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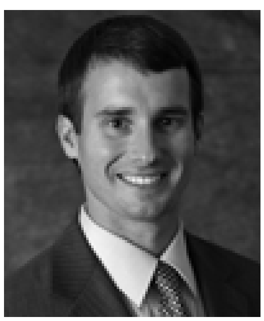
Investment Banker Conflicts Attract Greater Judicial Scrutiny



BY GARDNER DAVIS AND TYLER PARRAMORE

Recent Delaware cases suggest increased judicial scrutiny of investment banker conflicts of interest. The Delaware Chancery Court currently appears focused on the crucial role of investment bankers in today's mergers & acquisitions environment and prepared to raise the bar regarding their potential conflicts which threaten to compromise the integrity of the sale process.

Two recent Delaware cases, *Atheros Communications*[1] and *Del Monte Foods*,[2] recognized "the central role played by investment banks in the evaluation, exploration, selection and implementation of strategic alternatives."[3] Financial advisors "serve a critical function by performing a valuation of the enterprise upon which its owners rely in determining whether to support a sale. Before shareholders can have confidence in a fairness opinion or rely upon it to an appropriate extent, the conflicts and arguably perverse incentives that may influence the financial advisor in the exercise of its judgment and discretion must be fully and fairly disclosed."[4] Moreover, the Delaware court "has not stopped at disclosure, but rather has examined banker conflicts closely to determine whether they tainted the directors' process."[5]

In both *Del Monte* and *Atheros*, the Delaware court enjoined the shareholder vote on the pending merger and required additional, remedial disclosure to shareholders regarding investment banker conflicts of interest.

In order to put this increased judicial scrutiny of financial advisors in perspective, it must be understood within the court's over-arching concern – the board of directors' management of the sale of the company. The board of directors is responsible to the shareholders for the selection and management of the company's finan-

[1] *In re Atheros Communications, Inc. S'holder Litig.*, 2011 WL 864928 (Del. Ch. March 4, 2011).

[2] *In re Del Monte Foods Company S'holder Litig.*, 2011 WL 532014 (Del. Ch. Feb. 14, 2011).

[3] *Atheros, supra* at *10; *Del Monte, supra* at *16; *see also In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613 at *16-17 (Del. Ch. Oct. 2, 2009), *appeal denied*, 984 A.2d 124 (Del. 2009); *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1006 (Del. Ch. 2005).

[4] *Atheros, supra* at *10.

[5] *Del Monte, supra* at *16.

cial advisor. The shareholder lawsuits giving rise to examination of banker performance are brought against the board, as defendants, alleging the directors breached their fiduciary duty. As Vice Chancellor Laster found in *Del Monte*, ''[a]lthough the blame for what took place appears at this preliminary stage to lie with [the financial advisor], the buck stops with the Board. Delaware law requires that a board take an 'active and direct role in the sale process.' ''[6]

Under *Revlon*, when the board of directors decides to sell the company, ''the directors must focus on one primary objective – to secure the transaction offering the best value reasonably available for the shareholders and they must exercise their fiduciary duties to further that end.''[7] The board is not required to follow any specific plan or blueprint to fulfill its duties.[8] However, the directors must act reasonably ''by undertaking a sound process to get the best deal available.''[9]

In the context of the shareholder lawsuit challenging the proposed sale transaction, the court evaluates the adequacy of the sales process employed by the board. Specifically, the court is required to ''(1) make a determination as to whether the information relied upon in the decision-making process was adequate and (2) examine the reasonableness of the directors' decision viewed from the point in time during which the directors acted.''[10] The issue for the court ''in a sales context is whether the directors made a reasonable decision, not a perfect decision.''[11] It is the board's burden to prove it was sufficiently informed and acted reasonably.[12]

[6] *Del Monte, supra* at *19 (*quoting Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 66 (Del. 1989)).
[7] *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 42 (Del. 1994); *see Revlon v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 179 (Del. 1986).
[8] *Barkan v. Amsted Industries, Inc.*, 567 A.2d 1279, 1286 (Del. 1989); *In re Thrifty S'holder Litig.*, 2010 WL 5648898 at *17 (Del. Ch. Sept. 8, 2010).
[9] *In re Netsmart Techs. Inc. S'holder Litig.*, 924 A.2d 171, 192 (Del. Ch. 2007) (*citing Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 42 (Del. 1994)).
[10] *Atheros, supra* at *7 (*quoting In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 497 (Del. Ch. 2010).
[11] *Atheros, supra* at *7 (*quoting In re Dollar Thrifty S'holder Litig.*, 2010 WL 5648895 at *17 (Del. Ch. Sept. 8, 2010)).
[12] *Atheros, supra* at *7; *In Re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 497 (Del. Ch. 2010).

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''[A] reviewing court necessarily will consider the extent to which a board has relied on expert advisors.''[13] When managing the sale of the company, ''the directors' advisors play a pivotal role.''[14]

Shareholder lawsuits against the board of directors in the M&A context raise three general challenges relating to the investment banker's performance. The first type of claim involves substantive misconduct, such as conflicts of interest and deceit by the investment banker, which are alleged to taint the board's sale process.

The second common type of shareholder claim is the so-called ''disclosure claim.'' When soliciting shareholder approval of a merger, the board of directors is required to

> 'disclose fully and fairly all material information within the board's control . . . .' The burden of establishing materiality rests on the plaintiff, who must demonstrate 'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ''total mix'' of information made available.'[15]

Although non-material facts need not be disclosed, ''once a board voluntarily makes a partial disclosure, it has 'an obligation to provide the stockholders with an accurate, full and fair characterization' of the facts relating to that partial disclosure.''[16]

The final category of claims involves technical, substantive attacks on the financial advisor's valuation methodology and professional advice. Delaware courts generally hold that valuing a company is more an art than a science, and therefore avoid substantive review of a banker's valuation methodology so long as it is ''accurately described and appropriately qualified.''[17]

The touchstone in analyzing challenges to financial advisor methodology is full and accurate disclosure. In *Atheros*, Vice Chancellor Noble observed that the shareholders' argument boiled down to a simple complaint that the investment banker should have conducted its analysis differently, but because ''there are limitless opportunities for disagreement on the appropriate valuation methodologies to employ. . .quibbles with a financial advisor's work simply cannot be the basis of a disclosure claim.''[18]

A review of the facts of *Del Monte* and *Atheros* is helpful to provide context and a better understanding of the Delaware court's concern regarding banker conflicts.

In re Del Monte Foods Co.

In *Del Monte*, Vice Chancellor Laster, on a preliminary record, found that the Del Monte Foods board of directors breached its *Revlon* duties by failing to provide sufficient oversight of the sale process as a result of the investment banker's alleged misconduct. The

[13] *Del Monte, supra* at *15.
[14] *Del Monte, supra* at *15.
[15] *Atheros, supra* at *9 (*quoting Gantler v. Stephens*, 965 A.2d 695, 710 (Del. 2009) (*quoting Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992)).
[16] *Atheros, supra* at *9-10 (*quoting Arnold v. Society for Savings Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994).
[17] *In re 3Com S'holders Litig.*, 2009 WL 5173804 at *6 (Del. Ch. Dec. 18, 2009).
[18] *Atheros, supra* at *10 (*quoting 3Com S'holders Litig.*, 2009 WL 5173804, at*6).

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court delayed for 20 days the stockholder vote on the $5.3 billion merger and enjoined the buyer from enforcing the deal protection provisions during that time in order to permit a potentially higher bid to emerge without the taint of the alleged misconduct.

The central question in *Del Monte* was whether the alleged conflicts of interest and misconduct of Barclays Capital, Del Monte's financial advisor, so tainted the sale process that remedial action was required.

Barclays was one of Del Monte's primary investment banks and handled several engagements for the company during 2009 and 2010. However, Barclays apparently had an even stronger relationship with Kohlberg Kravis Roberts & Co. During the same two-year period, KKR paid Barclays more than $66 million in fees.

In late 2009 when Barclays was working for Del Monte on other matters and without Del Monte's knowledge, Barclays met with KKR to pitch investment opportunities, including the acquisition of Del Monte.

In early January of 2010, during a follow-up meeting, KKR said it was ready to pursue the acquisition of Del Monte. Barclays proceeded to outline for KKR how its client would respond to receiving the unsolicited offer: a private solicitation of interest from approximately five private equity sponsors with no strategic bidders. Needless to say, to the extent Barclays anticipated serving as Del Monte's financial advisor, sharing the client's strategy with the potential acquiror raised ethical issues.

Before KKR could make its move, Apollo Management, another private equity firm with ties to Barclays, advised Del Monte of interest in acquiring the company at $14 to $15 per share. Del Monte's Board engaged Barclays as its investment banker in connection with Apollo's expression of interest. As part of the selection process, Barclays claimed to be well qualified because the firm ''knew many of the entities that might be an interested buyer.''[19] However, Barclays omitted to mention that it had been pitching the acquisition of Del Monte to them and that Barclays' efforts may have resulted in the unsolicited takeover offer.

Barclays also did not mention to the Del Monte board during the engagement discussions that the firm intended to seek a role in providing buy-side financing. However, Barclays' contemporaneous internal documents reflected that, at the appropriate time, Barclays intended to seek the very lucrative, buy-side financing work.

Not surprisingly, once engaged, Barclays recommended that Del Monte pursue a targeted, non-public process that tracked precisely what Barclays had outlined to KKR. Vice Chancellor Laster pointed out that there were sound and reasonable justifications for such an approach. However, a narrow, targeted process involving a few large private equity firms also furthered Barclays' undisclosed goal of securing the lucrative buy-side financing work. Private equity buyers are generally more likely than strategic buyers to require financing and Barclays was one of a limited group of institutions with sufficient resources to handle a transaction as large as the Del Monte LBO.

As part of the process, each private equity firm signed a confidentiality agreement that contained a ''no teaming'' provision which prevented the firm from discussing Del Monte or their bids with anyone else, including another private equity firm. The no teaming provision provided, in part:

> [y]ou further agree that you will not, directly or indirectly . . . enter into any agreement, arrangement or understanding, or any discussions which would reasonably be expected to lead to such agreement, arrangement or understanding with any other person, including other potential bidders and equity or debt financing sources . . . regarding a possible transaction involving the Company without the prior written consent of the Company.[20]

Vice Chancellor Laster found that the no teaming provision ensured that Del Monte would have the contractual right to control the competitive dynamics of the process in determining whether any bidders would be allowed to work together on a joint bid.

Five private equity firms submitted preliminary expressions of interest. KKR submitted the second highest bid — $17.00 per share. Vestar presented the highest preliminary bid, in the $17.00 - $17.50 per share range. Vestar had advantages because of its knowledge of the industry and strength as an operator. However, Vestar needed to team up with another private equity firm because of the size of the deal.

Vice Chancellor Laster pointed out that in order to maximize competitive bidding, Del Monte would want to team Vestar up with a private equity group other than KKR so that the two highest bidders would remain in the chase. But given Barclay's objective of providing buy-side financing for the deal and its particularly close relationship with KKR, such competition arguably would be undesirable because it reduced KKR's chances of winning the company.

On March 18, 2010, the Del Monte Foods board considered the five indications of interest and decided that it was in the stockholders' best interest not to proceed further with the process. The board specifically instructed Barclays ''to shut [the] process down and let buyers know the company is not for sale.''[21]

In September, 2010, without Del Monte's knowledge, Barclays tried to put the Del Monte LBO back together. Barclays met with Vestar and suggested that the time might be right to make another run at Del Monte and that KKR would be the ideal partner. Barclays also discussed the idea with KKR and then followed up with Vestar to confirm KKR's continued interest.

Particularly troubling to Vice Chancellor Laster was the fact that both Vestar and KKR were bound by their confidentiality agreements with Del Monte, which prohibited them from having any discussions, much less entering into an agreement, without Del Monte's prior written consent. Vestar and KKR did not have Del Monte's written consent. Moreover, Barclays was not authorized at that time to do anything on behalf of Del Monte.

Vice Chancellor Laster found that ''[b]y pairing Vestar with KKR, Barclays put together the two highest bidders from March, 2010, thereby reducing the prospect of real competition in any renewed process . . . . Teaming up Vestar and KKR served Barclays' interests in furthering the deal with an important client (KKR) that previously had used Barclays for buy-side financing.''[22]

On October 11, 2010, KKR presented Del Monte with a written proposal to acquire the Company for $17.50

[19] *Del Monte, supra* at *4.

[20] *Del Monte, supra* at *5.
[21] *Del Monte, supra* at *7.
[22] *Del Monte, supra* at *7.

per share. KKR's letter did not mention Vestar. In fact, Vice Chancellor Laster found that ''Barclays worked with KKR to conceal Vestar's participation.''[23]

The Del Monte board authorized reengaging Barclays as its financial advisor. The Chairman of the Strategic Committee ''personally directed that Barclays was not to speak or act on Del Monte's behalf until the terms of the engagement letter had been finalized.''[24] Barclays did not advise the Chairman that Barclays ''had been communicating with Vestar and KKR, put the two firms together, and helped spur the KKR bid. Barclays then began advising Del Monte on the bid [Barclays] engineered.''[25]

With the momentum building towards a deal, in mid-November, 2010 KKR, through Barclays, requested that the company allow KKR to include Vestar in the deal as an additional member of the sponsor group. The Del Monte board was not told that Vestar in fact had been partnered with KKR since September, when Barclays put them together. The board never considered the ramifications of permitting KKR to team up with the firm who previously submitted the high bid and who could readily have teamed with another private equity firm to acquire the company or the possibility of enforcing the confidentiality agreement, and inviting Vestar to participate with a different sponsor to generate competition.

In retrospect, Vice Chancellor Laster found it was not reasonable for the Board to agree that KKR could team up with Vestar and ''give up its best prospect for price competition without making any effort to obtain a benefit for Del Monte and its stockholders.''[26]

''Barclays had long been signaling KKR about its desire to participate [in the buy-side financing].''[27] On November 8, 2010, while KKR and Del Monte were in the final stages of negotiation regarding price, Barclays asked KKR to give KKR one-third of the buy-side financing debt, which role could generate additional fees of $21 to $24 million for Barclays. KKR agreed. The next day, Barclays asked Del Monte management for permission to provide the buy-side financing to KKR. Vice Chancellor Laster found that ''[n]o one thought that KKR needed Barclays, and other banks were already clamoring for their shares. Barclays simply wanted to double dip.''[28]

''As a result, at the same time Barclays ostensibly was negotiating to get KKR to pay more, Barclays had an incentive as a well-compensated lender to ensure that a deal was reached and that KKR did not over-pay.''[29]

Vice Chancellor Laster found the board again failed to act reasonably by agreeing to Barclay's request. ''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.''[30]

The Del Monte board finally approved the transaction at $19.00 per share.

[23] *Del Monte, supra* at *8.
[24] *Del Monte, supra* at *9.
[25] *Del Monte, supra* at *9.
[26] *Del Monte, supra* at *18.
[27] *Del Monte, supra* at *10.
[28] *Del Monte, supra* at *10.
[29] *Del Monte, supra* at *17.
[30] *Del Monte, supra* at *18.

The Merger Agreement provided for a 45-day post-signing go-shop period during which Del Monte had the right to solicit and encourage competing, higher offers. Barclays conducted the ''go shop'' process for the company. Vice Chancellor Laster found that ''Barclays had a direct financial conflict. . . . For its role in the buy-side financing for KKR, Barclays stood to earn another $21 to $24 million. . . . If another bidder emerged that did not need financing or who chose not to use Barclays, then Barclays would lose its buy-side financing fees.''[31]

Barclays' alleged misconduct did not come to light until discovery in a stockholder lawsuit challenging the transaction. The Court faced a difficult dilemma because the proposed $19.00 per share represented an attractive opportunity for Del Monte stockholders, but the sale process was arguably tainted by Barclays' nondisclosure and conflicts of interest.

Vice Chancellor Laster reviewed the situation in terms of a breach of fiduciary duty claim against the Del Monte board under the ''enhanced scrutiny'' standard of *Revlon*.[32] He found that ''the director defendants failed to act reasonably in connection with the sale process'' because they relied upon, and were deceived by, a conflicted financial advisor.[33]

In an effort to ameliorate the taint from the financial advisor's alleged improper activities, and the apparent steering the deal to KKR, the Court enjoined Del Monte from conducting the stockholder vote on the merger for a period of 20 days and enjoined the parties from enforcing the deal protection devices for any deal which may be forthcoming during that period.

In re Atheros Communications Inc.

In the second recent Delaware case to address investment banker conflicts, *Atheros*,[34] Vice Chancellor Noble sustained the Board's sophisticated handling of the process leading to the sale of the Company, but faulted the Company for failure to make sufficiently robust disclosure in the Proxy Statement regarding the potential conflicts arising from the contingent nature of the investment banker's compensation. The *Atheros* decision arises from Qualcomm Incorporated's $3.1 billion all-cash acquisition of Atheros Communications, Inc. Atheros engaged Qatalyst Partners as its financial advisor.

Atheros and Qatalyst negotiated the terms of the engagement for more than three months, during which Qatalyst advised the board regarding negotiations with Qualcomm and other strategic options. The Atheros board of directors resisted Qatalyst's requested total fee and the extent of the ''tail'' provision in the event Atheros closed a future deal with a company other than Qualcomm. Approximately a week before signing the merger agreement, Qatalyst and Atheros agreed that Qatalyst would be paid a flat fee, of which approximately 98% was contingent upon the closing of the Qualcomm transaction. The final negotiated fee was substantially lower than that originally sought by Qatalyst.

[31] *Del Monte, supra* at *12.
[32] *Revlon, Inc. v. MacAndrews & Forbes Hldgs. Co.*, 506 A.2d 173, 179 (Del. 1986).
[33] *Del Monte, supra* at *20.
[34] *Atheros, supra*.

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It should be noted that the Atheros board was actively engaged in the sale process and seven of the eight Atheros directors were disinterested and independent.

The Atheros board eventually approved the sale of the company at $45 per share, which price represented a 21% premium over Atheros' closing price on the last full trading day before rumors of the transaction were made public.

Following announcement of the deal, several shareholders sued, seeking to enjoin the proposed sale of Atheros to Qualcomm. Plaintiffs also challenged the sufficiency of the disclosure to shareholders in the Atheros Proxy Statement regarding Qatalyst's compensation arrangement. The Proxy Statement stated that Qatalyst would ''be paid a customary fee, a portion of which is payable in connection with the rendering of its opinion and a substantial portion of which will be paid upon completion of the merger.''[35] However, the Proxy Statement did not include the amount of compensation that Qatalyst would receive or, more importantly to Vice Chancellor Noble, the quantification of the amount of the fee that is contingent – approximately 98%.

Vice Chancellor Noble noted that ''[a]lthough the Proxy Statement reports that a 'substantial portion' of the fee is contingent, the percentage of the fee that is contingent exceeds both common practice and common understanding of what constitutes 'substantial.' ''[36] Vice Chancellor Noble found that:

> the differential between compensation scenarios may fairly raise questions about the financial advisor's objectivity and self interest. Stockholders should know that their financial advisor, upon whom they are being asked to rely, stands to reap a large reward only if the transaction closes and, as a practical matter, only if the financial advisor renders a fairness opinion in favor of the transaction. In essence, the contingent fee can readily be seen as providing extraordinary incentive for Qatalyst to support the transaction.[37]

Vice Chancellor Noble concluded that the contingent fee arrangement created such substantial incentives that stockholders should be made aware of it and that the contingent fee structure is material to the stockholders' decision to support or oppose the transaction: ''it is clear that an approximately 50:1 contingency ratio requires disclosure to generate an informed judgment by the shareholders as they determine whether to rely on the fairness opinion in making the decision to vote for or against the transaction.''[38]

The defendants argued that because the fee agreement between Qatalyst and the Company was reached shortly before the merger agreement was signed, the practical risk was very small that the deal would not close, and therefore the ''contingent'' nature of the fee was not material. Vice Chancellor Nobel concluded, however, that ''the unusual timing supports the fullest disclosure. More specifically, the potentially pernicious incentives warrant disclosure regardless of the time remaining . . . .''[39]

The Plaintiffs also contended that the amount of the financial advisor's fee needed to be disclosed. Although Vice Chancellor Noble concluded that it was not necessary to make a specific ruling on whether the amount of compensation must always be disclosed, he concluded that under the circumstances, particularly because corrective disclosure would be required, ''the stockholders should be afforded an opportunity to understand fully the nature and means by which Atheros will compensate Qatalyst. Thus, that would include the amount of the fees as well.''[40]

The Chancery Court entered a preliminary injunction delaying the Atheros stockholder meeting or stockholder vote on the merger until after appropriate curative disclosures could be made to address the deficiencies found in the Proxy Statement.

Lessons Learned

In light of *Del Monte* and *Atheros*, corporate directors and M&A professionals must be on the lookout for potential financial advisor conflicts that may threaten the integrity of the sale process. The board must be adequately informed about the potential conflict and must evaluate how it may impact the board's primary duty under *Revlon* to maximize the company's value at the sale for the stockholders' benefit.

In order to fully protect both the deal and the directors from shareholder attack, the initial financial advisor selection process, or so-called ''beauty contest,'' needs to include blunt questions about potential conflicts. In light of *Del Monte*, directors may directly ask whether the candidate has had discussions with or made presentations to potential buyers regarding acquisition of the company.

The board should discuss at the outset whether the candidate intends to pursue the buy-side financing work for the transaction and the potential conflicts of interest which may result. It should be noted that Vice Chancellor Laster, in *Del Monte*, referred to the investment banker's dual role of providing buy-side financing and advising the seller as ''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.''[41]

The directors may also inquire about the candidate's prior advisory and finance work for private equity firms and other possible acquirors and the potential conflicts of interest that may result. Toward that end, the board will be interested in whether the firm would recommend approaching strategic as well as financial buyers and the number of potential financial buyers to be included in the initial round of the process.

The board should also specifically consider the advantages and disadvantages, from a process perspective, of an investment banking fee that is largely contingent upon the transaction closing. Although *Atheros* framed the contingent fee issue in the context of a disclosure claim, the court was clearly troubled by the ''all or nothing'' nature of the banker's compensation and the impact on the banker's objectivity.

The interview and the engagement letter should specifically address the company's right to fully disclose all aspects of the banker's compensation in the proxy statement. Bankers may resist full disclosure of fees in the belief that such disclosure sets a ceiling in future fee negotiations with other clients. However, the lack of full

[35] *Atheros, supra* at *22.
[36] *Atheros, supra* at *22-23.
[37] *Atheros, supra* at *23.
[38] *Atheros, supra* at *24.
[39] *Atheros, supra* at *25, Note 69.
[40] *Atheros, supra* at *25.
[41] *Del Monte, supra* at *16 (*quoting In re Toys ''R'' Us, Inc. S'holder Litig.*, 877 A.2d 975, 1006 (Del. Ch. 2005)).

disclosure regarding fees will give the plaintiff shareholders potential ammunition to attack the ultimate deal.

Finally, we must recognize that investment banker conflicts of interest are a fact of life. The most successful and experienced investment banks have extensive relationships with both competing companies and investors. The key lessons of *Del Monte* and *Atheros* are that the board should be fully informed of the conflicts and should thoughtfully consider the implications on the board's ability to discharge its fiduciary duty under *Revlon* and evaluate alternatives before accepting them. In the final analysis, the board of directors needs to be actively engaged in selecting and supervising the financial advisor and be on the lookout for potential problems that may raise questions regarding the integrity and fairness of the sale process.

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