DELAWARE CORPORATE LAW BULLETIN

CHANCERY COURT PROVIDES ADDITIONAL CLARITY ON DISCLOSURE REQUIREMENTS FOR ESTABLISHING *CORWIN* DEFENSE

Explains that directors seeking to benefit from Corwin need not have provided "exhaustive information" when seeking a stockholder vote

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INTRODUCTION

In *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015) ("*Corwin*"), the Delaware Supreme Court stated that where a transaction "has been approved by a fully informed, uncoerced majority of the disinterested stockholders[,]" the business judgment rule applies. Under those circumstances, Delaware courts will not "second-guess the judgment of [ ] disinterested stockholder[s]" to approve an otherwise tainted transaction. Thus, if defendant directors can establish that the *Corwin* requirements have been satisfied, alleged breaches of fiduciary duty in connection with a stockholder-approved transaction effectively will be "cleansed" and, as a result, pleading stage dismissal generally will be awarded.

While the language of *Corwin* appears straightforward, post-*Corwin*, the fact-laden determination whether a disinterested stockholder vote has been "fully informed" has required significant line drawing by the Delaware Court of Chancery ("*Chancery Court*"). For instance, in two post-*Corwin* decisions—*In Re Saba Software, Inc. S'holder Litig.*, C.A. No. 10697-VCS (Del. Ch. Mar. 31, 2017) ("*Saba*") and *In Re Tangoe, Inc. S'holders Litig.*, C.A. No. 2017-0650-JRS (Del. Ch. Nov. 20, 2018) ("*Tangoe*")—the Chancery Court found "cleansing" unavailable when "it [was] reasonably conceivable that the stockholders' approval of the transaction was uninformed," placing target company stockholders in a veritable "information vacuum." In both *Saba* and *Tangoe*, in light of delayed Securities and Exchange Commission ("*SEC*") filings and incomplete financial statements, target company stockholders "were not fully informed" when they approved the challenged transactions. Accordingly, the Chancery Court refused to grant pleading stage dismissal to either set of defendant directors. For discussions of *Saba* and *Tangoe*, see Robert S. Reder, *Delaware Court Refuses to Invoke* Corwin *to "Cleanse" Alleged Director Misconduct Despite Stockholder Vote Approving Merger*, 70 Vand. L. Rev. En Banc 47 (2017), and Robert S. Reder & Amanda M. Mitchell, *Chancery Court Refuses Pleading Stage Dismissal Under* Corwin *When Stockholders Not Fully Informed of Long-Overdue Financial Restatement*, 73 Vand. L. Rev. En Banc 35 (2020).

At the other end of the spectrum, as explained by Vice Chancellor Sam Glasscock III in *Galindo v. Stover*, CA No. 2021-0031-SG (Del. Ch. Jan. 26, 2022) ("*Galindo*"), "directors need not provide exhaustive information in seeking a stockholder vote; caselaw requires accurate and complete disclosure of *material* information." In *Galindo*,

Vice Chancellor Glasscock found *Corwin* "cleansing" available to defendant directors alleged to have breached their fiduciary duties in connection with a challenged M&A transaction, even though the disclosures provided to target company stockholders failed to discuss either (i) an earlier M&A overture or (ii) motivations underlying recent modifications of executive change-in-control arrangements. Nevertheless, because "the transaction was approved by a majority of the stock voting in an informed, uncoerced manner," the Vice Chancellor applied the business judgement rule in granting pleading stage dismissal to defendant directors. Since there was no allegation of coercion, the Vice Chancellor focused on whether stockholders "were sufficiently informed to ratify the transaction."

I. FACTUAL BACKGROUND

Noble Energy, Inc. ("*Noble*") was "an oil and gas exploration and production company with operations in the United States, Africa and the Eastern Mediterranean markets." Over time, Noble's Eastern Mediterranean assets attracted interest from potential acquirers.

A. Noble Considers Sale of Eastern Mediterranean Assets

The first suitor was Cynergy Capital, Ltd ("*Cynergy*"), a "global investment company." In mid-2018, Cynergy approached Noble on an unsolicited basis ("*Cynergy Proposal*"), expressing interest in purchasing some of the Eastern Mediterranean assets for approximately $1 billion in cash, with some indication that "Cynergy's interest could have solidified into 'up to' $6 billion in consideration for certain of the Eastern Mediterranean assets." Apparently Noble showed no interest in the Cynergy Proposal, the terms of which never were communicated to Noble stockholders.

Then, in July 2019, Noble's board of directors ("*Board*") determined "that to remain competitive and to increase 'value, stability, and diversification,' Noble would need to become a consolidator or to be sold to a larger company." To that end, in the fall, Noble reached out to prospective purchasers to gauge interest in a sale of its Eastern Mediterranean assets. At the very end of 2019, Noble "achieved commercial production" of its Eastern Mediterranean Leviathan natural gas field, "a significant milestone for Noble as a company."

Initially Noble held discussions with three interested parties but, by January 2020, only energy giant Chevron Corporation

("*Chevron*") retained an interest in participating in the process. Discussions with Chevron continued between February and April.

B. Amendment of Severance Plan

As discussions with Chevron continued, in March 2020, Noble's stock price experienced a steep drop in the wake of the COVID-19 pandemic. The following month, Noble's Board responded by, *first*, reducing senior management salaries and, *second*, amending the 2016 Change of Control Severance Plan for Executives ("*Amended Plan*"). As so amended, the Amended Plan specified that "any severance awards for executives were to be calculated based on compensation prior to the pandemic-related reductions." The Amended Plan was attached as an exhibit to Noble's first quarter Form 10-Q filing with the SEC ("*Form 10-Q*"), but no other disclosures were made to stockholders concerning the rationale for, or scope of the changes effected by, the Amended Plan.

C. Chevron Completes Acquisition of Noble

Although their previous discussions had focused only on the Eastern Mediterranean assets, Noble informed Chevron on May 12 that it "would be 'willing to entertain a serious offer to acquire the company.' " After several weeks of further negotiations, on July 20, the parties announced that Chevron would acquire Noble in a stock-for-stock merger ("*Merger*") providing a "valuation of $5.0 billion for the entirety of Noble." Following SEC clearance of a definitive proxy statement ("*Merger Proxy*"), Noble sought stockholders approval of the Merger. Per SEC requirements, Noble "also requested an advisory vote of stockholders in favor of the executive compensation to be paid in connection with the Merger, consistent with the Amended Plan." The Merger Proxy made no mention of the Cynergy Proposal, nor did it describe the "timing and rationale" for the Amended Plan, although the terms of the Amended Plan, as well as the "precise benefits" to be realized thereunder, were disclosed. On October 2, Noble stockholders approved both propositions.

D. Litigation Ensues

Two former Noble stockholders ("*Plaintiffs*") challenged the Merger in a purported class action filed in Chancery Court in January 2021. Plaintiffs sought damages from the members of the Board ("*Defendants*") for breaching their fiduciary duties in connection with the Merger. In particular, Plaintiffs claimed the Merger Proxy issued

by the Board was "materially incomplete and misleading" for failing to disclose:

- the "over-the-transom proposal to acquire certain company assets, made two years before the Merger," by Cynergy; and
- the amendment of the "company severance plan to provide . . . officers with change-in-control benefits that reflected their pre-COVID-19-pandemic, pre-reduction salaries."

Plaintiffs also suggested that, through the Amended Plan, "management engaged in self-dealing, and that the Board supported this conduct by enacting the Amended Plan."

Defendants sought pleading stage dismissal, claiming that under *Corwin* "any breaches of fiduciary duty inherent in this transaction were cleansed by an informed and uncoerced vote of the stockholders." Plaintiffs countered that, due to the Merger Proxy's failure to provide adequate disclosures concerning the Cynergy Proposal and the Amended Plan, "the stockholder vote approving the Merger was not fully informed." Vice Chancellor Glasscock, citing post-*Corwin* decisions interpreting *Corwin*'s "fully informed" requirement, granted Defendants' motion to dismiss.

II. VICE CHANCELLOR GLASSCOCK'S ANALYSIS

A. Exploring Corwin*'s Applicability*

Vice Chancellor Glasscock noted that, under *Corwin*, for Defendants to benefit from the vote by Noble stockholders, that vote must have been *both* uncoerced *and* informed. According to the Vice Chancellor, "[c]oercion is presumptively present where a 'looming conflicted controller' engages in a conflicted transaction . . . ." Plaintiffs, however, "[did] not ple[a]d that there is any conflicted controller associated with the Merger (indeed, the Plaintiffs do not plead coercion at all) . . . ." Therefore, the Vice Chancellor turned to the question whether the Noble stockholders were fully informed when they voted in favor of the Merger.

B. Assessing Whether the Vote was Fully Informed

Plaintiffs argued the Merger Proxy adequately disclosed *neither* the Cynergy Proposal nor the Amended Plan. In rejecting these contentions, Vice Chancellor Glasscock made an important distinction on the nature of the question before him on the motion to dismiss. In this vein, he clarified that he was not considering "whether

the . . . informational deficit [in the Merger Proxy] represents an unexculpated breach of fiduciary duty on the part of the Defendants." Such an analysis of "Plaintiffs' substantive claim of breach of fiduciary duty . . . would focus on the knowledge and action of the Defendant directors . . . ." Rather, "for purposes of applying the *Corwin* analysis," the "focus is on the knowledge of the transaction communicated to the stockholders, and whether they were sufficiently informed to ratify the transaction."

For *Corwin* purposes, once "a plaintiff challenging a stockholder vote . . . 'first identif[ies] a deficiency in the operative disclosure document'. . . , the burden falls to the defendants to establish that the alleged deficiency is not material as a matter of law, such that the cleansing effect of the vote may be secured." In this connection, however, defendant directors "need not provide exhaustive information in seeking a stockholder vote; caselaw requires accurate and complete disclosure of *material* information."

In considering what constitutes "material information," Vice Chancellor Glasscock relied on the pronouncement of the United States Supreme Court in *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." Essentially, the information must be "of a magnitude that it would, upon disclosure, have 'significantly altered the "total mix" of information in the marketplace,' " quoting *In re Oracle Corp.*, 867 A.2d 904 (Del. Ch. 2004). Any lower threshold requiring disclosure of "information of . . . dubious significance . . . may accomplish more harm than good . . . ." Against that backdrop, the Vice Chancellor turned to the disclosure deficiencies alleged by Plaintiffs.

1. Cynergy Proposal

Due to the lack of any Merger Proxy disclosure concerning the Cynergy Proposal, Plaintiffs complained, "Noble stockholders lacked 'full disclosure of the potential superior offers in the market . . . .' " Vice Chancellor Glasscock did not find this argument compelling. While "Plaintiffs correctly point out that the Cynergy proposal need not have remained available to Noble at the time of the Merger Proxy . . . to have been material," the Vice Chancellor nevertheless noted that the proposal "was unsolicited, made in mid-2018, and predated important contextual developments, such as the commercialization of the Leviathan [natural gas] field and the onset of the COVID-19 pandemic." Moreover, "the Cynergy proposal contemplated an entirely different

transaction structure than the one achieved in the Merger with Chevron . . . [and] was never entertained by management or the Board."

Offering additional insight into his conclusion, the Vice Chancellor explained that for the Cynergy Proposal to be considered material, it "must have been significant enough to alter the 'total mix' of information in the marketplace at the time the stockholder vote was solicited." Here, "[t]he time lapse between the original Cynergy proposal and the Merger, along with the content of the proposal, are such that a reasonable stockholder would not be substantially likely to consider the [presentation] important in voting its shares." During this time lapse, Noble achieved commercialization of its Leviathan gas field in the Eastern Mediterranean, a "significant milestone" that obviously was not factored into the Cynergy Proposal. Similarly, "the occurrence of the COVID-19 pandemic diminished the potential materiality of market conditions and opportunities existing pre-COVID-19." As such, "the changed circumstances indicate little relevance between the Cynergy contact and the Merger with Chevron."

In light of these factors, Vice Chancellor Glasscock found "it not reasonably conceivable that a reasonable investor would have considered the unanswered Cynergy proposal in 2018 important in determining how to vote on a stock-for-stock merger with Chevron in 2020." Accordingly, "the Cynergy proposal was not material, and the fact that the Merger Proxy did not discuss the Cynergy proposal did not render stockholders uninformed for the purposes of *Corwin* cleansing . . . ."

2. Amended Plan

Regarding the disclosures relating to the Amended Plan, Plaintiffs complained that the Merger Proxy

> fails to disclose the changes to the [Amended Plan] . . . . The Proxy fails to disclose whether this amendment was in due course or that it had been in the works for some time. The Proxy further fails to fully disclose what role the [Amended] Plan had in negotiations during the sale of [Noble.]

In response, Vice Chancellor Glasscock observed:

> The Merger Proxy includes detailed disclosure regarding potential severance payments and benefits in connection with the Amended Plan and Merger. The Merger Proxy also incorporates by reference the Form 10-Q, which had attached the Amended Plan previously. Between these references and the availability of the actual Amended Plan, . . . *the precise benefits of the plan flowing to . . . executive officers, should the Merger be approved, were explicitly disclosed to stockholders*.

As for the omissions cited by Plaintiffs, the Vice Chancellor explained, "it is not necessary that the Merger Proxy . . . summarize in

detail every change made to the Amended Plan." In fact, "[t]he information for which Plaintiffs advocate—the timeline for contemplation of changes ultimately enshrined in the Amended Plan—would not significantly alter the 'total mix' of information for stockholders in determining whether to vote *for the Merger with Chevron*, in light of that disclosed fact." In the Vice Chancellor's view, "the only facts pertaining to the Amended Plan that were material were the dollar-value payments to be made to the applicable members of management, which the Plaintiffs have conceded were included in the Merger Proxy."

Finally, the Vice Chancellor took note of Plaintiffs' "suggest[ion] that Noble management engaged in self-dealing and that the Noble Board either turned a blind eye or 'acquiesced and supported management's misconduct' " in connection with approval of the Amended Plan and prosecution of the Merger. Regardless of any substantive merits this claim might have, "these facts do not prevent application of the *Corwin* doctrine here." In the absence of an allegation of "any conflicted controller associated with the Merger . . . *Corwin* may be applicable in the event of a fully informed, uncoerced vote of the stockholders . . . ."

CONCLUSION

Galindo represents another step along the path of fleshing out the "fully informed" requirement outlined in *Corwin*. In parsing the alleged disclosure deficiencies offered by Plaintiffs to defeat Defendants' motion to dismiss, Vice Chancellor Glasscock reiterated that "directors need not provide exhaustive information in seeking a stockholder vote; caselaw requires accurate and complete disclosure of *material* information." According to the Vice Chancellor, given the lapse of time between the Cynergy Proposal and the very different circumstances faced by Noble as it negotiated with Chevron, the Cynergy Proposal was not material to stockholders considering whether to vote in favor of the Merger. Further, in the Vice Chancellor's opinion, by outlining the "precise benefits of the plan flowing to named executive officers, should the Merger be approved," the Merger Proxy provided the most pertinent information regarding the Amended Plan for assessing the choice faced by Noble stockholders. Because the stockholder vote was fully informed, the business judgment rule was applicable per the *Corwin* standard and Defendants were entitled to pleading stage dismissal of Plaintiffs' claims.