M&A Adviser Disclosures After *Brookfield*, *Inovalon* and *Berger*

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The Delaware Court of Chancery's recent decision in *Berger v. Fox* provides guidance on the scope of adviser-related disclosures necessary to ensure that a stockholder vote is fully informed in the M&A context. The opinion presents a common-sense interpretation and practical application of the Delaware Supreme Court's recent decisions related to disclosure of adviser conflicts in *City of Dearborn Police & Fire Revised Retirement System v. Brookfield Asset Management* and *City of Sarasota Firefighters' Pension Fund v. Inovalon Holdings*.

In 2024, funds affiliated with Bain Capital Private Equity LP acquired Envestnet, Inc. in an all-cash take-private merger following a series of strategic-review processes conducted between 2020 and 2024. Bain initially submitted a nonbinding proposal to acquire Envestnet in May 2020 and conducted extensive due diligence through its participation in the company's sale processes in the years that followed. In February 2024, Envestnet formally launched a sale process for its Data & Analytics business and contacted numerous potential bidders, including an affiliate of Bain.

Following that outreach, Bain submitted a nonbinding proposal to acquire Envestnet. Envestnet's board subsequently solicited relationship disclosures from, and formally engaged, Morgan Stanley & Co. LLC to advise it on Bain's proposal and its review of other strategic alternatives. Around the same time, the board retained Paul, Weiss, Rifkind, Wharton & Garrison as legal counsel in connection with the potential transaction.

Morgan Stanley's disclosures described, among other things, the fees it had earned from Envestnet and Bain during the prior two years, its lending relationships with Envestnet and Bain and that, in March 2024, it had prepared materials for Bain that addressed an illustrative leveraged-buyout analysis of the company. Morgan Stanley supplemented its disclosures throughout the process and its final disclosure stated that Morgan Stanley was engaged on a number of unrelated advisory and financing assignments for Bain-related entities and expected to receive aggregate fees from those assignments that would be "significantly more" than its fees from Envestnet in the contemplated merger.

After a competitive process, the merger with Bain was ultimately approved by the board and 75.3% of Envestnet shares held by stockholders other than directors and officers. Nearly a year after the merger closed, stockholders filed suit alleging that the directors and Envestnet's interim chief executive officer breached their fiduciary duties in connection with the merger and that Morgan Stanley aided and abetted those breaches. The defendants argued that dismissal of the claims was warranted under *Corwin v. KKR Financial Holdings* because the transaction was approved by a fully informed, uncoerced vote of disinterested stockholders. The defendants further argued that even if *Corwin* did not require dismissal, the plaintiffs failed to state a claim against the board for breach of fiduciary duty or against Morgan Stanley for aiding and abetting.

In an attempt to overcome *Corwin*, plaintiffs contended that the vote on the merger was uninformed because, among other things, the proxy statement omitted material information concerning: Morgan Stanley's relationship with Bain, and Paul Weiss's concurrent representations of Bain portfolio companies. The court rejected these claims and held that *Corwin* required dismissal.

The court first rejected claims related to Morgan Stanley's relationship with Bain. The proxy disclosed Morgan Stanley's transaction fee, the fees it had received from the company and Bain during the preceding two years and that Morgan Stanley was then engaged to provide unrelated advisory and financing services to Bain-related entities from which it expected to receive fees "significantly more" than its transaction fee. The court also held that the proxy was not required to disclose the expected dollar amount of those future Bain-related fees or a more granular breakdown of fees earned during the sale process because the proxy had sufficiently identified the existence of those other engagements and their rough scale. The disclosures here were thus distinguishable from those found lacking by the Delaware Supreme Court in *Inovalon*, which stated that the financial adviser had concurrent representations of the buyer but merely characterized the fees received as "customary" without giving a sense of relative materiality of the fees to the financial adviser.

The court also rejected claims that the stockholder vote was uninformed because the proxy statement failed to disclose Paul Weiss' concurrent representation of Bain by lawyers in the firm's London office in three unrelated European transactions. The plaintiffs relied principally on *Brookfield*, where the Delaware Supreme Court held that inadequate proxy statement disclosures—relating, in part, to the special committee's legal counsel's simultaneous representation of the controller in unrelated transactions—rendered the stockholder vote uninformed and the business judgment rule protections under *MFW* unavailable.

The court declined to read *Brookfield* as requiring disclosure of every concurrent, even immaterial, legal adviser engagement in an arm's-length transaction negotiated by an indisputably independent board. Rather, the court stated the plaintiffs had to plead facts supporting a reasonable inference that the concurrent representations were material to Paul Weiss and thus created a meaningful concern that the firm might temper its advocacy for the company to preserve its relationship with Bain. Because the complaint failed to plead anything other than the mere existence of the concurrent representations, the court held the omission did not render the vote uninformed.

Having concluded that the vote was fully informed and the other requirements of *Corwin* were indisputably satisfied, the court held that the business judgment rule applied and the plaintiffs' fiduciary claims must be dismissed. The court's dismissal under *Corwin* ultimately disposed of the entire complaint, including the aiding and abetting claim against Morgan Stanley because there was no finding of an underlying breach by the board.

The court nevertheless separately held that, even if *Corwin* did not compel dismissal, the aiding-and-abetting claim against Morgan Stanley failed on the merits. The court noted that Morgan Stanley provided the board with five disclosures throughout the strategic review process addressing its relationships with Bain and the other bidders in the process, and the complaint did not support a reasonable inference that Morgan Stanley misled the board, acted without the board's direction or approval or knowingly participated in an underlying fiduciary breach.

The Delaware Supreme Court's opinions in *Brookfield* and *Inovalon* introduced uncertainty regarding the level of detail that should be included in future disclosures related to legal and financial advisers in M&A transactions. The Delaware Court of Chancery's opinion in *Berger* provides welcome clarity by holding that financial adviser disclosures are sufficient where they identify the relevant relationships and fees and, if fees from concurrent representations are not readily quantifiable, their "rough scale." *Berger*'s holding with respect to the legal adviser disclosures also makes it clear that it is not enough to simply show that a particular relationship was not disclosed—a plaintiff must also allege facts supporting an inference that the relationship was material enough to compromise the adviser's ability to provide unconflicted advice to its client. In order to meet the standards set forth in these cases, boards and their advisers should endeavor to identify and evaluate adviser relationships early, obtain updated conflict disclosures as the process develops and ensure that proxy disclosures give stockholders context regarding adviser fees and relationships.

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