THE M&A JOURNAL

THE INDEPENDENT REPORT ON DEALS AND DEALMAKERS

VOLUME 21 NUMBER 1

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MARCH/APRIL 2021

*The M&A Journal is published approximately every six weeks, with ten issues per volume. The sequence of issues is therefore tracked by volume and issue number, rather than by month.

The 33rd Tulane Corporate Law Institute

Attended remotely by a record 1,300 participants

M&A in the Year 2020 and what comes next

Kristin Zimmerman-Sorio

Managing Director at Morgan Stanley

David Katz (co-chair of the Institute and corporate partner at Wachtell, Lipton, Rosen & Katz): We were the last major in-person event in New Orleans and one of the last few in the country before we all went into a COVID-19 lockdown. A lot has happened since last year, and I'm glad we could do this very exciting program virtually. We have over 1300 participants, which is a new record and truly amazing. But I do know that we all miss the opportunity to be in New Orleans. So that everybody can save the date for the 34th Annual Tulane Corporate Law Institute, it will be held in New Orleans on March 17th and 18th of 2022. There is no experience like St. Patty's Day in NOLA. It's just something you can only imagine, but it's even more intense than that. So we look forward to welcoming you next March in-person.

The year 2020 was the year of turmoil due to the COVID-19 pandemic and all of the political upheavals, but the economy and M&A deals kept chugging along. Lawyers and courts generally figured out ways to make things work, including using Zoom trials. So we have lots to talk about and lots to share.

Before we begin, I would like to take a moment of silence and reflection in the memory of the hundreds of thousands of Americans who have lost their lives over the past year to COVID-19. I know that everyone has friends, relatives, or colleagues who have died over the last year from this terrible disease. Thank you.

Rita-Anne O'Neill (co-chair of the Institute and partner at Sullivan & Cromwell): We're fortunate today to be joined by Kristin Zimmerman-Sorio. Kristin is an MD at Morgan Stanley and she heads their global SPAC M&A practice. Kristin is going to provide us with a brief market overview of the unprecedented year we had in 2020 and what we can look forward to for the rest of 2021.

Kristin Zimmerman-Sorio: Good morning everyone and thank you for having me. It's a privilege. I do have a deck, as bankers do. So without further ado, I'll dive right in and turn to Slide One (see page 5). As David mentioned in the opening preamble, 2020 was indeed a year of turmoil but it was also an unprecedented example of rapid M&A recovery. On the first slide, we've graphed the dollar volumes related to global M&A activity over the last 15 years. Most notably, the market ended 2020 very strong at over $3 trillion of global M&A volume, despite the pandemic. The equity markets and the M&A market proved to be quite resilient and really rallied in the second half of last year.

It was actually the seventh year in a row of $3 trillion-plus M&A activity. We haven't really had a true down cycle in M&A since the '08 / '09 crisis. So this has been well over a decade of relative stability of performance. And the takeaway here is that we're actually having a pretty good run, although certainly there is noise in

The M&A Market ➔

Revlon RIP: 1985-2015?

Don't bet on it, says Joel Friedlander

From his firm biography: Joel Friedlander has over 25 years of experience litigating breach of fiduciary duty actions and contract disputes relating to the control of Delaware entities. The 2020 and 2017 editions of The Best Lawyers in America recognized him as "Litigation - Mergers and Acquisitions 'Lawyer of the Year' for Wilmington, Delaware." The current edition of Chambers USA designates him as "Band 1" and states:Joel Friedlander is held in the utmost regard by market commentators, who consider him "one of the top attorneys in Delaware."Mr. Friedlander has been profiled in The Wall Street Journal and named "Litigator of the Week" in The Am Law Litigation Daily. He repeatedly has been selected for annual inclusion in The Best Lawyers in America, Benchmark Litigation, Chambers & Partners, and Delaware "Super Lawyers."

The last time I spoke at Tulane was on this panel in 2017. This year, I've plagiarized or copied a Ted Mirvis slide from 2017 on the subject of whether *Revlon* is dead. His slide contained a drawing of a tombstone that reads "RIP *Revlon* 1985-2015?" Rest in peace *Revlon*. The issue in 2017 was the series of decisions in 2015, *Corwin* probably being the most notable, that created all these barriers to pleading a *Revlon* case. I actually said four years ago that there was no path to plead a *Revlon* case and I wrote a law review article about that. Joel Friedlander, *Vindicating the Duty of Loyalty: Using Data Points of Successful Stockholder Litigation As a Tool for Reform*, 72(3) *The Business Lawyer* 623 (Summer 2017)

Not only was *Corwin* itself an impediment as an affirmative defense, but there was also language in *Corwin* to the effect of, well, maybe *Revlon* isn't meant for post-closing damages. People were advocating at the time that maybe we should just dispense with *Revlon* and not have damages claims to *Revlon*, even though in *Rural/Metro* just a year earlier, there had been the first and only final judgment for damages on a *Revlon* claim. I think that was the big issue four years ago and now I just want to bring it up to the present.

Since then, looking back over the last two years, we see there have been about six cases where motions to dismiss have been denied at least in part in *Revlon* cases: *Xura*, *KCG Holdings*, *Fresh Market*, *Mindbody*, *Blackhawk Network*, and *Columbia Pipeline*, just a couple of weeks ago. So *Revlon* litigation is alive. It's alive in a new form, it's alive in a more limited form, but it's very much alive.

I think the reason for that lies in prior rulings in that 2018 time period. And just to tell you about those real quick, there was *Rural/Metro* itself, also known as *RBC v. Jervis*. In that case, I think it was an under-appreciated fact that the CEO and the chair of the special committee were found to be jointly liable. They had settled before trial, but they were found to be jointly liable for a *Revlon* violation. And then in late 2017, there was Vice Chancellor Slights's decision in *Lavin v. West Corp.*, which was a 220 case for the purpose of pleading around *Corwin* or whether *Corwin* was an affirmative defense within 220. Vice Chancellor Slights explicitly stated that he was encouraging the use of Section 220 to plead around *Corwin*. I was glad to see he cited my article in support of that.

And then pivotally, in 2018 the Delaware Supreme Court weighed in. It was March 2018 in *Kahn v. Stern*, a short order, a little bit cryptic, but it talked about the pleading requirements for a post-closing *Revlon* damages claim. There

was no question that the court was endorsing in theory and laying out some parameters the pleading requirements for *Revlon* for post-closing damages. Then finally, *Morrison v. Berry*, which was the *Fresh Market* litigation. In that decision by the Delaware Supreme Court in August 2018, the justices reversed the *Corwin* dismissal based on a document we'd obtained under Section 220, which showed that the proxy materials were deficient in some fundamental ways about the process. So that laid the groundwork then for what came after, which is the series of motion to dismiss rulings, some of which, not all of which, but some of which sustained *Revlon* claims on the motion to dismiss.

The key for all these cases is that plaintiffs now have access to documents by various means to plead around *Corwin*. So just to run through quickly the six I mentioned at the outset. *Xura* began as an appraisal case and then it got flipped into a breach of fiduciary duty case. There was appraisal discovery. In *KCG* there had been expedited discovery from a preliminary injunction motion, and that then informed the subsequent complaint. In *Fresh Market*, as I mentioned, there was this very limited Section 220 inspection. But by the time the motion to dismiss was decided by the Court of Chancery in two decisions, in December 2019 and in June 2020, there'd been a prior appraisal action that had settled, so we got, in document discovery, we got all these documents, which then enabled us to plead a very rich story against a series of defendants.

Mindbody, one of these more recent post-*Fresh Market* decisions, began with the Section 220 action. There was also another plaintiff who had a 225 action, but perhaps more importantly, there was a parallel appraisal action. It was a significant stockholder. So there was all this appraisal discovery that was gathered by the time the motion to dismiss was decided. Then in *Blackhawk*, there was a very limited 220 inspection, which amounted to about 18 documents. In *Columbia Pipeline*, just a couple of weeks ago, we saw the plaintiffs had the benefit of an entire trial record from a prior appraisal case. So that's the key which allows folks in certain cases, to meet the pleading requirements set forth in *Kahn v. Stern* as well as the whole grand history of *Revlon* cases.

I'd like to spend some time on the four most recent decisions. In *Fresh Market*, there were seven sets of defendants. There was the conflicted chairman, he was a roll-over stockholder. We've alleged he lied to the board, so the *Revlon* case got past as to him. There was the financial advisor who was back-channeling information with the buyer and gave a misleading conflict disclosure to the board; there were the aiding and abetting claims sustained against the banker; there was the CEO who is subject to a due care disclosure claim, and the general counsel, who is subject to a separate due care disclosure claim. That has been a recurring theme for many of these cases, because 102(b)(7) doesn't apply to officers.

As to the other defendants, there were a series of other defendants who were dismissed; the outside directors, the law firm, the buyer, and the chairman's son who'd worked with the chairman and was himself, along with the chairman, a former CEO of the company. So that's *Fresh Market*.

Just a news flash: we're filing settlement papers today. It settled for $27.5 million dollars, which I think is important. I've often heard the question as to whether *Revlon* today is like *Revlon* in the past, or whether there are just tons of cases in which people can extract rents to just keep it going. But you have to fight through a lot to settle the case later. These are slow cases. They're rare cases. They have to get past the motion to dismiss. You have to get all the discovery as a basis to settle the case. So it's just a completely different *Revlon* environment than say six years ago.

Mindbody was a classic story of a sale of a company to a private equity buyer with a CEO who had a substantial stake that was pretty illiquid. The *Revlon* claim was sustained against the CEO. It was alleged that he favored a particular PE buyer that had been recruited, and as CEO he probably had a pretty rosy future there. He was looking for liquidity. He was strapped for cash. We alleged that he tanked the stock price and then he hid information from the board. And then there were allegations about the defects of the go-shop, a lack of full disclosure. So *Corwin* didn't apply. There's also a due care claim against the CFO/COO. That's *Mindbody*.

Blackhawk is an interesting decision. There are two things I want to bring out about it. There were only two defendants, the CEO and the chairman, who are two different people. They were sued solely in their capacity as officers. Vice Chancellor Fioravanti said that because they were only sued in that capacity, *Revlon* did not apply, despite the fact that this was a sale of control to a private equity buyer for cash. I would respectfully take issue with that. I think if it is a *Revlon* transaction then it should simply be subject to *Revlon*. I will turn to *Columbia Pipeline* in a moment, which disagrees with *Blackhawk*.

There is a second point I'd like to make about *Blackhawk*. The only claim that was sustained was a due care disclosure claim against the CEO,

Revlon ➔

Revlon

continued

but the court dropped a footnote, number 155, that reads as follows: "In the event that plaintiff later obtains information indicating that Roche and Tauscher engaged in deceitful conduct, only absent from the complaint for lack of discovery, this court is not precluded from revisiting this issue." It is also the third time since last year that a judge has issued this kind of declaration. This is significant for all practitioners.

Finally, there is *Columbia Pipeline*, just decided two weeks ago by Vice Chancellor Travis Laster. What really just stuns me is that a big issue in the case, which was also important in the *Rural/Metro* appeal—is the question of when enhanced scrutiny begins. This is just fascinating to me because back when I was a clerk, the very first case I worked on—and this is 1992—was when *Revlon* applies. This was such a huge issue in the late 1980s. People were constantly talking about *Revlon* duties, but when did they kick in? Now, it's when does *Revlon*'s enhanced scrutiny begin, but it's really the same question. Still, in 2021, that is a burning issue, a live issue.

The Vice Chancellor said that basically when the CEO, not the board, when the CEO met with a particular buyer, what he did at a certain meeting was the initiation of a sale process. And that's when enhanced scrutiny kicks in and covers all the conduct that comes after that. And then lastly, the claim was sustained for tilting the sale process. This is classic stuff. Wanting to do a deal for cash to trigger change-in-control payments can trigger potential damages because of issues with deal protections. That is taking issue with *Blackhawk*. Although not explicitly, it's the same thing. Vice Chancellor Laster said that because the CEO was sued only as an officer, there is no need to sue him as a director. "Indeed, that claim could be superfluous because the conduct in question was really the conduct as an officer." So the primary exposure is for officer liability, but it's the same *Revlon* standards. It doesn't matter whether the claim concerns one's capacity as officer or one's capacity as director, it's the same analysis.

I'll just close by saying, if people have concluded that *Revlon* is dead, that is a mistake. To transactional planners as well as fiduciaries and advisors, I say, "Don't assume *Revlon* scrutiny is dead. Don't assume plaintiffs will not get contemporaneously created documents. Don't assume plaintiffs are only going to be looking at your proxy statement. Don't play games with conflicted bankers."

~~MA~~

Tulane 2017:
"Corwin #5: Revlon R.I.P.??"

Corwin: "Unocal and Revlon are primarily designed to give stockholders and the Court of Chancery the tool of injunctive relief to address important M&A decisions in real time, before closing. **They were not tools designed with post-closing money damages claims in mind**."[1]

Rural Metro: "**sufficient predicate**" for post-closing aiding and abetting damages liability against sell-side ibanker where board "violated its situational duty [under Revlon] by failing to take reasonable steps to attain the best value reasonably available to the stockholders" — in absence of gross negligence.[2]

[1] *Corwin* v. *KKR Fin. Holdings LLC*, 125 A.3d 304, 312 (Del. 2015).
[2] *RBC Capital Markets, LLC* v. *Jervis*, 129 A.3d 816, 857 (Del. 2015).

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Tulane 2021:
Revlon litigation is alive (but in a new limited form)

- Motions to dismiss denied (in part) in cases challenging the sales of:
  - *Xura, Inc.*[1]
  - *KCG Holdings, Inc.*[2]
  - *The Fresh Market, Inc.*[3]
  - *Mindbody, Inc.*[4]
  - *Blackhawk Network Holdings, Inc.*[5]
  - *Columbia Pipeline Group, Inc.*[6]

[1] *In re Xura, Inc., S'holder Litig.*, 2018 WL 6498677 (Del. Ch. Dec. 10, 2018).
[2] *Chester County Emp. Retirement Fund v. KCG Holdings, Inc.*., 2019 WL 2564093 (Del. Ch. June 21, 2019).
[3] *Morrison v. Berry*, 2020 WL 2843514 (Del. Ch. June 1, 2020); 2019 WL 7369431 (Del. Ch. Dec. 31, 2019).
[4] *In re Mindbody, Inc. S'holder Litig.*, 2020 WL 5870084 (Del. Ch. Oct. 2, 2020).
[5] *City of Warren Gen. Emp. Retirement Sys. v. Roche*, 2020 WL 7023896 (Del. Ch. Nov. 30, 2020).
[6] *In re Columbia Pipeline Group, Inc. Merger Litig.*, 2021 WL 772562 (Del. Ch. Mar. 1, 2021).

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Key Prior Rulings

RBC Capital Markets, LLC v. *Jervis*, 129 A.3d 816 (Del. 2015):
- affirming common liability of CEO and Special Committee Chair for unexculpated *Revlon* breach due to their personal interests in a near-term sale

Lavin v. West Corp., 2017 WL 6728702 (Del. Ch. Dec. 29, 2017):
- encouraging Section 220 inspections to plead around *Corwin*

Kahn v. Stern, 183 A.3d 715 (Del. 2018) (Order):
- discussing pleading requirements "in cases where *Revlon* duties are applicable, but the transaction has closed and the plaintiff seeks post-closing damages"

Morrison v. Berry, 191 A.3d 268 (Del. 2018):
- reversing *Corwin* dismissal based on undisclosed "extent of … pressure on the Board, and the degree that this influence may have impacted the structure of [the] sale process"

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Fresh Market Scorecard[1]

- *Revlon* claim sustained against Chairman/rollover stockholder who allegedly lied to board about dealings with buyer
- Aiding and abetting claim sustained against financial advisor who allegedly back-channeled with buyer and misled board
- Due care disclosure claim sustained against CEO re: management projections
- Due care disclosure claim sustained against General Counsel re: distorted narrative of board deliberations
- *Revlon* claim dismissed as to outside directors
- Aiding and abetting claim dismissed as to legal advisor
- Aiding and abetting claim dismissed as to buyer
- Aiding and abetting claim dismissed as to Chairman's son

[1] *Morrison v. Berry*, 2020 WL 2843514 (Del. Ch. June 1, 2020); 2019 WL 7369431 (Del. Ch. Dec. 31, 2019).

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Mindbody[1]

- *Revlon* claim sustained against CEO founder who allegedly:
  - favored PE buyer who pitched him on future employment
  - desired liquidity and was strapped for cash
  - tanked stock price by lowering guidance
  - hid information from board
- Defective, abbreviated go-shop
- Lack of full disclosure to stockholders
- Due care claim sustained as to CFO/COO
- *Revlon* claim dismissed as to director/stockholder who chaired Transaction Committee

[1] *In re Mindbody, Inc. S'holder Litig.*, 2020 WL 5870084 (Del. Ch. Oct. 2, 2020).

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Blackhawk[1]

- CEO and Chairman sued solely as officers:

  "The Complaint thus offers no occasion to directly evaluate the reasonableness of the Board's transaction process under the heightened scrutiny standard imposed by *Revlon*." n.134

- Only due care disclosure claim against CEO sustained; omission of projected acquisition EBITDA; false disclosure re: go-shop

  "In the event that Plaintiff later obtains information indicating that Roche and Tauscher engaged in deceitful conduct only absent from the Complaint for lack of discovery, the Court is not precluded from revisiting this issue." n.155

[1] *City of Warren Gen. Emp. Retirement Sys. v. Roche*, 2020 WL 7023896 (Del. Ch. Nov. 30, 2020).

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Bad Lessons Drawn from *Corwin*

- Don't Assume *Revlon* Scrutiny Is Dead
- Don't Assume Plaintiffs Will Not Obtain Contemporaneously Created Documents
- Don't Play Games with Conflicted Bankers
- Don't Play Games with Disclosures

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