assets at a substantial discount. The veto rights provision permitted the minority members to exercise their rights in their "sole discretion," and eliminated any obligation to present corporate opportunities to the company or its members. Among other key holdings, the court, in an opinion by Vice Chancellor Slights, held that the minority members owed common law fiduciary duties to SMP and its other members (except for the duty not to usurp corporate opportunities), as the language in the veto rights provision did not "clearly and unambiguously" eliminate or restrict such fiduciary duties. The court also held that the company's two key minority members may have had actual control because their veto rights allowed them "to block *all* of SMP's efforts to finance *any* of its ongoing operations—with either debt or equity" (*i.e.*, "the unilateral power to shut SMP down"). For the opinion, click here.

Delaware Supreme Court Affirms Dismissal of Suit Based on Exculpatory and Independence Principles

Recently in *McElrath* v. *Kalanick*, the Delaware Supreme Court, in an opinion by Chief Justice Seitz, affirmed the Court of Chancery's dismissal of a derivative suit challenging Uber Technologies, Inc.'s acquisition of Ottomotto LLC, holding that a majority of the Uber board was disinterested in the transaction. First, the directors had no real threat of personal liability due to Uber's exculpatory charter provision, and the directors could face a likelihood of liability only if the pleaded facts showed that they acted with scienter (*i.e.*, "actual or constructive knowledge that their conduct was legally improper"). Second, the court confirmed that a majority of the board was independent of the only allegedly interested director. The plaintiff failed to allege facts showing that the directors' relationship to the allegedly interested director was "of a bias-

producing nature" (*i.e.*, "had a personal or financial connection" or "that the directorship was of substantial material importance to him"). For the opinion, click here.

Court of Chancery Issues Standing Order Concerning COVID-19 Precautionary Measures

In response to the coronavirus (COVID-19) pandemic, on March 13, 2020, the Delaware Supreme Court issued an Order Declaring a Judicial Emergency currently effective until April 15, 2020, subject to further review. Each Delaware court, including the Delaware Court of Chancery, has issued a separate standing order addressing the judicial emergency. Pursuant to the Court of Chancery's Standing Order Concerning COVID-19 Precautionary Measures, all hearings and trials are to be conducted only by telephonic or other electronic means unless the presiding judicial officer determines it is not practicable to do so, in which case the hearing or trial will be continued. A party may request by motion that the Court conduct a hearing in-person in the event of exigent need (*e.g.*, the existence of a threat of imminent irreparable harm). In that case, the moving party bears the burden to demonstrate good cause for having an in-person hearing and that all other means of conducting the hearing are impracticable under the circumstances. In addition, in response to an administrative order issued by the Delaware Supreme Court providing that deadlines imposed by court order continue to remain in place, but may be extended for good cause shown, the Court of Chancery issued a statement, noting among other things, that "many hearings and case schedules will have to be adjusted," and that "the court will be solicitous of granting any reasonable requests for extensions." The Delaware Supreme Court administrative order also provides that deadlines in court rules or in state or local statutes applicable to the judiciary, as well as statutes of limitations and statutes of repose, that would otherwise expire between March 23, 2020 and April 15, 2020 are extended through April 21, 2020.

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M&A Markets

The following issues of *M&A at a Glance*, our monthly newsletter on trends in the M&A marketplace and the structural and legal issues that arise in M&A transactions, were published this quarter. Each issue can be accessed by clicking on the date of each publication below.

- January 2020
- February 2020
- March 2020

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