10-22-2007

Order Granting Defendant's Motion to Dismiss (LOU ANN MURPHY)

Alice D. Bonner
Superior Court of Fulton County

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

LOU ANN MURPHY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Plaintiffs, v. PHILIP M. PEAD, DAVID E. MCDOWELL, JOHN W. CLAY, JR., JOHN W. DANAHER, M.D., CRAIG MACNAB, C. CHRISTOPHER TROWER, JEFFREY W. UBBEN, AND PER-SE TECHNOLOGIES, INC., Defendants.	CIVIL ACTION FILE NO.: 2006CV125407

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

This case is before the Court on Defendants' Motion to Dismiss. After reviewing the briefs submitted by the parties on this issue, the record of the case, and the arguments presented by counsel during the oral argument held on October 9, 2007, this Court finds as follows:

FACTS:

Plaintiff filed her derivative complaint in November 2006, after the announcement of a proposed merger between Per-Se Technologies, Inc. ("Per-Se") and McKesson Corporation ("McKesson"). At the time of the merger, Plaintiff was a shareholder in Per-Se, which is a Delaware corporation. In her complaint, Plaintiff named Per-Se as a nominal Defendant and listed the seven individual directors of Per-Se: Phillip M. Pead, Chairman of the Board and CEO, David E. McDowell, manager and former CEO, John W. Clay, Jr., John W. Danaher, M.D., Craig MacNab, C. Christopher Trower, and Jeffrey W. Ubben (hereinafter collectively, the "Defendants").

In her complaint, Plaintiff alleges breaches of fiduciary duties on behalf of Per-Se Board of Directors. First, Plaintiff alleges that the inadequate price of the merger breached the Director Defendants' fiduciary duties of care, good faith, and fairness. Second, Plaintiff alleges that the proxy statement regarding the merger omitted material information and breached the Defendants' fiduciary duties of loyalty and disclosure. In addition, Plaintiff alleges that Defendants aided and abetted each other in breaching their fiduciary duties.

Per-Se provides financial and administrative healthcare solutions for hospitals, physicians and retail pharmacies. From 2005 through the time of the announced merger, Per-Se had been steadily increasing its revenue and share price from $15/share to $20/share. In January 2006, Per-Se acquired NBC Health and prepared to work with McKesson as a customer. According to Defendants, prior to the McKesson merger the Per-Se Board had been approached by other interested buyers, but had never approved due diligence to move forward or otherwise acted upon any proposal.

By September, 2006, the Per-Se Board learned of McKesson's interest in acquiring the company and on September 12, 2006, Per-Se was formally approached with an offer price of $27-28/share. This initial McKesson offer was rejected by the Per-Se Board as inadequate. McKesson, however, countered with a second offer on September 15, 2006, with a price range of $28-29/share. The second McKesson offer was subject to due diligence and required that Per-Se agree to an exclusive bidding (i.e., no auction) option. The Per-Se Board approved due diligence to go forward and granted McKesson's exclusive bidding option through October 31, 2006.

While the due diligence was being performed, the Per-Se Board met five times to discuss the McKesson negotiations. In addition, the Per-Se Board hired outside legal counsel and financial advisors. The Blackstone Group, as financial advisors, provided the Defendants with a

fairness opinion on the $28/share price offered by McKesson. Additionally, at the request of McKesson, the Per-Se Board approved an extension of the exclusive bidding option past October 31, 2006.

Prior to the Board's vote, Blackstone Financial submitted a fairness opinion endorsing the adequacy of the offer price at $28/share. On November 5, 2006, the Per-Se Board unanimously approved the merger at the price of $28/share and announced it the following day. Plaintiff filed her complaint on November 6, 2006.

The $28/share price was a 12% premium above the previous 20-day average of the stock and a 14.5% premium on the previous day's trading close price. The Per-Se stock, however reached a Nasdaq price high of $27.66 on November 3, 2006 (the day before the merger was accepted) and traded for $27.83 on December 21, 2006, after the announcement of the merger.

Per-Se filed its preliminary proxy statement with the Securities and Exchange Commission on December 11, 2006 and the final proxy statement on December 21, 2006. On January 24, 2007, the Per-Se Shareholders held a Special Meeting and approved the merger at $28/share by an approval of 99.9% of the voting shareholders. On January 26, 2007, the Per-Se/McKesson merger was consummated.

STANDARD:

A party seeking a motion to dismiss brought under OCGA § 9-11-12(b)(6) for failure to state a claim upon which relief can be granted must demonstrate that plaintiff's allegations in the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof. Common Cause/Georgia v. City of Atlanta, 279 Ga. 480, 481 (2005).

The internal affairs of a corporation, such as actions involving officers and directors, shall be regulated by the law of the state of incorporation. Diedrich v. Miller & Meier & Assoc., Architects & Planners, Inc., 254 Ga. 734, 735 (1985). Whether or not the director defendants breached their fiduciary duties to Plaintiff and other Per-Se shareholders shall be governed by Delaware law under the internal affairs doctrine.

COUNT II BREACH OF DUTY OF DISCLOSURE:

The threshold issue to be decided by this Court relates to disclosure. Because the Per-Se shareholders approved the Per-Se/McKesson merger by 99.9% on January 24, 2007, Defendants assert that the actions of the board were ratified. Smith v. Van Gorkom, 488 A.2d 858, 890 (Del. Supr., 1985); In re Wheelabrator Tech. Inc. Shareholders Litigation, 1990 WL 131351, *9 16 Del. J. Corp. L. 1653, 1668 (Del. Ch. 1990); Weiss v. Rockwell Intern. Corp., 1989 WL 80345, *3 (Del.Ch. 1989) (holding that "the effect of a valid shareholder ratification is to cure any defect in the ratified transaction"). Thus, Defendants argue that regardless of any alleged defects in the process by which the merger was approved by the Per-Se Board, the shareholder ratification cured any such defects and prevents Plaintiff's action from moving forward.

Plaintiff, however, states that only the vote of "fully informed shareholders" can ratify a board's actions. Smith v. Van Gorkom, 488 A.2d at 890. Plaintiff in Count Two of her complaint alleges breach of the duty of loyalty and disclosure for the statements and omissions in the Per-Se proxy statement, which was the basis of information for the shareholder vote. Specifically, Plaintiff challenges the proxy statement as deficient because it alluded to previous sale offers but included no details (*e.g.*, share price, buyer identity, etc.) of the proposed offers.

In the "Background of the Merger" section of the proxy statement, Per-Se stated: "In evaluating our prospects and growth opportunities, our board has also considered whether

the sale of Per-Se would be in the best interests of our stockholders. In addition, our board has considered on several occasions specific sale opportunities proposed by large, potential strategic acquirers. In each of these cases, we and the potential acquirer terminated discussions prior to the consummation of any transaction for a variety of reasons." Plaintiff asserts that the Per-Se Board's reference to such "sale opportunities" but failure to provide full information was a material omission in violation of the Board's fiduciary duty of disclosure.

Directors of a corporation owe its shareholders a duty of full disclosure with regard to proxy statements or any other disclosure made in "contemplation of shareholder action." Arnold v. Society for Savings Bancopr, Inc., 650 A.2d 1270, 1277 (Del. 1993), citing, Stroud v. Grave, 660 2. Ad. 75, 84-85 (Del, 1992); see also, Lynch v. Vickers Energy Corp., 383 A.2d 278 (Del. 1978) (holding that directors owe a fiduciary duty to shareholders which requires "complete candor" in fully disclosing all facts and circumstances surrounding the offer). To state a claim for breach of a director's fiduciary duty to disclose on the basis of omitted facts, a plaintiff must "plead facts identifying (1) material, (2) reasonably available, (3) information that, (4) was omitted from the proxy materials." Crescent/Mach I Partners, LP v. Turner, 846 A. 2d 963, 987 (Del. Ch. 2000).

Whether or not the omitted information is "material" is the essential inquiry. Arnold, 650 A.2d at 1277. Material information is that with a substantial likelihood that the undisclosed information would significantly alter the "total mix" of information already provided or if it would be important in formulating a shareholder vote. Skeen v. Jo-Ann Stores, Inc., 750 A.2d 1170, 1174 (Del. 2000); *see also*, Arnold v. Soc'y for Savings Bancopr, Inc., 650 A.2d 1270, 1277 (Del. 1993). Materiality is determined from the perspective of a reasonable shareholder. Crescent/Mach I Partners, L.P. v. Turner, 846 A.2d 963, 987 (Del. Ch. 2000).

While Defendants urge this Court to find such omissions immaterial as a matter of law, Plaintiff cautions the Court that such a determination is often a mixed question of law and fact not appropriate for determination at the motion to dismiss stage of litigation. Crescent/Mach I Partners, LP v. Turner, 846 A.2d 988 (declining to hold omissions immaterial as a matter of law and denying the motion to dismiss for failure to state a claim); see also, Khanna v. McMinn, 2006WL1388744 * 29 (Del. Ch. 2006) (cautioning that a materiality determination occurs infrequently at the motion to dismiss stage, but may occur when "no set of facts could be proved that would permit the plaintiffs to obtain relief under the allegations made...").

In Arnold, the Delaware Supreme Court held that the proxy statement was incomplete because it referred to earlier firm bids, but did not explain the proposed transactions. Arnold v. Soc'y for Savings Bancopr, Inc., 650 A.2d 1270. "We hold only that, once defendants traveled down the road of partial disclosure of the history leading up to the Merger and used the vague language described, they had an obligation provide the stockholders with an accurate, full and fair characterization of those historic events." Id. at 1280. In Arnold, the Bancorp Board disclosed an earlier offer from the buyer (the "May Offer"), why it was rejected and the details of the negotiations leading upon the proposed merger. The proxy statement did not disclose, among other facts, a contingent bid for a division of Bancorp (which was not being sold separately, but which received several individual bids to purchase) for $275 M made in conjunction with the May Offer. The Delaware Chancery Court found that the there was a substantial likelihood that such information would have significantly altered the "total mix" of voting information. Id. at 1281 ("The voting choice of a stockholder included the decision of whether it was better to remain a stockholder in a continuing Bancorp with FAC as an asset...or to be transformed into a stockholder in a new entity with Bancorp's asset/liability mix plus other assets and liabilities

combined as part of the surviving entity.").

In Arnold, the undisclosed material bid was a definitive offer tendered after due diligence and in connection with the company's publically-announced intention to analyze possible mergers. The undisclosed material bid in Arnold offered a premium (*i.e.*, higher price) for a division of the company and was contemporaneous (*i.e.*, in competition) with offers from the successful buyer.

In this case, Plaintiff complains of a single sentence contained in a three page description of the background of the merger which reads "our board has considered on several occasions specific sale opportunities proposed by large, potential, strategic acquirers." In her complaint, Plaintiff asserts merely that "the [identity of offerors and price/share offered]" would have certainly been material to Per-Se shareholders in determining whether to approve or reject the proposed merger with McKesson." Plaintiff, however, includes no facts that were omitted from the proxy statement, were material to the shareholder vote, and reasonably available for inclusion. See, Crescent/Mach I Partners, LP v. Turner, 846 A. 2d 963, 987 (Del. Ch. 2000). Plaintiff did not identify a single offeror, proposed transaction, or offer-price which should have, but had not, been disclosed to Per-Se shareholders in the proxy statement. Plaintiff identified no definitive, contemporaneous, or higher offers that the Directors failed to disclose, and Plaintiff failed to raise these concerns at a time when the Per-Se Directors could rectify the harm. Accordingly, Plaintiff failed to state a claim upon which relief can be granted regarding Defendants' duty to disclose. See, In re HCA Inc., 2006 WL 3480273, *6-9 (Del.Ch. 2006); Khanna v. McMinn, 2006WL1388744 * 36-37 (Del. Ch. 2006.

Therefore, in accordance with the above-stated reasons, this Court hereby **GRANTS** Defendants' Motion to Dismiss Count II.

COUNT I BREACH OF DUTIES OF CARE AND LOYALTY:

Because this Court dismissed Plaintiff's challenges to the disclosures in the proxy statement, the 99.9% approving shareholder vote ratified any alleged-wrong doing by Defendants in Count I for breach of fiduciary duties of care and loyalty. "A merger can be sustained, notwithstanding the infirmity of the board's action, if its approval by majority vote of the stockholders is found to have been based on an informed electorate." In re Wheelabrator Tech., Inc. Shareholders Litigation, 1990 WL 131351, *8 (Del. Ch. Sept. 6, 1990); see also Weiss v. Rockwell Intl'l Corp., 1989 Del. Ch. Lexis 94, at *8 (Del. Ch. July 19, 1989).

In Count I, Plaintiff complains of an inadequate offer price citing prior share prices and revenue trends of Per-Se and of inadequate process citing the failure to auction the company. A breach of fiduciary duty analysis in the context of a merger "begins with the rebuttable presumption that a board of directors acted with loyalty and care." Crescent/Mach I Partners, LP v. Turner, 846 A.2d 963, 979 (Del. Ch. 2000). In order to rebut this presumption, a plaintiff must "allege facts, which, if accepted as true, establish that the board was either interested in the outcome of the transaction or lacked the independence to consider objectively whether the transaction was in the best interest of its company and all of its shareholders." Orman v. Cullman, 794 A.2d 5, 22 (Del. Ch. 2002).

Plaintiff alleges in her complaint that the merger was an "attempt by the Director Defendants to aggrandize or, at a minimum to maintain their personal and financial positions and interests through continued management position, and to enrich themselves to the detriment of the public stockholders of the Company. Defendants did not exercise independent business judgment..." Plaintiff's complaint, however, contains no other factual allegations to challenge the independence of the Director Defendants. In addition, the complaint states that the proxy

statement disclosed "the substantial financial incentives that Director Defendants personally had for accepting and soliciting shareholder approval of the acquisition proposal, regardless of the adequacy of the consideration given to shareholders." Plaintiff, however, claims no defect in the disclosures made in the proxy statement with regard to the Per-Se Directors' interests in the transaction.

Plaintiff alleges no factual basis to challenge the independence of the Director Defendants sufficient to overcome the business judgment rule. In addition, Plaintiff levies no challenge to the proxy statement disclosures regarding directors' interests, thus the shareholder vote on January 24, 2007 ratified not only the merger, but also the process. For the foregoing reasons, this Court hereby **GRANTS** Defendants' Motion to Dismiss Count I.

COUNT III AIDING AND ABETTING BREACH OF FIDUCIARY DUTIES:

Plaintiff failed to respond to Defendants' Motion to Dismiss Count III Aiding and Abetting Breach of Fiduciary Duty or argue this count before the Court. In an abundance of caution, however, this Court will address Plaintiff's third and final count.

Plaintiff alleges in her complaint that Defendants violated fiduciary duties owed to Per-Se shareholders and have "aided and abetted each other in unanimously accepting Buyer's proposal for an unfair and inadequate price, and in failing to take necessary steps to ensure that shareholders received the maximum value realizable for their shares." In order to state a claim for aiding and abetting a breach of a fiduciary duty, Plaintiff must allege "(1) the existence of a fiduciary relationship, (2) the fiduciary breached its duty, (3) a defendant, who is not a fiduciary, knowingly participated in a breach, and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and non-fiduciary." Gotham Partners, L.P. v. Hallwood Realty Partners, L.P., 817 A.2d 160, 172 (Del. 2002), citing, Fitzgerald v. Cantor, 1999 Del. Ch. Lexis 52, at *1

(Del. Ch. 1999).

Plaintiff's claim of aiding and abetting fails for two reasons. First, in this Order the Court dismissed both of Plaintiff's claims of breach of fiduciary duty, thus there is no underlying breach upon which to assert a claim of aiding and abetting. Second, all of the Defendants were Per-Se Directors, and therefore, fiduciaries during the time period in question. Thus, Plaintiff failed to properly plead the third prong of an aiding and abetting claim.

Accordingly, for the reasons stated above, this Court hereby **GRANTS** Defendants' Motion to Dismiss Count III.

Having disposed of all of Plaintiff's claims in this Order, this case is hereby **DISMISSED with PREJUDICE.**

SO ORDERED this 22 day of Oct., 2007.

Alice D. Bonner

ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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