WHITE & CASE

Client Alert

Mergers & Acquisitions

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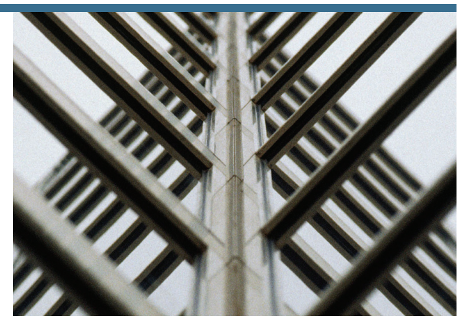

Del Monte: A Disclosure Case or More?

In a decision that was replete with criticism of an M&A process that appears to have achieved superior results, Vice Chancellor Laster of the Delaware Chancery Court temporarily enjoined, for 20 days, the stockholder vote scheduled to approve the leveraged buyout of Del Monte Foods Company. He also enjoined during that period the enforcement of the merger agreement's "no shop" provisions, the buyers' right to match a superior bid and the payment of the break-up fee in certain circumstances, so that such provisions would not deter the emergence of a competing bidder.

In early 2010, Del Monte, with the assistance of its financial advisor, explored strategic alternatives with a handful of private equity sponsors and one strategic bidder. The bidders all executed confidentiality agreements containing "anti-clubbing" provisions to maximize competition among the potential bidders. The Board received five indications of interest but determined not to pursue a transaction. According to the Court, Del Monte specifically instructed its financial advisor to "shut down the process and let the buyers know the Company is not for sale."

In September of 2010, while the original bidders remained bound by the anti-clubbing provisions, the financial advisor allegedly facilitated the pairing of the two highest bidders from the original process. One of these bidders, taking the lead as deal sponsor, delivered a written proposal to Del Monte without disclosing the participation of the other bidder. In response, and eight months after the Board had instructed its financial advisor to shut down the original process, the Board decided to pursue negotiations only with respect to the new proposal and formally "re-engaged" the financial advisor. As negotiations progressed toward a deal, the deal sponsor "formally" approached Del Monte's financial advisor to request permission to include the undisclosed second bidder as part of its consortium. Additionally, the financial advisor, who had a working relationship with the deal sponsor, sought Del Monte's permission to participate in the buy-side financing of the transaction at a time when price had not yet been agreed. Del Monte's Board consented to both requests.

The merger agreement was signed on November 24 and included a 45-day "go shop" window. Del Monte's Board permitted the same financial advisor to run the market check during the go-shop window. No other offer for Del Monte emerged despite the financial advisor having contacted 53 parties, including 30 strategic buyers. Only three parties requested confidentiality agreements, only two parties from the early 2010 process re-engaged and no one expressed interest. The deal price was higher than Del Monte's stock had ever traded and represented a premium of 40 percent over the stock's average closing price for the preceding three-month period.

If you have questions or comments about this Alert, please contact one of the lawyers listed below:

Eric Berg
Partner, New York
+ 1 212 819 8253
eberg@whitecase.com

Glenn Kurtz
Partner, New York
+ 1 212 819 8252
gkurtz@whitecase.com

Gregory Pryor
Partner, New York
+ 1 212 819 8389
gpryor@whitecase.com

John Reiss
Partner, New York
+ 1 212 819 8247
jreiss@whitecase.com

White & Case LLP
1155 Avenue of the Americas
New York, NY 10036
United States
+ 1 212 819 8200

Based on the preliminary factual record, Vice Chancellor Laster determined that the plaintiffs were reasonably likely to prove at trial that Del Monte's Board made the following unreasonable decisions in violation of its fiduciary duties:

- Allowing certain members of the winning consortium to team up, thereby eliminating a potential competing bid.
- Allowing Del Monte's financial advisor to have a lead role in the buy-side financing at a time when the deal price was still in negotiation.

Additionally, the Court determined that it was reasonably likely that the plaintiffs would succeed in their claim that the buyer had aided and abetted the Board's fiduciary duty breaches.

The Court criticizes a number of the financial advisor's activities. Most of the criticism essentially arises from the financial advisor's failure to disclose to Del Monte its efforts to facilitate a transaction. Further factual development at trial may reveal that some of this criticism is unwarranted, particularly in light of the "stop-and-go" nature of the transaction. Rather than breaking any new legal ground, the Court's criticisms should remind advisors and their clients that, for a corporate board to be fully informed as required by Delaware law, complete candor is required.

The Court also strongly criticizes the buyers' alleged breach of the anti-clubbing provisions and the lack of timely disclosure with respect to the formation of the bidding consortium. Further factual development at trial may or may not reveal a basis for money damages, but the decision highlights the breadth of typical anti-clubbing provisions as both a restriction on "arrangements and understandings" between potential bidders and even on preliminary discussions among potential bidders that result in disclosure of "the fact that [a party] is considering a possible transaction…."

Finally, the Court criticizes the financial advisor's role in the financing and its management of the go-shop process. This should not be construed as a broad condemnation of seller advisor participation in buy-side financing or stapled financing in all, or even most, circumstances. Rather, the decision is a reminder that it is critically important that corporate boards actively supervise any auction process to ensure that the board's decisions, including with respect to its advisors and their conduct, are fully informed and designed to benefit the process and its intended outcome. Ultimately, with proper disclosure, a fully informed Board of Directors acting in good faith and reasonably considering all available information could structure an acceptable process in which its financial advisor also provides buy-side financing and manages the go-shop process.

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