

Google Breakup Fee Near Record

20% Vs. Usual Sub-10%

Motorola would get far higher percentage than AT&T's T-Mobile terms

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AT&T faces a potential big breakup fee payment to T-Mobile, but by one measure an even heftier such fee could be faced by another company — Google.

The Web search leader's terms to acquire smartphone maker **Motorola Mobility**^{MMI} for \$12.5 billion includes a \$2.5 billion breakup fee if the deal is blocked by regulators or for most any reason doesn't get done. That's 20% of the price.

AT&T's^T terms call for a \$3 billion fee, which is less than 8% of the \$39 billion acquisition price. (See story, this page.)

Google's^{GOOG} breakup fee nearly breaks the record on a percentage basis, says Richard Smith, chairman of the mergers and acquisition practice for global law firm Orrick, Herrington & Sutcliffe, with offices in San Francisco and Menlo Park, Calif.

"It's huge and unusual," Smith said. "It may be that it's a sign of things to come as opposed to being out of line."

Sign Of The Times?

He says the market seems to be accepting higher breakup fees as a way for buyers to get out of a deals.

Breakup fees are standard with mergers and acquisitions to protect the target company in case the deal falls off the table, says Joe Abberger, president of Pritchett, a Dallas-based mergers and acquisitions advisory firm.

"When a seller is left at the altar it can damage their business, employees start jumping ship and customer defections are more likely," Abberger said. "Nobody does a deal for the breakup fee; they have a breakup fee to do the deal."

Most breakup fees are in single-digit percentages.

In 2000, **AOL**^{AOL} agreed to pay just \$5.4 billion to Time Warner^{TWK} if its planned \$168 billion acquisition of that company didn't happen. Drugmaker **Pfizer**^{PFE} agreed to pay Wyeth a \$4.5 billion breakup fee on that \$68 billion acquisition in 2009. Drugmaker **Merck & Co.**^{MRK} agreed to pay a \$2.5 billion breakup fee with its \$41.1 billion acquisition of Schering-Plough, also in 2009.

Applied Materials^{MAT} has agreed to pay a breakup fee of \$200 million in the event regulators prevent it from acquiring **Varian Semiconductor Equipment Associates**^{VSEA} for \$4.9 billion.

Several analysts and legal observers could point to only one larger breakup fee as a percentage of the acquisition price — the \$600 million **Monsanto**^{MON} agreed to pay Delta and Pine Land Co. in 2007, if its \$1.5 billion acquisition didn't get done.

Google declined to say just why it agreed to a 20% breakup fee.

"It's a strong statement of our confidence that the deal will close in the time frame allowed," a Google spokesperson said. Motorola declined to comment.

Analysts say Motorola could have pushed for a high breakup fee in light of the government scrutiny of Google's prior acquisitions of online ad firm DoubleClick and travel software maker ITA Software, says Dale Grimes, partner and chairman of the antitrust and trade prac-

tice for Tennessee-based law firm Bass, Berry & Sims.

"Traditionally, breakup fees are in 3% to 5% range, so (this high fee) indicates Motorola is concerned about the regulatory approval process and they want to make sure that Google has a very high incentive to fight through that and secure the approval," Grimes said. "Motorola looks like it has a lot of leverage."

The fee could have been pushed for by Motorola or a sign of good faith by Google, says Richard Brosnick, partner and specialist in antitrust law for Detroit-based law firm Butzel Long.

Patents Gave Leverage

"It could be either — Google could be saying, 'We are willing to fight for this or we are willing to give you this assurance because we don't think there is going to be any fight,' but Google faces a real downside if they decide to abandon the transaction," Brosnick said.

Google is banking on using the 17,000 wireless patents owned by Motorola Mobility to help shield the company from any potential patent litigation from rivals. The company is pushing its search and ad services into mobile devices, which are fast replacing PCs as the preferred method for accessing the Internet.

Motorola was aware of Google's need for its patents and likely insisted on a high breakup fee, says Orrick's Smith.

"Did Google do this out of desperation, is a very plausible kind of point," he said. "I can't imagine that Google said to Motorola Mobility, 'We are going to propose a \$2.5 billion breakup fee.' The discussion could not have started there. That would amaze me."