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Recent Delaware Corporate Law Decisions

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During the past few months, several cases in the Delaware courts have raised important issues for Delaware corporations and their advisors. In *Wayne County Employees' Ret. Sys. v. Corti*, the Court of Chancery applied the Delaware Supreme Court's decision in *Lyondell Chemical Co. v. Ryan* to dismiss all claims brought by a former stockholder of video game maker Activision, Inc. in connection with its combination with Vivendi Games, Inc., whereby Vivendi became the majority stockholder in the combined entity, Activision Blizzard. In *Berger v. Pubco Corp.*, the Delaware Supreme Court set forth for the first time the proper remedy for a parent corporation's failure to disclose facts material to a minority stockholder's decision whether to elect the exclusive remedy of appraisal in connection with a short-form merger pursuant to Section 253 of the General Corporation Law of the State of Delaware. In *San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals, Inc.*, the Court of Chancery held that the continuing directors provision in Amylin Pharmaceuticals, Inc.'s bond indenture, which the Court interpreted under New York law, did not prohibit incumbent directors from "approving" persons nominated by stockholders even as the incumbent board publicly opposed those nominees in a proxy contest. In *In re Atmel Corp. S'holders Litig.*, the Court of Chancery denied an application for an injunction through which the plaintiff sought to invalidate an amendment to Atmel Corporation's stockholder rights plan that incorporated certain derivative positions in calculating a stockholder's total beneficial ownership for purposes of determining whether the stockholder had triggered the rights plan. In *Dubroff v. Wren Holdings, LLC*, the Court of Chancery found that the plaintiffs stated a claim for breach of the fiduciary duty of disclosure in connection with the notice sent to the stockholders of NSC pursuant to Section 228 of the General Corporation Law of the State of Delaware. Finally, in *In re Waddell & Reed Financial, Inc.*, the Court of Chancery ordered the inspector of elections of the annual meeting of stockholders of Waddell & Reed Financial, Inc. to reopen the polls in order to count the votes of approximately 3.2 million shares of common stock of the company that had been excluded from the vote tabulation due to a technical error in their transmission.

The Court of Chancery Reviews Board's Decision-Making Process in a Sale of Control

In *Wayne County Employees' Ret. Sys. v. Corti*, C.A. No. 3534-CC (Del. Ch. July 24, 2009), the Court of Chancery dismissed all claims brought by a former stockholder of video game maker Activision, Inc. ("Activision") in connection with its combination with Vivendi Games, Inc. ("Vivendi"), whereby Vivendi became the majority stockholder in the combined entity, Activision Blizzard (the "Combination"). *Wayne County*, the first Chancery Court decision to apply the Supreme Court's recent decision in *Lyondell Chemical Co. v. Ryan*, reaffirms that Delaware courts will not "second guess the business judgment" of the board in a sale of control context. This case also highlights potential considerations when drafting charter provisions that renounce any interest in corporate opportunities pursuant to Section 122(17) of the General Corporation Law of the State of Delaware ("Section 122(17)").

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In addition to disclosure claims, the complaint primarily challenged the conduct of the Activision directors in negotiating and approving the Combination. According to the plaintiff, two Activision managers, who were also directors (the "Managers"), controlled both the sale process and Activision's advisors, had their own self interests in the Combination and favored those personal interests above the interests of Activision's stockholders. The plaintiff further alleged that the remaining directors breached their fiduciary duties by allowing the Managers to control the negotiations and the advisors and by failing to obtain a "control premium" for stockholders.

The Court determined that although management entrenchment can be a concern, the plaintiff had put forth no factual allegations that suggest that the Managers were motivated by entrenchment. Importantly, Vivendi assumed from the start of negotiations that the Managers would retain positions in the new company, and there were no allegations that there was a bidder threatening to take over Activision and replace management or that the Managers would be removed from their positions if Activision did not pursue a transaction with Vivendi. Nor had the plaintiff alleged facts sufficient to support its allegation that the Managers favored their own "interests in creating and reigning over [a] combined empire." To support such a claim, a plaintiff would have to show that the manager's primary purpose for pursuing the transaction was a desire to increase the size of the company for the manager's benefit, which would be a difficult showing to make. Largely for these reasons, the Court also determined that the remaining directors had not abdicated their duties in permitting the Managers to be involved actively in the negotiations.

With respect to the remaining fiduciary claims, the Court framed the issue as whether the plaintiff had pled facts sufficient to support a claim that the directors had failed to act in good faith.[1] The Court reiterated the standard, set forth in the Supreme Court's recent *Lyondell* decision, that to survive a motion to dismiss in this context the allegations must suggest that the director defendants "knowingly and completely failed to undertake their responsibilities" to obtain the best sale price. The allegations in the complaint fell short of this standard. In fact, the allegations demonstrated, among other things, that the board formed a committee of outside directors to oversee the sale process, the board and the committee along with its financial advisor met several times in the month leading up to the transaction, the board regularly evaluated financial reports and analyses, and no alternative bidder emerged in the roughly seven-month period between the signing and closing of the Combination. Further, prior to approving the Combination, the Activision board received a fairness opinion from its financial advisor, which had been advising the board throughout this process. Given that no "blueprint" must be followed in a sale of control, there is no requirement that a board probe for alternatives, as the plaintiff had argued.

Likewise, there is no requirement that the board obtain separate consideration identified as a "control premium." Rather, any "control premium" received by the selling company would be included in the consideration received by the stockholders in exchange for what is given to the

[1] The Court made this determination because the plaintiff had failed to establish that the directors were not independent, and the directors were afforded protection under an exculpatory charter provision pursuant to Section 102(b)(7) of the General Corporation Law.

acquirer, including voting control. The Court concluded that the plaintiff's criticisms in that regard were merely veiled attacks on the adequacy of the price obtained in the sale of control, and that if directors fulfill their fiduciary duties in the sale of control, the Court will "not second guess the business decision of the board." Put another way, the reviewing court focuses on the board's decision-making process rather than making an independent judgment of whether consideration received was adequate.

Lastly, the plaintiff sought a declaration that a provision in the Activision Blizzard certificate of incorporation relating to corporate opportunities was invalid and unenforceable under Delaware law. The plaintiff conceded that under Section 122(17), a corporation may renounce in its certificate of incorporation any interest or expectancy in a corporate opportunity. According to the plaintiff, however, the Activision Blizzard charter provision is nevertheless invalid because it does not specify the renounced corporate opportunities, as required by Section 122(17). The Court, however, did not determine the merits of this issue. Rather, the Court determined that this claim was not ripe for adjudication because the mere existence of the charter provision did not pose sufficient harm to stockholders to outweigh concerns associated with rendering a hypothetical opinion.[2]

The Delaware Supreme Court Sets Forth the Proper Remedy for a Disclosure Violation in Connection with a Short-Form Merger

In *Berger v. Pubco Corp.*, C.A. No. 3414 (Del. July 9, 2009), the Delaware Supreme Court set forth for the first time the proper remedy for a parent corporation's failure to disclose facts material to a minority stockholder's decision whether to elect the exclusive remedy of appraisal in connection with a short-form merger pursuant to Section 253 of the General Corporation Law of the State of Delaware ("Section 253").

In effecting a short-form merger under Section 253, a parent corporation needs only to provide minority stockholders with notice that the merger has occurred and that they are entitled to seek appraisal under Section 262 of the General Corporation Law ("Section 262"). Statutory appraisal is the exclusive remedy for minority stockholders in connection with a short-form merger, provided that there is no fraud, illegality or disclosure violation. *Glassman v. Unocal Exploration Corp.*, 777 A.2d 242 (Del. 2001). The notice, however, must include all information material to stockholders in deciding whether to seek appraisal, as well as a copy of the appraisal statute.

[2] The plaintiff also challenged a provision exempting certain persons from fiduciary liability as exceeding the authority permitted under Section 102(b)(7) of the General Corporation Law because it eliminates liability for any breach of fiduciary duty, including the duty of loyalty. The Court found that claim also was not ripe. Further, the Court noted that because the exculpatory charter provision is qualified by the phrase, "[t]o the fullest extent permitted by law," to the extent the provision could possibly be construed as endorsing conduct prohibited under Delaware law, its own language bars such an interpretation and that the provision could be read as not applying to Activision Blizzard directors in their capacity as such.

The Court of Chancery held on summary judgment, and the Supreme Court agreed, that the former parent corporation's notice of merger was deficient because it attached an outdated version of the appraisal statute and did not disclose the valuation methodology used to set the cash-out price. Because the merger already had been effected and consideration paid, to remedy the disclosure violation, the Court of Chancery held that the minority stockholders were entitled to a "quasi-appraisal" remedy, where (i) the parent would provide the minority stockholders with remedial supplemental disclosure; (ii) the stockholders would be given the option to opt in to the action; (iii) the stockholders who opted in would escrow a portion of the merger proceeds they had received; and (iv) valuation of the shares would be made as of the date of the merger. Exercising *de novo* review of the Court of Chancery's form of a remedy, the Supreme Court, sitting *en banc*, reversed and remanded back to the Court of Chancery.

The Supreme Court agreed that the optimal remedy for disclosure violations in this context is a "quasi-appraisal" action to recover the difference between "fair value" and the merger price. Unlike the Court of Chancery, however, the Supreme Court held that stockholders (i) would be treated automatically as members of the class and continue as members of the class unless and until they opt out after receiving the remedial supplemental disclosure and the notice of class action informing them of their opt out right, and (ii) would not be required to escrow a portion of the merger proceeds that they already received. Such a remedy, according to the Court, best effectuates the policies underlying Section 253, Section 262 and *Glassman*, and takes into consideration practicality of implementation and fairness to the litigants. Further, this remedy also gives the minority stockholders "credit" for the "expense and effort" of bringing litigation "solely because the controlling shareholder had violated its fiduciary obligation."

In determining that minority stockholders would not have to opt in, the Court focused on the respective burdens of the parties. According to the Court, an opt in requirement would potentially burden stockholders seeking appraisal recovery, who would bear the risk of forfeiture of their appraisal rights, whereas an opt out requirement would avoid any such risk. To the company, on the other hand, neither option is more burdensome than the other. Under either alternative, "the company will know at a relatively early stage which shareholders are (and are not) members of the class."

With respect to the escrow requirement, the Court recognized that removing this requirement would provide the stockholders with the dual benefit of retaining merger proceeds while at the same time litigating to recover a higher amount – a benefit they would not have in an actual appraisal. The Court determined that fairness nevertheless requires such a result. The Court reasoned that "[m]inority shareholders who fail to observe the appraisal statute's technical requirements risk forfeiting their statutory entitlement to recover the fair value of their shares. In fairness, majority stockholders that deprive their minority shareholders of material information should forfeit their statutory right to retain the merger proceeds payable to shareholders who, if fully informed, would have elected appraisal."

The Court qualified its opinion, however, acknowledging that where a "technical and non-prejudicial" violation of Section 253 occurs, *e.g.*, where stockholders receive an incomplete copy of the appraisal statute with their notice of merger, a "quasi-appraisal" remedy with opt in and escrow requirements might arguably be supportable.

The Court of Chancery Holds that the Amylin Board had Authority to Approve a Dissident Slate Pursuant to a Continuing Directors Provision in its Bond Indenture

In *San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals, Inc.*, C.A. No. 4446-VCL (Del. Ch. May 12, 2009), the Court of Chancery held that the continuing directors provision in Amylin Pharmaceuticals, Inc.'s ("Amylin") bond indenture (the "Indenture"), which the Court interpreted under New York law, did not prohibit incumbent directors from "approving" persons nominated by stockholders even as the incumbent board publicly opposed those nominees in a proxy contest. The Court also found that the Amylin board complied with its duty of care in approving the Indenture, although the Court cautioned counsel to be mindful of the board's duties to protect stockholders in doing so.

Amylin's Indenture provides holders of publicly traded convertible notes the right to demand redemption at face value upon the occurrence of certain events, including a "fundamental change," defined in part to have occurred if at any time the "continuing directors" do not constitute a majority of the company's board.[3] The Indenture defines "continuing directors" in part as "any new directors whose election to the Board of Directors or whose nomination for election by the stockholders of the Company was *approved* by at least a majority of the directors then still in office" (emphasis added).

Litigation ensued after two insurgent stockholders, Eastbourne Capital Management, L.L.C. and Icahn Partners LP, each nominated separate five-person slates for election to Amylin's twelve-member board. Election of seven of the insurgent nominees without the "approval" of the incumbent board, which had nominated its own slate, would constitute a "fundamental change" under the continuing directors provision, triggering the noteholders' put rights at a time when the notes were trading at a deep discount.

Another Amylin stockholder brought a putative class action suit alleging that the Amylin board (i) breached its fiduciary duties of care and loyalty in adopting the Indenture; (ii) breached its fiduciary duties of care and loyalty in failing to approve the dissident nominees and thereby avoid the negative consequences of triggering the change-in-control provision; and (iii) breached various disclosure obligations. The plaintiff also sought a declaration that the continuing directors provision was unenforceable, as well as a mandatory injunction requiring the Amylin board to approve the insurgent nominees.

Although Amylin believed that its board had the ability to approve the dissident slate for purposes of the Indenture, Amylin sought confirmation from the trustee. Not surprisingly, the trustee disagreed. The plaintiff subsequently added the trustee as a necessary defendant and sought a declaration that Amylin's board has the sole right and power to approve the stockholder nominees for purposes of the continuing directors provision; Amylin filed a cross-claim against the trustee seeking a similar declaration.

[3] Amylin's credit agreement contained a similar change-of-control provision. Although claims relating to the credit agreement were originally part of the lawsuit, prior to trial the lender agreed to waive its claims in exchange for payment of an additional fee on its outstanding balance. This summary therefore omits discussion of the credit agreement.

Prior to trial, the parties reached a partial settlement pursuant to which the plaintiff dropped its loyalty and disclosure claims and agreed not to seek monetary damages from the Amylin directors. The plaintiff also agreed to dismiss its claim against the directors for failing to act to approve the stockholder nominees and drop its demand for injunctive relief. In exchange, the Amylin board publicly stated that it would "approve" the dissident stockholder nominees for purposes of the continuing directors provision, contingent upon its receipt of a final adjudication that it possessed the contractual right to "approve" the nominees, but simultaneously recommend and endorse its own slate. As a result, the trial focused on whether the board had the power and the right to approve the dissident stockholder nominees and whether the board had breached its duty of care in adopting the Indenture.

The Indenture trustee argued that the Amylin board would have to recommend a vote for the insurgent slate to "approve" the nominees for purposes of the Indenture. Amylin maintained that it could "approve" nominees solely for purposes of the change-of-control provision but continue to recommend against their election. The Court held that Amylin's reading of the Indenture was correct. The Court noted that the trustee's reading "would prohibit any change in the majority of the board as a result of any number of contested elections, for the entire life of the notes." Such a provision would not be invalid *per se*, but if a board approved such a provision, that board would have to show that "in accepting such a provision, it was obtaining in return extraordinarily valuable economic benefits for the corporation that would not otherwise be available to it."

Having determined that the Amylin board had the authority to approve the stockholder-nominated slate and still recommend and endorse its own slate, the Court turned to whether Amylin's board properly exercised its right to do so in this case. The Court noted that the board's action would be consistent with the implied duty of good faith and fair dealing, which inheres in all contracts, including the Indenture, so long as the "board determines in good faith that the election of one or more of the nominees would not be materially adverse to the interests of the corporation or its stockholders." The Court ultimately declined to determine whether, in exercising its authority, Amylin's board had complied with the implied duty of good faith and fair dealing for two reasons. First, the Court had been presented with no evidence regarding the board's deliberation with respect to the decision to approve the stockholder-nominated slate. The Court did note that in its public statements and proxy materials, the board had made various remarks from which one could infer that the board believed that the election of the insurgent directors would, in fact, be materially adverse to Amylin's interests, but the Court dismissed those statements as election puffery which, according to the Court, "is hardly the same as a determination by the board" that the insurgents' election would be materially adverse to the corporation or its stockholders. Second, after the record had closed, the insurgents reduced their slates to three and two nominees, respectively. Thus, a majority of the board would remain continuing directors even if all of the insurgent nominees were elected, meaning that the issue could be left to be determined at a later time.

Lastly, the Court addressed whether, in approving the adoption of the Indenture, Amylin's directors had acted with gross negligence, thereby violating their duty of due care. The plaintiff based this claim largely on the fact that the board had not expressly known during its approval process that the Indenture contained a continuing directors provision. The Court nevertheless rejected the due care claim, stressing that the committee "retained highly-qualified

counsel, . . . sought advice from Amylin's management and investment bankers," and "asked its counsel if there was anything 'unusual or not customary'" before approving the Indenture. Nonetheless, the Court cautioned, "Outside counsel advising a board in such circumstances should be especially mindful of the board's continuing duties to the stockholders to protect their interests. Specifically, terms which may affect the stockholders' range of discretion in exercising the franchise should, even if considered customary, be highlighted to the board. In this way, the board will be able to exercise its fully informed business judgment."

The Court of Chancery Rejects a *Per Se* Challenge to Atmel's Rights Plan

In *In re Atmel Corp. S'holders Litig.*, C.A. No. 4161-CC (Del. Ch. May 19, 2009), the Court of Chancery denied an application for an injunction through which the plaintiff sought to invalidate an amendment to Atmel Corporation's ("Atmel") stockholder rights plan that incorporated certain derivative positions in calculating a stockholder's total beneficial ownership for purposes of determining whether the stockholder had triggered the rights plan.

On October 2, 2008, Microchip Technology Inc. and ON Semiconductor Corporation announced an all-cash offer to acquire Atmel. On October 29, the Atmel board of directors publicly rejected the offer as not in the stockholders' best interests. Then, on November 10 – three days after the waiting period under the Hart-Scott-Rodino Act expired, providing Microchip regulatory clearance to accumulate more than 50% of Atmel's stock – the Atmel board of directors adopted an amendment to its rights plan (i) lowering the percentage of equity ownership necessary to trigger the rights plan from 20% to 10% for any person or group of persons that made a takeover proposal on or after October 1, 2008, and (ii) expanding the definition of "beneficial ownership" to include derivative contracts that are designed to produce economic benefits and risks that correspond substantially to ownership of Atmel common shares.

The Court stressed that the issue before it was narrow. Specifically, the plaintiff claimed that the amendment was so indefinite and uncertain in its terms that nobody (including the Atmel board, stockholders and potential acquirers) had any objective means of determining how the rights plan operates or when it is triggered. Accordingly, argued the plaintiff, the Court should invalidate the amendment because its adoption constituted a *per se* breach of fiduciary duty or an *ultra vires* act.

In support of this position, the plaintiff made three primary arguments. First, the plaintiff argued that stockholders may be unable to determine the extent of their beneficial ownership under the expanded definition of "beneficial ownership" because a stockholder is imputed with ownership of not only the shares owned by its counterparty, but also those shares owned by its counterparty's counterparties, and so on. Second, the plaintiff argued that it would be impossible for Atmel to sort through the various layers of counterparties to determine beneficial ownership of a stockholder. Finally, the plaintiff attacked the definition of "derivatives contract," which provided that a contract "designed to produce economic benefits and risks to the receiving party that correspond substantially to the ownership by the receiving party of a number of common shares" regardless of whether the contract was settled through cash or other property, constituted a derivatives contract (and therefore was included in calculating "beneficial ownership"). The plaintiff claimed that it would be impossible to determine objectively whether a particular contract qualified as a derivatives contract under this definition, and asserted that the definition

was so vague as to include interests in mutual funds with a large percentage of their holdings represented by Atmel stock because such funds "may well substantially correspond to the economic risks and benefits" of owning Atmel stock.

The Court denied the plaintiff's motion for injunctive relief because the plaintiff had failed to carry its burden to show a reasonable probability of success on the merits. At this stage, the Court had been presented only with abstract and theoretical legal arguments based on hypothetical scenarios. The Court could not decide, for example, whether it would indeed be impossible to determine a stockholder's level of beneficial ownership under the amended definition without factual evidence or expert testimony regarding how investors in the real world will react to the language in question. Further, the delay necessary to decide this case on a more complete record would not likely cause the plaintiff to suffer irreparable harm, because the original offer to acquire Atmel had been revoked and the Court would have time to provide relief well before the deadline to make proposals at the next annual meeting.

The Court of Chancery Finds a Disclosure Violation in Connection with a Notice Informing Stockholders of Action by Written Consent

In *Dubroff v. Wren Holdings, LLC*, C.A. No. 3940-VCN (Del. Ch. May 22, 2009), the Court of Chancery (i) dismissed an overpayment claim by former stockholders in connection with the recapitalization of Nine Systems Corporation ("NSC") for lack of standing because the plaintiffs failed to allege sufficiently that the stockholders who approved the transaction formed a stockholder control group, and (ii) found that the plaintiffs stated a claim for breach of the fiduciary duty of disclosure in connection with the notice sent to the stockholders of NSC pursuant to Section 228 of the General Corporation Law of the State of Delaware.

Defendants Wren Holdings, LLC, Javva Partners, LLC and Catalyst Investors, L.P. (collectively, the "Entity Defendants") collectively owned 56% of the outstanding stock of NSC. In August 2002, NSC carried out a recapitalization transaction, approved by the written consent of the Entity Defendants, by which the Entity Defendants converted the subordinated debt they each held into convertible preferred stock (the "Recapitalization"). As a result, the Entity Defendants increased their ownership of NSC stock from approximately 56% to 80%, while the remaining stockholders of NSC were greatly diluted. The plaintiffs, former stockholders of NSC, who were cashed out as part of a transaction subsequent to the Recapitalization, brought an overpayment claim based on the Recapitalization and challenged the sufficiency of the notice informing them of the Recapitalization.

The Supreme Court has held that an overpayment claim, which classically is derivative, can also be a direct claim where a controlling stockholder causes the company to issue more equity to the controlling stockholder at the expense of the minority stockholders.[4] The plaintiffs argued that the Entity Defendants – none of which alone was individually a controlling stockholder – collectively formed a controlling stockholder group. Although the Court recognized the viability of such a "control group" theory, the complaint contained no facts that taken as true would establish that the Entity Defendants had formed a control group – by

[4] *Gentile v. Rosette*, 906 A.2d 901 (Del. 2006).

contract, common ownership, agreement or other arrangement – to work together toward a shared goal. Rather, the complaint merely alleged that the Entity Defendants had parallel interests, which is insufficient as a matter of law to support an inference that the stockholders acted as a control group. As such, the Court dismissed the overpayment claim for lack of standing.

The Court next addressed the disclosure claim. Under Section 228(e), "[p]rompt notice of the taking of the corporate action without a meeting by less than unanimous written consent shall be given to those stockholders . . . who have not consented in writing." After the completion of the Recapitalization, NSC's nonconsenting stockholders received a notice, which provided, in part: "[NSC] has recapitalized by converting its outstanding subordinated debt into shares of several new series of convertible preferred stock, and by declaring and implementing a one-four-twenty [sic] reverse stock split on all outstanding shares of common stock of the Company." The notice did not, however, inform the stockholders that the Entity Defendants were the primary recipients of the new convertible preferred stock; nor did it inform the stockholders of the pricing of the conversion of the Entity Defendants' debt into convertible preferred stock. The plaintiffs argued that they were injured by this lack of disclosure because had the notice contained such information, they could have made a claim for rescissory relief.

The Court recognized that Delaware case law has not addressed whether notice under Section 228(e) requires a fulsome disclosure akin to that required when stockholder approval is being solicited. The Court left that inquiry for another time, however, finding that regardless of the precise scope of required disclosure, the plaintiffs have stated a claim for breach of fiduciary duty. The Court reasoned that if the requirements under Section 228(e) were akin to a disclosure seeking a stockholder vote, *i.e.*, to disclose all material information, the plaintiffs have pled facts sufficient to establish that the board materially misled stockholders. If, on the other hand, the disclosure standard is less fulsome in this context, the Court still could reasonably infer that the board deliberately omitted material information with the goal of misleading the plaintiffs and other stockholders about the Entity Defendants' material financial interest in and benefit conferred by the Recapitalization. Under Delaware law, no matter what context, whenever directors communicate publicly or directly with stockholders about corporate matters, they must do so honestly. Thus, the Court determined that regardless of the scope of disclosure required pursuant to Section 228(e), the plaintiffs have sufficiently pled a disclosure violation.

The Court of Chancery Orders an Inspector of Elections to Reopen Polls to Allow Accidentally Omitted Votes to Be Counted

In *In re Waddell & Reed Financial, Inc.,* C.A. No. 4602-CC (Del. Ch. June 12, 2009), the Court of Chancery ordered the inspector of elections of the annual meeting of stockholders of Waddell & Reed Financial, Inc. (the "Company") to reopen the polls in order to count the votes of approximately 3.2 million shares of common stock of the Company that had been excluded from the vote tabulation due to a technical error in their transmission from RiskMetrics Group, Inc. ("RiskMetrics"), a proxy advisory firm that provided voting services to institutional investors of the Company, to Broadridge Financial Solutions, Inc., a vote processing firm that received stockholder votes for the Company ("Broadridge").

Section 231(c) of the General Corporation Law of the State of Delaware provides that once the polls are closed at a meeting of stockholders, no ballots, proxies or votes shall be accepted by the inspector of elections unless ordered by the Court of Chancery. The Company sought to reopen the polls in order to count votes which had been submitted by stockholders to RiskMetrics and which RiskMetrics believed – and informed the Company – had been transmitted to Broadridge, but which, due solely to a technical error in RiskMetrics' software, had not in fact been transmitted by RiskMetrics. As part of the proceeding, RiskMetrics submitted an affidavit detailing the nature of the error and supporting the reopening of the polls. Although this error resulted in the shares at issue being omitted from every vote taken at the annual meeting, the exclusion of the votes at issue only affected the outcome of one resolution, a nonbinding "say on pay" proposal (the "Proposal") submitted by a stockholder of the Company. The omission of the 3.2 million uncounted votes, the majority of which were votes against the Proposal, resulted in the Proposal receiving a majority of the votes cast.

The Court held that it was a proper exercise of its discretion under Section 231(c) to order the inspector of elections to reopen the polls to allow the omitted votes to be counted, noting that such votes were excluded because of a technical error and not because of any untimely action or omission on the part of the stockholders or the Company. The Court was unconvinced by the argument advanced by the proponent of the Proposal that because there was a theoretical possibility that other votes not before the Court had not properly been tabulated, the Court should decline to grant the relief sought unless the Company took unspecified actions to determine whether other votes may have been omitted. The Court further noted that nothing in the record demonstrated that the Company had selectively used its ability to know how votes were cast to bring a petition seeking only to have these votes counted but not other missed votes.

Finally, the Court placed significance on the fact that the uncounted votes were outcome determinative, rejecting an argument by the proponent of the Proposal that the relief was not necessary since the Proposal was merely precatory and did not bind the Company or its board of directors to any action. The Court noted the importance of stockholder franchise and the right of stockholders to have their votes counted, even on proposals that may have little or no practical effect on a Delaware corporation or its board of directors.