Milbank

Corporate Governance Group

Client Alert

December 11, 2012

BEIJING FRANKFURT HONG KONG LONDON LOS ANGELES MUNICH NEW YORK SÃO PAULO SINGAPORE TOKYO WASHINGTON, DC

DELAWARE COURT REFUSES TO ENJOIN STOCKHOLDER VOTE ON COMPANY SALE BASED ON A DISCLOSURE CLAIM RELATING TO PROJECTIONS OF TARGET'S MANAGEMENT

Determines that management projections, while "merely helpful", are not material and need not be disclosed

Recently, in *Dent v. Ramtron International Corporation, et al*,[1] the Delaware Court of Chancery determined that projections of a target company's management that were relied upon by target's financial advisor in delivering its fairness opinion were not material, and as a result, did not require disclosure in the target company's proxy statement. The Court denied a request by stockholders to preliminarily enjoin the merger vote, finding that it was "unlikely that a reasonable stockholder would find the projections to be important as opposed to merely helpful in deciding how to vote on the merger or whether to seek appraisal".

Background

Ramtron International Corporation "designs, develops, and markets specialized semiconductor memory, microcontrollers, and integrated semiconductor solutions." On March 8, 2011, Cypress Semiconductor Corporation, a manufacturer of USB controllers that enhance "conductivity and performance in multimedia handsets, PCs, and tablets", made an unsolicited offer to the Ramtron board to acquire Ramtron at a price of $3.01 per share. After more than a year of unsuccessful negotiations, Cypress publicly announced on June 22, 2012 its proposal to acquire Ramtron at a price of $2.48 per share. Ramtron publicly responded by recommending that its stockholders not tender into Cyprus' offer, and privately began conducting an auction process to explore all other available strategic alternatives. Over the course of the next 3 months,

1 C.A. No. 7950-VCP (Del. Ch. Nov. 19, 2012).

For further information about this Client Alert, please contact:

Roland Hlawaty
Partner
212-530-5735
rhlawaty@milbank.com

David Schwartz
Of Counsel
212-530-5260
dschwartz@milbank.com

the parties publicly negotiated pricing, with Cyprus amending its tender offer to increase its offer price, and Ramtron responding each time by rejecting the revised offer. By late September 2012, however, the parties finally agreed to a price of $3.10 per share and a merger agreement was executed. As part of the first step of the merger, Cyprus completed its tender offer and acquired approximately 78% of Ramtron's outstanding stock. However, Cyprus was not able to acquire a sufficient number of shares to conduct a short form merger, and therefore, decided to pursue a long form merger and solicited proxies via a proxy statement.

The Allegations and the Court's Analysis

Plaintiff filed suit, alleging various breaches of fiduciary duties by Ramtron's board. "Plaintiff's main claim…[was] that defendants breached the fiduciary duty of candor by failing to disclose Ramtron's management's financial projections that covered the second half of 2012 and the years 2013 through 2016" in its merger proxy statement. Ramtron had shared these projections with its financial advisor, who in turn used these projections for the discounted cash flow analysis underlying its fairness opinion.

Plaintiff sought to enjoin the stockholder vote on the merger until all material information concerning the merger, including the undisclosed financial projections, was made available to stockholders. Defendants contended that Ramtron's management's projections were neither accurate nor reliable, and that disclosure of those projections would only "create a greater risk of confusing" its stockholders than "informing them on whether to accept the $3.10 offer price or to seek appraisal." Defendants supported their contentions by noting, among other things, that "Cypress did not have access to Ramtron's financial projections when it decided to enter into the merger agreement….[rather], as disclosed in the proxy, Cypress noted at least once in an August 3 letter that it found management's projections to be 'inherently unreliable'".

The Court began its analysis with an overview of the "duty of disclosure", noting that it "is a specific application of a corporate directors' fiduciary duties of care and loyalty" and required "directors to disclose fully and fairly all material information within the board's control when it seeks shareholder action". In such cases, "the issue is whether shareholders have been provided with appropriate information upon which an informed choice on a matter of fundamental corporate importance may be made." The Court further noted that an "omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."

Turning more specifically to the question of whether management projections are required to be disclosed, the Court stated that "Delaware law does not require the disclosure of inherently unreliable or speculative information which would tend to confuse stockholders or inundate them with an overload of information. The omitted disclosure at issue in this case is Ramtron management's financial projections. 'There is no *per se* duty to disclose financial projections furnished to and relied upon by an investment banker. To be a subject of mandated disclosure, the projections must be material in the context of the specific case.'" Turning specifically to the evidence presented before it, the Court concluded in this context that "there are no facts suggesting that the undisclosed information is inconsistent with, or otherwise significantly differs from, the disclosed information."

Moreover, the Court noted that "the materiality of management's projections does not turn on whether those projections were reliable or unreliable." Rather, the Court reiterated that the key question is whether "there is a…substantial likelihood that the undisclosed information would significantly alter the total mix of information already provided.'" Based on the evidence before it, the Court held that "it is unlikely that a reasonable stockholder would find the projections to be important as opposed to merely helpful in deciding how to vote on the merger or whether to seek appraisal." Accordingly, the Court rejected plaintiff's claims.

Conclusion

The *Ramtron* decision again demonstrates that Delaware courts will closely examine the record before them in addressing attacks on a board of directors' process for selling a company and the accompanying public disclosures. As this case demonstrates, courts will not lightly challenge disclosures made by boards, placing the burden on plaintiffs to demonstrate that the alleged flaws are indeed material, rather than "quibbles" that do not add to the total mix of information.

Please feel free to discuss any aspect of this Client Alert with your regular Milbank contacts or with any of the members of our Corporate Governance Group, whose names and contact information are provided below.

Beijing
Units 05-06, 15th Floor, Tower 2
China Central Place, 79 Jianguo Road, Chaoyang District
Beijing 100025, China

Anthony Root	+86-10-5969-2777	aroot@milbank.com
Edward Sun	+86-10-5969-2772	esun@milbank.com
Gary Wigmore	+86-10-5969-2769	gwigmore@milbank.com

Frankfurt
Taunusanlage 15
60325 Frankfurt am Main, Germany

Norbert Rieger	+49-89-25559-3620	nrieger@milbank.com

Hong Kong
3007 Alexandra House, 18 Chater Road
Central, Hong Kong

Anthony Root	+852-2971-4842	aroot@milbank.com
Gary Wigmore	+852-2971-8815	gwigmore@milbank.com
Joshua Zimmerman	+852-2971-4811	jzimmerman@milbank.com

London
10 Gresham Street
London EC2V 7JD, England

Stuart Harray	+44-20-7615-3083	sharray@milbank.com

Los Angeles
601 South Figueroa Street, 30th Floor
Los Angeles, CA 90017

Ken Baronsky	+1-213-892-4333	kbaronsky@milbank.com
Neil Wertlieb	+1-213-892-4410	nwertlieb@milbank.com

Munich
Maximilianstrasse 15 (Maximilianhöfe)
80539 Munich, Germany

Peter Nussbaum	+49-89-25559-3430	pnussbaum@milbank.com

New York
One Chase Manhattan Plaza
New York, NY 10005

Scott Edelman	+1-212-530-5149	sedelman@milbank.com
Roland Hlawaty	+1-212-530-5735	rhlawaty@milbank.com
Thomas Janson	+1-212-530-5921	tjanson@milbank.com
Joel Krasnow	+1-212-530-5681	jkrasnow@milbank.com
Alan Stone	+1-212-530-5285	astone@milbank.com
Douglas Tanner	+1-212-530-5505	dtanner@milbank.com
Paul Wessel	+1-212-530-5077	pwessel@milbank.com

São Paulo
Rua Colombia, 325
Jardim América
São Paulo, SP
01438-000

Andrew Janszky	+55-11-3927 7701	ajanszky@milbank.com

Singapore
30 Raffles Place, #14-00 Chevron House
Singapore 048622

David Zemans	+65-6428-2555	dzemans@milbank.com
Naomi Ishikawa	+65-6428-2525	nishikawa@milbank.com

Tokyo
21F Midtown Tower, 9-7-1 Akasaka, Minato-ku
Tokyo 107-6221 Japan
+813-5410-2801

Washington, DC
International Square Building, 1850 K Street, NW
Suite 1100
Washington, DC 20006

Glenn Gerstell	+1-202-835-7585	gerstell@milbank.com