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4th time is no charm for disclosure-only settlement before Dela. judge

(Reuters) - On three different occasions - in May 2014, November 2014 and March 2015 - Vice-Chancellor **Travis** Laster of Delaware Chancery Court refused to approve the settlement of a shareholder class action against the board of the medical device company Theragenics, which was acquired by Juniper Investment for about \$68 million in 2013. Shareholders had originally claimed the merger price was inadequate, but ended up proposing a settlement that just provided investors with additional pre-merger disclosures about revenue projections, adviser contracts and other material the board considered in the sale process. When Laster rejected the settlement for a third time in March, the judge suggested that the best course for plaintiffs' lawyers from Rigrodsky & Long, Levi & Korsinsky, Brodsky & Smith and Weisslaw might be to voluntarily dismiss their case.

That's what the plaintiffs' firms tried to do in a proposed order filed with Vice-Chancellor Laster on June 15. The firms agreed to drop the shareholder suit without any release of investors' litigation rights. Class members, they said, didn't even need to be notified of the dismissal because they weren't giving up any rights. So the only remaining issue before Laster, the proposal said, would be approving fees to plaintiffs' lawyers for obtaining those pre-merger disclosures. (The firms had suggested a fee of \$400,000 last year when they first asked for court approval of the settlement. Theragenics and Jupiter said \$150,000 was more appropriate; the June 15 proposal didn't include a dollar amount.)

But guess what? Vice-Chancellor Laster once again refused to approve the proposed order! (I first read about the case in the Chancery Daily, which has faithfully chronicled all of the previous rejections.) This time around, the judge said class members have to be notified that Rigrodsky & Long and the other plaintiffs' firms want to drop the case. Shareholders may want to intervene and contest the dismissal or to object to any fees for plaintiffs' lawyers, he said.

"Given the high standards to which plaintiffs seek to hold other fiduciaries where matters of disclosure are concerned, they might consider aspiring to similar standards themselves," Laster wrote. "It reflects ill to defer the timing of the potential agreement or payment so as to avoid giving notice to one's beneficiaries."

Ouch. I left messages for both Seth Rigrodsky and Brian Long of the eponymous plaintiffs' firm. Neither of them returned my calls. But they and the other plaintiffs' lawyers in the Theragenics have to be frustrated about the endgame of a case that, they now concede, never presented much chance of recovery for shareholders. It's true that Jupiter and Theragenics had entered into an exclusivity agreement, which can raise questions. But plaintiffs' lawyers eventually learned that Theragenics' advisers pitched the company to dozens of alternate bidders over the course of several months and none stepped up with an offer, perhaps because Theragenics' management projections were unrealistically optimistic, by the reckoning of its own financial advisor.

Vice-Chancellor Laster seems at first to have been concerned plaintiffs' lawyers had rushed to settle the case without investigating whether shareholders might have a claim for money damages. (Theragenics and Jupiter, which filed a brief in support of the original proposed settlement but opposing the plaintiffs' \$400,000 fee request, said they'd received a formal settlement overture from shareholders' lawyers before a single deposition took place.) In November 2014, when he rejected the deal for a second time, the judge said he wanted plaintiffs to develop additional information about the merits of their proposed settlement.

By May 2015, in a motion asking for renewed consideration, shareholder lawyers were in the awkward position of explaining why the additional disclosures they obtained were valuable to shareholders even as they explained why shareholders were lucky

to get as much as they did from Jupiter. They based the latter argument on two depositions taken after the November 2014 settlement rejection. But Judge Laster remained unimpressed.

"Good cause has not been shown to revisit the earlier determination," he wrote. "This does not mean that the plaintiffs must go forward with their claims. Indeed, having represented that they do not believe there is anything worth litigating, it would be hard to understand how they could. Given their representations, the plaintiffs' duties to the putative class may well call for voluntary dismissal. Whether the parties agree to a mootness fee based on the disclosures made by the defendants, or whether in the absence of agreement the plaintiffs choose to seek a fee, are not questions for the court to answer."

With his latest refusal even to permit plaintiffs' lawyers to dismiss the case, it is clear Laster is making a stand in the Theragenics litigation. Maybe the fifth motion to end the case will be the one he approves.

(Reporting by Alison Frankel)

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