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Court Rejects Challenges to Sale Process and Disclosures in *Micromet* Litigation

The Delaware Court of Chancery recently affirmed a board's sale process by denying a motion for a preliminary injunction in *In re Micromet, Inc. Shareholders Litigation*. The court upheld the board's decision not to contact financial buyers and to limit its pre-signing market check to a small group of strategic buyers with whom the target company had prior dealings. The court also reaffirmed that the "fair summary" standard for providing disclosure of the financial analyses underlying a fairness opinion requires just that—a fair summary. It generally does not require disclosure of information that was not relied upon by the financial advisor in rendering its fairness opinion, nor does it require disclosure of the specific rationale underlying certain analyses and assumptions.

Background

In 2011, Micromet, Inc., a biopharmaceutical company, began exploring a potential transaction with Amgen, Inc. Not satisfied with Amgen's initial offer, Micromet entered into discussions with other pharmaceutical companies to consider potential partnerships for the development of one of its lead product candidates. After Micromet announced promising results from its clinical trials of that product, however, Amgen increased its offer. In response, Micromet's board authorized management to enter into negotiations with Amgen. It also directed its financial advisor to contact the pharmaceutical companies that had previously discussed the potential partnership to determine whether they might be interested in acquiring Micromet. The financial advisor contacted seven companies, three of which expressed interest but ultimately withdrew from the sale process. On January 26, 2012, Micromet announced that it had entered into a merger agreement with Amgen offering its shareholders $11.00 per share, a 22% increase over Amgen's initial proposal and a premium of approximately 37% to Micromet's trading price.

Court of Chancery's Decision

Board Discharged its Revlon Duties Through a Reasonable Market Check

The court affirmed that *Revlon's* enhanced scrutiny is a reasonableness standard applied in change-in-control transactions to determine whether the directors have obtained the best price reasonably available. Applying that standard, the court found that it was reasonable for Micromet to have conducted a narrow pre-signing market check limited to the pharmaceutical companies that had previously considered a potential partnership with Micromet, as the board believed those parties were most likely to be interested in acquiring Micromet and also had the financial capabilities to consummate an acquisition. Six of the seven companies also had conducted due diligence on Micromet when exploring the partnership.[1] "Thus,

[1] The court also held that a one-week period of data room access for the potential buyers did not appear unreasonably short before requesting preliminary indications of interest. The court observed that six of these buyers already had conducted due diligence on Micromet's leading product, and none cited the short time frame as a reason for not submitting an offer.

these companies knew about and were interested in Micromet and presumably understood the potential of [its leading product] for purposes of any offer they might make."

The court also concluded that the board's decision not to contact financial buyers during the pre-signing market check was reasonable. It observed that "Micromet's primary business strategy involved collaborating with larger pharmaceutical companies in the commercialization and distribution of its drugs" and that "Micromet needed not only capital, but technical expertise, to realize the full potential value of its product pipeline." As a result, Micromet's board "reasonably could have concluded that financial buyers would perceive less synergies than a strategic buyer and be less likely to make a topping bid in a billion-dollar deal for the Company." The court also found that the deal protections in the merger agreement were not likely to be found preclusive.

Disclosure of Financial Advisor's Analysis

The court also applied the "fair summary" standard articulated by previous Court of Chancery decisions regarding disclosure of the financial analyses underlying a fairness opinion. This standard requires companies to provide stockholders with a "fair summary of the substantive work performed by the investment bankers."[2] With this standard in mind, the court found that the plaintiffs were unlikely to succeed on their disclosure claims:

- Micromet was not required to explain why its financial advisor chose a particular probability of success rate relating to Micromet's clinical trial drugs. Since the success rate itself was disclosed, additional information would not "significantly alter the total mix of available information."
- Micromet was not required to disclose its financial advisor's sum of the parts discounted cash flow analysis. Although this analysis was prepared and shared with the board, the court stated that it was not relied upon by the financial advisor in providing its fairness opinion, and that the ranges it generated did not alter the total mix of information relative to the valuation ranges already disclosed.
- Micromet was not require to disclose management's "upside case" projections. The court found that the upside projections were not relied upon by the financial advisor, and Micromet's management testified that they were not realistic. Importantly, the company did disclose its baseline projections, including projected revenue, costs, earnings before interest and tax (EBIT), and free cash flows.

Disclosure of Financial Advisor's Compensation and Interest

The court also rejected plaintiffs' disclosure claims relating to Micromet's financial advisor. Micromet had disclosed that its financial advisor would be entitled to a $15 million advisory fee that was contingent on the closing of the transaction. It also had disclosed that its financial advisor had earned $5 million in fees from Amgen during the past two years. Nevertheless, the plaintiffs argued that Micromet needed to disclose the amount of other fees that it had paid to its financial advisor in the past. The court found that plaintiffs "fail[ed] to provide any persuasive explanation … as to why the actual amount of fees paid by Micromet … would be material" and that "[t]his is not a situation in which Micromet, apart from Amgen, would be a potential source of future business" for the financial advisor.

Finally, the court rejected plaintiffs' argument that Micromet needed to disclose the specific amount of Amgen stock held by its financial advisor. The court noted that most of the financial advisor's $336 million position was held on behalf of clients, and that it collectively represented 0.16% of the financial advisor's overall investment holdings. The court concluded that the plaintiffs "did not present any more detailed evidence from which the Court reasonably could infer that the size and nature of [the financial advisor's] holdings … would be likely to impede its ability effectively and loyally to perform its assignment for

[2] *In re Pure Resources, Inc. S'holders Litig.*, 808 A.2d 421, 449 (Del. Ch. 2002).

Micromet." This contextual analysis should be compared to the Court of Chancery's recent decision in *In re El Paso Corp. Shareholder Litigation*, where the court was critical of conflicts of interest where the seller's financial advisor had a $4 billion investment in the buyer.

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