October 2016

Weil

Securities Litigation Alert

Court of Chancery's *Nguyen* Decision Dismisses Post-Closing Disclosure Claims and Reinforces Preference for Disclosure Claims to be Addressed Pre-Closing

By Stacy Nettleton and Christine Di Guglielmo

The Delaware Court of Chancery's September 28, 2016 decision in *Nguyen v. Barrett,* C.A. No. 11511-VCG, dismisses disclosure claims following the closing of a two-step merger. The decision discusses the different pleading standards applicable to disclosure claims considered pre- and post-closing, reiterates that disclosure claims are best addressed pre-closing, and suggests, without deciding, that claims that are pled but not pursued pre-closing may be waived. The decision also indicates that directors' reliance on a pre-closing determination by the Court that the plaintiff's disclosure claims were not colorable may offer the directors protection against post-closing claims that the disclosures were made in bad faith.

Background

On September 2, 2015, the board of directors of Millennial Media, Inc. (Millennial) approved a cash-out merger with AOL, Inc. (AOL) pursuant to which Millennial's stockholders received $1.75 per share in cash (the Merger). The Merger was structured as a two-step transaction under Section 251(h) of the Delaware General Corporation Law (DGCL). The first-step tender offer commenced on September 18, 2015, and Millennial filed a 14D-9 Solicitation/Recommendation Statement (the Proxy) with the SEC that same day.

The plaintiff, a Millennial stockholder, alleged that the members of Millennial's board of directors breached their fiduciary duties of care and loyalty by failing to obtain a fair price or follow a fair process, and that AOL aided and abetted the alleged breaches of fiduciary duties. After the Proxy was filed, the plaintiff amended his complaint to add "roughly thirty alleged disclosure violations" and moved for a preliminary injunction based on only one of the disclosure claims: a claim that the Proxy should have disclosed unlevered, after-tax free cash flow projections that were used by Millennial's financial advisor in performing its valuation analyses. The Court of Chancery denied the plaintiff's motion for preliminary injunction, concluding that the Proxy accurately disclosed that the financial projections were prepared by the financial advisor and that Delaware case law holds that banker-derived financial projections need not be disclosed, and rejected the plaintiff's argument that all inputs provided by management on which the financial advisor bases its valuation must be disclosed. The plaintiff unsuccessfully sought an interlocutory appeal, and the Merger closed on October 23, 2015.

On January 4, 2016, the plaintiff filed a second amended complaint that, among other things, narrowed the disclosure claims that he was pursuing post-closing to three: the financial projections claim that the Court had addressed pre-closing, a claim alleging that the Proxy failed to sufficiently describe the contingent nature of the financial advisor's fees, and a third claim that the plaintiff effectively waived during the briefing of the defendants' motion to dismiss.

The Court of Chancery's Decision

In a Memorandum Opinion, Vice Chancellor Glasscock granted the defendants' motion to dismiss. The Court contrasted the pleading standard applicable to a pre-closing disclosure claim, when "a plaintiff must demonstrate 'a reasonable likelihood of proving that the alleged omission or misrepresentation is material'" in order to obtain a preliminary injunction, with the standard applicable to a post-closing disclosure claim for damages, when "a plaintiff must allege facts making it reasonably conceivable that there has been a *non-exculpated breach* of fiduciary duty by the board in failing to make a material disclosure." The Court stated that where a DGCL Section 102(b)(7) exculpation provision shields the directors from claims for breach of the duty of care, post-closing disclosure claims will survive dismissal only if the plaintiff demonstrates "that a majority of the board was not disinterested or independent, or that the board was otherwise disloyal because it failed to act in good faith, in failing to make the material disclosure."

The Court dismissed the plaintiff's claims because the amended complaint did not sufficiently plead disloyalty. The Court held that even if it determined that the failure to disclose the financial projections was a material omission, the plaintiff had "failed to plead facts such that it is reasonably conceivable that the allegedly incomplete disclosure was made by the board disloyally or in bad faith." The only conflict that the plaintiff alleged for six of the seven directors was that the transaction would trigger accelerated vesting of their stock options. The Court concluded that those allegations were insufficient to overcome the presumption that the directors were independent and disinterested, and that the plaintiff therefore had not pled facts showing that a majority of the board was interested in the transaction. The Court also determined that the facts alleged did not support an inference that the board acted in bad faith in omitting the allegedly material information. Notably, the Court pointed to its determination at the preliminary injunction stage that the plaintiff's claim with respect to the financial projections was not colorable, and observed that "the Defendants presumably relied on the preliminary conclusion by this Court, which was undisturbed on appeal by the Supreme Court."

The Court also held that the plaintiff had failed to plead disloyalty with respect to his claim that the Proxy omitted material information concerning how much of the fee payable to Millennial's financial advisor was contingent on the closing of a transaction. Defendants argued that the plaintiff had waived this claim by alleging it among the dozens of disclosure claims pled pre-closing, but not pressing it during the preliminary injunction phase of the case. The plaintiff responded that the claim should not be deemed waived because recent decisions of the Court of Chancery had "indicated a disposition toward addressing disclosure claims post-close." The Court observed that disclosure claims implicate two concerns—the stockholders' right to a fully informed vote, and potential damages—and stated that while damages can be awarded post-closing, the right to an informed vote is "irretrievably lost" once the vote occurs. Thus, the Court reiterated that "the preferred method of vindicating truly material disclosure claims is to bring them pre-close, at a time when the Court can insure an informed vote," and indicated that incentives might be properly aligned if disclosure claims that are pled but not pursued pre-closing are deemed to be waived. The Court did not ultimately decide the waiver issue, however, as it determined that the plaintiff had failed to plead that the disclosure regarding the contingency of the fee was insufficient or that any omission was made in bad faith.

Securities Litigation Alert is published by the Securities Litigation practice of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com.

If you have questions concerning the contents of this issue, or would like more information about Weil's Securities/M&A Litigation practice, please speak to your regular contact at Weil, or to the practice group leaders listed below:

Practice Group Leaders:

Joseph S. Allerhand (NY)	Bio Page	joseph.allerhand@weil.com	+1 212 310 8725
John A. Neuwirth (NY)	Bio Page	john.neuwirth@weil.com	+1 212 310 8297

Authors:

Stacy Nettleton (NY)	Bio Page	stacy.nettleton@weil.com	+1 212 310 8442
Christine Di Guglielmo (DE)	Bio Page	christine.diguglielmo@weil.com	+1 302 656 6600

© 2016 Weil, Gotshal & Manges LLP. All rights reserved. Quotation with attribution is permitted. This publication provides general information and should not be used or taken as legal advice for specific situations that depend on the evaluation of precise factual circumstances. The views expressed in these articles reflect those of the authors and not necessarily the views of Weil, Gotshal & Manges LLP. If you would like to add a colleague to our mailing list, please click here. If you need to change or remove your name from our mailing list, send an email to weil.alerts@weil.com.