

March 8, 2011 | Posted By

[Delaware Court Enjoins Merger Vote Citing Conflicts of Interest of Financial Advisor](#)

A recent decision by the Delaware Court of Chancery has provided a stark reminder that buyers, directors of target firms and financial advisors must be mindful that conflicts of interest affecting a target's financial advisor will be closely scrutinized by the courts.

In *In re Del Monte Foods Company Shareholders Litigation*, Consol. C.A. No. 6027-VCL (Del. Ch. Feb. 14, 2011), the Court of Chancery issued a preliminary injunction delaying for 20 days the stockholder vote on the proposed leveraged buyout of Del Monte Foods by a private equity group consisting of Kohlberg Kravis Roberts & Co., L.P. ("KKR"), Vestar Capital Partners ("Vestar"), and Centerview Partners. The court also enjoined the buyers from enforcing the no solicitation, termination fee and matching right provisions in the merger agreement pending the stockholder vote.

Central to the court's decision was the role played by Del Monte's financial advisor, Barclays Capital ("Barclays"), which the court stated had "secretly and selfishly manipulated the sale process to engineer a transaction that would permit Barclays to provide buy-side financing to KKR." The court concluded that the 45 day go-shop process managed by Barclays was tainted by Barclays' interest in earning fees for providing buy-side financing to the buyers. The court stated that the blame for what took place appeared to lie with Barclays, but said that "the buck stops with the board." The court found that the plaintiffs had established a reasonable likelihood of success on their claims that the director defendants failed to act reasonably in connection with the sale process, and that KKR had aided and abetted their breaches of fiduciary duty.

The merger agreement provided for the buyers to acquire all of the common stock of Del Monte for \$19 per share, which the court acknowledged was a premium price. The court found that, on the preliminary record, Del Monte's board appeared to have "sought in good faith to fulfill its fiduciary duties" and predominantly made decisions that ordinarily would be regarded as falling within the range of reasonableness for purposes of *Revlon* enhanced scrutiny. The court also found, however, that the board was misled by Barclays, and that the plaintiffs had shown a reasonable probability of success on their claim that the board failed to act reasonably in approving Barclays' request to provide buy-side financing and its recommendation to permit Vestar to participate in KKR's bid.

The court criticized Barclays for seeking permission from Del Monte to provide buy-side financing before the

parties had agreed on the price to be paid for Del Monte's shares, while failing to disclose to the board that it had intended to seek to provide buy-side financing from the very beginning of the sale process. The court also found that Barclays had acted improperly in pairing KKR and Vestar as joint bidders and failing to disclose the fact of the pairing to the board for several months. KKR and Vestar had each signed confidentiality agreements with Del Monte that contained a "no teaming provision" that prohibited the pairing. The court found that the pairing of KKR and Vestar materially reduced the prospect of price competition for Del Monte.

The court fashioned its remedy based on a balancing of hardships. The court noted that enjoining the transaction pending the outcome of a trial on the merits could jeopardize the stockholders' ability to receive a premium for their shares. Additionally, the court noted that even though the go-shop process was tainted, the transaction had been subject to a 45-day go-shop period and to a continuing "passive market check" for several more weeks. The court concluded that a 20-day injunction would "provide ample time for a serious and motivated bidder to emerge." The court also concluded that enjoining the deal protection provisions was appropriate because "they are the product of a fiduciary breach that cannot be remedied post-closing after a full trial." The court conditioned the injunction on the plaintiff posting a bond in the amount of \$1.2 million, 1% of the \$120 million termination fee provided for in the enjoined deal protection provisions. The defendants had sought a bond in the amount of \$1,076,612,698.80, based on the excess of the transaction value over the pre-announcement market value of Del Monte.

Authored by:

[William T. Manierre](#)

(415) 774-3283

wmanierre@sheppardmullin.com

and

[Kris B. Motola](#)

(415) 774-3262

kmotola@sheppardmullin.com