

Sjunde AP-Fonden v. Activision Blizzard Inc.: What May be Common May not be Right



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In another impactful decision, the Delaware Court of Chancery in *Sjunde AP-Fonden v. Activision Blizzard Inc.* again stressed the importance of the statutory text of the DGCL to dismiss claims by the plaintiffs alleging that the board violated Section 251 of the DGCL in approving Activision Blizzard, Inc.'s merger with Microsoft, Corp. As with *Moelis*, the Court recognized the market practice that sophisticated parties may continue to negotiate and finalize agreements and disclosure schedules “up until the moment a deal closes, if not beyond” but noted that “[w]here market practice exceeds the generous bounds of private ordering afforded by the DGCL, then market practice needs to check itself.”

In the case, the plaintiff alleged that the board of directors of Activision did not comply with the requirements in Section 251 of the DGCL in approving a merger agreement that was missing certain relevant sections necessary for execution, such as the newly formed company's charter and a company disclosure letter, a common practice in merger negotiations. The final merger agreement reflected the completion of those missing items, but Activision's board did not review and approve the final executed version of the agreement. Section 251(b) of the DGCL provides, in relevant part, that “the board of directors of each corporation which desires to merge or consolidate shall adopt a resolution approving an agreement of merger or consolidation and declaring its advisability” and requires that the merger agreement state certain terms.

Distinguishing between a true execution-ready agreement and what is required under Section 251(b), the Court held that “[a]t bare minimum Section 251(b) requires a board to approve an essentially complete version of the merger agreement.” In agreement with the plaintiff, the Court found that the draft merger agreement approved by the board of directors of Activision was not “essentially complete” and did not yet include, among other items:

- (i) the company disclosure letter or disclosure schedules;
- (ii) the surviving company's charter;
- (iii) the amount of consideration or Activision's name as the target, instead including placeholders for both (although the Court noted that these items are typically added at signing to preserve confidentiality); or

(iv) resolution as to whether Activision would be permitted to declare and pay dividends between the signing and closing of the merger.

The board met a day before the merger agreement was executed and approved the then-current draft, delegating to an *ad hoc* committee negotiation of the final dividend point. The final merger agreement executed the next day reflected the resolution of that issue and completion of the other missing items. Noting that under DGCL Section 141(c)(2), “no committee shall have the power or authority” to approve of any matter required to be submitted to stockholders, the Court held that the board erred by not approving the merger agreement after resolution of the final open items. In reviewing the claims in plaintiff’s motion for summary judgment, the Court held that it was “reasonably conceivable that the committee alone, and not the Board, approved the Dividend Provision” and “that the Board violated Section 141(c) by delegating to a committee approval of the Dividend Provision.”

The Court also refused to dismiss the plaintiff’s claim that the Activision board violated Section 251(c) of the DGCL, which states, in relevant part, that the merger agreement be submitted to the stockholders, that notice of a meeting shall be given, and that such “notice shall contain a copy of the agreement or a brief summary thereof.” The Court found that Activision’s notice did not meet either option required by Section 251(c) because (1) the merger agreement attached to the proxy statement for the stockholder meeting did not comply with Section 251(b) in that the agreement did not include the charter for the surviving corporation, and (2) the stockholder notice did not contain a summary of the merger agreement. The Court agreed with the defendant that the proxy statement itself included a detailed summary of the merger agreement but again relying on a strict construction of the statute, held that “the proxy statement is not the notice.”

Looking forward, both acquirors and target companies should pay close attention to statutory requirements for approval of merger agreements and, if applicable, consider holding final board meetings, or reapproving or ratifying agreements once all documents, exhibits and schedules are in final form with no open or missing items.