

Private Equity MBOs and the Delaware Court of Chancery: The Taming of the Few

Reflecting the recent spate of private equity acquisitions, so often accomplished in partnership with the target's senior management, the Delaware Court of Chancery has lately issued a series of decisions that confront the special conflicts and resulting fiduciary issues that frequently arise in such circumstances. In the view of some, these opinions imply a notable judicial cynicism, if not an unstated escalation of judicial scrutiny, in connection with the review of challenges to such transactions. An enhanced standard of judicial review with respect to the sale process in such circumstances is of course to be expected with respect to the typical private equity MBO; the typical factual patterns presented necessarily bring them within the application of *Revlon*, thus subjecting the target board to the special obligation imposed by that venerable precedent to take pains to secure the highest and best price reasonably available. But the language of these opinions seems to venture beyond the mere insistence that directors adhere to the standard of an objective and reasonable auctioneer, seeming instead to focus on inherent conflicts of interest arising from management's participation on the sell side. The fact patterns do not involve the archetypal enemies of broad judicial deference to the decisions of independent, honest and careful directors. There are no self-dealing majority stockholders, no majority of conflicted or indifferent directors, no formal (and always difficult to establish) allegations of domination or control. Nonetheless these cases appear to reflect a degree of judicial suspicion and scrutiny that, although arguably justified by the application of the *Revlon* mode of analysis, seems of a sort more typically reserved for circumstances that invoke entire fairness review.

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***In re SS&C Techs., Inc., S'holders Litig.*, 911 A.2d 816, (Del. Ch. 2006)**

The SS&C decision is the first Court of Chancery decision to have identified salient issues of concern peculiar to private equity MBOs. While, by virtue of its unusual procedural posture, it offered no definitive road map to the resolution of the questions it rather pointedly raised, the nature and tenor of the Court's expressed concern went far in foreshadowing the more searching precedents to come over the course of the next several months.

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The opinion itself arose in somewhat indirect fashion pursuant to a joint request for judicial approval of a proposed settlement of the shareholder representative action that had attacked the transaction at issue. That transaction contemplated a cash-out merger led by the target's management and supported financially by Carlyle Investment Management LLC, a private equity investment company. The primary management protagonist was William Stone, the Chair and CEO of SS&C, whose prearranged alliance with Carlyle for purposes of the proposed acquisition contemplated that he personally would roll over a large percentage of his considerable equity and options in the company into an even more significant equity position in the survivor. His deal with Carlyle also permitted him to sign a new employment agreement, keeping him at the helm of the business when the public investors had gone. He also was to receive the merger consideration in exchange for the balance of his SS&C equity interests, amounting to some \$76 million in cash.

The sheer abundance of the deal from Mr. Stone's happy perspective, indecorous as it may have appeared, is not what caught the Court's experienced eye, however. More provocative was the fact that Mr. Stone allegedly had taken it upon himself to initiate a search for a bidder on just such personally bountiful terms, all without authority from or notice to his board. Indeed, plaintiffs claimed, Stone and his bankers met, without the board's knowledge, with no less than six private equity firms, each of which was informed that any deal would be conditioned on terms that ensured Stone's equity participation in and continued employment with the survivor. Only after having successfully induced a bid from Carlyle that met his prerequisites did Stone approach his board to announce that he and Carlyle wished to take the company private.

Aside from the fact that it was necessarily a bit late to act, the board nonetheless responded in orthodox fashion, appointing an independent committee, retaining independent advisors and authorizing a simultaneous effort to look for alternatives and to negotiate for a higher bid from Carlyle. When no other offers surfaced, and Carlyle agreed to bump its initial offer, albeit by a paltry 1%, the committee approved the deal. A settlement of the

litigation with counsel for the complaining shareholders was quickly reached in the wake of this agreement, consisting primarily of supplemental proxy disclosures, and the transaction closed.¹

Upon the ensuing presentation of the settlement for approval, the Court flatly rejected it, in part on the grounds that the Vice Chancellor found himself unable to conclude that the seemingly weighty claims being released with regard to the sale process were equal to or smaller in value than the benefits to be conferred on the shareholders by the settlement, the critical prerequisite for the approval of representative settlements under Delaware law. In particular, the Court observed, Stone's decision to conduct a renegade search for a buyer, and to conduct negotiations designed in the first instance to serve his own personal interests and demands, raised a host of fiduciary issues on which the record, derived exclusively from post-settlement confirmatory discovery, failed to cast any informative light. The Court thus found itself less than adequately reassured with respect to a number of issues it deemed critical to a meaningful evaluation of the fairness of the proposed settlement.

... did Stone misuse the information and resources of the corporation when, acting in his official capacity but without board authorization, he hired an investment banker to help him identify a private equity partner to suit his needs? ... whether, given Stone's precommitment to a deal with Carlyle, the board of directors was ever in a position to objectively consider whether or not a sale of the enterprise would take place. Similarly, did Stone's general agreement to do a deal with Carlyle make it more difficult for the special committee to attract competing bids, especially from buyers not interested in having Stone own a significant equity interest in the surviving enterprise? And, did Stone's negotiation of a price range with Carlyle unfairly impede the special committee in securing the best terms reasonably

¹ The fact that the transaction closed before the Court had an opportunity to pass on the fairness of its revised terms for settlement purposes prompted a scolding from the Court, which identified that fact as constituting an independent basis for rejecting the settlement. Harkening back to the decision of Chancellor Duffy in *Chickering v. Giles*, 270 A.2d 373 (Del. Ch. 1970), and noting the failure to provide advance notice to the Court of any facts that compelled a closing before the settlement hearing took place, the Vice Chancellor stated:

... as a result of the earlier performance of the settlement consideration, i.e., the publication of some supplemental disclosure followed by the conclusion of the transaction, the court's review of the settlement terms is substantially emptied of meaning or purpose. There is simply little to commend the process of weighting the merits of a settlement of litigation where the only continuing interest is that of the plaintiff's counsel in recovering a fee.

911 A.2d at 816.

available. These are only some of the important legal issues that result from the way Stone and the board of directors formulated the private equity buy-out of SS&C Technologies.²

This SS&C decision obviously identifies more issues than it resolves. In the course of doing so, however, it presaged the nature of the Court's analysis going forward with respect to private equity MBO transactions and, in particular, signaled the importance that the Court was to accord to the target board's effectiveness in dealing with and controlling the inherent conflicts that can so easily arise in such circumstances. Such cases were quick to follow.

In re Netsmart Techs., Inc. S'holders Litig., C.A. No. 2563-VCS, 2007 Del. Ch. LEXIS 35 (Del. Ch. Mar. 14, 2007)

Netsmart Technologies was a small but publicly-held healthcare enterprise software company. After receiving some largely unsolicited feelers from private equity firms expressing preliminary interest in acquiring the company, the Netsmart CEO, Conway, began seriously to consider the possibility of a going private transaction led by such a buyer. He arranged for the board to take under advisement a range of strategic options, a sale to a financial buyer prominently featured among them. Ultimately and, the opinion suggests, pursuant to Conway's influential urging, the board authorized its banker to try to sell the company and in the process to eschew, at least initially, contacts with potential strategic suitors and to focus exclusively on potential private equity buyers instead. The basis for this tactical decision was said to be the conclusion by the board, informed by previous, albeit abbreviated, experience (described by the Court as "erratic, unfocused and temporally disparate discussions"³), that any likely strategic acquirors would either view the company as too small or its market segment too narrow to justify their interest, and the concomitant risk that approaching direct competitors would be detrimental to the Company's competitive position.

A Special Committee of the board was formed and, retaining the company's banker as its own, it proceeded to contact several private equity firms in an attempt to gauge their interest in an acquisition. When several of the identified candidates asked for additional information, management, largely unsupervised by the Special Committee, handled the ensuing due

² *In re SS&C Techs., Inc., S'holders Litig.*, C.A. No.1525-N, 2006 Del. Ch. LEXIS 201, at *10-11 (Del. Ch. Nov. 29, 2006).

³ *In re Netsmart Techs., Inc. S'holders Litig.*, C.A. No. 2563-VCS, 2007 Del. Ch. LEXIS 35, at *37 (Del. Ch. Mar. 14, 2007).

diligence process.⁴ In the end, all of the bids submitted as a result of the due diligence process envisioned a continuing role for target management and equity incentives with the resulting entity.

The process from this point forward appears to have proceeded more or less routinely. The Committee identified the two most attractive bids and invited them to conduct additional due diligence and to participate in another bidding round. In narrowing the range of suitors, the Committee expressed confidence, based upon the advice of its legal representatives, that the public announcement of a deal that did not include preclusive deal protections would create the opportunity for a topping bid by another buyer, in particular a strategic buyer to make a topping bid. The highest bidder eventually withdrew, but the remaining contender weighed in with a bid only slightly lower, and a deal was struck.

The ensuing arm's-length bargaining resulted in a merger agreement with a standard window shop provision that allowed Netsmart to consider unsolicited superior proposals, incorporated a 1% reverse break up fee triggered upon exercise of the buyer's financing out and a termination fee of 3% of the deal's implied equity value, including expenses triggered only in the event of Netsmart's termination to pursue a superior proposal.

Negotiations between the buyer and Conway with regard to their incentives proceeded in parallel with the knowledge but without the active involvement of the Committee. While they did result in a new employment agreement and equity participation for Conway in the new entity, they did not, in the words of the Court, make Conway a "markedly richer man."⁵

The Court began its legal analysis of the ensuing shareholder motion to preliminarily enjoin the deal with an examination of the *Revlon* standard,⁶ helpfully observing that this duty "does not, of course, require every board to follow a judicially prescribed checklist of sales activities," but rather "to act reasonably, by undertaking a logically sound process to get the best deal that is realistically attainable."⁷

⁴ While making a point of this questionable process, the Court also pointedly observed that "no plausible allegations of favoritism by management toward particular private equity firms among the seven have been made by the plaintiffs, and no evidence from which one can infer that Conway or other Netsmart managers had any preexisting relationship or bias toward any of the bidders has been presented." *Id.* at *43-44.

⁵ *Id.* at *52.

⁶ This aspect of the Court's discussion includes a refreshingly simple and succinct statement of the applicability of the sometimes hazy circumstances that are deemed to invoke the *Revlon* standard of conduct: "Having decided to sell the company for cash, the Netsmart board assumed the fiduciary duty to undertake reasonable efforts to secure the highest price realistically achievable given the market for the company." *Id.* at *56 (citing *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 184 n.16 (Del. 1986); *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 44 (Del 1994)).

⁷ *Netsmart*, 2007 Del. Ch. LEXIS 35, at *56.

Unlike the bare rationality standard applicable to garden-variety decisions subject to the business judgment rule, the *Revlon* standard contemplates a judicial examination of the reasonableness of the board's decision-making process. Although linguistically not obvious, this reasonableness review is more searching than rationality review, and there is less tolerance for slack by the directors. Although the directors have a choice of means, they do not comply with their *Revlon* duties unless they undertake reasonable steps to get the best deal.⁸

The Court then applied these general principles to the two primary questions raised by plaintiffs with respect to the sales process: whether the Committee failed to act reasonably in extracting the highest available price from the universe of identified private equity bidders; and whether the board's failure to include within its search possible strategic acquirors was unreasonable conduct that precluded the conclusion, required in order to pass muster under *Revlon*, that the process produced the best deal reasonably available. As to the first, the Court was unmoved by the allegations, characterizing plaintiffs' criticisms as mere quibbles with negotiating tactics. Conceding that the extent to which Conway had been permitted to participate in the Committee's deliberations and to oversee the due diligence process was troubling, and in other "easily imagined circumstances" might prove "highly problematic,"⁹ "the allegations that Conway dominated the Special Committee and drove it toward an inferior offer are not convincing."¹⁰ "Unlike some other situations," the Court pointedly observed,

this was not one in which management came to the directors with an already baked deal involving a favorite private equity group. Conway had no preexisting relationships with any of the invited bidders. None of the bidders was offering materially more or less to management.¹¹

The Court then turned to plaintiffs' second challenge under *Revlon*: had the board's search for alternatives been sufficient to support its conclusion that it had secured the best available deal? This contention found greater purchase. Unimpressed with the documentation supporting the board's determination not to exclude strategic suitors from the outset, unpersuaded

⁸ *Id.* at *58-59 (footnote omitted).

⁹ *Id.* at *63-64. One obvious reason for concern is the possibility that some bidders might desire to retain existing management or to provide them with future incentives while others might not. *Id.* at *64. If management had an incentive to favor a particular bidder (or type of bidder), it could use the due diligence process to its advantage, by using different body language and verbal emphasis with different bidders. "'She's fine' can mean different things depending on how it is said." *Id.*

¹⁰ *Id.* at *61.

¹¹ *Id.* at *64.

by the board's reliance on abbreviated experiences with potential strategic suitors from several years before, and seeming to harbor a vague suspicion that this approach too conveniently served the personal interests of Conway and his fellow officers,¹² the Court found that plaintiffs were likely to succeed on this claim at trial. In so concluding, the Court disdained defendants' suggestion that confidentiality concerns justified their decision to avoid, at least initially, an approach to strategic competitors ("...there is no record basis to believe that strategic acquirors (which have their own confidentiality concerns) were more likely to leak than private equity firms."). It also deemed unconvincing the board's reliance on the existing market trend in which private equity buyers regularly outbid strategic buyers. Most important, perhaps, the Court declined to credit the fact that the board's sales process and the resulting merger agreement were in keeping with a technique that seemingly had been viewed with approval in prior decisions of the Court and that was widely regarded by practitioners as the substantive equivalent of a broad pre-agreement market check for purposes of *Revlon* review: the use of a limited auction to secure a "bird in hand" coupled with a "window shop" provision, a relatively loose fiduciary out and a modest break-up fee in the resulting merger agreement, effectively leaving open the opportunity to receive and accept higher bids from alternative and unexpected bidders prior to closing. While observing that such a strategy might well be deemed a reasonable and sufficient substitute for a full pre-signing process in more typical market circumstances, the Court eschewed the suggestion of a bright-line rule to that effect. In this specific instance, the Court concluded that, in the absence of an unrestricted, pre-signing canvass of the market, the cleansing effect of employing relatively loose deal protection terms turns

¹² Even as it acknowledged that there was no basis to conclude that Netsmart's management had consciously pursued objectives that were at odds with getting the best price, the Court observed that there existed certain very real incentives for management to prefer a private equity deal regardless of price, and that "the Netsmart board rapidly narrowed its options to a channel consistent with those incentives." *Id.* at *78.

Rightly or wrongly, strategic buyers might sense that CEOs are more interested in doing private equity deals that leave them as CEOs than strategic deals that may, and in this case, certainly, would not. That is especially so when the private equity deals give management a 'second bite at the apple' through option pools. With this impression, a strategic buyer seeking to top ... might consider this factor in deciding whether to bother with an overture.

... while there is no basis to perceive that Conway or his managerial subordinates tilted the competition among the private equity bidders, there is a basis to perceive that management favored the private equity route over the strategic route. Members of management desired to continue as executives and they desired more equity. A larger strategic buyer would likely have had less interest in retaining all of them and would not have presented them with the potential for the same kind of second bite. The private equity route was therefore a clearly attractive one for management, all things considered.

Id. at *76-77.

importantly on the extent to which the suitors originally excluded from the process will become cognizant of the residual deal jumping opportunity left open by the merger agreement. Here, the Court concluded that such bidders likely were not sufficiently aware of that opportunity to make the post-signing market check a reliable indicator that there were no other interested buyers. The Court's determination turned upon the target's relative obscurity. A "micro-cap" size company in a niche market, Netsmart had a relatively thin float and was being covered by only one research analyst. As a result, the Court was disinclined to credit an inert, post-signing market check as sufficient evidence to sustain the conclusion that the board had secured the highest and best transaction reasonably available, as *Revlon* requires. "Rather, to test the market for strategic buyers in a reliable fashion, one would expect a material effort at salesmanship to occur.... In the case of a niche company like Netsmart, the potential utility of a sophisticated and targeted sales effort seems especially high."¹³

In the absence of such an outreach, Netsmart stockholders are only left with the possibility that a strategic buyer will: (i) notice that Netsmart is being sold, and, assuming that happens, (ii) invest the resources to make a hostile (because Netsmart can't solicit) topping bid to acquire a company worth less than a quarter of a billion dollars. In going down that road, the strategic buyer could not avoid the high potential costs, both monetary (e.g., for expedited work by legal and financial advisors) and strategic (e.g., having its interest become a public story and dealing with the consequences of not prevailing) of that route, simply because the sought after prey was more a side dish than a main course. It seems doubtful that a strategic buyer would put much energy behind trying a deal jump in circumstances where the cost-benefit calculus going in seems so unfavorable.¹⁴

Based on this analysis, the Court concluded that the plaintiffs were reasonably likely to prove at trial that the board's failure to include potential strategic bidders in their pre-signing search was unreasonable and in breach of their *Revlon* duties.

¹³ *Id.* at *73. The Court went so far as to describe in detail the sort of sales effort it regarded as necessary in the absence of a full, pre-signing sales process:

Netsmart and its financial advisor could have put together materials explaining Netsmart's business, why it had attractive growth potential, and how Netsmart's products and services fit within the broader healthcare IT space. Those materials could have been tailored for a few logical buyers and [the financial advisor] could have used its (much touted by the defendants) healthcare reputation to secure the attention of the key executives at those firms, the ones with decision-making authority over acquisitions.

Id. at *73-74.

¹⁴ *Id.* at *74-75.

The plaintiffs also challenged the propriety of the company's disclosures in seeking shareholder approval of the proposed merger on a variety of grounds. The Court declined to fault defendants for having failed to include certain preliminary projections that were more pessimistic than those that were disclosed in the proxy, or for not having more expansively dealt with simultaneous service of Conway and members of the Special Committee on third party boards, only vaguely identified by plaintiffs. The Court ruled, however, that the proxy statement improperly omitted management's final revenue and earnings projections as specifically utilized by the company's financial advisor in issuing its fairness opinion and presented to the company's board in support of that opinion. Although these projections were never provided to any bidder, and the financial advisor claimed to have placed little weight on them in formulating its opinion, the Court held that they were not only directly relevant and material to the stockholders' ability to evaluate the company's future prospects relative to the cash merger consideration being offered, but probably among the disclosures most "highly-prized" by investors given management's uniquely informed view of the company's prospects.¹⁵

Once a board broaches a topic in its disclosures, a duty attaches to provide information that is "materially complete and unbiased by the omission of material facts." For this reason, when a banker's endorsement of the fairness of a transaction is touted to shareholders, the valuation methods used to arrive at that opinion as well as the key inputs and range of ultimate values generated by those analyses must also be fairly disclosed.¹⁶

Having concluded that plaintiffs had shown a probability of success in proving a *Revlon* violation in connection with the challenged transaction and in establishing a material omission from the company's proxy statement in connection with the imminent stockholder vote, the Court turned to an examination of the remaining conjunctive prerequisites for preliminary injunctive relief: the existence of a threat of imminent irreparable harm in the absence of such an order and a balance of the equities suggesting that the entry of such an order will do more good than harm. The Court confirmed the well-understood principle that irreparable injury almost invariably is threatened where stockholders are being asked to make important decisions without all material information relevant to that decision. Moreover, rejecting defendants' assertion that a damage award after trial would suffice to compensate for any alleged *Revlon* violation, the Court observed that such a violation typically was regarded under Delaware law as threatening irreparable injury as a theoretical matter, as any damage award would be

¹⁵ Particularly so, the Court ruled, where as here, most of the key managers were seeking to remain as executives and will receive options in the company once it goes private.

¹⁶ *Id.* at *93 (quoting *In re Pure Resources, Inc. S'holders Litig.*, 808 A.2d 429, 448 (Del. Ch. 2002)).

necessarily speculative. As a practical matter, however, the Court noted that such injunctions seldom issue with respect to *Revlon* violations when there is no higher priced alternative bid on the table because the effect of such an order would be to preclude the stockholders from deciding for themselves whether to accept the only deal available to them. Because the integrity and legitimacy of that choice is importantly reliant on the sufficiency of the information disclosed to them in making their choice, however, the Delaware courts have been willing to employ their injunctive powers to rectify disclosure deficiencies even where there is no competing bid to be had. In such a circumstance, the Court observed, “a decision not to issue an injunction maximizes the potential that the crudest of judicial tools (an appraisal or damages award) will be employed down the line, because the stockholders’ chance to engage in self-help on the front end would have been vitiated and lost forever.”¹⁷

Drawing its conclusion from the intersection of these analytical concepts, the Court concluded that irreparable injury was threatened to the extent that the stockholders would be forced to express their choice whether to accept the pending transaction in the absence of the improperly omitted information. Once this additional information was supplied to shareholders, however, the balance tipped against injunctive relief because such an order could result in the evaporation of the proposed transaction, the elimination of the shareholders’ opportunity to make an informed choice, and the inequitable reconfiguration of a deal legitimately bargained for by the otherwise innocent buyer. The Court therefore determined to issue a limited injunction against the stockholders’ vote on the merger, but only until the proxy materials were supplemented to remedy the identified deficiencies and to include the Court’s opinion so as to alert shareholders of the flaws in the negotiation process leading to the transaction under consideration.

With full information, Netsmart stockholders can decide for themselves whether to accept or reject the Insight deal. If they are confident that the company’s prospects are sound and that a search for a strategic buyer or higher-paying financial buyers will bear fruit, they can vote no and take the risk of being wrong. If they would prefer the bird in hand, they can vote yes and accept Insight’s cash. Because directors and officers control less than 15% of the vote on the most generous estimate, the disinterested Netsmart stockholders are well-positioned to carry the day, and most of them are institutional investors.¹⁸

¹⁷ *Netsmart*, 2007 Del. Ch. LEXIS 35, at *110.

¹⁸ *Id.* at *113-114.

Upper Deck Co. v. Topps Co. (In re Topps Co. S'holders Litig.),
926 A.2d 58 (Del.Ch., 2007)

The *Topps* decision afforded the Court of Chancery the opportunity to consider, in the context of a proposed private equity MBO, the sufficiency and effectiveness of the inclusion of a go-shop provision in a merger agreement executed without the benefit of a pre-signing market check for purposes of judicial review of the board's approval of the transaction under *Revlon*.

In 2005, the classified *Topps* board confronted a difficult proxy fight over the election of certain of its incumbent directors. The dissidents, who were urging the incumbent board to explore strategic alternatives for the company, ultimately agreed to withdraw their challenge, but only in exchange for a pledge from the board to intensify its efforts to explore alternatives and a promise not to adopt a poison pill without stockholder approval over the course of the ensuing year. Thereafter, the board undertook an auction to sell one of its principal businesses, but the effort yielded no serious bidders.

This misfire prompted a renewal of the insurgents' attempt to elect three directors to the board in connection with the 2006 election of directors. Among the incumbents up for reelection in this instance was the company's CEO, Arthur Shorin, whose father had founded the company and who owned approximately 7% of the company's outstanding equity. This time, the dissidents campaigned on an unvarnished platform that urged an aggressive effort to sell the company in a going private transaction. To avoid the perceived prospect of imminent defeat, the incumbents again sought and secured an agreement to avoid a contested election, in this instance to expand the board so as to add the three insurgent nominees to the board while also retaining the incumbents.

Shorin's public statements during this volatile period to the effect that *Topps* was not looking for a quick sale of the company in order to assuage the shareholder unrest did not discourage unsolicited bids to acquire the company. Two financial buyers indicated interest in a potential transaction in a price range between \$9 and \$10, but backed away following due diligence review, apparently concluding that this price range was too rich.

During the course of the second proxy fight, Shorin was also contacted by Michael Eisner, the former CEO of Disney and private equity investor, who indicated at a meeting with Shorin that he was interested in being "helpful," presumably by proposing a going private transaction. Shortly thereafter, Eisner followed up with Shorin, indicating that he was interested in exploring the possibility of such a deal. Shorin suggested that Eisner speak to Stephen Greenberg, a long-serving independent director on the *Topps* board. Greenberg had previously met Eisner personally during the Disney days, having sold his business to ESPN, a Disney subsidiary, and during the ensuing year had served as an ESPN employee. In his ensuing discussion with Greenberg, Eisner suggested that he was unlikely to offer a price in excess of the then-current trading price of approximately \$9. Greenberg advised

Eisner that this was likely too low for the incumbent directors, who were more likely to regard as appropriate a price of not less than \$10 a share (a 10% premium), and that the position of the dissident directors as to price was as yet unknown.

At the time of Eisner's inquiry, the board, in keeping with the terms of the settlement of the most recent proxy contest, was in the process of creating a committee to explore and evaluate strategic alternatives. As formed, the four-man committee consisted of Greenberg, Allan Feder, also an independent incumbent director, and two of the newly-elected dissidents. Greenberg reported his discussion with Eisner to the committee, causing one dissident member to worry aloud that suggesting so high a price might scare Eisner away.

As the committee discussed a variety of alternatives in addition to a sale over the course of numerous meetings, Eisner proposed a transaction at \$9.24, approximately a 6% premium over the trading price. The two dissident members of the committee urged summary rejection of the Eisner proposal and the commencement of a public auction process. Greenberg and Feder, Greenberg's fellow incumbent director on the committee, were skeptical that auction would result in a better price in light of prior events, fearful of the effect on the company if an auction should fail, and concerned that Eisner would withdraw his attractive offer if an auction were initiated, as Eisner pointedly had threatened to do. They urged continued discussions with Eisner to improve his proposal.

The board, resolving the deadlock at the committee level, ultimately determined to continue to negotiations with Eisner in lieu of the initiation of an auction process. This resulted in a letter of intent that provided for an enhanced offer price of \$9.75 and a 30-day exclusivity period to negotiate deal terms, an issue that also produced deadlock at the committee level, but which received the approval of the full board. The board requested that Greenberg lead the ensuing negotiations given the lack of consensus on the committee but, reacting to objections from the dissidents based on Greenberg's prior contacts with Eisner, Greenberg declined. Feder, his fellow incumbent committee member, accepted this responsibility instead.

The negotiations that followed failed to produce a price above \$9.75, but resulted in a merger agreement that included a go-shop period and a relatively loose superior proposal provision. As a result, for a period of 40 days after signing, Topps was authorized to solicit alternative bids and to discuss a potential transaction with any potential buyer. Upon expiration of the 40-day window, discussions could continue only with a bidder that had submitted a superior proposal or a potential bidder that the board declared reasonably likely to make a superior proposal. With respect to bids received after the expiration of the go-shop period, the board could act only if the bid received was a superior offer or likely to lead to a superior offer. If any alternative offer was accepted, and the existing agreement terminated, Eisner had the right to match. He also had a right to receive a termination

fee that varied depending on whether the superior bid was received during or beyond the go-shop period; if the agreement was terminated during the 40 day period, Eisner was entitled to an \$8 million fee (approximately 3% of the transaction value) and if terminated thereafter, a \$12 million fee (approximately 4.6% of the total deal value). A divided Topps board approved the deal; all of the dissident directors voted against.

Fearing additional deadlocks, the board appointed a new committee to oversee the go-shop search process, consisting of Shorin, Greenberg, Feder and two other incumbent directors. No dissident director was asked to serve. It was agreed, however, that only the full board would determine whether any competing offer constituted a superior proposal for purposes of the merger agreement.

The committee undertook a broad and vigorous search upon commencement of the go-shop period, but it resulted in only one potentially interested bidder — Topps' primary competitor, Upper Deck. Concerned about providing proprietary information to its principal business competitor, Topps required as a condition of going further that Upper Deck execute a Standstill Agreement prohibiting Upper Deck from making public any information about its discussions with Topps or proceeding with a tender offer for Topps shares without permission from the Topps board. Upper Deck agreed.

The negotiations that followed progressed only haltingly. While Upper Deck indicated that it might be willing to pay as much as \$10.75, the deal terms and related concerns about conditionality, financing and antitrust issues, as well as a notable absence of alacrity on Upper Deck's part, persisted throughout the go-shop period. With no agreement in hand, the Topps board met to determine whether the Upper Deck expression of interest was reasonably likely to lead to a superior proposal, in which case discussions could continue beyond expiration of the go-shop period, in keeping with the terms of the merger agreement with Eisner. With only one of two dissident directors present voting against (the other abstained), the board determined that a deal with Upper Deck was not reasonably likely to result, citing concerns about the ability to finance such a deal (Upper Deck later agreed to remove this contingency, but only after expiration of the go-shop period), the unprotected risks associated with possible antitrust objections and the relative lack of sufficient protection for Topps under the proposal in the event that Upper Deck should fail to consummate, particularly given the high possibility of antitrust concerns.

Litigation challenging the proposed merger with Eisner promptly followed. Topps stockholders and Upper Deck sought to preliminarily enjoin the shareholder vote with respect to the transaction; to require Topps to correct material misstatements in the proxy; and to prevent Topps from using the contractual preclusions set forth in the Standstill Agreement signed in connection with the due diligence process to preclude Upper Deck from discussing its bid publicly or from making a tender offer. These requests for relief rested essentially on the allegedly misleading proxy statement

distributed to Topps stockholders in connection with the slated merger vote and on asserted *Revlon* violations against the Topps board for having refused to endorse an offer that was clearly higher and better than the one it was now recommending to shareholders for approval.

With respect to the *Revlon* allegations, plaintiffs' central assertion was that the Topps board had abandoned its responsibility to secure the highest and best price in favor of a desire to ensure that the company remained in the control of an owner friendly to the founding (but no longer controlling) family who would continue to allow it to guide the company. While the unattractive idea of a sale of the company had been forced upon Shorin by virtue of persistent shareholder unrest, the plaintiffs asserted that the board was pursuing a sale to a friendly buyer in order to eliminate the threat and secure the family's influence. As a result, the defendant directors had opted to deal with Eisner exclusively rather than to auction the company, to accept a merger agreement salted with strong deal protection devices that discouraged ensuing bids (i.e., a go shop too short, a break up fee too high, and a bid chilling match right) and to fabricate reasons to reject Upper Deck's higher bid as superior.

The Court concluded that the record was insufficient to support such conclusions. The determination by Greenberg and Feder that a full auction might hurt the company was viewed by the Court as reasonable under the circumstances. The incumbent but independent directors had appeared open to the views of the often volatile and divergent views of their dissident colleagues on the board. Greenberg had quickly stepped out of the negotiations when they had objected to his prior dealings with Eisner, even though the Court regarded those dealings as inadequate to compromise his objectivity. The board had successfully improved Eisner's price to a respectable level.

As to the absence of a pre-signing market check, the Court seemingly accepted the premise that the go-shop period, coupled with the right to continue discussions with any bidder appearing during that time who was deemed likely to make a superior proposal, cured the absence of a pre-signing market check. The Court was reassured in this conclusion by the relatively small advantage given to Eisner by virtue of the deal protection terms contained in the merger agreement with respect to any such bidder.

Although a target might desire a longer Go Shop Period or a lower break fee, the deal protections the Topps board agreed to in the Merger Agreement seem to have left reasonable room for an effective post-signing market check. For 40 days, the Topps board could shop like Paris Hilton. Even after the Go Shop Period expired, the Topps board could entertain an unsolicited bid, and, subject to Eisner's match right, accept a Superior Proposal. The 40-day Go Shop Period and this later right work together, as they allowed interested bidders to talk to Topps and obtain information during the Go Shop Period with the knowledge that if they needed

more time to decide whether to make a bid, they could lob in an unsolicited Superior Proposal after the Period expired and resume the process.¹⁹

The Court was expressly untroubled by the match right, a deal protection device that the Vice Chancellor noted “has frequently been overcome in other real-world situations.” And while the Court regarded the 4.3% termination fee applicable if the board terminated outside of the go-shop period (“an eventuality more likely to occur” than the termination within that relatively short period) as “a bit high in percentage terms,” it found that it included expenses and in a relatively small deal was not “of the magnitude that I believe was likely to have deterred a bidder with an interest in materially outbidding Eisner,” a point that the Court deemed effectively proven by Upper Deck’s ensuing expression of interest. Given the relatively mild restrictions on ensuing bidders, the Court credited the view that the Eisner deal resembled the proverbial bird in hand.

This is not to say that the Court was satisfied with the process in its entirety. Even as it concluded that an injunction was not warranted on *Revlon* grounds for the reasons stated, the Court exhibited considerable skepticism about the motives of the Topps board. The Court conceded that Upper Deck had proceeded with surprising lethargy and that the Topps board had legitimate reasons for concern as to the ultimate viability of Upper Deck’s bid. It nonetheless held out for pointed criticism the odd decision of the board to “tie its hands” by failing to declare Upper Deck’s bid reasonably likely to lead to a superior proposal, an option that would have maintained the board’s flexibility and held open the possibility of a higher and more satisfactory bid at no cost.

As for the alleged proxy violations, the Court held that the proxy should have disclosed Eisner’s oft-repeated statement that his proposal was designed to retain substantially all of senior management, and his assurances to both Feder and Greenberg throughout the process of his high regard for Topps’ key executives and of his intention to retain them following the merger. The failure to disclose these assurances rendered the proxy statement misleading by omitting a possible motivation for their support for the Eisner bid and their opposition to the bid from Upper Deck. It further concluded that the proxy statement also failed to disclose a valuation presentation prepared only a month before by the board’s financial advisor and presented to the board. It held that this valuation, which endorsed a valuation range in excess of Eisner’s price, tended to cast doubt on the fairness of that price, particularly because it appeared to have been significantly amended downward, allegedly on the strength of management’s lowered forecasts, for purposes of the board’s subsequent determination that the Eisner merger was fair.

¹⁹ Mem. Op. at 53

The remaining alleged omissions and misstatements, which plaintiffs stated reflected a consistent attempt to suggest that Upper Deck was motivated only by an interest in securing a competitive advantage and had no real interest in consummating an acquisition, were quickly rejected. The Court characterized these allegations as “he said, she said” disputes that are unsuited for resolution on a preliminary record and that in such circumstances are typically the subject of public debate that invites stockholders to determine which version they believe.

This analysis led the Court to turn directly to the propriety of the restrictions on such an exchange imposed upon Upper Deck by virtue of the Standstill Agreement, which appeared to stifle that very sort of public exchange. The Court began its discussion by observing that Standstill Agreements in the main serve legitimate corporate purposes. Thus:

When a corporation is running a sale process, it is responsible, if not mandated, for the board to ensure that confidential information is not misused by bidders and advisors whose interests are not aligned with the corporation, to establish rules of the game that promote an orderly auction, and to give the corporation leverage to extract concessions from the parties who seek to make a bid.²⁰

But, the Court observed, they are subject to abuse, as is the case when they are used by a target to favor one bidder over another for reasons unrelated to the interest of the stockholders. Here the Topps board had reserved the right to waive the Standstill restrictions if its fiduciary duties so required, but had refused to do so when Upper Deck requested a waiver in order to make a tender offer on the same terms it had offered to the board and to communicate with Topps stockholders in connection with the vote on the Eisner transaction. “On this record,” the Vice Chancellor held, “I am convinced that Upper Deck has shown a reasonable probability of success on its claim that the Topps board is misusing the Standstill,” not to extract concessions or to secure greater value but in a way that “keeps the stockholders from having the chance to accept a potentially more attractive higher priced deal,” but “keeps them in the dark about Upper Deck’s version of important events,” most specifically by precluding Upper Deck from responding to Topps’ statements disparaging the Upper Deck bid.

For these reasons, the Court determined that a limited injunction should issue enjoining the shareholder vote until 1) the disclosures are supplemented to reference the earlier projections by the investment banker and Eisner’s assurances to management as to their post-merger status; and 2) until such time as Topps has granted Upper Deck a waiver of the Standstill in order to make an all shares, non-coercive tender offer of \$10.75 cash or

²⁰ Mem. Op. at 62

more per share on the most favorable conditions previously offered by Upper Deck and to communicate with Topps stockholders about its version of the relevant events.

***In re Lear Corporation Shareholder Litig.*, 926 A.2d 94,
(Del. Ch. 2007)**

This opinion arose on a motion by stockholders of Lear Corporation to enjoin the scheduled vote on a proposed going private merger proposed by Carl Icahn, a 24% stockholder of Lear. The application for interim injunctive relief was based on the alleged violation by directors of Lear of their *Revlon* duties and the failure to disclose material facts to the stockholders in connection with that vote.

Lear, a large, publicly traded supplier of automotive interior systems, was a prominent player in a perennially depressed industry, its business severely hobbled by the daunting and persistent financial challenges afflicting its primary customers, the Big Three North American automotive manufacturers. These market challenges prompted rumors of a bankruptcy for Lear that in turn caused its board, populated by a majority of independent directors, to initiate a search for strategic alternatives. It was during this process that Icahn made his initial investment in the company, purchasing just short of 5% of Lear's outstanding stock. He doubled his investment position shortly thereafter and, believing the stock to be undervalued, again increased his position to 24% by way of a secondary offering of Lear common stock at \$23 per share, an equity position capped in exchange for a waiver by the Lear board of the restrictions imposed by the provisions of Section 203 with respect to investments exceeding 15%. When other large Lear investors declined to participate in the offering, believing the \$24 price to be too high, Icahn became Lear's largest investor.

A few months later, following a spike in the price of Lear stock to in excess of \$30 a share, viewed by many as a reaction to Icahn's significant investment, Icahn met with Rossiter, Lear's CEO, and broached the subject of a going private acquisition. Rossiter had much of his personal wealth tied up in Lear stock and was approaching retirement age. He had previously expressed to the Lear board his deep concern and his personal deliberations about continuing as CEO given the financial instability of the company and the concomitant threat to his substantial but unsecured retirement benefits. He had expressed his interest in finding a way to accelerate his access to those retirement benefits without giving up his position or suffering the discount that would result from early retirement. Responsive to his apprehension, the board had hired an expert to explore compensation options that might permit him to maximize his retirement assets while retaining his job. Rossiter was in the process of considering whether he was willing to confront the inevitable adverse publicity that likely would result from such a course of action when Icahn expressed an interest in pursuing a going private transaction and changed the subject.

After conducting follow-up discussions with Icahn for the better part of a week, Rossiter contacted several members of the board to bring them into the loop and advised the company's outside counsel of the overture. A board meeting was convened a few days later at which it determined to form a Special Committee to evaluate and negotiate proposals from Icahn, to consider alternatives and generally to oversee the process. Because the committee perceived no reason to regard the Icahn expression of interest as a source for conflict of interest on the part of senior management, the committee was content to allow Rossiter, the Company's most knowledgeable person and an effective negotiator, to take the lead in running the due diligence process and conducting the negotiations. Thus, the Committee did not participate directly in this aspect of the process, nor did it direct its advisors to do so.

Icahn conveyed to Rossiter his opening offer of \$35 per share, which Rossiter promptly reported to the Special Committee. The Committee rejected it as too low. Icahn then raised his offer to \$35.25, which Rossiter rejected on his own, prompting Icahn to raise his price again, this time to \$36. Vowing with enthusiasm apparently quite sincere to pay no more, he nevertheless indicated a willingness to be flexible in negotiating deal protection provisions, suggesting that he was open to the idea of a go-shop period, a reasonable termination fee and a reverse break-up fee triggered in the event that he should fail to close. Upon receiving this offer, the Special Committee considered pursuing a formal auction process rather than pursuing negotiations with Icahn, but ultimately rejected such a course of action as potentially harmful to its business and as inviting Icahn's threatened withdrawal of the pending proposal, and with it the considerable enhancement to Lear's stock price that had resulted directly from Icahn's expressions of interest in the company. The committee thus determined to deal in the first instance exclusively with Icahn and, lacking any basis to believe that the price would improve, to concentrate on securing favorable merger terms.

The ensuing discussions resulted in Icahn's agreement to a 45-day go-shop period, a fiduciary out that permitted the board to accept an unsolicited superior bid even after expiration of the go-shop period, and a voting agreement that would commit Icahn to vote in favor of a superior proposal that he did not match. In exchange, Icahn was accorded a ten-day match right with respect to any higher bid that might materialize and a termination fee if Lear accepted a higher bid. The size of the fee depended on whether the merger agreement was terminated during the go-shop period (2.79% of the equity value or 1.9% of the enterprise value of the deal) or after its expiration (3.52% of equity and 2.4% of enterprise value). In the meantime, the committee commissioned its financial advisors to conduct a limited assessment of interest among financial buyers, which failed to prompt any serious expressions of interest at or above the Icahn price.

Upon receiving a fairness opinion from its advisors, the committee unanimously voted to support the proposed merger at \$36, pursuant to a merger agreement that contained the merger terms previously negotiated, a recommendation promptly accepted by the full board. Immediately upon signing, the committee took advantage of the go-shop period by commissioning its advisors to contact numerous potential buyers, both strategic and financial. Only a handful agreed to execute a confidentiality agreement. None had made even a preliminary bid as of the expiration of the go-shop period. Those who continued to express the possibility that a bid might eventuate soon fell away as well.

Icahn simultaneously reached agreement with Lear's senior managers, including Rossiter, to continue their employment with the surviving entity and to receive substantial options to purchase equity in the new enterprise at the merger price. While they waived their right to receive substantial change of control payments provided for in their existing employment contracts, they were given accelerated access to their accrued but unsecured accrued retirement benefits, just as Rossiter was hoping to do when Icahn appeared on the scene.

The Court rejected the bulk of plaintiffs' disclosure claims, concluding that the allegations raised immaterial points or that the information had been adequately disclosed. As to one allegedly material omission, however, the Court concluded that plaintiffs had established a reasonable probability of succeeding at final trial. This charge related to the failure of the proxy statement to disclose Rossiter's statements to the board that he was considering resigning in light of the financial risks he faced with respect to his unprotected retirement benefits and Lear's tenuous financial condition; that the board had considered his concerns sufficiently serious to engage an expert to explore compensation options; and that both Rossiter and the board harbored serious concerns that any contemplated fix would draw the ire of investors. Although nothing came of this pre-Icahn semi-negotiation, the Court regarded these facts as materially relevant to the stockholders' assessment of Rossiter's motivations in initiating and subsequently spearheading the negotiation of a going private transaction that had the potential to (and ultimately did) solve Rossiter's problem in a relatively inconspicuous way.

Plaintiffs' *Revlon* claims did not enjoy so favorable an endorsement by the Vice Chancellor. The Court concluded with seeming ease that *Revlon* applied to this transaction, in that the company had determined to sell the company for cash, and reaffirmed its requirement that the board choose a reasoned course of action for securing the highest and best price reasonably available.

Plaintiffs' *Revlon* claim essentially comprised two aspects: 1) the assertion that the Special Committee had breached its duty by leaving to a conflicted CEO so large a responsibility for conducting the negotiations with Icahn; and 2) the assertion that the Special Committee had acted improperly in agreeing to the deal protections it accorded Icahn in the merger agreement.

Although it rejected plaintiffs' first claim, the Court was less than enamored with the significant role that the Committee had ceded to its conflicted CEO. Calling such an approach "less than confidence-inspiring," the Vice Chancellor took special pains to identify the problems such a choice invited, even as he concluded that no relief was warranted.

... I believe it would have been preferable for the Special Committee to have had its chairman or, at the very least, its lead banker participate with Rossiter in the negotiations with Icahn. By that means, there would be more assurance that Rossiter would take a tough line and avoid inappropriate discussions that would taint the process. Similarly, if the Special Committee was to proceed as it did, by leaving negotiations to Rossiter without direct supervision, it could have provided him with more substantial guidance about the strategy he was to employ.

... Although I do not ... view this negotiation process as a disaster warranting the issuance of an injunction, it is far from ideal and unnecessarily raises concerns about the integrity and skill of those trying to represent Lear's public investors. In reflecting on why this approach was taken, I consider it less than coincidental that Rossiter did not tell the board about Icahn's interest in making a going private proposal until seven days after it was expressed...²¹

The Lear Special Committee was deprived of important deliberative and tactical time, and, as a result, it quickly decided on an approach to the process not dissimilar to those taken on most issues that come before corporate boards that do not involve conflicts of interest. That is, the directors allowed the actual work to be done by management and signed off on it after the fact. But the work that Rossiter was doing was not like most work. It involved the sale of the company in circumstances in which Rossiter (and his top subordinates) had economic interests that were not shared by Lear's public stockholders.

Observing that *Revlon* required reasonableness rather than perfection, the Court ultimately concluded that the Committee's overall approach had been reasonable.

As for the terms of the proposed deal itself, the Court also declined to credit plaintiffs' allegation that the board should have proceeded with a full pre-signing auction, deeming reasonable defendants' stated concerns that such a process was unlikely to generate interest, given recent history, and that Icahn's threat to pull his bid was both credible and dangerous since it might well cause the stock price to drop precipitously, depriving shareholders of value that otherwise could be locked in through an Icahn agreement.

²¹ Mem Op. at 42-43

Moreover, the Court blessed the relatively mild deal protections secured by the Committee, which, by retaining flexibility and minimizing deterrence to ensuing bidders, allowed the Committee in practical effect to secure a bird in hand. The Vice Chancellor was notably unimpressed with the two tier termination fee, observing that the truncated 45-day go-shop period was likely insufficient to permit an intervening offer to be finalized and to allow Icahn his full ten-day match right, as the merger agreement required. Given the finality required to be achieved during the go-shop period, the lower break-up fee was in practical effect unlikely ever to be invoked. Nonetheless, the Court found acceptable the higher fee alternatively applicable, amounting to 3.5% of equity value and 2.4% of enterprise value,²² characterizing it as hardly of the magnitude that should deter a serious rival bid.

The Court similarly found no fault with the match right granted to Icahn, observing that second bidders have shown themselves historically willing to proceed and succeed in the face of such a provision, and that in this case the right, and thus its deterrent effect, had been significantly limited by the provision limiting Icahn to a single opportunity to match a superior bid.

Finally, the Court found both relevant and reassuring Icahn's contractual commitment to vote his equity in favor of a superior deal if he determined not to match. This the Court stated convincingly undercut plaintiffs' assertion that Icahn's perceived leg-up deterred any third party bidders from joining the fray, by suggesting instead to any such bidder that "cash was king in the Lear process, and that as long as it topped Icahn ... the Lear board would have to embrace its offer."²³

Based on this reasoning, the Court denied plaintiffs' motion for preliminary injunction, but for its direction that the merger vote await supplemental disclosure with respect to the facts surrounding the Rossiter conflict. With such information made available, the Court declined to refuse the Lear shareholders the opportunity to determine whether to accept the offered consideration.

Practice Pointers

Certainly these decisions offer valuable lessons to practitioners involved in counseling boards that contemplate transactions of this sort. The following points suggest themselves immediately upon close review of the decisions:

- A unconflicted board pursuing a cash merger or change of control transaction retains reasonable latitude in structuring a sale process under *Revlon*. Reasonableness, not perfection, remains the judicial standard of review.

²² In this respect, the Court observed that it was arguably more appropriate in most cases to look at enterprise value in considering the preclusive effect a termination fee, since most acquisitions require the buyer both to pay for the company's equity and refinance all of its debt.

²³ Mem. Op. at 54.

- In reviewing the reasonableness of the sale process under *Revlon*, the enhanced judicial scrutiny is magnified where the court perceives the process may have been tainted by self-interest on the part of central participants.
- If a CEO requests or is promised or has a reasonable expectation of an equity role in or of continued employment with the survivor in advance of or during sales process, he becomes a self-interested, conflicted party.
- A CEO interested by reason of such promises or expectations must involve the board/special committee at an early stage in order to avoid the judicial perception that the process has been tainted by the CEO's interest.
- In such circumstances, the independent board/special committee and/or its advisors must exercise direct supervisory responsibility for determining nature of process to be pursued, scope and conduct of market canvass/auction process, due diligence process, negotiations, and sales process in general.
- To the extent interested managers are given unsupervised leadership roles in process negotiations, judicial skepticism is provoked and additional rigor added to *Revlon* reasonableness review.
- The board would be wise to consider implementing policies, contractually (e.g., neutrality agreements) or otherwise, that preclude members of senior management from engaging in substantive discussions with prospective buyers without notice to or authority from the board of directors.
- CEO who acts without board authority to initiate sales process to preferred bidder and who shares confidential corporate information without authority in that effort risks unindemnifiable liability for breach of fiduciary duty of loyalty, and may poison the well to such an extent that resulting transaction cannot be salvaged.
- A board may reasonably conclude in a *Revlon* circumstance that pre-signing auction for full market check may succeed in curing effects of limited initial search by way of merger terms that ensure ability to contact potential bidders and to accept post-signing superior proposals without unwarranted penalty or other unreasonable deterrence.
- Go-shop provisions – Reasonable provision can cure curtailed pre-signing process, but needs to be of sufficient length and utility to serve stated purpose.
- Reduced termination fee for termination for superior proposal secured during go-shop period not likely to be credited by court if conditions cannot be realistically met during abbreviated go-shop period.

- Match right is not invalid deal protection device per se nor is it presumed unreasonable, particularly when limited as to number of match opportunities by original suitor.
- A board in a *Revlon* setting that fails to advantage itself of contractual options that preserve board's flexibility to negotiate without resulting cost invites judicial skepticism as to its objectivity and compliance with *Revlon* duty to secure highest and best price reasonably available.
- Where no alternative offer is outstanding, preliminary injunctive relief with respect to merits of pending transaction unlikely even where sales process or deal protections are materially flawed (imminent irreparable injury but unfavorable balance of equities), but damages action may proceed.
- Standstill agreements serve useful purpose in providing target with negotiating leverage and protecting confidential information, but cannot be abused by target in order to muzzle unsuccessful but persistent bidder or to preclude issuance of competing offer.
- Full disclosure, including relevant information regarding value and future prospects is critical in any going private deal and, where sufficient, will likely dissuade court from depriving fully informed stockholders from choosing between continued participation in the existing enterprise and a transaction that has resulted from a flawed process.

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