

Common M&A Provision Precludes Private Equity Buyer From Escaping an Aiding and Abetting Claim

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In a previous [alert](#), we discussed the Delaware Court of Chancery's decision in *In re Mindbody, Inc. Stockholders Litigation*. In the decision, the court declined to dismiss breach of fiduciary duty claims against the chief executive officer (CEO) of MINDBODY, Inc. (the Company), arising out of the Company's 2019 sale to private equity firm Vista Equity Partners (Vista), including claims related to the Company's failure to disclose the CEO's conflicts of interest in the merger proxy and his efforts to tilt the sales process in Vista's favor.

In a [new, recent decision](#) arising out of the same transaction, Vista moved to dismiss plaintiffs' claim that Vista aided and abetted the breaches of fiduciary duty committed by the other defendants. The court denied Vista's motion, finding that plaintiffs stated an aiding and abetting claim against Vista. The court held that it was reasonably conceivable that Vista knowingly participated in the other defendants' disclosure violations for two reasons: (1) plaintiffs' allegations that Vista knew the proxy did not disclose information about Vista's material interactions with the CEO, and (2) plaintiffs' further allegations that Vista expressed concerns with the disclosure of certain preliminary revenue results of the Company, causing those results to be omitted from the proxy. Notably, the court supported its conclusion using a provision in the merger agreement that gave Vista the right to review the proxy and required Vista to inform the Company of any deficiencies.

In practice, contractual provisions giving the buyer rights to review and comment on the proxy or information statement in a merger transaction are common. The court's decision serves as a reminder to buyers and their counsel to ensure compliance with such provisions. Buyers and their counsel should carefully review and correct any misstatements or omissions in the proxy or information statement, including any deficiencies in the description of the merger negotiations and background. As the court's decision makes clear, failure to do so can subject buyers, including private equity firms, to potential liability for a seller's disclosure violations.

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