

DELAWARE CORPORATE LAW UPDATE — END OF YEAR 2024

YOUNG
CONAWAY

FEATURED:

Gunderson v. The Trade Desk, Inc.
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***Gunderson v. The Trade Desk, Inc.*, 2024 WL 4692207 (Del. Ch. Nov. 6, 2024) (conversion to reincorporate in Nevada upheld under Court of Chancery's interpretation of corporate charter and the DGCL).**

The Delaware Court of Chancery interpreted a certificate of incorporation to permit a conversion from a Delaware corporation to a Nevada corporation, thereby denying stockholder plaintiff's motions for summary judgment and a preliminary injunction. The board of directors approved a resolution for Trade Desk, Inc. to incorporate as a Nevada corporation under Section 266 of the Delaware General Corporation Law, which "enables Delaware corporations to convert directly into another form of artificial entity." In an attempt to permanently enjoin the conversion, plaintiff argued that the certificate of incorporation required "the affirmative vote of the holders of at least sixty-six and two-thirds percent (66 2/3%) of the voting power of the outstanding shares . . . to amend or repeal, or adopt any provision of this Restated Certificate inconsistent with" certain named provisions that would be repealed and replaced with a Nevada charter. Reconciling contractual and statutory interpretation, the Court opined that "[w]hen it comes to the construction and interpretation of a certificate of incorporation, 'the agreement as a whole' includes the DGCL and all of its amendments, which the Delaware legislature has determined 'shall be a part of the charter or certificate of incorporation of every corporation except so far as the same are inapplicable and inappropriate to the objects of the corporation.'" The Court, relying on the doctrine of independent legal significance, held that the language of the certificate did not explicitly expand the scope of Article X beyond Section 242's requirements for amending certificates and, thus, did not apply a supermajority vote to the conversion.

***GB-SP Holdings, LLC v. Walker*, 2024 WL 4799490 (Del. Ch. Nov. 15, 2024) (post-trial entire fairness decision holding directors liable for approving a forbearance agreement in exchange for indemnification rights in a distressed corporation context).**

In this case, the Delaware Court of Chancery issued a post-trial entire fairness ruling against defendant directors on claims arising from a forbearance agreement where defendants received

indemnification rights for themselves. Bridgestreet WorldWide, Inc. was distressed and “deep in debt.” Defendants, in approving a consensual foreclosure agreement, negotiated an expanded indemnity term that indemnified defendants “against any claims arising out of the [f]orbearance [a]greement and against any claims related to the Company or its subsidiaries asserted by or with the assistance of [majority stockholder].” The Court found that the indemnification agreement exceeded the ordinary scope and created a material conflict because it was specifically tailored to indemnify directors against their self-created litigation risk. The Court held that the negotiation of indemnification, although not always a breach of fiduciary duty, was a breach of loyalty under the circumstances because the directors’ prioritization of the indemnification over beneficial terms for the defaulting company tainted the negotiations and rendered the forbearance agreement not entirely fair as to process or price. The court ordered the directors to disgorge: (1) all payments made to them or their attorneys under the indemnification agreement; and (2) the bonuses paid in connection with the challenged transaction.

***Salama v. Simon*, 2024 WL 4906737 (Del. Ch. Nov. 27, 2024) (holding that a pre-2023 charter provision providing that the number of authorized shares may be increased by an affirmative vote of a majority of outstanding shares only eliminated the need for a separate class vote, and that DGCL Section 242(d), newly enacted in 2023, still permitted the company to increase the number of authorized shares with a majority of votes cast).**

The Delaware Court of Chancery granted summary judgment to defendants, holding that a proposed charter amendment seeking to increase the number of a corporation’s authorized shares required approval of only a majority of votes cast rather than a majority of all outstanding votes. In 2023, Delaware amended DGCL Section 242 to add a subsection (d), allowing publicly listed corporations to alter the number of authorized shares with only a majority of votes cast rather than a majority of all outstanding shares. Plaintiff argued that the corporation’s charter nevertheless required the approval of a majority of outstanding shares. The charter provision at issue, which pre-dated the 2023 amendment, read: “The number of authorized shares of Common Stock . . . may be increased . . . by the affirmative vote of the holders of a majority of the voting power of all of the outstanding shares of stock of the Company entitled to vote thereon[.]” Defendants responded that the charter provision only eliminated another statutory requirement for a separate class vote, and that Section 242(d)’s majority-of-votes-cast standard applied. Although the Court found both parties’ interpretations reasonable, the court granted defendants’ motion for summary judgment, holding that the charter provision only intended to opt out of the separate class vote. As a consequence, Section 242(d)’s lower voting standard imposed a majority-of-votes-cast standard, rather than a majority-of-the-outstanding standard. The Court reasoned that this conclusion aligned with the legislative goal of amending Section 242 “to make it easier for corporations to increase their authorized shares.”

***Tornetta v. Musk*, 326 A.3d 1203 (Del. Ch. 2024) (denying defendants’ motion to revise post-trial opinion on the grounds of *ex post* stockholder ratification of challenged CEO compensation package and awarding \$345 million in attorneys’ fees).**

The Court of Chancery rejected the Tesla board’s attempt to ratify Elon Musk’s compensation package by way of a stockholder vote held after the Court had already ruled that the board’s approval of the compensation package was a breach of fiduciary duties. A super majority of stockholders not

affiliated with Musk voted in favor of ratification. Defendants argued that this post-trial stockholder vote provided grounds to modify the remedy ordered by the Court.

The Court reasoned that the ratification was invalid due to “at least four” reasons. First, the Court stated that defendants had no procedural ground for modifying the outcome of a post-trial ruling based on evidence created after trial. Second, the Court stated that common-law ratification is an affirmative defense that cannot be raised after a post-trial opinion. Third, a stockholder vote alone cannot ratify a conflicted controller transaction. *MFW*’s cleansing mechanism applies only if a conflicted controller transaction is conditioned from the outset on approval by both a majority of the minority stockholder vote and a disinterested and independent special committee. The post-trial ratification did not satisfy those conditions. Fourth, the Court held that the proxy statement for the ratification contained material misstatements.

The Court also awarded plaintiff’s counsel \$345 million in fees, the largest ever Delaware fee award. Plaintiff’s counsel had requested a number of unrestricted Tesla shares worth \$5.6 billion by applying Delaware’s methodology for calculating fees based on a percentage of the benefit achieved, which plaintiff valued at \$51 billion. The Court held that doing so would result in an “insurmountable windfall” to plaintiff’s counsel and instead valued the benefit at \$2.3 billion—the accounting expense Tesla recorded in connection with Musk’s compensation award. The Court then awarded plaintiff’s counsel 15% figure of that figure, equivalent to \$345 million.

***In re Mindbody, Inc., S’holder Litig.*, 2024 WL 4926910 (Del. Dec. 2, 2024) (reversing Court of Chancery’s holding that acquirer aided and abetted CEO’s disclosure violations).**

In this decision, the Delaware Supreme Court affirmed in part and reversed in part the Court of Chancery’s post-trial rulings concerning Vista Equity Partners’ take-private acquisition of Mindbody, Inc. The Court of Chancery held that Mindbody’s CEO breached his fiduciary duties in connection with the acquisition and Vista aided and abetted those breaches with respect to inadequate disclosures. The Court of Chancery had held that Vista’s “contractual obligation” in the merger agreement to review and “correct” any misstatements or omissions, and Vista’s subsequent failure to correct those omissions, amounted to “knowing participation” in the CEO’s disclosure breach. The Delaware Supreme Court reversed, holding that Vista’s contractual duty to notify the company of material omissions did not turn Vista’s inaction into a “knowing participation” in the CEO’s breach of his fiduciary duties.

***Sunder Energy, LLC v. Jackson*, 2024 WL 5052887 (Del. Dec. 10, 2024) (refusing to blue pencil “exceptionally broad” restrictive covenants that “would require the court to craft an entirely new covenant to which neither side agreed”).**

The Delaware Supreme Court affirmed the Court of Chancery’s refusal to blue-pencil “exceptionally broad” restrictive covenants in an LLC agreement that the Court of Chancery had deemed unenforceable. The Supreme Court held that blue-penciling was inappropriate because doing so “would require the court to craft an entirely new covenant to which neither side agreed.” The Supreme Court reasoned that blue-penciling is permissible when circumstances allow, but noted that a “reformation” of the restrictive covenants is “opposite of the freedom of contract principles that are esteemed by Delaware’s legal system.”

***In re Hennessy Cap. Acquisition Corp. IV S'holder Litig.*, 2024 WL 5114140 (Del. Dec. 16, 2024) (TABLE) (affirming the Court of Chancery's first dismissal of suit challenging de-SPAC despite application of the entire fairness standard).**

The Delaware Supreme Court summarily affirmed the Court of Chancery's first dismissal of a complaint for breach of fiduciary duties challenging a de-SPAC. The Court of Chancery had held that, even though the entire fairness standard applied, the complaint failed to state a claim because plaintiff relied on "post-closing developments, strained inferences," and contradictory documents. The Delaware Supreme Court affirmed "on the basis" of the Court of Chancery's decision.

***In re Fox Corp. Derivative Litig.*, 2024 WL 5233229 (Del. Ch. Dec. 27, 2024) (holding that plaintiffs successfully pleaded demand futility relating to allegedly defamatory Fox News coverage of the 2020 presidential election).**

Pleading-stage finding of demand futility with respect to claims that Fox directors and officers breached their fiduciary duties by causing the company to violate the law through alleged defamation of election machine companies during Fox's coverage of the 2020 presidential election. One defamation suit settled for \$787.5 million, while another is ongoing. The Court held that Fox chairman Rupert Murdoch faces a substantial likelihood of personal liability because he inferably knew the stories Fox published were unfounded but nevertheless permitted them to air. The Court held that three other members of Fox's eight-member board, which includes Murdoch's son, were not independent of Murdoch. As a result, the Court reasoned that at least half of Fox's board could not disinterestedly or independently assess a potential demand to bring litigation.