

Target Boards in Single-Bidder Context Given Guidance



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In two recent Delaware Court of Chancery decisions — *In re Plains Exploration & Production Stockholder Litigation*, C.A. No. 8090-VCN (May 9, 2013), and *Koehler v. NetSpend Holdings*, C.A. No. 8373-VCG (May 21, 2013) — the court reached opposite conclusions with respect to whether the plaintiffs were likely to succeed in establishing that a target board of directors breached its fiduciary duties in connection with a single-bidder sales process. These decisions serve as a useful reminder that while a target's board of directors may reasonably conclude that negotiating a sale of the company with a single bidder is consistent with the board's Revlon duties, the board must ensure that, at every step in the transaction, it has followed a process reasonably designed to achieve the best pos-

sible price under the circumstances, including through the implementation and monitoring of deal protection measures.

In *Plains Exploration*, the stockholder plaintiffs sought a preliminary injunction in connection with the combination of mining and natural resources companies Freeport-McMoRan Copper & Gold Inc. and Plains Exploration. The plaintiffs alleged that they were likely to succeed on their claim that the Plains board breached its fiduciary duties by negotiating a sale of the company with Freeport, and by not seeking out alternative bidders. In rejecting the plaintiffs' argument, Vice Chancellor John W. Noble found that the expertise of the Plains directors — most of whom had extensive experience in the oil and gas industry — sup-

ported a reasonable inference that they were capable of determining whether the transaction price was a fair one to the Plains stockholders, notwithstanding the absence of a market check or go-shop process. The court went on to conclude that the deal protections in place — a no-solicitation clause coupled with a fiduciary-out, a 3 percent termination fee and matching rights — were not so onerous that they would have precluded a competing bidder from making an offer or the board from accepting a superior proposal. Moreover, given that more than five months had passed since the deal was announced, the court credited the Plains board with "allowing sufficient time for competing acquirers to emerge," which, according to the court, was further evidence that the board had acted reasonably under

the circumstances. Accordingly, the court denied the plaintiffs' request for a preliminary injunction.

Twelve days later, Vice Chancellor Sam Glasscock III handed down a decision in *NetSpend*, where the stockholder plaintiffs sought to preliminarily enjoin the sale of NetSpend to Total System Services Inc. in an all-cash \$1.4 billion transaction. The plaintiffs attacked the merger on several grounds, including that the NetSpend board breached its *Revlon* duties by failing to conduct a sales process designed to lead to the best value reasonably available for NetSpend's stockholders.

With respect to the *Revlon* claim, the court concluded that while a single-bidder process is not per se invalid, a board pursuing this strategy is required to be "particularly scrupulous" in its sales process to ensure that it obtains the best value reasonably available. The court identified two factors that, together, according to the court's decision, impaired the board process. First, the court found that the fairness opinion delivered to the board was "weak" and a "poor substitute for a market check."

Second, the court addressed so-called "don't ask, don't waive" provisions, which prohibit bidders from requesting that a target company waive the terms of a standstill entered into between a bidder and target. The court concluded that, because the NetSpend board was prohibited under the terms of the merger agreement from waiving (without the buyer's consent) don't-ask-don't-waive provisions that NetSpend had entered into with two private equity companies that

had previously expressed an interest in purchasing a minority stake in the company, the board had approved the merger without adequately informing itself that the consideration was the best value reasonably available to NetSpend stockholders. After oral argument, but before the court handed down the decision, the buyer consented to NetSpend waiving the don't-ask-don't-waive provisions to allow the private equity buyers to submit competing bids, but NetSpend still received no competing offers. Thus, the court declined to enter the preliminary injunction because, in its view, the risk to NetSpend of losing what appeared to be the only available deal outweighed any harm to stockholders resulting from the sales process.

These decisions offer M&A participants useful guidance when considering a sales process that may involve only a single bidder:

- Delaware law is clear that single-bidder sales are not per se invalid under *Revlon* and there is no single blueprint for conducting this kind of sales process. At the same time, when a board elects to sell to a single bidder without conducting a market check or engaging in a post-signing go-shop process, the board must act scrupulously to ensure that its process was designed to deliver the best deal reasonably available to stockholders. This means that, wherever possible, target boards that forgo a market check should attempt to provide alternative and reasonable means for potential bidders to make competing bids.

- Don't-ask-don't-waive provisions appear to be here to stay. As recognized

in other Chancery Court decisions, such as Chancellor Leo E. Strine Jr.'s ruling in *In re Ancestry.com Shareholder Litigation*, C.A. No. 7988-CS (Dec. 17, 2012) (*Transcript*), these provisions can be an appropriate and effective tool in maximizing shareholder value in the bidding process. Don't-ask-don't-waive provisions, however, demand close attention by target boards where they survive announcement of a sale transaction. Target boards have a fiduciary obligation to consider whether continued enforcement of these provisions (and other deal protection measures) following announcement of a sale is likely to prevent a potential topping offer.

- In the current environment, where litigation challenging a target board's decision-making is almost a certainty, boards engaging in a single-bidder process must take particular care to develop a record of careful and deliberate action designed at each step in the transaction to deliver the best value reasonably available to stockholders.

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