

Drafting and Negotiating Corporate Agreements

**Confidentiality Agreements,
Standstills, Letters of Intent and
Exclusivity Agreements**



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Agenda [& Thank You & Acknowledgement]

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Thank you and Acknowledgement

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Confidentiality Agreements



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Confidentiality Agreements: Overview

Part of the M&A Process

- A confidentiality agreement is often the first agreement signed as part of the M&A process
- It is typically required to exchange any information between a potential Buyer and Seller for a private company
 - It may not be required initially for public companies because of available public information
 - Public company sellers may also require a credible indication of interest before signing an NDA
- Even after a confidentiality agreement is signed, the Seller will often control the information process
 - Sellers often stage access with due diligence data rooms
 - The initial stages contain less sensitive information until the seriousness of a bid is confirmed
 - Detailed commercial/legal / accounting / tax information may be held back and released later as part of confirmatory diligence
 - Careful review of what information is released and when is recommended, and counsel should discuss the process with the deal team

Confidentiality Agreements: Basic Framework

Preliminary Considerations

- Will disclosure be unilateral or mutual?
 - Roles (unilateral): Company (Seller) and Buyer (you)
 - Roles (reciprocal): Disclosing Party and Receiving Party; also 2-step NDA process
 - Even if the Seller is the primary or only disclosing party, the Buyer will often want reciprocal commitments, e.g., the Seller cannot disclose terms of transaction
 - If a stock transaction is contemplated, Seller will want to do “reverse diligence” on Buyer
 - Integration conducted pre-closing may include sensitive information that Buyer wants protected
- What information is being disclosed?
- Who should have access to information?
- What is the purpose for disclosing the Confidential Information to the other party?
- What are the restrictions on the use of the information?
- Are the parties competitors? Are there antitrust issues?
- Any attorney-client privilege issues?
- Are one or both of the parties public companies?

Confidentiality Agreements: Basic Framework

Definition of Confidential Information

The definition of Confidential Information is a central provision:

Information regarding the Company's business, operations and affairs (whether oral, written, electronic or otherwise), regardless of the form in which it is provided or maintained and whether prepared by the Company, its Representatives or otherwise and whether provided **[before,]** on or after the date hereof, together with **[those portions of]** any notes, analyses, compilations, studies, interpretations or other documents prepared by you or any of your Representatives that contain or otherwise reflect **[or are based in whole or in part]** on such information is hereinafter referred to as “**Confidential Information.**”

- Timing: Should the definition of Confidential Information include materials exchanged before the agreement is signed?
- Scope: Buyers may want to include “portions” and delete “based on” language
- Some parties try to limit the definition of Confidential Information only to written material marked with a legend. This is usually inappropriate in an M&A context

Confidentiality Agreements: Basic Framework

Definition of Confidential Information – Exclusions

These exclusions to the definition of “Confidential Information” prevent such information from being covered by the confidentiality agreement’s restrictions:

“**Confidential Information**” does not include any information that:

- i. was publicly available prior to the date of this agreement or hereafter becomes publicly available without any violation of this Agreement;
 - ii. was available to you on a non-confidential basis prior to its disclosure to you by the Company, provided that the source of such information was not **[, to the best of your knowledge [after due inquiry],]** subject to any legally binding obligation to keep such information confidential;
 - iii. is or becomes available to you on a non-confidential basis from a person other than the Company who is not **[, to the best of your knowledge [after due inquiry]],** subject to any legally binding obligation to keep such information confidential; or
 - iv. was or is independently developed by you without reference to the Confidential Information.
- Buyers may request the bracketed knowledge qualifier
 - Adding “after due inquiry” effectively raises the standard to “knows or should have known”

Confidentiality Agreements: Basic Framework

Definition of Representatives

The Representatives are the persons with whom Confidential Information may be shared:

As used in this agreement, the “**Representatives**” of any person means the **affiliates** of such person and the officers, directors, employees, attorneys, accountants, financial advisors, agents and other representatives of such person and its affiliates **[and its and their potential [debt] financing sources]**.

- Buyers may try to expand the definition of Representatives but this usually comes with the added risk of responsibility for breaches by the Representatives
- Including “affiliates” within the definition may be negotiated, and Buyers may try to limit to “controlled affiliates” or use other language that also excludes portfolio companies
- Sellers typically want to control access of information by financing sources
 - Allowing equity financing sources could inadvertently facilitate a club deal with less competition, although PE buyers will want to contact limited partners (See *In re Del Monte Foods Company Shareholders Litigation*, Consol. C.A. No. 6027-VCL (Del. Ch. Feb 14, 2011))

Confidentiality Agreements: Basic Framework

Responsibility for Representatives

Sellers generally require Buyers to be responsible for breaches by their Representatives:

You shall require your Representatives to be bound **[in writing]** by the **[applicable]** terms of this Agreement to the fullest extent as if they were parties hereto, and shall be responsible for any breach of **[the applicable terms of]** this Agreement by you or any of your Representatives.

- Parties generally do not require Representatives to be bound in writing to the NDA because it can be impractical
 - If desired, the addition of “in writing” as marked requires the execution of a joinder
 - Even if the parties do not get the joinder, the other party is still responsible for the breach

The Buyer and its Representatives are responsible for taking reasonable care to prevent disclosure of Confidential Information:

You shall, and shall cause your Representatives to, safeguard the Confidential Information in the same manner and with the same level of care (but no less than reasonable care) that you use in safeguarding and handling your own confidential and proprietary information.

Confidentiality Agreements: Basic Framework

Use Restrictions

The core provisions of the confidentiality agreement are the use and non-use provisions below:

In connection with your consideration of a possible **[negotiated]** transaction (the “**Transaction**”) **[between/involving]** **[name of Seller]** (the “**Company**”) and **[name of Buyer]**, it is expected that the Company and its Representatives (as defined below) will furnish or otherwise make available to you Confidential Information.

You will not use, or allow the use of, the Company’s Confidential Information for any purpose except to evaluate, negotiate and consummate the Transaction.

You agree that the Company’s Confidential Information will be kept confidential and will not be disclosed, in whole or in part, by you or any of your Representatives to any person other than those of your Representatives who need to know such Confidential Information for the purpose of assisting you in evaluating, negotiating and consummating the Transaction.

- Some Seller’s may add that Confidential Information may not be used “in any way that is detrimental to the Company.” Such language is overly broad and should be deleted.

Confidentiality Agreements: Basic Framework

Use Restrictions – Backdoor Standstills?

- The drafting of use restrictions can have significant and unintended impacts
 - The addition of the word “negotiated” and “between” (rather than “involving”) in the definition of Transaction arguably prevents the use of any Confidential Information in a hostile bid for a public company
- *Martin Marietta Materials, Inc. v. Vulcan Materials Co.*, 56 A.3d 1072 (Del. Ch. 2012), *aff’d*, 45 A.3d 148 (Del. 2012).
 - Martin Marietta was enjoined from pursuing a hostile bid of Vulcan Materials because it disclosed information in SEC filings in a manner that violated the NDA
 - The Court of Chancery determined that the definition of Transaction excluded a hostile bid and that Martin Marietta was violating the non-use and non-disclosure provisions; carveouts for disclosure required by applicable help to alleviate this concern
- *Depomed Inc. v. Horizon Pharma, PLC*, No. 1:15-c v-283834 (Cal. Sup. Ct. Nov. 19, 2015).
 - The court issued a preliminary injunction against a hostile bid by Horizon Pharma for Depomed
 - Depomed and Horizon both participated in an earlier auction for certain assets of Janssen Pharmaceuticals, including a key product, NUCYNTA
 - Depomed won the auction and Janssen’s NDA with Horizon was assigned to Depomed
 - Depomed enforced the NDA against Horizon alleging that Horizon was using information obtained from Janssen in its hostile bid. Horizon immediately terminated its hostile bid.

Confidentiality Agreements: Basic Framework

Permitted Disclosures

It is customary to permit disclosure if required by applicable law as provided below:

If you or any of your Representatives is requested or required by oral questions, interrogatories, requests for information or documents, subpoenas, civil investigative demand or similar process to disclose any of the Confidential Information . . . , or you determine[, **based on the opinion of your counsel,**] that any such disclosure is required under applicable law or applicable rules or regulations of any national securities exchange, you will, to the extent permitted by applicable law, provide the Company with prior written notice thereof promptly (and in any event within **[two]** business days) after receipt of such request or determination so that the Company may seek a protective order or other appropriate remedy and/or waive your compliance with the provisions of this agreement...

- Sellers may want to require an opinion of counsel that disclosure is required and will want as much prior written notice as possible
- Buyers may want more flexibility (e.g. “under advise of counsel”) to determine whether there is a disclosure requirement and may find prior notice to be unduly burdensome

Confidentiality Agreements: Basic Framework

Anti-Publicity and Stalking Horse Risk

Confidentiality agreements also customarily restrict disclosure of the transaction:

Without the prior written consent of the Company, except to the extent required by applicable law, applicable rules or regulations of any national securities exchange or legal process, you will not disclose to any person except to your Representatives the fact that any investigations, discussions or negotiations are taking place concerning the Transaction, or that you have received Confidential Information...or any of the terms, conditions or other facts with respect to the Transaction, including the status thereof.

- Sellers do not want potential Buyers to disclose the status of any negotiations or any other transaction details
- Buyers will want to make the obligation reciprocal to prevent any “stalking horse” risk from the Seller shopping the Buyer’s offer to other potential bidders; Sellers may push back due to need to maximize bid (but should be restricted in disclosing identities of specific bidders)

Confidentiality Agreements: Basic Framework

Destruction/Return of Information

If it becomes clear that negotiations have ceased, Sellers typically request the return or destruction of any Confidential Information:

Promptly upon the Company's request, you shall, at your option, either destroy or return to the Company all Confidential Information. Upon the **[written]** request of the Company, you will promptly (and in any event within **[ten]** business days) provide the Company **[notice][written certification by an authorized officer]** confirming your compliance with the prior sentence.

- It is customary to allow for the Buyer to have the option to destroy information because most information is in electronic form and available on data sites
 - Return of information can also raise issues if the definition of Confidential Information includes any portions of notes or analyses
- This also raises issues related to automatic electronic backups
 - Receiving Parties often ask for a carveout to allow retention in restricted access files for legal compliance or anticipated litigation
- Some Buyers resist having to provide certification by an authorized officer and prefer just to give notice

Confidentiality Agreements: Basic Framework

Non-Solicit: Restrictions on Solicitation and Hiring of Employees

Sellers can be concerned about potential Buyers hiring away their employees and will add a non-solicit provision:

You further agree that for a period of **[two]** years following the date hereof, you will not, directly or indirectly, solicit for employment or hire any officer, director, or **[executive]** employee of the Company or any of its subsidiaries **[with whom you have had contact or who (or whose performance) became known to you in connection with the process contemplated by this Agreement]**.

- Overly broad non-solicit provisions can be impractical for potential Buyers because they will have independent recruiting staff unaware of the transaction
- Buyers may look to limit scope by:
 - Limiting to executives or named individuals
 - Limiting to employees that became known through the negotiation of the transaction
- Sellers may also seek to extend this clause (and Standstills) to Representatives
 - Buyers resist this because of overbreadth; compromise is to limit to those Representatives aware of the transaction
 - Note how this provision should be read together with the definition of Representatives and the responsibility of the Buyer for breaches by its Representatives

Confidentiality Agreements: Basic Framework

Non-Solicit Carveouts

Buyers will often request carveouts from the non-solicit provision so that ordinary course recruiting is not disrupted:

The non-solicit provisions will not prevent you from:

- i. conducting any general solicitations for employment, such as any newspaper or Internet help wanted advertisement, directly or through any agent (including placement and recruiting agencies) **[that is not directed at such persons]**, or
 - ii. hiring any such person (A) who approaches you in response to such advertisements or general solicitations, (B) who contacts you on his or her own initiative without any direct or indirect solicitation from you or (C) whose employment with the Company **[has ceased/has been terminated] [without any solicitation or encouragement from you]**.
- Sellers may request a no-hire for certain listed key employees (notwithstanding above carveouts)
 - Overly broad agreements can also raise antitrust concerns
 - For example, the DOJ order in *United States of Am. v. Adobe, et al.*, No. 10-cv-01629 (D.D.C.) in 2011 and the civil litigation *In re: High-Tech Employee Antitrust Litigation*, 11-cv-02509 (N.D. Cal) settled in 2015

Confidentiality Agreements: Basic Framework

No Legal Obligation

The parties usually clarify that the confidentiality agreement does not impose a requirement to complete a transaction:

Unless and until the parties shall have executed and delivered a definitive transaction agreement, neither party will be under any legal obligation of any kind whatsoever with respect to the Transaction by virtue of this agreement except for the matters specifically agreed to herein. You understand and agree that the Company shall be free to establish and/or change any process or procedure with respect to the Transaction as the Company in its sole discretion may determine.

Sellers will seek to include a broad waiver of any liability:

Neither the Company nor any of its Representatives shall have any liability to you or any of your Representatives resulting from the selection or use of the Confidential Information or any errors therein or omission therefrom. Neither the Company nor its Representatives makes any representations or warranties, express or implied, with respect to the confidential Information, except for any representations and warranties that may be expressly made to the other party in a definitive transaction agreement when, as, and if finally executed, and subject to such limitations and restrictions as may be specified therein.

Confidentiality Agreements: Basic Framework

Remedies

Sellers generally want to preserve the ability to obtain an injunction or an order for specific performance for breaches of this Agreement:

You agree that the Company **[would][may]** be irreparably injured by a breach of **[the confidentiality provisions of]** this Agreement by you or your Representatives and that, in the event of a breach or threatened breach, the Company shall be entitled, in addition to any and all other remedies, to **[seek]** injunctive relief and specific performance **[without the necessity of providing any bond or other security][, and you hereby irrevocably consent to such relief]**.

- Buyers may attempt to use the formulation “may be irreparably injured” and “entitled to seek injunctive relief” as well as deleting the bond waiver and consent
- The risk to the Seller of accepting that markup is the difficulty of proving damages
 - A possible compromise is to emphasize that the Seller always needs to prove a breach
 - Buyer only has to agree not to object to the availability and enforceability of specific performance
- Sellers may also ask for attorney fees for enforcement
 - If accepted, Buyers may seek to limit to apply only to final non-appealable orders
- Sellers typically resist limitations on consequential or special damages

Confidentiality Agreements: Basic Framework

Other Terms

- **Governing law:** Parties frequently choose Delaware or New York
- **Term:** May be unlimited; two years is common; typical range is 18 months to three years, though five is sometimes seen as well
 - Sellers may push for longer time period for protection of trade secrets
 - If exceptions were granted to the requirement to return or destroy information for backups, etc., consider adding language that the confidentiality agreement applies to such information for so long as it is Confidential Information
- **Assignment:** Consider preventing assignment without mutual consent but allowing Seller to assign to a successor entity without consent of the other party
- **Jurisdiction:** Consider stipulation of exclusive jurisdiction and venue
- **Protection of attorney-client privilege**
 - There may be limits in showing that a joint interest exists early in the due diligence process
 - Parties should observe limitations on making privileged information available to non-lawyers
- **No-contact provisions;** all requests made through same contact
- **Conflict waivers for law firms**
- **Agent for service of process provisions** for parties located outside of U.S.
- **Public company provisions:** acknowledgment of securities laws and standstill

Confidentiality Agreements: Antitrust and IP Issues

Antitrust Issues

- Certain detailed business information can be “competitively sensitive”, raising antitrust concerns
 - Various approaches can be taken to resolve

IP Issues

- Sellers typically add a provision to clarify that nothing in the confidentiality agreement grants an option, license or other right, title or interest to any of the intellectual property rights of the Company
- Prospective buyers of technology companies may ask for a “residual” provision as a carveout to the “use” provision (see p. 9):
 - A “residual” is a memory of general knowledge or know-how retained by a person who has examined Confidential Information during due diligence without the intent to memorize it
 - Residuals provision would allow the use of residuals by a Buyer

Standstills



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Standstills: Overview

Public company sellers usually propose standstills as part of the confidentiality agreement to restrict hostile bids. An illustrative excerpt follows:

You agree that for a period of [two years], you will not (and will ensure your affiliates and associates and any person acting on behalf of or in concert with you will not), directly or indirectly, without the prior written consent of the Company:

- i. acquire any securities or assets of the Company;
 - ii. enter into or facilitate any merger or other transaction involving the Company;
 - iii. solicit proxies or influence any person with respect to voting of Company securities;
 - iv. seek to control or influence the management or the policies of the Company;
 - v. participate in a “group” or act in concert with others with respect to the foregoing; or
 - vi. advise, encourage or enter into any discussions or arrangements, disclose any intention or plan or require the Company to make a public announcement in connection with any of the foregoing.
- Period is usually shorter than the confi. agreement but the same as the non-solicit
 - Typical carveouts to be discussed:
 - *De minimis* acquisitions of securities or indirect ownership through fund or brokerage affiliates
 - Ordinary course transactions (important for existing business partners)
 - Termination of standstill upon announcement of a recommended deal with another party

Standstills: Don't Ask, Don't Waive (DADW) Provisions

- Some Sellers require Buyers to agree not to request a waiver of the standstill
- Delaware cases put limits on the use of such DADW clauses:
 - *In re Complete Genomics, Inc. Shareholder Litigation*, C.A. No. 7888–VCL (Del. Ch. Nov. 27, 2012). The court preliminarily enjoined use of the DADW provision because the Board violated its duty of care to consider more bids.
 - *In re Ancestry.com Inc. Shareholder Litigation*, C.A. No. 7988–CS (Del. Ch. Dec. 17, 2012). The court enjoined a stockholder vote until the DADW provisions were disclosed to stockholders because of potential impact on the sale process and the proposed price.
- Practical Implications
 - Use DADW provisions with great care because of skepticism from courts
 - For DADW provisions to be enforceable, the Board must be informed upfront
 - If used, they should be used consistently with all parties and disclosed to shareholders
 - We often see “fallaway” provisions, which provide that following the signing of a definitive agreement, bidders can make a private confidential bid to the Board or that the DADW provision or the entire standstill should automatically fall away

Standstills: Most Favored Nation (MFN) Provisions

- A Buyer may request that the standstill provision or the entire confidentiality agreement contain an MFN provision requiring that if the Seller enters into an agreement that is more favorable (or less restrictive) to another party that the same terms must be offered to that Buyer
 - Typically coupled with a request for a representation regarding other standstills
- Buyers could argue that the provision helps ensure a level and fair playing field
- Sellers can counter that they need flexibility to conduct the sales process as appropriate with different types of Buyers and circumstances
- MFN clauses can have unintended consequences if the Seller halts an auction process, decides to engage with just one Buyer, enters into a less restrictive agreement and then needs to notify all previous bidders still covered by standstill

Letters of Intent



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Letters of Intent: Overview

Content of a Letter of Intent

- Description of the transaction and transaction structure
- Purchase price
 - May include valuation assumptions net of debt and normalized working capital
- Form and timing of consideration
 - Cash vs. stock and holdbacks, escrows and earn-outs
- Due diligence investigation scope and expectations
- Expected timeline and conditions precedent
 - Completion of definitive documentation, satisfactory findings from due diligence, etc.
- High-level terms of definitive agreement
 - Representations and warranties, covenants, indemnification, conditions to closing, etc.
- Sometimes specific target company operating or financing covenants
- Exclusivity
- Confidentiality
- Fees and expenses
- Governing law and other miscellaneous provisions

Letters of Intent: Overview

Buyer's Perspective

- **Goal:** Prevent Seller from talking to other bidders but otherwise preserve as much flexibility as possible
 - Buyer can always walk away
- Include fewer specific deal terms
 - Price ranges instead of definitive valuation
 - Possibility of escrow, holdback, earn-out but without specifying length of time or amount of consideration
 - Ability to revise representations, warranties, covenants, closing conditions and indemnification provisions based on due diligence
- Longer exclusivity period
 - Provide time for due diligence

Seller's Perspective

- **Goal:** Extract as many specific terms as possible in return for exclusivity
 - While the substantive deal terms in the LOI are usually not binding, they may have some “moral” force in negotiation
- Include more specific deal terms
 - Allows for comparison of competing bids and compliance with fiduciary obligations to maximize deal value
 - Push for specific price terms and resolve questions about timing of consideration
 - Attempt to lock Buyer into specific provisions such as indemnification caps before diligence complete
- Shorter exclusivity period
- More process control
 - Milestone deadlines for documentation

Letters of Intent: Advantages and Disadvantages

Advantages

- Demonstrates seriousness of bid
- Setting out non-binding deal terms can streamline negotiations
 - Spot “deal breakers” early
- Justifies the expenses to move the transaction forward
 - Some sellers don’t want to provide detailed diligence material without some agreement on price and other key terms
- Confidentiality and exclusivity provisions remove stalking horse risk
- Provides clarity on expenses and process
- Potential vehicle for regulators / financing

Disadvantages

- Inadvertent creation of duty to negotiate if not drafted carefully
- Can lock parties in to price and other terms prematurely
 - Buyers can cite unforeseen due diligence materials but Sellers can try to hold Buyers to terms expressed in term sheet
- Drafting and negotiating an LOI can itself take considerable time
- Ambiguities can hurt negotiating positions
- Less helpful for public companies
 - Less need for diligence due to public filings
 - Disclosure considerations if binding

Letters of Intent: Binding vs. Non-Binding Terms

The LOI and any term sheet should state which provisions are binding and non-binding:

This letter of intent sets forth the parties' intentions with respect to a possible transaction, but, except for this paragraph and the paragraphs under the headings **[Confidentiality]**, **[Exclusivity]**, **[Costs and Expenses]**, **[Governing Law; Jurisdiction]**, which shall be binding, shall not give rise to any binding obligations. No other obligations shall arise unless and until mutually satisfactory definitive documentation has been executed and delivered by the parties hereto, and neither party shall be under any legal obligation to continue discussions or negotiations by virtue of this letter of intent or any other written or oral expression.

- Generally, the “process” provisions are binding: the confidentiality, exclusivity, costs and expenses and governing law provisions.
 - The paragraph specifying the binding and non-binding provisions should also be binding.
 - Substantive deal terms, sometimes set forth in a separate term sheet, are usually not binding.
- Generally, if parties do not intend to be bound, courts will respect this, but if language in the LOI or behavior imply an agreement to negotiate, courts will enforce it
- Courts consider these factors in determining if there is a duty to negotiate in good faith

Exclusivity Agreements



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Exclusivity Agreements: Overview

- An exclusivity agreement is intended to commit a Seller to negotiate exclusively with one Buyer for a specified time period
 - Buyers typically request exclusivity to ensure their bid is not used as a stalking horse
 - Also helps justify the further cost and expense of due diligence and negotiating definitive agreements
- Sellers generally ask for specific deal terms before agreeing to an exclusivity agreement
- On the other side, Buyers can require an exclusivity agreement before further discussing the deal terms
- An exclusivity provision can be included as part of an LOI or in a separate agreement
- The exclusivity period is usually short (less than 30 days)
- Consider which parties execute the LOI if there are significant Seller stockholders
- General points from confidentiality agreements and letters of intent still important
 - Document agreements on damages, specific performance and continued non-binding nature of discussions

Exclusivity Agreements: Basic Framework

An illustrative exclusivity covenant:

From the date of this letter until **[DATE]**, the Company agrees to negotiate exclusively with Buyer in good faith with respect to the Potential Transaction. During such period, except solely with Buyer with respect to the Potential Transaction, the Company agrees that it will not and will cause each of its **[controlled]** affiliates and its and their respective directors, officers, employees, agents and representatives **[consider defining]** not to, directly or indirectly, solicit, participate in negotiations with or furnish any confidential information to any person with respect to the Company or any of its subsidiaries in connection with, or approve or enter into any agreement relating to, any alternative third-party proposal to acquire shares in, or a material portion of the assets of, the Company.

- Key points for negotiation:
 - Scope of “affiliates” and “representatives” (same practical concerns as for NDAs)
 - Definition of acquisition proposal and percentage of securities or assets implicated
 - Early termination conditions such as changes in the Buyer’s offer terms
 - Covenant to provide the Buyer with notice of any other proposals within a specified time
 - For public companies, covenant to not waive or fail to enforce existing standstills

Exclusivity Agreements: Basic Framework

Fiduciary Duties and Case Law

- A target company's Board of Directors should carefully consider its fiduciary duties in connection with exclusivity agreements, especially if a public company
 - *In re Comverge, Inc. Shareholders Litigation*, C.A. No. 7368-VCP (Del. Ch. Nov. 15, 2014)
 - *Revlon* duties generally require the Board to maximize a company's sale price
 - However, entering into exclusivity agreements can be consistent with fiduciary duties if an appropriate process is followed and based on specific facts and circumstances
- Sometimes public company sellers ask for a fiduciary out to an exclusivity agreement
 - This is arguably unnecessary if the negotiation is non-binding and the exclusivity period is short because the Company can just wait for the exclusivity period to expire
 - More customary to have a fiduciary out in a merger agreement no-shop
- Absent explicit language granting a fiduciary out, courts are reluctant to read it into an agreement. Expectation damages may be available for breaches as well as injunctions.
 - *Global Asset Capital, LLC v. Rubicon US Reit, Inc.*, No. 5071-VCL (Del. Ch., No. 16, 2009)
 - *WaveDivision Holdings LLC v. Millennium Digital Media System, L.L.C.*, C.A. No. 2993-VCS (Del. Ch. Sept. 17, 2010)
- As with any contract, exclusivity agreements may be unenforceable if ambiguous
 - *Gemini Investors v. AmeriPark, Inc.*, 643 F.3d 43 (1st Cir. 2011)

Contact Us

Questions?



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