IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DCV HOLDINGS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CA No. 98C-06-301-JEB**
	)	
CONAGRA, INC., E.I. DU PONT DE NEMOURS AND COMPANY, and DU PONT CHEMICAL AND ENERGY OPERATIONS, INC.,	)	
	)	
Defendants.	)	

Submitted: August 5, 2004
Decided: March 24, 2005

Decision Following Bench Trial.
Judgment For Defendants.

Appearances:

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Attorneys for Defendants E.I. du Pont De Nemours and Company, and du Pont Chemical & Energy Operations, Inc.

JOHN E. BABIARZ, JR., JUDGE.

BACKGROUND

Defendants Du Pont and ConAgra set up a series of limited partnerships under a corporate general partner, DCV, Inc., which was jointly owned by Defendants. DCV, Inc. oversaw 13 Du Pont/ConAgra joint ventures, which were structured as independent operating companies (IOC's), each with its own management and accounting structure. The companies were involved in the animal nutrition and food ingredients businesses, and appeared to have growth potential in bio-nutrition and certain environmental markets. DCV, Inc. employed more than 500 people in nine different states, as well as Mexico, Canada and Malaysia.

Each IOC reported on a monthly basis to DCV, Inc's officers, who compiled the results into an omnibus monthly report. In turn, the officers reported the results to the DCV, Inc. board of directors. The board's role was to assess and approve the IOC's annual business plans and monitor their progress.

By October 1996, most of the businesses were under performing, and Defendants decided to sell the businesses and dissolve DCV, Inc. Instead, four of the DCV, Inc. managers sought to purchase the company, in conjunction with Winward Capital Partners, L.P., a private equity and subordinated debt organization.

After lengthy negotiations, the deal was closed in August 1997. The venture was incorporated under the name DCV Holdings, Inc., which is Plaintiff in this case.

Things did not go well for the new company, as business continued to decline for most of the IOC's. Worse yet, top executives in DuCoa, one of the most profitable IOC's, were involved in an international antitrust conspiracy regarding price fixing of choline chloride, DuCoa's primary product. Following a federal investigation, three DuCoa executives entered guilty pleas to various charges. As a result, prices for choline chloride took a nose dive, as did DuCoa's profit margin. Plaintiff sold most of its businesses to pay off debts, including the acquisition debt. More than 100 civil suits have resulted from the choline chloride antitrust conspiracy, but the record does not reflect that Plaintiff has any accrued liability as a result of these suits. None of these actions names DCV Holdings as a defendant, but many of them name DuCoa, Du Pont and/or ConAgra.

In March 1998, Plaintiff DCV Holdings filed this action in Superior Court against Du Pont and Conagra on a variety of legal theories, seeking recission of the Purchase Agreement as well as punitive damages of $100,000 million, or, in the alternative, indemnification for its losses. Defendant Du Pont filed a third party complaint against five individuals, seeking indemnification or contribution.

In April 2002, this Court granted and denied a number of partial summary judgment motions filed by both parties.[1] After unsuccessfully seeking an

[1] *DCV Holdings, Inc. v. ConAgra, Inc.,* 2002 WL 508343 (Del. Super.).

interlocutory appeal on its principal claims, which had been dismissed, DCV Holdings moved for a voluntary dismissal all claims save two. That motion was granted, and Plaintiff appealed this Court's decision granting summary judgment to Defendants on Plaintiff's fraud and breach of contract claims. The Delaware Supreme Court reversed this Court's decision, and returned the case to Superior Court for trial, based on a finding that the record disclosed issues of material fact.[2]

Following remand, two issues were to be addressed at trial. The first issue, on which Plaintiff's fraud claim is based, pertained to a letter promising a rebate which DuCoa improperly obtained from Du Pont for its purchases of trimethylamine ("TMA"), a raw material used in chlorine chloride. Defendants acknowledged that Du Pont falsely confirmed a non-existent rebate in the letter to DuCoa and also acknowledged that DuCoa's management included the false rebate in order to inflate revenue and to obtain more than $404,000 in unearned bonuses. The TMA issue at trial was whether there was adequate disclosure of the false nature of the rebate during the negotiations leading to the sale of the sale.

The breach of contract issue pertained to the intent of the parties in negotiating and drafting the warranties and disclosures in the Purchase Agreement. The Delaware Supreme Court affirmed this Court's ruling that Section 3.9, "No

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[2]*DCV Holdings, Inc. v. ConAgra, Inc.*, 2003 WL 2008199 (Del. Supr.).

Undisclosed Liabilities," of the Purchase Agreement is ambiguous but found that the extrinsic evidence showed material disputes as to whether Defendants intended to accept liability for DCV's violations of law about which they had no knowledge. That issue is determinative as to whether Du Pont and ConAgra are liable under Section 3.9 to indemnify DCV Holdings for charges stemming from the antitrust conspiracy.

THE TMA REBATE

The Court's recital of the facts surrounding the TMA rebate is based on the evidence adduced at trial. In December 1996, DuCoa executive Pete Fischer called John Leddy, the Du Pont TMA business manager, and asked for a letter promising a TMA rebate to help smooth out a temporary accounting problem for calendar year 1996. Fischer indicated to Leddy that he would destroy the letter within a week. According to Leddy's trial testimony, he had previously provided DuCoa with at least one such letter under similar circumstances, and he trusted Fischer not to book the rebate on this occasion. On December 17, 1996, Leddy wrote a letter to Fischer which provided in part as follows:

> Per our discussions, we have concluded our analysis of DuCoa's 1996 Trimethylene purchase performance versus pre-agreed commitment standards, and we are pleased to advise that DuCoa has qualified for the $0.35/lb volume rebate incentive which will be applicable to the entire 1996 TMA purchase volume.

On his file copy of the letter, Leddy wrote "cancelled 12-18-96." When asked at trial whether he had discussed this letter with anyone during the negotiations leading to the sale, Leddy testified that he never mentioned the letter or the Fischer request to Paul Halter, Du Pont's point person in the DCV transaction, or anyone from ConAgra. The Court accepts this testimony as credible. Leddy's role in this fiasco started and ended with the letter.

Pete Fischer, the recipient of the letter, wrote on his copy, "12-17-96[;] Dale--please book in December. Thanks. PF." He or someone else also pencilled in the amount of the rebate as "$506,198." Based on the rebate letter and Fischer's directive, DuCoa entered this amount on its books for 1996, booking $404,000 for executive bonuses and the remainder as earnings.

In the meantime, Defendants had decided to restructure DCV, Inc. and divest many of the newer businesses. Earnest Porta, president of DCV, Inc., strongly believed that the businesses were viable, and he opposed the divestiture. When he realized that it was inevitable, he put together a group of top DCV executives to purchase all of DCV and keep the businesses intact. These individuals were Earnie Porta; Rick Stejskal, chief financial officer of DCV, Inc.; Mark Gundersen, general counsel, DCV, Inc. and Dan Rose, then-president of Canadian Harvest, one of the more profitable IOC's. After interviewing several financial firms, Winward Capital

Partners, Inc. was chosen as the group's equity partner. Tom Sikorski was Winward's primary negotiator. This group constitutes the Buyers for purposes of this Opinion. In January 1997, the Buyers submitted several bids, and on January 31 the parties signed a Confidentiality Agreement and a Letter of Intent stating that the Buyers would purchase the companies for $60 million, plus assumption of liabilities. After the bid was accepted, the parties proceeded to the due diligence effort, during which Winward was given access to DCV, Inc.'s management, employees, books and records. In April 1997, the buyers sought to reduce the sale price because the companies were under-performing and because the buyers' accounting firm had raised questions about DCV, Inc.'s financial records. Negotiations led to a $2 million price reduction, from $60 million to $58 million.

In July 1997, Rick Stejskal, DCV, Inc.'s chief financial officer, as well as one of the potential buyers, learned for the first time that DuCoa was in the process of writing off a TMA rebate from Du Pont. By this time, negotiations for the sale were nearing completion, and the unexplained write-off was not good news. After discussing the issue with Earnie Porta, DCV, Inc.'s president, Stejskal questioned DuCoa's president, Lindell Hilling, and controller, Rich Christensen, to learn more about the rebate. Stejskal was told that Fischer had gotten the rebate letter from Leddy even though there had never been a final agreement as to the total amount of

the rebate. Stejskal was also told that DuCoa started incrementally writing off the rebate in March 1997. Stejskal wrote a memo which provided as follows:

> TMA Rebate being written off at $33M/month. As of 12/31/96, the following was on the books:
>
> $506 Related to 1996 Rebates
>
> * * *
>
> It was confirmed by two business managers, the accountant who handles the books, and the Verona Plant Manager, that these amounts were openly discussed as potentially uncollectible at DuCoa at yearend. . . .
>
> If the rebates would not have been booked in 1996, then incentives would have been reduced.

On July 16, 1997, Stejskal faxed this memo to Henkel and James (both of ConAgra) and Halter (of Du Pont). On Henkel's cover sheet Stejskal handwrote, "Per our conversation, this is what Earnie [Porta] went over with Paul [Halter.]"

In the meantime, Porta contacted Ron Mask, one of Leddy's colleagues at Du Pont. He also talked to Leddy. Both men told Porta that Leddy had sent Fischer a TMA rebate letter without intending to pay it and so noted on his file copy. At his deposition, Porta stated that he may have discussed the validity of the rebate with Sikorski sometime in July, but at trial he did not specifically recall any such discussion. Sikorski conceded at trial that he and Porta may have talked about various accounting issues, including the TMA rebate but not about its validity.

When Halter learned about the write-off, he directed Stejskal to ascertain whether there were any other issues that might impact Winward's willingness to proceed with the deal. Stejskal identified six such issues, and Halter scheduled two meetings on July 21, 1997, to discuss them.

Halter met first with Du Pont and ConAgra executives as well as the DCV, Inc. management team. Discussion focused on disclosure to Winward of the accounting issues, and a memo which had been prepared for that purpose. The second meeting included the same people plus DuCoa management. Hilling and Christensen assured Halter that there were no accounting issues other than those enumerated in the disclosure memo. Following the meetings, Halter directed Stejskal to revise the disclosure memo to reflect the substance of both discussions. He also directed DuCoa management to arrange a teleconference with Pete Fischer.

At trial, Porta testified that he had told Halter everything he knew about the rebate. Halter contradicted this testimony, stating that neither Porta nor anyone else had ever told him that Leddy never intended to honor the rebate. Halter and Steksjal both testified that at the July 21 meeting both Hilling and Christensen said that DuCoa was justified in billing the rebate. In his deposition, Gundersen stated that the rebate letter appeared to him to have created a binding legal obligation.

On July 22, Halter and James had a conference call with Hilling, Christensen

and Fischer. According to Halter, Fischer stated that based on Leddy's letter he believed that a rebate had been promised by Du Pont and was deserved by DuCoa. At Halter's request, Fischer put his thoughts into writing and forwarded his explanation as well as a copy of Leddy's letter to Halter on July 23. Fischer's memo provided as follows:

> At the end of the [1996] year, the support amount was not agreed to by Du Pont and DuCoa. I asked Ray Hunting for a letter with the idea that we would complete negotiations for 1996 rebates during the first quarter of 1997. He referred me to John Leddy who provided the letter. Admittedly, I knew this letter required further negotiations between the parties. At this point, I had no idea that DuCoa would be for sale and I had full confidence that an additional rebate could be worked out until I met Ray in San Antonio during March of 1997.
>
> I believed that the promised support was due DuCoa and discussed with Lindell [Hilling] the possibility of bringing the DuCoa board into negotiations.
>
> ConAgra and DuCoa have been purchasing TMA from Du Pont since 1984. During this period of time, until 1996, Du Pont had given price support for TMA in the form of low prices, year-end rebates or credits. I had no reason to believe that this support would not continue in some form. In retrospect, it was a mistake for me to assume that the support would continue.
>
> On the other hand, I still feel that the support is owed to DuCoa based on previous discussions with Du Pont, past history, and market conditions.

At trial, Halter stated that after reading Fischer's memo he understood that there was no agreement at the end of December 1996 as to the amount of the TMA

rebate. He also stated that he was aware that booking income from a rebate as to which there is no contract or obligation to pay is contrary to Generally Accepted Accounting practices (GAAP). When Halter was asked if he made further efforts to get to the bottom of the issues after July 23, he testified as follows:

> At that time, no, because at that time I felt that all I had to do was to remit the money, have Sikorski know that I had remitted the money, and that issue would go away as a disclosure area, and I would sort out later with Joe Glas and people in specialty chemical as to whose books this would really go on.

Disclosure to Winward was of the essence, and Halter sent a fax to Sikorski on July 23, the same day he received Fischer's memo. The pertinent portions provided as follows:

> The December 31, 1996 audited financial statements of DuCoa had a TMA rebate receivable from Du Pont in the amount of $506,198 (based on a December 17, 1996 letter from Du Pont.) This receivable was established at the rate of $0.035 per pound on total TMA purchases of 14,462,800 pounds by DuCoa in 1996. TMA is a major raw material for producing choline chloride. Historically, rebates and/or credits were provided to DuCoa based on Du Pont's approval. In March 1997, after further negotiations with Du Pont on TMA price, it was determined that Du Pont would not be remitting the rebate to DuCoa (we are trying to get to the bottom of this, but Paul Halter commits that Du Pont will honor the rebate letter).
>
> ***
>
> DuCoa has amortized $148,000 of these rebates and miscellaneous adjustments through June 30, 1997 with the balance of $416,00 to be amortized. If these rebates had not been booked in 1996, incentive

> compensation would have been reduced by $404,000 and earnings reduced by $160,000 in DuCoa. See attached schedule.

Thus, Halter clearly informed Winward that the rebate had been booked but not paid in 1996 and had been used by DuCoa to boost bonuses and earnings. On July 24, Stejskal sent a similar fax to Winward. At trial, Stejskal testified that he could not read the minds of DuCoa management regarding the nature of the rebate, but that he had related the facts as he understood them to Winward.

As Winward's chief negotiator, Sikorski testified at trial about his understanding of Halter's July 23 fax. Sikorski knew that the TMA rebate had been booked by DuCoa as a 1996 receivable because of Leddy's December 1996 letter to Fischer. He also knew that even though the rebate was not paid in 1996, DuCoa management had received an additional $404,000 in incentive compensation because of the rebate letter. He realized that DuCoa may have acted intentionally in order to increase bonus compensation. Finally, Sikorski knew that as of March 1997 DuCoa was aware that it would not receive the rebate from Du Pont.

After Sikorski received Halter's fax, a conference call was held among Halter, Sikorski and an executive from MetLife, Winward's primary investor. During that conversation, Sikorski told Halter that Winward wanted to reaudit the books of both DuCoa and DCV, Inc., and that the accounting issues could impact the value of the

sale. Shortly after the phone call took place, Winward decided to forego a reaudit in favor of a $4 million reduction in the cash purchase price, from $58 to $54 million. This strategy was successful. It is clear from Sikorski's testimony that Winward executives, as sophisticated investment professionals, made a tactical decision to use the TMA rebate issue as leverage to obtain a lower purchase price.

At trial, Halter testified that on July 23 he paid the rebate from discretionary funds allotted for the DCV transaction because both he and James were concerned about impact of the unresolved accounting issues. Winward was well aware of DuCoa's accounting problems. For this reason, Sikorski and Porta planned to replace Hilling with Dan Rose, then-president of DCV's Canadian Harvest division, as president of DuCoa if the deal went through. Sikorski testified that the reason for the change was the newly discovered accounting irregularities in the systems and controls of the company.

The same information was incorporated into the Disclosure Schedule to the Purchase Agreement, which was signed by the parties on August 12, 1997. The wording is the same as that used in Halter's July 23 fax to Winward except for the omission of the phrase "we are trying to get to the bottom of this, but Paul Halter commits that Du Pont will honor the rebate letter." The information is included *verbatim* as an exception to Sellers' representation in § 3.8 of the contract that DCV,

Inc.'s 1996 financial statements were prepared in accordance with GAAP and fairly represented the financial position of DCV, Inc. and its IOC's. Thus, the Buyers were again informed again that:

> The following list, previously disclosed to the Buyers, represent[s] certain items that are either not in accordance with GAAP or affect the identified subjects in the previously provided Financial Statements:
>
> *TMA Rebate*
>
> The December 31, 1996 audited financial statements of DuCoa had a TMA rebate receivable from Du Pont in the amount of $506,198 (based on a December 17, 1996 letter from Du Pont). This receivable was established at the rate of $0.035 per point on total TMA purchases of 14,462,800 pounds on total TMA purchases of 14,462,800 pounds by DuCoa in 1996. TMA is a major raw material for producing choline chloride. Historically, rebates and/or credits were provided to DuCoa based on Du Pont's approval. In March 1997, after further negotiations with Du Pont on TMA price, it was determined that Du Pont would not be remitting the rebate to DuCoa.
>
> * * *
>
> DuCoa has amortized $148,000 of these rebates and miscellaneous adjustments through June 30, 1997 with the balance of $416,000 of these rebates to be amortized. If these rebates had not been booked in 1996, incentive compensation would have been reduced by $404,000 and earnings by $160,000 by DuCoa. See attached schedule.

Despite the information contained in Halter's July 23 fax to Sikorski and reiterated in the Disclosure Schedule to the Purchase Agreement, Plaintiff argues that Defendants omitted two material facts in conveying information about the TMA

rebate to the buyers. Plaintiff asserts first that Halter did not explicitly state that the rebate was "bogus." Plaintiff also asserts that Halter failed to tell Winward that the exact rebate amount had not been determined by 1996 year-end.

Defendants acknowledge that there was no authentic TMA rebate for 1996. They also concede that DuCoa management booked a 1996 rebate and used the rebate letter to obtain unearned bonuses for 1996. However, Defendants argue that the evidence shows that Halter, Stejskal and Gundersen believed the rebate letter to be genuine and that the only material facts were that Leddy, the Du Pont TMA business manager, had written a letter promising a TMA rebate in December 1996 and that Du Pont, after further negotiations, had refused to remit the rebate in March 1997. The question before the Court is whether Defendants' disclosures to the Buyers regarding the rebate were so inadequate as to constitute fraud.

In order to prevail on a claim of common law fraud claim, a plaintiff must prove the following elements:

> 1. A false representation, usually one of fact, made by the defendant; or omission of a fact of which defendant had to duty to disclose;
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> 2. The defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth;
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> 3. An intent to induce the plaintiff to act or to refrain from

acting;

4. The plaintiff's action or inaction taken in justifiable reliance upon the representation; and

5. Damage to the plaintiff as a result of such reliance.[3]

Plaintiff argues that Halter and James failed to state that the rebate was "bogus," despite a duty to do so. However, Plaintiff has not produced or identified any evidence to show that Halter and James were told that the rebate extended by the Du Pont TMA business manager Leddy was not genuine. The Buyers knew exactly what Halter and James knew -- that the booking of the unpaid rebate in 1996 constituted a GAAP violation. The buyers' knowledge affected the deal to the tune of $4 million off the purchase price. Both Halter's July 23 fax and the language of the Disclosure Statement clearly acknowledged that DuCoa used the rebate letter to obtain unearned executive bonuses and to inflate 1996 earnings. Even without using a such a colorful term as "bogus," the information conveyed the material realities to the buyers. When faced with these facts, Winward made an informed decision not to conduct a second audit of the books but instead to seek a cash price reduction, and a significant one at that. All of the individuals involved, Buyers and Sellers alike, were experienced professionals who understood the ramifications of the mishandling

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[3] *Stephenson v. Capano Development, Inc.,* 462 A.2d 1069, 1074 (Del. 1983).

of the TMA rebate.

Plaintiff has also failed to show that Defendants' duty of disclosure included any element of so-called self-flagellation. In the context of a board of director's fiduciary duty to disclose material information when it seeks shareholder action, "a board is not required to engage in 'self-flagellation' and draw legal conclusions implicating itself in a breach of fiduciary duty from surrounding facts and circumstances prior to a formal adjudication of the matter."[4] That is, even where material facts must be disclosed, negative inferences or characterizations of misconduct need not be articulated.[5] This rule limits only the duty to admit to misconduct; it does not limit a party's duty to disclose all material facts relating to the party's actions, including those that might relate to misconduct.[6] The Court finds that in this case, the Defendants did exactly that. They related the full range of facts which were material to an understanding of how DuCoa handled the TMA rebate.

Both Halter and Stejskal, a member of the DCV, Inc. management team provided the same information to Winward. This information was also included in the Disclosure Statement to the Purchase Agreement. Stejskal, asked by Halter to

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[4]*Stroud v. Grace*, 606 A.2d 75, 84 n. 1 (Del. 1992).

[5]*Louden v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 143 (Del. 1996).

[6]*Warner Communications, Inc. v. Murdoch*, 581 F.Supp. 1482, 1490 (D.Del. 1984).

investigate the TMA rebate issue, obtained his information from Hilling, Christensen and Fischer. That information was that no final agreement had been reached on the amount of the 1996 TMA rebate although Leddy had furnished a rebate letter; that further negotiation between Du Pont and DuCoa was necessary to establish the rebate amount; and that Hilling, Christensen and Fischer all believed that the rebate was in fact owed to DuCoa.

The memo which Halter provided to Winward on July 23 was penned by Stejskal and Gundersen, both members of the DCV, Inc. management team. Stejskal's own fax to Winward on July 24 was substantially the same. Although neither memo used the phrase "potentially uncollectible," which Stejskal had used in a July 16 memo, the facts themselves made this abundantly clear.

Neither Halter nor Stejskal stated that there was no agreement as to the amount of the 1996 rebate. However, Halter and Stejskal both told Winward executives that DuCoa had booked the rebate in 1996 even though it had not been paid. Again, the Court finds that the disclosure was sufficient and did not leave out any material facts.

Furthermore, Gundersen (DCV, Inc.'s general counsel and a member of the DCV management team) told Halter at a July 21 meeting that the letter appeared to him to be "legitimate" and "legally binding." When Halter was informed about the rebate issue, he did not seek to hide the information but rather directed Stejskal to

determine whether there were any other accounting issues that needed to be disclosed to Winward. Halter also told the DCV, Inc. management team that they were free to discuss the issues with Winward after Halter spoke with them himself. Porta and Stejskal both communicated with Winward on these matters. When Winward asked to conduct another audit, Halter agreed, manifesting a willingness to let the truth be known. It was Winward that decided to use the information not to reexamine the books but to obtain a price reduction. The Purchase Agreement included sworn certifications from Porta, Stejskal, Gundersen, Hilling and Christensen as to the veracity of the books. Halter and James rightfully relied on these certifications. The record shows that if any of the key players knew that the rebate was invalid, it was Porta. By his own testimony, Porta learned from both Ron Mask and John Leddy that Du Pont's TMA business group never intended to pay the rebate referred to in Leddy's letter.

Viewing these facts in their entirety, the Court finds that any reading of Halter's July 23 fax, together with the Disclosure Schedule to the Purchase Agreement, shows that DuCoa's handling of the rebate was either contrary to GAAP and/or caused DuCoa's books to not accurately present the financial condition of the company.

Plaintiff has also failed to show that it would not have closed the deal if it had

understood that DuCoa senior management mishandled the rebate. First, Sikorski readily acknowledged at trial that he knew that DuCoa executives took unearned bonus money based on an unpaid rebate. Sikorski was no novice in the world of finance. He understood the ramifications of DuCoa's actions. According to Halter's notes from the July 23 teleconference, Winward repeatedly stated its impressions that DuCoa was doing its own thing financially, and that what it was doing was not in accordance with GAAP. Winward realized that a reaudit might be in order but chose instead to offer less money for the companies. Both Porta and Sikorski agreed that following the transaction, Hilling would be replaced with Rose, another indication that the Buyers were aware that change was needed.[7] These plans show that Plaintiffs did not rely on omitted facts as to the amount of the rebate. In fact, they were acting, or planning to act, on the information that they had been given by the sellers about the mishandling of the TMA rebate. The Court finds that Defendants disclosed the material facts, and that Plaintiff has failed to prove its common law fraud claim.

INDEMNIFICATION FOR ANTITRUST ACTIVITY

The second issue at trial pertained to the intent of the parties in negotiating § 3.9 contained in Article III of the Purchase Agreement. Section 3.9 is an all-inclusive

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[7]Another off-key note in Plaintiff's case is that DCV, Inc. continued to employ both Hilling and Fischer in various capacities after they completed their federal prison terms for price-fixing.

warranty protecting the Buyers from undisclosed liabilities or obligations. Plaintiff argues that § 3.9 encompasses the accrued antitrust liability that existed at the time of closing and that the parties' intention in drafting § 3.9 was to provide buyers with indemnification for all potential liabilities, known or unknown at the time of the sale. Defendants argue that § 3.13 controls the issue of antitrust liability because § 3.13 specifically addresses unlawful conduct and because allowing the general provisions of § 3.9 to govern would render the knowledge provision of § 3.13 mere surplusage.

The Supreme Court found that § 3.9 is ambiguous in the context of the entire Purchase Agreement and that resolution of the intent of the parties must be made by examining extrinsic evidence from the negotiation process. At trial, all the witnesses agreed that the negotiations regarding the contractual representations and warranties were intense and difficult. A particularly thorny issue was the breadth of § 3.9, which provides general protection to the buyers from liabilities undisclosed by the sellers. In its final form, § 3.9 states as follows:

> No Undisclosed Liabilities. None of the Companies has any liabilities or obligations of any nature (whether absolute, accrued, contingent, unasserted, determined, determinable or otherwise) [other than three inapplicable exceptions].

This Court previously found that § 3.9 is inherently ambiguous, as shown by Plaintiff's interpretation of the word "liabilities" as embracing future or potential

liabilities, and Defendant's contrary assertion that the word means actual or existing liabilities. The language conceivably supports either interpretation, and it therefore becomes necessary to examine the extrinsic determine the parties' intentions in drafting this section.[8] Evidence of what was deleted from the original draft sheds light on the intended meaning of "liabilities."

The buyer's original version of § 3.9 included a clause that made Sellers liable for any condition that could result in future detriment to the buyers:

> No Undisclosed Liabilities. Except as set forth in Section 3.9 of the Disclosure Schedule, none of the Companies has any liabilities or obligations of any nature (whether absolute, accrued, contingent, unasserted, determined, determinable or otherwise) and **there is no existing condition or situation which could be reasonably expected to result in any such liabilities or obligations**, except. . . (emphasis added) .

This assignment of future liability was not acceptable to the sellers. Roger Wells, the sellers' lead negotiator, testified that the sellers refused to agree to the highlighted clause regarding "no existing condition" because it made them liable for unforeseen future events:

> The discussion we had was, again, that the Sellers were not willing to sign a contract that obligated them for consequences of unknown events they didn't know about. And this was a clause that could certainly do that. And so we took it out.

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[8] *ABB Flakt, Inc. v. Nat'l Fire Ins. Co. of Pittsburgh, Pa.*, 731 A.2d 811, 815 (Del. 1998); *Eon Labs Mfg., Inc. v. Reliance*, 756 A.2d 889, 894 n. 25 (Del. 2000).

The sellers steadfastly resisted indemnifying the buyers from liabilities that might develop following the sale. Following discussion and debate, the buyers agreed to sellers' removal of the clause in question, thereby indicating a mutual understanding that in the context of § 3.9 the word "liabilities" meant actual liability at the time of the sale, not any liability that could accrue in the future. The Court finds that the extrinsic evidence shows that the agreed-upon intention of the parties was that the sellers would not be liable for future liabilities. When the parties signed the Purchase Agreement in August 1997, no "liabilities" had arisen from DuCoa's antitrust activity.

Equally contentious during the contract negotiations was the question of whether the warranties and representations would be based on the sellers' actual knowledge at the time of the sale. The parties do agree that the "knowledge of Sellers" was intended to mean only what Halter and James knew with an obligation on their part to make due inquiry. In the first draft of the Purchase Agreement, the buyers did not include any "knowledge qualifiers," the clauses which allocate risk to the buyer if the seller did not have knowledge of the subject of the representation and warranty. In its initial form, § 3.13 was a blanket representation that the companies' business had been conducted lawfully:

Compliance with Law. The Business is not being and has not been

> Conducted, and none of the Companies has been, or is in violation of any applicable Law, except for violations which in the aggregate would not have a Material Adverse Effect.

The sellers wanted a knowledge qualifier, and they added one to the draft. At trial, Mr. Sikorski testified that Winward's position had been that the Sellers should bear the risk of the companies' lack of compliance with the law, whether Mr. Halter and Mr. James were aware of it or not. Mr. Sikorski also stated that he had been well aware that the sellers wanted to include knowledge qualifiers so that buyers would bear the risk on topics of which sellers were not knowledgeable. Roger Wells concurred. He testified that by June the parties had reached an understanding that the sellers would not accept responsibility for unknown eventualities. Based on this understanding, Mr. Wells added knowledge qualifiers to the draft and also defined the sellers' knowledge to include only that of Mr. Halter and Mr. James after making inquiry of the DCV management team.

At the next meeting, the parties and their attorneys (Mr. Wells and Mr. Ellin) went through each of the representations and warranties. They hashed out terms for specific topics, including Compliance with Law (§ 3.13); Real Estate (§ 3.6); Default in Contracts (§ 3.11); Litigation (§ 3.12); Permits (§ 3.14); Product Liability and Defective Products (§ 3.15); Employment Benefit Plans (§ 3.16); and Employment (§ 3.20). The evidence shows that the sellers were clear about not taking on liability

for what they did not know. There is no evidence that buyers believed that the general provisions of § 3.9 would override an obligation that had specifically qualified in another representation. A second draft was submitted to sellers which included most of the sellers' proposed knowledge qualifiers and the sellers' definition of knowledge. Section 3.13 included an explicit knowledge qualifier:

> Compliance with Law. To the knowledge of Sellers, the business is not being and has not been conducted, and none of the Companies has been, or is in violation of any applicable Law, except for violations which in the aggregate would not have a Material Adverse Effect.

The evidence is clear that the parties agreed that sellers would be liable for the companies' unlawful conduct only if Halter and James had had knowledge of it. Plaintiff now argues that buyers agreed to qualify the sellers' liability under 3.13 only because § 3.9 rendered sellers liable for any undisclosed liabilities regardless of sellers' knowledge. Sikorski testified to this effect at trial. However, nothing in the record and none of the testimony indicates that the parties agreed that § 3.9 trumped all other representations. If the Winward team pinned its hopes on a contract interpretation that was not conveyed to the sellers, such interpretation cannot stand. A contract will be construed against a party who maintains its own interpretation of an agreement and fails to inform the other party of that interpretation.[9]

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[9] *See* Restatement (Second) of Contracts § 201(2).

In fact, if it did, the hard-won knowledge qualifier contained in § 3.13 is rendered meaningless.[10] The section warranting full disclosure is also conditioned on Halter and James' knowledge:

> 3.25. Full Disclosure. To Sellers' Knowledge, the representations and warranties of Sellers in this Agreement do not contain any untrue statement of a material fact or fail to state any material fact necessary to make the statements contained therein not materially false or misleading in light of the circumstances in which made.

Thus a question of law arises as to the interplay of § 3.9, § 3.13 and § 3.25.

Every contract must be interpreted to give effect to the intention of the parties.[11] In construing intention where there is both a general and a specific provision that pertains to the same subject, courts ordinarily qualify the meaning of the general provision according to the meaning of the more specific provision.[12] While the word "liabilities" as used in § 3.9 may have various meanings, the language of § 3.13 clearly states that the companies were not being operated in violation of any laws, to the knowledge of the sellers. Section 3.25 reiterates that under the circumstances in which a particular disclaimer was made, the sellers did not knowingly misstate or omit any material fact. The conditions on this warranty, as to

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[10]*See Northwestern Nat'l Ins. Co. v. Esmark*, 672 A.2d 41, 43 (Del. 1996); *Stasch v. Underwater Works, Inc.*, 158 A.2d 809, 812 (Del. Super. Ct. 1960).

[11]*Northwestern Nat'l Ins. Co. v. Esmark*, 672 A.2d 41, 43 (Del. 1996).

[12]*Katell v. Morgan Stanley Group, Inc.*, 1993 Del. Ch. LEXIS 92, at *11-12 (Del. Ch.).

both knowledge and circumstance, confirm the sellers' unwillingness to guarantee anything outside their limited purview. As a matter of law, the Court finds that § 3.13 governs the question of whether Defendants are liable to indemnify Plaintiff for the damages resulting from the antitrust conspiracy. As a factual matter, it is undisputed that Mr. Halter and Mr. James were not aware of DuCoa's role in the antitrust activity. The Court concludes that Defendant is not liable to indemnify Plaintiff for damages arising from DuCoa's antitrust activity.

Judge John E. Babiarz, Jr.

JEB,Jr./rmp/bjw
Original to Prothonotary