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M&A/PE QUARTERLY

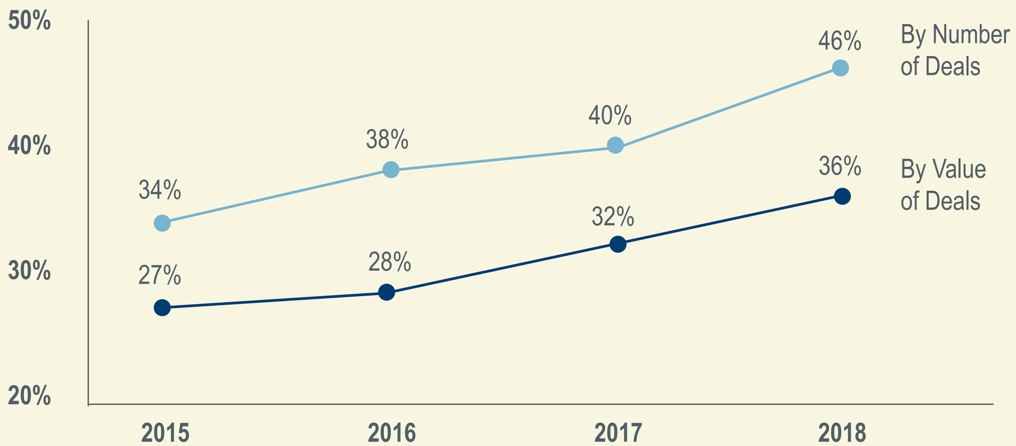
A quarterly round-up of key M&A/PE developments

December 2018

PE Represents Increasing Portion of Overall M&A Activity

Over the last few years, private equity has accounted for an increasing portion of M&A activity. PE deals represented about 36% of overall M&A activity measured by deal values, and about 46% measured by number of deals closed, in 2018 (through October 31).

Private Equity as a Percentage of Overall M&A Activity



Data derived from Prequin.

4Q 2018 Delaware Decisions Are Notable for Rulings That Are Infrequently Made—Finding a MAC, Duty of Loyalty Breaches, Aiding and Abetting, Corwin Non-Applicability, and Fraud

Akorn, PLX, Tangoe, Xura, *and* Plimus

The major themes of the Delaware decisions issued in 2018 were (a) the continued rejection of fiduciary claims (with many fewer fiduciary cases filed than in the past), and (b) the continued emphasis on judicial interpretation of agreement provisions based on the "contractarian" approach (with more contract dispute cases filed than in the past). Notably, in the last quarter of the year, the Court of Chancery made a number of rulings of a type seen only infrequently—but these decisions at the same time reaffirmed the highly fact-specific nature of such rulings and the high bar to a plaintiff's obtaining them.

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In the key decisions issued this quarter:

- ***MAC.*** The court found, for the first time ever, that a target company "material adverse change" had occurred between signing and closing, which permitted the buyer to terminate the merger agreement. (The decision has been affirmed by the Delaware Supreme Court.) As the target's decline was extreme, the decision underscores that it will continue to be difficult to establish the occurrence of a MAC that permits termination of a deal. (*Akorn*)

- ***Duty of loyalty.*** The court found in two cases that directors, and in one case that a CEO, breached the fiduciary duty of loyalty in connection with a sale of the company. As the fiduciaries' actions were egregious in each of these cases, the decisions are consistent with the court's approach of finding loyalty violations only when the facts are extreme. (*PLX, Tangoe, Xura*)

- ***Aiding and abetting.*** The court found that an activist stockholder with designees on the target company's board aided and abetted fiduciary breaches by the directors in connection with a sale of the company. The court suggested that the company's banker (which had settled the claims against it prior to trial) also had aided and abetted the breaches. The context included the particularly egregious fact that one of the activist's board designees (who was its managing partner and was serving as the company's lead negotiator in the sale discussions) and the banker withheld from the board material information about the buyer's intentions with respect to bidding. The decision thus reflects that there still is a high bar to establishing aiding and abetting. (*PLX*)

- ***Corwin.*** The court found in a few cases that *Corwin* business judgment review was not applicable to a challenged sale of the company because the stockholder approval was not "fully informed" (*PLX, Tangoe, Xura*). Each of these cases involved serious disclosure violations that went to the core of the fiduciary claims being asserted; thus, in our view, they do *not* indicate any change in the court's general approach of broad applicability of *Corwin*.

- ***Fraud***. The court held that a false representation by selling stockholders in a merger agreement constituted fraud by the CEO-stockholder who knew that the representation was false. As the misrepresentation was material to the business, and the overall factual context reflected numerous examples of highly questionable conduct by the conflicted CEO, the decision reaffirms that there continues to be a high bar to establishing fraud. (*Plimus*)

A number of sub-themes emerge from these decisions:

- ***Foundation for board decisions.*** While a sale process can be more than minimally flawed and still found to be within the range of reasonableness required by *Revlon*, the court remains focused on the fundamental duty of a board to have a rational foundation for its decisions that is based on the interests of the stockholders (and not based on the directors' personal interests). A board should consider whether any directors are conflicted, evaluate how to address any conflicts, and document the basis for its decisions (especially when the decision represents a change in the board's previous view).

- ***Lead negotiator conflicts.*** The court continues to focus particularly on conflicts of a lead negotiator for sale of the company—including, for example, with respect to compensation he or she would receive on a sale and/or negotiations for post-closing employment with the acquired company (particularly if his or her employment is likely to be terminated if there is not a sale). A board should carefully consider who should serve as the lead negotiator, should consider whether that person has any conflicts and (if so) how to address them, and should monitor and understand what the lead negotiator is doing during the process.

- ***Possible delisting scenario.*** *Tangoe* highlights (as the 2017 *Saba Software* decision also did) that, when a company faces delisting and deregistration due to an ongoing failure to complete a required restatement of financial statements, the board is in a particularly sensitive position that a quick sale of the company will not necessarily solve. In this situation, a board should pay special attention to the disclosure to stockholders relating to the likely timing of completion of the restatement and the reasons for its not yet having been completed, and should be sure to evaluate the alternative of the company continuing on a stand-alone basis.

Below, we discuss the key points from these decisions and summarize other decisions of note issued during the quarter.

Key Decisions Issued in 4Q 2018—Akorn, PLX, Tangoe, Xura, *and* Plimus

Akorn v. Fresenius (Oct. 17, 2018, affirmed by the Delaware Supreme Court Dec. 7, 2018)

The Court of Chancery found—for the first time ever—that, between signing and closing of a merger agreement, a target company (Akorn, Inc.) had experienced a "material adverse change" (MAC) that permitted termination of the agreement by the buyer (Fresenius Kabi AB). On appeal, the Delaware Supreme Court quickly, and with little commentary, affirmed. The decision reflects, however, that there is still a high bar to establishing a MAC—given that the company's decline in this case was so extreme, had substantial "durational significance," and was compounded by the company's long-term, serious regulatory non-compliance. The decision also serves essentially as a primer by Vice Chancellor Laster on the court's approach to interpreting many contractual provisions that are common in merger and other corporate agreements.

- **Still a high bar to establishing a MAC*.*** The court applied the traditional Delaware framework for evaluating (under a typical MAC clause) whether a MAC had occurred—that is, whether the changes represented, from the viewpoint of a reasonable long-term investor, a material decline in the earnings power of the company, based on "company-specific" (rather than "industry-wide") factors. *Importantly, the decline in this case and its "durational significance" were far more dramatic than in previous cases in which the court has evaluated whether a MAC had occurred.* This suggests that it will continue to be difficult to establish the occurrence of a MAC. Of note, the court (i) reiterated that there is no "bright-line test" for the occurrence of a MAC; (ii) rejected the concept that MAC clauses *implicitly* allocate to the buyer risks "known" to it at the time of signing; and (iii) found that the emergence of new competitors for the company's top three products was a "company-specific" (rather than an "industry-wide") change (and, even if an industry-wide change, had disproportionately affected the target, based on its performance as compared to its peers).

- **Emphasis on a contractarian approach to interpreting standard agreement provisions*.*** Throughout the 246-page opinion, the court reiterated that Delaware, as a "contractarian" jurisdiction, relies on the specific words of an agreement and will not "read in" concepts that the parties did not specifically provide for. The decision thus underscores the importance of ensuring that merger agreement provisions as drafted accurately reflect the parties' business understandings and that any special issues or concerns relating to the company, the business, the industry or the transaction are expressly and specifically dealt with in the agreement. Of note:

    - ***Reasonable best efforts to close.*** In finding that the buyer had the right to terminate the agreement and had not breached its obligation to use "reasonable best efforts" to close, the court emphasized that the buyer had kept moving diligently toward closing (including seeking regulatory approvals and seeking to "problem-solve"), even though material problems had surfaced, the company had engaged in fraud, and the buyer was evaluating whether it had a right to terminate.

    - ***Efforts standards.*** The court indicated that "reasonable best efforts" and "commercially reasonable efforts" standards, for practical purposes, impose the same obligation—to take all reasonable steps to problem-solve and to consummate the transaction; and that, while "best efforts" may represent a higher standard than these, it is still "implicitly qualified by a reasonableness test—it cannot mean everything possible under the sun."

    - ***Ordinary course covenant.*** In finding that the target materially breached the interim covenant to operate in the ordinary course between signing and closing, the court evaluated the target's decisions as compared to those that "a generic pharmaceutical company" would make in the ordinary course of business. The court held that this breach of the interim covenant provided a second, independent basis (in addition to the occurrence of the MAC) for the buyer's right to terminate the agreement. (The Delaware Supreme Court, in its affirmance, stated that it was unnecessary for it to address—and thus it did not affirm—this aspect of the decision given that it affirmed that the buyer had the right to terminate based on a MAC having occurred.)

- ○ ***Regulatory noncompliance.*** In finding, as a separate, third basis for a right to terminate the agreement, that the target's regulatory noncompliance breached the compliance representation to the extent of a MAE, the court observed that remediation would take several years, would cost the equivalent of 21% of the target's market capitalization, and would have lasting "qualitative" effects on the company.

- ○ ***Buyer change in divestiture strategy.*** In finding that the buyer had not materially breached any covenant in the agreement, the court held that a change in the divestiture strategy that had been presented to the regulator did not breach the covenant to take no action that would be expected to delay the closing, because the buyer reverted to the original strategy within a week and the diversion was not expected to delay the closing date.

For further discussion and practice points, see here the Fried Frank M&A/PE Briefing, "Court of Chancery's Commentary in Akorn*—on MAC and Other Standard Merger Agreement Provisions—Prompts New Drafting Considerations."*

In re PLX Technology Inc. (Oct. 16, 2018)

The Court of Chancery found that an activist stockholder (Potomac Capital Partners (the "Activist")), which had designees on the board of a target company (PLX Technology Inc.), had aided and abetted a breach of the duty of loyalty by the target directors. The court also suggested, in dicta, that the company's financial advisor (the "Banker") likely had aided and abetted the breach as well. The court, finding that the stockholder approval of the sale was not "fully informed," rejected the defendants' *Corwin* defense, applied the *Revlon* standard of review, and found that the directors had breached the duty of loyalty by succumbing to the Activist's pressure to effect a quick sale of the company (to Avago Technologies Wireless USA Inc.). However, the court also held that the plaintiff had not proved that any damages flowed from the breach, as the arm's-length merger price likely was the best indication of the company's value. Vice Chancellor Laster therefore entered judgment for the Activist. (The directors and the Banker had settled the claims against them before trial.) The decision is most instructive as a guide to the series of errors by the board, the Activist and the Banker that led to the unusual findings in this case.

- ■ **Series of missteps by the board, the activist, and the Banker.** It is to be noted that damages are rarely awarded based on fiduciary claims because, first, duty of *care* breaches by directors are typically exculpated and, second, duty of *loyalty* breaches are found only in the case of truly egregious facts. There is also a high bar to establishing aiding and abetting of fiduciary breaches (including a requirement of "knowing participation," which involves scienter). Thus, it generally takes an extraordinary series of missteps for directors to be found to have liability for fiduciary breaches or for a stockholder, banker or other third party to be found to have aided and abetted such breaches. As discussed below, these types of missteps generally can be easily avoided without affecting the parties' ability to effectuate the desired transaction.

- ■ **Critical egregious factor relating to the sale process.** The decision underscores that, even in the case of a flawed process, the potential for director liability for fiduciary breaches or third party liability for aiding and abetting is remote. The court identified numerous problematic factors in this sale process, but stated that, notwithstanding these, the court *still* would have viewed it as *clearly* within the range of reasonableness required by *Revlon* but for "one additional critical fact." That fact was that the lead negotiator for the company (who was the co-managing partner of the Activist and one of the Activist's designees on the board) ("ES") and the Banker withheld from the target board material information that the buyer had told the Banker (and the Banker had shared with ES). The information was that the buyer planned to make an acquisition proposal for the target and it included the buyer's intended timing and pricing. The decision thus highlights the importance of the board's identifying conflicts of interest, selecting an appropriate person as the lead negotiator for the company, and monitoring and understanding what the lead negotiator is doing (particularly if that person may have dual loyalties or other conflicts). Notably, the court seemed to suggest that, at least in a potential conflict situation, the board may have some affirmative obligation to seek to determine whether any director or the banker has information that should be shared with the board.

- **Conflict of interest arose from a misguided approach.** The company had disclosed that, during the go-shop period for a merger with another company, which had recently been terminated (due to antitrust issues), one competing bidder for the company had emerged. The Activist had acquired a significant equity stake at very depressed prices following the termination of that merger and then had commenced an activist campaign for a near-term sale of the company to whomever that competing bidder had been. The Activist's sole investment thesis was that the price offered by the competing bidder likely had been close to the merger price in the terminated deal—which was far above the prices the Activist had paid for its company shares. We note that the Activist may have believed (and it may well have been the case) that such a sale would benefit all of the stockholders. However, the court concluded that the Activist had a divergent interest from the other stockholders because the Activist's *stated* objective was to achieve for itself a short-term profit on the shares it had acquired following the terminated deal and the Activist's *sole* focus was on pressing for a quick sale to the competing bidder (which turned out to be Avago). Critically, the Activist did not consider, and indicated that it was not open to considering, the possibility of any other route to enhancing the company's value. The Activist's divergent interest, the court stated, triggered a heightened scrutiny standard of judicial review and led to judicial skepticism about the sale process that was led by ES (who the Activist had designated to the board).

- **Avoiding missteps.** It appears that, with only minor modification to any of a number of the steps that were taken by the Activist, ES, the target board, and/or the Banker, the very same transaction could have been approved with essentially no vulnerability to successful challenge. First, and most notably, if the Activist's divergent interest had been disclosed to the stockholders, then (so long as the other disclosure to the stockholders had been adequate), *Corwin* business judgment review (rather than the enhanced scrutiny of *Revlon*) likely would have applied and the case would have been dismissed at the early pleading stage. Even under *Revlon* review, however, in our judgment, with any of the following changes, the court almost certainly would not have found a fiduciary breach:

    - the target board had formed a rational foundation for changing its view that it was the wrong time to sell the company (rather than having framed its decision to sell the company in terms of a capitulation to the Activist due to the Activist having gained the support of other stockholders and the proxy firm ISS);

    - the sale process had been run by someone other than ES (or the board had provided consistent oversight of ES);

    - the Activist's director-designees had evaluated what was in the interests of *all* of the target stockholders (rather than only the Activist's interest);

    - the target board itself had more carefully considered what was in the interests of *all* of the stockholders (including by obtaining a standalone valuation for the company and an explanation of changes that had been made in the company's projections); and/or, most importantly,

    - the Banker and/or ES had shared with the target board the information they had obtained about the buyer's intended timing and pricing for an acquisition proposal.

- **Reminder of the following principles:** The decision serves as a reminder that:

    - ***Board foundation for its decisions.*** With respect to any board decision, a board obviously should have a rational basis for the board's belief that the decision is in the best interests of all of the stockholders and should have a foundation for any change in the board's view. Depending on the facts and circumstances, capitulation to a stockholder to "head off" a proxy contest, or because of support the stockholder has garnered, may not itself be sufficient as a basis for a board decision to support the stockholder's agenda.

    - ***Not conceding to an influential stockholder.*** Where independent directors constitute a majority of the board (as was the case with the PLX board, including after the Activist's successful proxy contest), it is unlikely that the board would be in a position where it would have no choice but to concede to an activist's agenda (*i.e.*, even in the face of an influential stockholder advocating for a deal, a board generally can "just say no").

- ***Dual loyalties.*** Directors with loyalties to both the company and a stockholder who appointed them must consider the interests of all of the stockholders, not just the appointing stockholder's interests.

- ***Passive-only sale process.*** A passive-only sale process (*i.e.*, without any active solicitation of competing bids) can satisfy a board's Revlon duties (if accompanied by only limited deal protection provisions).

- ***Aiding and abetting without director liability.*** It is possible for a third party (such as a banker or dominant stockholder) to have aiding and abetting liability for a breach by directors as to which the directors themselves have no liability because they were exculpated or the claims against them were settled.

- ***Partial disclosure.*** Partial disclosure relating to an otherwise immaterial matter (such as projections not relied on by the company's banker) may lead to an obligation for "full" disclosure with respect to that matter (such as that those projections indicated values above the deal price).

For further discussion and practice points, see here the Fried Frank M&A/PE Briefing, "Series of Avoidable Missteps by an Activist Stockholder and the Target Board Led the Court of Chancery to Find Fiduciary Breaches and Stockholder Aiding and Abetting in Connection With the Sale of a Company—PLX Technology.*"*

In re Tangoe (Nov. 20, 2018)

The Court of Chancery ruled, at the pleading stage, that, in connection with the sale of a company (Tangoe, Inc.) to a private equity firm (Marlin Partners), the facts alleged supported a reasonable inference that the directors had breached their duty of loyalty by focusing on their compensation in the event of a sale rather than considering whether the alternative of the company remaining as a standalone would (as appeared to be the case) create more value for the stockholders. Vice Chancellor Slights ruled, first, that *Corwin* business judgment review of the challenged transaction was not applicable because the stockholder approval of the sale was not "fully informed" (and likely also was "coerced"). The decision highlights that, although stockholders may agitate for a quick sale when a company faces potential delisting and deregistration due to an ongoing failure of the company to produce a required restatement of financials, a sale is not necessarily a clear path for the board out of the difficulties. *Tangoe* (and also the 2017 *Saba Software* decision) indicate that, in this situation, at a minimum, the board should ensure that it discloses to the stockholders the likely timing for completion of the required restatement and/or the reasons why it has not been completed—so that the stockholders, when considering whether to approve a sale recommended by the board, can evaluate whether the company's continuing as a standalone entity is a feasible alternative.

- **Still broad applicability of *Corwin.*** *Corwin* provides for business judgment review (and, so, dismissal at the early pleading stage) of challenged transactions that were approved by stockholders in a vote that was "fully informed" and not "coerced." *Tangoe* is one of only a handful of cases in which the court has held *Corwin* to be inapplicable based on the stockholder vote not meeting these criteria. Notably, the factual situation in this case was very similar to that in *Saba Software*, which was the first case in which the court ever found *Corwin* to be inapplicable. In both cases, the company being sold was in the midst of potential delisting and deregistration due to an ongoing, years-long, unexplained failure of the board to complete a required restatement of financials. Moreover, in both cases, the company did not disclose to stockholders why the restatement had not been completed or when it would be, if ever. The court concluded in *Tangoe* and *Saba* that the stockholders, faced with a "Hobson's choice" of retaining potentially illiquid stock or approving an all-cash deal (albeit at a depressed price), chose the all-cash deal while not having the information necessary to evaluate whether the company had a realistic alternative of remaining as a standalone company. Notably, in both cases, if the disclosure to stockholders had been viewed by the court as adequate (and thus *Corwin* had applied), the cases would have been dismissed at the pleading stage of litigation—even though the court viewed the plaintiffs' claims as establishing a reasonable inference of a breach of fiduciary duties by the target directors.

- **Inadequate disclosure.** The court found that the Tangoe stockholder vote was not "fully informed" because (i) the stockholders had not been provided audited financial statements and (ii) the board had not explained whether the Restatement ever would be completed or when it might be. Audited financial statements were material, the court stated, because, throughout the uncertainties relating to the Restatement, the financial information the board provided to stockholders was "sporadic and heavily qualified." The "information vacuum" under which the stockholders were operating was highlighted by the facts that the board: (i) cautioned the stockholders that the unaudited financials were preliminary, not in accordance with GAAP, and likely to be adjusted in the future; (ii) chose not to disclose an outside firm's "quality of earnings" report that the board obtained to address some of the uncertainties relating to the company's financial situation; (iii) failed to file multiple quarterly reports in 2016; and (iv) had not held an annual stockholder's meeting for three years.

  Information about whether and when a Restatement would be completed was also critical to the stockholders' evaluation of the proposed sale, the court stated. The court noted that the board knew, but chose not to share with the stockholders, that the Restatement was close to being completed (*i.e.*, the forensic work was completed and only the "formal audit" remained). By not disclosing this to the stockholders, the board "deprived them of the opportunity to consider whether to stay the course and allow the Restatement to proceed or whether to sell as the consequences of the unfinished Restatement were still unfolding." The information about the Restatement process was material because "the delisting depressed the amount potential acquirers were willing to pay for Tangoe and stockholders needed to understand whether the delisting was likely to continue or whether the Company had a legitimate prospect of completing the Restatement and regaining its listed status with NASDAQ."

- **Likely coercion.** The court stated that, having determined that the vote was not fully informed, there was no need for the court to determine whether the vote had also been coerced. However, the court wrote: "*Saba* likely foretells where that analysis would lead me." As discussed above, in *Saba*, Vice Chancellor Slights decided that the "Hobson's choice of either retaining stock that was likely to become illiquid or taking an all-cash deal" was "situationally coercive."

- **Directors' improper focus on their compensation.** The court found that the directors' motivation to approve the sale was based on their own self-interest rather than the interest of the stockholders and they therefore breached the duty of loyalty. The court also ruled that, even while the stock declined as the company faced the prospect, and then the reality, of delisting, "the Board's focus was on Board and executive compensation" rather than on enhancing value for the stockholders. After the board's financial advisor told the board that no strategic buyers were interested in considering an acquisition of the company unless the board completed the Restatement, "the Board was not moved" to complete it. Rather, the board "diverted focus and resources from the Restatement process and fixed its sights on Board compensation and a quick deal with any of the financial sponsors who were willing to look past the Restatement delays." The board adopted a new compensation scheme to get around the prohibition on awards being made under the existing compensation plan pending completion of the restatement; and then made numerous awards to themselves under the new plan which would be payable on a sale of the company.

- **Still a high bar for duty of loyalty claims.** It is well-established that the court will find claims of duty of loyalty violations to have been adequately pled only in unusual cases involving truly egregious conduct by directors. We observe that the directors' conduct in *Tangoe* apparently was egregious. The directors made misstatements to the SEC, which created a need for restated financial statements; failed, without explanation and over a years-long period, to produce the restatements; provided no explanation or information to the stockholders about the failure to produce the restatements; when considering whether to sell the company rather than complete the restatements and remain independent, did not evaluate the stand-alone option—although it appeared to be the option with the potential for greater value for the stockholders; and, when deciding to sell the company (at a negative 28% premium), significantly increased the compensation that would be payable to them when the company was sold.

In Re Xura, Inc. Stockholder Litigation (Dec. 10, 2018)

The Court of Chancery rejected the defendants' motion to dismiss fiduciary claims against the CEO ("PT") of a target company (Xura, Inc.) in connection with his acting as lead negotiator for the company's sale to a private equity firm (Siris). Vice Chancellor Slights found that *Corwin* did not apply at the pleading stage because the stockholder approval of the sale was not "fully informed." The Vice Chancellor also found that the alleged facts supported an inference that PT had steered the company into the sale based on his personal interest in remaining employed post-closing, particularly in light of his knowledge that the board was dissatisfied with his performance and would terminate his employment if the company were not sold.

- **Standing to bring suit notwithstanding a pending appraisal case.** The stockholder-plaintiff brought this fiduciary suit based on information that it obtained in the appraisal case it had previously filed relating to the sale of the company. The court rejected PT's argument that the plaintiff lacked standing to pursue breach of fiduciary duty claims because of the pending appraisal case. The court distinguished *Aristotle* (2012), where the court had rejected a plaintiff's attempt to "complicate a pending appraisal case by asserting 'late-breaking' breach of fiduciary duty claims that would only yield them a right to a 'quasi' version of something they already possess[ed] in its actual form." The court stated that, in *Aristotle*, the plaintiff's fiduciary claim focused on alleged disclosure violations; but that, in *Xura*, the gravamen of the fiduciary claims was that a conflicted fiduciary directed the company to consummate an undervalued transaction for reasons other than the best interests of the stockholders—and the disclosure violation claims were pled primarily as a response to the defendant's *Corwin* defense. Also, the court observed, in *Aristotle*, the plaintiff sought only quasi-appraisal as a remedy for the alleged fiduciary breach, while, in *Xura*, the plaintiff sought more traditional post-closing remedies, including rescissory damages and disgorgement (remedies that the court has held that a shareholder has standing to pursue while also pursuing an appraisal remedy).

- ***Corwin* non-applicability due to undisclosed process flaws and conflicts.** The court, noting that even "one disclosure violation is sufficient to prevent application of *Corwin*," found that the plaintiff adequately pled seven. There was no disclosure that: (i) PT and the buyer communicated about the transaction in private, without the knowledge or approval of the target company board or its banker; (ii) PT negotiated price terms with the buyer without the board's approval and PT advised the buyer what offer the board would accept; (iii) the buyer repeatedly indicated that it wanted to continue to work with PT and other company managers post-closing; (iv) the Strategic Committee of the board did not do the work attributed to it in the proxy statement (rather, it had actually acted only as an informal "check-in" point for PT—indeed, one member of the Committee did not even know that the Committee had been formed and that he was a member of it); (v) when, during negotiations with the buyer, another private equity firm expressed interest in offering a superior bid, that firm somehow learned that Siris was the proposed buyer and the firm then did not bid and instead moved its financial support to Siris's bid; (vi) another potentially interested competing bidder did not bid after being offered an opportunity to co-invest its equity with Siris in support of Siris's bid; and (vii) PT, while negotiating the deal with Siris, received word from Xura's chairman that PT's employment at Xura would be in jeopardy if the company were not sold.

  The court acknowledged that boards need not "engage in self-flagellation in their public disclosures." Here, however, the court emphasized that the stockholders could not make an informed judgment about the proposed sale while being "entirely ignorant of the extent to which [PT] influenced the negotiations and ultimate terms of the Transaction, not to mention his possible self-interested motivation for pushing an allegedly undervalued Transaction on the Company and its stockholders."

- **The lead negotiator's divergent interests and fiduciary breach.** The court found that the plaintiff had well pled that PT's interests—"e.g., a $25 million payout and continued employment post-closing in the face of his looming termination from stand-alone Xura"—were different from those of the other stockholders. "Continued employment in itself is a material interest," the court wrote. Moreover, the conflict was compounded in this case by the fact that, as PT was engaged in unauthorized discussions with Siris, he knew that both the board and stockholder activists were displeased with his performance and likely would terminate his employment if a sale of the company did not occur. Furthermore, PT knew that Siris had consistently emphasized that it wanted to work with him post-closing. The decision (like *PLX*, discussed above) underscores the need for a board to carefully consider who the lead negotiator for the company should be and to understand and monitor what the lead negotiator is doing, particularly if he or she has conflicts of interests.

Great Hill Equity v. SIG Growth Equity ("Plimus") (Dec. 3, 2018)

The Court of Chancery ruled that, in connection with the sale of a company (BlueSnap, Inc., formerly known as Plimus Inc.) to a private equity fund (Great Hill Equity Partners), a misrepresentation in the merger agreement by the sellers constituted fraud by the one seller (the then-CEO of Plimus ("HT")) who knew that the representation was false. (The other defendants were private equity firm SIG (which was a major stockholder) and other Plimus stockholders, including the Plimus founders, two directors who were SIG designees, and a non-profit group that had received a donation of Plimus shares.) Vice Chancellor Glasscock also held that the buyer was entitled to indemnification, up to the escrowed cap amount provided in the merger agreement, for other representations that were inaccurate (but that did not constitute fraud as the defendants did not have the knowledge and scienter required for fraud and/or the misrepresentations were not material). The Vice Chancellor deferred judgment on the buyer's unjust enrichment claim pending further proceedings to determine the amount of damages.

- **Breach of the representation relating to termination of supplier contracts.** The sellers represented in the merger agreement that no supplier "has notified the Company…that it intends to terminate its business relationship with the Company." They confirmed the accuracy of the representation at the closing. Soon after the closing, a major supplier, PayPal, terminated its agreement with the company. The plaintiffs learned at that time that, between signing and closing of the merger agreement, PayPal had made numerous threats to terminate. The sellers argued that they did not breach the representation that no suppliers had notified the company that they intended to terminate their agreements because the company had not received any termination notice prior to closing. The court found, however, that the bringdown of the representation was false. The court concluded that the "plain language" of the representation "does not require a notice of termination; only a notification of an intent to terminate." Such an intent had been expressed, the court found, in emails and calls to the company in the two months preceding closing. The court observed that the company "was aware of the PayPal representatives' declarative statements that PayPal would send a termination notice once certain conditions were met."

- **Breach of the representation constituted fraud.** The court held that the misrepresentation constituted fraud by HT. First, the court found that HT *had knowledge* that the representation was false. Second, the court found that HT had *intended that the buyer rely* on the falsehood—because he "wanted the merger to go forward," as he was "set to continue as CEO after the merger" and would receive substantial compensation triggered by the merger. (The court acknowledged that HT thought that PayPal would not actually terminate the contract and that he could resolve the issue with them post-closing; however, the court stated, he "undoubtedly recognized that [the] problems with PayPal could have a negative effect on the merger.") Third, the court found that the termination threats were *material information*—because the loss of PayPal would be the loss of a second major supplier in a matter of a few months, would represent a "major disruption" to the target's business, and was based on issues that were "ongoing problems" for the company. Finally, the court found that the buyer had *justifiably relied* on the false representation—as "the target company was contractually bound to disclose this information, and [the buyer] was entitled to rely that disclosures were not knowingly false"; the buyer had completed its due diligence and signed the merger agreement before PayPal threatened termination and so could not have discovered the threats through pre-signing diligence; and, during the period between signing and closing, the buyer was "relying on [HT] to raise issues that required…attention."

- **Overall factual context supported a finding of fraud.**

  - ***History of regulatory non-compliance.*** The company apparently had a long history of knowing and deliberate regulatory noncompliance and an ongoing failure to cure violations despite receiving notices from vendors that the noncompliance constituted breaches of their agreements with the company.

  - ***HT's conflicts.*** HT was entitled to a substantial transaction bonus upon a sale of the company. Moreover, parallel to the pre-signing due diligence process, the buyer (which was "buying into [HT]'s vision" for the company) and HT were negotiating the terms of HT's continued employment and the roll-over of his equity. When there was a dispute between HT and the buyer relating to his bonus amount, HT told the buyer that, unless he got his way, he would have "little interest" in a sale of the company to the buyer. The disputes over HT's bonus and the size of his rollover were the sole issues that delayed signing of the deal at the end of the process.

- ***General lack of candor.*** HT appeared to take a generally less than truthful approach during the sale process. For example:

  - With respect to the other major supplier's termination of its agreement with the company, HT (i) in an email to another company manager, stated that he had to "think about ways to communicate" the termination to the buyer so it would not raise concerns; (ii) changed the draft schedule to the merger agreement that had been prepared by the company's legal counsel, so that instead of stating (accurately) that the contract was terminated by the supplier, the schedule stated that the contract was "mutually terminated"—and then HT decided to simply remove the draft schedule (this knowing misrepresentation did not constitute fraud, however, the court found, as the termination of this contract was not material); and (iii) the correspondence relating to the termination was never actually placed in the due diligence data room, although all of the company representatives thought that it had been.

  - With respect to the PayPal termination threats and another issue, HT instructed the CFO not to bring up these topics on the bring-down call prior to closing, and that he himself would bring them to the buyer's attention separately, but he never did.

  - Post-signing, HT caused the company to engage in a credit card processing industry practice known as "load balancing"—which, while not illegal (and not necessarily prohibited by the merger agreement), is typically used only because it creates a misleading picture that understates regulatory non-compliance.

  - To curry favor with the buyer, HT told the buyer (inaccurately) that the CFO was incompetent and was telling "white lies."

- **Fraud exception to exclusive remedies clause.** The indemnification section of the merger agreement provided that a specified amount of the proceeds would be held in escrow to cover indemnification for any breaches of the sellers' representations and warranties. It also provided that indemnification liability would be capped at the escrowed amount and that each seller's liability would be limited to his pro rata portion of the escrow amount. An exclusive remedies clause provided that indemnification would be the sole and exclusive remedy for a breach of a representation or warranty, "except in the case of fraud or intentional misrepresentation (for which no limitations set forth herein shall be applicable)."

  The plaintiffs contended that, in the case of fraud, the sellers' indemnification liability for the misrepresentation was "without limit"—that is, that they could seek indemnification without being subject to the indemnification cap and with the sellers being jointly (rather than only severally) liable. The court held that the fraud carve-out meant that the buyer could seek damages for fraud in tort, and not that it could seek *unlimited indemnification* for the fraud. As a result, only the selling stockholder who committed the fraud (*i.e.*, HT, who knew that the representation was false and intended that the buyer rely on it) was liable for it, and not the selling stockholders jointly. The court found that the Exclusive Remedy clause was "not unambiguous" on this point, as the fraud carve-out "[did] not address whose fraud will trigger the provision." The court therefore looked to the contract as a whole to answer the question, and found that it reflected a "thoughtful, bargained-for liability scheme" under which "*fraudsters* [would be exempted] from the benefits of the negotiated limits on liability" (but not that non-fraudsters would be so exempted).

- **Earlier decisions in the case.** This case is also notable for the court's holdings in decisions issued in 2013 and 2014. In those decisions, the Court of Chancery ruled that the buyer was entitled to use in its complaint pre-closing communications among the target company directors (obtained from the company's email server), and attorney-client protected information, the ownership of which passed to the buyer in the merger because the sellers had not expressly retained ownership of it. The court also ruled that, to withstand a motion to dismiss a fraud-based claim, the plaintiff was not required to plead that the sellers had "knowingly participated" in the fraud, but only that the fraud "was knowable" and the sellers were "in a position to know it."

Other 4Q 2018 Decisions and Developments of Note

Riche v. Pappas (Oct. 2, 2018)—**Directors May Have Breached Their Duty of Loyalty By Going Along With an "Activist" Stockholder's Plan for Sale of the Company (When the Activist Had a Track Record of Forcing Companies into Quick Sales and the Board "Ignored" a Competing Bidder)**

In an oral ruling from the bench, Vice Chancellor Laster reached what seems to be a somewhat surprising result—but may reflect a general skepticism about the board's process and disclosures in this case. The Vice Chancellor rejected the defendants' motion to dismiss claims that the independent board of U.S. Geothermal Inc. had breached its duty of loyalty in connection with the sale of the company to Ormat Technologies Inc. Until JCP Investment Management, a hedge fund, acquired 15% of the company's stock, and its principal ("JP") joined the board, the board had had no intention of selling the company. After JP advocated for a sale, the board engaged in a sale process and sold the company. The plaintiff learned post-closing that, soon after joining the board, JP had stated in an email to the CEO of another company ("TEP") that JP "need[ed] an exit strategy" from the investment. The plaintiff also alleged, based on another email and other evidence, that TEP had wanted to bid during the sale process but was "stonewalled" and "ignored."

The board was comprised of Geothermal's CEO and six independent directors including JP. The plaintiff argued that JP controlled the board, as evidenced by the fact that the board had had no intention of selling the company but then did so within six months after JP joined the board and advocated for a sale. The plaintiff contended that, even if JP were deemed not to be a controller, the board had acted in bad faith by deciding to sell the company to comply with JP's wishes rather than considering the interests of all of the stockholders. The other directors were motivated, he asserted, to avoid the reputational embarrassment of a proxy contest (which, he contended, was implicitly threatened when JP talked about needing "board changes"). The plaintiff argued that *Corwin* did not apply because JP was a controller who was conflicted due to his divergent interest in wanting liquidity, and therefore entire fairness was the appropriate standard of review. The plaintiff contended further that, if JP were deemed not to be a controller, then *Corwin* did not apply due to inadequate disclosure to the stockholders, and *Revlon* would be the appropriate standard of review.

The defendants argued that no facts were alleged to support the plaintiff's suggestion that the 15% stockholder could have controlled or unduly influenced five clearly independent directors, nor why any of the directors would have preferred to do the Ormat all-cash deal if there had been a credible higher priced all-cash deal. They argued also that no facts were alleged that suggested (as required under established case law) that JP's interest in liquidity was of an "extreme" nature that created an "emergency situation" for JP such that it would indicate a divergent interest from the other stockholders. The defendants also stated that JP had not threatened a proxy contest. Finally, the defendants asserted that the board had engaged in a 15 months-long process involving ten potential bidders; and it had not viewed TEP as a "credible buyer" because (although this was disputed by the plaintiff) TEP's financing was uncertain and TEP was known as a "finder" of bids that typically only took a small participation in other parties' bids.

The court agreed with the plaintiff that *Corwin* did not apply at the pleading stage. First, the court agreed that JP might be a conflicted controller. The court commented that JP "most likely" was *not* a controller but that, at the pleading stage, it was "not a lunatic idea." Also, the court found that, at the pleading stage, it was reasonably conceivable that JCP's desire for liquidity constituted a divergent interest. The court asked the defendants' counsel: "Imagine a world where a company's highest and best use alternative is to remain independent. Then you have one director who looks around and says, 'Man, I need an exit strategy'…. Explain to me why that wouldn't, at least at the pleading stage, support an inference that that person might be incented to do something other than pursue the best value and remain independent." Second, the court agreed that the disclosure to stockholders was inadequate. This conclusion apparently was based on the stockholders not having been told about the two emails, both of which the plaintiff uncovered post-closing. In one, as noted, JP wrote to the CEO of TEP that JP "need[ed] an exit strategy." In the other, the day after the Ormat deal was signed, TEP wrote to JP: "Why did you enter into agreement yesterday? I was willing to pay more." The court also found that, based on the plaintiff's allegations, it was reasonably conceivable that the directors had acted in bad faith by going along with JP's alleged divergent interest in a quick sale. Apparently referencing the alleged higher bid that TEP wanted to make, the court stated: "One is left with real questions about why the directors did what they did." Separately, the court stated: "It may be when the plaintiff gets into discovery that the answer as to why the directors did what is at least strange, if one views the plaintiff's allegations, is that there were threats being made or boardroom bullying or other types of things that would not be uncommon in activist settings."

In ruling that it was reasonably conceivable that JP had a divergent interest, it appears that the key factor for the court was that the plaintiff had not "simply made…allegation[s]" about JP's having been motivated by a desire for liquidity but had "pled evidence" by producing internal emails and providing "details" that established that JP had a "track record" at other companies of "follow[ing] a modus operandi of forcing quick sales at companies." In ruling that it was reasonably conceivable that the directors had acted in bad faith (*i.e.*, breached the duty of loyalty), it appears (although few details on these points can be gleaned from the hearing transcript) there was some evidence that the standalone option likely was superior to the sale in creating value for the stockholders, and there was not a sufficient explanation by the board as to the foundation for its deciding to sell the company instead. Moreover, notably, the court's comments suggest that it had a *general* skepticism about the board's process and disclosures. The Vice Chancellor stated: "What we have here is exactly what I think the courts worry about…. We have more and more instances in this court where minutes and disclosure documents seem to have been drafted wishfully rather than accurately. In other words, they are drafted to create a story rather than to document what happened." The Vice Chancellor noted that this might or might not be the case here and that he was not pre-judging the case, but that the "detailed complaint" raised questions sufficient to defeat dismissal. The Vice Chancellor characterized the case as "likely…difficult for the plaintiff to win," but as "one that survives a motion to dismiss."

The Vice Chancellor stated that he was ruling from the bench "because this is a fact-specific ruling … based on the allegations in the complaint…. I think if I write something lengthy on it, it would really give this ruling too much dignity, as if it suggested some change in Delaware law, which it doesn't."

In our view, the decision underscores, again, (a) the critical need for a board to have (and to appropriately document and disclose) a foundation for its actions, and (b) the importance of disclosure to stockholders that meets the *Corwin* standard for "fully informed" approval of a transaction (including, critically, by disclosing facts that may reflect possible deficiencies in the board's process). Of note, the decision indicates that a plaintiff may be successful in alleging a possible conflict of interest of an activist stockholder's designee on the board based on the activist's track record at other companies—such as, in this case, a history of forcing companies into quick sales after joining the board, which could suggest that the activist's interest in a sale is based on something other than the best interests of all of the stockholders in the particular situation at hand. (We note, however, that it could suggest instead that the activist only buys into situations where it believes that a quick sale is in the best interests of the stockholders.)

Yu v. Guard Hill Estates, LLC (Sept. 28, 2018)—NY Decision Holds LLC Majority Members' Fiduciary Duties Limited Their Ability to Freeze Out or Punish Minority Members

In a slip opinion, the Commercial Division of the NY Supreme Court held that even amendments expressly authorized by an LLC operating agreement can still constitute a breach of fiduciary duties of majority members if the amendments are adopted for an illegitimate purpose. In *Yu*, the plaintiff and his two siblings were members of an LLC that owned the family estate in Bedford, NY. The siblings disagreed on the plaintiff's ownership interest in the LLC. The LLC agreement permitted amendments to the agreement by a vote of 51% of the membership interests. The plaintiff alleged that his two siblings, in retaliation over the dispute, amended the LLC agreement to remove him as managing member and to add a capital contribution provision, and then made a capital call (knowing that he could not afford to make the payment). The plaintiff claimed that the amendments violated the fiduciary duties of the majority members as they were not made in good faith for a legitimate business purpose, but instead were designed to force him out of the family business. The court refused to dismiss the fiduciary claims. The court stated that, even though the LLC agreement authorized amendments by vote of a majority of the members, it should be determined through litigation whether the two siblings exercised their rights under the LLC agreement in an "unfair" or "inequitable" manner, "solely for personal gain in such a way as to deprive [the plaintiff] of the fruits of the contract." The allegations that the siblings took the action in furtherance of a "family vendetta to oust [the plaintiff] from the family entities," rather than "to fulfill a need in the company" were sufficient to support a fiduciary claim.

Zayo Group, LLC v. Latisys Holdings, LLC (Nov. 26, 2018)—**Court's Interpretation of Contract Provision Relies on Deleted "Redundant Synonyms" in a Prior Draft**

In *Zayo*, the buyer of the Latisys Companies sued the seller for breach of the representation and warranty that the company had not "received any written notice that any party to a Material Contract intends to cancel, terminate, materially modify or refuse to perform such Material Contract." After closing, the company experienced an unprecedented level of contract terminations and the buyer alleged that before closing the counterparties to five material contracts had provided written notice of "their intent not to renew the contracts or to renew on different terms." The seller argued that the merger agreement representation did not require disclosure of notice of an intent *not to renew* a contract or to renew on different terms—as those were different from notice of an intent to *cancel or terminate* the contract or to *materially modify* the contract. Vice Chancellor Slights concluded that the representation and warranty, with a list of "redundant words" that "all appeared to mean the same thing," was ambiguous because it was subject to two conflicting reasonable interpretations. One interpretation was that "terminate," "cancel," and "refuse to perform" covered a customer's expressing an intent not to renew an existing contract, and that "materially modify" included negotiations for new terms in new contracts. The other interpretation was that "terminate," "cancel," and "refuse to perform" covered only when a customer ends, or expresses an intent to end, a contract before its expiration, and "materially modify" covered only modifications of existing contracts and not a potentially renewed contract.

The court considered extrinsic evidence to discern the intent of the parties. The court noted that the buyer had marked up the seller's auction draft of the stock purchase agreement to add the concept of requiring notice of intent to "cancel, terminate, materially modify or refuse to perform" a Material Contract, and had also included "refuse to renew" a Material Contract. The seller had accepted all of these changes *other than* the phrase "refuse to renew." The Vice Chancellor wrote: "The fact that [the buyer] inserted this added language in its proposed SPA reveals that [the buyer], like [the seller], believed that 'refuse to renew' had a different meaning than the language already included [in the representation]—i.e., 'terminate,' 'cancel' and 'refuse to perform.'" (We would note that a possible alternative explanation may be that the buyer believed that a non-renewal already was covered by the other words.)

Manti Holdings v. Authentix Acquisition (Oct. 1, 2018)—**Chancery Court Holds (For the First Time) that Common Stockholders Can Contractually Waive Appraisal Rights**

A stockholder agreement provided that, in the event of a board-approved proposed sale of the company (Authentix Inc.) meeting certain conditions, the signatory common stockholders would consent to the sale and "refrain from the exercise of appraisal rights." Following sale of the company to a private equity firm, these stockholders, who received almost no consideration in the sale, contended that the stockholders agreement did not prohibit them from exercising appraisal rights. The stockholders argued that (i), the word "refrain" implied a vested right held in abeyance rather than a right that had been waived or extinguished by the stockholders agreement, and (ii) the stockholders agreement provision stating that the agreement would terminate upon consummation of a sale indicated that any restriction on appraisal rights no longer applied after closing of the sale. Vice Chancellor Glasscock, in a letter opinion, disagreed with the stockholders and ruled that they had waived their appraisal rights. He found the agreement language unambiguous and wrote: "No contracting party, agreeing to the quoted language [with respect to refraining from exercising appraisal rights], would consider itself free to exercise appraisal rights" after the board had approved a contractually compliant sale.

The stockholders also argued that it would be against public policy to permit the company to enforce a waiver by contract of stockholder rights that are prescribed by state statute. Answering a long outstanding question that had not been previously addressed by the court, the court held that a contractual waiver of appraisal rights by common stockholders was permissible. (The court has previously upheld contractual waiver of appraisal rights by preferred stockholders—a less complex issue given that preferred stock is contractual in nature.) The court disagreed with the stockholders' argument that the company's enforcement of a waiver of appraisal rights would transform the petitioners' shares into a de facto new restricted class (which would violate the DGCL Section 151(a) requirement that limitations on classes of stock be set forth in the corporate charter). The court concluded that the stockholders agreement "did not restrict the appraisal rights of the classes of stock held by the Petitioners; instead, the Petitioners, by entering the [stockholders agreement], agreed to forbear from exercising that right." The court stated that the company had entered into the stockholders agreement to incentivize investment in the company by the Carlyle Group, which was in the interest of all stockholders, including those who entered into the stockholders agreement and forwent appraisal rights. The court is currently (December 2018) considering a reargument of the case, which is focused on the argument that a Delaware corporation cannot obtain an advance waiver or limitation of rights of stockholders that are provided for under state law.

Sciabacucchi v. Salzberg (Dec. 19, 2018)—**Court of Chancery Rules that Forum Selection Provisions for Federal Securities Claims are Invalid**

While Delaware and other courts have upheld forum selection bylaws that require fiduciary duty and other corporate governance disputes to be brought solely in the state courts of Delaware, the Court of Chancery ruled that the same is not true with respect to federal securities laws disputes. The federal Securities Act of 1933 grants state courts concurrent jurisdiction over 1933 Act disputes. In *Sciabacucchi*, the Court of Chancery has now ruled that a forum selection charter provision that purports to eliminate concurrent state court jurisdiction and to require such disputes to be brought solely in federal court is invalid and unenforceable. Vice Chancellor Laster held that "[t]he constituent documents of a Delaware corporation cannot bind a plaintiff to a particular forum when the claim does not involve rights or relationships that were established by or under Delaware's corporate law."

The Vice Chancellor observed that, in *Boilermakers* (2013), Chief Justice Strine (while a Vice Chancellor) held that a Delaware corporation can adopt a forum-selection bylaw for claims relating to the corporation's *internal affairs*, but not claims that are "external to the corporation." In *Boilermakers*, the Chief Justice reasoned that DGCL Section 109(b), which specifies what subjects bylaws can address, authorizes bylaws to regulate "internal affairs claims brought by stockholders *qua* stockholders" (that is, in their capacity as stockholders), but does not authorize a Delaware corporation to regulate "external relationships." *Boilermakers* noted that a bylaw cannot dictate the forum for tort or contract claims against the company, even if the plaintiff happens to be a stockholder. Vice Chancellor Laster concluded that, because Section 102(b)(1), which governs what subjects can be addressed in a Delaware corporate charter, parallels Section 109(b), the distinction drawn in *Boilermakers* between internal and external claims applies to charter-based provisions as well as bylaw provisions. The court thus ruled that a 1933 Act claim is external to the corporation and therefore a charter provision cannot limit the forum for bringing a 1933 Act claim. The court wrote: "Federal law creates the claim, defines the elements of the claim, and specifies who can be a plaintiff or a defendant. The 1933 Act establishes a statutory regime that applies when…securities…are offered for sale in particular scenarios that the federal government has chosen to regulate. A 1933 Act claim does not turn on the rights, powers, or preferences of the shares, language in the corporation's charter or bylaws, a provision in the DGCL, or the equitable relationships that flow from the internal structure of the corporation."

We note that, by extension, the decision appears to answer, in the negative, the important outstanding question whether Delaware corporations can impose other limitations on federal securities litigation in their charters or bylaws—such as requiring that the claims are subject to mandatory arbitration.

inTEAM v. Heartland (Dec. 19, 2018)—**Delaware Supreme Court Holds that the Court of Chancery Exceeded Its Authority on Remand By Vacating an Injunction that the Supreme Court Had Previously Affirmed as a Remedy for a Non-Compete Violation**

In connection with the acquisition by Heartland Payment Systems, Inc. of assets of School Link Technologies, Inc. ("SL-Tech"), the parties (Heartland, SL-Tech, LG (who was SL-Tech's CEO), and LT Tech's inTEAM business which was carved out of the deal) agreed to mutual non-compete, non-solicitation, exclusivity and support obligations. In a post-closing action, the Court of Chancery found that Heartland and LG had breached certain of their contractual obligations, and that inTEAM had not breached its obligations. On appeal, the Delaware Supreme Court affirmed the lower court's holdings and remedies, which included an injunction against Heartland that extended its non-compete; however, the Supreme Court reversed the lower court's finding that inTEAM and LG had not breached their noncompetes. The case was remanded to the Court of Chancery to craft a remedy to compensate Heartland for those breaches and to permit inTEAM and LG to reassert any affirmative defenses to those breaches. On remand, the Court of Chancery rejected inTEAM's and LG's affirmative defenses, but, characterizing all of the parties as having had unclean hands, vacated the injunction against Heartland and rejected entering new injunctions against any of the parties. inTEAM and LG appealed the remand order, claiming that the Court of Chancery (i) exceeded the scope of the remand by vacating the injunction against Heartland that had been affirmed by the Supreme Court and (ii) denied inTEAM's and LG's affirmative defenses based on an improper revisiting of factual findings that had been affirmed by the Supreme Court. In this latest decision, the Supreme Court has agreed with inTEAM and LG, holding that the remand was limited to the issue of what relief to grant for inTEAM's and LG's non-compete violations. "[The other] rulings were binding on the Court of Chancery, and not subject to being re-litigated on remand," the Supreme Court wrote. The Supreme Court reinstated the injunction for the period it was to have been operative and remanded yet again to the Court of Chancery, this time to decide whether inTEAM's request to extend the injunction further to sanction Heartland for violating it when it was in place should be granted.

NASDAQ Amends its 20% Shareholder Approval Rule for Private Placements (Sept. 26, 2018)

The NASDAQ shareholder approval rule often applied in private investments in public equities (PIPEs) and certain other private offerings—the “price test” under NASDAQ Rule 5636(d)—has been amended. Before the amendment, the Rule exempted from the stockholder approval requirement offerings priced at or above the greater of book value or market value per share. The amendment (i) eliminates book value and (ii) revises the market value measure to both (a) incorporate a five-day average and (b) use the last closing price (instead of the consolidating closing bid price). Thus, as amended, the Rule will not require stockholder approval for private placement transactions involving the issuance of 20% or more of the common stock or of the voting power outstanding before the issuance if the offer price is greater than or equal to the lesser of (i) the last closing price immediately preceding the signing of a binding agreement and (ii) the average closing price of the common stock on NASDAQ for the five trading days immediately preceding the signing of the binding agreement. The amendment does not affect stockholder approval requirements relating to other types of transactions (such as in connection with an acquisition of stock or assets of another company, a change of control, or equity compensation).

NASDAQ reasoned that (a) book value, as it is based on historic values, is not an appropriate measure of whether a transaction is dilutive or should otherwise require stockholder approval; is just one of several financial data points; and is already incorporated into the market value of a security; (b) using the last closing price is more transparent to investors (compared to to the last closing bid price), as it reflects sale prices at one of the more liquid times of day; and (c) the five-day average closing price provides more flexibility and certainty for companies in their transactions (for example, prior to the amendment, a company could not offer a five-day average price because of the risk that it would ultimately be below or above market).

Increase in Negative Say-on-Pay Votes by Institutional Investors

A topic of discussion at the 2018 Annual NASPP Conference was that institutional investors voted against companies’ say-on-pay proposals at unusually high rates in 2018. Reportedly, CalPERS voted against these proposals 43% of the time (whereas its previous highest percentage of negative votes was 18%); five other investors voted against say-on-pay proposals at a rate higher than CalPERS’ high rate (one of which, Allianz Global Investors, voted against say-on-pay proposals 79% of the time); and failure of say-on-pay proposals in 2018 was 52% overall, while in 2017 it was at a historic low of 34%.

Fried Frank M&A/PE *Round-Up*

Fried Frank's M&A practice advises clients on some of the largest and most complex US and global deals, providing counsel to a full spectrum of companies on sophisticated transactions that are often multi-jurisdictional and, in some cases, transformational. With over eighty attorneys in four offices, our team has deep experience advising public and private companies, special committees, audit committees, and boards of directors in complex negotiated and contested situations, including negotiated mergers, hostile takeovers and takeover defense, proxy contests, financial adviser representations, and restructuring transactions.

Fried Frank received *The Deal's* **Private Equity Deal of the Year Award** in 2018 for its role as counsel to Humana Inc. as part of a consortium with TPG Capital and Welsh, Carson, Anderson & Stowe in their $4.1 billion acquisition of the Kindred at Home Division of Kindred Healthcare, Inc.

Highlights of Our 2018 Third Quarter Work Include Representations of:

Reis, Inc.

Counsel to **Reis, Inc.** in its US$278 million merger with Moody's Corporation.

U.S. Security Associates

Counsel to **U.S. Security Associates** in its approximate US$1 billion sale to Allied Universal.

Permira Funds

Counsel to **Permira Funds** in the US$500 million secondary investment in its portfolio company, LegalZoom, led by Francisco Partners and GPI Capital.; and its portfolio company, WeddingWire's, US$933 million combination with XO Group, Inc.

Wendel

Counsel to **Wendel** in its US$555 million sale of all share capital of CSP Technologies to AptarGroup.

Yellow Wood Partners, LLC

Counsel to **Yellow Wood Partners, LLC** in its acquisition of Paris Presents, Inc.

Transcendia, Inc.

Counsel to **Transcendia, Inc.** in its acquisition of Spire Flexpack Inc., the parent company of Precision Poly LLC.

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