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Legislative Solutions to Practitioner Problems: Important Amendments to the Delaware General Corporation Law

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On June 30, 2013, Delaware Governor Jack Markell signed into law legislation amending the Delaware General Corporation Law (the "DGCL") in a number of important ways. These amendments are expected to have a significant impact on the structure of mergers and acquisitions, and corporate practice, in Delaware. First, the DGCL has been amended to add § 251(h), which will allow consummation of second-step mergers without stockholder approval following a tender or exchange offer in certain circumstances.[1] Second, the DGCL has been amended to add §§ 204 and 205, which will define corporate and judicial procedures for ratifying defective corporate acts.[2] The legislation also includes various other amendments to the DGCL, including the use of formulas for stock issuance pricing and restrictions on "shelf" corporations, which are beyond the scope of this article.[3]

Section 251(h): Short-Form Mergers In Two-Step Transactions

Acquisitions often employ a two-step structure in which the acquiror first launches a tender or exchange offer for any and all outstanding shares. Upon the

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12. 8 Del. C. § 204(h)(1).
13. 79 Del. Laws, c. 72, § 4.
14. 588 A.2d 1130, 1136 (Del. 1991) ("Stock issued without authority of law is void and a nullity.").
15. C.A. No. 5317-VCS, 2010 WL 4638603, at *10 (Del. Ch. Nov. 17, 2010) (explaining that "scrupulous adherence to corporate formalities are germane to a board's adoption of a stock split because both board actions involve a change in the corporation's capital structure").
16. For purposes of §§ 204 and 205, overissued shares are those issued in excess of the number permitted by section 161 at the time the shares in question are issued.
17. *See Noe v. Kropf*, C.A. No. 4050-CC, trans. at 13 (Del. Ch. Jan. 15, 2009) (explaining that shares were void when issued, and "any action taken where authority is lacking will constitute more than a mere defect as contemplated by § 8-202(b)(1). [Purchaser] purchased shares that in effect never existed. Therefore, [Purchaser] is not entitled to any protection under the Delaware Uniform Commercial Code.").
18. If such defective corporate act involved the issuance of shares of putative stock (*i.e.*, shares of stock that but for a failure of authorization would have been validly issued and any other shares that the board of directors cannot determine to be valid stock), the resolution must also state the number and type of shares of putative stock issued and the date or dates upon which such putative shares were purported to have been issued. The procedures of section 204 are not available if a corporation does not have a valid board of directors. 79 Del. Laws, c. 72, § 4. If there is no valid board, relief would need to be sought under § 205. *Id.*
19. 79 Del. Laws, c. 72, § 4.
20. *Id*.
21. 36 A.3d 785 (Del. Ch. 2011).
22. 750 A.2d 531(Del. Ch. 1999), *aff'd*, 748 A.2d 913 (Del. 2000) (unpublished table decision).
23. 965 A.2d 695 (Del. 2009).

Managing Litigation Risk in Single-Bidder Transactions

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As readers of this publication know, once directors of a Delaware corporation decide to pursue a change-of-control transaction, *Revlon*[1] requires that they "undertake reasonable efforts to secure the highest price realistically achievable."[2] When a company decides to pursue that strategy with a single bidder, however, designing a process that satisfies the *Revlon* standard takes on added importance and complexity.

In two recent cases decided less than two weeks apart, the Delaware Court of Chancery reached opposite conclusions regarding the merits of *Revlon*-based challenges to single-bidder transactions. In his May 9, 2013 opinion in *In re Plains Exploration & Production Company Stockholder Litigation*, Vice Chancellor John W. Noble found that the plaintiffs were unlikely to prevail on a *Revlon*-based challenge to a single-bidder transaction.[3] In his May 21, 2013 opinion in *Koehler v. NetSpend Holdings, Inc.*, Vice Chancellor Sam Glasscock III found that the single-bidder sales process undertaken by the NetSpend board was not designed reasonably to maximize the sale price for the company's stockholders.[4]

While "there is no single blueprint that a board must follow" in discharging its *Revlon* duties,[5] the board and its advisors must design a process that will withstand scrutiny. These cases provide helpful guidance for boards of directors and practitioners seeking to manage litigation risk when pursuing single-bidder transactions.

In re Plains Exploration & Production Company

In December 2012, following nearly one year of intermittent negotiations between Plains Exploration & Production Company and Freeport-McMoRan Copper & Gold Inc., Plains agreed to be acquired by Freeport.

Negotiations followed initial discussions between the companies' CEOs in early 2012.[6] By mid-2012 the parties began investigating a potential transaction. Chairman and CEO James Flores led the discussions on behalf of Plains.[7] Although the parties would not reach an agreement for another half-year, Plains never considered other potential transactions or sought other potential acquirers. The Plains board decided that if it did not enter into a transaction with Freeport, it would continue as a stand-alone company.[8]

By the fall of 2012, the parties were negotiating the price. On November 1, 2012, Freeport offered to acquire Plains for $47 per share—half in cash and half in Freeport stock—and expressed its desire to retain Plains' management after closing.[9]

In response to the offer, Plains' financial advisor, Barclays PLC, advised that a price of $50 would be fair. Barclays also proposed utilizing a collar to protect Plains' stockholders from the risk of a decrease in Freeport's stock value, but Plains did not pursue that option.[10]

After several rounds of negotiations, the parties agreed to a $50 per share price, which represented a 39% premium to the prior day's closing price and a 42% premium to the average closing price for the prior month.[11] Under the merger agreement, Plains stockholders could elect to receive stock or cash, subject to an aggregate proration of approximately 50% cash and 50% stock.[12] The agreement's various deal protection measures—including a no-solicitation provision, a 3% termination fee, and matching rights—were "not onerous."[13]

Following the completion of the price negotiations, but before the Plains board approved the transaction, Flores—with the permission and oversight of the board—reached an agreement with Freeport regarding his post-merger employment.[14]

The Plains board approved the transaction on December 4, 2012, and the parties announced it the following day.[15]

The plaintiffs attacked the transaction on several grounds, claiming that: (1) Flores was conflicted because he knew he would be offered a position in the combined company and stood to receive $120 million in Freeport stock as a result of the merger; (2) the Plains board abdicated its fiduciary duties by allowing Flores to lead the negotiations, and by failing to oversee those negotiations; and, (3) the board breached its *Revlon* duties by failing to (a) pursue other potential buyers, (b) conduct a pre- or post-signing market check, (c) negotiate a post-signing go-shop provision, and (d) negotiate a collar or equity "kicker" for the portion of the consideration to be paid in stock.[16]

In denying the plaintiffs' preliminary injunction motion, Vice Chancellor Noble roundly rejected the plaintiffs' arguments.[17] First, the decision to allow Flores to lead the negotiations was reasonable. While the formation of a special committee "can serve as 'powerful evidence of fair dealing,'" it "is not necessary every time a board makes a decision."[18] Here, the board "could have reasonably believed that Flores…was in the best position to advance the interests" of the company's stockholders because of his experience with and knowledge of Plains' assets.[19] Moreover, the board was fully aware of and discussed Flores' potential conflict, and decided that Flores' significant ownership of Plains stock mitigated the conflict by aligning his interests with those of other stockholders.[20] And to the extent a conflict existed, the Plains board properly managed it by overseeing the negotiations.[21]

Next, the Court rejected the argument that a pre-agreement market check was required. Relying on the Delaware Supreme Court's decision in *Barkan*,[22] the Court found that when "directors possess a body of reliable evidence with which to evaluate the fairness of a transaction, they may approve that transaction without conducting an active survey of the market."[23] Although the absence of a pre-signing market check forced the board to rely upon its own knowledge and that of its financing advisor, because most Plains directors "had significant experience in the oil and gas industry," they were capable of making an informed decision with the advice of Barclays as to the fairness of the merger price.[24]

Third, the Court held that the absence of onerous deal protection devices permitted an effective "post-agreement market check."[25] The no-solicitation provision contained a "fiduciary out" that allowed the board to respond to unsolicited, superior bids.[26] Neither the 3% termination fee nor the customary matching rights—either individually or collectively—would deter a serious bidder from making a superior competing bid.[27] The ability to conduct an effective "post-agreement market check" was critical because, "as long as the [b]oard retained 'significant flexibility to deal with any late-emerging bidder and ensured that the market would have a healthy period of time to digest the proposed transaction' and no other bidder emerged, the [b]oard could be assured that it had obtained the best transaction reasonably attainable."[28]

Fourth, the Court rejected the plaintiffs' argument that the board breached its fiduciary duties by failing to obtain a collar or an equity "kicker."[29] While Flores at one point sought an equity "kicker," he elected not to pursue it after being told that adding one would reduce the price per share. The Court held that the decision not to push for those provisions was a reasonable business judgment, for a company "has discretion in deciding what consideration to seek in negotiating a merger."[30]

Because the plaintiffs failed to establish a reasonable probability of succeeding on any of their claims, the Court refused to enjoin the transaction.

Koehler v. NetSpend Holdings Inc.

Formed in 2004, NetSpend Holdings Inc. went public in 2010. Both while it was privately held and after it went public, NetSpend engaged in multiple negotiations regarding a possible sale or merger, some of which were "very advanced."[31] For example, in 2007 NetSpend negotiated a merger agreement, only to have a federal regulatory agency block the deal.[32] In 2009, NetSpend negotiated a transaction with a company that later withdrew from negotiations.[33] Also in 2009, NetSpend was in the midst of negotiating another transaction when a new regulation made the deal unattractive.[34]

In October 2010, NetSpend went public at $11.00 per share.[35] By late 2011, NetSpend's stock had dropped to $3.90 per share.[36] Even after two $25 million stock repurchases, NetSpend's stock traded between $7 and $9 per share.[37] Convinced that this range did not reflect the company's long-term value, the board considered various alternatives, including a sale of the company. Despite receiving several expressions of interest, in early 2012 the board decided not to pursue a sale at the time out of concern that stockholders would not realize full value.[38]

In August 2012, one of NetSpend's largest stockholders, JLL Partners Inc., advised the NetSpend board that it was interested in selling all or a significant portion of its stock.[39] Concerned about the effect such a sale would have on the company's stock price, the board agreed to help facilitate a private sale of JLL's stock by providing financial projections to the two interested buyers.[40] When it shared that information, NetSpend informed the prospective buyers that the entire company was not for sale and required each to execute a confidentiality agreement containing "don't-ask-don't-waive" standstill provisions.[41] Importantly, neither agreement contained a sunset provision.[42] Ultimately, JLL declined an offer of $12 per share for its stock.[43]

Meanwhile, NetSpend began exploring a potential sale to Total System Services, Inc. ("TSYS"), and in the fall of 2012 TSYS expressed interest in acquiring NetSpend through a negotiated transaction.[44] Although NetSpend's history of unsuccessful transactions made it hesitant to commit to a sales process, the board instructed management to begin discussions with TSYS.[45]

In December 2012, TSYS expressed interest in an all-cash tender offer for NetSpend stock at $14.50 per share, a premium of more than 24% to NetSpend's previous closing price. In its expression of interest, which was subject to due diligence and execution of retention agreements with certain members of senior management, TSYS requested a six-week exclusivity period.[46]

After retaining counsel and Bank of America Merrill Lynch ("BofA") as its financial advisor and reviewing a list of nine potential alternative acquirers, the NetSpend board declined TSYS' request for exclusivity.[47] NetSpend nevertheless decided not to contact additional potential acquirers because of concern about leaks and rumors suggesting that the company was for sale.[48]

NetSpend advised TSYS that because it was not for sale, "convincing the Board to depart from the company's existing business strategy would require a substantial improvement in TSYS' proposed price."[49] At the same time, NetSpend gave notice to one company, as required under a pre-existing commercial contract, that it was considering a sale.[50] Although identified by BofA as a potential credible purchaser, the counter-party never expressed interest in a possible transaction.[51]

During December 2012 and January 2013, NetSpend and TSYS negotiated potential transaction terms. When NetSpend sought a go-shop clause, TSYS declined, suggesting that NetSpend shop the company while TSYS conducted due diligence. The NetSpend board decided not to contact other potential bidders because of (1) concerns about a possible leak, (2) the fact that the contractual counter-party showed no interest after receiving notice of a potential sale, (3) BofA's recommendation that no higher bid would emerge, (4) concerns about a possible loss of leverage vis-à-vis TSYS if no other bidder emerged, (5) the board's belief that other bidders would not be deterred by the termination fee and no-shop clause, and (6) the fact that the board could accept a superior offer after signing.[52]

On January 26, 2013, after further negotiations and "multiple additional counter-offers," the parties agreed to a price of $16.00 per share, which represented a 45% premium over the stock price one week before the deal.[53] Over the next several weeks, the parties negotiated the merger agreement and various other agreements required as conditions to TSYS' offer, including certain employment agreements.

On February 19, 2013, the NetSpend board approved the transaction. During the board meeting, BofA presented its fairness opinion, which utilized several analyses, including a discounted cash flow analysis ("DCF"), a comparable companies analysis, and a comparable transactions analysis.[54] The $16.00 per share transaction price was well below the $19.22 to $25.52 fairness range derived by the DCF.[55]

That same day, the parties signed a merger agreement which included a 3.9% termination fee, matching rights, and voting agreements locking up approximately 40% of the stockholder vote.[56] In addition, the merger agreement prohibited NetSpend from waiving the don't-ask-don't-waive standstill provisions of the confidentiality agreements with the two parties who previously considered purchasing JLL's stake in NetSpend.

In the ensuing litigation, the plaintiff sought to enjoin the transaction based upon various purported deficiencies in the sales process. Among other things, the plaintiff claimed that the NetSpend board (1) allowed a conflicted CEO to lead negotiations for NetSpend, (2) did not reach out to other potential bidders, (3) relied on a weak fairness opinion by BofA, (4) agreed to unreasonable deal protection devices, and (5) improperly kept in force the don't-ask-don't-waive standstill provisions with the two potential acquirers of JLL's stock.[57]

The Court found that it was reasonable to allow the CEO to negotiate on NetSpend's behalf.[58] The Court expressed skepticism that the plaintiff could show that the CEO was conflicted based on his potential future employment by TSYS. In any event, the board mitigated any conflict by closely supervising the negotiations and instructing the CEO not to discuss any management agreements with TSYS until the material deal terms were agreed upon.[59]

The Court also found that NetSpend's decision to engage in negotiations with only a single bidder was not *per se* unreasonable.[60] The board's pursuit of a single-bidder strategy was a "deliberate strategy to maximize stockholder value," which the board adopted based upon both its own transactional experience as well as information provided by the company's financial advisor.[61]

The Court found that the strategy used to implement the single-bidder approach—pitching the company as "not for sale," while intimating that it *could* be for sale at a high enough price—was "within the range of actions a reasonable board could take to maximize shareholder value" for several reasons.[62] First, the directors were "sophisticated professionals with extensive business and financial expertise."[63] Second, "the [b]oard had several indicia as to how the market valued NetSpend," including the current stock price, the price at which the 31% stockholder was willing to sell its position, a prior merger offer, and the failure of the contractual counterparty to show any interest in the company.[64] Third, based upon its prior experience, "the [b]oard was well-informed about the process of selling the Company."[65] Taken together, the board had sufficient knowledge "to reasonably determine that a single-bidder process was in the best interest of the Company."[66]

The Court cautioned, however, that when a board forgoes a market check in favor of a single-bidder strategy, "that decision must inform its actions regarding the sale going forward."[67] Having elected to pursue a single-bidder strategy, the board was required to carefully review the other aspects of the sales process, including the terms of any resulting agreement, to ensure that they were reasonably designed to maximize stockholder value in light of the strategy being pursued by the company.

It was against this backdrop that the Court evaluated the plaintiff's challenge to other aspects of the sale process. First, the Court found four deficiencies in BofA's "ambiguous" and "weak" fairness opinion: (1) two of its analyses were based on the prevailing stock price, which the board previously indicated was an unreliable measure of value; (2) the comparable company analysis was based on dissimilar companies; (3) the precedent transaction analysis used dissimilar transactions that predated the 2008 financial crisis; and (4) the lower bound of the valuation range in the DCF analysis *exceeded* the merger consideration by roughly 20%—indicating "that the TSYS offer was grossly inadequate."[68] Although the weakness of the opinion did not necessarily mean the price was unfair, it suggested that the opinion was a "poor substitute for a market check."[69]

The Court next turned to what it described as the merger agreement's "relatively mild" deal protection measures. The combination of the 3.9% termination fee, matching rights, and voting agreements locking up 40% of the stockholder vote (which were co-terminus with the merger agreement and therefore subject to the same fiduciary-out provisions) posed "no credible barrier to the emergence of a superior offer."[70] The Court likewise did not take issue with the inclusion of a no-shop provision, to which NetSpend only agreed after extracting a raised price and lower termination fee from TSYS.

The Court did, however, fault other aspects of the board's process. In light of the single-bidder sale process and the no-shop provision, by failing to terminate the don't-ask-don't-waive standstill provisions (and instead agreeing not to waive them absent TSYS' consent), "the [b]oard blinded itself to any potential interest" from potential buyers who had previously explored the purchase of JLL's stock.[71] Indeed, and perhaps more troubling for the Court, the NetSpend board "did not consider, or did not understand, the import of the [don't-ask-don't-waive] clauses and of their importation into the Merger Agreement."[72] This undermined any suggestion that the sales process was "informed, logical and reasoned."[73]

More broadly, the lack of a market check, when combined with the reliance upon BofA's "weak" fairness opinion, certain deal protection measures (including the don't-ask-don't-waive clauses), and a quick post-signing closing (which prevented the market from evaluating the transaction and making competing bids), resulted in a process that was not reasonably designed to maximize stockholder value. The Court therefore concluded that it was reasonably likely that the defendants would fail to meet their burden at trial of proving that they maximized value through an informed process.[74]

The Court likewise found that the plaintiff faced irreparable harm because (1) the stockholders' decision whether to tender their shares or seek appraisal was risky "in light of the lack of a reliable indication of value and the substantial market premium which the deal provides," and (2) money damages would be not be available because the directors were exculpated from liability under a "102(b)(7)" charter provision.[75]

Nevertheless, the balance of the equities weighed heavily against the issuance of an injunction. The absence of a competing bid in the three months following the announcement of the transaction suggested that an injunction would "likely be of marginal benefit" to stockholders.[76] Moreover, the plaintiff failed to demonstrate the "magnitude" of the harm it faced; despite criticizing the board's process, the plaintiff offered "no competing evidence of value."[77]

In contrast, if a material change in circumstances during an injunction period caused the deal to fail, stockholders could potentially lose the opportunity to receive a "substantial premium over the market value of their shares."[78] Following "established precedent disfavoring injunctions of premium deals in the absence of an alternative bidder," the Court denied the plaintiff's motion for preliminary injunction.[79]

Key Takeaways

Taken together, *Plains* and *NetSpend* provide important insights for boards of directors and the practitioners who counsel them on how to manage litigation risk in single-bidder transactions.

A board may authorize, but should carefully supervise, management-led negotiations. In both *Plains* and *NetSpend*, the Court of Chancery rejected claims that the board acted unreasonably by permitting potentially conflicted management to lead negotiations, relying upon the boards' awareness of the potential conflicts and supervision of negotiations.[80] Because the scope and severity of conflicts vary widely, however, boards should carefully consider in each case whether a potential or actual conflict exists and, if so, whether it can be adequately managed or mitigated. Of course, the independence of, and level of supervision by, a board or special committee is an important factor that will be considered by the Court.[81]

A board that pursues a single-bidder strategy should have a clearly articulated and reasonable business justification for doing so. In both *Plains* and *NetSpend*, the target board had a credible business justification for pursuing a single-bidder strategy. In *Plains*, the company did not pursue other bidders because it was "focused on completing a deal with Freeport or going forward as a stand-alone company." The NetSpend board had a demonstrable reason to believe that no other bidders would emerge, and believed that pursuing other bidders could undermine its negotiating leverage. Regardless of the reason, the pursuit of a single bidder should result from a considered board decision based upon a clearly articulated rationale.

A board pursuing a single-bidder strategy should have knowledge of the relevant markets and sufficiently reliable evidence of value to justify choosing to proceed with a single bidder. Pursuit of a single-bidder strategy "requires a board to rely more extensively on its own knowledge and the knowledge of its financial advisor in determining whether the proposed transaction is fairly priced."[82] As a result, the stronger this evidence, the more likely the Court will be to bless a single-bidder strategy.

Directors can look to a variety of sources of indicia of a company's market value. Stock price, past offers, prior negotiations and transactions, and the market's reaction to other indications that the company could be for sale are among the many factors that a board may consider.[83] It is important to remember that because the board will be relying more heavily on such evidence, any weaknesses in that evidence—like the issues that plagued the BofA report in *NetSpend*—will put the board's decision at risk.

A board that elects to pursue a single-bidder strategy should be "particularly scrupulous" in ensuring it possesses reliable evidence of the fairness of the transaction. This requires an analysis of not only the reliability of the evidence of value that the board receives, but an assessment of whether the structure of the transaction (including deal protection measures) in any way impedes the collection and assessment of relevant evidence. As *NetSpend* makes clear, where there are flaws in that evidence (as in the BofA fairness opinion) or barriers to its collection (such as don't-ask-don't-waive standstill provisions), the litigation risk increases significantly.

The greater the opportunity for a post-agreement offer, the more comfortable the Court will be. One of the primary differences between *Plains* and *NetSpend* concerned the potential for a post-agreement offer. In *Plains*, "the combination of mild deal-protection devices … and a five-month lag in time between the announcement of the merger and the merger's closing … created a de facto market check."[84] In contrast, the NetSpend board "blinded itself to any potential interest" from "the only two entities which had recently expressed an interest in" the company by agreeing not to seek waiver of the don't-ask-don't-waive provisions of the confidentiality agreements.[85] And the directors appeared to the Court to have agreed to maintain those prohibitions through the merger agreement without even understanding what they had done.[86] While a considered board decision to retain don't-ask-don't-waive provisions could be defensible, it will be very difficult for such provisions to survive in a single-bidder transaction absent a compelling justification.

In addition to the underlying deal-protection measures, another important factor that may affect the likelihood of a post-agreement offer is the length of time between signing and closing. The longer the market has to analyze the proposed transaction, the greater potential that another interested buyer may emerge. While in *Plains* Vice Chancellor Noble had no doubt "that the Board allowed a sufficient time for competing acquirers to emerge,"[87] *NetSpend* lacked "an anticipated leisurely post-agreement process which would give other suitors the opportunity to appear."[88]

The Court will continue to apply Revlon to mixed-consideration transactions. The *Plains* decision reiterates the Court's view that, absent a contrary ruling by the Delaware Supreme Court, the *Revlon* standard applies to transactions in which the merger consideration is 50% cash and 50% stock.[89] The Delaware Supreme Court has not yet addressed this issue directly and, therefore, has not established what percentage of cash merger consideration will trigger *Revlon* review.[90] At this point, however, it appears that threshold is somewhere below 50%.[91]

A Board is not obligated to obtain a price collar or equity kicker. Even where, as in *Plains*, stockholders are to receive at least some stock consideration, there is no *per se* obligation to obtain an equity kicker or price collar, even in a single-bidder transaction. Whether to seek such terms or drop any requests in negotiations are business decisions reserved for the judgment and discretion of the board and will be respected by the Court assuming a reasonable and deliberate process.[92]

The Court remains reluctant to enjoin premium transactions in the absence of alternative bids or viable disclosure claims. Even upon a finding of a probability of success on plaintiff's claims and irreparable harm absent injunctive relief, the Court is reluctant to enjoin a premium transaction where the plaintiff has not alleged viable disclosure claims and no competing bid exists.[93] In such cases, counsel must remain particularly mindful of the risk of post-closing damages actions.[94]

NOTES

1. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).
2. *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 192 (Del. 2007) (citing *Revlon*, 506 A.2d at 184 n. 16).
3. 2013 WL 1909124, at *7 (Del Ch. May 9, 2013).
4. 2013 WL 2181518, at *1 (Del. Ch. May 21, 2013).
5. *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989).
6. *Plains*, 2013 WL 1909124, at *1.
7. *Id*. at *5.
8. *Id*. at *2. While the Court did not go into detail on this issue, Plains' public filings indicate that the Plains board considered a merger with Freeport despite its prior decision not to sell the company due to unique strategic advantages offered by the transaction and the opportunity for Plains stockholders to participate in the future growth of the combined entity.
9. *Id*.
10. *Id*.
11. *Id*. at *1, 6.
12. At the time of the agreement, the transaction was valued at $50 per share. However, a post-announcement decline in Freeport's stock value resulted in a combined value of less than $50.
13. *Plains*, 2013 WL 1909124, at *6.
14. *Id*. at *3.
15. *Id*.

16. *Id*. at *3, 7. The plaintiffs also alleged that the proxy statement contained both misleading and inadequate disclosures, as well as material misstatements. *Id.* The Court rejected these claims.
17. Because both cases discussed herein were before the Court on a motion for a preliminary injunction, the decisions reflect initial conclusions concerning the plaintiffs' ultimate likelihood of success on the merits based upon a limited factual record, not final factual determinations.
18. *Id.* at *5.
19. *Id*. (citation and internal quotations omitted).
20. *Id*.
21. *Id*.
22. 567 A.2d 1279.
23. *Plains*, 2013 WL 1909124, at *5 (quoting *Barkan*, 567 A.2d at 1287).
24. *Id*. at *6.
25. *Id*.
26. *Id*.
27. *Id*.
28. *Id*. at *5 (citation omitted).
29. *Id*. at *7.
30. *Id*. The Court also rejected plaintiffs' disclosure claims. *Id.* at *7-10.
31. *NetSpend*, 2013 WL 2181518, at *2.
32. *Id*.
33. *Id*.
34. *Id*.
35. *Id*.
36. *Id*.
37. *Id*.
38. *Id*.
39. *Id*. at *3.
40. *Id*.
41. *Id.* Don't-ask-don't-waive provisions recently have been a topic of interest in the Court of Chancery. *See, e.g.*, *In re Complete Genomics, Inc. S'holder Litig.*, C.A. No. 7888-VCL (Del. Ch. Nov. 27, 2012) (Transcript Opinion) (enjoining don't-ask-don't-waive provision that handcuffed board's ability to fulfill its "ongoing statutory and fiduciary obligations to properly evaluate a competing offer, disclose material information, and make a meaningful recommendation to its stockholders"); *In re Ancestry.com S'holder Litig.*, C.A. No. 7988-CS (Del. Ch. Dec. 17, 2012) (Transcript Opinion) (stating that Delaware does not have a *per se* rule against don't-ask-don't-waive provisions, but such provisions will be closely scrutinized by the Court, and enjoining transaction pending issuance of supplemental disclosures regarding don't-ask-don't-waive provisions).
42. *NetSpend*, 2013 WL 2181518, at *3.
43. *Id*. at *4.
44. *Id*.
45. *Id*.
46. *Id*.
47. *Id*. at *5.
48. *Id*.
49. *Id*.
50. *Id*.
51. *Id*.
52. *Id*. at *6.
53. *Id*. at *8-9.
54. *Id*. at *9.
55. *Id*.
56. *Id*.
57. *Id*. at *12. As in *Plains*, the plaintiff also alleged disclosure claims, on which the Court found that the plaintiff was not likely to prevail. *Id.* at *10.
58. *Id*. at *13.
59. *Id*. at *13. The Court likewise rejected the suggestion that the four directors affiliated with NetSpend's two largest stockholders, one of which was JLL, were conflicted. Not only did stock ownership generally align their interests with those of other stockholders, but the chronology indicated that "JLL was focused on achieving the highest price possible rather than liquidating its interests at a fire-sale price." *Id.* at *11.
60. *Id*. at *13; *see also id*. at *14 (discussing *Barkan*, 567 A.2d 1279 (affirming Court of Chancery's approval of *Revlon*-based duties in relation to board's agreement to management-sponsored leveraged buyout without auction); *Plains*, 2013 WL 1909124, at *5-6 (rejecting stockholder challenge to board's negotiation of transaction with single bidder without pre-signing market check); and *In re Smurfit-Stone Container Corp. S'holder Litig.*, 2011 WL 2028076 (Del. Ch. May 24, 2011) (rejecting stockholder challenge to board's decision to negotiate with single bidder when company had recently emerged from bankruptcy without receiving any takeover bids, a previous bidder had made a much lower offer than the ultimate buyer, and board's financial advisor believed that no higher bid would likely emerge)).
61. *NetSpend*, 2013 WL 2181518, at *15.
62. *Id*.
63. *Id*.
64. *Id*.
65. *Id*.
66. *Id*.
67. *Id*. at *16.
68. *Id*. at *16-17.
69. *Id*. at *16.
70. *Id*. at *17.
71. *Id*. at *19.
72. *Id*.
73. *Id*.
74. *Id*. at *21.

75. *Id*. at *22. Having already rejected plaintiff's disclosure claims, the Court did not find any harm based on a lack of accurate information. *Id*.
76. *Id*. at *23
77. *Id*. at *22-23.
78. *Id*. at *23.
79. *Id*. *See also*, *e.g.*, *In re El Paso Corp. S'holder Litig.*, 41 A.3d 432 (Del. Ch. 2012) (declining to enjoin transaction despite reasonable likelihood of success on merits of plaintiff's claims and showing of irreparable harm where no competing bid had emerged); *In re Delphi Fin. Grp. S'holder Litig.*, 2012 WL 729232 (Del. Ch. Mar. 6, 2012) (same).
80. *See NetSpend*, 2013 WL 2181518, at *13; *Plains*, 2013 WL 1909124, at *5.
81. *See NetSpend*, 2013 WL 2181518, at *1 (finding all directors other than CEO were independent); *Plains*, 2013 WL 1909124, at *5 (same). *Compare In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1010 (Del. Ch. 2005) (declining to enjoin transaction negotiated by target company CEO where "board had regularly monitored the process, controlled managerial conflicts, and met outside the presence of management") *with In re Lear Corp. S'holder Litig.*, 926 A.2d 94 (Del. Ch. 2007) (criticizing process in which special committee tasked conflicted CEO with negotiating merger without direct supervision and requiring additional disclosure regarding the conflict); *Netsmart Techs.*, 924 A.2d at 194 (describing potential conflicts where management conducts due diligence process with potential bidders without supervision of independent directors).
82. *Plains*, 2013 WL 1909124, at *6 (finding that most Plains directors had extensive experience in the relevant industry). *See also NetSpend*, 2013 WL 2181518, at *15 (describing NetSpend directors as "sophisticated professionals with extensive business and financial expertise").
83. For example, in *Barkan*, there was evidence that the market understood that the target company was a likely MBO target for nearly a year before the transaction closed, yet no bid emerged. *Barkan*, 567 A.2d at 1287. Similarly, in *Smurfit-Stone*, the company had recently spent approximately eighteen months in bankruptcy, during which it received no bids. *Smurfit-Stone*, 2011 WL 2028076, at *18.
84. *NetSpend*, 2013 WL 2181518, at *14.
85. *Id*. at *19.
86. *Id*.
87. *Plains*, 2013 WL 1909124, at *6.
88. *NetSpend*, 2013 WL 2181518, at *20. It is unclear, however, exactly how long is sufficient. In *NetSpend,* the board's original negotiated closing timeline of between six and ten weeks was held insufficient to allow competing bids to emerge. Contrast that with *In re Pennaco Energy, Inc. Shareholders Litigation*, where the Court found a period of roughly three weeks, including holidays, sufficient to allow the market to examine the transaction and make any competing bids. 787 A.2d 691, 702-03, 707 (Del. Ch. 2001). *See also* Charles F. Richards and J. Travis Laster, *Return of the Market Check*, INSIGHTS, Vol. 15, No. 6, at 20 (June 2001) (discussing Delaware court opinions relating to post-closing market checks).
89. *See Plains*, 2013 WL 1909124, at *4 n.32 (citing *Smurfit-Stone*, 2011 WL 2028076, at *11-16). Although the Plains board agreed to a deal with a 50/50 cash-stock split, by the time the Court heard the case the ratio had shifted due to a decrease in the stock price of the acquirer. *Plains*, 2013 WL 1909124, at *1.
90. *Smurfit-Stone*, 2011 WL 2028076, at *11-15 (applying *Revlon* to transaction with 50/50 cash-stock consideration split). Delaware courts have indicated on a few instances where the "line" might be drawn. The Supreme Court in *In re Santa Fe Pacific Corp. Shareholder Litigation*, 669 A.2d 59 (Del. 1995) affirmed the Court of Chancery's dismissal of an action alleging that the defendants had breached their *Revlon* duties by agreeing to a merger in which the acquirer would obtain 33% of the target's stock through a cash tender offer, followed by acquisition of the remaining shares in an exchange for the acquirer's stock. The Supreme Court held that *Revlon* did not apply because the plaintiffs failed to allege that "control of [acquirer] and [target] after the merger would not remain 'in a large, fluid, changeable and changing market'" and, consequently, that the target had "decided to pursue a transaction which would result in a sale of control." *Id.* at 71 (citation omitted). *See also In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 732 n.25 (Del. Ch. 1999) (indicating that *Revlon* would apply to transaction with 60% cash consideration), *aff'd sub nom., Walker v. Lukens, Inc.*, 757 A.2d 1278 (Del. 2000); *In re NYMEX S'holder Litig.*, 2009 WL 3206051, at *5-6 (Del. Ch. Sept. 30, 2009) (considering, but ultimately not deciding, whether *Revlon* would apply to transaction with 44% cash consideration); *Steinhardt v. Howard-Anderson*, C.A. No. 5878-VCL (Del. Ch. Jan. 24, 2011) (Transcript Opinion) (discussing whether to shift focus in application of enhanced scrutiny from percent of cash consideration to whether transaction represents the last opportunity for stockholders to have their fiduciaries bargain for a premium for their shares).

91. There also is an open question regarding at what point in time the consideration ratio should be evaluated. *Compare Smurfit-Stone*, 2011 WL 2028076, at *15 n.106 (using ratio when board approved transaction) *with NYMEX*, 2009 WL 3206051, at *5 n.54 (using ratio at closing, rather than ratio on date board approved transaction).
92. *Plains*, 2013 WL 1909124, at *7.
93. *See generally NetSpend*, 2013 WL 2181518, at *22-23.
94. *See* Bradley R. Aronstam and S. Michael Sirkin, *Post-Closing Litigation Risk in Stockholder M&A Actions*, INSIGHTS, Vol. 26, No. 5 (May 2012) (discussing risk of post-closing damages following Court of Chancery's refusal to enjoin a transaction).

The Proxy Put and Fiduciary Duties: A Closer Look at *Kallick v. SandRidge*

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On March 8, 2013, the Delaware Chancery Court issued an opinion in *Kallick v. SandRidge Energy, Inc.*[1] analyzing the fiduciary duties of directors where (1) a dissident shareholder has launched a proxy context seeking to replace the directors that would, if successful, trigger a provision in the company's debt entitling the debt holders to require the company to repurchase the debt (a so-called "Proxy Put" provision) and (2) the incumbent directors have the ability to waive the application of the defensive mechanism by approving the dissident slate for purposes of the debt. The Court found that in this situation directors have an affirmative duty to approve the dissident slate in order to neutralize a change of control provision unless there is a "specific and substantial risk to the corporation or its creditors posed by the rival slate." This case serves as a useful reminder of the scrutiny Delaware courts use to review decisions of the board having the effect of entrenching an incumbent board and highlights the need for directors of Delaware corporations to carefully consider the inclusion of Proxy Puts and similar provisions in debt and other corporate agreements.

Factual Background

In November 2012, frustrated with SandRidge Energy, Inc.'s perceived underperformance, major shareholder TPG-Axon issued a public letter to the SandRidge board calling for an amendment of the company's bylaws to declassify the board, the reconfiguration of the board to include shareholder representatives and the replacement of the company's CEO, Tom Ward. Shortly thereafter, Mount Kellett Capital Management, another large shareholder, issued a similar statement. The board of SandRidge quickly responded by, among other things. adopting a poison pill and amending its bylaws to make it more difficult for shareholders to act by written consent.

TPG then announced its intention to seek a consent solicitation to amend the bylaws to destagger the board and remove and replace the incumbent board. Upon the filing of TPG's preliminary consent solicitation statement with the SEC on December 26, 2012, the board of SandRidge filed its own preliminary consent revocation statement, warning shareholders that the election of a new slate of board members not approved by the incumbent board would trigger a change of control provision in the company's debt. The relevant indentures provided that a change of control mandating such repurchase would occur if, during any two consecutive years, individuals constituting the board of directors at the beginning of that period (including any new directors approved by a two-thirds vote of the existing directors) ceased to constitute a majority. As a result of this so-called "Proxy Put," the company would be required to offer to repurchase $4.3 billion of debt at 101% of par value. The board warned shareholders that the company would not

