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Board Enjoined From Impeding Consent Solicitation Until It Approves Insurgent Slate for Purposes of Credit Agreement

In *Kallick v. SandRidge Energy, Inc.*, the Delaware Court of Chancery, in an opinion by Chancellor Strine, enjoined the incumbent board of SandRidge Energy, which faced a consent solicitation initiated by a large stockholder seeking to de-stagger and replace the board, from, among other things, soliciting against or otherwise impeding the consent solicitation until the board approved the rival slate for purposes of a "proxy put" provision in SandRidge's credit agreements. The *Kallick* decision, along with the Court of Chancery's earlier decision in *San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals*, confirm that corporations, as a matter of process, should carefully consider and review whether proxy put and other similar change-of-control provisions in credit agreements and indentures are truly in the best interests of the stockholders. For more detail, click here.

Delaware Court of Chancery Confirms that a Reverse Triangular Merger is Not an Assignment by Operation of Law

In *Meso Scale Diagnostics, LLC v. Roche Diagnostics GMBH.*, the Delaware Court of Chancery, after initially reserving judgment on the issue in prior decisions in this case, confirmed, for the first time, that a reverse triangular merger was not an assignment by operation of law. The decision has particular significance for determining whether anti-assignment provisions in contracts governed by Delaware law have been triggered. For more detail, click here.

Delaware Court of Chancery Holds that "Don't Ask, Don't Waive" Provisions Are Permissible Under Certain Circumstances

In *In re Ancestry.com*, a December 17, 2012 bench ruling, the Delaware Court of Chancery again addressed "Don't Ask, Don't Waive" standstill provisions, holding that there is no per se rule prohibiting such provisions. For more detail, click here.

Delaware Court of Chancery Dismisses Shareholder Complaint for Failure to Allege Conflicts of Interest Among Board, Bidders

The Court of Chancery in *In re BJ's Wholesale Club, Inc.* dismissed all of the stockholder plaintiffs' claims, which fell across a broad spectrum of claims that are typically brought to challenge board conduct in mergers. The decision reaffirmed that boards are entitled to rely on their advisors and to favor certain bidders over others, if done in good faith, and that pressure tactics by a large stockholder or buyer will be considered permissible hard bargaining unless the plaintiffs can show the actions were purposely designed to induce a breach of fiduciary duty. For more detail, click here.

Delaware Court of Chancery Finds Claims Relating to Poison Pill As Deal Protection Device Not Colorable

In *In re Bioclinica*, the Court of Chancery found that the combination of a rights plan ("poison pill") and standstill provisions in non-disclosure agreements did not operate to preclude potential topping bids. In ruling that the claims were not even colorable, the court has all but dismissed the case. For more detail, click here.

Other Notable Developments

The Delaware Court of Chancery recently issued a series of rulings, relating to disclosure-based settlements and disclosure-focused suits, favorable to defendants through the Court's reduction of plaintiff attorney fee awards and denial of plaintiffs' requests for expedition of suits challenging company disclosures. *See e.g., In re Interclick, Inc. S'holders Litig.*, C.A. 7038-VCG (Del. Ch.) (bench ruling awarding $250,000 in attorneys' fees, although defendants agreed not to oppose up to $500,000 in fees, for a disclosure only settlement); *In re Transatlantic Holdings Inc. S'holders Litig.*, C.A. 6574-CS, ID 50003454 (Del. Ch. Feb. 28, 2013) (bench ruling rejecting a disclosure only settlement where the named plaintiffs had no personal interest or meaningful participation in the litigation and the additional disclosures were not meaningful); *Corwin v. MAP Pharmaceuticals Inc.*, C.A. 8267-CS, ID 49646405 (Del. Ch. Feb. 20, 2013) (order denying a motion to expedite where more disclosure about the banker's work and the process would not meaningfully alter the total mix of information and the plaintiff essentially admitted that the target's board fulfilled its Revlon duties).

We also note the additional decisions of interest:

In re Novell, Inc. S'holder Litig., Consol. C.A. No. 6032-VCN (Del. Ch. Jan. 3, 2013) (The Court declined to dismiss fiduciary duty claims against a board based upon allegations that, among other things, the board acted in bad faith by treating a serious bidder materially different than the ultimate acquirer). For the decision, click here.

In re PAETEC Holding Corp. S'holders Litig., 2013 WL 1110811 (Del. Ch. Mar. 19,2013) (The Court held that supplemental disclosure that the buyer's financial advisor formerly represented the target in a different transaction and that the same individuals working at the buyer's advisor previously had access to the target's nonpublic information "mere months" before the merger was material and that other disclosures such as how the target's financial advisors valued the

target's NOLs, how a accretion/dilution analysis could change depending on the realization of anticipated mergers, and why the target hired three financial advisors were of "marginal utility.") For the decision, click here.

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M&A Markets

During the last quarter, we published the following issues of our monthly M&A at a Glance as well as a 2012 Year-End Roundup. We include the summary findings of each of these publications below. To access the full publication, please click on the publication title.

2012 Year-End Roundup

This publication looks back at the M&A market over the last three years and found that deal volume was surprisingly consistent across multiple sectors. The volume of sponsor-related transactions outside of the United States was an exception, spiking in 2011 before dipping below 2010 levels in 2012. We surmise that this may be due to the dependence of sponsor transactions on credit and the volatility in global credit markets over the last few years.

The Oil & Gas, Healthcare, and Computers & Electronics sectors were consistently leaders in deal volume, although the Real Estate/Property sector saw significant gains since 2010.

Over the past three years, crossborder transactions inbound to and outbound from the United States have consistently shown the greatest volume and number of deals with countries that have similar cultures and legal systems to the United States (e.g., the U.K. and Canada). However, Brazil remains a top target for U.S. investors, as it appears to be very receptive to foreign investment.

U.S. public mergers saw a small but steady increase in all cash transactions (with a concomitant decrease in the number of all stock deals). We note a large decline from 2011 to 2012 in hostile and unsolicited offers as a percentage of U.S. public mergers, although we surmise that this is not necessarily indicative of a decrease in shareholder activism, but rather due to activists advocating M&A transactions at their targets but not undertaking hostile M&A activity themselves. We would expect that such activism will continue to increase in 2013.

In 2011 and 2012, the percentage of mergers involving financial buyers that had go-shops stabilized around one-third, lower than the 48.8% of 2010. The high percentage in 2010 is likely a product of uncertain economic conditions, but the fact that one-third of U.S. public company mergers with a financial sponsor over the last two years involve a go-shop is an indicator that many financial sponsors successfully resist having their deals shopped prior to announcement and that board of directors are comfortable using go-shop provisions in carrying out their *Revlon* duties.

January 2013 Issue

December 2012 saw large gains in global strategic transaction volume from November 2012, underpinning a strong month for global M&A activity. While the volume of U.S. sponsor-related transactions decreased, there was a sharp increase in

the number of deals, perhaps driven in part by an increase in tax-driven transactions. The volume of announced U.S. public mergers increased significantly since September, especially in the largest deals, which considerably increased in size. December also saw a substantial decrease in tender offers, as a percentage of all U.S. public mergers.

February 2013 Issue

Following the significant increase in M&A activity that we observed in December 2012, it was not surprising to see a decline in the level of activity in January. The extent of the drop, however, was larger than expected with global transactions declining over 50% and the number of deals declining over 10%. U.S. deals had mixed results, seeing a volume decline of under 40% and a small increase in the number of deals. These trends were consistent across both strategic and sponsor-related transactions. U.S. public mergers announced in January continued the upward trend of all cash transactions, which represented 80% in the month.

March 2013 Issue

The long awaited mega deal made a spectacular return in February 2013, with statistics showing a sharp rise in average deal size and total volume globally and in the U.S. These increases were accompanied by a marked decline in the number of deals, with the number of U.S. deals down by more than 50%. The acquisitions of H.J. Heinz Company ($23.25 billion), Dell Inc. ($20.39 billion), Virgin Media Inc. ($12.85 billion) and US Airways Group, Inc. ($11.00 billion), all announced in February, were the four largest U.S. public mergers of the last twelve months. Prior to February, the last leveraged buyout over $20 billion was announced in May 2007 (ALLTEL Corporation at $24.70 billion), and the last strategic deal over $20 billion was announced in July 2011 (Medco Health Solutions, Inc. at $28.53 billion).

Although average deal value increased, average break fees and reverse break fees as a percentage of equity value both decreased in February, once again evidencing what we have observed to be an inverse relationship between deal size and the size of break fees as a percentage of deal value. February 2013 also broke the upward trend in cash only U.S. deals, declining to 50% of deals from 80% in January 2013 and 75% in December 2012.

We also examined in this issue the top 5 countries of origin or destination for U.S. crossborder transactions. Despite the attention given to BRICs in recent years, Brazil was the only country out of that category to break into the top five for crossborder M&A activity with the U.S. during the past twelve months and only as a country of destination for investment by U.S. companies. Canada and the U.K. were the only countries that appeared in the top five of both origin and destination for crossborder M&A activity in the past 12 months.

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