GET IN TOUCH

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QUESTIONS OR COMMENTS?

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Quarterly Corporate / M&A Decisions Update

Below is our Quarterly Corporate / M&A Decisions Update for decisions in Q4 2017 and selected others. This Update is designed to highlight selected important M&A, corporate and commercial court decisions on a quarterly basis. Brief summaries of each decision appear below with links to more robust discussions. Please contact us with any questions.

Robert Lenois v. Kase Lukman Lawal, et al.

C.A. No. 11963-VCMR (Del. Ch. Nov. 7, 2017)

Why is it important

This decision demonstrates that, even in circumstances where a transaction is dominated by a controller alleged to have acted in bad faith, a company nonetheless may obtain dismissal of shareholder derivative claims where there is no basis to find that a majority of the board of directors, aided by a special committee with independent legal and financial advisors, acted in bad faith or otherwise engaged in conduct that would create a risk of personal liability outside the scope of a Section 102(b)(7) exculpatory clause.

Summary

The CEO of Erin Energy Corporation ("Erin" or the "Company") led negotiations of a multi-step offshore asset purchase that resulted in the Company's acquisition of oil mining rights in Nigeria from an entity controlled by the CEO. The transactions were negotiated and approved by an independent committee, with the aid of independent legal and financial advisors. A minority shareholder brought breach of fiduciary duty claims against the CEO, alleging that he stood on all sides of the transaction, dominated the process and negotiated the deal out of self-interest, and the board of directors for approving the purportedly unfair transactions. Despite the allegations against the CEO, the Delaware Court of Chancery dismissed the plaintiff's derivative claims for failing to adequately plead demand futility, which is a prerequisite that must be established in order for a shareholder to bring claims on behalf of the company. The court held that where a company has an exculpatory provision in its charter pursuant to 8 Del. C. § 102(b)(7), as Erin did, shareholders must adequately plead that a majority of the board of directors faces a substantial likelihood of liability for non-exculpated claims in order to plead demand futility. Because the plaintiff failed to plead allegations sufficient to create a reasonable doubt regarding the good faith of a majority of the Board members, the court held that demand was not excused and dismissed the complaint.

*Please click **HERE** for a more detailed discussion of this case.*

Sarissa Capital Domestic Fund LP, et al. v. Innoviva, Inc.

C.A. No. 2017-0309-JRS (Del. Ch. Dec. 8, 2017)

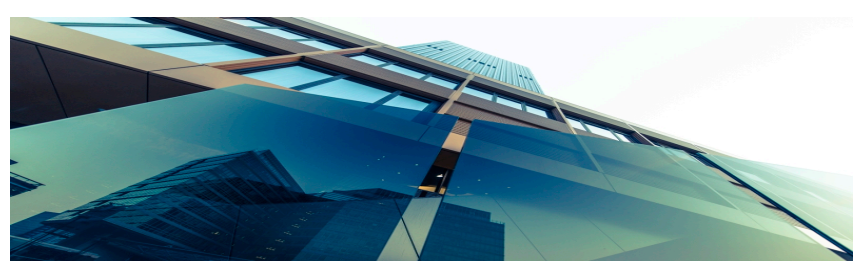
Why is it important

This decision demonstrates that, unless an oral agreement is expressly conditioned upon the execution of a written contract, Delaware courts will enforce an oral agreement provided the agreement is sufficiently definite and entered into by a corporate representative that is duly authorized or otherwise acting with actual or apparent authority to bind the company.

Summary

The plaintiff hedge funds ("Sarissa") launched a proxy contest to elect three members to defendant Innoviva, Inc.'s ("Innoviva" or the "Company") board of directors (the "Board"). When the parties' respective proxy solicitors indicated that the vote was too close to call, the parties' settlement discussions intensified but appeared to be unsuccessful. However, after learning less than 24 hours before the vote that one of its largest shareholders, The Vanguard Group, Inc., would vote for Sarissa's nominees, the Board quickly convened and authorized the Chairman of the Board to convey a settlement offer to Sarissa's founder and Chief Investment Officer that removed the principle obstacle to settlement – the Company's insistence that Sarissa agree to a standstill. By telephone, the parties' representatives agreed on the essential terms – (1) Innoviva would settle without a standstill; (2) Innoviva would expand its Board from seven to nine members and appoint two of Sarissa's three nominees; and (3) the parties would issue a joint press release announcing the settlement that contained a conciliatory quote from Sarissa regarding the Company. Later that night, while the parties were preparing the settlement documentation, the Company learned that another of its largest shareholders, BlackRock, Inc., unexpectedly had voted in favor of the Board's slate of directors. As a result, the Company reneged on the deal. Sarissa sued pursuant to DGCL Section 225 seeking a declaration that the parties had entered into a binding agreement and seeking specific enforcement. In a post-trial opinion, the court concluded that the Chairman of the Board had actual or apparent authority to bind the Company, that the oral agreement was sufficiently definite to be enforceable and that specific performance was warranted.

*Please click **HERE** for a more detailed discussion of this case.*



IRA Trust f/b/o Bobbie Ahmed v. Crane, et al.

C.A. No. 12742-CB (Del. Ch. Dec. 11, 2017)

Why is it important

In this decision, the Delaware Court of Chancery held that the *MFW* framework adopted by Delaware courts in the context of squeeze-out merger transactions also applies to conflicted stock issuances. This decision highlights that Delaware courts are likely to hold that conflicted controller transactions in whatever form are subject to review under the deferential business judgment standard if, consistent with the *MFW* framework, they are conditioned at the outset on both the approval of an independent, adequately-empowered special committee of directors and the uncoerced, informed vote of a majority of the minority stockholders.

Summary

The plaintiff brought a class action challenging a *pro rata* stock split that preserved the voting control of the company's controlling stockholder, which also managed the day-to-day affairs of the business. The court held that the transaction constituted a conflicted controller transaction presumptively subject to rigorous entire fairness review standard because even though it was a *pro rata* stock split the controlling stockholder received a "unique" or "non-ratable" benefit not shared with the company's other stockholders. However, relying on a number of decisions endorsing the application of the *MFW* framework to circumstances other than squeeze-out mergers, the court decided to review the stock split under the business judgment rule because the transaction was conditioned at the outset on the approval of the company's conflicts committee, comprised of independent directors, and the approval of the majority of the minority stockholders. Therefore, because the plaintiff failed to plead facts sufficient to overcome the business judgment rule, the court dismissed the complaint.

*Please click **HERE** for a more detailed discussion of this case.*

Dell, Inc. v. Magnetar Global Event Driven Master Fund, Ltd.

C.A. No. 9322-VCL (Del. Ch. Dec. 14, 2017)

Why is it important

Although the Delaware Supreme Court declined to adopt a bright-line rule requiring courts to consider the deal price when assessing fair value in an appraisal proceeding, this decision reinforces the significant weight that may be afforded to deal price where there is a sufficiently robust, arm's-length sale process.

Summary

Former stockholders of Dell commenced an appraisal proceeding challenging the acquisition of Dell, Inc. by Michael Dell, the company's Founder, Chairman, and Chief Executive Officer, and private equity firm Silver Lake Partners for US$13.75 per share in cash. In its post-trial decision, the Court of Chancery declined to assign any weight to the deal price, and held that the fair value of Dell's shares exceeded the deal price by 28 percent based on the court's own discounted cash flow analysis. The Delaware Supreme Court reversed and remanded the case to the Court of Chancery to either enter judgment at the deal price without further proceedings or otherwise render a decision in accord with accepted financial principles.

*Please click **HERE** for a more detailed discussion of this case.*

Lavin v. West Corporation

C.A. No. 2017-0547-JRS (Del. Ch. Dec. 29, 2017)

Why is it important

The Delaware Chancery Court ruled that the *Corwin* doctrine—which creates an irrebuttable presumption of business judgment rule protection when a transaction is ratified by a fully informed and uncoerced stockholder vote—cannot be invoked to bar a stockholder's demand to inspect books and records under Section 220 of the Delaware General Corporation Law.

Summary

A stockholder commenced a Section 220 books and records action to investigate potential wrongdoing and mismanagement by the company's directors in connection with a proposed merger that was approved by the majority of the stockholders. In its post-trial decision, the Court of Chancery held that the stockholder had alleged a credible basis on which to infer that wrongdoing might have occurred in connection with the merger, and directed the company to allow the stockholder to inspect certain books and records. In so holding, the court rejected the company's contention that the *Corwin* doctrine barred inspection under Section 220, but recognized that the stockholder still bore the burden of overcoming the *Corwin* doctrine in a subsequent plenary action.

*Please click **HERE** for a more detailed discussion of this case.*