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DELAWARE CHANCERY COURT LABELS NO-TALK PROVISIONS "TROUBLING"

In a ruling from the bench on September 27, 1999, Chancellor Chandler denied a motion to enjoin meetings of the stockholders of both Cyprus Amax Minerals Company and ASARCO Inc., called to vote on a stock-for-stock merger of the companies. The injunction was sought in the context of an uninvited bid by Phelps Dodge Corporation to buy both corporations. Among other things, the plaintiffs argued that the directors of the merging corporations had breached their duty of care because the merger agreement contained a so-called "no-talk" provision. Plaintiffs also attacked the size of the break-up fee.

The Court denied the motion, based on its balancing of harms and its finding that no irreparable injury would result from the failure to grant an injunction. However, the Court said that, on the limited record before it, plaintiffs had shown a reasonable probability of success on the merits on their claim that the no-talk provision involved a violation of the directors' duty of care. The provision in issue flatly prohibited discussions with third parties prior to the stockholder vote, and did not contain any "fiduciary out" or other exception for parties making superior proposals. The Court questioned whether the provision prevented directors from making an informed decision as to further negotiations:

> No-talk provisions, thus, in my view, are troubling precisely because they prevent a board from meeting its duty to make an informed judgment with respect to even considering whether to negotiate with a third party.

The Court characterized such a provision as "the legal equivalent of willful blindness, a blindness that may constitute a breach of a board's duty of care . . . ." In addition, the Court said that the 6.3% break-up fee in the merger agreement "certainly seems to stretch the definition of range of reasonableness and probably stretches the definition beyond its breaking point."

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