

ClientAlert

Mergers & Acquisitions

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No Auction Required – Delaware Supreme Court Affirms Board Flexibility under *Revlon*



Ruling that an active solicitation process is not necessarily required for a target board of directors to satisfy its fiduciary duties in a change of control transaction, the Delaware Supreme Court overturned a preliminary injunction issued by the Delaware Court of Chancery. The Chancery Court's injunction not only enjoined the stockholders of C&J Energy Services, Inc. from approving C&J Energy's merger with a subsidiary of Nabors Industries Ltd., but also imposed a mandatory go-shop in contravention of the no-shop provisions of the merger agreement. In reversing the Chancery Court, the Supreme Court confirmed that transactions which do not include an active sale process are acceptable so long as interested bidders can present, and targets have the ability to accept, a higher value alternative.

In June 2014, C&J Energy and Nabors entered into a merger agreement pursuant to which C&J Energy would merge into a subsidiary of Nabors which would hold Nabors' completions and productions services division. Following the merger, Nabors would hold a majority of the equity in the surviving company. A stockholder of C&J Energy challenged the merger. While the Chancery Court found that the C&J Energy Board was fully informed of its own company's value, and did not find the Board to be conflicted, the Chancery Court determined that there was a "plausible" violation of the Board's fiduciary duties because the Board did not affirmatively solicit offers for C&J Energy either before or after entering the merger agreement with Nabors. On the basis of these findings, the Chancery Court enjoined the merger vote of C&J Energy's stockholders for 30 days and required C&J Energy to shop itself.

The Supreme Court disagreed, finding that the Chancery Court's analysis "rested on the erroneous proposition that a company selling itself in a change of control transaction is required to shop itself to fulfill its duty to seek the highest immediate value." In not requiring boards to actively solicit offers, the Supreme Court confirmed that merger agreements which contain customary "no-shop" and fiduciary out provisions are generally sufficient to satisfy a board's fiduciary duties.

In the Supreme Court's view, no pre- or post-signing affirmative market check was required because "[w]hen a board exercises its judgment in good faith, tests the transaction through a viable passive market check, and gives its stockholders a fully informed, uncoerced opportunity to vote to accept the deal, [the Court] cannot conclude that the board likely violated its *Revlon* duties." The Supreme Court noted particularly that there would be sufficient time before closing "for a serious bidder to express interest and to formulate a binding offer for the C&J board to accept." In addition, a competing bidder did not face a termination fee or other deal protections that were found to be preclusive.

The Supreme Court's decision reaffirms the flexibility boards have in satisfying their fiduciary duties in change of control transactions. A board of directors is permitted to pursue a change of control transaction "so long as the transaction is subject to an effective market check under circumstances in which any bidder interested in paying more has a reasonable opportunity to do so." A market check does not require an auction or other active solicitation "so long as interested bidders have a fair opportunity to present a higher-value alternative and the board has the flexibility to eschew the original transaction and accept the higher-value deal."

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