

# What's Market? Update: Litigation

October 19, 2015

Derek B. Domian, Martin M. Fantozzi, Richard J. Rosensweig, Richard M. Zielinski

---

## *what's*market?

In *In re Appraisal of Ancestry.com, Inc.*, C.A. No. 8173-VCG (Del. Ch. 2015), the Delaware Court of Chancery held in connection with an appraisal proceeding brought by a dissenting shareholder that the best indication of the company's fair value was the merger price. Leading up to the merger, Ancestry.com conducted a "robust" auction involving at least fourteen parties that, according to the Court, was "unlikely to have left significant stockholder value unaccounted for." The Court rejected the petitioner's assertion that each share was worth \$42 (the merger price was \$32) and instead concluded that because Ancestry's pre-merger auction had been so robust, the merger price was a more credible indication of value than the expert reports submitted by the parties.

In *In re Rural Metro Corp.*, 88 A.3d 54 (Del. Ch. 2014), the target's primary investment banker, RBC, was held liable for aiding and abetting the directors' breach of fiduciary duty, in part because of the banker's conflict of interest in attempting to sell the corporation and providing stapled financing. The directors and a second banker settled prior to trial, leaving only RBC in the case. The Court of Chancery found that RBS was liable as an aider and abettor because:

- It created an unreasonable process and information gaps;
- Its actions caused damage in the form of an ill-timed sale, uninformed board approval and a manipulated fairness opinion; and
- The stockholders relied on misleading disclosures in the proxy statement in the form of false information that the banker presented to the board in its financial presentation.

The Court of Chancery also held that the board breached its Revlon duties by, among other things, failing to monitor or impose meaningful restrictions on the banker's conduct.

The Court entered judgment for approximately \$75.8 million against RBC.

In *Orckit Communications Ltd. v. Networks Inc.*, C.A. No. 9658 (Del. Ch. 2015), the Court granted defendant's motion to dismiss a claim that it had wrongfully terminated an agreement to purchase patents from plaintiff Orckit. The purchase was contingent upon the issuance of regulatory approval and the agreement provided that approval "shall be satisfactory in the sole discretion [is this right];

I can't access the decision], which, for purposes of this condition, shall not, to the extent permitted by law, be subject to the implied covenant of good faith and fair dealing of Networks." The Court found that whether the terms of the approval were satisfactory to Networks was "a decision that is unreviewable in the sense that, if it is timely taken, the defendant could then...terminate." Plaintiff had argued that the exercise of sole discretion was qualified by either a "commercially reasonable efforts" standard appearing elsewhere in the contract or a default good faith standard that could not be disclaimed. But the Court found it unreasonable to assume that the parties would expressly disclaim the application of the implied covenant only to impose a higher standard and that the provision's "language...could not be any clearer."

In *In re Cornerstone Therapeutics Inc. Stockholder Litigation*, Nos. 564, 2014 & 706, 2014 (Del. May 14, 2015), the Delaware Supreme Court injected exculpatory charter provisions adopted in accordance with 8 Del. C. §102(b)(7) with vigor in controlled transaction claims brought by shareholder plaintiffs against independent directors. It held that a plaintiff seeking only monetary damages must plead a *non*-exculpated claim against disinterested, independent directors to survive a motion to dismiss by those directors even if the underlying transaction is subject to the "entire fairness" standard – or, for that matter, subject to *Revlon*, *Unocal*, or business judgment rule review. The plaintiffs argued that because a controlled transaction is subject to heightened "entire fairness" review, all directors, including independent ones, should labor under an inference of disloyalty at the pleading stage. The Delaware Supreme Court rejected this argument as bad law and bad policy. When a director is protected by an exculpatory charter provision, a plaintiff must plead facts supporting a rational inference that the director breached his or her duty of loyalty or good faith. An inference of disloyalty that burdened independent directors would violate the principle enshrined in Delaware law that each director is presumed to be independent and to have acted in good faith and would dissuade independent directors from doing what they were appointed to do, namely, exercise independent judgment for or against proposed transactions. The Delaware Supreme Court did make clear, however, that its holding applied only to claims for monetary damages. An exculpatory charter provision might not have the same dispositive effect in cases where equitable relief, such as rescission or injunctive relief, is sought as a remedy.

*This advisory should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer concerning your situation and any specific legal questions you may have.*