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Court of Chancery Expands Protective Effects of Informed Stockholder Approval of Merger Transactions

The Delaware Court of Chancery last week held that a third-party, cash-out merger accomplished through a fully informed tender offer will be governed by the business judgment standard of review, requiring dismissal of all litigation challenges to the transaction unless a plaintiff can establish corporate waste. *In re Volcano Corp. Stockholder Litig.*, C.A. No. 10485-VCMR (Del. Ch. June 30, 2016). The decision extends an important line of recent Delaware case law that substantially inoculates transactions other than controlling stockholder squeeze-out mergers from litigation challenge so long as they have been approved by a majority of the independent shares outstanding on the basis of proper disclosure.

In a string of recent rulings, the Delaware courts have held that a board's decision to enter into a change-in-control transaction should be reviewed under the business judgment rule where fully informed, independent stockholders have approved the challenged transaction. This rule generally requires dismissal, the Court of Chancery and Supreme Court have made clear, notwithstanding allegations that the target board was not fully independent, and applies even to transactions otherwise subject to enhanced scrutiny under the *Revlon* doctrine and to aiding-and-abetting claims against investment bankers.

At issue in last week's decision was whether the same rule applied to a transaction accomplished by a two-step merger under the recently adopted Section 251(h) of the Delaware General Corporation Law. In her well-reasoned opinion, Vice Chancellor Montgomery-Reeves rejected plaintiffs' argument that a two-step merger structure should be treated differently just because stockholders signaled their assent to the merger in a first-step tender offer rather than through a stockholder vote. The Court instead ruled that "stockholder approval of a merger under Section 251(h) by accepting a tender offer has the same cleansing effect as a vote in favor of merger." The Vice Chancellor reconfirmed that this "cleansing effect" "renders the business judgment rule irrebuttable," foreclosing any claim other than waste against both the target board of directors and their financial advisors.

The *Volcano* opinion confirms that disinterested stockholder approval reliably translates into substantial deference in post-closing merger litigation. Attention to complete disclosure thus pays significant dividends in transactions subject to such approval.

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