IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

APPRIVA SHAREHOLDER LITIGATION COMPANY, LLC	)	
Plaintiffs	)	CIVIL ACTION NUMBER
v.	)	**05C-11-208 JOH**
EV3, INC., DELAWARE CORPORATION F/K/A MICROVENA CORPORATION; EV3 SUNNYVALE, INC., A CALIFORNIA CORPORATION, F/K/A APPRIVA MEDICAL INC.	)	
Defendants	)	

Submitted: June 26, 2006
Decided: August 24, 2006

MEMORANDUM OPINION

Appearances:

Jeffrey L. Moyer, Esquire and Kelly E. Farnan, Esquire of Richards, Layton & Finger, P.A., Wilmington, Delaware, Attorney for Plaintiff

Daniel V. Folt, Esquire, and Matt Neiderman, Esquire of Duane Morris LLP, Wilmington, Delaware, Attorney for Defendants

HERLIHY, Judge

Plaintiff Appriva Shareholders Litigation Company, LLC ("ASLC"), as an assignee of certain former shareholders of Appriva Medical, Inc., has sued ev3, Inc and ev3 Sunnyvale, Inc. ("defendants"). ASLC seeks damages from the defendants and also seeks declaratory relief.

The basis for ASLC's action arises from a 2002 merger between several corporations in which a medical device developed by Appriva Medical was the centerpiece. The defendants contend that the agreement to merge provides that two of the former shareholders of Appriva Medical must act in concert when undertaking action such as this and that this action is not brought by both of them, but only one of them. They also contend the merger agreement bars assignment of the rights without its consent. They did not consent to any assignment to ASLC. Since the two shareholders are not acting in concert and since the assignment is invalid. As to the defendants, they have moved to dismiss, arguing one or both grounds mean(s) ASLC lacks standing. They also raise challenges to ASLC's substantive claims.

The Court concurs that ASLC has not demonstrated it has standing to bring this action. The motion to dismiss[1] is **GRANTED**.

Background

Appriva Medical, prior to 2002, had developed a device designed to prevent

[1] *See* p. 8 indicating why the motion to dismiss must be treated as a motion for summary judgment.

strokes in moderate - high risk atrial patients. It was and is known as the Percutaneous Left Atrial Appendage Transcatheter Occlusion device, or PLAATO. Appriva Medical apparently had some early trial success with the device. Defendant ev3 Inc., then known as Microvena Corporation, expressed interest to Appriva Medical's board about a merger whereby Microvena would purchase PLAATO and continue with its development.

These parties entered into an agreement to merge and signed a Merger Agreement on July 15, 2002. The consideration was $250 million. Just prior to the merger and as part of its consummation, Appriva Medical's shareholder's shares were cancelled. Out of the $250 million the shareholders received an initial payment of $50 million. The balance of $175 million was to be paid off in a series of structured steps.

The Merger Agreement provided for the appointment of a Shareholder's Representative. The "Representative" was and is two people, Michael Lesh and Eric van der Burg. Their role was more fully set out in a Shareholder Representative Agreement signed on August 10, 2002.

ASCL's complaint describes its members as van der Burg, and three institutional investors who were former shareholders in Appriva Medical. Lesh is not among them, however. These members of ASLC claim they are entitled to collect the remaining $175 million. As noted above, that balance becomes due through a series of structured steps described in the Merger Agreement as "Milestones":

1) Milestone #1: Appriva would pay fifty million dollars ($50,000,000.00) upon the FDA's IDE[2] Clinical Approval and achievement of certain "Acceptable Clinical Outcomes." This had an outside date of January 1, 2005.

2) Milestone #2: Appriva would pay twenty five million dollars ($25,000,000.00) upon the International Registry Completion. This has an outside date of January 1, 2008.

3) Milestone #3: Appriva would pay fifty million dollars ($50,000,000.00) upon the submission to the FDA of an application for Pre-Market Approval which would be made at the completion of Phase III clinical trial. Same date for this Milestone.

4) Milestone #4: Appriva would pay fifty million dollars ($50,000,000.00) when the FDA granted Pre-Market Approval for commercial distribution of PLAATO. The outside date for this milestone is January 1, 2009.

The first milestone has allegedly not been met and that $50 million has not been paid.

ASLC summarizes its action in this fashion:

> By this action, Plaintiff seeks to recover damages, and ancillary declaratory relief, resuting from the defendants' breach of a July 2002 merger agreement by which they acquired from Appriva's shareholders an innovative stroke treatment device known as PLAATO. Alternatively, Plaintiff seeks damages and other relief flowing from the numerous misrepresentations of material fact by which defendants induced Appriva to enter into the July 2002 merger agreement.

* * * * * *

[2] Investigative Device Exemption.

> Thereafter, on or about June 17, 2006, after engaging in their dilatory course of conduct, defendants asserted in an initial public offering prospectus filed with the Securities and Exchange Commission that the first of the four contractually-defined milestones set forth in the merger agreement was not timely completed, despite the fact that they concurrently described PLAATO as "the leading minimally invasive device," and a product with "the potential to change the standard of care for patients at risk for atrial fibrillation-related stroke." ev3's prospectus also disclosed facts suggesting that the second contractually-defined milestone, the completion of a European registry of 300 patients, had also been completed in that time frame. Nonetheless, defendants have refused to honor their promise to pay any of the contractual consideration owing under the July 2002 merger agreement, and defendants have denied any ongoing obligation actively to complete the first and second milestones. Defendants' deliberate failure to complete these contractual milestone constitutes a breach of the merger agreement and exposes the falsity of their pre-merger promises, assurances, and representations.[3]

ASLC has brought various kinds of actions to recover damages. They are: Count I - Misrepresentation; Count II - Breach of Contract - First Contractual Milestone; Count III - Breach of Implied Covenant of Good Faith and Fair Dealing - First Contractual Milestone; Count IV - Breach of Contract - Second Contractual Milestone; Count V - Breach of the Implied Covenant of Good Faith and Fair Dealing - Second Contractual Milestone; and Count VI - Declaratory Relief.

ASLC describes itself as the "assignee, for purposes of collection, of certain former shareholders in, and officers of Appriva Medical," and further identifies itself as:

[3] Plaintiff's complaint paragraphs 1 and 7.

> A limited liability company organized and existing under the laws of the State of California, with its principal offices in the San Francisco Bay Area. The Members of ASLC are certain former shareholders of Appriva Medical, Inc. ("Appriva"), including a former officer and shareholder representative under the merger agreement, Erik van der Burg, as well as three institutional investors, each of whom formerly held stock in Appriva immediately prior to the merger transaction described herein. ASLC was formed on or about August 18, 2005, for the primary purpose of collecting for its Members claims against defendants arising from, and relating to, the July 2002 merger.[4]

Parties' Claims

The defendants' first argument is that ASLC lacks standing to bring this action. That contention is premised on several grounds. One is that when approving the Merger Agreement, two persons, Erik van der Burg and Michael D. Lesh were appointed as the "Shareholders'Agents." Those two are required, the defendants assert, to work in concert. That requirement, they say, is set out in the Merger Agreement and the compliant shows they are not acting jointly. Lesh is not an assignor or a plaintiff in this action.

In addition, the defendants have cited to a document not in ASLC's complaint entitled "Shareholder Representative Agreement ("Shareholder Agreement"). The Shareholder Agreement, defendants argue, gives exclusive rights to Lesh and van der Burg to act, specifically to bring claims. Any other shareholders, such as the institutional investors (former Apriva Medical shareholders) lost any independent rights to act. Those shareholders, also, did not and could not assign to ASCL their

[4] Plaintiff's complaint paragraph 8.

rights to act.

Another facet of the defendants' argument that ASLC lacks standing arises from its complaint that it is acting as assignee, in this case apparently exercising whatever rights van der Burg has and others may have. It is noted that Lesh is not as assignor to ASLC and is not a party to this action.[5] Since these two persons had to act in concert, defendants claim that van der Burg cannot act independently.

Finally, on standing, the defendants contend that the or any assignment to ASLC cannot validly assign whatever rights Lesh and van der Burg had. The invalidity exists because the defendants did not consent to it. Its consent was needed by the terms of the Merger Agreement. Because of the contractual limitations noted, the defendants also assert ASLC cannot bring this action as a"third party beneficiary."

In addition to challenging standing, the defendants move to dismiss the fraud claim on various grounds, such as, that it is precluded by express contractual language, lacks particularity, and so forth. They challenge ASLC's breach of contract claims and claims for the breach of the covenant of good faith and fair dealing. They draw attention to both of those causes of action particularly as to Milestone #2 as its performance is executory. Finally the defendants argue that with the availability of damages, ASLC is not entitled to declaratory relief.

ASLC responds that it has third party beneficiary status to bring this suit. It

points out that the Shareholder Agreement attached to the defendants'motion was not included with or referenced in its complaint. This, it argues, precludes this Court from considering it on the motion to dismiss. But in referring to it in its answering brief, ASLC notes that the Shareholder Agreement's terms do not support the defendants arguments.

In addition, ASLC contends that the assignment does not affect its standing to bring this action.

ASLC disputes the defendants'arguments about its action for fraud, breach of contract and breach of the covenant of good faith and fair dealing. It says it is entitled to declaratory relief because it is entitled to a judicial declaration of the parties' continuing rights and obligations under the Merger Agreement.

Applicable Standards

[5] See p.2, *infra*.

On a motion to dismiss, all well-pled allegations are to be taken as true.[6] Such a motion cannot be granted if the plaintiff may not recover under any conceivable set of circumstances susceptible of proof under the complaint[7] If a motion to dismiss is accompanied by additional papers, it is to be converted to a summary judgment motion.[8] The defendants' inclusion of the Shareholder Agreement converts their motion to one for summary judgment.

[6] *Savor, Inc. v. FUR Corp.*, 812 A.2d 894, 896 (Del. 2002).

[7] *Lord v. Sonder*, 748 A.2d 383, 398 (Del. 2000).

[8] *Chrysler Corp. v. Airtemp Corp.*, 426 A.2d 845, 847 (Del. Super. 1980).

That, in turn, implicates principles applicable to motions for summary judgment. The first is that the moving party is entitled to summary judgment if there are no genuine issues of material fact and that party is entitled to judgment as a matter of law.[9] The Court must view the evidence in a light most favorable to the non-moving party, here ASLC.[10]

Discussion

ASLC does not dispute the existence or authenticity of the Shareholder Agreement. It merely argues it is inapplicable, as well, of course, that it did not attach it to its complaint. The Court is troubled by that latter argument because of paragraph one of its complaint which states ASLC is the "assignee for purposes of collection, of certain former shareholders in, and officers of, Appriva Medical." Its complaint does not expressly state that it brings this action as a third party beneficiary or as an agent for third party beneficiaries. But ASLC in responding to the defendants' motion, raises the alternative argument that it has that capacity to bring this action.

ASLC has placed the Shareholder Agreement before the Court. It has done so by its complaint, in paragraphs one and eight which identify what it is, states its capacity to maintain this action and indicates who its members are. Arguably, claiming third party states also injects the Shareholder Agreement into this matter at

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[9] *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 844 (Del. 1987).

[10] *Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. Super. 1990).

this stage. At this stage, therefore, the Court would be proceeding with blinders on to ignore or pretend the Shareholder Agreement does not exist and is not implicated. Further, ASLC, and importantly, has the burden of proving its standing.[11]

The analysis of ASLC's standing starts, however, with the Merger Agreement (which ASLC attached to its complaint). Specifically, within that agreement is the section dealing with Shareholders' Agent:

[11] *Dover Historical Society v. City of Dover Planning Comm.*, 838 A.2d 1103, 1109 (Del. 2003).

> *Shareholders' Agent.* By approving the Merger and adopting and approving this Agreement, each shareholder of the Company has designated, and approved the designation of, Michael Lesh, M.D. and Erik van der Burg to jointly act as the agent for all shareholders of the Company and holders of Vested Options (the "*Shareholders' Agent*") and as the attorney in fact and agent for and on behalf of the company shareholders and Vested Options with respect to the taking any and all actions and the making of any decisions required or permitted to be taken by the Shareholders' Agent under this Agreement and the Escrow Agreement, including without limitation the power to (i) arbitrate, resolve, settle or compromise any dispute regarding indemnification claims or matters arising out of the calculation of the Cash Shortfall Amount and the Initial Per Share Amount and (ii) take all actions necessary in the judgment of Shareholders' Agreement for the accomplishment of the forgoing. Each shareholder of the Company and each holder of Vested Options will be bound by all actions taken and all documents executed by the Shareholders' Agent in connection with any of the foregoing matter. In performing the functions specified in this Agreement, the Shareholders' Agent will not be liable to any shareholder of the Company or holder of Vested Options in the absence of fraud or willful misconduct on the part of the Shareholders' Agent. If the Shareholders' Agent shall resign or become unable to fulfill his or her duties as such, then the person with the then largest interest in the Contingent Payment Obligations who is willing to appoint a new Shareholders' Agent shall be entitled to make such appointment. Expenses of the Shareholders' Agent shall be the obligation of the holders of the Company Shares, provided, however, that the Surviving Corporation will, until the earlier of (I) the achievement of Milestone #1, or (ii) January 1, 2004, pay on such holders' behalf (up to a maximum of $250,000) to the Shareholders' Agent the actual, reasonable fees of such Shareholders' Agent as such fees are incurred, provided, further that the Surviving Corporation shall be entitled to deduct any such advanced fees from any Contingent Payment due after the date of any such advance.[12]

Also key to the Court's analysis is another provision in the Merger Agreement governing assignment:

[12] Merger Agreement §15.5

> *Successors and Assigns.* Except as otherwise provided in this Agreement, no party hereto shall assign this Agreement or any rights or obligations hereunder without the prior written consent of the other parties hereto and any such attempted assignment without such prior written consent shall be void and of no force and effect; provided, however, that Parent may assign its right to any Affiliate of Parent so long as Parent (or any successor to Parent) remains responsible for its obligations hereunder, provided, further, that nothing contained herein shall prevent the Surviving Corporation from selling, transferring or conveying some or all of the assets of the Company (which become the assets of the Surviving Corporation as the Effective Time) so long as such sale, transfer or conveyance is made by the Surviving Corporation in good faith. This Agreement shall inure to the benefit of and shall be binding upon the successors and permitted assigns of the parties hereto.[13]

ASLC contends that these provisions of the Merger Agreement are ambiguous.

They are not. First, the agreement appoints Lesh *and* van der Berg as Shareholders' Agent. Second it requires them to act in concert. ASLC's complaint manifestly shows they have not and it makes no pretense that they have done so. Third, the Merger Agreement requires the defendants consent to any assignment. ASLC's complaint and its responses to defendants'motion betray the obvious. It did not get and does not have that consent. As part of that, putting consent aside for the moment, ASLC's complaint does not state, which it must for purposes of standing, that Lesh was an assignor to it.

On the Merger Agreement alone, ASLC has not met its burden to show its standing.

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[13] Merger Agreement §16.1

The Shareholders Agreement contains provisions which also but independently, undercut ASLC's claims of standing:

> 1.1 Appointment of Shareholder Representative.
> (a) the irrevocable authorization, direction and appointment of Michael Lesh and Erik van der Burg and any successor designated pursuant to Section 15.5 of the Merger Agreement jointly as "Shareholder Agent" for purposes of the Merger Agreement and sole and exclusive agents, attorneys-in-fact and agents of each holder of outstanding shares of common stock of Appriva (the "Common Shares") and/or preferred stock of Appriva (the "Preferred Shares" and, together with the Common Shares, the "Company Shares") and each holder of a Vested Option, and each such holder's heirs, agents and successors;
> (b) the approval and authorization for all of the arrangements relating thereto, including: (1) the execution, delivery and performance of the Escrow Agreement by the "Shareholders' Agent" performance of the Escrow Agreement by the "Shareholders' Agent"; (ii) the preparation and delivery of Payment Schedules with respect to the Merger Consideration as contemplated by Section 4.1(b) of the Merger Agreement by the "Shareholders' Agent": (iii) the "Shareholders' Agent" performance of its obligations under the Merger Agreement and the Escrow Agreement and the Shareholder Representatives performance of their obligations under this Agreement, including, without limitation, taking any and all actions, incurring any costs and expenses for the account of the holders of Company Shares, hiring legal counsel to defend against any Claim made by a Parent, hiring accountants to determine the allocation of Merger Consideration among the holders of Company Shares pursuant to the Merger Agreement and making and all determinations which may be required or permitted to be taken by the "Shareholders' Agent" as contemplated by the Merger Agreement; and (v) the exercise of such rights, power and authority as are indicated to the foregoing; and
> (c) the irrevocable relinquishment of the right of each holder of Company Shares to act independently and other than through the Shareholder Representatives with respect to the foregoing, any such rights being irrevocably and exclusively delegated to the Shareholder Representative. Without limiting the generality of the foregoing, any notice hereunder delivered to Parent by a holder of Company Shares other than through the "Shareholders' Agent" shall be effective as against each holder of outstanding Company Shares and Vested

Options.[14]

It also contains other important provisions, one that the Shareholder Representatives are to act jointly and an assignment provision generally similar to the assignment provision in the Merger Agreement:

> 2.3 The Shareholder Representatives shall together have full power and authority to represent the Shareholders, and their successors and assigns, within the scope of their appointment pursuant to Section 1, and all action jointly taken by the Shareholder Representatives hereunder shall be binding upon the holders of Company Shares and Vested Options, and their successors and assigns, as if expressly confirmed and ratified in writing by each of them. The appointment of the Shareholder Representatives under this Agreement shall survive the death, incapacity or any assignment of rights or assets of any such holder. Without limiting the generality of the foregoing, the Shareholder Representatives shall together have full pwer and authority on behalf of the holders of Company Shares and Vested Options to: (i) interpret all of the terms and provisions of this Agreement, the Merger Agreement and the Escrow Agreement) and the total limit of liability set forth in Section 15.2(d) of the Merger Agreement of the Escrow Agreement or otherwise in connection with the transactions contemplated by the Merger Agreement; and (iii) authorize payments, delivery or issuance with respect thereto out of the Escrow Deposit, on behalf of the holders of Company Shares and Vested Options.

[14] Shareholders Agreement, page 2

> 4.1 Assignment. This Agreement shall inure to the benefit of and be binding upon the respective executors, administrators, heirs, successors, and assigns of the parties. All rights arising with respect to the Company Shares and Vested Options subject to this Agreement (including without limitation the right to receive payments of Merger Consideration pursuant to the Merger Agreement) may be transferred or assigned by any holder; provided, however, that (I) the Shareholder Representative may receive written notice prior to the time of said transfer or assignment, stating the name and address of said transferee or assignee, and (ii) such transferee or assignee must agree to be bound by the terms and conditions of this Agreement.[15]

The Shareholder Agreement re-enforces the Merger Agreement's requirement for joint action by Lesh and van der Burg. ASLC's complaint again fails to show compliance with that provision with its consequent affect on standing. Again, as if re-enforcement of that lack of joint action is needed, the Court takes judicial notice of a totally separate law suit undertaken by Lesh.[16]

In that litigation, Lesh's standing to sue alone was also challenged. And he is not a party in this case either individually, as an assignor to, or as a member of ASLC. The same Merger Agreement requires Lesh and van der Burg to act jointly. To create "joint action" ASLC offers the same suggestion as Lesh did in his case, which was to have the Court consolidate the two actions. This, each has separately argued, would make it a "joint action."

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[15] Shareholder Agreement, pages 2-3.

[16] *Lesh v. Appriva Medical, Inc.*, Del. Super. C.A. No. 05C-05-218

When rejecting Lesh's standing because he was not acting jointly with van der Burg, the Court also rejected the consolidation argument.[17] Court ordered consolidation would do violence to the express wording of the Merger Agreement, and/or to the Shareholder Agreement. It would impose a status neither Lesh or van der Burg selected when they chose to file separate actions.

ASLC's complaint does not state that it brought its action based on its status as a third-party beneficiary or that it was acting as an agent on behalf of third-party beneficiaries – its members. However, in its response to defendants'motion, it adds, almost as an afterthought, that it has third-party beneficiary status. Analysis of a party's standing, however, typically starts with examining third-party status, but ASLC's belated attempted end-run has placed that analysis last.

Defendants argue that ASLC's assertion of its status as a third-party beneficiary divests it of standing under the unambiguous terms of the Merger Agreement.

[17] *Lesh v. Appriva Medical, Inc.*, Del. Super. C.A. No. 05C-05-218, Scott, J. (June 15, 2006).

To qualify as a third-party beneficiary, it must be shown that the contract, in this case, the Merger Agreement, was "made for the benefit of that third party, within the intent and contemplation of the contracting parties."[18] The intention of the contracting parties is paramount in determining whether others have standing as third-party beneficiaries.[19] Thus if it was not the promissee's intention to confer direct benefits upon a third party, but rather such third party happens to benefit from the performance of the promise either coincidentally or indirectly, then the third party will have no enforceable rights under the contract.[20] Former shareholders are intended third-beneficiaries of a merger agreement where the shareholders receive payments or other consideration for the sale of their shares in one of the companies.[21]

However, when a plaintiff seeks to secure benefits under a contract to which it is a third-party beneficiary, it must take that contract as it finds it and cannot select the parts favorable to it and reject those unfavorable to it.[22] This is precisely what ASLC attempts to do in seeking to avoid the contractual requirement set forth in

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[18] *Hadley v. Shaffer*, 2003 WL 21960406 (D.Del.) (quoting *Grand St. Artists v. Gen'l Electric Co.,* 19 F.Supp.2d 242, 253 (D.N.J. 1998)).

[19] *E. I Dupont & Co. v. Rhone Poulenc Fiber and Resin Intermediaries, S.A.S.*, 269 F.3d 187, 197 (3d Cir. 2001).

[20] *Guardian Constr. Co. v. Tetra Tech Richardson, Inc.*, 583 A.2d 1378, 1386 (Del. Super. Ct. 1990).

[21] *Hadley v. Shaffer*, *supra* at *5.

[22] *Rumsey Elec. Co. v. Univ. of Del.*, 358 A.2d 712, 714 (Del. 1976).

Section 15.5 that Lesh and van der Burg act jointly in taking action. The Court concludes that the Merger Agreement also precludes ASLC from bringing this lawsuit as a third-party beneficiary.

Conclusion

For the reasons stated herein the defendants' motion to dismiss (summary judgment) is **GRANTED**.

IT IS SO ORDERED.

J.