IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE BIOCLINICA, INC.	)	
SHAREHOLDER LITIGATION,	)	*Consolidated C.A. No. 8272-VCG*
	)	

MEMORANDUM OPINION

Date Submitted: February 22, 2013
Date Decided: February 25, 2013

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GLASSCOCK, Vice Chancellor

On January 29, 2013, Nominal Defendant BioClinica, Inc. ("BioClinica") entered into a merger agreement with JLL Partners, Inc. ("JLL").[1] The Plaintiffs, stockholders of BioClinica, soon filed several complaints, consolidated here, seeking to enjoin the merger on grounds of breach of duty by the BioClinica board. Perhaps heeding the advice of the Vice-President,[2] the Plaintiffs filed scattershot Complaints, firing a broad pattern of claims, from director interest to inadequate price and process, to varied and numerous disclosure inadequacies. This blunderbuss approach was perhaps understandable, since the short time frame—the merger is set to close on March 11, 2013[3]—provided little opportunity for elegant pleading. To their credit, the Plaintiffs, in presenting the Motion to Expedite, which is the subject of this Memorandum Opinion, reduced their claims to a few cogent and interesting issues: one allegation of improper process and two inadequate disclosure claims. Upon close examination, however, none of these claims is colorable, sufficient to justify the substantial burden of expedited proceedings that would necessarily result before consummation of the merger on March 11, 2013. For that reason, the Motion to Expedite is denied.

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[1] Am. Compl. ¶ 50, Feb. 13, 2013.
[2] "Buy a shotgun. Buy a shotgun." Hon. Joseph R. Biden, http://www.npr.org/blogs/thetwo-way/2013/02/20/172483097/biden-for-protection-buy-a-shotgun-buy-a-shotgun, Feb. 20, 2013 (last accessed 2/24/13).
[3] Am. Compl. ¶ 61.

I. BACKGROUND FACTS

On January 30, 2013, BioClinica filed a Schedule 14D-9 with the SEC announcing its support for a tender offer, undertaken by JLL, at a price of $7.25 per share.[4] A committee of independent BioClinica directors ("the Committee") explored selling the company to approximately fifteen strategic and private equity buyers over an eight-month period.[5] JLL withdrew from the process for a five-month period, during which the Committee continued to negotiate with other parties. In October 2012, JLL reentered the bidding process,[6] and the Committee granted JLL exclusive rights to negotiate a merger agreement in November 2012.[7] The Committee obtained a fairness opinion from its financial advisor, EP Securities LLC ("Excel"). Determining that $7.25 was a fair price, the Committee approved the deal for the stockholders.[8] The BioClinica board of directors and JLL executed an Agreement and Plan of Merger (the "Merger Agreement") on January 29, 2013. On January 30, 2013, BioClinica filed a Schedule 14D-9 with the SEC, announcing and recommending the tender offer to the stockholders. JLL's offer

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[4] The tender offer is actually being pursued by BC Acquisition Corp., a wholly owned subsidiary of BioCore Holdings, Inc. and an affiliate of JLL Partners Fund VI, L.P. JLL Partners Fund VI is managed by JLL, a Defendant here. BC Acquisition Corp. and BioCore Holdings, Inc. are also Defendants to this action.

[5] *Compare* Am. Compl. ¶ 42 ("The process began in May 2012, when the Board determined that it would explore a sale of the Company."), *with* Am. Compl. ¶ 50 ("The Merger Agreement was finalized by January 29, 2013, and the deal was announced).

[6] *Id.* at ¶ 46.

[7] *Id.* at ¶ 49.

[8] *Id.* at ¶ 50.

represents a substantial premium over the pre-sale trading price of BioClinica stock.[9]

Following the announcement of the tender offer, several derivative complaints were promptly filed in this Court seeking to enjoin the merger. These complaints were consolidated on February 18, 2013, and a Lead Plaintiff was appointed.[10] The Amended Complaint makes several garden-variety challenges to the Merger Agreement, including (1) that the BioClinica board favored JLL over any strategic bidders during the bidding process; (2) that as a result of an unfair auction process the BioClinica board accepted an unfair price; (3) that the Merger Agreement locked up the deal with preclusive and coercive deal-protection devices; and (4) that the disclosures in the Schedule 14D-9 were misleading and incomplete. The only allegation of self-interest on the part of the BioClinica board is that one member of the board of directors will remain part of BioClinica's management post-acquisition.[11] The remaining eight directors are independent.[12]

The Plaintiffs filed a Motion to Expedite, anticipating a preliminary-injunction hearing before the tender offer is expected to close, on March 11,

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[9] Reply Br. Supp. Pls.' Mot. Exped., Ex. A, at 29 (calculating the implied premium to be between 21% and 24%, depending on the measuring period of BioClinica's stock price).

[10] *In re BioClinica S'holder Litig.*, C.A. No. 8272-VCG (Del. Ch. Feb. 18, 2013)(ORDER).

[11] Am. Compl. ¶ 57.

[12] The Amended Complaint alleges that these directors are conflicted because the tender offer will accelerate the vesting of the directors' stock options. This has been held to be insufficient grounds for expedition in the past. *See, e.g.*, *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1003-05 (Del. Ch. 2005) (noting that equity compensation for management arising from a merger creates an alignment of management and stockholder interests rather than a conflict).

2013.[13] The parties submitted extensive briefing on the Motion to Expedite. During oral argument, the Plaintiffs were able to narrow the issues to three: (1) whether the combination of a non-disclosure agreement and poison pill rendered the deal a "lock-up," preclusive to other bidders;[14] (2) whether the 14D-9 wrongfully omitted management projections of BioClinica's free cash flows or 2016 financial performance; and (3) whether the 14D-9 wrongfully omitted an explanation of BioClinica's decision to revise its 2012 capital expenditure budget. I will discuss each of these issues in turn.

II. ARGUMENT

A. Standard

To obtain expedited proceedings and discovery, BioClinica need only demonstrate that it has brought at least one colorable claim and that it faces a possibility of threatened irreparable injury sufficient to justify the imposition of expedition on the defendants.[15] As a practical matter, the merger, once accomplished, will represent an irremediable change in position, which, if

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[13] Pls.' Mot. Exped. 1, Feb. 13, 2013.

[14] The no-shop provision in the Merger Agreement contains a "fiduciary-out" clause which allows the board to consider other offers in certain circumstances. *See* BioClinica, Inc., Current Report (Form 8-K), Ex. 2.1 (Jan. 30, 2013)(Merger Ag. § 6.2(c)).

[15] *Cnty. of York Emps. Ret. Plan v. Merrill Lynch & Co.*, 2008 WL 4824053, at *5 (Del. Ch. Oct. 28, 2008).

wrongful, will likely generate injury difficult to compensate via damages.[16] I concentrate here on whether the Plaintiffs have stated a colorable claim.

B. The Process Claim

The Plaintiffs have alleged that the Committee agreed to deal-protection devices that impermissibly lock up the Merger Agreement with JLL. Specifically, the Plaintiffs have alleged that the combination of devices—a no-shop clause, a top-up feature, matching rights, a termination fee, a poison pill, and a standstill agreement—are preclusive to other potential bidders.[17] Thus, the Plaintiffs invoke our Supreme Court's language in *Omnicare* which forbids the impermissible locking up of a transaction that is either preclusive to other bidders or coercive to the stockholders.[18] In response, the Defendants have cited numerous cases that have upheld the various deal-protection devices that the Plaintiffs have challenged.[19] The Plaintiffs point out, correctly, that I must examine the effect of the deal-protection devices as they operate in concert to determine whether they preclude other offers or coerce the votes of the stockholders.[20]

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[16] *See In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 207 (Del. Ch. 2007) ("[T]his court's jurisprudence has tended to [accept] the notion that stockholders . . . face a threat of irreparable injury when a board seems to have breached its *Revlon* duties or failed to disclose material facts in advance of a merger vote.").

[17] Am. Compl. ¶ 6.

[18] *See Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 938 (Del. 2003) ("We hold that the NCS board did not have authority to accede to the Genesis demand for an absolute "lock-up.").

[19] *See* Defs.' Opp'n Pls.' Mot. Exped. 10-12.

[20] Am. Compl. ¶ 6 ("When viewed cumulatively along with the Company's poison pill provision and the expedited nature of the tender process, the deal protection terms ensure that no

In their Reply Brief and during oral argument, the Plaintiffs focused almost entirely on the joint effect of BioClinica's poison pill and the NDAs that allegedly bind the bidders. The standstill provision of the NDA[21] restricts a bidder from engaging in several practices that would enable the bidder to acquire BioClinica.[22] But the provision also contains language that would allow the bidder to commence a tender offer for the stock of BioClinica, notwithstanding the existence of a pending merger with a third party.[23] The Plaintiffs argue that this restriction—limiting future bids to a tender-offer process—when combined with a poison pill, impermissibly locks up the deal with JLL. JLL is exempt from the poison pill's effects, but the pill remains in effect for all other potential bidders.[24]

> [T]he Rights Agreement and the NDAs further and improperly impede the auction process to sell BioClinica. The terms of the NDAs have not been disclosed, and Plaintiffs ask for them to be disclosed in

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alternative bidder will have a meaningful opportunity to enter into the process and submit a superior proposal to that of JLL.").

[21] The NDA provided in the 14D-9 was the agreement entered into between BioClinica and JLL. The Plaintiffs have alleged that the NDA entered into between JLL and another potential bidder, "Strategic Buyer B" has not been disclosed. From this non-disclosure, the Plaintiffs infer that the NDA executed between JLL and Strategic Buyer B is likely more onerous than the agreement that has been disclosed. Following oral argument, the Defendants submitted an affidavit clarifying that the problematic paragraph in the JLL NDA—restricting a bidder to the sole acquisition strategy of a tender offer—was the same in the agreement with Strategic Buyer B. Affidavit of Ted Kaminer ¶ 3, Feb. 22, 2013 ("Kaminer Aff.").

[22] Reply Br. Supp. Pls.' Mot. Exped. Ex. C, Non-Disclosure Agreement § 7.

[23] *Id.* at § 7(n)("Nothing contained in this Section 7 shall restrict the Receiving Party from making a cash tender offer for all of the outstanding capital stock of the Company after such time as both (i) a third party has commenced, within the meaning of Rule 14d-2 of the Exchange Act, a cash tender offer for the Company at a lower price per share than the price per share offered by the Receiving Party in its tender offer and (ii) the Company has recommended to its stockholders that they accept such third party's tender offer.").

[24] Am. Compl. ¶ 62.

> the Amended Complaint. Defendants contend that one JLL-related NDA has been disclosed and they claim it has no "don't ask, don't waive" restrictions. This is likely to be a contested fact *because the NDA signed by JLL still limits the circumstances in which JLL can re-enter any bidding process to a tender offer process.* Every other NDA remains non-public but are referenced in the 'non-solicitation' section of the Merger Agreement, itself challenged in the Amended Complaint. Further, *the Rights Agreement is triggered by a public announcement of an intent to commence a tender or exchange offer for the Company*. Therefore, it appears the NDAs, in the context of the Rights Agreement, and in context of the Deal Protection Terms of the Merger Agreement, operate to prevent former prospective purchasers from seeking either publicly or privately to re-enter the bidding process.[25]

If the facts underlying this paragraph were true, the Plaintiffs may have stated a colorable claim justifying expedition. A deal-protection tool that could both (1) relegate a bidder to making a tender offer, without approaching the board of directors, and then (2) trigger the onerous provisions of a poison pill upon the mere *announcement* of such a tender offer could indeed preclude a bid from any party that had signed such an NDA.

A review of BioClinica's poison pill reveals that its harsh effects are not triggered by the mere announcement of the intent to launch a tender offer. Instead the following are the relevant terms of the Amended and Restated Rights Agreement (the "Rights Plan").

> [A[fter the date of the commencement by any Person . . . or of the first public announcement of the intention of any Person . . . to commence, a tender or exchange offer the consummation of which would result in

[25] Reply Br. Supp. Pls.' Mot. Exped. 6-8 (internal citations omitted) (emphasis added).

> any Person becoming an Acquiring Person . . . the Company will cause to be sent . . . to each record holder of Common Shares as of the Close of Business on the Distribution Date . . . a Right Certificate evidencing one Right for each Common Share so held.[26]

Section 1 of the Rights Plan defines "Acquiring Person" as "any Person who . . . shall be the Beneficial Owner of 20% of the Common Shares."[27] Thus, the Plaintiffs are technically correct in asserting that the Rights Plan is "triggered" by the announcement of a tender offer. The Plaintiffs have neglected to specify, however, what a stockholder gains by receiving a Right under the Rights Plan.[28] Under the Rights Plan, if no Person becomes an Acquiring Person—by acquiring over 20% of BioClinica's common stock—the stockholders have only the right to purchase Preferred Stock at the price of $16.00 for 1/1000 of a Preferred Share.[29] One 1/1000 interest in a Preferred Share equates to the value of approximately one share of BioClinica common stock.[30] Contrary to the Plaintiffs' representations, the only "right" exercisable upon the announcement of a tender offer is a stockholders' option to purchase stock worth $7.25 for the price of $16.00. Obviously, no rational stockholder would make such a purchase. As a result, the

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[26] BioClinica, Inc., Am. and Restated Rights Ag. § 3(a), March 23, 2011, [hereinafter Rights Plan] *available at* http://www.sec.gov/Archives/edgar/data/822418/000095012311029218/w82156exv4w1.htm.
[27] *Id.* at § 1.
[28] Under the Rights Plan, a "Right" does not entitle the holder to voting rights, dividends, or other privileges associated with stock ownership. *Id.* at § 17.
[29] *Id.* at § 7(a), (b).
[30] *Id.* at Ex. C-2 ("Because of the nature of the Preferred Shares' dividend, liquidation and voting rights, the value of the one one-thousandths interest in a Preferred Share purchasable upon exercise of each Right should approximate the value of one Common Share.").

fears typically associated with triggering a poison pill—the substantial dilution of the bidder's ownership in a target resulting in a much more expensive acquisition—are *not* triggered by the public announcement of a tender offer under the Rights Plan.

Instead, the teeth of the Rights Plan are only exposed once a bidder acquires over 20% of BioClinica's common stock and becomes an Acquiring Person.[31] At that point, stockholders who have elected not to purchase the over-priced Preferred Stock—i.e., all of the common stockholders—are given the option to purchase two shares of BioClinica common stock, at half price, for every one share of common stock the stockholder owns.[32] The Acquiring Person is excluded from the benefit of the Rights Agreement, as is customary in poison pills.[33] Only after a bidder acquires 20% of BioClinica's common stock does the Rights Plan have its traditional discriminatory impact on the bidding stockholder; thus, the bidders acquiring 20% of BioClinica is the true trigger. The BioClinica board has the right

[31] *Id.* at § 11 (a)(ii).

[32] *Id.* Furthermore, after any Person becomes an Acquiring Person, the BioClinica board has the right, at its option, to exchange each Right distributed under the Rights Agreement for one share of common stock. *Id.* at § 24(a).

[33] *Id.* ("From and after the occurrence of such event, any Rights that are or were acquired or beneficially owned by such Acquiring Person . . . on or after the earlier of (x) the date of such event and (y) the Distribution Date shall be void and any holder of such Rights shall thereafter have no right to exercise such Rights under any provision of this Agreement."); *id.* at § 3(c) ("Under certain circumstances, Rights that are or were acquired or beneficially owned by Acquiring Persons . . . may become null and void.").

to redeem the pill, at its option, any time before the bidder becomes an Acquiring Person.[34]

There is nothing in this set of deal-protections devices that distinguishes the facts in this case from those that were upheld in *In re Orchid Cellmark Inc. Shareholder Litigation*.[35] In that case, Vice Chancellor Noble refused to preliminarily enjoin a merger that was protected by a no-shop clause, top-up option, matching rights, a termination fee, and a poison pill.[36] Vice Chancellor Noble found that the deterrent effects of a poison pill on any serious competing bidder would be minimal.[37]

The same is true here. The effect of the pill on a bidder would be as follows. If the bidder announced a tender offer, conditioned on redemption of the pill, BioClinica would distribute the Right Certificates. The common stockholders would then have the right to purchase the over-priced Preferred Stock. No rational stockholder would exercise that right. If the bidder's hostile tender offer were higher than the JLL tender offer, the stockholders would withdraw their tendered shares from the JLL tender offer.[38] The Merger Agreement contains a fiduciary-

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[34] *Id.* at § 23.
[35] 2011 WL 1938253, at *6-8 (Del. Ch. May 12, 2011).
[36] *Id.* at *6.
[37] *Id.* at *7.
[38] The Schedule 14D-9 expressly informs the stockholders that they may withdraw their shares prior to the takedown. BioClinica, Inc., Schedule 14D-9, at 3 (Jan. 30, 2013).

out clause which would allow the BioClinica board to deal with superior offers.[39] JLL has contracted for the right to increase its offer and match the price offered by the hostile bidder.[40] Therefore, the auction would continue, ensuring the stockholders received the highest price available to them. If, for some reason, the BioClinica board refused to redeem the pill, even when faced with a superior offer, the BioClinica stockholders and the hostile bidder would be free to petition this Court for relief.[41] Therefore, as in *Orchid*, "a sophisticated buyer could navigate [these] shoals if it wanted to make a serious bid."[42] I find that the Plaintiffs have not pled a colorable claim that these deal-protection devices, when combined, impermissibly lock up the Merger Agreement.

C. Disclosure Claims

The Plaintiffs accurately state that the Defendants are under an obligation to "disclose fully and fairly all material information within the board's control when it seeks shareholder action."[43] Information is "material" when it would

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[39] BioClinica, Inc., Current Report (Form 8-K), Ex. 2.1, at § 6.2(c) (Jan. 30, 2013) [hereinafter Merger Agreement]. Furthermore, the Rights Plan has a built-in procedure for "Qualifying Offers," under which the stockholders can compel the board of directors to put the redemption of the Rights Plan to a stockholder vote. *See* Rights Plan, *supra* note 26, at § 23(b).
[40] Am. Compl. ¶ 60.
[41] *See* Merger Agreement, *supra* note 39, at § 6.2(c).
[42] *Orchid*, 2011 WL 1938253, at *8.
[43] *Abrons v. Maree*, 911 A.2d 805, 812 (Del. Ch. 2006).

significantly alter the total mix of information that a stockholder would consider in deciding how to vote.[44]

Though the Plaintiffs made several allegations of inadequate disclosure in the Complaint and the Motion to Expedite, only two were pressed as colorable in the Plaintiffs' Reply Brief and at oral argument: (1) that the 14D-9 failed to disclose projections made by BioClinica management of free cash flows and 2016 financial performance,[45] and (2) that the 14D-9 failed to explain why BioClinica's 2013 capital expenditures were revised upward in the midst of the sales process. I find neither of these claims colorable.

1. Failure to Disclose Management Projections

Generally, the failure of a company to disclose management's financial projections in its proxy materials, when those projections have been relied on by a financial advisor to render a fairness opinion, is a material omission that will sustain injunctive relief if not corrected.[46] This is because management's projections of the future value of the company are valuable to a stockholder deciding whether to exchange his ownership for the consideration tendered.[47]

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[44] *Id.*

[45] The 14D-9 discloses management's financial projections through BioClinica's 2015 fiscal year. Reply Br. Supp. Pls.' Mot. Exped., Ex. A, at 42.

[46] *In re Netsmart Techs., Inc. S'holder's Litig.*, 924 A.2d 171, 203 (Del. Ch. 2007).

[47] *Id.* ("[Management's] projections . . . are probably among the most highly-prized disclosures by investors. Investors can come up with their own estimates of discount rates or . . . market multiples. What they cannot hope to do is replicate management's inside view of the company's prospects.").

The only support that the Plaintiffs provide for management's alleged failure to disclose material financial forecasts is the following language from the 14D-9:

> Excel performed a discounted cash flow sensitivity analysis of BioClinica to determine indications of implied equity values per share of BioClinica Common Stock based on financial information provided by BioClinica's management. This analysis assumed 16.8 million shares of BioClinica Common Stock outstanding on a fully diluted basis.
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> In performing the illustrative discounted cash flow analyses, Excel applied discount rates ranging from 10% to 12% to the projected free cash flows of BioClinica for 2013-2016.[48]

Based on this language, the only thing "provided by management" was "financial information," not financial projections derived from that information. I disagree with the Plaintiffs that BioClinica represented in the 14D-9 that management provided Excel with its projections of BioClinica's free cash flows or 2016 financial performance.[49] Nowhere does the 14D-9 state that the "projected free cash flows of BioClinica for 2013-2016," or other financial projections for 2016, were prepared and provided by management, rather than by Excel. Furthermore, the Defendants have represented that BioClinica did not create any such projections.[50] Because the Plaintiffs cannot produce any factual support for their claim concerning undisclosed management projections, I conclude that their claim

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[48] Reply Br. Supp. Pls.' Mot. Exped. 9-10.

[49] As noted above, management forecasts of BioClinica's financial performance for fiscal years 2012 through 2015 were in fact produced, provided to Excel for use in preparing a fairness opinion, and disclosed in BioClinica's 14D-9. Reply Br. Supp. Pls.' Mot. Exped., Ex. A, at 42.

[50] Kaminer Aff. ¶ 2.

is not colorable. I reiterate this Court's consistent position that "[management] cannot disclose projections that do not exist."[51]

The Plaintiffs at oral argument cited to this Court's decision in *Dias v. Purches* for the proposition that the fact that management *did not* provide financial projections to an investment banker is itself material and must be affirmatively disclosed. That case, however, involved an erroneous statement in a securities filing that projections—which management had in fact *not* created—*had* been produced by management and relied on by the banker in arriving at its fairness opinion.[52] Here, BioClinica made no such erroneous representation in its 14D-9. Accordingly, no corrective disclosure is called for.

2. Failure to Disclose the Change in Estimated 2013 Capital Expenditures

The other alleged disclosure deficiency is that BioClinica provided JLL with a revised 2013 capital expenditure budget, yet failed to explain in its 14D-9 why the revisions took place.[53] The Plaintiffs argue that stockholders are entitled to an explanation for the revision, "because [the revision] dramatically impacts the multiples implied in the Comparable Companies Analysis for EV/EBITDA -

[51] *In re CNX Gas Corp. S'holders Litig.*, 4 A.3d 397, 419 (Del. Ch. 2010).
[52] *Dias v. Purches*, 2012 WL 4503174, at *2 (Del. Ch. Oct. 1, 2012).
[53] Reply Br. Supp. Pls.' Mot. Exped. 11.

CapEx, which is arguably the only multiple that makes the Proposed Transaction look fair within that analysis."[54]

Our law concerning proxy disclosures does not require such detailed disclosure. In *David P. Simonetti Rollover IRA v. Margolis*, the plaintiffs alleged that a company's proxy statement was materially misleading because it failed to disclose that the defendant company's financial advisor used only one set of management forecasts out of the three sets that were prepared, and that the set of projections used were the most pessimistic of the three.[55] In denying the *Simonetti* plaintiffs' motion for a preliminary injunction, Vice Chancellor Noble found that "[a]lthough including the more optimistic projections in the Proxy Statement and then explaining why they were not relied upon may have been somewhat helpful to stockholders, it is doubtful that any such additional disclosures would have materially altered the total mix of information provided."[56] The Court further noted that "[t]he record indicates that the projections used by UBS reflected management's best estimates at the time."[57]

Here, the Plaintiffs' presume, incorrectly, that stockholders are entitled to something *more* than management's "best estimates" of future performance when

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[54] *Id.*
[55] *David P. Simonetti Rollover IRA v. Margolis*, 2008 WL 5048692, at *9 (Del. Ch. June 27, 2008)
[56] *Id.* at *10.
[57] *Id.*

those "best estimates" were the only forecasts used by a financial advisor in producing a fairness opinion. The Plaintiffs do not contend that BioClinica's revised estimates of 2012 capital expenditures are inaccurate or that BioClinica's financial advisor relied on an earlier budget projection in preparing its fairness opinion. Accordingly, I find the Plaintiff's requested disclosure is not material to stockholders, as a matter of law, and that Plaintiffs have failed to articulate a colorable claim that BioClinica has withheld material information.

In conclusion, having found that the Plaintiffs have failed to state a colorable claim justifying expedited treatment, I deny the Motion to Expedite. An Order accompanies this opinion.