

# *Kettleton Multi-Year Holdings LLC v. Sourcefire LLC* Reminds Practitioners that Timely Notice of a Merger's Effective Date Reduces Litigation Risks in Delaware

## **Client Alert**

07.15.2014

Following a merger (or consolidation), Section 262 of the Delaware General Corporation Law ("DGCL") requires notice to be sent to any stockholder of record who has demanded appraisal informing that stockholder that the transaction was accomplished. For long-form mergers approved pursuant to a stockholder vote (*i.e.*, under Section 251(c) of the DGCL), Section 262(d)(1) requires notice of the effective date of the merger to be sent within 10 days of the merger becoming effective. For mergers approved pursuant to Sections 228, 251(h), 253 or 267 of the DGCL (*e.g.* mergers approved by written consent, certain mergers following a tender or exchange offer, short-form mergers between parent and subsidiary corporations and short-form mergers between a non-corporation parent entity and its subsidiary corporation) the notice of the effective date is governed by Section 262(d)(2), which sets its own timing requirements.

Sometimes, however, in the bustle of closing the transaction and the transition that follows, sending notice of the effective date can be overlooked. In the current M&A environment, the number of appraisal demands is steadily increasing and stockholders are more frequently seizing on a company's failure to send timely notice, creating additional litigation risks related to the transaction.

In *Kettleton Multi-Year Holdings LLC v. Sourcefire LLC*, No. 9157-VCL (Del. Ch. Apr. 25, 2014) (Trans.), after the announcement of a merger between Sourcefire Inc. and Cisco Systems Inc., Kettleton (a Sourcefire stockholder) demanded appraisal and asked that the company send it notice of the effective date. The notice was sent seven days after the 10-day deadline set in Section 262(d)(1). When Kettleton filed its appraisal petition, it asserted a claim based on the late notice and moved for judgment on the pleadings on that claim.

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For a proposed remedy, Kettleton relied principally on the Delaware Supreme Court's decision in *Berger v. Pubco*, 976 A.2d 132 (Del. 2009), which held that a statutory disclosure violation in the context of a Section 253 merger could trigger a quasi-appraisal proceeding, where all class members receive at least the merger consideration and potentially more, based on the Court's appraised value of the stock. The Court can also shift attorneys' fees in a quasi-appraisal proceeding. Kettleton argued that the late notice should likewise be remedied by requiring the surviving corporation to pay Kettleton the merger consideration upfront to protect itself if the appraised value was less than the merger price. Kettleton also asked that its fees be shifted to the surviving corporation. In essence,

Kettleton sought to remove the risk of loss that exists in a statutory appraisal proceeding and thereby emulate certain features of a quasi-appraisal proceeding envisioned under *Berger v. Pubco*.

The Court denied Kettleton's motion, observing that while corporations must follow the DGCL, there was "no connection" between the notice violation and the remedy Kettleton sought. The Court noted that the purpose of an effective date notice is to permit a stockholder to calculate the 120-day window in which it must file its appraisal petition with the Court. Because Kettleton was the only stockholder that had demanded appraisal and because it had timely filed a petition, there was no injury to be remedied. But in so ruling, the Court cautioned that it was not foreclosing the possibility that a notice violation under Section 262 could result "in a substantial remedy."

Because the M&A market is already charged with an increasing number of appraisal demands, care should be taken to remove the additional risk to a buyer that sending an untimely Section 262 notice creates. In effectuating and closing a merger, the applicable provisions of the DGCL must be strictly followed, and sending the effective date notice should be on every deal counsel's post-closing checklist.

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