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VICE CHANCELLOR

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
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GEORGETOWN, DELAWARE 19947

Date Submitted: May 23, 2013
Date Decided: May 24, 2013

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Re: *Ehlen v. Conceptus, Inc.*,
Civil Action No. 8560-VCG

Dear Counsel:

This Letter Opinion concerns a Motion to Expedite filed by the Plaintiff on May 21, 2013 and argued on May 23, 2013. This Court is used to responding to the exigencies of business and routinely hears matters on expedited schedules where required. Our familiarity with such procedures should not mask the cost, to corporations, to stockholders, and to the taxpayer, of the burdens caused by expedited consideration. I review seriously, therefore, requests for expedition, granting such requests only where it appears that the facts alleged justify the burdens involved. Because I find that the Plaintiff here has failed to state a colorable claim, his Motion is denied.

A. Background: The Proposed Transaction

The Plaintiff seeks expedited proceedings leading to a hearing on his request to preliminarily enjoin a merger. Under the proposed transaction, Evelyn Acquisition Co., a wholly owned subsidiary of Bayer Healthcare, Inc. ("Bayer") will acquire Conceptus Inc.[1] through a two-step merger (the "Merger") for $31.00 per share.[2] The total value of the transaction is approximately $1.2 billion, and the merger consideration represents a 19.7% premium over Conceptus's market price the day before the merger was announced. Conceptus's Board agreed to the transaction after a six-month-long process, during which Conceptus initially invited four companies to submit proposals and also welcomed proposals from unsolicited bidders. Bayer was the only bidder to submit an offer for Conceptus.

The Plaintiff filed the Complaint on May 15, 2013, alleging that the Conceptus directors breached their fiduciary duties of care, loyalty, and candor in approving the Merger and in filing the accompanying 14D-9 with the SEC. The Complaint alleges three types of claims: a *Revlon* claim, a challenge to the merger agreement's package of deal protections, and numerous disclosure claims. The heart of the Complaint surrounds one of Conceptus's core prospects for growth: a new version of Conceptus's Essure birth-control technology, which is currently

[1] Conceptus is a Delaware corporation engaged in the design, development, and marketing of medical devices for use in reproductive medicine. Compl. ¶ 9. The Plaintiff is, and at all relevant times has been, a stockholder of Conceptus. Compl. ¶ 8.

[2] The facts in this Letter Opinion have been derived from the Complaint and from Conceptus's publicly available disclosures, each of which was referenced in the Complaint.

proceeding through clinical trials in Europe. Citing Conceptus's glowing press releases, the Plaintiff alleges that the Board undervalued the company and failed to take the Essure clinical trial into account when deciding to sell the company.

The Plaintiff's Complaint was filed on May 15, 2013, seeking injunctive relief. The Complaint discloses that the first step of the Merger is currently scheduled to close on June 5, 2013. Surprisingly, given the imminent closing date, the Plaintiff did not file this Motion to Expedite until May 21, 2013. I scheduled a telephonic hearing on the motion for May 23, 2013. At that hearing, the Defendants opposed the Motion to Expedite on the ground that the Plaintiff has failed to state a colorable claim. Notably, the Plaintiff failed to raise his *Revlon* claims, deal-protection claims, and several disclosure claims at oral argument. As a result, those claims have been waived for purposes of this Motion to Expedite. The Plaintiff advanced only three disclosure claims as colorable. For reasons I explain below, I agree with the Defendants that the Plaintiff has failed to state a colorable claim, and I deny the Motion to Expedite.

B. Standard of Review

Although this Court "has followed the practice of erring on the side of more [expedited] hearings rather than fewer,"[3] the plaintiff has the burden of persuading the Court that good cause exists to "justify imposing on the defendants and the

[3] *Giammargo v. Snapple Beverage Corp.*, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994).

public the extra (and sometimes substantial) costs of an expedited preliminary injunction proceeding."[4] The plaintiff meets this burden if he is able to demonstrate "a sufficient possibility of threatened irreparable injury" and a "colorable claim."[5] The burden of demonstrating a colorable claim is minimal: in deciding whether the plaintiff's claims are colorable, the Court conducts "something of an almost superficial factual assessment in order to determine whether imposing the burdens resulting from expedition is warranted."[6]

C. Laches and the Discarded Claims

The Defendants note that this deal was announced on April 29, 2013, but that the Complaint was not filed until May 15, 2013. As a result, they argue, the Plaintiff's delay has significantly enhanced the burden that will result in preparing this matter for a hearing on preliminary injunctive relief, which justifies denial of the Motion to Expedite on laches grounds. However, to the extent that litigants take sufficient time to await a final proxy and file a complaint with strong claims, rather than a quickly filed makeweight placeholder, I cannot fault that decision. More troubling is the Plaintiff's decision to wait a week to seek expedition, rather than filing the Motion with the Complaint. With only three weeks between

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[4] *In re 3Com S'holders Litig.*, 2009 WL 5173804, at *1 (Del. Ch. Dec. 18, 2009). *Accord Cnty. of York Emps. Ret. Plan v. Merrill Lynch & Co., Inc.*, 2008 WL 4824053, at *4 (Del. Ch. Oct. 28, 2008) ("This Court does not set matters for an expedited hearing or permit expedited discovery unless there is a showing of good cause why that is necessary.").

[5] *Giammargo*, 1994 WL 672698, at *2.

[6] *Cnty. of York Emps. Ret. Plan*, 2008 WL 4824053, at *6.

Complaint and closing, a week's delay is significant. While I do not deny the Motion based on this delay, it does add to the burden of expedition, an added burden created by the Plaintiff which he must overcome through the strength of his allegations of wrongdoing.

Those allegations are numerous. The Plaintiff alleges that the directors (1) breached their *Revlon* duties, (2) violated duties of care and loyalty in six respects through imposition of deal protection mechanisms, and (3) omitted (by my count)14 material facts from its disclosures. Between the time the Complaint was filed and the Motion to Expedite heard, however (a period during which no discovery was taken) the Plaintiff apparently decided that the majority of those claims were not colorable. At the telephonic hearing, the Plaintiff alleged only three claims warranting expedition, all purported disclosure violations. The other alleged breaches of duty have been waived with respect to Motion to Expedite. It does not inspire confidence in the Plaintiff's Complaint that he is unwilling to advocate the colorability of some 85% of the breaches of duty alleged in the Verified Complaint, in the context of a Motion to Expedite heard eight days thereafter.

D. The Three Disclosure Claims

Directors of Delaware corporations have duties of candor, under which they must fully and accurately disclose all material information to stockholders when seeking stockholder action. Under Delaware law, an omitted fact is material "if a reasonable stockholder would consider it important in a decision pertaining to his or her stock."[7] In other words, in order to be material, the omitted fact must contribute meaningfully to the "total mix" of information available to the stockholders.[8] "So long as the proxy statement, viewed in its entirety, sufficiently discloses and explains the matter to be voted on, the omission . . . is generally left to management's business judgment."[9]

As this Court noted in *Sunguard Data Systems, Inc. Shareholder Litigation*, the "optimal time to bring a disclosure claim in connection with a proposed merger . . . is before the stockholder vote is taken and the deal closes."[10] This allows the Court to cure any potential harm before the vote on the merger occurs.[11] Nonetheless, to justify expedition, "a plaintiff still needs to raise a colorable claim of a disclosure violation."[12]

The Plaintiff here argues that three disclosure claims are colorable. First, the Plaintiff argues that the Board's failure to disclose in the 14D-9 why Goldman Sachs terminated its DCF analysis at 2017, instead of some later date, was a material omission. Second, the Plaintiff argues that the Board's failure to disclose

[7] *In re 3Com S'holders Litig.*, 2009 WL 5173804, at *1 (Del. Ch. Dec. 18, 2009).
[8] *Id.*
[9] *Id.*
[10] *In re Sunguard Data Sys., Inc. S'holders Litig.*, 2005 WL 1653975, at *2 (Del. Ch. July 8, 2005).
[11] *Id.*
[12] *Id.*

its reasons for halting the sales process, to await an offer from Bayer, was a material omission. Third, the Plaintiff argues that the failure of the Board to disclose why it decided not to contact certain companies during the sales process was a material omission. I discuss each of these claims in turn.

First, the Plaintiff alleges that Goldman Sachs's discounted cash flow analysis (DCF) should have extended past 2017.[13] At oral argument (but not in the Complaint), the Plaintiff opined that ending the DCF at 2017 does not reflect the future value of Essure because the latest version of the device will not be available until the end of 2017. There is no support for this proposition in the facts alleged; it is based purely on speculation and only articulated at oral argument. Instead of basing the DCF on five-year projections, as was done here, the Plaintiff would have the Defendants extend the scope of management's forecasts, and the DCF, for an unspecified number of years. The Defendant argues that all material information has been disclosed concerning the DCF. The Company has disclosed that there is a clinical trial of its new version of Essure proceeding in Europe. I note that, although this issue was couched as a disclosure claim, it is really a "disagreement with Goldman's methodology."[14] Goldman used management-

[13] *See* Compl. ¶ 75.

[14] *See In re 3Com*, 2009 WL 5173804, at *3-4. In *3Com*, then-Chancellor Chandler held that a similar disagreement with Goldman Sachs's methodology was not colorable as a disclosure claim. *Id.* Specifically, the Court analyzed whether the decision to treat stock-based compensation as cash expense in a DCF constituted a material misstatement or omission. *Id.* In holding that no additional disclosure was required, the Court noted that Goldman Sachs's

provided financial forecasts, which were projected for five years, in calculating its DCF. Management prepared forecasts for both base case and upside scenarios, both of which included management's best estimates with respect to the next generation of Essure, one of Conceptus's most important products.[15] There is no allegation that the circumstances of the analysis that Goldman actually undertook were not adequately disclosed. At oral argument, neither party was aware of any Delaware case that requires management to prepare forecasts for a specific period of time. Instead, the Plaintiff argues that this is a special scenario, since Conceptus is in growth mode, and that I should determine an analysis based on cash flows beyond five years would be material. I note that DCFs using five-year forecasts are routine in fairness opinions supporting mergers. Therefore, the Plaintiff must allege some reason for believing that a forecast that included 2018 or 2019, or beyond, would differ, or add anything substantial to the total mix of information, from the present DCF. The Plaintiff has failed to provide any such explanation to me. There is simply no particularized allegation, beyond Plaintiff's naked

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methodology was adequately disclosed and that Goldman's decision to treat stock-based compensation as cash expense was simply a judgment call in conducting the valuation. *Id.* There was no explanation by the Plaintiffs there how Goldman's judgment rendered the DCF in any way misleading. *Id.* I find that the Plaintiff's argument here that the DCF should be extended past 2017 is a similar methodology-based claim, which fails to adequately explain why extending the DCF past 2017 would have any effect on the total mix of information available to stockholders.

[15] *See* Conceptus, Inc., Solicitation/Recommendation Statement under Section 14(d)(4) of the Securities Exchange Act of 1934 (Schedule 14D-9), at 22 (May 7, 2013) (the "Schedule 14D-9") (expressly disclosing that management incorporated "company specific factors such as market launch dates and the success of new product introductions" in its forecasts).

assertion, that the methodology it champions would be superior to the five-year projection employed by Goldman. In fact, common sense indicates that estimates of future performance become less useful as the forecasts project further into the future.[16] Goldman's use of its five-year DCF analysis is adequately disclosed, and the Plaintiff's judgment that another period would be superior does not state a colorable claim. The Directors have disclosed that there is a clinical trial proceeding in Europe; the stockholders can consider that fact when deciding whether to tender their shares. The Plaintiff has not pointed to any disclosure with respect to Goldman's DCF analysis that would add to the "total mix" of information in a way that is material, and the Plaintiff's claim is not colorable.

Second, the Plaintiff argues that the Board should have disclosed its reasons for "halting" the sales process on March 13 to await an offer from Bayer. On March 13, the Conceptus directors learned that two of three companies that had undertaken due diligence to explore acquiring Conceptus had determined that they would not submit offers for the company. At that juncture, after reviewing their fiduciary duties with their legal advisors, the Board determined to "defer any decision with respect to contacting additional healthcare companies until after it received an initial indication of interest from [the third company,] Bayer."[17] The

[16] Forecasting necessarily involves some speculation, and the further out projections are made, the more speculative they are.

[17] *Id.* at 16.

Board received Bayer's first offer three days later, on March 18, 2013.[18] At that point, the Board reconvened to consider soliciting competing offers, on March 20, 2013.[19] Therefore, the Board did not "halt" the sales process; it waited five days to solicit further bids, when it had an offer in hand. The Plaintiff has alleged nothing ominous in that decision, nor any "facts suggesting that [any] undisclosed information is inconsistent with, or otherwise significantly differs from, the disclosed information."[20] The disclosure that the Plaintiff advocates is inconsistent with the facts, and disclosure of the Board's "reasoning" during the period in question would not assist a stockholder considering tender. I find that the Plaintiff's second claim is not colorable.

Third, and finally, the Plaintiff argues that the Board failed to disclose why it decided not to contact certain companies during the sales process, and that this omission was material.[21] After Conceptus received an offer from Bayer, Goldman Sachs provided the Board with a list of five companies that would possibly be interested in Conceptus. The Board discussed the companies on the list. The 14D-9 disclosed that: "based in part upon conversations held with those healthcare companies by either management of the Company or representatives of Goldman . . . , *the Company Board concluded that the healthcare companies discussed would*

[18] *Id.*
[19] *Id.* at 16-17.
[20] *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000).
[21] Compl. ¶ 77.

generally not be interested in or able to pursue an acquisition of the Company . . . ."[22] Nonetheless, the Board requested that Goldman contact an additional healthcare company to see if it might be interested in making an offer for the Company.[23] Thus, the Board has already provided its reasons for not contacting the four of the five companies: based on the Conceptus's communications with those companies, the Board did not believe the companies would be interested in or financially able to pay for Conceptus. This disclosure is adequate. The Plaintiff wants to know what, in particular, the Board found defective about *each* potential bidder. That level of detail, an effective "play-by-play," is not required under Delaware law.[24] Furthermore, the Plaintiff has not alleged any facts which render the Board's summary discussion of this decision seem in any way problematic. On the contrary, the 14D-9 reflects the Board's willingness to engage with any bidder that came courting. Specifically, one of the four companies that the Board declined to reach out to later approached Conceptus during the auction and expressed interest in making a bid. Conceptus welcomed the company to join the sales process, but the company ultimately declined to make an offer. Taking all of the foregoing into account, I find that the Plaintiff's third disclosure claim

[22] Schedule 14D-9 at 17 (emphasis added).
[23] *Id.*
[24] *In re OPENLANE, Inc.*, 2011 WL 4599662, at *12 (Del. Ch. Sept. 30, 2011); *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 511-12 (Del Ch. Oct. 5, 2010).

likewise would not add to the total mix of information in a material way and is not colorable.

Because I find that the Plaintiff has failed to state a colorable claim, I determine that the costs associated with proceeding on an expedited basis are not justified here.[25] Therefore, the Plaintiff's Motion to Expedite is DENIED. IT IS SO ORDERED.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III

[25] *Giammargo*, 1997 WL 672698, at *2.