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Client Alert

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DE Court Upholds Single-Bidder Sale Process

In *In re Plains Exploration & Production Co. S'holder Litig.*, C.A. No. 8090-VCN, mem. op. (Del. Ch. May 9, 2013), the Delaware Court of Chancery denied a motion to enjoin a pending merger. The court found that the stockholder-plaintiffs did not have a reasonable probability of success in proving that the target company's board of directors had breached its fiduciary duties by (i) failing to conduct a presigning market check or (ii) allowing the chief executive officer, who would be employed by the acquiring company after closing, to negotiate the transaction. The decision reaffirms the contextual nature of structuring a sale process under Delaware law when a board discharges its *Revlon* duties to obtain the best price reasonably available.

Background

Plains involved a challenge to the proposed merger between Plains Exploration & Product Company ("Plains") and Freeport-McMoran Copper & Gold Inc. ("Freeport"). In its acquisition proposal, Freeport had expressed its desire to retain Plains' management. Plains' board of directors did not form a special committee or conduct a market check, but it met frequently to discuss the proposed merger. It also allowed the CEO to lead the negotiations with Freeport. After the merger price was established in the negotiations, Plains' executives met with Freeport to discuss their expected roles in the combined company after closing. The merger price represented a 39% premium to Plains' preannouncement trading price. The definitive merger agreement included a no-solicitation (or "no shop") covenant, a four business-day matching right and a termination fee equal to 3% of the transaction's equity value.

The Court's Opinion

The court denied the plaintiffs' request for a preliminary injunction against the merger, finding that the plaintiffs did not have a reasonable probability of success in proving the Plains' directors had breached their fiduciary duties in approving the transaction. First, the court rejected the plaintiffs' attack on the board's decision to permit Plains' CEO to negotiate the merger agreement. The court noted that seven of the eight directors were disinterested and independent and thus not dominated by or beholden to the CEO. In addition, the court noted that "the Board's decision to allow [the CEO] to run the negotiations was not inherently unreasonable." It explained that the CEO may have been "in the 'best position to advance the interests of [Plains'] stockholders' because he had the 'most experience with and deepest knowledge of [Plains'] assets' " (alterations in original). Equally important, the court observed that the Board "properly managed the conflict by overseeing the negotiations" through several meetings in which they "discussed the proposed merger and participated in the decision-making process." It was also noted that the CEO's share ownership should have motivated him to obtain the best price possible.

Second, the court found that the directors' decision not to conduct a presigning market check or include a "go-shop" provision in the merger agreement was not reasonably likely to constitute a breach of fiduciary duty. The court stated that "there is no bright-line rule that directors must conduct a pre-agreement market check or shop the company." It also explained that "[o]ne consequence of a single-buyer negotiation strategy is that it requires a board to rely more extensively on its own knowledge and the knowledge of its financial advisor in determining whether the proposed transaction is priced fairly."

The court concluded that the Plains' "directors' relevant expertise and experience support a reasonable inference that they were informed and competent to make an appropriate decision." It also found that the deal protection terms, including the four business-day matching right and the 3% termination fee, "would not have prevented either a serious bidder from putting forth a higher bid or the Board from entertaining and accepting a bona fide superior proposal."

Finally, the court rejected the plaintiffs' challenge to the board's decision not to include a "collar" around the exchange ratio. The merger agreement provided for a fixed exchange ratio in which Plains' stockholders would receive a specified number of shares of Freeport stock. Because there was no "collar" around the exchange ratio, Plains' stockholders would receive less merger consideration if Freeport's share price declined following announcement of the merger, which is what happened. The court held that "[t]he decision to negotiate or not to negotiate for a collar is within the business judgment of the board."

Conclusion

Plains confirms longstanding Delaware law that boards have wide latitude in structuring sale processes. Delaware courts have repeatedly stated that there is "no single blueprint" to discharging *Revlon* duties. While some companies conduct broad pre-signing market checks, numerous Delaware opinions have upheld decisions made by a majority of disinterested and independent directors to pursue a single-bidder sale strategy. In such cases, directors generally consider the benefit of the "bird in hand"; the risk of losing that bid; the possible adverse effects that may result from conducting a pre-signing market check; and the extent to which any "deal protection" terms in the merger agreement might impede a post-signing market check. While there is always a risk of hindsight judgment, boards should be able to make an informed decision as to which kind of sale process is most likely to maximize stockholder value. Such decisions will generally not be second-guessed by courts, particularly where the record shows appropriate oversight of the sale process by independent directors.

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