

Delaware Court of Chancery Finds Accepting Tender Offer Has Same Cleansing Effect as Stockholder Vote

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In *In re Volcano Corporation Stockholder Litigation*, the Delaware Court of Chancery recently held that majority stockholder approval of a merger under Delaware General Corporation Law Section 251(h) by accepting a tender offer has the same cleansing effect as a stockholder vote in favor of that merger at a stockholder meeting. Consequently, Delaware courts will irrebuttably apply Delaware's deferential business judgment rule when reviewing the actions of a target corporation's directors in approving such a transaction. The *Volcano* decision is significant because the Delaware Court of Chancery now allows parties to reap the advantages of a tender offer structure, which often may be closed more quickly than transactions involving a stockholder vote, while also providing the protection of the business judgment rule.

Volcano Corporation agreed to be acquired by Koninklijke Philips, N.V. in December 2014 after several months of negotiation. Philips commenced a tender offer to purchase all of Volcano's outstanding common stock and garnered sufficient acceptance to complete the merger without a separate stockholder vote under Section 251(h) of the Delaware General Corporation Law. Certain Volcano stockholders brought claims against directors of Volcano for breaches of fiduciary duty in connection with the acquisition.

In dismissing the claims of the Volcano stockholder plaintiffs, the Court reiterated the recent holding of the Delaware Supreme Court in *Singh v. Attenborough* which stated that upon a fully informed vote by a majority of a company's disinterested, uncoerced stockholders, the business judgment rule irrebuttably applies to a court's review of the approved transaction and that such a transaction can only be challenged on the basis that it constituted waste. The Chancery Court also determined that acceptance of a tender offer by fully informed, disinterested, uncoerced stockholders representing a majority of a corporation's outstanding shares under Section 251(h) should have the same cleansing effect as a vote in favor of a transaction by such stockholders. Therefore, in such circumstances, any such transaction may be challenged only on the basis that it constitutes waste and, as a practical matter, the court's review will not override the decision of stockholders to approve the transaction.

Section 251(h) permits a merger agreement to include a provision eliminating the requirement of a stockholder vote to approve certain mergers if, among other requirements, the acquirer consummates a tender offer that results in the acquirer owning at least such percentage of the target corporation's stock that would be necessary to adopt the agreement of merger through a stockholder vote. The Court found that the target board's role in negotiating a two-step merger subject to a first-step tender offer under Section 251(h) is substantially similar to its role in a one-step merger approved by a stockholder vote. In particular, the target's

board must negotiate, agree to and declare the advisability of the terms of a two-step merger under Section 251(h) just as it must negotiate, agree to and declare the advisability of a merger involving a stockholder vote. The Court also noted that Section 251(h) alleviates the coercion that stockholders might otherwise be subject to in a tender offer (as opposed to a stockholder vote) by requiring that (i) the tender offer be for all the target company's outstanding stock, (ii) the second-step merger be effected as soon as practicable following the tender offer, (iii) the consideration paid in the second-step merger be the same amount and kind as the consideration paid in the tender offer and (iv) appraisal rights be available in all Section 251(h) mergers.

With this decision, the Delaware Court of Chancery highlights the deference that will be given to transactions that are approved by stockholders who are disinterested, uncoerced and fully informed. The mechanics of a particular transaction structure will not negate this overriding principle. By taking this approach, the Court allows transaction participants to take advantage of the speed of a tender offer structure without subjecting their actions to a higher standard of judicial review than would be applicable if such transaction were consummated pursuant to a merger subject to a stockholder vote.

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