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M&A/PE Quarterly

A QUARTERLY ROUND-UP OF KEY M&A/PE DEVELOPMENTS

Looming Proxy Contest by an Activist, Standing Alone, Did Not Render Directors Conflicted —Rudd v. Brown

In *Rudd v. Brown* (Sept. 1, 2020), the plaintiff alleged that the defendant directors of Outerwall, Inc. had decided to sell the company because they feared and wanted to avoid "a costly and embarrassing ouster" in a proxy contest that was threatened by activist stockholder Engaged Capital. The Delaware Court of Chancery found, at the pleading stage of litigation, that selling the company in the face of a looming proxy contest to replace directors did not, standing alone, render the directors conflicted with respect to the sale. Vice Chancellor Zurn granted the defendant directors' motion to dismiss the case.

KEY POINTS

- **The court confirmed that the fact that a company is sold in the shadow of a threatened proxy contest will not, without more, indicate that the directors acted disloyally or in bad faith.** The court distinguished this case from three recent cases in which the court refused to dismiss fiduciary claims against directors based on their having sold a company in the face of a looming proxy contest. In those cases, the court explained, there were "other indicia of gross negligence or disloyalty" by the defendant directors.
- **The court reaffirmed that stockholder-appointed directors and directors hoping for post-closing employment are not inherently conflicted.** The court explained that the fact that a director is a designee of a stockholder will not indicate self-interest of the director without alleged facts supporting a reasonable inference that the director actually made decisions based on a preference for the designator's interests over the interests of the other stockholders. Also, the fact that a director is interested in securing post-closing employment with an acquiror will not indicate self-interest if no discussions relating to the employment took place.
- **The court reaffirmed that an alleged disclosure violation does not, without more, indicate that directors or officers acted disloyally or in bad faith.** The court's discussion reflects that not every alleged disclosure violation indicates possible disloyalty or bad faith by the

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LONDON

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Ian Lopez

Dan Oates

Simon Saitowitz

FRANKFURT

Dr. Juergen van Kann

Dr. Christian Kleeberg

* Senior Counsel

directors and officers who prepared and reviewed the disclosure. (The same point was made in *USG*, which is discussed in the article below.)

Background. In 2015, Outerwall was experiencing financial difficulties, but management and analysts remained optimistic about the company's future. In early 2016, Engaged Capital amassed a 14.6% interest in Outerwall and became its second largest stockholder. Engaged publicly released materials criticizing Outerwall, urging that it explore strategic alternatives, and threatening a proxy contest to replace multiple directors. Outerwall engaged Morgan Stalnley as a financial advisor and shortly thereafter announced that it had initiated a process to explore strategic and financial alternatives to maximize shareholder value. Over several months, Morgan Stanley contacted 53 potential bidders, 42 of which expressed an interest in further evaluating a potential transaction. As due diligence progressed, Outerwall announced that it had entered into a Cooperation Agreement with Engaged. Under this agreement, Engaged agreed not to launch a proxy contest; it appointed one director to Outerwall's board ("JB"); and it had the right to appoint two directors to two newly created vacancies on the board (which was expanded from nine members to twelve) by August 1, 2016 (which date, according to the plaintiff, "provided a deadline for the Board to negotiate a sale or be swamped by Engaged appointees"). Outerwall received "numerous" indications of interest, ranging from $27 to $53 per share, and focused on Apollo's bid of $50 per share (which ultimately was raised to $52) and Company A's bid of $48 per share (which ultimately was raised to $50.82). In July, the board resolved to sell Outerwall to Apollo. Outerwall entered into an agreement with Apollo pursuant to which Apollo would acquire all of Outerwall's outstanding common stock at $52 per share through a tender offer and subsequent short-form merger (the "Acquisition"). After Engaged extended the tender offer by several weeks, 69.3% of the outstanding shares were ultimately tendered and the tender offer closed.

Discussion

The court found that the fact of the threatened proxy contest, without more, did not give rise to a reasonable inference of disloyalty by the directors. The plaintiff challenged the Acquisition on "narrow grounds." He did not assert that the sale process was defective, but "that the defendants decided to sell the Company out of self-interest" to avoid the cost and embarrassment of being ousted through a proxy contest. He also claimed that the offer price was unfair and that the disclosure in the proxy statement was materially unfair. The defendants argued, first, that the claims should be dismissed under *Corwin* given the stockholders' approval of the Acquisition through their tender of shares; and, second, that, even if *Corwin* were not applicable, the claims should be dismissed under *Cornerstone* because the plaintiff failed to plead any *non*-exculpated fiduciary claim (*i.e.*, any claim of breach of the duty of loyalty, because the directors were exculpated for breaches of the duty of care under the company's charter, as authorized under DGCL Section 102(b)(7)). The court concluded that, even if the disclosure were inadequate and *Corwin* thus were not applicable, the plaintiff failed to plead unexculpable claims. While "enhanced judicial scrutiny" of directors' conduct was applicable under *Revlon*, the court explained, "plaintiffs challenging a transaction under *Revlon* and seeking monetary damages… [still] must plead facts sufficient to state a non-exculpated fiduciary duty claim."

The court stated a "great reluctance" to infer disloyalty by directors in selling a company in the face of a looming proxy contest. The Vice Chancellor acknowledged that in three recent cases, in which directors faced fiduciary claims based on their having sold a company allegedly due to self-interest to avoid their ouster in a proxy contest that had been threatened, the court did *not* grant dismissal of the claims at the pleading stage. In each of those cases, however, the Vice Chancellor stated, the court had found "other indicia

of gross negligence or disloyalty" by the defendant directors. In *In re Tangoe*, the directors revised their own compensation structures so that they would benefit in the short term from a change in control transaction. In *Kosseff v. Ciasio*, the directors approved an agreement that "neutralized the threat of a proxy context, but also sold the company's assets to an insider board member and his confreres." In *In re PLX Technology*, the directors "double flip-flopped after successive activist campaigns and ultimately decided to sell the company at a price less than its standalone value." In *Rudd*, however, the Vice Chancellor found, the "Plaintiff's allegations offer no such meat on the bone." She wrote: "Given this court's reluctance to find that the mere threat of a proxy contest renders directors conflicted, the Plaintiff's allegations that the Director Defendants were conflicted solely because they initiated the sale process after Engaged threated a proxy contest is insufficient as a matter of law to plead a non-exculpated breach of fiduciary duty." Therefore, dismissal was "compelled" under *Cornerstone* (which provides for dismissal at the pleading stage of litigation of claims that would be exculpated under a company's charter provisions authorized under DGCL Section 102(b)(7)).

The court reaffirmed that the fact that a director was appointed by a stockholder does not, without more, give rise to a reasonable inference of disloyalty by the director in favor of that stockholder. The plaintiff contended that one of the directors, who was Engaged's designee on the Outerwall board, had prioritized Engaged's desire to exit its Outerwall investment over the interests of the other stockholders. The court stated that, under Delaware law, "a director's independence is not compromised by virtue of his status as a stockholder appointee." The court characterized as "conclusory" the plaintiff's allegations that this director had prioritized Engaged's interest. In a footnote, the court contrasted the situation in *Coty* (see the article on *Coty* below), where the court found that the complaint *had* sufficiently alleged that a director acted to advance the self-interest of his appointing stockholder in connection with a challenged tender offer. (In *Coty*, the director "allegedly made sure that the projections the Special Committee and its financial advisor used in connection with the tender offer were understated and kept the market in the dark about the company's strategic plan, which helped create uncertainty to benefit the appointing stockholder's plan to acquire majority ownership at the expense of the public stockholders.") The court also rejected the plaintiff's contention that this director's "long history of being appointed [including by Engaged] to companies' boards to push a merger or acquisition for short-term profit" gave rise to a conflict. A director is not "conflicted purely by virtue of his track record," the Vice Chancellor wrote.

The court reaffirmed that the fact of a director's interest in securing post-closing employment with an acquiror, without any allegation that discussions with respect to employment took place, does not give rise to a reasonable inference of disloyalty by the director. The court emphasized that the proxy statement clearly stated that no negotiations with respect to post-closing employment had taken place (a disclosure that the plaintiff did not challenge). Without alleged facts supporting a reasonable inference that discussions had taken place, the allegations only that the director was involved in the sale process and wanted to be employed post-closing did not give rise to an inference of self-interest. (We note that post-employment discussions generally will not create a conflict if they occur after material terms of the transaction have been agreed or the discussions are appropriately supervised by the board.)

The court held that the fact that there was a disclosure violation, without more, does not support a rational inference that the directors and officers provided the disclosure in bad faith (*i.e.*, that they knew the disclosure was inadequate and intended to provide inadequate disclosure). Outerwall's proxy statement disclosed three sets of projections: the "Core Case," "Unrisked Strategy Case," and "Downside

Case." The proxy disclosed that the Core Case reflected management's best estimate and had been approved by the board for use by its financial advisor in evaluating the Acquisition. The plaintiff asserted that the proxy was misleading in portraying the Core Case as most accurately portraying management's view of the company's future, primarily because the Core Case allegedly contained incorrect assumptions. The court found that the alleged facts did not support a reasonable inference of bad faith or disloyalty by the directors or the company's CEO. The court noted, in a footnote, that in *Kahn v. Stern* (2018), the Delaware Supreme Court "recognized that a plaintiff can state a claim under *Revlon* by pleading that a conflicted fiduciary failed to disclose 'critical information' to the board or that the board failed to oversee a conflicted fiduciary sufficiently throughout the sale process." However, "Plaintiff does not pursue either of these theories," the court wrote. (Note that, in the recent *USG* decision (discussed in an article below), Vice Chancellor Glasscock appears to have clarified that his *Morrison v. Berry* decision, issued after remand of that case from the Delaware Supreme Court, did not stand for the contrary proposition that *any* disclosure violation may, at the pleading stage, indicate the possibility of bad faith.)

Acquisition of Majority Ownership May Constitute a Potential "Benefit" to a De Facto *Controller*—Coty

In re Coty Stockholder Litigation (Aug. 17, 2020) involved the acquisition, by JAB Holding Company S.a.r.l., of shares in Coty, Inc. through a partial tender offer. Prior to the tender offer, JAB owned 40% of Coty's outstanding shares and had effective control of the company. After the tender offer, JAB owned 60% of Coty's outstanding shares and continued to control the company. Minority stockholders of Coty remaining after the offer was completed (the "Remaining Stockholders") brought suit in the Court of Chancery, alleging that JAB and the Coty directors had breached their fiduciary duties by effecting the tender offer at an unfair price and through an unfair process. Many of the claims were resolved prior to the defendants bringing their motion to dismiss before the court. Thus, in this decision, the claims the court addressed related only to the shares still held by the Remaining Stockholders after the tender offer closed (either because the shares were not tendered or due to proration because the shares tendered exceed the cap on shares that would be purchased in the offer). The defendants conceded that the entire fairness standard of review applied to the offer. However, they argued that, even if the offer had not been entirely fair, with respect to the shares the Remaining Stockholders continued to hold after the offer closed, they had not been *harmed* by JAB's acquisition of majority control in the tender offer because JAB controlled Coty both before and after the tender offer. Chancellor Bouchard denied the defendants' motions to dismiss the case at the pleading stage.

KEY POINTS

- **The decision indicates that a *de facto* controller's acquisition of *actual majority voting control* may be viewed by the court as a "benefit" to the controller and a "harm" to the remaining stockholders.** The court emphasized that, although JAB, as the *de facto* controller, as a practical matter prior to the tender offer could be virtually assured of the outcome of a stockholder vote, the court "could not rule out" that the Remaining Stockholders suffered harm when JAB obtained actual majority ownership. The court emphasized that, with "mathematical control," JAB could take certain actions "unilaterally" and the minority stockholders might no longer be able to obtain any control premium for their shares in a future

buyout. We would observe that, in other words, a controller with actual majority control would not need to have even one other share assent to certain of its proposed actions and therefore could act with impunity with respect to them — which is different from having to convince at least one other shareholder of the virtue of a proposed action.

- **The decision serves as a reminder of the difficulty in obtaining pleading stage dismissal of a fiduciary claim based on the director having abstained from voting.** The court reaffirmed that a director who was "wholly uninvolved" in a sale process will not face liability if the sale is challenged on fiduciary grounds. However, the court reiterated that a facts-intensive analysis often is required to determine whether abstaining directors, although they did not vote, may have been involved in the decision-making process. In this case, the court noted, the abstaining directors allegedly "participated" in the meeting at which the vote was held before recusing themselves for the vote.

- **The decision suggests that use of the phrase "as of [a specified date]" in a contract provision may be "ambiguous," at least in certain contexts.** In this case, the court found that, as used in the agreement at issue, it was unclear whether the phrase meant only *on* the specified date or also *going forward* from that date.

Background. JAB acquired Coty, Inc. in 1992 and took it public in 2013. In 2019, JAB proposed a partial tender offer. At the time, the Coty board consisted of nine members: four individuals who were affiliated with JAB (the "JAB Directors"); Coty's CEO ("L"), who had long served as an executive and/or director at numerous JAB affiliates; and four other individuals (the "Outside Directors") who also had served as directors at various JAB affiliates. The tender offer proposal was conditioned on approval by Coty's "independent directors." The board formed a Special Committee consisting of three of the "Outside Directors" to evaluate the proposal. The Special Committee, and then the board (with the "JAB Directors" recusing themselves from the vote) approved and recommended the tender offer. The offer was over-subscribed, with more than 75% of the publicly owned shares tendered. On closing, JAB acquired shares that increased its ownership stake from 40% to 60%, for a total purchase price of about $1.75 billion. Also, as had been agreed with the Special Committee, JAB entered into a Stockholders Agreement pursuant to which, after the tender offer, JAB and Coty agreed to ensure the election of directors to the Coty board who would be "independent and disinterested with respect to JAB." After the tender offer, JAB elected new directors to Coty's board, all of whom had longstanding ties to JAB. Chancellor Bouchard denied all of the defendants' motions to dismiss the claims against them.

Discussion

The plaintiffs alleged that (i) JAB opportunistically timed and priced the offer and acted coercively and (ii) all of the Special Committee members were not independent and disinterested with respect to JAB and acted to favor its interests. Specifically, the plaintiffs alleged as follows:

- ***Opportunistic timing and pricing.*** JAB commenced the tender offer after it had overhauled Coty's management team and had announced that Coty would be adopting a new strategic plan, but before the content of the strategic plan had been disclosed. The Committee's financial advisor advised the Committee that the offer "came at a highly complex time" as it followed a strategic planning process that had commenced but had not yet "matured" to the point that the plan or accompanying financial projections had been completed (neither of which was expected to be available until after the tender offer closed). One week after the tender offer closed, Coty announced

its fiscal third quarter earnings, which beat analysts' expectations. During an earnings call, Coty confirmed that it had resolved certain key business issues and Coty previewed the strategic plan which would begin to roll out the following month. By the following week, Coty's share price had increased 25% over the tender offer price. According to JAB, as of the date just preceding announcement of the offer, the $11.65 per share offer price represented a 38% premium to the 90-day weighted average share price, a 51% premium to the 30-day weighted average, and a 21% premium to the closing price. The court observed that the offer price represented a "considerable discount," however, to Coty's 52-week high of $21.53 per share and to the $22.00 estimated "intrinsic value" of the shares according a recent analyst report.

- ***Non-independence of the Special Committee members.*** When the Coty board established the Special Committee, the board adopted a resolution stating that the directors being appointed to the Committee had no interest in the tender offer that was different from the other stockholders' interests—however, the court emphasized, the board had made no determination with respect to whether the Committee members were independent and disinterested *with respect to JAB*. In fact, all of the Committee members had longstanding ties with JAB as directors and/or executives at numerous JAB portfolio companies. Further, none of the Coty directors had disclosed in their Director Questionnaires their ties with JAB. Coty's 14D-9 Recommendation Statement stated that the Committee members had no conflicts of interest, did not disclose the Committee members' ties with JAB, and misleadingly characterized the Committee members as "independent directors."

- ***Non-effectiveness of the Special Committee.*** The Committee made only one request to JAB to increase the tender offer price, "without providing any specific counteroffer or minimum price." JAB rejected the request and, throughout the process, refused to engage in monetary negotiations with the Committee (although JAB (i) agreed to raise the minimum share tender condition so that, if the tender offer was consummated, JAB would own at least 50.1% of the outstanding shares and (ii) agreed to enter into the Stockholders Agreement).

- ***Coercion by JAB.*** During the Committee's process, JAB "consistently communicated" that it would terminate the tender offer if the Committee was not prepared to approve it in a timely fashion.

The court viewed the acquisition of actual majority voting control as a potential "benefit" to the controller and a potential "harm" to the Remaining Stockholders.

The necessary elements of a fiduciary claim by stockholders are that (i) there was a fiduciary breach and (ii) the stockholders were harmed. The defendants argued that, accepting as true the plaintiffs' allegation that JAB controlled Coty before the tender offer as the holder of 40% of the outstanding shares, the Remaining Stockholders were not harmed with respect to the shares they continued to own after the tender offer because they were not situated differently than before the tender offer—*i.e.*, Coty was controlled by the same entity (JAB) both before and after the acquisition. The defendants contended that Delaware law does not recognize a distinction between "mathematical control and *de facto* control." The court stated that the fact that a less than 50% owner can be deemed to be a controller if it exercises control "does not mean that a *de facto* controller may not obtain real benefits from securing mathematical control of a corporation in a transaction and, as a corollary, that other stockholders of the corporation may potentially suffer harm as a result of such a transaction." The court observed that, once majority voting control is secured, the controller "may unilaterally" elect directors, cause a breakup of the corporation or a merger, cash out the public stockholders, amend the charter, sell all or substantially all the assets of the corporation, or otherwise alter

materially the nature of the corporation and the public stockholders' interests. The court stated that, "[a]lthough the Plaintiffs [did] not dispute that JAB's voting power was sufficiently potent before the Tender Offer that it would have to lose a corporate election with a ninety percent turnout by a vote of more than nine to one, the court cannot rule out at this stage of the case that the Remaining Stockholders suffered harm when JAB secured mathematical control of Coty through the Tender Offer"—because, with such control, JAB could act unilaterally. The court observed that Coty's 14D-9 itself noted the loss of the minority stockholders' ability to obtain a control premium in the future as a "negative factor" of the tender offer and recognized the potential value to JAB of obtaining a majority ownership stake. The court gave no indication of what the value of the benefit to JAB would be or how the court would calculate damages with respect to the correlating harm to the Remaining Stockholders.

A conflicted director's abstention from voting on a transaction will not necessarily lead to dismissal at the pleading stage of fiduciary claims against the director. A director who plays "no role" in the process of deciding whether to approve a transaction cannot be held liable on a claim that the board's decision to approve the transaction was wrongful. The JAG Directors argued that the fiduciary claims against them should be dismissed because they (i) did not serve on the Special Committee and (ii) recused themselves from the board's decision to recommend the tender offer. The court pointed to *Voigt v. Metcalf* (Del. Ch. Feb. 10, 2020), in which the court described a number of scenarios that would "preclude applying the abstention principle" and explained "why the factual nuances underlying this rule often necessitate the development of a discovery record before the rule can be applied." Discovery may be particularly warranted, the court suggested, where, as here (and as was the case in *Voigt*), the directors may be dual fiduciaries of the company and its controller. The court noted that, in this case, (i) the Complaint alleges that the JAB Directors failed to disclose in their Director Questionnaires all of their relationships with the Special Committee members (which allegedly caused Coty to distribute a 14D-9 that misleadingly portrayed the Committee members to be independent) and (ii) the 14D-9 indicates that the JAB Directors participated in the key board meeting before the vote on the challenged transaction (specifically, before recusing themselves from the meeting, they "discussed with the Board [JAB's] reasons for making the Offer, including their belief that the Offer represents a strong expression of support for the Company and its management team"). Based on these allegations, the court found it reasonably conceivable at the pleading stage that the JAB Directors may not have totally abstained from the process by which the Tender Offer was approved.

Dismissal of fiduciary claims at the pleading stage under *Cornerstone* may not be available to a director who also served as an officer and may have advanced the interests of the controller *in his or her capacity as an officer*. Under *Cornerstone*, fiduciary claims for which a director would be exculpated (as permitted by DGCL Section 102(b)(7)) will be dismissed at the pleading stage. However, *Cornerstone* applies only to directors' actions in their capacity *as directors* (because there is no exculpation under Section 102(b)(7) for officers). Thus, fiduciary claims against a director who also served as an officer will *not* be dismissed under *Cornerstone* at the pleading stage if the complaint contains allegations to support a rational inference that he or she may have acted out of loyalty to the controller and could have breached his or her fiduciary duties *as an officer*. In this case, the court found such a rational inference with respect to Coty's CEO, based on his alleged actions, *as CEO*, to ensure that the projections used in connection with the offer were "understated" and to "ke[ep] the market in the dark about Coty's strategic plan, which helped create uncertainty to benefit JAB's plan to acquire majority ownership at the expense of Coty's public stockholders." (In *Voigt*, the same inference was drawn with respect to

the director-CEO in that case based on his allegedly having "provided his assessment of the challenged transaction to the Board and having advocated in favor of the deal in his capacity as an officer.")

The court found it to be "ambiguous" whether the Stockholders Agreement provision that was stated "as of" a specified date meant only *on* that date or also *going forward* from that date. Section 3.01 of the Stockholders Agreement required that, within five months after the tender offer closing, JAB and Coty would elect to, and then maintain on, the board four directors who were "independent and disinterested with respect to JAB." The provision further stated (the "Independence Representation") that, "[f]or the avoidance of doubt, as of the date hereof, each of [the Outside Directors] are Independent Directors who are disinterested as it relates to [JAB]." The defendants argued that there could be no breach of Section 3.01 for a failure to cause the election of four Independent Directors to the board because the four Outside Directors (who continued to serve) were, pursuant to the Independence Representation, deemed to satisfy the test for independence. The plaintiffs responded that the Representation spoke only as of the date of the Agreement—that is, that the Representation indicated only that the Outside Directors were to be deemed independent *on* that date (allegedly, for the purpose of precluding a challenge to their authority to approve the Stockholders Agreement for Coty on grounds of non-independence). The defendants countered that the "as of" language meant both on that date *and* "going forward" from it (until the facts that existed on that date changed in a way that would bear on the definition of independence in the Agreement). The court held that, on a motion to dismiss, the defendants' interpretation should not be adopted because "the forward-looking language…does not appear in the contract" and the plaintiffs' offered "a reasonable interpretation…that accords with [the] plain language" of the Independence Representation. Further, the court rejected the Outside Directors' argument that they could not have breached their fiduciary duties in connection with any alleged violation of Section 3.01 because they had relied in good faith on their belief that the Representation was forward-looking. That argument, the court stated, was "untethered from the allegations in the Complaint, which call[ed] into question the Outside Directors' good faith with respect to the composition of the Board"—specifically, that they had intentionally (i) submitted false director questionnaires concerning their ties to JAB; (ii) entered into "a mutually self-interested bargain" with JAB regarding the [Representation]; (iii) misled the stockholders about their lack of independence in the 14D-9; and (iv) appointed two new non-independent directors to the board (in violation of the Stockholders Agreement) and then re-nominated a slate of directors that again included no Independent Directors as required under Section 3.01." The court found it reasonably conceivable that the Outside Directors "knowingly caused [Coty] to breach [Section 3.01] in a self-interested manner in order to retain their directorships and remain in JAB's good graces."

PRACTICE POINTS

- **The overall factual context will influence the court's result.** We note that the backdrop to the Coty decision was a situation in which the directors and the company controller allegedly did not disclose their significant ties to each other and the directors did not even offer a defense of the claims of fiduciary breach against them but only argued that there had been no harm to the stockholders.
- **A *de facto* controller should be mindful that the acquisition of majority ownership may constitute a benefit to itself and harm to the remaining minority stockholders.** The decision appears to suggest that there could be *some* level of *de facto* control (above a 40% ownership level with the exercise of control) at which the acquisition of shares resulting in over 50% ownership would *not* put the stockholders in any different position than they were before the acquisition.

However, we would observe that the court's emphasis on the acquisition of mathematical majority control providing the benefit that the majority owner could act "unilaterally" (*i.e.*, without the assent of even a single other stockholder) with respect to certain actions would appear to be applicable to *every* situation in which a stockholder who is a de facto controller with less than 50% ownership acquires over 50% ownership.

- **A director-officer should offer a defense not only for his or her actions that were taken as a director but also those taken as an officer.** Directors who defend only their actions taken in their capacity as directors (*e.g.*, voting for and recommending to stockholders the challenged transaction) will not be eligible under *Cornerstone* for dismissal at the pleading stage of fiduciary claims against them unless they also have offered a defense of their challenged actions taken in their capacity as officers (*e.g.*, with respect to their alleged involvement in the preparation of projections or other sale process infirmities).
- **There is no bright-line test for precisely what level of involvement in the decision-making process renders abstention insufficient to shield a director from liability.** The safest course is to be "wholly uninvolved." *Coty* highlights that an abstaining director generally should not participate in meetings, or provide their views, relating to the transaction on which they intend to abstain.
- **Parties to an agreement should seek to ensure clarity as to the meaning of a provision that is specified to be true "as of" a date.** It should be clear whether the phrase means "on" that date or going forward from that date and, if the latter, for how long. We note that, in *Coty*, the more usual interpretation of "as of" (that it speaks "going forward") arguably did not make sense in the context of the particular provision at issue.

Court Denies Corwin *Cleansing Based on Non-Disclosure of the Board's View of the Company's "Intrinsic Value"*—USG

In *In re USG Corporation Stockholder Litigation* (Aug. 31, 2020), the Court of Chancery held that the fiduciary claims of USG Corporation stockholders against the company's directors in connection with the sale of the company would not be dismissed at the pleading stage under *Corwin* because the stockholder vote approving the transaction had not been "fully informed." However, Vice Chancellor Glasscock dismissed the claims against the directors under *Cornerstone* (which provides for early dismissal of claims for alleged fiduciary breaches that would be exculpable) after finding that the alleged facts did not support a reasonable inference that the directors had acted in bad faith.

KEY POINTS

- **The decision is notable for the finding of a disclosure violation based on the board's not having disclosed its view of the "intrinsic value" of the company.** Notably, as the court emphasized, the board had determined the intrinsic value of the company and had stated numerous times in the Proxy Statement that its decisions were guided by its view of the company's intrinsic value. Further, the board had several times made the conscious decision not to disclose its view of the company's intrinsic value (which was nearly 15% higher than the deal price).
- **The decision is also notable for the court's emphasis that a disclosure violation does not necessarily indicate the possibility of bad faith.** By emphasizing this in this case, Vice

Chancellor Glasscock seems to have clarified what we had viewed as possibly a contrary suggestion in his *Morrison v. Berry* decision issued last year on remand of that case from the Delaware Supreme Court (as we discuss below).

Background. USG Inc. (a manufacturer of Sheetrock) was owned 10.6% by Gebr. Knauf KG (a German manufacturer of building materials) and 31.1% by Berkshire Hathaway. Berkshire had publicly indicated that it wanted to exit its investment in USG. Knauf had been thinking of ways it could partner with USG. In April 2017, Knauf discussed with Berkshire the possibility of Knauf's making an offer for USG. Berkshire encouraged Knauf to do so and indicated that it would support any bid at or near $40 per share. Knauf then made a proposal to USG to acquire it for $40 per share, which it later raised to $42 per share. The USG board repeatedly rejected the offers as inadequate based on its view that the offer prices were below USG's "intrinsic value." Ultimately, Knauf publicly disclosed its proposal to acquire USG and conducted a "withhold campaign" against USG's directors. Berkshire disclosed that it had proposed that it would grant to Berkshire an option to buy its USG shares at $42 per share and would support the withhold campaign. Another large USG shareholder also announced its support for the campaign. ISS and Glass Lewis recommended in favor of the campaign. During this time, USG received some interest from other potential buyers, but none submitted a proposal.

Ultimately, the USG board authorized the CEO to begin negotiations with Knauf within a range (unanimously approved by the board) of $48 to $51 per share. The CEO presented Knauf with a counterproposal of $50 per share. Shortly thereafter, at USG's annual meeting, 75% of the shares voted were cast against each of USG's director nominees. As a result, four directors were not re-elected and only continued to serve as holdover directors. Knauf then increased its offer to $43.50 per share. The CEO told Knauf that the board believed USG's intrinsic value was $50 per share but that the board might accept an offer as low as $47 per share. After discussion at its next meeting, the USG board approved the negotiation of a sale at as low as $44 per share. Not long thereafter, Knauf proposed a "best and final" offer of $44 per share. The USG board accepted this offer and Berkshire entered into a voting agreement to support it. USG's stockholders approved the merger and it closed in April 2019.

Discussion

The court held that the stockholder approval was not "fully informed" because USG did not disclose that it believed that the company's "intrinsic value" was above the merger price. The plaintiffs "essentially pl[ed] that the Board determined that USG had an intrinsic value, that the Board did not disclose this material fact, and that by not disclosing [the] intrinsic value the Board's other disclosures, namely that the Acquisition was favorable to USG's stockholders, were rendered materially misleading." The plaintiffs also alleged that USG's CEO told Knauf that the board believed USG's intrinsic value was $50 per share. The defendants responded, first, that the directors had not formed any "personal and unanimous opinion of USG's intrinsic value." The court found, however, that there was a reasonable inference that the board *had* formed such a view given the frequent references in the Proxy Statement to the board's decisions having been based on "the Board's view of USG's intrinsic value." In a footnote, the court states that, by its count, the Proxy Statement "reference[d] USG's intrinsic value fifteen times." Second, the defendants noted that it was disclosed in the Proxy Statement that the board had authorized USG's CEO to negotiate in the range of $48 to $51 per share and that USG's first counteroffer to Knauf was $50 per share. The court stated that disclosing a negotiating price is different from indicating a view of intrinsic value. More fundamentally, the court emphasized that, in the Proxy Statement, USG disclosed several times that it considered disclosing publicly its view of the company's intrinsic value and determined not to do so.

Finally, the defendants argued that the board's view of intrinsic value was not material. Vice Chancellor Glasscock, while agreeing that "'intrinsic value' or 'fair value' are nebulous, even illusory, concepts," stated that the directors "had a better opportunity to develop a reliable, if still subjective, belief as to intrinsic value that did USG's unaffiliated stockholders." The court concluded that, "because the Proxy Statement disclosed that the Board held a view of intrinsic value and frequently referenced such a view during its disclosures about the sale process, USG's stockholders were entitled to know the Board's opinion of USG's intrinsic value, even if it was unachievable due to market forces and Knauf's threats to launch a hostile takeover." There was a substantial likelihood that "a reasonable stockholder would have considered the Board's oft-mentioned view of intrinsic [value] important in deciding how to vote."

The court held that USG was *not* materially misleading in not providing further disclosure regarding its financial advisors' analyses. The plaintiffs contended that the financial advisors' "preliminary analyses" showed that Knauf's $42 proposal was at the low end of the advisors' range of DCF valuations, below the average for premium analyses, and did not appear to account for lower corporate tax rates. Observing that USG was required only to provide "a fair summary of the substantive work performed" by the financial advisors, the court noted that the Proxy Statement did provide a fair summary of these preliminary analyses and, in any event, the plaintiffs did not complain about the disclosure of the advisors' work underlying the board's approval of the Acquisition itself. The court distinguished its *Clements v. Rogers* decision, stating that the case involved two analyses, with the latter analysis being "more pessimistic" than the earlier one, giving rise in that case to a plausible inference that the valuations changed in order to justify a bargaining outcome.

The court addressed the interaction of the *Corwin* and *Cornerstone* doctrines—and found that, because the disclosure claims did not imply bad faith, they were exculpable and had to be dismissed under *Cornerstone*. The court explained that, in a post-closing action for damages, the defendant directors were exculpated from liability for damages under USG's charter (as permitted under DGCL Section 102(b)(7)), absent breach of the duty of loyalty or bad faith. The court found that the "disclosure deficiency alleged, although it prevents application of *Corwin*, is insufficient to reasonably imply bad faith." The court therefore dismissed the claims under *Cornerstone* (which provides for early dismissal of exculpable fiduciary claims against directors).

We note the following possible implications of the decision:

Retrenchment of the Corwin *doctrine.* As we have observed in previous commentary, initially there was a steady stream of cases in which the Delaware courts amplified a broad view of *Corwin's* applicability, readily found *Corwin* governed the case at issue, and almost invariably dismissed the case at the early pleading stage of litigation—even in factual contexts involving non-trivial disclosure issues, a largely *not* independent and disinterested board, and/or apparently serious sale process flaws. By contrast, in 2018 through 2020, there have been only a few cases involving *Corwin* and the court found *Corwin* to be applicable in only a small number of them. Instead, in most instances, as in *USG*, the court found *Corwin* inapplicable, typically based on a finding that the stockholders were not "fully informed" due to inadequate disclosure.

Clarification of the Morrison v. Berry *decision.* Vice Chancellor Glasscock's decision in *Morrison* was reversed by the Delaware Supreme Court (July 27, 2017). In his decision issued on remand of the case to the Court of Chancery (Dec. 31, 2019), Vice Chancellor Glasscock established a framework of analysis, in response to the Supreme Court's opinion, that seemed to suggest that *any* time that, at the pleading stage, the court found that disclosure may have been inadequate, it necessarily followed, as a matter of logic,

that there would be a reasonable inference that the directors and officers involved in drafting or reviewing the disclosure *may* have acted in bad faith in producing and providing bad disclosure. *USG* indicates that this is *not* in fact the Vice Chancellor's view. In *USG*, he clearly articulated that a finding of inadequacy of disclosure by USG was *separate* analytically from a finding whether there was a reasonable inference that the defendants acted with the requisite culpability for bad faith.

Continued Recent Judicial Receptivity to Caremark *Claims*

Delaware courts have repeatedly emphasized that a *Caremark* claim is "possibly the most difficult theory in corporation law upon which a plaintiff may hope to win judgment," and, traditionally, the courts have routinely dismissed *Caremark* claims at the pleading stage. However, *Teamsters Local 443 v. AmerisourceBergen Corporation* (Aug. 24, 2020) is now the fourth decision in just over a year in which the Delaware courts have allowed a *Caremark* claim to proceed beyond the pleading stage of litigation. While the express articulation of the standard for pleading a valid *Caremark* claim has not changed, and while each of these recent cases has presented an alleged factual context that was particularly egregious, directors should be mindful that, unlike in the past, there is now a trend of decisions in which the court has rejected early dismissal of *Caremark* claims.

"*Caremark* claims" relate to directors' duty to oversee and monitor a corporation's operational viability, legal and regulatory compliance, and financial performance and reporting. Under *Caremark*, directors can have personal liability for failing to prevent corporate harm when they have done so under egregious circumstances involving their knowing bad faith. A successful *Caremark* claim requires a pleading showing that either (i) the directors "utterly failed to implement" any reporting or information system or controls, or (ii) having implemented a system of controls, the directors "consciously failed to monitor" or oversee its operations (such as by consciously disregarding "red flags," particularly if involving noncompliance by the company with regulatory requirements that are the "central issue" and "mission critical" to the business), thus disabling themselves from being informed of risks or problems requiring their attention.

In the following recent cases, the courts have denied early dismissal of *Caremark* claims:

AmerisourceBergen. In *Teamsters Local 443 v. Chou* ("*AmerisurceBergen*") (Aug. 24, 2020), stockholders of AmerisourceBergen brought *Caremark* claims against the directors for alleged failings that cost the company or its affiliates about $900 million in civil and criminal penalties for what the court characterized as allegedly "operat[ing] a criminal enterprise." The business of the company's subsidiary pharmacy business ("Pharmacy") involved buying single-dose vials of oncology drugs from manufacturers, transferring the drugs from the vials to syringes, and then selling the syringes for injection into cancer patients. The manufacturers of the single-dose vials would intentionally include an "overfill" amount of medication that provided for an excess amount that could be used to make up for human error and to permit a loss of some medication to avoid air bubbles when filling the syringes. Any overfill not used was to be discarded. Pharmacy, however, illegally saved and pooled together the overfill amounts and used the accumulated amounts to fill additional syringes for sale—which led to contamination of the syringes that were filled with the medication that had been pooled from various vials. The contamination was reflected in the presence of "floater" particles in the

syringes. Pharmacy removed the floaters, allegedly so that the contamination would not be visible. In addition, Pharmacy, which was not registered with the Food and Drug Administration, allegedly was operated in a way to make it appear that it was state-licensed (so that it could avoid oversight by the FDA). In 2017, Pharmacy's direct parent entity pleaded guilty as part of a criminal investigation conducted by the Department of Justice. The court wrote: "The allegations here are a prime example [of potential *Caremark* violations]: Flouting laws meant to ensure the safety and purity of drugs destined for patients suffering from cancer is directly inimical to the central purpose of ABC's business." The court noted that the directors "ignored such red flags as did exist, and, in addition, permitted a woefully inadequate reporting system" with respect to Pharmacy's oncology supply services business line.

Hughes. In *Hughes v. Hu*, the Court of Chancery refused to dismiss *Caremark* claims based on the alleged failures of the audit committee process of Kandi Technologies, a Chinese company. The committee allegedly met only once a year, and only for minutes, notwithstanding that it knew (including from its independent auditor) about material weaknesses in the company's internal controls. The court concluded that the alleged facts indicated that the audit committee "met sporadically, devoted inadequate time to its work, had clear notice of irregularities, and consciously turned a blind eye to their continuation," which led the company to continue to suffer "pervasive problems with its internal controls." Although Kandi had publically pledged to correct these shortcomings, it apparently had done little to address the issues—for example, in the following two years, it met only five times, for an hour or less each time, and generally only to approve the company's annual report, as required by federal securities laws. Also, the committee and the board allegedly frequently had to act by written consent after the committee meetings to address issues that were not addressed at the meetings. The court did not view the allegations as claiming only that monitoring systems that were in place (including the audit committee, an audit department, a code of ethics, and an independent auditor) should have been more effective. Rather, the court viewed the allegations as supporting an inference that the audit committee had never implemented its own system for reporting and monitoring, but instead had chosen to rely on management (including for decisions such as replacing the auditor and establishing the appropriate policies for approving conflicted related party transactions, although the committee allegedly knew that management had not been accurately reporting related party transactions). Although a New York federal court had dismissed a federal securities lawsuit against Kandi on the basis that its required restatement of financials had resulted in no changes to the company's net income, the Court of Chancery ruled that, in a *Caremark* action, the director defendants still could be liable for incidental damages (*e.g.*, the costs of the restatement, reputational harm, and the costs of litigation related to the restatement).

Clovis. In *In re Clovis Oncology* (Oct. 2019), the Court of Chancery denied a motion to dismiss the plaintiffs' *Caremark* claim alleging that individual directors should be held financially liable for failing to monitor the development of the biotech firm's only promising experimental drug and for allowing the firm to publish inflated performance results. Clovis (which had no products or sales revenue, and only the single promising lung cancer drug in its pipeline) committed to a well-accepted clinical trial protocol under FDA regulations to test the drug. The company then allegedly engaged in "serial noncompliance" with the protocol and the regulations, most crucially by falsely reporting the drug's "objective response rate" (ORR), which measured the percentage of patients experiencing meaningful tumor shrinkage as verified by confirmation scans. When the FDA identified the problem, Clovis

announced the actual clinical results, after which the company's stock price plummeted and the company was liable for significant securities fraud and regulatory settlements and penalties. The board allegedly had received reports that the ORR reported to the FDA and publically was inflated because it included responses not verified by confirmation scans. Citing the vast discrepancies between the company's public statements and the information the board of directors had received, the court characterized the directors as having approved an annual report "with hands on their ears to muffle the alarms." Given that the protocol and FDA regulations governing the clinical trial were "mission critical regulatory issues" for the company's sole potential product, the court declined to dismiss the *Caremark* claim at the pleading stage.

Marchand. In *Marchand v. Barnhill* (June 2019), the plaintiff-stockholder claimed that the directors of Blue Bell Creameries USA, Inc., a company that only made ice cream, breached their fiduciary duty of loyalty under *Caremark* by having failed to oversee and monitor the company's food safety operations. The suit was brought after an outbreak of listeria contamination in the company's ice cream led to the sickening and (in three cases) the death of consumers who ate the ice cream—as well as the recall of all of the company's products, the shuttering of all of its plants, and, ultimately, a liquidity crisis that led it to accept a dilutive private equity deal. The Court of Chancery had dismissed the suit on the basis that Blue Bell's food safety operations were subject to a reasonable system of oversight through the extensive regulatory scheme to which the company was subject (which included inspections and reports by federal and state regulators). The Delaware Supreme Court overturned the dismissal, however, after finding that the facts alleged in the complaint indicated that *the board itself* had taken no action to assure a system for oversight of food safety *at the board level.* Notably, in *Blue Bell*, the alleged facts were extreme in terms of both the board's inattentiveness (for example, the board minutes reflected that the board never discussed anything about food safety, even in the midst of the unfolding listeria crisis) and its dire consequences (*i.e.*, the deaths of consumers of the ice cream).

Other *Caremark* cases. We note that, in other recent cases, the court has dismissed *Caremark* claims at the pleading stage and has stressed "that directors are not omniscient, that their eyes cannot be on every sparrow, and that not every failure of oversight is the result of bad faith (see, for example, *In re GoPro* (Apr. 28, 2020); *Owens v.Mayleben* (Feb. 13, 2020); *LendingClub Corp. Deriv. Litig.* (2019); and *Rojas v. Ellison* (2019)). And, again, we emphasize that the alleged facts in each of *Marchand, Clovis, Hughes,* and *AmerisourceBergen* are extreme, reflecting repeated, consistent and total lack or failure of systems for reporting and/or monitoring systems relating to the companies' core business and having disastrous effects on human health or life. At the same time, it is noteworthy that there is now a trend of four recent cases that were *not* dismissed. Moreover, we would highlight that, in *AmerisourceBergen*, Vice Chancellor Glasscock (i) rejected the company directors' argument that the court should take into account the fact that Pharmacy was only a small part of AmerisourceBergen's overall business; (ii) stressed that, even in *Caremark* cases, stockholders are entitled to the benefit of all reasonable inferences at the pleading stage; and (iii) emphasized that boards of companies operating in a business where outside regulations govern its "mission critical operations" must exercise oversight more rigorously. Further, we would note that the increased prevalence of and judicial receptivity to stockholders' requests under DGCL Section 220 to obtain books and records for investigation prior to commencing litigation likely will continue to facilitate stockholders' ability to bring *Caremark* claims. These factors may harbinger greater judicial reluctance to dismiss *Caremark* claims at the pleading stage than has been the case in the past.

PRACTICE POINTS

Boards should consider on a regular basis whether regulatory compliance (or other) risks exist and should take steps to address them. The following should be kept in mind:

- ***Need for* board-level *oversight and monitoring.*** A board should establish *board-level* systems for oversight and monitoring of the issues central to the company's operations—and not rely only on *non*-board-level mechanisms such as the oversight provided by the regulators themselves or reports from management on the company's operations *generally*. A board should consider establishing and maintaining one or more board committees to oversee and address the company's compliance with and risks related to the regulations, and other matters, central to its business; regular processes and protocols requiring management to keep the board apprised of key compliance and other practices, risks or reports; and a schedule for the board to consider on a regular basis whether compliance (or other) risks exist and steps taken to contain them. Periodic reviews of the effectiveness of compliance reporting and monitoring systems should be undertaken by the audit, compliance and/or other relevant committees of the board, with reports on the results furnished to the full board. Board minutes should reflect the board's monitoring and oversight efforts, including those to establish, implement and maintain oversight systems; the board's regular discussion of key compliance and other issues; and management's disclosure to the board of compliance and other key risks and developments.
- ***Need for management involvement.*** Management—and also the audit committee and the outside auditors—should keep the board focused on, and apprised of key developments with respect to, issues and risks that are central to the business. There should be regular processes and protocols requiring management to keep the board apprised of key compliance and other practices, risks or reports; and when management learns of "yellow flags" or "red flags" (including complaints or reports from regulators), the board should be told, and the board should address these issues.
- ***Need for heightened focus on regulatory mandates and risks to health.*** As was articulated in another Delaware decision issued last year (*In re Facebook Section 220 Litigation*), there is heightened risk under *Caremark* where a board fails to oversee the company's obligations to comply with "positive law" (including regulatory mandates) as opposed to the company's efforts generally to avoid business risk. Also, there appears to be heightened risk of *Caremark* liability when human life or health is involved; thus, directors of companies in businesses such as food, pharmaceuticals, medical devices, transportation, and the like, may face a heightened risk of *Caremark* liability as compared to directors of other companies.

Notes

Delaware Supreme Court Finds Possible Fiduciary Breach Based on a Pre-Signing Compensation Presentation Made to the CEO-Lead Negotiator—Fort Meyers v. Haley

In *City of Fort Myers General Employees' Pension Fund v. Haley* (June 30, 2020), certain stockholders of Towers Watson & Co. challenged the fairness of the merger of equals between Towers and Willis Group Holdings Public Limited Company. The gravamen of their claim was that the Towers CEO-Chairman ("JH"), who was the lead negotiator for Towers and was to become CEO of the combined company, had breached his fiduciary duties by not disclosing to the Towers board that during the merger negotiations a significant stockholder of Willis had proposed to him a post-closing compensation package. The package represented the potential for a five-fold increase in JH's compensation (to $140 million). The Court of Chancery had dismissed the claims at the pleading stage. The Delaware Supreme Court (with one dissenter) reversed the dismissal and remanded the case for further proceedings.

The decision is notable for highlighting the high level of transparency required of a director serving as a lead negotiator when he or she may have a conflict of interest. The Court of Chancery had dismissed the case on the basis that the board knew that JH had a potential conflict because it knew that he would become CEO of the combined company and thus would be entitled to increased compensation—and the board nonetheless selected him to be the lead negotiator. The Supreme Court, however, viewed the receipt of the compensation proposal as "deepening" the conflict such that the board would have wanted to know about it when evaluating the merger JH had negotiated. The Supreme Court emphasized directors' "unremitting duty of candor" as fiduciaries "to not use superior information or knowledge to mislead" the other directors and to not use their position of trust "to further their private interests."

Lead negotiators should be aware that, even if the other directors are aware of the general contours of potential conflicts, they should keep the directors informed about new details that emerge during the course of negotiations that may intensify or change the conflict.

The decision highlights the importance of erring on the side of full disclosure. Importantly, as the court noted, a director's having a conflict or even acting disloyally will not preclude business judgment review—so long as it is disclosed. Given that the "deepening" of the conflict was *not* disclosed, business judgment review of the merger under *Corwin* was unavailable (because the stockholder approval was not "fully informed"). On close calls, particularly those relating to conflicts, the best course generally is to err on the side of more fulsome disclosure rather than less.

Court of Chancery Confirms a Minority Stockholder Does Not Become Part of the Control Group Merely by Rolling Over Its Stock in a Take-Private Transaction—Gilbert v. Perlman

In *Gilbert v. Perlman* (Apr. 29, 2020), the Court of Chancery confirmed that minority stockholders do not necessarily become part of a company's control group merely by virtue of agreeing to roll over their equity into a going-private transaction. For minority stockholders to be found to have joined a control group, they must, first, have met the basic prerequisite under Delaware law for formation of a group—*i.e.*, been connected in a legally significant way,

such as by contract, common ownership or other arrangement, towards a shared goal; and, second, "the controller must [have] perceive[d] a need to include the minority holders to accomplish the goal" and must have ceded "some material attribute of its control to achieve their assistance."Francisco Partners ("FP") owned 56% of Connecture, Inc. and Chrysallis Ventures (an affiliate of Connecture's Chairman, "DJ") owned 11% of Connecture. Following Connecture's delisting from NASDAQ because it could not meet the minimum share pruce or market capitalization requirements, FP offered to purchase Connecture for $0.30 per share. Connecture formed a special committee to evaluate the offer and negotiate with FP. During the negotiations, Chrysallis offered to roll over its shares to help the special committee negotiate a higher price. The special committee and FP agreed to the rollover and FP increased its price to $0.35 per share. Thereafter, FP also agreed to Chrysallis' request to rollover its shares. Chrysallis and FP also entered into a voting support agreement, which assured approval of the going-private (given that there was not a majority-of-the-minority approval condition). Only 9.9% of the shares held by the other minority stockholders were voted in favor of the merger.

After the merger closed, the plaintiffs brought suit alleging that Chrysalis, DJ, and FP were part of a "buyout group" and, as controlling stockholders, owed fiduciary duties to Connecture and its stockholders, which they had breached. The Court held that Chrysalis and DJ could only be members of a control group if (i) they had a legally significant relationship with FP and (ii) FP had agreed to materially limit or share its control power. The court acknowledged that the plaintiff's allegations suggested that FP, Chrysallias and DJ may have had more than mere "parallel investing interests," but found that the plaintiffs did not show that FP materially limited or shared its control. The Court specifically rejected the plaintiffs' argument that FP had limited or shared its control by permitting the rollover, which would dilute its investment. Such a determination, which would mean that a control group is formed every time minority stockholders roll over their investment in a going private transaction with a majority stockholder, would not be in accordance with Delaware law, the court held.

Interrelationship of the Indemnification and Third Party Beneficiary Provisions in a Purchase Agreement—CHS v. Steward

In *CHS v. Steward* (Aug. 21, 2020), the Delaware Court of Chancery found an indemnification provision in an asset purchase agreement to be "ambiguous" and therefore refused, at the pleading stage, to dismiss an indemnification claim against the seller. The ambiguity arose from the interrelationship of the indemnity and third-party beneficiaries provisions, as well as the definitions of "Affiliates" and "Seller Entities."

The Asset Purchase Agreement, between Steward Health Care System LLC and CHS/Community Health Systems, Inc., provided that Steward would purchase from the "Seller Entities" (which were affiliates of CHS listed in the Agreement) substantially all the assets of certain hospitals and, after the closing, would assume the future payment and performance of all obligations under the Assumed Contracts.

The Agreement also provided as follows:

- *Indemnification.* Steward would indemnify "CHS and its Affiliates" from and against any and all Losses incurred in connection with the Assumed Obligations.
- *Definition of "Affiliates."* Affiliates meant, with respect to any person, "any other Person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such specified person."

- *Definition of "Seller Entities."* The Seller Entities (which were Affiliates of CHS) were listed in the Agreement.
- *Third-Party Beneficiaries.* (i) The terms of the Agreement were intended solely for the benefit of CHS, Steward and their Affiliates, and (ii) the parties did not intend to confer third-party beneficiary rights "upon any other person other than the Seller Entities and the Buyer Entities, which the parties agree[d] [we]re express third party beneficiaries of the rights of Seller and Buyer respectively."

After the closing, CHSPSC, an Affiliate of CHS, sought indemnification from Steward for approximately $3,000,000 that it paid after the closing to satisfy contractual obligations that it believed met the definition of Assumed Obligations under the Agreement. CHSPSC, which was not a party to the Agreement, contended that it was an intended third-party beneficiary of Steward's obligation to indemnify "CHS as its Affiliates." Steward argued that CHSPSC was *not* an intended third-party beneficiary because, although an Affiliate of CHS, it was *not* listed as one of the "Seller Entities" and therefore was excluded as a third party beneficiary based on the second clause of the third party beneficiaries provision.

The court found reasonable CHSPSC's interpretation that CHSPSC was intended as a third party beneficiary of the indemnification provision that covered "CHS and its Affiliates." At the same time, the court found reasonable Stewart's contrary interpretation that, because all the Seller Entities were Affiliates of CHS, the only way to ascribe independent meaning to the second clause of the third-party beneficiaries provision was to read it as limiting the universe of CHS "Affiliates" entitled to third party beneficiary status (*i.e.*, to limit it only to the "Seller Entities"). Finding, at the pleading stage, that both interpretations were reasonable, Vice Chancellor Slights denied Steward's motion to dismiss the indemnification claim.

Parties should seek to ensure clarity with respect to who may be an intended third-party beneficiary of an indemnification provision in a sale agreement. In this case, the drafting ambiguity arose because the defined term "Seller Entities" was used in the third-party beneficiaries provision while "Affiliates" was used in the indemnification provision.

Court of Chancery Finds Private Equity Controller's Preferred Stock Redemption Was "Entirely Fair" – Hsu

In *The Frederick Hsu Living Trust* v. *Oak Hill Capital Partners* (May 4, 2020), the Court of Chancery, in a post-trial decision, held that private equity firm Oak Hill Capital Partners (which was the controlling stockholder of ODN Holding Corporation and the holder of ODN's Preferred Stock) and its board designees satisfied the stringent "entire fairness" standard of review in connection with their redemption of the Preferred Stock. The decision is notable for being one of only a few cases where, the court having applied the entire fairness standard of review, the defendants prevailed in establishing that the challenged transaction was entirely fair.

ODN's Preferred Stock carried a redemption right that was exercisable five years after the issuance. Based on changing market conditions, over the two years prior to exercise date of the redemption right, ODN had sold off various assets and then used the accumulated cash to honor the redemption right when it was exercised. A common stockholder (and co-founder) of ODN brought suit claiming that ODN's directors had breached their fiduciary duties to the common stockholders, aided and abetted by Oak Hill, by managing the company to accumulate

cash so it would be in a position to redeem the maximum amount of Preferred Stock as quickly as possible after Oak Hill exercised the redemption, and then by redeeming the Preferred Stock. The plaintiff contended that in these respects the directors had managed ODN for the benefit of Oak Hill, rather than managing the company to maximize its long-term value for the benefit of the common stockholders.

At the pleading stage, giving the benefit of all reasonable inferences to the plaintiff (as is required at that stage of litigation), Vice Chancellor Laster had declined to dismiss the claims, on the basis that, given the economic terms of the Preferred Stock (*i.e.*, no accruing dividend in the event of non-redemption) and the apparent potential business prospects of ODN, the alleged facts supported a reasonable inference that the board "could have grown [ODN's] business, gradually redeemed all of the preferred stock, and then generated returns for its common stockholders" rather than effecting a "de facto liquidation" of ODN through a series of asset sales at "seemingly fire-sale prices" and "stockpiling cash" so that the controller's Preferred Stock could be redeemed. After the ten-day trial, however, the Vice Chancellor ruled that the defendants had proved that the redemption (i) "was the best use of the [ODN]'s cash" and (ii) had "inflicted no harm on the common stockholders." The court concluded that, given that ODN's business was in significant decline, alternative uses of the cash would not have created additional value for the common stockholders.

The court concluded that the "Oak Hill deal team did not behave like people who were happy to build up a cash balance, redeem part of their Preferred Stock, and then write off the rest of Oak Hill's investment." To the contrary, the court noted, Oak Hill "spent countless hours working with the Company to enhance the value of Oak Hill's investment. . . . Oak Hill wanted *both* a return of capital *and* to make the Company a success." The court concluded that ODN's business was in decline due to "industry headwinds" and "relentless competition," not Oak Hill's actions, and that the common stock likely "would have ended up worthless" whether the accumulated cash had been otherwise invested or not. The court stated that there was no obligation for the board "to take a long-shot bet" that an alternative use of the cash might have achieved success and created "outsized value for the common stock." Instead, the court stated, Oak Hill, as the majority stockholder, had "a counterbalancing incentive not to harm the value of the common stock," which was "a final contextual factor that support[ed] the economic fairness" of the company's strategy.

The decision highlights the potential *under certain circumstances* for liability of portfolio company directors and sponsors when preferred stock held by the sponsor is redeemed. Specifically, when a controller holds preferred stock with a redemption right, the court may apply entire fairness review to the board's decision to redeem, on the basis that the redemption confers a unique benefit on the controller as compared to the other stockholders. Further, the court may also apply entire fairness review to the board's management of the company prior to (even, potentially, years prior to) the redemption, on the basis that a strategy to accumulate cash would have facilitated the redemption. Importantly, the decision also reflects that, with the right record, it is possible for defendants to prevail under an entire fairness review.

Hsu serves as a reminder of the challenges to a controlling stockholder of exiting an investment through a redemption of preferred stock in a manner that is consistent with its fiduciary duties to the minority stockholders. Importantly, the court stated in *Hsu* (as it did in its 2013 *Trados* decision involving a redemption of preferred stock held by a venture capital investor) that, when directors weigh the interests of preferred stockholders against the interests of the common stockholders, they should generally prefer the interests of the common stock even if at the expense of the interests of the preferred stock. We note, however, that the issue of a divergence of the interests of preferred stockholders and common stockholders

has typically *not* created liability for boards or sponsors (although the court's pre-trial decision in Hsu, as well as its decisions in *Trados* and *TradingScreen* (2015) underscore the potential for liability, particularly in the context of redemptions that would render the company insolvent). We recommend that (i) in their preferred stock investments, sponsors should seek to provide for a cumulative dividend (and/or other rights or remedies) in the event that a company does not satisfy a mandatory redemption obligation; and (ii) boards, when meeting obligations to the preferred stockholders which on their face present an issue as to the impact on the common stockholders, should engage in a reasonable process to consider the interests of the common stockholders and provide careful documentation of the reasons for board actions.

New DOJ Antitrust Division Guidance States PE Sponsors May Be "Preferred" Buyers of Divestiture Assets

On September 3, 2020, the Antitrust Division of the US Department of Justice (DOJ) announced that a new "Merger Remedies Manual" will be published. Significantly, the Manual will provide that the Division, when considering divestiture remedies, "will use the same criteria to evaluate both strategic purchasers and purchasers that are funded by private equity or other investment firms," and that, "in some cases a private equity purchaser may be [a] preferred" purchaser of divestiture assets.

The government's primary objective, when it evaluates a proposed remedy to competitive concerns presented by a proposed transaction, is to maintain competition in the relevant market. The most common remedy has been the divestiture of assets — typically, of a standalone business to a buyer who appears able to ensure that the divested business will be capable of competing in the market. Divestiture to "existing businesses" has been a preferred route because, as the Manual states: "An existing business typically possesses not only all of the physical assets, but also the personnel, customer lists, information systems, intangible assets, and management infrastructure for the efficient production and distribution of the relevant product, and it has already succeeded in competing in the market." However, according to the Manual, "in some cases funding from private equity and other investment firms [is] important to the success of the [divestiture] remedy because the purchaser [has] flexibility in investment strategy, [is] committed to the divestiture, and [is] willing to invest more when necessary." Thus, it appears that a sponsor may be a preferred buyer when its existing portfolio companies do not present competitive concerns and the sponsor is well-positioned to support and grow the divested business by adequately capitalizing it and providing managers with relevant experience.

The articulation in the Manual of the Division's view of private equity sponsors as desirable buyers of divestiture assets should encourage sponsors to seek out these acquisition opportunities. (We would note that a sponsor would have to be mindful of the prohibition under Section 8 of the Clayton Act on unlawful "interlocking directorates.")

California State Court Finds Federal Forum Provision for Securities Act Claims is Enforceable

In *Wong v. Restoration Robotics, Inc.* (Sept. 1, 2020), the Superior Court in California became the first state court to dismiss claims brought under the Securities Act of 1933 based on a federal forum provision ("FFP") in an issuer's corporate charter. FFPs require that Securities Act claims against corporate officers and directors be brought exclusively in federal court.

In 2018, in *Cyan, Inc. v. Beaver County Employees Retirement Fund*, the U.S. Supreme Court held that federal and state courts have concurrent jurisdiction over Securities Act claims and that such claims brought in state court cannot be removed to federal court. After *Cyan*, the number of Securities Act suits filed in state courts increased dramatically, and in many cases plaintiffs brought parallel suits in federal courts as well. Seeking to avoid the costs of, and potential inconsistent results from, multi-jurisdictional Securities Act litigation, corporations began to adopt FFPs in their corporate charters. In March 2020, the Delaware Supreme Court held, in *Salzberg v. Sciabacucchi*, that FFPs are facially valid under Delaware law. However, the question remained whether other state courts would follow Delaware's lead in enforcing these provisions.

In *Restoration Robotics*, the California court found that the issuer's FFP was legal and enforceable under California law. While the California court relied on *Sciabacucchi*, it adopted different reasoning. The court observed that forum selection clauses are generally enforceable under California law. The court noted that the FFP at issue was approved by the stockholders, was not applied retroactively, and did not restrict Securities Act claims to a specific federal venue. The court concluded that the plaintiffs had not demonstrated that the FFP was "unenforceable, unconscionable, unjust or unreasonable," as there was "no disruption to the substantive rights of the shareholders to all protections provided by the Securities Act" and the shareholders were entitled to at least as much procedural due process in federal court as would be the case in state court. The court characterized the plaintiffs' arguments that the FFP was unconstitutional under the Commerce and Supremacy Clauses as "interesting," but considered the state court an inappropriate forum to decide those issues. While the court dismissed the Securities Act claims against the issuer's officers and directors, the court did not dismiss the Securities Act claims against the underwriters of the issuer's initial public offering, nor against certain venture capital stockholders with large ownership stakes in the issuer, because these defendants had not filed substantive motions to dismiss and were not parties to the corporation's charter which contained the FFP.

It remains uncertain whether other states will enforce FFPs. It also remains uncertain whether an FFP would be upheld in California (or elsewhere) if it is not stockholder-approved, is applied retroactively, and/or restricts claims to a specific federal venue; whether there are circumstances under which claims against defendants who are not parties to the corporate charter would be dismissed on the basis of an FFP; and whether courts might enforce an FFP that is contained in the bylaws rather than the charter.

New CFIUS Rules Go Into Effect October 15

On September 15, 2020, the U.S. Treasury Department issued final regulations that govern when a filing must be made with the Committee on Foreign Investment in the United Sates (CFIUS). Currently, a CFIUS filing is required for a transaction if the target U.S. company business produces or develops "critical technology" that is designed for or used in certain industry categories under the North American Industry Classification System (NAICS). The new regulations base the filing requirement instead on whether the target U.S. company business produces, designs, tests, manufactures or fabricates "critical technology" that is subject to export controls. Specifically, a filing will be required if (i) the U.S. target, hypothetically, would require a license to export, reexport, transfer (in-country) or retransfer its critical technology to the foreign investor and (ii) the foreign investor could directly control the U.S. business as a result of the transaction, is

directly acquiring an interest that qualifies as a "covered investment" in the U.S. business, already has a direct investment in the U.S. business but its rights will change such that it could have control or a "covered investment," or individually or as part of a group of foreign investors directly or indirectly holds at least a 25% interest in another foreign entity that falls into any of these categories. The new rules go into effect on October 15, 2020. The current NAICS-based test will continue to be applicable to transactions for which certain steps have been taken between February 15 and October 15, 2020. It is expected that the new rules will cover more transactions and lead to an increase in mandatory filings.

SEC Adopts Rules Raising the Standards for Making Shareholder Proposals

On September 23, 2020, by a 3-2 vote, the Securities and Exchange Commission adopted new rules that will make it more difficult for shareholders to submit new ballot proposals or to resubmit proposals that have previously failed. Under the current rules, shareholders can submit proposals if they own at least $2,000 in the company's stock for at least one year before submitting the proposal. Under the new rules, shareholders can submit proposals if they own at least $25,000 in the company's stock for at least one year; $15,000 for two years; or $2,000 in the company's stock for at least three years. Also, under current rules, a proposal that has been voted on at least once in the past five years must have gained at least 3% support for it to be resubmitted; if voted on twice in that timeframe, 6% support; and, if voted on three times in that timeframe, 10% support. Under the new rules, those percentage requirements will increase to 5%, 15% and 25%, respectively. The new rules also prohibit stockholders from aggregating their holdings to meet the ownership thresholds. The new rules will be effective 60 days after publication in the Federal Register and will apply to shareholder meetings starting on January 1, 2022 (but, under certain conditions, shareholders can continue to rely on the $2,000-one year ownership threshold until January 1, 2023).

EEOC Guidance Provides Clarification on Post-COVID-19 Telework Requests

On September 8, 2020, the Equal Employment Opportunity Commission issued guidance that makes clear that a company's permitting telework during the COVID-19 pandemic does not mean that telework automatically will be considered a "reasonable accommodation" that the company would have to make under the American Disabilities Act after a return-to-work. The guidance states: "The employer has no obligation under the ADA to refrain from restoring all of an employee's essential duties at such time as it chooses to restore the prior work arrangement, and then evaluating any requests for continued or new accommodations under the usual ADA rules." By having "temporarily excused performance of one or more essential functions when it closed the workplace and enabled employees to telework for the purpose of protecting their safety from COVID-19, it does not mean that the employer permanently changed a job's essential functions, that telework is always a feasible accommodation, or that it does not pose an undue hardship [for the employer]," the EEOC wrote. However, it is generally expected that more employees will be requesting telework and will point to the company's experience during the pandemic as support for these requests. The EEOC guidance emphasizes that all requests require a fact-specific determination on an individual basis. The guidance notes that a company's experience with telework during the pandemic may be relevant especially to situations where an employee requested telework prior to the pandemic and was denied, as it could be viewed as "a trial period that showed

whether or not this employee with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information."

SEC Provides Guidance on (Lack of) Availability of Shelf Registrations for Former SPACs

A critical concern for sponsors of special purpose acquisition companies (SPACs), as well as their target companies, is the availability of a shelf registration statement to the former SPAC after it has completed a de-SPACing transaction. On September 21, 2020, the Staff of the SEC's Division of Corporation Finance provided a Compliance & Disclosure Interpretation that indicates that a shelf registration generally will not be available. The Staff posed the following question: "Following the merger of a private operating company or companies with or into a reporting shell company (for example, a [SPAC]), may the resulting combined entity rely on the reporting shell company's pre-combination reporting history to satisfy the eligibility requirements of Form S-3 during the 12 calendar months following the business combination?" The Staff provided the following answer: "If the registrant is a new entity following the business combination transaction with a shell company, the registrant would need 12 calendar months of Exchange Act reporting history following the business combination transaction in order to satisfy General Instruction I.A.3 before Form S-3 would become available. If the registrant is a 'successor registrant,' General Instruction I.A.6(a) would not be available because the succession was not primarily for the purpose of changing the state of incorporation of the predecessor or forming a holding company. General Instruction I.A.6(b) also would not be available because the private operating company or companies would not have met the registrant requirements to use Form S-3 prior to the succession. Where the registrant is not a new entity or a 'successor registrant,' the combined entity would have less than 12 calendar months of post-combination Exchange Act reporting history. Form S-3 is premised on the widespread dissemination to the marketplace of an issuer's Exchange Act reports over at least a 12-month period. Accordingly, in situations where the combined entity lacks a 12-month history of Exchange Act reporting, the staff is unlikely to be able to accelerate effectiveness under Section 8(a) of the Securities Act, which requires the staff, among other things, to give 'due regard to the adequacy of the information respecting the issuer theretofore available to the public,… and to the public interest and the protection of investors.'"

Delaware Superior Court Reaches an "Unfair" Result Based on an Anti-Assignment Provision's Effect on an Asset Seller's Post-Closing Merger

MTA Canada Royalty Corp. v. Compania Minera Pangea, S.A. de C.V. (Sept. 16, 2020) involved a claim, by a successor to a Seller under an asset purchase agreement (governed by Delaware law) (the "Agreement"), that it was entitled to collect the "Conditional Payment" that the Buyer owed the Seller under the Agreement. Following the closing of the Agreement, however, the Seller's shareholders sold all of their shares in the Seller to a third party (albeit with a carve-out for the Buyer's obligation to make the Conditional Payment). When the Conditional Payment became due, the former shareholders of the Seller sued to collect it. In an earlier decision in the case, the Delaware Superior Court held

that only the Seller had standing to sue to collect the Conditional Payment—because the obligation was to the Seller and there cannot be a carve-out of assets of an entity in favor of its shareholders who are selling stock of that entity, without the entity itself having assigned those assets to its shareholders (by way of a dividend). In this more recent action, the Seller (rather than its former shareholders) claimed entitlement to the Conditional Payment. However, the third party buyer of the Seller's shares had, through an Amalgamation under Canadian law (which is the equivalent of a merger under Delaware law), combined the Seller into a new surviving entity. The Buyer argued that the anti-assignment provision in the Acquisition Agreement was violated when the Amalgamation occurred without the Buyer's consent and, as a corollary, that the successor entity to the Seller did not have standing to sue to collect the Conditional Payment. Under Delaware law, a general prohibition on a party assigning rights under an agreement does not automatically prohibit a merger involving the party (even if the party is not the surviving entity in the merger). However, when an anti-assignment provision expressly prohibits assignment "by operation of law," as was the case here, the provision is generally held to apply to mergers in which the contracting party is not the surviving entity (even though Delaware courts have held that merger in which the contracting party is the survivor (*i.e.*, a reverse triangular merger) is not an assignment by operation of law because the contract rights remain with the contracting party and do not pass to another entity). Accordingly, the court ruled, the Amalgamation resulted in a new entity acquiring the contract rights of the Seller and the Seller ceasing to exist. Thus, the effect of the anti-assignment provision and its applicability to the Amalgamation resulted in the Buyer having no obligation to make the Conditional Payment to anyone. The court acknowledged the seeming unfairness of this result, but stressed that these sophisticated parties could have avoided it "through careful drafting" or by utilizing a different corporate structure for the combination of the Seller and the surviving new entity.

Fried Frank M&A/PE Memos Recently Issued

Please click on the title to read the memo.

- ***Lessons from Anthem-Cigna, Including Avoiding the Result of No Damages for Clear Breaches of a Merger Agreement*** **(Sept. 8, 2020)**

  In *Anthem-Cigna*, the Court of Chancery held, in a 310-page opinion, that Cigna had "egregiously" breached the merger agreement covenants under which it was obligated to try to consummate its planned merger with Anthem. The court ruled that no damages were payable, however, because the injunction that was issued against the merger (on antitrust grounds) likely would have been issued, and thus the merger would not have closed, anyway. In this memorandum, we discuss the decision and offer related practice points for mergers of equals, best efforts obligations, and damages provisions.

- ***SEC Expands Definition of "Accredited Investor"*** **(Aug. 27, 2020)**

- ***PE Seller May Have Liability for Portfolio Company's Alleged Fraud in Concealing Steep Earnings Decline Post-Signing*****—Agspring (Aug. 17, 2020)**

  The Court of Chancery's *Agspring v. NGP* decision serves as a reminder of the potential for a private equity fund to have liability for fraudulent representations made by its portfolio company in connection with the company's sale, based on the seller's extensive involvement in the company and in the sale process. The decision also highlights the possibility of a steep decline in a portfolio company's earnings rendering false certain representations and warranties made in a sale or related financing agreement. In this memorandum, we analyze the decision and offer related practice points for buyers and sellers of portfolio companies.

- ***Decision Highlights Risk a Controller's Direct Discussions With Minority Stockholders May Render MFW Unavailable*****—In re HomeFed (July 28, 2020)**

  In *In re HomeFed*, the Court of Chancery held that a controlling stockholder proposing a go-private transaction did not satisfy the "*ab initio*" requirement of *MFW* for review under the deferential business judgment standard. The opinion amplifies the court's recent focus on direct discussions between a controller and the minority stockholders as potentially undermining a special committee's critical role, as contemplated by *MFW*, to act as the "independent bargaining agent" for the minority stockholders so that the controller's influence is "disabled." The court's discussion suggests that direct communications between a controller and minority stockholders—whether occurring before *or* (as was recently decided in *Dell Technologies*) even *after* the *MFW* conditions are put in place—may be problematic, as they may interfere with the special committee's effective functioning as contemplated by *MFW*.

- *Court of Chancery Amplifies the MFW Prerequisites and May Portend a New Approach to MFW and Corwin*—Dell Technologies (June 30, 2020)

  Dell Technologies can be viewed as a routine decision analyzing the *MFW* prerequisites to business judgment review of a controlled-company transaction. We would suggest, however, that it may indicate, going forward, a generally more restrictive approach by the Court of Chancery to the availability of business judgment review under *MFW* (and, in the *non*-controlled company context, under *Corwin*). In this memo we discuss this issue; analyze the court's holdings (relating to "coercion," special committees, "catering to" controllers, disclosure, and bankers); and offer related practice points.

MEMOS RELATING TO COVID-19:

- *New Rules on Use and Forgiveness of PPP Loans* (June 10, 2020)
- *Business Reopenings: Thinking About the Future* (June 1, 2020)
- *Business Reopenings: Updated Guidance and FAQs* (May 14, 2020)
- *Further PPP Update—Including Extension of Safe Harbor Deadline for Return of Loans to May 18* (May 7, 2020)
- *Further PPP Loan Developments—Including a New May 14 Deadline for Givebacks* (May 6, 2020)
- *A Detailed Update on Reopening of Business—NY's Plan, the Federal Guidance, and Scenarios to be Prepared For* (April 28, 2020)
- *Considerations on Returning PPP Loans* (April 22, 2020)
- *Preliminary Thinking on Reopening a Business: Planning for the End of Stay-at-Home* (April 14, 2020)
- *ISS Releases Guidance on Its Policies in Response to the Coronavirus Pandemic—Poison Pills, Share Repurchases, Dividends, Virtual Meetings, and Compensation* (April 13, 2020)
- *Possible Expanded Utility of PIPE Transactions for Companies to Raise Funds in the Current Environment* (April 4, 2020)

M&A/PE Round-Up

PRACTICE HIGHLIGHTS:

- Fried Frank has advised on approximately US$60b worth of M&A and Private Equity transactions since the beginning of 2020.
- Partners Steve Epstein and Steve Scheinfeld were named to NACD's Directorship 100.

2020 THIRD QUARTER HIGHLIGHTS:



RedBird Capital Partners

Counsel to RedBird Capital Partners in multiple matters including, in its agreement, alongside Dany Garcia and Dwayne Johnson, to acquire substantially all of the all assets of Alpha Entertainment, LLC, the parent company of the XFL and advising RedBall Acquisition Corp., a newly formed SPAC co-chaired by Gerald Cardinale, founder of RedBird, in its initial public offering and listing on the New York Stock Exchange. RedBall intends to focus on businesses in the sports, media, and data analytics sectors, with a focus on professional sports franchises.



New Mountain Capital

Counsel to New Mountain Capital in connection with an equity investment by Panasonic Corporation in Blue Yonder, giving the transaction an enterprise value of US$5.5b.



LPA Holding Germany GmbH

Counsel to LPA Holding Germany GmbH, the German portfolio company of Motive Partners, on their acquisition of the Acarda Group, a German and Luxembourg-based RegTech software developer.

RECENT FRIED FRANK M&A/PE QUARTERLIES (*click to access*)

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