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CHANCERY DISMISSES CLAIMS FINANCIAL ADVISOR STEERED DEAL TO A FAVORED BIDDER: *ENVESTNET*

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In *Berger v. Fox* ("*Envestnet*"),[1] the Delaware Court of Chancery dismissed a suit challenging the $4.5 billion stockholder-approved take-private merger (the "Merger") of Envestnet, Inc. (the "Company") with affiliates of a private equity firm (the "Buyer"). The Plaintiffs claimed that the Company's directors breached their fiduciary duties by (i) engaging a financial advisor (the "Financial Advisor") that they knew was conflicted due to its extensive business relationships with the Buyer, and (ii) then permitting the Financial Advisor to steer the sale to the Buyer and away from two higher, unsolicited competing bids. They also claimed that the Financial Advisor aided and abetted the directors' breaches. The Merger price was near the bottom of the Financial Advisor's discounted cash flow valuation range for the Company and represented a 4.8% discount to the 52-week share price high.

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Key Points

- **It is extremely difficult for plaintiffs to succeed on claims that independent and disinterested directors acted in bad faith.** As the Company's directors were independent and not self-interested in the transaction, and were exculpated for duty of care violations, they could have liability only if they had acted in bad faith. It is a "daunting task," the court stated, to show that independent and disinterested directors intentionally failed to run a reasonable sales process or intentionally caused a merger proxy statement to omit material information—as they would have "no motive" for doing so. Moreover, the court stressed, in this case, it appeared that the "fully independent Board retain[ed] experienced advisors, inform[ed] itself of potential conflicts, engag[ed] with multiple bidders, and me[t] over a dozen times before reaching a deal"—none of which indicated bad faith.

- **The Financial Advisor's relationship with the Buyer did not create an incentive for it to favor the Buyer.** The court emphasized that the Financial Advisor had fully disclosed to the Board its relationship with the Buyer, and the Board fully disclosed the conflict to the stockholders. Also, the Financial Advisor had "similar relationships" with the competing bidders. And, in any event, there were no allegations that the Financial Advisor had taken "any action without Board direction or approval or concealed information from or otherwise misled the Board."

- **The Company's disclosure to stockholders relating to the Financial Advisor was adequate.** Although the amount of the fees the Financial Advisor expected to receive for concurrent engagements with the Buyer was not disclosed to the stockholders, the court concluded that "the scale" of the engagements was sufficiently disclosed as the proxy stated that compensation was expected to be "significantly more" than the fees the Financial Advisor would receive from the Company in connection with the Merger. Also, the court concluded that it was not necessary that the Company have disclosed in the proxy that the Financial Advisor, a month before being engaged by the Company, had in the ordinary course provided an "Illustrative LBO Analysis" of the Company with the Buyer, which it had shared with the Buyer.

- **With respect to the aiding and abetting claim against the Financial Advisor, the court applied the heightened *Mindbody* standard for "knowing participation."** Notably, the court did not mention recent decisions in which Vice Chancellor J. Travis Laster has suggested that the *Mindbody* standard should apply only when aiding and abetting claims are asserted against third-party buyers, and *not* when asserted against financial advisors.

- **The decision stands in contrast to the more skeptical approach toward financial advisors the court has taken in other recent cases.** We note that, in *EngageSmart*,[2] Vice Chancellor Laster emphasized that a financial advisor's disclosure of conflicts does not indicate a lack of scienter by the advisor nor "eliminate [the] effect" of the conflicts. Vice Chancellor Laster also suggested in that decision that, given a financial advisor's "central role" in a sale process and the sell-side directors' extensive reliance on the advisor, it may be likely that, when there are breaches of fiduciary duties by the directors, the financial advisor aided and abetted them. We note that, in *Electric Last Mile*,[3] Chancellor Kathaleen St. J. McCormick declined to dismiss claims that a financial advisor had knowingly failed to correct projections contained in board materials, which later were summarized in the proxy statement. The Chancellor imputed to the advisor knowledge of allegedly conflicting information from a different transaction, without considering whether the information had been obtained by a different deal team and the advisor had customary information firewalls in place.

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Background

The Company, a public Delaware corporation in the wealth management technology business, had periodically engaged in discussions with the Buyer about a possible transaction. In late 2023, the Company met with the Buyer to discuss again a potential transaction—just after the Company's stock price precipitously declined due to deterioration in its Data & Analytics business (the "D&A Business"); Bloomberg leaked that the Board was exploring the possibility of a sale of the D&A Business; and the Company's interim CEO departed. The next month, the Company formally launched a sale process for the D&A Business, with outreach to the Buyer and many others. The Buyer submitted a non-binding proposal to acquire the whole Company for $62-$64 per share in cash. The Board then engaged the Financial Advisor to advise it on a sale of the D&A Business and strategic alternatives. Reuters published an article reporting that the Company, after receiving interest from private equity firms including the Buyer, was exploring strategic alternatives that potentially could include a sale of the whole Company.

The Company then received two unsolicited bids for the whole Company—from "G" (a private equity firm) and "F" (a strategic buyer)—at prices higher than the Buyer's proposal. The Financial Advisor told the Board it believed that G and F likely expected to achieve significant business-operation synergies through a transaction with the Company. The Financial Advisor also noted that the Buyer was likely to be able to complete its due diligence on a more expeditious timeline than G or F. The Board's legal advisor (the "Legal Advisor") advised that the Buyer's proposal would present no regulatory issues, while G's and F's proposals could lead to a longer antitrust investigation. Meanwhile, in the D&A Business sale process, following widespread outreach, four bidders submitted bids, which ranged from $100-$220 million, down considerably from their initial preliminary proposals' range of $250-$325 million.

Ultimately, the Buyer's final bid was $63.15 per share, with proceeds from a pre-closing divestiture of the D&A Business, if it occurred, to be distributed to the Company's stockholders. Funding of the purchase price would be provided by the Buyer's affiliated funds, third-party co-investors, and strategic partners, plus committed debt and preferred equity. G, whose last bid had been $72.50 per share, withdrew from the process, stating that it could not meet the deadline set by the Board for final bids because it had been provided only "limited access" to conduct due diligence. F's final bid was $71 per share, conditioned on pre-closing divestiture of the D&A Business. F valued its bid at $72-$73 per share (assuming the proceeds from the divestiture yielded $100-$160 million). F stated that it required three to four more weeks to secure financing; and its proposal contemplated a rollover of equity by a major Company stockholder (who had agreed only to "evaluate" a rollover).

The Financial Advisor provided the Board with an updated presentation on valuation and a fairness opinion. The presentation showed that the Buyer's offer was at the low end of the Financial Advisor's DCF analysis; and that it represented a 4.8% discount to the Company's 52-week share price high, but an 11.7% premium to the unaffected share price and a 12.1% premium to the unaffected 30-day volume-weighted average share price.

The Board approved the Merger. A merger proxy statement (the "Proxy") was distributed to stockholders. Over 75% of the outstanding voting power approved the Merger. The Merger closed in November 2024. The Plaintiffs served demands under DGCL Section 220 to inspect the Company's books and records concerning the Merger, and the Company produced documents in response. About a year later, the Plaintiffs brought this suit. Vice Chancellor Bonnie W. David granted the Defendants' motion to dismiss the case.

Discussion

The court held that *Corwin* business judgment review applied. The Merger did not involve a controller and was approved by a majority of disinterested stockholders in what the court determined was a fully informed and uncoerced vote. Therefore, the *Corwin* doctrine applied, requiring judicial review under the

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deferential business judgment rule rather than the heightened scrutiny of the *Revlon* doctrine. The court stated that even if *Corwin* did not apply, the Plaintiffs' claims would be dismissed because (a) the Company's charter exculpated directors from liability for duty of care claims and (b) duty of loyalty claims require a showing that directors acted in their own self-interest or in bad faith. The directors were not self-interested in the Merger, and their actions did not support an inference of bad faith. Indeed, the record showed that the Board had received and considered conflict disclosures from the Financial Advisor; met more than a dozen times before approving the Merger; repeatedly evaluated and considered the competing bids; tried to re-engage G in the process when it withdrew; and chose the Buyer's offer because they viewed it as providing greater certainty of closing.

The court rejected the Plaintiffs' contention that the sale process—which included neither an auction nor any solicitation of alternative bidders—reflected bad faith. The court noted that the news media publicly reported that the Company was considering strategic alternatives; that the Company separately ran a process to sell the D&A Business, in which it contacted 80 potential bidders; and that the Board had received two unsolicited bids to acquire the Company. Further, the Board had considered conducting a pre-signing market check, but rejected doing so, deciding instead to negotiate a low break fee, after considering the widespread news of its process, the risk of additional delay, and the fact that the two unsolicited bidders both had rejected a go-shop provision. These decisions were not outside the bounds of reason or otherwise indicative of bad faith, the court stated.

The court rejected the Plaintiffs' contention that the Financial Advisor's relationship with the Buyer caused it to steer the deal to the Buyer. The court noted that, although the Financial Advisor disclosed to the Board that it expected to receive significantly more compensation from the Buyer than from the Company relating to the Merger, the contingent fee arrangement with the Company incentivized the Financial Advisor to maximize price. Also, the Financial Advisor had "similar relationships" with both competing bidders as it had with the Company. Further, the court stated, even if the Financial Advisor had an incentive to favor the Buyer over its other clients, the Complaint "still fail[ed] to allege" that the Financial Advisor acted improperly—*i.e.*, it acted as directed by the Board and did not mislead the Board.

The court found no fault with the Financial Advisor's conflicts disclosures to the Board. The Financial Advisor, initially and in several updates, disclosed the financial advisory and financing fees it had earned from the Company and from the Buyer and its affiliates, as well as its ownership of common stock in affiliates of the Buyer. It also disclosed to the Board that, one month earlier, it had prepared, and had shared with the Buyer and another financial sponsor, the Illustrative LBO Analysis, in which it had assumed a purchase price of $60-$80 per share for the Company.

The court held that the Financial Advisor did not "knowingly participate" in any director fiduciary breaches. The court found that the Plaintiffs failed to allege any *non*-exculpated claim for breach of the duty of *loyalty* against the directors—but noted that an aiding and abetting claim also can be premised on an *exculpated* claim for breach of the duty of *care* if the alleged aider and abettor "knowingly participated" in the breach. The court noted the heightened standard for "knowing participation" recently established by the Delaware Supreme Court in *Mindbody*.[4] That standard requires that the alleged aider and abettor (i) "kn[ew] that the primary party's conduct constitute[d] a breach and kn[ew] that its own conduct regarding the breach was legally improper"; and (ii) "provided 'substantial assistance' to the primary violator." The Plaintiffs had premised their aiding and abetting claim on the directors' alleged duty of care breaches based on purported sales process violations—but, the court stressed, the Financial Advisor did not knowingly participate in any of these alleged breaches, as it was the Board (not the Financial Advisor) that made the decisions relating to the sales process.

The court did not address whether the *Mindbody*

heightened standard for "knowing participation" applies to financial advisors. *Mindbody* clarified that, for knowing participation, the knowledge must have been actual knowledge (constructive knowledge would be insufficient) and the participation must have been active and substantial (passive awareness would be insufficient). Notably, in three post-*Mindbody* Court of Chancery decisions—*EngageSmart*, *YWCA of Rochester*,[5] and *Guilbeau v. Footprint*[6] —Vice Chancellor Laster has suggested that the more stringent standard articulated in *Mindbody* should apply only when aiding and abetting claims are asserted against third-party buyers, as they are "outsiders" with respect to the process, and should not apply when aiding and abetting claims are asserted against parties who are "insiders" with respect to the process, such as sell-side financial advisors as their very role is to help ensure that the board fulfills its fiduciary duties. In *Envestnet*, the court applied the *Mindbody* standard, without mentioning as an issue whether this standard should apply to financial advisors.

The court found no fault with the Financial Advisor's actions during the sale process.

- ***Discussions with bidders.*** The Plaintiffs alleged that the Financial Advisor held "unsupervised discussions with bidders" and that the Board "permitted" the Financial Advisor to "privately handle" bidder communications. The court noted that it was the Board, not the Financial Advisor, that made these decisions, and, in any event, that there were no allegations "that misconduct occurred during those discussions."

- ***Deadline for bids.*** The Plaintiffs alleged that the Financial Advisor improperly "imposed a timeline" on bids, which aided the Buyer because it had a significant head start on due diligence. The court found that the only reasonable inference, from the Complaint and the Board minutes incorporated by reference therein, was that it was the Board, not the Financial Advisor, that made the decision to set a deadline. It was "not reasonable to infer that setting a deadline for bids was grossly negligent, rather than an appropriate measure for managing the sales process, let alone that the Financial Advisor knew its participation in that decision was legally improper."

- ***Inadequate due diligence materials to a competing bidder.*** The Plaintiffs alleged that the Financial Advisor acted improperly in limiting G's access to diligence (which G stated as the reason for its withdrawing from the process). The court noted that, immediately after receiving G's letter, the Board met to discuss it; reviewed in detail with the Financial Advisor the materials and access that had been provided to G as compared to the Buyer and F; and directed the Legal Advisor to communicate with G "to better understand" and address G's concerns.

- ***Pretextual discrediting of competing bids.*** The Plaintiffs alleged that the Financial Advisor gave the Board "pretextual reasons for discrediting the other bidders, which the [directors] unwittingly accepted." The court viewed the Board as having properly focused on the financing, regulatory, and other closing risks (such as conditioning closing on an uncertain sale of the D&A Business) that were presented by the competing bids as compared to the Buyer's bid, and again stressed that the Financial Advisor did not conceal information from or mislead the Board.

- ***Valuation adjustment.*** The Plaintiffs alleged that the Financial Advisor downwardly adjusted its valuation of the Company to help support the Buyer's lower bid. The court, again, stressed that the Plaintiffs did not identify any information that the Financial Advisor hid from the Board. The valuation adjustment came, "at the Board's direction," following the Company having received diminished second-round bids for the D&A Business. "In any event," the court wrote, "an advisor revising its analysis during the course of its engagement in a manner that is supportive of a proposed transaction does not on its own support an inference of knowing participation."

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The court rejected the Plaintiffs' contention that the Proxy should have included additional disclosure about the Financial Advisor's "concurrent representations" with the Buyer. The Proxy disclosed that the Financial Advisor was presently engaged to provide financial advisory services for the Buyer and its affiliates unrelated to the Merger and expected to receive customary fees in the future if transactions were completed—and that such fees from the Buyer and its affiliates would be "significantly more," in the aggregate, than the fees it would receive from the Company in the Merger. The Plaintiffs argued that the specific amount of expected fees from the Buyer and its affiliates should have been disclosed because, without that, stockholders could not "contextualiz[e] and evaluat[e] the Financial Advisor's concurrent conflicts of interest with the Buyer against its $50 million fee from the Merger." The court wrote that the Proxy *did* provide context, as the Proxy explained that the amount of fees from the Buyer would be "significantly more" than those from the Company. "[T]he relationship and its rough scale [were] disclosed," the court wrote—particularly as, in this case, "the disclosure of future fees for unrelated concurrent engagements would require guesswork, and imprecise disclosure itself could be misleading to stockholders."

The court rejected the Plaintiffs' contention that the Proxy should have disclosed the Financial Advisor's concurrent engagements with the Buyer that had concluded prior to issuance of the fairness opinion. Without this disclosure, the Plaintiffs argued, stockholders could not tell whether the Financial Advisor "concurrently represented [the Buyer] on separate engagements during the entirety of the sale process." The court noted that the Proxy disclosed the fees received in the two years prior to issuance of the fairness opinion, and that the fees expected from current engagements would be "significantly more" than the fee to be earned in connection with the Merger. There is no requirement for "an additional breakdown of the specific fees earned between commencement of the deal process and delivery of a fairness opinion," the court wrote.

The court rejected the Plaintiffs' contention that the Proxy should have disclosed that the Financial Advisor had shared the Illustrative LBO Analysis with the Buyer. The Financial Advisor shared that Analysis with the Buyer in March 2024—the same month that the Buyer provided its initial bid to the Board. The Company's failing to mention the Analysis in the Proxy did not render the stockholder vote uninformed, however, the court stated. The Plaintiffs' theory of materiality with respect to the Analysis relied on "unreasonable inferences that the [Analysis] may have given [the Buyer] informational and timing advantages." However, there were no facts alleged supporting a reasonable inference that the Financial Advisor "possessed recent confidential information that [the Buyer] did not already have through years of diligence under multiple NDAs [with the Company]." Further, the court noted that the Analysis would not have "allowed [the Buyer] to calibrate its bid more precisely" than the other bidders could, given that the range of $60-$80 per share in the Analysis "was so broad that it encompassed every bid received from all three bidders . . ."

The court rejected the Plaintiffs' contention that the Proxy was deficient with respect to disclosure of the Legal Advisor's engagements with the Buyer. The Plaintiffs argued that the Proxy should have disclosed that, while the Legal Advisor was representing the Company on the Merger, lawyers in the firm's London office were advising certain portfolio companies of the Buyer on three European transactions unrelated to the Merger. The Plaintiffs cited *City of Dearborn Police v. Brookfield*,[7] in which the Delaware Supreme Court concluded (albeit stating it was a "close call") that the proxy statement in that case should have disclosed that the law firm representing the special committee that approved a transaction had simultaneously represented the buyer's controller in unrelated transactions. In *Envestnet*, the court stated that the Plaintiffs had not even tried to argue that the London representations were material to the Legal Advisor such that they might cause the law firm to "not want to push [the Buyer] too hard." The court stated that, although advisor conflicts should be disclosed, the independent Board's failure to disclose

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the Legal Advisor's "immaterial conflicts" did not render the stockholder vote uninformed.

Practice Points

- **Companies should weigh carefully whether to include independent, disinterested directors on a board.** *Envestnet* underscores the benefits of having independent, disinterested directors on a board. Such directors should neither have personal liability nor face trial beyond the pleading stage, unless they intentionally or consciously breach their fiduciary duties. Of course, although liability for independent and disinterested directors is remote except in the context of truly egregious facts, it is generally in their interest nevertheless to conduct a reasonable sale process and adhere to best practices—in order to achieve the best result for stockholders, to avoid pre-closing injunction of a transaction, and for personal reputational reasons.

- **A board or special committee should maintain a record of the reasons for its key sale process decisions.** This would include decisions to engage a conflicted financial advisor; not to conduct an auction or pre-market check; and which bid to select. It is also important to maintain a record of which due diligence materials and access are provided to which bidders; and, when a bidder complains of more limited access than is being granted to other bidders, to investigate and address the issue.

- **A board or special committee should be proactive in obtaining conflicts information from its financial advisor—**and the advisor should be proactive in providing such information (even if it is not specifically requested). The board should document its consideration of the conflicts; the reasoning behind a conclusion that the advisor's experience outweighs the risk presented by the conflicts; and its determination whether measures should be taken to ameliorate the conflicts. Although unrelated to *Envestnet*, we note also that a board should keep in mind that the Delaware courts in recent decisions have emphasized that the analysis whether to engage an advisor notwithstanding conflicts is separate and different from the analysis as to what information about potential conflicts has to be disclosed to stockholders.

- **Financial advisors should be prepared for the possibility of aiding and abetting claims.** We note that the 2025 DGCL amendments providing safe harbor protection for conflicted transactions reduce the likelihood of recovery on claims of breach of fiduciary duties against directors, officers and controllers—but the Delaware Legislature's synopsis to the amendments states that liability for aiding and abetting such breaches remains. We note also Vice Chancellor Laster's suggestion in several recent decisions that a *lower* pleading standard for "knowing participation" should be applied to aiding and abetting claims brought against financial advisors. And we note again *EngageSmart*, in which Vice Chancellor Laster stated that a financial advisor's "central role makes it all the more conceivable that—when a [fiduciary] breach [by directors] happens—the financial advisor will have assisted in the act and understood its nature."

- **Boards should consider carefully the disclosure in a merger proxy statement about a financial advisor's conflicts.** It should be kept in mind that, under *Corwin*, a "fully informed" stockholder vote will cleanse fiduciary duty claims. Boards also should consider what information potential stockholder-plaintiffs may obtain through Section 220 demands that could then be used to craft a complaint that pleads around the board's *Corwin* defense. *Envestnet* is helpful in indicating that even broad disclosure, without detailed fee information, may be sufficient to indicate "the scale" of expected compensation.

ENDNOTES:

[1] *Paul Berger and Kevin Barnes v. James Fox, et al.*

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(Del. Ch. July 24, 2026).

[2]*In re EngageSmart, Inc. Stockholder Litigation* (Del. Ch. Feb 27, 2026).

[3]*Electric Last Mile Solutions, Inc. Stockholder Litigation* (Del. Ch. January 27, 2026).

[4]*In re Mindbody, Inc., Stockholder Litigation*, 332 A.3d 349 (Del. 2024).

[5]*YMCA of Rochester & Monroe County v. Hatteras Funds, LP, et al*. (Del. Ch. March 31, 2026).

[6]*Eric Douglas Guilbeau, et. al. v. Footprint International Holdco, Inc., et al.* (Del. Ch. May 11, 2026).

[7]*City of Dearborn Police and Fire Revised Retirement System v. Brookfield Asset Management Inc.* (Del. Ch. March 2024).

WHEN AI MEETS RWI IN M&A: WHAT IMPACT WILL AI HAVE ON REPRESENTATION AND WARRANTY INSURANCE?

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What happens when an unstoppable force meets an immovable object?

Artificial intelligence ("AI") is the unstoppable force in our metaphor: it's quickly becoming ubiquitous across all industries as its integration into business models continuously deepens. Representation and warranty insurance ("RWI") is our unmovable object: it's a fixture of the M&A landscape that many M&A parties rely on to grease the wheels of their transactions and get deals done.

The collision is unfolding in real time. AI's ever-greater market penetration means that AI issues in M&A are no longer limited to "tech" deals. More and more targets, regardless of their sector, present significant AI-related commercial and legal considerations. Given that AI presents a variety of hard to verify risks, this raises increasingly complex issues around RWI. A question that follows is (1) whether reductions in RWI coverage around AI are likely, whether by AI-related exclusions or otherwise, and (2) if this could progressively push AI risk allocation onto due diligence and traditional contractual mechanisms such as indemnities.

To begin to provide an answer, we review the competing forces at play and some of the practical takeaways for both buyers and sellers.

The Cause: AI Risks Present Diligence Challenges

The nucleus of the tension between AI and RWI is an understandable concern on the part of insurers: confidence that all material AI risks in an M&A transaction have been identified and are fully understood can be hard to come by. On the one hand, AI systems can be difficult to audit, unpredictable in their behavior, and dependent on inputs that may be hard to verify after the fact. On the other hand, AI risk may sit in such varied places as the relevant training data, the model itself, an open-source component, or the way the target deploys AI in its services, products and/or operations.

The Effect: AI-Related RWI Coverage May Narrow

Different potential corresponding impacts on RWI policies and processes are foreseeable. As a base matter, heightened insurer scrutiny of AI-related issues is inevitable and well underway. Narrower policy coverage is also possible, depending on the transaction and target.

A policy exclusion could be limited to a known issue, such as a particular data set, model provider, customer claim, privacy concern, or regulatory investigation. However, if the diligence record is incomplete, RWI insurers may push for broader language, such as terms excluding losses arising from the development, deployment, use, governance, or performance of the target's AI systems generally.

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