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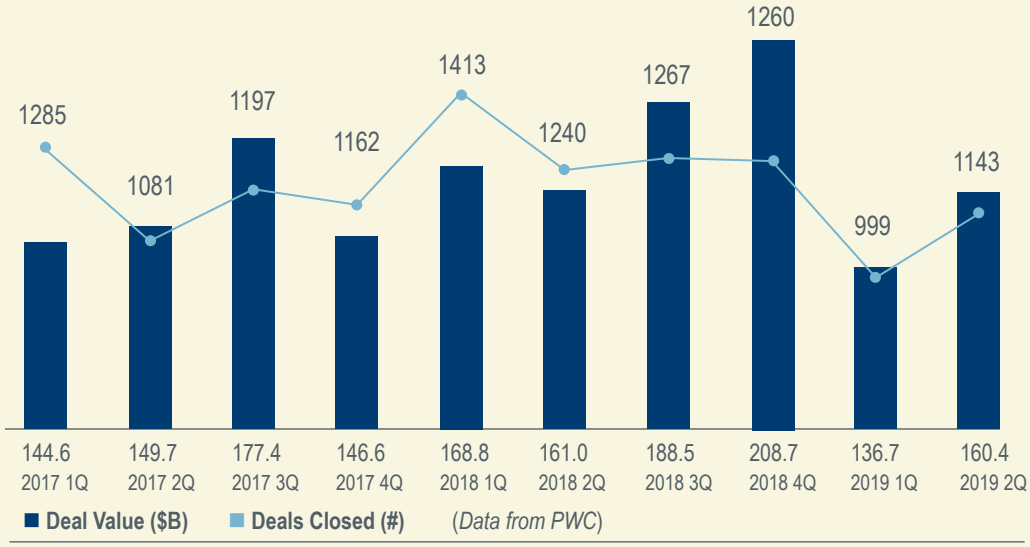
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M&A/PE QUARTERLY

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

Fall 2019

U.S. PE Deal Value and Volume By Quarter 2017–2019



***H1 Deal Value*:** ↓ Down 10% vs. H1 2018 ($297.1 B)
***H1 Deal Volume*:** ↓ Down 19% vs. H1 2018 (2,142 deals)
***Q2 Deal Value/Volume*:** Rebounded from sluggish Q1 levels
***H1 Exits*:** ↓ Down 38% vs. H1 2018 (371 exits); secondary buyouts continue to comprise a majority of exits
***H1 Transaction Multiples*:** 12.3 (↑ up from 11.5 in H1 2018, which matches the recent years' record in 3Q 2018)
***H1 Time to Fundraising Close*:** Over 40% of funds closed in < 6 months, vs. about 25% in each of the previous 5 years (notably, 5% of funds raised in Q2 accounted for > half of all of the capital raised)

A Focus on Conflicted Controllers, the "800-Pound Gorillas"—Tornetta *and* BGC

In the past quarter, two important Court of Chancery decisions—*Tornetta* and *BGC*—have highlighted the "reflexive skepticism" with which the Delaware courts approach transactions involving conflicted controllers.

- In *Tornetta*, a case of first impression according to the court, Vice Chancellor Slights held that unless a board's decision on executive compensation for a controlling stockholder–CEO complies with the protections outlined in the seminal *MFW* decision, the entire fairness standard of review (which is the strictest standard) applies to the court's evaluation of a stockholder challenge to the compensation. The court so decided notwithstanding that, until now, a) business judgment review has applied to compensation decisions made by independent directors and b) *MFW*-compliance has been required for business judgment review of conflicted controller transactions only in the context of transactions that are "transformational" for the corporation.

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- In *BGC*, Chancellor Bouchard applied what seems to be a more stringent standard than in the past for evaluating whether putatively independent directors can be presumed to be capable of acting independently from a controller in the context of evaluating demand futility. ("Demand futility" means that a stockholder who wishes to bring claims against a controller need not first make a demand on the board—for the board to bring the claims on behalf of the corporation—if doing so would be "futile" because the directors' conflicts or lack of "independence" suggest that they might not be capable of making the decision impartially.) The Chancellor appeared to focus on the sense of owingness that a director could feel toward a controller if the director's general status or positions of importance in the company or the community were a result of his or her connection with the controller.

The court emphasized in these cases the potential for "coercive influence" by controllers—"800-pound gorillas" (in the words of Chief Justice Strine, quoted in *Tornetta*)-—over directors (who the controller typically can remove or not reappoint) and unaffiliated stockholders (who the controller can harm through retributive acts such as a squeeze-out merger or the cutting of dividends). There is "an obvious fear that even putatively independent directors may owe or feel a more-than-wholesome allegiance to the interests of the controller, rather than to the corporation and its public stockholders," the Chief Justice had explained in a previous case. The court reinforced in *Tornetta* and *BGC* that this concern is not necessarily eliminated even where the controller has no intention to be coercive, the transaction is negotiated by "outside" directors, and/or the transaction is stockholder-approved.

Below, we discuss *Tornetta* and *BGC* and offer practice points arising from the decisions.

In a Case of First Impression, the Court of Chancery Holds a Board's Decision on a Controller's Executive Compensation Will be Subject to Business Judgment Deference Only If MFW Requirements Are Met—Tornetta

In *Tornetta v. Elon Musk, Tesla, Inc. et al* (Sept. 20, 2019), at the pleading stage of litigation, Vice Chancellor Slights denied the defendants' motion to dismiss the shareholder lawsuit challenging Tesla, Inc.'s compensation plan for Elon Musk, the CEO and largest stockholder of Tesla, who was deemed to be a controller. The 10-year incentive-based plan had been approved by the Tesla board and by a majority of the minority stockholders.

Key Points

- **The court applied the "entire fairness" standard of judicial review to the board's executive compensation for a controller.** The court held that, even though a board's executive compensation decisions typically are accorded "great judicial deference," entire fairness applies to transactions with conflicted controllers where the process was not structured to nullify the potential for "coercive influence" by the controller.

- **The court held that business judgment deference would have applied if the process had been *MFW*–compliant**. Although the compensation plan had been approved by the board and by the minority stockholders, in the court's view those approvals could be free of the "inherent coercion" resulting from the presence of a controller only if the additional safeguards provided by the *MFW* framework (in this case, an independent special committee of the board) had been in place.

- **The decision expands the applicability of *MFW* beyond "transformational" transactions**. The decision extends *MFW* to a board's executive compensation decisions ("about as work-a-day as board decisions get," Vice Chancellor Slights conceded). The court acknowledged that neither the Court of Chancery nor the Delaware Supreme Court had provided any indication that their *MFW* holdings were to apply—and in fact *MFW* has not previously been applied—outside the context of "transformational" transactions.

Background. In January 2018, the Tesla board approved a compensation plan (the "Award") for Elon Musk, the company's founder, CEO, Chief Product Architect, recent longtime Chairman, and largest stockholder (with a 21.9% interest at that time). The board submitted the Award to the stockholders for approval after describing it in detail in the company's proxy statement. The stockholders

overwhelmingly approved it at a special meeting. After Tesla implemented the Award, a Tesla stockholder brought this suit, making direct and derivative claims against Musk and the directors who approved the Award. The plaintiff claims that the Award is excessive (Musk has the potential to receive stock options worth $55.8 billion) and is the product of breaches of fiduciary duty by Musk and the directors.

The board consisted of seven "outside" directors, as well as Musk and Musk's brother. For purposes of the motion to dismiss (only), the defendants did not contest, and the court assumed as true, the plaintiff's allegation that Musk is a controller and that he dominated the board and the compensation committee during the time the Award was negotiated and approved.

The court ruled that, because the Award related to compensation for a controller, the applicable standard of judicial review would be "entire fairness" rather than the deferential business judgment. Business judgment review typically has been applied to a board's executive compensation decisions--even when the recipient of the compensation is a controlling stockholder so long as the decision was made by an independent compensation committee (and especially when the decision was approved by the stockholders). The court characterized the standard of review issue as one of "first impression" for the court, and ruled that business judgment deference should be accorded to compensation decisions for a controller *only if* the prerequisites of *MFW* are met. The Tesla board admittedly did not follow the *MFW* roadmap (*e.g.*, there was no special committee of independent directors). The court found that the plaintiff had alleged facts that supported ("albeit just barely") a reasonable inference that the compensation plan was *not* entirely fair to Tesla. Accordingly, the court denied the defendants' motion to dismiss the suit.

The Compensation Plan. The Award is a 10-year grant of stock options to Musk that would vest in 12 tranches, each contingent on the company's having reached market capitalization and operational milestones. If *every* milestone is reached, options will vest with a maximum potential value of $55.8 billion. If any milestone is not met, no options will vest. In its proxy statement, Tesla estimated the Award's preliminary aggregate fair value at $2.615 billion. The Award provides as follows:

- ***High milestones***. Each of the market capitalization milestones requires a $50 billion increase in Tesla's market capitalization. Reaching the first market capitalization milestone "would roughly double Tesla's market capitalization as of the date the Award was approved, and reaching all 12 would likely make Tesla one of the most valuable public companies in the world." The operational milestones require annual increases in revenue ranging from $20 billion to $175 billion, and annual increases in adjusted EBITDA ranging from $1.5 billion to $14 billion. The milestones will be adjusted if Tesla makes acquisitions having a material impact on reaching any milestone ("ensuring the milestones will be met through organic growth, not acquisitions").

- ***Vesting***. Upon reaching the twin milestones corresponding to each tranche of the Award, options held by Musk representing 1% of Tesla's current total outstanding shares will vest. Any options that do not vest within the 10 years are forfeited, and no options will vest if, at the time the relevant milestone is met, Musk is not serving as CEO (or as both Executive Chairman and Chief Product Officer, with the CEO reporting directly to him).

- ***Sale restrictions***. Musk cannot sell vested shares for five years ("tying him more closely to Tesla").

- ***Dilution borne by Musk***. By tying the shares Musk receives to outstanding shares at the time of the grant (rather than the fully diluted shares at the time of vesting), Musk bears the cost of dilution.

Discussion

The board's process appears to have been thorough. The background context for the Award included (i) Musk not having taken any compensation for many years after founding Tesla, (ii) in 2012, Musk having reached almost all of the operational milestones set for him in the option grant he had been awarded in 2009, and (iii) by 2017, Musk having already met almost all of the very high market capitalization and operational milestones set forth in his 10-year 2012 stock option award. Also, importantly, in 2018, the board was faced with the problem of "keeping Musk focused on Tesla" given his many other business interests, including his role as CEO of SpaceX (another company he had founded which is among the largest private companies in the world and is of great personal interest to him). Using Musk's 2012 award as a model, the compensation committee crafted the Award with outside counsel and Tesla's regular outside compensation consultant. The board tied the operational milestones to increases in total revenue and adjusted EBITDA after conferring with Tesla's largest institutional investors. Over a series of meetings, Musk and the compensation

committee negotiated the milestones, the overall size of the grant, and how share dilution would affect the award. The full board approved the Award in January 2018. The board conditioned implementation of the Award on the approval of a majority of the disinterested shares voting at a special meeting in March 2018. To that end, the proxy statement conditioned approval of the Award on a majority of the shares not affiliated with Musk voting in favor. The Award was approved by the shareholders, with 80% of the shares voting cast in favor. Of the disinterested shares (those not affiliated with Musk), 73% of those voting voted in favor (which equated to 47% of the total disinterested shares outstanding).

The court held that the standard of judicial review applicable to executive compensation decisions for a controller is "entire fairness" rather than business judgment. The court concluded that, although a board's compensation issues are entitled to great deference, as the Award constitutes a transaction *with a controlling stockholder*, "it ought to provoke heightened judicial suspicion." The Vice Chancellor wrote:

- "This court's earnest deference to board determinations relating to executive compensation does not jibe with our reflexive suspicion when a board transacts with a controlling stockholder."
- "Without doubt, our law recognizes the relationship between a controlling stockholder and minority stockholders is fertile ground for potent coercion" even where no coercion is intended.
- A controlling stockholder's "coercive influence is no less present and no less consequential, in instances where the board is negotiating the controlling stockholder's compensation than it is when the board is negotiating with the controller to effect a 'transformational' transaction. In my view, stockholder ratification, without more, does not counterpoise the risk of coercion in either context."
- "While stockholders generally would have no reason to feel coerced when casting a non-binding, statutory Say on Pay vote, or when asked to approve a board-endorsed executive compensation plan, I discern no reason to think minority stockholders would feel any less coerced when voting against the controlling CEO's compensation plan than they would when voting to oppose a transformational transaction involving the controller. In both instances, the minority stockholders would have reason to fear controller retribution [such as] forcing a squeeze-out or cutting dividends."

We observe that the court's view that entire fairness applies to decisions on a controller's executive compensation is not necessarily surprising given the Delaware Supreme Court's holding in *In re Investors Bancorp* (December 2017), which limited the extent to which the business judgment rule protects directors when they determine their own compensation. (*In Investors Bancorp*, the Supreme Court held that a challenge to awards that directors grant to themselves—even when they are made under equity plans that contain "meaningful limits" on awards—will be reviewed under entire fairness if the plaintiff has alleged facts that support an inference that the directors may have breached their fiduciary duties when determining the awards. The Supreme Court found such an inference in that case based on the awards appearing to have been "excessive" given that they were significantly higher than the directors' past compensation and the compensation at peer companies.)

The court held that business judgment review would have applied if the *MFW* prerequisites had been met. The court acknowledged that *MFW* was decided in the context of a squeeze-out merger and that "nothing in *MFW* or its progeny would suggest the Supreme Court intended to extend the holding to other transactions involving controlling stockholders." The court observed that *MFW* has been held to apply to the merger of a controlled company with a third party and to a reclassification of stock, but that both were "transformational transactions" (involving a "fundamental alteration of the corporate contract"), while compensation decisions are *not* transformational. However, the court stated, *MFW* can "provide useful safeguards" in this context. Preconditioning a controller's compensation package on *MFW*'s "dual protections"—*i.e.*, both the approval of a fully functioning, independent committee *and* an informed, uncoerced vote of the majority of the minority stockholders—"will dilute the looming coercive influence of the controller." With the dual protections in place, the court wrote, "the minority stockholders can cast their votes knowing the controller has agreed at the outset to negotiate his compensation award with an independent, fully functioning committee of the board, to condition consummation of the award on that committee's endorsement, and to allow the unaffiliated stockholders to have the final say." Under these circumstances, the minority stockholders "have far less reason to fear that the controller will retaliate if the committee or minority stockholder votes do not go his way," the court wrote. We note that in this way the decision is consistent with the seminal *Corwin* decision—which provides

for business judgment deference for any board decision that is approved by stockholders (in a fully informed, uncoerced vote), but which expressly does *not* apply in the case of a decision relating to a controller.

The court discussed past precedent where the court had applied business judgment deference to board compensation decisions for controllers. In a footnote, Vice Chancellor Slights stated that neither party had cited *Friedman v. Dolan* (2015), where Vice Chancellor Noble had determined that business judgment review was appropriate in connection with a board's decision to award allegedly excessive compensation to a controlling stockholder-CEO. Vice Chancellor Slights, without much discussion, stated that he found *Dolan* to be "distinguishable and unpersuasive" for the same reasons, he stated, that Vice Chancellor Laster had articulated in *EZCORP* (2016), where *Dolan* was discussed at length. In *EZCORP*, Vice Chancellor Laster emphasized that *Dolan* and the few subsequent decisions that relied on it were not consistent with the "weight of authority" which held that conflicted controller transactions (including those involving consulting agreements and management agreements, or where the controller otherwise "extracts a non-ratable benefit" from the corporation) are subject to entire fairness.

The court found that the plaintiff met the bar for non-dismissal at the pleading stage—but suggested that the defendants' arguments could well ultimately prevail. As the Award had been approved by a majority of the minority stockholders (satisfying one prong of *MFW*'s dual protections), the burden of proof shifted to the plaintiff to prove that it is reasonably conceivable that the Award is *not* entirely fair to Tesla (*i.e.*, that it was "not the product of both fair dealing and fair price"). The court found that the plaintiff "ha[d] cleared the bar, albeit just barely." The court cited the plaintiff's allegations that the Award is "well in excess of that paid to Musk's peers," and emphasized the low bar to meet the "reasonably conceivable" standard applicable at the pleading stage. At the same time, the Vice Chancellor observed that, while he was declining to dismiss the case at the pleading stage, the defendants' arguments "may well carry the day" in the context of a summary judgment motion or trial. The defendants' arguments were that (i) the Award is entirely performance-based and aligns Musk's incentives with the interests of the other stockholders (especially given Musk's several other business interests that might distract him from his work at Tesla); (ii) it is quite possible that Musk will never obtain the full value of the Award given the "extraordinary" milestones; and (iii) if the milestones are met, Tesla would be one of the world's most valuable companies and all stockholders then will have reaped the benefits of Musk's "incentivized focus."

Practice Points

- **A company and its controller should be prepared for the potential that a transaction of any type pursuant to which the controller obtains a non-ratable benefit as compared to the other stockholders may be reviewed by the court under the entire fairness standard.**

- **Is it possible that there is a continuum of compensation decisions for controllers such that they would not all necessarily be subject to entire fairness?** The court characterized executive compensation decisions as "work-a-day" decisions of a board and not "transformational"—but nonetheless applied entire fairness. We observe that the compensation decision in *Tornetta* was, if not transformational, certainly highly significant given the extreme importance of Musk to the company and the extreme amount awarded to him (potentially $55.8 billion). Query whether more mundane compensation awards for controllers (or other types of garden-variety transactions with controllers) necessarily would be subjected to the entire fairness standard under *Tornetta*—and, if entire fairness were applied, whether the court might be more inclined to find that the award (or other transaction) was entirely fair.

- **A controller should consider the benefits of including independent directors on the board.** Tesla engaged in a quite thorough and reasonable process in crafting and approving the compensation award at issue. The critical missing piece was that a special committee of independent directors had not considered and approved the award. The decision highlights the potential benefits of having some number of independent directors on a board so that *MFW* compliance is an option. We note that there is judicial skepticism as to one-person special committees, thus it may be advisable to appoint more than one clearly independent director.

- ***Tornetta* does not necessarily lead one to conclude that *MFW* compliance typically should be pursued in connection with a board's decision on compensation for a controller.** Indeed, *Tornetta* suggests that, if the process is reasonable and there are good reasons for the compensation award made (even if it is in excess of the compensation received by the controller's peers), the court is likely to find the award entirely fair (although it may not be likely that it will dismiss the case at the early

pleading stage). At the same time, we note that compliance with *MFW* should be less risky in the context of a compensation decision for a controller than a going-private transaction with a controller. In the compensation decision context, it is unlikely that there would be interference by a third party attempting to block the minority stockholder vote for "holdup value" (*i.e.*, to obtain better terms for the proposed transaction or to permit the third party to do accomplish its own proposed transaction instead).

- **A person who may be deemed to be a controller should, whenever possible under the facts and circumstances, present arguments as to why he or she is not a controller.** Out of "respect" for Vice Chancellor Slight's prior ruling in another case (at the pleading stage) to the effect that Musk likely is a controller of Tesla, Musk did not contest the plaintiff's allegation in this case (for purposes of the motion to dismiss) that he is a controller. We would observe that in almost every case where, based on the facts and circumstances, one can argue that he or she is not a controller, those arguments should be made, even if only to preserve the issue in the event there is an appeal.

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*Court of Chancery Decision Underscores the Risk (and Consequences) of Directors Being Considered Not Independent of a Conflicted Controller—*BGC *Partners*

In *In re BGC Partners, Inc. Derivative Litigation* (Sept. 30, 2019), Chancellor Bouchard found, at the pleading stage of litigation, that there was "reasonable doubt" whether a majority of the directors who approved a conflicted controller transaction were independent of the controller. Based on the finding of possible non-independence of the four "outside" director-defendants, (i) the plaintiffs were excused from making demand on the board to bring this derivative action on behalf of the company (because demand is "futile" when made on directors who cannot be presumed to make the decision impartially) and (ii) the suit could not, under *Cornerstone*, be dismissed based on the exculpation provision in the company's charter (because the challenged act of the directors advanced the self-interest of an interested party from whom they could not be presumed to be acting independently). As a result, Chancellor Bouchard declined the defendants' motion to dismiss the case.

Key Points

- **The decision signals that the court may be more inclined now than in the past to find outside directors non-independent in the demand futility context.** The court highlighted that, in the past few years, when considering the issue of demand futility, the Delaware Supreme Court, under "a de novo standard of review," several times has overturned the Court of Chancery's findings of director independence from a controller or other interested party. These Supreme Court decisions, the court wrote, "reinforce the importance of considering a plaintiff's factual allegations holistically and affording [the] plaintiff all reasonable inferences." *BGC* underscores that the evaluation must be based on "the constellation of facts," considered "in totality," relating to the director's business and personal relationships with the controller or other interested party.

- **The court in this decision (as well as recently in *Marchand*) seems to indicate that there is a higher bar for a finding of independence of a director in the demand futility context than in other contexts.** In determining that each of the directors may not have been independent of the controller, the court focused primarily on the facts that the directors (i) were "go-to" persons for membership on boards of the controller's affiliates, and (ii) had overlapping social connections. Significantly, the court did not view these as coincidences but as indicating that in reality the directors appeared to owe their general status or positions of importance to the controller.

- **It is unclear to what extent the process the directors engaged in to evaluate the challenged transaction influenced the court's determination as to non-independence.** The court did not characterize the special committee process in any way in the opinion and mentioned it at all only in the court's lengthy recitation of the factual background. However, the facts as alleged

indicated that the process was severely flawed. Indeed—although the court did not articulate this—arguably, any director with independence from the controller would not have engaged in such a process.

Background. BGC Partners, Inc. (a public company) paid $875 million to acquire Berkeley Point Financial LLC (a private company) (the "Transaction"). BGC and Berkeley both were affiliates of Cantor Fitzgerald, L.P. and both were controlled by Howard Lutnick, who was the CEO and Chairman of BGC and also controlled Cantor Fitzgerald and many of its affiliated companies. The Transaction was approved by a special committee of outside directors of BGC but was not subject to approval by BGC's stockholders. After the closing, two BGC stockholders brought suit, alleging that Lutnick (standing on both sides of the transaction) had BGC overpay for Berkeley because his economic interest in Berkeley (60%) far exceeded his economic interest in BGC (13.8%). According to the Complaint, Lutnick's ownership interests meant that he would receive almost 47% of each dollar that BGC overpaid in the Transaction. The plaintiffs also alleged that the outside directors of BGC acted in bad faith in allowing the overvalued sale to happen. The defendants moved to dismiss. They asserted that the plaintiffs, who had not made a demand on the board to bring the derivative claims on behalf of BGC, had failed to establish that demand would have been futile. In addition, the director defendants argued that the claims against them should be dismissed, under *Cornerstone*, given the protection for independent directors set forth in the exculpatory provision in BGC's charter. However, the court found that there was "reasonable doubt" as to the directors' independence, and it therefore ruled that (i) demand was excused and (ii) the claims were not dismissible under *Cornerstone*.

Discussion

The presence of a controller who stood on both sides of the challenged transaction was obviously relevant to the inquiry on demand futility. A stockholder who wishes to bring a derivative claim on behalf of the corporation must first make a demand on the board for the board itself to bring the suit. If demand is not brought, the court will dismiss the case unless the plaintiffs establish that it would have been "futile" to make the demand. The *BGC* plaintiffs did not make a demand and claimed futility. The "*Aronson* test" of futility applied which required a court determination that the facts alleged by the plaintiffs created a "reasonable doubt" as to whether a majority of the directors that would have considered a demand if it had been made were "disinterested" (as to the challenged transaction) and "independent" (of any party that was self-interested in the transaction). If a director is not both disinterested and independent, he or she could not have been expected to impartially exercise their discretion whether to bring suit. The court reaffirmed that demand is not *automatically* excused simply because there is a conflicted controller. However, the court emphasized that the presence of a controller is "not irrelevant" to the inquiry—"our law is not blind to the practicalities of serving as a director of a corporation with a controlling stockholder" and the "threat of implicit coercion because of the controller's ability to not support the director's re-nomination or re-election [or to cause the director's removal]."

When the Complaint was filed, BGC's board consisted of five members: Lutnick, three outside directors who served on the Special Committee (Moran, Bell, and Curwood), and a new outside director (Richards) who had not considered the Transaction. The parties agreed that Richards was disinterested and independent, and that Lutnick was not. Thus, demand futility turned on whether there was a "reasonable doubt" as to the disinterestedness and independence of at least two of Moran, Bell and Curwood.

The court first reviewed well-established general principles relating to the determination of the independence of directors in the context of a controller transaction. In this context, reasonable doubt about independence can arise from a director's feeling "subject to [the controller]'s dominion or beholden to [the controller]." When assessing independence, the court further emphasized the potential personal connections and feelings between an outside director and the controller. "[O]ur law cannot ignore the social nature of humans or their possibly being motivated by love, friendship, and collegiality," the court wrote. At the pleading stage, the court stated, a plaintiff cannot "just assert that a close relationship exists" between a director and an interested party, but "when the plaintiff pleads specific facts about the relationship—such as the length of the relationship or details about the closeness of the relationship—then this Court is charged with making all reasonable inferences from those facts in the plaintiff's favor." The independence judgment must be made based on whether the "constellation of facts" (that is, the allegations "in totality," including with respect to both business and personal connections) create a reasonable doubt as to independence.

The court characterized recent Supreme Court decisions as having applied a "de novo standard of review" for independence. The court reviewed the recent Supreme Court decisions on independence:

- In *Sanchez*, the Supreme Court indicated that the Court of Chancery had erred by considering a director's business relationships and personal friendships "as entirely separate issues" rather than recognizing that the director's "economic positions derive[d] in large measure from his 50-year close friendship with [the interested party]."

- In *Sandys*, the Supreme Court held that a director was not independent of the controller because they owned a private airplane together—which was "not a common thing" and suggested that the two were "extremely close."

- In *Marchand*, the Supreme Court found that there was reason to doubt that a former employee ("WR"), who had been at the company for 28 years and had risen to the position of CFO, could impartially decide whether to sue the company's CEO. The CEO's family had (i) run the company for generations and was responsible for WR's career success and (ii) spearheaded an effort that resulted in a $450,000 donation to a college in WR's honor and a facility at the college being named for him. These facts supported a pleading-stage inference of "very warm and thick personal ties of respect, loyalty and affection" that supported an inference that WR would not act independently of the CEO.

The court determined there was "reasonable doubt" as to the independence of each of the directors. The court stated that it was "guided" by the recent Supreme Court decisions and explained as follows:

- ***Moran***. Moran's professional and personal relationship with Lutnick spanned twenty years. Moran had served on at least one Cantor Fitzgerald-affiliated board for sixteen of the past twenty years—which the court stated, suggests that Lutnick "trusts, cares for, and respects" Moran, and that it would be "important to Moran to maintain a good relationship with Lutnick, who has the unilateral ability to terminate the perquisites of Moran's board service to Cantor affiliates, which yielded Moran $931,986 (mostly in cash) over the past five years." (The court did not discuss the fact that there were no allegations as to the materiality of this compensation to Moran and that this compensation appears to be at an average level for directors of comparable companies.) In addition, Moran appeared to have a close personal relationship with Lutnick, according to the court. The court cited that Moran and his wife had appeared at public events with Lutnick, including a black tie gala in 2007 at which they were photographed together "in a staged setting"; in 2014, Moran's wife honored Lutnick's sister (who had co-founded the Cantor Fitzgerald Relief Fund with Lutnick) at another gala event; and Lutnick had once offered to help arrange a private tour of the Tate Museum of Art in London for Moran's wife and granddaughters. These alleged facts suggested that the personal relationship between Moran and Lutnick was "close" and "not simply a thin social-circle friendship."

- ***Bell***. Bell had served with Lutnick on two Cantor-affiliated boards (including BGC) over the previous ten years. In 2015, Lutnick placed Bell's name on a publicly-filed list of potential board appointees to another Cantor affiliate. Bell "appears to be another of Lutnick's go-to choices for board appointments on companies he controls," the court wrote. As such, "it would be important to Bell not to compromise her good relationship with Lutnick, who has the unilateral power to discontinue the benefits Bell has received from serving on Cantor-affiliated boards," particularly since there are "specifically alleged facts suggesting that these board appointments have been financially material to Bell." The plaintiffs conducted a search of publicly-available information and determined that Bell's board compensation from BGC of $266,000 in 2017 represented over 30% of her annual income in recent years. Bell also was Provost at Haverford College from 2007 to 2012 and Lutnick had donated over $65 million to Haverford over the past twenty-five years. The court concluded that "it can reasonably be inferred that these donations benefitted Bell professionally as Provost of Haverford, and deepened her personal relationship with Lutnick given his self-professed 'Love' for Haverford College and its people." The court noted that Bell was first appointed to a Cantor-affiliated board during her tenure as Provost of Haverford, and that, although she had left Haverford a few years ago, past benefits may establish "a sense of owingness" upon which a reasonable doubt as to a director's independence may be premised.

- ***Curwood.*** Curwood had served with Lutnick on the BGC board for the previous ten years. Also, in 2015, Lutnick placed Curwood's name on a publicly-filed list of potential appointees to another Cantor affiliate's board. Curwood had received more than $1.3 million as a BGC director, including $938,000 over the past five years. There were specific allegations that his board compensation, which Lutnick "ha[d] the unilateral power to discontinue," was financially material to him—based on his primary employment being president of a group that paid all of its executives collectively $62,000 in 2015 and his other employment being with an investment group run out of his residence in New Hampshire which had no internet presence, and as

an occasional Harvard and University of Massachusetts lecturer and an environmental journalist. Curwood also had served with Lutnick on the Board of Managers of Haverford College and, since 2000, he had served on a group that encourages financial support to Haverford. "Given Lutnick's extraordinary generosity to Haverford, and Curwood's own deep ties to Haverford, it stands to reason that Curwood naturally would be reluctant to support bringing a lawsuit against Lutnick."

- ***Dalton***. Dalton had served on three Cantor Fitzgerald-affiliated boards (including BGC) over a period of twenty years. He received more than a total of $2 million for service on these boards and for at least the previous five years had derived 40-50% of his income from Cantor Fitzgerald-affiliated entities. Unlike the other three directors discussed above, there were no allegations of a deep *personal* relationship between Dalton and Lutnick. However, the court concluded that, at the pleading stage, it was reasonably conceivable that Dalton, too, could not be presumed to have acted independently of Lutnick, given "how lucrative his Cantor-affiliated board positions have been to him and Lutnick's unilateral power to decide who should serve on those boards."

The court appeared to view each director's various connections with Lutnick as not being "coincidences" but evidencing a depth of relationship (and sense of obligation on the director's part). We note that, arguably, the relationship factors in *BGC* do *not* self-evidently lead to a conclusion of non-independence. For example, with respect to Moran, while Lutnick was responsible for his serving on Cantor Fitzgerald-affiliated boards, there was no allegation that the compensation he received was material to him. Also, the purportedly deep personal relationship between them was based only on their having appeared in a photo together at a gala, his having honored Lutnick's relative at an event, and his having been willing to help arrange a private tour of a museum. In the case of Bell, the court found a deep personal relationship and allegiance to Lutnick partly based on her having been the provost for five years at the college to which Lutnick had donated a very substantial sum over a period of 25 years. Similarly, in the case of Curwood, the court found that a deep personal relationship was suggested by his having been on a committee to encourage financial giving at the college to which Lutnick was a substantial donor. The court focused not only on each director's interest in continuing to receive compensation for board service that (in some cases) appeared to be financially material, but also on the director appearing to have attained status, prestige or positions of importance due to the relationship with Lutnick. These were sufficient, at the pleading stage, for a conclusion that the director may not have been capable of acting independently of Lutnick.

***BGC* (and another recent decision, *Marchand*) appear to suggest that there is a higher standard for a finding of independence of a director in the demand futility context than in other contexts.** A board's determination whether to authorize litigation on the company's behalf is in substance a quasi-judicial function and thus may demand a more rigorous definition of "independence." The Supreme Court addressed this directly in *Marchand* (June 18, 2019), where it overturned the Court of Chancery's finding of independence. The Supreme Court found that the plaintiff, WR, could *not* be presumed to be independent of the CEO with respect to deciding whether to bring derivative litigation against the CEO—*even though* WR had recently voted against the CEO's interests in supporting the separation of the Chairman and CEO roles that he held. Chief Justice Strine wrote: "The Court of Chancery ignored that the decision whether to sue someone is materially different and more important than the decision whether to part company with that person on a vote about corporate governance, and our law's precedent recognizes that the nature of the decision at issue must be considered in determining whether a director is independent." The *BGC* holding appears to reinforce this concept.

The allegedly egregious board process for evaluating the Transaction presumably also influenced the court's determinations as to the directors' non-independence. The court did not discuss the BGC Special Committee process at all in its analysis of the directors' independence. However, the court recited in a lengthy summary of the factual background of the case numerous alleged facts that indicated that the directors had engaged in a severely flawed process. It seems likely that the egregious nature of the process—one which, arguably no independent director would have engaged in—could have influenced the court's view of the directors' independence. The process flaws were as follows (according to the plaintiffs' allegations, which, at the pleading stage, the court was obliged to accept as true):

- The amount Cantor proposed be paid for Berkeley increased from the low $700 million range to the $875 million purchase price, over a five-month period, without any apparent justification, and the special committee's minutes did not reflect that the committee had "pushed back" on the increase in the purchase price;

- The special committee's own financial advisor's valuation of Berkeley indicated that the purchase price should be $720 million at most (and the advisor had outlined eight reasons why the purchase price overvalued Berkeley);

- An initial public offering (completed three months after closing of the Transaction) of the entity into which Berkeley was merged implied a valuation for Berkeley of only $563 million;

- Lutnick himself was the lead negotiator for the Transaction, and he had attended multiple BGC special committee meetings, had withheld information from the special committee, and had directed certain changes in the financial advisor's valuations; and

- Neither the special committee nor BGC had considered any alternative transactions.

We note also that the court characterized Lutnick as a person who had a reputation as being "a Wall Street bruiser" and "famously sharp-elbowed." Thus, presumably, the court viewed Lutnick as someone who likely would want to exert his influence over the other directors and/or to seek retribution if they did not support him.

The court held that, based on the directors' not being independent of Lutnick, the plaintiff's claims were not dismissible (under *Cornerstone)* based on BGC's exculpation provision. The court noted that the BGC special committee directors were protected by a Section 102(b)(7) exculpatory provision in BGC's charter. When a director is protected by such a provision, the court wrote, a plaintiff can survive a motion to dismiss by that director defendant by pleading facts supporting a rational inference that the director had been self-interested in the transaction, had "acted to advance the self-interest of an interested party from whom [that director] could not be presumed to act independently," or had acted in bad faith. As discussed above, the court found that the plaintiffs had pled facts supporting a reasonable inference that (i) Moran, Bell and Curwood, by voting to approve the Transaction, had acted to advance the self-interest of an interested party who stood on both sides of the Transaction (Lutnick) and with respect to whom they could not be presumed to act independently and (ii) Dalton, because of his "lucrative" Cantor-affiliated directorships that were financially material to him, also could not be presumed to be act independently of Lutnick. Thus, the claims against these directors were not dismissible based on the exculpation provision.

Practice Points

- **A controller should consider the benefits of having some number of independent directors on the board.** To avoid a situation where a majority of the directors may be deemed by the court not to be independent, a controller may want to consider appointing persons to the board who do not have other relationships with the controller and should therefore be viewed by the court as clearly independent of the controller. The approval by a majority of those directors of a conflicted transaction could then result in business judgment review under *MFW* if the transaction is also subject to approval by the minority stockholders—or, if not, at least in a shift to the plaintiffs of the burden of proof under the "entire fairness" standard for the transaction. (See the similar point made above relating to the *Tornetta* decision.)

- **A controller and the board should be aware of the kind of relationships that the court may view as establishing a reasonable doubt as to a director's ability to be independent of the controller.** *BGC* reflects that directors appointed to numerous boards by the controller, and directors with whom the controller has an extensive business or personal relationship, may well be considered to be not independent of the controller. The determination is relevant both for purposes of a court deciding whether demand on the board to bring a derivative action is futile and therefore excused, and deciding whether a director may be dismissed from the case based on the exculpatory provision that appears in the charter of most companies. The board should proactively seek the information required to make a judgment in advance about possible non-independence or interestedness of directors with respect to proposed transactions. The evaluation of independence and interestedness of directors is, of course, critical if the controller seeks to structure the transaction to be *MFW*-compliant in order to obtain review under the business judgment standard.

- **The board process is likely to influence the court on the issue of independence of the directors.** A board process that is so flawed that arguably no director who was actually independent would have engaged in it may well influence the court's view of the directors' independence. We note that, among the flaws in the BGC board process, was that the controller was the lead negotiator for the transaction as to which he stood on both sides. Recently, in *Olenik v. Lodzinski* (2018), the court was not troubled by the CEO of a company, who had close ties to the controller, being the lead negotiator for a transaction in which the controller was conflicted. In *Olenik*, however, there appeared to be a good reason for the selection of the CEO for that role, given his unique expertise and track record in the industry. Moreover, and most importantly, the overall factual context in that case included an effectively functioning special committee of independent directors that actively oversaw the negotiating process.

Delaware Appraisal Update

The Court of Chancery issued three appraisal decisions in the past quarter, all of them relating to arm's-length third-party mergers.

- In *Jarden*, Vice Chancellor Slights relied on the "unaffected market price" of the target company's stock and determined appraised "fair value" to be an amount that was 18% below the merger price.

- In the two decisions that followed—*Columbia and Stillwater*, Vice Chancellor Laster relied on, and determined fair value to be equal to, the merger price. Vice Chancellor Laster did not exclude the value of expected synergies from the fair value calculation because in his view the respondent company had not provided a calculation for that adjustment that was reliable.

Jarden indicates that, even after the Delaware Supreme Court's strong endorsement in *Dell* and *DFC* of the deal price as the most reliable indicator of appraised fair value in cases involving arm's-length mergers, there may still be some variability in the Court of Chancery's methodology for determining fair value. Notably, however, the result in each of these three cases was at or below the merger price—continuing the trend of this type of result and, accordingly, the now-reduced incentive for shareholders to make appraisal claims (particularly those based on appraisal arbitrage). Unsurprisingly, the number of appraisal claims filed has been dropping precipitously. Below, we discuss *Jarden* and explain why in our view the court is not likely to use frequently the unaffected market price as the sole or predominant indicator of appraised fair value; and we briefly summarize *Columbia* and *Stillwater*.

Jarden*: Court of Chancery Relies on the "Unaffected Market Price" Rather than the Deal Price—But Nonetheless Highlights a Continued Reduction in the Appraisal Risk for Acquirers*

In *In re Appraisal of Jarden Corporation* (July 19, 2019), Vice Chancellor Slights relied on the unaffected market price of the target company and, in a 143-page opinion, determined appraised "fair value" to be an amount that was 18% below the deal price.

Key Points

- **The court's reliance on the unaffected market price to determine fair value was surprising given the Delaware Supreme Court's recent jurisprudence which has established that, in the context of an arm's-length merger (absent a seriously flawed sale process), the *deal price* (less the value of expected synergies) should be the predominant factor in determining fair value.** Vice Chancellor Slights rejected reliance on the deal-price-less-synergies approach based on "concerns" about the sale process and "particular difficulty" in determining to what extent the value of synergies was reflected in (and therefore would have to be deducted from) the deal price.

- ***Jarden* underscores the continued reduction in appraisal risk for acquirers of public companies.** Notwithstanding the court's declining to rely on the deal-price-less-synergies approach, the decision reflects the current trend of the court finding fair value to be at, below, or near the deal price (regardless of the methodology that is used). (Of course, going private transactions, controller-led mergers, and arm's-length mergers with a seriously flawed sale process continue to involve a significant risk of appraisal results above the deal price, depending on the facts.)

- ***Jarden* suggests that the court may now rely on the target's unaffected market price to determine fair value in some appraisal cases—but we believe this will be rare.** First, as noted, the Delaware Supreme Court's recent jurisprudence strongly endorses reliance on the deal price in cases involving an arm's-length merger without serious sale process flaws. Indeed, the Supreme Court expressly rejected reliance on the unaffected market price in *Aruba* (April 16, 2019). In addition,

Vice Chancellor Slights' reliance on the unaffected market price was, as he conceded, highly dependent on the specific facts of the case (which, it would appear, are not likely to be present in most cases, as discussed below).

- ***Jarden* highlights the uncertainty associated with the court's evaluation of whether a sale process was sufficiently "robust" to support reliance on the deal price to determine fair value.** Although Vice Chancellor Slights viewed the *Jarden* sale process as too flawed to support reliance on the deal price, we would observe that the sale process arguably was far less problematic than the process in other cases in which the court has relied on the deal price without hesitation. It bears emphasis that the flaws in the Jarden sale process provided the court with a rationale to reject reliance on the deal price. *Jarden* thus reinforces that a target's taking steps to make a sale process more robust should reduce the appraisal risk for the acquirer.

- ***Jarden* indicates that the court may view a deal with a large stock component differently for appraisal purposes.** Stockholders are not entitled to appraisal rights in all-stock, merger-of-equals type deals. To the extent a deal includes a large stock component in the merger consideration, no change of management, and other characteristics similar to mergers of equals, the court may be even less likely than otherwise to reach *above*-the-merger-price results.

Background. In 2016, Newell Rubbermaid, Inc. acquired Jarden Corporation, a consumer products company with a market capitalization prior to the merger of $10.2 billion and "impressive" financial growth and performance. In the merger, the Jarden shareholders received cash and Newell stock worth $59.21 per share at the time of closing. Announcement of the merger resulted in an immediate 12% increase in Jarden's stock price (which continued over time to rise until it converged with the deal price) and fluctuations in Newell's stock price reflected "at best, a neutral market response." Post-closing, the merger integration did not go well and, ultimately, the Jarden executives who had joined the combined company's board resigned and joined with activist Starboard to challenge the board. Activist Carl Icahn then emerged with a competing slate and successfully placed five directors on the board, after which the president of the combined company was replaced. The petitioners (several Verition and Fir Tree funds), who had bought 2.5 million shares of Jarden after announcement of the merger, dissented from the merger and sought appraisal of their shares. (Merion and other funds also filed appraisal petitions but withdrew them after reaching settlements with Newell.)

In the appraisal trial, Jarden's expert relied on a discounted cash flow analysis and found fair value as of the merger to be $48.01 per share. The petitioners' expert relied on a comparable companies analysis and found fair value to be $71.35 per share. "To put the disparity in context," the court wrote, "[petitioners'] valuation implies that the market mispriced Jarden by over $5 billion." Vice Chancellor Slights, in a 144-page opinion, determined fair value to be equal to Jarden's unaffected market price of $48.31 per share (which is 18% below the merger price). The Vice Chancellor also determined that the $48.31 result was corroborated by (i) other market evidence, including a Jarden stock offering at $49.00 per share; (ii) the court's own DCF analysis which yielded a value of $48.13 per share; and (iii) to a lesser extent, Jarden's ("less reliable, but still relevant") deal-price-less-synergies analysis which yielded a value of $46.21 per share.

After the decision was issued, the petitioners, on a motion for reargument, claimed that the Vice Chancellor's DCF analysis did not corroborate his fair value determination based on the unaffected market price because the he had made structural and mathematical errors in the court's DCF analysis—and, if corrected, the DCF analysis would yield a value of about $61-$64 per share. The Vice Chancellor agreed that he had miscalculated Jarden's unlevered free cash flows, miscalculated the weighted average cost of capital (WACC), miscalculated the terminal value, and failed to make proper adjustments for certain tax shields and unfunded pension/postretirement liabilities. However, the Vice Chancellor found that the corrected analysis yielded a fair value result of $48.23 per share—which, he concluded, corroborated his $48.31 fair value determination based on the unaffected market price.

Discussion

***Jarden* suggests the possibility of some continued uncertainty with respect to what approach the Court of Chancery will utilize when determining fair value in appraisal cases.** Based on the Delaware Supreme Court's *Dell* and *DFC* decisions in 2017, and its *Aruba* decision in April 2019, it can be expected that the Court of Chancery will now most often rely on the deal-price-less-synergies approach to determine fair value in appraisal cases involving arm's-length mergers. *Jarden* indicates that there may nonetheless continue to be some variability in the Court of Chancery's choice of methodology. In *Jarden*, Vice Chancellor

Slights emphasized that the court's choice of methodology should be dictated by the specific facts and circumstances of the case at hand. He stated that, in his view, the "takeaway" from the Supreme Court's recent appraisal jurisprudence is simply that the Court of Chancery must "explain its fair value calculus in a manner that is grounded in the record before it." In an expansive footnote, he commented that, in his view, it is not "proper" for appraisal parties "to cite to decisions of this court, or our Supreme Court, for the proposition that a particular valuation methodology should be applied." He stated that, "[w]hile legal authority may support the contention that a valuation methodology has been accepted by Delaware courts as generally reliable, I see no value in referring to the factual conclusions of another court in another case while appraising the fair value of another company when attempting to fulfill the statutory mandate that I determine the fair value of this Company."

***Jarden* continues the trend of at-below-or-near-the-deal-price appraisal results—and thus highlights a continued reduction of appraisal risk for acquirers.** Although the court did not rely on the deal-price-less-synergies approach, the court's result was well below the deal price. *Jarden* thus reflects the trend over the past couple of years of appraisal results, in cases involving arm's-length mergers, that are below, at or near the deal price in cases involving arm's-length mergers—notwithstanding which methodology the court relies on to determine fair value. This trend, obviously, indicates reduced appraisal risk for acquirers and, indeed, has led to a significant decline recently in the number of appraisal claims.

In our view, the court's reliance on the unaffected market price to determine fair value is likely to be rare. Vice Chancellor Slights' adoption of the methodology in *Jarden* was *based* on (i) "concerns" about the target's sale process and (ii) "particular difficulty" in this case associated with determining to what extent the value of expected synergies was reflected in the merger price. We would observe that (i) the sale process appeared to be *less* problematic than sale processes that the court has relied on without hesitation in previous cases; (ii) it is *always* difficult to calculate the deduction for the value of expected synergies (yet the Delaware Supreme Court has made clear that the court must do so to comply with the statutory mandate that any "value arising from the merger itself" is to be excluded from "fair value" for appraisal purposes); and (iii) most importantly, the Supreme Court, in *Aruba*, expressly rejected reliance on the unaffected market price to determine appraised fair value. In *Aruba*, the Supreme Court explained that its references to "market efficiency" in *Dell* were focused on "informational efficiency—the idea that markets quickly reflect publicly available information and can be a proxy for fair value—not the idea that an informationally efficient market price invariably reflects the company's fair value in an appraisal or fundamental value in economic terms."

It appears that the unaffected market price typically would be a particularly inappropriate proxy for appraised fair value because it includes an inherent "minority discount" that would have to be excluded from "fair value" and the calculation of which would be inherently uncertain. In *Jarden*, Vice Chancellor Slights concluded that, due to the specific facts applicable in this case, there was no minority discount inherent in the target company's unaffected market price. The Vice Chancellor acknowledged the premise that, for a company without a controlling stockholder, a determination of fair value must adjust for "minority trading multiples" resulting from "the inherent conflict of interest between company management and a diffuse stockholder base." Here, however, he stated, "the foundation for applying the discount has not been laid." Jarden's management was well known to the stockholders and the market and the management was "not going anywhere as the Company was not for sale." Under these circumstances, "Jarden's agency costs were embedded in its operative reality and reflected in its Unaffected Market Price." The Vice Chancellor stated that this transaction did not involve a change of control but, rather, due to the large stock component of the merger consideration, was essentially like a merger of equals. Even under the Vice Chancellor's reasoning, then, in the event of a change of control, departure of key target management, or key target management that is relatively new, unaffected market price *would* include a minority discount that would render it an inappropriate proxy for appraised fair value.

Vice Chancellor Slights viewed the sale process as too flawed to support reliance on the deal price to determinate fair value. The Vice Chancellor cited the following concerns:

- ***No market check.*** The sale process did not include a pre-market or post-market check. The court acknowledged that these were not required but found the other "flaws" in the sale process troubling when "coupled with" the lack of a market check.

- ***Lack of oversight of the lead negotiator.*** There was "little or no oversight" by the Jarden board of the company's lead negotiator, MF (who was Jarden's Chairman of the Board, with chief responsibility for M&A activity). During the process, MF (i)

without first obtaining approval of the board, in his first meeting with Newell, suggested a price range (which "may well have set an artificial ceiling on what Newell was willing to pay," the court stated); and (ii) in another meeting, proposed a counteroffer to Newell although the board had instructed him not to.

- ***The lead negotiator's "take-charge" approach and conflicts.*** The court's skepticism of the process was heightened by what it characterized as "a troubling theme" in MF's "take-charge" attitude and "stereotypical 'cut to the chase' CEO mentality." In addition, the court expressed concern about: (i) MF's having revealed to Newell that he would like to exit Jarden to have more time to pursue business ventures with his sons (which, the court stated, "likely communicated to Newell that he was eager, maybe overly eager, to do a deal"); (ii) Newell's offer letter for Jarden having made clear that it expected that MF and other Jarden executives would join the combined company's board; (iii) MF's having discussed during the negotiations with Newell change of control payments that would be due to him and his management team; and (iv) MF's having recommended a banker for the deal without fully disclosing his prior substantial relationship with the bank.

While less than optimal, the sale process does not appear to have been seriously flawed. In previous appraisal cases, even truly problematic sale processes have passed judicial muster for purposes of reliance on the deal price to determine fair value. Moreover, the court acknowledged the following in *Jarden*:

- ***Incentive to negotiate a high price.*** MF and his negotiating team "owned millions of Jarden shares" and "had every incentive to negotiate a good deal." There was no allegation that MF favored a deal with Newell over others or was motivated by any non-corporate interest. Moreover, the actual process reflected "arm's-length, provocative bargaining between Jarden and Newell."

- ***Experienced negotiators.*** While the board was not proactive with oversight, MF and his team were highly accomplished negotiators who were "not only well-known deal makers in the public markets, [but] among the best performers in the sector."

- ***The rationale for MF's mention of a price range.*** MF's unauthorized reference to a price range was simply that "an offer would need to start with a six." At that time, Jarden stock was trading in the high $40's; MF believed that a price in the $70's would be "laughable"; and MF believed that, even if a price in the $60's undervalued Jarden, the Jarden stockholders would benefit from sharing in the upside of the combined company. Also, MF informed the board of the price discussion within a few days and the board was "supportive and encouraged [him] and his team to continue the discussions with Newell within [his] outlined parameters."

The court viewed the determination of synergies value to be too difficult to support reliance on the deal-price-less-synergies to determine fair value. The Vice Chancellor accepted Newell's "conservative estimate" of $500 million of expected synergies (notwithstanding that Newell's bankers had advised the board of ranges up to $1 billion and the board itself increased the $500 million estimate not long after the closing). The Vice Chancellor was uncertain, however, as to the extent to which "Jarden captured synergies" in the merger price. The Vice Chancellor cited evidence in the record relating to conversations between Newell management and the board that suggested that Newell believed it was paying nothing for synergies. Their lead negotiator told the board that, if the deal could be done between $60 and $65 per share, "we are basically getting the synergies with no value ascribed to them." He explained that, in the deal, Jarden stockholders were getting a premium on their stock price and the Newell stockholders were getting "ownership of Jarden, and after the synergies are delivered, the future value creation that comes through the new combination." The Vice Chancellor also cited conversations and expert testimony which suggested that "the premium to market price that Newell paid was for control of the combined entity" (*i.e.*, not for synergies). On the other hand, Jarden's expert conducted a "discounted value of cash flows" analysis, in which the expected future cash flows from the synergies (net of the costs to achieve them) were discounted to their value as of the merger date—and the analysis reflected that the synergies had a value of $17.42 per Jarden share, which was approximately the same amount as the delta between the unaffected stock price and the merger price (indicating that that delta, or premium, represented expected synergies). Jarden's expert also observed that the rise in stock price of both companies after the leak of merger negotiations revealed that the market "appreciated the presence of significant synergies," and the fact that Newell's stock fell when Jarden's rose after announcement of the merger "indicates the market appreciated that the anticipated synergies would accrue to the Jarden stockholders." The court noted that the burden was on Jarden to prove "what, if any, portion of the synergies value was included in the price-per-share." Finding that "the evidence on this

point stands in equipoise," and that "the expert analysis of the transaction synergies raised more questions than it answered," the Vice Chancellor declined to deduct the value of synergies from the deal price to determine fair value.

Determination of the extent to which synergies value was reflected in the deal price arguably was *not* especially problematic. Clearly, there are inherent difficulties associated with calculating a deduction from the deal price for the expected value of synergies. These include uncertainties as to: (i) Which types of synergies are to be deemed as "arising from the merger itself" (for example, should synergies that the target could have achieved on a standalone basis, or had already planned for, be included)? (ii) How are these synergies to be valued by the court (should the parties' estimates be relied on and how are they to be reconciled if they differ)? (iii) How is the court to determine to what extent the value of the synergies was reflected in the merger price and therefore must be deducted? These difficulties historically led the Court of Chancery, when relying on the deal price to determine fair value, to ignore whether the value of expected synergies should be excluded under the statutory mandate to exclude from fair value arising from the merger itself. However, in *Aruba*, the Supreme Court interpreted the statute to require this deduction and the Court of Chancery in a few recent cases has been calculating the deduction notwithstanding the difficulties. The difficulties associated with the calculation in *Jarden* appeared to be exacerbated by a record of confusing pre-merger comments by Jarden about expected synergies and testimony by the parties' experts that "raised more questions than they answered."

Also of note, the Vice Chancellor raised in *Jarden* the question whether the premium in the deal price was perhaps properly attributable to the acquisition of control rather than to the value of synergies--a topic not yet fully addressed by the court in appraisal cases.

Vice Chancellor Slights rejected arguments that the unaffected market price was unreliable. Jarden argued that the unaffected market price was unreliable as an indicator of fair value because (i) the market lacked material information about Jarden on the date as of which the unaffected market price was fixed; (ii) the unaffected market price would have to be adjusted to exclude the inherent "conglomerate discount" and "minority discount" that it reflects; and (iii) the unaffected market price was "stale" by the time the merger closed (which, under the appraisal statute, is the date as of which fair value is to be determined).

- ***Lacking market information.*** Jarden argued that its fair value must have been more than the unaffected market price because, after the date on which the unaffected market price was fixed, (a) the federal risk-free rate declined, (b) Jarden's share price rose, and (c) Jarden management's projections (which were based on "informed opinion") were higher than the market analysts' projections (which were based on "raw data")—all of which would indicate an increase in value. Moreover, at that date, Jarden's stockholders did not have access to management's latest projections. The court rejected these contentions. First, the court stated, all else being equal, a decline in the risk-free rate would indicate an increase in value. However, Newell introduced evidence that, while the rate decreased, stock prices generally decreased as well during that period—so "all else" must not have been "equal." Second, the management's subsequently prepared projections "converged" with the analysts' projections, indicating that the earlier disparity was not attributable to unreasonable market pessimism but instead to the market analysts having more accurately predicted Jarden's outlook.

- ***"Conglomerate discount" and "minority discount."*** Even if a "conglomerate discount" were accepted as an actual valuation issue, the high trading volume and intense scrutiny of analysts suggested that the market "understood Jarden's holding company structure as an operative reality" and imputed the associated high overhead costs into the market price, the court explained. As discussed above, the court stated that there was no inherent "minority discount" in this particular case (based primarily on its being more like a merger of equals than a change of control). Under these circumstances, "Jarden's agency costs were embedded in its operative reality and reflected in its Unaffected Market Price," the court wrote.

- ***Staleness***. The Vice Chancellor pointed out that, after the date fixing the unaffected market price, Jarden was experiencing a decline (after a period where it had been particularly acquisitive) and was providing the board with more conservative projections. "This is not a case where the credible evidence reveals that the Unaffected Market Price was demonstrably below Jarden's fair value as of the Merger," he wrote.

There is the potential that the court may not continue to calculate a DCF valuation as a double-check on a fair value valuation that is based on the deal price or unaffected market value. The court has long been skeptical of and frustrated by

the exercise of acting as referee between dueling experts who never agree on the significant inputs to a DCF analysis and reach widely varying results. Appraisal parties can expect that the court will continue to rely solely or predominantly on DCF to determine fair value when it deems the deal price (and unaffected market value) to be *un*reliable. We note, however, that the court may not necessarily continue its typical practice of conducting a DCF analysis as a double-check on its valuation when it relies on deal price (or unaffected market value). In *Jarden*, Vice Chancellor Slights did conduct a DCF analysis as a double-check—and the last 42 pages of his opinion are thick with higher mathematical concepts, advanced accounting principles, complex formulas, investment banker methodologies, and difficult calculations. This was followed by a 13-page order (in response to the petitioners' motion for reargument) to correct "mathematical and structural errors" in the court's DCF analysis. The Vice Chancellor's comments in a footnote in that order poignantly reflect the court's continuing angst with respect to DCF analyses in appraisal cases:

> Ironically, in the opinion, I cautioned that our courts should not wade 'deep into the weeds of economics and corporate finance' without 'the guidance of experts trained in these disciplines.' Yet that is precisely what I did when I endeavored to conduct my own DCF analysis upon concluding that the credible evidence did not support certain aspects of both of the competing experts' DCF valuations. While I stand by that factual determination, I did not adequately account for the fact that making adjustments to the experts' DCF models might require that other adjustments be made in order to stay true to the DCF methodology. I made other unforced errors as well. With the assistance of the parties, and their experts' supplemental affidavits, I have attempted to correct those errors here as best I can acknowledging fully that there must be a 'better way to run a railroad.' In view of the fact that the parties' experts could not agree on any of the significant inputs for the DCF analysis, I am more convinced than ever that the experts' inability to agree on inputs is evidence that DCF is not reliable here, particularly given the presence of a reliable 'market-based metric.' The better approach, therefore, would have been to leave it at that rather than 'parse through the inputs and hazard semi-informed guesses about which expert's view was closer to the truth.' Having endeavored, instead, to work through the DCF on my own, I will see that process through to the bitter end by engaging in the revised DCF presented here.

Practice Points

- **Petitioners should understand that there is a significant risk, in connection with an arm's-length merger, of a court determining fair value to be at or below the deal price.** Notably, this risk is applicable whether the court relies on the deal price or the unaffected stock price.

- **Based on *Jarden*, a respondent company should argue for the court to rely on:** both (i) the deal price-less-synergies and (ii) the unaffected market price.

- **Petitioners should consider arguing against the deal price or unaffected market price based on "market inefficiency."** Based on *Dell*, in the context of an arm's-length merger, the sole potential route to non-reliance on market-based factors (such as the deal price or the unaffected market price) is "market inefficiency"—i.e., establishing the unavailability to the market of information that typically is available for public companies that are widely held, traded and followed in the market. Thus, for example, an argument for market inefficiency could be successful if a private company is involved, there are few stockholders or limited trading, the company is not generally followed by analysts, the company is late in making public filings, or the company has withheld or misstated material information. We note that, otherwise, the court generally would be unlikely to conclude that the deal price was unreliable based on factors such as a trough in the target company's market price, an inopportune time to sell, significant uncertainty as to prospects, and the like.

- **A flawed sale process will provide the court with a basis on which to reject reliance on the deal price—but in most of the recent cases the court has set a high bar for considering a sale process not sufficiently robust for reliance on the deal price.**The court has stated in previous cases that the purpose of appraisal is not to ensure that dissenting stockholders receive the best price that would have been obtainable in the merger (*i.e.*, a *Revlon*-like standard is not applicable). In *Aruba*, Vice Chancellor Laster stated that the purpose of appraisal is only to ensure that the stockholders were not "exploited" in the merger (and that, in that case, the premium in the deal price over the unaffected market price established that the stockholders had not been exploited).

- **Appraisal parties should expect that the court will not rely on a comparable companies analysis to determine fair value.** We are not aware of any case in recent years in which the court has accorded any significant weight to a comparable companies analysis. In each case where a party has presented a comparable companies analysis, the court has determined that it is not reliable because no companies that were included were sufficiently comparable to the respondent company.

Columbia: *Court Relies on Deal Price (Without an Adjustment)*

***Columbia Pipeline* (August 12, 2019) related to the acquisition of Columbia Pipeline Group, Inc. by TransCanada Corporation for $25.50 per shares. In a 112-page opinion, Vice Chancellor Laster found "fair value" to be equal to the merger price. In explaining the reliability of the deal price, the court noted that the merger was an arm's-length transaction with a third party; the board had no conflicts of interest; the acquirer conducted due diligence and received confidential information about the company's value; the company conducted a pre-signing market check and no other party pursued making a bid; the company extracted multiple price increases from the acquirer through negotiation; and no competing bidder emerged post-signing despite deal protections that "fell within the norm."**

The petitions identified flaws in the sale process. The petitioners claimed that the CEO and CFO had misled the board about the sale process and had engineered a fire sale to obtain for themselves the benefits of a merger before their imminent retirement; that Columbia had favored TransCanada over other potential buyers; that deal protections undermined the sale process; and that the proxy statement was materially misleading. The court stated that the CEO and CFO were "professionals who took pride in their jobs and wanted to do the right thing" and that the board "would not have let them" arrange a fire sale. The court concluded that TransCanada ultimately was favored because it offered higher and more certain value than the other potential bidders; and that Columbia's having allowed only TransCanada to breach its standstill agreement did not undermine the process given that, even after the standstills were waived for all parties post-signing, no other party made a bid although they were able to do so. The court noted that the deal protections did not constrain Columbia in the post-signing period; and that, while the proxy statement was materially misleading, that meant only that the stockholder vote could not provide *additional* support for a conclusion that fair value was equal to the deal price.

The court found that the sale process was sufficient for reliance on the deal price even though "not perfect." The court characterized the sale process as "not perfect." The Vice Chancellor noted that, in *DFC* and *Dell*, the Supreme Court found the sale processes to have been "sufficiently good that the deal prices deserved 'heavy, if not dispositive, weight'"—but that the decisions "did not address when a sale process would be sufficiently bad" that the court should give the deal price no weight. The Supreme Court "could have believed the sale processes in *DFC* and *Dell* warranted [heavy or sole reliance on the deal price] without excluding the possibility that a not-as-good sale process would deserve the same treatment," he stated. Thus, he concluded that *DFC*, *Dell* and *Aruba* did not "establish minimum requirements for other sale processes to meet before the deal price can be considered as a persuasive indicator of fair value." He concluded that the Columbia sale process "had aspects that compared favorably with the processes in *DFC*, *Dell* and *Aruba*" and aspects that "differed" from those processes, but that "on balance, TransCanada proved that the deal price is a reliable indicator of fair value."

The acquirer did not "prove" an adjustment to exclude synergies value from the deal price. TransCanada asserted that Columbia had received 100% of the value of the expected merger synergies (*i.e.*, that all of the synergies value was reflected in the merger price) and therefore, to determine appraised fair value, the deal price should be adjusted downward by that full amount (*i.e.*, a deduction of $4.64 from the $25.50 deal price). The court emphasized that TransCanada had the burden of proving the amount of any such adjustment and concluded that it had not done so. In the court's view, TransCanada's evidence demonstrated that it had "perceived," and had made various calculations with respect to, synergies—but "[that] does not mean that the deal price included [the synergies]," the court stated. The court commented that TransCanada "likely could have justified a smaller synergies deduction, but it claimed a larger and unpersuasive one...therefore [the court] declines to make any downward adjustment to the deal price." The decision thus underscores the benefits for an acquirer of establishing, during the sale process, a clear internal record of its determinations with respect to synergies, including not only the calculation but to what extent that is reflected in its offers and the ultimate deal price.

The company did not "prove" an adjustment to account for an increase in the company's value between signing and closing. Columbia asserted that there should be an upward adjustment from the deal price to account for an increase in value of the company between signing and closing. The court rejected the adjustment on the basis that Columbia did not meet its burden of proving the increase in value and did not provide a metric for determining the amount of the increase from the factors that it cited as supporting the conclusion that there had been an increase.

The court did not discuss the *Jarden* precedent (discussed above, where Vice Chancellor Slights relied on the unaffected market price instead of the deal price). Vice Chancellor Laster stated that deal price is a more reliable market-based indicator of fair value than the unaffected market price and it was therefore "unimportant" whether the unaffected market price was or was not a reliable indicator of fair value in this particular case. He explained: "In this decision, I have attempted to adhere to the principles expressed in *DFC*, *Dell* and *Aruba*…." He mentioned *Jarden* only once, as a citation in a footnote that acknowledged he was "aware of "the existence of other decisions that have sought to apply the teachings of *DFC* and *Dell*, and which have declined to rely on the deal price as an indicator of fair value."

Stillwater: *Court Relies on Deal Price (Without an Adjustment)*

***Stillwater Mining* (August 21, 2019) relates to the acquisition of Stillwater Mining Company by Sibanye Gold Limited in a reverse triangular merger at a deal price of $18 per share. In a 142-page opinion, Vice Chancellor Laster found "fair value" to be equal to the merger price. The court cited *Dell* and *DFC* and explained its reliance on the deal price by noting the following: the merger was an arm's-length transaction with a third party; the merger was approved by an independent board that harbored no conflicts of interest and was approved by the Stillwater stockholders; the merger price was established through "adversarial negotiations"; and "most significantly, no bidders emerged during the post-signing phase, despite a Merger agreement that contained a suite of deal protections that would pass muster under enhanced scrutiny."**

The court found the sale process sufficient to support reliance on the deal price even though there was only a very limited pre-signing market check. The sale process in this case involved a very limited pre-signing market check and a passive-only post-signing check, with no competing bid emerging. The Vice Chancellor noted that, in *C&J Energy*, the Delaware Supreme Court ruled that this type of process passes muster under the enhanced scrutiny standard of *Revlon*—and that, generally, "as commentators have perceived, the deal price will provide persuasive evidence of fair value in an appraisal proceeding involving a publicly traded firm if the sale process would satisfy enhanced scrutiny in a breach of fiduciary duty case." The Vice Chancellor noted that "the Delaware Supreme Court has not yet been asked to rule on the reliability of a sale process involving a single-bidder strategy, no pre-signing outreach, and a passive post-signing check" and that there are no precedents squarely on point. He stated that his view was that this sale process, which "exhibited objective indicia of reliability" (including "merger agreement terms that facilitated a meaningful post-signing check" and no competing bidder having emerged), was sufficient for the deal price to provide persuasive evidence of fair value. In his view, the sale process in this case "compared favorably" with those in *DFC* and *Dell* and in *Aruba* (which, in his view, was the closest precedent because "the dynamics closely resembled a single-bidder process"). The Vice Chancellor wrote:

> The Merger in this case was rough and ready. [The CEO-lead negotiator] and the Board did not adhere to the best practices and transactional niceties that an advisor steeped in Delaware decisions would recommend. Nevertheless, given the arm's-length nature of the Merger, the premium over market, and the substance of what took place during the sale process, it is not possible to say that an award at the deal price would result in the petitioners being exploited.

The court found that the lead negotiator's conflicts did not undermine the reliability of the deal price. The CEO ("M") acted as the company's lead negotiator and the board did not appear to provide proactive oversight of his role notwithstanding that he had certain conflicts of interest, including that he was allegedly trying to maximize his personal wealth before his imminent retirement and he was focusing on many other interests that he had. The court noted that, notwithstanding his conflicts, M "had ample reason to pursue the best possible deal for Stillwater," including that, "as a matter of professional pride, he wanted to sell Stillwater for the best price he could" and, importantly, he held a large number of common shares (with a value, at the deal price, of over $9 million).

The court found that the respondent company did not meet its burden of proof to establish that there should be a downward adjustment from the deal price to exclude the value of merger synergies. Sibanye's own valuation expert opined that the evidence he reviewed "did not indicate that the transaction resulted in quantifiable synergies" and Sibanye told its shareholders that the deal price did not reflect any synergies.

The court explained the complexities associated with a petitioner's argument for an upward adjustment to the deal price to reflect an increase in value of the company between signing and closing. Stillwater is a mining company and, between signing and closing, the prices of palladium and platinum increased materially, with a direct effect on Stillwater's value (according to the petitioners' expert, an increase of at least $2.00-$2.30 per share). The expert used this information to make adjustments to the unaffected trading price (in connection with the petitioners' arguments against Sibanye's contention that the unaffected market price, with certain adjustments, was a reliable indicator of fair value). However, the petitioners "never argued for an adjustment *to the deal price* based on this increase in value between signing and closing." While "there could be considerable conceptual overlap between the approaches," the court stated, "there could also be considerable differences." Therefore, the court did not make an upward adjustment to the deal price to determine fair value. The court noted "numerous difficult questions" that are presented by the issue of whether to adjust a deal price for an increase in value between signing and closing. Among other issues, the court stated, the petitioner would have to address why no competing bidder emerged post-signing if the deal price had come to undervalue the company. The court offered several possible "counterarguments" that could be responsive to this issue. The court stated that because the petitioners here did not argue for an adjustment in the deal price, the parties did not have the opportunity to address the related issues and the court therefore would not make an adjustment.

The court found the "trading price" to be a less reliable indicator of fair value than the deal price. The court engaged in a lengthy analysis of economic principles and expert testimony relating to the reliability of Stillwater's trading price as an indicator of fair value. The court "[did] not find that the trading price was so unreliable that it could not be used as a valuation indicator," but that it was not as reliable as the deal price whose "persuasiveness…ha[d] been established by analyzing the sufficiency of the sale process." In the court's view, "the record provide[d] sufficient reason for concern about incorporating a trading price metric" given that certain analyses indicated reliability, while others provided contrary evidence.

Delaware Roundup

The Delaware courts issued the following additional decisions of note during the quarter:

***Supreme Court Holds Section 220 Inspections Are Not Presumptively Subject to Confidentiality*—Tiger.** In *Tiger v. Boast Apparel, Inc.* (Aug. 7, 2019), the Delaware Supreme Court acknowledged that the Court of Chancery typically subjects books and record inspections under DGCL Section 220 to orders of confidentiality; however, the Supreme Court rejected a report (adopted by the Court of Chancery) in which a Master of Chancery had held that Section 220 inspections are "presumptively subject to a 'reasonable' confidentiality order." The Court of Chancery, in the case below, had denied the shareholder's request for a time limitation on the confidentiality order entered into in connection with the company's production of documents pursuant to Section 220. The Court of Chancery held that confidentiality of the documents produced should be maintained by the shareholder indefinitely unless and until the shareholder brought suit, at which time confidentiality would then be governed by applicable court rules. The Supreme Court reversed and held that a confidentiality order need not be entered in connection with a Section 220 inspection and, if it is entered, its duration is not dependent on a showing by the shareholder of an absence of exigent circumstances requiring confidentiality. Rather, the Supreme Court stated, the Court of Chancery should weigh the shareholder's legitimate interests in "free communication" against the corporation's legitimate interests in confidentiality.

***Superior Court Rejected Insurer's Argument that the Costs of an Appraisal Case (Plus Interest on the Appraisal Award) Was Not Covered by the Insurance Policy*—Solera.** In *Solera Holdings, Inc. v. XL Specialty Insurance Co.* (July 31, 2019), the Delaware Superior Court denied an insurance company's motion for summary judgment to dismiss a claim by Solera for recovery of the $13 million it expended in defending against an appraisal claim plus the interest that it paid pursuant to the Delaware appraisal statute. The court held that, under the insurance agreement, an appraisal claim constituted a "securities claim." The agreement

defined a securities claim as a claim arising out of any violation of any law regulating securities. The court held that a "violation" of law need not have involved any allegation of wrongdoing. The court held that interest on the appraisal award was covered (even though the appraisal payment was not a "loss") because the agreement covered interest paid on a judgment. The court suggested that the result would have been different if the agreement had provided for coverage only for "interest on a *covered* judgment" (*i.e.*, on a judgment relating to a covered "loss" under the insurance policy) rather than "interest on a judgment" (*i.e.*, on any judgment the company paid, whether relating to a covered loss or not).

***Court of Chancery Rejects* Corwin *Defense Based on Inadequate Disclosure*—Chester County.** In *Chester County Employees' Retirement Fund v. KCG Holdings, Inc.* (June 21, 2019), Vice Chancellor Kathaleen McCormick, at the pleading stage of litigation, declined to dismiss breach of fiduciary duty claims against the company's directors under *Corwin*, as well as aiding and abetting claims against the acquirer and the company's financial advisor, after finding that the stockholder approval of the challenged transaction was not "fully informed" because the disclosure was inadequate.

***Court of Chancery Finds Ambiguity in Merger Agreement Provisions With Respect to the Enforceability of a Post-Closing Covenant*—Cablevision.** In *Dolan v. Altice* ("Cablevision") (June 27, 2019), the Court of Chancery held, at the pleading stage of litigation, that a merger agreement was "ambiguous" with respect to whether the parties intended that a post-closing covenant governing operation of a part of the business would be enforceable post-closing by the controlling stockholder (who was not a party to the agreement but had negotiated for the covenant and allegedly had relied on it in determining to support the merger). The court also held that it was reasonably conceivable that the alleged facts supported the plaintiff's promissory estoppel claim.

***Vice Chancellor Laster's Comments May Have Relevance for the Debate on Consideration of a Corporation's Non-Stockholder Constituencies*--Boardwalk Pipeline.** In *Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP*, Vice Chancellor Laster's commentary has potential relevance to the current debate relating to the parameters of a corporate board's consideration of the corporation's non-stockholder stakeholders. First, the court reiterated that, under Delaware fiduciary duty law in the corporate context, "[D]ecisions [by a board that produce greater profits over the long-term] benefit the corporation as a whole and, by increasing the value of the corporation, increase the share of value available for the residual claimants. However, Delaware case law is clear that the board of directors of a for-profit corporation must, within the limits of its legal discretion, treat stockholder welfare as the only end, considering other interests only to the extent that doing so is rationally related to stockholder welfare." Next, the Vice Chancellor interpreted the partnership agreement at issue (which required that the general partner "pursue a course of action that is fair and reasonable to the Partnership as an entity") to mean that the General Partner "had discretion to consider the full range of entity constituencies in addition to the limited partners, including but not limited to employees, creditors, suppliers, customers, and the General Partner itself." The Vice Chancellor continued: "Nevertheless, because the limited partners are one of the Partnership's constituencies, a transaction that is in the best interests of the Partnership logically should not be highly unfair to the limited partners." The Vice Chancellor stated that, "[u]nder a constituency-based regime like the one established by the Partnership Agreement, it is possible that benefits to the entity as a whole or to its other constituencies might outweigh harm to a particular constituency, such as the limited partners." Finally, he wrote, with respect to the issue in the context of a controlled company: "A party in control of an enterprise should not be able to transfer value from a particular constituency to itself, even under a constituency-based regime. Rather than a reasoned judgment about what is in the best interests of the entity, that type of value expropriation more closely resembles theft."

Fried Frank M&A/PE Briefings Issued this Quarter

(Please click on the title to see the Briefing)

- ***New Guidance and Best Practices for Investment Advisers on Proxy Voting and Use of Proxy Advisory Firms (Sept. 6, 2019)***
- ***CFIUS Issues Proposed Regulations to Implement FIRRMA (Sept. 24, 2019)***
- ***FTC Action Highlights Antitrust Scrutiny of Non-Competes in M&A Deals (Sept. 26, 2019)***

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.

This quarter, Fried Frank was recognized by **The Deal's 2019 Cross-Border Asia Awards** for advising on **Private Equity Deal of the Year** for Permira's US$1.68 billion sale of Magento Commerce, an ecommerce services provider, to Adobe and **Healthcare Deal of the Year** for Takeda Pharmaceutical Company's US$46 billion acquisition of Shire plc.

Highlights of Our 2019 Third Quarter Work Include Representations of:

NorthStar Realty Europe

Counsel to Strategic Review Committee of the Board of Directors of NorthStar Realty Europe in connection with its agreement to be acquired by AXA Investment Managers—Real Assets for an enterprise value of US$1.055 billion.

Yellow Wood Partners

Counsel to Yellow Wood Partners in its US$585 million definitive agreement to buy the Dr. Scholl's business from Bayer.

Blackstone

Counsel to Blackstone in its acquisition of a controlling interest in Great Wolf Resorts (Great Wolf) to form a new $2.9 billion joint venture with Centerbridge Partners to own Great Wolf, which is an owner and operator of family-oriented entertainment resorts, with 18 resorts around the country.

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