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## Delaware M&A Quarterly

### In This Issue:

Delaware Court of Chancery Enforces Unambiguous Terms of Advance Notice Bylaw [read more](#)

Court of Chancery Holds That Company's Pandemic Response Did Not Cause it to Breach Ordinary Course Covenant Nor Cause an MAE [read more](#)

Court of Chancery Holds That Stockholders Agreement Did Not Waive Right to Bring Fiduciary Duty Claims [read more](#)

Court of Chancery Includes Amount for Post-Signing Value Increase in Appraisal Award [read more](#)

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[Our M&A Practice](#)  
[Other Practices](#)  
[Professionals](#)  
[About the Firm](#)

### Delaware Court of Chancery Enforces Unambiguous Terms of Advance Notice Bylaw

In [Strategic Investment Opportunities LLC v. Lee Enterprises, Inc.](#), the Delaware Court of Chancery upheld a board's rejection of a stockholder nomination notice due to noncompliance with the unambiguous terms of the corporation's advance notice bylaw – namely, that the notice must be submitted by a record holder and that information regarding the nominees must be submitted on a form provided by the company. This recent opinion by Vice Chancellor Will, viewed alongside [Rosenbaum v. CytoDyn, Inc.](#) (another recent decision upholding the rejection of stockholder nominees due to deficiencies in the stockholder notice required by a company's advance notice bylaws and discussed [here](#)), demonstrates the Delaware courts' continued enforcement of advance notice bylaws that are adopted on a "clear day" and where there is no evidence of manipulation or other inequitable conduct by the board. For more, click [here](#).

### Court of Chancery Holds That Company's Pandemic Response Did Not Cause it to Breach Ordinary Course Covenant Nor Cause an MAE

In [Level 4 Yoga, LLC v. CorePower Yoga, LLC](#), the Delaware Court of Chancery ordered CorePower to close on its agreement, entered into pre-pandemic, to acquire yoga studios owned by its franchisee, Level 4 Yoga. Under the terms of the parties' franchise agreement, CorePower had the right to buy Level 4's studios. Level 4, which was initially an unwilling seller, bargained for a "one-way" purchase agreement that did not contain any closing conditions or termination rights. Level 4 made representations that it was operating its business in the ordinary course and also that it had not suffered an MAE, and that these representations would remain true between signing and closing. Between signing and closing, in response to the pandemic, CorePower ordered Level 4 to close its studios. CorePower then told Level 4 that it was not operating in the ordinary course of business due to the closing of its studios and refused to close on the purchase. The court disagreed and ordered CorePower to close the transaction. Level 4 had not failed to operate its business in the ordinary course by closing the studios, as it had acted at CorePower's direction, which Level 4 was required to do as franchisee. Level 4 also had not suffered an MAE because the relevant time for determining whether there was an MAE was when CorePower determined not to close on the purchase, and at that time there was no basis to conclude that the business effects of the pandemic would be anything other than a short-term "hiccup."

## **Court of Chancery Holds Stockholders Agreement Did Not Waive Right to Bring Fiduciary Duty Claims**

In [Manti Holdings, LLC v. The Carlyle Group Inc.](#), the Delaware Court of Chancery denied a motion to dismiss breach of fiduciary duty claims brought in connection with the sale of Authentix Acquisition Company, Inc. The defendants moved to dismiss by arguing the plaintiffs had waived their claims in a stockholders agreement that required them to “consent and raise no objections to [the] transaction” if it was approved by “holders of at least fifty percent (50%) of the then-outstanding shares.” The court, in an opinion by Vice Chancellor Glasscock, disagreed, however, and held that such language was not a clear and unambiguous waiver of the right to seek redress against corporate directors and controllers for breach of fiduciary duty because, in context, the full provision more directly spoke to covenants not to exercise appraisal rights and to execute any required auxiliary documents to the deal. The court also stated specifically that it was not deciding whether a clear and unambiguous waiver of claims of breach of fiduciary duty would be enforceable as a matter of public policy.

## **Court of Chancery Includes Amount For Post-Signing Value Increase in Appraisal Award**

In a recent appraisal opinion in [BCIM Strategic Value Master Fund, LP v. HFF, Inc.](#), the Court of Chancery awarded the petitioner additional consideration based on the increased value of the target that arose between signing and closing of the transaction. The case involved Jones Lang LaSalle’s \$1.8 billion acquisition of HFF Inc. In the months between signing and closing, the per-share value of the mixed cash and stock deal consideration declined from \$49.16 to \$45.87. In determining the fair value of HFF in the appraisal action, the court concluded that although the sale process had “flaws,” it had been effective. Therefore, the court held that the deal price was reliable evidence of fair value at the time of signing. After deducting \$4.87 from the deal price to account for synergies, the court reached an implied valuation of the company at signing of \$44.29. Delaware’s appraisal statute requires the court to value the company at closing, however. Relying on expert testimony involving a regression analysis of prior instances in which the company had outperformed earnings guidance, the court determined that there was a 5.2% increase in the value of the company’s stock as a result of improved performance, resulting in a price of \$46.59 per share. This price was below the deal value determined at signing, but more than the deal consideration as of closing.

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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 2022](#)

[February 2022](#)

[March 2022](#)

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