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## Delaware Court of Chancery Rejects M&A Litigation Settlement

In *Acevedo v. Aeroflex Holding Corporation*, in connection with a stockholder suit that challenged the sale of a company with a controlling stockholder to a third party, the Delaware Court of Chancery rejected a settlement which provided a global release of claims in exchange for a reduced termination fee and a shortening of the matching-rights period by one day, holding that these deal protections were not impediments to competing bidders and therefore were insufficient to support a global release.

In 2014, Aeroflex agreed to sell itself to a third-party and a class-action challenging the transaction was subsequently commenced. After engaging in discovery and consulting with third-party experts, the plaintiff concluded that the consideration offered to the Aeroflex stockholders fell within a range of reasonable value for Aeroflex's shares, but that the proxy omitted certain material facts. The parties agreed to a settlement where the plaintiff granted the defendants a global release of all possible claims in exchange for modifying the deal protections by (i) reducing the termination fee by over 40% from \$32 million to \$18 million, and (ii) shortening the matching rights period from four business days to three business days. Additionally, the defendants agreed to make certain supplemental disclosures in the proxy.

The plaintiff asserted that the deal modifications were particularly important because another bidder, Company A, had continued to show interest in acquiring Aeroflex up to two weeks after the public announcement of the transaction. However, because of restrictions set forth in its non-disclosure agreement, Company A allegedly could not make a bid for Aeroflex even after the modification of the deal protections.

The Court of Chancery rejected the settlement holding that:

- *Reduction of the termination fee and the shortening of matching rights period added little value to the stockholders because it was unlikely that modifying these deal protections would have encouraged a higher bid* – The court noted that the disclosure in the proxy statement suggested that the impediment to a higher bid for Aeroflex was the non-disclosure agreement that prevented Company A from making a higher bid, not the termination fee or the matching rights period; therefore, the plaintiffs “fixed something that didn’t need fixing.”
- *The Supplemental Disclosures were immaterial, providing only that there was not “any problem with the deal” or differential interests on the part of the financial advisors* – The court held that the supplemental disclosures were “precisely the type of nonsubstantive disclosures” that routinely show up in M&A litigation settlements.
- *The deal protection modifications and supplemental disclosures were insufficient to support a global release of claims* – The court described the breadth of the release as “intergalactic” and because the deal protections modifications and the supplemental disclosures were immaterial, they were insufficient consideration to support the release.

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