

Recent Complaint Unsuccessfully Challenged 'Standard Plain Vanilla' Rights Plan

By Nathaniel J. Stuhmiller

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In *Building Trades Pension Fund of Western Pennsylvania v. Desktop Metal*, a stockholder plaintiff brought derivative claims against Desktop Metal, Inc., alleging that a provision of the company's rights plan, which was adopted in connection with a proposed merger transaction, impermissibly chilled the free exercise of stockholder voting with respect to the merger agreement at an upcoming stockholder meeting.

Rights plans, sometimes referred to as "poison pills," are commonly used defensive devices that a board of directors may deploy to deter potential threats to the corporation or its business and its stockholders. A rights plan deters rapid accumulations of a corporation's shares and hostile takeover attempts by imposing the risk of severe dilution upon anyone who acquires beneficial ownership of shares in excess of a certain triggering threshold (usually, 10%, 15% or 20% of the outstanding stock). A typical definition of "beneficial ownership" in a rights plan covers shares of stock a person owns directly as well as shares that the person owns or controls indirectly or has the right to acquire. One common way to attribute ownership in this manner is through inclusion of an "agreement, arrangement or understanding" provision (AAU provision) pursuant to which a person is deemed to beneficially own any shares held by another person with whom such person has an "agreement, arrangement or understanding" for purposes of acquiring, holding, voting or disposing of such shares. Customarily, AAU provisions will include certain exceptions, including an exception for a situation where an agreement, arrangement or understanding arises solely from a revocable proxy or consent given to the person in response to a public proxy or consent solicitation contest.

On May 25, Desktop Metal entered into a merger agreement for the acquisition of Stratasys Ltd. Before entering into the merger agreement, Stratasys had been the target of an unsolicited tender offer by another company, Nano Dimension Ltd., and had adopted a rights plan in response. Nano Dimension had also engaged in prior discussions with Desktop Metal about a potential business combination. In light of the ongoing hostile takeover attempt of Stratasys and Desktop Metal's prior history with Nano Dimension, the parties agreed in the merger agreement that Desktop Metal would adopt a rights plan of its own. Desktop Metal's rights plan, which was adopted shortly after the execution of the merger agreement, had a triggering threshold set at 15% of the outstanding stock. It also included an AAU provision that followed the same basic framework outlined above for indirectly attributing beneficial ownership of shares and contained an express exception for public proxy solicitations.

On June 6, a Desktop Metal stockholder filed a complaint in the Delaware Court of Chancery challenging the rights plan, alleging, among other things, that the AAU provision in the rights plan would prevent stockholders from freely discussing with each other how to vote on the proposed merger agreement. Specifically, the complaint alleged that the AAU provision "restricts basic elements of corporate democracy and prevents stockholders from reaching understandings on whether they will support the Merger without resorting to expensive proxy contests." The plaintiff stockholder sought to enjoin the operation of the AAU provision and moved to expedite the case.

On July 5, Vice Chancellor J. Travis Laster, ruling from the bench on the motion to expedite, found that the plaintiff had failed to show a threat of irreparable harm and questioned whether the claims in the complaint were even colorable. The court characterized Desktop Metal's rights plan as a whole, and the definition of beneficial ownership

(including the AAU provision) in particular, as “absolutely standard,” noting that the language in the AAU provision was “not new” and that the exact same “agreement, arrangement or understanding” language has been used for years in Section 203 of the Delaware General Corporation Law, which is Delaware’s principal antitakeover statute, and in Section 13D of the Securities Exchange Act of 1934. The court noted that the AAU provision included a standard exception for soliciting revocable proxies and also stated that “it doesn’t prohibit [stockholders from] talking about what they want to do” or from “voting down the deal if they want to do it.” In short, the court concluded that Desktop Metal’s rights plan was “a standard plain vanilla pill with a standard plain vanilla [AAU provision] in what is a standard plain vanilla buy-side deployment.” In finding there was no showing of irreparable harm, the court described the dispute as “academic,” given that the complaint was being brought by a stockholder “desirous of simply engaging in the academic question of whether, in this setting, standard [AAU provision] language creates some issue under enhanced scrutiny” rather than by a party who was being actively prevented from pursuing a course of action. Accordingly, the court denied the motion to expedite, and a few days later the plaintiff voluntarily dismissed the complaint against Desktop Metal.

While rights plans are a standard feature of any takeover defense playbook, their adoption and maintenance can subject the corporation and its board to a heightened risk of litigation. In the past, litigation challenging the adoption of a rights plan was often initiated by hostile acquirers claiming that they were being impermissibly precluded from pursuing a deal. In more recent years, however, rights plan litigation has increasingly originated from stockholders who have no interest in pursuing a transaction, but who are instead focused on pursuing purely “academic” disputes that provide little if any real benefit to the stockholders. Although rights plans that include nonstandard or particularly onerous terms will likely continue to be subject to scrutiny, the court’s statements in *Desktop Metal* should give substantial comfort that rights plans with standard terms that are deployed in appropriate circumstances will withstand challenge.

Nathaniel J. Stuhlmiller (stuhlmiller@rlf.com) is a director of Richards, Layton & Finger. His practice focuses on transactional matters involving Delaware corporations, including mergers and acquisitions, corporate governance, and corporate finance. The views expressed in this article are those of the author and not necessarily those of Richards, Layton & Finger or its clients.

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