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Delaware Chancery Again Upholds "Sign and Consent" Structure under *Omnicare* and Board Action under *Revlon*

In the recent *In re OPENLANE* decision, the Delaware Chancery Court again confirmed the use of the "sign and consent" method to address restrictions against a fully locked-up merger transaction set forth in the Delaware Supreme Court's 2003 *Omnicare v. NCS Healthcare* decision. Further, the Court upheld under *Revlon* the board's decision to enter into a transaction notwithstanding a targeted sale process focusing on only three strategic companies, due in large part to its finding that the board had "impeccable knowledge" of the company's business. This opinion can be seen to stand for the continued deference that a Delaware court will show to boards where their decisions are accompanied by evidence of considered action.

OPENLANE is an automotive remarketer that derives 90% of its revenue from reselling formerly leased vehicles. Its board included the CEO and affiliates of two private equity investors in the company. Together the directors (or their affiliated shareholders) owned approximately 60% of OPENLANE's outstanding capital stock. In April 2010, the board saw a future decline in the business due to a decrease in the number of available vehicles for resale and engaged a financial advisor to assist it in conducting a sale of the company. Although the financial advisor initially identified multiple possible strategic and financial buyers, the board decided to engage in a market check limited to strategic acquirers and which ultimately focused on only three candidates. During this process, the financial advisor provided the board with data as to the value of the company, but never provided a formal fairness opinion. After some back and forth, KAR Auction Services (acting through its subsidiary ADESA) emerged as the winner. The merger agreement followed the "sign and consent" model, which included no explicit shareholder agreement to vote for the deal, but which included an obligation for OPENLANE to use its reasonable best efforts to obtain shareholder approval of the transaction as soon as reasonably practicable and the right of each of OPENLANE and KAR to terminate the deal if such approval was not delivered by midnight on the next business day after signing. OPENLANE also agreed to a non-solicitation provision without a fiduciary out. Shareholder consent to the transaction was received the day after signing.

In upholding the transaction under *Omnicare*, the Court noted that unlike the transaction in the earlier decision, the OPENLANE transaction was not a *fait accompli* as there was no voting agreement that bound the shareholders to approve the deal. That approval was a "virtual certainty" given the board's (and their affiliates') ownership of 60% of the outstanding stock did not affect the Court's holding. Further, although the Court recognized that *Omnicare* may be read to require a fiduciary out in every merger agreement, the Court noted that it does not automatically follow that every merger agreement without a fiduciary out should be enjoined, especially when no superior offer has emerged. To do so would risk the possibility that the deal at hand would disappear, thereby denying shareholders of the benefit of any deal. The Court also stated that the lack of a fiduciary out was of "little moment" because the board had the ability to terminate the deal if shareholder approval was not received a day later. *OPENLANE* is at least the second decision under Delaware to uphold the "sign and consent" model (the first being *Optima v. WCI Steel)* and follows other decisions that have weakened or otherwise questioned the vitality of *Omnicare*.

Separately, the Court also found that the board's actions in approving the merger transaction satisfied *Revlon*'s requirement to "secure the best value reasonably attainable" for OPENLANE shareholders, notwithstanding the fact that the board choose a narrow sale process focusing on three strategic buyers and no financial buyers. The Court reiterated that *Revlon* did not specify a single path to value maximization, but only that the path taken be reasonable. While the board's sale process was not a "model to be followed", the Court nevertheless found that the path taken was sufficient because, among other things, the board had conducted a targeted market check over the course of a year, it had received data on the company's value from its financial advisor and the company faced a potential decline in its business. Most importantly, the Court found that the board had "impeccable knowledge" of OPENLANE's business, which is necessary to satisfy *Revlon* where the board chooses not to employ traditional value maximization tools, such as an auction, a broad market check or a go-shop. Among other things, the Court noted that OPENLANE's board was more involved in the business than the typical board (and indeed that the corporation appeared to be "'managed by' as opposed to 'under the direction of' its board"). That the directors either had invested in or were affiliated with investors in the company made them particularly knowledgeable both as to the value of the company and as to its appeal (or rather lack of appeal) to financial buyers. The fact that "the [b]oard had more to lose or gain from a change of control transaction than any other OPENLANE shareholder, suggests that the [b]oard would be motivated to get the best price reasonably available for OPENLANE's shareholders."

For a copy of the opinion, see http://www.paulweiss.com/files/upload/26Sep11Opinion.pdf.

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