more easily understood than defendants' approach. However, this is not adequate reason for finding a disclosure violation.

b. Substantial Undervaluation of Hotels

Plaintiff contends that the appraisal results were manipulated in order to reduce the valuations of the hotels and thus, the Units. As evidence of this change, plaintiff notes that as of 1996, the value of the hotels had more than doubled since the original offering, and that the conversion price of the Unit in the REIT merger was $237,334 per Units. Plaintiff argues that contrary to defendants' assertion that the increase was the result of a drop in prevailing capitalization rates of more than 20% (200 + basis points), his expert, relying on "the most commonly relied upon industry publication" opined that the decrease in rates was significantly lower, thus resulting in a valuation increase of only 5% (52 basis points). Plaintiff also finds value suppression in the alleged use of "inflated capitalization rates" by American Appraisal, noting that American's 12.2% base case cap rate yielded a lower valuation than the average cap rate at the time, which was only 10.4%.

Again, the distinction drawn by plaintiff is merely a quarrel over methodology. Defendants' affidavit, relying on *the same industry publication* as plaintiff, shows that the base case cap rate used by American Appraisal was within the range used by the hotel industry at the time, and also that the cap rates dropped between 200 and 300 points. Further, that plaintiff's expert disagrees with the use of a base case cap rate as compared to an average cap rate or with the specific amount that the basis points dropped is not relevant to the motion before me. This dispute would have significantly more importance were I attempting to value the hotels. I am not. Plaintiff was not misled by this methodology and he has not alleged how other Unitholders would be. Therefore, this claim fails and is dismissed.

c. Advantage of the Transaction to Host Marriott

Plaintiff alleges that while Host Marriott's purported business motivations were discussed in the Offer to Purchase, defendants did not disclose the financial benefits to be gained by Host Marriott as a result of the Offer, such as increased cash distributions and the addition of the hotels as assets on Host Marriott's balance sheet.

The advantage of increased distributions is a corollary to the surviving disclosure claim and, therefore, will not be dismissed. As to the accounting benefit, plaintiff has not alleged sufficient facts for me to find that defendants' alleged failure to inform the Unitholders of the financial benefits

that Host Marriott would receive from the addition of the hotels as assets on its financial statements is a material nondisclosure. Also, common sense dictates that an acquirer of majority ownership in a partnership will reflect such ownership on its financial statements. This claim is dismissed.

F. Issues of Standing or Acquiescence

[24] Salter, the only remaining plaintiff, tendered in the Offer. Generally speaking, of course, a person who voluntarily accepts the benefits of a transaction with knowledge or means of knowledge of all the material circumstances thereof is precluded from thereafter attacking the same transactions.[83] The crux of the issue is whether the party was informed when accepting the benefits.[84]

I requested briefs by the parties discussing whether by tendering, Salter acquiesced in defendants' alleged conduct or otherwise waived rights that may have been available to him. After further consideration, I conclude that there are valid jurisprudential reasons to permit Salter to continue acting as class plaintiff notwithstanding the fact that *he* was admittedly aware of all or nearly all of the non-disclosures or misrepresentations about which he now complains. To rule otherwise would discourage plaintiffs and their counsel from acting promptly to litigate disclosure claims in advance of the conclusion of a transaction. This is directly at odds with the interests of the class who are best served when full and complete disclosures are made in a timely fashion. Moreover, it is also true that even Salter did not know that distributions would increase dramatically after the Offer closed, a fact that he now relies on in challenging the completeness and accuracy of the disclosures made in the Offer to Purchase. Thus, I cannot conclude that even Salter was fully informed when tendering.

IV. CONCLUSION

For the foregoing reasons, defendants' motion to dismiss is GRANTED IN PART and DENIED IN PART. Specifically, plaintiff's contract claims, *Revlon* and *Unocal* claims, coercion claims, and disclosure claims not relating to distributions are hereby DISMISSED. Defendants' motion for summary judgment is DENIED.

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[83] *Bershad v. Curtiss-Wright Corp.*, Del. Supr., 535 A.2d 840, 848 (1987).

[84] *Id.*; *Siegman v. Columbia Pictures Entertainment, Inc.*, Del. Ch., C.A. No, 11152, mem. op. at 19, Hartnett, V.C. (Jan. 12, 1993).; *Iseman v. Liquid Air Corp.*, Del. Ch., C.A. No. 9694, mem. op. at 4-5, Berger, V.C. (Feb. 11, 1993).

PAINEWEBBER R & D PARTNERS II, L. P. v. CENTOCOR, INC.
AND
CENTOCOR PARTNERS III, L.P. v. PAINEWEBBER GROUP, INC.

No. 14,405

Court of Chancery of the State of Delaware

January 31, 2000

After settlement of a derivative class action suit, attorneys for two objectors filed a petition seeking attorneys' fees. These objectors' attorneys jointly filed a petition seeking attorney's fees and expenses amounting to $900,000.

The court of chancery, per Vice Chancellor Steele, concluded that, based on the multifactor analysis customarily used to determine fees on a *quantum meruit* basis, fees were awarded at $650,000. The court held that one objector's attorneys' efforts generated the only real benefit in the case, and therefore, should be reimbursed for expenses that it advanced for the class even though they already received a non-contingent partial fee with no risk of effort expended with no return. The other objector's attorneys, who took the case on a contingency basis and who, despite extensive time expended, added nothing of real value to the case, earned a more modest fee which reflects the inconsequential result they obtained. The court ruled the distribution of the $650,000 award should be paid as follows: (1) the more effective of the two objectors' attorneys will be reimbursed for what it advanced for the class through its hourly rate payments to its counsel and its counsel will be paid the balance of its hourly fees owed, but not yet paid; (2) the less effective objector's counsel will be paid their hourly rate for the time expended as modified by the court to the extent a balance remains in the $650,000 fund created by this order with priority to the time and effort expended by one particular attorney.

1. Attorney and Client ☞ 157.1
   Costs ☞ 194.10, 194.16, 194.26

Heightened judicial scrutiny applies to the approval of fee applications in class action settlements because once a fee petition is filed

and the attorney becomes a claimant against the fund created for the benefit of the class, fiduciary responsibility for the class shifts from the attorney to the trial court and the trial court has the duty to award fees with moderation and a jealous regard for the rights of class members.

2. Attorney and Client ⟹ 130, 157.1
Costs ⟹ 194.10, 194.16, 194.26

The standard used to award attorney's fees for a class representative is equally applicable to requests for fees made by an objector to a class settlement.

3. Attorney and Client ⟹ 130, 157.1, 160
Costs ⟹ 194.10, 194.16, 194.26

To demonstrate that they deserve fees of *any* amount, petitioners must convince the court that: (1) the suit was meritorious when filed, (2) the action produced a benefit to the corporation or class, and (3) the resulting benefit to the class or corporation was causally related to the suit.

4. Attorney and Client ⟹ 130, 140
Costs ⟹ 194.10, 194.16, 194.26

In evaluating a fee request, the court generally uses a multifactor approach consisting of the following factors: (1) time and effort expended by counsel, (2) difficulty and complexity of the litigation, (3) counsel's standing and ability, (4) contingent nature of the fee, (5) stage at which the litigation ended, (6) amount of the benefit that can fairly be attributed to the efforts of the requestor of the fees, (7) causation, and (8) size of benefit conferred.

5. Attorney and Client ⟹ 130, 140
Costs ⟹ 194.10, 194.16, 194.26

Of the factors used to evaluate a fee request, the courts regularly give the size of the benefit conferred the greatest weight.

Ann M. Caldwell, Esquire, of Caldwell & Associates LLC, Bala Cynwyd, Pennsylvania; and Douglas R. MacGray of The Bear Law Firm, Bear, Delaware, for objector John E. Abdo.

Vernon R. Proctor, Esquire, Kurt M. Heyman, Esquire, and John H. Newcomer, Jr., Esquire, of The Bayard Firm, Wilmington, Delaware, for objector Pharmaceutical Partners II, L.P.

STEELE, *Vice Chancellor*

I. Issue Presented

After the parties reached settlement in this case, attorneys for objectors to the settlement filed a petition seeking attorney's fees. Two law firms jointly represent Objector John E. Abdo ("Abdo's Attorneys"); a third law firm represents Objector Pharmaceutical Partners II, L.P. ("PPII's Attorneys"). Abdo's Attorneys and PPII's Attorneys (collectively "the petitioners") jointly ask this court to award fees and expenses in the amount of $900,000 plus interest. Abdo's efforts resulted in no more than an arguable therapeutic benefit to the class, were unsuccessful on the merits, caused extra expense to the parties and delayed receipt of a real monetary benefit to the class. While PPII's efforts directly resulted in a real monetary benefit to the class, PPII's attorneys did not take this case on a contingency basis. Based upon the multifactor analysis customarily used to determine fees on a quantum meruit basis, I award fees totaling $650,000. Since the petitioners did not supply the Court initially with information sufficient to allow a meaningful determination of how the joint fees should be fairly divided, the total can be divided between them in a manner consistent with the findings in this Opinion.

II. Background

Defendant Centocor, Inc. ("Centocor") is a biotechnology company incorporated in Pennsylvania. As part of its business, Centocor develops and sells pharmaceutical drugs. In 1992 and 1993, Centocor allegedly "gave away," without consideration, marketing rights to a drug called CentoRx. The marketing rights to CentoRx belonged to a Delaware limited partnership in which Abdo and PPII invested (the "Limited Partnership").[1] The Limited Partnership was comprised of separate classes. PPII was the largest single investor in what was labeled "Class A;" Abdo likewise invested in Class A.

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[1]Centocor, whose wholly-owned subsidiary, Centocor Development Corporation served as general partner of the Limited Partnership, entered into an agreement with Eli Lilly & Co. ("Lilly") that, *inter alia*, permitted Lilly to exercise an option to acquire the marketing rights to CentoRx for no additional consideration if a separate drug developed by Centocor (which rights were owned by a separate limited partnership) failed to gain FDA approval. The FDA did not approve that drug and Lilly exercised its option to acquire the marketing rights for CentoRx.

In 1995, another investor in the Limited Partnership brought this derivative class action seeking damages for breach of contract and fiduciary duties, and declaratory relief giving the Limited Partnership a right to future profits and revenue generated by CentoRx. The facts underlying this action are complicated, and fortunately do not need to be repeated here in detail.[2] For present purposes, it is important to know that the parties did settle, but both Abdo and PPII objected to the methodology used to calculate the terms of the settlement and to the adequacy of the class representative. Abdo had earlier filed his own separate action because he believed the class representative did not effectively respond to his concerns, failed to name certain defendants and failed to pursue certain claims because of Abdo's perception that the class representative had a conflict of interest. PPII joined the action late as an objector, a fellow pleader for limited discovery into the basis for the terms of the settlement and as a skeptic about the calculations used for the allocation of the monetary payments to the class to which it belonged. Plainly put, PPII tagged along with Abdo on the request for limited discovery on issues related to the settlement and on the adequacy of the class representative claim and Abdo went along for the mathematical ride with PPII on the economic terms of the settlement.

On March 15, 1999, this Court approved the settlement and found the class representative to be adequate despite the initial objection. Notably, that ruling did not find that objection to be frivolous and, therefore, the objectors' claim, albeit ultimately unsuccessful, could fairly be characterized as colorable.[3]

Petitioners, on the other hand, contend that their mathematical miscalculation claim was not only colorable, but directly produced a total of approximately $11.8 million in added value for the Class A unitholders. Breaking that sum down, petitioners claim to be responsible for $690,431.25 in additional monies paid to the Class A unitholders because the petitioners insisted upon the correction of a mathematical error that resulted from reliance on the wrong partnership agreement. They uncovered a second miscalculation in the computation of trailing royalties payable to the Class A unitholders.[4] The settling parties corrected this error and Centocor made an additional $502,707 compensatory payment to the Class A unitholders.

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[2]If so inclined, for much greater factual detail, see *PaineWebber R & D Partners II, L.P. v. Centocor, Inc*, Del. Ch., C.A. No. 14405, Steele, V.C. (March 15, 1999).

[3]The objectors' interests at stake in this action were more than nominal — each Class A unit of the limited partnership cost $100,000. Therefore, even the individual investor, Abdo, had invested substantial sums.

[4]The trailing royalties were based on the percentage ownership of each class under the Limited Partnership agreement.

That second recalculation not only resulted in the payment of the just-mentioned delinquent trailing royalties but, petitioners contend, will also yield an additional benefit to the Class A unitholders of at least $10,615,808 *over time*, on a net present value basis. Finally, they argue that Abdo's claims filed against the employees of an affiliate of the class representative greatly motivated the class representative to seek a fair and prompt settlement. Petitioners contend that the Class A unitholders would not have received these substantive benefits had the petitioners not been actively involved stirring up controversy even if the resolution of the controversy so stirred did not directly benefit the class.

III. Analysis

[1-2] Heightened judicial scrutiny applies to the approval of fee applications in class action settlements because "[o]nce a fee petition is filed and the attorney becomes a claimant against the fund created for the benefit of the class, fiduciary responsibility for the class shifts from the attorney to the trial court and the trial court has the duty to award fees 'with moderation' and a 'jealous regard' for the rights of class members."[5] The standard used to award attorney's fees for a class representative is equally applicable to requests for fees made by an objector to a class settlement.[6]

[3] "An attorney fee is not a pot of nectar available to any attorney who represents any shareholder."[7] To demonstrate that they deserve fees of *any* amount, petitioners must convince me that: (1) the suit was meritorious when filed; (2) the action produced a benefit to the corporation or class; and (3) the resulting benefit to the class or corporation was causally related to the suit.[8]

Abdo's action and the objection to the adequacy of the class representative may have been colorable claims, but that alone does not mean those claims contributed to the creation of any benefit conferred. The original Abdo action filed after the class representative's complaint was nothing more than a copycat pleading. Further, I find that the objection to the class representative achieved absolutely nothing of tangible value for the

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[5]Deborah A. Klar, *Attorney's Fees in Securities Class Actions: Present Developments Under the Common Fund Doctrine*, 417 P.L.I./Lit. 153, 156 (Oct.-Nov. 1991), *cited in* DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 9-5(b), at 676 (1998).

[6]*See, e.g.*, *Rosen v. Smith*, Del. Ch., C.A. No. 7863, 1985 WL 21143, *2, Hartnett, V.C. (Sept. 23, 1985).

[7]*In re Resorts Int'l Shareholders Litig.*, Del. Ch., C.A. Nos. 9470, 9605 (consolidated), mem. op. at 4, Hartnett, V.C. (Oct. 11, 1990).

[8]*United Vanguard Fund, Inc. v. Takecare, Inc.*, Del. Supr., 693 A.2d 1076, 1079 (1997).

Class A unitholders. Perhaps one could argue that a slight therapeutic benefit resulted from that objection because the unitholders could presumably rest easier knowing that they had been adequately represented by counsel and a class representative adjudicated free of substantial conflict, who acted competently and aggressively on their behalf. But as I will further explain below, this is more chimera than benefit. The recalculations resulting directly from objectors' efforts are what conferred the only real benefit to the Class A unitholders.

Petitioners claim the recalculations directly produced a total of at least $11.8 million in added value for the Class A unitholders.. They do admit, however, that only "$7.7 million is attributable *solely* to the actions of the [o]bjectors, without regard to the benefit claimed by [the class representative]."[9] Remarkably, petitioners' request for fees is unopposed, therefore, I have no basis to question their assertion that their actions produced a sizable benefit for the Class A unitholders. Likewise, petitioners' efforts directly caused a benefit to the class of at least $7.7 million. Petitioners have met the required test for entitlement. As they have met the required elements, I find that petitioners are entitled to attorney's fees.

Once deciding that counsel are entitled to fees, this Court has no standard method with which to compute the proper amount of those fees or how they should be dispersed among counsel. "The adoption of a mandatory methodology or particular mathematical model for determining attorney's fees in common fund cases would be the antithesis of the equitable principles from which the concept of such awards originated."[10]

[4] Nonetheless, in evaluating a fee request, this Court generally uses a multifactor approach consisting of the following factors:

1. time and effort expended by counsel;[11]
2. difficulty and complexity of the litigation;[12]
3. counsel's standing and ability;[13]
4. the contingent nature of the fee;[14]
5. stage at which the litigation ended;[15]

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[9]Objectors' Amend. Pet. for Award of Attorneys' Fees and Expenses, at 25 (emphasis in original). In a separate petition, counsel for the class representative are seeking fees.

[10]*Goodrich v. E.F. Hutton Group, Inc.*, Del. Supr., 681 A.2d 1039, 1046 (1996).

[11]*Stroud v. Milliken Enters., Inc.*, Del. Ch., C.A. No. 8969, 1990 WL 113345, Hartnett, V.C. (Aug. 2, 1990).

[12]*Weinberger v. U.O.P., Inc.*, Del. Ch., C.A. No. 5642, Berger, V.C. (Mar. 10, 1987).

[13]*J.L. Schiffman & Co., Inc., v. Standard Indus., Inc.*, C.A. No. 11267, 1993 WL 271441, at *4, Allen, C. (July 15, 1993).

[14]*In re Caremark Int'l Inc. Derivative Litig.*, Del. Ch., C.A. No. 13670 (consolidated), Allen, C. (Sept. 25, 1996).

[15]*See, e.g., In re MAXXAM Group, Inc. Stockholders Litig.*, Del. Ch., C.A. No. 8636,

6. the amount of the benefit that can fairly be attributed to the efforts of the requestor of the fees;[16]
7. causation;[17]
8. size of benefit conferred.[18]

[5] Of those factors, the Courts regularly give the size of the benefit conferred the greatest weight.[19] Accordingly, I will closely examine the size of the benefit conferred in appraising petitioners' request for fees. Just as pivotal in this instance, however, is to what extent the petitioners can be credited with causing the benefit conferred upon the Class A unitholders.

The size of the benefit conferred is substantial. As much as $11.8 million may have been generated for the Class A unitholders as a result of the recalculations. There is no dispute that at least $7.7 million directly resulted from the objectors/petitioners efforts. In either event, petitioners seek approximately 10% of the benefit conferred as attorney's fees.[20] According to my recollection of what transpired, PPII's efforts financed and procured the benefit flowing from the recalculations. There is no indication in the record that Abdo independently advanced the argument for recalculation or would have done so if he had been the sole objector. Since Abdo and PPII petitioned jointly, however, PPII and its counsel seem willing to share the fruits of their labor with Abdo's counsel. Nonetheless, the petitioners' joint filing creates a dilemma for me, which I will explain.

In contrast to the considerable benefit resulting from the recalculations, I find that the challenge to the adequacy of the class representative failed to benefit the Class A unitholders in any meaningful way. While the initial request for limited discovery into the settlement terms

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mem. op. at 33-34, Jacobs, V.C. (April 16, 1987) (only four depositions were taken and no pretrial motions were made).

[16]*See, e.g.*, *MAXXAM Group*, mem. op. at 15 (change in market conditions and independent actions of board helped create benefit).

[17]*See, e.g.*, *In re Anderson Clayton Shareholders Litig.*, Del. Ch., C.A. No. 8387, ltr. op. at 7, Allen, C. (Sept. 19, 1988). In my mind, this factor overlaps almost completely with the previous factor. Therefore, I will, by implication, treat it when I discuss the amount of the benefit that can fairly be attributed to the efforts of the requestor of the fees.

[18]*Goodrich v. E. F. Hutton Group, Inc.*, Del. Supr., 681 A.2d 1039, 1048 (1996); *In re Golden State Bancorp Inc. Shareholders Litig.*, Del. Ch., C.A. No. 16175, Chandler, C. (Jan. 7, 2000).

[19]*See, e.g.*, *In re Appraisal of Shell Oil*, Del. Ch., C.A. No. 8080 (consol.), Hartnett, V.C., 1992 LEXIS 228, *11-*12 (Oct. 30, 1992); *In re Anderson Clayton Shareholders Litig.*, Del. Ch., C.A. No. 8387, ltr. op. at 3, 7, Allen, C. (Sept. 19, 1988); *In re Dr. Pepper/Seven Up. Cos., Inc. Shareholders Litig*, Del. Ch., C.A. No. 13109, 1996 WL 74214, at *5, Chandler, V.C. (Feb. 9, 1996, as amended Feb. 27, 1996), *aff'd*, Del. Supr., 683 A.2d 58 (1996).

[20]If the $7.7 million figure is used, the petitioners seek approximately 11% of the benefit as fees. If the $11.8 million amount is used, petitioners seek approximately 8% of the benefit as fees.

and the objection to the adequacy of the class representative stalled settlement and allowed PPII to jump on board and ultimately object to the calculation of the monetary terms of the settlement, Abdo's initial objection had as much a negative effect as a positive one on the Class A unitholders. Throughout this litigation, the class representative skillfully advanced the cause of the Class A unitholders. When the objection to its adequacy was filed the class representative had to turn its attention to defending its own position as class representative. In so doing, it had to expend resources that would have been better used investigating and correcting or litigating the underlying monetary dispute. This distraction only delayed resolution of the ultimate payment of any real benefit to the detriment of Class A unitholders.

I find that counsels' expended time and effort, as well as the difficulty and complexity of the litigation, cuts in favor of the petitioners. This case was complex and (at the time) seemed interminable. Counsel on all sides spent considerable time preparing and litigating this matter. There remains considerable question, however, whether Abdo's substantive efforts did anything more than mirror the actions of the class representative early on. It generated unnecessary extra effort, even with consolidated discovery, and later distracted the class representative from its efforts to settle for better economic terms.

Petitioners did not submit hourly rates or time expended in support of their joint fee request. I can only assume they did not, hoping, in the absence of an objection to their fee request that the Court would consider the request as a modest 10% contingency slice of an $11 million pie. Because of the fact that I must authorize no more than a fair, adequate and reasonable fee to be paid from the class fund, I asked for hourly rates, time expended and some sense of how otherwise counsel might be paid. To some extent, I found the response startling. Abdo's attorneys informed me that Richard D. Greenfield sought an hourly rate of $495.00. His rate is apparently twice that of almost all admitted attorneys authorized to practice in this action and who seek fees in this petition. I cannot understand that request. Nothing in the record reflects that Greenfield's experience, standing or ability merits an hourly rate of almost $500 per hour. Ann Caldwell made virtually all the appearances in Court for Abdo and her work appeared to carry the ball for his action. I adjust the fee awarded to reflect those facts.[21] While the time expended as reported seems substantial, the issues on which that time was spent were neither pivotal nor consequential in light of the ultimate result.

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[21]Greenfield purportedly worked 188.5 hours, worth allegedly $93,307.50. Reducing his rateto $200 per hour would justify a claim for $37,700. His application for admission *pro hac vice*, though enthusiastically endorsed by local counsel, reflects a suspension from practice in Pennsylvania for a period of time related to a conflict in representation in similar litigation.

Abdo's attorneys did take this case on what appears to be a contingency basis. PPII's attorneys, on the other hand, were paid an hourly rate while working on this case, but now hope to be paid from the class fund rather than by PPII. The fee request has been made jointly, and the planned allocation between counsel has not been disclosed to me. My ignorance of that plan is of no real significance here, except that I must consider the actual fruits of their labor and that all the attorneys seeking fees did not handle this case on a contingent basis with the attendant risk.

My decision has not been easily reached. By filing jointly, counsel made it especially difficult for me. As a result of the joint filing, I cannot differentiate between the amount earned by PPII's attorneys, whose efforts generated the only real benefit in this case but who already received a non-contingent partial fee and therefore incurred no risk of effort expended with no return; and, Abdo's attorneys, who did take the case on a contingency and who despite extensive time expended, added nothing of real value to this case. Because PPII funded the effort that resulted in the real benefit to the class, it should be reimbursed for its expenses that it advanced for the class. PPII's attorneys' efforts truly drove the recalculation of the settlement provisions and produced the benefit not only for their client but for the class as a whole. The litigation, but for their objection to the monetary calculations essential to the settlement, could not have ended as well for the class. Under the factors outlined above, except for No. 4, PPII's counsel's efforts arguably deserve an enhancement beyond their hour rate. The fact that they incurred no risk by taking the case on a contingency, however, prevents any "lodestar" form of enhancement.[22]

On the other hand, Abdo's attorneys earned a more modest fee which reflects the inconsequential result they obtained. Even if their efforts generated a benefit, that benefit in whatever form of therapeutic balm it may have come, was more than offset by the wasteful distractions their objection created and the resulting delay in receipt of the enhanced monetary benefit directly resulting from the recalculations.

Little information has been provided by the parties on the standing and ability of counsel or the differing nature of counsel's terms for

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[22]*See Sonet v. Plum Creek Timber Company*, Del. Ch., C.A. Nos. 16639, 16931, mem. op. at 12 n. 5, Jacobs, V.C. (August 10, 1999) (stating "[t]he approach of determining a "lodestar" fee (attorney time multiplied by actual hourly rates) and then increasing that lodestar amount by a multiple, closely resembles the "Lindy Bros." method of fee determination used by some federal courts. That is not the approach followed by our courts, either in "fund" cases or in nonpecuniary benefit cases where the fee is determined on a quantum meruit basis. Sugarland v. Thomas, Del. Supr., 420 A.2d 142 (1980). Nor is that approach consistent with the quantum meruit method of determining a reasonable fee, at least as that method has been applied by his Court. In applying that approach, this Court has customarily utilized counsels' customary hourly rates, not "multiplied" rates, to arrive at a reasonable fee.").

representation. I am not able, especially in the case of foreign counsel, to simply assume that a claim for substantial hourly rate evidences counsel of special competency and extraordinary experience. Therefore, causation and the relative benefit conferred weighed heavily on my conclusion. After forcing counsel to submit details concerning time and effort expended, I had to weigh the credibility of the time allegedly spent against the benefit actually received from the result obtained. Despite the shroud of the joint petition, I can neither conclude that all time expended was wisely spent nor that the class benefited from the effort expended. Considering the multi-factor approach normally used and applying it to the unusual, if not bizarre, nature of this case, I conclude a total fee of $650,000 to be fair, adequate and reasonable and that it should be paid as follows: (1) PPII will be reimbursed for what it advanced for the class through its hourly rate payments to its counsel; (2) its counsel will be paid the balance of its hourly fees owed, but not yet paid; (3) Abdo's counsel will be paid their hourly rate for the time expended as modified above to the extent a balance remains in the $650,000 fund created by this Order with priority to the time and effort expended by Ann Caldwell.

I am satisfied that on this record that the petitioners and the class who will pay these fees have received equitable treatment.

PPII's counsel will prepare an appropriate order consistent with these findings.

IT IS SO ORDERED.

STATE OF WISCONSIN INVESTMENT BOARD v. BARTLETT

No. 17,727

Court of Chancery of the State of Delaware

February 24, 2000

Plaintiff brought this action to preliminarily enjoin a shareholder vote on a proposed merger and to enjoin the merger's consummation. Plaintiff alleged corporate waste and breach of fiduciary duties of disclosure, care, and loyalty by the defendant corporation's directors when they: (1) failed

to disclose all information; (2) misstated information; (3) did not adequately inform themselves; (4) appointed a self-interested sole negotiator who did not maximize shareholder value and whom the board failed to supervise; and (5) agreed to the negotiator's unreasonable fee arrangement in the merger. The defendants contend that the plaintiff did not meet the requirements for preliminary injunction because: (1) there was no likelihood of success on the merits, (2) there was no imminent irreparable harm, and (3) the balance of hardships weighed against issuing a preliminary injunction.

The court of chancery, per Vice Chancellor Steele, concluded that under the business judgment rule the court must defer to the discretion of the directors. The court denied the preliminary injunction with respect to the merger and the shareholder vote.

1. Injunction ☞ 13, 14, 138.15, 138.18, 138.21

Plaintiff shareholder may obtain preliminary injunction by establishing: a reasonable likelihood of success on the merits; imminent, irreparable harm if the injunction is not granted; and the damage to the plaintiff if the injunction is not issued outweighs the damage to the defendants if the injunction issues.

2. Corporations ☞ 301(1)

Directors have an unyielding fiduciary duty to protect the interests of the corporation and the shareholders alike.

3. Corporations ☞ 320(11)

In the context of a merger, a breach of fiduciary duty analysis begins with the rebuttable presumption that a board of directors acted with care, loyalty, and in good faith; unless this presumption is sufficiently rebutted, raising a reasonable doubt about self-interest or independence, the court must defer to the discretion of the board and acknowledge their decisions are entitled to the protection of the business judgment rule.

4. Corporations ☞ 211(4), 211(5), 320(7)

In order to require application of the entire fairness standard, the plaintiff has to show that a majority of directors have a financial interest in the transaction or a motive to entrench themselves in office through the merger.

5. Corporations ⟹ 320(11)

One director's alleged interest, as in a fee related to consummation of the merger, related to his work and tied to overall enhancement in the value of the merger transaction is simply not enough to mandate strict scrutiny of the board's actions.

6. Corporations ⟹ 320(11.5), 585

Whether or not the directors' actions constitute an abdication of directorial duty is a fact specific question; in other words, does the record indicate any self-interest or lack of independence on the part of the board which caused them to delegate responsibility to a sole director to negotiate a merger and to abandon review of his work?

7. Corporations ⟹ 308(9), 585

A board decision to delegate responsibility to a director to negotiate a merger is not an abdication of directorial authority merely because it limits a board's freedom of future action.

8. Corporations ⟹ 310(2)

Where the board considered advise from the corporation's team, reasonably relied on an investment banker's advise, and was regularly briefed by the negotiating director, the board adequately informed themselves of all material information necessary to execute a merger agreement.

9. Corporations ⟹ 307, 310(1)

Whether a breach of the board's fiduciary duty of loyalty exists is determined by whether the board acted in its members' own independent conflicted self-interest or in the best interest of its shareholders, maximizing value to them.

10. Corporations ⟹ 307, 310(1)

Evidence of personal and/or past business relationships does not raise an inference of self-interest.

11. Corporations ⚿ 310(1)

The duty of disclosure arises as a subset of a director's fiduciary responsibilities of care, loyalty, and good faith.

12. Corporations ⚿ 310(1)

A board of directors seeking shareholder approval of a specific corporate action must disclose all material facts relating to the requested action so that shareholders can make an informed decision.

13. Corporations ⚿ 310(1)

Directors are required to provide shareholders with all information that is material to the action being requested and to provide a balanced, truthful account of all matters disclosed in the communications with shareholders.

14. Corporations ⚿ 307, 310(1)

The court does not defer to directors' judgment about what information is material; materiality is a matter for the court to determine from the record at the particular stage of a case when the issue arises.

15. Corporations ⚿ 310(1)

The mere existence of unrequited attraction with other entities does not lead to acceptance of plaintiff's assertion of materiality — namely that shareholders would then know other deals might be possible and that there might be better options.

16. Corporations ⚿ 310(1)

Delaware law permits lock-ups and related agreements where their adoption is untainted by director interest or other breaches of fiduciary duty; therefore, in the absence of breach of fiduciary duty in agreeing to the lock-up devices, these provisions are reviewable as business judgments, and are, thus, granted deference.

17. Corporations ⚷ 320(2)

Compensation for executives for their effort on behalf of a corporation has consistently been approached in a corporate waste claim with caution by the courts; where there is no reasonable doubt as to the disinterest of the board, mere disagreement cannot serve as grounds for imposing liability based on alleged breaches of fiduciary duty and waste.

18. Corporations ⚷ 310(1)
Injunction ⚷ 14, 138.18, 138.21

Evidence making it unlikely that the plaintiff can show the board failed to provide shareholders with all the information a reasonably prudent shareholder would find material in the total mix required in order to cast an informed vote means that plaintiff will not be subject to irreparable harm if the vote goes forward as scheduled.

19. Corporations ⚷ 310(1)
Injunction ⚷ 14, 138.18, 138.21

Irreversible harm would occur by permitting a shareholder vote on a merger to proceed without all material information necessary to make an informed decision.

20. Injunction ⚷ 13, 138.15, 138.21

The balance of the relative harm to the corporation should the merger not go forward, versus the harm to shareholders should the merger be consummated should be determined by a fully informed shareholder vote.

Stuart M. Grant, Esquire, Cynthia A. Calder, Esquire, Megan D. McIntyre, Esquire, John C. Kairis, Esquire, and Denise T. DiPersio, Esquire, of Grant & Eisenhofer, Wilmington, Delaware, for plaintiff.

A. Gilchrist Sparks, III, Esquire, Alan J. Stone, Esquire, S. Mark Hurd, Esquire, and Jessica Zeldin Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware; and James R. Daly, Esquire, Lee Ann Russo, Esquire, and Robert C. Micheletto, Esquire, of Jones, Day, Reavis & Pogue, Chicago, Illinois, of counsel, for defendants.

STEELE, *Vice Chancellor*

Plaintiff brings this action, on behalf of itself and all others who own Medco common stock, to enjoin a shareholder vote on the proposed merger between Medco Research Inc. ("Medco") and King Pharmaceuticals, Inc. ("King") and to enjoin the merger's consummation.

Plaintiffs request for injunctive relief is based on allegations of breaches of the fiduciary duties of care, loyalty, and disclosure. In assessing the viability of this claim, the Court of Chancery must determine whether the plaintiffs has established (1) a likelihood of success on the merits of its claims; (2) imminent and irreparable harm if the vote and/or merger are not enjoined; and that (3) in balance, the plaintiff will suffer more if the vote and merger are not enjoined than the defendants will suffer if they are. I conclude that plaintiff does not meets its burden.

This Court must defer to the discretion of the board and acknowledge that their decisions are entitled to the benefit of the business judgment rule where plaintiff can not show that the board of directors, in approving and recommending a merger agreement: (1) failed to inform themselves adequately about the merger negotiation process, the terms or the market effect of the terms of the merger in a manner which constitutes gross negligence; (2) did not maximize the interests of the shareholders; (3) did not disclose material information that would adversely effect the ability of reasonable shareholders to make an informed decision as part of the total mix of information available to them.

Therefore, plaintiffs request for preliminary injunctive relief is denied.

I. Background

A. The Parties

Plaintiff, State of Wisconsin Investment Board ("SWIB"), is an investment manager for the Wisconsin public employees retirement system. SWIB holds 1,206,400 shares of common stock, which comprises 11.5% of the outstanding shares of Medco. Defendant Medco, a Delaware corporation, is a pharmaceutical company specializing in cardiovascular medicines and adenosine receptor technologies. Defendant Richard C. Williams ("Williams") is the Chairman of Medco's board of directors. The remaining members of the board of directors are defendants, William Bartlett, Jay N. Cohn, Mark B. Hirsch, Eugene L. Step (collectively with Williams, the "Board").

Plaintiff brings this action requesting that this Court enjoin a shareholder vote on the proposed merger between Medco and King Pharmaceuticals, Inc. ("King") and enjoin the merger's consummation.

B. Factual and Procedural Background

1. Factual Background

In 1996, amid concern for maintaining its growth and maximizing the value of its product pipeline, Medco began to explore the possibility of finding a merger partner. To assist in its effort, Medco retained Hambrecht & Quist, LLC ("H&Q"), an investment banking firm with considerable experience in the pharmaceutical industry and with Medco in particular.

In the early months of 1999, King approached Medco regarding the possibility of forming a business combination between the two corporate entities. The Medco board voted to appoint its Chairman, Williams, to represent Medco in the--King merger negotiations.[1]

After agreeing to approve a merger agreement, the Medco board, in a proxy statement dated January 5, 2000, recommended that shareholders vote for the Medco-King merger at the shareholders' meeting scheduled for February 10, 2000. Because of disputes plaintiff raised concerning omissions and mischaracterized statements contained in the original proxy solicitation, the Medco board issued a supplemental proxy on January 31, 2000 to supplement and/or correct the disclosures contained in the original proxy.

2. Procedural Posture

On January 11, 2000, plaintiff instituted this action to enjoin preliminarily the shareholder vote on the Medco-King merger and to enjoin the consummation of the merger. On January 12, 2000, this Court expedited proceedings given the February 10, 2000 shareholders' meeting. The Court held oral argument on February 9, 2000 and by written Order, enjoined and postponed the February 10, 2000 shareholder vote for at least fifteen days allowing a later vote if the parties so chose.[2]

C. Contentions

Plaintiff requests injunctive relief based on allegations of corporate waste and breach of the fiduciary duties of care, loyalty, and disclosure.

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[1]Both plaintiff and defendants concede that Williams was to receive .75% of the aggregate value of the consideration to be paid to Medco in any strategic alliance involving Medco. Additionally, Williams was awarded 30,000 options for Medco's shares.

[2]*State of Wisconsin Investment Board v. Bartlett, et al.*, Del. Ch., C.A. No. 17727, order, Steele, V.C. (Feb. 9, 2000).

1. Plaintiffs Contentions

Plaintiff contends it has satisfied each of the criteria set forth for the issuance of a preliminary injunction and is, therefore, entitled to relief. Plaintiff has asked this Court to assess the Medco-King merger in accordance with the "entire fairness" standard of review asserting that it has sufficiently rebutted the presumption that the Medco board's action are entitled to the protection of the business judgment rule.[3]

Plaintiff argues that a majority of Medco's directors are self-interested and not independent. It further asserts that no reasonably prudent business person of sound judgment would have negotiated and monitored the deal and then have structured it as Medco's board has done. The plaintiff asserts that it is manifest that the only explanation for the resulting deal is that the board either put its interest before that of the shareholders or acted grossly negligently by failing to monitor the transaction appropriately.

(1) *Plaintiff Claims Medco's Directors Breached their Fiduciary Duties as follows*:

(a) Disclosure

- They failed to disclose all information material to the shareholders' decision on the merger.
- There are outright falsehoods, misleading statements and omissions in both the original proxy solicitation and the supplemental disclosure that a reasonable investor would find material.
- The "corrective" supplemental disclosure fails to cure four "misdisclosures" about information necessary for shareholders to cast an informed vote.

(b) Care:

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[3]*See Mills Acquisition Co. v. MacMillan, Inc.*, Del. Supr., 559 A.2d 1261, 1279 (1989) (since the business judgment rule was sufficiently rebutted "the challenged transaction must withstand rigorous judicial scrutiny under the exacting standards of entire fairness.").

- The board did not adequately inform themselves of all information reasonably available in order to recommend this merger agreement.

- They appointed Williams as sole negotiator, with an improper financial incentive that created a conflict between his own interests and those of the shareholders and further compounded their error by negligently failing to supervise or oversee his actions.

(c) Loyalty

- The board allowed Williams to advance his own interests by structuring the merger to assure King the deal would become reality rather than on more favorable terms that would have tended to maximize shareholder value.

- Agreed to lock-up devices employed in the merger (collar, termination fee, no talk/no shop provision, stock option agreements) and allowed Williams to steamroll past other more favorable potential deals.

- The free rein given Williams resulted from a majority of the board's relationships and close ties with Williams which limited their independence and colored their interests.

(2) *The Medco Directors committed corporate waste by agreeing to Williams' fee arrangement in the merger.*

2. *Defendants' Contentions*

Defendants contend that plaintiff has not met the criteria for the issuance of a preliminary injunction. To the extent the original proxy solicitation left some room for confusion, defendant, without conceding error, submits that the supplemental proxy sent to shareholders adequately corrected any misdisclosures in the original proxy solicitation. In short, defendants contend that plaintiff's application should be denied for the following reasons:

(1) *No Likelihood of Success on the Merits*

- Medco's board is disinterested and independent.
- The board's process to approve the merger agreement was proper and they were adequately informed.
- The board engaged in a thorough and exhaustive search, with the assistance of H&Q, to identify possible alternatives for maximizing shareholder value.
- Williams kept the board well informed of all important developments.
- All facts alleged to have been omitted have either been deemed immaterial or were fully disclosed in the original proxy solicitation or supplemental proxy.

(2) *No Imminent Irreparable Harm*

- The supplemental proxy cured all deficiencies in the original proxy solicitation.
- Shareholders have neither been deprived of the opportunity to "shop" the company nor have the lock-up devices employed by Medco deterred other suitors.

(3) *Balance of Hardships Weighs Against Issuing a Preliminary Injunction*

- Enjoining this merger, after an exhaustive, diligent, but unsuccessful search for other partners, would cause Medco shareholders to lose their only opportunity to receive a premium on their shares.

- Medco's stock would decline if the merger were to be enjoined (potentially to a price below $20 per share).

- Medco would face significant risks if they remained as an independent, stand-alone company.

II. Discussion

[1] Plaintiff shareholder may obtain a preliminary injunction by establishing the following three elements: (1) a reasonable likelihood of success on the merits; (2) imminent, irreparable harm if an injunction is not granted; and, (3) the damage to plaintiff if the injunction does not issue outweighs the damage to defendants if injunction does issue.[4] This test is stringent and the relief is extraordinary. After evaluating plaintiff's claims, I find that the circumstances surrounding the February 25, 2000 Shareholder Meeting and the proposed Merger do not warrant preliminary injunctive relief:

A. Reasonable Likelihood of Success on the Merits

1. Standard of Judicial Review

Before evaluating the likelihood of plaintiff's success on the merits, it is essential to determine the appropriate standard of judicial review to assess whether the directors breached their fiduciary duties in the context of this merger. Plaintiff claims that the Medco board's actions are subject to the entire fairness standard on the basis of disloyalty and an abdication of directorial duty that amounts to gross negligence.[5] Defendants claim that there is no evidence of self-interest that would justify depriving the Medco board of the protection of the business judgment rule and its presumption that directors act loyally.

[2-4] Directors have an unyielding fiduciary duty to protect the interests of the corporation and the shareholders alike.[6] In the context of a merger, a

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[4] *Mills Acquisition Co., infra* at 1278-79.

[5] Plaintiff alleges that Williams, as sole director responsible for negotiating the merger, had financial interest in the merger and selectively "filtered" information to the remainder of the Medco board. Furthermore, plaintiff alleges that the Medco board abdicated its directorial duties by permitting Williams to negotiate the merger with limited participation from the remaining Medco board members.

[6] *Cede & Co. v. Technicolor, Inc.*, Del. Supr., 634 A.2d 345, 360 (1993).

breach of fiduciary duty analysis begins with the rebuttable presumption that a board of directors acted with care, loyalty, and in "good faith." Unless this presumption is sufficiently rebutted, raising a reasonable doubt about self-interest or independence, the Court must defer to the discretion of the board and acknowledge that their decisions are entitled to the protection of the business judgment rule. In order to require application of the entire fairness standard, the plaintiff has to show that a majority of directors have a financial interest in the transaction or a motive to entrench themselves in office through the merger.[7]

[5] Plaintiff's allegations of self-interest do not meet the threshold necessary to rebut the presumption of the business judgment rule and require an analysis of the board's actions under an entire fairness standard. One director's alleged interest, as here in a fee related to consummation of the merger, related to his work and tied to overall enhancement in the value of the merger transaction is simply not enough to mandate strict scrutiny of the Medco board's actions.[8] Plaintiff has only alleged facts concerning the financial interest at stake for Williams. Plaintiff offers nothing to indicate that Williams' interest was not aligned with that of the shareholders. While it may well be so that Williams would get nothing if no deal gets done, he has every reason to attempt to negotiate the highest consideration possible for Medco's shareholders. His stake rises with the value of the deal. Nothing about the directors' relationships to Williams suggests their loyalty has been tainted or that they have an interest inconsistent with their duty of loyalty to Medco and its shareholders.

[6-7] Whether or not the directors' actions constitute an abdication of directorial duty is a fact specific question.[9] In other words, does the record indicate any self-interest or lack of independence on the part of the Medco board which caused them to delegate responsibility to Williams to negotiate the merger and to abandon any responsibility to review his work? The decision by the Medco board to delegate responsibility to Williams to negotiate the merger is "not an abdication of directorial authority merely because [it] limit[s] a board's freedom of future action."[10] Rather, the decision by the Medco board to delegate responsibility to Williams can only be regarded as a valid exercise of business judgment.[11] I do not find that the conclusory statements suggesting inferences proffered by plaintiff exhibit any aspect of self-interest or lack of independence that would support the

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[7]*See Grobow v. Perot*, Del. Supr., 539 A.2d 180, 188 (1988).

[8]*See Cede v. Technicolor, Inc.*, Del. Supr. 634 A.2d 345 (1993).

[9]*See Rosenblatt v. Getty Oil Co.*, Del. Supr., 493 A.2d 929, 943 (1985) (finding that the directors delegation of responsibility to others is an exercise of business judgment)..

[10]*Grimes v. Donald*, Del. Supr., 673 A.2d 1207, 1214 (1996).

[11]*Rosenblatt*, infra at 943.

imposition of the entire fairness standard. What the record actually shows is that: four of five directors had no economic interest in the outcome of the merger negotiations; they had no entrenchment motive; no evidence that Williams controlled any other directors through any power to affect their related or unrelated economic interests.

2. Did the Medco directors breach their duty of care by failing to inform themselves adequately?

The plaintiff's allegations do not demonstrate that the Medco board failed to inform itself of all material facts concerning the proposed merger with King.

The parties genuinely disagree about the materiality of facts and the inferences to be drawn from those on which they do agree to be true and material. I can not discern from the bounty of facts presented by counsel what is and what is not truthful. What I can do is determine whether the members of the Medco board were adequately informed of all material information reasonably available prior to approving the merger agreement.

Based on the record before me, it is fair to say that there is substantial disagreement about the efforts taken by Medco's board to engage in discussions with other potential suitors and the efforts taken to inform the board of material facts concerning this merger. Amid concern of maintaining growth and maximizing the value of its product pipeline, the Medco board began efforts to find a suitable partner to form a business combination. While not every potential suitor either became the subject of intense scrutiny or implicated mutual due diligence, the Medco board could not invariably control whether or not potential suitors wished to negotiate. In its effort to "shop" the company, the Medco board retained H&Q to assist in finding a potential suitor. It bears noting that H&Q was intimately familiar with Medco's business resulting from providing investment banking advice earlier.

The record does not provide any further insight about the extent of each suitors expressed interest in a potential business combination with Medco. If it did, this opinion would conceivably require more careful analysis than is reasonable and necessary given plaintiff's claims. What is apparent from the record is that Medco, with the experience and assistance of H&Q, aggressively sought out suitors who might benefit from Medco's existing drug pipeline and income stream. In fact, H&Q played an integral part in Medco's efforts to canvass the market to seek: a more economically viable business combination.

Plaintiff contends that the Medco board acted with gross negligence in: (1) deterring potential suitors; (2) relying on the advice of its investment

banker; (3) relying on the reports provided by Williams and Medco's own due diligence team; and (4) including a collar, termination fee, no talk/no shop provision, and a grant of a stock option to King[12].

Nothwithstanding plaintiff's allegations, it seems apparent to me that the evidence equally supports the view that Medco's board proceeded with the King merger because its efforts had failed to find a viable combination with other suitors. The proposed merger with King to Medco's shareholders appeared to be a viable and preferable option to going it alone. They considered the advice and assessment of the Medco due diligence team, reasonably relied upon their investment banker's advice and appropriately apprised the fear that appearing "over-shopped" could frustrate any deal.

Plaintiff's more particularized basis for assessment of the board's actions stem from Medco's board's decision to have Williams negotiate the merger agreement while enjoying a financial incentive to bring about a deal and the board's alleged failure to monitor his actions. Plaintiff's theory has no support in our case law nor on those facts. This scenario is quite unlike *Macmillan*,[13] upon which plaintiff primarily relies. In *Macmillan*, the negotiators were also active bidders. Williams neither had ties to King nor any other potential acquirer. His charge was to negotiate the best business deal he could consistently with the board's firm judgment that Medco could no longer go it alone. He undertook that mission incentivized by a fee tied to the best result he could obtain for all shareholders in a market where overshopping the company and its deleterious effect on its attractiveness had to be considered as well as the limited number of potential acquirers. Williams regularly briefed the board, Medco had its own due diligence team and Medco's investment bankers, no strangers to Medco's market niche, rendered a fairness opinion on which the board relied.

[8] I conclude that Medco's board met its duty of care in proceeding with the King merger. Despite the material disputes of fact, I am confident that Medco's board adequately informed themselves of all material information necessary to execute the merger agreement.

3. Did the board breach their duty of loyalty by not acting in the best interests of the shareholders?

[9] The underlying premise to establishing whether the Medco board breached their fiduciary duty of loyalty is: Did the board act in its members own independent conflicted self-interest or in the best interest of the

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[12]The "lock-up" devices also included a "pooling of interests" tax accounting treatment that was subsequently rendered moot at oral argument.

[13]*Mills Acquisition Co. v. Macmillan, Inc.*, Del. Supr. 559 A.2d 1261 (1989).

shareholders? In other words, would the King merger maximize value to its shareholders?

[10] In order for me to find that plaintiff would likely succeed at a trial on the merits on any breach of the fiduciary duty of loyalty, I would have to accept, as plaintiff suggests, the contention that the Medco directors acted in their own self-interest on the basis of their personal and/or business relationships with one another.[14] Evidence of personal and/or past business relationships does not raise an inference of self-interest. As I stated earlier, the facts do not support a conclusion that the Medco directors acted inconsistently with what they believed to be the best interest of Medco shareholders.

> "[T]he plaintiff alleges nothing about the genesis of this proposed merger, whether in negotiations or in the proposed terms, to lead me to conclude that the actions of the board as a whole (as well as the self-interest of the director-shareholders) were not in alignment with the interests of all [Medco] shareholders."[15]

Plaintiff has attempted to demonstrate that the entire process by which Medco and King pursued this merger agreement was "tainted" by the directors' self-interest flowing from business dealings in the past with Williams who stood to gain personally if the merger with King became a reality. Moreover, plaintiff asks this Court to examine self-interest on the part of H&Q on the basis that it had done business with King in the past, wanted to keep them as a client and had to build an internal "firewall" separating employees who had worked for King apart from those advising Medco; the failure of the Medco board to conduct a market check; the failure of the Medco board to conduct independent valuations to assess the economic fairness of the King merger; the failure of the Medco board to negotiate an adequate and fair merger; and, by employing lock-up devices.[16]

I can not, on the basis of these allegations find that the board either willfully left itself uninformed in order to serve its "self-interest" or failed to act in "good faith and in the honest belief that the [merger] was in the best interests of the company."[17] It is equally apparent to me that the board

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[14]Plaintiff states that the both of the directors who voted to approve the merger, Bartlett and Hirsch, have business and/or personal relationships with Williams dating back to 1969.

[15]*In re IXC Communications, Inc., Shareholders Litig.*, Del. Ch., Consol. CA. No. 17324 & C.A. No. 17334, Steele, V.C. (Oct. 27, 1999).

[16]Lock-up devices employed include: no talk/no shop provision, termination fee, and a grant of stock option.

[17]*Aronson v. Lewis*, Del. Supr., 473 A.2d 805, 812 (1984).

sufficiently complied with the "good-faith" standard set forth by this Court in *Aronson*. The efforts of the Medco board to give thorough consideration to the analysis prepared by H&Q, to complete due diligence of King, and to stimulate interest one last time regarding merger discussions with other suitors leads me to conclude that the directors were acting to benefit the economic: interests of the shareholders. I can not reasonably conclude, solely on the bases that Williams acted self-interestedly by receiving compensation for his efforts in negotiating a deal, that the goal of this strategic combination was anything other than an attempt to maximize the value of the interest of the corporation and shareholders.

One can not plausibly contend, in light of the written and oral record, that the actions of the Medco board suggested disloyalty either to the corporation or its shareholders. The approval of the merger agreement and the recommendation to shareholders results from Medco board's best, informed judgment.

In light of this Court's inability to conclude that the facts now before it support breaches of either the duty of care or duty of loyalty, plaintiff's claims have no reasonable likelihood of success on the merits.

4. Duty of Disclosure

[11-12] The "duty of disclosure" arises as a subset of a director's fiduciary responsibilities of care, loyalty, and "good faith."[18] A board of directors seeking shareholder approval of a specific corporate action must disclose all material facts relating to the requested action so that shareholders can make an informed decision.[19]

Medco issued a proxy statement soliciting shareholder approval for the merger with King. In the midst of allegations of false and misleading statements and omissions of material facts, Medco issued a supplemental disclosure to disarm the allegations surrounding the initial proxy.[20]

[13] Arguably, in light of this Court's Order to enjoin and postpone the February 10, 2000 shareholders' meeting for fifteen days, the supplemental disclosure has provided sufficient time for shareholders to consider the disclosure, make an informed decision, and return the proxy card.

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[18] *Malone v. Brincat*, Del. Supr., 722 A.2d 5, 11 (1998).

[19] *Id.* at 12.

[20] The Supplemental Proxy was issued January 31, 2000 to Medco's stockholders, a full ten days prior to the shareholders' meeting scheduled for February 10, 2000. Since that time, by Court Order, the February 10, 2000 shareholders' meeting was enjoined and postponed for fifteen days or until such later time as the parties agreed that the shareholders would have adequate time to assimilate the information necessary to cast an informed vote. *State of Wisconsin Investment Board, infra* at *7.

Therefore, any disputes concerning the reasonableness of the time period to receive, consider, and act upon the supplementary proxy materials are moot.

The issue that lingers is whether the misdisclosures in the board's original proxy solicitation not cured by the supplement are material to the shareholders ability to make an informed decision as part of the "total mix" of information available to them. "Directors are required to provide shareholders with all information that is material to the action being requested. and to provide a balanced, truthful account of all matters disclosed in the communications with shareholders."[21]

The well-settled standard for materiality states:

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. . .It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable reasonable investor as having significantly altered the "total mix" of information made available.[22]

[14] This Court does not defer to directors' judgment about what information is material. It is a matter for the Court to determine from the record at the particular stage of a case when the issue arises.[23]

Plaintiff contends that the supplementary, corrective disclosure, while enriching the quality of information potentially available to the shareholder, fails to address its concern about the fairness of the merger approval and recommendation process utilized by the Medco board or the adequacy of the price. Specifically, plaintiff advances the notion that the Medco board's failure to disclose information surrounding the valuation methodologies employed by H&Q, the Fujisawa offer, and Medco's inability to find a potential suitor constitute breach of the directors' duty to disclose all material information necessary to provide a balanced, truthful account of the action being requested of the shareholders.

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[21] *Malone, infra* at 12 citing *Zirn v. VLI Corp.*, Del. Supr., 681 A.2d 1050, 1056 (1996).

[22] *Rosenblatt, infra* at 944 *quoting TSCIndustries, Inc., v. North-way, Inc.*, 426 U. S. 438, 449.

[23] *In re Anderson, Clayton Shareholders Litig.*, Del. Ch., 519 A.2d 669, 675 (1986).

Applying the materiality standard, I conclude that the Medco board fully met its duty of complete disclosure. The corrective disclosure issued by Medco was designed to cure any complaints that the earlier information was misleading, incomplete, and/or susceptible to inconsistent interpretations.

I am not convinced that the alleged omissions represent information that a reasonable shareholder would consider to have significantly altered the "total mix" of information made available.

[15] Defendants first alleged omission regarding indications of interest from other potential suitors need not be disclosed as those discussions were preliminary in order to explore the possibility of a business combination that might lead to a merger agreement, and little more. I further find plaintiff's allegations regarding the omission of the Fujisawa offer to be without merit. The proxy fully discloses Fujisawa's all-cash offer. This interest is never hidden from the shareholders — only the details that made that option unlikely to bear fruit. One can not conclude that a failure to disclose the details of negotiations gone south would be either viably practical or material to shareholders in the meaningful way intended by our case law. The mere existence of unrequited attraction with other entities does not lead to acceptance of plaintiff's assertion of materiality — namely that shareholders would then know other deals *might be possible* and that there *might be better options* than the King merger agreement.[24] The Medco board's judgment that it would have been futile to pursue the Fujisawa offer, in other words, is not a misleading partial disclosure denying shareholder's information on a "significant prospect," generally considered to be a material fact.[25] The proxy disclosed the underlying material fact of the offer and the decision not to pursue it.

As for the alleged omission concerning the valuation methodologies employed by H&Q, I find that the Medco board adequately disclosed all relevant material information.[26] The analyses applied by H&Q in developing its Fairness Opinion are adequate and appropriate and I do not find anything unusual about their judgment that need be disclosed to the shareholders as part of their "total mix" of information. The proxy statements contained

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[24] *In re Lukens Inc.*, Del. Ch., C.A. No. 16102, Lamb, V.C., 1999 Del. Ch. 233 (Dec. 1, 1999).

[25] *See In re the Walt Disney Co. Derivative Litigation*, Del. Ch., 731 A.2d 342, 376 (1998)
A.F.'d in part, rev'd in part and remanded, Del. Supr., No. 469, 1998 (Feb. 9, 2000).

[26] *In re 3Com Corporation Shareholders Litigation*, Del. Ch., CA. No. 16721, Steele, V.C.,
(Oct. 25, 1999).

sufficient factual information from the H&Q investment bankers to assist the shareholders decision making.

I find that the dissemination of both the original proxy solicitation and the supplemental disclosure have enabled Medco shareholders to make an informed decision based upon material information necessary as part of the "total mix" of information available to them. Therefore, I conclude that the plaintiff can not satisfy its burden to establish that it is likely to succeed on the merits of its disclosure claims at trial.

5. Medco's Use of Lock-Up Devices

[16] Delaware law permits lock-ups and related agreements "where their adoption is untainted by director interest or other breaches of fiduciary duty."[27] Therefore, in the absence of breach of fiduciary duty in agreeing to the lock-up devices, these provisions are reviewable as business judgments and are, thus, granted deference. Neither the collar, termination fee, no talk/no shop provision, nor stock option agreements were used here as defensive mechanisms instituted to respond to a perceived threat from a potential acquirer making a competing bid for Medco.

6. Corporate Waste

[17] Plaintiff asserts that the fee paid to Williams to negotiate the King merger amounts to corporate waste. Compensation to executives for their efforts on behalf of a corporation has consistently been approached in a corporate waste claim with caution by our courts . . . "where, as here, there is no reasonable doubt as to the disinterest of . . . the Board, mere disagreement cannot serve as grounds for imposing liability based an alleged breaches of fiduciary duty and waste."[28]

As our Supreme Court recently stated:

> To rule otherwise would invite courts to become super-directors, measuring matters of degree in business decisionmaking and executive compensation.[29]

I earlier explained the futility of plaintiff's assertion of lack of independence and self-interest on the part of the board apart from Williams.

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[27] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, Del. Supr., 506 A.2d 173, 176 (1986).

[28] *In re The Walt Disney Co. Derivative Litig.*, 73 1 A.2d at 364, *supra*.

[29] *In re The Walt Disney Co. Derivative Litig.*, Del. Supr., No. 469, 1998, at 41 (Feb. 9, 2000).

Williams' efforts as a negotiator brought consideration for the fee designed to incentivize his efforts for the corporation and its shareholders. There is no viable claim for corporate waste.

B. Irreparable Harm

[18] Plaintiff's contentions that the original proxy solicitation and the supplement disclosure omitted or mischaracterized material facts that deny Medco shareholders the opportunity to make a fully informed decision on the merger is without merit. Because the evidence at this stage makes it unlikely that the plaintiff can show at a hearing on the merits that the Medco board failed to provide the shareholders with all the information a reasonably prudent shareholder would find material in the total mix required in order cast an informed vote, plaintiff will not be subject to irreparable harm if the vote goes forward as scheduled.

[19] I recognize the irreversible harm which would occur by permitting a shareholder vote on a merger to proceed without all material information necessary to make an informed decision. The Medco board, however, has presented the shareholders with an adequate supplementary disclosure, corrected to show all material information arguably absent from the original proxy solicitation and to allay concerns over misreadings which may be misleading. Plaintiff's second argument in support of its claim that a failure to enjoin the vote and the merger preliminarily would constitute, imminent irreparable harm is without merit. Plaintiff claims imminent and irreparable harm from being deprived of the opportunity to have Medco shopped. Medco's desire to form new alliances was well known in the pharmaceutical industry and its investment advisors, H&Q were familiar with the players. There is no record support for the speculation that any clause in the merger agreement deterred other ready, willing and able suitors. King's option is not preclusive and the agreement allowed Medco to follow up on any materializing superior proposal.

C. Balance of Harm

[20] The balance of the relative harm to Medco should the merger not go forward, versus the harm to shareholders should the merger be consummated will and should ultimately be determined by a fully informed shareholder voted on February 25, 2000.

The Medco board has evaluated the proposed merger with King. The proxy materials submitted to all shareholders sufficiently outline the efforts the board undertook in approving and recommending the merger agreement. The facts alleged do not persuade me that the board, either through gross

negligence or through lack of loyalty to Medco's shareholders, manipulated the deliberative process in order to deprive the shareholders of a meaningful opportunity to approve or reject the Medco-King merger.

The shareholders, based upon the information available to them from all sources, should reject the merger if they believe that information supports the view that there exists better alternative business combinations in the marketplace than the King merger or that Medco's future lies in standing alone. They should vote for the merger if they believe the information available supports the conclusion that the King merger is the only viable option likely to enhance, in any meaningful way, shareholder value. Now that it is clear to me that there has been no showing of a likelihood of success on the merits of the disclosure claims, the shareholders it seems to me, are the better judges of whether their interests would be harmed or enhanced by this merger. Should the merger vote be enjoined on this record, the harm to Medco and its shareholders caused by depriving the shareholders of an opportunity to decide on the King merger outweigh the harm to plaintiff by denying its application to enjoin both the vote and merger preliminarily.

D. Supplemental Issue

On February 17, 2000, plaintiff filed a second motion for preliminary injunction, obviously after the Court's ruling postponing the vote and before the Count could issue an opinion following the hearing on the first motion for preliminary injunction.

The second motion focuses on the timing of the shareholder vote and the "ramifications of the date on which the Medco Stockholders Meeting" was to be rescheduled. The plaintiff alleges that the Medco board never met to consider the financial consequences of the particular rescheduling date nor did they solicit or receive any advice on the financial consequences. The plaintiff believes the date chosen to be financially disadvantageous to the stockholders and to Medco and by failing to acknowledge this and act accordingly by rescheduling the vote and/or by withdrawing their recommendation for the merger, the Medco directors have failed in the execution of their duty to make an informed judgment.

Plaintiff requests mandatory injunctive relief before all the factual circumstances assumed by them can be determined. The plaintiff wishes me to order the board to meet and communicate to the shareholders whether the merger "is still in the best interests of" Medco shareholders. The basis for calculating the terms of exchange for the shares has not changed and the voting shareholders presumably know those terms and can vote accordingly. The board set a date consistent with the Court Order. The shareholders may not in fact approve the merger on February 25th. If they do not, plaintiff's

renewed motion for injunctive relief will be moot. I note, interestingly, that plaintiff's first motion and the consequences flowing from it are in part responsible for the changing financial picture described by plaintiff but none of this argument appeared in the first hearing or in the written papers. No hearing will be scheduled for a preliminary injunction on these grounds for the reasons stated elsewhere in this Opinion as well as for the reasons stated in this section.

III. Conclusion

Plaintiff's request for preliminary injunction is hereby *denied* with respect to the shareholder vote and *denied* with respect to the merger.

IT IS SO ORDERED.