Corporations, Securities, & Antitrust

Del Monte and *El Paso*: Going to *Revlon*-Land With a Conflicted Financial Advisor

*By Robert T. Miller**

Note from the Editor:

This article examines two recent cases in the Delaware Court of Chancery addressing the *Revlon* duties of directors when the company's financial advisor has a conflict of interest related to the proposed business combination transaction. As always, The Federalist Society takes no position on particular legal or public policy initiatives, and no position on the conduct of the parties involved or decisions by the respective judges in *Del Monte* or *El Paso*. Any expressions of opinion are those of the author. The Federalist Society seeks to foster further discussion and debate about conflicts of interest in business combination transactions. To this end, we offer links below to different perspectives on the issue, and we invite responses from our audience. To join the debate, please e-mail us at info@fed-soc.org.

Related Links:

- *In re* Del Monte Foods Co. Shareholders Litigation, 25 A.3d 813 (Del. Ch. 2011): http://www.rlf.com/files/Del%20Monte.pdf
- Del Monte and Barclays Settle Investor Lawsuit for $89.4 million, N.Y. Times Dealbook, Oct. 6, 2011: http://dealbook.nytimes.com/2011/10/06/del-monte-and-barclays-settle-investor-lawsuit-for-89-4-million/
- John Coaes, et. al, Barclays Capital and the Sale of Del Monte Foods, Harvard Law School Case Study (from the perspective of the bankers and lawyers at Barclays) (July 27, 2012): http://casestudies.law.harvard.edu/barclays-capital-and-the-sale-of-del-monte-foods/
- Jeffrey McCracken, *Barclays Leads LBO Financing Retreat After Del Monte Slap*, Bloomberg, Sept.14, 2011: http://www.bloomberg.com/news/2011-09-14/barclays-leads-lbo-financing-retreat-after-del-monte-criticism.html

Two recent cases in the Delaware Court of Chancery address the *Revlon*[1] duties of directors when the company's financial advisor has a conflict of interest related to the proposed business combination transaction. The first, *In re Del Monte Foods Company Shareholders Litigation*,[2] was relatively straightforward. In a cash sale of Del Monte Foods Company (Del Monte) to a consortium of private equity buyers, Del Monte's financial advisor, Barclays Capital (Barclays), flagrantly violated its fiduciary duties to the company by concealing its role in putting the company in play, its desire to provide financing to the buyers (so-called "stapled financing"),[3] and its facilitating a pairing of two buyers to make a joint bid for the company. The doctrinally interesting aspect of the case concerns how breaches of fiduciary duties that an agent owed to the corporation can support a claim that the directors, who were entirely unaware of the agent's wrongdoing, breached their *Revlon* duties to the shareholders.

The second case, *In re El Paso Corporation Shareholders Litigation*,[4] is more complex. El Paso Corporation (El Paso) had agreed to be acquired by Kinder Morgan, Inc. (Kinder Morgan) for a mix of cash and stock, but its usual financial advisor, Goldman Sachs & Co. (Goldman), owned a substantial interest in Kinder Morgan. Fully aware of this conflict, El Paso reduced Goldman's role in the transaction and engaged Morgan Stanley & Co., LLC (Morgan Stanley) to advise it as well. Morgan Stanley's compensation was structured in such a way that it would receive a large fee only if El Paso completed a deal with Kinder Morgan, a fact about which the board was of course also fully aware. Although these conflicts were fully disclosed to the board, and although under well-known principles of agency law an agent does not breach its fiduciary duty merely by having a fully-disclosed conflict of interest, the court nevertheless held that the El Paso directors had breached their *Revlon* duties in part because they relied on advice from conflicted advisors. Thus, while *Del Monte* concerns primarily the effect of *undisclosed breaches* of a financial advisor's fiduciary duty, *El Paso* concerns primarily the effect of a financial advisor's *fully disclosed conflicts of interest*. Below I discuss both cases, arguing that the result in *Del Monte* was clearly right but that in *El Paso* is largely wrong.

I. *In re Del Monte Foods Company Shareholders Litigation*[5]

A. Factual Background

As usual in Delaware business combination cases, the facts in *Del Monte* are complex. In January of 2010, Apollo Global Management (Apollo) approached Del Monte about a possible leveraged-buyout.[6] Del Monte sought the advice of Peter J. Moses, an investment banker at Barclays, who had often advised Del Monte in the past.[7] Moses, whose responsi-

**Robert T. Miller is a Professor of Law and F. Arnold Daum Fellow in Corporate Law at the University of Iowa College of Law. He teaches Mergers and Acquisitions, Law & Economics, Corporate Finance, Business Associations, Antitrust, and Contracts.*

bilities at Barclays included the consumer food sector, had in the ordinary course of his activities been pitching Barclays to various private equity firms, including Apollo.[8] In so doing, Moses hoped that, in any leveraged buyout of the company, Barclays would be able to offer stapled financing to the buyers and thus collect an additional fee. Disclosing none of this to Del Monte, Moses advised the company to conduct a limited process focusing on financial buyers,[9] which itself was reasonable given the paucity of potential strategic buyers for the company. As Vice Chancellor Laster points out, however, this decision also furthered Barclay's goal of providing buy-side financing,[10] for financial buyers are much more likely to use such financing than strategic buyers.

On Barclays's recommendation, Del Monte invited five financial buyers, including Apollo and Kohlberg, Kravis, Roberts & Co. (KKR),[11] to submit expressions of interest,[12] and when word leaked that Del Monte was soliciting proposals, Campbell Soup Company, a potential strategic buyer, and Vestar Capital Partners (Vestar), another financial buyer, asked to be, and were, included in the process as well.[13] All of the potential buyers entered into confidentiality agreements with Del Monte,[14] and, as is common in transactions involving financial buyers, these agreements contained "no-teaming" clauses, which provide that, without the prior written consent of the target company, the potential buyer shall not enter into any discussions or agreements with another other person, including other potential buyers, concerning a transaction involving the target.[15] The purpose of such provisions is obvious: because private-equity buyers routinely join forces to acquire portfolio companies,[16] the target naturally wants to control this process in order to maximize price competition among the buyers.

Eventually, most of the financial bidders submitted nonbinding indications of interest in acquiring the company, with the highest bids coming from KKR ($17 per share) and Vestar ($17.00 to $17.50 per share), although Vestar made it clear that it would have to partner with another firm in making an actual bid.[17] The Del Monte board decided not to proceed, however, and it instructed Barclays to terminate the sales process and inform the bidders that the company was not for sale.[18]

A few months later, in September of 2010, acting on his own initiative, Moses restarted the process. He approached Vestar and indicated that Del Monte might be receptive to proposals (the company had failed to meet its earnings targets for successive quarters and its stock price was down), and he further suggested that KKR would be the ideal partner for Vestar.[19] Moses then discussed the idea with KKR, and soon KKR and Vestar had agreed to work together on an approach to Del Monte.[20] As Vice Chancellor Laster later found, these discussions breached the no-teaming provision in the agreements that KKR and Vestar had with Del Monte.[21] Moreover, in pairing KKR and Vestar, Moses had joined together the two highest bidders in the earlier process. If Del Monte was to get the highest price possible, it would seem to make more sense to pair Vestar with some other large and capable firm, such as Apollo. But teaming Vestar with KKR served Barclays' interest: Barclays had an especially close relationship with KKR, had provided stapled financing to KKR in the past, and believed that its chances of providing such financing in a transaction involving Del Monte would be maximized if KKR was the buyer.[22]

On October 11, 2010, KKR presented to Del Monte a written indication of interest to acquire the company at $17.50 cash per share.[23] KKR said nothing about Vestar participating in the transaction.[24] Neither did Moses. Even worse, Moses worked with KKR to keep Del Monte in the dark about Vestar's role. On October 31, for example, Moses emailed a representative of KKR, noting that he agreed with KKR's judgment that Vestar's representatives should not yet be invited to meetings with representatives of Del Monte.[25] When the Del Monte board met to consider KKR's indication of interest, the directors decided that, since they had conducted a limited market check only eight months earlier and since KKR's bid was equal to the highest bid received during that process, they would negotiate with KKR and not seek bids from other potential buyers.[26] They also engaged Barclays to act as the company's financial advisor, and Barclays again failed to disclose to Del Monte that its representatives had for some time been discussing the transaction not only with KKR but also with Vestar.[27]

In the subsequent negotiations, Barclays was the principal point of contact with KKR.[28] Del Monte rejected KKR's $17.50 per share offer as inadequate but offered to make due diligence materials available to KKR. KKR began reviewing these materials, and eventually raised its offer to $18.50 per share, an offer which Del Monte again rejected as inadequate.[29] On November 8, with the parties believing they were close to reaching agreement, KKR finally requested that it be permitted to partner with Vestar.[30] Apparently without considering whether it would be more advantageous to the company if Vestar were paired with another major firm, and without attempting to extract some concession from KKR, the Del Monte board consented to the arrangement between KKR and Vestar.[31]

Barclays then asked KKR to give Barclays one-third of the debt financing KKR would need to complete the transaction, a request to which KKR assented.[32] The next day Barclays asked Del Monte's management for permission to provide buy-side financing to KKR. Apparently without any consideration of the ramifications, Del Monte agreed.[33] There was never any contention that KKR needed Barclays to finance the deal; indeed, KKR's relationships with other major banks were more than sufficient. Nor did the Del Monte board obtain any advantage for the company in exchange for its consent that Barclays arrange buy-side financing. The only apparent reason for the arrangement was that it benefited Barclays, which hoped to earn between $21 million and $24 million in fees from its buy-side work—an amount approximately equal to the $23.5 million it would earn from Del Monte for its sell-side work in the deal.[34]

Of course, when Barclays became a lender to the buyer, its interests became aligned with those of the buyer and contrary to those of Del Monte, a fact made explicit in a letter agreement between Del Monte and Barclays.[35] That agreement also provided that Barclays "believes that it is essential . . . for the company to receive independent financial advice, including an additional fairness opinion, from an independent third party firm who is not involved in the acquisition financing."[36] Del Monte thus engaged Perella Weinberg Partners, LP (Perella Weinberg) to provide such an opinion at an additional cost

to the company of $3 million.[37] Moreover, as Vice Chancellor Laster observes, at the time that Barclays interests became contrary to those of Del Monte, Del Monte and KKR had not yet agreed on price, and Barclays was still handling price negotiations with KKR.[38]

On November 24, KKR presented its best and final offer of $19 cash per share.[39] Barclays and Perella Weinberg delivered favorable fairness opinions, and the Del Monte board accepted the offer.[40]

The merger agreement between the parties provided for a 45-day go-shop period during which Del Monte was permitted to further shop the company, after which it would be bound by a customary non-solicitation provision.[41] The agreement also contained a standard fiduciary out, permitting Del Monte to terminate the agreement to accept a superior offer (subject to matching rights in favor of KKR), provided that Del Monte paid a termination fee to KKR. The fee would be $60 million (1.5 percent of the equity value of the transaction) if the superior offer were made during the go-shop period and $120 million (3.0 percent of the equity value of the transaction) if the superior offer were made after go-shop period.[42]

Del Monte asked Barclays to conduct the market check permitted by the go-shop.[43] Although Barclays approached fifty-three potential acquirers, including both strategic and financial buyers, none ultimately made a competing offer for Del Monte.[44] As Vice Chancellor Laster observes, however, at this point Barclays stood to make at least as much from its buy-side work for KKR as from its sell-side work for Del Monte, and Barclays would likely lose the former benefit if another buyer emerged.[45] Other banks were available to manage the go-shop, and Goldman approached Del Monte about fulfilling this role.[46] When this happened, a representative of Barclays emailed a representative of KKR, stating that "Goldman has been pushing the company to help run the go-shop and scare up competition against us."[47] KKR responded by offering Goldman five percent of the buy-side financing work, after which Goldman ceased its efforts to acquire the go-shop assignment from Del Monte.[48]

Several shareholders sued, alleging breaches of the Del Monte board's fiduciary duties in the sales process.[49]

B. The Court's Holdings: Breaches of Revlon *Duties by the Board and the Effect of Barclays' Misconduct*

The plaintiffs sought to preliminarily enjoin the merger, and so they had to demonstrate a reasonable probability of success on the merits.[50] Since the plaintiffs were suing the directors directly, not Barclays derivatively on behalf of the corporation, the key *legal* issues concerned breaches by the board of its fiduciary duties, even though some of the most important *facts* concerned breaches by Barclays of its fiduciary duties.[51] Because the Del Monte board had agreed to sell the company for cash, its *Revlon* duties had been triggered,[52] and so, in Vice Chancellor Laster's formulation, the burden was on the directors to prove that: (a) "they sought to secure the transaction offering the best value reasonably available for the stockholders,"[53]—meaning that they "tr[ied] in good faith" to secure the best available transaction, not that they necessarily had done so (this is the so-called subjective component of *Revlon*),[54] and (b) "they (i) followed a reasonable decision-making process and based their decisions on a reasonable body of information, and (ii) acted reasonably in light of the circumstances" (this is the so-called objective component of *Revlon*—the first part of which concerns the objective reasonability of the board's process and the second part of which concerns the substantive reasonability of its decisions).[55]

Vice Chancellor Laster concentrates on the objective aspect of *Revlon*, and although his discussion of the issues is lucid and insightful, he does not expressly distinguish two issues that I think are helpful to keep separate. Bearing in mind that Barclays kept from the Del Monte various material facts, we should acknowledge an analytically important distinction between (a) the reasonability of a decision by the board given the facts as the board understood them at the time it made its decision, and (b) the reasonability of a decision by the board in light of the facts as they would have appeared to the board had Barclays been completely candid with the board. These are obviously different issues. The wrongdoing of Barclays cannot be charged to the board as if the board had authorized or intended it,[56] and a decision by the board may have been fully reasonable if the facts had been as the board believed but not as Barclays knew them to be. Although he did not organize the issues in this way, Vice Chancellor Laster found both that (a) some decisions by the directors would have breached their *Revlon* duties even if the facts had been as the board had thought at the time, and (b) Barclay's actions in concealing material facts from the board deprived other decisions by the board—decisions that might have been reasonable under *Revlon* had the facts been as the directors thought—of protection.

As to issues of the first kind, the court held that the Del Monte board breached its *Revlon* duties both when deciding to allow KKR to team with Vestar and when deciding to allow Barclays to provide buy-side financing. In particular, the Vice Chancellor held that, when KKR and Barclays finally informed the board that KKR wanted to team with Vestar to make a bid, the board did not engage in any "meaningful . . . consideration or informed decision-making with respect to the Vestar pairing."[57] The implication seems to be that this violated the *procedural* aspects of the objective component of the board's *Revlon* duties: the board was not informed of all the material facts reasonably available before it decided. The Vice Chancellor does not expressly say which facts the board should have had before it, but surely information about how pairing with Vestar was creating value for KKR, about whether any of this value could be extracted by Del Monte in the form of a price increase from KKR, and whether Vestar would be likely to make a competing bid paired with another major private equity firm if the board declined KKR's request would all surely have been material. Furthermore, the court also held that it "was not reasonable for the Board to accede to KKR's request and give up its best prospect for price competition without making any effort to obtain a benefit for Del Monte and its stockholders."[58] The board thus also violated the *substantive* aspects of the objective component of its *Revlon* duties: its bargaining—or, more accurately, lack of bargaining—was not reasonably calculated to get the best available transaction for the shareholders. In other words, if Del Monte is conferring a significant benefit on KKR

by allowing it to team with Vestar, the board should at least have tried to get something in exchange.[59]

As to the board's decision to allow Barclays to provide buy-side financing, the court appears to have held that this decision also breached both the procedural and the substantive aspects of *Revlon*'s objective component. For, in considering Barclay's request, "the Board did not ask whether KKR could fund the deal without Barclays' involvement" and "did not learn until this litigation that Barclays was not needed on the buy-side,"[60] which implies a breach of the board's duty to be informed before making a decision. Furthermore, on the substance, "[t]here was no deal-related reason [from Del Monte's point of view] for the request, just Barclays' desires for more fees. Del Monte did not benefit."[61] In fact, Del Monte's interests were compromised, because Del Monte and KKR were still negotiating the price of the deal, and Barclays had the lead role in handling those negotiations. "Without some justification reasonably related to advancing stockholder interests, it was unreasonable for the Board to permit Barclays to take on a direct conflict when still negotiating price. It is impossible to know how the negotiations would have turned out if handled by a representative that did not have a direct conflict."[62]

The court's holdings that these two decisions by the directors—allowing KKR to team with Vestar and allowing Barclays to provide buy-side financing—breached the directors' fiduciary duties do not rely on the fact that Barclays had been deceiving the board in various ways. Put another way, even if the facts had been as the directors had thought, their decisions would still have breached their *Revlon* duties. What, then, was the effect of Barclays' wrongdoing? Perhaps not fully consistently, the Vice Chancellor believed that "the blame for what took place appears . . . to lie with Barclays,"[63] and so he discussed at-length how Barclays' misconduct tainted almost every aspect of the sales process, from the decision to pair KKR and Vestar, to the price negotiations with KKR, to the conduct of the go-shop. Clearly, Barclays' misconduct may have reduced the deal price. Less clear, however, is how wrongdoing by Barclays results in a breach of duty by the directors. This point is critical because, if the merger was to be enjoined, it had to be because of a breach of the *directors'* duties. Breaches of duty merely by Barclays could support an action by the corporation for damages, but probably not an injunction stopping or delaying the merger. So the question becomes how wrongdoing by Barclays implies a breach of duty by the directors.

Here Vice Chancellor Laster relies on *Mills Acquisition Co. v. McMillan, Inc.*[64] for the proposition that, although decisions by a board based upon information provided by expert advisors will not normally be disturbed when otherwise made in the proper exercise of business judgment, "when a board is deceived by those who will gain from such misconduct, the protections girding the decision itself vanish."[65] In other words, the court will not respect such decisions and will enjoin their effects, but the directors will not generally be liable in damages for such decisions. In particular, because the Del Monte board "sought in good faith to fulfill its fiduciary duties" (that is, did not violate the subjective component of *Revlon*) "but failed because it was misled by Barclays,"[66] "exculpation under Section 102(b)(7) and full protection under Section 141(e) make[] the chances of a judgment for money damages vanishingly small."[67] Both of these results seem correct, but none of this yet explains, in a doctrinally coherent way, how wrongdoing by an advisor amounts to a breach of duty by the directors.

The situation seems paradoxical. If the directors made poor decisions because a faithless advisor deceived them, this is the fault of the advisor, not the directors, who thus are victims, not villains. Hence, the directors ought not be liable in damages. But if the directors did nothing wrong, how can the court void their decisions? After all, only wrongful decisions may be voided.

At one point Vice Chancellor Laster states that "the directors breached their fiduciary duties" because they "fail[ed] to provide serious oversight that would have checked Barclays' misconduct."[68] In other words, the directors' decisions based on Barclays' deceptions were wrongful after all, not because the directors were involved in Barclays' wrongdoing but because, through a lack of oversight, they failed to detect that wrongdoing. But this reasoning does not pass muster. For one thing, making out a case that directors have breached their oversight duties under *Caremark*,[69] as confirmed and elaborated in *Stone v. Ritter*,[70] is extremely difficult,[71] and Vice Chancellor Laster did not even the attempt to do this. Moreover, it is difficult to see how the board could have discovered the Barclays' deceit no matter how actively it managed the sales process. For example, on the crucial issue of teaming KKR with Vestar, Barclays arranged this pairing before the sales process had even started. Without employing "a corporate system of espionage"[72] against its own advisors, which it surely is not required to do, the board would almost certainly never have discovered this. The problem in *Del Monte* was not that the board was unreasonably disengaged, but that its trusted financial advisor was actively deceiving it. Moreover, even if the *Del Monte* directors were lax in their oversight of Barclays, what would happen in a case when an advisor was so skilled in mendacity that even the most actively engaged directors would not discover the advisor's deception? Surely in such a case, too, the directors' decisions made on the basis of fraudulent advice should be voided. We need some other explanation of why wrongdoing by an advisor can result in breaches of duty by the directors.

The answer here is actually straightforward—namely, that we are here considering whether the directors' decisions were reasonable under the *objective* component of *Revlon*, which requires both that the board be informed of all the material facts reasonably available to it at the time it makes a decision (the procedural aspect of the objective component) and that board's decision be reasonably calculated to get best price for the shareholders reasonably available (the substantive aspect of the objective component). If a financial advisor—or any other agent, for that matter—deceives a board, or withholds from the board information it should have conveyed, then the board does not have all the material facts reasonably available. The directors may be entirely blameless, but this is irrelevant: their decision was nevertheless made without all the material facts reasonably available. Accordingly, the court ought not to respect it. The directors are not personally liable in damages, but the reason

for this is not they personally did nothing wrong but that they are fully protected under Section 141(e).[73]

This shows us that the procedural and substantive aspects of *Revlon*'s objective component are independent, and a breach of either is sufficient for a court to void the board's decision. In particular, a decision by the board breaching the procedural aspect—that is, a decision made when the board has less than all the material facts reasonably available—cannot be saved even if it is substantively reasonable in light of all those facts, including those the board did not have when it made the decision. This may seem odd, but the reason is that the substantive aspect is a mild standard: the question is "whether the directors made a reasonable decision, not a perfect decision,"[74] and "[i]f a board selected one of several reasonable alternatives, a court should not second-guess the choice even though it might have decided otherwise or subsequent events have cast doubt on the board's determination."[75] Hence, a decision may be substantively reasonable under *Revlon* even though it was made without the benefit of all the material facts reasonably available. But such a decision, though substantively reasonable under *Revlon,* may not have been the decision that a fully-informed board would have made to maximize value for shareholders, which is what the shareholders are entitled to once the board's *Revlon* duties are triggered. Hence, once a decision by the directors is shown to have been made without the benefit of all the material facts reasonably available, the proof of a breach of fiduciary duty by the directors is complete and the substantive reasonability of the decision is irrelevant.

To return to *Del Monte*, having found that the plaintiffs had a reasonable probability of success on the merits, the court then turned to the other requirements for obtaining a preliminary injunction—a showing of irreparable injury if the injunction is not granted[76] and a balancing of the equities.[77] Noting that "[t]he core injury inflicted on the stockholders was Barclays' steering the deal to KKR"[78] "without meaningful competition,"[79] the court concluded that it would issue a preliminary injunction along the lines requested by the plaintiffs. In particular, the court enjoined the consummation of the merger for twenty days, during which time all of the deal protection measures in the merger agreement would be suspended—an arrangement "which should provide ample time for a serious and motivated bidder to emerge."[80]

C. Aftermath: Approval by the Shareholders and Settlement

No other suitors emerged, and on March 7, 2011, the Del Monte shareholders voted overwhelming to prove the transaction with KKR,[81] and the merger was completed.[82] Subsequently, Del Monte and Barclays settled with the shareholders and paid them $89.4 million, with Del Monte paying $65.7 million and Barclays paying $23.7 million.[83] Del Monte withheld $21 million in fees it would otherwise have owed Barclays.[84] In effect, Barclays forfeited its entire fee from the transaction.

D. Significance of the Decision and Effects on Subsequent Transactions

Barclays' misconduct was egregious. It involved breaches of elementary rules of agency law concerning loyalty of agents to principals, and for precisely this reason the *Del Monte* case breaks little new legal ground. Investment bankers may on rare occasions behave as badly as the bankers at Barclays did, and they may often be tempted to behave that badly, but they have always known that such behavior is wrong and will be punished by courts (and, of course, by boards) if it is detected. It is hardly news to the financial community, for example, that a selling company's investment banker ought not to conspire with the buyer to conceal facts about the transaction from the company's board. *Del Monte* thus reminds bankers of obligations about which they are already well aware, but the case does not create any new obligations for investment bankers or even expand any existing ones.

At the margin, however, the case deters the use of stapled financing. Nowadays, in practically every public company acquisition and especially when *Revlon* duties have been triggered, some target shareholders sue their board, and if the board authorized its banker to provide stapled financing, there will now be one more issue to litigate, for plaintiffs will undoubtedly rely on *Del Monte* to argue that the board's decision to authorize such financing was a breach of its fiduciary duties. That said, early reports that stapled financing may effectively disappear[85] have proven untrue. In appropriate circumstances, stapled financing creates value for both sellers and buyers, and so parties have continued to use it. Where the value of such financing was positive but low, however, the increased litigation risk arising from such financing may deter its use. This, of course, reduces value for both buyers and sellers.

In this regard, the opinion in *Del Monte* was somewhat unfortunate. For, no holding in the case implies that stapled financing is always bad, and Vice Chancellor Laster could have emphasized that, if a sell-side banker makes full disclosure to the selling board and the board behaves reasonably to maximize shareholder value, then neither the banker nor the board violates its fiduciary duties if the board allows the banker to provide buy-side financing. But, instead of stating clearly this undoubted point of law, the Vice Chancellor repeats the opinions of then-Vice Chancellor, now Chancellor, Leo Strine, who, in the *Toys "R" Us* case in 2005, severely criticized stapled financing even though he had found that neither the selling board nor its banker had breached their fiduciary duties.[86] In passages Vice Chancellor Laster quotes in *Del Monte*, Vice Chancellor Strine writes that the selling board's decision to allow its financial advisor to provide buy-side financing "was unfortunate, in that it tends to raise eyebrows by creating the appearance of impropriety, playing into already heightened suspicions about the ethics of investment banking firms,"[87] and it would have been "far better . . . if [the financial advisor] had never asked for permission, and had taken the position that its credibility as a sell-side advisor was too important in this case, and in general, for it to simultaneously play on the buy-side in a deal when it was the seller's financial advisor." Thus, "it might have been better . . . for the board of the Company to have declined the request."[88] These statements may or may not describe best practices in corporate control transactions (probably, they do not), but they certainly do not describe the law in Delaware.

Indeed, in Delaware law as in American law generally,

there is no absolute rule against agents acting adversely to their principals. On the contrary, the general rule is that an agent may act adversely to its principal if the principal consents to the arrangement after disclosure of all the material facts and the agent deals fairly with the principal.[89] There is no reason why this traditional principle of the common law ought not to apply to stapled financing. In fact, few principals are better able to understand the issues involved in such a decision than the independent directors of a public company. Sometimes, but not always, stapled financing creates value for both the buyer and the seller. Hence, such arrangements are sometimes good and sometimes bad, and the party best placed to decide whether such an arrangement is advisable in an individual case is the selling board, not a judge in Delaware. At some point, the *Del Monte* case ought to have been clear about that.

II. *In re El Paso Corporation Shareholders Litigation*[90]

The *El Paso* case made headlines[91] because Chancellor Strine held that Goldman, the financial advisor to the selling company, had engaged in various forms of wrongdoing that so impaired El Paso's sales process that the plaintiff shareholders were likely to prevail on the merits on their claims for breaches of fiduciary duty by the board. A closer look shows, however, that this case is nothing like *Del Monte*. In *Del Monte*, Barclays egregiously breached its fiduciary duties; in *El Paso*, Goldman did little more than have a fully-disclosed conflict of interest, which is no breach of duty at all.

A. Factual Background

El Paso was a petroleum company with two main businesses, a pipeline business and an exploration and production (E & P) business, the latter of which the El Paso board had announced it intended to spin-off.[92] The market had reacted favorably to this announcement, and El Paso expected that, after the spin-off was completed, the pipeline business standing alone would be an attractive acquisition target for several potential buyers.[93] Soon after the announcement of the spin-off, Kinder Morgan approached El Paso about acquiring the entire company.[94] Kinder Morgan was really interested only in the pipeline business and made it clear it would sell the E & P business, either before or after a transaction with El Paso closed.[95] In fact, El Paso understood quite well that, in offering to buy El Paso before the spin-off was completed, Kinder Morgan was attempting to preempt competition for the pipeline business.[96]

On August 30, 2011, Kinder Morgan offered to acquire El Paso for $25.50 per share in cash and stock,[97] but El Paso quickly rejected this offer as inadequate. Kinder Morgan then threatened to go public,[98] and the El Paso board decided to open negotiations.[99] Goldman was El Paso's long-time financial advisor and had been advising El Paso in connection with the spin-off of the E & P business, but Goldman would have a substantial conflict of interest in any transaction with Kinder Morgan because Goldman owned 19% of Kinder Morgan, had the right to name directors to two of its board seats, and participated in a group that controlled 78.4% of the company's voting power.[100] All of this was fully disclosed to El Paso's board, however, and the board and Goldman agreed that El Paso would also engage Morgan Stanley for financial and tactical advice regarding a potential sale of the company.[101]

The El Paso board made Doug Foshee, the company's chief executive officer, its primary negotiator, and Foshee soon reached a tentative agreement with Rich Kinder, Kinder Morgan's chief executive officer, pursuant to which Kinder Morgan would acquire El Paso for $27.55 per share in cash and stock, subject to further due diligence by Kinder Morgan.[102] Soon thereafter, however, Kinder Morgan backed away from the $27.55 price, claiming that it had relied upon a too bullish set of analyst projections.[103] In Chancellor Strine's words, Foshee "backed down," and "[i]n a downward spiral, El Paso ended up taking a package that was valued at $26.87" as of the signing date, comprising $25.91 in cash and stock, as well as a warrant to purchase Kinder Morgan stock valued at $0.95.[104] Nevertheless, the price still included a substantial premium above El Paso's undisturbed stock price, and after both Goldman and Morgan Stanley opined that the offer was more attractive than completing the spin-off, the board approved the transaction and entered into a merger agreement with Kinder Morgan.[105]

The agreement provided that El Paso would assist Kinder Morgan in selling the E & P business, preferably before the closing of the Kinder Morgan-El Paso transaction.[106] It also contained a standard no-shop provision prohibiting El Paso from soliciting competing bids for the company, qualified by a fiduciary out, which permitted El Paso to terminate the merger agreement to accept a superior proposal from a third party provided it paid Kinder Morgan a $650 million terminate fee.[107] This fiduciary out was not unusual in itself, for it defined a "superior proposal" as one to acquire more than 50% of El Paso's equity securities or consolidated assets. It thus permitted El Paso to terminate the agreement to sell the pipeline business (subject to a match right in favor of Kinder Morgan), because the pipeline business represented more than 50% of the company's assets, but it did not permit El Paso to terminate the agreement to sell the E & P business, because that business represented less than 50% of the company's assets.[108] Thus, if another buyer wanted to purchase just the pipeline business and Kinder Morgan did not want to match the new buyer's price, El Paso would have to pay Kinder Morgan the full $650 million termination fee, which would have aggregated about 5.1% of the equity value and 2.5% of the enterprise value of that business.[109]

B. The Court's Holdings: Four Conflicts of Interest and a Breach of Revlon

Chancellor Strine begins his analysis by stating, "Although a reasonable mind might debate the tactical choices made by the El Paso Board, these choices would provide little basis for enjoining a third-party merger approved by a board overwhelming comprised of independent directors, many of whom have substantial industry experience."[110] But, "when there is a reason to conclude that debatable tactical decisions were motivated not by a principled evaluation of the risks and benefits to the company's stockholders, but by a fiduciary's consideration of his own financial or other personal self-interests," then the result under *Revlon* may well be quite different.[111] In other words, the Chancellor's ultimate holding in favor of the plaintiffs depends on his finding that some of the fiduciaries involved

had conflicts of interests. As he puts it, "the record . . . belies [the defendants'] argument that there is no reason to question the motives behind the decisions made by El Paso in negotiating the Merger Agreement."[112] In particular, Chancellor Strine identified four conflicts of interest, including ones affecting (a) Goldman generally, (b) an individual Goldman banker, (c) Morgan Stanley generally, and (d) El Paso's CEO.

1. Goldman's Conflict of Interest

Chancellor Strine recounts at great length the undisputed facts concerning Goldman's substantial interest in Kinder Morgan, which of course aligned Goldman's financial interests with Kinder Morgan and against El Paso. The Chancellor then notes that, although "Goldman formally set up an internal 'Chinese wall' between Goldman advisors to El Paso and the Goldman representatives responsible for the firm's Kinder Morgan investment,"[113] nevertheless "Goldman still played an important role in advising the [El Paso] Board," by, for example, suggesting that the board avoid causing Kinder Morgan to go hostile and by presenting information about the value of pursuing the spin-off instead of the Kinder Morgan deal.[114] As Chancellor Strine suggests, Goldman's advice on these matters may well have been suspect, and in fact the El Paso board regarded it as such, but it is a mistake, in my view, to conclude as Chancellor Strine does that this somehow makes the El Paso board's decision after receiving this advice in any way questionable under *Revlon*.

Here, Chancellor Strine is running together the El Paso board's decision to retain Goldman as its financial advisor after learning of its conflict of interest with various decisions the board subsequently made perhaps based in part on Goldman's advice. That is, at the outset the board received full disclosure about its financial advisor's conflict of interest. At that point, the board had to decide whether to allow the agent to continue to act on its behalf, bearing in mind its divided loyalties, or to terminate the relationship with the agent and hire another. Obviously, there were costs to retaining Goldman as a financial advisor (its advice might be tainted by self-interest), but there were benefits as well because Goldman, as the long-time advisor to the company, was very familiar with its business and had already done a great deal of work on the potential spin-off, none of which was tainted by its relationship with Kinder Morgan. In the event, the board chose a middle path: keep Goldman to advise on the spin-off issues, make it set up a Chinese wall between the relevant individuals, and scrutinize Goldman's advice with a critical eye. Thus, the first issue that Chancellor Strine should have decided was whether this decision by the El Paso board to retain Goldman in a limited role was reasonable under *Revlon*. He never does so. If he had, he would have noted that, in making this decision, the board had no conflict of interest. Presumably, "[a]lthough a reasonable mind might debate" this choice, the choice "would provide little basis for enjoining a third-party merger approved by a board overwhelming comprised of independent directors, many of whom have substantial industry experience."[115] And, indeed, this seems to be what Chancellor Strine himself believed at least implicitly, because at no point in the opinion does he say that the El Paso board's decision to retain Goldman breached its *Revlon* duties.

But, once that point is settled, Goldman's conflict of interest cannot, without more, be used to attack other decisions the board made based in part on Goldman's advice. First, it cannot be that Goldman's conflict, without more, makes subsequent board decisions based on Goldman's advice unreasonable under *Revlon*. That would imply that the board may retain a conflicted advisor only if it never hears the advisor's advice, which is absurd. Nor can it be that hearing a conflicted advisor's advice is even a negative factor in determining whether a board's subsequent business decisions are unreasonable. For, the conflict obviously cannot count against the substantive reasonability of the decision, and the board's prior fully informed decision to retain a conflicted advisor settles the question of the procedural reasonability of hearing the advisor's advice, provided, of course, the board keeps in mind that the advisor has a conflict of interest (which the El Paso board seems clearly to have done). Raising the issue of the advisor's conflict in evaluating subsequent decisions by the board is thus double-counting.

But that is just what Chancellor Strine does. He argues that Goldman's fully disclosed conflict somehow tainted the process, much as Barclay's undisclosed breaches did in *Del Monte*. Hence, he says that the board's decisions "would provide little basis for enjoining . . . [the] merger," but then finds that these decisions were nevertheless unreasonable under *Revlon* because "there is a reason to conclude that debatable tactical decisions were motivated . . . by a fiduciary's consideration of his own financial or other personal self-interests."[116] What it really comes down to this is: the board made a fully informed decision to retain a conflicted financial advisor, a decision that Chancellor Strine obviously thinks was dead wrong but which he cannot seriously maintain was a breach of *Revlon*, and so when the board makes subsequent decisions which he finds debatable but also not likely on the merits to be breaches of *Revlon*, he re-raises the issue of the advisor's conflict to add to the case against these decisions and so hold that they were in fact breaches. This is not a tenable way to apply *Revlon*.

2. An Individual Goldman Banker's Conflict of Interest

Goldman's lead banker on the transaction, Steven Daniel, owned, directly and indirectly, approximately $340,000 in Kinder Morgan stock and never disclosed this fact to the El Paso board. In Chancellor Strine's view, this was "a very troubling failure that tends to undercut the credibility of his testimony and the strategic advice he gave."[117] It also led to sensational press coverage and heated denunciations of the ethics of Goldman's bankers,[118] prompting Goldman to revise its procedures for individual bankers to disclose such conflicts in the future.[119]

Now, like other agents, individual bankers should disclose material conflicts of interest to their principals, but in this case it is very unlikely that Daniel's financial interest in Kinder Morgan was material. Hence, disclosure was very likely not required under general principles of agency law, and, in any event, it is difficult to see how a rational board of directors would have regarded Daniel's interest in Kinder Morgan as important. This may seem shocking, but a moment's attention to the numbers involved shows that it is correct. For, on October 16, 2011, the date of the merger, El Paso had outstanding 771,852,913 shares of common stock.[120] Hence, every additional $0.25 that

Kinder Morgan paid per El Paso share cost Kinder Morgan in the aggregate about $193 million, or, since Kinder Morgan had outstanding on a fully diluted basis 707,001,570 shares of its common stock,[121] about $0.27 per Kinder Morgan share. Now, since Kinder Morgan shares closed at $26.89 on October 14, 2011, the last trading day before the merger was announced, Daniel's $340,000 in Kinder Morgan stock represented about 12,644 shares.[122] Therefore, each additional $0.25 that Kinder Morgan paid per El Paso share cost Daniel about $3,414, or, conversely, for each $0.25 per El Paso share that Daniel might, by nefarious means, depress the deal price, he would personally profit by about $3,414. Was this amount material to Daniel given his actual financial circumstances? Daniel heads Goldman's Houston office, and he is co-head of Goldman's global energy practice.[123] His annual compensation is not, to my knowledge, publicly disclosed, but it must be several thousand times $3,414 and probably many times the total value of his investment in Kinder Morgan. In other words, assuming Daniel has the income and wealth typical of senior bankers at Goldman, the idea that his judgment would be affected by his financial interest in Kinder Morgan is implausible. It may be politically incorrect to suggest that a $340,000 investment could be immaterial, but when this is in fact the case, it is the duty of courts to say so. Very wealthy people should not be treated worse by the legal system just because they are very wealthy.

3. Morgan Stanley's Conflict of Interest

Chancellor Strine also found that Morgan Stanley, the financial advisor El Paso engaged because of Goldman's conflict of interest, was itself subject to a conflict. Goldman, which had been engaged as the company's exclusive financial advisor in connection with the potential spin-off of the E & P business, had not agreed to give up its contractual right to its exclusive role related to that transaction (as distinct from a sale of the whole company); hence, El Paso could not pay Morgan Stanley a fee in connection with the spin-off if it ultimately chose to pursue such a transaction.[124] Accordingly, this produced an incentive structure for Morgan Stanley, in which, if it recommended a deal with Kinder Morgan, it would get its full fee of $35 million, but if recommended that El Paso pursue the spin-off, it would get nothing.[125] According to Chancellor Strine, "[t]his makes more questionable some of the tactical advice given by Morgan Stanley and some of its valuation advice, which can be viewed as stretching to make Kinder Morgan's offers more favorable than other available options."[126]

There is a surface plausibility to this argument, but given the usual way fees for investment banking advisory services are structured, the argument is plainly wrong. In the typical situation, a target company's investment banker receives a large fee (usually called a "success fee") only if the target agrees to be acquired, the fee being calculated as a percentage of the deal value. If there is no transaction, the financial advisor gets at most a modest fee plus reimbursement of its out-of-pocket expenses. The obvious virtue of this arrangement is that it incentivizes the financial advisor to get the highest price possible for the target; the obvious vice is that it incentivizes the financial advisor to approve a transaction at any price if the alternative is that no transaction at all will be completed. Everyone involved in this business fully understands this. Independent directors are appropriately wary, and bankers realize that there will reputational costs if their clients perceive them to be pushing for a suboptimal deal just to collect their success fee. El Paso's relationship with Morgan Stanley fits exactly into this pattern: Morgan Stanley got a big fee if El Paso completed a transaction with the buyer, and it got nothing otherwise. The only difference is that, in the typical case, the status quo is the buyer remaining an independent company, whereas here the status quo was that El Paso would continue with its previously announced spin-off. It is very difficult to see why this makes any difference. All of Chancellor Strine's concerns about Morgan Stanley's conflict of interest would apply *mutatis mutandis* to virtually every instance of a target company engaging a financial advisor in connection with a potential sale of the company. Accordingly, it is unclear how Morgan Stanley's compensation structure in any way supports an argument that the El Paso board breached its *Revlon* duties in relying on Morgan Stanley's advice.[127]

Moreover, Chancellor Strine's argument about Morgan Stanley falls into the same error as his argument about Goldman. That is, even if Morgan Stanley did have a serious conflict of interest, the El Paso board was fully aware of all the material facts and decided that the benefits of engaging Morgan Stanley on the agreed-upon terms outweighed the costs, and this decision by the board was in no way questionable under *Revlon*. Therefore, Morgan Stanley's conflict of interest, standing alone, cannot be used as an argument that the board's subsequent decisions based on Morgan Stanley's advice somehow breached the board's *Revlon* duties. Once a board makes a decision reasonable under *Revlon* to engage a conflicted advisor, its subsequent decisions based on advice from that advisor cannot become unreasonable under *Revlon* merely because the advisor was conflicted. But this is exactly what Chancellor Strine's argument about Morgan Stanley implies.

4. El Paso CEO's Conflict of Interest

Chancellor Strine also found that Foshee, El Paso's CEO, to whom the board entrusted the lead role in negotiating with Kinder Morgan, also had a conflict of interest. "Worst of all was that the supposedly well-motivated and expert CEO entrusted with all the key price negotiations kept from the Board his interest in pursuing a management buy-out of the Company's E & P business."[128] In particular, while negotiating the deal price with Kinder Morgan, Foshee had already started discussing a potential management buy-out of the E & P business with other senior officers of El Paso.[129] Hence, "Foshee was interested in being a buyer of a key part of El Paso at the same time he was charged with getting the highest possible price as a seller of that same asset."[130] This is important, as Chancellor Strine sees it, because "for an MBO to be attractive to management and to Kinder Morgan, not forcing Kinder Morgan to pay the highest possible price for El Paso was more optimal than exhausting its wallet, because that would tend to cause Kinder Morgan to demand a higher price for the E & P assets."[131]

For Chancellor Strine, this is uncharacteristically naïve. He seems to think that if Foshee went easy on Kinder Morgan in the negotiations to buy El Paso, Kinder Morgan would return the favor and go easy on him in negotiations to sell the E & P

business. Far more likely is that Kinder Morgan would seek the highest price available for the E & P, regardless of how Foshee negotiated. Besides, Foshee had a substantial equity interest in El Paso, and so had a large financial interest in getting the best price in a sale of the company.[132] That he would give up certain and immediate value in the sale of El Paso for the mere hope that Kinder Morgan would go easy on him to some unknowable extent in a later transaction that might or might not occur passes credibility. If Foshee was determined to lead an MBO for the E & P business after a sale of the company, he should have disclosed this to the board, but even with this fact undisclosed, his interest was so speculative that I have grave doubts that Foshee's conflict warrants voiding the board's decision to rely on him to negotiate the deal price. In any event, since Foshee was not a financial advisor, the question is beyond the scope of this article.

C. No Injunction Issued

Despite finding that plaintiffs were likely to prevail on the merits,[133] and despite going on to find that they were likely to suffer irreparable harm if the merger was not enjoined (because it was unlikely that they could collect sufficient monetary damages),[134] Chancellor Strine nevertheless declined to enjoin the merger because he held that the balance of equities did not favor issuing an injunction.[135] In so doing, he noted that there was no other transaction in the offing,[136] that the transaction with Kinder Morgan was at a substantial premium to market,[137] and that the stockholders of El Paso were free to vote down the merger if they wanted to do so.[138] Moreover, the relief that the plaintiffs requested—an injunction that would allow El Paso to shop itself either in whole or in part (in contravention of the no-shop provision in the merger agreement), allow El Paso to terminate the merger agreement without paying the termination fee if a superior proposal emerged, but also force Kinder Morgan to consummate the merger in accordance with the merger agreement if no superior offer appeared[139]—would "pose serious inequity to Kinder Morgan, which did not agree to be bound by such a bargain."[140]

D. Aftermath: Approval by the El Paso Shareholders

After Chancellor Strine declined to enjoin the merger, the El Paso shareholders overwhelmingly approved the transaction: approximately 79 percent of the company's common shares entitled to vote were voted, and of these more than 95 percent voted in favor.[141] Apparently, the company's shareholders were less concerned about the conflicts of interest identified by Chancellor Strine than Chancellor Strine was. Subsequently, without admitting any wrongdoing, Kinder Morgan paid $110 million to settle the suit, with Goldman agreeing to forgo its $20 million fee in connection with the settlement.[142]

III. Concluding Observations

Although they both involve financial advisors and were decided close in time*, Del Monte* and *El Paso* are very different cases. In *Del Monte*, an agent flagrantly breached well-understood duties of loyalty; the case is important from a legal point of view primarily because it raises the question of how breaches by the corporation's agent support setting aside decisions by the corporation's board. *El Paso*, on the other hand, did not involve any significant breaches by financial advisors of their fiduciary duties as traditionally understood. The primary question in that the case was what should be the legal effect under *Revlon* of an independent board's fully-informed decision to use a conflicted financial advisor—a question that, once asked, answers itself: none, provided that in the circumstances the board's decision was made on an informed basis and was reasonably calculated to get the best price reasonably available for the shareholders. But Chancellor Strine never formulated this question; instead, he held that various negotiating decisions made by the El Paso board breached the board's *Revlon* duties in part because they were made on the basis of advice from conflicted advisors, thus suggesting, but not holding, that a board breaches its *Revlon* duties if relies on a conflicted advisor. As I argued above, this is a mistake, for it amounts to saying that a board may engage a conflicted advisor provided that it refuses to hear that advisor's advice, which cannot possibly be right.

As to their likely effects on future deal making, *Del Monte* will reduce, but not eliminate, the use of stapled financing, which will continue to create value for both buyers and sellers in appropriate cases. *El Paso* may make selling boards and their bankers more concerned about the bankers' actual or apparent conflicts of interest, but this will be more because of the perceived hostility of courts and the risk of strike suits than on the merits. The fact that it is a significant departure from traditional principles of agency law will, in all likelihood, limit the real effects of the *El Paso* decision.

Endnotes

1 Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

2 *In re* Del Monte Foods Co. Shareholders Litigation, 25 A.3d 813 (Del. Ch. 2011).

3 A financial buyer virtually always needs debt financing to acquire a target, and sometimes a strategic buyer does as well. When this financing is arranged by the selling company's investment bank, it is called "stapled financing" because the financing is made available to potential buyers together with the opportunity to purchase the company (i.e., is "stapled" to the larger transaction). The benefits of this arrangement to the seller include a speedier negotiation and increased certainty that the transaction will be consummated. Paul Povel and Rajdeep Singh have also argued that stapled financing makes the bidding process more competitive, thus producing higher prices for sellers. Paul Povel & Rajdeep Singh, Stapled Finance, (Aug. 2007), *available at* http://finance.wharton.upenn.edu/department/Seminar/2007FALL/micro/paul-povel-micro092007.pdf.

4 In re El Paso Corporation Shareholder Litigation, 41 A.3d 432 (Del. Ch. 2012).

5 The court's opinion deciding the plaintiffs' application for a preliminary injunction is based on a limited record, and the further discovery that would have occurred had the matter come to trial could have developed facts that contradict or supplement the account described in the text, which is based on the court's factual findings made in the opinion. The reader should bear in this mind in forming judgments about the conduct of the individuals involved. *See Del Monte*, 25 A.3d at 819.

6 *Id.* at 820.

7 *Id.* at 820.

8 *Id.* at 819–820

9 *Id.* at 820.

10 *Id.* at 820–821.

11 From the outset, KKR partnered with Centerview Partners. *Id.* at 820. For simplicity I refer only to KKR throughout.

12 *Id.* at 821.

13 *Id.* at 821.

14 *Id.* at 821.

15 *Id.* at 821.

16 There are many pro-competitive justifications for private-equity firms teaming up in this way. One is that, for some large transactions, a single firm acting alone may not have enough equity capital to fund the deal. Another is that teaming allows private equity firms to invest in a larger number of portfolio companies, diversifying their investments and reducing the risk they bear.

17 *Id.* at 822.

18 *Id.* at 822.

19 *Id.* at 823.

20 *Id.* at 823.

21 *Id.* at 823. Of course, since the Del Monte board had instructed Barclays to terminate the sales process that it had begun earlier in the year, Barclays had no authority to act for Del Monte in any way and certainly no authority to consent on its behalf to the actions of KKR and Vestar that would otherwise violate the no-teaming provision. *Id.*

22 *Id.* at 823.

23 *Id.* at 823.

24 *Id.* at 823.

25 *Id.* at 824.

26 *Id.* at 824.

27 *Id.* at 824.

28 *Id.* at 825.

29 *Id.* at 825.

30 *Id.* at 825.

31 *Id.* at 825.

32 *Id.* at 826.

33 *Id.* at 825–826.

34 *Id.* at 826.

35 *Id.* at 826.

36 *Id.* at 826.

37 *Id.* at 826.

38 *Id.* at 826.

39 *Id.* at 826.

40 *Id.* at 827.

41 *Id.* at 827.

42 *Id.* at 828.

43 *Id.* at 828.

44 *Id.* at 828.

45 *Id.* at 828.

46 *Id.* at 828.

47 *Id.* at 828.

48 *Id.* at 828.

49 *Id.* at 817.

50 *Id.* at 829–830. The reader should keep in mind that this standard "falls well short of that which would be required to secure final relief following trial," *Id.* at 830 (quoting, Cantor Fitzgerald, L.P. v. Cantor, 724 A.2d 571, 579 (Del. Ch. 1998)), and the facts as Vice Chancellor Laster found them and as described above (especially the rather unsavory actions of Barclays, KKR and some of their respective representatives) were found only to this standard and on a limited record. *See supra* note 5.

51 Although Vice Chancellor Laster's opinion does not discuss the issue, presumably Barclays' fiduciary duties, which arise from the common law of agency, run to its principal, which would be the Del Monte corporate entity, not that entity's shareholders. Hence, except in a derivative action on behalf of the corporation, the shareholders would have no standing to sue Barclays, which owned them no duties.

52 *See* Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 42-43 (Del. 1994).

53 *Id.* at 830 (quoting *QVC*, 637 A.2d at 44 (internal quotations omitted)).

54 *Id.* at 830.

55 *Id.* at 830. This formulation of the board's *Revlon* duties makes it perfectly clear that, under *Revlon*, the court reviews for reasonability not only the process of the board's decision-making (i.e., whether the board reasonably considered all the material facts reasonably available to it before deciding, as required by Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985)) but also the substance of the board's decisions (which is not evaluated by the court under the ordinary business judgment rule, *see In re* Caremark International Inc. Derivative Litigation, 698 A.2d 959, 967 (Del. Ch. 1996) (Allen, C.), except for the minimal rational business purpose requirement, *see* Brehm v. Eisner, 746 A.2d 244, 246 (Del. 1998), which seems to be functionally equivalent to the corporate waste test, *Id.*).

56 Assuming, that is, that the board's decision to engage Barclays was not itself wrongful. This presents a very subtle question because some of Barclays' very questionable conduct occurred before it was engaged as the board's financial advisor, and, as Vice Chancellor Laster points out, "If the directors had known at the outset Barclays' intentions and activities, the Board likely would have hired a different banker." *Del Monte*, 25 A.3d at 833. In other words, the same distinction made the in the text—reasonability given the facts as the board understood them versus reasonability given the facts as they would have appeared to the board had Barclays been completely candid—applies even to the very decision to engage Barclays as the board's financial advisor.

57 *Del Monte*, 25 A.3d at 834.

58 *Id.* at 834.

59 The only obvious exception to this would be, presumably, if the board had concluded that it would lose the KKR bid completely if the board did not permit KKR to team with Vestar, but, at least as appears from the facts found in the court's opinion, there is little basis for thinking that this would have been the case. Moreover, because the board apparently did not consider the issue in any serious way, it apparently had no information to this effect when it made the decision to allow the pairing.

60 *Id.* at 835. Of course, one need not be a very sophisticated deal-maker to conclude that KKR does not need Barclays to fund a $5.3 billion acquisition of a public company. But, if the Del Monte directors *did* know this without having to ask, then their decision to allow Barclays to participate in providing such financing without obtaining some benefit for Del Monte in exchange becomes even more unreasonable.

61 *Id.* at 834.

62 *Id.* at 835. In addition, the court notes that, when the board allowed Barclays to provide buy-side financing, it also created the necessity of hiring another banker, at a cost to the company of $3 million, to provide an unconflicted fairness opinion. *Id.* at 834–835. The court seems to imply that the board breached its duties by making the corporation worse off solely to benefit Barclays. To the extent that the court is referring to the $3 million fee, however, this is not quite correct. For, unless Del Monte's incurring this additional $3 million liability caused KKR to reduce the price it was willing to pay (recall that, at this point, the parties had still not reached agreement on price, so this is a real possibility), the additional liability in no way harmed Del Monte's shareholders. The reason is that, although the *corporation* incurred this cost, assuming the transaction closed, the Del Monte shareholders would still receive the same cash price for their shares. Hence, unless Del Monte's incur-

ring this obligation affected the deal price, it was KKR, not the Del Monte shareholders, who would be paying for the second fairness opinion: when the deal closed, KKR would own the company, including whatever cash it had, and so the result of the company's spending $3 million for the second fairness opinion would be that KKR bought for the same price a company holding $3 million less in cash than it otherwise would have held.

63 *Id.* at 835.

64 559 A.2d 1261 (Del. 1989).

65 *Id.* at 836 (quoting Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1284 (Del. 1989)).

66 *Id.* at 818. Of course, it is not quite correct that the Del Monte board breached (the objective component) of its *Revlon* duties *only* "because it was misled by Barclays." As discussed above, the court held that the board's decision (a) to allow KKR to team with Vestar, and (b) to allow Barclays to provide buy-side financing both breached its *Revlon* duties, and these breaches were independent of Barclays' wrongdoing.

67 *Id.* at 818.

68 *Id.* at 818.

69 *In re* Caremark International Inc. Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996).

70 Stone v. Ritter, 911 A.2d 362 (Del. 2006).

71 *See In re* Caremark International Inc. Derivative Litigation, 698 A.2d 959, 967 (Del. Ch. 1996) (referring to oversight claims as "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment").

72 Graham v. Allis-Chalmers Manufacturing Co., 188 A.2d 125, 130 (Del. 1963); *see also* Caremark, 698 A.2d at 969 (discussing the ongoing validity of this holding).

73 If the corporation's certificate of incorporation incudes a 102(b)(7) provision, the directors would be protected under that provision as well.

74 QVC 637 A.2d at 45 (emphasis deleted).

75 QVC 637 A.2d at 45.

76 *In re* Del Monte Foods Co. Shareholders Litigation, 25 A.3d 813, 837–838 (Del. Ch. 2011).

77 *Id.* at 839.

78 *Id.* at 839.

79 *Id.* at 839.

80 *Id.* at 840.

81 Form 8-K of Del Monte Foods Company (filed March 7, 2011) (stating that Del Monte's stockholders approved the merger with KKR and indicating that 149,829,208 shares voted in favor, 1,603,244 against, and 2,348,232 abstained).

82 Form 8-K of Del Monte Foods Company (filed March 8, 2011) (stating that acquisition was completed).

83 Gina Chon & Anupretta Das, *Settlement Chills Use of M&A Tactic*, Wall St. J., October 7, 2011.

84 *Id.*

85 *Id.*

86 *In re* Toys "R" Us Shareholders Litig., 877 A.2d 975, 1005-1006 (Del. Ch. 2005).

87 *Id.* at 1006 (quoted in *In re* Del Monte Foods Co. Shareholders Litigation, 25 A.3d 813, 832 (Del. Ch. 2011).

88 *Id.* at 1006 (quoted in *Del Monte*, 25 A.3d at 832).

89 Under Section 8.03 of the Restatement (Third) of Agency (2006), an agent has a duty not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency relationship, but, under Section 8.06, conduct by an agent that would otherwise violate Section 8.03 does not constitute a breach of duty if the principal consents to the conduct, provided that (a) in obtaining the principal's consent, the agent (i) acts in good faith, (ii) discloses all material facts that the agent knows, has reason to know, or should know, would reasonably affect the principal's judgment, and (iii) otherwise deals fairly with the principal. Apart from questions of emphasis, this seems little different from the traditional rule embodied in Sections 389-390 of the Restatement (Second) of Agency (1958), which provided that an agent has a duty not to deal with his principal as an adverse party in a transaction connected with this agency without the principal's knowledge (Section 389), but an agent may act as an adverse party to his principal if the agent discloses to the principal all facts the agent knows or should know would reasonably affect the principal's judgment and the agent deals fairly with the principal (Section 390).

90 *In re* El Paso Corporation Shareholders Litigation, 41 A.3d 432 (Del. Ch. 2012). As in *Del Monte*, the case came before the court on a motion for a preliminary injunction, and thus the court's decision was based on a limited record. If the matter had come to trial, further discovery could have developed facts that contradict or supplement the account described in the text, which is based on the court's factual findings made in the opinion. *Id.* at 433.

91 Steven M. Davidoff, *Goldman, on Both Sides of a Deal, Is Now in Court*, N.Y. Times Dealbook, February 7, 2012 (stating, "Goldman Sachs appears to be everywhere in a $21.1 billion buyout of a giant pipeline and energy company—or at least on every side where money can be made"); Andrew Ross Sorkin, *As an Adviser, Goldman Guaranteed Its Payday*, N.Y. Times Dealbook, March 5, 2012 (stating, "Goldman was on every conceivable side of the deal" and "[a]s a result, El Paso may have unwittingly sold itself far too cheaply"); William D. Cohan, *Wise Up on Goldman*, Bloomberg Businessweek, March 15, 2012 (stating, "Goldman's supposedly pristine reputation has always been more invented than earned").

92 *In re* El Paso Corporation Shareholders Litigation, 41 A.3d 432, 435 (Del. Ch. 2012).

93 *See id.* at 435 (discussing how Kinder Morgan was attempting to preempt competition to purchase the pipeline business).

94 *Id.* at 435.

95 *Id.* at 436.

96 *Id.* at 435.

97 *Id.* at 435.

98 *Id.* at 435.

99 *Id.* at 435. Chancellor Strine seems to think this might have been a mistake, noting that the El Paso board could have "force[d] Kinder Morgan into an expensive public struggle." *Id.* In reality, such struggles have costs for targets as well as acquirers, and reasonable businesspeople could easily differ in particular cases as to which is the value-maximizing course of action for the target. This is merely the first instance in which Chancellor Strine takes—and then pointedly expresses—a dim view of a decision by the El Paso board that, to my mind, falls clearly within the range of reasonability.

100 *Id.* at 435–436.

101 *Id.* at 436.

102 *Id.* at 436.

103 *Id.* at 436.

104 *Id.* at 436–437. Chancellor Strine thinks Foshee should have told Kinder "where to put his drilling equipment," *Id.* at 436, and demand that Kinder stand by the price they had previously negotiated. He does not say how Foshee should have responded if Kinder merely stated that he would not do so. In reality, of course, Foshee's actual choices were likely to continue negotiations at a lower price level or else to terminate negotiations.

105 *Id.* at 436.

106 *Id.* at 436.

107 *Id.* at 437.

108 *Id.* at 437.

109 *Id.* at 437.

110 *Id.* at 439.

111 *Id.* at 439.

112 *Id.* at 440.

113 *Id.* at 440.

114 *Id.* at 440.

115 *Id.* at 439.

116 *Id.* at 439.

117 *Id.* at 442.

118 *E.g.*, Matthew Philips, *Goldman's Dubious Deals: Is This 'God's Work'?*, Bloomberg Businessweek, March 7, 2012; Alison Frankel, *Tortured Opinion is Strine's Surrender in El Paso Case*, Thomson Reuter's News & Insight, March 1, 2012.

119 Gina Chon and Anupreeta Das, *Goldman Reviewing Policies on Its Deal Makers' Conflicts*, Wall St. J., March 16, 2012.

120 Section 3.2(a) of the Agreement and Plan of Merger, Dated as of October 16, 2011, among Kinder Morgan, Inc., Sherpa Merger Sub, Inc., Sherpa Acquisition, LLC, Sirius Holdings Merger Corporation, Sirius Merger Corporation, and El Paso Corporation, include as Exhibit 2.1 in Form 8-K of El Paso Corporation (filed October 18, 2011).

121 Section 4.2(a) of the Agreement and Plan of Merger, Dated as of October 16, 2011, among Kinder Morgan, Inc., Sherpa Merger Sub, Inc., Sherpa Acquisition, LLC, Sirius Holdings Merger Corporation, Sirius Merger Corporation, and El Paso Corporation, include as Exhibit 2.1 in Form 8-K of El Paso Corporation (filed October 18, 2011). References to Kinder Morgan's common stock in the text refer to Kinder Morgan's Class P common stock.

122 According to Yahoo! Finance, Kinder Morgan common shares closed at $26.89 on October 14, 2011, the last full day of trading prior to the execution of the merger agreement. Hence, $340,000 worth of Kinder Morgan stock represents approximately 12,644 shares.

123 Zachary R. Miter, *Goldman Oil Bank Montgomery Said to Leave for Buyout Job*, Bloomberg News, April 6, 2011, *available at* http://www.bloomberg.com/news/2011-04-06/goldman-oil-banker-montgomery-to-leave-said-to-plan-buyout-job.html.

124 *In re* El Paso Corporation Shareholders Litigation, 41 A.3d 432, 442 (Del. Ch. 2012).

125 *Id.* at 442. Chancellor Strine's opinion says that, in this situation, Morgan Stanley would get nothing, but in reality it was probably entitled to a very modest fee plus reimbursement of its expenses. At least that is what financial advisor engagement letters usually provide in such circumstances.

126 *Id.* at 442.

127 Given that Morgan Stanley's incentives were substantially the same as those of the typical financial advisor on the target-side of a deal, it seems especially strange that Chancellor Strine would conclude that Goldman was somehow responsible for creating Morgan Stanley's allegedly perverse incentives. See id. at 434 (asserting that Goldman "was able to achieve a remarkable feat: giving the new investment bank an incentive to favor the Merger by making sure [Morgan Stanley] only got paid if El Paso adopted the strategic option of selling to Kinder Morgan," thus "distorting the economic incentives" of Morgan Stanley). But, regrettably, Chancellor Strine's hostility to Goldman is apparent throughout the opinion. For example, in a footnote in the slip opinion, the Chancellor reproduces the script for a telephone call that Goldman's chief executive officer, Lloyd Blankfein, placed to El Paso's chief executive officer, and recounts how his clerks found it reminiscent of the lyrics of a certain popular song, from which he then quotes. *In re* El Paso Corporation Shareholder Litigation, CA No. 6949-CS (February 29, 2012), at 22 n. 43–44. This footnote was widely discussed in the press, *e.g.*, David Benoit, *Lloyd Blankfein Makes Scripted Phone Calls*, Wall St. J. Deal J., Mar. 1, 2012, but it was entirely irrelevant to the issues in the case and served no apparent purpose except to hold up to public ridicule a politically unpopular defendant. Wisely, Chancellor Strine chose to delete this footnote from the final, reported version of the opinion.

128 *El Paso*, 41 A.3d at 443.

129 *Id.* at 443.

130 *Id.* at 443.

131 *Id.* at 444.

132 According to El Paso's Definitive Proxy Statement on Schedule 14A, 170–171 (filed January 31, 2012), Foshee had restricted stock, stock options, and performance-based restricted stock units that would be worth about $25,830,411 if the merger had been consummated on October 31, 2011.

133 *Id.* at 447.

134 *Id.* at 449.

135 *Id.* at 451.

136 *Id.* at 449.

137 *Id.* at 450; *see also id.* at 435 (noting that the deal price represented a 47.8% premium over the price of El Paso stock thirty days before Kinder Morgan made its first bid).

138 *Id.* at 451.

139 *Id.* at 449.

140 *Id.* at 450.

141 Press Release of El Paso Corporation, Mar. 9, 2012, *available at* http://www.marketwire.com/press-release/el-paso-corporation-stockholders-overwhelmingly-approve-merger-with-kinder-morgan-nyse-ep-1630176.htm.

142 Jef Feeley, *Kinder Morgan to Pay $110 Million to Settle El Paso Suits*, Bloomberg, Sept. 8, 2012.