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8-25-2011

Order on Motion To Dismiss and Motion for Expedited Discovery (SHAEV)

Alice D. Bonner  
*Superior Court of FULTON County*

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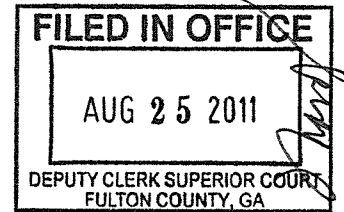
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IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA



VICTORIA SHAEV, on behalf of herself and )  
all others similarly situated, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
EMS TECHNOLOGIES, INC., HONEYWELL )  
INTERNATIONAL INC., EGRET )  
ACQUISITION CORP., JOHN B. MOWELL, )  
JOHN R. BOLTON, HERMANN BUERGER, )  
JOSEPH D. BURNS, JOHN R. KREICK, )  
NEILSON A. MACKAY, THOMAS W. )  
O'CONNELL, BRADFORD W. PARKINSON, )  
GARY B. SHELL, NORMAN E. THAGARD, )  
and JOHN L. WOODWARD, JR., )  
 )  
Defendants. )

**COPY**

Civil Action No. 2011CV203036

**ORDER**

This matter came before the Court on August 15, 2011 for a hearing on: (1) the EMS Defendants' Motion to Dismiss Plaintiff's Complaint; (2) the Motion to Dismiss of Defendants Honeywell International Inc. and Egret Acquisition Corp. (together, the "Motions to Dismiss"); and (3) Plaintiff's Motion for Expedited Discovery. 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 June 13, 2011, Defendants EMS Technologies, Inc. ("EMS") and Honeywell International Inc. ("Honeywell") announced that the companies had entered into a definitive

agreement and plan of merger (the “Merger Agreement”). Pursuant to the Merger Agreement, Honeywell’s wholly owned subsidiary Egret Acquisition Corp. (“Egret”) would commence a tender offer (the “Tender Offer”) to purchase all outstanding shares of EMS common stock for \$33.00 per share, to be followed, subject to the satisfaction of certain prerequisites set forth in the Merger Agreement, by a second-step merger of Egret into EMS, with EMS as the surviving corporation and a direct or indirect wholly-owned subsidiary of Honeywell (the “Merger”) (together, the Tender Offer and the Merger are referenced herein as the “Proposed Transaction”). Complaint, ¶¶ 60, 61.

On July 8, 2011, Plaintiff Victoria Shaev filed a purported class action complaint against EMS, certain of EMS’s officers and members of its Board of Directors (the “Individual Defendants,” and together with EMS, the “EMS Defendants”), Honeywell, and Egret (together, the “Honeywell Defendants”). Plaintiff alleges that the Individual Defendants breached their fiduciary duties, by, among other things, failing to obtain adequate value for EMS’s common stock, engaging in a flawed process that favored Honeywell over other bidders and EMS management to the detriment of EMS shareholders, and failing to disclose certain material information to EMS’s shareholders. . Complaint, ¶¶ 2, 37, 75-78, 89-93, 95-98. Plaintiff alleges that EMS, Honeywell, and Egret aided and abetted the alleged breaches of fiduciary duty. *Id.* ¶¶ 100-102. Plaintiff seeks “preliminary and permanent injunctive relief and declaratory relief,” *Id.* ¶ 85, and demands judgment “enjoining defendants from effectuating the Proposed Transaction” and “[d]eclaring the Proposed Transaction void and ordering rescission if those transactions are consummated.” *Id.* Prayer for Relief, ¶¶ B, C. Plaintiff also seeks damages. *Id.* Prayer for Relief, ¶ E.

## II. DISCUSSION

Upon consummation of the Proposed Transaction, holders of EMS shares immediately prior to the effective time of the Merger are 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”). *See* Honeywell’s Schedule TO filed June 27, 2011, with the SEC, at 51.<sup>1</sup> Where the Appraisal Remedy is available, the Appraisal Remedy is the sole and exclusive remedy for a shareholder entitled to dissent. O.C.G.A. § 14-2-1302(b); Comment, Note to 1989 Amendment (providing appraisal is the exclusive remedy); *accord Grace Bros., Ltd. v. Farley Indus., Inc.*, 264 Ga. 817 (1994) (holding same); *In re Radiant Systems, Inc. S’holder Litig.*, No. 2011-CV-203228, slip op. (Fulton Cnty. Super. Ct. Bus. Case Div. Aug. 10, 2011) (Long, J.) (holding same); *Kramer v. Immucor, Inc.*, No. 2011-CV-203124, slip op. (Fulton Cnty. Super. Ct. Bus. Case Div. Aug. 12, 2011) (Goger, J.) (expressly adopting and incorporating Judge Long’s Order in *Radiant*); *In re Scientific-Atlanta, Inc. S’holder Litig.*, Civil Action No. 2005-CV-109014, slip op. (Fulton Cnty. Super. Ct. Jan. 25, 2006) (Schwall, J.) (holding same); *Simon v. Georgia-Pacific Corp.*, Civil Action No. 2005-CV-108796, slip op. (Fulton Cnty. Super. Ct. Dec. 5, 2005) (Baxter, J.) (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

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<sup>1</sup> On a motion to dismiss under Rule 12(b)(6), a court may rely not only on the allegations in the complaint, but also those documents incorporated by reference in the complaint. *See Stendahl v. Cobb Cnty.*, 284 Ga. 525, 526 n.2 (2008). The Court also may consider the contents of documents that were “legally required by and publicly filed with the SEC.” *See In re JDN Realty Corp. Sec. Litig.*, 182 F. Supp. 2d 1230, 1239 (N.D. Ga. 2002).

limited circumstances which are not applicable here.<sup>2</sup> See *Lewis v. Turner Broad. Sys., Inc.*, 232 Ga. App. 831, 833 (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.”). The Tender Offer here is structured so it will not be consummated unless conditions for the Merger are satisfied, which will give EMS shareholders access to the Appraisal Remedy. Georgia law does not provide a separate and independent remedy for disclosure claims where appraisal is available and the exceptions in O.C.G.A. § 14-2-1302(b) do not apply. Because the Appraisal Remedy is the exclusive Georgia remedy, Plaintiff’s breach of fiduciary duty claims must be dismissed.

Plaintiff also fails to state a claim against EMS and the Honeywell Defendants for aiding and abetting breaches of fiduciary duty. Under Georgia law, a claim for aiding and abetting a breach of fiduciary duty requires a plaintiff to establish the following elements:

(1) through improper action or wrongful conduct and without privilege, the defendant acted to procure a breach of the primary wrongdoer’s fiduciary duty to the plaintiff; (2) with knowledge that the primary wrongdoer owed the plaintiff a fiduciary duty, the defendant acted purposely and with malice and the intent to injure; (3) the defendant’s wrongful conduct procured a breach of the primary wrongdoer’s fiduciary duty; and (4) the defendant’s tortious conduct proximately caused damage to the plaintiff.

*Insight Tech., Inc. v. FreightCheck, LLC*, 280 Ga. App. 19, 25–26 (2006) (footnotes omitted).

First, because the Court concludes that Plaintiff has not alleged an actionable breach of fiduciary duty by the Individual Defendants, there can be no claim against EMS or the

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<sup>2</sup> The statute provides 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 action 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). Plaintiff does not allege that any of those exceptions are applicable.

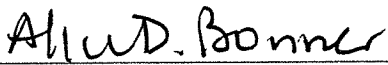
Honeywell Defendants for aiding and abetting a breach of fiduciary duty. *See, e.g., Gordon Document Prods., Inc. v. Serv. Techs., Inc.*, 308 Ga. App. 445, 454 (2011). Second, Plaintiff has not alleged that either EMS or the Honeywell Defendants maliciously engaged in wrongful conduct,<sup>3</sup> without privilege, to procure an actionable breach of fiduciary duty. *See, e.g., Massey v. Perkerson*, 129 Ga. App. 895, 896 (1973) (dismissing complaint where facts alleged show that plaintiff cannot recover).

Plaintiff's claims for aiding and abetting breaches of fiduciary duty against the Honeywell Defendants and EMS thus fail as a matter of law.

### III. CONCLUSION

For the foregoing reasons, Defendants' Motions to Dismiss are granted and Plaintiff's Motion for Expedited Discovery is denied as moot. Plaintiff's claims are hereby dismissed with prejudice with costs taxed against the Plaintiff.

SO ORDERED this 25 day of August, 2011.

  
The Honorable Alice D. Bonner  
Judge, Superior Court of Fulton County,  
Business Case Division

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<sup>3</sup> “[W]rongful” conduct “generally involves predatory tactics such as physical violence, fraud or misrepresentation, defamation, use of confidential information, abusive civil suits, and unwarranted criminal prosecutions.” *Disaster Servs., Inc. v. ERC P’ship*, 228 Ga. App. 739, 741–42 (1997) (citation and brackets omitted), *quoted in Gordon Document Prods.*, 308 Ga. App. at 449.

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