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IQVIA/PROPEL MEDIA AND ITS POTENTIAL EFFECT ON MERGER ENFORCEMENT

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On January 8, 2024, Judge Edgardo Ramos of the Southern District of New York issued his ruling in the FTC's challenge to the proposed acquisition of DeepIntent by IQVIA.[1] The decision, a victory for the FTC, is one likely to be cited early and often by antitrust plaintiffs in Section 7 cases.

Background

The FTC alleged that IQVIA's Lasso and Propel Media's DeepIntent were two leading firms providing programmatic advertising to healthcare professionals.[2] Programmatic advertising is an automated way of presenting targeted advertising, in the form of website-based ads, to a specific cohort, in this case, doctors, nurses, and other health practitioners.[3]

After investigating the proposed acquisition, after which DeepIntent would become part of the IQVIA portfolio, the FTC filed a lawsuit in federal court to temporarily enjoin the transaction pending an in-house administrative proceeding.[4] As discussed below, the court's opinion reads quite favorably to government plaintiffs on a number of key fronts, and as a result, will likely be frequently trumpeted by DOJ and FTC in future merger enforcement cases.

Analysis

The Court Placed Undue Weight on the 30% Market Share Threshold in *Philadelphia National Bank*. Perhaps the most concerning aspect of the *IQVIA* decision is its seeming reinvigoration of the 30% market share presumption in *Philadelphia National Bank*,[5] a case that celebrated its 60th birthday last year.

To refresh on *Philadelphia National Bank*, one of the earliest cases applying Section 7 of the Clayton Act, the opinion established the structural presumption—a minimum level of market concentration that creates a rebuttable presumption that a merger is anticompetitive. The decision states that, at least as concerns bank mergers, 30% market share held by the combined firm is the threshold above which a merger "threaten[s] undue concentration . . ."[6]

The *IQVIA* court had to consider two competing market share calculations. The FTC's

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enter into a de-SPAC transaction. In this connection, the SEC noted the one-year grace period provided to issuers generally in Rule 3a-2 under the Investment Company Act and the 18-month period permitted for blank check companies under Rule 419 under the Securities Act and stated that a "SPAC that operates beyond these timelines raises concerns that the SPAC may be an investment company, and those concerns increase as the departure from these timelines lengthens." The SEC also stated that it "believes that a SPAC should reassess its status and analyze whether it has become an investment company if it has . . . failed to enter into an agreement with a target company beyond such timelines."

In light of these statements, we believe that the SEC staff may require SPACs to disclose their proposed timelines in their prospectuses when conducting an IPO and may raise enforcement concerns under the Investment Company Act if SPACs fail to comply with these timelines. A SPAC that has not entered into an acquisition agreement prior to the 18 months after the completion of its IPO may want to consider moving its assets to demand deposits at banks or consider whether there are other facts and circumstances that would indicate that it is not an investment company.

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ENDNOTES:

[1] https://www.sec.gov/files/rules/final/2024/33-11265.pdf.

[2]Special Purpose Acquisition Companies, Shell Companies, and Projections, SEC Release 33-11265 (Jan. 24, 2024), at n. 943.

[3]*Id.,* at Section III.F.3(ii).

[4]The SEC also stated that such management of a SPAC could cause SPAC sponsors to come within the definition of "investment adviser" in Section 202(a)(11) of the Investment Advisers Act. Section 202(a)(11) generally defines an investment adviser as any person who, for compensation, engages in the business of advising others either directly or indirectly as to the valuation of securities or the advisability of investing in, purchasing or selling securities, among other things. Importantly, a person must "advise others" to be considered an investment adviser, such that officers, directors and employees of a company that manage the company's portfolio are not considered investment advisers subject to regulation under the Investment Advisers Act.

CHANCERY INVALIDATES ADVANCE NOTICE BYLAWS THAT WERE "OVERBROAD," "AMBIGUOUS," OR TOO "DENSE": *KELLNER V. AIM*

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In *Kellner v. AIM ImmunoTech*,[1] the Delaware Court of Chancery, in a post-trial decision, held that certain advance notice bylaw amendments that had been adopted by AIM ImmunoTech Inc.—in response to an activist stockholder's impending proxy contest for board control—were invalid. The court upheld, however, the company's rejection of the activist's notice of director nominations for the 2023 annual meeting, finding that it did not comply with other, valid provisions of the advance notice bylaws.

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Key Points

- **The decision highlights that an advance notice bylaw may be deemed invalid if the provision is overbroad, ambiguous, or so "dense" as to be incomprehensible.** The court viewed such defects as restricting the stockholder franchise without accomplishing a reasonable approach to information gathering; as suggesting an intention to block dissidents' nomination efforts; and as giving the board license to reject a nomination notice based on the board's "subjective interpretation" of the provision. The decision thus underscores the importance of clear drafting of advance notice bylaws and careful attention to the (still-evolving) permissible parameters for such bylaws. (See "Practice Points" below.)

- **The court did not invalidate the advance notice bylaws in their entirety.** The court invalidated only the provisions it found to be problematic. Also, it enforced the provision requiring disclosure of agreements and understandings relating to nominations in its pre-amendment form, finding that the prior iteration did not suffer from the same flaws as the amended version.

- **The decision confirms the death of the *Blasius* standard of review.** The court flatly rejected application of the *Blasius* standard of review—which requires a "compelling justification" for a board's defensive actions, taken in response to a threat to corporate control, that affect the stockholder franchise. The correct standard of review, the court readily concluded, is the one recently pronounced by the Delaware Supreme Court in *Coster v. UIP*—which, as described by the court in *Kellner*, is a "situationally-specific" application of the *Unocal* standard, essentially requiring "reasonableness." We note that the court's *Unocal* analysis in *Kellner* incorporated the concerns underlying the *Blasius* (and *Schnell*) doctrines—namely, the board's motivations and justifications; and on this basis the court *invalidated* certain of the board's actions. Thus, the decision appears to confirm our view at the time *Coster v. UIP* was issued that the new standard is not likely to result in any significant change to the court's general approach to or outcome in these types of cases.[2]

Background

AIM ImmunoTech, an NYSE-listed immunopharmacy company, experienced a 99% stock price decline since 2016. In 2022, a stockholder activist group sought to nominate two director candidates for the company's four-person board. The group was led by a stockholder who had been permanently enjoined from engaging in such activities related to penny stocks—the class of microcap companies that included AIM. The company rejected the group's nomination notice on the basis that it included false and misleading statements that concealed the true identity of the group members and their plans for the company, and litigation ensued. The group turned their efforts toward planning for making nominations at the 2023 meeting. The board then began to consider amendments to its advance notice bylaws—to prevent similar deceptive stockholder misconduct in the future and to update and modernize the bylaws. The board unanimously adopted amendments to the advance notice bylaws (the "Amendments").

The stockholder group submitted a notice to nominate three director candidates at the 2023 meeting (the "Notice"). Outside legal counsel engaged by the board to evaluate the Notice found that it did not comply with the advance notice bylaws, as amended. On that basis, the board rejected the Notice. The nominating stockholder brought suit against AIM and its directors, claiming that the Amendments were invalid, the rejection of the Notice was unlawful, and the board had breached its fiduciary duties by adopting the

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Amendments and rejecting the Notice. Following trial, Vice Chancellor Lori W. Will held that certain of the Amendments were not valid, as they "unduly restricted" the stockholder franchise. The Vice Chancellor also held, however, that the company was justified in rejecting the Notice, as it was noncompliant with other, valid provisions of the advance notice bylaws.

Discussion

The court held that the standard of review pronounced in *Coster* was applicable. Advance notice bylaws (or amendments thereto) adopted on a "clear day" (*i.e.*, *not* adopted when the company faces an actual threat to corporate control) are subject to judicial deference under the business judgment standard of review. Such bylaws adopted on a "rainy day," however, will be subject to enhanced scrutiny review. The applicable enhanced scrutiny standards have been: (i) *Unocal*—which requires that the board acted in furtherance of proper corporate objectives and that the actions taken were proportionate to the threat and not preclusive (essentially, a "reasonableness" test, the court has stated); (ii) *Schnell*—which requires that the board was not motivated to take disenfranchising action for inequitable purposes; and/or (iii) *Blasius*—which requires that, if the board's primary purpose in taking the challenged action was stockholder disenfranchisement, the board had to have a "compelling justification" therefor. In *Coster v. UIP*, the Delaware Supreme Court acknowledged the courts' long evolution toward combining these three standards, and pronounced a new "unitary" standard—which requires "apply[ing] *Unocal* with sensitivity to the stockholder franchise that integrates the spirit of *Blasius* and *Schnell*."[3]

The court engaged in a *Unocal* analysis. The court considered (i) whether "the board faced a threat to an important corporate interest or to the achievement of a significant corporate benefit"; and, if so, (ii) whether "the board's response to the threat was reasonable in relation to the threat posed and was not preclusive or coercive to the stockholder franchise." The court concluded that the board had proper corporate objectives, but that certain Amendments were not a reasonable response.

The court found the company had "proper corporate objectives"—*i.e.*, the first prong of *Unocal* was satisfied. The board sought to amend the bylaws for the purpose of "obtaining transparency" from stockholders seeking to nominate director candidates, in order to "better protect AIM and its stockholders against potentially abusive and deceptive practices." The court wrote: "The Board made a reasonable assessment, in reliance on the advice of counsel, that this information-gathering objective was threatened." Also: "AIM had just endured a proxy contest where it seemed that the nominating stockholder was a façade concealing the identities of individuals responsible for the effort . . . [and] the Board had reason to believe that the group behind the prior proxy contest was threatening to revive its efforts for the 2023 election. In revisiting AIM's advance notice bylaws, the Board sought to prevent the types of manipulative, misleading, and improper conduct experienced in 2022 from happening again."

The court found certain of the Amendments were preclusive or not reasonable in relation to the corporate objectives—*i.e.*, the second prong of *Unocal* was *not* satisfied. The court found certain provisions to be so overbroad, ambiguous and/or "indecipherable" as to make it unlikely a nominating stockholder could comply with them. Also, the court emphasized, these defects gave the board license to reject a nomination notice on the basis of the board's "subjective interpretation" of the provision's terms. The following provisions were found to be invalid:

AAUs: This provision required disclosure of all arrangements, agreements, or understandings ("AAUs") relating to a board nomination or the company. The provision "[went] off the rails" by covering too many people—requiring a nominating stockholder to dis-

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close AAUs not only with persons acting in concert with the nominating stockholder, but also with any "Stockholder Associated Person" ("SAP"). SAP was defined, in relation to the nominating stockholder or beneficial owner on whose behalf a nomination was being made (a "Holder"), as: (i) any person acting in concert with such Holder with respect to the nomination or AIM, (ii) any person controlling, controlled by, or under common control with such Holder or any of their respective Affiliates and Associates, or a person acting in concert therewith with respect to the nomination or AIM, and (iii) any member of the immediate family of such Holder or an Affiliate or Associate of such Holder. The court stated that "the interplay of the various terms" within this definition—including "acting in concert," "Associate," "Affiliate," and "immediate family"—"causes them to multiply, forming an ill-defined web of disclosure requirements." The "expansive text" rendered the AAU Provision "overbroad, unworkable, and ripe for subjective interpretation by the Board."

Consulting/Nominations. This provision required disclosure of AAUs between the nominating stockholder or an SAP, on one hand, and any stockholder nominee, on the other hand, "regarding consulting, investment advice, or a previous nomination for a publicly traded company within the last ten years." The court concluded that the provision suffered from the same problem as the AAU Provision insofar as it included "SAPs"; and that it "also impose[d] ambiguous requirements across a lengthy term." The court wrote: "[The Provision] d[id] not stop with the present nomination—or even AAUs about AIM. It implicate[d] a decade of AAUs (including 'advice' on 'potential investments') involving other publicly traded companies as well." The Provision may be preclusive, the court stated, as it "would give the Board license to reject a notice based on a subjective interpretation of the provision's imprecise terms."

Known Supporter. This provision required the nominator and nominees to list all known supporters of their effort. The court noted that—unlike the provision the court found reasonable in *Rosenbaum v. CytoDyn* (2021),[4] which required disclosure of known *financial* supporters—this provision required disclosure of "any sort of support whatsoever, including that of other stockholders known by SAPs to support the nomination." The court found that "the limits of this provision are ambiguous—both in the terms of the types of support and supporters one must disclose." Generally, the board could take a "broad reading" of the provision and "reject a nomination as noncompliant for reasons a stockholder could not realistically anticipate." The court wrote: "Had the Board crafted a bylaw mandating the disclosure of known supporters providing financial support or meaningful assistance in furtherance of a nomination, it might have taken a legitimate approach to ensuring adequate disclosure. Instead, it overreached. As drafted, the Known Supporter Provision impede[d] the stockholder franchise while exceeding any reasonable approach to ensuring thorough disclosure."

Ownership. This provision required the disclosure of, among other things, a Holder's ownership in AIM stock, including beneficial, synthetic, derivative, and short positions. The requirements extended to SAPs, immediate family members, and persons acting in concert with a nominee. The Vice Chancellor wrote that provisions requiring disclosure of synthetic equity positions generally are "perfectly legitimate," this provision had "flummoxed this judge . . .. Though I have tried to read and understand it, the bylaw—with its 1,099 words and 13 subparts—is indecipherable." Further, the provision "sprawl[ed] wildly beyond" the usual purpose of disclosure of beneficial ownership. The court noted, as one example, that the provision required the disclosure of "legal, economic, or financial interests in any principal competitor" of the company, and that the term "principal competitor" was undefined, which "created ambiguity." As another example, the provision called for disclosure of "[a]ny performance-related fees that each [SAP] is entitled

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to, including interests held by family members." The court stated that "[a]ny justifiable objectives that might be served by aspects of the Ownership Provision are buried under dozens of dense layers of text. The provision seems designed to preclude a proxy contest for no good reason; none were given. A stockholder could not fairly be expected to comply."

The court found the following provisions were valid:

First Contact. This provision required "disclosure of the dates of first contact" among those involved with respect to the company or the nomination effort. The court found this provision was not preclusive because it could be determined "from any number of sources" (including texts and emails) when there was first contact. The court noted the plaintiff's assertion that this provision was unusual—"but that is not the test," the court wrote.

Questionnaire. This provision required that nominees submit responses to a questionnaire prepared by the company. The court addressed the plaintiff's objection that the allowance of five days for the company to send the questionnaire to a stockholder might allow the company "time to make unfair revisions." The court indicated that while five days conceivably could be too long a period, "a slightly shorter period (say, three days)" would not be. Rather than engage in such "hair splitting," though, the court concluded that "[s]uch matters are better addressed in considering whether the Board's enforcement of the Questionnaire Provisions was equitable."

Lookback. This "bespoke" provision (part of the AAUs provision), imposed a 24-month lookback period for disclosure of AAUs relating to board nominations. The court observed that the provision "reduced the risk of gamesmanship through overly narrow readings" applying the requirements only with respect to current nominees; and that the board chose the 24-month period after it considered that nominations the stockholder group had submitted for the 2022 meeting came after "18 months of activity."

The court found the board acted reasonably in rejecting the Notice. The court found numerous deficiencies with the Notice, but found to be "fatal" that information relating to significant AAUs was "withheld from or obfuscated in" the Notice. Such "concealment . . . go[es] to the heart of a nomination effort [and] risks undermining the essential disclosure function of advance notice bylaws . . . [to reveal] whether a nomination is part of a broader scheme."

Recent Law on Advance Notice Bylaws

The court has generally acknowledged that advance notice bylaws are a critical tool for an orderly annual meeting and proxy solicitation process, which is in the interest of all stockholders. Such bylaws seek to ensure a fair process, including with respect to timing and transparency, regarding stockholder nominations of director candidates. As we note in our treatise (*Takeover Defense: Mergers and Acquisitions*, by Fleischer, Weinstein & Luftglass—which was cited in *Kellner* for this proposition), advance notice bylaws give a board time to evaluate the proposed candidates and prevent last-minute "surprise attacks" by third parties for control or board representation. As such, advance notice bylaws, if not ambiguous, within usual parameters, and not applied inequitably, generally have been upheld as valid by the court.

In one recent case, *Politan Capital Mgt. v. Kiani*, an activist hedge fund stockholder's challenge to advance notice bylaws that had been adopted ahead of a proxy contest convinced the company to retract the bylaws—and the court[5] ordered the company to pay the fund nearly $18 million for legal fees in bringing the challenge. The *Politan* bylaws, which generally were viewed as unusually far-reaching, required that the nominations notice had to identify: (i) the fund's limited partners; (ii) any plans the fund had to nominate directors at other public companies in the next 12 months; and (iii) all understandings between the

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limited partners and any of their respective family members and cohabitants. The fund contended that (i) and (ii) required information that was highly confidential and proprietary, and that (iii) was unworkably broad—thus effectively precluding a fund from making nominations.

In *Paragon Techs. v. Cryan*,[6] the court, applying a *Coster-Unocal* standard of review, expressed concerns about the boards having "adopted sprawling advance notice bylaws after [the stockholder]'s outreach, seemingly delayed and obfuscated in rejecting [the stockholder's nominations] notice, and then produced a laundry list of deficiencies." In addition, the company's CEO apparently had deleted text messages. Nonetheless, the court denied the requested preliminary injunction invalidating the bylaws and forcing the company to accept the nomination notice—primarily because it appeared the stockholder may have had plans for the company's business that were not disclosed in the notice.

Practice Points

- ***Companies should consider updating their advance notice bylaws.*** With stockholder activism having increased during the current difficult economic environment, and the vulnerability of directors having increased following the SEC's mandate for use of universal proxy cards in all proxy contests, companies should consider bolstering their advance notice bylaws (as well as adjournment and other bylaws) to support their ability to respond if they later find themselves in a position of having to defend against an activist campaign or deal with a new director with a relationship to an activist. Whenever possible, advance notice bylaws (or amendments thereto) should be adopted on a clear day—in which case, if challenged, they generally would be subject to judicial deference under the business judgment rule, rather than enhanced scrutiny.
- ***Advance notice bylaws cannot be preclusive or unreasonable.*** The court may view advance notice bylaw provisions as "preclusive" if they make a dissident's ability to wage a successful proxy contest "realistically unattainable." Bylaws that require the disclosure of information that it would be extremely difficult or nearly impossible for a nominating stockholder to collect, or that would be considered to be highly confidential and proprietary, may be deemed by the court to be preclusive. In addition, as reflected in *Kellner*, advance notice bylaws may be deemed by the court to be "unreasonable" if they are overbroad, ambiguous, imprecise, or incomprehensible.
- ***Requiring information about "family members" or "supporters."*** Requiring information about "family members" or "cohabitants" is more likely to be upheld when the terms are not defined very broadly (so that only close family members are included and cohabitants are included only under certain circumstances). Care should be taken to avoid the interaction of various definitions creating a multi-layered "web" of disclosure requirements. Generally, where the nominating stockholder is a fund, it may be problematic to require information about family members or cohabitants of the other limited partners of the fund. A requirement for disclosure of those known to be providing financial or other meaningful support is likely to be upheld, whereas a requirement for disclosure of "support" more generally, or without definition, may be less likely to be upheld.
- ***Requiring information about "nominations at other companies."*** In other cases, the court has indicated that it may be problematic to require disclosure of *future* plans to make director nominations at other companies (as, for example, a fund's strategies and plans may be highly confidential and proprietary information).

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In *Kellner*, the court indicated that requiring disclosure of *past* nominations may also be problematic—if the period of time is lengthy (in *Kellner*, 10 years) and/or the requirement covers *all* companies. It is uncertain what period of time might be deemed valid, and whether the requirement would have to cover *only* the company at issue or could be somewhat broader (*e.g.*, others in the company's industry or some other relevant parameter).

- ***Requiring a look-back period with respect to AAUs.*** Given that activist activity can precede an annual meeting by months or years, a board may wish to consider including a lookback period for disclosure of AAUs relating to board nominations. Such a provision would address the risk of narrow interpretation of the AAU provision such that it would apply only to current nominees.

- ***Context matters.*** In evaluating whether a company's advance notice bylaws are reasonable, the court will look to the context in which they were adopted. As in *Kellner*, where a company knows that a proxy contest is coming, augmenting existing advance notice bylaws with vague or broad requirements may suggest an intention to block the dissident's effort. At the same time, as in *Kellner*, if a company has experienced a stockholder having tried to evade the company's advance notice disclosure requirements, the court is more likely to view the board's amendment of the bylaws as having been designed to protect the stockholders against potentially abusive or deceptive practices by activists or hostile acquirors rather than having been designed to thwart a dissident.

- ***Recent amendments relating to the universal proxy rules.*** Many companies have updated their advance notice bylaws to account for the SEC's recently adopted universal proxy rules (SEC Rule 14a-9, which requires use of a universal proxy card in all proxy contests). These amendments have included requirements that: (i) a nominating stockholder make a specific representation that it intends to company with Rule 14a-9 (including the requirement under Rule 14a-19(a)(3) to solicit the holders of shares representing at least 67% of the voting power of the company's outstanding shares); (ii) a nominating stockholder provide the company, a specified number of days before the stockholder meeting, with reasonable evidence of its compliance with Rule 14a-19; and (iii) if the nominating stockholder fails to comply with Rule 14a-19, the company will deem the nomination proposal invalid and will not include the stockholder's nominees on the company's proxy card.

- ***Other recent amendments to advance notice bylaws.*** Among other amendments made in recent years have been provisions limiting the number of candidates a stockholder can nominate at a meeting to the number of directorships up for election at the meeting; and requiring that director nominees sit for interviews with the board or one of its committees. Also, in some cases, amendments have been adopted requiring that the nominating stockholder maintain record ownership of company shares through the meeting date (rather than the record date); ensuring that the deadline for director nominations is at least 90 days before the one-year anniversary of the prior annual meeting; and requiring that a nominee provide written consent to being named as a nominee in the company's proxy statement.

ENDNOTES:

[1]*Kellner v. AIM ImmunoTech et al.*, C.A. No. 2023-0879-LWW (Del. Ch. Dec. 28, 2023).

[2]*See* our Briefing, *Delaware Supreme Court Upholds Board Action that Has Disenfranchising Effect on a Stockholder—Coster v. UIP* (https://www.friedfr

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ank.com/news-and-insights/delaware-supreme-court-for-the-first-time-upholds-a-board-action-that-has-a-disenfranchising-effect-on-a-stockholder-and%20clarifies-the-standard-of-review-for-such-actions-uip-11233).

[3]*Coster v. UIP Companies, Inc.*, 300 A.3d 656 (Del. 2023).

[4]*Rosenbaum v. CytoDyn Inc.*, 2021 WL 4775140 (Del. Ch. 2021).

[5]*Politan Capital Management LP v. Kiani*, 2023 WL 8084330 (Del. Ch. 2023).

[6]*Paragon Technologies, Inc. v. Cryan*, 2023 WL 8269200 (Del. Ch. 2023).

DELAWARE COURT OF CHANCERY REJECTS CLAIMS RELATED TO THE ACQUISITION OF AN ALLEGED CONTROLLER'S PORTFOLIO COMPANY FOR FAILURE TO PLEAD DEMAND FUTILITY

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On December 28, 2023, Vice Chancellor Morgan T. Zurn of the Delaware Court of Chancery dismissed derivative breach of fiduciary duty and other claims asserted by a plaintiff shareholder after nCino, Inc. (the "Corporation") acquired a portfolio company (the "Target") of the Corporation's alleged controlling shareholder.

In *City of Hialeah Employees' Retirement System v. Insight Venture Partners, LLC*,[1] plaintiff generally contended that the Corporation overpaid for the Target to the benefit of the alleged controller and the detriment of the Corporation, as reflected in the decline in the Corporation's stock price after the deal was announced. Plaintiff sought to establish that pre-suit demand was excused because the directors faced a substantial likelihood of liability and were beholden to the alleged controller. The Court found that plaintiff did not adequately allege that the board approved the acquisition in bad faith or lacked independence from the alleged controller and, therefore, failed to plead demand futility.

The Court highlighted that the Corporation had an exculpatory provision in its charter pursuant to Delaware General Corporation Law Section 102(b)(7). Therefore, plaintiff could not show a substantial likelihood of liability in the absence of bad faith. Plaintiff focused on aspects of the approval process, including an alleged lack of price negotiations, reliance on the financial advisor's fairness opinion, and the alleged failure to consider a valuation of the Target based on the alleged controller's prior investment in the Target.

As to plaintiff's price-related contention, the Court found that the complaint's own allegations showed that the board reasonably relied on the assessment of management regarding the "floor" that the Target would accept for the deal and the fairness opinion of the financial advisor. The Court also noted that the board negotiated the cash portion of the cash/stock deal down from 50% to 20%, which enabled the Corporation to avoid having to raise funds for the deal.

Regarding the analysis of the Corporation's financial advisor, plaintiff alleged that there were several flaws, including in the financial projections the advisor used. The Court, however, concluded: "Even if [p]laintiff's criticisms are well-founded, quibbling with or criticizing a financial analysis falls far short of showing it was so facially flawed as to rebut the presumption that the directors relied on it in good faith."

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