MERGERS AND ACQUISITIONS

Practical Considerations for Single-Bidder Processes in Public M&A

*What are single-bidder processes and why do they matter in a post-*Corwin v. KKR *world? The authors present practical considerations for boards of directors when considering a single-bidder sale process.*

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Whether a public company should engage in a "single-bidder"[1] process is one of the most difficult questions a target public company's board of directors must consider during the early stages of a transaction. In the right circumstances, a single-bidder process can result in an expedient transaction that maximizes stockholder value while minimizing the risks associated with putting a corporation "in play." In other circumstances, a single-bidder process can be a high risk proposition that exposes the deal to uncertainty and the directors and officers to possible monetary liability. Although there are no "bright line" rules under Delaware law regarding the appropriateness of a single-bidder process, there are certain circumstances in which, we believe, a Delaware court likely would view a single-bidder process more favorably than in other situations.

Background

Directors of a Delaware corporation have two fiduciary duties: the duty of care and the duty of loyalty. The duty of care requires that each director become well informed of all relevant facts reasonably available and take such facts into consideration whenever making a decision.[2] The duty of loyalty requires that the directors act with the sole purpose of advancing the best interests of the corporation and its stockholders.[3] In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, the Supreme Court of Delaware held that, in the context of a change-of-control transaction, these fiduciary duties require the target board to obtain the best short-term value reasonably available for the target company's stockholders.[4] In addition to focusing the directors' standard of conduct, *Revlon* heightens a court's standard for reviewing that conduct to a reasonableness inquiry of both the directors' decisionmaking process and substantive decision.[5]

The now thirty-plus years of jurisprudence since *Revlon* have provided practitioners some general guidelines of what *Revlon* requires, and (perhaps more importantly) what it does not:

- *Revlon* does not set out a specific route that a board must follow when fulfilling its fiduciary duties;[6]
- *Revlon* does not require a board to set aside its own view of what is best for the corporation's stockholders and run a broad pre-signing auction whenever the board approves a change-of-control transaction;[7]
- *Revlon* permits a board to pursue a transaction it reasonably views as most valuable to stockholders, without even a limited pre-signing market check, so long as the transaction is subject to an effective post-signing market check under circumstances in which a bidder interested in paying more has a reasonable opportunity to do so;[8] and
- A post-signing market check required by *Revlon* does not necessarily have to involve an active

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solicitation, so long as interested bidders have a fair opportunity to present a higher-value alternative, and the board has the flexibility to eschew the original transaction and accept the higher-value deal.[9]

In *C&J Energy Services, Inc. v. City of Miami General Employees' & Sanitation Employees' Retirement Trust*, the most notable recent opinion from the Delaware Supreme Court addressing the appropriateness of a single-bidder strategy, the Court discussed the *Revlon* principles above and reversed the Delaware Court of Chancery's order to enjoin a stockholder vote and require the target to shop itself in a transaction where the parties pursued a single-bidder strategy.[10] The *C&J* decision is noteworthy because it rejected prior caselaw suggesting that a single-bidder process was permissible only in limited circumstances (such as where the target board had "impeccable knowledge" of the value of the company that it is selling).[11] In *C&J*, the Delaware Supreme Court held that *Revlon* does not require this "impeccable knowledge" in order to pursue a single-bidder strategy, citing the flexibility afforded to a target board of directors by *Revlon*.[12] Moreover, *C&J* emphasized that a market check need not involve active solicitation, "so long as interested bidders have a fair opportunity to present a higher value alternative, and the board has the flexibility to eschew the original transaction and accept the higher-value deal."[13]

Factors Supporting a Single-bidder Strategy

In evaluating the reasonableness of the board's decision to undergo a single-bidder strategy, a Delaware court likely will consider, among other things, the factors set forth below. Note, however, that not all of these factors are required in order for a court to conclude that a board made a reasonable determination to pursue a single-bidder process.

- ***Identity of buyer:*** Is the potential buyer a strategic buyer?[14]
- ***Conflicts of interest:*** Is the target company's board and management free of any material conflicts of interest in the proposed transaction?[15]
- ***Price and terms of transaction:*** Does the potential buyer's proposed price and terms of the transaction provide compelling value to the target company's stockholders?[16]
- ***Deal protection:*** Do the terms of the proposed transaction provide the opportunity for any bidder interested in paying materially more with a reasonable opportunity to do so after the transaction with the potential bidder is signed?[17]
- ***Interest of other buyers:*** Considering the views of the target's management and financial advisor, is there a low likelihood of other parties being interested in pursuing a transaction with the target company?[18]
- ***Risks to company of active shopping:*** Are there meaningful risks to the target company that would result from an active shopping process (for example, considering the impact on the target's customers and suppliers if the sale process were to leak to the public)?
- ***Buyer's insistence on exclusivity:*** Has the potential buyer insisted on exclusivity?[19]

If the answer to the above factors is "yes" in all cases, such a result will present the most favorable scenario for a single-bidder process. Take, for example, a potential transaction involving a target in a competitive industry with employees as its main asset. The target's board is independent and disinterested and the buyer is a strategic buyer, with a strong management team, that would derive meaningful synergies from the transaction. The buyer is offering a significant premium to market but insists that it will not serve as a pre-signing stalking horse. Moreover, because of significant regulatory issues and a partial stock component of the consideration, there will be a substantial amount of time for a post-signing market check. Such scenario would present a truly favorable case that would support the use of a single-bidder strategy.

On the other end of the spectrum is a case where a chief executive officer was contacted by a financial sponsor and moved fairly far along the negotiating process (including as to his or her post-closing employment package) prior to informing any other members of the board. The sponsor has not stated expressly a demand for exclusivity, but there is a general concern it will walk if it gets wind of outreach to other bidders, particularly to one of the target's competitors, who is in acquisition mode. The price is a decent size premium to market, but the target's stock is at an historic low. In such a situation, a board should think hard before pursuing a single-bidder strategy and may conclude that it will insist on a post-signing "go shop" provision in order to grant exclusivity.

Most fact patterns fall between these extremes. For example, what if the buyer is a financial buyer offering a significant premium to market but insisting on exclusivity? Or what if the buyer is a strategic buyer but is offering a small premium in the form of high-volatility stock of a controlled company? Or perhaps the buyer is a strategic buyer offering a large premium, but recently has been outbid for a different company in a similar space and thus is insisting upon fairly tight deal protection measures. How should a target company board evaluate a single-bidder process in that context? Below we provide guidelines for boards to consider, but note that there are no firm rules that any particular board must follow.

Practical Considerations

Process, Process, Process

As a general matter, the more confidence a court has in a board's decision-making process, the more deferential that court will be to the board's decisions. Thus a "good process" not only helps a board get the decision "right," but it also helps the board defend its ultimate decision. Along those lines, it may not be enough if a board's only justification for pursuing a single-bidder process are a general belief that no other buyer could meet the bird-in-hand price, an unsubstantiated concern that the bird-in-hand would walk away if it learned of even a targeted pre-signing outreach, and a generic concern about leaks to the market that the company might be considering a sale transaction. A better process would be for the board to sit down with its financial advisor and discuss potential alternative suitors, the likelihood of those suitors being interested in pursuing, and able to pursue, a transaction, and whether those suitors would be deterred from bidding if having to do so during a post-signing market check. In addition, a board should press management: Why is it that management believes even a limited outreach could result in leaks; just how damaging would such leaks be to the company; would the bird-in-hand really walk or is the target so attractive to the buyer that the risk of the buyer walking are minimal? It may be that a board believes it has a good sense of the answers to these questions, but oftentimes it is worthwhile – both for substantive decision-making and protecting the ultimate decision – to go through the exercise of discussing this at length.[20]

Negotiating Exclusivity Arrangements

If a buyer is insisting on entering into an exclusivity arrangement prior to signing the final transaction documents, and the target company's board has determined that it would be appropriate to pursue a single-bidder process, the target company could insist on a "fiduciary out" in the exclusivity agreement. Such a provision would terminate the target company's exclusivity obligations if it were to receive an unsolicited competing proposal while it was discussing a potential transaction with the original potential buyer.

In addition, if the target company board determines that it will insist upon a post-signing "go shop" provision in order to pursue a single-bidder strategy, it should make such request clear to the potential buyer at the outset of discussions. This would help ensure that a target board is not put in the unenviable position of deciding, after fully negotiating a transaction, whether to accept a transaction with a buyer that will not agree to a go-shop after the target previously has determined that it would be required.

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Deal Protections

As highlighted by *C&J*, one of the critical elements a Delaware court will look at in determining whether the target's board of directors properly discharged its fiduciary duties in a sale transaction is the question of whether the terms of the transaction reasonably provide an opportunity for a topping bid after the potential transaction is signed.[21] Although "it is not the concern of [Delaware] law to set up a system that promotes endless incremental bidding," deal protection measures should leave room such that "any serious bidder who want[s] to present a materially higher bid [can] still do so."[22] Several elements factor into the strength of the deal protection measures (i.e., the various acquisition structures and contractual provisions that parties use to make it more difficult for a third party buyer to jump an announced transaction).

Form of transaction. Parties may choose to structure a transaction to shorten the time period between signing and closing, which may reduce the ability of a third party to put forward a topping bid. For example, a two-step transaction governed by Section 251(h) of the Delaware General Corporation Law could close in as little as 35 to 45 days; a typical all cash, long-form merger without significant regulatory risk or other unusual closing conditions can often be submitted to a stockholder vote and closed in as little as 50 to 60 days from signing, depending upon the length of time it takes for the target company to file its proxy statement and any SEC review of the proxy statement. This may not provide enough time for an adequate post-signing market check—especially if due diligence of the target company is particularly complex or a topping bidder must get through a matching period.[23] In a single-bidder process, the target company could consider extending the period of time between the signing of the transaction and the stockholder vote or closing of the tender offer to allow sufficient time for an effective post-signing market check. Of course, any such extension of the period of time between signing and the stockholder vote should be weighed against the additional closing risk associated with such extended period.

Form of market check. A target company contemplating a single-bidder process often will try to negotiate for an "active" post-signing market check in the form of a "go-shop". This is particularly so in the case of a financial buyer, as the Delaware courts previously have suggested that a single-bidder strategy involving a financial buyer and only a passive market check signals to the market that management has found "its partner" and is not interested in a topping bid.[24] Again, given the flexibility that *Revlon* affords a board, a "go shop" is not an absolute requirement in such a process,[25] but it could greatly mitigate the risk to the target company and its board. If the target company is unsuccessful in getting the buyer to agree to a "go shop", the target company's board should give careful consideration to the reasons underlying the rationale of the single-bidder process. At a minimum, the target's board will want to be comfortable that the buyer's proposed purchase price represents the highest value that can reasonably be achieved for stockholders, and that another interested bidder has a meaningful opportunity to make a competing bid.[26]

Termination fees and matching rights. A termination fee deters topping bids by ensuring that a stated amount of the topping bidder's purchase price (usually determined as a percentage of the original deal price) gets delivered to the buyer, and not the target company's stockholders. The Delaware courts generally have approved of termination fees that are triggered upon acceptance of a topping bid in the range of 3 percent to 4 percent of the original transaction's value, though they have often cautioned that there is no "blanket rule" of acceptable termination fee percentages.[27] In the single-bidder context, the target company could attempt to negotiate a lower fiduciary termination fee, perhaps in the range of 2 percent to 3 percent of the transaction value. In addition, because the other deal protections in the merger agreement (such as matching rights) will be reviewed by a court as a whole,[28] the target will want to see that the overall suite of deal protection measures are not overly preclusive so as to effectively eliminate the possibility of a topping bid.

Continued Relevance of *Revlon*—Defending the Maginot Line?

There is no question that the Delaware courts have, particularly in recent years, shown significant deference to the thoughtful and fully informed decisions of independent boards of directors, even when enhanced scrutiny applies.[29] In addition to this substantive deference, several recent opinions facially limit two key risks often lurking in the background of a transaction subject to *Revlon* review—injunctive risk and monetary liability.

As to injunctive risk, in *C&J*, the Delaware Supreme Court suggested that Delaware courts ought not be enjoining transactions (other than disclosure-related injunctions) in the absence of a topping bid—including through the use of an injunction that would prevent closing until after the target company subjected itself to a market check in a manner not otherwise permitted by the transaction agreement.[30]

And, as to monetary liability, in *Corwin v. KKR Financial Holdings LLC*, the Delaware Supreme Court held that the business judgment rule—and not *Revlon*—is the appropriate standard of review in a post-closing damages suit involving a merger that has been approved by a fully informed, uncoerced majority of the disinterested stockholders.[31] When *Corwin* is applicable, directors will be insulated from liability associated with approving a merger unless a plaintiff adequately can demonstrate "waste" – which is practically impossible to do.[32]

These cases, and *Corwin* in particular, have led many to question the continued relevance of *Revlon.* For example, consider the extreme scenario discussed above in which a chief executive officer is contacted by a financial sponsor and moves fairly far along the negotiating process (including as to his or her post-closing employment package) prior to informing any members of the board, the target board grants the sponsor exclusivity (even though the sponsor has not requested exclusivity and the target's competitor is in acquisition mode), and the sponsor's purchase price provides a small premium to the target's stock price (which is at an historic low). Given that, as discussed above, Delaware courts are reluctant to enjoin transactions prior to a stockholder vote, then under *Corwin*, wouldn't the target board escape judicial sanctioning as long as this poor process was fully disclosed to and approved by the target company's stockholders? Stated otherwise, in a post-*Corwin* world, is not a focus on *Revlon* essentially analogous to the fallacy of the general preparing for battle by "fighting the last war", blind to changes of the current era—manning the Maginot line in 1940, for example, while the enemy's forces simply bypass this elaborate defense? We do not believe that this is the case; instead, we believe *Revlon* continues to be relevant to practitioners and to target company boards of directors for a number of reasons.

As a threshold matter, *Corwin* changes the *standard of review*; it does not change the *standard of conduct*. And regardless of the standard of review, our experience has been that the vast majority of boards take their fiduciary duties very seriously, particularly in the change-of-control context, and will follow the *Revlon* guidance even though *Revlon* may, under current case law, have less of a practical effect in terms of injunction risk or the risk of monetary liability. Moreover, *Corwin* does not eliminate the risk of "opinion" or "reputation" risk. In at least one case applying *Corwin* to dismiss a complaint, the Court of Chancery observed that the complaint "sets forth a disquieting narrative."[33] Although fairly mild in that opinion, Delaware courts historically have used opinions to shape norms, even if not awarding monetary liability.[34]

Second, *Corwin* is inapplicable if the stockholder vote either was not fully informed or was coerced. Should a plaintiff obtain documents post-close that demonstrate a vote was not fully informed, *Corwin* would be inapplicable, as was the case in *In re Comverge, Inc. Shareholders Litigation*.[35] Corwin also would be inapplicable if, as was recently held in *In re Saba Software, Inc. Stockholder Litigation*, the stockholder vote was coerced (in *Saba* because the board had allowed the company's stock to become delisted prior to the vote).[36]

Most fundamentally, *Revlon* is well established under Delaware law and its basic holding is

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remarkably clear—in a change-of-control transaction, the target company's board of directors must obtain the best short-term price reasonably available for the target company's stockholders. Although the vast majority of written opinions addressing *Revlon* claims since *Corwin* was issued have declined substantively to review board action leading to a change-in-control transaction that has been approved by stockholders, that restraint undoubtedly has its limits. As stated by the Court of Chancery in the context of a review of deal protection measures:

> Not surprisingly, we do not have a bright line test to help us all understand when too much is recognized as too much. Moreover, it is not merely a matter of measuring one deal protection device; one must address the sum of all devices. Because of that, one of these days some judge is going to say "no more" and, when the drafting lawyer looks back, she will be challenged to figure out how or why the incremental enhancement mattered. It will be yet another instance of the straw and the poor camel's back. At some point, aggressive deal protection devices—amalgamated as they are—run the risk of being deemed so burdensome and costly as to render the "fiduciary out" illusory.[37]

Given our experience, we do not believe boards (or their advisors) *in practice* would rely on *Corwin* to say "forget *Revlon*". But, should practice tend that way, one of the strengths of the common law is that the courts can moderate their approach on a case-by-case basis as warranted by the facts of the case.

Notes

1. A single-bidder process will generally arise in one of two ways: through a buyer insisting on an exclusivity arrangement or through the target board's determination to pursue a transaction with only one buyer (and not to discuss a transaction with other potential buyers). In this article, we use the term "single-bidder process" to refer to a transaction process resulting from either of these two fact patterns.
2. *Smith v. Van Gorkom*, 488 A.2d 858, 872-73 (Del. 1985).
3. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1994).
4. 506 A.2d 173, 182 (Del. 1986). Subsequent case law has addressed what it means for a transaction to be a "change of control" such that *Revlon* is applicable. For example, the Delaware courts have held that *Revlon* is applicable to the sale of a noncontrolled corporation if the acquisition currency is stock of a controlled corporation, but not if the acquisition currency is stock of another noncontrolled corporation. *Compare Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1150 (Del. 1990), *with Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 46-48 (Del. 1994). Recall, however, that *Revlon* is simply a situation-specific application of the omnipresent duties of care and loyalty. Regardless of whether *Revlon* applies, in any "end stage" transaction, regardless of currency, the target board is negotiating perhaps the single most important transaction in the lifecycle of the corporation. Thus, even if *Revlon* does not formally apply, directors might consider subjecting a transaction to either a pre- or post-signing market check in order to fulfill their duty of care. *See Steinhardt v. Howard-Anderson*, C.A. No. 5878-VCL (Jan. 24, 2011) (TRANSCRIPT) (observing that, even in a stock-for-stock transaction, the target board's directors are negotiating for what percentage of a future premium the target stockholders might obtain upon a change of control of the *pro forma* entity).
5. *See QVC Network*, 637 A.2d at 45.
6. *C&J Energy Servs., Inc. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Trust*, 107 A.3d 1049, 1053 (Del. 2014); *see also Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989) (there is no "single blueprint" to maximizing value); *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 197 (Del. Ch. 2007) ("The 'no single blueprint' mantra is not a one way principle. The mere fact that a technique was used in different market circumstances by another board and approved by the court does not mean that it is reasonable in other circumstances that involve very different market dynamics." (footnotes omitted)).

7. *See In Re Fort Howard Corp. S'holders Litig.*, C.A. No. 9991, 1998 WL 83147, at *13-14 (Del. Ch. Aug. 8, 1988) (finding that, although a special committee of independent directors did not conduct an auction prior to signing a transaction agreement, it fulfilled its fiduciary duties by including provisions that were intended to permit an effective post-signing, pre-closing market check); *In re Pennaco Energy, Inc. S'holders Litig.*, 787 A.2d 691, 704-07 (Del. Ch. 2001) (holding that the board met its fiduciary duties by aggressively negotiating with a single-bidder and ensuring that the transaction was subject to a post-signing market check).
8. *See Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 244 (Del. 2009). Post-signing market checks generally take one of two forms. Passive market checks, or "window shops", generally allow a board to respond to, but not solicit, alternative transactions during the period between signing and the stockholder vote (or closing of the tender in a two-step transaction). Active market checks, or "go shops", generally allow a board to solicit alternative transactions for a specific period of time following signing.
9. *See C&J*, 107 A.3d at 1067-71. *But see* Netsmart Techs., 924 A.2d at 197 (finding that, in the context of a sale of a micro-cap public company, where the record did not support any basis for the financial advisor's concurrence with management that a post-signing market check would turn up any topping bidder, "an inert, implicit post-signing market check does not…suffice as a reliable way to survey interest by strategic players").
10. *See C&J*, 107 A.3d at 1067-71.
11. *See, e.g., In re OPENLANE, Inc. S'holders Litig.*, C.A. No. 6849-VCN, 2011 WL 4599662, at *5 (Del. Ch. Sept. 30, 2011).
12. *C&J*, 107 A.3d at 1068-69.
13. *Id* at 1067-68.
14. The presence of a strategic buyer with synergies is generally conducive to a single-bidder process because, due to the presence of these synergies, it will likely be able to pay a greater purchase price than other bidders (particularly financial buyers). To the contrary, although all financial buyers pursue their own investment fund strategies, the absence of synergies effectively means that financial buyers can be viewed as interchangeable "pools of investment capital." In other words, at a general level, one financial buyer with $4 billion of available investment capital is effectively the same as another financial buyer with $4 billion of available investment capital, which can make it hard for a board to determine upfront that a financial buyer's proposed purchase price is the highest price that can be reasonably obtained for the target company's stockholders. Delaware courts have repeatedly expressed skepticism of a single bidder strategy involving a financial sponsor, especially if the post-signing market check is a passive one. *See, e.g., Forgo v. Health Grades, Inc.*, C.A. No. 5716-VCS (Del. Ch. Sept. 3, 2010) (TRANSCRIPT); *Netsmart Techs.*, 924 A.2d at 197.
15. *See, e.g., C&J*, 107 A.3d at 1070 (finding "important" to its *Revlon* analysis the fact that "the majority of C&J's board is independent, and [thus] there is no apparent reason why the board would not be receptive to a transaction that was better for stockholders that the [signed] deal").
16. *See, e.g., Lyondell Chem.*, 970 A.2d at 242 (highlighting the "blowout" price in determining that directors did not act in bad faith by pursuing a single bidder strategy).
17. *See, e.g., In re Pennaco Energy, Inc. S'holders Litig.*, 787 A.2d 691, 707 (Del. Ch. 2001) ("[I]f the merger agreement…contained onerous deal protection measures that presented a formidable barrier to the emergence of a superior offer, the Pennaco board's failure to canvass the market earlier might tilt its actions toward the unreasonable. But it appears that the Pennaco board was careful to balance its single buyer negotiation strategy by ensuring that an effective post-agreement [passive] market check would occur."); *cf. In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1014-23 (Del. Ch. 2005).
18. *See, e.g., C&J*, 107 A.3d at 1070 (finding "important" to its *Revlon* analysis the fact that "[t]he Court of Chancery was right to be skeptical that another buyer would emerge"); *cf. Netsmart Techs.*, 924 A.2d at 208 ("[W]hen this court is asked to enjoin a transaction and another higher-priced alternative is not immediately available, it has been appropriately modest about playing games with other people's money.").

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19. *See*, *e.g.*, *In re Comverge, Inc.*, C.A. No. 7368-VCP, 2014 WL 6686570, at *11 (Del. Ch. Nov. 25, 2014) (applying *Revlon* in the post-closing context and holding that plaintiff had failed to state a claim for a breach of fiduciary duty where the target board "had a firm $2.00 offer on the table, with [the buyer] conditioning any further negotiations on the acceptance of exclusivity").
20. *Forgo v. Health Grades, Inc.*, C.A. No. 5716-VCS (Del. Ch. Sept. 3, 2010) (TRANSCRIPT) (finding it likely that a board that pursued a single-bidder process did not satisfy its *Revlon* duties in part because the court found the record did not reflect a serious sifting of potential alternative suitors).
21. *See C&J*, 107 A.3d at 1070-71. This inquiry likely will apply regardless of whether *Revlon* is applicable. *See, e.g.*, *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 930 (Del. 2003) (observing that "defensive devices adopted by the board to protect the original merger transaction must withstand enhanced judicial scrutiny under the *Unocal* standard of review, even when that merger transaction does not result in a change of control"). The applicability of this inquiry is another reason why the issues raised by this article are relevant, irrespective of whether *Revlon* formally applies. *See supra* note 4.
22. *Toys "R" Us*, 877 A.2d at 1018 (emphasis added).
23. *Forgo v. Health Grades, Inc.*, C.A. No. 5716-VCS (Del. Ch. Sept. 3, 2010) (TRANSCRIPT).
24. *See*, *e.g.*, *Miramar Firefighters Pension Fund v. AboveNet*, C.A. No. 7376-VCN, 2013 WL 4033905, at *7-8 (Del. Ch. July 31, 2013); *Forgo v. Health Grades, Inc.*, C.A. No. 5716-VCS (Del. Ch. Sept. 3, 2010) (TRANSCRIPT); *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 197 (Del. Ch. 2007).
25. *See C&J*, 107 A.3d at 1068-69.
26. *See Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 244 (Del. 2009).
27. *See*, *e.g.*, *Netsmart Techs.*, 924 A.2d at 197 n.80 (quoting *La. Mun. Police Emps.' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1181 n.10 (Del. Ch. 2007)). Delaware caselaw generally looks to "transaction value" (*i.e.*, "equity value") in evaluating termination fees. *See*, *e.g.*, *Orchid Cellmark Inc. S'holder Litig.*, C.A. No. 6373-VCN, 2011 WL 1938253, at *7 (Del. Ch. May 12, 2011). In the case of a highly leveraged company, however, "enterprise value" (*e.g.*, equity value plus net debt) may be a relevant metric. *See*, *e.g.*, *In re Lear Corp. S'holders Litig.*, 926 A.2d 94, 120 (Del. Ch. 2007).
28. Delaware courts will look at deal protection measures both individually and collectively, and are skeptical of overly buyer-friendly suites of deal protection measures. *See, e.g.*, *Orchid Cellmark*, 2011 WL 1938253, at *4 ("Moreover, it is not merely a matter of measuring one deal protection device; one must address the sum of all devices."); *In Re Compellent Techs., Inc. S'holder Litig.*, C.A. No. 6084-VCL, 2011 WL 6382523, at *23 (Del. Ch. Dec. 9, 2011); *In re Answers Corp. S'holder Litig.*, C.A. No. 6170-VCN, 2011 WL 1366780 (Del. Ch. Apr. 11, 2011) ("The measure of a deal protection strategy, of course, is the cumulative effect.").
29. *See, e.g.*, *In re Plains Exploration & Prod. Co. S'holder Litig.*, C.A. No. 8090-VCN, 2013 WL 1909124, at *4-7 (Del. Ch. May 9, 2013) (denying motion for a preliminary injunction of a merger where the board pursued a single bidder strategy, with a post-signing window shop); *In re 3Com S'holders Litig.*, C.A. No. 5067-CC, 2009 WL 5173804, at *7 (Del. Ch. Dec. 18, 2009) (denying a motion for expedited discovery notwithstanding single-bidder strategy); *Lyondell Chem.*, 970 A.2d at 241-44 (holding that a board's decision to rely on a post-signing market check was not made in bad faith); *In re MONY Grp. Inc. S'holders Litig.*, 852 A.2d 9, 20-21 (Del. Ch. 2004) (holding that board's decision to limit merger negotiations to one bidder was reasonable); *In re Pennaco Energy, Inc. S'holders Litig.*, 787 A.2d 691, 705-06 (Del. Ch. 2001) (same). *But see* Koehler v. Netspend Holdings, Inc., C.A. No. 8373-VCG, 2013 WL 2181518, at *16, *20-21 (Del. Ch. May 21, 2013) (holding that, although the board's "decision to conduct a single-bidder process was reasonable at the time the decision was made," the plaintiffs had shown a reasonable likelihood of success on their *Revlon* claim in light of "the combination of the Board's single-bidder strategy, the failure to obtain a go-shop period or otherwise solicit other acquirers post-agreement (including through providing sufficient time, post-merger, for a suitor to appear), the reliance on a weak fairness opinion and, in particular, the failure to waive the [don't-ask-don't-waive] clauses" in the standstill sections of the confidentiality agreements

with previously contacted potential bidders (footnotes omitted)).

30. *See C&J*, 107 A.3d at 1071-72. The form of "blue pencil" remedy was used in the lower court's opinion in *C&J* as well as previously in *In re Del Monte Foods Co. Shareholders Litigation*, 25 A.3d 813 (Del. Ch. 2011). *Cf. Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 50-52 (Del. 1994) (rejecting "vested rights" argument in upholding Court of Chancery injunction).
31. *See* 125 A.3d 304, 308-14 (Del. 2015). The Court of Chancery has repeatedly cited *Corwin* in dismissing *Revlon* claims at the pleadings stage. *See In re Paramount Gold and Silver Corp. S'holders Litig.*, Consol. C.A. No. 10499-CB, 2017 WL 1372659, at *5 (Del. Ch. Apr. 13, 2017); *In re Merge Healthcare Inc. S'holders Litig.*, Consol. C.A. No. 11388-VCG, 2017 WL 395981, at *6-7 (Del. Ch. Jan. 30, 2017); *In re Solera Holdings, Inc. S'holder Litig.*, C.A. No. 11524-CB, 2017 WL 57839, at *6-7, *13 (Del. Ch. Jan 5, 2017); *Chester Cnty. Ret. Sys. v. Collins*, C.A. No. 12072-VCL, 2016 WL 7117924, at *2 (Del. Ch. Dec. 6, 2016); *In re Om Grp., Inc. S'holders Litig.*, C.A. No. 11216-VCS, 2016 WL 5929951, at *9-10, *17 (Del. Ch. Oct. 12, 2016); *Huff Energy Fund, L.P. v. Gershen*, C.A. No. 11116-VCS, 2016 WL 5462958, at *15-16 (Del. Ch. Sept. 29, 2016); *In re Columbia Pipeline Grp., Inc. S'holder Litig.*, C.A. No. 12152-VCL (Del. Ch. Sept. 6, 2016) (TRANSCRIPT); *Larkin v. Shah*, C.A. No. 10718-VCS, 2016 WL 4485447, at *10-13 (Del. Ch. Aug. 25, 2016); *City of Miami Gen. Empl. & Sanitation Empl. Ret. Trust v. Comstock*, C.A. No. 9980-CB, 2016 WL 4464156, at *17 (Del. Ch. Aug. 24, 2016); *In re Volcano Corp. S'holder Litig.*, 143 A.3d 727, 738-41 (Del. Ch. 2016); *In re Zale Corp. S'holders Litig.*, C.A. No. 9388-VCP, 2015 WL 6551418, at *2-3 (Del. Ch. Oct. 29, 2015), *aff'd*, 137 A.3d 151 (Del. 2016). These decisions have made clear that *Corwin* does not apply to cases in which a controlling stockholder stands on both sides of the transaction. *See, e.g.*, *Merge Healthcare*, 2017 395981, at *6. It is less clear, though, whether *Corwin* applies to transactions that do not involve a controlling stockholder but would still otherwise be subject to entire fairness review (*e.g.*, a transaction approved by a majority interested board). In at least one decision applying *Corwin*, the Delaware Court of Chancery's analysis appears to suggest that *Corwin* would *not* apply to such transactions. *See Comstock*, 2016 WL 4464156, at *17-19 (evaluating whether a majority of the board was interested in order to determine whether stockholder vote would be given cleansing effect under *Corwin*). In two more-recent decisions, however, the Court of Chancery has expressly held that "the only transactions that are subject to entire fairness that cannot be cleansed by proper stockholder approval [under *Corwin*] are those involving a controlling stockholder." *Larkin*, 2016 WL 4485447, at *10; *see also Merge Healthcare*, 2017 WL 395981, at *6 (same).
32. *See Singh v. Attenborough*, 137 A.3d 151, 151-52 (Del. 2016) ("When the business judgment rule standard of review is invoked because of a vote, dismissal is typically the result. That is because the vestigial waste exception has long had little real-world relevance, because it has been understood that stockholders would be unlikely to approve a transaction that is wasteful.").
33. *Om Grp.*, 2016 WL 5929951, at *1.
34. *See generally* William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 26 DEL. J. CORP. L. 1287 (2001).
35. C.A. No. 7368-VCMR (Del. Ch. Oct. 31, 2016) (ORDER). There are many ways a plaintiff could obtain documents post-close. For example, facts could develop in appraisal litigation that suggest the vote was not fully informed. *See, e.g.*, *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 34 (Del. Ch. 2013). Alternatively, so long as a complaint for books and records is filed before the effectiveness of the merger, a plaintiff might be able to obtain documents through Section 220 of the Delaware General Corporation Law. *See Weingarten v. Monster Worldwide, Inc.*, C.A. No. 12931-VCG, 2017 WL 752179, at *3-5 (Del. Ch. Feb. 27, 2017) (holding that "only those who are stockholders at the time of filing have standing to invoke this Court's assistance under Section 220").
36. *See* Consol. C.A. No. 10697-VCS, 2017 WL 1201108, at *14-16 (Del. Ch. Mar. 31, 2017).
37. *Orchid Cellmark Inc. S'holder Litig.*, C.A. No. 6373-VCN, 2011 WL 1938253, at *8 (Del. Ch. May 12, 2011).

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