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Several of this quarter's major decisions again involved, directly or indirectly, the Chancery Court's newest member, Vice Chancellor Laster, who continues to show no interest in shying away from tackling unresolved or novel legal issues head-on. Among other things, he authored one of two significant decisions that offer competing views on the appropriate standard of review for controlling stockholder freeze-outs in the tender offer context. In *In re CNX Gas Corp. Shareholders Litigation*,¹ Vice Chancellor Laster expressly adopted the "unified" standard of review first articulated by Vice Chancellor Strine in *Cox Communications*,² whereas in *In re Cox Radio, Inc. Shareholders Litigation*,³ Vice Chancellor Parsons applied the standard previously set out in *Pure Resources*.⁴ (Yet a third decision this quarter, the post-trial opinion in the long-running *Gentile* dispute, applied the entire fairness standard in another type of controlling stockholder transaction, namely, a debt-for-equity conversion by a controller who is also the company's primary creditor.)

Vice Chancellor Laster also issued one of this quarter's troika of significant opinions relating to the role of financial advisors in merger transactions and associated disclosures. In *In re Zenith National Insurance Company Shareholders Litigation*,⁵ Vice Chancellor Laster held that, while it was a "very close issue," under all of the circumstances in that case, the fact that the "number 2 guy" on the deal team of the target's financial advisor had recently been a key member of the deal team representing the buyer (in an unrelated transaction) was not material and did not have to be disclosed. Meanwhile, in *3Com Corp. v. Diamond II Holdings Inc.*,⁶ Vice Chancellor Noble held that the presence of a company's

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investment banker during communications in the course of which company counsel provided legal advice did not serve to destroy or waive the privilege. And finally, in *Maric Capital Master Fund, Ltd. v. Plato Learning, Inc.*,⁷ Vice Chancellor Strine enjoined a proposed merger pending (a) corrective disclosure concerning what the Court deemed a materially misleading description in the proxy statement of how the target's financial advisor had derived the discount rate for its DCF analysis and (b) inclusion in the proxy statement of (i) free cash flow projections relied on by the financial advisor (which the Court found to be among the most pertinent information available for a stockholder looking to assess the fairness of the merger consideration) and (ii) a more accurate description of discussions between the acquiror and the target's management about future retention and economic arrangements.

The quarter also saw the Supreme Court take up and address the substantial issues presented in *Crown EMAK Partners, LLC v. Kurz*,⁸ affirming Vice Chancellor Laster's determinations that a purchase agreement conveying both the economic and voting interests in the shares at issue did not constitute improper "vote-buying" and that an attempt to gain control of a board through a bylaw amendment reducing the size of the board violated Section 141(b) of the Delaware General Corporation Law ("DGCL"). The Court also came down against what it perceived as judicial legislation by the Vice Chancellor on the issue of whether a Cede breakdown is part of a company's stock ledger for purposes of DGCL Section 219(c).

And finally, in *MCG Capital Corp. v. Maginn*,⁹ the Chancery Court, in a matter of first impression, addressed whether preferred stockholders have standing to bring a derivative suit, holding they do — as long as there are no express restrictions or limitations in the company's articles of incorporation, preferred share designations or other governing documents.

Beyond these major decisions, the quarter also saw Delaware court rulings across a range of other noteworthy issues, including: books and records actions; *forum non conveniens*; the fraud exception to post-merger extinguishment of derivative claims; attorneys' fees; the implied covenant of good faith and fair dealing; discovery; arbitration; fiduciary duties; jurisdiction; forum selection clauses; appraisal valuation; and appeal of class action settlements. All of these are discussed in due course below.

Controlling Stockholder Tender Offers: Competing Standards

In re CNX Gas Corp. Shareholders Litigation

In *In re CNX*, representatives of a putative class of minority stockholders of CNX Gas Corp. challenged a freeze-out structured as a tender offer by CNX's controlling stockholder, CONSOL Energy, Inc., to be followed by a short-form merger.

Background

In September 2009, CONSOL approached T. Rowe Price Associates, Inc., the largest minority stockholder of CNX and the holder of a roughly equal percentage interest in CONSOL, about acquiring its CNX shares. That quest gained momentum on March 15, 2010, when CONSOL announced that it had agreed to acquire the gas assets of Dominion Resources, Inc., a CNX competitor whose purchase provided potential long-term benefits through consolidation with CNX assets.

On March 21, 2010, CONSOL and T. Rowe Price executed a tender agreement that provided that CONSOL would commence a tender offer no later than May 5, 2010, at a price of no less than \$38.25 per share in cash, and obligated T. Rowe Price to tender its shares and not withdraw them. On April 28, 2010, CONSOL commenced the tender offer at \$38.25, a premium of 45.83 percent from the day prior to CONSOL's announcement of the Dominion transaction and a 24.19 percent premium over the day prior to CONSOL's announcement of the T. Rowe Price agreement. CONSOL committed to effect a short-term merger promptly after successful consummation of the tender offer, which was subject to a non-waivable condition that a majority of the outstanding minority shares be tendered, excluding shares owned by directors or officers of CONSOL or CNX, but including the T. Rowe Price shares. With the T. Rowe Price shares committed to be tendered, CONSOL only needed approximately 12 percent of the outstanding stock to tender in order to satisfy the majority-of-the-minority condition.

On April 15, 2010, CNX formed a "special committee of one" (consisting of the company's lone independent director), which had limited authority to evaluate the tender offer, prepare a Schedule 14D-9, and engage legal and financial advisors (Skadden and Lazard, respectively), but not to negotiate the terms of the tender offer or consider alternatives. The Special Committee asked first for authority to consider alternatives and the next day for "full powers and authority of the board of directors," but the CNX board declined both requests on the grounds that CONSOL was unwilling to sell its CNX shares. After the Special Committee's advisors met with CONSOL, CNX and T. Rowe Price and reviewed financial data, the Special Committee was advised that, while \$38.25 per share was fair from a financial point of view, it was probably not the highest price CONSOL was prepared to pay. On May 5, 2010, the Special Committee sought a price increase to \$41.20 notwithstanding its lack of authorization to negotiate, which authorization CNX retroactively granted on May 10.

On May 11, CONSOL declined to increase its offer. Later that day, the Special Committee issued a Schedule 14D-9 stating, among other things, that (1) it had "determined not to express an opinion on the offer and to remain neutral with respect to the offer," (2) it had "concerns about the process by which CONSOL determined the offer price" and had formed the "view that CONSOL was unwilling to negotiate the offer price," (3) a member of CONSOL management had previously suggested that CNX stock was worth more than \$38.25, (4) the CNX board had refused to expand the size of the Special Committee or to grant it the full power of the board, (5) the Special Committee had considered the tender agreement with T. Rowe Price to be a "potentially negative factor[]" when evaluating the offer because it "reduces the likelihood of any increase in the offer price by reducing the negotiation leverage of the 'majority of the minority' condition," (6) "T. Rowe Price's interests may not be the same as the other minority shareholders due to the fact that T. Rowe Price beneficially owned 6.51 percent of the outstanding common stock of CONSOL," and (7) "the offer price was determined through relatively short negotiations with T. Rowe Price without the input from any other minority shareholders or the Special Committee."

The Court's Analysis

After noting the divergent standards under *Kahn v. Lynch* (which held that entire fairness applies to a negotiated merger between a controlling stockholder and its subsidiary) and *In re Siliconix Inc. Shareholders Litigation*¹⁰ (which concluded that "an evolving standard far less onerous than *Lynch*"¹¹ applies to a controller's unilateral tender offer followed by a short-form merger), Vice Chancellor Laster proceeded to "question the soundness of the twin cornerstones on which *Siliconix* rests" — namely,

(1) “the statutory distinction between mergers and tender offers and the lack of any explicit role in the General Corporation Law for a target board of directors responding to a tender offer” and (2) the rule frequently cited from *Solomon v. Pathe Communications Corp.*¹² that a tender offeror has no duty to provide a fair price.

Vice Chancellor Laster observed that *Solomon* did not involve a freeze-out, but rather a voluntary tender offer occurring after the acquiror had gained control by foreclosing on security interests it had contracted for years earlier – noting that neither the Chancery Court nor the Supreme Court in that case had analyzed the particulars of a controlling stockholder tender offer in general or a unilateral tender offer coupled with a back-end squeeze out in particular. The Vice Chancellor further noted that both courts had in fact considered whether the *Solomon* plaintiffs had received a fair price in the tender offer, but rejected the fair price challenges based on the “unique facts” of the case, making *Solomon*, in the Vice Chancellor’s words, “an odd and unsatisfactory cornerstone for the *Siliconix* line of authority.”¹³ Vice Chancellor Laster also observed that the Chancery Court decisions of Justice Hartnett, who later authored the *Solomon* decision for the Supreme Court, indicate that he believed that entire fairness would apply to a controlling stockholder tender offer preceding a freeze-out.

Thus concluding that *Solomon* “does not hold that controllers never owe fiduciary duties when making tender offers, nor does it eliminate the possibility of entire fairness review for a two-step freeze-out transaction,”¹⁴ the Vice Chancellor held, instead, that a court must ask “[w]hat transactional structures result in the controlling stockholder not standing on both sides of a two-step freeze-out?”¹⁵ In the Vice Chancellor’s view, *Pure Resources* was an attempt to answer that question by moving “tentatively, and incompletely”¹⁶ towards harmonizing *Siliconix* and *Kahn v. Lynch* — “an evolutionary decision that raised the bar for two-step squeeze-outs,”¹⁷ not a decision that established “immutable rules.” As explained in *CNX*, the next step in the evolution of the standard was Vice Chancellor Strine’s 2005 decision in *Cox Communications*, which “rendered the *Lynch* and *Siliconix* standards coherent by explaining that the business judgment rule should apply to any freeze-out transaction that is structured to mirror *both* elements of an arms’ length merger, *viz.* approval by disinterested directors and approval by disinterested stockholders.”¹⁸ Vice Chancellor Laster thus deemed “the coherent and correct approach” to be the *Cox Communications* “unified” standard, under which both a first-step tender offer and a second-step freeze-out merger benefit from the presumption of the business judgment rule if they are (1) negotiated and recommended/approved by a special committee of independent directors and (2) conditioned on the affirmative tender/vote of a majority of the minority shares/stockholders, but are subject to entire fairness review if either requirement is not met. The Vice Chancellor acknowledged that by applying the unified standard, he was reaching a different conclusion from *Cox Radio* (see below) and invited the Delaware Supreme Court to address definitively the *Kahn v. Lynch* and *Siliconix* distinction. (Underscoring the significance of the conflict in the Chancery Court with respect to the correct standard of review, on July 5, 2010, Vice Chancellor Laster certified his injunction decision in *CNX* for interlocutory appeal (at the request of the prevailing defendants) and, in a 30-page decision well worth reading, elaborated on his views of why the Supreme Court should hear the interlocutory appeal now, notwithstanding that similar applications had been denied on at least two prior occasions (including in *Pure Resources*.)¹⁹

The Court then held that the tender offer did not satisfy the unified standard (and that plaintiffs therefore had shown a probability of success on the merits) because the Special Committee (a) did not recommend the transaction and (b) was not provided with authority comparable to what a board

would possess in a third-party transaction. The Court rejected the argument that such authority was superfluous given CONSOL's stated unwillingness to sell its CNX shares, because whether to explore strategic alternatives was a decision for the Special Committee, which, along with the "creative minds" of its legal and financial advisors, might have devised increased leverage through litigation or a rights plan. Additionally, the Court found that the effectiveness of the majority-of-the-minority condition was undercut by facts raised by plaintiffs about the role and economic incentives of T. Rowe Price, which owned 6.5 percent of CONSOL's outstanding common stock in addition to its 6.3 percent stake in CNX. Because those roughly equivalent equity interests left T. Rowe Price fully hedged, and therefore indifferent to the allocation of value between CONSOL and CNX, the Court observed that T. Rowe Price had materially different incentives than a holder of CNX common stock. The Vice Chancellor rejected defendants' assertions that an inquiry into the economic incentives of stockholders would be unworkable and unwarranted, cautioning that this case "is not the result of, nor should it be read to encourage, generalized fishing expeditions into stockholder motives."²⁰ The Court observed that plaintiffs had raised other "serious fact issues that cloud the T. Rowe Price picture" but were difficult to evaluate on the preliminary record, but because the absence of Special Committee approval required defendants to show that the tender offer price was fair, defendants would be "free to argue at a later stage of the proceeding and on a fuller record that (1) the negotiations with T. Rowe Price were truly at arms' length and untainted by cross-ownership and (2) the majority-of-the-minority condition was effective."²¹

With respect to outcomes, Vice Chancellor Laster suggested that assessing irreparable harm and balancing the hardships would prove a complex and difficult task under the *Pure Resources* standard because of the "serious concern" about the structure of the majority-of-the-minority condition and the limitations CONSOL placed on the Special Committee, both of which, under *Pure Resources*, would weigh in favor of an injunction and would have to be balanced against the risk of jeopardizing a non-coercive, all-cash, premium transaction (particularly in light of CONSOL's reservation of the right to withdraw the tender offer if an injunction issued). The *Cox Communications* standard, on the other hand, simplifies matters, the Court explained, because plaintiffs did not show that a post-trial award of money damages would not be a sufficient remedy if defendants failed to establish that the tender price is fair. Absent any threat of irreparable harm, the Court therefore held that the balance of the equities favored denial of the motion for a preliminary injunction.

In re Cox Radio, Inc. Shareholders Litigation

Background

Under a stock repurchase program begun in August 2005, Cox Radio, Inc. ("Cox Radio") purchased millions of shares of its Class A common stock until the global financial crisis caused it to suspend the program effective March 6, 2009. On March 22, 2009, the board of Cox Enterprises, Inc. ("CEI"), the controlling shareholder of Cox Radio, voted to make an all-cash tender offer for all shares of Cox Radio not already beneficially owned by CEI at \$3.80 per share, a 13 percent premium. The following day, CEI and its wholly owned subsidiary filed a Schedule TO with the SEC commencing the tender offer, which was subject to several conditions including a non-waivable majority-of-the-minority tender condition, a waivable condition that at least 90 percent of shares be tendered, and the parties' agreement to promptly consummate a short-form merger at the tender offer price if the 90 percent of the outstanding shares tendered.

Litigation by Cox Radio shareholders ensued in various jurisdictions, including an action in the Northern District of Georgia (the “Federal Action”) and a consolidated action in Delaware Chancery Court (the “Delaware Action”). Meanwhile, a special committee composed of the two independent directors of Cox Radio was formed and retained legal and financial advisors. Notably, the Committee initially believed that it did not have the power to negotiate terms of the transaction with CEI.

On April 1, 2009, after meeting with its legal and financial advisors, the Special Committee unanimously determined that \$3.80 per share was a fair price for Cox Radio’s Class A shares and recommended in a Schedule 14D-9 that the minority stockholders tender their shares. By mid-April, fewer than ten percent of the requisite shares had been tendered. At that point, the Special Committee — whose authority to negotiate had just been confirmed by the Cox Radio board — suggested that CEI consider increasing the offer price. Instead, CEI merely extended the offer from April 17 to May 1, causing the Special Committee to file an amended 14D-9 withdrawing its prior recommendation of the offer and taking a neutral stance. After “vigorous” negotiations, CEI announced on April 29 that it was increasing the offer price to \$4.80, which the Special Committee then publicly recommended.

The same day, the parties to the Delaware Action filed a memorandum of understanding based on the \$1 offer increase and providing for certain supplemental disclosures, dismissal of the action and the release of any claims related to the tender offer, including those in the Federal Action. The tender offer closed in May, having garnered sufficient shares to satisfy the majority-of-the-minority condition, and on May 29, 2009, CEI announced the consummation of the short-form merger at \$4.80 per share.

In September 2009, the parties to the Delaware Action filed a settlement purporting to release all claims based on any aspect of the tender offer or the events leading up to it, including, but not limited to, all claims asserted in other pending actions, but carving out statutory appraisal claims under DGCL Section 262. In November, one group of stockholders objected to the settlement on the grounds that it provided only minimal consideration while preventing them from bringing appraisal claims worth “potentially hundreds of millions of dollars” (the “Appraisal Objectors”), while another group objected on the grounds that the settlement released valuable pre-transaction securities claims not asserted in the Delaware Action (the “Federal Objectors”).

The Decision

The Chancery Court (Vice Chancellor Parsons) certified the proposed class under Court of Chancery Rules 23(b)(1) and (b)(2)²² and appointed plaintiffs and their counsel class representatives. The Court then considered whether the settlement was fair, adequate and reasonable in light of the benefits provided, focusing particularly on “the likelihood of success of the claims of Plaintiffs and the objectors, what the Class has gained from the Settlement, and what the Class would lose by operation of the Settlement’s release.”²³

In considering the cost of the settlement to the Appraisal Objectors, the Court assessed the value of their challenge to the transaction, which required it first to determine whether entire fairness applied. Plaintiffs argued that under *Kahn v. Lynch*,²⁴ “the exclusive standard of judicial review in examining the propriety of an interested cash-out merger transaction by a controlling or dominating shareholder is entire fairness.”²⁵

Vice Chancellor Parsons held that the *Kahn* standard applied only to transactions involving a negotiated merger between a target company and its controlling stockholder, not to tender offers, and agreed with defendants that *Pure Resources*²⁶ supplied the proper standard in the latter scenario. The Court interpreted *Pure Resources* as holding that entire fairness should not apply to a “non-coercive” tender offer by a controlling shareholder where “the independent directors of the target are permitted to make an informed recommendation and provide fair disclosure.”²⁷ Under this standard, a tender offer is deemed “non-coercive” when: “(1) it is subject to a non-waivable majority of the minority tender condition; (2) the controlling stockholder promises to consummate a prompt § 253 [short-form] merger at the same price if it obtains more than 90 percent of the shares; . . . (3) the controlling stockholder has made no retributive threats”; and (4) the independent directors are given “both free rein and adequate time to react to the tender offer, by (at the very least) hiring their own advisors, providing the minority with a recommendation as to the advisability of the offer, and disclosing adequate information for the minority to make an informed judgment.”²⁸ If those requirements are met, Vice Chancellor Parsons held, “then the controlling shareholder is under no obligation to offer any particular price for the minority’s stock.”²⁹

Rejecting the Appraisal Objectors’ argument that *Pure Resources*, a Chancery Court decision, was trumped by the Supreme Court’s decision in *Kahn v. Lynch*, the Court cited the Delaware Supreme Court’s decision in *Solomon*³⁰ and observed that Vice Chancellor Strine’s “extensive analysis” in *Pure Resources* “persuasively demonstrate[ed] that *Kahn v. Lynch* governs situations involving negotiated mergers, while *Solomon* governs situations involving tender offers.”³¹ The Court similarly rejected the argument that *Pure Resources* was either “extended dicta” or distinguishable, concluding that, contrary to Appraisal Objectors’ assertions, the Special Committee here had, and exercised, full power to negotiate with CEI. The Court further concluded that the offer appeared non-coercive under *Pure Resources* because (1) it was subject to a non-waivable majority of the minority condition, (2) CEI promised to consummate a prompt-short form merger at the same price offered in the tender offer upon obtaining 90 percent of the target’s shares, (3) there was no allegation of retributive threats by CEI or its subsidiary, and (4) the disinterested and independent Special Committee hired advisors and used its negotiating power “robustly.” Noting further that, with the supplemental disclosures accompanying the settlement, the minority had received adequate information to make an informed tender decision, the Court determined that the Appraisal Objectors’ claim likely would not be subject to entire fairness review and therefore would probably fail.

Nevertheless, the Court went on to evaluate the claims under entire fairness and found that they “would have to clear significant hurdles to succeed.” Among other things, the Court found the allegations of unfair process to be “long on conclusions, but short on facts”³² showing that CEI timed the transaction to come at the bottom of a down market, issued faulty projections “paint[ing] an unrealistically grim picture of Cox Radio’s future,”³³ and created an environment that forced the Special Committee to make a rushed recommendation of the tender offer. The Court further rejected the Appraisal Objectors’ argument that, because the prices of comparable companies had risen 255.7 percent in the preceding six months, ostensibly suggesting that the tender offer price should have been \$12 per share, the offer price was unfair. The Court observed that while “hindsight is generally 20/20, it cannot be used to second guess the business judgment of Delaware directors; thus this data is irrelevant.” Having determined that defendants had at least a colorable claim that the transaction was entirely fair, Vice Chancellor Parsons found that the Appraisal Objectors’ challenge had “little, if any value” and therefore did not provide a basis for rejecting the settlement.³⁴

The Court therefore approved the settlement and, applying the seven “*Sugarland* factors”³⁵ to plaintiffs’ \$3.6 million fee request, shaved the fee to \$1,010,450, or approximately 6 percent of the benefit obtained for the class.

Projections/Role of Financial Advisor

In re Zenith National Insurance Corp. Shareholders Litigation

As noted above, Vice Chancellor Laster also issued one of the three significant opinions this quarter on issues relating to the role played by investment bankers in merger transactions. In the April 22, 2010 transcript ruling in *Zenith*, the Vice Chancellor denied a preliminary injunction motion, brought on behalf of a putative class of shareholders of Zenith National Insurance Corp., seeking to block the company’s \$1.4 billion proposed merger with Fairfax Financial Holdings Ltd. The Court’s ruling, delivered from the bench, found that plaintiffs had not demonstrated a likelihood of success on the merits either with respect to their claims challenging the process by which the transaction was achieved or with respect to their claims that Zenith’s proxy statement issued in connection with the deal did not adequately disclose all material facts to allow shareholders to cast an informed vote on the merger.

The most noteworthy aspects of the Court’s ruling relate to the disclosure of (1) financial projections and (2) the facts underlying a perceived conflict of interest on the part of Zenith’s financial advisor.

Disclosure of Financial Projections

Zenith’s preliminary proxy statement included customary language stating that the company did not, as a matter of course, prepare financial projections, but that, in connection with the evaluation of a possible transaction with Fairfax, Zenith management prepared projections solely for purposes of its financial advisor’s analysis. The plaintiffs originally complained that these projections were not disclosed in the preliminary proxy statement. When the projections were included in the definitive proxy statement, together with extensive caveated language, the plaintiffs shifted theories and attacked the reliability of the projections, arguing that there should have been more disclosure about how they were prepared.

Noting the “irony” of plaintiffs’ original insistence on the disclosure of the projections only to later complain that they were unreliable (such that disclosure of them was misleading), Vice Chancellor Laster rejected this argument. As the Vice Chancellor explained:

[T]he starting point . . . is that the projections are in the proxy, and that’s a good thing. That’s what we want The usual concern is the projections aren’t in the proxy [T]he proxy [contains] cautionary language about the company’s practice with respect to projections . . . and why stockholders should be cautious in relying on these things [I] like this proxy statement. It’s the type of language that I think ought to be included in proxy statements more often, because people come in to this Court and say ‘We want projections.’ And the defendants say ‘Oh, no, but the projections aren’t credible.’ Then we have an injunction proceeding about whether or not the projections are sufficiently credible. Well, stockholders are sophisticated. Why, with a disclosure like [that in Zenith’s proxy statement] shouldn’t stockholders be allowed to look at the projections and say ‘All right.

If I want to use them, I get this, and I agree with it'? So I think that this type of disclosure is more than adequate and entirely appropriate in terms of what the cautionary language ought to be about the fact as to the company's history vis-à-vis projections."

Perceived Banker Conflict

The second and more "troubling" issue for the Court related to the perceived conflict on the part of Zenith's financial advisor. Zenith's preliminary proxy statement disclosed that the financial advisor, prior to being engaged by Zenith in connection with the Fairfax merger, previously had provided services to Fairfax, including serving as Fairfax's financial advisor in connection with a separate acquisition that was announced in September 2009 and closed earlier this year. The plaintiffs complained that this disclosure failed to reveal the value of services performed by the financial advisor for Fairfax over the past two years.

Zenith's definitive proxy statement appeared to moot this allegation by disclosing each of the financial advisor's engagements by Fairfax over the past two years, as well as the total amount of fees that the financial advisor and its affiliates received for those services. Indeed, as Vice Chancellor Laster explained, Zenith's proxy statement "gave more disclosure than you see in a lot of proxies about banker historical relationships," which the Court found "very helpful." Even this disclosure did not satisfy plaintiffs, however, insofar as it did not reveal that "the day-to-day guy" or "No. 2 fellow" who worked on the Zenith engagement also had been involved in the financial advisor's most recent engagement for Fairfax. The plaintiffs argued that this information was material to stockholders and should also be disclosed in the proxy statement. Vice Chancellor Laster shared the plaintiffs' "concern about partial disclosure," and agreed that "the implication [from the proxy statement] is that these folks are on separate teams [and] that you're not using the same guys who worked for the bidder just recently."

Nevertheless, the Court ruled that this information, while potentially "helpful" and "beneficial" to stockholders, was "not ultimately material." The Court identified a number of factors as supporting its ruling, suggesting that "had any of these factors been different . . . you would probably be getting an opinion from me . . . enjoining the stockholder meeting." These factors included the following: (1) the transaction was an all-cash merger, "where stockholders can evaluate whether 38 bucks plus a 50-cent dividend is a good price, and they can have an up-or-down vote"; (2) "[i]t's an arm's-length deal," which creates less concern about banker conflicts; (3) the financial advisor was not involved "in the face-to-face negotiations" between Zenith and Fairfax, but rather served in an "advisory role"; and (4) there was no record in terms of what the particular banker in question "did or didn't do." As Vice Chancellor Laster explained, "I know he's the No. 2 guy, but nobody took his deposition," which the Court viewed as a "critical omission."

Vice Chancellor Laster described this as a "very close issue" and stressed that "nobody should cite this transcript as saying 'Court of Chancery blesses same banker working for target side, having six months ago worked for bidder side.'"

Take-Aways

There are several takeaways from the Vice Chancellor's decision in *Zenith*. First, the most sure-fire way to avoid an injunction regarding the disclosure of financial projections (at least in an all-cash transaction) is to disclose them, along with extensive caveated language, leaving stockholders free to decide for themselves whether and to what extent to make use of them.

Second, financial advisors should be careful about having overlapping deal team members. Obviously, this may be impracticable, if not impossible, in situations in which the financial advisor has a relatively small or specialized group of individuals devoted to a specific industry or sector. In such situations, the financial advisor should, to the extent possible, erect information walls. The more recent the prior engagement, and the more senior and involved the deal team member in question, the more acute these concerns may be.

And third, financial advisors should also be careful about going down the road of partial disclosure. Vice Chancellor Laster suggested that disclosing the financial advisor's prior engagements for the bidder created "the implication . . . that you're not using the same guys who worked for the bidder just recently." That being the case, financial advisors and their clients should consider carefully whether to disclose such information as a threshold matter and, when they decide to do so, they should be sure to disclose material non-confidential information relating to the engagements in question.

Maric Capital Master Fund, Ltd. v. Plato Learning, Inc.

Disclosure of projections also figured prominently in Vice Chancellor Strine's succinct but meaty decision in *Maric*, a case arising out of the friendly acquisition of educational software purveyor PLATO Learning, Inc. by Thoma Bravo, LLC.³⁶ There, the Court enjoined the proposed merger pending (a) corrective disclosure with respect to what the Court determined were materially misleading descriptions in the proxy statement of how the target's financial advisor had derived the discount rate used in its DCF analysis and the discussions and understandings between the acquiror and the target's management about future retention and economic arrangements, and (b) supplementation of the proxy statement's disclosure of projections to include free cash flow estimates, which the Court suggested was among the most pertinent information for a stockholder looking to assess the fairness of the merger consideration.

Projections

As in *Zenith*, the issue before Vice Chancellor Strine with respect to the projections was one of selective disclosure. Finding that the proxy statement "selectively disclosed projections relating to PLATO's future performance," the Court went on to conclude that "for some inexplicable reason" it had "excised the free cash flow estimates that had been made by PLATO's management and provided to" the investment bank that rendered the fairness opinion. Recognizing that "reasonable minds might differ" on the issue, the Court nevertheless found that, in its view, "management's best estimate of future cash flow of a corporation that is proposed to be sold in a cash merger is clearly material," and, therefore, it enjoined the proposed merger until the free cash flow estimates were disclosed.³⁷

DCF/Discount Rate Disclosure

With respect to the disclosure around the DCF analysis performed by PLATO's financial advisor (a small, non-bulge bracket firm brought in by the company to render the fairness opinion due to concerns about the fact that the compensation of its primary financial advisor, Thomas Weisel, included a contingent component), the issue was the manner in which the banker had arrived at the discount rate. Once again, the problems began with a partial disclosure — and "[b]ecause the proxy statement spoke on this subject, there was a duty to do so in a non-misleading fashion." Specifically, the proxy statement indicated that what the Court described as the "lofty" discount rate

of 23-27 percent had been selected “based upon an analysis of the company’s weighted average cost of capital.” In reality, the Court determined, the WACC calculation had produced lower (albeit still “girthy”) discount rates of 22.6 percent and 22.5 percent, both below the low end of the range reported in the proxy statement. The financial advisor had then “subjectively” adjusted those rates upward based on a comparable companies analysis and its “dubious” view that an “eyebrow raising” technology industry risk premium, 9.5 percent small cap premium *and* liquidity discount should be “heaped on top.” In addition to raising questions about the validity of this approach,³⁸ the Court found that there was no evidence that the financial advisor had informed the PLATO Special Committee that the 23-27 percent range had been derived in this manner. Accordingly, because, in the Court’s view, the only “actual analysis” of WACC had generated the lower, undisclosed rates, Vice Chancellor Strine enjoined the merger pending supplementation of the proxy statement to indicate the value that would be obtained using the discount rates “actually calculated.”³⁹

3Com Corp. v. Diamond II Holdings Inc.

3Com involved dueling motions to compel the production of documents, some of which reflected attorney-client communications made in the presence of third-parties, most notably, the company’s investment banker. As a threshold matter, the Chancery Court determined that Delaware, rather than Massachusetts, law applied because Delaware has “a considerable interest in the communications that take place among a client, its lawyers, and its investment bankers when those parties are discussing the merits of a complex transaction, such as a merger, for which they have selected Delaware law and Delaware as a forum for resolution of any disputes that might arise.”⁴⁰ Vice Chancellor Noble concluded for that reason that Delaware had a more significant relationship to the challenged communications than Massachusetts, where the communications took place. Accordingly, the Vice Chancellor applied Delaware privilege law, which, the Court held, differs from Massachusetts law in that it extends wide protection to communications between a client and a lawyer in the presence of an investment banker.

Supreme Court Tackles Bylaws Reducing Size of the Board

Crown EMAK

As we noted in our last edition, *Crown EMAK Partners, LLC v. Kurz* arose from dueling consent solicitations, each of which purportedly resulted in a different board majority at EMAK Worldwide, Inc. (“EMAK”). Plaintiffs-appellees contended that on December 20 and 21, 2009, Take Back EMAK, LLC (“TBE”) delivered sufficient consents, including those purportedly transferred from EMAK consultant Peter Boutros to TBE member and EMAK director Donald A. Kurz, to (1) remove two directors from the seven-seat board, which already had two vacancies, and (2) fill three of the vacancies to create a new board majority. Defendants-appellants, meanwhile, contended that on December 18, 2009, Crown EMAK Partners, LLC (“Crown”) — which, as the only owner of Series AA Preferred Stock, already had the right to appoint two directors — delivered sufficient consents to amend EMAK’s bylaws to (1) reduce the size of the board to three directors, and (2) provide that if the number of sitting directors exceeds three, EMAK’s CEO must call a special shareholders’ meeting to elect the third director to replace his multiple predecessors.

The Chancery Court's decision is discussed at length in our last edition. Upon review, the Supreme Court agreed with the Court of Chancery that the Purchase Agreement between Boutrous and Kurz did not constitute illegal vote buying because the economic interests and the voting interests of the shares remained aligned, insofar as the agreement transferred both sets of interests from Boutrous to Kurz. Parting company with the Chancery Court, however, the Supreme Court determined that the transfer of all of these rights — save only bare legal title — breached another governing document, the Restricted Stock Grant Agreement, and therefore the votes in question could not be counted. Whereas Vice Chancellor Laster had agreed with defendants that the “odd framing of what Boutrous sold and Kurz bought” successfully contracted around the transfer restrictions, the Supreme Court determined that “by its very terms, the Restricted Stock Grant Agreement prohibits what the Boutrous/Kurz Purchase Agreement purports to do, i.e., sell, transfer or assign his shares.”

With respect to the Crown consents, the Supreme Court agreed with the Chancery Court's conclusion that they were ineffective because the unprecedented manner in which they were obtained — a bylaw amendment that purported to shrink the board's size below the number of sitting directors — violated Section 141(b) of the DGCL, which provides, with certain limited exceptions, that “[e]ach director shall hold office until such director's successor is elected and qualified or until such director's earlier resignation or removal.” The Supreme Court adopted the Chancery Court's reasoning that the reduction scheme could not be saved by allowing unseated directors to finish their terms bereft of their seats (as in the case of holdover directors) because, among other things, quorum requirements would be impossible to apply if the number of directors could exceed the number of directorships. The Supreme Court further agreed with the Chancery Court that the new bylaw providing for special interim stockholder elections conflated what takes place at an annual meeting with what can take place in between meetings and thus conflicted with the DGCL's provisions requiring, except for a properly classified board, annual elections and terms coextensive with the period between annual meetings.

The Supreme Court diverged from the Chancery Court, however, on the proper analysis of Delaware law with respect to the classification of “stockholders of record” entitled to vote. Recall that Vice Chancellor Laster had rejected several challenges to TBE's consent solicitation, including the novel argument that no one ever procured a DTC omnibus proxy to validate the consents delivered by the beneficial owners of EMAK shares held by the DTC. Because the DTC lacks discretionary voting authority over the shares it holds, it ordinarily conveys voting authority to participant member banks and brokers through the DTC omnibus proxy. Here, however, no one had ever sought, and the DTC had never issued, the proxy. Although Vice Chancellor Laster acknowledged the established jurisprudence requiring consents to be given by shareholders of record, he endeavored to harmonize the law with operational financial reality by dispensing with the need for the DTC omnibus proxy as a mere formality. Reaffirming that a proxy is only evidence of an agent's authority to vote shares owned by another, the Chancery Court held that the DTC inevitably transfers voting authority, regardless of whether a DTC omnibus proxy is generated. Specifically, the Vice Chancellor held that the so-called “Cede breakdown” — the DTC's list of the holdings of a company's stock by each participant bank and broker — is part of the company's stock ledger for purposes of determining the “stockholders of record” entitled to vote under DGCL, § 219(c). To insist otherwise, the Chancery Court reasoned, would contravene Delaware's policy against the disenfranchisement of stockholders.

Having found the votes attributable to the Boutrous shares invalid, the Supreme Court found it unnecessary to decide whether the Cede breakdown is part of the stock ledger for purposes of Section 219(c), but not before noting that the Chancery Court had acknowledged that the DTC system usually works well, absent the anomalous human oversight that occurred here. The Court also counseled that a legislative cure is preferable to a “gratuitous statutory interpretation” of the “comprehensive and carefully crafted statutory scheme” that is the DGCL, especially in light of the coordinated amendments that the General Assembly made in 2003 to Sections 219 and 220. Indicating that “[a]ny adjustment to the intricate scheme of which section 219 is but a part should be accomplished by the General Assembly through a coordinated amendment process,” the Court characterized Vice Chancellor Laster’s interpretation as *obiter dictum* without precedential effect.

Preferred Stockholder Derivative Standing

MCG Capital Corp. v. Maginn

MCG Capital arose from plaintiff MCG Capital Corp.’s \$5 million equity investment in and \$30 million in loans to defendant software services company Jenzabar, Inc., whose CEO and COO, respectively, were defendants Robert A. Maginn, Jr. and his wife, Ling Chai, both of whom also were self-appointed directors on Jenzabar’s five-person board along with one MCG appointee and two directors appointed by mutual agreement of MCG, Maginn and Chai. MCG’s investment was conditioned on Jenzabar’s entering into Employment Agreements with Maginn and Chai, was governed by a Purchase Agreement and company charter, and prohibited the company from taking certain corporate actions with affiliates absent the consent of MCG. The investment left MCG with all of Jenzabar’s senior preferred shares but none of its common stock and allowed Jenzabar, once it had repaid all of its debts to MCG, to repurchase the preferred stock — which Jenzabar purported to do in April 2009. In December 2008, Maginn and Chai were granted salary increases and retroactive bonuses without MCG’s consent, including a \$750,000 bonus for Maginn purportedly first approved in 2002 but never paid. This 12-count action ensued, followed by defendants’ motions to dismiss.

After expressing thinly-veiled annoyance at MCG’s failure to identify which claims were derivative and which were direct⁴¹ and holding that MCG, having answered the motions to dismiss, was precluded by Court of Chancery Rule 15(aaa) from amending its complaint to allege that Maginn and Chai were controlling shareholders, the Chancellor noted that other actions had been brought derivatively by preferred shareholders but apparently had not directly addressed the question of standing. MCG argued that, by default, preferred shareholders have the same standing as common shareholders to bring derivative actions, while defendants argued that preferred shareholders should have such standing only if they enjoy a proportionate economic interest with common shareholders with respect to any value resulting from the litigation or if they have “taken the place” of the common shareholders as the residual beneficiaries of any increased value. Chancellor Chandler sided with MCG. The Court started with “the proposition that all stock is created equal” — *i.e.*, that all classes of stock enjoy the same rights and privileges unless affirmatively limited, in which case only those specific rights are altered, and other default rights remain unaltered — and then observed that nothing in Delaware statutes, rules of procedure or case law expressly prevents preferred shareholders from bringing derivative actions. The Court thus held that MCG had standing to bring a derivative action, provided it complied with ownership and demand requirements.

Rejecting defendants' argument that MCG was not an adequate derivative plaintiff, the Chancery Court held that MCG's economic rights surpassed, but did not conflict with, those of Jenzabar shareholders, that conflicting theories of MCG's "real motivation" for seeking to invalidate repurchase of the preferred shares must be resolved in plaintiffs' favor at the pleadings stage, and that the remedies sought for direct contract claims against Jenzabar were coextensive with the interests of common shareholders.

The Court then proceeded to determine, on a count-by-count basis, whether each of the claims asserted was direct or derivative and, as to the latter, whether demand was excused.⁴²

Additional Recent Developments in Delaware Business and Securities Law

In addition to the topics studied above, the Delaware courts also issued noteworthy decisions in the following areas of law during the past quarter.

Controlling Stockholder Debt-for-Equity Conversion

- In *Gentile v. Rossette*,⁴³ a post-trial decision involving a "classic example of self-dealing by a controlling shareholder," Vice Chancellor Noble held that P. David Rossette, the majority shareholder and largest debtholder of tech-bubble casualty SinglePoint Financial, Inc., breached his fiduciary duties to the minority shareholders by converting debt into equity at an unfair conversion price, resulting in an improper dilution of the voting and economic rights of the company's minority shareholders. The case arose when, in 2000, SinglePoint's board (consisting of Rossette and one other person, David Bachelor) decided to improve the company's balance sheet, which reflected a substantial amount of debt, virtually all of which was owed to Rossette. Rossette and members of SinglePoint's management believed that reducing the debt on the company's balance sheet would facilitate future business, the possibility of other investment and perhaps even a sale of the entity. To that end, Rossette converted approximately \$2.2 million in debt (a significant portion of the debt owed to him by SinglePoint) into common stock at \$.05 per share (the "Debt Conversion"), a conversion rate for which Rossette had obtained a fairness opinion from The Harman Group Corporate Finance, Inc. As a result of the Debt Conversion, Rossette's holdings in the company went from 61 percent to 95 percent. Shortly after the Debt Conversion, Rossette entered into a stock-for-stock merger with Cofiniti that provided an imputed value of SinglePoint stock at \$2.46 per share.

As part of the merger, Rossette was given an option to sell a portion of the Cofiniti shares he received through the merger back to Cofiniti after a year at the effective price at which those shares had been publicly valued for purposes of the merger, although likely substantially above Cofiniti's reasonable market price at that time (the "Put Option"). He was the only shareholder to receive such an option. Within months of the merger, Cofiniti filed for bankruptcy and the shares received by SinglePoint's former shareholders became worthless, as did the Put Option. Thereafter, the former minority shareholders of SinglePoint sued alleging that Rossette and David Bachelor, the other member of SinglePoint's board, had violated their fiduciary duties in approving the Debt Conversion at an unreasonably low conversion rate and in according special treatment to Rossette through the Put Option.

The Court quickly disposed of the challenge to the Put Option, finding that it had been granted to Rossette because Cofiniti had modified the terms of the proposed merger at the last moment and refused to assume the remainder of the debt still outstanding after the Debt Conversion, and that Rossette had agreed to the Put Option in an attempt to save the transaction. Noting that no one involved in the negotiations at the time believed the Put Option had much, if any, value, and that it is now worthless as a result of Cofiniti's demise, the Court found it had been imposed by Cofiniti (presumably to advantage itself) and caused a significant detriment to Rossette. As such, it was fair to the minority shareholders and represented a minor consolation for the loss of some degree of security that he would be repaid the debt he had lent to SinglePoint.

By contrast, the Court found that the Debt Conversion was not fair to the minority shareholders in terms of either process or price. Analyzing at the outset which party bore the burden of demonstrating the entire fairness (or lack thereof) of the Debt Conversion, the Court rejected the defendants' argument that plaintiffs should bear the burden because Bachelor, as one member of a two-person board, was independent and received no benefit from the transaction. As the Court noted, as a general rule, a board that is evenly-divided between conflicted and non-conflicted members is not considered an independent board and there was no evidence in this case that Bachelor had been impaneled as a single-member special committee (which are disfavored by Delaware courts in any event) for purposes of considering the transaction. In addition, the Court found that Bachelor had no experience as a director, had no firm basis for determining what a fair conversion price would have been, and had not sought or received independent legal and financial advice. The Court discounted the Harman Group's opinion because it had not been provided to Bachelor in final form as of the time he had approved the transaction, was based on insufficient and inaccurate financial information provided by SinglePoint, and Bachelor had not met with representatives of the Harman Group to review its work. (The Court also noted that the opinion appeared by its terms not to address the fairness of the transaction to the company and its minority stockholders, but to – of all people – Rossette.) Under such circumstances, the Court held it was the defendants' burden to prove entire fairness. Additionally, for all of the same reasons, the Court found that the process was flawed.

“From a tainted process, one should not be surprised if a tainted price emerges,” and the Vice Chancellor found that was the case here. While noting that determining a “proper” conversion rate is a “worse than uncertain undertaking,” and recognizing that, as it turned out, the true value of the company was nil, the Court stated that the conduct of a fiduciary must be assessed in context. In this case, Rossette's conduct demonstrated that he believed that there was value to be had from SinglePoint and acted to maximize that value for himself. Among other things, the Court noted that the most persuasive evidence that SinglePoint's stock was worth considerably more than the \$.05 conversion rate was Rossette's “persistent willingness” to “pour his ultimately limited resources into the Company;” “[f]or him to continue infusing the Company with money would have been rational only if he believed that it would survive and eventually prosper.” While such evidence was sufficient to convince the Vice Chancellor that a nickel per share was not fair, it does not provide a quantitative basis for a value determination. For that, the Court considered the parties' respective valuation experts, as well as other valuations that Rossette had endorsed, both before and after the Debt Conversion, finding that in all comparable instances, the price was substantially more than the Debt Conversion Rate. “Acknowledging that the difficulty in calculating such a number may cut against the fiduciary who has not faithfully discharged his duties,” the Court ultimately concluded that the

fair value of the stock at the time of the Debt Conversion was \$.40 per share — eight times the rate that had been used. The Court then went on to calculate damages equal to the fair value of the shares representing the overpayment by the company in the debt conversion (\$309,000).

Vice Chancellor Noble declined to hold Bachelor liable for monetary damages in approving the Debt Conversion in light of the company's Section 102(b)(7) provision, finding that he had received no personal benefit, was a significant equity holder who stood to have his own interests heavily diluted by the transaction, and had attempted to do the best he could (albeit "crimped by his lack of experience"). He was, therefore, at most, liable for a breach of the duty of care, which was excused. In contrast, the Court found the exculpatory provision afforded Rossette no relief because, as a controlling shareholder who used his position to direct the Debt Conversion, with its unfair price and process, for his personal benefit, his liability was accompanied by, and indeed the result of, a breach of his fiduciary duty of loyalty.

The Vice Chancellor rejected plaintiffs' request to shift attorneys' fees, finding that neither Rossette's pre-litigation nor litigation conduct (the underlying conduct giving rise to the breach of fiduciary duty and inconsistent testimony provided by Rossette over the course of the litigation, respectively) "reach[ed] the level that would justify a reallocation of the burden of representation."

Books and Records Actions

- In *King v. VeriFone Holdings, Inc.*,⁴⁴ the Chancery Court held that a plaintiff who fails to conduct an adequate pre-suit investigation before filing a derivative action in federal court lacks a proper purpose to bring a Section 220 books and records action in Delaware state court to obtain information in aid of the federal suit. Shortly after VeriFone Holdings, Inc. announced in 2007 that it had to restate its financial statements, plaintiff Charles R. King "rushed off to a federal court" to file a derivative suit even though there was no exigency in an apparent attempt to "win the filing Olympics" and be named lead plaintiff and lead counsel. In the haste to file, plaintiff had not conducted a sufficient pre-suit investigation, and the complaint was dismissed without prejudice for failure to plead demand excusal.⁴⁵ At the federal court's suggestion, plaintiff then filed a books and records action in Delaware to obtain the necessary facts to establish demand futility so he could file a complaint that might withstand dismissal. That strategy did not sit well with Vice Chancellor Strine, who criticized it on several public policy grounds. First, allowing a plaintiff to use a Section 220 action in an after-the-fact manner to bolster a derivative complaint would permit a "costly, inefficient end-run around the discovery rules applicable in the derivative action," which generally preclude a derivative plaintiff from suing first and then seeking discovery to aid in pleading a viable complaint. Indeed, as Vice Chancellor Strine noted, "Rule 23.1's heightened pleading standard is there for a reason" and would be undermined by such an approach. Second, it would subject defendants to simultaneous suits in separate forums and waste scarce judicial resources through repetitive litigation. Third, and "perhaps most importantly," it would "exacerbate[] the perverse incentives motivating too many representative plaintiffs' unseemly and inefficient race to the courthouse." Citing the "nearly identical" case of *Beiser v. PMC-Sierra, Inc.*,⁴⁶ Vice Chancellor Strine identified as additional reasons for concluding that King lacked a proper purpose that he (i) was dilatory in bringing his Section 220 action (almost eighteen months after filing his original federal derivative complaint) and (ii) had not sought discovery in the federal action and was therefore apparently trying to use a §220 demand to

obtain discovery that is either unnecessary or unavailable in the federal action. As the Court made clear, however, Section 220 is “not a license to conduct unwarranted fishing expeditions.”

- In a case with similar facts and an identical result, *Baca v. Insight Enterprises, Inc.*,⁴⁷ Vice Chancellor Laster cited *King* extensively in repeating the holding that generally a stockholder does not act with a proper purpose when attempting to use Section 220 to investigate matters that the same stockholder has put at issue in a plenary derivative action. Analyzed at the level of the individual plaintiff, “the stockholder who serves a post-plenary-action Section 220 demand contradicts his own certification that he already possessed sufficient information to file a complaint.” Analyzed doctrinally, “permitting a post-plenary-action Section 220 demand circumvents the substantive legal principles embodied in Rule 23.1.” And, analyzed systemically, “permitting a post-plenary-action Section 220 demand rewards entrepreneurial plaintiffs’ lawyers who file quickly to gain control of a derivative case without conducting a meaningful pre-suit investigation.” In an attempt to distinguish *King*, the plaintiff in *Baca* argued that he had amended his derivative complaint to delete certain allegations, and there are therefore certain issues that are no longer present in the derivative litigation, but the Vice Chancellor held that permitting such strategic amendments would merely reinforce the “perverse incentives” described in *King* by permitting a plaintiff to file a placeholder complaint to secure control of the derivative litigation and then “cleverly use the amendment process to open a window for a subsequent Section 220 investigation.” Notwithstanding the general precept, the Court noted that there are certain “special circumstances” identified by the Chancery Court in prior cases under which a Section 220 demand would not be foreclosed by a prior derivative action, and anticipated others, including “a desire to explore unrelated matters not put validly at issue in the pending derivative action.”⁴⁸

Forum non conveniens

- In *Lisa, S.A. v. Mayorga*,⁴⁹ the Delaware Supreme Court affirmed a Chancery Court dismissal on *forum non conveniens* grounds and applied the so-called “*McWane* doctrine” requiring the Court to exercise its discretion to stay or dismiss an action in favor of an earlier-filed action pending in another forum, even though the earlier filed action was no longer pending. Plaintiff Lisa, S.A., a Panamanian corporation that had sold shares in a group of family-owned corporations incorporated in Guatemala and El Salvador, brought several actions in various jurisdictions, including a state court action filed in 1998 in Florida involving a common nucleus of operative facts as the subsequently filed Delaware suit. The Chancery Court dismissed on *forum non conveniens* grounds, and plaintiff appealed, arguing that the Chancery Court had merely purported to apply the standard requiring defendants to establish “overwhelming hardship” if forced to litigate in Delaware, but had in fact simply balanced the respective hardships to the parties of having to litigate in the other party’s proposed forum. The Supreme Court reaffirmed the “well settled rule” that the “overwhelming hardship” standard applies only where a defendant moves to dismiss a first-filed suit, and applied instead the tandem *McWane*⁵⁰ doctrine, which applies where the Delaware action is not the first-filed. In so doing, the Court clarified that the *McWane* doctrine applied notwithstanding the fact that the earlier-filed Florida action had already been decided and even though *McWane* speaks in terms of a “prior action pending in another jurisdiction.” To allow otherwise, the Court explained, would “ignore the binding effect of the [earlier action] and create the possibility of inconsistent and conflicting rulings” — “precisely the outcome *McWane*’s doctrine of comity seeks to prevent.”

Fraud exception to post-merger extinguishment of derivative claims

- In *Arkansas Teacher Retirement System v. Caiafa*,⁵¹ the Supreme Court affirmed the approval of a settlement related to Countrywide's merger with Bank of America ("BOA") over the objection of a former Countrywide stockholder, Arkansas Teacher Retirement System ("TRS"). TRS had objected on the grounds that the Chancery Court failed to value its derivative claim pending in a companion federal court action, and that approving the settlement and permitting BOA to close its acquisition of Countrywide would extinguish TRS's standing to pursue derivative claims. Finding that the Chancery Court had not abused its discretion in finding that the claims asserted in TRS's derivative suit were worthless, the Supreme Court affirmed the settlement's approval. The Court went on, however, to observe in extensive dicta that TRS had alleged facts reflecting conduct "wholly inappropriate" for directors, suggesting a "potential relationship between the directors' alleged premerger fraudulent conduct and the rapidly and severely depressed stock price on which the merger consideration was based," and counseled that had TRS argued that Countrywide's board sought the merger to extinguish shareholder standing to bring derivative claims resulting from the directors' allegedly intentionally fraudulent conduct, it might have qualified for the fraud exception to the rule that derivative claims are extinguished upon a merger. While the Court agreed with the Chancery Court that the Countrywide board had not supported the transaction solely or primarily to avoid derivative liability, but was instead running from "the crest of a ruinous wave of losses," it stated that it could not ignore the "close connection between that wave's crest and its underlying trough." In other words, "[a]n otherwise pristine merger cannot absolve fiduciaries from accountability for fraudulent conduct that necessitated the merger." Because, however, TRS had not made that claim at the Chancery Court level, nor presented it to the Supreme Court on appeal, the Court approved the settlement "despite facts in the complaint suggesting that the Countrywide directors' premerger agreement fraud severely depressed the company's value at the time of BOA's acquisition, and arguably necessitated a fire sale."

Attorneys' Fees

- In *Saliba v. William Penn Partnership*,⁵² Chancellor Chandler granted plaintiffs' request to shift attorneys' fees and expenses based on defendants' pre-litigation conduct. The Court noted that it had "clearly found" that defendants, who had stood on both sides of a sales transaction involving the sale of a hotel, had breached their fiduciary duties by failing to make full and timely disclosures to plaintiffs and by manipulating the sale process for their personal benefit, rather than ensuring that the sale occurred pursuant to a fair process that would protect the interests of plaintiffs and all members of the partnership. "The defendants were fiduciaries who stood on both sides of the transaction and, thus, were required to demonstrate their utmost good faith and the most scrupulous and inherent fairness of the bargain." Because they did not do so, and instead conducted the sale in a "clearly conflicted manner" and failed to meet their burden of establishing entire fairness, the Court concluded that it would be "unfair and inequitable to require plaintiffs to shoulder the costs incurred in demonstrating the unfairness of th[e] sales process." As the Court states, "[t]hose who violated their fiduciary obligations and were the cause of this litigation are the parties who properly should bear the fees and costs made necessary solely by reason of their faithless conduct."
- In *Berger v. Pubco Corp.*,⁵³ Chancellor Chandler approved a fee petition of \$1.2 million, or approximately 26 percent of the value of the "tremendous benefit" in cash recovered for Pubco's former

minority stockholders, which, the Chancellor noted, is at the bottom of the 25-33 percent range found in many Court of Chancery cases. In addition to the benefit realized for the class at the conclusion of lengthy and thorough litigation (as opposed to a “quick settlement”), the Chancellor found the award to be fair based on the somewhat complex nature of the litigation, counsel’s demonstrated skill in achieving a significant benefit for the class, and the contingency basis of counsel’s work. The Court also held that \$250,000 paid as an initial award in the litigation would not constitute an advance on the \$1.2 million award because the initial award related to earlier efforts, fees and expenses relating to the establishment of a breach of fiduciary duty by Pubco’s controlling stockholder (who, the Court noted, “should bear the cost of litigation”), whereas the \$1.2 million award relates to the efforts, fees and expenses of counsel in securing a judgment for the stockholder class.

Implied Covenant of Good Faith and Fair Dealing

- In *Nemec v. Shrader*,⁵⁴ the Delaware Supreme Court held that the defendant, consulting firm Booz Allen, did not breach the implied covenant of good faith and fair dealing or its fiduciary duties when, several months before the sale of its government-consulting business significantly increased the company’s stock value, the company redeemed stock granted to the plaintiffs, two former company officers. For two years after retiring, plaintiffs were granted a “put” right to sell shares of the company’s stock back to Booz Allen at book value. After that period, the company had a contractual right to redeem part or all of the remaining shares at any time at book value. The complaint alleged that at the time of the drafting of the stock option plan, nobody had anticipated the possibility that the company would be for sale in whole or in part during the redemption period. The Supreme Court rejected that “naked, wholly unworthy” allegation and agreed with the Chancery Court that the stock plan explicitly authorized the redemption’s price and timing. The Supreme Court also held that the redemptions were a rational business judgment and furthered a legitimate interest by benefiting all working stockholders rather than favoring the retired stockholders. Affirming the Chancery Court’s dismissal and stating that a “party does not act in bad faith by relying on contract provisions for which that party bargained where doing so simply limits advantages to another party,” the Court refused to expand the doctrine of the implied duty of good faith and fair dealing by engaging in “post contractual rebalancing of the economic benefits flowing to the contracting parties.” Plaintiffs grounded their breach of fiduciary claim on the fact that Booz Allen’s directors stood to gain personally from their redemption decision, but the Supreme Court, again affirming the Chancery Court, held that any fiduciary duty claims were foreclosed because the dispute related to the exercise of a contractual right and the nature and scope of the directors’ duties were defined solely by reference to that contract. The Court also rejected a claim of unjust enrichment because plaintiffs had failed to prove that the directors had unjustly benefited from the redemption in contravention of “fundamental principles of justice or equity or good conscience.”

Arbitration

- In *Orix LF, L.P. v. InsCap Asset Management, LLC*,⁵⁵ Vice Chancellor Strine held that it should be for the arbitrator, in the first instance, to determine the proper forum for this dispute between an investment fund and its investors. The parties’ investment relationship was governed by two documents with conflicting provisions as to arbitration. When a dispute arose, defendants initiated two arbitrations and plaintiff sought an injunction from the Chancery Court because defendants failed

to obtain another investor's consent to arbitrate. Vice Chancellor Strine observed that issues of procedural arbitrability, such as the consent purportedly required here, are to be decided by arbitrators, not courts. Alternatively, substantive arbitrability is generally determined by courts, except where there is "clear and unmistakable evidence that the parties intended otherwise."⁵⁶ In *James & Jackson, LLC v. Willie Gary, LLC*,⁵⁷ the Supreme Court explained that that test could be met even when the agreement does not explicitly state that the arbitrator should decide issues of substantive arbitrability if: (1) the contract generally refers all disputes to arbitration; and (2) the contract refers to a set of rules that would empower arbitrators to decide arbitrability. Here, Vice Chancellor Strine concluded, the broad language in one of the underlying documents clearly evidenced that the parties intended the arbitrator to determine issues of substantive arbitrability. Moreover, the Vice Chancellor noted that at this procedural stage, the burden on defendants is merely to show that their claims are arguably, not conclusively, arbitrable.

- In *Aris Multi-Strategy Fund, LP v. Southridge Partners, LP*,⁵⁸ an inspection action under 6 Del. C. §17-305 by a limited partner against the partnership, Chancellor Chandler granted the defendant's motion to dismiss in favor of arbitration, holding that the Delaware Revised Uniform Limited Partnership Act ("DRULPA") permits parties to contractually agree to submit records actions under Section 17-305 to arbitration, notwithstanding the latter statute's vesting of "exclusive jurisdiction" in the Court of Chancery. As Chancellor Chandler observed, DRULPA specifically permits a limited partner to waive its right to bring actions "relating to the organization or internal affairs of a limited partnership" in the Delaware courts, so long as it does so by agreeing to arbitration, as the plaintiff had done. The Chancellor noted that his ruling is consistent with the manner in which Delaware has treated this issue in other contexts over which the Court of Chancery also has exclusive jurisdiction, such as advancement actions in the corporate context and derivative actions against company management in the limited liability context.

Fiduciary Duties

- In *Kates v. Beard Research, Inc.*,⁵⁹ the Chancery Court dismissed claims that a doubling of management fees paid by a pharmaceutical contracting company to an affiliate constituted corporate waste and a breach of fiduciary duty, even though the company's key officer and director was also an officer, director and owner of the affiliate. While plaintiff, a shareholder of the affiliate, argued that the entire fairness standard applied, rather than the traditional waste standard, Vice Chancellor Parsons held that the claim failed under either. The Court held that: (i) the increased management fees did not constitute waste because the affiliate had provided adequate consideration by carrying overhead associated with a tripling of employees at the company; and (ii) even under the entire fairness standard, the process of approving the fee increase was fair because the plaintiff had approved it in advance and the amount of fees was fair based on expert testimony concerning the financials and operations of the two companies.
- In *Monroe County Employees' Retirement System v. Carlson*,⁶⁰ Chancellor Chandler dismissed a derivative complaint that lacked sufficient allegations demonstrating an absence of fairness. Rejecting plaintiff's argument that, to survive a motion to dismiss, a plaintiff need only allege a transaction between a company and a controlling shareholder, the Court emphasized that, while defendants may bear the burden at the proof stage of the proceedings to demonstrate fairness, plaintiff nevertheless bears the burden at the pleading stage to state a claim by pleading sufficient

facts that, if true, would establish that the transaction was not fair. This is not accomplished, the Court noted, merely by alleging a transaction between a controlling shareholder and the company, since such transactions are not per se invalid under Delaware law, but, to the contrary, are “perfectly acceptable if they are entirely fair.” The Court then went on to consider — and reject — the plaintiff’s alternative argument that it had pled facts demonstrating unfairness. It is not sufficient, the Chancellor held, to allege merely unfair process, since “the entire fairness test is not a bifurcated one; dealing and price must both be considered.” As such, even if the unfair process allegations were otherwise sufficient, because the complaint contained only a conclusory assertion that the price terms were unfair but lacked any factual basis in support of that allegation, it failed to state a claim for breach of fiduciary duty.

- *Sutherland v. Sutherland*,⁶¹ the latest round in a long saga of inter-family litigation before the Chancery Court, is a decision on defendants’ motions for summary judgment in a stockholder derivative and double-derivative action in which plaintiff sued her siblings and family-held businesses (“Company” or “Companies”) alleging, among other claims, breaches of fiduciary duty relating to defendants’ actions in the prior litigations. A threshold issue was whether defendants, by appointing a special litigation committee in an earlier action pursuant to *Zapata Corp. v. Maldonado*,⁶² conceded that they had assumed the burden to prove that certain accounting payments made between the Companies were entirely fair. Vice Chancellor Noble held that appointment of the SLC was a concession only that self-dealing was adequately pled in the complaint, a presumption not applicable after the pleading stage. Because the record was unclear as to whether defendants received material benefits from the accounting scheme not available to other stockholders generally, the Court denied defendants’ motion for summary judgment on that issue. The Court also held that duty of loyalty and care claims relating to defendants’ purchase and use of a Company plane were time-barred and, in any event, did not survive the business judgment rule because (1) evidence that defendants had considered the plane’s cost and tax implications defeated allegations of gross negligence and failure to make an informed business judgment and (2) the plane’s use as a mode of transportation to the Companies’ remote locations was a rational business purpose defeating the duty of loyalty claim.

Plaintiff also alleged that defendants’ unsuccessful, “vigorous, and expensive” efforts to defend against her earlier books and records action constituted self-dealing, bad faith, and waste. Vice Chancellor Noble rejected plaintiff’s argument that entire fairness applied because defendants’ opposition allegedly was motivated by concerns about personal liability, reasoning that that would create an “unjustifiably burdensome rule.” Instead, the Court held that the appropriate question was whether defendants’ § 220 opposition was mounted in bad faith and determined that the evidence here showed that it was not. Plaintiff’s claims that the books and records opposition constituted gross negligence and waste failed for lack of evidence that defendants were recklessly uninformed about the likely costs and savings. In rejecting plaintiff’s claims that charter amendments instituting a § 102(b)(7) immunization provision and eliminating cumulative voting constituted self-dealing and bad faith, the Court observed that prior case law held that recognition by director defendants of some personal benefits from adopting a 102(b)(7) amendment did not create a reasonable doubt about their disinterest or independence and that cumulative voting may be supplanted by straight voting if statutory provisions are followed, as they were here.

In denying plaintiff’s claims that defendants improperly expensed personal living expenses, the

Court found no supporting evidence and rejected her suggestion that the Court “impose an affirmative duty on fiduciaries to come forward and explain the allocation of company funds at the behest of an inquiring shareholder.” Finally, plaintiff argued that she deserved attorneys’ fees and costs because her prior litigation resulted in cost savings from amended employment agreements between defendants and the Companies that mooted her employment claims. The Vice Chancellor decided that only some, but not necessarily all, of plaintiff’s fees should be shifted because not all of her employment requests had been successful.

- Vice Chancellor Noble dismissed all claims in *Binks v. DSL.net, Inc.*,⁶³ involving allegations “spanning the inept to the corrupt” after internet services company DSL.net, Inc. issued convertible notes to MegaPath, Inc., which shortly thereafter exercised its conversion rights to obtain more than 90 percent of DSL’s common stock and eliminated the minority stockholders through a short-form merger. When a former minority stockholder challenged the merger, the Chancery Court, assuming without deciding that the notes transaction was subject to *Revlon* review, concluded that the board’s decision was entitled to the presumption of independence and disinterestedness because plaintiff had offered only “sweepingly general allegations” and had conceded that a majority — three of five directors — were independent and disinterested. Plaintiff further argued that the board was not adequately informed because it would not have approved the MegaPath notes transaction if purportedly improper connections on the part of two of the directors were known to the other directors, but the Vice Chancellor deemed those allegations insufficiently material to have potentially swayed the overall board vote.

Plaintiff also argued that a DSL bankruptcy would have been preferable to the notes transaction and that the board breached its fiduciary duties by not pursuing that route, but the Court concluded that plaintiff’s personal opinion was not enough to sustain a *Revlon* claim and dismissed that claim and a related aiding and abetting claim. Plaintiff urged entire fairness review for Megapath’s role ostensibly as controlling stockholder both before and after it had obtained a controlling position. The Court, however, held that “[o]nly those transactions that occur at the behest of an actual — not a potential — controlling shareholder may be subject to entire fairness review,” and Megapath’s approval of a charter amendment necessary for the notes transaction was proper because “even a majority stockholder is entitled to vote its shares, including to further its own financial interest.” A conspiracy claim failed because the Court found that plaintiff had not alleged any relationship between MegaPath and DSL’s former controlling shareholder beyond *ipse dixit* speculation.

Derivative claims for breach of fiduciary duty, corporate waste, gross mismanagement and breach of good faith and fair dealing were dismissed because, among other reasons, they were extinguished by the merger, and disclosure claims suffered a similar fate because the facts identified either were disclosed or did not have to be and the only available remedy — supplemental disclosure — would now “be an exercise and [sic] futility and frivolity.”⁶⁴

Contract Disputes

- In *CorVel Enterprises Comp, Inc. v. Schaffer*,⁶⁵ Vice Chancellor Noble held that a broad, general release resolving a dispute concerning an earn-out provision contained in a stock purchase agreement encompassed claims relating to a noncompetition agreement executed the same day as part of the same transaction but contained in a separate agreement, where the release spoke of

“any and all claims.” In reaching that conclusion, the Court focused on the specific language of the release, which stated that plaintiff released defendant from, among other things, any “obligations” and any claims arising out of their relationship, “including but not limited to” claims relating to the earn-out dispute. The Court noted that the language “including but not limited to,” by its terms, cannot possibly be limited to the earn-out dispute, and that the defendant’s duties under the noncompetition agreement would clearly qualify as an “obligation” from which he was released. The Court rejected the argument that, even if the release was sufficiently general, it could not function to amend the noncompetition agreement provision because plaintiff had already discharged its duties under that agreement and the only additional consideration given in connection with the release was earmarked exclusively toward the earn-out, finding that “[i]n a global settlement of all past and future claims, the final settlement amount naturally reflects the offsetting values of a number of claims that are foregone on both sides by way of the settlement.” Accordingly, a release need not contain an itemized list of consideration for each claim, and the absence of one does not mean consideration was not given. The Court went on to point out that the issue before it was not whether plaintiff intended to release its rights under the noncompetition agreement, but whether, in light of the language of the release “freely chosen” by the parties, plaintiff — a sophisticated party represented by counsel in connection with the release — in fact did so.

Jurisdiction

- In *Ross Holding and Management Co. v. Advance Realty Group*,⁶⁶ plaintiffs asserted that defendant Rothschild Realty, Inc., a New York corporation whose investment fund had invested in a company in which plaintiffs owned shares, had waived its personal jurisdiction defense by engaging in discovery and participating in a dispute over disqualification of the initial defense counsel. Plaintiffs also asserted personal jurisdiction via Rothschild’s supposed agency relationship with its Delaware affiliates. Vice Chancellor Noble held (a) that Rothschild had not been so actively involved that it waived the personal jurisdiction defense and (b) stating that agency theory permits only the attribution to the principal of specific acts of the agent, not the subsidiary’s status as a Delaware entity, that plaintiffs must, but had failed to, assert that the nonresident agents could have been sued in Delaware subject to the long-arm statute. Finally, the Court considered the open question in Delaware jurisprudence of what constitutes sufficient material participation in the management of a limited liability company to ground personal jurisdiction on the implied consent statute⁶⁷ — a question to which the statute and case law do not offer much guidance, according to the Court — but deferred judgment pending additional discovery.

Forum Selection Clauses

- In *Baker v. Impact Holding, Inc.*,⁶⁸ the Chancery Court held that forum selection clauses mandating exclusive foreign jurisdiction over matters involving the internal affairs of Delaware corporate entities do not violate Delaware public policy as reflected in the State’s LLC Act. Vice Chancellor Parsons also held that a right to a seat on the board of directors is sufficient to constitute a direct benefit to plaintiff such that the forum selection clause contained in a stockholders agreement bound him even though he was not a signatory to it. The Court thus dismissed the action on the basis of improper venue without prejudice to refile in the forum mandated by the clause.

- In *Ashall Homes Ltd. v. ROK Entertainment Group, Inc.*,⁶⁹ Vice Chancellor Strine enforced forum selection provisions in subscription and share sale agreements to dismiss an action he held should rightly be brought only in an English court. The Vice Chancellor held that defendants, successors to the original signatories, had standing to enforce the forum selection clause in the share sale agreement because it was foreseeable that they would invoke that provision and it would be inequitable to preclude them from so doing given that plaintiffs were suing based on acts implicating the agreements. The Court also enforced the subscription agreement clause because, the Court held, its “shall have jurisdiction over any dispute” language was mandatory rather than permissive, disputes arising from the “intertwined” agreements should be heard together to avoid inefficiency and confusion, and it was up to an English court to weigh the public policies involved in drawing the boundary between plaintiffs’ tort and contract claims arising from the same facts.

Appraisal

- Vice Chancellor Strine took a deep-dive into the nitty-gritty of valuation analysis in the *Global GT LP v. Golden Telecom, Inc.*⁷⁰ appraisal action, systematically deconstructing competing analyses of Golden Telecom’s worth, drawing on the experts’ common methodology, borrowing from each and tweaking their assumptions and data to come up with an intermediate valuation for the company, which has been acquired by fellow Russian telecom company, Vimpel-Communications (“VimpelCom”), in a January 2008 tender offer that was followed by a back-end merger the next month. After “extensive expert discovery” and a four-day trial, the Vice Chancellor rejected the valuation reports of the parties’ respective experts, who, the Court found, had less than ideal knowledge of Golden Telecom and even less knowledge of comparable companies or transactions. The Vice Chancellor gave no weight to the merger price of \$105 per share because the Special Committee had not engaged in an active market check, and the passive market check required the implausible assumption that Golden Telecom’s two largest shareholders, who also were the largest shareholders in VimpelCom, would ignore their own economic interest and sell their Golden Telecom stake to another bidder. The Court also rejected the argument that the fairness of the merger price was demonstrated by the fact that only one investor brought an appraisal claim, given that such an approach was without statutory support and amounted to speculation. Vice Chancellor Strine then employed the discounted cash flow method chosen by both sides’ experts and plugged in: (1) the 5 percent terminal growth rate (predicting a company’s cash flow into perpetuity after a base 5-year period) advanced by petitioners, representing the mid-point between the forecasted rates of long-term Russian nominal GDP growth and inflation; (2) the 31.6 percent tax rate espoused by Golden Telecom’s expert and adjusted from Golden Telecom managements’ projections to reflect the company’s higher historical tax rate; (3) petitioners’ estimated equity risk premium of 6.0 percent, based on recent forward-looking supply side research (departing from the traditional historical samples because a “court’s duty is to recognize [a] practice if, in the court’s lay estimate, the practice is the most reliable” and “the relevant professional community has mined additional data and pondered the reliability of past practice and come . . . to believe that [the new] practice should become the norm”); and (4) a beta of 1.29 (modifying Golden Telecom’s proffered value and rejecting petitioners’ value derived from a proprietary model that the expert could not explain and which lacked support in reliable academic or professional literature). The Vice Chancellor’s DCF analysis produced a value of \$125.49 per share, as opposed to the \$139 proposed by petitioners and \$88 by Golden Telecom. The Court then tasked the parties with checking his use of the model and reporting back.

Appeal of Class Action Settlement

- In both a panel decision⁷¹ and subsequent *en banc* decision upon rehearing,⁷² the Supreme Court in *In re National City Corp. Shareholders Litigation* denied as to all objectors the appeal of the Chancery Court's approval of a class action settlement relating to National City Corporation's merger with The PNC Financial Services Group, Inc. In the *en banc* decision, the Court also denied as moot the appeal of one group of objectors after they had dismissed a related federal action, where arguments in their opening briefs had been based on the pendency of the federal action and they attempted to introduce new arguments during and after oral argument in violation of Supreme Court Rule 14.

Endnotes

1. C.A. Consol. No. 5377-VCL, 2010 WL 2291842 (Del. Ch. May 25, 2010).
2. *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604 (Del. Ch. 2005).
3. C.A. Consol. No. 4461-VCP, 2010 WL 1806616 (Del. Ch. May 6, 2010).
4. *In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421 (Del. Ch. 2002).
5. C.A. Consol. No. 5296-VCL (Hrg. Tr. Apr. 22, 2010).
6. C.A. No. 3933-VCN, 2010 WL 2280734 (Del. Ch. May 31, 2010).
7. C.A. No. 5402-VCS, 2010 WL 1931084 (Del. Ch. May 13, 2010).
8. 992 A.2d 377 (Del. 2010), *aff'g in part & rev'g in part, Kurz v. Holbrook*, C.A. No. 5019-VCL, 2010 WL 707425 (Del. Ch. Feb. 9, 2010).
9. C.A. No. 4521-CC, 2010 WL 1782271 (Del. Ch. May 5, 2010).
10. 2001 WL 716787 (Del. Ch. 2001).
11. 2010 WL 2291842, at *7.
12. 672 A.2d 35 (Del. 1996).
13. 2010 WL 2291842, at *10.
14. *Id.* at *11.
15. *Id.*
16. *Id.* (quoting *Pure Res.*, 808 A.2d at 445).
17. *Id.* at *12.
18. 2010 WL 2291842, at *12.
19. *In re CNX Gas Corp. S'holders Litig.*, C.A. Consol. No. 5377-VCL (Del. Ch. July 5, 2010).
20. *Id.* at *17.
21. *Id.* at *19. The Court went on to find plaintiffs' disclosure claims to be without merit.
22. "Subdivision (b)(1) applies to class actions that are necessary to protect the party opposing the class or the members of the class from inconsistent adjudications in separate actions. Subdivision (b)(2) applies to class actions for class-wide injunctive or declaratory relief." 2010 WL 1806616, at *8 (citations and quotations omitted).

23. *Id.* at *9.
24. *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110 (Del. 1994).
25. 2010 WL 1806616, at *11 (quoting *Kahn v. Lynch*, 638 A.2d at 1117).
26. *Pure Res.*, 808 A.2d at 421.
27. 2010 WL 1806616, at *11 (citing *Pure Res.*, 808 A.2d at 445-46).
28. *Id.* (citing *Pure Res.*, 808 A.2d at 445).
29. *Id.*
30. 672 A.2d 35 (Del. 1996).
31. 2010 WL 1806616, at *11.
32. *Id.* at *13.
33. *Id.*
34. The Chancery Court also held that the Appraisal Objectors' fiduciary duty claims relating to the stock repurchase program did not relate to the offer, did not appear to be released by the settlement and could therefore be valued at appraisal. The Federal Objectors, for their part, argued that the settlement should be enjoined because it would extinguish several claims not brought in the Delaware Action, including that the unannounced commencement of the stock repurchase program in 2005 began a creeping tender offer in violation of the securities laws and the SEC's best price rule and that the company should have filed a Schedule 13e-3 in connection with the stock repurchase program. The Court concluded that the federal district court in Georgia would likely not uphold a creeping tender offer claim where the transactions at issue occurred almost four years before formal commencement of the tender offer and no evidence of the three *Wellman v. Dickinson* factors asserted were present in the stock repurchase program and that the Federal Objectors would have a difficult time proving the alleged 13e-3 violation.
35. *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149-50 (Del. 1980).
36. The case also presented *Revlon* issues, which were decided by Vice Chancellor Strine from the bench. The full transcript of the hearing is well worth reading not just for this reason, but (i) as a source of deeper background not readily apparent from the written decision and (ii) for the Vice Chancellor's views on such matters as whether companies should permit investment bankers to do "all the cool stuff" — e.g., negotiating, considering strategic alternatives, etc. only to leave to another firm the work of issuing a fairness opinion on the grounds that they have a theoretical conflict. See C.A. No. 5402-VCS (Hrg. Tr. May 13, 2010), at 39-40.
37. 2010 WL 1931084, at *2.
38. See n. 11 (2010 WL 1931084, at *1) for the Vice Chancellor's views about the dangers posed by such an approach of double-counting the same risks.
39. Finally, the Court held that the proxy statement's technically accurate disclosure that the Special Committee and board had considered the fact that Thoma Bravo did not negotiate the terms of post-merger employment, including any compensation arrangements or equity participation in the surviving corporation, with PLATO management was materially misleading when, in fact, there had been extended discussions of Thoma Bravo's standard equity compensation package, with the suggestion that it could be expected and that top management could expect to be retained. 2010 WL 1931084, at *3.
40. *3Com Corp.*, 2010 WL 2280734, at *1.
41. 2010 WL 1782271, at *4 n.14 ("I also confess that, from a judge's perspective, when a plaintiff does not make the effort to identify the derivative claims in its complaint a tinge of skepticism begins to color the demand futility analysis. A judge will naturally question how thoroughly the plaintiff evaluated demand futility before filing the complaint. As will be seen, this tinge of skepticism is just a tinge; it does not color the demand futility analysis in a cloud of darkness. Nevertheless, it adds a hue that the plaintiff would be better off without.").
42. The case demands a thorough reading for its treatment of the derivative/direct distinction and demand futility issues.

This article is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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43. C.A. No. 20213-VCN, 2010 WL 2171613 (Del. Ch. May 28, 2010).
44. 994 A.2d 354 (Del. Ch. May 12, 2010).
45. See *In re VeriFone Holdings, Inc. Sec. Litig.*, No. 07-06140 MHP (N.D. Cal.); *In re VeriFone Holdings, Inc. S'holder Deriv. Litig.*, No. C07-06347 MHP (N.D. Cal.).
46. 2009 WL 483321, at *3 (Del. Ch. Feb. 26, 2009).
47. C.A. No. 5105-VCL, 2010 WL 2219715 (Del. Ch. June 3, 2010).
48. *Id.* at *6 n.1.
49. 993 A.2d 1042 (Del. 2010).
50. *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970).
51. No. 530, 2009, 2010 WL 2103027 (Del. May 21, 2010).
52. C.A. No. 111-CC, 2010 WL 1641139 (Del. Ch. Apr. 12, 2010).
53. C.A. No. 3414-CC, 2010 WL 2573881 (June 23, 2010).
54. 991 A.2d 1120 (Del. 2010).
55. C.A. No. 5063-VCS, 2010 WL 1463404 (Del. Ch. Apr. 13, 2010).
56. *Id.* at *7 (citing *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 78-79 (Del. 2006)).
57. 906 A.2d 76 (Del. 2006).
58. C.A. No. 5422-CC, 2010 WL 2173839 (Del. Ch. May 21, 2010).
59. C.A. No. 1480-VCP, 2010 WL 1644176 (Del. Ch. Apr. 23, 2010).
60. C.A. No. 4587-CC, 2010 WL 2376890 (Del. Ch. June 7, 2010).
61. C.A. No. 2399-VCN, 2010 WL 1838968 (Del. Ch. May 3, 2010).
62. 430 A.2d 779, 786 (Del. 1981) (affirming authority of board of directors to delegate to committee the power to consider, and possibly dismiss, "derivative litigation that is believed to be detrimental to the corporation's best interest").
63. C.A. No. 2823-VCN, 2010 WL 1713629 (Del. Ch. Apr. 29, 2010).
64. The Court also held that: (a) it did not have personal jurisdiction over MegaPath's President and CEO; (b) certain fiduciary duty claims against certain corporate entities and present and former directors of DSL were not viable; and (c) plaintiff's request for leave to replead should be denied.
65. C.A. No. 4896-VCN, 2010 WL 2091212 (Del. Ch. May 19, 2010).
66. C.A. No. 4113-VCN, 2010 WL 1838608 (Del. Ch. Apr. 28, 2010).
67. 6 Del. C. § 18-109.
68. C.A. No. 4690-VCP, 2010 WL 1931032 (Del. Ch. May 13, 2010).
69. 992 A.2d 1239 (Del. Ch. 2010).
70. 993 A.2d 497 (Del. Ch. 2010).
71. Consol. Nos. 542 & 543, 2009, 2010 WL 1728931 (Del. Apr. 30, 2010).
72. Consol. Nos. 542 & 543, 2009, 2010 WL 2585282 (Del. June 29, 2010).