

[原著論文：査読付]

## M&A Litigation in Delaware Courts from January to June 2017.

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### Abstract

This paper presents an overview of some of the most important decisions handed down by the Delaware Supreme Court and the Delaware Court of Chancery from January 2017 to June 2017 in lawsuits arising out of Merger and Acquisition (M&A) transactions.

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## I. Introduction:

In spite of the recent decline in disclosure-only suits arising out of M&A transactions brought in Delaware Courts,<sup>1</sup> the Delaware Court of Chancery and the Delaware Supreme Court continue to be among the leading courts in the United States in matters relating to corporate law.<sup>2</sup> In keeping with their expertise and primacy in corporate matters, the Delaware Courts handed down numerous decisions relating to mergers and acquisitions in the United States in 2017. This paper sets out briefly some of the more important opinions handed down by the Delaware Courts in M&A lawsuits in the first six months of 2017.

## II. Important rulings of the Delaware Court of Chancery and the Delaware Supreme Court in cases relating to Mergers and Acquisitions:

### 1. *In re United Capital Corp. Stockholders Litigation*:<sup>3</sup>

The plaintiff was a minority stockholder of United Capital Corporation which merged with its controlling stockholder on September 30, 2015. The plaintiff sought a “quasi-appraisal”<sup>4</sup> in respect of this short-form merger,<sup>5</sup> alleging breaches of the duty of disclosure on the part of the defendants. The

<sup>1</sup> See, Matthew D. Cain, Jill Fisch, Steven Davidoff Solomon, and Randall S. Thomas, *The Shifting Tides of Merger Litigation*, 71:2 VANDERBILT LAW REVIEW, 603.(2018). There was a concomitant surge in federal class action securities cases in the first half of 2017. See: *Securities Class Action Filings, 2017 Midyear Assessment*, Cornerstone Research. Available at: <https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2017-Midyear-Assessment>.

<sup>2</sup> Delaware’s primacy stems largely from the fact that over 50% of publicly traded companies, including two-thirds of Fortune 500 companies are incorporated there. However, according to the 2017 Lawsuit Climate Survey, Delaware’s rank declined to No.11 from the No.1 spot that it had continuously held from 2002 to 2016. See: *2017 Lawsuit Climate Survey: Ranking the States*, U.S. Chamber Institute for Legal Reform. Available at: <https://www.instituteforlegalreform.com/research/2017-lawsuit-climate-survey-ranking-the-states>.

<sup>3</sup> *In re United Capital Corp. Stockholders Litigation*. Consolidated C.A.No.11619-VCMR. Decided by the Court of Chancery of the State of Delaware on January 4, 2017. Available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=250980>

<sup>4</sup> “Quasi-appraisal” is a remedy that is sought on the grounds of breaches of the duty of disclosure. Unlike in a conventional appraisal action, the plaintiff is not required to oppose the merger, and also not required to refuse the merger consideration. Quasi-appraisal is an equitable remedy that was first recognized in Delaware in the case of *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del.1983).

<sup>5</sup> A short-form merger is provided for in § 253 of the Delaware General Corporation Law. In the relevant part, § 253 provides:

§ 253 Merger of parent corporation and subsidiary corporation or corporations.

In any case in which (1) at least 90% of the outstanding shares of each class of the stock of a corporation or corporations (other than a corporation which has in its certificate of incorporation the provision required by § 251(g)(7)(i) of this title), of which class there are outstanding shares that, absent this subsection, would be entitled to vote on such merger, is owned by a corporation of this State or a foreign corporation, and (2) 1 or more of such corporations is a corporation of this State, unless the laws of the jurisdiction or jurisdictions under which the foreign corporation or corporations are organized prohibit such merger, the parent corporation may either merge the subsidiary corporation or corporations into itself and

alleged non-disclosure related to the following: (i) the information that constituted the basis for the per share merger price; (ii) the controlling stockholder's rationale for his initial offer; (iii) various financial information; (iv) cash as working capital; (v) potential conflicts of interest; and (vi) the identities of some directors and their spouses.<sup>6</sup> The defendants filed a motion to dismiss, asserting that all material information had been adequately disclosed and that whatever remained undisclosed was not relevant to the issue of whether the plaintiffs should seek appraisal. In considering the defendants' motion to dismiss, the Court relied on an opinion of the Delaware Supreme Court to the effect that in the context of §253 short-form mergers, the parent corporation was not required to show "entire fairness" and that in the absence of fraud or illegality, the minority stockholder's remedy was to seek appraisal.<sup>7</sup> The Court noted that the eighty-page notice of merger in the present case contained exhaustive business and financial information about the company that the omissions alleged by the plaintiff were not material, and that the plaintiff had sufficient information to decide whether to seek appraisal. On that footing, the Court granted the defendants' motion to dismiss, while stating that the plaintiff's only remedy was to seek appraisal.

## 2. *In Re Solera Holdings, Inc. Stockholder Litigation*:<sup>8</sup>

The plaintiff was a former stockholder of the Defendant Company, i.e., Solera Holdings, Inc. The plaintiff alleged breach of fiduciary duty on the part of Solera's board of directors relating to the acquisition of Solera Holdings, Inc. by a private equity firm. Seven out of eight members of the board were outside directors and there was no controlling stockholder involved in the sale. The plaintiff sought post-closing damages for the alleged breach, contending that the transaction was subject to enhanced scrutiny

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assume all of its obligations, or merge itself, or itself and 1 or more of such other subsidiary corporations, into 1 of the subsidiary corporations by executing, acknowledging and filing, in accordance with § 103 of this title, a certificate of such ownership and merger setting forth a copy of the resolution of its board of directors to so merge and the date of the adoption; provided, however, that in case the parent corporation shall not own all the outstanding stock of all the subsidiary corporations, parties to a merger as aforesaid, the resolution of the board of directors of the parent corporation shall state the terms and conditions of the merger, including the securities, cash, property, or rights to be issued, paid, delivered or granted by the surviving corporation upon surrender of each share of the subsidiary corporation or corporations not owned by the parent corporation, or the cancellation of some or all such shares. Any of the terms of the resolution of the board of directors to so merge may be made dependent upon facts ascertainable outside of such resolution, provided that the manner in which such facts shall operate upon the terms of the resolution is clearly and expressly set forth in the resolution. The term "facts" as used in the preceding sentence, includes, but is not limited to, the occurrence of any event, including a determination or action by any person or body, determination or action by any person or body, including the corporation....

<sup>6</sup> *Supra* note 3. The grounds are adumbrated at internal page 10 of the opinion.

<sup>7</sup> The Court relied upon the opinion of the Delaware Supreme Court in *Glassman v. Unocal Expl. Corp.*, 777 A.2d 242, 243 (Del.2001) (at internal page 6 of the opinion.)

<sup>8</sup> *In Re Solera Holdings, Inc. Stockholder Litigation*. Consolidated C.A.No. 11524-CB. Decided by the Court of Chancery of the Court of Delaware on January 5, 2017. Available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=251000>.

under the *Revlon* standard.<sup>9</sup> The defendants filed a motion for dismissal of the complaint. Invoking the doctrine set out in *Corwin v. KKR Financial Holdings LLC*,<sup>10</sup> the Court granted defendants' motion and dismissed the complaint, on the footing that the decision of the board of directors to approve the sale transaction was to be evaluated in light of the business judgment rule<sup>11</sup> since a disinterested majority of the Solera's shareholders had voted, fully-informed and uncoerced, in favor of the transaction.

### 3. *Dieckman v. Regency*:<sup>12</sup>

The case involved the merger of a publicly-traded master limited partnership (MLP)<sup>13</sup> firm and another limited partnership that was affiliated to one of the MLP's general partners, creating a conflict of interest. The partnership agreement embodied two safe harbor provisions for conflict resolution. One provision postulated "special approval" by an independent Conflicts Committee and another provided for "unaffiliated unitholder approval." Under the partnership agreement, if either of the two safe harbor provisions was satisfied, the merger transaction would be effective.

The plaintiff was a limited partner of the MLP. Plaintiff filed suit seeking judicial review of the merger transaction. In the complaint, plaintiff alleged that the general partner had not satisfied either of the two safe harbor provisions. According to the complaint, one member of the Conflicts Committee constituted by the MLP was not truly independent as required by the partnership agreement. The complaint further alleged that the "unaffiliated unitholder approval" ostensibly obtained by the board was tainted as it was secured on the basis of false and misleading statements in the proxy statement. The defendant moved to

<sup>9</sup> See: *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). According to the *Revlon* doctrine, when the sale of a company or its control is at issue, the board's fiduciary duty is to serve the immediate interests of the stockholders by securing the highest possible price for the shares. If challenged in court, the board's performance is evaluated by a stringent "enhanced scrutiny" standard rather than the deferential "business judgment" standard.

<sup>10</sup> *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015). The Supreme Court of Delaware upheld the decision of the Delaware Court of Chancery that the business judgment rule was "the appropriate standard of review for a post-closing damages action when a merger that is not subject to the entire fairness standard of review has been approved by a fully informed, uncoerced majority of the disinterested stockholders."

<sup>11</sup> DGCL § 141 (a) states: "The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation." [DEL.CODE ANN. title 8, § 141 (a) (2016). In *Zapata Corp. v. Maldonado*, 430 A.2d 779, 782 (Del.1981), the Delaware Supreme Court observed:

The "business judgment" rule is a judicial creation that presumes propriety, under certain circumstances, in a board's decision. Viewed defensively, it does not create authority. In this sense the "business judgment" rule is not relevant in corporate decision-making until after a decision is made. It is generally used as a defense to an attack on the decision's soundness. The board's managerial decision-making power, however, comes from § 141 (a). The judicial creation and legislative grant are related because the "business judgment" rule evolved to give recognition and deference to directors' business expertise when exercising their managerial power under § 141 (a).

<sup>12</sup> *Dieckman v. Regency*. No. 208, 2016, C.A.No.11130. Decided by the Supreme Court of the State of Delaware on January 20, 2017. Available at: <https://cases.justia.com/delaware/supreme-court/2017-208-2016.pdf?ts=1484946034>.

<sup>13</sup> An MLP is a publicly-traded limited partnership.

dismiss the complaint. The Chancery Court did not address the issue of the lack of independence on the part of the Conflicts Committee member. However, the Chancery Court granted the defendant's motion to dismiss on the footing that the "unaffiliated unitholder approval" safe harbor had been satisfied. The Chancery Court held that since fiduciary duties had been disclaimed in the partnership agreement, no fiduciary obligations could be made incumbent on the general partner, and that the fulfillment of the express disclosure requirements of the partnership agreement was sufficient. The Delaware Supreme Court reversed the judgment of the Court of Chancery on the ground that there was an implied covenant of good faith and fair dealing that the defendants were bound to comport with and as the plaintiff had sufficiently alleged breaches of that implied covenant, the complaint could not be dismissed at the interlocutory stage.

#### 4. *In re Merge Healthcare Inc. Stockholders Litigation*:<sup>14</sup>

The case involved the acquisition of Merge Healthcare, Inc. by IBM in a cash transaction that was supported by a majority of fully-informed, disinterested stockholders of Merge. The plaintiffs were former shareholders of Merge who alleged breach of fiduciary duties on the part of Merge's directors. The plaintiffs contended that the directors were disloyal and breached their duty of care in respect of the merger process and also that the shareholder consent was obtained on the basis of incomplete information. The plaintiffs further contended that Merge had a controlling shareholder who was seeking to exit his investment in Merge and that except for one, all the directors were conflicted as they were in some way obligated to the controlling shareholder. The defendants filed a motion to dismiss. Plaintiffs invoked *Corwin*<sup>15</sup> in support of their argument that the presence of a controlling shareholder entailed the application of the entire fairness standard of review rather than the business judgment rule. Granting the defendants' motion to dismiss, the Court stated:

Importantly, the mere presence of a controller does not trigger entire fairness *per se*. Rather, coercion is assumed, and entire fairness invoked, when the controller engages in a conflicted transaction, which occurs when a controller engages in a conflicted transaction, or is on only one side but "competes with the common stockholders for consideration." In these scenarios, "[c]oercion is deemed inherently present," unlike "in transactions where the concerns justifying some form of heightened scrutiny derive solely from board-level conflicts or lapses of due care." Thus, "[i]n the absence of a controlling stockholder that extracted personal benefits," if a majority of the Company's disinterested stockholders approves the transaction with a fully informed, uncoerced vote, then the business judgment rule applies "even if the transaction might otherwise have been subject to the entire fairness standard due to conflicts faced by individual directors."<sup>16</sup>

(Internal citations omitted)

<sup>14</sup> *In re Merge Healthcare Inc. Stockholders Litigation*. Consolidated C.A.No.11388-VCG. Decided by the Court of Chancery of the Court of Delaware on January 30, 2017. Available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=251970>.

<sup>15</sup> *Supra* note 10.

<sup>16</sup> *Supra* note 14, at internal pages 19 and 20 of the opinion (internal citations and footnotes omitted).

On a detailed consideration of the facts of the case, the Court ruled that the vote by a majority of the fully-informed shareholders in support of the merger cleansed the transaction of any alleged violations, resulting in an application of the business judgment rule and a consequent dismissal of the complaint.

5. *Columbia Pipeline Group, Inc. Stockholder Litigation*:<sup>17</sup>

The case involved a putative class action that challenged the sale of Columbia Pipeline Group, Inc. to TransCanada Corporation under a merger agreement that was approved by Columbia's board of directors, and subsequently voted in favor of by 95% of the outstanding shares entitled to vote. The plaintiffs filed the action alleging that the directors had committed breaches of fiduciary duties relating to the merger. Specifically, the plaintiffs alleged that the directors had effected a spinoff and sale as a self-serving subterfuge to take advantage of change-in-control benefits that were to flow therefrom. The defendants filed a motion for the dismissal of the complaint. The Court observed:

3. When a transaction has been approved by a majority of the disinterested stockholders in a fully informed and uncoerced vote, the business judgment rule applies and “insulates the transaction from all attacks other than on the grounds of waste[.]” *In re KKR Fin. Hldgs. LLC S’holder Litig.*, 101 A.3d 980, 1001 (Del.Ch.2014), *aff’d sub nom. Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304 (Del. 2015). ...

4. “In the absence of a controlling stockholder that extracted personal benefits, the effect of disinterested stockholder approval of the merger is review under the ... business judgment rule, even if the transaction might otherwise have been subject to the entire fairness standard due to conflicts faced by individual directors.” *Larkin v. Shah*, 2016 WL 4485447, at \*1 (Del.Ch.Aug.25, 2016). ...<sup>18</sup>

Upon finding that a majority of the disinterested stockholders had approved the transaction in a fully informed and uncoerced vote, the Court held that the business judgment rule applied, and granted the Defendants’ motion to dismiss the case. Thereby, the Chancery Court held that the ruling in *Corwin*<sup>19</sup> would effectively apply even if the directors of the target company were not independent and disinterested, so long as they disclose their self-interest in the transaction.

6. *In Re Saba Software, Inc. Stockholder Litigation*:<sup>20</sup>

This case provided an instance where the Delaware Chancery Court refused to apply the *Corwin* standard in a post-closing action damages action and instead applied the enhanced

<sup>17</sup> *Columbia Pipeline Group, Inc. Stockholder Litigation*. C.A.No.12152-VCL. Decided by the Court of Chancery of the Court of Delaware on March 7, 2017. Available at: <https://www.cadwalader.com/uploads/media/ColumbiaPipelineMTDOrder.pdf>.

<sup>18</sup> *Id.*, at internal page 3 of the Court’s Opinion. (Part of paragraphs 3 and 4.)

<sup>19</sup> *Corwin v. KKR Financial Holdings*, *supra* note 8.

<sup>20</sup> *In Re Saba Software, Inc. Stockholder Litigation*. C.A.No.10697-VCS. Decided by the Court of Chancery of the Court of Delaware on March 31, 2017 (Revised: April 11, 2017).. Available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=255270>.



scrutiny *Revlon* standard.<sup>21</sup>

A former stockholder of an acquired company alleged breach of fiduciary duty on the part of the board of directors of the acquired company and aiding and abetting of the breach on the part of the acquirer. Defendants separately moved for a dismissal of the complaint. The acquisition had followed in the wake of a convoluted set of facts whereby the Securities and Exchange Commission had deregistered the acquired company's shares, leaving the stockholders with deregistered, illiquid stock. The Chancery Court held that the cleansing effect of *Corwin* would not apply because the plaintiff had sufficiently pled facts to indicate that the shareholder vote was not fully informed and uncoerced and that the directors had acted in bad faith and in breach of their duty of loyalty due to their non-disclosure of material information to the stockholders.<sup>22</sup> The Court therefore held that the cleansing effect of *Corwin* would not apply and that the transaction was to be judged on the basis of the exacting enhanced scrutiny standard rather than the deferential business judgment standard. On that footing, the Court denied the directors' motion. The Court, however, found that the plaintiff had not stated a claim to support the aiding and abetting allegation against the acquirer. On that footing, the Court granted the acquirer's motion to dismiss.

7. *The Williams Companies, Inc. v. Energy Transfer Equity, L.P., et al.*:<sup>23</sup>

By a 4-1 decision, the Delaware Supreme Court affirmed the Court of Chancery's ruling permitting the termination of a merger agreement whereby Energy Transfer Equity, L.P. (ETE) was to acquire The Williams Companies, Inc. (Williams) in a two-step transaction. A material pre-condition to the closing of the transaction was that ETE'S outside tax counsel would issue an opinion that the second step of the proposed transaction "should" be tax-free under Section 721 (a) of the Internal Revenue Code. The parties covenanted to use "commercially reasonable efforts" to get the tax opinion and "reasonable best

<sup>21</sup> *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). Under the *Revlon* doctrine, when the sale of a company or its control is at issue, the fiduciary duty of the directors is to maximize the immediate value of the stockholders' shares, and the performance of this duty is to be evaluated under an "enhanced scrutiny" standard rather than the deferential "business judgment" standard.

<sup>22</sup> The non-exculpated duties of directors are set out in § 102 (b) (7) of the General Corporation Law of Delaware which provides:

§ 102 Contents of certificate of incorporation.

...

(b) In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters:

...

(7) a provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit. ...

<sup>23</sup> *The Williams Companies, Inc. v. Energy Transfer Equity, L.P., et al.* No. 330, 2016, C.A.Nos.12168 & 12337.. Decided by the Supreme Court of the State of Delaware on March 23, 2017. Available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=254450>.

efforts” to close the transaction. Soon after the merger agreement was signed, the energy market declined drastically and the proposed transaction was no longer financially appealing to ETE. Shortly thereafter, a senior tax executive at ETE noticed that the ramifications ensuing from the changed economic situation had created a risk that the second step of the transaction would not be tax-free as had been originally envisaged. This concern was communicated to ETE’s outside tax counsel. Consequently, the outside tax counsel declared an inability to issue the required opinion that the transaction “should” be tax-free under Section 721 (a) of the IRC. As the obtaining of the opinion was a pre-condition to the closing of the deal, ETE sought to terminate the agreement.

Williams brought suit seeking to enjoin ETE from terminating the agreement. The Court of Chancery ruled against Williams and granted judgment in favor of ETE. The Court of Chancery found that ETE’s outside tax counsel had acted in good faith in expressing its inability to issue the required tax opinion. Secondly, regarding “commercially reasonable efforts” and “reasonable best efforts,” the Court found that Williams could not specifically show what efforts ETE should have taken that it did not. Finally, the Court rejected Williams’ contention that ETE had misrepresented at the signing of the agreement that it was unaware of any fact that would prevent the transaction from qualifying for tax-free status because there was nothing to indicate that the problem with the tax liability issue was known to ETE at the time of the signing of the agreement.

Williams appealed. On appeal, by a 4-1 majority, the Supreme Court of Delaware affirmed the Court of Chancery’s decision even though the Court’s majority disagreed with certain aspects of the Court of Chancery’s reasoning.<sup>24</sup> The Supreme Court majority agreed with Williams’s contention that the best efforts covenants in the merger agreement imposed an affirmative obligation on ETE and should have been the focus of the Court of Chancery’s inquiry. Nevertheless, in light of the Court of Chancery’s finding that ETE’s action or inaction had not caused the non-issuance of the opinion by the outside tax counsel, the Supreme Court majority concluded that even if the Court of Chancery had focused on ETE’s affirmative obligation, ETE had effectively demonstrated that any alleged breach had not materially caused the non-fulfillment of the tax opinion pre-condition. The Supreme Court majority agreed with the Court of Chancery’s analysis regarding ETE’s alleged non-disclosure of facts at the time of the signing of the agreement.

#### 8. *Shareholder Representative Services v. Gilead Sciences*:<sup>25</sup>

This case arose out of a dispute over an earnout provision in an M&A contract. An earnout is a financing arrangement in an M&A transaction, whereby the buyer agrees to pay to the seller a further post-closing amount in addition to the original acquisition price contingent upon the achieving of certain results. Earnout provisions can be useful in bridging valuation differences, but can also lead to post-closing disputes.<sup>26</sup>

The case related to Gilead’s acquisition of Calistoga Pharmaceuticals. The Delaware Court of Chancery was called upon to resolve the meaning of an ambiguous term in the merger agreement. Specifically, the word at issue was “indication.” At stake was a \$50 million milestone payment that

<sup>24</sup> Chief Justice Strine dissented.

<sup>25</sup> *Shareholder Representative Services v. Gilead Sciences*. C.A.No.110537-CB. Decided by the Court of Chancery of the Court of Delaware on March 15, 2017. Available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=253760>.

<sup>26</sup> Vice Chancellor Laster of the Delaware Court of Chancery famously observed: “An earnout often converts today’s disagreement over price into tomorrow’s litigation over the outcome.” *Airborne Health, Inc. v. Squid Soap LP*, 984 A.2d 126, 132 (Del.Ch.2009).



Calistoga Pharmaceuticals claimed was owed to it, which Gilead disputed. The merger agreement provided, *inter alia*, that a \$50 million milestone payment would be triggered in the event of “the receipt of Regulatory Approval of CAL-101 in the United States or the European Union, whichever occurs first, as a first-line drug treatment ...” for a specified “indication.”<sup>27</sup> In the event, the regulatory approval in the EU was granted in respect of a narrower target category than had been sought in the original application. At issue was whether the milestone had been reached even though the approval only covered a subset of the people that the original application had sought to cover. Both parties agreed that the term “indication” had several meanings within the oncology industry but each proffered its own interpretation of the term as used in the agreement. The Court was required to decide what the term meant in the specific context of this particular case. After finding that the term was ambiguous in the context of the merger agreement, the Court examined extensive extrinsic evidence including various versions of the draft agreement, e-mail communications, testimony regarding the meaning of the word “indication,” the parties’ understanding of the term in the course of their discussions and negotiations as well as the business and economic ramifications of different interpretations. Upon a detailed consideration of the evidence, the Court concluded that: “[T]he shared intention of the parties at the time of contracting was that the word “indication” means “disease” and that the milestone at issue could only be triggered by a disease-level regulatory approval.”<sup>28</sup> Upon further finding that the regulatory approval in the EU was not a disease-level approval, the Court ruled in Gilead’s favor and held that the milestone under the merger agreement had not been reached and therefore the earnout payment to the plaintiff had not been triggered.

#### 9. *Vento v. Curry*:<sup>29</sup>

The case related to a proposed stock-for-stock merger transaction. By a motion, the plaintiff sought a preliminary injunction of the acquiring company’s shareholder vote in respect of the acquisition until the acquiring company made an adequate disclosure of its financial advisor’s interests in the proposed merger. Through an affiliate, the financial advisor also participated in the acquisition financing. The financial advisor was the sole provider of the fairness opinion in respect of the proposed transaction. Plaintiff alleged that the directors of the acquiring company committed breach of their fiduciary duties because of non-disclosure of the requisite information regarding the financial advisor’s conflict of interest. The Court noted that although the advisory fee had been disclosed in the proxy statement, there was no disclosure of the potential fees that the financial advisor and its affiliates could receive in the event of the merger being approved. Upon considering the balance of equities to weigh in favor of the plaintiff, the Court granted plaintiff’s motion to preliminarily enjoin the stockholders’ meeting until after the requisite disclosure was made.<sup>30</sup>

<sup>27</sup> *Supra* note 25, at internal pages 27 and 28 of the Court’s opinion.

<sup>28</sup> *Supra* note 25, at internal page 2 of the Court’s opinion.

<sup>29</sup> *RE: Richard Vento v. Robert J. Curry, et al.* Civil Action No. 2017-0157-AGB, Letter Decision. Decided by the Court of Chancery of the Court of Delaware on March 22, 2017. Available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=254260>.

<sup>30</sup> The Court noted that:

[I]t is well established under Delaware law that “[b]ecause of the central role played by investment banks in the evaluation, exploration, selection, and implementation of strategic alternatives, this Court has required full disclosure of investment banker compensation and potential conflicts.” In *David P. Simonetti Rollover IRA v. Margolis*, the Court was faced with a similar challenge to the adequacy of disclosures

10. *In Re Paramount Gold and Silver Corp. Stockholders Litigation*:<sup>31</sup>

The case arose out of a merger transaction whereby Paramount Gold and Silver Corporation was acquired by Coeur Mining, Inc. Former shareholders of Paramount filed suit against the Paramount directors challenging the merger transaction, alleging that the directors had committed a breach of their fiduciary duties. The plaintiffs contended that a concomitant royalty agreement signed between Paramount and Coeur was in effect an additional termination fee that enlarged the termination fee already included in the merger agreement, and as such was tantamount to an “unreasonable deal protection device” subject to the Unocal enhanced scrutiny standard of review.<sup>32</sup> The plaintiffs further alleged that the defendants had acted in bad faith because the sale process had been rushed and because the defendants did not negotiate a pre-signing auction and a post-signing go shop of the company. The defendants filed a motion to dismiss the complaint. The Court found that the terms of the royalty agreement did not preclude a potential bidder from acquiring Paramount subject to the royalty agreement, and that it was not an additional termination fee as contended by the plaintiffs. The original termination fee, by the plaintiffs’ concession, was reasonable. The Court further found that a majority of Paramount’s stockholders had approved the transaction in a fully informed, uncoerced vote and therefore the business judgment rule under *Corwin* applied. Finally, the Court found that the plaintiffs had not alleged any non-exculpated breach of fiduciary duty against the defendants. On these grounds, the Court granted defendants’ motion to dismiss.

11. *In re Cyan, Inc. Stockholders Litigation*:<sup>33</sup>

The case arose out of the acquisition of Cyan, Inc., a provider of carrier-grade networking solutions, by Ciena Corporation, a provider of communications networking solutions.. The merger was effected through a stock and cash transaction, consisting of 89% stock and 11% cash. Plaintiffs were former shareholders of Cyan. Defendants were Cyan’s directors. Prior to the closing of the transaction, several class actions – which were later consolidated – were filed against the board of directors and others

relating to a financial advisor’s separate financial interest in a proposed transaction. The Court held that the resolution of the disclosure claim depended on whether the financial advisor’s interest in the transaction was material and, if so, whether the interest was quantifiable. The Court further explained that “it is imperative for the stockholders to be able to understand what factors might influence the financial advisor’s analytical efforts ... A financial advisor’s own proprietary financial interest in a proposed transaction must be carefully considered in assessing how much credence to give its analysis.” (Internal citations and footnotes omitted.)

*Id.*, at internal page 6 of the Court’s Letter Decision.

<sup>31</sup> *In Re Paramount Gold and Silver Corp. Stockholders Litigation*. Consolidated C.A. No. 10499-CB. Decided by the Court of Chancery of the State of Delaware on April 13, 2017. Memorandum opinion, available at:

<https://courts.delaware.gov/Opinions/Download.aspx?id=255370>.

<sup>32</sup> See: *Unocal Corp. v. Mesa Petroleum Co.*, 493 A. 2d 946 (Del. 1985). In the context of the defensive tactics adopted by a board of directors against a takeover bid, the Delaware Supreme Court held that the board must demonstrate a reasonable basis for believing that the takeover constituted a threat to corporate policy and effectiveness, and that the defensive tactics adopted were a proportionate response to the perceived threat.

<sup>33</sup> *In re Cyan, Inc. Stockholders Litigation*. Consolidated C.A. No. 11027-CB. Decided by the Court of Chancery of the State of Delaware on May 11, 2017. Memorandum Opinion, available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=256640>.

challenging the proposed merger. . However, plaintiffs did not seek pre-closing injunctive relief. The merger was approved by an overwhelming majority of the shares that voted. Almost a year later, plaintiffs filed an amended complaint, alleging breach of fiduciary duties by Cyan’s directors in approving the merger, and seeking the remedy of quasi-approval. Defendants filed a motion to dismiss the complaint. The Court found that the merger consideration having been 89% stock-for-stock, and that the facts as pled did not support a claim for non-exculpated breach of fiduciary duty, the heightened review *Revlon* standard was inapplicable, and that the business judgment rule would apply. Furthermore, since the merger had been approved by a majority of fully informed, uncoerced, and disinterested shareholders, and the Cyan directors’ decision to approve the merger did not constitute waste, *Corwin* would come into play and therefore the business judgment rule would apply. Upon finding that the plaintiffs’ claim for the equitable relief of “quasi-appraisal” was founded upon an attempt to get around the exculpatory provision in Cyan’s certificate of incorporation, the Court also dismissed the quasi-appraisal claim,<sup>34</sup> and granted the defendants’ motion to dismiss the complaint.

12. *In re Appraisal of PetSmart, Inc.*:<sup>35</sup>

This case related to a transaction whereby a private equity firm acquired *PetSmart, Inc.* for \$83 per share. After a period of considerable growth, the company’s upward trajectory had stalled, and its stock price declined. Thereupon, the company sought to explore strategic alternatives. After an auction, the board recommended a merger with one private equity firm for a price of \$83 per share. More than 99% of the shares that voted approved the merger, and the merger closed. The petitioners in this action consisted of dissenting stockholders who sought appraisal of their shares. At trial, the petitioners contended that a Discounted Cash Flow analysis indicated that the fair value was \$127.78 per share. After elaborate post-trial briefing and oral arguments, and a comprehensive consideration of “all relevant factors,”<sup>36</sup> the Court determined that the merger price was the fair value of the shares. The Court noted that the sale process was sound since it was pursued as one of several strategic measures, had been conducted in a measured fashion, was open to bids from both financial and strategic bidders without precluding a bid from the company’s principal competitor, and was concluded after negotiating a hike in the original offer of the highest bidder. The Court refused to countenance the result of the Petitioners’

<sup>34</sup> The Court cited *In Re Orchard Enterprises, Inc. Stockholder Litigation*, 88 A.3d 1 (Del.Ch.2014) to support the proposition that “quasi-appraisal” was a form of remedy that the Delaware Courts had held to be “available ... when a fiduciary breaches its duty of disclosure in connection with a transaction that requires a stockholder vote.”(Internal citation omitted.) *Id.*, at internal page 40 of the Court’s opinion.

<sup>35</sup> *In re Appraisal of PetSmart, Inc.* Consolidated C.A. No. 10782-VCS. Decided by the Court of Chancery of the State of Delaware on May 26, 2017. Memorandum Opinion, available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=257260>.

<sup>36</sup> Appraisal rights are provided for in Delaware Code Title 8, §262. Subsection (h) of §262 provides, in relevant part, as follows:

(h) After the Court determines the stockholders entitled to an appraisal, the appraisal proceeding shall be conducted in accordance with the rules of the Court of Chancery, including any rules specifically governing appraisal proceedings. Through such proceeding the Court shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, together with interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors. ...

discounted cash flow analysis, since it was founded upon unreliable projections. Furthermore, the Court noted that there was nothing on record to indicate why the unimpeded play of market forces could result in such a huge discrepancy between the merger price and the value claimed by the petitioners, or any basis on which the Court should substitute its own evaluation for that arrived at in the course of the sale process. These were among the factors that weighed with the Court and upon the basis of which the Court ruled that the fair value of the PetSmart shares was the merger consideration of \$83 per share.

13. *In Re Appraisal of SWS Group*:<sup>37</sup>

This was a case of appraisal arbitration that worked to the detriment of the petitioners' interests, inasmuch as the Court determined the fair value of the shares as being less than the merger price.<sup>38</sup> This case arose out of the merger of SWS Group, Inc. with a subsidiary of a significant creditor, Hilltop Holdings, Inc. for a consideration of \$7.75 per share. 75% of the consideration was payable in stock and 25% in cash. Due to a drop in the price of Hilltop's stock subsequent to the signing of the merger agreement, the merger price was reduced to \$6.92 per share at the time of closing. The petitioners in this action were holders of appraisal-eligible shares of SWS Group, Inc. Petitioners alleged that the merger price was unfair and sought appraisal of their shares.

In the discussion of the valuation methodology to be adopted, the Court noted:

A line of decisions in this Court have invoked the merger price as the best indication of fair value. Certain common threads run through these decisions making the merger price, in those circumstances, the best indicator available – including a sales process which exposed the company sufficiently to the market such that if the market valued the asset at a higher price, it is likely that a bidder would have emerged. Similarly, cases invoking the merger price generally involve a relatively clean sales process. However, when the merger price represents a transfer to the sellers of value arising solely from a merger, these additions to deal price are properly removed from the calculation of fair value.<sup>39</sup>  
(Internal citations omitted.)

In light of the particular facts of this case whereby the buyer was the subsidiary of a significant creditor, and had veto rights over competing bids, the Court found that the merger price yielded by the sale process was an unreliable measure of the fair value. The Court found that a comparable companies analysis urged by the petitioners was also not a reliable indicator of fair value as it was founded upon a comparison of

<sup>37</sup> *In Re Appraisal of SWS Group*. C.A. No. 10554-VCG. Decided by the Court of Chancery of the State of Delaware on May 30, 2017. Memorandum Opinion, available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=257320>.

<sup>38</sup> Cases where the Court determined the fair value as being below the merger price are few and far between. Two cases in which the Court made a similar lower-than-the-merger-price valuation are: (1) *Longpath Capital, LLC v. Ramtron International Corporation*, 2015 WL 2069417. C.A. No. 8094-VCP. Memorandum Opinion, available at: <https://courts.delaware.gov/opinions/download.aspx?ID=226040>; and (2) *Gearreald v. Just Care, Inc.* C.A. No. 5233-VCP. Opinion, available at: <https://courts.delaware.gov/opinions/download.aspx?ID=172060>.

<sup>39</sup> *In Re Appraisal of SWS Group*. Supra note 35, at internal page 29 of the Court's Opinion.

companies which were not properly comparable to SWS Group, Inc. The Court then proceeded to make its own Discounted Cash Flow analysis taking into account the deal synergies, and arrived at a figure that was below the merger consideration.

14. *Chicago Bridge & Iron Company N.V. v. Westinghouse Electric Company*:<sup>40</sup>

Here, the Supreme Court of Delaware reversed a 2016 ruling of the state Chancery Court.

The case involved the interpretation of a contractual term regarding the resolution of disputes arising out of the post-closing adjustment of the purchase price to be paid under an acquisition agreement. The case involved a convoluted set of facts, a simplified version of which follows. Chicago Bridge & Iron Company agreed to sell its subsidiary CB&I Stone & Webster, Inc. to Westinghouse Electric Company. The agreed sale price, subject to adjustments, was zero dollars. As narrated more particularly in the Court's opinion, the agreement made business sense because it potentially furnished Chicago Bridge & Iron Company a means of shedding responsibility for the liabilities and escalating costs of projects undertaken by CB&I Stone & Webster. The agreement provided for an adjustment to the sale price depending on CB&I Stone & Webster's net working capital at the time of closing, and any disputes relating arising therefrom were to be referred to an independent auditor. Chicago Bridge & Iron Company represented to Westinghouse Electric Company that the financial statements of CB&I Stone & Webster, Inc. were in compliance with the Generally Accepted Accounting Principles (GAAP). The agreement had a few unusual terms such as one whereby most representation and warranties made by the seller would be extinguished at closing.

Three days prior to closing, in accordance with the terms of the agreement, Chicago Bridge & Iron Company submitted to Westinghouse Electric Company its estimate of the adjusted closing payment amounting to \$428 million as due and payable by Westinghouse Electric Company to Chicago Bridge & Iron Company. On that footing, the deal closed. Post-closing, Westinghouse Electric Company submitted its own estimate of the adjusted closing payment, whereby it claimed that an amount of more than \$2 billion was payable to it by Chicago Bridge & Iron Company. The huge difference in the rival estimates largely arose from Westinghouse Electric Company's claim that Chicago Bridge & Iron Company's financial statements had historically not been in consonance with GAAP. Chicago Bridge & Iron Company contended that the jurisdiction of the independent auditor was restricted under the agreement to events that took place between the signing and closing. Chicago Bridge & Iron Company then filed an action in the Delaware Court of Chancery seeking a declaration that the basis of Westinghouse Electric Company's claim was outside the purview of the independent auditor as it related to breaches of representations and not to events between signing and closing. The case turned on the interpretation of the terms of the agreement, particularly one postulating that accounts be in compliance with GAAP.<sup>41</sup> Westinghouse

<sup>40</sup> *Chicago Bridge & Iron Company N.V. v. Westinghouse Electric Company*. No. 573, 2016, C.A.No.12585. Decided by the Supreme Court of the State of Delaware on June 27, 2017 and revised on June 28, 2017. Available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=258840>.

<sup>41</sup> One crucial clause of the Purchase Agreement, as quoted in the Court's Opinion read:

Working Capital ... will be determined in a manner *consistent with GAAP, consistently applied* by [Stone] in preparation of the financial statements of the Business, as in effect on the Closing Date. To the extent not inconsistent with the foregoing, Working Capital ... shall be based on *the past practices and accounting principles, methodologies and policies* applied by [Stone] and its subsidiaries and the Business (a) in the Ordinary Course of Business and (b) in the preparation of (i) the balance sheet of the [Stone] and its Subsidiaries for the year ended on



Electric Company filed a motion for judgment on the pleadings. The Delaware Court of Chancery ruled in favor of Westinghouse Electric Company. The Delaware Supreme Court reversed and remanded the case to the Delaware Court of Chancery with a direction that Chicago Bridge & Iron Company be granted the declaration that it sought. In coming to its decision, the Court relied upon various principles of contract interpretation,<sup>42</sup> American Bar Association publications, treatises, and Delaware and New York precedents.

### III. Conclusion:

The preceding overview provides a brief conspectus of the jurisprudence of the Delaware Supreme Court and the Delaware Court of Chancery in issues relating to Merger and Acquisition transactions as it has evolved during the period from January to June 2017.<sup>43</sup> A study of the rulings

December 31, 2014 (adjusted to reflect the Business)  
and (ii) the Sample Calculation set forth on Schedule 1.4 (f).

(Internal citation omitted.) (Italics as provided by the Court in its Opinion.)  
*Id.*, at internal page 19 of the Court's Opinion.

<sup>42</sup> In one particularly important strand of the Court's interpretation of the contract, the Court ruled that:

The phrases "applied on a consistent basis throughout the periods indicated" and "based on the past practices and accounting principles, methodologies and policies" both require consistent accounting treatment. They recognize that GAAP allows for a variety of treatments and different accountants may come to differing views on what constitutes acceptable GAAP treatment, but for the purpose of these calculations, both Westinghouse and Chicago Bridge must hold the accounting approach constant.

*Id.*, at internal pages 33 and 34 of the Court's Opinion.

<sup>43</sup> The present paper is not an exhaustive survey of all rulings handed down by the Delaware Courts in M&A-related lawsuits. For reasons of space, some cases involving M&A transactions have not been included here. See, e.g., *In Re Energy Transfer Equity, L.P. Unitholder Litigation*. Consolidated C.A. No. 12197-VCG. Decided by the Court of Chancery on February 28, 2017. Memorandum Opinion, available at: <https://www.courts.delaware.gov/Opinions/Download.aspx?id=253220>. (The case dealt with the issuance of securities in a private offering in anticipation of a merger. The Court turned down the parties' cross motions for summary judgment.); *Frederic Hsu Living Trust v. ODN Holding Corporation*. 2017 WL 1437308 (Del. Ch. April 14, 2017). C.A. No. 12108 – VCL. Decided by the Court of Chancery of the State of Delaware on April 14, 2017, and corrected on April 25, 2017.. Memorandum Opinion, available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=255860>. (Although this case did not arise specifically out of an M&A transaction, it is important because it deals with the rights of preferred stockholders. In a merger transaction, a private equity buyer often receives preferred shares. The Court here held that entire fairness review, rather than business judgment review is the applicable standard to evaluate the redemption of preferred shares, where the preferred shareholder was also the controlling shareholder and the board of directors was under the influence of the controlling shareholder.); *In Re Massey Energy Company Derivative and Class Action Litigation*. Consolidated C.A. No. 5430-CB. Decided by the Court of Chancery of the State of Delaware on May 4, 2017. Opinion, available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=256410>. (This case dealt with the continuous ownership rule for keeping derivative standing.); and *In Re Appraisal of GoodCents Holdings, Inc.*, 2017 WL 2463665 (Del. Ch. June 7, 2017). C.A. No. 11723-VCMR. Decided by the Court of Chancery of the State of Delaware on June 7, 2017. Memorandum Opinion, available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=257700>. (This case, too, dealt with the rights of preference shareholders and turned on the interpretation of the Certificate of Incorporation. In this case, the preferred stockholders of a target company received the



provides useful guidance to corporations seeking to undertake M&A transactions.

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entire sale proceeds of a merger on the footing that under the terms of the certificate of incorporation, the merger had triggered the liquidation preference of the preferred shareholders. The common stockholders filed an appraisal action in which they contested the interpretation put forward by the company claimed a share of the sale proceeds. Based upon precedent, the Court accepted the petitioners' argument, and granted petitioners' motion for partial summary judgment.) Some significant rulings related to M&A transactions have also been handed down by other Courts in the United States. See, e.g., *Int'l Brotherhood of Electrical Workers Local No. 129 Benefit Fund v. Tucci*, SJC-12137 (Massachusetts Supreme Judicial Court, Mar. 6, 2017). Slip Opinion, available at: <https://cases.justia.com/massachusetts/supreme-court/2017-sjc-12137.pdf?ts=1488814314>.