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Sealing The Deal: Chiquita Sale A Rare Win For Deal Jumpers

By **Karlee Weinmann**

Law360, New York (November 21, 2014, 5:16 PM ET) -- Almost half a year after they hammered out a complex all-stock inversion deal for longtime client Chiquita Brands International Inc., Skadden Arps Slate Meagher & Flom LLP attorneys Peter Krupp and David Friedman were looking forward to a shareholder vote on the deal.

By mid-August, five months after the March deal announcement, the $500 million-plus union between the banana giant and rival Fyffes PLC had a few key regulatory approvals left to win. An investor vote on the deal was about a month away, and the parties expected a clean victory.

But all that changed when a pair of Brazilian suitors represented by Cravath Swaine & Moore LLP surfaced with a heftier offer that turned the deal on its head and put the Chiquita team unexpectedly on the defensive, forcing it to tweak its deal-making strategy as the interlopers waged a fierce campaign for control.

The joint counterbid from the Cutrale Group, a juice company, and the Safra Group, a banking conglomerate, bested the original Fyffes deal value by nearly $100 million, but it didn't appeal to Chiquita's board or a crop of investors that believed the Fyffes union — structured to lighten the company's tax load and create a global fruit powerhouse — would pay off huge in the long term.

“We were about seven or eight months into the deal when the Cutrales expressed interest in making their offer,” Krupp said. “At that point, the lawyering changed from trying to get a deal done on a stock-for-stock basis to being right in the middle of a proxy fight.”

Both sides stuck by their deals as the better options, and neither had time to relax with just five weeks from the Cutrale-Safra approach until investors were set to decide Chiquita's fate. With Chiquita unwilling to open deal talks, the parties got to work on competing strategies to win over investors, igniting a takeover fight that swelled into one of the most public, and surprising, battles of the year.

"One way to think about this transaction is that it wasn't actually a fight over bananas, it was a fight over time — who had it, who needed it and who controlled it," said Cravath partner Richard Hall. "The whole thing started with Cutrale-Safra needing it and having no control over it, but by the end Cutrale-Safra were the only ones who had it and didn't need it."

The Cutrale-Safra group ultimately lured Chiquita shareholders away from the Fyffes deal in favor of their own, but not before blowback from the reluctant target and some investors forced a substantial price increase. Still, the buyers in the end notched a rare victory over a board-approved, big-ticket bid and illuminated a novel way for deal jumpers to bolster their chances.

For the Cravath team helming the Cutrale-Safra campaign, a pivotal moment came when the bidders' focus shifted from penetrating a reluctant board to winning the upcoming vote, the first in a series of complex maneuvers that gave the interlopers unusual flex in the tussle for control.

Frustrated by Chiquita directors committed to the Fyffes merger plan, the Cutrale-Safra suitors urged the board to push back the planned shareholder vote and give the interlopers access to Chiquita's books. The board balked, sparking a proxy campaign for shareholders to adjourn the meeting and effectively vote down the existing deal. At the same time, the Brazilian duo got more time to fine-tune their bid.

"My view is that if the adjournment strategy had not been available, this deal would not have happened," Hall said.

Endorsements from three prominent proxy advisory firms, including Institutional Shareholder Services Inc., put steam behind the interlopers' effort. In response to shareholder support for the adjournment, plus associated votes against the Fyffes tie-up, Chiquita delayed its meeting by more than two weeks, then delayed it again, and granted the Cutrale-Safra group due diligence.

“Chiquita's ability to manage time was clearly constrained by their concern that we had all these no votes so that if somehow the adjournment motion wasn't brought at a shareholder meeting, their Fyffes deal would be voted down,” said Andrew Thompson, another Cravath partner who represented the Brazilian bidders.

By that time, the Skadden team had already begun discussions with Fyffes over how to shore up the existing deal. It's difficult to sell shareholders on the long-term value locked in an all-stock merger when there's a beefier cash bid on the table, so a sweeter bid from Fyffes seemed like a natural next step — though logistical roadblocks made it tough.

Under Irish law, Fyffes needed to go through a relatively lengthy process of getting permission to improve the terms for Chiquita stockholders — a somewhat unconventional move at that stage of the game.

“It was complicated and a little unusual, but we got it done,” Krupp said. However, the regulatory hoops under Irish takeover rules would make it virtually impossible for Fyffes to increase its offer again before the looming shareholder vote.

Meanwhile, the Cutrale-Safra group ramped up its public relations assault on the revised Fyffes deal. From their first approach, the bidders leveled criticism on virtually every front, rocketing their fight to the forefront of a buzzing M&A marketplace — just where they wanted it, particularly amid the proxy play.

"In large part because we started so close to the meeting, we felt that we did need to make a big impact with the press very quickly," Hall said. "The average interloper is negotiating primarily with the board, whereas in most of this process we were negotiating primarily with the shareholders. We needed things from the shareholders beyond simply calling on the board — we needed the votes."

After a couple of delays, the shareholder meeting was finally set for Oct. 27. Facing mounting pressure in the weeks after Fyffes sweetened its deal, the Cutrale-Safra group less than two weeks before the vote raised its offer to $14 per share, a significant upgrade over its initial $13-per-share proposal.

Still, the increased offer still wasn't enough to woo Chiquita or to nail down a coveted nod from ISS, which reversed course and backed Fyffes' revised bid. ISS is widely seen as the most influential proxy adviser in the marketplace and an especially prominent player in fights where the investor base, like Chiquita's, is dominated by institutional investors.

In the final run-up to the vote, the parties braced for their final showdown, each sticking to its bid. But recognizing the possibility that its client's preferred plans could falter, Skadden attorneys opened the door to talks over a Cutrale-Safra purchase — just in case.

“It was pretty exciting legal work and challenging to negotiate terms of an offer that your board had rejected,” Krupp said. “Going into the shareholder meeting, we tried to do the best we could for shareholders to have a win-win situation.”

And it paid off.

The Cutrale-Safra bidders had been weighing their options ahead of the vote. The day before, they leveled a last-minute bid worth $14.50 per share, enough for ISS to backpedal on the Fyffes deal. The substantially bigger offer was also good enough for Chiquita's shareholders, sidelining Fyffes.

The end result was, as Krupp suggested, a win-win-win — for the Cutrale-Safra group in its short-but-intense fight, for a Chiquita investor base hungry for returns and for other deal makers who got a glimpse of a fresh strategy that could play in to deal jumpers' moves.

"Almost certainly, the Chiquita transaction and the Cutrale-Safra tactics will lead to a change in how merger agreements are negotiated," Hall said. "M&A practitioners understand the issues of adjournment and postponement much more effectively than we did a year ago. Nobody before really thought interlopers had this much leverage."

--Editing by Kat Laskowski.
