CASE NOTE

IF ALL INVESTMENT BANKS ARE CONFLICTED, WHY BLAME BARCLAYS? AN EXAMINATION OF INVESTMENT BANK FEE STRUCTURES AND *DEL MONTE FOODS*

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INTRODUCTION

In February 2011, Vice Chancellor Laster held in *In re Del Monte Foods Co. Shareholders Litigation* that the Del Monte Foods board of directors breached its duty of care to the Del Monte stockholders by failing to identify and guard against its investment banker Barclays' conflicts in a merger transaction with Blue Acquisition Group.[1] The court identified four instances of misbehavior throughout the sale process: (1) Barclays met secretly with potential bidders to solicit interest in acquiring Del Monte before the company was up for sale, and prior to being hired as the company's sell-side advisor;[2] (2) once the company was up for sale, Barclays facilitated a relationship between two competing bidders in violation of confidentiality agreements between the bidders and the company;[3] (3) Barclays planned to and in fact did obtain the company's permission to provide the acquirers' financing;[4] and (4) subsequent to the approval of the merger agreement, Barclays conducted the go-shop despite an agreement to

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1 25 A.3d 813, 817-18, 836 (Del. Ch. 2011).

2 *Id.* at 820, 822.

3 *Id.* at 823.

4 *Id.* at 826.

finance the acquirers.[5] And how did the Del Monte board breach its duty? It didn't stop Barclays.

What could the board have done differently? The court explained that, despite having relied in good faith on Barclays' independence and expertise, the Del Monte board breached its duty of care by failing to realize that Barclays had pieced together a deal resulting in its earning more than forty million dollars in fees from its dual role.[6] The board, according to the court, should have recognized that Barclays suffered from a conflict of interest as it stood on both sides of the transaction by providing both sell-side advice and buy-side financing.[7] I argue in this Note, however, that Barclays, and indeed all sell-side advisors, face a serious conflict of interest in standing on even one side of the transaction—by receiving success fees contingent on the consummation of a merger. For that reason, it is unclear whether the *Del Monte* decision imposed on boards of directors a duty to identify conflicts that are more serious than those ordinarily accepted in the investment banking industry, or merely a duty to fully disclose all conflicts. But considering the facts of *Del Monte*, I argue that the *possibility* of obtaining permission to provide buy-side financing is just another conflict shared by all full-service investment banks, and that additional disclosure would not have changed the outcome of the case. As a result, I conclude that Delaware courts should either (1) accept that investment bankers are necessarily conflicted when working on the sale of a corporation or (2) require a fundamentally different fee structure for investment bankers working on such a sale, and ultimately advocate for the elimination of success fees and staple financing.

This Note proceeds as follows: In Part I, I describe investment banking services provided in the sale of a corporation and common fee structures used in those services. In Part II, I contextualize *Del Monte* with respect to relevant case law, and in Part III, I describe the facts of the case. In Parts IV and V, respectively, I present the claims brought against the Del Monte board as well as the Delaware Court of Chancery's response to those claims. Part VI describes the consequences of the court's holding for Del Monte and Blue Acquisition Group. Finally, in Part VII, I argue that Barclays' conflicts were no more significant than the conflicts that exist for nearly all full-service investment banks, and that, for this reason, additional disclosure would not have affected the outcome. I do make the caveat that the Del

5 *Id.* at 828; *see also id.* at 827 (identifying a forty-five-day post-signing go-shop period during which Del Monte had the right to solicit competing offers).

6 *Id.* at 818, 834-35.

7 *Id.* at 835-36.

Monte board did breach its duty of care by permitting Barclays to conduct the go-shop after Barclays had committed to provide the acquirers' financing. Finally, I analyze the standard for investment bank conflicts going forward and advocate for eliminating success fees and staple financing altogether.

I. THE ROLE OF INVESTMENT BANKS IN THE SALE OF A COMPANY

A. *Fairness Opinions, Sell-Side Advising, Buy-Side Financing, and Staple Financing*

Investment banks participate in the sale of a company in three fundamental ways. First, investment banks provide fairness opinions that (a) value a company using various valuation methods, and (b) determine whether, given a company's value, a particular price falls within a reasonable range of fairness.[8] Boards of directors use fairness opinions to justify accepting or rejecting a given offer.[9] Second, investment banks provide sell-side advising to companies that have received offers from one or more potential acquirers, or that are interested in soliciting such offers.[10] Sell-side advising often requires the banks to act as emissaries between target and acquirer and to conduct go-shops to solicit additional bids for the company.[11] Banks also provide particularized knowledge about challenges and opportunities available in a given industry and advise on strategic alternatives.[12] Companies look to investment banks for insight on how to capitalize on assets that make a company unique in its industry. Although providing a fairness opinion may be analytically distinct from providing sell-side advice, "investment banks delivering fairness opinions in a corporate control

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8 *See* Steven M. Davidoff, *Fairness Opinions*, 55 AM. U. L. REV. 1557, 1558 (2006) ("A fairness opinion is an opinion . . . that a transaction meets a threshold level of fairness from a financial perspective.").

9 *See id.* at 1558-59 ("The board will rely on this opinion to satisfy its duty of care in the determination of whether or not to proceed.").

10 *Cf.* Mary Siegel, *The Illusion of Enhanced Review of Board Actions*, 15 U. PA. J. BUS. L. 599, 610, 627-28 & nn.123-25 (2013) (explaining that a board of directors of a corporation that is up for sale can satisfy its *Revlon* duties to maximize shareholder value by relying on advice from independent financial advisors and canvassing the market).

11 *Cf.* Guhan Subramanian, *Go-Shops vs. No-Shops in Private Equity Deals: Evidence and Implications*, 63 BUS. LAW. 729, 730 (2008) (explaining that go-shops, which allow companies to seek out higher bidders after they have conditionally committed to sell to a particular acquirer, "emerged as an important new deal-making technology during the private equity boom of 2005–2007").

12 *See* COMM. ON NEGOTIATED ACQUISITIONS, AM. BAR ASS'N, THE M&A PROCESS: A PRACTICAL GUIDE FOR THE BUSINESS LAWYER 77-78 (2005) ("An investment bank is a full service financial advisor that can generally provide advice regarding valuation of the target (including rendering a fairness opinion), conduct the marketing process, advise on the appropriate structure for the transaction, participate in the negotiation of financial terms and even raise funds to finance the transaction.").

transaction typically are also retained to render general financial advice with respect to the relevant transaction."[13] Third, investment banks provide partial or full financing to, and become creditors of, bidders in the event that an acquisition actually takes place.[14]

Finally, investment banks sometimes combine these services. Staple financing, for example, occurs when an investment bank acts as sell-side advisor for a target company and agrees up front that, in the event that a merger takes place, the bank will provide financing to an acquirer if the acquirer needs it.[15] Staple financing has been criticized for creating a conflict of interest for bankers who, on the one hand, seek as sell-side advisors to maximize the price paid to the target's stockholders, and on the other, want as a creditor to ensure that an acquirer will be able to repay its financing obligations.[16] Further, investment banks that offer staple financing may favor bidders that are more likely to need financing, such as private equity firms, to the exclusion of parties less likely to require financing, such as strategic bidders.[17] The literature dealing with staple financing has primarily focused on balancing benefits against the potential for harm, by looking, for example, at the fact that allowing staple financing makes obtaining financing easier in market conditions where it is difficult to otherwise procure financing.[18]

B. *Investment Banks' Fees*

When an investment bank provides a one-time fairness opinion, it usually does so for a specified transaction fee, which it collects regardless of whether an acquisition occurs.[19] Proxy statements usually disclose the basic

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13 Davidoff, *supra* note 8, at 1586.

14 *See* COMM. ON NEGOTIATED ACQUISITIONS, *supra* note 12, at 77-78.

15 Christopher Foulds, *My Banker's Conflicted and I Couldn't Be Happier: The Curious Durability of Staple Financing*, 34 DEL. J. CORP. L. 519, 520 (2009). Staple financing may be more desirable in a poor credit market where the availability of financing is limited. *See id.* at 521-22.

16 *See* Davidoff, *supra* note 8, at 1588 (noting that an investment bank providing staple financing "has an incentive for a lower target price so that the acquirer will not be over-leveraged after the acquisition").

17 *See* Foulds, *supra* note 15, at 521 ("The concern [with staple financing] is that the target[]'s financial advisor may steer the sale to those bidders that will use staple financing, and away from a potentially higher bidder not using staple financing."); *id.* at 524 ("The main concern is the potential that the seller will unfairly favor one bidder over another for reasons unrelated to obtaining the highest value for the target's shareholders. The suspicion is that a sell-advisor may skew an auction in favor of those bidders who will also use the stapled-lender for financing.").

18 *See, e.g.*, *id.* at 521-22.

19 Perella Weinberg Partners LP, for example, earned $3 million solely for providing a second fairness opinion in the Del Monte–Blue Acquisition Group merger. *In re* Del Monte

fee structure—that is, whether there is a contingent or set fee—underlying a fairness opinion.[20] By contrast, when an investment bank provides sell-side advising, the bank usually charges three types of fees: a standard minimum transaction fee, a "success" or "incentive" fee, and reimbursement for expenses.[21] The payment of a success fee is contingent on the deal closing and is determined by a percentage of the total value of the deal.[22] One variation of the success fee is the "Lehman Formula," which awards fees in the amount of 5% of the first $x million of the deal, 4% of the second $x million, 3% of the third $x million, 2% of the fourth $x million, and 1% of the remainder.[23] Current advising fees more commonly amount to about .05% of a transaction's value, however.[24] Success fees have been criticized for creating a conflict of interest on the part of investment banks because the relative size of the success fee as compared to the transaction fee may cause a bank to encourage a target to accept a price that does not adequately value the company for the sake of pushing *any* transaction through.[25] The potential for conflicts has caused some commentators to argue that "the investment banker will have an economic incentive to persuade the seller to sell the business even if the price is low or the non-price terms are unfair to the seller,"[26] to which boards of directors should respond by selecting only investment banks with excellent reputations and by actively overseeing the chosen banks' conduct.[27]

Providing buy-side financing is often the most lucrative activity for investment banks.[28] For one, when an investment bank provides financing

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Foods Co. S'holders Litig., 25 A.3d 813, 826 (Del. Ch. 2011). When a fairness opinion is issued as part of an investment bank's sell-side advising engagement, however, the fee for the fairness opinion is often subsumed into the bank's "success" fee, and is therefore dependent on the consummation of the transaction. Davidoff, *supra* note 8, at 1586.

20 Blake Rohrbacher & John Mark Zeberkiewicz, *Fair Summary: Delaware's Framework for Disclosing Fairness Opinions*, 63 BUS. LAW. 881, 900 (2008).

21 *See* John F. Seegal, *Investment Banking Fees*, *in* 1 ACQUIRING OR SELLING THE PRIVATELY HELD COMPANY 173, 175 (2009).

22 *See* Davidoff, *supra* note 8, at 1586 ("The manner of compensation [for sell-side advising] is a success fee payable to the bank at transaction milestones such as announcement or completion.").

23 COMM. ON NEGOTIATED ACQUISITIONS, *supra* note 12, at 79-80.

24 Foulds, *supra* note 15, at 525.

25 *See* Seegal, *supra* note 21, at 175 ("A flaw in the Lehman formula and other similar declining percentage approaches is that they tend to reward the investment banker more highly for selling the business than for selling the business at the highest price.").

26 *Id.* at 176.

27 *See id.*

28 *See* Gina Chon & Shira Ovide, *Judge Blasts Barclays over Del Monte Deal*, WALL ST. J. (Feb. 16, 2011), http://online.wsj.com/article/SB10001424052748704409004576146471401456158.html ("Providing financing for acquirers usually generates more fees for investment banks than advising sellers.").

for an acquirer, the bank does not accept the same level of risk that the deal will not go through as it does when providing sell-side financing. Financing fees are stated as a fixed percentage, typically between 1.3 and 1.5%, of the total value of the loan.[29] The investment bank also becomes a creditor to the acquirer, who is required to repay the financing.

II. BEFORE *DEL MONTE*

Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc. established that, where it is clear that a company is up for sale, a board of directors' primary duty with respect to the sale is to obtain the best price attainable for the stockholders.[30] *Smith v. Van Gorkom*, although pre-*Revlon*, implied that boards could satisfy their duties in the sale of a company by procuring a fairness opinion and advice from an investment banker with respect to the sale.[31] With these two propositions in place—that a board must seek the best price and that a board may rely on the expertise of investment bankers to achieve that goal—obtaining fairness opinions and sell-side advice has become best practice for Delaware corporations.

However, *Mills Acquisition Co. v. Macmillan, Inc.*[32] and *In re Toys "R" Us, Inc. Shareholder Litigation*[33] complicated the view that a board may always rely on an investment bank's expertise to satisfy its fiduciary duties when selling a company. In *Macmillan*, Mills Acquisition Company sought to acquire Macmillan, Inc., which had already signed a merger agreement with Kohlberg Kravis Roberts & Co. (KKR).[34] Prior to entering into the KKR merger agreement, Macmillan's board, which had been planning to restructure the company, received an offer from the Bass Group to purchase Macmillan for $64 per share.[35] Evans, a board member with significant financial interest in the company, opposed the merger and met privately with Macmillan's investment banker, Lazard Freres & Co., regarding the offer.[36] Lazard, over which Evans had significant influence, advised Macmillan's

[29] Foulds, *supra* note 15, at 525.

[30] 506 A.2d 173, 182 (Del. 1986).

[31] *See* 488 A.2d 858, 876 (Del. 1985), *overruled on other grounds by* Gantler v. Stephens, 965 A.2d 695 (Del. 2009); *see also* Davidoff, *supra* note 8, at 1559 (noting that the court in *Van Gorkom* "placed heavy reliance on the lack of a fairness opinion or other reliable valuation in a corporate control transaction to sustain a holding that an acquiree board breached its duty of care").

[32] 559 A.2d 1261 (Del. 1989).

[33] 877 A.2d 975 (Del. Ch. 2005).

[34] *Macmillan*, 559 A.2d at 1264.

[35] *Id.* at 1268.

[36] *Id.* at 1267-68.

board that the proposed recapitalization was fair and that the Bass Group's offer was not;[37] however, when the board rejected the Bass Group's higher counteroffer and adopted the recapitalization plan, the Delaware Court of Chancery issued a preliminary injunction, finding that the board had improperly relied on Lazard's mischaracterizations of the available alternatives.[38] At that point, the board immediately put the company up for sale.[39] In spite of communication from Maxwell, another potential acquirer, that he would top any bid by his competitor, KKR, the Macmillan board entered into a merger agreement with KKR, whom Evans favored for personal reasons.[40]

The Delaware Supreme Court held that Macmillan's board had breached its duty of care because, "[a]lthough the Macmillan board was fully aware of its ultimate responsibility for ensuring the integrity of the auction, the directors wholly delegated the creation and administration of the auction to an array of Evans' hand-picked investment advisors."[41] Because Macmillan's investment bank had been operating under Evans' control, the board was not entitled to rely on its financial advice. The court held that "[w]hile a board of directors may rely in good faith upon 'information, opinions, reports or statements presented' by corporate officers, employees and experts 'selected with reasonable care,' it may not avoid its active and direct duty of oversight in a matter as significant as the sale of corporate control."[42]

Sixteen years later, in *Toys "R" Us*, then-Vice Chancellor Strine declined to preliminarily enjoin a merger between Toys "R" Us and KKR,[43] despite the plaintiffs' "sketch[ing] out a picture of a passive board who deferred too easily to the wishes of a CEO, Eyler, and financial advisor, First Boston."[44] Toys "R" Us originally planned to sell only its toy division, but changed its mind when it received a bid of $25.25 per share for the entire company.[45] Toys "R" Us, once committed to a sale of the company, quickly accepted a bid from KKR for significantly more than the next highest offer it had received.[46] Then-Vice Chancellor Strine found that, while Eyler did have some incentive to sell the company because of the "golden parachute" in his

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37 *Id.* at 1270.

38 *Id.* at 1271.

39 *Id.* at 1272.

40 *Id.* at 1272-74.

41 *Id.* at 1281.

42 *Id.* (citation omitted).

43 *In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 980 (Del. Ch. 2005).

44 *Id.* at 1002.

45 *Id.* at 986-87, 991-93.

46 *Id.* at 993-95.

employment contract, his own financial status did not ultimately motivate his decision to sell to KKR.[47] Further, the then-Vice Chancellor decided that First Boston's incentive fee structure[48] and the fact that it agreed to provide buy-side financing to KKR did not result in the investment bank "tilt[ing] the process in order to jack up its fees and profits," noting that incentive fees "ha[ve] been recognized as proper by our courts."[49] Thus, while *Macmillan* required that a board actively oversee the sales process and identify conflicts of the dominating personalities involved, *Toys "R" Us* suggested that some investment banks' conflicts may be acceptable.

III. *DEL MONTE*

A. *The Parties*

In 2010—before litigation began—Del Monte was one of the largest and most profitable food distributors in the United States: Richard Wolford, Del Monte's then-CEO, remarked that over the course of several years "Del Monte [had transformed] from a $1 billion consumer foods business into a branded pet and consumer products company with more than $3.7 billion in revenues,"[50] generating $250 million in cash flow and increasing dividends by 80%.[51] Interestingly, Del Monte's success came after a period of decline in the 1990s. In the 1980s, Del Monte was a subsidiary of R.J. Reynolds Industries, later renamed RJR Nabisco.[52] When KKR acquired Nabisco in 1988, it sold Del Monte, which continued its canned foods business but, in order to stay afloat, was forced to sell many divisions that today are household names.[53]

Blue Acquisition Group is owned by private equity firms KKR, Centerview Partners, and Vestar Capital Partners.[54] KKR is an infamous private equity firm whose portfolio companies include Dollar General, Duracell,

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47 *Id.* at 1004-05.

48 First Boston stood to earn an additional $7 million from Toys "R" Us if it facilitated a sale of the entire company rather than the toy division alone. *Id.* at 998 & n.26.

49 *Id.* at 1005-06.

50 Consolidated Verified Class Action Complaint for Breach of Fiduciary Duties & Aiding & Abetting, para. 3, *In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813 (Del. Ch. 2011) (No. 6027-VCL), 2011 WL 118896.

51 *Id.*

52 *Del Monte Foods Company History*, FUNDINGUNIVERSE, http://www.fundinguniverse.com/company-histories/Del-Monte-Foods-Company-Company-History.html (last visited Nov. 23, 2013).

53 *Id.* Among the divisions sold was Hawaiian Punch. *Id.*

54 *Del Monte*, 25 A.3d at 817.

and Nabisco—Del Monte's former parent.[55] KKR is no stranger to the Delaware Court of Chancery, having litigated *Macmillan*, *Toys "R" Us*, and countless other cases; its notorious takeover of Nabisco was the subject of the 1990 book[56] and 1993 made-for-television movie, *Barbarians at the Gate*.[57] Centerview's private equity arm, Centerview Capital, was founded in 2006 and invests solely in market consumer businesses.[58] In addition to Del Monte, its portfolio consists entirely of The Nielsen Company and Richelieu Foods, Inc.[59] Vestar is a private equity firm whose completed investments totaled $30 billion in 2011.[60] Prior to forming Vestar in 1988, its founders were principals of The First Boston Corporation's Management Buyout Group[61]—the investment bank at issue in *Toys "R" Us*.

Barclays PLC is a global, U.K.-based financial services provider with "over 300 years of history and expertise in banking."[62] The KKR acquisition was not Del Monte's first interaction with Barclays. In fact, Barclays functioned as one of Del Monte's "principal investment banks,"[63] participating in various transactions in 2009 and 2010 that generated roughly $3.6 million in fees.[64] Barclays was on even friendlier terms with KKR—over the same period, Barclays earned over $66 million in fees from at least six KKR consumer and retail projects.[65] At the time, Peter "P.J." Moses was the Barclays managing director with coverage responsibility for Del Monte.[66]

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55 Press Release, Del Monte Foods Co., KKR, Vestar and Centerview Complete Acquisition of Del Monte Foods (Mar. 8, 2011), http://investors.delmonte.com/releasedetail.cfm?ReleaseID=662562.

56 BRYAN BURROUGH & JOHN HELYAR, BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO (1990).

57 BARBARIANS AT THE GATE (HBO 1993).

58 Press Release, Del Monte Foods Co., *supra* note 55; *Company Overview of Centerview Capital Holdings, LLC*, BLOOMBERG BUSINESSWEEK, http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=46401796 (last visited Nov. 23, 2013).

59 *Portfolio*, CENTERVIEW CAPITAL, http://cv.kbddev.com/consumer/portfolio/ (last visited Nov. 23, 2013).

60 Press Release, Del Monte Foods Co., *supra* note 55.

61 *History*, VESTAR CAPITAL PARTNERS, http://www.vestarcapital.com/about-vestar/history (last visited Nov. 23, 2013).

62 *About Us*, BARCLAYS, http://group.barclays.com/About-us (last visited Nov. 23, 2013).

63 *In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813, 819 (Del. Ch. 2011).

64 Del Monte Foods Co., Supplement #2 to Definitive Proxy Statement (Form DEFA 14A), at 5 (Feb. 4, 2011), *available at* http://www.sec.gov/Archives/edgar/data/866873/000119312511024568/ddefa14a.htm.

65 *Del Monte*, 25 A.3d at 820.

66 *Id.* at 819.

B. *The Deal*

Before Del Monte ever considered selling, Barclays' Peter Moses approached several potential bidders to gauge their interest in acquiring the company.[67] At a January 2010 meeting with KKR, Moses described his plan to coordinate the sale of Del Monte: he believed the company would privately solicit targeted bids and implied that KKR would be included in the private solicitation.[68] KKR informed Moses that it was prepared to "take the next step," but before KKR could approach Del Monte about a potential acquisition, Apollo Management, with whom Barclays had also met, sent Del Monte a letter of interest.[69]

Based on the companies' longstanding relationship, Del Monte contacted Barclays for advice on how to proceed with Apollo. Barclays did not inform Del Monte that it had discussed a potential acquisition with Apollo, nor did the Del Monte board inquire whether Barclays had met with Apollo or any other firms.[70] Barclays also failed to mention that it had circulated internal memos describing its intention to provide financing should a deal come to fruition.[71] Instead, Peter Moses suggested that Del Monte privately solicit bids via a targeted process that included Apollo, KKR working with Centerview, the Carlyle Group, CVC Partners, and the Blackstone Group.[72] When information leaked that Del Monte was accepting bids, Vestar and Campbell's Soup were also included.[73] The chosen bidders consisted exclusively of private equity firms rather than strategic parties who would

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67 *Id.* at 820.

68 *See id.*

69 *Id.* Apollo was identified only as "Bidder A" in the Preliminary Proxy Statement sent to Del Monte shareholders. *See* Consolidated Verified Class Action Complaint, *supra* note 50, para. 56.

70 Amended Consolidated Verified Class Action Complaint for Breach of Fiduciary Duties & Aiding & Abetting, para. 38, *Del Monte*, 25 A.3d 813 (No. 6027-VCL), 2011 WL 675719. Barclays did, however, note that it "knew many of the entities that might be an interested buyer." Brief in Support of Plaintiff's Motion for a Preliminary Injunction at 5, *Del Monte*, 25 A.3d 813 (No. 6027-VCL), 2011 WL 487121.

71 *See* Brief in Support of Plaintiff's Motion, *supra* note 70, at 5 (quoting Barclays' internal January 2010 "Project Hunt (Del Monte) Screen Committee Memo," which stated that "*Barclays will look to participate in the acquisition financing* once [Del Monte] has reached a definitive agreement with a buyer").

72 *Del Monte*, 25 A.3d at 820-21. Plaintiffs and the court failed to address the fact that, at this point, the Del Monte board of directors formed a Strategic Committee to identify the parties from whom to solicit bids and to evaluate those bids. *See* Del Monte Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction at 7, *Del Monte*, 25 A.3d 813 (No. 6027-VCL), 2011 WL 487122 ("The Strategic Committee . . . expressly limited [Del Monte's] outreach at this initial stage to private equity firms . . . .").

73 *Del Monte*, 25 A.3d at 821.

not need Barclays' financing.[74] All potential bidders signed confidentiality agreements preventing them from communicating with one another in formulating their bids.[75] By March 11, 2010, Apollo, KKR, Carlyle, CVC, and Vestar submitted their bids.[76] On March 18, 2010, however, the Del Monte board abruptly ended the process, deciding that it was in the stockholders' best interests at that time to remain independent.[77]

In April and May 2010, KKR approached Del Monte about a deal, but the company was not receptive.[78] In September, Peter Moses met with KKR and Vestar separately to suggest that, in violation of their confidentiality agreements, the firms pair up to make a new offer.[79] The parties also agreed that KKR would approach Del Monte to begin negotiations but would conceal the fact that it intended to partner with Vestar until the last minute.[80] Pursuant to that strategy, KKR, still partnered with Centerview, delivered a written indication of interest to Del Monte.[81] The Del Monte board considered the offer and, departing from its earlier decision to remain independent, ultimately decided to pursue a single-bidder strategy in favor of KKR and Centerview.[82] Over the next several weeks, Del Monte negotiated the terms of the transaction with KKR.[83] It was not until nearly a month after submitting its letter of interest that KKR asked to include Vestar in the deal—the Del Monte board summarily granted the request.[84] The same

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74 *See* Amended Consolidated Verified Class Action Complaint, *supra* note 70, para. 41. Barclays, however, claimed that it presented Del Monte as an acquisition opportunity to "a broad range of strategic buyers and private equity firms." Barclays Capital Inc.'s Answer to the Amended Consolidated Verified Class Action Complaint at 13, *Del Monte*, 25 A.3d 813 (No. 6027-VCL), 2011 WL 1213007.

75 *Del Monte*, 25 A.3d at 821.

76 *Id.* at 822.

77 *Id.* Del Monte notes in its answer to the amended complaint that it decided, based on "the Company's strong results in the third fiscal quarter of 2010 and the perceived lower level of execution risk inherent in the Company's long-range plan," not to pursue a sale at that time. The Individual Del Monte Defendants' Answer to the Amended Consolidated Verified Class Action Complaint at 23, *Del Monte*, 25 A.3d 813 (No. 6027-VCL), 2011 WL 1235372; *see also* Brief in Support of Plaintiff's Motion, *supra* note 70, at 10 (indicating that Del Monte's stock price rose roughly 37% between the time it initially solicited bids and the time it considered those bids).

78 *Del Monte*, 25 A.3d at 822-23. While plaintiffs alleged in their initial complaint that Mr. Wolford met with KKR to discuss the acquisition, Del Monte contended in its answer that the parties met to discuss different joint investment opportunities, in particular a joint acquisition of Waggin' Train LLC. Individual Del Monte Defendants' Answer, *supra* note 77, at 23-24.

79 *Del Monte*, 25 A.3d at 823.

80 *Id.* at 823-24.

81 *Id.* at 823.

82 *Id.* at 824. The Del Monte board of directors did, however, reject KKR's request for exclusivity. Del Monte Defendants' Opposition, *supra* note 72, at 15.

83 *Del Monte*, 25 A.3d at 825.

84 *Id.*

day, the *London Evening Standard* publicized KKR's attempt to acquire Del Monte Foods.[85]

Barclays then asked Del Monte's permission to partially finance the merger.[86] The Del Monte board granted the request and hired a second investment bank, Perella Weinberg Partners LP, to provide an independent fairness opinion for an additional $3 million.[87] Although the board recognized that Barclays' conflict of interest arising out of its participation in the financing would require an additional fairness opinion, it nevertheless permitted Barclays to conduct the 45-day go-shop period between late November 2010 and mid-January 2011.[88]

A merger agreement was signed on November 24, 2010, in which Blue Acquisition Group agreed to acquire Del Monte Foods via a $5.3 billion leveraged buyout.[89] The merger amounted to $19 per share of common stock, a 40% premium over the average closing price.[90] The agreement contained a "fiduciary out" for Del Monte, and a termination fee.[91] The first round of proxy materials was released on January 12, 2011, and a second round was sent out on February 4, 2011.[92] Before stockholders could vote on the transaction, plaintiffs filed a derivative suit seeking a preliminary injunction.[93]

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85 *See* Rosamund Urwin, *City Wild with Talk a Suitor Is Stalking the Man from Del Monte*, LONDON EVENING STANDARD (Nov. 9, 2010), http://www.standard.co.uk/business/city-wild-with-talk-a-suitor-is-stalking-the-man-from-del-monte-6534109.html. In their original complaint, shareholders alleged that KKR approached Vestar in response to this article, which "destroyed the *de facto* exclusivity that KKR/Centerview had managed to secure for itself." Consolidated Verified Class Action Complaint, *supra* note 50, para. 71.

86 *Del Monte*, 25 A.3d at 825-26.

87 *Id.* at 826. The plaintiffs' amended complaint alleges that Del Monte's board of directors, in considering whether to accept Barclays' request to provide financing, did not consider (1) whether allowing Barclays to provide financing would speed up the process, (2) whether it would be necessary for KKR to secure financing, (3) whether it would increase KKR's bid, or (4) whether Del Monte could use the request as leverage to obtain additional consideration in the transaction. Amended Consolidated Verified Class Action Complaint, *supra* note 70, para. 73.

88 *Del Monte*, 25 A.3d at 827-28.

89 *Id.* at 817.

90 *Id.* The entire transaction was valued at roughly $5.3 billion, $1.3 billion of which was debt assumed. Press Release, Del Monte Foods Co., KKR, Vestar and Centerview Enter into Agreement to Acquire Del Monte Foods (Nov. 25, 2010), http://investors.delmonte.com/releasedetail.cfm?ReleaseID=662531.

91 *See* Answering Brief of the Sponsor Defendants in Opposition to Plaintiff's Motion for a Preliminary Injunction at 3-4, *Del Monte*, 25 A.3d 813 (No. 6027-VCL), 2011 WL 495646 (noting that the termination fee was "only 1.13% of the $5.3 billion total deal value during the go-shop and 2.26% post go-shop").

92 *Del Monte*, 25 A.3d at 828-29.

93 *Id.* at 829-30.

C. *The Banks' Fees*

Although Del Monte did not disclose its fee structure with Barclays, its proxy statement revealed that the company paid $2.5 million for Barclays' fairness opinion, that it would pay $23.5 million upon completion of the merger, and that Barclays stood to earn between $21 and $24 million from financing the merger.[94] Thus, of the roughly $47.5 million that Barclays stood to earn in the transaction, slightly more than half was for financing and slightly less than half was for its role as sell-side advisor. For providing its fairness opinion, Perella Weinberg earned a flat fee of $3 million.[95]

IV. THE LITIGATION

In their complaint, the plaintiffs raised duty of loyalty, inadequate disclosure, and duty of care claims.[96] This Part considers each of those claims in turn.

A. *Duty of Loyalty*

The plaintiffs' primary claims prior to discovery were that the merger undervalued Del Monte Foods[97] and that Del Monte's management was improperly persuaded to agree to the merger terms because KKR offered them management equity and assurance that they would keep their positions within the company after the merger was consummated.[98] The complaint further alleged that the Del Monte board should have notified Vestar that KKR had agreed to match its bid.[99] The most compelling element of this claim was that "KKR and Centerview then, *with the approval of the Del Monte Board*, approached Vestar and invited their most likely competitor to join the Sponsor group instead of engaging in a competitive auction."[100] The complaint also alleged that the Del Monte board of directors allowed KKR to "buy the support" of Barclays by seeking Barclays' assistance in financing the merger, and further breached its fiduciary duty by permitting Barclays to conduct the go-shop process despite this "obvious conflict."[101]

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94 Del Monte Foods Co., Supplement #2 to Definitive Proxy Statement, *supra* note 64, at 5. The $23.5 million success fee would be reduced by the amount of the fee paid for Barclays' fairness opinion. *Id.*

95 *Id.* at 6.

96 Amended Consolidated Verified Class Action Complaint, *supra* note 70, para. 130.

97 Consolidated Verified Class Action Complaint, *supra* note 50, para. 44.

98 *Id.* para. 7.

99 *Id.* paras. 63-64.

100 *Id.* para. 9.

101 *Id.* paras. 10-11.

B. *Inadequate Disclosures*

The plaintiffs also argued that Del Monte failed to adequately disclose information regarding the process that resulted in the proposed acquisition; the details of KKR's communications with Del Monte's management and with Vestar; the financial advisors in the transaction; and the details of both fairness opinions.[102] Del Monte promptly issued a proxy supplement, which mooted these claims.[103]

C. *Duty of Care*

In their amended complaint, the plaintiffs also sought relief on the theory that the Del Monte board breached its duty of care by failing to adequately oversee Barclays, thereby permitting Barclays to secretly pair Vestar with KKR in violation of their confidentiality agreements, and to seek financing opportunities from KKR.[104] After discovery, two points became clear: (1) that Barclays—not the *London Evening Standard*[105]—was the impetus behind the anticompetitive KKR–Vestar pairing, and (2) that Barclays had structured the deal to include buy-side financing because it had planned from the outset to contribute part of that financing.[106] Thus, the plaintiffs claimed that Del Monte's board should have recognized and prevented Barclays' conflict of interest in the transaction.

V. THE DECISION

The court held that the Del Monte board breached its fiduciary duty of care by failing to recognize and prevent Barclays' conflict of interest in servicing the merger, and that KKR aided and abetted the board's breach.[107] Because the plaintiffs sought a preliminary injunction, the opinion primarily assesses the probability of success on the merits[108]—specifically, the duty of care claim.

Because Del Monte had placed itself up for sale, the court identified *Revlon* as the applicable standard of review, noting that the board was required to "try in good faith, in such a setting, to get the best available

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102 *Id.* paras. 78-88.

103 *In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813, 817 (Del. Ch. 2011); *see also* Del Monte Foods Co., Supplement #2 to Definitive Proxy Statement, *supra* note 64.

104 Amended Consolidated Verified Class Action Complaint, *supra* note 70, para. 1.

105 *See supra* note 85 and accompanying text.

106 *See Del Monte*, 25 A.3d at 817.

107 *Id.* at 818.

108 *See id.* at 830-37.

transaction for the shareholders," and that the board's actions must have been "reasonable in relation to their legitimate objective."[109] The opinion acknowledges the importance of a board's reliance on experts in evaluating the merits of a transaction, but notes that because investment banks play such a vital role in acting as experts, "this Court has required full disclosure of investment banker compensation and potential conflicts."[110] While the court pointed out that the board could potentially have negotiated a higher price when KKR requested to team up with Vestar, its primary concern was that the board accepted Barclays' request to provide financing when it instead could have obtained a disinterested negotiator.[111] Likewise, the court found it was unreasonable for the board to allow Barclays to conduct the go-shop when it was in Barclays' interest for the go-shop to fail.[112] In determining that the board had acted unreasonably, the court ultimately concluded that "[a]lthough the blame for what took place appears at this preliminary stage to lie with Barclays, the buck stops with the Board."[113] Even though a board is entitled to rely on experts, "when [it] is deceived by those who will gain from such misconduct, the protections girding the decision itself vanish"; accordingly, the Del Monte directors "failed to act reasonably in connection with the sale process."[114]

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109 *Id.* at 830 (citations and internal quotation marks omitted).

110 *Id.* at 831-32.

111 *See id.* at 834-35 ("[I]t was unreasonable for the Board to permit Barclays to take on a direct conflict when still negotiating price.").

112 *Id.*

113 *Id.*

114 *Id.* at 836 (citations and internal quotations omitted); *see also* David A. Katz, Del Monte *and the Responsibility of a Board in a Sales Process*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Apr. 14, 2011), http://blogs.law.harvard.edu/corpgov/2011/04/14/del-monte-and-the-responsibility-of-a-board-in-a-sales-process ("The opinion of Vice Chancellor Laster in the *Del Monte* case is a powerful reminder to directors that actions such as hiring advisors and forming special committees—while appropriate and even essential in some circumstances—do not obviate the need for members of the board to be fully engaged in and actively supervising the process of negotiating a significant company transaction."); Theodore Mirvis, *Buyout and Deal Protections Enjoined Due to Conflicted Advisor*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 16, 2011), http://blogs.law.harvard.edu/corpgov/2011/02/16/buyout-and-deal-protections-enjoined-due-to-conflicted-advisor ("[T]he decision serves as an important reminder to all participants in M&A transactions that the terms of confidentiality agreements should be properly respected, that bankers should receive and follow clear instructions from selling boards, and that bankers should ensure that any conflicts of interest are disclosed in advance, with specificity, to the selling board of directors."); Theodore Mirvis, Del Monte *Settlement Highlights Risk of Conflicts in Buyout Financing*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 21, 2011), http://blogs.law.harvard.edu/corpgov/2011/10/21/del-monte-settlement-highlights-risk-of-conflicts-in-buyout-financing (noting that the Del Monte "board was faulted for failing to take sufficiently strong measures to restore a fair process or oversee its advisor"). The plaintiffs put it bluntly in their brief: "[T]he Board of Directors of Del Monte, repeatedly misled by its faithless financial

As a result of the board's breach of its fiduciary duties, the court found that failing to issue a preliminary injunction would result in irreparable harm to Del Monte's stockholders. The court reasoned that in the absence of an injunction, "the Del Monte stockholders [would] be deprived forever of the opportunity to receive a pre-vote topping bid in a process free of taint from Barclays' improper activities," and that the 102(b)(7) exculpation provision in Del Monte's certificate of incorporation would render future monetary damages unlikely if the transaction went through.[115] Ultimately, the shareholder vote was enjoined for twenty days, and, in order to allow additional time for Del Monte to receive more bids, the Vice Chancellor prohibited the parties from enforcing the no-solicitation, match-right, and termination fee provisions contained in the merger agreement.[116] The Vice Chancellor also awarded the plaintiffs $22.3 million in attorney's fees.[117]

VI. AFTER THE DECISION

Over the twenty days during which the merger was enjoined, Del Monte hired Perella Weinberg to conduct another go-shop; the investment bank contacted seventy potential bidders, including forty-two strategic buyers.[118] No additional bids resulted from that go-shop.[119] The merger did eventually close in April 2011, after a shareholder vote in early March.[120] Richard

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advisor throughout the process, was out getting popcorn while this whole movie was being produced." Brief in Support of Plaintiff's Motion, *supra* note 70, at 1.

115 *Del Monte*, 25 A.3d at 838. A 102(b)(7) provision limits or eliminates a director's personal liability for monetary damages arising from a breach of fiduciary duty, but does not limit liability (1) for a breach of the director's duty of loyalty or (2) for acts or omissions not in good faith, or which involve intentional misconduct or a knowing violation of law. DEL. CODE ANN. tit. 8, § 102(b)(7) (2011).

116 *Del Monte*, 25 A.3d at 818-19.

117 Jef Feeley, *Del Monte Foods Wins Final Approval of Settlement of KKR Buyout Suits*, BLOOMBERG (Dec. 1, 2011), http://www.bloomberg.com/news/2011-12-01/del-monte-wins-approval-of-settlement-of-kkr-buyout-suits-1-.html; *see also* Eric S. Waxman & Robert S. Saunders, *Southern Peru: Debunking the Myth*, SEC. LITIG. REP., Feb. 2012, at 1 (suggesting that the *Del Monte* decision exhibits Delaware courts' willingness to award interim fees to plaintiffs' counsel, since Vice Chancellor Laster awarded $2.75 million in fees before the case settled for plaintiffs' counsel's role in securing additional disclosures in the merger proxy statement).

118 Del Monte Foods Co., Supplement #5 to Definitive Proxy Statement (Form DEFA 14A), at 1 (Mar. 3, 2011), *available at* http://www.sec.gov/Archives/edgar/data/866873/000119312511055113/ddefa14a.htm.

119 *Id.*

120 Katz, *supra* note 114. Of the shares that voted, 99% voted in favor of the merger. Jef Feeley & Phil Milford, *Del Monte, Barclays Pay $89.4 Million to Settle Buyout Suits*, BLOOMBERG BUSINESSWEEK (Oct. 6, 2011), http://www.businessweek.com/news/2011-10-06/del-monte-barclays-pay-89-4-million-to-settle-buyout-suits.html; *see also* Individual Del Monte Defendants'

Wolford stepped down from his position as Del Monte CEO shortly thereafter.[121] The parties settled in November 2011 for $89.4 million.[122] Of that total, Del Monte paid $65.7 million, $20 million of which was owed to Barclays for its work on the deal; Barclays contributed $23.7 million.[123]

A November 2011 court filing stated that federal prosecutors were investigating potential antitrust violations surrounding the merger.[124] At the same time, shareholders brought suit in California alleging antitrust violations, but unsuccessfully argued that the settlement should go unapproved in Delaware because it would render their California claims moot.[125] As a result of the *Del Monte* decision, at least nine major investment banks have reexamined their lending processes.[126]

VII. WHY BLAME BARCLAYS? AN ANALYSIS OF THE DECISION

The court explained that the Del Monte board breached its duty of care "[b]y failing to provide the serious oversight that would have checked Barclays' misconduct."[127] That misconduct involved (1) soliciting interest from bidders before Del Monte was up for sale,[128] (2) planning to seek the board's permission to provide financing to an acquirer in the event that the company was sold,[129] (3) pairing KKR with Vestar in violation of their confidentiality agreements with Del Monte,[130] and (4) conducting the go-shop after Del Monte agreed to allow Barclays to provide financing to KKR.[131]

At first glance, one might read the *Del Monte* decision as imposing a duty on a board of directors to identify and prevent all conflicts of interest faced

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Answer, *supra* note 77, at 14 ("[A]s of March 8, 2011, approximately 99% of the 151,400,000 shares voted were cast in favor of the transaction at $19 per share.").

121 Press Release, Del Monte Foods Co., *supra* note 55.

122 Feeley, *supra* note 117. The settlement gave shareholders about $0.50 more per share than the original purchase price. *Id.*

123 Feeley & Milford, *supra* note 120.

124 *See* Jef Feeley, *Del Monte, KKR Deal Faces U.S. Antitrust Probe, Lawyer Says*, BLOOMBERG BUSINESSWEEK (Nov. 30, 2011), http://www.businessweek.com/news/2011-11-30/del-monte-kkr-deal-faces-u-s-antitrust-probe-lawyer-says.html.

125 Feeley, *supra* note 117.

126 Feeley & Milford, *supra* note 120. In the months following *Del Monte*, "no firm . . . offered sell-side financing for a U.S. public company buyout valued at more than $1 billion"; prior to *Del Monte* such financing was offered in 40% of the deals of that size. *Id.*; *see also* Chon & Ovide, *supra* note 28 (noting that despite criticism for creating conflicts of interest, staple financing was "common during the buyout boom of 2007").

127 *In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813, 818 (Del. Ch. 2011).

128 *Id.* at 820.

129 *Id.* at 833.

130 *Id.*

131 *Id.* at 828.

by investment bankers hired in conjunction with the sale of a company. This reading, however, is far too broad. First, although the court found that the board failed to exercise oversight in identifying conflicts, it also acknowledged that "[i]nvestment banks generate large fees from doing deals," and that "[c]overage officers for investment banks regularly visit past, present, and potential clients to suggest mergers, acquisitions, and other strategic alternatives."[132] Given these statements, it seems as though Barclays acted the way any other investment bank in the industry might have acted.

Second, the court recognized that the fee structures common in sell-side advising engagements provide incentives for investment banks to drum up business by actively pairing targets and acquirers.[133] As mentioned in Section I.B., "incentive" or "success" fees encourage investment banks not only to seek out the highest price for a company up for sale, but to execute a sale regardless of whether it is necessarily in the best interests of a company at that time.[134] And yet, despite the conflicts they generate, then-Vice Chancellor Strine recognized in *Toys "R" Us* that Delaware courts condone incentive fees.[135]

A narrower and more consistent reading of the *Del Monte* decision, then, is that the duty of care requires a board to identify and guard against *unusual* conflicts, but not those conflicts that are widely accepted in Delaware practice. With this narrower understanding of *Del Monte* in mind, I analyze what the Del Monte board and Barclays did wrong, and then consider how to approach the somewhat arbitrary distinction between conflicts that the industry accepts and the "unusual" conflicts present in *Del Monte*.

A. *What the Board Didn't Do Wrong: Preventing Extra Conflicts or Requiring Additional Disclosure*

The court acknowledged that "[t]his case is difficult because the Board predominantly made decisions that ordinarily would be regarded as falling within the range of reasonableness for purposes of enhanced scrutiny."[136] If

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132 *Id.* at 819.

133 *See id.*

134 *See supra* notes 21-27 and accompanying text.

135 *In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1005 & n.44 (Del. Ch. 2005); *see also id.* at 1005-06 (holding that, even though "First Boston's engagement provided for higher compensation if it found a high-value, whole-Company deal rather than simply a buyer for Global Toys," there was still "simply no basis to conclude that First Boston's questionable desire to provide buy-side financing ever influenced it to advise the board to sell the whole Company rather than pursue a sale of Global Toys").

136 *Del Monte*, 25 A.3d at 817.

the board's actions ordinarily would have been reasonable, then what, under the facts of *Del Monte*, made its actions unreasonable? One way to approach this inquiry is to ask, if the conflicts investment banks face in typical merger transactions are acceptable under Delaware law, which of Barclays' conflicts went above and beyond these generally accepted conflicts? Alternatively, the *Del Monte* decision might indicate that the board should have exercised greater diligence by asking Barclays questions to determine whether it had any conflicts of interest that it failed to disclose. In response to *Del Monte*, one practitioner has suggested that to avoid liability, a board should ask its advisors at the very beginning of the engagement to identify any potential conflicts that may arise during the course of the transaction.[137] This advice suggests that disclosure of conflicts, rather than the existence of a conflict in itself, implicates duty of care issues.

I would suggest, however, that more disclosure would not have made a difference in *Del Monte*. In fact, regardless of whether the more important issue is disclosure or the existence of a conflict in the first place, disclosure of Barclays' conflicts would have failed to alert the *Del Monte* board to the potential for misbehavior.

1. Actual Conflicts

If the court's primary concern was the existence of actual conflicts in Barclays' secretly seeking to provide financing, this view is problematic for two reasons. First, Barclays was interested in the outcome of the deal from the beginning. As Del Monte's sell-side advisor, Barclays stood to gain roughly $20 million if the company was sold.[138] This meant that it was already in Barclays' interest to effectuate a sale regardless of whether the company would retain more value by remaining independent. In the back of Peter Moses's mind was the fact that Barclays stood to gain an additional roughly $20 million by providing financing in the transaction—but again, only if the company was sold.[139] That Barclays thought there was $40 million on the line rather than $20 million hardly changed Barclays' incentive to sell Del Monte Foods.

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[137] *See* Katz, *supra* note 114; *see also* CLEARY GOTTLIEB STEEN & HAMILTON LLP, LESSONS OF *DEL MONTE FOODS* FOR COMPANIES RUNNING (OR CONSIDERING) A SALE PROCESS 2 (2011), *available at* www.cgsh.com/files/News/83debb78-b4a1-4fa4-abde-53ddc5a28fcb/Presentation/NewsAttachment/9fcaf89f-f120-468a-b625-559516615584/CGSH%20Alert%20-%20Del%20Monte%20Foods.pdf (suggesting that when hiring an investment banker, companies should consider including a provision in the engagement letter that the banker may not, without board approval, offer to provide financing services to a prospective bidder).

[138] *See supra* note 94 and accompanying text.

[139] *See supra* text accompanying note 94.

Second, the possibility of providing financing meant that it was in Barclays' interest to find a buyer who might require financing. I would argue, however, that at the beginning of any sell-side engagement with a full-service investment bank, either (1) the possibility of providing financing in the deal is always open to the bank and therefore can always affect its involvement in a deal, or in the alternative, (2) the possibility of providing financing is so remote that, even if desired by the bank, that prospect will not affect how the bank proceeds with the deal. Either way, the possibility of providing financing affects all full-service banks equally—as long as staple financing is permitted under Delaware law.[140] And the only way that the Del Monte board could have fully eliminated any conflicts arising from the possibility of providing financing would have been by foreclosing that possibility at the beginning of its engagement with Barclays, which is not required under Delaware law.[141] Further, it is not entirely clear that prohibiting staple financing in an engagement letter would prevent all conflicts. For example, even if full-service banks are not all seeking to provide financing, it might be the case that they are seeking to please the private equity firms bidding for target companies.[142] Private equity firms represent 60% of investment banks' top clients, and even when banks are not interested in providing financing, they have significant financial interests in obtaining future business from these firms.[143]

2. Disclosure of Conflicts

If, however, disclosure of conflicts is the more important issue, then the Del Monte board could have asked in its engagement letter that Barclays

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140 *See* Foulds, *supra* note 15, at 525 (noting that there is no per se rule against staple financing in Delaware). Since staple financing has not been invalidated as per se illegal, the somewhat arbitrary and unverifiable factor becomes: when did it occur to the investment bank that it might provide financing? From the outset of the deal, like Barclays in *Del Monte*, *see* 25 A.3d at 817, or just before the agreement was approved, like First Boston in *Toys "R" Us*? *See* 877 A.2d at 1005.

141 *See* Foulds, *supra* note 15, at 525.

142 This argument is particularly relevant to *Del Monte*, as Barclays had a prior relationship with KKR. *See* 25 A.3d at 820 ("Like many large banks, Barclays has strong relationships with various [leveraged buyout] shops. KKR is one of Barclays' more important clients."). Yet companies often value investment banks' longstanding relationships with private equity firms. *See, e.g.*, New Mountain Finance Corp., Prospectus Supplement, at S-7 (Mar. 20, 2013), *available at* http://www.sec.gov/Archives/edgar/data/1491925/000104746913003145/a2213796z497.htm ("Furthermore, the Investment Adviser's investment professionals have deep and longstanding relationships in both the private equity sponsor community and the lending/agency community which they have and will continue to utilize to generate investment opportunities.").

143 *See, e.g.*, *Del Monte*, 25 A.3d at 820 (noting that Barclays had earned over $66 million in fees from KKR prior to the Del Monte acquisition).

disclose any possible conflict that might occur over the course of the engagement. Indeed, the most effective way to deal with investment banks' conflicts may simply be to ensure that the client, the board of the target company, is aware of each conflict that exists, so that legal counsel can advise the board as to how to proceed.[144] While Barclays did disclose to the board of directors that it had a potential conflict in acting as both Del Monte's sell-side advisor and KKR's financer, that disclosure came only after Barclays had planned all along to seek permission to provide the financing. If Barclays had been up front from the beginning, however, what might its disclosures have looked like?

> 1. Receiving incentive fees contingent on the consummation of a transaction creates an incentive for the investment bank to approve a transaction regardless of whether that transaction is truly advisable.
>
> 2. If, in the future, the investment bank wishes to provide financing to an acquirer, and the company permits the investment bank to provide such financing, the investment bank will be incentivized to sell the company to a party who requires financing.

These conflicts are common to all investment banks, and requiring such disclosures would essentially create a boilerplate conflicts provision for all engagement letters that would do little to alter target boards' oversight of the sale process.

B. *What the Board Did Wrong: Conducting the Go-Shop*

By arguing that Barclays' conflicts in the Del Monte transaction should not have raised red flags at the beginning of its engagement, I do not mean to suggest that the board was entirely without fault. It is important to recognize that when the *possibility* of Barclays providing financing became a reality, Barclays did in fact face an extraordinary conflict. Even after the board permitted Barclays to participate in the financing, it allowed Barclays to conduct the go-shop. At this point, Barclays' interests were clearly divergent from those of a "nonconflicted" bank. A bank with a success fee but only a possibility of providing financing would be interested in producing a

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[144] *See* Sal Guerrera et al., *Stapled Financing in the Aftermath of Delaware's* Del Monte *Decision*, *in* SKADDEN 2012 INSIGHTS 2, 3 (2012), *available at* http://www.skadden.com/sites/default/files/publications/Skadden_2012_Insights_Capital_Markets_0.pdf (advising that, in light of *Del Monte*, a board should "evaluate any prior or existing relationships that the financial advisor has with actual or potential bidders and determine whether any potential conflicts of interest are likely to develop, in each case carefully reflecting such consideration in its board minutes").

topping bid in the go-shop to attain the highest possible value for the company, and, therefore, the highest fees for the bank; Barclays, however, had already secured permission to provide financing to a specific acquirer and was not interested in finding another buyer who might not require its financing. The board should have recognized this conflict and should not have allowed Barclays to conduct the go-shop.

C. *The Standard for Investment Bank Conflicts Going Forward*

On one hand, Delaware law has addressed the question of success fees and has held that they are not per se illegal; in fact, they create conflicts that nearly all investment banks in the industry share. On the other hand, however, the court in *Del Monte* suggested that a board has a duty to seek out and address—either by eliminating or disclosing—its investment bank's conflicts before it can rely on its bank's advice in selling the company. With so many conflicts implicitly accepted in the industry, the outcome in *Del Monte* seems on some level arbitrary. After all, why accept Barclays' roughly $20 million incentive to push a sale through, but reject an additional $20 million incentive to select a bidder who requires financing? With a duty of care standard that requires directors to identify and correct or disclose some conflicts but not others, courts are left with two choices: accept the fact that investment banks as we currently use them are fundamentally conflicted, or require a dramatic restructuring of the fee arrangements used in nearly all M&A deals.

One is tempted to argue that investment bank conflicts do not deserve the attention they received after *Del Monte*. For one, reputational effects may reign in investment banks' behavior even where conflicts exist.[145] Further, it may be that "[m]anagement is sophisticated, and they hire the bank not for advice in deciding between bids but for their contacts and knowledge of prospective bidders."[146] This view may soften one's outlook on Barclays' behavior, but it also weakens the claim that investment banks have financial expertise upon which directors can rely. Even so, one might argue that Barclays' conflicts did not make a difference for the Del Monte board. Several market leaks alerted potential bidders to the fact that the

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[145] *C.f.* Andrew F. Tuch, *Conflicted Gatekeepers: The Volcker Rule and Goldman Sachs*, 7 VA. L. & BUS. REV. 365, 386 (2012) (suggesting that investment banks acting as underwriters in the securities offering context have strong incentives to build and maintain reputations for diligence and honesty).

[146] Foulds, *supra* note 15, at 529.

company was up for sale;[147] Barclays did contact more than fifty potential acquirers during the first go-shop period;[148] and even after the litigation, Perella Weinberg's go-shop did not lead to any topping bids.[149] We already accept conflicts arising out of success fees—why arbitrarily reject other conflicts as too much?

Another almost assuredly unpopular suggestion, but one I am inclined to accept, would be to eliminate success fees in the industry altogether. The facts of *Del Monte* suggest that serious manipulation will result when the industry looks the other way as experts upon whom boards heavily rely in large-scale transactions suffer from conflicts of interest. While the court in *Del Monte* attempted to characterize Barclays' conflicts as more serious than those that generally exist in the industry, I have suggested in this Note that they are not so easily distinguishable. The best way to prevent future manipulation is to eliminate success fees and staple financing altogether.

CONCLUSION

The court's dissection of Barclays' misbehavior in *Del Monte* brought attention to the conflicted position of an investment bank that gives sell-side advice while secretly planning to later provide buy-side financing. While the *Del Monte* court imposed upon a board a duty to either eliminate or disclose conflicts, some conflicts—like staple financing—are not per se illegal under Delaware law, and others—like success fees—are widely used in the industry. But these are the only conflicts that plagued Barclays in the *Del Monte* transaction. In order to prevent manipulation that ultimately may harm stockholders, investment bank conflicts should be minimized through the elimination of both success fees and staple financing.

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147 *See supra* note 85 and accompanying text.

148 *Del Monte*, 25 A.3d at 828.

149 *See supra* text accompanying notes 118-19.