October 18, 2013

Delaware Court of Chancery Addresses Post-Merger Breach of Fiduciary Duty Claims

In *In re Bioclinica, Inc. Shareholder Litigation*, the Delaware Court of Chancery (VC Glasscock) dismissed a stockholder suit alleging that the members of a board of directors breached their fiduciary duty of loyalty in a sale process for a transaction that had since closed, and where plaintiffs' allegations previously had been found insufficient to support a pre-closing motion to expedite. Under those circumstances, the court found the chances of those same allegations surviving a post-closing motion to dismiss to be "vanishingly small." Moreover, the court reaffirmed that reasonable deal protections, such as no-solicitation provisions, termination fees, information rights, top-up options, and stockholder rights plans, in the context of an otherwise reasonable sales process, are not preclusive and do not, in and of themselves, demonstrate a breach of the duty of care or loyalty. Finally, the court dismissed claims against the acquirer that it aided and abetted the directors' breach of fiduciary duties because no breach of such duties was found.

As we previously detailed here, BioClinica engaged in an eight-month sale process, which led to a two-step tender offer acquisition that closed on March 13, 2013. Before the closing of the tender offer, the court found that plaintiffs' allegations that the board members had breached their fiduciary duties were not colorable, and the court declined to expedite the litigation (or enjoin the transaction). Such a finding typically leads to a voluntary dismissal by plaintiffs. Here, however, plaintiffs nonetheless chose to pursue this action, and, because the exculpation provisions in the company's certificate of incorporation absolved the directors from monetary damages arising out of breaches of the duty of care, plaintiffs were forced to allege that the directors breached their duty of loyalty or acted in bad faith.

Plaintiffs alleged two principal bases for a duty of loyalty/bad faith claim: (1) the directors procured a material benefit for themselves not shared by the other stockholders; and (2) the directors did not act in good faith in approving the transaction. In support of the first basis, plaintiffs alleged that the directors were interested in the transaction principally because their stock options would vest in the transaction. In support of the second basis, plaintiffs asserted that the directors acted in bad faith during the sales process by (i) approaching private equity buyers before approaching strategic buyers; (ii) granting the acquirer's request for exclusive negotiations; (iii) relying on a "weak" fairness opinion; (iv) precluding an acquisition by a third party other than the acquirer by retaining the corporation's poison pill; (v) utilizing deal-protection devices such as a no-solicitation provision, information rights, a top-up option, and a termination fee; and (vi) failing to disclose certain information, including discounted cash flow calculations performed by BioClinica's financial advisor and certain inputs used in the financial advisor's fairness opinion. The court concluded that neither basis existed.

Specifically the court held that:

- *The claim alleging that the vesting of stock options made the directors interested in the transaction was "frivolous"* – The fact that stock options held by the directors would vest in a

change of control transaction did not implicate the directors' duty of loyalty because stock ownership by the directors would incentivize the directors to maximize the transaction price and had been so held in numerous prior Delaware decisions.

- *Approaching private equity bidders before strategic bidders, because of confidentiality concerns, was not a breach of the duty of loyalty* – The court held that "approaching private equity bidders seem[ed] like an entirely reasonable way to protect BioClinica's confidential information during a first market test." Moreover, the board authorized its financial advisor to solicit strategic bidders after private equity bidders expressed interest.

- *Relying on an allegedly "weak" fairness opinion was not a breach of the duty of loyalty because the board canvassed the market for a potential buyer* – In *Koehler* v. *NetSpend Holdings Inc.*, highlighted here, the Court of Chancery enjoined the sale of a corporation accomplished through a single-bidder process where a "weak" fairness opinion was the only equivalent of a market check. Here, the board canvassed the market and therefore had a "market-based indication that the offer price [was] adequate."

- *Granting the acquirer's request for exclusivity was unremarkable* – Although another bidder had expressed a "serious" interest in acquiring BioClinica, that bidder's board refused to make a final offer; as such, the exclusivity arrangement was not unreasonable.

- *Use of deal-protection devices, such as a no-solicitation provision, information rights, a top-up option, a poison pill, and a reasonable termination fee was not a bad faith act by the board* – The court noted that the use of these types of deal-protection devices "in the context of an otherwise reasonable sales process" is permissible.

- *Discounted cash flow analysis calculations performed by the board's financial advisor did not need to be disclosed* – The court held that where management did not estimate free cash flows, "management need not disclose intermediate calculations, made by its financial advisors, used in crafting inputs for its DCF analysis."

- *"[G]ranular details concerning why individual inputs were selected or rejected" by a financial advisor do not need to be disclosed* – Directors have a duty to disclose only a "fair summary" of the procedures and inputs used to render the fairness opinion upon which they rely. "A complaint about the accuracy or methodology of a financial advisor's report is not a disclosure claim."

Finally, the court noted that because plaintiffs had failed to adequately allege a breach of the duty of loyalty, a claim for aiding and abetting that breach must fail. The court noted, however, that "it is possible that an aider and abettor could be liable for a director's otherwise exculpated breach of the duty of care" by knowingly participating in such a breach by the directors. Nonetheless, the court concluded that plaintiffs had not adequately alleged that the acquirer improperly participated in the board's discussions, conspired with the board or otherwise caused the board to make the decisions at issue, or that the deal protections employed by the board constituted a breach of the duty of care, and thus the claim for aiding and abetting a breach of duty of care also failed.

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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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