

In re Emulex Shareholder Litigation

COURT: Delaware Court of Chancery
CASE NUMBER: C.A. No. 4536-VCS
JUDGE: Vice Chancellor Leo Strine
CASE CONTACTS: Mark Lebovitch

This was a shareholder class action against the technology company, Emulex Corporation ("Emulex" or "the Company"), and its board of directors (the "Board") (collectively, the "Emulex Defendants") for violations of their fiduciary duty of care arising from their adoption of a "Poison Pill" and a "Supermajority Bylaw" amendment, along with other entrenchment measures, in response to an all cash, all shares offer to purchase the Company by Broadcom Corporation ("Broadcom"). The Complaint alleged that by failing to redeem the Poison Pill and invalidate the Supermajority Bylaw, shareholders were deprived of the opportunity to accept Broadcom's Offer and to freely exercise their fundamental franchise rights to elect a new board.

On December 24, 2008, Broadcom's CEO Scott McGregor contacted Emulex's Chairman of the Board Paul Folino about a possible business combination of Emulex and Broadcom.

Shortly thereafter, the Emulex Board implemented seven separate measures designed to impede every avenue of possible shareholder action. Among other things, the Board adopted a poison pill preventing any potential acquirer from gaining a foothold in a proxy contest and a supermajority bylaw that improperly impedes pro-Merger bylaw amendments.

On April 21, 2009, Broadcom sent a letter to Emulex proposing to acquire all outstanding Emulex stock for \$9.25 per share in cash.

On May 4, 2009, Emulex issued a press release announcing that the Emulex Board "with the assistance of its financial and legal advisors" completed its evaluation and "unanimously determined that the Broadcom proposal significantly undervalues Emulex and is not in the best interest of Emulex shareholders."

On May 5, 2009, Broadcom commenced a tender offer to acquire Emulex common stock for \$9.25 per share in cash (the "May 5, 2009 Tender Offer"). Broadcom also filed a Form 14A initiating a consent solicitation campaign to, among other things, amend Emulex's Bylaws to permit shareholders to call special meetings, repeal the Poison Pill and Supermajority Bylaw, and replace Emulex's Board with board members willing to consider Broadcom's offer. Despite Broadcom's tender offer and consent solicitation, Emulex consistently refused to negotiate with Broadcom.

On June 29, 2009, Broadcom erased any doubt that the Poison Pill and Supermajority Bylaw precluded an acquisition of Emulex. In a letter to Emulex in which Broadcom raised the Offer price to \$11.00 per share, Broadcom told Emulex that if not accepted, the Offer would expire on July 14, 2009. Broadcom made clear in its June 29 letter that unless the Board accepted Broadcom's offer so that the companies could "move quickly to combine," Broadcom would move on "to consider other alternatives."

Broadcom eventually withdrew its offer but Plaintiff continued to press its claims to invalidate the improper defensive measures. Thereafter, the Emulex Board repealed both the Poison Pill and the Supermajority Bylaw and a settlement of the action was subsequently reached and approved by the Court.