

Delaware Chancery Court Allows TripAdvisor to Move to Nevada, But Lets Stockholders Pursue Their Claims for Damages

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Delaware corporations contemplating conversion to another state should take note of a recent Delaware Court of Chancery decision in which Vice Chancellor J. Travis Laster declined to enjoin a corporate move to Nevada, but sustained stockholder allegations that the defendants breached their fiduciary duties in connection with approving the conversion.

[On February 20, 2024, Vice Chancellor Laster held](#) that two entities – TripAdvisor Inc. (TripAdvisor) and Liberty TripAdvisor Holdings Inc. (Holdings) – may move forward with their respective conversions into Nevada corporations, dealing a blow to the plaintiffs' hopes of keeping the corporations in Delaware. However, the breach of fiduciary duty claims challenging each board's decision to approve the conversion will continue, with a potential for monetary damages for any harm suffered by stockholders.

The court held that the decisions to approve the conversions were subject to entire fairness review because both TripAdvisor and Holdings were controlled companies (a point the defendants conceded for purposes of their motion to dismiss) and the conversions resulted in a non-ratable benefit (i.e., reduced litigation exposure) for the controller and the directors who approved them. The court observed that the conversions could have been protected by the business judgment rule if the companies had adopted the twin [MFW](#) protections, i.e., approval by both:

1. A fully functioning special committee of independent directors.
2. A majority of the disinterested stockholders.

But neither protective device was employed, so entire fairness governed.

Background

TripAdvisor and Holdings are Delaware corporations with dual-class capital structures. Gregory B. Maffei is the CEO and chairman of Holdings and sits on the board of TripAdvisor. At the time this case was filed, Maffei owned shares carrying 43% of Holdings' voting power. Likewise, Holdings exercises 56% of TripAdvisor's outstanding voting power. For purposes of the defendants' motion to dismiss, both parties agreed that Maffei controls Holdings and TripAdvisor.

According to the plaintiffs' allegations, in November 2022, TripAdvisor management first brought to the board's attention the possibility of converting into a Nevada corporation, citing considerations such as greater litigation protections for directors and officers and lower franchise taxes and fees.

In February 2023, TripAdvisor's board received a lengthy presentation from management highlighting perceived advantages of conversion, including protections offered to directors and officers in Nevada. For example, the presentation identified that under Nevada law, in order to hold an officer or director individually liable for a breach of fiduciary duty, plaintiffs must both rebut the business judgment presumption and demonstrate that "the fiduciary breach involved intentional misconduct, fraud, or a knowing violation of law." The board received a similar presentation in March 2023, after which it unanimously decided to approve the conversion. The board approved final resolutions authorizing the conversion in April 2023.

The Holdings board received a similar presentation from management during March 2023. After receiving additional information about the conversion from management in April 2023, the Holdings board unanimously approved the conversion.

After distributing proxy statements asking stockholders to vote in favor of the conversion, a majority of voting power at each company approved each conversion in June 2023. However, only 5.4% of the unaffiliated TripAdvisor stockholders voted in favor of conversion, and only 30.4% of the unaffiliated Holdings stockholders voted in favor of conversion. Thus, Holdings and Maffei provided the decisive votes.

The plaintiffs filed suit in April 2023 contending that the conversions were self-interested transactions that fail the entire fairness test. They asked the court to enjoin the conversions from closing, seeking to keep the companies in Delaware. The defendants agreed not to complete the conversions unless the court dismissed the case or the parties otherwise came to an agreement.

Decision

The court held that the plaintiffs “alleged facts supporting a reasonable inference that the conversions are not entirely fair” but that an injunction is “off the table” – meaning the plaintiffs may proceed with their case for damages, but the companies also may move forward with the planned conversions.

First, the court determined what standard of review to apply, with the defendants arguing for the business judgment rule and the plaintiffs advocating for the far stricter entire fairness standard. Under Delaware law, entire fairness applies “to any transaction between the corporation and a controlling stockholder in which the controller receives a non-ratable benefit.” The key issue was thus “whether the conversions conferred a non-ratable benefit on the fiduciary defendants.” As the court explained, “a controller or other fiduciary obtains a non-ratable benefit when a transaction materially reduces or eliminates the fiduciary’s risk of liability.” The defendants argued that a material benefit from a reduction in liability could only exist if it addressed “existing potential liability” (i.e., “where the events giving rise to the claim have already occurred”) not “future potential liability” (i.e., “where the events that could give rise to liability have not happened yet”). The court rejected this argument, calling the distinction “arbitrary” and noting that each company’s board focused on the reduced liability exposure in approving the conversions, which signified that it was a material benefit.

In finding that entire fairness applies due to the non-ratable benefit of a material reduction in litigation risk, the court emphasized the importance of a shareholder’s right to sue, stating plainly that, “or investor protections to be meaningful, litigation rights cannot become second-class rights.” The court made clear that “from the perspective of equity, Delaware law should be just as concerned about transactions that reduce stockholders’ litigation rights as it is about transactions that reduce their economic rights or governance rights.”

Second, the court considered the feasibility of applying the entire fairness test, which requires both substantive fairness (fair price) **and** procedural fairness (fair dealing). The defendants argued entire fairness cannot be applied to transactions where stockholders do not receive cash for their shares (i.e., where there is no “price”). The court rejected this interpretation of the entire fairness test and explained that the substantive fairness inquiry focuses on “whether the minority stockholder receives at least ‘the substantial equivalent in value of what had before.’” The court recounted previous decisions applying the entire fairness test to transactions where stockholders did not receive cash for their shares and held that an entire fairness inquiry was likewise appropriate here.

Third, the court found that the plaintiffs pled facts sufficient to call into question both substantive and procedural fairness. For substantive fairness, the court found that the litigation rights provided to unaffiliated stockholders in Nevada were alleged to be “inferably less than what Delaware provides.” For procedural fairness, the court found that the companies failed to replicate arm’s-length bargaining, and the unaffiliated stockholders’ voting pattern supported an inference of unfairness.

Finally, the court held that monetary damages were adequate to compensate the plaintiffs’ alleged harm, if any, and, therefore, granted the defendants’ motion to dismiss with respect to the plaintiffs’ request for an injunction. At the same time, the court did not rule out the possibility of granting such relief in the future, explaining that “in theory ... this court could enjoin or Holdings from departing Delaware if the equities warranted it. But the circumstances in which the equities might warrant that extreme result are limited. They are not present here.”

The court further observed that though it was “quite likely that the court can craft a monetary remedy ... the remedial challenge will be to quantify the extent of the harm.” The court noted that because the only corporate change related to the conversion was the companies’ domicile, TripAdvisor’s “trading price should help quantify the harm, if any,” and that “the announcement of the conversion should have a relatively clean price impact.” The court considered various methods for calculating damages, such as evaluating the stock price reaction to the announcement of the conversion, the announcement of the vote, or the filing of the litigation.

Key takeaways

- The Court of Chancery’s decision to deny the plaintiffs’ request for an injunction means TripAdvisor and Holdings can complete their conversion to Nevada, but if the plaintiffs prevail, the defendants may face liability for damages. Moving forward, it appears there is a clear path for Delaware companies looking to reincorporate in

other states; however, it comes with a risk of litigation. Companies should make sure to follow the *MFW* process (if a controlled company) or one of the classic cleansing mechanisms:

- Approval by a majority of independent directors.
- Approval by a special committee of independent directors.
- Approval by a majority of disinterested stockholders.
- The court ruled that a conversion from Delaware to Nevada confers a non-ratable benefit on the controller and the directors. Thus, absent appropriate cleansing, the default standard of review is entire fairness.
- Outside of the controller context, any one of the three traditional cleansing mechanisms will be sufficient to trigger an irrebuttable version of the business judgment rule. So, disinterested stockholder approval with adequate disclosure – including potential impact on litigation rights – should be sufficient.
- But, in the controller context, the twin *MFW* protections (approval by an independent special committee of directors and majority of disinterested stockholders) are required to trigger business judgment protection of a conversion. The upcoming *Match Group* decision from the Delaware Supreme Court (which could limit application of *MFW* to only squeeze-out mergers) may change this, but for now, both safeguards are required.
- Although the court noted that the *MFW* protections could cleanse a conversion, it is difficult to see how, as a practical matter, those could be applied because, according to Vice Chancellor Laster, directors are interested in a conversion that allegedly reduces their exposure to litigation liability. In that case, any special committee of directors would be conflicted, unless: (a) the company was reincorporating in a state where the fiduciary standards were akin to those in Delaware (and, thus, the directors would not be receiving any material benefit from the conversion); or (b) the committee was comprised of directors who will **not** be staying on with the company post-conversion (and, thus, those directors would not be receiving any material benefit from the conversion).

Interestingly, TripAdvisor’s stock price **increased** following announcement of the conversion (April 10, 2023), announcement of the vote (June 6, 2023), and announcement of the Chancery Court’s decision (February 20, 2024). The price decreased on the filing of this litigation (April 21, 2023).

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