The M&A LAWYER

March 2023 ▪ Volume 27 ▪ Issue 3

AN (UN)FIT THEORY: LESSONS FROM THE FTC'S FAILED ATTEMPT TO BLOCK META'S ACQUISITION OF WITHIN'S VR FITNESS APP

By Michael A. Gleason, Ryan C. Thomas, and Ian W. Fraser

Michael Gleason and Ryan Thomas are partners in the Washington, D.C. office of Jones Day. Ian Fraser is an associate in Jones Day's Washington, D.C. office. Contact:
magleason@jonesday.com or rcthomas@jonesday.com or ifraser@jonesday.com

In the latest example of aggressive—but unsuccessful—Biden Administration antitrust enforcement, the Federal Trade Commission ("FTC") failed to obtain a preliminary injunction in federal court that would have barred Meta Platforms, Inc. from acquiring virtual reality ("VR") fitness app developer Within Unlimited, Inc., pending the outcome of an administrative hearing on the merits. Following the loss and public speculation that the FTC would continue to pursue the case in its administrative court, the FTC withdrew its administrative complaint, consistent with past practice. Historically, most antitrust M&A challenges involve companies that *currently* compete in the same market. Here, the FTC challenged Meta's acquisition not because it competed with Within, but because it was allegedly a *potential* competitor to Within.

Antitrust enforcers globally, particularly in the U.S., have spilled much ink about challenging deals involving potential competitors. For example, in an early memo to staff, the then-new FTC Chair urged staff to be "forward-looking in anticipating problems . . . especially attentive to next-generation technologies, innovations, and nascent industries across sectors."[1] Likewise, in announcing revisions to their merger guidelines, the DOJ and the FTC called for input on "threats to potential and nascent competition" which "may be key sources of innovation and competition."[2] The enforcers have settled and litigated potential competition cases too.[3] For example, during the Obama Administration, the FTC litigated and lost its challenge to STERIS' acquisition of Synergy Health. During the Trump Administration, the DOJ litigated and lost its effort to block Sabre's acquisition of Farelogix and filed a complaint challenging Visa's acquisition of Plaid, which prompted the parties to abandon the deal.

A common concern that we hear from busi-

IN THIS ISSUE:

An (Un)fit Theory: Lessons from the FTC's Failed Attempt to Block Meta's Acquisition of Within's VR Fitness App 1

Chancery Grants Judicial Validation of SPACs' Potentially Defective Charter Amendments and Share Issuances Effected Without a Separate Vote of Class A Common Shares—*Lordstown* 9

Putting the Best Spin on Corporate Splits 14

New European Union Foreign Subsidies Regulation Targets Inbound M&A Activity 18

Policy in Transition 21

From the Editor 29

THOMSON REUTERS®

42986052

[11]*Id.* at *52.

[12]*Id.* at *54.

[13]*Id.* at *64.

[14]Complaint at ¶¶ 5, 25, *United States v. Visa Inc.*, No. 3:20-cv-07810 (N.D. Cal. Nov. 5, 2020), CM/ECF No. 1, *available at* https://www.justice.gov/atr/case-document/file/1334736/download.

[15]Complaint at ¶ 10, *In re Nielsen Holdings N.V., and Arbitron Inc.*, No. C-4439 (F.T.C. Feb. 24, 2014), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2013/09/130920nielsenarbitroncmpt.pdf.

[16]*Id.*

[17]Complaint at ¶ 4, *Visa*, No. 3:20-cv-07810.

[18]*Id.*, ¶ 7.

[19]Complaint at ¶ 34, *United States v. Sabre Corp.*, No. 1:19-cv-01548-UNA (D. Del. Aug. 20, 2019), CM/ECF No. 1, *available at* https://www.justice.gov/atr/case-document/file/1196836/download.

[20]*Id.*

[21]*Id.*, ¶ 4.

[22]Complaint, *In re Polypore Int'l, Inc.*, No. 9327 (F.T.C. Sept. 10, 2008), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2008/09/091008cmp9327.pdf.

[23]*Meta Platforms*, at *57-58.

[24]*Federal Trade Com'n v. Steris Corp.*, 133 F. Supp. 3d 962, 964-65, 977-82, 2015-2 Trade Cas. (CCH) ¶ 79303 (N.D. Ohio 2015).

[25]This can include documenting what approvals or hurdles within the company are necessary to enter, and which of them have not been obtained. Those facts in particular can be helpful if the company later changes course.

[26]*See, e.g.*, Khan Speech, *supra* note 1, at 3.

[27]Press Release, Fed. Trade Comm'n, FTC Announces Multilateral Working Group to Build a New Approach to Pharmaceutical Mergers (Mar. 16, 2021), *available at* https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-announces-multilateral-working-group-build-new-approach-pharmaceutical-mergers.

[28]Transcript at 3, Public Workshop, The Future of Pharmaceuticals: Examining the Analysis of Pharmaceutical Mergers (June 14, 2022), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-The-Future-of-Pharmaceuticals-Transcript-Tuesday-June-14-2022.pdf.

[29]Complaint at ¶ 33, *Sabre Corp.*, No. 1:19-cv-01548-UNA.

[30]Complaint at ¶ 9, *Visa*, No. 3:20-cv-07810.

[31]Draft Horizontal Merger Guidelines, Released for Public Comment Apr. 20, 2010 (stating that a "high purchase price may indicate that the acquiring firm is paying a premium to reduce competition or that the acquired firm has assets not easily replaced"). The DOJ and the FTC removed that language from the final version of the 2010 Horizontal Merger Guidelines.

[32]*Id.* at ¶ 12 ("Recognizing that the deal 'does not hunt on financial grounds,' Visa's CEO justified the extraordinary purchase price for Plaid as a 'strategic, not financial' move because '[o]ur US debit business i[s] critical and we must always do what it takes to protect this business.").

[33]*Id.*

CHANCERY GRANTS JUDICIAL VALIDATION OF SPACs' POTENTIALLY DEFECTIVE CHARTER AMENDMENTS AND SHARE ISSUANCES EFFECTED WITHOUT A SEPARATE VOTE OF CLASS A COMMON SHARES—*LORDSTOWN*

By Gail Weinstein, Andrew B. Barkan, and Brian Hecht

Gail Weinstein is a senior counsel, and Andrew Barkan and Brian Hecht are partners, in the New York office of Fried, Frank, Harris, Shriver & Jacobson LLP. Contact: gail.weinstein@friedfrank.com or andrew.barkan@friedfrank.com or brian.hecht@friedfrank.com.

Many SPACs, in connection with a de-SPAC merger, have approved charter amendments authorizing an increase in the number of their authorized

shares of Class A Common Stock to facilitate the issuance of shares required for the merger. Based on widely accepted legal advice at the time, such amendments typically were approved by vote of the Class A and Class B Common Stock voting together. However, in a December 2022 decision, *Garfield v. Boxed*, which came as a surprise to corporations and legal practitioners, the Delaware Court of Chancery indicated that such amendments require, in addition, a separate vote of the Class A common shares.

In response to the uncertainty created by *Garfield* as to the validity of such charter amendments that were approved only by a joint vote, as well as the validity of the billions of shares that have been issued based on such amendments, the court now has indicated, in *In re Lordstown Motors Inc.*[1] that, absent unusual circumstances, it will grant requests, made pursuant to DGCL Section 205, for judicial validation of such amendments and share issuances. In bench rulings (Feb. 20, 2023), the court granted Section 205 petitions on this issue that had been submitted by Lordstown and five other companies; hearings on the additional 30 such petitions the court has received are being scheduled for the coming weeks; and the court expects to receive more such petitions.

Key Points

- **Many SPACs (and potentially other Delaware corporations) may not have validly adopted charter amendments increasing their authorized Class A common shares, nor have validly issued Class A common shares, if such amendment was approved by a combined vote of all common shares and not a separate vote by the Class A shares.** Approval only by a combined vote has been the norm, based on widely accepted legal advice, prior to *Garfield*, that a separate vote of the Class A shares was not required.
- **In *Lordstown,* the court has indicated that, to resolve the uncertainty for companies that took such potentially defective corporate acts, the court is likely to grant requests under DGCL Section 205 for judicial validation of these acts, absent unusual circumstances.** Section 205, which has not been utilized frequently, provides a route to validate defective corporate acts. The court has viewed Section 205 as an appropriate route to resolution where a company has taken an act with the intent and belief that it is valid and later discovers a technical defect and seeks a court remedy to avoid incidental harm.
- **We note that the issue potentially extends to other corporate acts as well that were taken based on charter amendments approved only by a combined vote**—such as amendments providing for officer exculpation from liability (see "Practice Points" below).

Background

In several cases filed in the Court of Chancery, stockholders have challenged de-SPAC mergers on the basis that the SPAC's charter amendment, prior to a de-SPAC merger, to increase the authorized number of Class A common stock (an "Authorized Share Amendment") was not validly authorized, and that the shares issued based on such amendments were not validly issued. These challenges have been made on the basis that the Authorized Share Amendments involved a change in the number of authorized shares of a *class* of stock ("Class A Common Stock") and thus, under Section 242(b)(2), a separate vote of the holders of the Class A common shares was required. Most lawyers had believed that a SPAC's Class A and Class B common shares represented two *series* (A and B) of a single *class* of stock (the Common Stock)—even though they were labeled as "Class" A and B. The thinking was that, nomenclature aside, there could not be separate *classes* of stock within a single class of stock (*i.e.*, the Common Stock), thus a

© 2023 Thomson Reuters

SPAC's "Class A Common Stock" and "Class B Common Stock" were actually different *series* of the *single class* of Common Stock.

Lordstown, for example, disclosed that it had relied on the advice of several law firms, including a legal opinion of Delaware counsel, that a separate class vote of the Class A common shares was not required for its Authorized Share Amendment. In some cases, SPACs sought a separate vote of Class A common shares to avoid litigation over whether a separate vote was required; however, in most cases, SPACs' Authorized Shares Amendments were approved only by the Class A and Class B common shares voting together.

In *Garfield v. Boxed*,[2] Vice Chancellor Morgan Zurn indicated that the Class A and Class B common shares of the SPAC at issue were separate "classes," not separate series of a single class, and thus the separate vote of the Class A common shares had been required. Following *Garfield*, many SPACs have filed petitions to the court under DGCL Section 205 seeking judicial validation of their Authorized Share Amendments and the shares they issued thereunder. In *Lordstown*, Vice Chancellor Lori Will has indicated that the court likely will grant judicial validation requests under Section 205 by other companies facing similar circumstances with respect to their Authorized Share Amendments and shares issued thereunder.

Discussion

De-SPAC Mechanics

When a SPAC (special purpose acquisition company) is organized, it typically has Class A Common Stock, which is ordinary common stock held by public investors, and Class B Common Stock, which is typically acquired for nominal consideration and held by the SPAC's sponsor. In a de-SPAC transaction (this is, the merger pursuant to which the SPAC's acquisition target becomes a public company), typically, a wholly-owned subsidiary of the SPAC is merged with and into the target company, with the target company's equity being converted into the right to receive shares of the SPAC's Class A common stock. Also, in the de-SPAC merger, typically, the Class B Common Stock is converted into Class A Common Stock (thus the Class A Common Stock is the only type of common stock left outstanding after the de-SPAC). Before the de-SPAC merger, the SPAC's charter is amended to increase the authorized shares of Class A Common Stock to accommodate these issuances.

DGCL Section 242(b)

Section 242(b)(1) of the DGCL requires that most charter amendments be approved by (i) the holders of a majority in voting power of outstanding stock entitled to vote on the amendment and (ii) any additional vote required by Section 242(b)(2). Section 242(b)(2) provides that a charter amendment to change the number of authorized shares of a *class of stock* requires a separate vote of the affected class. Section 242(b)(2) does *not* state that a change in the authorized number of shares of a *series of stock* within a class requires any separate vote. Section 242(b)(2) states that companies may opt out of a separate class vote for adding authorized shares to a class—but (although the National Venture Capital Association form charter contains an opt-out provision), many SPACs' charters have not included an opt-out provision.

DGCL Sections 204 and 205

These provisions of the DGCL (which became effective in 2014 and have been little-utilized since then) provide two statutory methods that can be used to fix defective (or potentially defective) corporate acts that might otherwise be void.

- ***Section 204*** allows a board (without judicial involvement) to validate a defective corporate act by following specified procedures.
- ***Section 205*** allows identified parties to petition

© 2023 Thomson Reuters

the Court of Chancery to enter an order validating or invalidating a defective corporate act—if self-help under Section 204 is unavailable or the board seeks to ensure that a validity determination is not subject to challenge.

- ***Sections 205(a)(3) and (a)(4).*** Section 205(a)(3) provides that the court may determine the validity and effectiveness of any defective corporate act not ratified (or not ratified effectively) pursuant to Section 204. Section 205(a)(4) provides that the court may determine "the validity of any corporate act or transaction and any stock, rights or options to acquire stock."

Garfield v. Boxed

In *Garfield*, Vice Chancellor Zurn granted an award of fees ($850,000) to the attorneys for a SPAC stockholder who had challenged an Authorized Share Amendment. In response to the stockholder's challenge, the SPAC had changed course and put the Amendment to a separate vote of Class A holders. The court viewed the Class A and Class B Common Stock as separate classes of common stock, not separate series of common stock, and therefore viewed a separate class vote as having been required. As a result, the court held, the stockholder had provided a "substantial benefit" to the company by raising the issue and procuring the separate vote—thus, its attorney was entitled to a fee award. In *Garfield*, the court emphasized that the SPAC's charter used the word "class" rather than "series." Also, the court noted that DGCL Section 102(a)(4) requires that if a corporation has authority to issue more than one *class* of shares, the charter must set forth the number of shares of each class and whether the shares are par or no-par—and, in this SPAC's charter, the number of authorized shares, and their par value, was set forth for the Class A common shares and for the Class B common shares, apparently to comply with the statute's requirements for authorized *classes* of shares. Further, the court observed that the charter provided authority to the board to issue one or more "series" of preferred stock, but not "series" of common stock. The court concluded that the charter, read as a whole and together with the DGCL, granted the SPAC authority to issue "only classes of common stock—not series."

The Aftermath of *Garfield*

Following *Garfield*, several companies (including Lordstown Motors Corp.) filed petitions with the court, under Section 205, for judicial validation of Authorized Share Amendments that had been approved only by a joint vote of Class A and Class B common shares. They also generally filed Form 8-Ks to disclose the issue and that the Section 205 petition was filed; and suspended use of existing registration statements pending resolution by the court. Law firms that had provided Exhibit 5 validity opinions with respect to shelf registration statements generally did not withdraw the opinions but relied on the client's suspension of the shelf registration statement and the anticipated judicial resolution under the Section 205 petition. In some situations, auditors have raised concerns about the effect on a company's financial statements of the uncertainty arising from this issue.

Lordstown Opinion

The court granted Lordstown's request for judicial validation of its Authorized Share Amendment and its issuance of Class A common shares thereunder. The court granted the validation under Section 205(a)(4) (and, in a footnote, stated that Section 205(a)(3) also appeared to be applicable). The court held that ratification of the charter amendment under Section 204 was not a practical alternative because it was not clear which stockholders would be entitled to vote on a ratification proposal, as the shares issued based on the Authorized Share Amendment had been actively traded on NASDAQ.

Vice Chancellor Will reasoned that: (i) the com-

© 2023 Thomson Reuters

pany had filed and effected the Authorized Share Amendment with the good faith belief that it was adopted in accordance with Delaware law and the company's charter; (ii) the company and third parties (including market participants, financing sources, business partners, stockholders, employees, and directors) had treated the charter amendment as valid and had acted in reliance on its validity; (iii) the company had issued over 115 million shares of Class A Common Stock in reliance on the effectiveness of the Authorized Share Amendment and had described those shares as issued and outstanding in its SEC filings, financial statements, and third-party agreements; (iv) no persons would be harmed by validating the Authorized Share Amendment; and (v) absent relief, the company, its stockholders, and other parties "would face substantial damage."

Other Cases

The court stated in the *Lordstown* opinion that it has received 36 Section 205 petitions seeking validation of SPACs' Authorized Share Amendments—and that the court expects to receive more such petitions. The court stated that its reasoning in the *Lordstown* opinion "should prove instructive to other companies seeking the court's assistance to validate similar corporate acts." The court wrote that whether or not Authorized Share Amendments and the shares issued thereunder were "defective as a technical matter" (either due to (i) shares having been issued without the requisite approval or (ii) notwithstanding approval by the requisite number of votes, the wrong voting standard having been disclosed), these companies "are experiencing the same pervasive uncertainty and risk of harm." The court stated: "Ratification will restore confidence in the company's capital stock and assuage market fears," while "[a] contrary ruling would invite untold chaos."

Practice Points

- **Companies with multi-class common stock should keep in mind that, based on *Garfield v. Boxed*, a separate class vote is required to increase the number of authorized shares of the class.** Based on *Garfield*, generally, under Section 242(b)(2), a SPAC (or other Delaware company with multi-classes of common stock, such as Class A and Class B common stock) must have a separate vote of the affected class to approve an increase in the authorized number of shares of that class (such as a vote of the Class A common shares, voting separately, to authorize a charter amendment increasing the number of Class A authorized shares)—unless, as noted below, the charter contains a Section 242(b)(2) opt-out provision. Companies that have authorized such a charter amendment only by a combined vote of different classes of common shares should consider whether, under the specific circumstances, validation of the increase and the related issuance of shares should be sought under DGCL 205. Even where a sufficient number of shares of a class, as part of the combined vote, approved such a charter amendment, it may be advantageous to seek Section 205 validation to provide certainty.
- **A separate class vote to authorize increased shares is not required if the charter contains a Section 242(b)(2) opt-out provision.** Companies going public, adopting new charters, or considering charter amendments for other purposes should consider including such an opt-out provision. A separate class vote also may not be required, based on the reasoning in *Garfield*, if the charter supports a reading that, for example, "Class A" and "Class B" Common Stock are two *series* of common stock rather than two *classes.* For example, the charter may have language referring to "series" of common stock; and/or the charter may not set forth the number of authorized shares and the par value for each of Class A and Class B common shares as would be required under the DGCL if they were "classes" of stock.

© 2023 Thomson Reuters

- **Until a potentially defective act such as that involved in *Lordstown* is validated, issues may arise, at least for public companies, with respect to accountants' audit and review of financial statements, registration statements, and legal opinions provided in connection with registration statements.** Pending validation, a public company should consider publicly disclosing these issues, and, as appropriate, also disclosing that the use of any existing shelf registration statement has been suspended, that a Section 205 petition has been or will be filed, and that validation under Section 205 is expected in light of the *Lordstown* decision.

- **Cayman Islands law.** Many SPACs are organized under the laws of the Cayman Islands. It appears that these SPACs do not face the same issue regarding potentially defective charter amendments and share issuances, as, according to Cayman law practitioners, there is no provision under Cayman law that is similar to Delaware's requirement for a separate class vote on issues that may adversely affect the class.

- **Similar issue with respect to officer exculpation charter amendments.** We note that there are lawsuits pending in Delaware in which the plaintiff shareholders are claiming that a separate class vote of Class A common shares was required for charter amendments providing for exculpation of liability for officers. In these cases, the plaintiffs challenged the charter amendment on the grounds that it violated Section 242's grant of the right to vote on charter amendments that would "alter or change the powers, preferences, or special rights of the shares" of that class. The plaintiffs have argued that the exculpation amendment adversely affects the company's Class A common shares, given that, previously, officers were not exculpated. (Charter provisions providing exculpation of liability for officers under certain circumstances is now permitted under recent amendments to DGCL Section 102(b)(7).) No decisions have yet been issued in these cases.

ENDNOTES:

[1]C.A. No. 2023-0083-LWW (Del. Ch. Feb. 22, 2023).

[2]No. 2022-0132-MTZ (Del. Ch. Dec. 27, 2022).

PUTTING THE BEST SPIN ON CORPORATE SPLITS

By Brandon Van Dyke, Steven J. Matays, and Kyle J. Hatton

Brandon Van Dyke, Steven Matays, and Kyle Hatton are partners in the New York office of Skadden, Arps, Slate, Meagher & Flom LLP. Contact: brandon.vandyke@skadden.com or steven.matays@skadden.com or kyle.hatton@skadden.com.

- Companies are likely to see continued pressure from both institutional investors and activists to separate businesses that are not deemed "core" and thereby generate higher equity multiples for the parent or the separated business.

- Tax-free spin-offs and similar transactions may be the most appealing way to separate a business, in part because companies retain flexibility during the process to change the structure of the transaction, and they can entertain third-party bids while pursuing a spin-off.

- Spin-offs are less dependent on third parties and market conditions, so the company has more control over the timing of a separation, which helps to unlock value on the company's chosen timeframe.

In recent years, in the boardrooms of public companies with multi-line businesses, there have been few louder drum beats than those from investors calling

© 2023 Thomson Reuters