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Delaware Court of Chancery Declines to Enjoin Merger Vote, Affirming Single-Bidder Strategy

In *In re Plains Exploration & Production Co. S'holder Litig.*, the Delaware Court of Chancery denied the plaintiffs' request to enjoin a merger between Plains Exploration & Production Company and Freeport-McMoran Copper & Gold even though the Plains board of directors (1) did not shop Plains before agreeing to be acquired by Freeport for a combination of cash and stock, (2) did not obtain price protection on the stock component of the merger consideration and (3) allowed its CEO (who Freeport had decided to retain after closing) to lead negotiations with Freeport. The Court also held that the estimates of future free cash flows prepared by Plains' financial advisor did not need to be disclosed in Plains' proxy materials because management's estimates of cash flows were already disclosed.

In early 2012, the CEOs of Freeport and Plains discussed an acquisition of Plains by Freeport. The Plains board did not shop the company to other potential buyers or form a special committee, instead allowing the CEO to lead negotiations with Freeport even after becoming aware of the fact that Freeport had determined to retain the Plains CEO after the merger. The Court noted that the Plains CEO was "motivated to obtain the best deal possible" given that a higher merger price would have resulted in a larger payout to him as a substantial stockholder (although ultimately he agreed to roll his stock into the post-merger company).

In December 2012, the Plains board approved the merger agreement, which provided Plains stockholders with the right to elect to receive either cash or Freeport stock, subject to proration based on an aggregate amount of approximately 50% cash and 50% stock. When the Plains board approved the agreement, the value of the consideration was equal to $50 per share. After signing, the value of Freeport's stock declined, and the Plains stockholders are currently expected to receive less than $50 of value per share. No collar or other price protections were obtained, although such devices were considered. The agreement does not provide for a go-shop period and contains standard deal protections, such as a 3% termination fee, matching rights and a no-shop clause combined with a fiduciary out.

Plaintiffs sought to enjoin the merger, arguing that the Plains board failed to obtain the highest price reasonably available and that the proxy statement provided inadequate disclosure. The Court specifically held that:

- *The Plains board likely fulfilled its fiduciary duties although it did not engage in a pre-signing market check or post-signing go-shop* – The Court reconfirmed that there is no single blueprint requiring that a board of directors conduct a pre-signing market check or shop the company to fulfill

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their fiduciary duties. As long a board of directors has knowledge of the corporation's value, retains the ability to engage a later-emerging bidder and the market has sufficient time to consider the proposed transaction, a board of directors "can be assured that it obtained the best transaction reasonably available." Here, the Court could reasonably infer that the Plains board knew the Company's industry and were informed and competent, and moreover, indicated that the deal protections were not unreasonable.

- *The board did not have a duty to obtain a price collar or an equity kicker* – Although the merger agreement provided both cash and stock consideration, the Court held that the Plains board had no duty to obtain an equity kicker or a price collar to protect the Plains stockholders from a decline in the value of the Freeport stock offered as consideration. This holding reiterated that the type of consideration and other terms and price protections to seek in merger negotiations, such as a collar, are within the business judgment of a board of directors.

- *Allowing the Plains CEO to conduct negotiations and deciding not to form a special committee was reasonable* - The Court noted that the Plains board could have reasonably concluded that the Plains CEO had the most experience with the company's assets and was in the best position to advance the interests of the stockholders. Although the Plains CEO may have had divergent interests because of his anticipated post-merger employment, the Plains board was aware of the issue and managed the situation by overseeing negotiations. The Court held further that a special committee was not required because, with the exception of the Plains CEO, the remainder of the Plains board members who approved the merger were disinterested and independent, and the record did not support an inference that the Plains CEO dominated or controlled them.

- *Free cash flows independently derived by Plains' financial advisor were not required to be disclosed* – The proxy provided a non-GAAP "discretionary cash flow" measure used by Plains' management, but it did not provide the unlevered free cash flows derived independently by Plains' financial advisor. The Court held that because the proxy statement already provided management's "inside view of the Company's financial performance," Plains was not obligated to disclose the financial advisor's cash flow calculations. The Court also reiterated that merely "asking 'why'" does not state a disclosure claim.

This case is yet another example of the Court of Chancery refusing to second guess the strategic decisions made by an independent and knowledgeable board of directors in negotiating a sale to a single bidder with reasonable deal protections that permit topping bids.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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