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Re: Recent Delaware Corporate Law Decisions and the 2008 Amendments to the General Corporation Law of the State of Delaware

During the past few months, the Delaware courts have issued several opinions and made various rulings that raise important issues for Delaware corporations and their advisors. In *Optima International of Miami, Inc. v. WCI Steel, Inc.*, the Court of Chancery declined to enjoin a merger that had been approved by the board of directors and adopted by the stockholders promptly thereafter by written consent pursuant to a merger agreement permitting the acquirer to terminate the agreement if stockholder approval was not obtained within 24 hours. In *Berger v. Pubco Corp.*, the Court of Chancery found that the failure to disclose the manner in which the consideration offered in a short-form merger was determined, as well as the failure to attach the current and correct version of Delaware's appraisal statute to the notice of merger, constituted a violation of the board's duty of disclosure. In *Feldman v. Cutaia*, the Delaware Supreme Court affirmed the dismissal of an equity dilution claim brought by a former stockholder following the consummation of a cash-out merger on the grounds that the claim was derivative in nature and the former stockholder lacked standing to pursue the derivative claim. In *Zaman v. Amedeo Holdings, Inc.*, the Court of Chancery addressed several issues regarding indemnification and advancement, including the circumstances under which corporations may be required to indemnify agents and when counterclaims brought by a party may be viewed as being "in defense of" claims brought against that party for purposes of advancement. In *Solow v. Aspect,* the Court of Chancery required the plaintiff to enter into a "quick peek" arrangement (*i.e.*, an arrangement under which the parties agree that disclosure of privileged documents will not result in a waiver) in connection with electronic discovery from a non-party. *Solow* is the first order of a Delaware court requiring or permitting a "quick peek" arrangement. In *In re Transkaryotic Therapies, Inc.*, the Court of Chancery held that no monetary or injunctive relief could be awarded for alleged breaches of the duty of disclosure in connection with a solicitation of proxies in favor of a proposed merger, where plaintiffs had waited nearly two years after completion of the merger to file the disclosure claims and the record contained no evidence of disloyalty or bad faith by the directors who authorized the disclosures. Finally, in *Sun-Times Media Group, Inc. v. Conrad M. Black, et al.,* the Court of Chancery held that a bylaw provision granting directors and officers mandatory advancement through the "final disposition" of an action meant that the corporation was obliged to continue advancing fees and expenses through the appellate, as opposed to trial, proceedings.

In addition, amendments to the General Corporation Law of the State of Delaware (the "DGCL") were signed by the Governor of the State of Delaware on June 26, 2008, and became effective upon signing. The amendments address two important topics, including the remedy under Section 219 for the failure to produce the list of stockholders at a meeting, and the parties entitled to bring a petition under Section 225 to determine the results of a vote of stockholders.

Delaware Court of Chancery Declines to Enjoin Merger Requiring Stockholder Approval Within 24 Hours of Signing

In *Optima International of Miami, Inc. v. WCI Steel, Inc.*, C.A. No. 3833-VCL (Del. Ch. June 27, 2008) (TRANSCRIPT), the Court of Chancery declined to enjoin a merger that had been approved by the board of directors of WCI Steel Inc. ("WCI") and adopted by the stockholders of WCI later that same day by written consent pursuant to a merger agreement permitting the acquirer to terminate the agreement if stockholder approval was not obtained within 24 hours. This is the first case of a Delaware court to address such a provision following the Delaware Supreme Court's opinion in *Omnicare v. NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003).

In connection with WCI's emergence from bankruptcy in March 2006, the bankruptcy court approved a collective bargaining agreement (the "CBA") between WCI and the union representing its employees. The CBA contained a "successorship" provision triggered upon a change-of-control transaction as well as a right-to-bid provision. The union apparently interpreted the successorship provision as granting it a veto right over any third-party acquisition of WCI.

In the summer of 2007, WCI began searching for a potential acquirer, since it was suffering from severe liquidity problems and was under pressure to complete a deal or face the prospect of bankruptcy. WCI's board hired an investment firm, Moelis & Company LLC ("Moelis"), as its advisor. Moelis solicited 22 potential buyers, but by April 2008, only two bidders remained: Optima International of Miami, Inc. ("Optima") and OAO Severstal ("Severstal"). At that time, each bidder was proposing an acquisition transaction on similar economic terms (approximately $101 million in equity).

Severstal and Optima both sought the support of the union in connection with their bids, and the union ultimately decided to support Severstal over Optima. In late April, WCI requested that Optima and Severstal present their best and final bids. Only Severstal came forward, offering $136 million but demanding that stockholder approval be delivered within 24 hours of signing. Rather than recommending a deal with Severstal at that time, the special committee again requested that Optima submit a bid, offering to assist Optima in its negotiations with the union. On May 1, Optima submitted a bid of $150 million.

Optima resumed its negotiations with the union, but it quickly became apparent that those negotiations would not be successful. WCI and Optima considered pursuing an alternative transaction that would not trigger the successorship provision under the CBA and would not injure minority stockholders, but they were unable to find an acceptable solution. Meanwhile, Severstal was pushing to close a deal promptly. On May 14, with Severstal offering $136

million, WCI approached Severstal with an option: either waive the 24-hour stockholder approval requirement or increase its bid. Severstal increased its bid to $140 million, but demanded that WCI's board act immediately and further demanded that WCI's stockholders adopt the merger agreement by consent promptly after signing. At this time, Optima's bid was $150 million, but it was conditioned on union approval, which Optima had been unable to obtain. After discussions with its legal advisors regarding the risks inherent in the options and receiving a fairness opinion from Moelis, WCI's board approved a merger agreement with Severstal. Shortly thereafter, two stockholders who together owned a majority in voting power of WCI's stock delivered written consents adopting the merger agreement.

Plaintiffs argued that the board "abdicated its authority or delegated its authority to manage the business and affairs of the corporation to the union and that they did so by declining to strenuously challenge the union on its interpretation of the successorship provision." The Court rejected that argument and distinguished the provision in the CBA from the "no-hand poison pill" at issue in *Quickturn Design System Inc. v. Shapiro,* 721 A.2d 1281 (Del. 1998), or the "force-the-vote provision in *Omnicare*," noting that the successorship provision was not self-imposed, but rather had been approved by the bankruptcy court as a condition of WCI's emergence from bankruptcy.

Plaintiffs also argued that the stockholder vote was a form of a lockup that either exceeded the board's power or resulted in a breach of its fiduciary duties. Plaintiffs argued that, in agreeing to the provision requiring the stockholder consent to be delivered within 24 hours, the board improperly contracted away its "fiduciary out" in violation of *Omnicare*. After noting that "*Omnicare* is of questionable continued vitality," the Court distinguished the present facts from those of *Omnicare*. The Court noted that "[n]othing in the [DGCL] requires any particular period of time between a board's authorization of a merger agreement and the necessary stockholder vote." Here, the provision relating to the stockholder vote was part of an agreement that the board recommended to stockholders after having decided that it was better for stockholders to take Severstal's lower (but more certain) bid than Optima's higher (but less certain) bid. In making this decision, the board was keenly aware of WCI's liquidity problems and of the uncertainty surrounding Optima's ability to consummate a transaction. Thus, "the stockholder vote, although quickly taken, was simply the next step in the transaction as contemplated by the statute."

Failure to Disclose Determination of Pricing and Failure to Include Correct Copy of Appraisal Statute in Notice of Short-Form Merger Found to Constitute Violation of Duty of Disclosure

In *Berger v. Pubco Corp.*, 2008 WL 2224107 (Del. Ch. May 30, 2008), the Court of Chancery held that, in connection with a short-form merger, the parent corporation's failure to disclose the manner in which the merger price was determined and the failure to attach the current and correct version of the Delaware appraisal statute to the notice of merger constituted a violation of the board's duty of disclosure.

The dispute arose shortly after Robert Kanner, the controlling stockholder of Pubco Corporation ("Pubco"), a privately held corporation, transferred his shares of Pubco to a newly formed corporation and effected a short-form merger under Section 253 of the DGCL. Barbara

Berger, a Pubco minority stockholder who was cashed out in the merger, subsequently filed suit in the Court of Chancery alleging violations of the fiduciary duty of disclosure resulting from various defects and deficiencies in the notice of merger (the "Notice").

The Notice disclosed that the shares held by the minority stockholders were converted in the short-form merger into the right to receive $20 per share. The Notice contained summary financial information regarding Pubco's business, the names of its officers and directors, the number of shares and classes of stock, and copies of its most recent interim and annual financial statements. It did not, however, disclose the means by which the merger price had been determined. In addition, while the Notice disclosed that stockholders were entitled to seek an appraisal of their shares under Section 262 of the DGCL and included a copy of that statute, the copy that was attached to the Notice was outdated—it did not reflect the amendments to the statute that became effective as of August 2007.

The Court first considered whether the alleged defects and deficiencies in the disclosure were material. The Court noted that because a vote of minority stockholders was not required to effect the short-form merger, the minority stockholders were only entitled to information material to the decision of whether to accept the merger consideration or seek appraisal. The Court determined that Pubco's failure to attach the current version of Section 262 constituted a "clear violation" of the board's duty of disclosure. The Court also held that the failure to disclose the manner in which Pubco was valued in connection with the merger was material, particularly since Pubco was a privately-held corporation with little readily available financial information.

In discussing the appropriate remedy, the Court noted that minority stockholders have a right to appraisal in a short-form merger and a proper remedy should preserve that right. Both parties agreed that quasi-appraisal was appropriate, but disagreed as to how that remedy should be implemented. Plaintiff urged the Court to follow *Nebel v. Southwest Bancorp, Inc.*, 1995 WL 405750 (Del. Ch. July 5, 1995), where the Court, in the case of a company that effected a short-form merger but mistakenly attached another state's appraisal statute to the notice of merger, awarded all minority stockholders, including those who did not initially seek appraisal, the difference between the merger consideration and the "fair value" of their shares. The defendants argued that the Court should instead follow *Gilliland v. Motorola, Inc.*, 873 A.2d 305 (Del. Ch. 2005), which fashioned a more detailed quasi-appraisal remedy designed to replicate the "modicum of risk" present in an actual appraisal action, where stockholders must initially decide whether to seek appraisal and accept the risk that their shares will ultimately be valued at a price that is higher or lower than, or equal to, the merger consideration.

The Court found that the *Gilliland* approach more accurately mirrored the statutory appraisal remedy. Accordingly, the Court ordered the parties to submit a form of order requiring that: (1) Pubco make supplemental disclosures explaining the manner in which the merger consideration was determined and attaching a current and correct copy of the appraisal statute; (2) minority stockholders may "opt-in" to a quasi-appraisal; (3) the quasi-appraisal remedy be structured to replicate the "modicum of risk" involved in an actual appraisal action, including a requirement that the minority stockholders who "opt-in" pay a portion of the proceeds that they received from the merger into escrow pending the outcome of the appraisal action; and (4) a valuation of Pubco shares be conducted using the method set forth in the appraisal statute.

Ordinary Equity Dilution Claim Found to be Derivative

In *Feldman v. Cutaia*, — A.2d —, 2008 WL 2223084 (Del. May 30, 2008), the Delaware Supreme Court affirmed the Court of Chancery's dismissal of an equity dilution claim brought by a former stockholder following the consummation of a cash-out merger on the grounds that the claim was derivative and the former stockholder lacked standing to pursue derivative claims.

Peter Feldman, a stockholder of The Telx Group, Inc. ("Telx"), sued the Telx directors and officers for various breaches of fiduciary duty. Following commencement of that litigation, Telx merged with GI Partners Fund II, L.P. and GI Partners Side Fund II, L.P., and Feldman's shares of Telx were cashed out in the merger. Defendants moved to dismiss, asserting that Feldman's claims were derivative and that, as a result of the merger, Feldman lacked standing to pursue them. Feldman amended his complaint by adding a claim that the stock options issued to three of the defendants inequitably diminished the consideration Feldman received for his shares in the merger (the "Dilution Claim"). Feldman argued that the failure of defendants, as Telx directors, to reconsider the validity of the stock options at the time of the merger gave rise to a direct, rather than derivative, claim. The Court of Chancery dismissed Feldman's complaint, finding that all of his claims were derivative and that Feldman thus lacked standing to pursue the claims after the merger. Feldman appealed the dismissal of the Dilution Claim.

Read together, Section 327 of the DGCL and Court of Chancery Rule 23.1 require a derivative plaintiff to be a stockholder at the time of the alleged wrongdoing and to maintain stockholder status throughout the course of the litigation. As a result, "a plaintiff may avoid dismissal of his derivative claims following a merger in only two distinct circumstances: where the claims asserted are direct, rather than derivative, or where one of the exceptions recognized in *Lewis v. Anderson* applies." (The two exceptions are: (i) if the merger itself is the subject of a claim of fraud perpetrated to deprive stockholders of standing to bring a derivative action or (ii) if the merger is merely a reorganization that does not affect plaintiff's ownership in the business enterprise). Because neither of the *Lewis* exceptions applied, Feldman could avoid dismissal only if the Dilution Claim was direct.

To assert a direct claim, a plaintiff must allege harm independent of any injury to the corporation that would entitle him to individual recovery. If the corporation alone suffers the harm, the claim is derivative. A claim for wrongful dilution – one based on the grounds that the corporation, by issuing equity for inadequate consideration, diminished the value of the complaining stockholder's equity interest – is not normally regarded as direct. "In the absence of a controlling stockholder, 'such equal "injury" to the [company's] shares resulting from a corporate overpayment is not viewed as, or equated with, harm to specific shareholders individually.'" In the present case, Feldman, in advancing the Dilution Claim, failed to plead any facts showing that failure to reconsider the validity of the stock options caused "harm separate and distinct from the alleged harm to the Company."

That the Dilution Claim was derivative was further supported by *In re J.P. Morgan Chase & Co. Shareholders Litigation*, 906 A.2d 766 (Del. 2006), where the Court rejected an attempt to recast a derivative claim as direct by alleging the same harm in a slightly different way. "[T]he damages allegedly flowing from the purportedly direct claim [in the Dilution Claim] are exactly the same as those suffered by the corporation in the underlying derivative

claim [in Count V], and thus the injury alleged in the complaint is properly regarded as injury to the corporation and not to the class."

The Delaware Supreme Court reaffirmed its distinction, articulated in *Kramer v. Western Pacific Industries, Inc.*, 546 A.2d 348 (Del. 1988), between attacks involving fair dealing or fair price in a corporate transaction, which are direct, and claims of mismanagement resulting in a decrease in the value of corporate stock, which are derivative. In this case, as in *Kramer*, plaintiff's "claim of diversion of funds and excessive payments clearly [did] not rise to an attack on the merger itself sufficient for [plaintiff's] suit to survive the merger."

Court of Chancery Addresses Requirements to Indemnify Agents and Right to Indemnification and Advancement for Counterclaims

In *Zaman v. Amedeo Holdings, Inc.*, 2008 WL 2168397 (Del. Ch. May 23, 2008), the Court addressed a number of indemnification and advancement issues under Section 145 of the DGCL, including (1) who qualifies as an "agent," (2) whether claims were brought "by reason of the fact" that a person was an agent, (3) how indemnification obligations of a parent entity could be triggered by actions taken at the subsidiary level, (4) whether counterclaims would be "in defense of" claims brought against an agent for purposes of advancement and (5) whether bringing claims for advancement and indemnification automatically results in a waiver of the attorney-client privilege for legal bills.

Faith Zaman and Thomas Derbyshire (collectively, the "Derbyshires") are British attorneys and spouses who were retained by Prince Jefri, the younger brother of the Sultan of Brunei, to act as agents with managerial and financial authority over all of Prince Jefri's American entities. In this capacity, from August 2004 to November 2006, the Derbyshires managed the New York Palace Hotel and assisted Prince Jefri's other entities with raising funds so that Prince Jefri and his entities could defend themselves against legal actions brought by the Sultan.

The relationship between Prince Jefri and the Derbyshires soured in November 2006, and Prince Jefri terminated the Derbyshires from the positions they held in his entities. Prince Jefri then filed several lawsuits against the Derbyshires, alleging, among other things, that they had improperly siphoned funds from those entities for their personal benefit. Prince Jefri filed suit in the New York district court (the "Federal Action") alleging that the Derbyshires exercised discretion over Prince Jefri's assets in violation of their fiduciary duties, and filed a second suit in a British court (the "London Action") to secure a worldwide freeze of the Derbyshires' assets. The Federal Action was dismissed for lack of jurisdiction, and Prince Jefri filed, but subsequently abandoned, a notice of appeal. Prince Jefri then re-filed most of the claims from the Federal Action in the Supreme Court of the State of New York (the "State Action").

As a result of these lawsuits, the Derbyshires brought this action in the Delaware Court of Chancery against multiple entities owned by Prince Jefri seeking indemnification for legal expenses incurred and advancement of expenses for pending claims. Although Prince Jefri was merely the beneficial owner of the various entities managed by the Derbyshires, the Court found that he effectively controlled those entities, often without regard for corporate formalities. The Court also found that the Derbyshires acted at the direction of Prince Jefri, regardless of whether

they were formally installed as directors or officers of those entities. To enable their exercise of this broad authority, Prince Jefri executed a document giving the Derbyshires authority to act as general agents on behalf of all his entities.

The Court considered whether the Derbyshires qualified as "agents." Defendants argued that the Derbyshires were merely outside legal advisors for Prince Jefri and his entities. The Court disagreed, finding that the Derbyshires possessed significant managerial power and discretion such that they would constitute "agents." The Court noted that this finding was consistent with Delaware precedent construing the term "agent" under Section 145 narrowly to avoid characterizing outside corporate counsel who might be sued by a corporation for malpractice as "agents" entitled to indemnification. The Court noted that, under that precedent, an "agent" must have the power to act on behalf of the corporation with third persons. Here, although the Derbyshires were technically attorneys, they had the requisite power to act on behalf of Prince Jefri with third parties, so they satisfied the narrow definition of "agent."

In the pre-trial stipulation, the Derbyshires argued that they were successful in the Federal Action and London Action and therefore entitled to indemnification under Section 145(c) of the DGCL, which mandates indemnification for present or former directors or officers of a corporation who are successful in defense of any action, suit or proceeding. Because the Derbyshires had taken many of the relevant actions in their capacity as "agents," the Court had to determine whether Section 145(c), which by its terms makes no reference to agents, applied to those actions. Although mandatory indemnification for successful claims under Section 145(c) is required only for officers and directors – and not for agents – the Court found that the indemnification bylaw at issue "contractually obligate[d] the defendants to indemnify an agent . . . to the full extent permitted by Delaware law." The Court found that, as a contractual matter, if the Derbyshires acted in an indemnifiable capacity, the defendants must indemnify them if Section 145(c) would authorize them to do so, reasoning that if Delaware law mandates indemnification of officers and directors for successful claims, a corporation is not prohibited by Delaware law from indemnifying agents for successful claims. According to the Court, if a corporation promises to indemnify agents to the fullest extent permitted by Delaware law, it is bound to indemnify those agents for successful claims if they are sued in an indemnifiable capacity.

The Court then analyzed whether the Derbyshires were sued in their indemnifiable capacities. The Court found a sufficient nexus of causation between the claims in the Federal Action and State Action and the Derbyshires' official capacities. Specifically, the Court found that the claims asserted in those actions depended on a showing that the Derbyshires breached duties owed to Prince Jefri's corporations; thus, the claims they faced were "by reason of" their service as directors, officers or agents of Prince Jefri's entities.

The Court next considered whether various parent entities were required to indemnify the Derbyshires for actions taken at the subsidiary level. Many of the claims in the Federal Action and State Action involved the Derbyshires' mishandling of assets held by a New York limited partnership, the organizational documents of which provided no indemnification or advancement of expenses to agents. The two Delaware defendants that owned this limited partnership – PH Partners and Palace Holdings – had bylaws providing for indemnification of agents. In addition, PH Partners and Palace Holdings were both wholly owned by Amedeo Holdings, another

defendant in the Delaware action that had bylaws providing for indemnification of agents. Defendants argued that, because there was no specific document authorizing the Derbyshires to act at the subsidiary level on behalf of the defendant Delaware entities, those entities were not obligated to indemnify the Derbyshires for actions taken at the subsidiary level. The Court, however, found that there were documents providing such authority and that, even in the absence of any such documents, the Derbyshires would have been entitled to indemnification from the parent entities for actions taken at the subsidiary level. The Court pointed to *VonFeldt v. Stifel Financial Corp.*, 714 A.2d 79, 87 (Del. 1998), in which a director of a subsidiary's board was entitled to indemnification from the parent because the parent had asked that director to sit on the subsidiary's board. Here, the Court found that, because Prince Jefri exercised effective control over the entities he beneficially owned, the Derbyshires were serving as agents of the subsidiary entity at the request of the parent entities. (Nevertheless, because one entity, Cedar Swamp, existed independently of any chain of ownership and did not have bylaws mandating indemnification and advancement of its own agents, it was not bound to provide indemnification or advancement of expenses to the Derbyshires).

The Court next considered whether the Derbyshires were entitled to advancement for counterclaims in the pending State Action. Section 145(e) of the DGCL permits advancement of expenses incurred "in defending" actions, suits or proceedings. In *Citadel Holding Corp. v. Roven*, 603 A.2d 818, 824 (Del. 1992), the Delaware Supreme Court had found that counterclaims brought by a party were "in defense" of a claim against that party, because the counterclaims were compulsory under the federal rules. Here, the Court found that a counterclaim, even if not compulsory, may be "in defense" of a proceeding when it is so directly related to a claim against the corporate official that success on the counterclaim would defeat the affirmative claims against the corporate official. The Court found that, although New York law only provides for permissive counterclaims, the Derbyshires were entitled to advancement for most of their counterclaims in the State Action, since those counterclaims were directly responsive to and negated the affirmative claims in that action. The only two counterclaims for which the Derbyshires were not entitled to advancement were those claiming abuse of process and malicious prosecution in the already-concluded Federal Action, as those counterclaims did not have the effect of negating any of the pending State Action claims.

Finally, the Court determined that bringing an action for advancement and indemnification does not automatically waive the attorney client privilege for legal bills that might reflect litigation strategy. Thus, unredacted legal bills in an indemnification or advancement action must be provided to defendants only to the extent needed to substantiate the reasonable basis of the request.

The Delaware Court of Chancery Orders Use of a "Quick Peek" Arrangement

In *Solow v. Aspect,* C.A. No. 20397-CC (Del. Ch. May 7, 2008) (TRANSCRIPT), the Court ordered the plaintiff to enter into what is referred to as a "quick peek" arrangement in connection with electronic discovery from a non-party. Under such an arrangement, the parties agree that disclosure of privileged documents will not result in a waiver. The producing party then makes potentially responsive documents available for review by opposing counsel without first screening them for applicable privileges. Documents identified for production by opposing

counsel are subsequently reviewed by the producing party for applicable privileges, and may be withheld on the basis thereof. The arrangement minimizes pre-production costs and shifts much of the burden to the party seeking discovery.

A fundamental issue with "quick peek" arrangements has been the enforceability of the parties' non-waiver agreement. As a general matter, the intentional disclosure of privileged documents to a third party will result in the waiver of any applicable privileges. During the hearing, however, Chancellor Chandler held that "quick peek" arrangements do not result in the waiver of privileges under Delaware law.

The *Solow* transcript ruling appears to be the first time that a Delaware court has required (or even permitted) parties to enter into such an arrangement (although the ruling in *Solow* is consistent with the view expressed by Vice Chancellor Strine at a hearing in *SLM Corp. v. J.C. Flowers II L.P.*, C.A. No. 3279-VCS (Del. Ch. Nov. 5, 2007) that "quick peek" arrangements are the future of electronic discovery).

The validity of "quick peek" arrangements has been percolating at the federal level for some time. On September 26, 2007, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States proposed amendments to Federal Rule of Evidence 502 which would, in part, allow for "quick peek" arrangements to be incorporated into federal court orders without resulting in a waiver of privilege. Given that the proposed rule would modify evidentiary privileges, the Rules Enabling Act requires Congress to approve it. To date, Congress has not yet approved proposed Rule of Evidence 502.

Court of Chancery Bars "Duty of Disclosure" Claims Brought Two Years After Completion of Merger in Absence of Showing of Director Disloyalty or Bad Faith

In *In re Transkaryotic Therapies, Inc.*, — A.2d —, 2008 WL 2699442 (Del. Ch. June 19, 2008), the Court of Chancery granted in part defendants' motions for summary judgment, holding, *inter alia*, that the Court could not grant monetary or injunctive relief for alleged breaches of the duty of disclosure in connection with a solicitation of proxies in favor of a proposed merger, where the record contained no evidence of disloyalty or bad faith by the directors who authorized the disclosures and where plaintiffs waited nearly two years after completion of the merger to file their disclosure claims.

The case arose from the July 27, 2005, merger of Transkaryotic Therapies, Inc. ("TKT") with a subsidiary of Shire Limited ("Shire"), in which non-dissenting stockholders of TKT received $37 per share. After completion of the merger, certain stockholders sought appraisal under Section 262 of the DGCL and undertook discovery. In March 2007, after substantial fact discovery had been taken in the appraisal action, certain of the appraisal petitioners filed a second suit against four of TKT's seven former directors alleging breaches of the fiduciary duties of disclosure and loyalty, against Shire alleging aiding and abetting the former directors' misconduct, and against TKT alleging that the stockholder vote on the merger had failed to comply with the relevant statute. The second action was consolidated with the appraisal case for discovery and trial.

After completion of a second round of fact discovery, the defendants sought summary judgment on most of the non-appraisal claims. Three of the four director-defendants moved for summary judgment on the duty of disclosure and duty of loyalty claims against them. Shire requested summary judgment on the aiding and abetting claims. All defendants moved for summary judgment on the claim of a defective merger vote.

The Court found that the record did not support plaintiffs' claims of breach of the duty of loyalty as to the three director-defendants who had moved on those claims, and accordingly granted those defendants' motions. The Court also granted Shire's motion for summary judgment to the extent it related to alleged aiding and abetting breaches of the duty of loyalty by the three moving directors. The Court denied Shire's motion as it related to the loyalty claims against the fourth director-defendant, holding that, on the assumption that the non-moving director had breached the duty of loyalty, the record reflected genuine disputes of material fact as to Shire's knowing participation and proximate causation of damages.

The Court also granted summary judgment on the claims for money damages arising from alleged breaches of the duty of disclosure. The Court first reviewed the development of the "fiduciary duty of disclosure" under Delaware law, noting the duty's origin in cases involving disloyal conduct by a controlling stockholder, its subsequent expansion to a "virtual *per se* rule of damages for breach of the fiduciary duty of disclosure," and the Delaware Supreme Court's more recent cases, including *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135 (Del. 1997), and *In re J.P. Morgan Chase & Co. S'holders Litig.*, 906 A.2d 766 (Del. 2006), paring back that rule and requiring that any monetary award be "logically and reasonably related to the harm." The Court also discussed the rule, frequently enunciated in preliminary injunction cases, that the harm caused by a breach of the duty of disclosure is "irreparable" and hence by definition cannot be remedied by an after-the-fact monetary award. In light of the passage of time since the allegedly faulty disclosures, the completion of the merger, the "irreparable" nature of the harm, and the absence of any viable claim for disloyal or bad faith conduct by the directors, the Court held that it could not award injunctive or monetary relief on the disclosure claims, and accordingly dismissed the claims. The Court held alternatively that the disclosure claims sounded exclusively in the duty of care and that the exculpatory clause in TKT's certificate of incorporation barred claims for monetary relief against the moving directors.

The Court finally denied TKT's motion for summary judgment on the claim of an inadequate stockholder vote in favor of the merger. (The Court clarified, however, that this claim could proceed only against TKT and not against Shire or the individual defendants.) The Court held that the plaintiffs had adequately rebutted for summary judgment purposes the statutory and common-law presumption of a sufficient vote created by the certified report of the inspector of election and the certificate of merger on file with the Delaware Secretary of State. However, recognizing the policy favoring finality in corporate elections and the plaintiffs' failure to employ the summary challenge mechanisms provided by statute, the Court emphasized that plaintiffs would not be able to prevail at trial on this claim without showing by clear and convincing evidence, as opposed to the usual preponderance standard, that the vote had been invalid, and further stated that the denial of the motion did not in "any way imply" that the Court is "optimistic that plaintiffs will succeed in carrying their ultimate burden of proof at trial."

The Delaware Court of Chancery Interprets "Final Disposition" in the Context of Mandatory Advancement

In *Sun-Times Media Group, Inc. v. Conrad M. Black, et al.,* C.A. No. 3518-VCS (Del. Ch. July 30, 2008), the Court of Chancery was once again the stage for the continuing saga of Conrad Black and his associates. The question of first impression presented to the Court was this: where corporate bylaws made advancement of litigation expenses mandatory through "final disposition" of an "action", did that mean through sentencing in the criminal trial, or through appeal of that sentencing? The question takes on broad significance, since the bylaws at issue paralleled generally the language of Section 145 of the General Corporation Law and thus were in a form widely used among Delaware corporations.

In the opinion, Vice Chancellor Strine held that "final disposition" in this context meant through the appellate, as opposed to trial, proceedings. The "final disposition" of an action, the Court wrote, "occurs when its outcome is no longer subject to any further review as of right."

The Court's analysis should be a further comfort to fiduciaries under siege. Likewise, the Court made clear that corporations who wish to limit advancement through appeal may do so in their bylaws.

2008 AMENDMENTS TO THE GENERAL CORPORATION LAW OF THE STATE OF DELAWARE

Legislation amending the General Corporation Law of the State of Delaware (the "DGCL") has been adopted by the Delaware General Assembly and was signed by the Governor of the State of Delaware on June 26, 2008. The DGCL amendments became effective upon signing by the Governor. The DGCL amendments are designed to keep Delaware law current and address issues raised by practitioners, the judiciary and legislators with respect to the current language or interpretation of the DGCL.

AMENDMENTS TO THE DGCL

List of Stockholders. Section 219(a) of the DGCL provides that the officer of a Delaware corporation that has charge of the stock ledger of the corporation shall prepare, at least ten days before every meeting of stockholders, a complete list of the stockholders entitled to vote at the meeting. The list of stockholders is required to set forth the address of each stockholder and the number of shares registered in the name of each stockholder. Section 219(a) also specifies where the list of stockholders must be kept and who may "inspect" or "examine" the list. Prior to the effectiveness of the DGCL amendments, in the event of a wilful neglect or refusal of the directors to produce the list of stockholders at any meeting for the election of directors held at a place, or open such list to examination on a reasonably accessible network during a meeting for the election of directors held solely by means of electronic communication, Section 219(b) provided that those directors were ineligible for election to any office at such meeting.

Section 219(a) has been amended to replace the word "inspected" with the word "examined" in order to remove any suggestion that such words were intentionally distinct. Section 219(b) has been amended to remove the concept of "wilful neglect" and to provide that the corporation shall have the burden of proof to establish that the examination sought by the stockholder is not germane to the meeting. Section 219(b) also has been amended to remove the single sanction of ineligibility to stand for election and to grant the Court of Chancery broad authority to fashion appropriate relief.

Contested Election of Directors. Section 225(b) of the DGCL provides a method whereby the stockholders or members, as applicable, of a Delaware corporation may apply to the Court of Chancery of the State of Delaware to determine the results of a vote of stockholders or members, as applicable, on matters other than the election of directors, officers or members of the governing body. Section 225(b) has been amended to include the corporation itself as a permissible applicant in an action brought under that subsection.

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The amendments to Sections 219 and 225 of the DGCL became effective on June 26, 2008.