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Consolidated Comm's Merger Vote Must Wait On More Info

By **Vince Sullivan**

Law360, Wilmington (March 22, 2017, 7:55 PM EDT) -- Consolidated Communications Holdings Inc. will need to provide additional information about fees paid to a financing arranger before shareholders can vote on a $1.5 billion merger next week after a Delaware judge granted a preliminary injunction motion from a proposed class of investors Wednesday.

Chancellor Andre G. Bouchard said that Consolidated Communications must provide clear details about the financing fees being paid to an affiliate of Morgan Stanley for arranging 40 percent of the funding for a $935 million term loan that will help fund the company's acquisition of FairPoint Communications Inc. in the all-stock merger. Morgan Stanley also served as the company's financial adviser for the deal and provided a fairness opinion to Consolidated Communication.

The court determined, after considering oral arguments at a Tuesday hearing, that a shareholder vote on the issuance of 24 million shares of new company stock needed to consummate the merger should be postponed until the amended disclosures are made. Chancellor Bouchard said that if action is taken quickly, then shareholders will have the five days needed to review the new information without the need to delay the March 28 vote.

"The amount of fees Morgan Stanley and/or its affiliates stand to receive for providing financing in connection with the proposed merger is material and quantifiable, and there is simply no excuse for Consolidated's failure to disclose that information in a clear and transparent manner along with related information bearing on its financial adviser's potential conflicts of interest," Chancellor Bouchard wrote.

The injunction request came from Consolidated Communications shareholder Richard Vento, who filed a complaint March 3 alleging the disclosure violations from the company. Morgan Stanley received $13 million for its advisory services related to the FairPoint transaction and will also share in $14 million in fees being paid to a group of lenders and arrangers putting together the $935 million term loan. Morgan Stanley signed a commitment letter pledging to provide $375 million of that facility with the right to syndicate the lending to other parties.

Vento said Consolidated Communications did not inform shareholders of the conflicted relationship of Morgan Stanley as financial adviser and its affiliate, Morgan Stanley Senior Funding Inc., in a proxy statement outlining the deal. His attorneys argued that the shareholders could not make a fully informed decision on the financing package with the unclear disclosures.

Attorneys for Consolidated Communications' board members and executives had argued that shareholders could find the pertinent information in the company's February registration statement and in a December filing with the U.S. Securities and Exchange Commission. But Chancellor Bouchard said that the "buried facts" doctrine applied to the situation, finding that investors shouldn't have to dig through hundreds of pages of company filings to find material information.

"One would reasonably expect that all material facts concerning a financial adviser's potential conflicts of interest would be disclosed in plain English in one place," the chancellor wrote. "A stockholder should not have to go on a scavenger hunt to try to obtain a complete and accurate picture of a financial adviser's financial interests in a transaction."

The chancellor also said that even if a shareholder put all of the relevant information together, it still wouldn't be able to determine the amount of financing fees due to Morgan Stanley because the documents don't expressly state what portion of the $14 million in commitment fees it is entitled to.

Representatives for Vento said Wednesday they are pleased with the ruling.

Representatives for Consolidated Communications' board and executives did not immediately respond Wednesday to a request for comment.

Consolidated Communications and FairPoint unveiled the $1.5 billion all-stock merger in December, requiring Consolidated Communications to issue more than 24 million new shares. After the deal is consummated, FairPoint shareholders will own 28.7 percent of the company, while Consolidated shareholders will retain the rest.

Vento is represented by Peter Andrews, Craig Springer and David Sborz of Andrews & Springer LLC.

The Consolidated Communications executives and directors are represented by S. David Hurd and Colleen Hill of Morris Nichols Arsht & Tunnell LLP and Anthony S. Burt of Schiff Hardin LLP.

The case is Vento et al. v. Currey et al., case number 2017-0157, in Court of Chancery of the State of Delaware.

--Editing by Catherine Sum.
