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Case No. 7368-VCMR

IN THE COURT OF CHANCERY FOR THE STATE OF DELAWARE

IN RE COMVERGE, INC.	)	
SHAREHOLDERS LITIGATION	)	C.A. No. 7368-VCMR

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

WHEREAS, the Plaintiffs Gary K. Schultz and Saravanan Somlinga were stockholders of Comverge, Inc. ("Comverge") at all relevant times;

WHEREAS, the Defendants, R. Blake Young, Nora Mead Brownell, Alec G. Dreyer, Rudolf J. Hoefling, A. Laurence Jones, David R. Kuzma, John T. McCarter, James J. Moore, Joseph M. O'Donnell, and John S. Rego were directors of Comverge at all relevant times;

WHEREAS, H.I.G. Capital, LLC ("HIG") acquired Comverge through a board-negotiated tender offer, top-up option, and short-form merger for $1.75 per share in cash on May 15, 2012, and Plaintiffs challenge the deal protection devices connected with the acquisition;

WHEREAS, during HIG's negotiation of the acquisition of Comverge's common stock, HIG acquired convertible Comverge debt that gave HIG blocking rights for transformative Comverge transactions and entitlements to payments upon a Comverge change of control;

WHEREAS, Defendants have moved for summary judgment, and I have reviewed the parties' briefs, supporting submissions, and the applicable law;

NOW, THEREFORE, THE COURT HEREBY FINDS AND ORDERS:

1. Summary judgment is DENIED.

2. "There is no 'right' to a summary judgment." *Telxon Corp. v. Meyerson*, 802 A.2d 257, 262 (Del. 2002). Summary judgment is appropriate only where the moving party demonstrates that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)). On any application for summary judgment, "the Court must view the evidence in the light most favorable to the non-moving party." *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992) (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970)). "Summary judgment must be denied 'if there is any reasonable hypothesis by which the opposing party may recover, or if there is a dispute as to a material fact or inferences to be drawn therefrom.'" *Mentor Graphics Corp. v. Quickturn Design Sys., Inc.*, 1998 WL 731660, at *2 (Del. Ch. Oct. 9, 1998) (quoting *Seagraves v. Urstact Prop. Co.*, 1996 WL 159626, at *3 (Del. Ch. Apr. 1, 1996)).

3. The Court may, in its discretion, deny summary judgment if it decides, upon examination of the facts presented, that it is desirable to inquire into or develop more thoroughly the facts at trial in order to clarify the law or its application. *See, e.g., Alexander Indus., Inc. v. Hill*, 211 A.2d 917 (Del. 1965);

Ebersole v. Lowengrub, 180 A.2d 467 (Del. 1962); *Phillips v. Schifino*, 2009 WL 5174328, at *1 (Del. Ch. Dec. 18, 2009). As Chancellor Chandler explained while serving on the Delaware Superior Court:

> Before a court can apply the law, it must have an adequate factual basis for doing so. And in some situations a fuller development of the facts may serve to clarify the law or help the Court determine its application to the case . . . . In other words, summary judgment, with ever-lurking issues of fact, is a treacherous shortcut. . . . [S]ound judicial administration may dictate withholding judgment until the whole factual structure stands upon a solid foundation following a plenary trial where proof can be fully developed, questions answered and issues clearly focused.

McCabe v. Wilson, 1986 WL 8008, at *2 (Del. Super. June 26, 1986).

4. In this case, Defendants first argue that any claim regarding the so-called "make whole payment"—which other bidders would have to pay to HIG under a forbearance agreement associated with Comverge debt that HIG held—either was dismissed by Vice Chancellor Parsons or is improperly raised for the first time in response to the motion for summary judgment. Defs.' Reply Br. 3-5. The complaint and Plaintiffs' brief opposing Defendants' motion to dismiss, however, did mention the terms of the forbearance agreement although they did not mention the make whole payment explicitly. Second Am. Compl. ¶ 103; Pls.' Opp. to Mot. to Dismiss 29. And while Vice Chancellor Parsons's memorandum opinion on the motion to dismiss does not discuss the make whole provision, he

denied the motion to dismiss for the entire "termination fee structure," *In re Comverge, Inc.*, 2014 WL 6686570, at *17 (Del. Ch. Nov. 25, 2014), which included payments on Comverge debt held by HIG. Plaintiffs' challenge to the make whole payment thus is not procedurally improper.

5. Next, Defendants argue that the Comverge stockholders' tender of their shares shifts the standard of review of the directors' actions to the business judgment rule. They argue that under *Corwin v. KKR Financial Holdings, LLC*, 125 A.3d 304 (Del. 2015), and *In re Volcano Corp. Shareholders Litigation*, 143 A.3d 727 (Del. Ch. 2016), the irrebuttable business judgment rule applies after a fully informed, uncoerced, and disinterested stockholder tender of shares and that Defendants are thus entitled to summary judgment. Plaintiffs argue that the deal protection devices must satisfy enhanced scrutiny under *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985), before the business judgment rule will apply to the directors' actions. I tend to agree with Defendants that *Corwin* and *Volcano* control this case. As the Supreme Court in *Corwin* held:

> [A]lthough the plaintiffs argue that adhering to the proposition that a fully informed, uncoerced stockholder vote invokes the business judgment rule would impair the operation of *Unocal* and *Revlon*, or expose stockholders to unfair action by directors without protection, the plaintiffs ignore several factors. First, *Unocal* and *Revlon* are primarily designed to give stockholders and the Court of Chancery the tool of injunctive relief to address important M & A decisions in real time, before closing. They were not tools designed with post-closing

> money damages claims in mind, the standards they articulate do not match the gross negligence standard for director due care liability under *Van Gorkom*, and with the prevalence of exculpatory charter provisions, due care liability is rarely even available.
>
> Second and most important, the doctrine applies only to fully informed, uncoerced stockholder votes, and if troubling facts regarding director behavior were not disclosed that would have been material to a voting stockholder, then the business judgment rule is not invoked.

125 A.3d at 312; *see also Huff Energy Fund, LP v. Gershen et al.*, 2016 WL 5462958, at *16 (Del. Ch. Sept. 29, 2016) ("*Corwin* and its progeny provide that, even if the Court determined that *Revlon* or *Unocal* enhanced scrutiny might otherwise apply, given the cleansing vote of the stockholders, 'the business judgment rule irrebuttably applies' to the Board's adoption of the Plan of Dissolution." (quoting *Volcano*, 143 A.3d at 738)).

6. In order to obtain business judgment rule review under *Corwin*, however, a stockholder vote must be fully informed. Plaintiffs argue that the Comverge stockholders were not fully informed, pointing to three omissions from the Comverge disclosures: (1) the stockholders were told that if Company X—the only other serious bidder for Comverge—submitted a superior offer, HIG would not be entitled to convert the bridge loan it had provided to Comverge into common stock, but the stockholders were not told that the carve-out from the conversion feature for Company X lasted for only 65 days; (2) the stockholders

were not told that the board was unaware of the 65-day limit on Company X's carve-out; and (3) the stockholders were not told about instructions from CEO Young restricting Company X's due diligence. Pls.' Answering Br. 17-20.

7. "Whether shareholders are 'fully-informed'" as to a particular transaction depends on whether those stockholders were apprised of "all material information" related to that transaction. *Solomon v. Armstrong*, 747 A.2d 1098, 1127-28 (Del. Ch. 1999) (quoting *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 66 (Del. 1995)). "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding [whether to approve the challenged transaction]." *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)) (internal quotation marks omitted). "Stated another way, there must be 'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable stockholder as having significantly altered the total mix of information made available.'" *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1172 (Del. 2000) (quoting *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 142 (Del. 1997)). Although a plaintiff generally bears the burden of proving a material deficiency when asserting a duty of disclosure claim, a defendant bears the burden of demonstrating that the stockholders were fully informed when relying on stockholder approval to cleanse a challenged transaction. *In re KKR*

Fin. Hldgs. LLC S'holder Litig., 101 A.3d 980, 999 (Del. Ch. 2014) (citing *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 846 (Del. 1987)).

8. Plaintiffs argue that the stockholders were not told that the carve-out from the HIG bridge loan conversion provision in the event that Company X made a superior offer for Comverge lasted for only 65 days. The board, however, did disclose the terms of the bridge loan. The Schedule 14D-9 stated that "the indebtedness under the Note Purchase Agreement is convertible under certain circumstances into shares of common or preferred stock of the Company." Defs.' Ex. 1, at 38. The full text of the Note Purchase Agreement was attached to the Schedule 14D-9 that the stockholders received. Defs.' Ex. 1 Ex. Index (indicating that the Note Purchase Agreement was attached as Exhibit (e)(3)). It stated:

> [I]f the Acquisition Agreement is terminated . . . to enter into an "Alternative Acquisition Agreement" . . . with . . . Company X . . . then no conversion of the principal amount outstanding under any Note, together with any accrued and unpaid interest thereon and the other Obligations owed in connection therewith, shall be permitted until the earlier to occur of (i) the consummation of the transaction contemplated by the Alternative Acquisition Agreement, (ii) the termination of the Alternative Acquisition Agreement according to its terms or (iii) sixty-five (65) days after the termination of the Acquisition Agreement . . . .

Defs.' Ex. 30, § 2.2(a). Documents attached to a disclosure and incorporated by reference are considered disclosed under Delaware law. *See, e.g., Orman v. Cullman*, 794 A.2d 5, 35 (Del. Ch. 2002) (holding that disclosures in a Form 10-K

that was incorporated into a proxy statement by reference were adequate); *Wolf v. Assaf*, 1998 WL 326662, at *2-3 (Del. Ch. June 16, 1998) (same). Thus, the 65-day limit on the Company X carve-out from the conversion feature was disclosed to the Comverge stockholders.

9. As to the other disclosure issues Plaintiffs raise, however, this case presents a complex mosaic of factual issues and questions of law. Plaintiffs' evidence that the board was unaware of the 65-day limit is not conclusive. For example, Plaintiffs failed to ask directly about the 65-day limit in all of the director depositions except Brownell's. But at the summary judgment stage, taking all reasonable inferences in Plaintiffs' favor and considering that Defendants bear the burden of proving that the Comverge stockholders were fully informed in this case, I cannot hold that the board was aware of the 65-day limit as a matter of law. I doubt disclosure of the board's understanding of the 65-day limit would have been material in light of the disclosures made in this case. Further, to require disclosure of the board's alleged misunderstanding likely would amount to improperly insisting upon director "self-flagellation." *See Orman*, 794 A.2d at 34. But I deny summary judgment because the directors' understanding of the deal terms may remain an issue, as discussed in paragraph 11.

10. Plaintiffs also point to several emails from Comverge CEO Young in which Young directed that Company X not be allowed print or download access to

the Comverge data room and that Comverge employees not direct any efforts to Company X diligence requests until the HIG deal was announced. Pls.' Exs. G, H, I, J. Plaintiffs also reference emails that suggest Comverge's bankers at J.P. Morgan Securities LLC ("J.P. Morgan") believed Young could be more flexible in providing information to Company X given the tight timeline. *See* Pls.' Ex. G. Company X was the only serious bidder for Comverge other than HIG. Company X's February 2, 2012, indication of interest was between $4 and $6 per share, which was more than double the HIG deal price. Pls.' Ex. C. And Company X indicated that the time constraints—which may have arisen partially from Young's instruction that Comverge employees not focus on Company X diligence requests—were the primary reason it could not move forward with a Comverge offer. Defs.' Ex. 37. While the Young emails may be legitimate routine responses to overbroad diligence requests, I cannot, at this stage, weigh the evidence in that way or hold that this information was not material to Comverge stockholders as a matter of law. This is especially true because Plaintiffs argue that Young had a potential conflict of interest given that HIG planned to retain Comverge management, including Young, after a deal was consummated. Defs.' Ex. 1, at 7.

11. If *Corwin* does not control this case, Defendants argue that under *Revlon* or *Unocal*, they are entitled to summary judgment because Comverge has a Section 102(b)(7) provision and Plaintiffs cannot prove that the directors acted in

bad faith in adopting the deal protection devices. Plaintiffs argue that the payments that another bidder would have been required to make to terminate the HIG deal amounted to 18% of the deal value at the low end and 27% of the deal value at the high end when the payments to HIG in connection with the Comverge debt are taken into account. Pls.' Answering Br. 9. Approving such deal protection devices, Plaintiffs contend, rose to the level of bad faith, as 18% of the deal value far exceeds the amount of any deal protection device that this Court has found reasonable. Pls.' Answering Br. 33-35 (citing *In re Answers Corp. S'holders Litig.*, 2011 WL 1366780, at *4 n.52 (Del. Ch. Apr. 11, 2011) ("The break-up fee, at 4.4% of equity value, is near the upper end of a 'conventionally accepted' range."); *Phelps Dodge Corp. v. Cyprus Amax Minerals Co.*, 1999 WL 1054255, at *2 (Del. Ch. Sept. 27, 1999) (not reaching the issue, but stating, "I think 6.3 percent certainly seems to stretch the definition of range of reasonableness and probably stretches the definition beyond its breaking point")). Defendants argue that some of the payments on the Comverge debt are not deal protection devices at all and that the remaining deal protection devices are reasonable under Delaware law. To the extent these and other issues ultimately may be decided as a matter of law, a fuller development of the facts should serve to clarify the law or help the Court determine its application to the case.

/s/ Tamika Montgomery-Reeves
Vice Chancellor