KRAMER v. WESTERN PACIFIC INDUSTRIES, INC.

No. 8675

Court of Chancery of the State of Delaware, New Castle

September 11, 1987

Plaintiff brought a class action and/or derivative action suit to challenge the conduct of defendant and two officers of the corporation as to a merger which cashed out all the stockholders. Defendants moved for a summary judgment on the basis that plaintiff lacked standing to pursue the case because he ceased to be a stockholder upon effectuation of the merger.

The court of chancery, per Vice-Chancellor Hartnett, granted the summary judgment because plaintiff failed to attack the fairness of the merger and is no longer a stockholder of the corporation without standing to pursue purely stockholder derivative claims.

1. Corporations ⟹ 202

When plaintiff fails to challenge the fairness of a merger, the plaintiff is without standing to pursue a patently stockholder derivative claim.

2. Judgment ⟹ 181(2)

A controversy is ripe for disposition through summary judgment when the record demonstrates that there exists no genuine issue as to any material fact necessary for adjudication.

3. Corporations ⟹ 202

In order to be permitted to maintain a stockholder derivative suit, a plaintiff must be a stockholder at the time of the filing of the suit and must remain a stockholder throughout the litigation.

4. Corporations ⟹ 202

To determine whether a complaint states a derivative or an individual cause of action, we must look to the nature of the wrongs

alleged in the body of the complaint, not to the plaintiff's designation or stated intention.

5. Corporations ⟹ 202

For a plaintiff to attack the validity of allegedly excessive termination stock payments, the alleged breach must go directly to the fairness of the merger and plaintiff must be directly attacking the merger.

6. Corporations ⟹ 320(1), 207

A plaintiff wishing to challenge the validity of fees paid in conjunction with a cash-out merger must do so through the filing of a derivative suit, but such plaintiff does not have standing to engage in such a challenge where plaintiff is no longer a stockholder of the corporation.

7. Corporations ⟹ 207

A plaintiff wishing to challenge the granting of certain stock options by filing a derivative suit must be a stockholder of the corporation to file such suit.

Pamela S. Tikellis, Esquire, of Biggs & Battaglia, Wilmington, Delaware; of counsel, Silverman & Harnes, New York, New York, for plaintiff.

David A. Drexler, Esquire, and Kenneth J. Nachbar, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, for defendant.

HARTNETT, *Vice-Chancellor*

Defendants originally filed this motion as a "Motion To Dismiss pursuant to Chancery Court Rule 12(b)(6)". That rule, however, relates to a Motion For Summary Judgment. Plaintiff, in responding to defendants' motion to dismiss, produced certain materials, including at least one affidavit, which thereby converted the motion to dismiss into a motion for summary judgment pursuant to Chancery Court Rule 12(b)(6). See *Lineberger v. Welsh*, Del. Ch., 290 A.2d 847 (1972).

This action was commenced as a purported "class action and/or derivative action suit". Plaintiff challenges the conduct of the defendants as to a merger which cashed out all the stockholders and became effective on December 31, 1986. Defendants have moved for summary judgment on the grounds that plaintiff lacks standing to pursue the case because he ceased to be a stockholder upon effectuation of the merger. I find that it is undisputed that plaintiff is no longer a stockholder of Western Pacific Industries, Inc., ("Western Pacific") and therefore does not have standing to pursue what are purely stockholder derivative claims. Defendants' Motion For Summary Judgment must therefore be granted.

I

This action challenges the acquisition of the outstanding shares of stock of Western Pacific by means of a joint tender offer by Danaher Corporation and Western Pacific. The tender offerors sought all the shares of Western Pacific's common stock and the offer was concluded by a cash out merger consummated on December 31, 1986. Prior to the Danaher offer, numerous other potential purchasers had expressed an interest in acquiring Western Pacific. As a result of the offers from other parties a bidding war erupted, with Danaher emerging as the highest bidder, thereby paving the way for the cash out merger.

Plaintiff commenced this action on October 10, 1986, shortly before the tender offer was consummated, purportedly on behalf of all Western Pacific common stockholders, except Messrs. Newman and Scott, who were officers of Western Pacific and who were named as defendants. The crux of plaintiff's complaint is that the activities of Messrs. Newman and Scott, by granting to themselves certain stock options, termination bonuses and excessive fees, gave rise to individual and stockholder derivative claims of the plaintiff and all other stockholders similarly situated. While plaintiff has challenged the propriety of the payments received by defendants Newman and Scott as a result of the cash out merger, he has not challenged the fairness of the underlying merger itself. Likewise, plaintiff failed to prevail earlier in this litigation when he sought to enjoin the proposed Danaher acquisition. See *Kramer v. Western Pacific Industries, Inc., et al.*, C.A. No. 8675-NC, Hartnett, V.C. (Nov. 7, 1986).

[1] Well-settled Delaware case law clearly indicates that, as a result of the cash out merger and plaintiff's failure to challenge the

fairness of the underlying merger itself, the plaintiff is without standing to pursue his patently stockholder derivative claims.

II

[2] From a review of the record in this case it is clear that the controversy is ripe for disposition through summary judgment because the record demonstrates that there exists no genuine issue as to any material fact necessary for adjudication. *Nash, et ux. v. Connell, et. al.*, Del. Ch., 99 A.2d 242 (1953); Chancery Court Rules, Rule 56.

III

[3-4] In order to be permitted to maintain a stockholder derivative suit, a plaintiff must be a stockholder at the time of the filing of the suit and must remain a stockholder throughout the litigation. *Lewis v. Anderson*, Del. Supr., 477 A.2d 1040 (1981). As was recently held in *Lipton v. News International, PLC*, Del. Supr., 514 A.2d 1075, 1078 (1986), "To determine whether a complaint states a derivative or an individual cause of action, we must look to the nature of the wrongs alleged in the body of the complaint, not to the plaintiff's designation or stated intention."

IV

The ruling in *Lewis v. Anderson*, supra, as recently restated in *Penn Mart Realty Co. v. Ronald O. Perelman, et al.*, C.A. No. 8349-NC, Hartnett, V.C., (April 15, 1987), clearly mandates the granting of defendants' motion for summary judgment. In fact, plaintiff's allegations are virtually identical to those advanced in *Penn Mart*.

Plaintiff herein challenges the termination bonuses (also called "golden parachutes") awarded to defendants Newman and Scott in much the same way the *Penn Mart*, plaintiffs did. The Delaware Supreme Court in *Lewis* held that the plaintiff in that suit could no longer challenge similar payments as he had lost his standing to bring a stockholder derivative suit. In deciding that the plaintiff lost his standing the Delaware Supreme Court stated:

> "[p]laintiff's derivative claim against the individual defendants of Old Conoco was a property right of Old Conoco . . . . Nor is there any dispute that upon Old Conoco's

> merger into DuPont Holdings, Old Conoco's assets and liabilities, in general passed under §259(a) to, and became vested in, the surviving corporation, DuPont Holdings or New Conoco." (Citations omitted.)

Lewis, supra, 477 A.2d 1044. The parallels between *Lewis* and the case at bar are virtually undistinguishable. Here, as in *Lewis*, any claim based on the allegedly excessive termination bonuses is a claim for a waste of corporate assets, which in turn may only be asserted derivatively by a stockholder. Plaintiff, however, is no longer a stockholder because of the cash out merger and therefore lacks standing to pursue his claim. Cf., *Rosen v. Navarre*, C.A. No. 7098-NC, Hartnett, V.C. (Oct. 29, 1985).

Plaintiff attempts to overcome this bar to his standing to maintain this suit by citing a recent decision, *CEDE & Co., et al., v. Technicolor, Inc., et al.*, C.A. No. 8358-NC, Allen, C., (Jan. 13, 1987). That case, however, is distinguishable from the present case. In *CEDE*, the plaintiff, although cashed out as a stockholder by a merger, chose to pursue its appraisal rights pursuant to 8 *Del. C.* §262. After electing to proceed in this manner however, the plaintiff discovered previously unknown evidence of a breach of the fiduciary duty allegedly owed to it resulting from the merger transaction. The Chancellor therefore gave the plaintiff the option to pursue an action seeking rescission of the merger, in lieu of an appraisal action.

[5] In *Bershad v. Hartz, et al.*, C.A. No. 6960-NC, Berger, V.C. (Jan. 29, 1987), this court specifically held that a plaintiff, even a plaintiff who had lost his stockholder status by being merged out, may attack the validity of allegedly excessive termination payments, provided that the plaintiff concomitantly challenges the fairness of the merger. "For it [the plaintiff] to do so, however, the alleged breach must go directly to the fairness of the merger and plaintiff must be directly attacking the merger." *Bershad*, citing *Abelow v. Symonds*, Del. Ch., 156 A.2d 416 (1959); *Lewis*, supra. See also *Rabkin v. Phillip A. Hunt Chemical Co.*, C.A. No. 7547-NC, Berger, V.C. (Dec. 4, 1986); *Penn Mart*, supra.

In the present case plaintiff has not attacked the fairness of the merger and, therefore, is foreclosed from prosecuting his claims under the doctrine set forth in *Lewis* and its progeny. And significantly, plaintiff has not asserted that either of the two exceptions set forth in *Lewis* applies in the present case. See *Lewis*, supra, at p. 1046.

V

[6] Plaintiff also claims that excessive fees were paid in conjunction with the merger which operated to deny him and the other stockholders the full financial benefits of the transaction. Once again, prior holdings of this court preclude plaintiff's continual maintenance of this suit as to this claim. In *Bokat v. Getty Oil Co.*, Del. Supr., 262 A.2d 246, 249 (1970), the Delaware Supreme Court stated that "Mismanagement which depresses the value of stock is a wrong to the corporation, i.e., the stockholders collectively, to be enforced by a derivative action." This is precisely plaintiff's claim. A claim that excessive fees, options and bonuses operated to depress the value of the stock of the corporation resulting in a loss in value to the stockholders is merely a claim for the waste of corporate assets—a purely stockholder derivative claim.

VI

[7] Plaintiff finally challenges the granting of certain stock options to defendants Newman and Scott, once again asserting that such options operated to devalue the stockholders' interest in the corporation. These claims virtually mirror the challenges to the termination bonuses and stock options discussed above and must, for the same reasons, be deemed to be derivative in nature and cannot be asserted absent a direct attack on the fairness of the merger.

The holding of the Delaware Supreme Court in *Lewis*, supra, as recently reiterated by this Court in *Penn Mart*, supra, requires the granting of defendants' Motion for Summary Judgment because all the claims advanced by plaintiff are derivative in nature and, as a result of the cash out merger, plaintiff lacks standing to pursue them. The defendants' Motion for Summary Judgment is therefore granted. IT IS SO ORDERED.

LEWIS v. HONEYWELL INC.

No. 8651

Court of Chancery of the State of Delaware, New Castle

July 28, 1987

Plaintiff, a minority stockholder claiming on behalf of a stockholder class, filed a complaint for damages alleging that defendant corporation and its individual directors wrongfully rejected a cash offer for all of corporation's stock. Defendants moved to dismiss the complaint for failure to state an actionable claim.

The court of chancery, per Vice-Chancellor Jacobs, granted the motion, holding that, while a claim that corporate directors made an uninformed business judgment as to whether or not to accept a cash offer for all of the corporation's common stock or to negotiate the transaction on different terms stated a cognizable legal theory which, if properly alleged, would overcome a motion to dismiss, the complaint failed to allege sufficient nonconclusory facts that would support the aforementioned claim, and therefore was legally deficient and warranted dismissal.

1. Pleading ⟹ 354(17)

For the moving party to prevail on a motion to dismiss for failure to state a claim, the movant must demonstrate that the nonmoving party cannot prevail on any set of facts that could be proved in support of his claim.

2. Pleading ⟹ 354(17)

For the purposes of entertaining a motion to dismiss for failure to state a cognizable claim, all well-pleaded factual allegations are to be accepted as true, and all factual inferences will be drawn in favor of the nonmoving party.

3. Corporations ⟹ 310(2)

In corporate transactions that depend upon the directors' recommendation and approval, particularly those that would have a direct economic impact upon shareholders' investment, the directors

have a duty to make a fully informed business judgment concerning the merits of such transactions, which may include the directors' decision to accept or reject a cash offer for the corporation's stock or to determine whether to negotiate the transactions on different terms.

4. Corporations ⟹ 206(4), 320(8)

Where the directors properly discharge their duty to make a fully informed business judgment concerning the merits of a proposed transaction, they may reject a takeover proposal without further negotiation.

5. Corporations ⟹ 310(2)

Where the directors do not properly discharge their duty to make a fully informed business judgment concerning the merits of a proposed transaction, where their conduct would constitute gross negligence under the particular circumstances, their decision to reject a takeover proposal without further negotiation would not be protected under the business judgment rule and would give rise to an actionable claim by shareholders.

6. Pleading ⟹ 48, 193(5)

In a case where the complaint on behalf of a class of a corporation's stockholders alleges that directors wrongfully rejected a cash offer for the corporation's common stock, the complaint is sufficient to state a claim under Delaware's system of notice pleading if it alleges facts that, if taken as true, would establish the elements of a claim.

7. Pleading ⟹ 192(2)

Mere vagueness of allegations will not justify dismissal of a complaint alleging that directors wrongfully rejected a cash offer for the corporations' common stock.

8. Pleading ⟹ 354(1)

A motion to dismiss a claim concedes only well-pleaded allegations of fact and does not concede conclusory allegations of law

or fact where there are no allegations of specific fact that would support such conclusions.

Norman M. Monhait, Esquire, and Kevin Gross, Esquire, of Morris and Rosenthal, P.A., Wilmington, Delaware; of counsel, Stull, Stull & Brody, New York, New York; and Joseph H. Weiss, Esquire, New York, New York, for plaintiff.

Edmund N. Carpenter, II, Esquire, Samuel R. Nolen, Esquire, and Gregory V. Varallo, Esquire, of Richards, Layton & Finger, Wilmington, Delaware, for individual defendants.

Robert K. Payson, Esquire, of Potter Anderson & Corroon, Wilmington, Delaware, for defendant Honeywell, Inc.

JACOBS, *Vice-Chancellor*

This action was filed on October 3, 1986 by a minority stockholder of Honeywell, Inc. ("Honeywell"), a Delaware corporation, seeking damages on behalf of a class of Honeywell's public stockholders[1] by reason of the defendants' alleged illegal, summary and arbitrary rejection of a cash offer by Sperry Corporation ("Sperry") to purchase all of Honeywell's common shares for $105 per share. On November 26, 1986, the individual defendants moved to dismiss the complaint for failure to state a claim upon which relief can be granted, for failure to comply with Chancery Court Rule 23.1, and on other grounds. Defendant Honeywell subsequently joined in the dismissal motion.

Following briefing, the motion was argued on April 28, 1987. This is the decision of the Court on the defendants' motion to dismiss.

I.

[1-2] For the moving party to prevail on a motion to dismiss for failure to state a claim, the movant must demonstrate that the nonmoving party cannot prevail on any set of facts that could be

1. The alleged class consists of all of the persons who owned Honeywell common stock on May 14, 1986, other than "the individual defendants and other officers and directors of Honeywell, members of their families and persons in privity with them." (Compl. ¶2).

proved in support of his claim. For that purpose all well-pleaded factual allegations are to be accepted as true, and all factual inferences will be drawn in favor of the nonmoving party. *Harman v. Masoneilan Int'l. Inc.*, Del. Supr., 442 A.2d 487, 502-503 (1982); *Joseph v. Shell Oil Co.*, Del. Ch., 498 A.2d 1117, 1121-1122 (1985); *Gilbert v. El Paso Co.*, Del. Ch. 490 A.2d 1050, 1053 (1984); *Judah v. Delaware Trust Co.*, Del. Ch., 378 A.2d 624, 632 (1977).

The essential facts alleged in the complaint are as follows: The individual defendants, in addition to being directors of Honeywell, comprised three of its top executives, namely the Chairman of the Board and Chief Executive Officer (Edson W. Spencer), the Vice Chairman of the Board and member of the Executive Committee (James J. Renier), and the Vice President and Chief Financial and Administrative Officer and member of the Executive Committee (Louis E. Navin). (Compl. ¶5). On or about May 6, 1986, Honeywell's Board of Directors authorized and fully empowered the individual defendants to negotiate and agree to a merger transaction with Sperry. (*Id.* ¶8).

Pursuant to that authorization, defendant Spencer contacted Gerald G. Probst, Sperry's Chief Executive Officer, and proposed an acquisition of Sperry by Honeywell, a proposal that Sperry rejected. (*Id.* ¶¶ 9, 10). Thereafter on May 14, 1986, Mr. Probst informed defendant Spencer that Sperry's board of directors had met that afternoon and had authorized him to propose a friendly offer for Honeywell in which Sperry was prepared to purchase all shares of Honeywell's common stock for $105 per share cash. On May 14, 1986, the closing price of Honeywell's common stock on the New York Stock Exchange was $76.625 per share. Accordingly, Sperry was offering a cash premium of $28.375 or 37% per share, amounting to a total premium of approximately $1,248,500,000, for all of Honeywell's more than 44,000,000 shares of outstanding common stock. (*Id.* ¶11). Plaintiff further alleges that later that very evening, on May 14, 1987, without in any way negotiating the offer or consulting with Honeywell's investment advisors, defendant Spencer summarily rejected Sperry's offer, telling Mr. Probst that Honeywell's management was not interested in pursuing the proposal and that they considered the matter to be at an end. (*Id.* ¶12). Neither Sperry's offer nor the defendants' rejection thereof was ever disclosed to Honeywell's shareholders. (*Id.* ¶13).

II.

In support of their dismissal motion, the defendants argue that (1) the claim is derivative in character and must be dismissed for failure to comply with the demand requirements of Rule 23.1, and (2) the plaintiff has failed to state a claim upon which relief can be granted. For the reasons now discussed, I conclude that the complaint does not state a cognizable claim upon which relief can be granted. Accordingly, it is unnecessary to address the defendants' argument that the claim is derivative and fails to comply with Rule 23.1.

The defendants argue that the complaint fails to state a cognizable claim because (i) it does not adequately allege that an offer was made, or that if one was, it was not made to the Board of Directors, (ii) the Board was under no duty under the circumstances to negotiate such an "offer" or to submit it to Honeywell's investment bankers, and (iii) in any event, the rejection of Sperry's proposal was not a breach of any duty, because the shareholders had no enforceable right to receive a tender offer.

Defendants' first argument must be rejected inasmuch as it is based upon a misreading of the complaint. The defendants' premise their argument upon the implicit assumption that an offer must be communicated to the full Board or to the shareholders and must then be rejected by the full Board. Without commenting on the validity of that assumption, I find that the complaint, fairly read, meets the substance (if not the precise letter) of the defendants' premise. The complaint alleges that Sperry's Chief Executive Officer, Mr. Probst, communicated a proposal to Honeywell's Chief Executive, Mr. Spencer, for Sperry to purchase all of Honeywell's common stock for cash in a friendly offer, and that Mr. Spencer later responded to Mr. Probst that Honeywell's management was not interested. The complaint also fairly alleges that the individual defendants (who comprise some or all of Honeywell's "management") were fully empowered to negotiate and agree to a merger or other corporate combination with Sperry. The fair import of these allegations is that Sperry communicated an offer to three directors who were empowered to act on behalf of the full Board and who rejected the offer. In those circumstances, by assuming the power of the full Board the individual defendants would also have assumed the fiduciary duties that would have accompanied the exercise of those powers. *Cf.* 8 *Del. C.* §141(c); *Zapata Corp. v. Maldonado*, Del. Supr., 430 A.2d 779, 786 (1981).

The question is whether, under the circumstances alleged here, the defendants' rejection of Sperry's offer violated a fiduciary duty owed by them to Honeywell's shareholders, so as to give rise to a claim upon which relief could be granted. To answer that question it is necessary to examine precisely what the plaintiff has alleged. Its clearest expression is found in Paragraph 6 of the complaint, which states:

> By reason of the director defendants' positions with the Company, they are in fiduciary relationships with plaintiff and the other class members and owe to them the highest obligations of good faith and fair dealing. The director defendants have breached their fiduciary duties to the Company's public shareholders by summarily and arbitrarily rejecting the offer to acquire Honeywell at a substantial premium above its market price, failing to negotiate the offer, failing to submit it for consideration by the Company's investment bankers, and failing to disclose it to Honeywell's public shareholders. These actions demonstrate a clear absence of due care and the failure to have made an informed decision. These actions have injured Honeywell's shareholders because they have been effectively foreclosed from obtaining the highest possible price for their shares.

The defendants argue that the quoted allegations do not state a cognizable legal claim because they are premised on the notion that the defendants violated, or in some wrongful way interfered with, the shareholders' right to receive a tender offer from Sperry. That premise is incorrect, defendants say, because this Court has held in *Moran v. Household Int'l. Inc.*, Del. Ch., 490 A.2d 1059, *aff'd*, Del. Supr., 500 A.2d 1346 (1985), that "shareholders do not possess a contractual right to receive takeover bids." 490 A.2d at 1070. Moreover, defendants add, they breached no duty by failing to negotiate the offer, because directors are empowered in the proper exercise of their business judgment to reject a takeover offer without negotiating it. *Pogostin v. Rice*, Del. Supr., 480 A.2d 619, 627 (1984).

These arguments misconceive the thrust of the complaint, which, as I view it, is not based on the premise that the shareholders had an enforceable right to receive a tender offer. Rather, the plaintiff's theory, as stated in his brief, is that the complaint

> raises a triable claim that the defendants' neglect and summary rejection of the Sperry offer—without taking the time

> or effort to discuss it with an investment banker or to give it informed consideration or any negotiation (despite the one and a quarter billion dollar premium)—was not made with the care which ordinarily careful and prudent men would use in similar circumstances and that plaintiff and the class were damaged as a result thereof.

(Plaintiff's Br., p. 10).

[3] Thus, what the plaintiff seeks to enforce is the shareholders' right to have the corporation's directors make an informed business judgment as to whether or not to accept Sperry's offer and, if not, whether to negotiate a transaction with Sperry on different terms. In corporate transactions that depend upon the directors' recommendation and approval, particularly those that would have a direct economic impact upon the shareholders' investment, the directors have a duty to make a fully informed business judgment concerning the merits of such transactions. *Smith v. Van Gorkom*, Del. Supr., 488 A.2d 858, 872-873 (1985); *Sealy Mattress Co. of New Jersey, Inc. v. Sealy, Inc.*, Del. Ch., Civil Action No. 8853, Jacobs, V. C. (July 20, 1987).

[4-5] Where the directors discharge that duty in a proper fashion, they may, in a proper case involving a valid exercise of their business judgment discretion, reject a takeover proposal without further negotiation. *See Pogostin v. Rice*, 480 A.2d at 627. But where the directors do not properly discharge that duty, as, for example, where they make an uninformed business judgment under circumstances constituting gross negligence, that decision would not be protected under the business judgment rule and may give rise to an actionable claim. *Smith v. Van Gorkom*, 488 A.2d at 872-873; *Aronson v. Lewis*, Del. Supr., 473 A.2d 805 (1984). It is the latter situation that the plaintiff contends is the subject of his complaint.

To state the matter differently, the plaintiff has articulated a cognizable legal theory which, if properly alleged, would overcome a motion to dismiss. That observation, however, does not dispose of the matter. For the question still remains whether the plaintiff has alleged facts sufficient to state a claim under the theory upon which he has chosen to rely.

[6-8] Under our system of notice pleading, a complaint is sufficient if it alleges facts that, if taken as true, would establish the elements of a claim. Mere vagueness will not justify dismissal of a complaint. *Mayer v. Adams*, Del. Supr., 174 A.2d 313, 317 (1961). On the other hand, a motion to dismiss concedes only well-pleaded

allegations of fact. It does not concede conclusory allegations of law or fact where there are no allegations of specific fact that would support such conclusions. *Weinberger v. UOP Inc.*, Del. Ch., 409 A.2d 1262, 1264 (1979); *Cohen v. Mayor of Wilmington*, Del. Ch., 99 A.2d 393, 395 (1953).

It is in that latter respect that the present complaint is deficient. The plaintiff's theory is that the individual defendants were grossly negligent by making an uninformed decision to reject the Sperry offer and not to pursue further negotiations with Sperry. The facts alleged in support of that theory are that the director defendants breached their fiduciary duties

> by summarily and arbitrarily rejecting the offer to acquire Honeywell at a substantial premium above its market price, failing to negotiate the offer, failing to submit it for consideration by the Company's investment bankers, and failing to disclose it to Honeywell's public shareholders. These actions demonstrate a clear absence of due care and the failure to have made an informed decision.

(Compl. ¶6).

To the extent that those allegations are intended to support the claim that the defendants' decision to reject the offer was uninformed and was made without the requisite due care, the allegations are conclusory. The adverbs "arbitrarily" and "summarily" are certainly conclusory, as, of course, are the averments that there was a "clear absence of due care" and a "failure to [make] an informed decision." The only nonconclusory pleaded facts are that the directors rejected the Sperry offer without submitting it for consideration by investment advisors and without disclosing it to stockholders. None of those facts, taken singly or together, would establish that the directors acted without adequate information. A rejection of an offer at a premium over market price and a failure to disclose that action to shareholders may or may not be informed. The commission or omission of those acts does not, by itself, establish the degree of enlightenment or ignorance of the decisionmakers. For example, the Honeywell directors may have rejected Sperry's offer and declined to submit it to the company's investment bankers (or to disclose it to shareholders) because, based upon their knowledge gathered from other reliable sources, the offer, even at a premium over market price, was plainly inadequate in relation to the company's intrinsic value. Although the directors' failure to submit the offer to an investment banker would tend to support the plaintiff's claim, by

itself it is legally insufficient. An outside valuation, while certainly probative, is not essential to establish or support an informed business judgment. *Smith v. Van Gorkom*, 488 A.2d at 876. What is missing in this complaint are nonconclusory factual allegations that would establish that the defendant directors rejected (and refused to negotiate) the Sperry offer without having properly informed themselves of the critical facts relating to the merits of that offer, or that the directors, while having such information, chose to ignore it in making their decision.[2] The absence of such pleaded facts renders the complaint legally deficient.[3]

* * *

For the foregoing reasons, the defendants' motion to dismiss for failure to state a claim will be granted. However, plaintiff will be granted leave to amend his complaint within 30 days of this Opinion. *In re Sea-Land Corp. Shareholders' Litigation*, Del. Ch., Civil Action No. 8453, Jacobs, V. C. (May 22, 1987), at 14. IT IS SO ORDERED.

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2. It should be noted that the plaintiff does not allege that the defendants chose to reject the Sperry offer by reason of an improper entrenchment motive.

3. It should also be noted that the plaintiff has chosen to plead a specific theory of damages, namely that the shareholders were financially injured in the amount of the difference between the Sperry offer ($105) and the market price on the day the offer was rejected ($76). If that is to be the theory upon which plaintiff intends to proceed, he must be prepared to meet what may well be an extremely heavy burden of persuading the Court that if the defendants had made a fully informed business judgment, the result would have been their acceptance of the Sperry offer at $105 per share on May 19, 1986.

LEWIS v. LEASEWAY TRANSPORTATION CORP.

No. 8720

Court of Chancery of the State of Delaware, New Castle

June 12, 1987

Plaintiffs seek a preliminary injunction to prevent the enactment of a proposed leveraged buy-out of Leaseway Transportation Corporation (Leaseway), by Citicorp Capital Investors, Ltd. and others (Citicorp). The court of chancery, per Vice-Chancellor Hartnett, held that plaintiffs failed to bear their burden of proof and, therefore, that plaintiffs would be denied injunction. In support, the court held: (1) absent proof of improper behavior, the business judgment rule protects the acts of the board from judicial scrutiny; (2) despite omissions of the updating of an opinion as to fairness and that quarterly dividends would not be declared in the proxy statement, the statement was not misleading; (3) the stock purchase agreement which gave disparate stock purchase prices to stockholders was not necessarily improper; and (4) plaintiffs did not show the requisite probability of success on the merits, irreparable harm to the plaintiffs, and that the balance of hardships weighs in their favor.

1. Corporations ⟹ 310(1)

Where a board of directors negotiated an acquisition proposal of a specified price per share and the board is independent and appointed an independent committee to oversee the process, and no evidence exists to justify a conclusion that the board acted improperly, the business judgment rule protects the acts of the board from further judicial scrutiny.

2. Corporations ⟹ 152

The declaration of a dividend is ordinarily the sole prerogative of the board of directors.

3. Injunction ⟹ 132

A preliminary injunction will be granted only upon the showing of a reasonable probability of success on the merits, irreparable harm

to the plaintiffs and the class they purport to represent if the injunction is not granted, and that the balance of hardships weighs in their favor.

Joseph A. Rosenthal, Esquire, of Morris & Rosenthal, P.A., Wilmington, Delaware, for plaintiff.

Charles F. Richards, Jr., Esquire, of Richards, Layton & Finger, Wilmington, Delaware, for defendant.

HARTNETT, *Vice-Chancellor*

Plaintiffs seek a preliminary injunction enjoining the consummation of a proposed leveraged buy-out of Leaseway Transportation Corporation, a Delaware corporation ("Leaseway"), by Citicorp Capital Investors, Ltd. and others ("Citicorp"), whereby the present stockholders of Leaseway will receive $51 per share for their shares if a majority of stockholders approve the transaction. The transaction is set to close on June 16, 1987, five days after the hearing on the application for a preliminary injunction.

Plaintiffs have failed to bear their burden of showing that the transaction should be enjoined and therefore their request for a preliminary injunction must be denied.

I

The constraints of time allow only a summary review of the facts and numerous contentions of the parties.

The present transaction grew out of a proxy contest between the Leaseway board and a group of stockholders mainly composed of relatives of one of the founders of Leaseway, who controlled 30% of the outstanding stock.

As a result of the insurgents' representation that they were seeking to buy Leaseway, the board decided to put the corporation "into play" and seek acquisition proposals and it retained Salomon Brothers, Inc., to assist in the process.

It is not necessary to set forth all the procedures followed by the board. Suffice to say that the board is independent and is composed of persons of outstanding credentials. It appointed an independent committee to oversee the process and that committee also retained Salomon Brothers and independent legal counsel. I am convinced from the evidence in the present record that the procedures

mandated by the Delaware Supreme Court in *Smith v. Van Gorkom*, Del. Supr., 488 A.2d 858 (1985) were complied with in good faith.

Salomon Brothers, over a period of almost one year, contacted 120 potential buyers, of which 60 were sent detailed information. Ultimately only 3 serious, potential buyers emerged and only 1 proposal was made—by Citicorp—which was for $50 per share. This price was ultimately negotiated up to $51 per share.

On November 13, 1986, the board accepted the written proposal of Citicorp and publicly announced it. The next day the original complaint in this action was filed.

On May 12, 1987, the directors disseminated to the shareholders, in connection with the June 16, 1987, stockholders' meeting, a proxy statement in which the board seeks approval of the agreement.

II

[1] Plaintiffs attack the process whereby the agreement was negotiated but I am satisfied from a review of the present record that they have not borne their burden of showing that the board was not independent, or that it did not act in an informed and deliberate manner. There is just no evidence to justify a conclusion that the board acted improperly or that the business judgment rule does not protect the acts of the board from further judicial scrutiny. Cf., *Smith v. Van Gorkom*, Del. Supr., 488 A.2d 858 (1985).

III

Plaintiffs also attack the proxy statement as being misleading because of two alleged omissions. Both arise because of the delay between the date of the agreement, November 13, 1986, and the date the proxy materials were issued in May.

Plaintiffs call attention to the fact that there has been no updating of Salomon Brothers' opinion as to fairness since November. While I agree with plaintiffs that an updating would have been preferable and that data set forth in a proxy statement can become impermissibly stale, the uncontroverted facts here show that the value of the $51 per share offer has not increased and that the contrary is likely.

The record also shows that the delay between November and May was not deliberate but was due to the need to obtain certain regulatory approvals.

The second alleged omission also arises because of the delay. Plaintiffs correctly point out that Leaseway has historically declared

quarterly dividends and that ordinarily a quarterly dividend would have been declared payable to stockholders of record on June 13, 1987. No such dividend will be declared this quarter, however.

[2] The declaration of a dividend, of course, is ordinarily the sole prerogative of the board of directors. *Gabelle & Co. v. Liggett Group, Inc.*, Del. Supr., 479 A.2d 276 (1984).

It would have been preferable, however, if the proxy statement had made clear that the Regular Second Quarter Dividend might not be declared.

The usual amount of the quarterly dividend ($.375), however, is not significant when measured against the $51 per share being offered which represents a significant premium for the shares.

I must also assume that a reasonably sophisticated investor knows that dividends on common shares of stock are never guaranteed.

I, therefore, find that the proxy statement is not materially misleading.

IV

Plaintiffs also attack the action of the board in agreeing to the purchase by the corporation of part of the 30% stock interest of the O'Neal family members prior to December 31, 1986, at the market price which was significantly below the $51 per share price set forth in the Citicorp agreement and now being offered to the other stockholders.

I find nothing in the record to convince me that this purchase was improper, considering all the facts and circumstances, or that it could somehow be the basis for my enjoining the present transaction.

V

[3] In order for plaintiffs to prevail, they must show the reasonable probability of success on the merits. *Gimbel v. Signal Co.*, Del. Ch., 316 A.2d 599 (1974). As set forth, they have failed to do so. They must also show irreparable harm to them and the class they purport to represent if the injunction is not granted. This they have failed to do because dissenting stockholders will still have the right to seek an appraisal. *Weinberger v. UOP, Inc.*, Del. Supr., 457 A.2d 701 (1983).

The plaintiffs must also show that the balance of hardships weighs in their favor. *Eastern Shore Natural Gas Co. v. Stauffer Chemical*

Co., Del. Supr., 298 A.2d 322 (1972). They have also failed to meet this burden. Cf., *Weinberger v. United Financial Corp.*, Del. Ch., 405 A.2d 134 (1979).

A majority of the stockholders have already returned their proxies showing that they approve the transaction and the transaction agreement provides that Citicorp can terminate it if the transaction is not closed by June 30, 1987. There is considerable (and uncontroverted) evidence that Citicorp now justifiably believes that it should pay less for Leaseway and it seems reasonably probable that if this transaction is enjoined, the majority of the stockholders who want to accept $51 will lose that opportunity.

Plaintiffs' application for a preliminary injunction is, therefore, denied. IT IS SO ORDERED.

LIEB v. CLARK

No. 9012

Court of Chancery of the State of Delaware, New Castle

June 1, 1987

Plaintiff, a minority stockholder in a Delaware corporation, sought to enjoin a tender offer, made jointly by the company and an unleveraged stock employee ownership plan, to purchase approximately forty-seven percent of the company's stock. The court of chancery, per Vice-Chancellor Jacobs, rejected plaintiff's contentions that the offer was a device to entrench the officers in their positions of control and that the offer was unlawfully coercive. Accordingly, the court held that plaintiff had failed to establish a likelihood of ultimate success on the merits or a threat of irreparable harm and denied plaintiff's motion for a preliminary injunction.

1. Injunction ⟹ 151

In exercising its discretion to a grant preliminary injunction, the court must determine whether the moving party has established the likelihood of ultimate success on the merits or the threat of irreparable harm.

2. Corporations ⟹ 310(1), 319(7), 320(11)

To establish that the officers of a company had the specific intent to maintain themselves in control, it must be shown that the proposed allocation of shares will result in the officer having such increased voting power as to cause the control of the company to shift to them.

3. Corporations ⟹ 310(1)

As a general matter, a tender offer is not actionably coercive unless the shareholders are being wrongfully induced to accept the offer for reasons unrelated to its merits.

4. Corporations ⟹ 310(1)

An offer that is economically "too good to resist" as compared to the alternative of not tendering, would not, for that reason alone, be actionably coercive.

5. Corporations ⟹ 310(1)

The fact that a post-offer market price will be less than the offering price, without more, does not establish that the tender offer is actionably coercive.

Irving Morris, Esquire, of Morris & Rosenthal, P.A., Wilmington, Delaware, for plaintiff.

Rodman Ward, Jr., Esquire, of Skadden, Arps, Slate, Meagher & Flom, Wilmington, Delaware, for defendants.

JACOBS, *Vice-Chancellor*

In this class and derivative action, filed on May 20, 1987, the plaintiff, a stockholder of Bank Building & Equipment Corporation of America (the "Company") seeks to enjoin a tender offer (the "Offer") made jointly by the Company and the Bank Building Employer Stock Ownership Plan and Trust (the "ESOP") to purchase approximately 47% of the Company's stock at $14 per share cash. The Offer is scheduled to be consummated on June 2, 1987. Upon the filing of the complaint, the plaintiff moved for a preliminary injunction which was argued on May 28, 1987.

This is the Opinion of the Court, following briefing and oral argument,[1] on plaintiff's motion for a preliminary injunction.

I.

Due to the press of time, no extended treatment of the facts or legal issues is possible. The essential facts are, however, undisputed: The Company is a Delaware corporation that provides specialty services to financial institutions in the development of their home offices, branches, operation centers and multi-tenant office buildings. The Company has 1,657,111 shares of common stock that are issued and outstanding and are traded on the American Stock Exchange. Of the eight members of the Company's Board of Directors, only two are members of management, the remaining six being "outside" directors. The Company's officers and directors currently own 48,300 (approximately 2.9%) of its outstanding shares.

For some time the Company has held approximately $10 million of assets that, by reason of an over-funded pension plan and certain underutilized real estate, were not needed in the conduct of its business. The presence of these excess assets, as well as the possibility of unfriendly takeover attempts, prompted the Board of Directors to take several steps during the fall of 1986. First, in November, 1986, the Board adopted a shareholder's rights ("poison pill") plan intended to deter what it believed might be coercive takeover tactics and to prevent an acquirer from acquiring the Company at an unfair price. Those rights are redeemable by the Board.

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1. Supplemental memoranda were filed on May 29 and June 1, 1987. No discovery having been taken, the record at this stage consists of the Offer to Purchase and certain affidavits filed by the defendants, who consist of the Company, the directors who voted to recommend acceptance of the Offer, and Mark Twain Bank, N.A., as Trustee of the ESOP.

Second, during the same month, the Board retained an investment banker, A. G. Edwards & Sons, Inc. ("Edwards"), to provide investment banking services for the Company and to explore available financial alternatives so as to maximize shareholder values. In conjunction with senior management, Edwards engaged in an extensive, time-consuming search between November, 1986 through February, 1987, to solicit potential bidders for the Company. Edwards solicited indications of interest from about 60 potential bidders, but despite numerous meetings and other efforts, the only live candidate to emerge was Acmat Corporation ("ACMAT"). None of the remaining contacts matured into a firm proposal.[2]

In December, 1986, ACMAT made a firm proposal for an exchange offer, whereby ACMAT shares would be offered in exchange for the Company's shares. The Board rejected the ACMAT offer based on Edward's advice that the ACMAT offer was inadequate from a financial point of view.

Third, because by mid-winter Edwards had largely exhausted its search for interested parties, the Board (assisted by Edwards) began to explore various methods of distributing the Company's excess assets to its stockholders. Two major alternatives were developed: (i) an extraordinary cash dividend or (ii) a tender by an unleveraged employee stock ownership plan ("ESOP"). The Board authorized Edwards to explore the feasibility of both alternatives. By the end of February, 1987, it was decided that the time had come to decide which alternatives to choose. Edwards recommended a tender offer with ESOP participation as the superior alternative, because the creation of the ESOP would enable the Company to utilize $7.7 million in excess pension assets without federal tax liability, thereby resulting in a $3.6 million tax savings. Moreover, it was perceived that other benefits would flow from this alternative: the Company's contribution to the ESOP would be deductible for federal income tax purposes, and ESOP participants would receive deferred tax treatment. It was thought that these benefits would enhance the Company's ability to retain the attention and loyalty

2. Two proposals were made, but later abandoned, during this period. Hyde Park Holdings, Inc., as general partner for Inanda Partners, L.P., proposed a cash offer for all of the Company's shares for $14.25 per share, but abandoned that proposal when J. L. Mason Group made a proposal of a stock-for-stock merger. The Mason proposal was conditioned on financing and the negotiation of a definitive agreement, but that, too, was later abandoned.

of its employees which, in turn, would enhance the value of the Company.

On February 23, 1987, ACMAT made a new acquisition proposal under which the Company's stockholders would receive cash plus a new class of non-voting ACMAT common stock. That new ACMAT proposal triggered a new round of negotiations. Because of the directors' concerns about certain aspects of the proposal, as well as about ACMAT itself, the Board authorized Edwards to advise ACMAT that it had a strong preference for an all-cash offer. Edwards negotiated with ACMAT for that purpose, and the result was a different proposal, albeit one less favorable than that which ACMAT had indicated it would propose. After further negotiations, ACMAT submitted an improved proposal in early April, 1987. As a result, the Board was left with two choices: a nonleveraged tender offer by an ESOP and the ACMAT proposal.

Between April 6, and April 22, 1987, the Board met six times, consulting with Edwards, legal counsel and with other advisors, to consider both alternatives. For a host of business-related reasons (including the risks of being affiliated with ACMAT, which was intensively involved with asbestos-related work and which had had financial difficulties in recent years)—none of which reasons the plaintiff has challenged—the Board determined to reject the ACMAT offer and to proceed with the proposed Offer by the Company and the ESOP.[3] Nonetheless, the Board still believed a combination with ACMAT and its risks would be acceptable, if ACMAT would make a tender offer for all shares on terms no less favorable than its most recent proposal. The Board advised ACMAT that were this to be done, it would redeem the shareholders' rights and release ACMAT from the terms of the confidentiality agreement under which ACMAT's right to purchase shares was restricted.

On April 27, 1987, ACMAT made a new proposal to acquire the Company for $14.25 per share cash, subject to obtaining financing and executing a definitive agreement. ACMAT advised the Company that it was confident that financing could be obtained within a short period of time and that ACMAT was prepared to work within any

3. By a vote of 4-2 (management abstaining) the Board determined that the proposed ESOP offer was in the best interests of stockholders. The two directors who voted against the Offer acknowledged that reasonable people could differ on the matter. Once the Board determined to approve the proposed ESOP offer, the Board voted unanimously to recommend its acceptance by Company shareholders.

reasonable time frame the Company suggested. In response the Board voted not to proceed with the proposed ESOP offer, and to give ACMAT until the close of business on May 11 (*i.e.*, two weeks) to arrange financing. However, the following day ACMAT advised the Company that it would not continue to pursue the acquisition. Although ACMAT took the position that the time allowed to obtain financing was unreasonable, ACMAT never requested an extension of time nor indicated what additional time it would need. On April 30, 1987, the Board reaffirmed its previously announced decision that if ACMAT would make a cash offer for $14.25 cash to all Company shareholders, the Board would remove any impediments to such an offer. To date no such offer has been made.

On May 5, 1987, the Offer that is the subject of the present injunction motion was commenced. Its principal features may be summarized as follows: the Company and the ESOP would purchase 780,300 shares (47%) of the Company's outstanding shares at $14 per share cash. Except for shareholders who owned fewer than 100 shares, the stock will be purchased on a pro-rata basis, so that shareholders would, in effect, receive $14 per share for 47% of their holdings, and would retain 53%. The 194,800 shares acquired by the Company would be held as treasury shares. The ESOP would acquire 585,500 shares and, as a result, would own at least 40% of the Company's outstanding shares.

II.

[1] In support of its request for preliminary injunctive relief, the plaintiff does not contend that the Offer is unfair from a financial standpoint. The $14 per share cash price stands unchallenged. Instead, plaintiff focuses his attack upon the effect of the Offer. Specifically, he claims that (1) the Offer is a device to entrench the directors and management in their positions of control and (2) the Offer is unlawfully coercive, and, hence, represents a breach of the directors' fiduciary duty. I find, for the reasons discussed, that neither contention is factually or legally supported. Accordingly, the plaintiff has failed to establish the likelihood of ultimate success on the merits of his claims or the threat of irreparable harm.

A.

Plaintiff does not premise his entrenchment argument upon a theory that the Company's directors had a specific intent to maintain

themselves in control. Indeed, the directors' stated amenability to a $14.25 cash offer by ACMAT (or anyone else) for all the Company's shares, seems to be highly inconsistent with any such claimed intent. Rather, the plaintiff contends that the Offer will have an entrenchment *effect*, specifically, by placing the directors (who presently own 2.9% of the Company's stock) in a position where they would control the voting of the 40% share block that would be owned by the ESOP. That result is said to flow from the "pass-through" voting arrangement whereby the ESOP Trustee will vote shares as directed by the beneficial owners. The allocation of beneficial ownership of shares held by the ESOP will be *pro rata*, based upon the participants' compensation for each year. Plaintiff argues that since the officers of the Company receive the highest compensation, they will receive the largest allocations, and that as a result of employee turnover, the officers and directors will eventually control the voting of the largest percentage of the shares held by the ESOP.

[2] This contention fails for lack of evidence. Plaintiff points to nothing in the record that would indicate that the allocation of ESOP owned shares would result in the officers and directors having such increased voting power as to cause control of the Company to shift to them. On the contrary, the record evidence shows that, following the Offer, the officers and directors will beneficially hold only approximately 3.9% of the Company's outstanding shares, including 2.16% that would be allocated among the officers' and directors' accounts maintained by the ESOP.

B.

Plaintiff's coercion argument may be stated thusly: The market has valued the Company's stock at far less than the $14 offering price. The current market price of the Company's stock (plaintiff asserts) is $8.35 per share, a circumstance that virtually forces the shareholders to tender, since they would otherwise be left holding 100% of their shares at only a $8.35 per share current market value. In contrast, a decision to tender would enable the shareholders to receive $14 per share for 47% of their shares. Plaintiff argues that as between those two alternatives, there is no realistic choice but to tender. Plaintiff claims that it is unnecessary to place shareholders in such a position, and that the problem could easily be avoided by having the ESOP tender for 100% (rather than only 47%) of the Company's stock.

The defendants agree that the economic features of the offer are such as to be too attractive for any rational stockholder to turn down. They argue, however, that that circumstance does not make the Offer wrongful or actionable. Defendants point out that if the mere fact that a post-offer market price would be less than the offering price is sufficient to make the offer actionable, then many partial offers would be rendered legally invalid. Defendants contend that there is no authority for that proposition. They further argue that the Offer is for a fair price, it has no entrenchment motivation or effect, and it was determined as a matter of independent directorial business judgment to be the best available method for affording shareholders a significant economic benefit for some of their shares. Under those circumstances, defendants conclude, the Offer is proper and there is no basis under Delaware law for invalidating it.

[3-4] Our case law recognizes that to label a transaction as "coercive" is only a starting point for legal analysis. The relevant question is whether the transaction is wrongfully, *i.e.*, actionably, coercive. *See Katz v. Oak Industries, Inc.*, Del. Ch., 508 A.2d 873, 879-80 (1986). As a general matter, a tender offer is not actionably coercive unless the shareholders are being wrongfully induced to accept the offer for reasons unrelated to its merits. *See MacFadden Holdings, Inc. v. John Blair & Company*, Del. Ch., Civil Action No. 8489, Jacobs, V. C. (July 2, 1986), at 14. Thus, an offer that is economically "too good to resist" as compared to the alternative of not tendering, would not, for that reason alone, be actionably coercive. *See MacFadden Holdings, Inc.*, *supra*, at 15. On the other hand, a "leveraged buyout" by the corporation, that was structured so as to afford shareholders no practical choice but to tender their shares for an unfair price, has been found to be actionably coercive. *See Kahn v. United States Sugar Corporation*, Del. Ch., Civil Action No. 7313, Hartnett, V. C. (December 10, 1985), at 15-16. Also found actionably coercive was an offer made by a corporation for a fair price, but which was structured and timed so as effectively to deprive stockholders of the opportunity to choose a competing offer—also at a fair price—that the shareholders might have found preferable. *AC Acquisitions Corp. v. Anderson, Clayton & Co.*, Del. Ch., 519 A.2d 103, 113-114 (1986).[4]

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4. In *Kahn v. United States Sugar Corporation*, *supra*, a "leveraged buy out" offer by the corporation and an ESOP was found to be actionably coercive where the stockholders were put to a choice between tendering their shares for an unfair

[5] Viewed from this perspective, plaintiff has failed to show a likelihood that he will succeed in establishing that the Offer is actionably coercive. There is no contention that the offering price is unfair, nor is there any contention or showing that the Offer is being timed or structured so as to preclude shareholders from accepting a competing offer opposed by management. Indeed at present, there is no competing offer or other alternative. The only circumstance that the plaintiff can find to criticize is a circumstance over which management has no control: the post-Offer price will be less than the $14 offering price. In all likelihood that result will occur, but not by reason of any director or officer misconduct. Indeed the only "conduct" to which the plaintiff attempts to affix blame is management's (implicit) decision *not* to structure the transaction as a leveraged buyout of 100% of the Company's shares at $14.25 per share. Plaintiff makes no argument, and cites no authority, that the directors had a fiduciary duty to structure the Offer as a 100% offer assuming that such a transaction is economically feasible. Nor does he point to any legal principle that would proscribe a partial offer of the kind at issue here.

Finally, the plaintiff has failed to show that consummation of the Offer would be harmful or in what respect the shareholders would be better off if an injunction were granted. If the Offer is enjoined, the shareholders would wind up holding *all* their shares at a current market price that is less than the Offer price. The Offer, if allowed to go forward, would enable shareholders to receive $14 for at least

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price and retaining their shares under circumstances where they would be subject to a significant risk that the shares (due to the prospect of their being delisted) would become illiquid and (due to the significantly increased debt incurred by the corporation to finance the offer) would become less valuable.

In *AC Acquisitions Corp. v. Anderson, Clayton & Co., supra*, an outside bidder made a $56 cash offer for "any and all" of the corporation's stock, to be followed by a cash merger at the same ($56) price. On the following day, the corporation, as a defensive response, announced a self-tender for 65% of its outstanding shares at $60 per share cash, to be followed by a sale of 25% of the company's shares to an ESOP (the "Company Transaction"). The Company Transaction was timed so that it would "close" the day after the all-cash competing offer was scheduled to close. This Court found that the Company Transaction was deliberately structured so that no rational shareholder would risk tendering into the competing all-cash offer, because (i) stockholders tendering into the competing offer could not be assured that that offer would be consummated, since it was subject to a maximum number of shares being "taken down" and the Company Transaction being abandoned and (ii) by tendering into the all-cash offer, tendering shareholders would thereby preclude themselves from participating in the "front end" of the company transaction and the value of all their shares would fall very dramatically.