Unreported Cases

INTRODUCTION

UNREPORTED CASES is a continuing feature of THE DELAWARE JOURNAL OF CORPORATE LAW. All unreported cases of a corporate nature that have not been published by a reporter system will be included. The court's opinions are printed in their entirety, exactly as received.

To expedite the attorney's research, all cases are headnoted according to the National Reporter key number classification system.* Indices are provided for case names, statutes construed, rules of court, and key numbers and classifications for this issue.

* The National Reporter key number classification system is used with the permission of the West Publishing Co., St. Paul, Minnesota 55102.

CASE INDEX

This Issue

STATUTES CONSTRUED*

This Issue

RULES OF COURT*

This Issue

KEY NUMBER INDEX*

This Issue

* Page reference is to the first page of the case in which the statute or rule is construed.

IN RE APPRAISAL OF ENSTAR CORP.

No. 7802 (Consolidated)

Court of Chancery of the State of Delaware, New Castle

January 31, 1989

Following an unsuccessful effort to enjoin the merger of Enstar and Unimar Corporations, a group of Enstar stockholders rejected the merger consideration and sought appraisal of their shares of stock. Enstar conceded the right of several of the dissenting stockholders to the appraisal, but disputed the right to other stockholders, including the Belzbergs. Enstar asserted that the Belzberg shares were held by Cede & Co., the record owner, and that Cede had not properly perfected the demand for an appraisal. A settlement between Enstar and the Belzbergs was reached which allegedly required the Belzbergs to tender their shares of stock. When Enstar determined the Belzbergs had previously tendered their shares, Enstar claimed that the Belzbergs had thereby accepted the merger consideration and were not entitled to an appraisal. The Belzbergs thereafter moved to enforce the settlement agreement.

The court of chancery, per Vice-Chancellor Hartnett, held that summary judgment was inappropriate. The circumstances surrounding the Belzbergs' receipt of the original merger consideration, the extent of the parties' knowledge of Cede's prior tender of the Belzbergs' shares and the intention of the Belzbergs to tender or not tender were all disputed questions of fact.

1. Compromise and Settlement ⟹ 2

Delaware law favors the voluntary settlement of contested suits.

2. Compromise and Settlement ⟹ 8(2)

Attorney and Client ⟹ 70

An attorney of record in a pending action who agrees to a compromise of a case is presumed to have lawful authority to make such an agreement.

3. Attorney and Client ⟹ 101(1)

A binding contract is created where opposing attorneys orally agree to compromise and settle a lawsuit.

4. Compromise and Settlement ⟹ 2, 10, 14, 21

A compromise and settlement agreement is construed by the legal principles applicable to contracts generally.

5. Compromise and Settlement ⟹ 7, 8(3), 8(4), 19(1)

Like any other contractual agreement, a compromise and settlement may be invalidated under certain conditions including fraud, illegality, duress, undue influence, and mistake.

6. Compromise and Settlement ⟹ 8(3), 8(4)

While a material mutual mistake of fact may invalidate a compromise and settlement, absent fraud or some other equitable consideration, a unilateral mistake generally will not.

7. Compromise and Settlement ⟹ 5(2), 15(2)

Once a valid compromise and settlement has been reached, the actual merits of the underlying claim will not afterward be examined.

8. Compromise and Settlement ⟹ 5(2), 15(2)

The fact that later judicial developments or other sources of information may subsequently show that an underlying claim was, in fact, at the time of settlement, unfounded will not justify invalidating the compromise if the claim was brought in good faith.

9. Judgment ⟹ 181(2)

Although summary judgment is an efficient means of resolving legal issues, it has long been established that summary judgment

cannot be granted unless there is no genuine issue of material fact. DEL. CH. CT. R. 56(c).

10. Judgment ⟹ 181(19)

Summary judgment is particularly inappropriate in disputes concerning the formation and interpretation of contracts.

11. Compromise and Settlement ⟹ 8(2)

A compromise and settlement agreement is a contract and requires, among other things, parties who have the capacity and authority to agree, a definitive offer and acceptance, and consideration.

12. Compromise and Settlement ⟹ 5, 6(4)

An appraisal action presents a bona fide controversy existing between the parties when there is no evidence that the action was brought in bad faith.

13. Compromise and Settlement ⟹ 5

Even if an appraisal claim is actually invalid and its invalidity is not even doubtful, the existence of the claim is a sufficient basis for a compromise if it is asserted in good faith.

14. Compromise and Settlement ⟹ 15(2)

Once a valid settlement has been reached, courts will not inquire into or examine the merits of the underlying claim, and it makes no difference that the claim had no legal basis.

15. Judgment ⟹ 180

When a disputed fact is motive, intention, or other subjective matter, summary judgment is ordinarily inappropriate.

16. Judgment ⟹ 186

The court's role is not to determine facts or to weigh the evidence at the preliminary stage of summary judgment motion.

Grover C. Brown, Esquire, and Lewis H. Lazarus, Esquire, of Morris, James, Hitchens & Williams, Wilmington, Delaware, for Belzbergs.

Edmund N. Carpenter, II, Esquire, and Nathan B. Ploener, Esquire, of Richards, Layton & Finger, Wilmington, Delaware, for Enstar Corporation.

HARTNETT, *Vice-Chancellor*

Marc Belzberg, Abraham Farbstein, First City Financial Corp. LTD and First City Trust Company (collectively referred to as the "Belzbergs") moved to enforce an alleged agreement reached between their attorney and the attorney for defendant Enstar Corporation ("Enstar") to compromise and settle that portion of this suit which involves the Belzbergs. The motion shall be treated as a Motion For Summary Judgment. In this suit the Belzbergs have asserted a claim for a statutory appraisal of their Enstar stock following the merger of Unimar Subsidiary, Inc. with Enstar. I find that, although the undisputed evidence shows that an agreement to settle the Belzbergs' claims was agreed to by the attorneys for the parties, there are material facts in dispute as to the existence of mistake, fraud or unclean hands and, therefore, the Belzbergs' motion for summary judgment must be denied.

I

The focal issue is whether the parties, through their attorneys, reached a binding agreement to settle and compromise the Belzbergs' claim for a statutory appraisal of their shares of Enstar. The facts are for the most part undisputed and consist primarily of the deposition testimony of the two attorneys who negotiated the now challenged settlement. Where the facts are disputed, they are construed in favor of Enstar, the non-moving party.

After the unsuccessful effort of several stockholders to enjoin the merger, on September 25, 1984 Enstar merged with and into Unimar. The Enstar shareholders who accepted the merger consideration received, $2.00 in cash and one newly issued Indonesian Participating Unit ("IPU") for each share of Enstar stock held on the merger date. More than 106 Enstar shareholders, however, including the Belzbergs, rejected the merger consideration and sought appraisal of

their Enstar shares pursuant to 8 *Del. C.* § 262. Of the dissenters, the Belzbergs were the holders of the greatest number of shares.

On June 11, 1985, in accordance with the pretrial procedures approved by the Court, Enstar filed a Stockholder Information Form in the Office of the Register in Chancery in which it conceded the right of several dissenting stockholders to an appraisal but disputed the right to an appraisal by other dissenting stockholders. The Belzbergs' 156,828 shares were among those which Enstar denied were entitled to an appraisal.

The position of Enstar was based on its assertion that the Belzbergs' shares were held by Cede & Co., as the record owner, for a broker which in turn held the shares in its street name for the Belzbergs, and that Cede, the record owner, had not properly perfected the demand for an appraisal. On July 24, 1985, the Belzbergs answered Enstar's objection by claiming that the demand for an appraisal was properly made and that, in any case, they had relied upon prior representations by Enstar that the appraisal demand was proper and therefore Enstar was estopped from claiming that the appraisal demand was deficient.

After approximately six months of settlement negotiations, counsel for Enstar, Charles F. Richards, Jr. and Michael D. Goldman, counsel for all the dissenting shareholders including the Belzbergs, reached a tentative settlement agreement. That proposed settlement agreement provided that Enstar would pay $20 per share, plus 10% interest and counsel fees, for those shares which Enstar conceded were entitled to appraisal. Enstar also agreed to pay the same consideration as to those shares which it did not concede were entitled to appraisal upon this Court finding that the shares were entitled to appraisal. Enstar however insisted that this settlement would not be effective unless the Belzbergs, the major dissenting stockholder, agreed to be bound by it.

On January 15, 1986, the Belzbergs broke ranks with other dissenting stockholders and rejected the proposed settlement agreement. The remaining dissenting shareholders, however, accepted the compromise terms which later became the basis for a settlement as to their claims which was approved by the Court on June 27, 1986. As a result of this conflict, Mr. Goldman withdrew as Delaware counsel for the Belzbergs, leaving their New York attorney, Richard S. Borisoff to negotiate with Mr. Richards.

On Friday, January 17, 1986, Mr. Borisoff and Mr. Richards negotiated an understanding, the facts and legal effect of which is presently disputed. Mr. Borisoff first offered to settle the Belzbergs'

claims for $20 per share, with no interest for all the Belzbergs' shares. Mr. Richards counter-proposed, on a "take-it-or-leave-it" basis, that the Belzbergs receive the original merger consideration of $2 and one Indonesian Participating Unit ("IPU") for 50% of their shares and receive the $20 per share (plus interest) settlement price reached with the other dissenting shareholders for their other shares. Enstar alleges that its offer also required the Belzbergs to immediately tender their shares and to send a letter to Mr. Richards confirming the agreement.

After conferring with the Belzbergs, Mr. Borisoff counter-proposed that the Belzbergs receive the original merger consideration of $2 and one IPU per original share for 25% of their shares and the $20 (plus interest) settlement consideration for the remaining 75% of their shares. Mr. Richards immediately rejected this offer re-emphasizing that his 50-50 offer was being made on a take-it-or-leave-it basis. After again speaking to his clients, Mr. Borisoff reported that his clients would accept the 50-50 proposal as long as Enstar paid all of the Belzberg's attorney fees. Mr. Richards indicated this was acceptable and restated the terms of the agreement and Mr. Borisoff agreed. Mr. Richards claims that in the restatement he again required the tender of the Belzbergs' shares by the following Monday, January 20, 1986.

Mr. Richards then informed Mr. Goldman and other counsel for the other dissenting shareholders of the understanding reached with the Belzbergs. The other shareholders adapted their settlement agreement to provide for the oral agreement between Mr. Richards and Mr. Borisoff. Mr. Richards also told Mr. Goldman that the Belzbergs' oral agreement would not be effective until a tender of their Enstar shares.

On Monday afternoon, January 20, 1986, Mr. Richards called Mr. Borisoff to inquire why the confirmatory letter and the Belzbergs shares had not arrived.

The next morning Mr. Richards called again asking for the letter and shares. During this phone call, Mr. Borisoff informed Mr. Richards that Cede, shortly after the merger (in 1984), had delivered the shares of stock to Enstar. Mr. Richards did not immediately repudiate the agreement, however. Neither did his associate, Mr. Nolen, who called Mr. Borisoff later in the morning to gain more information about Cede's delivery of the shares to Enstar.

On the same day, Mr. Borisoff telecopied his confirmatory letter to Mr. Richards. This letter did not mention any requirement that the Belzbergs physically deliver their shares.

The next day, January 22, 1986 in response to his previous request, Mr. Borisoff informed Mr. Nolen that Cede, purportedly without the knowledge of the Belzbergs, had mistakenly surrendered the shares to Enstar on October 24, 1984. Mr. Nolen then told Mr. Borisoff that Enstar would have to re-examine its position in light of these facts.

Thereafter, on January 24, 1986, Mr. Richards informed Mr. Borisoff that Enstar was not willing to enter into a compromise or settlement with the Belzbergs on the terms previously agreed upon and considered any agreement rescinded by its terms. Later that day, Mr. Richards and the non-Belzberg dissenting shareholders reached a modified settlement agreement excluding the Belzbergs.

On January 29, 1986, Enstar moved to amend the Stockholder Information Forms previously filed with the Court to add a second objection to the Belzbergs' claims: that the Belzbergs had tendered their shares thereby accepting the merger consideration and were, therefore, not entitled to an appraisal.

On April 29, 1986, I granted Enstar's motion to amend its Stockholder Information Forms to plead the new defense, while reserving decision on the enforceability of the compromise and settlement agreement until a further hearing. *Matter of ENSTAR CORP.*, Del. Ch., 513 A.2d 206 (1986). On December 31, 1987, the Belzbergs moved to enforce the compromise and settlement.

On March 12, 1986, after it was obvious that there would be litigation over the effect of the January 17 settlement agreement reached by Mr. Richards and Mr. Borisoff, Mr. Richards, over the objection of Mr. Brown, the Belzbergs new Delaware counsel, took the deposition of Mr. Borisoff in New York. On March 18, 1986, Mr. Brown took the deposition of Mr. Richards and Mr. Nolen in Wilmington.

These three depositions are the only evidence of what transpired on January 17-24, 1986 between Mr. Richards and Mr. Nolen on behalf of Enstar and Mr. Borisoff on behalf of the Belzbergs.

II

[1-2] Delaware law favors the voluntary settlement of contested suits. *Neponsit Inv. Co. v. Abramson*, Del. Supr., 405 A.2d 97 (1979). "An attorney of record in a pending action who agrees to a compromise of a case is presumed to have lawful authority to make such an agreement." *Aiken v. National Fire Safety Counsellors*, Del. Ch., 127 A.2d 473 (1956).

[3-6]A binding contract is therefore created where opposing attorneys orally agree to compromise and settle a lawsuit. *Corbesco, Inc. v. Local No. 542, Intern. Union of Operation Engineers*, 620 F.Supp. 1239 (D. Del. 1985). It is construed by the legal principles applicable to contracts generally. *Airline Stewards & Stewardesses Assoc., Local 550, TWU, AFL-CIO v. Trans World Airlines, Inc.*, 713 F.2d 319 (7th Cir. 1983); *Interspace, Inc. v. Morris*, 650 F.Supp. 107 (S.D.N.Y. 1986); *Jones v. First Nat'l Bldg. Corp.*, 155 F.2d 815 (10th Cir. 1946). Like any other contractual agreement, therefore, a compromise and settlement may be invalidated under certain conditions including, fraud, illegality, duress, undue influence and perhaps mistake. See *Interspace, Inc. v. Morris*, supra; *Thibaut v. Ourso*, 605 F.Supp. 1 (M.D. La. 1981), *App. dis.*, 705 F.2d 118 (5th Cir. 1983); 15A AM.JUR.2d, *Compromise and Settlement* Sections 27-34 (1976). While a material mutual mistake of fact may invalidate a compromise and settlement, absent fraud or some other equitable consideration, a unilateral mistake generally will not. See *Cheatham v. Cheatham*, 405 N.Y.S.2d 878 (1976); *L.E. Smith Constr. Co. v. Reardon Plumbing & Heating Co.*, 372 P.2d 229 (Okla. 1962); *Sparrow v. Cimonetti*, 58 A.2d 875 (Vt. 1948); 15A AM.JUR.2d, supra, Section 34. See also *Aetna Casualty & Sur. Co. v. LaFazia*, Del. Ch., C.A. No. 6567, Brown, C. (November 3, 1982).

[7-8] Once a valid compromise and settlement has been reached, the actual merits of the underlying claim will not afterward be examined. See *Hennessy v. Bacon*, 137 U.S. 78 (1890); *United States v. Child & Co.*, 79 U.S. 232 (1871); *Patterson v. Stovall*, 528 F.2d 108 (7th Cir. 1976); 15A AM.JUR.2d, *Compromise and Settlement*, Section 25. The fact that later judicial developments or other sources of information may subsequently show that the claim was, in fact at the time of settlement, unfounded will not justify invalidating the compromise if the claim was brought in good faith. See *Hennessy v. Bacon*, supra; 15A AM.JUR.2d, *Compromise and Settlement* § 17.

[9-10] Although summary judgment is an efficient means of resolving legal issues, it has long been established that summary judgment cannot be granted unless there is no genuine issue of material fact. *H. & S. Mfg. Co. v. Benjamin F. Rich Co.*, Del. Ch., 164 A.2d 447 (1960); Chancery Rule 56(c). Summary judgment is particularly inappropriate in disputes concerning the formation and interpretation of contracts. See 10A WRIGHT & MILLER, *Federal Practice and Procedure*, Civil Sec. 2730.1. See also *Clearly v. U.S. Lines, Inc.*, 555 F.Supp. 1251 (D.N.J. 1983), *aff'd* 728 F.2d 607 (3d Cir.

1984). But see *Kellam Energy, Inc. v. Duncan*, 668 F.Supp. 861 (D.Del. 1987).

III

The Belzbergs argue that the negotiations of January 17, 1986, between Mr. Richards and Mr. Borisoff, formed a valid and binding settlement agreement which Enstar must now honor as a matter of law.

In response, Enstar asserts that there are numerous defenses which preclude summary judgment. First, Enstar claims that no agreement ever existed because, they assert, the parties never reached an understanding as to all the material terms of the contract in as much as there was never any discussion as to how to account for the merger consideration and subsequent dividends received by the Belzbergs because of the tender of their shares by Cede. Secondly, Enstar states that if an agreement did arise, Borisoff's confirmatory letter of January 21 somehow "repudiated" the agreement. Thirdly, Enstar asserts that physical delivery of the Belzbergs' shares was a condition precedent to settlement and that this condition was not met, nor can it be met. Fourthly, Enstar contends that there is a dispute as to whether it, the Belzbergs, or both, were aware of Cede's tender of the Belzbergs' shares and therefore a factual issue exists whether there was a mutual or unilateral mistake of fact. Lastly, Enstar asserts that the Belzbergs are guilty of unclean hands and fraud in that the Belzbergs knew of Cede's previous tender of their shares and intentionally deceived Enstar, which allegedly had no knowledge of it, into settling the dispute. Enstar states that had it been aware of Cede's tender of the Belzbergs' shares, it would not have entered into the settlement agreement with the Belzbergs.

IV

[11] As previously discussed, a compromise and settlement agreement is a contract and requires, among other things, parties who have the capacity and authority to agree, a definitive offer and acceptance, and consideration. It appears from the undisputed record that the formal requirements for the formation of a binding settlement have been met and it is also undisputed that, on January 17, 1986, Mr. Richards and Mr. Borisoff believed that they had arrived at an oral settlement of the dispute regarding the Belzbergs' appraisal rights. Both Mr. Richards and Mr. Borisoff clearly had the implicit authority to enter into a settlement agreement and, therefore, their

oral agreement created a binding contract, unless there is some reason it was legally invalid. *Corbesco*, supra.

The terms of the settlement are certain. The Belzbergs were to receive the same $20 per share, plus interest, settlement consideration that Enstar's other dissenting shareholders were to receive for 50% of their shares. For their remaining shares, they were to receive the original merger consideration which consisted of $2 and one Indonesian Participating Unit per share. Additionally, Enstar, through Mr. Richards, agreed to pay the Belzbergs' attorney fees. Under this agreement there was no mention that the original merger consideration including the subsequent IPU dividends had already been received by the Belzbergs but presumably those sums could have been returned to Enstar.

There is a potential material factual dispute as to whether Mr. Borisoff agreed to physically deliver the Belzbergs' share certificates to Mr. Richards on the following business day after the agreement and, if so, whether such delivery was a prerequisite to the settlement. This disputed fact, however, is immaterial in light of the fact that Enstar already had possession of the Belzbergs' shares because they had been previously tendered by Cede. The deposition testimony of Mr. Richards clearly indicates that the only reason he imposed the requirement of the surrender of the share certificates to Enstar was to ensure that the Belzbergs not back out of the agreement. The delivery requirement, therefore, had actually already been satisfied and technical non-performance of the timing of that condition cannot, under the circumstances, amount to a breach of contract. See 17 AM.JUR.2d, *Contracts* § 378 (1964).

The only possible adverse legal effect of the delivery of the shares by Cede on October 24, 1984, instead of a delivery by the Belzbergs on January 20, 1986, is that the earlier delivery by Cede might raise the specter that the Belzbergs had accepted the terms of the merger and thereby waived their right to an appraisal. As previously noted, however, Enstar was already contesting the legal right of the Belzbergs to an appraisal.

[12-14] There is no evidence that the Belzbergs' appraisal action was not brought in good faith. There was, therefore, a *bona fide* controversy existing between the parties. Even if a claim is actually invalid and its invalidity is not even doubtful, the existence of the claim is a sufficient basis for a compromise if it is asserted in good faith. *Rommel v. West American Insurance Co.*, 158 A.2d 683 (D.C. 1960). Once a valid settlement has been reached, courts will not inquire into or examine the merits of the underlying claim and it

makes no difference that the claim had no legal basis. See *Hennessey v. Bacon*, supra; *United States v. Child & Co.*, supra; 15A AM. JUR.2d, *Compromise and Settlement*, Sections 15, 17, 25.

Enstar's claim that the Belzbergs are *prima facie* precluded from seeking an appraisal because Cede had previously tendered the shares ignores an earlier opinion in this very case. In *Matter of Enstar Corp.*, Del. Ch., 513 A.2d 206 (1986), I found that Cede's mistaken tender of shares held on behalf of United Virginia Bank, as trustee for William W. and Helen Sproul, did not preclude the bank, as trustee, from reaping the benefits of the settlement of the appraisal claim.

Enstar's claim that written confirmation of the terms of the agreement by Mr. Borisoff was a condition precedent to actual settlement is also not supported by the record. The terms of settlement offered to the Belzbergs through Mr. Richards were made on a take-it-or-leave-it basis. If Mr. Borisoff, on behalf of the Belzbergs, did not immediately accept the offer, Mr. Richards indicated the offer would be withdrawn. Under these circumstances, it is clear that Mr. Borisoff and Mr. Richards could not have intended the written confirmation to be a precondition to settlement. In his deposition testimony Mr. Richards admits that the purpose of the letter was only to confirm the oral agreement. Nor could Mr. Borisoff's January 21, 1986 letter on its face have been a repudiation of the compromise settlement. See *Corbesco*, supra.

[15-16] Except for Enstar's claim of mistake, fraud or unclean hands, therefore, the compromise and settlement would be binding on Enstar and the Belzbergs would be entitled to summary judgment enforcing the agreement. However, the circumstances surrounding the Belzbergs' receipt of the original merger consideration and the receipt of subsequent Indonesian Participating Unit dividends, the extent of the parties' knowledge of Cede's prior tender of the Belzbergs' shares and the intention of the Belzbergs to tender or not tender are all disputed questions of fact going directly to Enstar's defenses of mistake, fraud, and unclean hands. When a disputed fact is motive, intention or other subjective matter, summary judgment is ordinarily inappropriate. *Continental Oil Co. v. Pauley Petroleum, Inc.*, Del. Supr., 251 A.2d 824 (1969). Therefore, on this record, I cannot grant the Belzbergs' motion for summary judgment. *H. & S. Mfg. Co. v. Benjamin F. Rich Co.*, supra. The Court's role at this preliminary stage is not to determine facts, *Gamble v. Penn Valley Crude Oil Corp.*, Del. Ch., 104 A.2d 257 (1954), or to weigh the evidence, *Continental Oil Co. v. Pauley Petroleum, Inc.*, supra.

V

In summary, I find genuine issues of material fact exist and, therefore, I deny the Belzbergs' motion for summary judgment.

IT IS SO ORDERED.

GRAND METROPOLITAN PLC v. PILLSBURY CO.

No. 10,319

IN RE PILLSBURY COMPANY SHAREHOLDERS LITIGATION

No. 10,323 (Consolidated)

Court of Chancery of the State of Delaware, New Castle

November 7, 1988

(revised November 9, 1988)

Plaintiffs sought a preliminary injunction based on allegations that the board of directors violated its fiduciary duties to the shareholders in that the board acted without good faith, primarily in its own interest and without reasonable investigation. The court of chancery, per Justice Duffy (retired), held that plaintiffs failed to meet their burden of proof as to all allegations.

1. Corporations ⟹ 307, 310(1)

In the absence of any significant challenge to the board of directors' good faith, and in the absence of any direct evidence that the board was acting primarily in its own interest, and given the board's relatively prompt consideration of the tender offer, it cannot be said that the board violated its *Unocal* fiduciary duties.

2. Injunction ⟹ 14, 136(1)

A party seeking a preliminary injunction must demonstrate that irreparable harm will result if relief is denied at the present time.

3. Corporations ⟹ 182.4(2), 310(1)

While an all-cash, all-shares tender offer may not be coercive, it may be a threat to the stockholders' economic interests if it is inadequate.

R. Franklin Balotti, Esquire, of Richards, Layton & Finger, Wilmington, Delaware, for plaintiff Grand Metropolitan, PLC.

Steven J. Rothschild, Esquire, of Skadden, Arps, Slate, Meagher & Flom, Wilmington, Delaware, for defendant Pillsbury Company.

Joseph A. Rosenthal, Esquire, of Morris, Rosenthal, Monhait & Gross, P.A., Wilmington, Delaware, for Pillsbury shareholders.

DUFFY, *Justice**

The pending motions for a preliminary injunction were argued last Friday afternoon and Grand Met's Tender Offer is scheduled to expire tomorrow, November 8, at midnight.

Given the limited time frame, I cannot file a plenary opinion before the Offer expires. I have, however, considered the briefs filed by counsel and the contentions made during oral argument, together with the record on which they are based. My conclusions (which may be supplemented by a full opinion at a later date) are as follows:

The decision by Pillsbury's Board of Directors on October 17.

[1] On that date, the Pillsbury Board determined that Grand Met's Tender Offer is inadequate and refused to redeem the Poison Pill. In my view, those decisions should be judged, not in hindsight but by what was available to the Board when it acted on October 17. So viewed, I conclude that the Board's action was consistent with the fiduciary standards established by Delaware law. *Moran v. Household International, Inc.*, Del. Supr., 500 A.2d 1346, 1356 (1985); *Unocal Corp. v. Mesa Petroleum Co.*, Del. Supr., 493 A.2d 946, 954 (1985); *City Capital Associates Limited Partnership v. Interco Incorporated*,

* Assigned pursuant to DEL. CONST. art. IV, § 13(2).

Del. Ch., ___ A.2d ___, C.A. No. 10105, Allen, C. (November 1, 1988) slip op. at 3. In saying this, I note particularly the independence of 12 out of 14 Directors, the absence of any significant challenge to their good faith, and the absence of any direct evidence that the Board was acting primarily in its own interest. And, given the Board's relatively prompt consideration of the Tender Offer, I cannot say, as a matter of law, that its investigation was unreasonable: the meeting was lengthy, written opinions from two investment bankers (stating that the proposed consideration is "inadequate" from a financial point of view) were considered, the Company's post-restructuring prospects were discussed, and counsel's advice was received as to legal implications related to the so-called "Tied-House" statutes. And the Board directed its financial advisors to explore all alternatives available to Pillsbury and to report on them to the Board.

In sum, the Board met its *Unocal* duties on October 17. *Unocal* at 455.

The Tied-House Statutes.

[2] Litigation is ongoing in 14 States which may have varying statutes and opinions as to whether Grand Met's Tender Offer and/or its present ownership (of 200 shares) of Pillsbury stock violates local law. In my view, the decisions as to possible application of the statutes should be left to the States involved. And, in any event, plaintiffs have not shown that irreparable harm will result if relief is denied on this issue at this time. *Ivanhoe Partners v. Newmont Mining Corp.*, Del. Supr., 535 A.2d 1334, 1341 (1987); *Interco* at p. 17.

As to events after October 17.

Grand Met and the stockholder-plaintiffs emphasize, strongly, that more and more time has passed and Pillsbury has not put any offer of any kind on the table for shareholders to consider as an alternative to Grand Met's offer of $60 per share, all cash for all shares. Meanwhile, the Pill remains in place, both as bargaining leverage for Pillsbury to maximize value to shareholders (if the Board elects to use it for that purpose), *Interco* at p. 27, and as a barrier to shareholders' consideration of Grand Met's Tender Offer.

[3] Pillsbury's exploration of alternatives may go on indefinitely, but a "just say no" posture may not justify keeping a Pill in place when its only purpose is to bar all stockholders from having an opportunity to consider an all-cash, all-shares offer to sell their shares. Such an offer, while not coercive, may, however, be a threat to

stockholders' economic interests if it is "inadequate." *See Interco*, pp. 26-28. There, the Chancellor ordered the Interco Board of Directors to redeem the Pill because its only purpose was to protect a Board sponsored restructuring and to exclude shareholders from considering an alternative which was arguably comparable. I note, however, that the alternative offer was so close in value to the restructuring which was proposed that the Court concluded that any "threat" was too mild to justify keeping the Pill in place. In other words, any threat arising from "inadequacy" of the Tender Offer had been removed on the record in that case. A similar type of inquiry may be required here.

I cannot say, based on events that have occurred subsequent to October 17, that plaintiffs are now entitled to injunctive relief.

Any party may make such further application to the Court as it deems appropriate, including renewal of the respective motions for a preliminary injunction. *Compare Doskocil Companies Incorporated v. Kenneth J. Griggy, et al.*, Del. Ch., C.A. No. 10045, Berger, V.C. (October 7, 1988).

* * *

The motions for a preliminary injunction are denied. IT IS SO ORDERED.

GRAND METROPOLITAN PLC v. PILLSBURY CO.

No. 10,319

IN RE PILLSBURY COMPANY SHAREHOLDERS LITIGATION

No. 10,323 (Consolidated)

Court of Chancery of the State of Delaware, New Castle

November 22, 1988

Plaintiffs, Grand Metropolitan and Wendell Investments Limited, as well as shareholders of Pillsbury, sought to compel production of documents withheld by Pillsbury under a claim of privilege or immunity as they would disclose ongoing business matters relating to the board's response to Grand Metropolitan's offer for up to all of the Pillsbury Company common stock.

The court of chancery, per Chancellor Allen, held that a "white knight" privilege or "business strategy" privilege, while not technically an absolute privilege, is subject to protection in a manner similar to attorney work product. Because Pillsbury's decision to spin-off its Burger King subsidiary would substantially change the Pillsbury Company, documents created prior to the decision are discoverable while documents created subsequent to the decision are protected if they relate to defenses still under consideration.

1. Pretrial Procedure ⟹ 27

The scope of permissible discovery under Delaware Court of Chancery Rule 26(b), while broad, must be balanced against the ongoing responsibility of the board of directors of a target corporation to manage the corporation. DEL. CH. CT. R. 26(b).

2. Pretrial Procedure ⟹ 27

Corporations ⟹ 310(1)

In a contest for corporate control, the board of directors of a target company continues to have an ongoing responsibility to manage the corporation and, in the face of such a contest, that responsibility may entail the exploration of alternative transactions that would better promote corporate and shareholder welfare.

3. Pretrial Procedure ⟹ 27

In a contest for corporate control and under the authority of Delaware Court of Chancery Rule 26(b), the courts will engage in an analysis that attempts to evaluate the importance of the matter sought to be discovered to the party seeking it; the risk of nonlitigation injury that might occur to the target corporation if discovery is permitted; and the stage of the company's efforts, as well as the stage of the litigation. DEL. CH. CT. R. 26(b).

4. Pretrial Procedure ⟹ 27

The courts in performing an analysis under Delaware Court of Chancery Rule 26(b) attempts to fashion a discovery ruling that best

balances and accommodates inconsistent yet valid contending interests. DEL. CH. CT. R. 26(b).

5. Pretrial Procedure ⟹ 27

Since the business strategy privilege or white knight privilege is not technically a privilege in the sense that proof of certain elements creates something akin to an entitlement, but is in the nature of a qualified immunity to discovery similar to the attorney's work product doctrine, its invocation in all instances calls forth a balancing of interests approach.

6. Pretrial Procedure ⟹ 17, 27

Where a decision has already been made to resist an acquiror's offer, documents relevant to that decision are subject to discovery. However, as the board does continue to function with respect to its alternatives, the question whether production of documents under Delaware Court of Chancery Rule 26(b) disclosing elements of possible alternatives will be compelled must be addressed with particularity. DEL. CH. CT. R. 26(b).

7. Pretrial Procedure ⟹ 34, 35

Studies relating to the recapitalization or a leveraged buyout of the pre-spin-off company could not reveal ongoing negotiations or explorations and thus would be discoverable, while documents created after the board decision would be protected as they relate to transactions under active consideration.

8. Pretrial Procedure ⟹ 121, 131

Where instructions to deposition questions were correct when given but not appropriate in light of the target's board of directors' decision to spin-off a valued asset, plaintiff-acquirors should be given an opportunity to inquire into alternatives considered before the spin-off decision.

9. Pretrial Procedure ⟹ 171, 173

Where a deposition question sought to engage the witness in a normative discourse rather than discovery of facts, an instruction

not to answer was appropriate in light of the witness' limited participation in the underlying action.

C. Stephen Bigler, Esquire, of Richards, Layton & Finger, Wilmington, Delaware, for plaintiff Grand Metropolitan.

Joseph A. Rosenthal, Esquire, of Morris, Rosenthal, Monhait & Gross, P.A., Wilmington, Delaware, for plaintiff Pillsbury Company shareholders.

Edward P. Welch, Esquire, of Skadden, Arps, Slate, Meagher & Flom, Wilmington, Delaware; and A. Gilchrist Sparks, III, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, for defendant Pillsbury Company.

ALLEN, *Chancellor*

These actions arise out of a current tender offer by Grand Metropolitan PLC, through its subsidiary, Wendell Investments Limited, for up to all of the common stock of The Pillsbury Company at $60 per share cash. Two actions are consolidated. In one, plaintiffs are Grand Met and Wendell; plaintiffs in the second action are shareholders of Pillsbury. Currently pending are motions by both sets of plaintiffs to compel production of certain documents withheld by Pillsbury under a claim that those documents (or portions of documents) disclose ongoing business matters relating to the board's response to Grand Met's offer. These materials are said to be subject to a privilege or immunity from the discovery process, at least at this stage. That "privilege," which has been referred to in some of our decisions as a "white knight" privilege, is here somewhat more appropriately referred to as a "business strategy privilege."

A central issue at this stage of this litigation appears to be whether the board of Pillsbury has acted in good faith and with due care in reaching and adhering to a decision to resist the Grand Met offer and whether the steps it has taken to defeat that offer are reasonable in relationship to a threat that the offer is seen as presenting. *Unocal Corp. v. Mesa Petroleum Co.*, Del. Supr., 493 A.2d 946 (1985). The principal decision the board has made to thwart the Grand Met offer, which the board has determined with the advice of its bankers is at an inadequate price, is the decision to leave in place certain stock rights ("poison pill"), the existence of which

apparently render it quite unlikely that Grand Met will be able to close its proposed transaction even if a large majority of Pillsbury shareholders seek to accept the offer. (It now appears that approximately 85% of the Pillsbury stock has been tendered to Grand Met).

An initial motion for an injunction requiring the board to redeem the stock rights was heard on November 4, 1988, approximately one month after the offer commenced. That motion was denied on the basis that as of its meeting of October 17, it appeared that the board was meeting its obligations in the circumstances. The board was at that time seen as actively considering steps to maximize shareholder interests in face of the Grand Met bid and the stock rights, therefore, were seen as serving a valid purpose at that time. Subsequent to the presentation of that motion, the board has announced an intention to spin off the Burger King business and its associated distribution company to Pillsbury stockholders as of December 2. That record date has now been changed to December 19. Plaintiffs have sought a time for the presentation of another motion seeking, among other relief, an order requiring the board to now redeem the stock rights. That motion will be heard on December 12. It is in connection with that motion that the current motion under Rule 37 is pressed.

* * *

The general principles governing this motion may be stated without great difficulty. The application of those standards, however, is necessarily highly particularized and often difficult.

[1-4] The starting place is a recognition that the scope of permissible discovery under Rule 26(b) of the Rules of the Court of Chancery (which is modeled on the federal rules of civil procedure) is broad. There is no assertion here that the materials sought fail to satisfy the test of Rule 26(b). However, this court and others have recognized that in a contest for corporate control, the board of directors of a target company continues to have an ongoing responsibility to manage the corporation and, in the face of such a contest, that responsibility may entail the exploration of alternative transactions that would better promote corporate and shareholder welfare. The discovery process may legitimately give some consideration to such efforts. We have repeatedly recognized that disclosure of such efforts, while they are ongoing, may be detrimental to shareholder interests.[1] Thus, under authority of Rule 26(c), we have, when a

1. *See, e.g.*, *Newell Co. v. William E. Wright Co.*, Del. Ch., C.A. 9513, Allen,

threat of that kind is present, engaged in an analysis that attempts to evaluate the importance of the matter sought to be discovered to the party seeking it; the risk of nonlitigation injury that might occur to the target corporation if discovery is permitted; and the stage of the company's efforts, as well as the stage of the litigation. The effort is to fashion a discovery ruling that best balances and accommodates inconsistent yet valid contending interests.

[5] Since the "business strategy privilege" or "white knight privilege" is not technically a privilege in the sense that proof of certain elements creates something akin to an entitlement, but is in the nature of a qualified immunity to discovery similar to the attorney's work product doctrine (*see Computervision Corp. v. Prime Computer, Inc.*, Del. Ch., C.A. No. 9513, Allen, C. (January 26, 1988); *BNS, Inc. v. Koppers Co., Inc.*, 683 F. Supp. 454 (D. Del. 1988)), its invocation in all instances calls forth this balancing of interests approach. The cases engaging in this analysis, however, have developed a few helpful principles. Primary among these is the notion that, once a decision has been made, the shareholders "are entitled to test the validity of that decision and, for that purpose, to inquire into its underlying basis." *Plaza Securities Company v. Office*, Del. Ch., C.A. No. 8737, Jacobs, V.C. (December 15, 1986). In *BNS, Inc. v. Koppers*, Chief Judge Schwartz, applying federal, not Delaware, law, noted a similar view:

> BNS will not be denied the documents forever. This fact has been a significant factor in the Court's efforts to accommodate the needs of the parties. As discussed above, BNS has a genuine need for the documents its seeks. It is equally clear at some future point BNS may be immediately entitled to that which has been refused it today. That point will be reached with respect to the $60 offer if, and when, the Koppers board formally rejects it. Similarly, if the Koppers board should formally announce its intent to adopt any one or a combination of defenses, BNS will become immediately entitled to all documents relating to all defensive strategies it had considered.

683 F. Supp. at 458.

C. (September 26, 1985) (oral ruling); *Wickes Cos. v. Owens-Corning Fiberglass Corp.*, Del. Ch., C.A. 8572, Berger, V.C. (August 29, 1986); *Computervision Corp. v. Prime Computer, Inc.*, Del. Ch., C.A. 9513, Allen, C. (January 26, 1988).

Here, plaintiffs say the board has made a decision to resist the Grand Met offer and to keep the rights in place. Therefore, now is the time for full disclosure (subject to the terms of a confidentiality agreement already in place).

Pillsbury contends that the principle that full disclosure of discoverable matters relating to an accomplished decision has been fully complied with in this case. It says that it has fully produced documents relevant to the board's decision to leave the poison pill in place except where those documents disclose information concerning options still being actively considered.

* * *

[6] Plaintiffs apparently seek an order of broad generality determining that, at this stage of the litigation, there can be no invocation of a business strategy privilege. This relief is overly broad, however. The board has determined to resist the Grand Met offer and thus, in light of the legal issue raised thereby, the basis for its determination must be subjected to limited judicial review. Documents relevant to that decision thus are subject to discovery. However, as the board does continue to function with respect to its alternative, the question whether production of documents disclosing elements of possible alternatives will be compelled must be addressed with particularity.

Turning to specifics, plaintiffs claim that they have been unable to obtain discovery of efforts by the Company to locate a so-called "white knight" or friendly alternative transaction. In this connection, they say it is surely relevant to the reasonableness of the board's judgment that Grand Met's $60 cash offer constitutes a "threat" and that that offer is "inadequate" to know (a) how many other potential buyers were contacted by Pillsbury's agents, (b) what they were told about the Company,[2] and (c) what the responses were.

This discovery has been resisted because the board apparently has not rejected the possibility of proposing such a transaction. That the Company may not yet have abandoned the idea of a possible alternative merger partner does not itself implicate the concerns that this "privilege" is meant to address, insofar as contacts that have failed to excite a still lively interest are concerned. With respect to any contacts that have led to a still lively interest, the identity of such person and the subject of discussions that may have occurred

2. As to this, I understand that the Pillsbury "book" prepared by its investment bankers has now been provided to plaintiffs with a single page redacted.

between them and the Company or its outside advisors would seem to implicate those concerns and, in the circumstances, to warrant protection at this time.

Accordingly, defendants shall inform plaintiffs of the identity of each person or entity that it solicited or with whom it otherwise had discussions relating to a possible business combination or other material transaction (whether by merger, sale of assets or other device)—except such persons or entities with whom such discussions may in good faith be said to be ongoing; and the Company shall be required to respond to discovery requests seeking the disclosure of the course and outcome of such discussions in each such instance (unless disclosure of the identity of such person or the substance of the contacts would breach an existing confidentiality agreement with such third party).

Another subject to which plaintiffs point is the refusal of the Company to disclose materials relating to evaluation of any possible LBO option. Such a hypothetical transaction was one of several techniques employed by Pillsbury's investment bankers for valuing the Company. The Company claims that several alternative bases for determining that the Grand Met offer was "inadequate" have been disclosed (including the discounted cash flow analysis apparently), and that the LBO alternative is not critical. More importantly, they say that that alternative continues under active study as an option. While plaintiffs are quite skeptical that such an option can realistically be regarded as tenable at this date, I accept defendants' representation.

Plaintiffs presumably suppose that the LBO studies show that such a transaction would not be feasible at a price of $60 per share or more, and thus contend that the court must be apprised of that information, which was before the board, in evaluating the reasonableness of the board's reaction to the "threat" posed by the Grand Met offer. I agree that the information would appear quite relevant.

Moreover, information relating to possible recapitalization would appear to have a similar claim to relevance. That information too has been redacted because that type of transaction continues to be considered as an option.

[7] These two, related subjects may be treated together. Aside from their obvious relevance, the most important fact to note about these alternatives is that to the extent they were considered in a pre-Burger King spin-off environment, they are quite different from any such alternatives being considered now. The decision to spin-off that important asset entailed a decision to change the Pillsbury Company

in a very substantial way. Studies relating to a recapitalization or an LBO of the pre-spin-off Company could not reveal ongoing negotiations or explorations, the disclosure of which so threatens injury to the Company as to outweigh the Rule 26(b) claim to inspection. The decision to do the spin-off rendered of historical interest studies to do alternatives incompatible with the spin-off. To the extent there are ongoing negotiations or consideration of an LBO or recapitalization of the Company as it would appear post spin-off, they would present the problem that the business strategy privilege addresses.

Accordingly, defendants will be required to produce all documents relating to or disclosing a possible LBO transaction or a recapitalization or restructuring of the Company previously withheld under a claim of business strategy privilege that were created prior to the board's approval of the spin-off. As to documents created after that time relating to such transactions, the motion to compel will be denied at this time insofar as counsel will represent that they relate to a form of transaction still under active consideration.

The request for the production of the Company's "corporate strategy/plan review" that was created prior to the offer shall be produced as it may have formed an important part on the board's determination that the Grand Met offer was inadequate in light of the future prospect for the Company. I cannot determine what subjects are redacted on the document produced. As with the Smith notes treated below, if the Company wishes to reargue this ruling in light of the specific matters redacted, it may do so by getting an appointment with me tomorrow. Otherwise, this document shall be produced promptly.

The request that the Company be required to produce the minutes of its meeting since January 1, 1986, insofar as they relate to issues in this lawsuit, will be granted.

The request that the Company be required to produce documents relating to a Shearson Lehman study concerning the financial ability of Grand Met to acquire Pillsbury will be granted.

The request for the production of an unredacted copy of the handwritten notes of Mr. Philip Smith relating to the October 17 meeting will be granted, except defendants may move for reconsideration of this item within twenty-four hours, if they wish to supply the court with a copy of these notes in their unredacted form and reargue the basis of the objections with the particularities of that document in view.

[8] As to the specific deposition question, I have reviewed the various transcripts and conclude as follows. Most, if not all, of the instructions were proper when given. All of the depositions occurred prior to the board decision with respect to the spin-off. As indicated above, that decision has consequences for the discovery in this case. Some of those instructions would not be appropriately given under the current state of affairs (*i.e.*, Levin Dep. pp. 52-55; Macke Dep. 158; McLamore Dep. 155; Slater Dep. 94-95; Spoor Dep. 142); the other questions would still be validly subject to an instruction. I will not order that all of the foregoing witnesses submit to further deposition as the instructions were proper. Plaintiffs should, however, be afforded some opportunity now to inquire into the subject of alternatives considered before the decision to accomplish the spin-off. The parties should confer on this.

[9] As to the cross motion, I conclude that the instruction given to Mr. Giordiano was appropriate; the question did not seek the discovery of facts, but sought to engage the witness in a normative discourse. The limited scope of discovery of Grand Met's bankers, appropriate in light of the narrow relevance of its financial arrangements, together with the representation that no valuation data was provided to the banks by Grand Met, lead me to deny the Company's motion in this respect.

The materials required to be produced shall be produced by the close of business tomorrow.

GROBOW v. PEROT

No. 8759 (Consolidated)

Court of Chancery of the State of Delaware, New Castle

November 25, 1988

Plaintiffs' stockholder derivative actions were originally filed on behalf of a corporation and its wholly-owned subsidiary against its directors. Plaintiffs alleged that certain transactions, which involved the repurchase by the corporation of its securities from the directors, constituted a breach of the directors' fiduciary duties and a waste

of corporate assets. The court dismissed the action for failure to plead particularized facts in accordance with Delaware Court of Chancery Rule 23.1. On the basis of newly discovered evidence, plaintiffs sought leave to file an amended complaint. Defendants argue that: (1) plaintiffs' new evidence does not constitute newly discovered evidence; and (2) even if there was new material evidence, it was not material to the corporation's director, who had no new allegations levied against him.

The court of chancery, per Vice-Chancellor Jacobs, held that it could not conclude as a matter of law that the new evidence would not change the outcome on a renewed motion to dismiss. To hold that the plaintiffs were equitably compelled to forego their right to prosecute a rule 60(b) motion as a condition to preserve their appellate remedy, where the complaint had been dismissed at the very threshold and without discovery, would be unreasonable and unfair. Any prejudice to defendants in defending a duplicative action would be *de minimis* and is not a ground for denying a motion for leave to file a second amended complaint.

1. Equity ⟹ 430(2)

It cannot be concluded as a matter of law that new evidence not pled in prior dismissed complaint would not change the outcome on a renewed motion to dismiss. DEL. CH. CT. R. 23.1.

2. Corporations ⟹ 310(1)

If directors of a corporation approved a buyout based on information so inadequate as to make their decision unintelligent and unadvised, that decision would not be protected by the business judgment rule.

3. Equity ⟹ 430(2)

Because a cause of action may be duplicative is not ground for denying relief under Delaware Chancery Court Rule 60(b) or 15(a). DEL. CH. CT. R. 15(a), 60(b).

4. Equity ⟹ 430(2)

Any prejudice to defendants in defending a duplicative action with duplicative pleadings would be *de minimis* and is not a ground

for denying a motion for leave to file a second amended complaint.

Joseph A. Rosenthal, Esquire, and Kevin Gross, Esquire, of Morris, Rosenthal, Monhait & Gross, P.A., Wilmington, Delaware, for plaintiffs.

E. Norman Veasey, Esquire, of Richards, Layton & Finger, Wilmington, Delaware, for General Motors Corporation directors and individual defendants Anne L. Armstrong, Catherine B. Cleary, James H. Evans, Walter A. Fallon, Charles T. Fisher III, Marvin L. Goldberger, John J. Horan, Howard H. Kehrl, Thomas A. Murphy, Edmund T. Pralt, Jr., James D. Robinson III, John G. Small, Leon H. Sullivan, Dennis Weatherston, and Thomas H. Wyman.

William O. LaMotte III, Esquire, and Thomas R. Hunt, Jr., Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, for defendants General Motors Corporation and Electronic Data Systems Corporation.

Grover C. Brown, Esquire, of Morris, James, Hitchens & Williams, Wilmington, Delaware, for defendant directors of General Motors Corporation and individual defendants Donald J. Atwood, F. James McDonald, Lloyd E. Reuss, F. Alan Smith, Roger B. Smith, and Robert C. Stempel.

Bruce M. Stargatt, Esquire, and David C. McBride, Esquire, of Young, Conaway, Stargatt & Taylor, Wilmington, Delaware, for defendant H. Ross Perot.

JACOBS, *Vice-Chancellor*

Pending are the plaintiffs' motions to vacate a judgment dismissing these consolidated actions and for leave to file a second amended complaint, pursuant to Chancery Rules 60(b)(2) and 15(a). This is the decision of the Court on those motions.

I.

These stockholder derivative actions were originally commenced in December, 1986 on behalf of General Motors Corporation ("GM") and its wholly owned subsidiary, Electronic Data Systems Corporation ("EDS") against GM's directors, H. Ross Perot ("Perot")

and three of Perot's associates. The gist of the complaints, as originally filed and as later amended, was that certain transactions entered into in December, 1986, which involved the repurchase by GM of its securities from Perot and his associates and Perot's termination of his involvement with GM and EDS, constituted a breach of the GM directors' fiduciary duties and a waste of corporate assets.

On April 13, 1987, this Court dismissed the consolidated amended complaint for failure to plead particularized facts demonstrating that demand was excused as futile. Chancery Rule 23.1; *Grobow v. Perot*, Del. Ch., 526 A.2d 914 (1987). The plaintiffs appealed that dismissal order to the Supreme Court of Delaware. By opinion dated March 15, 1988, the Supreme Court affirmed the dismissal, although it also clarified the proper legal standards for demand excusal which, that Court ruled, had been improperly applied in that particular case. *Grobow v. Perot*, Del. Supr., 539 A.2d 180 (1988).

On May 16, 1988, the plaintiffs filed the pending motions to vacate the judgment and for leave to file a second amended complaint. Plaintiffs contend that following the dismissal of this action and while their appeal was pending, discovery was taken by other plaintiffs in certain related litigation in New York.[1] The result of that discovery was then made available to these plaintiffs, who concluded that it constituted material new evidence, and who thereafter sought leave to file their proposed second amended complaint. That complaint is said to be based upon that discovery and also upon a book about the "Perot buy out" that was published in 1988. Plaintiffs argue that by reason of such evidence, the proposed amended complaint, if allowed to be filed, would satisfy the pleading requirements for demand excusal. Plaintiffs submit that in the interests of justice they should be allowed to file the second amended complaint and, as a necessary predicate, to have the judgment of dismissal vacated.

II.

In their brief and at oral argument the defendants opposed these motions on essentially three grounds. As now discussed, none of

---

1. The discovery was taken in *Hart v. General Motors Corp.*, No. 28039/86 (Sup. Ct. N.Y. Co.) which was later dismissed on appeal. *Hart v. General Motors Corp.*, 129 A.D.2d 179, 517 N.Y.S.2d 490 (1st Dept.), *leave to appeal denied*, 70 N.Y.2d 608, 521 N.Y.S.2d 225 (1987). That same plaintiff (Hart) later filed two new actions in the Supreme Court of New York and in the United States District Court for the Southern District of New York. *See Hart v. General Motors Corp.*, No. 88/12502 (Sup. Ct. N.Y. Co.) and *Hart v. General Motors Corp.*, 88 Civ. 4378 (TPG) (S.D.N.Y.).

those contentions warrants denial of the relief being sought here.

The defendants first argue that the plaintiffs' new evidence does not constitute "newly discovered evidence," because it is not ". . . so material and relevant that it would probably change the result," as required by Chancery Rule 60(b)(2). Perot advances a separate, alternative, argument that even if there were material new evidence as to the GM defendants, that evidence is not material as to Perot, because no new allegations are leveled against him.

[1] On the basis of the limited record before me, I cannot conclude as a matter of law that the new evidence, as reflected in the proposed amended pleading, would not change the outcome on a renewed motion to dismiss under Rule 23.1. The deposition testimony of the two outside GM directors was taken in the *Hart* actions in May and June, 1987, *i.e.*, after this litigation had been dismissed. That testimony forms the basis of new allegations—not pleaded in the prior (dismissed) complaint—that GM's outside directors were misled about certain key provisions and consequences of the Perot buy out, and that GM's Board approved the buyout in a hasty, ill-informed, and therefore grossly negligent manner.

[2] Assuming (but not deciding) that those allegations are sufficiently particularized,[2] they would be sufficiently ". . . material and relevant . . . [to] . . . probably change the result," because a reasonable doubt would be created as to the applicability of the business judgment rule. If, as plaintiffs now allege, the directors approved the buyout based on information so inadequate as to make their decision "unintelligent and unadvised," that decision would not be protected by the business judgment rule. *Smith v. Van Gorkom*, Del. Supr., 488 A.2d 858, 873 (1985); *Aronson v. Lewis*, Del. Supr., 473 A.2d 805, 812 (1984); *In Re General Motors Class E Stock Buyout Securities Litigation*, D. Del., 694 F. Supp. 1119, 1132 (1988).

Nor can it be concluded as a matter of law that no newly discovered evidence has been adduced as to Perot. The proposed amended complaint alleges that Perot was a party to corporate waste because he demanded and received a 100% premium for his stock, for which GM received nothing in return. Perot is charged with culpability, because at that time he was a GM director and, hence, a fiduciary. Although (to repeat) the Court expresses no view as to

2. The sufficiency of the proposed amended complaint under Rule 23.1 is not presently in issue, and the Court intimates no view on the merits of that question.

the sufficiency of these new allegations against Perot for demand excusal purposes, it does conclude that those allegations are the product of newly discovered evidence.

Next, the defendants argue that the requested relief should be denied because the request is untimely. The argument runs as follows: The plaintiffs discovered the new information while their appeal was pending. At that point the plaintiffs should immediately have disclosed that information to this Court and the Supreme Court, and thereafter should promptly have filed these instant applications. Rather than follow that procedure, the plaintiffs' elected to have the Supreme Court decide an appeal unnecessarily. (Defendants stress that if plaintiffs' Rule 60(b) motion had merit, then the judgment would have been reopened, thereby mooting the appeal). Having made a deliberate tactical decision to prosecute their appeal with the objective of obtaining a reversal of the dismissal, as opposed to seeking relief from this Court under Rule 60(b), the plaintiffs should be required to abide by that decision. That is, the plaintiffs ought not to be allowed to "have it both ways," thereby imposing upon both the defendants and the Delaware Courts.

The defendants are unable to cite any positive rule of law that would have required the plaintiffs not to prosecute their appeal from a judgment, as a condition to prosecuting a later-filed motion for relief from that judgment under Rule 60(b). The defendants' argument amounts essentially to a request that the Court deny the relief sought as a discretionary matter, because the plaintiffs, in attempting to "have it both ways," behaved inequitably. I cannot agree.

If, in fact, the plaintiffs' chosen procedural course has worked an inequity or did abuse the court system, this Court would not hesitate to respond appropriately. However, the circumstances of this case do not warrant the denial of the requested relief. After this Court dismissed the plaintiffs' complaint, the plaintiffs concluded, in good faith, that the dismissal was erroneous both as to the result and the legal standard employed. Plaintiffs had the undoubted right to pursue their appellate remedy, and they did so. In one respect, at least, they were successful.[3] Only while the appeal was pending

3. Although the Supreme Court did not overturn the result reached by this Court, it did hold that this Court had applied an overly restrictive interpretation of the demand excusal pleading standard under *Aronson*, *supra*, and clarified those standards.

did the plaintiffs learn of new evidence upon which they now rely, *i.e.*, the May and June, 1987 depositions of the GM directors. The balance of that evidence was not discovered until 1988 when a book written about the "Perot buy out," *Call Me Roger*, was published. By that point the appeal was already under consideration by the Supreme Court.

The defendants invite this Court to fashion an equitable requirement, nowhere reflected in our Court Rules, that would have required the plaintiffs to elect either to prosecute their pending appeal or to abandon the appeal and prosecute a Rule 60(b) motion. Presumably such an election would be made at the point when the plaintiffs come into possession of material new information that would support such a motion. While the Court is not prepared to say that under no circumstances would such a requirement be warranted, this case is hardly an appropriate vehicle for its adoption. Here the plaintiffs acted appropriately. Their appeal, already *sub judice*, was one that they believed, in good faith, had merit. If plaintiffs appeal had fully succeeded, then no Rule 60(b) motion would be required. Even if the appeal were unsuccessful, an affirming opinion might provide useful guidance in any further proceedings in this case, as well as in future, cases. To hold that the plaintiffs were equitably compelled to forego their right to prosecute a Rule 60(b) motion as a condition to preserving their appellate remedy in this case, where the complaint had been dismissed at the very threshold and without discovery, would, in my opinion, be unreasonable and unfair.

Finally, the defendants argue that to grant the requested relief would be prejudicial to defendants, whereas to deny it would not prejudice the plaintiffs. They base that argument upon the existence of certain related actions, all involving the "Perot buy out," pending in both this Court (*Levine v. Smith*, Del. Ch., C.A. No. 8333) and in the multidistrict litigation now consolidated in the United States District Court for the District of Delaware. (*In Re General Motors Class E Stock Buyout Litigation*, D. Del., Master File No. Misc. 87-47, the "*MDL* Action"). The defendants contend that the proposed second amended complaint simply duplicates the factual allegations made in those other actions. They argue that to be required to defend yet another duplicative action would be prejudicial, but a refusal to reopen the judgment of dismissal would not prejudice the plaintiffs, because the real plaintiff in a derivative action is GM, whose interests are adequately represented and protected in the *Levine* and *MDL* litigations.

[3] This argument labors under three infirmities. First, even if its premise (that this action is duplicative) were correct, defendants have not shown that that is a ground for denying relief under Rules 60(b) or 15(a). That circumstance might support a motion to stay this action or to consolidate this and certain of the other related actions; however, no motion to stay or consolidate has been made.

Second, the defendants' premise is not correct. This action (*Grobow*) differs from the *Levine* and *MDL* actions in that *Grobow* is (arguably) a "demand excused" case, whereas *Levine* and *MDL* are "demand refused" cases. The pivotal focus in *Grobow* would be upon the claimed wrongfulness of the directors' initial approval of the "Perot buy out" transaction. In *MDL* and *Levine*, the focus would be upon the claimed wrongfulness of the directors' decision to reject the plaintiffs' demand, which occurred after the directors' approval of the buyout. On that basis alone the proposed amended complaint in this action stands apart from the pleadings in *Levine* and *MDL*.

[4] Third, the "duplicative complaint" argument cuts both ways. The defendants are presently required to respond to the amended *Levine* complaint in this Court, and have done so by moving to dismiss that complaint under Rule 23.1. That motion has been briefed and will be scheduled for argument at a future date. If, as defendants insist, the proposed pleadings in this case duplicate those in *Levine*, then presumably the defendants' response would be identical to that in *Levine*, except that it would be made in a "demand excused" context. Any prejudice to the defendants in these circumstances would be *de minimis*.

* * *

For the foregoing reasons, the plaintiffs' motions for relief under Rule 60(b) and for leave to file a second amended complaint under Rule 15(a) are granted. Counsel will submit an appropriate form of order.

IN RE HOLLY FARMS CORP. SHAREHOLDERS LITIGATION

No. 10,350 (Consolidated)

Court of Chancery of the State of Delaware, New Castle

December 30, 1988

In response to merger negotiations, the Holly Farms Corporation Board of Directors met to consider various options including recommending to shareholders the approval of a leveraged recapitalization, approving an all-cash, all-shares tender offer, approving an agreement for a ratio stock swap with a lock-up option, a termination fee and reimbursement expenses, or doing nothing. The board decided to sell the company and negotiate actively with the purchaser until an agreement was reached. Another suitor was not informed of the agreement until after it was signed. Plaintiffs sought to enjoin the implementation of the asset lock up, the termination fee, and the expense reimbursement. The plaintiffs also sought to compel Holly Farms to redeem its stock rights plan.

The court of chancery, per Vice-Chancellor Hartnett, granted the preliminary finding that once the Holly Farms' Board of Directors decided to sell the company, the board should have assumed the role of auctioneer but failed to do so in that the board refused to negotiate further with other suitors. The court also stated that disclosure to sell the company would not have violated its "no-shop" agreement nor would it have tipped off either party as to the identity of the other. Considering all of the circumstances, the refusal to inform other suitors of the sale was an irrational, fatal flaw in the sales process with the result that value for Holly Farms' shareholders probably was not maximized. The court also stated it would not compel redemption of the "poison pill" because it had not been used improperly and could still play an active role in maximizing value for Holly Farms' shareholders in any ensuing auction.

1. Injunction ⟹ 14, 136(1)

To obtain a preliminary injunction, a plaintiff must demonstrate that it has a reasonable probability of success on the merits and that, absent the injunction, it will suffer irreparable harm.

2. Injunction ⟹ 12, 23, 136(1)

To obtain a preliminary injunction, a plaintiff must show that the harm it would suffer absent an injunction outweighs the harm to defendant if relief is granted.

3. Injunction ⟹ 126, 133, 136(1)

Where a preliminary mandatory injunction is sought, the plaintiff has an even greater burden because the legal right sought to be protected must be clearly established.

4. Corporations ⟹ 310(1)

The ultimate responsibility for managing the business and affairs of a corporation falls on its board of directors. DEL. CODE ANN. tit. 8, § 141(a) (1983).

5. Corporations ⟹ 310(1)

In discharging their responsibilities, the directors of a corporation owe fiduciary duties of care and loyalty to its shareholders.

6. Corporations ⟹ 310(1)

A court reviewing a transaction cannot substitute its judgment for a valid business judgment of a board and cannot set aside a decision of a board if a fully informed, properly motivated board has acted properly and its judgment can be attributed to any rational purpose.

7. Corporations ⟹ 310(1)

The principles of the business judgment rule apply with equal force when a board approves a corporate merger, and they are the bedrock of Delaware law regarding corporate takeover issues.

8. Corporations ⟹ 310(1)

When the business judgment rule applies to corporate decision making, there is a presumption in making a business decision that the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action was taken in the best interests of the company.

9. Corporations ⟹ 310(1)

An enhanced duty, beyond the business judgment rule, is imposed on a board when it adopts or implements antitakeover measures.

10. Corporations ⟹ 310(1), 312(5)

Within the context of corporate takeovers, there may come a time when the responsibility of a corporation's board of directors changes from the duty of preserving the corporation as a corporate entity to the duty of maximizing the company's value at a sale for the benefit of the stockholders.

11. Corporations ⟹ 310(1), 312(5)

The responsibility of a corporation's board of directors shifts from the duty of preserving the corporation as a corporate entity to the duty of maximizing the company's value at a sale for the benefit of the stockholders when a bidder no longer poses a threat to corporate policy and effectiveness.

12. Corporations ⟹ 310(1), 312(5)

When a bidder for a corporation no longer poses a threat to corporate policy and effectiveness, the maintenance of defensive measures becomes improper as the directors then are required to become auctioneers charged with obtaining the best price for the company's stockholder.

13. Corporations ⟹ 312(5)

There must be the most scrupulous adherence to ordinary principles of fairness in the conduct of an auction for the sale of a corporate enterprise.

14. Corporations ⟹ 310(1), 312(5)

When a board of directors decides to sell the corporation and, thinking it is acting in good faith, it implements a sales process that is so substantially flawed that the board's actions, considering all the facts and circumstances, are not likely to have maximized the value of the corporation for its shareholders, the board's actions cannot be viewed as being rational.

15. Corporations ⟹ 310(1), 312(5)

While the granting of a lock up may be rational where it is reasonably necessary to encourage a prospective bidder to submit an offer, lock ups which end an active auction and foreclose further bidding operate to the shareholders' detriment are extremely suspect.

16. Corporations ⟹ 310(1), 312(5)

The presumptions of the business judgment rule will generally not protect acts of directors who grant a lock up in an active bidding situation where there is more than one bona fide bidder.

17. Corporations ⟹ 310(1), 312(5)

Where there is no evidence that a board of directors is presently using a "poison pill" for any improper purpose and the "pill" may still have a role in maximizing values in the future, a court will not compel the board to redeem the pill.

R. Bruce McNew, Esquire, and Pamela S. Tikellis, Esquire, of Greenfield & Chimicles, Wilmington, Delaware; and Jules Brody, Esquire, of Stull, Stull & Brody, New York, New York, for shareholder plaintiffs.

Joseph A. Rosenthal, Esquire, and Carolyn D. Mack, Esquire, of Morris, Rosenthal, Monhait & Gross, P.A., Wilmington, Delaware, for shareholder plaintiffs.

Rodman Ward, Jr., Esquire, and Anthony W. Clark, Esquire, of Skadden, Arps, Slate, Meagher & Flom, Wilmington, Delaware; and Jonathan J. Lerner, Esquire, of Skadden, Arps, Slate, Meagher & Flom, New York, New York, for Tyson Foods, Inc. and Holly Acquisition Corporation.

Kenneth J. Nachbar, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware; and Steven M. Barna, Esquire, and Paul Vizcarrondo, Jr., Esquire, of Wachtell, Lipton, Rosen & Katz, New York, New York, for defendants Holly Farms Corporation and its directors.

R. Franklin Balotti, Esquire, and Samuel A. Nolen, Esquire, of Richards, Layton & Finger, Wilmington, Delaware; Gregory P. Joseph, Esquire, of Fried, Frank, Harris, Shriver & Jacobson, New York, New York; and Bruce C. Rohde, Esquire, and John E. North, Esquire, of McGrath, North, Mullin & Kratz, Omaha, Nebraska, for ConAgra, Inc. and CAG Acquisition Corporation.

HARTNETT, *Vice-Chancellor*

In this consolidated action Tyson Foods, Inc. and Holly Acquisition Corp. (collectively "Tyson") and certain stockholders of Holly Farms Corporation ("Holly Farms") seek a preliminary mandatory injunction to enjoin the effectuation of provisions for an asset option lock up, termination fee and expense reimbursement contained in an agreement of merger entered into between Holly Farms and ConAgra, Inc. The applicants also seek to compel Holly Farms to redeem a stock rights plan ("the poison pill").

I find that because the Board of Holly Farms did not utilize the proper procedures to maximize the value of the corporation after the Board decided to sell it, a preliminary injunction must be entered as to the Holly Farms-Conagra agreements. However, under all the circumstances, I find that it would be premature to require a redemption, at this time, of the poison pill stock rights plan.

I

Although the critical decision to sell Holly Farms took place on November 17, 1988, the sale had its antecedents in early Spring of

1988 when R. Lee Taylor, Holly Farms' President and Chief Executive Officer ("CEO"), and Charles Harper, the CEO of ConAgra, engaged in informal discussions regarding the merits of a possible business combination of their two companies. These discussions, however, were ordered terminated by Holly Farms' Board of Directors (the "Board") at its June 29, 1988 meeting after the Board determined that such a combination would not be in the best interests of Holly Farms' shareholders.

In mid-September 1988, Taylor was approached by Jackson Stephens, the Chairman of Stephens, Inc., Tyson Foods' financial advisor, regarding a possible acquisition of Holly Farms by Tyson Foods. Taylor informed Stephens of the Board's recent determination that the interests of Holly Farms' shareholders would be best served by maintaining the corporation's independence. At its October 10 meeting, the Board reaffirmed this position and adopted a flip-in, flip-over "poison pill" stock rights plan whereby the stockholders of Holly Farms would, in addition to other options, obtain the right to purchase at a substantial discount shares of any adverse acquirer of Holly Farms and also amended its Restricted Stock Bonus Plan to accelerate vesting and cash payouts to the plan's beneficiaries in the event of a change in control of the corporation. The manner of adoption of the poison pill stock rights plan and the amendment of the Bonus Plan is not currently attacked.

The following day, Taylor received a letter from Don Tyson, the CEO of Tyson Foods, proposing a merger of the two companies whereby Holly Farms' shareholders would receive $45 plus 1/4 of a share of Tyson Foods' Class A common stock for each of their Holly Farms shares. Based upon existing market values, the nominal value of this offer was approximately $49 per share. Once Tyson Foods' offer became publicly known, Mr. Harper of ConAgra called Taylor and again expressed ConAgra's interest in a possible combination.

On October 18, following a presentation by its investment advisor, Morgan Stanley, the Board of Holly Farms rejected Tyson Foods' offer as being financially inadequate. The Board, however, instructed Morgan Stanley to actively explore available alternatives to the offer. In addition to negotiating with ConAgra, Morgan Stanley contacted various potential buyers, including Kohlberg, Kravis & Roberts & Co. and Riordan Freeman & Spogli, to determine whether they had any interest in acquiring Holly Farms.

Three days later, on October 21, Tyson Foods commenced a cash tender offer for all of Holly Farms' outstanding common stock at an improved $52 per share price. On November 2, the Board of

Holly Farms met and, after a presentation by Morgan Stanley, again rejected Tyson Foods' improved bid as being financially inadequate. Meanwhile, Morgan Stanley continued to negotiate with ConAgra in addition to exploring various other alternatives to the Tyson Foods' offer.

On November 11, the Board of Holly Farms wrote a letter to Tyson Foods informing it that it would be meeting on November 16, 1988, to consider all of its alternatives. The letter made clear, however, that no decision had yet been reached as to whether the company was for sale. That same afternoon, Tyson Foods signed a confidentiality agreement and certain non-public financial information previously made available to other interested parties was provided to it. On November 15, after reviewing this confidential material, Don Tyson and Tyson Foods' legal and financial advisors met with Taylor and other senior managers of Holly Farms to discuss Holly Farms' operations. Similar meetings had taken place earlier with other interested parties.

The November 16-17 Board meeting is the focal point of the present application for a preliminary injunction. At this meeting, the Board had before it four viable alternatives: first, it could recommend that its shareholders approve a leveraged recapitalization valued by Morgan Stanley at $56-57 per share; secondly, it could approve Tyson Foods' all cash tender offer which had been raised to $54 per share just prior to the meeting; thirdly, it could approve a ratio stock swap proposal from ConAgra which had a non-discounted nominal value of $57.75 per share based on then-current market prices (approximately $54.00 discounted); and lastly, the Board could decide to do nothing.

This marathon meeting lasted through the evening and into the early morning hours of November 17. When the meeting finally adjourned, the Board had determined that a sale of the company was in the best interests of Holly Farms' stockholders and that the ConAgra proposal was the best alternative available from a financial view. The ConAgra offer, however, came with a prerequisite. As part of any agreement, the Board had to extend to ConAgra a lock up option on Holly Farms' prime poultry operations and agree to a termination fee of $15 million and expense reimbursement if the deal was not consummated.

Needless to say, Tyson Foods was deeply chagrined by that result and it now claims that it was unfairly denied the chance to actively bid for ConAgra. Tyson Foods contends that it was never told of the Board's decision that Holly Farms was to be sold and,

therefore, refrained from submitting a higher bid of approximately $57 which it was ready and willing to make. Tyson Foods also claims that the Board breached its fiduciary duty to its shareholders by failing to maximize shareholder value by seeking the highest price once the Board had determined Holly Farms was for sale. While there are numerous charges and countercharges in the voluminous record, the essence of Tyson Foods' claim is that the Board did not conduct an auction of the corporation as mandated by *Revlon, Inc. v. MacAndrews & Forbes Holdings*, Del. Supr., 506 A.2d 173 (1986).

II

[1-2] It is well established that in order to obtain a preliminary injunction, a plaintiff must demonstrate that it has a reasonable probability of success on the merits and that, absent the injunction, it will suffer irreparable harm. In addition, a plaintiff must show that the harm it would suffer absent an injunction outweighs the harm to defendant if relief is granted. *Allen v. Prime Computer*, Del. Supr., 540 A.2d 417 (1988); *Ivanhoe Partners v. Newmont Mining Corp.*, Del. Supr., 535 A.2d 1334 (1987); *Revlon, Inc. v. MacAndrews & Forbes Holdings*, supra.

[3] Where a preliminary mandatory injunction is sought, the plaintiff has an even greater burden because the legal right sought to be protected must be clearly established. *Steiner v. Simmons*, Del. Supr., 111 A.2d 574 (1955).

III

[4-7] In considering whether the plaintiffs have shown a reasonable probability that they will prevail on the merits, I must take into consideration that the ultimate responsibility for managing the business and affairs of a corporation falls on its board of directors. 8 *Del. C.* § 141(a); *Ivanhoe Partners v. Newmont Mining Corp.*, supra; *Revlon, Inc. v. MacAndrews & Forbes Holdings*, supra. In discharging their responsibilities, however, the directors of a corporation owe fiduciary duties of care and loyalty to its shareholders. *Aronson v. Lewis*, Del. Supr., 473 A.2d 805 (1984); *Pogostin v. Rice*, Del. Supr., 480 A.2d 619 (1984). A court reviewing a transaction cannot substitute its judgment for a valid business judgment of a board and cannot set aside a decision of a board if a fully informed, properly motivated, board has acted properly and its judgment can be attributed to any rational purpose. Cf. *Unocal Corp. v. Mesa Petroleum Co.*, Del. Supr., 493 A.2d 946 (1985). These principles apply with

equal force when a board approves a corporate merger and they are the bedrock of Delaware law regarding corporate takeover issues. *Revlon*, supra, at 179; *Moran v. Household International, Inc.*, Del. Supr., 500 A.2d 1346 (1985); *Pogostin v. Rice*, supra.

[8] When the business judgment rule applies to corporate decision-making, there is a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company." *Revlon*, supra, at 180, citing *Aronson v. Lewis*, supra, at 812.

[9] An enhanced duty is imposed on a board, however, when it adopts or implements anti-takeover measures. *Unocal Corp. v. Mesa Petroleum Co.*, Del. Supr., 493 A.2d 946 (1985); *Revlon*, supra. See also *Capital City Associates Limited Partnership v. Interco Incorporated*, Del. Ch., C.A. No. 10105-NC, ___ A.2d ___, Allen, C. (Nov. 1, 1988) (directing redemption of a poison pill); and *Grand Metropolitan Public Limited Company v. The Pillsbury Company*, Del. Ch., C.A. No. 10319-NC, Duffy, J. (Dec. 16, 1988) (enjoining a spinoff).

[10-12] Within the context of corporate takeovers there may come a time when the responsibility of a corporation's board of directors changes from the duty of preserving the corporation as a corporate entity to the duty of maximizing the company's value at a sale for the benefit of the stockholders. *Revlon*, supra, at 182. This responsibility shifts when a bidder no longer poses a threat to corporate policy and effectiveness and the maintenance of defensive measures becomes improper as the directors then are required to become auctioneers charged with obtaining the best price for the company's stockholders. *Revlon*, supra; *City Capital Associates L.P. v. Interco, Inc.*, supra.

[13] While it is normally within the Board's prerogative as how to satisfy the *Revlon* mandate, the Delaware Supreme Court has recently reiterated that "Our decision in *Revlon, Inc. v. MacAndrews and Forbes Holdings*, supra, requires that there must be the most scrupulous adherence to ordinary principles of fairness in the conduct of an auction for the sale of a corporate enterprise." *Mills Acquisition Co. v. MacMillan, Inc.*, Del. Supr., Nos. 415 and 416, Consolidated, Moore, J., Bench Ruling of Reversal (Opinion pending) (Nov. 2, 1988).

IV

The essence of the Tyson Foods' claim is that the Board of Holly Farms breached its duty to the Holly Farms shareholders by

failing to attempt to maximize shareholder value upon the sale of the corporation. Tyson Foods further contends that when Holly Foods agreed to the grant to ConAgra, a lock up option, a termination fee and expense reimbursement, it effectively put the auction process at an end, before it actually began.

It is now not contested that the stock swap transaction with ConAgra, if consummated, will constitute a "sale" of Holly Farms. Because this sale came in response to, and as an alternative to, Tyson Foods' $52 cash tender offer, I agree that the Board's actions must be judged under the standards articulated in *Revlon* and I find that the Board failed to meet that mandate.

At some point during the late evening or early morning hours of the November 16-17 meeting, the Holly Farms' Board determined that it would sell the corporation. At this point, the Board should have assumed the role of an auctioneer and it then became its duty to maximize the sales price of Holly Farms for the benefit of its shareholders. *Revlon*, supra. At that moment the Board was required to do everything reasonably necessary to sell the corporation for the highest price available. The record conclusively shows, however, that an auction aimed at maximizing shareholder value never really took place. Stephen Waters, the Managing Director of Morgan Stanley who spearheaded the negotiation effort for the Holly Farms' Board that evening, testified that he did not consider his role to be that of an auctioneer. The three Holly Farms directors who were deposed also testified that the Board never conducted either a silent or open auction of the company, and that, in any case, it was their belief that the proposed merger with ConAgra was not a sale of the company. I find unpersuasive defendants' claim, based partly on later affidavits of these very same directors, that a fair auction complying with the high *Revlon* standards actually took place.

The record also conclusively shows that the Board favored ConAgra as a business partner over Tyson Foods and that under the ConAgra proposal it was likely that Holly Farms would remain substantially intact as an operating division of ConAgra.

[14] It is obvious from the record that the Board negotiated with ConAgra throughout the evening in an attempt to extract the highest possible stock swap ratio from it. The lock up, termination fee and reimbursement provisions which are currently at issue were also negotiated with ConAgra at that time. The Board, however, did not make any serious effort to likewise negotiate with Tyson Foods nor encourage Tyson Foods to put its best offer on the table. Especially significant is that the Board refused to tell Tyson Foods,

in the face of direct questioning from it, whether Holly Farms was to be sold, and it was not until a definitive agreement was reached with ConAgra that Tyson Foods was told that a sale of Holly Farms was imminent. Nor did Tyson Foods' numerous inquiries as to the adequacy of its $54 proposal receive any meaningful response, let alone any real encouragement to submit an improved bid. The record also is undisputed that Tyson Foods was prepared to make a higher bid that evening. Even if the Board thought it was acting in good faith, the sale process itself was so substantially flawed that the Board's actions, considering all the facts and circumstances, were not likely to have maximized the value of the corporation for its shareholders and, therefore, its actions cannot be viewed as being rational.

In an attempt to explain the lack of salesmanship, the defendants claim that an auction did in fact take place, but that it was conducted within the constraints of certain "no shop" provisions demanded by both ConAgra and Tyson Foods. It is argued that by setting these "no shop" ground rules, the suitors for Holly Farms prevented the Board from releasing any information about the competing bids. The defendants' rationale, however, is fatally flawed. While the no-shop conditions may have served a valid purpose, the mere disclosure of the Board's newly arrived at decision to sell the corporation could not have violated either ConAgra's oral or Tyson Foods' written "no shop" provisions, nor could it have tipped off either party as to the identity of the other party or the amount of its bid. The Board's primary duty was to its shareholders and the Board clearly failed to meet that duty. Cf. *In re J. P. Stevens & Co., Inc.*, Del. Ch., 542 A.2d 770, 780 (1988).

The Board, therefore, failed to act rationally to meet the high standards articulated in *Revlon*. Had the Board disclosed to both parties that Holly Farms was to be sold during the course of the November 16-17 meeting, the best bids would undoubtedly have been placed on the table and the goal of value maximization would thus have been served. Unfortunately, there is no way of knowing what added value a genuine auction of Holly Farms might have brought although the record is undisputed that Tyson Foods would have bid at least $57 per share, more than the discounted value of the ConAgra merger. The withholding of the basic information that the sale of the corporation was to take place was therefore fatally flawed under the *Revlon* mandate. This colors all the other actions taken by the Board on November 17, 1988.

V

[15-16] While the granting of a lock up may be rational where it is reasonably necessary to encourage a prospective bidder to submit an offer, lock-ups "which end an active auction and foreclose further bidding operate to the shareholders' detriment" are extremely suspect. *Revlon*, supra, at 183; see also *Thompson v. Enstar Corp.*, Del. Ch., 509 A.2d 578, 583 (1984). The presumptions of the business judgment rule will generally not protect acts of directors who grant a lock up in an active bidding situation where there is more than one bona fide bidder. See *MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc.*, Del. Ch., 501 A.2d 1239 (1985). *Hanson Trust PLC v. ML SCH Acquisition Inc.*, 781 F.2d 264 (2d. Cir. 1986).

While the record indicates that the lockup became part of ConAgra's agreement with Holly Farms, the record does not substantiate that the lock up was necessary to obtain ConAgra's proposal. Under the circumstances present, the lock up was nothing but a "show stopper" that effectively precluded the opening act. Cf. *Revlon*, supra. The Board's granting of the lock up was, therefore, clearly improper. It is obvious that Tyson Foods cannot bid for Holly Farms as long as the lock up remains in place and because the lock up is the product of a fundamentally flawed process and cannot be in the interests of the stockholders, its adoption was not rational and is not protected by the presumption of propriety of the business judgment rule.

The termination fee and reimbursement provisions of the Merger Agreement also appear likely to have been part of the effort to preclude a genuine auction.

VI

I also find that the equities clearly favor the applicants for a preliminary injunction. It cannot be disputed that the applicants will suffer irreparable harm if the effectuation of the lock up, termination fee and reimbursement provisions are not enjoined. See *Revlon*, 506 A.2d at 184. In the absence of an injunction, Tyson Foods will lose the opportunity to bid for Holly Farms and the Holly Farms' shareholders will lose the opportunity to achieve the highest value for their shares. *Id.* at 184-85. I am satisfied that the potential harm to the applicants clearly outweighs any harm to the defendants.

Under all the facts and circumstances, therefore, I find that effectuation of the lock up, the termination fee and reimbursement