

In re Data Domain Shareholder Litigation

COURT: Delaware Court of Chancery
CASE NUMBER: C.A. No. 4663-CC
JUDGE: Chancellor William B. Chandler III
CASE CONTACTS: Mark Lebovitch

On June 12, 2009, BLB&G filed a shareholder class action lawsuit in the Delaware Court of Chancery, on behalf of the Police & Fire Retirement System of the City of Detroit and similarly situated shareholders of Data Domain, against members of the board of directors of Data Domain, Inc. (“Data Domain”), and NetApp Inc., Kentucky Merger Sub One Corporation and Derby Merger Sub Two LLC (collectively “NetApp”).

The lawsuit alleges that the members of the Board of Directors of Data Domain (the “Board”) are breaching their fiduciary duties to their shareholders by refusing to negotiate with a potential acquirer, EMC Corporation (“EMC”), by agreeing to sell Data Domain to NetApp without taking any steps to maximize the price paid to Data Domain’s shareholders, and by agreeing to certain deal protection provisions in the merger agreement between NetApp and Data Domain. In this regard, on May 20, 2009, just days after EMC privately disclosed its desire to acquire Data Domain, Data Domain agreed to a merger agreement, which allows NetApp to acquire Data Domain for \$25 per share in a mix of cash and stock consideration and contained deal protection measures (including a termination fee, a matching right, and the no-solicitation provision). On June 1, 2009, EMC launched a competing proposal to acquire Data Domain in a \$30 per share all-cash deal. Shortly thereafter, NetApp increased its bid to \$30, comprised of the same amount of stock and an increased percentage of cash. The Board immediately approved NetApp’s new proposal, which included the same deal protection provisions as the original merger agreement.

On June 15, 2009, Plaintiff filed a motion for expedited proceedings and a motion for a preliminary injunction that seeks to prevent the consummation of any proposed business combination between Data Domain and NetApp and enjoin the operation of the deal protection provisions contained in the merger agreement. On June 26, 2009, the Court granted Plaintiff’s motion for expedited proceedings, and set a hearing on Plaintiff’s motion for a preliminary injunction for August 13, 2009. Prior to the hearing, on July 6, 2009, EMC raised its bid for Data Domain to \$33.50 per share, without any deal protections in place. NetApp was unable to match the bid, and the offer was accepted by Data Domain. On August 26, 2009, Plaintiff moved to dismiss the action without prejudice and for an award of attorneys fees and expenses. In early 2010, Defendants agreed to pay Plaintiff’s attorney fees and expenses.