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Delaware Court Rejects Per Se Rules for Financial Advisor Proxy Disclosure

In a recent ruling, the Delaware Court of Chancery rejected an attempt to enjoin a merger vote on the basis of allegedly insufficient disclosure in the merger proxy. In re BEA Systems, Inc. Shareholder Litigation, C.A. No. 3298 (March 26, 2008) (Lamb, V.C.). The ruling confirmed that Delaware's materiality standard fully applies to claims relating to the disclosure of investment banker analyses and also highlighted the importance of transactional and market context in evaluating claims that seek to interfere with the shareholder decision-making process.

The case arose out of Oracle's $8.5 billion all-cash agreement to acquire BEA Systems. Plaintiffs sought to enjoin the BEA shareholder vote on the grounds that disclosures in BEA's proxy statement were insufficient. Noting that the transaction was an arms-length negotiated deal priced at a significant premium, the Court observed that current "disruptions in the marketplace" "make it more risky … for the court to undertake to interfere with the completion of a transaction." The Court further observed that these market conditions "would give any judge even greater pause before moving to restrain a transaction unless very substantial grounds existed that required such action." The Court thus concluded that "given a great many factors that are either part of this transaction or part of the current market environment in which we all live, this Court would hesitate before interfering with the completion of this transaction on less than a compelling record."

Turning to the particulars of plaintiffs' disclosure claims, the Court rejected plaintiffs' claims that aspects of a financial advisor's analysis are subject to mandatory disclosure in the merger proxy. The plaintiffs had argued that certain financial data considered by BEA's financial advisor—including potential scenarios as to the company's future financial performance, synergy analyses drawn from public sources regarding other transactions, and preliminary discounted cash flow analyses—had been presented to the board and thus must be disclosed. Finding that neither the financial advisor nor the board considered the contested data reliable or actually relied upon that data in forming their views on valuation, the Court concluded that there had been no showing that such information was material, and that disclosure of such unreliable information "could well mislead shareholders rather than inform them." In denying the injunction, the Court made clear that "the fact that something is included in materials that are presented to a board of directors does not, ipso facto, make that something material." The Court likewise rejected plaintiffs' request for disclosure of further detail regarding the financial advisor's contingent fee arrangement, here again holding that plaintiffs had made no showing of materiality.

The BEA ruling confirms that the Court of Chancery is closely attuned to the present market turbulence and the risks that can result from transactional delay. The ruling also confirms that Delaware will continue to avoid *per se* disclosure standards, including as to financial projections and other aspects of a financial advisor's work. Case-specific materiality remains the touchstone for disclosure, and merger proxies should be carefully prepared to comply with the securities laws and present the material information stockholders require to make an informed decision.

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