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IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

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Reg'r in Ch

STATE OF WISCONSIN INVESTMENT BOARD, on behalf of itself and all others similarly situated,	)	
Plaintiff,	)	
v.	)	CA. No. 17727
WILLIAM BARTLETT, JAY N. COHN, MARK B. HIRSCH, EUGENE L. STEP, RICHARD C. WILLIAMS, and MEDCO RESEARCH, INC.,	)	
Defendants.	)	

Submitted: February 9, 2000
Decided: February 24, 2000

MEMORANDUM OPINION

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

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

STEELE:, V.C.

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 Medco-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 3 1,

[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.

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.

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

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

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.

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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.").

(b) Care:

- 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 n&disclosures in the original proxy solicitation. In short, defendants contend that plaintiffs 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 rnerger 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**

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 plaintiffs claims, I find that the circumstances surrounding the February 25, 2000 Shareholder Meeting and the proposed Merger do not warrant -preliminary injunctive relief

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

A. Reasonable Likelihood of Success on the Merits

1. Standard of Judicial Review

Before evaluating the likelihood of plaintiffs 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.

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 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-

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[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).

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]

Plaintiffs 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

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

has been tainted or that they have an interest inconsistent with their duty of loyalty to Medco and its shareholders.

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 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.“” Rather, the decision by the Medco board to delegate responsibility to Williams can only be regarded as a valid exercise of business judgment.” 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 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

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[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] **Rosenbllatt,** infra at 943.

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 plaintiffs 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 plaintiffs 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 plaintiffs 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. Plaintiffs 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 acquiror. His charge was to negotiate the best business

[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).

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 acquirors. 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.

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?

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

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 sharehold.ers.

> "[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"

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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. C.A. No. 17324 & C.A. No. 17334, Steele, V.C. (Oct. 27, 1999).

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 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

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[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).

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, plaintiffs claims have no reasonable likelihood of success on the merits.

4. Duty of Disclosure

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

Medco issued a proxy statement soliciting shareholder approval for the merger with King. In the midst of allegations of false and misleading

[18] *Malone v. **Brincat***, Del. Supr., 722 A.2d 5, 11 (1998).
[19] Id. at 12.

statements and omissions of material facts, Medco issued a supplemental disclosure to disarm the allegations surrounding the initial proxy.[20]

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. 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:

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[20] The Supplemental Proxy was issued January 3 1, 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.

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

> 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]

Th-is 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

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[22] ***Rosenblatt***, *infra* at *944 quoting TSC Industries, 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).

material information necessary to provide a balanced, truthful account of the action being requested of the shareholders.

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.

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 plaintiffs allegations regarding the omission of the Fujisawa offer to be without merit. The proxy filly 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 plaintiffs 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 sufficient factual information from the H&Q investment bankers to assist the shareholders decision making.

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[24] *In re: Lukens Inc.,* Del. Ch., C.A. No. 16102, Lamb, V.C., 1999 Del. Ch. 233 (Dec. I, 1999).
[25] *See In re the Walt Disney Co. Derivative Litigation,* Del. Ch., 731 A.2d 342, 376 (1998) aff' 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., C.A. No. 16721, Steele, V.C., (Oct. 25, 1999).

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

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

Plaintiff asserts that the fee paid to Williams to negotiate the King merger amounts to corporate waste. Compensation to executives for their

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

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 disagreernent 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 plaintiffs assertion of lack of independence and self-interest on the part of the board apart from Williams. 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

Plaintiffs 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

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[28] *In re The Walt Disney Co. Derivative Litig.,* 731 A.2d at *364, **supra***.

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

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.

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. Plaintiffs 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**

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 par-tic-ular 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

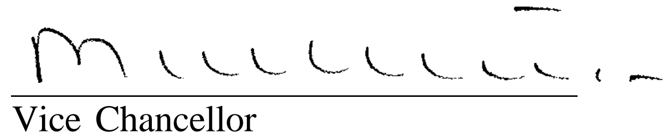
stockholders and to Medco and by failing to acknowledge this and act accordingly by rescheduling the vote and/or by withdrawing their recommendation for the merger, the Medco directors have failed in the execution of their duty to make an informed judgment.

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, plaintiffs 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

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

IT IS SO ORDERED.



Vice Chancellor