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Corporate Governance Group Client Alert

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DELAWARE COURT REFUSES STOCKHOLDERS' CALL FOR PRELIMINARY INJUNCTION OF TENDER OFFER

Determines that sales process was reasonable and disclosures were adequate

In *In Re Micromet, Inc. Shareholders Litigation*,[1] the Delaware Court of Chancery recently reconfirmed that it will not second guess the process used by a target company's board of directors in connection with a sale of the company, so long as that process is one that does not have the effect of unreasonably deterring prospective bidders. The Court's fact-specific discussion of the issues before it, including the adequacy of disclosures made in solicitation statements given to target stockholders, provide useful guidance for dealmakers and their counsel in negotiating and documenting future transactions.

Background

Micromet, Inc. is an "early-stage pharmaceutical research and development company" specializing in the "discovery, development, and commercialization of antibody-based therapies for the treatment of cancer." As part of its business strategy, Micromet partnered with larger pharmaceutical companies to "aid in the commercialization and distribution of drugs in Micromet's pipeline."

On June 15, 2010, Micromet entered into a confidentiality agreement with Amgen, Inc., the world's "largest independent biotechnology medicines company," to discuss a potential collaboration. In April 2011, as Amgen's interest in Micromet's business grew, Amgen introduced the possibility of a "strategic transaction between the companies." The Micromet board believed that Micromet's stock was "undervalued in the market" and therefore declined to pursue a transaction at that time. However, Amgen continued to press for a deal and, in August, the parties "entered into confidentiality and standstill agreements" that permitted Micromet to conduct limited due diligence. Although Amgen made a series of offers during the ensuing months, Micromet's board refused to entertain a buy-out.

1 C.A. No. 7197-VCP (Del. Ch. Feb. 29, 2012).

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During this same period, Micromet discussed potential collaborations with numerous large pharmaceutical companies (not including Amgen) concerning MT103, its "lead product candidate." Although many of these companies engaged in detailed due diligence relating to MT103, Micromet did not enter into any partnering arrangement for MT103.

In late November 2011, Micromet made two positive announcements concerning MT103: the commencement of "Phase II clinical trials" and successful initial results from clinical trials. These announcements attracted renewed attention from Amgen, which "substantially" increased its offer in late December 2011 to $10.75 per share. At a meeting in early January, the Micromet board directed its financial advisor to conduct a market check to gauge the interest of "other large pharmaceutical companies that have either expressed interest in the partnering process or that have a potential strategic fit" in acquiring Micromet. At the same time, the board told Amgen that if it increased its offer to $11 per share, it would be given access to more detailed due diligence.

Although several of the other companies contacted by Micromet's financial advisor expressed some interest in pursuing an acquisition and conducted due diligence, ultimately none was willing to make an offer. Amgen, on the other hand, indicated its willingness to increase its bid to $11, representing a 37% premium to the market price, and was permitted to conduct further due diligence. By the end of January, the parties negotiated a merger agreement calling for a two-step transaction – an $11 tender offer followed by a merger at the same price – and containing several deal protections, including a four-day match right and a 3.4% termination fee. Following receipt of a fairness opinion from its financial advisor, the Micromet board approved the merger with Amgen.

Following public announcement of the transaction on January 26, 2012, various Micromet stockholders sought a preliminary injunction against Amgen's tender offer. Plaintiffs contended, among other things, that (i) the tender offer was being conducted at "an unfair price that resulted from a flawed sales process," (ii) the deal protections "unreasonably have shortened the tender offer period" by including the match right period and generally precluded competing bids, and (iii) the disclosure documents distributed to Micromet stockholders contained "materially incomplete and misleading statements …." The Court refused to grant the requested injunction.

The Court's Analysis

Applicable Standard of Review

In assessing whether plaintiffs had established a reasonable probability of success on the merits – one of the key requirements for a preliminary injunction – the Court applied the "seminal" *Revlon*[2] standard of review. Under *Revlon*, the "primary objective" of a board is "to maximize the value of the sale of the company for the benefit of its shareholders." The Court's two-part analysis is "to determine whether the information relied upon by the Board in the decision-making process was adequate," and then "to examine the reasonableness of the directors' decision viewed from the point in time during which the directors acted." The Court reiterated what a host of post-*Revlon* decisions have made clear: "[t}here is 'no single blueprint' that a board must follow in maximizing shareholder value …."

2 *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc*., 506 A.2d 173 (Del. 1986).

When did Revlon Duties Attach?

The first issue in dispute was the point in time at which *Revlon* duties attached and the Micromet board's obligation shifted as discussed in *Revlon*. Despite plaintiffs' argument that this occurred when Amgen made its first formal offer and Micromet allowed limited due diligence in August 2011, the Court determined that the board only began to seriously contemplate a sale of Micromet in late December 2011/ early January 2012 when "it resolved to enter into serious merger negotiations with Amgen and instructed [its financial advisor] to conduct a market check of other potential acquirers." The Court then turned to an analysis of the reasonableness of the board's actions in light of their *Revlon* duties during the relevant period.

Reasonableness of the Process

The Court made the following findings after examining the alleged infirmities in the process followed by the Micromet board:

- The "scope of the market check was adequate and consistent with the Board's well-informed understanding of the industry and Micromet's needs." The board's focus on bidders already familiar with MT103 from the partnering process and those "most likely to be able to make synergistic topping bids" was "reasonable." Moreover, given Micromet's need not only for capital but also "technical expertise, to realize the full potential value of its product line," the board's "decision to eschew contacting any private equity buyers also seems reasonable.

- Given the other potential bidders' familiarity with Micromet's key product and the fact that none of them cited "inability to conduct sufficient due diligence in the time allotted" as the reason for not pursuing a transaction, the Court did not find fault with the length of the pre-signing market check.

- The deal protection measures, including the four-day match right granted to Amgen, "appear to be relatively standard and they do not raise serious concerns of preclusion."

Adequacy of the Disclosures

The Court also rejected plaintiffs' claims with respect to the disclosures made to Micromet stockholders in connection with Amgen's tender offer, explaining that while "[t]he duty of disclosure … serves the ultimate goal of informed stockholder decision making," it does not establish "a full-blown disclosure regime like the one that exists under federal law." Specifically, the Court concluded that:

- The disclosure of "highly technical" information underlying the financial advisor's fairness analysis, including "the scientific basis for management's assumptions relating … to each drug in its pipeline," would "bury the shareholders in an avalanche of trivial information, a result that is hardly conducive to informed decisionmaking." Rather, "[s]tockholders are entitled to 'a fair summary of the substantive work performed by the investment bankers' …. " In this case, Micromet stockholders "received a summary that adequately described management's well-informed projections as to the viability of the drug pipeline."

- The size of the equity interest of Micromet's financial advisor in Amgen was not of a magnitude that required disclosure beyond the statement that it "may at any time make or hold long or short positions and investments … in the equity, debt and other securities" of Amgen.

- Plaintiffs provided no "persuasive explanation … why the actual amount of fees paid by Micromet to [its financial advisor] would be material to shareholders or to cite any Delaware case law mandating such disclosures …."

- Projections of how Micromet "expected net operating loss carry-forwards to be used in future periods" represent "a level of granular disclosure not required under our law."

- Neither a "Sum of the Parts" analysis prepared by the financial advisor at the request of the Micromet board, nor "Upside Case" projections prepared by Micromet management but considered by "at least some of the directors … to be unreliable and overly optimistic," was required to be disclosed. None of this information was relied upon by Micromet's financial advisor in reaching its conclusions and, as the Court explained, "Delaware law does not require disclosure of inherently unreliable or speculative information which would tend to confuse stockholders or inundate them with an overload of information."

- The choice of one test of fairness rather than another is "nothing more than a 'quibble[] with a financial advisor's work'" that "does not state a valid disclosure claim."

Conclusion

The *Micromet* Court's ruling on plaintiffs' substantive *Revlon* claims, as well as their allegations of inadequate disclosures, demonstrates that Delaware courts will continue to be deferential to directors who are disinterested, even in the context of a sale of the company. While the Court's conclusions no doubt rest on its belief that the process followed by the Micromet board was reasonable and the additional disclosures sought by plaintiffs were not material, it is worth noting that, in summing up its findings, the Court stated that "[b]ecause no other bidder has emerged …, the proposed transaction "may represent the shareholders' only and best opportunity to receive a substantial premium for their shares." This powerful fact appears to carry the day even in situations in which the process is less than ideal.[3]

3 For a discussion of two recent cases in which the Court of Chancery specifically cited the absence of a competing bid to an otherwise favorable transaction as the reason for its refusal to issue an injunction, despite infirmities in the sales process, please see our Client Alerts entitled "*Delaware Court Sharply Criticizes Conflicts of Interest in High-Profile Corporate Merger*," dated March 21, 2012, and "*Delaware Court Refuses to Enjoin Merger Despite 'Meritorious Allegations' of Fiduciary Impropriety*" dated April 16, 2012.

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.

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