# Some Recent Developments in M&A Litigation

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## Abstract

This paper presents an overview of some of the most important decisions handed down by the Delaware Supreme Court and the Delaware Court of Chancery from February 2016 to October 2016 in lawsuits arising out of Merger and Acquisition (M&A) transactions.

## I. Introduction:

As had been anticipated, the Delaware Court of Chancery's decision on January 22, 2016 in *In Re Trulia, Inc. Stockholder Litigation*[1] led to a dramatic decrease in disclosure-only suits arising out of M&A transactions.

However, the Delaware Supreme Court and the Delaware Chancery Court have handed down significant decisions in the period from February 2016 to October 2016 in issues relating to M&A transactions. This paper briefly sets out the legal principles enunciated in some of these decisions.[2]

## II. Significant Decisions:

Following are some of the important M&A-related decisions handed down by the Delaware Supreme Court and the Delaware Court of Chancery in the period from February to October 2016, in chronological order.

- *Singh v. Attenborough*:[3]

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[1] *In Re Trulia, Inc. Stockholder Litigation*, 129 A.3d 884 (Del.Ch.2016). Consolidated C.A. No. 10020-CB. Decided by the Court of Chancery of the State of Delaware on January 22, 2016. Available at:
http://courts.delaware.gov/opinions/download.aspx?ID=235370.
The Court there had rejected a disclosure only settlement, while stating:

> To be more specific, practitioners should expect that disclosure settlements are likely to be met with continued disfavor in the future unless the supplemental disclosures address a plainly material misrepresentation or omission, and the subject matter of the proposed release is narrowly circumscribed to encompass nothing more than disclosure claims and fiduciary duty claims if the record shows that such claims have been investigated sufficiently.
> (Internal footnote omitted.)

*In Re Trulia, Inc. Stockholder Litigation*, *Id*., at internal page 24 of the opinion.

[2] Because of space limitations, some significant decisions are not set out in this paper. See, for example: *FdG Logistics LLC v. A&R Logistics*. C.A. No. 9706-CB. Decided by the Court of Chancery of the State of Delaware on February 23, 2016. Available at: http://courts.state.de.us/opinions/download.aspx?ID=237210.

[3] *Singh v. Attenborough*. Decided by the Supreme Court of the State of Delaware on May 6, 2016. Order available at:
http://courts.delaware.gov/Opinions/Download.aspx?id=240520.

This was a decision issued by the Supreme Court of the State of Delaware on May 6, 2016. The case related to a merger between Zale Corporation and Signet Jewelers, Limited. Some stockholders of Zale Corporation had alleged breaches of fiduciary duties on the part of the directors in respect of the merger, and the aiding and abetting of those breaches by Zale's financial advisors.

In the first instance, on the defendants' motion, the Delaware Court of Chancery concluded that the directors had committed a breach of their duty of care but dismissed the claims against the directors because of a 102(b)(7) exculpatory clause.[4] However, the Court denied the motion to dismiss the aiding and abetting claim against the financial advisors.[5]

However, the financial advisors moved for reargument on the basis of a subsequently issued decision of the Supreme Court of Delaware.[6] Based on that decision, the Court accepted the financial advisors' contention that the appropriate standard of review for evaluating the directors' conduct regarding their duty of care

[4] The relevant part of Section 102 (b)(7) of the Delaware General Corporation Law states:

> § 102 Contents of certificate of incorporation
> (a) ....
> (b) In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters:
> …
> (7) A provision eliminating or limiting the personal liability a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director' s duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii)...; (iv) for any transaction from which the director derived an improper personal benefit....

[5] *In Re Zale Corporation Stockholders Litigation*. Consolidated C.A. No. 9388-VCP. Decided by the Court of Chancery of the State of Delaware on October 1, 2015. 2015 WL 5853693. Available at: http://courts.delaware.gov/opinions/download.aspx?ID=230480.

[6] In the case of *Corwin v. KKR Financial Holdings LLC*. 125 A.3d 304 (Del. 2015). Decided by the Supreme Court of the State of Delaware on October 2, 2015.

should have been the Business Judgment Rule standard rather than the enhanced scrutiny *Revlon* standard which the Court had earlier applied. Applying the Business Judgment Rule standard, the Court held that the allegations in the complaint were not sufficient to show that the directors had breached their duty of care and therefore there could be no aiding and abetting liability on the part of the financial advisors.[7]

The Delaware Supreme Court affirmed the judgment of the Chancery Court that "a fully informed, uncoerced vote of the disinterested stockholders invoked the business judgment rule standard of review."[8]

Importantly, the Delaware Supreme Court observed:

> "When the business judgment rule standard of review is invoked because of a vote, dismissal is typically the result. That is because the vestigial waste exception has long had little real-world relevance, because it has been understood that stockholders would be unlikely to approve a transaction that is wasteful."[9] (Internal citations omitted)

The opinion of the Chancery Court and its affirmation by the Delaware Supreme Court sets out certain aspects of the liability of financial advisors for aiding and abetting breaches of fiduciary duties on the part of the board of directors.

- *In Re: Appraisal of Dell, Inc.*:[10]

This case arose from a 2013 going-private merger, whereby Dell, Inc. merged with Michael Dell-affiliated entities and a private equity firm. The merger agreement provided that each publicly traded share of the common stock of the company would be converted into a right to receive a specified amount per share in cash, with the holders retaining their right to seek appraisal.[11] After the closing of the merger, thirteen

[7] *In Re Zale Corporation Stockholders Litigation* (Motion for reargument). Decided by the Court of Chancery of the State of Delaware on October 29, 2015. Available at: http://courts.delaware.gov/opinions/download.aspx?ID=231670.
[8] *Singh v. Attenborough, supra* note 3, at internal pages 1 and 2 of the Order.
[9] *Singh v. Attenborough, supra* note 3, at internal pages 2 and 3 of the Order.
[10] *In Re: Appraisal of Dell Inc*. Decided by the Court of Chancery of the State of Delaware on May 11, 2016, 143 A.3d 20 (Del.Ch.2016).
[11] Appraisal rights are provided for in § 262 of the Delaware General Corporation Law.

appraisal petitions were filed by former shareholders. The litigation involved two different issues. One related to the question of entitlement to appraisal. The other related to the core question of fair value. The present ruling, delivered post-trial by the Court of Chancery on May 11, 2016, related to the question of the right to seek appraisal by a certain specified block of appraisal petitioners. (referred to in the Court's opinion as "T. Rowe Petitioners") who had directed the holder of record of their shares to vote against the merger. However, due to a convoluted series of circumstances, the shares had been inadvertently voted in favor of the merger. The Court held that this block of appraisal petitioners ("T. Rowe Petitioners") were not entitled to appraisal as they did not satisfy the requirement of § 262 (a) of the Delaware General Corporate Law that fair value appraisal petitioners should have "neither voted in favor of the merger or consolidation nor consented thereto in writing pursuant to § 228 of this title...." The precedents on this issue might have suggested a contrary conclusion. The Court, however, distinguished the precedents principally on the basis that unlike in the precedents, the evidence in this case showed that the specified block of petitioners' shares had in fact been voted in favor of the merger.

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Subsections (a) and (h) of § 262, in relevant part, state:

> (a) Any stockholder of a corporation of this State who holds shares of stock on the date of the making of a demand pursuant to subsection (d) of this section with respect to such shares, who continuously holds such shares through the effective date of the merger or consolidation, who has otherwise complied with subsection (d) of this section and who has neither voted in favor of the merger or consolidation nor consented thereto in writing pursuant to § 228 of this title shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock under the circumstances described in subsections (b) and (c) of this section....
> …
> (h) After the Court determines the stockholders entitled to an appraisal, the appraisal proceeding shall be conducted in accordance with the rules of the Court of Chancery, including any rules specifically governing the appraisal proceedings. Through such proceeding the Court shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, together with interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors....

● *In Re Chelsea Therapeutics International Ltd. Stockholders Litigation*:[12]

This case was a class action lawsuit instituted by the stockholders of a corporation that was sold through a tender offer and a short-form merger, The Plaintiffs alleged that the directors had committed breaches of their duty of loyalty by selling the company at a price below its actual value. The plaintiffs sought to enjoin the deal from closing but were unable to get a preliminary injunction. Thereupon, the plaintiffs sought post-closing damages. Upon defendants' motion, the Court dismissed the plaintiffs' claims. The Court noted that the duty of loyalty had two aspects. One aspect encompassed, inter alia, the requirement that "action must be in the interest of the corporation and its owners, the stockholders; the duty prohibits actions for the benefit of the director herself, or others to whom she is beholden, absent entire fairness to the corporation."[13] Another aspect of the duty of loyalty, the Court postulated, was "that disinterested, independent directors act in good faith."[14] This required the directors to act only for the corporate weal and that they do not deliberately avoid performing their duty. However – the Court noted – bad faith could also be intuited when "even though there is no indication of conflicted interests or lack of independence on the part of the directors, the nature of their action can in no way be understood as in the corporate interest: *res ipsa loquitar*."[15] The Court characterized this component of good faith as "a rara avis."[16] The plaintiffs based their case on the theory that the defendants had acted in bad faith.[17] The Court held that the plaintiffs had not stated a case

[12] *In Re Chelsea Therapeutics International Ltd. Stockholders Litigation*. Consol. C.A. No. 9640-VCG. Decided by the Court of Chancery of the State of Delaware on May 20, 2016. Memorandum Opinion available at: http://courts.delaware.gov/Opinions/Download.aspx?id=241140.

[13] *Id*., at internal page 1 of the opinion.

[14] *Id*., at internal page 1 of the opinion.

[15] *Id*., at internal pages 1 and 2 of the opinion.

[16] *Id*., at internal page 2 of the opinion.

[17] In addressing the bad faith claim, the Court noted:

> As this Court explained in *Dent v. Ramtron International Corp*., to state a bad-faith claim, a plaintiff must show Either "an 'extreme set of facts' " to establish that " 'disinterested directors were intentionally disregarding duties,' " or that "the decision under attack is so far beyond the bounds of reasonable judgment that it seems inexplicable on any ground other than bad faith." (Internal citations omitted)

showing that the defendants had acted in bad faith, and on that footing, dismissed the complaint.

● *In Re: Appraisal of Dell Inc*.:[18]

This case related to the appraisal of fair value of the shares relating to the previously mentioned Dell merger. The petitioners were stockholders of Dell, Inc. at the time of its merger. They had opposed merger and therefore were entitled to an appraisal of the fair value of their shares at the time of the merger. At the meeting held to approve the deal, holders of 57% of the outstanding shares voted to approve the merger.

In its legal analysis of the fair value in the case, the Court noted that under the terms of Section 262 (h) of the DGCL, it is the Court that is required to determine the fair value of the shares.[19] The Court cited numerous Delaware precedents which set out the basic principles regarding the appraisal of fair value.[20]

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*In Re Chelsea Therapeutics International Ltd. Stockholders Litigation*

*Id*, at internal page 16 of the opinion.

[18] *In Re: Appraisal of Dell Inc*. C.A. No.9322-VCL. Decided by the Court of Chancery of the State of Delaware on May 31,2016. Memorandum Opinion available at: http://courts.delaware.gov/Opinions/Download.aspx?id=241590.

[19] *Id*., at internal page 41 of the opinion.

[20] The Court quoted at length the Delaware Supreme Court's opinion in *Tri-Continental Corp. v. Battye*, 74 A.2d 71,72 (Del. 1950), regarding value. The passage quoted by the Delaware Court of Chancery reads:

> The basic concept of value under the appraisal statute is that the stockholder is entitled to be paid for that which has been taken from him, *viz*., his proportionate interest in a going concern. By value of the stockholder's proportionate interest is meant the true or intrinsic value of his stock which has been taken by the merger. In determining what figure represents the true or intrinsic value....the courts must take into consideration all factors and elements which reasonably might enter into the fixing of value. Thus, market value, asset value, dividends, earning prospects, the nature of the enterprise and any other facts which were known or which could be ascertained as of the date of the merger and which throw any light on future prospects of the merged corporation are not only pertinent to an inquiry as to the value of the dissenting stockholder's interest, but must be considered.... (Internal citations omitted)

Citing a plethora of considerations, the Court of Chancery rejected the company's contention that the final merger price was the best evidence of fair value.[21] A few of the factors that weighed with the Court were the following: The present case

The passage above is quoted in the Delaware Court of Chancery's Opinion, *supra* note 18, at internal page 45.

[21] The Delaware Court of Chancery also extensively quoted the opinion of the Delaware Supreme Court in *Golden Telecom, Inc. v. Glob. GT LP* (*Golden Telecom II*) 11 A.3d 214, 217-18 (Del. 2010) (footnotes omitted). The passage quoted states:

> Section 262 (h) neither dictates nor even contemplates that the Court of Chancery should consider the transactional market price of the underlying company. Rather, in determining "fair value," the statute instructs that the court "shall take into account all relevant factors." Importantly, this Court has defined "fair value" as the value to a stockholder of the firm as a going concern, as opposed to the firm's value in the context of an acquisition or other transaction. Determining "fair value" through "all relevant factors" may be an imperfect process, but the General Assembly has determined it to be an appropriately fair process....
> Section 262 (h) unambiguously calls upon the Court of Chancery to perform an *independent* evaluation of "fair value" at the time of the transaction. It vests the Chancellor and Vice Chancellors with significant discretion to consider "all relevant factors" and determine the going concern value of the underlying company. Requiring the Court of Chancery to defer – conclusively or presumptively – to the merger price, even in the face of a pristine, unchallenged transactional process, would contravene the unambiguous language of the statute and the reasoned holdings of our precedent. It would inappropriately shift the responsibility to determine "fair value" from the court to the private parties. Also, While it is difficult for the Chancellor and Vice Chancellors to assess wildly divergent expert opinions regarding value, inflexible rules governing appraisal provide little additional benefit in determining "fair value" because of the already high costs of appraisal actions….Therefore, we reject… [the] call to establish a rule requiring the Court of Chancery to defer to the merger price in any appraisal proceeding.

(The passage above is quoted in the Court's Opinion, *supra* note 18 at internal pages 48-49.)

was a management buyout and hence to be distinguished from a typical arm's length transaction because of the information differential between the two; the active bidders were financial buyers who use LBO model because of their IRR requirements, rather than strategic buyers; the evidence suggested a wide gap between the market price of the company and its real value; and the unique value of the founder Michael Dell to the company and the fact that he was part of the buyout group.

The Court considered the sale process to have been flawed, causing various anomalies that resulted in mispricing. On that basis, the Court ruled that the merger consideration did not constitute the fair value of the company. Using a Discounted Cash Flow analysis, the Court concluded that the fair value of the company at the closing date of the merger was $ 17.62 per share, which was $ 3.87 higher than the merger consideration price of $ 13.75 per share.[22]

- *In Re Volcano Corporation Stockholder Litigation*:[23]

This was an action instituted by the former stockholders of an acquired corporation against the directors and the financial advisor of the corporation alleging breaches of fiduciary duties on the part of the directors and aiding and abetting of those breaches on the part of the financial advisor. The defendants filed a motion to dismiss, invoking Rule 12(b)(6) of the Delaware Court of Chancery. Upon a consideration of the facts, the Court granted defendants' motion to dismiss. In doing so, the Court applied the Delaware Supreme Court's ruling in *Corwin v. KKR Financial*

[22] In a follow-up motion regarding the attorneys' fees of the claimants, the Chancery Court relied upon the factors spelled out in *Sugarland Industries, Inc. v. Thomas*, 420 A.2d 142 (Del. 1980), as summarized by the Delaware Supreme Court in *Ams.Mining Corp. v. Theriault*, 51 A.3d 1213, 1254 (Del.2012). Quoting the Supreme Court, the Court noted that the factors were: "1) the results achieved; 2) the time and effort of counsel; 3) the relative complexities of the litigation; 4) any contingency factor; and 5) the standing and ability of counsel involved." *In Re: Appraisal of Dell Inc*. Consolidated C.A.No.9322-VCL. Decided by the Court of Chancery of the State of Delaware on October 17, 2016. Memorandum Opinion available at: http://courts.delaware.gov/Opinions/Download.aspx?id=247530. The passage quoted above is at internal page 26 of the Opinion. In the light of the factors cited, the Court ruled that the fees sought by the attorneys were reasonable.

[23] *In Re Volcano Corporation Stockholder Litigation*. Consolidated C.A. No. 10485-VCMR. Decided by the Court of Chancery of the State of Delaware on June 30, 2016. Available at: http://courts.delaware.gov/Opinions/Download.aspx?id=243120.

*Holdings, LLC*[24] to a two-step merger under DGCL §251 which was undertaken in the present case. The Court's ruling, inter alia, sets out the following: "1. The fully informed, uncoerced, disinterested approval of a merger by a corporation's outstanding shares pursuant to a statutorily required vote renders the business judgment rule irrebuttable";[25] "2. Stockholder acceptance of a tender offer pursuant to a Section 251(h) merger has the same cleansing effect as a stockholder vote in favor of a transaction";[26] "3. Volcano's stockholders were full informed, disinterested, and uncoerced."[27] The Court held that the merger could only be challenged on the grounds of waste which the plaintiffs had not pled. On that basis, the Court granted the defendants' motion to dismiss the complaint.

- *In Re Appraisal of DFC Global Corporation*:[28]

In this case, the petitioners were former stockholders of a corporation that was sold to a private equity buyer. The petitioners sought the Court's appraisal of the fair value of their shares held by them, contending that the sale price was lower than its fair value due to a temporary period of uncertainty. In calculating the fair value, the petitioner's expert used a discounted cash flow model relying on the projections issued by the management. The respondent's expert used a combination of a discounted cash flow model and a multiples-based comparable companies analysis. The Court rejected the transaction price as the fair value, stating:

> Although this Court frequently defers to a transaction price that was the product of an arm's-length process and a robust bidding environment, that price is reliable only when the market conditions leading to the

[24] *Supra* note 6.

[25] *In Re Volcano Corporation Stockholder Litigation, supra* note 23, at internal page 22 of the opinion. The detailed discussion of this point runs from internal pages 22 to 28 of the opinion.

[26] *Id.*, at internal page 28 of the opinion. The detailed discussion of this point runs from internal pages 28 to 41 of the opinion.

[27] *Id.*, at internal page 41 of the opinion. The detailed discussion of this point runs from internal pages 41 to 47 of the opinion.

[28] *In Re Appraisal of DFC Global Corporation*. Consolidated C.A.No.10107-CB. Decided by the Court of Chancery of the State of Delaware on July 8, 2016. Memorandum Opinion available at: http://courts.delaware.gov/Opinions/Download.aspx?id=243400.

> transaction are conducive to achieving a fair price. Similarly, a discounted cash flow model is only as reliable as the financial projections used in it and other underlying assumptions. The transaction here was negotiated during a period of significant company turmoil and regulatory uncertainty, calling into question the reliability of the transaction price as well as management's financial projections. Thus, neither of these proposed metrics to value DFC stands out as being inherently more reliable than the other.[29]

The Court conducted its own valuation analysis using a combination of a discounted cash flow model appropriately adapted to suit the facts of the case, a comparable company analysis, and the transaction price and arrived at a fair value that was somewhere between the figures proffered by the petitioners' and respondents' experts.

- *In Re Riverstone National, Inc. Stockholder Litigation*:[30]

This case was filed by the minority stockholders of a corporation, inter alia, challenging the fairness of the corporation's merger on the ground that the majority of directors had committed a breach of their fiduciary duty of loyalty. The plaintiffs alleged that the board of directors caused the merger to happen, whereby one of the merger terms had the effect of preemptively staving off a potential impending derivative lawsuit against the directors by the stockholders for breach of fiduciary duty on the ground of usurpation of corporate opportunity. Under the terms of the merger agreement, the acquirer waived the right to pursue the cause of action against the directors. The plaintiffs claimed that this chose-in-action was a corporate asset, the abandonment of which was not adequately compensated for by the merger price,

[29] *Id.*, at internal pages 1 and 2 of the opinion.

[30] *In Re Riverstone National, Inc. Stockholder Litigation*. Consolidated C.A. No. 9796-VCG. Decided by the Court of Chancery of the State of Delaware on July 28, 2016. Memorandum Opinion available at: http://courts.delaware.gov/Opinions/Download.aspx?id=244240.

thereby resulting in unfairness to the minority shareholders. The defendant directors filed motions to dismiss on the ground that their actions were to be evaluated on the basis of the business judgment rule. The court noted that the applicability of the business judgment rule was a rebuttable presumption, and that the facts pled in the complaint in this case were adequate to overcome the presumption. Specifically, the Court stated:

> [T]he Plaintiffs plead particularized facts with respect to individual directors showing the existence of a chose-in-action against the directors which, if brought as a claim would have survived a motion to dismiss; that the director at the time of negotiating and recommending the merger was aware of the potential action; that the potential for liability was material to the director; and that the directors obtained and recommended an agreement that extinguished the claim directly by contract. Where, as here, such a pleading is made with respect to a majority of the directors, the complaint is sufficient to rebut the business judgment rule.[31]

The business judgment rule having been rebutted, the Court found that "entire fairness" was the appropriate standard of review in the present case for evaluating the plaintiffs' allegation of usurpation of corporate opportunity by the defendant directors.[32] In addition to the applicability of the entire fairness standard, the Court also concluded

[31] *Id.*, at internal page 22 of the opinion.

[32] With reference to the usurpation of corporate opportunity, the Court noted that the germane factors identified by the Supreme Court of Delaware in *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 155 (Del.1996), were:

> " (1) the corporation is financially able to exploit the opportunity; (2) the opportunity is within the corporation's line of business; (3) the corporation has an interest or expectancy in the opportunity; and (4) by taking the opportunity for his own, the corporate fiduciary will thereby be placed in a position inimicable to his duties to the corporation."

(*Supra* note 30, at internal page 23 of the opinion.)

that the facts pled in the complaint indicated that the merger was unfair and that the plaintiffs' claim regarding the defendants' breach of their fiduciary duty of loyalty survived the motions to dismiss.

- *City of Miami General Employees v. Comstock*:[33]

This case involved a stockholder challenge to a merger on the ground of breaches of fiduciary duty. Upon plaintiff's application for a preliminary injunction, the Chancery Court enjoined the closing of the merger until the target company had solicited alternative bids within a 30-day period. On appeal, the Delaware Supreme Court reversed the order of injunction. Thereupon, the closing of the merger was completed with a majority vote of the target company's stockholders. The plaintiff made a post-closing amendment of its complaint seeking damages for breaches of fiduciary duties on the part of certain officers of the target company along with an aiding and abetting claim against others. The defendants moved the Chancery Court seeking a dismissal of the amended complaint and recovery of damages.

The Court rejected the various allegations put forward by the plaintiff regarding the sale process and the proxy disclosures. The Court also noted the situation resulting from the Supreme Court's reversal of the preliminary injunction. Finding that this case involved a non-controller transaction and that it had been approved by a majority of fully informed stockholders, the Court declined to use the entire fairness review standard as urged by the plaintiff and instead applied the deferential business judgment standard as required by the Delaware Supreme Court's decision in *Corwin v. KKR Financial Holdings LLC*.[34] Applying the business judgment standard of review, the Chancery Court granted the defendants' motion to dismiss. The Court also granted the plaintiff's motion for damages.

[33] *City of Miami General Employees' Retirement Trust v. Jerry M. Comstock and others*. C.A. No. 9980-CB. Decided by the Court of Chancery of the State of Delaware on August 24, 2016. Available at: http://courts.delaware.gov/Opinions/Download.aspx?id=245350.

[34] *Corwin v. KKR Financial Holdings*., 125 A.3d 304. Decided by the Supreme Court of the State of Delaware on October 2, 2015. Available at: http://courts.delaware.gov/opinions/download.aspx?ID=230530.

- *Larkin v. Shah*:[35]

In this case, former stockholders of an acquired corporation (Auspex) brought suit challenging the merger and seeking post-closing damages, on the grounds that the directors had committed breaches of their fiduciary duties in allowing a flawed sales process whereby the stockholders were denied suitable consideration for the shares they held. The plaintiffs alleged that a controlling stockholder seeking personal benefit had influenced the board into approving the merger to the detriment of the other stockholders, or in the alternative, that the majority of board members had actual conflicts of interest during the sale process. For this reason, the plaintiff urged the Court to apply the entire fairness standard of review. The defendants moved the Court to dismiss the plaintiffs' complaint contending, inter alia, that the business judgment standard of review applied. The Court accepted the defendants' argument and granted the defendants' motion to dismiss the complaint. In considering the facts of the case, the Court's opinion states:

> [A]nalysis of the applicable standard of review follows three analytical markers: (1) when disinterested, fully informed, uncoerced stockholders approve a transaction absent a looming conflicted controller, the irrebuttable business judgment rule applies; (2) there was no looming conflicted controller in this case; (3) the challenged merger was properly approved by disinterested, uncoerced Auspex stockholders.[36]

After a detailed examination of the pled facts in the light of applicable precedents, the Court concluded that the deferential business judgment standard of review, rather than the exacting entire fairness standard, was applicable in the present case. The Court noted that a claim for waste could defeat the application of the

[35] *Larkin and another v. Shah and others*. C.A. No.10918-VCS. Decided by the Court of Chancery of the State of Delaware on August 25, 2016. Available at: http://courts.delaware.gov/Opinions/Download.aspx?id=245400.

[36] *Larkin v. Shah, id*., at internal page 21 of the Opinion. (In a footnote to the passage quoted above, the Opinion explains that "proper stockholder approval" refers "to an uncoerced, fully informed vote or tender of a majority of outstanding shares owned by disinterested stockholders.")

business judgment rule, but the plaintiffs in the present claim had made no such claim. In the event, the Court dismissed the plaintiffs' complaint. The Court also denied the plaintiffs' request to amend the complaint.

- *An Nguyen v. Michael G. Barrett*:[37]

In this case, the stockholder of a corporation brought a class action challenging the corporation's merger agreement on the grounds of breaches of fiduciary duty by the directors and the aiding and abetting of those breaches by another, and on the ground of violations of disclosure requirements. Before the closing of the merger, the plaintiff moved the court for expedition of the proceedings and for a preliminary injunction urging only one of the disclosure violations. The Court denied injunctive relief. The plaintiff filed an interlocutory appeal before the Delaware Supreme Court which, too, was denied. Thereupon, the merger transaction closed with a large majority of the corporation's shares being tendered. In the post-closing action, the plaintiff amended his complaint and sought damages alleging two disclosure violations, one of which was the same as that urged in support of the preliminary injunction. Upon defendants' motion, the Court dismissed the amended complaint. In its ruling, the Court made a distinction between a pre-close and a post-close disclosure claim. The Opinion states:

> In order to sustain a *pre-close* disclosure claim, heard
> on a motion for preliminary injunctive relief, a plaintiff
> must demonstrate "a reasonable likelihood of proving
> that the alleged omission or misrepresentation is material;
> by contrast, when asserting a disclosure claim for
> for damages against directors *post-close*, a plaintiff
> must allege facts making it reasonably conceivable that
> there has been a non-exculpated breach of fiduciary duty
> by the board in failing to make a material disclosure.
> ....
> Where, as here, an exculpation provision under

[37] *An Nguyen v. Michael G. Barrett*. C.A. No. 11511-VCG. Decided by the Court of Chancery of the State of Delaware on September 28, 2016. Memorandum Opinion available at: http://courts.delaware.gov/Opinions/Download.aspx?id=246500.

> 8 Del.C. § 102(b)(7) shields a board from duty-of-care Claims, this means a plaintiff must demonstrate that a majority of the board was not disinterested or independent, or that the board was otherwise disloyal because it failed to act in good faith, in failing to make the material disclosure. A showing of bad faith requires an "extreme set of facts to establish that disinterested directors were intentionally disregarding their duties or that the decision...[was] so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."[38]
> (Internal citations omitted)

On the basis of the facts pled in the complaint, the Court held that the exacting standards of a post-close disclosure claim had not been met, and on that footing dismissed the amended complaint.

- *In Re Books-A-Million, Inc. Stockholders Litigation*:[39]

In this case, the controlling stockholders of a corporation took it private through a squeeze-out merger, whereby the minority stockholders were given the right to receive a specified amount per share that they held, subject to their right to appraisal of fair value. The minority stockholders challenged the merger and made a post-closing claim for damages contending breaches of fiduciary duties on the part of the controlling stockholders, the directors, and certain officers, and the aiding and abetting of such breaches by others. The plaintiffs made their claim on the basis that the offered price per share was lower than another offer that the controlling stockholders did not want to accept. Upon defendants' motion, the Court dismissed

[38] *An Nguyen v. Michael G. Barrett, id.*, at internal pages 7 and 8 of the opinion (internal citations omitted).

[39] *In Re Books-A-Million, Inc. Stockholders Litigation*. Consolidated C.A. No. 11343-VCL. Decided by the Court of Chancery of the State of Delaware on October 10, 2016. Memorandum Opinion available at: http://courts.delaware.gov/Opinions/Download.aspx?id=247090.

the complaint because the merger transaction had comported with the framework set out by the Delaware Supreme Court in respect of controlling-stockholder mergers in *Kahn v. M&F Worldwide Corporation*.[40] Due to this compliance, the Court held that the deferential business judgment standard of review applied. The Court further explained: "Under that standard of review, the court will defer to the judgments made by the corporation's fiduciaries unless the Merger is so extreme as to suggest waste."[41] As the merger in the present case did not constitute waste, the complaint was dismissed.

[40] *Kahn v. M&F Worldwide Corp*., 88 A.3d 635 (Del. 2014). The framework as set out by the Delaware Supreme Court and quoted in the Court's opinion is:

> (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority."
>
> *In Re Books-A-Million, Inc. Stockholders Litigation supra* note 39, at internal page 16 of the Opinion.

[41] *In Re Books-A-Million, Inc. Stockholders Litigation*, *supra* note 39, at internal page 1 of the Opinion. Quoting from precedents, the Court further stated at internal page 41 of the Opinion:

> "Once the elements of *M&F* Worldwide are met, the business judgment rule provides the operative standard of review. "Under that rule, the court is precluded from inquiring into the substantive fairness of the merger, and must dismiss the challenge to the merger unless the merger's terms were so disparate that no rational person acting in good faith could have thought the merger was fair to the minority." *MFW*, 67 A.3d 496 at 500. "[It is] logically difficult to conceptualize how a plaintiff can ultimately prove a waste or gift claim in the face of a decision by fully informed, uncoerced, independent stockholders to ratify the transaction." *Huizenga*, 751 A.2d at 901. By definition, at that point, rational people who were members of the minority thought the merger was fair."

## III. Conclusion:

The preceding overview provides a brief conspectus of the evolving jurisprudence of the Delaware Supreme Court and the Delaware Court of Chancery in issues relating to Merger and Acquisition transactions, serving to reinforce their reputation as the leading Courts in the United States in respect of matters relating to corporate law.

# 合併と買収（M&A）訴訟における近年の進展

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## 要　約

この論文では、2016年2月から2016年10月まで合併と買収（M&A）訴訟において、デラウエア最高裁判所とデラウエア大法官府裁判所（Delaware Court of Chancery）が下した最も重要な判決のいくつかを概観している。