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Lessons of *Del Monte Foods* For Companies Running (or Considering) a Sale Process

In In re Del Monte Foods Company Shareholders Litigation,[*] Vice Chancellor Travis Laster preliminarily enjoined a shareholder vote on an acquisition of Del Monte Foods by a group of private equity firms based on a preliminary finding that the sales process was tainted by the misconduct of the company's investment banker, with the knowing participation of the buyers. While the company had already mooted the plaintiffs' disclosure claims through a supplemental proxy statement, the court delayed the vote for a period of 20 days, during which time the "no shop", break-up fee and matching right provisions of the merger agreement would not apply, in order to enable competing bidders to make proposals.

The court stated, based on the limited record before it, that "it appears that the Board sought in good faith to fulfill its fiduciary duties," but failed to do so because it was misled by its investment bank which had "secretly and selfishly manipulated the sale process." Among other troubling facts (as found by the Court on a preliminary record), Barclays Capital, the company's investment bank, had not disclosed to the Board that: prior to its initial retention it had suggested to KKR (the lead sponsor) and other PE firms the possibility of bidding for Del Monte; from the beginning it intended to seek to provide financing to the buyer; that some months after the Board had terminated the process, it had suggested (without client authorization) to KKR/Centerview Partners (which had been working jointly from the beginning) and Vestar Capital, the two sponsors that had been high bidders during the prior period (Vestar having made it clear that it would need a partner to have sufficient equity) that the time was right to try again and suggested that they team up, which the Court viewed as a violation of the customary "anti-teaming" provisions contained in the confidentiality agreements; and while deal price negotiations were ongoing, Barclays sought and obtained KKR's agreement that it could provide a portion of the financing before it sought and obtained the company's authorization to do so the next day without disclosing such prior agreement. The Court also found, based on the preliminary record, that Barclays, with the sponsors' knowing participation, intentionally concealed Vestar's involvement for over a month. Because Barclays was going to provide buy-side financing, the company obtained (at additional cost) a second fairness opinion from Perella Weinberg. Finally, despite its apparent conflict, Barclays ran the "go-shop" process and, according to the

[*] C.A. No. 6027-VCL (Del. Ch. Feb. 14, 2011).

Court's preliminary findings, after Barclays disclosed to KKR the efforts of Goldman Sachs to replace it in that process, KKR invited Goldman to participate in the syndication of its acquisition financing.

While on a fully-developed record it may turn out that some of the facts are not as preliminarily found by the Court in granting the preliminary injunction, the implications of the opinion for companies and Boards running or considering a sale process are substantial. While differing facts and circumstances can affect the analysis and conclusions, generally:

- Boards should consider instructing their investment banks (possibly in the engagement letter itself) that, without prior Board approval, they should not suggest to any prospective buyer that they would be interested in providing financing and, if the subject is raised by a bidder, should promptly so advise the Board and not respond until instructed by the Board.

- Boards faced with a request to allow its investment bank to provide buy-side financing should generally grant approval only if they perceive that the Company or its shareholders will benefit from doing so – e.g., by increasing the chance that bids will be made and/or closed or making a higher price more likely.

- Except in the context of stapled financing offered to all bidders as authorized by the Board, if a Board decides it is beneficial to allow its investment bank to offer financing to a bidder, it should generally do so only after the deal price and other key terms have been agreed <u>or</u> if the company has a second financial advisor who can and will take over (or play an active role in monitoring) the sale process.

- Before authorizing the company's investment bank to offer any form of buy-side financing to one or more bidders, the Board should generally consider who the bidders are, whether a conflict of interest is likely to develop, and the implications of that conflict. The Board should consider involving a second banker to run (or, if appropriate, jointly run or actively monitor) the sale process (including any go-shop or window shop process), not merely to provide a fairness opinion, and may wish to consider asking the first investment bank to bear some of the expense of the second firm's fees under at least some scenarios.

- At the beginning of any sale process, the Board may wish to ask the investment bank about any conversations it has had in the recent past with prospective acquirers about their potential interest in acquiring the Company. This is not to suggest that such prior conversations should prevent retention of that investment bank, but just that it may be helpful for the Board to know about conversations to date in deciding whether to initiate a process and in evaluating alternatives.

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