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Preliminary Injunctions and Share Counts in Merger Context

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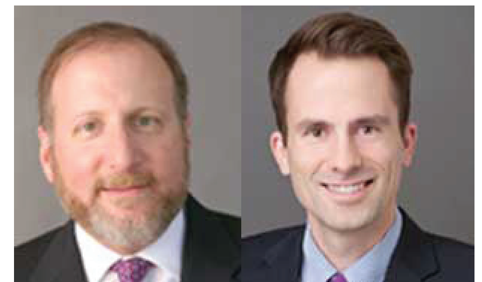
In *In re Tibco Software Stockholders Litigation*, Consol. C.A. No. 10319-CB (Del. Ch. Nov. 25, 2014), Delaware Court of Chancery Chancellor Andre G. Bouchard declined to enjoin a stockholder vote on a merger between Tibco Software Inc. and Vista Equity Partners V L.P., notwithstanding a share-count miscalculation that resulted in the total purchase price being $100 million less than originally announced. The opinion is notable for a number of reasons. First, the court made clear that a preliminary injunction will not issue where damages are "quantifiable," even though perhaps not ultimately recoverable from a target's board; however, the court noted that stockholder plaintiffs are not necessarily without recourse because a stockholder could seek recovery from third parties who may have aided and abetted wrongdoing. Second, the court found that the balance of equities weighed in Tibco's favor because the robust sales process had apparently resulted in the highest available price for stockholders and the miscalculation at issue had been fully disclosed before the stockholder vote. Third, the court stressed that market participants must pay careful attention to the "mechanics" of deals and for deal teams to relay all material information as promptly as possible to boards and other key players.

The Transaction

This case arose out of Vista's agreement to purchase Tibco for $24 per share. In arriving at the per-share price, both parties had relied on inaccurate information as to the number of fully diluted Tibco shares. Vista and Tibco publicly announced that Vista would purchase Tibco for an enterprise value of approximately $4.3 billion (or an equity value of $4.24 billion). Due to the share-count miscalculation, the enterprise value implied by the $24-per-share price was actually $100 million less, or $4.2 billion (in turn, the equity value was also less, at $4.14 billion).

After the miscalculation was discovered, the Tibco board convened to reconsider its recommendation to stockholders, at which meeting its financial adviser reaffirmed its opinion that the $24-per-share price was fair to Tibco stockholders. Notably for the court, no member of the Tibco board



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asked whether Vista had relied on the errant count or might be willing to renegotiate its offer. The board decided to continue to recommend the merger, and a preliminary proxy statement was issued disclosing that the total value of the transaction would be $100 million lower than originally announced.

Days later, the board reconvened to consider additional courses of action, including whether to seek a renegotiation with Vista. The board decided against this approach based on its belief that (1) negotiations had always been based on a per-share price rather than total purchase price; (2) Vista's bid was the highest price achievable; and (3) there was no basis to "force" Vista to increase its payment per share. The board was also concerned that seeking to renegotiate may mean, in effect, reopening the

deal and starting over, and in opposing the motion asserted that doing so would have risked losing a beneficial deal for stockholders.

Court Declines to Reform the Merger Agreement

The court held that the plaintiff failed to establish a likelihood of success on its reformation claim because there was insufficient evidence that the parties had come to a "specific prior understanding that differed materially" from the per-share price reflected in the merger agreement.

In so doing, Bouchard agreed that both parties had individually assumed a total value of $4.3 billion (including an aggregate equity value of $4.24 billion), but found that the specific understanding between Vista and Tibco contemplated only a per-share price. The court found that each of Vista's proposals, the Tibco board's acceptance, and the final merger agreement itself had all expressed the transaction in terms of price per-share rather than total equity value. Bouchard, noting that there was a capitalization representation in the merger agreement that accurately reflected the Tibco share count, added that parties could expressly allocate the risk of fluctuation with respect to share counts in a merger agreement, or, alternatively, include a tight range of total equity value in addition to a per-share price.

Court Finds No Irreparable Harm

The plaintiff also alleged that Tibco's board had breached its duty of care in failing to adequately inform itself of the circumstances surrounding the share-count miscalculation, including whether Vista had relied on that miscalculation and might renegotiate a per-share price. Although the court acknowledged that "serious issues had been raised" by the plaintiff, the court rejected the plaintiff's request for injunctive relief because the claim was for an objectively quantifiable sum: $100 million. In doing so, the court rejected the plaintiff's argument that it would nonetheless be irreparably harmed because a Delaware Code Section 102(b)(7) provision in Tibco's charter insulated Tibco's board from liability, and made clear that an injunction is not justified merely because an otherwise quantifiable sum might prove ultimately unrecoverable.

The court observed, in addition, that stockholder plaintiffs are not necessarily without recourse. Citing Vice Chancellor J. Travis Laster's opinion in *In re Rural/Metro Stockholders Litigation*, 88 A.3d 54, 99103 (Del. Ch. 2014), the court emphasized that the provisions that exculpate directors from liability do not insulate third-party aiders and abettors. (In *Rural/Metro*, Laster determined that a financial adviser was liable to stockholders for $75.8 million for aiding and abetting a board's breach of fiduciary duty.) The court here indicated that it may well consider such liability under appropriate circumstances. The court also highlighted that the auction had been won by the highest bidder, that the bidding process itself was not tainted, and that the case was distinguishable from those in which an injunction was necessary to "prevent the proverbial eggs from being scrambled." The court did note that, under different facts, a similar share-count oversight could lead to a different result.

Declining the Injunction

Tibco is an interesting example of Bouchard declining to enjoin a stockholder vote on a merger agreement even where "serious issues" may exist. The court denied the injunction because the damages were quantifiable, the sales process was robust and because the miscalculation, which occurred very late in the process, was fully disclosed prior to the vote. In addition, the chancellor's citation to *Rural/Metro*, and language regarding the potential liability of parties alleged to be aiders and abettors, is of particular note. This case is ongoing; further rulings will likely be of keen interest to market participants.

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