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Delaware Supreme Court Affirms Decision Permitting Merger Termination Based on Failure to Satisfy Tax Opinion Covenant

In a 4-1 split decision in *The Williams Cos., Inc. v. Energy Transfer Equity, L.P., et al.*, the Delaware Supreme Court affirmed the Court of Chancery's decision permitting termination of a merger agreement by the acquirer based on the failure of the acquirer to obtain a tax opinion from its counsel, the receipt of which was a condition precedent to the closing of the merger. The Delaware Supreme Court held that even though the Court of Chancery did not properly analyze whether the acquirer met its covenants to use "commercially reasonable efforts" to obtain the tax opinion and "reasonable best efforts" to consummate the transaction, the acquirer had met its burden of proving that any alleged breach did not materially contribute to the failure to obtain the tax opinion. In his dissent, Chief Justice Strine argued that the evidence suggested that the acquirer failed to fulfill its covenant to use commercially reasonable efforts to obtain the tax opinion. For more, click [here](#).

Delaware Supreme Court Affirms Appointment of Custodian to Sell Solvent Corporation and Order of Sanctions

In a 4-1 split decision in *Shawe v. Elting*, a majority of the Delaware Supreme Court affirmed the Court of Chancery's decision to appoint a custodian to sell TransPerfect Global, Inc., a solvent corporation, in the midst of a deadlock between its co-owners, who were the directors of the corporation, and over the objections of stockholders owning a 50% interest in the corporation. For the decision, click [here](#).

In a related opinion issued the same day, the Delaware Supreme Court also affirmed the Court of Chancery's decision to order one of the co-owners of TransPerfect, Philip Shawe, to pay certain fees of another co-owner, Elizabeth Elting. Following an evidentiary hearing, the Court of Chancery found that Shawe had deleted documents from his computer, recklessly failed to safeguard his cell phone, improperly gained access to Elting's emails, and lied multiple times under oath, and concluded that Shawe's conduct caused delays, confusion, and even led the court to make false factual findings. The Court of Chancery ordered Shawe to pay one-third of Elting's legal fees to defend the case on the merits and all of her fees to prosecute the award of sanctions. The Delaware Supreme Court affirmed, noting that the Court of Chancery has broad discretion in fixing the amount of attorneys' fees to be awarded, and absent a

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clear abuse of discretion, the Supreme Court will not reverse. For the Delaware Supreme Court decision, click [here](#).¹

Delaware Court of Chancery Enjoins Buyer Stockholder Vote on Dilutive Issuance until Banker Financing Fees Disclosed

In *Vento v. Curry*, the Delaware Court of Chancery granted the plaintiff stockholder's motion to preliminarily enjoin a NASDAQ-mandated buy-side stockholder vote on a 20% dilutive issuance done in connection with a stock-for-stock merger until the buyer disclosed the exact amount of financing fees paid to its banker. Without discussion, the court suggested that the standard for the buy-side board's duty of disclosure to stockholders in connection with the stock exchange mandated vote is the same standard as a sell-side board's duty of disclosure in connection with a vote of target stockholders on a merger required by Delaware law. For the decision, click [here](#).

Delaware Court of Chancery Dismisses Complaint Seeking Quasi-Appraisal Remedy Based on Post-Closing Disclosure Claims

In *In re United Capital Corp. Stockholders Litigation*, the Delaware Court of Chancery granted the defendants' motion to dismiss a complaint filed by a former minority stockholder of United Capital Corporation seeking "quasi-appraisal" as a remedy in connection with the 2015 short-form merger under Section 253 of the Delaware General Corporation Law between United Capital and its controlling stockholder. The plaintiff alleged that the notice sent to stockholders in connection with the merger made various omissions, none of which the court found material to the minority stockholders' decision of whether to seek appraisal in connection with the merger. Therefore, the court held that the only remedy available to minority stockholders was appraisal. For more, click [here](#).

Delaware Courts Continue to Define Boundaries of *Corwin* Doctrine

This quarter saw several Delaware decisions applying Delaware's *Corwin* doctrine (i.e., that a fully informed and uncoerced stockholder vote invokes the business judgement standard of review in the merger context). For more on *Corwin*, click [here](#).

In a one-sentence order, the Delaware Supreme Court affirmed the Court of Chancery's decision in *In re Volcano Corporation Stockholder Litigation* that extended *Corwin* to two-step mergers under Section 251(h) of the Delaware General Corporation Law. Following the Supreme Court's affirmance in *Volcano*, it is now settled that the acceptance of a first-step tender offer by fully informed, disinterested, uncoerced stockholders representing a majority of a corporation's outstanding shares in a Section 251(h) merger has the same cleansing effect as a fully informed, uncoerced vote of a majority of the disinterested stockholders of a target corporation in a merger. Upon receipt of the required tendered shares, the business judgment rule will apply and stockholders can only challenge the merger if it constitutes waste. For the Supreme Court's decision in *Volcano*, click [here](#). For a discussion of the Court of Chancery's decision in *Volcano*, click [here](#).

Similarly, in *In re Solera Holdings, Inc. Stockholder Litigation*, the Delaware Court of Chancery again applied *Corwin* to dismiss stockholder claims challenging a change-in-control merger, holding that the business judgment rule applied to the board's decision to enter into the merger that was approved by a fully-informed, uncoerced stockholder vote. For the decision, click [here](#).

¹ Paul, Weiss represents defendant/appellee Elizabeth Elting in connection with the matters before the Delaware Court of Chancery and Delaware Supreme Court in *Shawe v. Elting*.

Notwithstanding the foregoing, however, in *In re Saba Software, Inc. Stockholder Litigation*, the Delaware Court of Chancery held that the target stockholder vote approving an all-cash merger with a third party buyer was coerced and not fully informed, and therefore did not “cleanse” the transaction and invoke the application of the business judgment rule to the merger pursuant to *Corwin*. *Saba*, though decided on unique facts, demonstrates the limits of the *Corwin* doctrine following a line of recent decisions where the court applied *Corwin* to dismiss stockholder challenges to third party mergers. For more, click [here](#).

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M&A Markets

The following issues of M&A at a Glance, our monthly newsletter on trends in the M&A marketplace and the structural and legal issues that arise in M&A transactions, were published this quarter. Each issue can be accessed by clicking on the date of each publication below.

- [January 2017](#)
- [February 2017](#)
- [March 2017](#)

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:



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