

8-12-2011

Order on Motion to Expedite Proceedings (KRAMER)

John Goger
Superior Court of Fulton County

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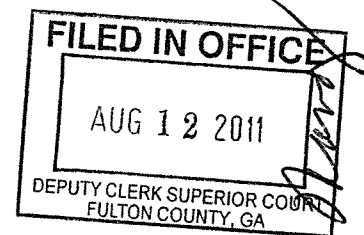
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**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**



**HILARY KRAMER, on Behalf of Herself)
and All Others Similarly Situated,)**

Plaintiff,)

v.)

Civil Action File No.

2011CV203124

**IMMUCOR, INC., JOSEPH E. ROSEN,)
JOSHUA H. LEVINE, JAMES F.)
CLOUSER, PAUL V. HOLLAND,)
RONNY B. LANCASTER, PAUL D.)
MINTZ, G. MASON MORFIT, CHRIS E.)
PERKINS, TPG CAPITAL, TPG)
PARTNERS VI, L.P., IVD HOLDINGS)
INC., and IVD ACQUISITION)
CORPORATION,)**

Defendants.)

ORDER ON MOTION TO EXPEDITE PROCEEDINGS

Plaintiff's Motion For Expedited Discovery, Expedited Proceedings and Scheduling of a Hearing on Plaintiff's Motion for a Preliminary Injunction ("Motion to Expedite Proceedings") came before this Court for a telephonic hearing on August 10, 2011. Upon consideration of the motion, the briefs submitted on the motion, and the oral arguments presented by counsel, the Court finds as follows:

On July 2, 2011, Immucor, Inc. ("Immucor") announced that it had entered into a definitive agreement (the "Merger Agreement") to be acquired by TPG Capital, L.P. ("TPG") in a transaction valued at \$1.973 billion (the "Transaction"). Pursuant to the Merger Agreement, an affiliate of TPG, IVD Holdings, Inc. ("IVD Holdings") and IVD Acquisition Corporation ("IVD Acquisition," and together with IVD Holdings, "IVD"), would commence a tender offer (the

“Tender Offer”) to purchase all outstanding shares of Immucor’s common stock for \$27.00 per share. Following the Tender Offer, IVD will then acquire any Immucor shares not purchased in the Tender Offer through a merger.


On July 12, 2011, Plaintiff filed a complaint, commencing a putative class action on behalf of Immucor’s public shareholders against Immucor’s Board of Directors, Immucor, TPG and IVD. On July 19 and 25, 2011, Larry Macintyre and Irene Dixon filed related class action complaints commencing Civil Action File Numbers 2011CV203397 and 2011CV203567, respectively. Plaintiffs moved to consolidate these matters pursuant to Plaintiffs’ Amended Motion to Consolidate Related Cases and Appoint Plaintiffs’ Co-Lead Counsel. On July 28, 2011, Plaintiff filed her Verified Amended Class Action Complaint alleging that Immucor’s Board of Directors breached their fiduciary duties by, among other things, structuring the Transaction to benefit insiders and failing to ensure that all material information was disclosed to Immucor’s shareholders in Immucor’s Schedule 14-D-9 filed in connection with the Transaction. Plaintiff alleges that TPG and IVD aided and abetted these purported breaches of fiduciary duty.

On July 29, 2011, Plaintiff filed the instant Motion to Expedite Proceedings requesting that Plaintiff be permitted to commence merits discovery for good cause pursuant to O.C.G.A. § 9-11-23(f)(2) and that discovery be had on an expedited basis. On August 10, 2011, TPG Defendants’ filed a Motion to Dismiss Count II of Plaintiffs’ Complaints.

On August 10, 2011, the Honorable Elizabeth E. Long issued a ruling on a motion to expedite discovery in In re Radiant Systems, Inc. S’holder Litig., Civil Action No. 2011CV203228, a purported shareholder class action arising out of a merger substantially similar to the one at issue here. (See Order dated August 10, 2011, attached hereto as Exhibit A). For

the reasons set forth in Exhibit A, which the Court expressly adopts and incorporates herein by reference, Plaintiff's Motion to Expedite Proceedings is DENIED.

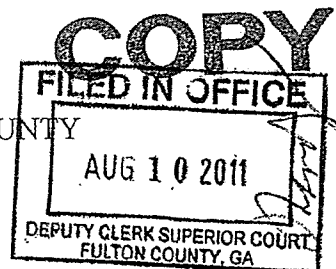
SO ORDERED this 11 day of August, 2011.



JOHN J. GOGER, JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

EXHIBIT A

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



IN RE RADIANT SYSTEMS, INC.)

SHAREHOLDER LITIGATION)

CIVIL ACTION NO. 2011-CV-203228

[Related to Civil Action Nos.
2011-CV-203297 & 2011-CV-203324]

ORDER

Plaintiffs' Emergency Motion Pursuant to Georgia Uniform Superior Court Rule 7.1 to Expedite Proceedings ("Motion to Expedite Proceedings") came before this Court for a hearing on August 5, 2011. After consideration of the arguments by counsel at the hearing, together with the briefs and other materials submitted into the record, the Court finds as follows:

I. BACKGROUND

On July 11, 2011, Defendants Radiant Systems, Inc. ("Radiant") and NCR Corporation ("NCR") announced that the companies had entered into a definitive agreement and plan of merger (the "Merger Agreement"). Pursuant to the Merger Agreement, NCR's wholly owned subsidiary would commence a tender offer (the "Tender Offer") to purchase all outstanding shares of Radiant common stock for approximately \$1.2 billion in cash, or \$28.00 per share (the "Proposed Transaction"). Verified Amended Class Action Complaint (the "Amended Complaint") ¶ 1. The Merger Agreement provides that following completion of the Tender Offer, the purchaser will be merged into Radiant (the "Merger"). See July 25, 2011 Schedule 14D-9, attached as Exhibit C to the Radiant Defendants' Opposition to Plaintiffs' Motion to Expedite Proceedings (Schedule 14D-9), at p. 32.

On July 14th, 15th and 18th, respectively, Plaintiffs Jay Phelps, City of Worcester Retirement System, and Oakland County Employees' Retirement System filed three purported class action complaints against Defendants Radiant, NCR and its wholly owned subsidiary, and Radiant's Board of Directors (the "Individual Defendants," together with Radiant, the "Radiant Defendants."). On July 29, 2011, the Court entered a Consolidation Order pursuant to Plaintiffs' Unopposed Motion to Consolidate Cases, to Appoint Lead Representative Plaintiffs, and to Appoint a Lead Counsel Structure. On July 27, 2011, Plaintiffs filed their Amended Complaint alleging that the Individual Defendants breached their fiduciary duties, by, among other things, failing to obtain adequate value for Radiant's common stock, engaging in a flawed process that favored NCR over other bidders and Radiant management to the detriment of Radiant shareholders, and by failing to disclose certain information in the Radiant Defendants' Schedule 14D-9 filing made in connection with the Proposed Transaction. Amended Complaint, ¶¶ 3, 5, 7, 63, 68. Plaintiffs allege that NCR and Radiant aided and abetted these purported breaches of fiduciary duty. *Id.*, ¶ 100.

In the Amended Complaint, Plaintiffs "seek to enjoin the sale of the Company, or to rescind the Proposed Transaction in the event of its consummation" (*Id.*, ¶ 8), and demand judgment "[e]njoining, preliminarily and permanently, defendants from taking any steps to consummate the Proposed Transaction...." (*Id.*, Prayer for Relief, ¶ B).

On July 18, 2011, Plaintiffs served written requests for production of documents on the Radiant Defendants and its investment bankers.

On July 27, 2011, Plaintiffs filed the Motion to Expedite Proceedings, with a supporting memorandum of law, requesting that (i) Plaintiffs be permitted to commence immediately merits discovery for good cause pursuant to O.C.G.A. § 9-11-23(f)(2); and (ii) that discovery be had on

an expedited basis. Defendants opposed Plaintiffs' Motion to Expedite Proceedings in memoranda of law filed on August 2, 2011.

On August 2, 2011, the NCR Defendants filed a Motion to Dismiss, with a supporting memorandum of law. On August 4, 2011, the Radiant Defendants filed a Motion to Dismiss, with a supporting memorandum of law.

The Court heard oral argument on Plaintiffs' Motion to Expedite Proceedings on August 5, 2011.

II. DISCUSSION

If the Proposed Transaction is consummated, holders of Radiant shares immediately prior to the effective time of the Merger may be entitled to dissent from the Merger and obtain payment for the fair value of their shares pursuant to O.C.G.A. § 14-2-1302(a) (the "Appraisal Remedy"). Schedule 14D-9, p. 32. ("Holders of Shares will not have dissenters' rights in connection with the Offer. However, if Parent purchases Shares in the Offer and a subsequent merger (including a short-form merger) involving the Company is consummated, holders of Shares immediately prior to the effective time of such merger may have the right pursuant to the provisions of Section 14-2-1302 of the GBCC to demand appraisal of their Shares."). Where the Appraisal Remedy is available, the Appraisal Remedy is the sole and exclusive remedy for a shareholder entitled to dissent. *See* O.C.G.A. § 14-2-1302(b); Comment, Note to 1989 Amendment (providing appraisal is the exclusive remedy); *Grace Bros., Ltd. v. Farley Indus., Inc.*, 264 Ga. 817 (1994) (holding same).

A shareholder afforded the Appraisal Remedy may not assert claims for breach of fiduciary duty challenging the corporate action creating his or her entitlement, except in certain

limited circumstances which are not applicable here.¹ *See also Lewis v. Turner Broad. Sys., Inc.*, 232 Ga. App. 831 (1998) (“To hold otherwise would encourage future dissenting shareholders to circumvent the statutory appraisal process to skirt the risk of receiving a lower price or having costs assessed.”). Accordingly, because the Appraisal Remedy is the exclusive Georgia remedy and Plaintiffs have an adequate remedy at law, Plaintiffs have neither shown irreparable injury nor a colorable claim or likelihood of success thereon, and thus have not shown adequate grounds to obtain expedited discovery.

Under O.C.G.A. § 9-11-23(f)(2), when a putative class action is filed, “[e]xcept for good cause shown, the court shall stay all discovery directed solely to the merits of the claims or defenses in the action until the Court has issued its written decision regarding certification of the class.” Plaintiffs have not filed a motion for class certification (but did make an oral motion at the hearing to certify the class defined in the Amended Complaint), nor has the Court issued a written decision regarding certification of the class. Thus, pursuant to O.C.G.A. § 9-11-23(f)(2), the Court must stay all merits discovery unless Plaintiffs have shown “good cause” otherwise. The facts and circumstances presented by this case do not demonstrate good cause to lift the discovery stay required under O.C.G.A. § 9-11-23(f)(2).

Finally, under O.C.G.A. § 9-11-12(j), the filing of a motion to dismiss for failure to state a claim stays all discovery for ninety days or until the motion to dismiss is ruled upon. Defendants have filed motions to dismiss, thus triggering the mandatory discovery stay of O.C.G.A. § 9-11-12(j) until they are ruled upon, including the discovery that is the subject of

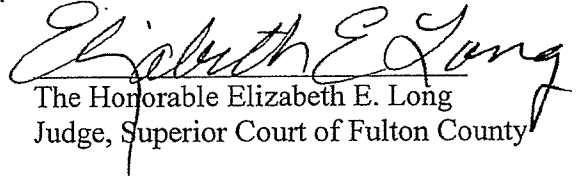
¹ The statute does provide for limited exceptions to the exclusivity of the remedy of appraisal – where “the corporate action fails to comply with procedural requirements of this chapter or the articles of incorporation or bylaws of the corporation or the vote required to obtain approval of the corporate actions was obtained by fraudulent and deceptive means, regardless of whether the shareholder has exercised dissenter’s rights.” O.C.G.A. § 14-2-1302(b). However, Plaintiffs’ Amended Complaint does not allege that any of those exceptions are applicable.

Plaintiffs' Motion to Expedite Proceedings. The facts and circumstances of this litigation do not warrant relief from the discovery stay imposed by O.C.G.A. § 9-11-12(j).

III. CONCLUSION

Plaintiffs' Motion to Expedite Proceedings is denied.

So ORDERED this 10th day of August, 2011.


The Honorable Elizabeth E. Long
Judge, Superior Court of Fulton County

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(Civil Action File Nos. 2011CV203228, 2011CV203297, 2011CV20334)

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