INSIGHTS
The Corporate & Securities Law Advisor

VOLUME 33, NUMBER 3, MARCH 2019

■ CORPORATE LITIGATION

Drafting Minutes and Preparing Disclosures in the Post-*Corwin* Era

Stockholder plaintiffs increasingly are attempting to challenge M&A transactions through alleging disclosure deficiencies based on an examination of corporate books and records. This puts added pressure on the preparation of minutes and other corporate books and records.

By John Mark Zeberkiewicz and Robert B. Greco

While the Delaware Supreme Court's central holding in *Corwin v. KKR Financial Holdings LLC*[1]—namely, that a fully informed and uncoerced vote of disinterested stockholders restores the presumption of the business judgment rule to a board's decision in a sale of control that would otherwise be subject to enhanced scrutiny under *Revlon*—has resulted in the early dismissal of many post-closing price and process claims challenging M&A transactions[2] and potentially has deterred the filing of weak claims, it also has given rise to a new and unexpected dynamic in deal litigation. As *Corwin* mandates the dismissal of claims "cleansed" by a fully informed, uncoerced stockholder vote, a stockholder plaintiff seeking to withstand a motion to dismiss must adequately allege a disclosure deficiency in its complaint prior to obtaining formal discovery in the action.[3] Plaintiffs can attempt to surmount this hurdle through other means of obtaining discovery, including discovery in appraisal proceedings[4] or actions brought in other jurisdictions. Increasingly, however, plaintiffs have been attempting to uncover disclosure deficiencies through an examination of corporate books and records pursuant to Section 220 of the Delaware General Corporation Law (DGCL).[5]

As their claims generally cannot withstand dismissal under the *Corwin* doctrine unless they are able to show that the stockholders' "cleansing" vote was not fully informed, plaintiffs have begun using the results of their books and records inspections to challenge the sufficiency of the target company's disclosure document, focusing principally on the background of the transaction. Stockholder plaintiffs increasingly have sought to show, based on their review of board minutes and related materials, that the background of the transaction either omitted material facts regarding the sales process or misrepresented material elements of it. The omnipresent specter of a motivated fact-checker scrutinizing the background of the transaction places additional pressure on ensuring that the target's disclosure document adequately and accurately captures

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the key elements of the process—many if not all of which should be reflected in the minutes.

Members of the Delaware judiciary and practitioners have noted some of the benefits of appropriately drafted long-form minutes in the M&A context, particularly as a means of protecting the board.[6] But, as board minutes typically are subject to inspection pursuant to pre-closing Section 220 demands,[7] and plaintiffs continue to search for discrepancies between the minutes and the background of the transaction, practitioners may legitimately question whether long-form minutes merely serve to provide plaintiffs ammunition from which to contrive a disclosure claim and prevent the application of *Corwin*.[8] In our view, however, recent developments under Section 220 and in the post-closing M&A litigation context provide additional support for the practice of keeping detailed contemporaneous minutes during an M&A process.

Section 220 Developments

Since the Supreme Court's decision in *Corwin*, stockholders have demanded inspection of corporate books and records in connection with M&A transactions with greater frequency. The uptick in Section 220 demands is not surprising. Often, a disclosure deficiency is the only basis on which a stockholder plaintiff can overcome the imposition of the "irrebuttable business judgment rule" under *Corwin*.[9] As the Delaware courts are traditionally not receptive to "'why' or 'tell me more'" disclosure claims, it is generally difficult to plead a disclosure deficiency without knowledge of the undisclosed facts.[10]

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Under Section 220, a stockholder may inspect corporate books and records for any "proper purpose" that is "reasonably related to such person's interest as a stockholder."[11] One proper purpose recognized under Delaware law is the investigation of mismanagement or wrongdoing, which requires a stockholder to demonstrate "a credible basis from which the court can infer that mismanagement, waste or wrongdoing may have occurred"[12] and is the stated purpose of most Section 220 demands related to M&A transactions. While *Corwin* may serve as a basis to dismiss potential fiduciary claims investigated pursuant to Section 220, it does not serve as a defense to inspection under Section 220 if the stockholder has met its burden of proof.[13]

Section 220 only entitles stockholders to inspect those "documents in the corporation's possession, custody or control" that are "necessary and essential to accomplish the[ir] stated, proper purpose."[14] "Documents are 'necessary and essential' pursuant to a Section 220 demand if they address the 'crux of the shareholder's purpose' and if that information 'is unavailable from another source.'"[15] "In other words, the court must give the petitioner everything that is 'essential,' but stop at what is 'sufficient.'"[16]

Traditionally, "board level documents evidencing the directors' decisions and deliberations, as well as the materials that the directors received and considered," have been "[t]he starting point—and often the ending point—for a sufficient inspection."[17] In several recent cases, however, the Delaware courts have extended production under Section 220 to emails and other electronic communications, including those sent or received on non-company or personal accounts or devices.[18] Production of emails and other electronic communications nevertheless remains "the exception rather than the rule" and is only appropriate in a Section 220 proceeding if the petitioner satisfies its burden of establishing that such communications are essential to its stated purpose.[19] Accordingly, decisions regarding the production of emails

> reflect the principle that the Court of Chancery should not order emails to be produced when other materials (*e.g.*, traditional board-level materials, such as minutes) would accomplish the petitioner's proper

> purpose, but if non-email books and records are insufficient, then the court should order emails to be produced.[20]

Given that the production of emails and other electronic materials will only be compelled when traditional materials are insufficient to accomplish the petitioner's proper purpose, it follows that detailed minutes stand a far greater chance of being deemed sufficient to accomplish the petitioner's purpose than short-form minutes. It likewise follows that keeping short-form minutes introduces a greater risk that a court will order the production of emails and other electronic communications in a Section 220 action, thus allowing for the exposure of more confidential information to stockholder plaintiffs—and potentially providing additional (and better) fodder for disclosure-based claims. The informal nature of emails renders their production particularly problematic. Unlike minutes thoroughly and thoughtfully prepared by counsel, emails are often quickly drafted and are far more likely to contain statements susceptible to contortion or distortion. Indeed, in at least one recent case, plaintiffs obtained an email after making a Section 220 demand that formed the basis of a purported disclosure deficiency and prevented the dismissal of their claim under *Corwin*.[21]

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Moreover, there is a growing trend in the Delaware courts of conditioning production of Section 220 documents on a requirement that any complaint in subsequent litigation relying on the produced documents be deemed to incorporate all such produced documents by reference.[22] The imposition of such a condition makes all of the produced documents "fair game for citation and reliance in a motion to dismiss" and "permits a defendant to respond to 'cherry-pick[ed] documents' that are taken 'out of context,' by pointing the Court to other documents already produced for assistance in determining the reasonableness of inferences drawn in any follow-on complaint."[23] Where an incorporation-by-reference condition applies, detailed minutes, which inevitably will be produced in response to any proper Section 220 demand, provide far greater context for defendants to rebut naked assertions and strained constructions of documents and past events on a motion to dismiss. The incorporation of long-form minutes by reference can be especially useful in the defense of "tell me why" disclosure claims, which, despite typically carrying little weight, have been found to preclude the application of *Corwin* in certain cases.[24] If the "why" is more thoroughly explained in board minutes and proves to be insignificant, defendants have an even stronger basis to dismiss such claims.

Establishing Credibility

Recent post-closing M&A cases where disclosure deficiencies prevented the application of *Corwin* have highlighted the heightened significance of credible minutes. Most notably, in *In re PLX Technology Inc. Stockholders Litigation*, the Delaware Court of Chancery critiqued several aspects of board and special committee minutes and gave them little weight in its post-trial opinion.[25] Among other observations, the Court noted that the minutes' account of several events contradicted other more credible evidence in the record,[26] stating that the discrepancies appeared to be the result of "wishful minute drafting" and provided "an example of lawyers drafting minutes after the fact in an effort to paper a good process, but not getting the details right."[27]

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Additionally, in finding that misleading public disclosures rendered *Corwin* inapplicable, the *PLX* Court

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declined to give any weight to the repeated characterization of management projections as "aggressive" in board and special committee minutes.[28] The Court explained that "the minutes went out of their way" to make these characterizations and were the product of interested parties' "widespread efforts to reconfigure the record by drafting questionable minutes and overemphasizing the 'aggressive' nature of the . . . Projections."[29] The Court also observed that "[t]he minutes d[id] not discuss, and the Special Committee's materials d[id] not identify, any new information that would have necessitated adjustments" to the purportedly aggressive projections. The omission of such details from the minutes, according to the Court, further undermined the authenticity of the other characterizations in the minutes regarding the aggressive nature of the projections.[30]

The Court of Chancery made similar statements regarding the credibility of minutes in *Riche v. Pappas*.[31] After finding *Corwin* inapplicable as a result of disclosure deficiencies identified in emails that contained information not reflected in the minutes or proxy statement, the Court stated:

> What we have here is exactly what I think courts worry about, which is that the proxy statement paints a picture that tells a story. We have more and more instances in this court where minutes and disclosure documents seem to have been drafted wishfully rather than accurately. In other words, they are drafted to create a story rather than document what happened.[32]

To avoid these pitfalls, practitioners should, to the extent possible, strive to prepare and circulate minutes contemporaneously. Doing so provides drafters with the benefit of a clear memory, thereby limiting inadvertent factual errors that can undermine the credibility of minutes. It also may help quell concerns the court may have as to whether the minutes were drafted "wishfully," with a view towards crafting a story whose narrative arc takes shape only after the ending has been revealed.[33] Moreover, contemporaneous drafting allows directors to consider and approve minutes promptly, and prior to the commencement of any litigation, which further enhances their credibility.[34]

All that said, while practitioners should ensure that the minutes appropriately reflect the directors' decision-making process,[35] they should avoid going "out of their way" to craft a particular narrative. As *PLX* illustrates, minutes that overtly and repeatedly emphasize self-serving facts in a conclusory fashion could give rise to "thou doth protest too much" reactions from reviewing courts. Where conveying a specific fact, event or decision is critical, greater credibility may be gained through an explanation of the "why's" or "how's" surrounding the underlying issues—matters that frequently are addressed in long-form minutes—than by bald assertions. Furthermore, minutes that provide appropriately robust explanations tend to add context regarding the breadth and depth of board discussions on particular issues, demonstrating the directors' discharge of their duty of care (and, incidentally, providing the type of context that the Delaware courts have indicated would be valuable).[36]

Preparing Disclosure Documents from the Minutes

Given the significance of obtaining the protections of *Corwin*, it is critical that proxy statements and other disclosure documents prepared at the conclusion of an M&A process do not omit any non-public information that could be deemed material. As recent cases have shown, it is not always perfectly clear what information is material, and even jurists may have diverging views on whether a fact is material.[37] Thus, to the extent there is a debate as to whether a particular fact is material, practitioners should be inclined toward disclosure. In this regard, contemporaneous long-form minutes provide an added benefit of forming a thorough record from which complete and accurate disclosures can be derived.

To ensure that no material information is inadvertently omitted from a disclosure document, it often will be helpful to conduct a comprehensive side-by-side review of the background of the transaction and the minutes of board and committee meetings held

throughout the process. Reference also should be made to any other key documents or communications, including any documents or communications that the corporation might be expected to produce in response to a Section 220 demand. In addition to serving as a check on the adequacy of public disclosures, this process will help confirm that there are no factual discrepancies in the minutes that could undermine their credibility.

The review of the disclosure documents and minutes should be undertaken by members of the deal team with intimate knowledge of the sales process, as they are in the best position to know the material facts that need to be disclosed. Deal lawyers also may benefit from the views of their colleagues, particularly M&A litigation colleagues, unfamiliar with the deal to serve as a sounding board. Having a fresh perspective on the disclosure document—from a party that would essentially be approaching the document in the same way that a potential stockholder plaintiff would approach it—could be useful in identifying areas that those steeped in the facts may inadvertently overlook, whether through a subconscious filling of gaps or otherwise.

Conclusion

In the post-*Corwin* era, stockholder plaintiffs have begun to focus their sights on disclosure deficiencies that prevent the application of the presumption of the business judgment rule in post-closing M&A litigation. To assert disclosure deficiencies, and avoid dismissal of their price and process claims, stockholder plaintiffs have turned to minutes and other corporate books and records obtained pursuant to Section 220 of the DGCL. The fact that plaintiffs are relying on minutes to identify omissions or materially misleading statements in the disclosure document, however, does not in our view counsel in favor of drafting short-form minutes as a means of avoiding potential discrepancies. Indeed, recent developments in Section 220 litigation indicate that more detailed minutes actually may be beneficial in defending against post-closing litigation because they can diminish the likelihood that the corporation will be compelled to produce emails and other electronic communications. Detailed minutes also may provide greater context for purposes of defending against post-closing litigation on a motion to dismiss in the event that an incorporation-by-reference condition is imposed on Section 220 production.

Drafting long-form minutes—those that provide a sufficiently detailed summary of the board's or committee's decision-making process—and ensuring that they are circulated and approved, to the extent practicable, substantially contemporaneously with meetings throughout the process also could assist in assuring that the minutes are found to be credible. Contemporaneous drafting, circulation and approval of minutes may help to avoid any inference that the minutes were "wishfully" drafted to make it appear that the outcome was inevitable. In addition, minutes that are sufficiently detailed such that they cross-reference board materials and key events throughout the process—rather than merely asserting facts that may be perceived to be self-serving—are likely to be viewed as more credible.

At the end of a sales process, proxy statements and other disclosure documents should be constructed, at their core, from the minutes. In light of the importance of *Corwin*'s protections, these disclosures should be prepared carefully and reflect all non-public information set forth in the minutes and other relevant documents or communications, except to the extent that any such information is plainly immaterial or subject to privilege.

Notes

1. 125 A.3d 304 (Del. 2015).
2. *See, e.g.*, *In re Volcano Corp. S'holder Litig.*, 143 A.3d 727 (Del. Ch. 2016), *aff'd* 156 A.3d 697 (Del. 2017) (TABLE).
3. *In re Solera Hldgs., Inc. S'holder Litig.*, 2017 WL 57839, at *78 (Del. Ch. Jan. 5, 2017).
4. *See, e.g.*, *In re Xura, Inc. S'holder Litig.*, 2018 WL 6498677, at *1 (Del. Ch. Dec. 10, 2018).
5. *CHC Invs., LLC v. FirstSun Capital Bancorp*, 2019 WL 328414, at *5 (Del. Ch. Jan. 24, 2019) (quoting *Lavin v. West Corp.*, 2017 WL 6728702, at *9 (Del. Ch. Dec. 29, 2017)); *see, e.g.*, *Morrison v. Berry*, 191 A.3d 268 (Del. 2018); *Appel v. Berkman*, 180 A.3d 1055 (Del. 2018).

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6. *See, e.g.*, E. Norman Veasey & Christine T. De Guglielmo, Indispensable Counsel: The Chief Legal Officer in the New Reality 82 (2012) ("If the directors' actions or decisions later become the subject of litigation, a greater level of detail in the minutes may help the directors to demonstrate that they engaged in an appropriately deliberative process in reaching their decision. This is particularly true for a major transaction (such as a merger, sale, or acquisition) at the board level, and is essential also for a special board committee (such as one charged with a buyout transaction or a special litigation committee)."); *cf.* Leo E. Strine, Jr., "Documenting the Deal: How Quality Control and Candor Can Improve Boardroom Decision-making and Reduce the Litigation Target Zone," 70 *Bus. Law*. 679, 697-99 (2015). Chief Justice Strine notes that "[t]here are good arguments on both sides of the question" as to whether to draft long-form or short-form minutes, observing that "[t]hose who favor long-form minutes emphasize the importance of documenting in full why the directors made the decisions they did in a high-stakes situation that is likely to be the subject of litigation," while "those who favor short-form minutes note that long-form minutes sometimes look like a transcript without having the accuracy of one" and that drafters "can focus on being more precise, and use other documents, such as the bankers' book, to provide more details about decisions made." *Id.* at 697-98. The Chief Justice further observes, however, that in the context of an M&A transaction, "outside counsel is often well equipped to prepare long-form minutes whose quality and accuracy justify the risks entailed" and urges that drafters "always be clear what approach is being taken, so it is understood by all upfront, and is not the subject of after-the-fact skepticism and criticism by dissident stockholders." *Id.* at 699.
7. *See Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 790 (Del. Ch. Feb. 2, 2016).
8. *See, e.g.*, *Appel*, 180 A.2d at 1063 (holding that a stockholder vote was not fully informed due to the failure to disclose the reasons that the corporation's founder, largest stockholder and chairman declined to approve the deal, which were uncovered by plaintiffs in board minutes).
9. *In re OM Gp., Inc. S'holders Litig.*, 2016 WL 5929951, at *10 (Del. Ch. Oct. 12, 2016); *Larkin v. Shah*, 2016 WL 4485447, at *7 (Del. Ch. Aug. 25, 2016).
10. *In re Saba Software, Inc. S'holder Litig.*, 2017 WL 1201108, at *9 (Del. Ch. Mar. 31, 2017); *accord Solera*, 2017 WL 57839, at *12 ("'[A]sking why does not state a meritorious disclosure claim' under Delaware law.") (quoting *In re Sauer–Danfoss Inc. S'holders Litig.*, 65 A.3d 1116, 1131 (Del. Ch. Apr. 29, 2011)).
11. 8 Del. C. § 220(b).
12. *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 118 (Del. 2006).
13. *Lavin*, 2017 WL 6728702, at *7-10; *Inter-Local Pension Fund GCC/IBT v. Calgon Carbon Corp.*, 2019 WL 479082, at *15 (Del. Ch. Jan. 25, 2019). A plaintiff may only file a petition under Section 220 if it is a stockholder of the corporation at the time of its filing. Accordingly, to investigate a cash-out M&A transaction, a stockholder plaintiff must file its petition prior to the closing of the transaction. *Weingarten v. Monster Worldwide, Inc.*, 2017 WL 752179, at *3–5 (Del. Ch. Feb. 27, 2017). As a petition can only be filed after inspection is refused or no response is received within five business days after the stockholder's demand for inspection was made, the stockholder's initial demand must be made even further in advance of closing. 8 Del. C. § 220(c).
14. *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 115-16 (Del. 2002).
15. *Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Trust Fund IBEW*, 95 A.3d 1264, 1271 (Del. 2013) (quoting *Espinoza v. Hewlett–Packard Co.*, 32 A.3d 365, 371–72 (Del.2011)).
16. *KT4 P'rs LLC v. Palantir Techs. Inc.*, —A.3d—, 2019 WL 347934, at *9 (Del. Jan. 29, 2019).
17. *Yahoo!*, 132 A.3d at 790.
18. *See, e.g.*, *Palantir*, 2019 WL 347934 (holding that a petitioner was entitled to inspect emails since the corporation "conduct[ed] formal corporate business without documenting its actions in minutes and board resolutions or other formal means" and instead maintained "its records of the key communications only in emails"); *Wal-Mart*¸ 95 A.3d 1264 (affirming an order compelling the production of electronic documents and the search of the personal devices and computers of certain officers and directors for responsive documents); *Yahoo!*, 132 A.3d at 793 (requiring the production of emails from the personal email account of Yahoo!'s CEO because there was evidence that she "chose to use a personal email account to conduct Yahoo business").

19. *In re UnitedHealth Gp., Inc. Section 220 Litig.*, 2018 WL 1110849, at *9 (Del. Ch. Feb. 28, 2018), *aff'd sub nom. UnitedHealth Gp. Inc. v. Amagamated Bank*, 196 A.3d 885 (Del. 2018) (TABLE).
20. *Palantir*, 2019 WL 347934, at *10; *see also Mudrick Capital Mgmt., L.P. v. Globalstar, Inc.*, 2018 WL 3625680, at *9 (Del. Ch. July 30, 2018) (ordering the production of emails from the corporation's CEO and General Counsel and two members of its special committee where produced traditional corporate records did not adequately address the stockholder's stated purpose); *UnitedHealth*, 2018 WL 1110849, at *9–10 (holding that petitioners were not entitled to inspect emails from specified officers because they failed to carry "their burden of showing why board-level documents alone would not be sufficient for their stated purposes"); *In re Plains All Am. Pipeline, L.P.*, 2017 WL 6016570, at *5 (Del. Ch. Aug. 8, 2017) (denying stockholders access to the emails of a corporation's Chairman and CEO "because board-level materials [were] sufficient for their stated purpose").
21. *Morrison*, 191 A.3d at 273; *see also Riche v. Pappas*, C.A. No. 2018-0177-JTL (Del. Ch. Oct. 2, 2018) (transcript) (holding that *Corwin* was inapplicable to post-closing fiduciary claims due to disclosure deficiencies identified by plaintiffs in emails).
22. *See, e.g. Yahoo!*, 132 A.2d at 796-99; *City of Cambridge Ret. Sys. v. Universal Health Servs., Inc.*, 2017 WL 4548460, at *3 (Del. Ch. Oct. 12, 2017); *Calgon*, 2019 WL 479082, at *18.
23. *City of Cambridge*, 2017 WL 4548460, at *2 (quoting *Yahoo!*, 132 A.2d at 797).
24. *See, e.g.*, *Saba Software*, 2017 WL 1201108, at *11-12.
25. 2018 WL 5018535 (Del. Ch. Oct. 16, 2018).
26. *Id.* at *18-19, *21-23, *26.
27. *Id.* at *19, *26; *see also In re Rural Metro Corp.*, 88 A.3d 54, 72 (Del. Ch. 2014) ("The minutes . . . have the feel of a document drafted in anticipation of litigation, and the rose-colored description of the sale process that appears in the minutes does not match up with what actually took place."), *aff'd sub. nom. RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816 (Del. 2015).
28. 2018 WL 5018535, at *35-37.
29. *Id.* at *22, *36 n.459; *see also id.* at *19 ("When the lawyers documented the deal process, they started building the case for the subsequently lowered projections in the minutes.").
30. *Id.* at *20.
31. C.A. No. 2018-0177-JTL.
32. *Id.* at tr. 24-25.
33. *See Rural Metro*, 88 A.3d at 72 (expressing concerns as to the reliability of one set of board minutes and noting that minutes for earlier board meetings held months prior were drafted at the same time).
34. *See Frontfour Capital GP, LLC v. Taube,* C.A. No. 2019-0100-KSJM, at 25, n.98 (Del. Ch., Mar. 11, 2019) (declining to give minutes any "presumed weight" and viewing them as a summary of "Defendants litigation position" instead of "contemporaneous evidence" because they were not finalized until litigation was commenced); *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 191 (Del. Ch. 2007) ("After this litigation commenced, the Special Committee met on December 21, 2006 and approved formal minutes for ten meetings ranging from August 10, 2006 through November 28, 2006. That tardy, omnibus consideration of meeting minutes is, to state the obvious, not confidence-inspiring.").
35. Obviously, even long-form minutes "should not purport to constitute a verbatim record of the discussion." Veasey, *supra* n. 6, at 83.
36. *See In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 768 n.539 (Del. Ch. 2005) (observing that it "would have been extremely helpful to the Court" in determining that directors adequately considered a specific issue "if the minutes had indicated in any fashion that the discussion relating to the [issue] was longer and more substantial than the discussion relating to the myriad of other issues brought before the compensation committee that morning"), *aff'd*, 906 A.2d 27 (Del. 2006).
37. *See, e.g.*, *Morrison*, 191 A.3d 268 (finding four material omissions that prevented the application of *Corwin* and overruling the Court of Chancery's decision in which it found no material omissions, noted that only one alleged deficiency even came close to being material and dismissed claims under *Corwin*); *Appel*, 180 A.3d 1055 (reversing the Court of Chancery's ruling in which it held that an omitted fact was immaterial in light of "the significant weight of twenty-five years of Delaware authority on this point").

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