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Delaware Supreme Court Continues to Urge Reliance on Deal Price in Appraisal Actions

This quarter, the Delaware Supreme Court issued a milestone appraisal decision, continuing the trend to urge reliance on deal price in appraisal actions, especially where the appraised company is public. In *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*, the Delaware Supreme Court, sitting *en banc*, in an opinion by Justice Valihura, reversed in part the Court of Chancery's determination of fair value of Dell, Inc., which was based entirely on the lower court's own discounted cash flow analysis. The Supreme Court held that, based upon the factual record, the Court of Chancery erred in affording no weight to the deal price in determining fair value. On remand and in line with other recent Delaware precedent, the Supreme Court urged the Court of Chancery to rely on deal price in determining fair value. For more, click [here](#).

Delaware Court of Chancery Applies MFW to Dismiss Challenge to Reclassification

In line with its opinion in the third quarter of 2017 in *In re Martha Stewart Living Omnimedia, Inc. Stockholder Litigation* (discussed [here](#)), the Delaware Court of Chancery (in an opinion by Chancellor Bouchard) clarified in *IRA Trust FBO Bobbie Ahmed v. Crane* that the framework to invoke business judgment review in controlling stockholder squeeze-out mergers (set forth in *Kahn v. M&F Worldwide, Corp.* ("MFW")) applies generally to any conflicted controller transaction. In this particular case, the court concluded that application of the MFW framework restored business judgment review to an arguably pro rata share reclassification by NRG Yield, Inc., which the court found was nevertheless conflicted because the transaction created a class of stock for the company to use for capital raises, while preserving the control position of NRG Energy, Inc. For more, click [here](#).

Delaware Court of Chancery Specifically Enforces Oral Settlement Agreement with Activist Investor

In *Sarissa Capital Domestic Fund LP v. Innoviva, Inc.*, the Delaware Court of Chancery (in an opinion by Vice Chancellor Slights) specifically enforced a disputed oral settlement agreement in a proxy contest between Innoviva, Inc. and Sarissa Capital Management resulting in two dissident directors being seated on the Innoviva board. The court held that the principals of Innoviva and Sarissa had entered into a valid, binding (albeit oral) agreement that required, among other things, Sarissa to cease its proxy solicitation in exchange for two seats on the Innoviva board. Due in part to what the court referred to as Innoviva's "opportunistic maneuvers" of reneging on the agreement only after it became clear that it would win the proxy contest despite early predictions of a

loss, the court used its equitable powers to award Sarissa specific performance of the settlement agreement. For more, click [here](#).

Delaware Supreme Court Holds Ratification Defense Inapplicable to Certain Discretionary Incentive Plan Awards

The Delaware Supreme Court (in an opinion by Justice Seitz) also reversed the Court of Chancery this quarter in *In re Investors Bancorp, Inc. Stockholder Litigation*, holding that stockholder ratification of an equity incentive plan that affords directors discretion cannot be used to foreclose the Court of Chancery from reviewing further discretionary actions by the directors when there is a properly alleged breach of fiduciary duty claim challenging those actions. Under the Supreme Court's holding, the Investors Bancorp stockholder vote approving the equity incentive plan did not serve to ratify the directors' discretionary awards to themselves under the plan, and the board must therefore show the fairness of these awards because of the unavailability of the deferential business judgment rule. For more, click [here](#).

Delaware Court of Chancery Dismisses Fiduciary Duty Claims Despite Inapplicability of *Corwin*

In *van der Fluit v. Yates*, the Delaware Court of Chancery (in an opinion by Vice Chancellor Montgomery-Reeves) dismissed fiduciary duty claims brought against the board of Opower, Inc. in connection with the company's acquisition by Oracle Corporation, even though the court concluded that the defendants were not entitled to the irrebuttable presumptions of the business judgment rule under *Corwin* due to the shareholder tender offer not being fully informed. Applying the familiar *Revlon* standard post-closing, the court concluded that the board nevertheless acted reasonably and did not commit a nonexculpated breach of fiduciary duty in connection with the transaction, despite, among other things, allegations that the two-week market check was rushed. For more, click [here](#).

Delaware Opinion Demonstrates Complexity of Negotiating Transaction Tax Deduction Provisions

In *LSVC Holdings, LLC v. Vestcom Parent Holdings, Inc.*, the Delaware Court of Chancery (in an opinion by Vice Chancellor Montgomery-Reeves) held that in connection with the sale of Vestcom International, Inc., the target company was entitled to claim all of its transaction tax deductions ("TTDs") on its estimated tax returns filed pre-closing, despite arguments by the acquirer that the parties had agreed that the acquirer would be entitled to half of the value of the TTDs, regardless of how or when realized. The court concluded that based on extrinsic evidence presented at trial, including the parties' negotiation history and the interplay of the TTD and working capital purchase price adjustment provisions of the stock purchase agreement, the acquirer was only entitled to half of the value of any *post-closing* refunds or reductions attributable to TTDs. The opinion demonstrates the complexity involved in negotiating TTD provisions and serves as a general reminder of the potential high-value impact of pre- and post-closing tax and purchase price adjustment provisions and their interaction. For the decision, 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.

➤ [October 2017](#)

➤ [November 2017](#)

➤ [December 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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