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## Delaware Court of Chancery Rejects Another Disclosure-Only Settlement

In *In re Trulia, Inc. Stockholders Litigation*, the Delaware Court of Chancery has again rejected a settlement in the M&A context that released a broad range of claims in exchange only for supplemental disclosure in the proxy. The Court explained that practitioners should expect approval of such disclosure-only settlements if the plaintiff obtains supplemental disclosures that are “plainly material” (*i.e.*, not a “close call” with respect to materiality) and the release is narrowly tailored to encompass only disclosure and fiduciary duty claims concerning the sale process.

Stockholders of Trulia, Inc. brought suit alleging that Zillow, Inc.’s acquisition of Trulia in 2015 undervalued Trulia and that Trulia’s board of directors disseminated materially false and misleading disclosures to its stockholders. The parties agreed to a settlement by which Trulia made supplemental disclosures providing additional details concerning its financial advisor’s analysis, and the plaintiffs released all potential federal and state law claims against the defendants, including “unknown claims.” The Court initially withheld approval of the settlement and asked the parties for supplemental briefing regarding the appropriate standard of materiality to be applied to the disclosures and whether the Court should endorse a settlement that released “unknown claims.” The parties subsequently removed “unknown claims” and certain other state and federal antitrust claims from the ambit of the release, but the settlement still contained a broad release of all potential federal and state law claims relating to the transaction.

The Court of Chancery rejected the revised settlement holding that the proxy already provided a fair summary of the financial advisor’s analysis and that the supplemental disclosures were extraneous and immaterial. In doing so, the Court also provided guidance for parties seeking to litigate disclosure claims in the Court in the future:

- *Considerations Involving Disclosure Claims in Deal Litigation* – The Court began its analysis by highlighting the problematic features of deal litigation that prompted its decision. The Court explained that its willingness in the past to approve disclosure settlements of marginal value resulted in a litigation landscape where virtually every transaction involving the acquisition of a public corporation became subject to hastily-filed class action lawsuits alleging disclosure violations, but that far too often such litigation served no useful purpose for stockholders. Instead, it served only to generate attorneys’ fees for certain plaintiffs’ attorneys and as a means for defendants to obtain through settlement an extremely broad release of all claims against them in exchange for immaterial disclosures.
- *Disclosure settlements will be met with continued disfavor unless plaintiffs obtain “plainly material” supplemental disclosures* – The Court went on to explain that it would be “increasingly vigilant” in assessing the reasonableness of the “give” and the “get” of disclosure settlements “unless the supplemental disclosures address a plainly material misrepresentation or omission.” The Court described a “plainly material” disclosure as one where it is not “a close call that the supplemental information is material.” Even where parties reach a settlement on supplemental disclosures that are

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“plainly material,” the Court will only approve the settlement where its release is narrowly circumscribed to encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process.

- *With the foregoing considerations in mind, the Court rejected the settlement because the supplemental disclosures were not material and provided no meaningful benefit to stockholders* – In doing so, the Court found that the supplemental disclosures, which provided additional details regarding certain synergy numbers in Trulia’s financial advisor’s value creation analysis, selected comparable transaction multiples, selected public trading multiples and implied terminal EBITDA multiples in the financial advisor’s discounted cash flow analysis, were extraneous and immaterial.
- *Disclosure claims should be litigated or resolved outside of the context of a proposed settlement* – The Court also explained that “the optimal means” to adjudicate M&A disclosure claims is in an “adversarial process where the defendants’ desire to obtain a [broad] release does not hang in the balance.” In that regard, the Court encouraged plaintiffs to litigate the merits of such claims on a motion for preliminary injunction or defendants to voluntarily moot the claims by unilaterally making supplemental disclosures and seeking to dismiss the lawsuit as moot. In the latter scenario, plaintiff’s counsel could agree upon a mootness fee with the defendants or make an application to the Court for such a fee. Although the defendants would not obtain a formal release, the Court posited that “the filing of a stipulation of dismissal likely represents the end of fiduciary challenges over the transaction as a practical matter.”
- *Forum selection bylaws can be used to avoid forum shopping* – Finally, the Court explained that by enacting a forum selection bylaw, Delaware corporations could address any concern that enhanced judicial scrutiny of disclosure-only settlements in Delaware would lead plaintiffs to sue in other jurisdictions in the hope of finding a forum more hospitable to signing off on settlements of no genuine value.

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