

M&A Watch

“You’re Not Fully Clean”: § 220 Inspection Demands Under *Corwin* 08 January 2018

On December 29, 2017, the Delaware Court of Chancery declined to extend the ruling in *Corwin* by finding that the approval of a merger by a vote of the disinterested stockholders does not act as an impediment to a properly supported demand for inspection of books and records under § 220 of the Delaware General Corporation Law. In *Corwin*, the Delaware Supreme Court clarified the “long-standing” principle that the business judgment rule standard of review (as opposed to more intrusive standards of judicial review) applies where a transaction is approved by a voluntary, fully-informed vote of disinterested stockholders, and the transaction does not involve a controlling stockholder.

BACKGROUND

In May 2017, Apollo Global Management agreed to purchase the outstanding stock of West Corporation, a global provider of communication and network infrastructure. In connection with the transaction, stockholder Mark Lavin requested access to West’s books and records, which West denied claiming that he had failed to state a proper purpose for inspection. West argued that Lavin could not articulate a credible basis of wrongdoing against West’s board of directors as a matter of law, as the stockholder vote had “cleansed” any purported breaches of fiduciary duty under *Corwin*. Lavin brought suit to inspect West’s books and records for the purpose of investigating possible wrongdoing and the disinterestedness of West’s board.

THE RULING

The Court rejected West’s argument and wrote, “[s]imply stated, *Corwin* does not fit within the limited scope and purpose of a books and records action in this court.” The Court reiterated that, the purpose of a books and records action is to investigate potential claims prior to filing a formal complaint which will eventually be subject to merits-based defenses (e.g., a *Corwin* defense). Vice Chancellor Slight noted that Delaware courts have long encouraged stockholders to use Section 220 requests to gather information before filing complaints that will be subject to heightened pleading standards and that where a plaintiff has shown a credible basis from which the court can infer mismanagement, waste or wrongdoing, the plaintiff should not be deprived of the ability to use a books and records action to enhance the quality of the plaintiff’s future pleadings.

The Court determined that the factual record showed a “credible basis” to infer potential wrongdoing and a lack of disinterestedness for purposes of the Section 220 request. The Court pointed to, among other things, “some evidence” that West’s directors and officers knew that a sale of West’s business segments in separate transactions would have provided greater value to stockholders than a sale of the whole company, but that two private equity sponsors that had the right to elect half of the board may have pushed the board to pursue a sale of the whole company to obtain a prompt liquidation of their investment. Accordingly, the Court ordered West to produce certain of its books and records pursuant to the Section 220 request.

The Court did note, however, that should Lavin ultimately challenge the stockholder vote approving the transaction, he would need to answer West’s *Corwin* defense with facts that support a reasonable inference that the vote was uninformed or coerced – “no easy task” according to Vice Chancellor Slight.

OUR VIEW

We think that the Court’s decision is consistent with its past jurisprudence and, as it is designed to permit plaintiffs to bring well-pleaded complaints, is sound public policy. Companies should continue to be prepared to comply with properly supported requests for books and records to the extent required by Section 220. As is always the case, the importance of prudent record keeping in the course of a public sale process cannot be overstated.



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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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