COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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Re: *In re 3Com Shareholders Litigation*
Civil Action No. 5067-CC

Dear Counsel:

I have carefully reviewed the arguments of each side regarding plaintiffs' motion to expedite discovery. For the reasons set forth below, I deny plaintiffs' motion.

Plaintiffs have separately filed a motion for a preliminary injunction asking the Court to enjoin defendants from taking any action to consummate the transaction in which Hewlett Packard Company, through its wholly owned subsidiary Colorado Acquisition Corporation (collectively, "HP"), has proposed to acquire 3Com Corporation's ("3Com") outstanding shares for $7.90 cash per share (the "Merger"). Plaintiffs seek expedited discovery in order to garner the facts necessary to support their request to enjoin the Merger. The Merger is expected to close during the first half of calendar 2010, but no definitive closing date has been set.

Before the Court will grant a motion for expedition, plaintiffs must establish "a sufficiently colorable claim and show[] a sufficient possibility of threatened

irreparable injury, as would justify imposing on the defendants and the public the extra (and sometimes substantial) costs of an expedited preliminary injunction proceeding."[1]

Plaintiffs put forth two primary justifications for seeking expedited discovery. First, plaintiffs assert that management failed to make adequate disclosures in the proxy statement filed December 4, 2009,[2] wherein 3Com's Board of Directors recommended that stockholders vote in favor of the Merger. Second, plaintiffs assert that Board members violated their fiduciary duties by approving the Merger because its terms are structured to discourage or preclude competitive bids. I address each of plaintiffs' contentions in turn.

Plaintiffs' Disclosure Claims

The most appropriate time to seek relief to remedy proxy disclosure violations is before the shareholder action related to the proxy occurs.[3] Under Delaware law, a material disclosure violation typically creates a *per se* irreparable harm because the approval of a transaction by uninformed or misinformed shareholders, and the resulting consummation of that transaction, cannot be adequately remedied by an award of damages.[4] Thus, when a plaintiff is seeking expedited proceedings amidst allegations of disclosure violations, the paramount question is whether the plaintiff has demonstrated a sufficiently colorable claim that disclosure violations have occurred.

The stockholders meeting to vote on the Merger is currently scheduled for January 26, 2010. Thus, plaintiffs have brought their alleged disclosure violations to the Court's attention in a timely fashion. What must be resolved is whether there is a colorable claim that any of plaintiffs' alleged disclosure violations are material. Under Delaware law, an omitted fact is material if a reasonable stockholder would consider it important in a decision pertaining to his or her

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[1] *Giammargo v. Snapple Beverage Corp.*, 1994 WL 672698, at *3 (Del. Ch. Nov. 15, 1994).

[2] The proxy filed December 4, 2009, upon which the plaintiffs base their complaint and motion for expedited proceedings, was a preliminary proxy. On December 15, 2009, a definitive proxy was filed. I have reviewed the sections of the preliminary proxy at issue and note no material differences from the definitive proxy. All references to the "Proxy" herein are to the definitive proxy.

[3] *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 359 (Del. Ch. 2008).

[4] *Laborers Local 235 Benefit Funds v. Starent Networks Corp.*, 2009 WL 4725866, at *1 (Del. Ch. Nov. 18, 2009).

stock.[5] If including the omitted fact would significantly alter the total mix of information available to stockholders, that fact is material.[6] But "[o]mitted facts are not material simply because they might be helpful."[7] So long as the proxy statement, viewed in its entirety, sufficiently discloses and explains the matter to be voted on, the omission or inclusion of a particular fact is generally left to management's business judgment.[8]

Plaintiffs allege there are five material disclosure violations in the Proxy: (1) the Proxy fails to provide a meaningful description of management's projections or the projections used by Goldman Sachs & Co. ("Goldman"), 3Com's financial advisor, in evaluating the advisability and fairness of the Merger; (2) the Proxy fails to disclose material facts regarding why 3Com's Management Plan,[9] completed September 23, 2009, was revised with lower projections (the "Revised Management Plan") after HP had made its $7.90 per share offer, as well as why the Revised Management Plan was given to Goldman before it was presented to the Board on November 10, 2009; (3) the Proxy fails to provide any information as to the value of 3Com's three distinct operating units (3Com, Tipping Point, and H3C); (4) the Proxy fails to disclose any details regarding 3Com's stand-alone plan and other strategic initiatives considered by the Board as an alternative to the Merger; and (5) the Proxy fails to disclose why Goldman deviated from accepted practices in its valuation methodology, including whether it deviated from the methodology it used when it previously valued 3Com in connection with Bain & Co.'s attempted buyout of 3Com in 2008 (the "2008 Attempted Buyout"). I will analyze, in turn, each alleged disclosure violation to determine whether there is a colorable claim that it is material and warrants expedited discovery.[10]

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[5] *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985).

[6] *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000).

[7] *Id.*

[8] *Kaplan v. Goldsamt*, 380 A.2d 556, 565 (Del. Ch. 1977).

[9] The Management Plan is a three-year business plan maintained by 3Com management.

[10] I note here that plaintiffs have made a very minimal attempt to cite authority supporting their allegations that the five omissions they identify are material. They cite one case that purportedly supports their allegation that the first omission is material, but fail to cite any authority supporting their other four allegations. While the standard for obtaining expedited proceedings is low—requiring only that plaintiffs demonstrate a colorable claim—that does not mean that plaintiffs can obtain expedited proceedings simply by cobbling together a list of purported disclosure violations and placing it before the Court in a timely manner. Plaintiffs would be well-advised to buttress their allegations with at least some legal support, even at this early stage of the proceedings. This would not only make it more likely that plaintiffs will have their motion

Management's projections and the projections used by Goldman

Plaintiffs' first allegation is that the Proxy fails to provide adequate information regarding management's projections or the projections used by Goldman in rendering its fairness opinion. Specifically, plaintiffs complain that (a) the Proxy does not disclosure cash flow measures, EBIT estimates, or EBITDA estimates from which cash flows could be derived, (b) the limited management projections that are disclosed in the Proxy[11] differ from Goldman's discounted cash flow analysis ("DCF Analysis") in that management excluded stock-based compensation expense from its projections but Goldman included stock-based compensation expense in its DCF analysis,[12] and (c) there is no disclosure of whether the Management Plan or the Revised Management Plan incorporates the value of VAT refunds that 3Com expects to receive from the Chinese government.

Plaintiffs' first complaint asserting that management should have provided cash flow measures and EBIT or EBITA estimates from which cash flows could be derived does not state a colorable claim. This is so because in the Proxy 3Com management gives a thorough description regarding the process they went through to obtain the Merger price,[13] adequately explains why they believe the Merger is fair and shareholders should vote in favor of it,[14] and thoroughly summarizes the work done by Goldman in rendering its fairness opinion.[15] In particular, the "Opinion of Financial Advisor" section summarizes the material financial analyses performed by Goldman and delivered to the 3Com Board in connection with the Merger, including the end results—or ultimate conclusions—of each analysis.

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for expedited proceedings granted, but it would assist the Court in making an informed decision on a highly time-sensitive basis. Moreover, it would ensure that plaintiffs don't allege that certain omissions are disclosure violations when there is precedent that clearly demonstrates otherwise.

[11] Most of the financial projections in the Proxy are disclosed in the "Opinion of Financial Advisor" section which summarizes the fairness opinion conducted by Goldman. *See* Proxy at 28-36. The only projection 3Com management discloses independent of Goldman's projections is a four-year summary of key metrics in the Management Plan and the Revised Management Plan (the key metrics being revenue, gross profit margin, operating profit, and earnings per share). *See* Proxy at 36-39.

[12] As noted, plaintiffs separately challenge Goldman's DCF analysis methodology and I address that below.

[13] Proxy at 18-25 (section entitled "Background of the Merger").

[14] *Id.* at 26-28 (section entitled "Reasons for the Merger; Recommendation of the Board of Directors").

[15] *Id.* at 28-36 (section entitled "Opinion of Financial Advisor").

Moreover, 3Com management independently discloses the material data points in the Management Plan and the Revised Management Plan that Goldman relied on in preparing its fairness opinion.[16] Thus, in asserting that cash flows measures, EBIT measures, and EBITDA measures should also be disclosed, plaintiffs are essentially arguing that full versions of the summarized projections must be included in the Proxy (at least full versions of cash flow projections). Presumably plaintiffs want this information to make their own independent evaluation of fair value.

Plaintiffs' request is highly similar to the request made in *In re CheckFree Corporation Shareholders Litigation*.[17] In that case, the plaintiffs alleged that the CheckFree directors breached their disclosure duties by excluding management's projections from the proxy statement when those projections had been provided to CheckFree's financial advisor to use in rendering a fairness opinion.[18] An otherwise adequate and fair summary of the financial advisor's work was included in the proxy. In rejecting the plaintiff's argument, this Court noted that "[a] disclosure that does not include all financial data needed to make an independent determination of fair value is not . . . *per se* misleading or omitting a material fact. The fact that the financial advisors may have considered certain non-disclosed information does not alter this analysis."[19] The Court pointed out that the plaintiffs failed to "explain why receiving information in addition to the basic financial data already disclosed [would] significantly alter the total mix of information available."[20] Plaintiffs in this case have likewise failed to assert a colorable reason as to why management should be required to provide full versions of the projections underlying the already disclosed summaries. 3Com management has made the Proxy more accessible to investors by summarizing the financial information relied on in connection with the Merger. Moreover, an adequate and fair summary of the work performed by Goldman is included in the proxy.[21] I am reluctant to require full disclosure of the projections underlying such summaries as I do not believe it would alter the total mix of available information and may even undermine the clarity of the summaries.

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[16] Proxy at 36-39 (section entitled "Projected Financial Information").
[17] 2007 WL 3262188 (Del. Ch. Nov. 1, 2007).
[18] *Id.* at *2.
[19] *Id.* (quoting *In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *16 (Del. Ch. May 4, 2005), *aff'd*, 897 A.2d 162 (Del. 2006)).
[20] *Id.*
[21] I discuss this summary more fully in the section below dealing with Goldman's alleged deviations from accepted valuation methodologies.

Plaintiffs also complain that a disclosure violation has occurred because the limited management projections that are disclosed in the Proxy differ from the projections used by Goldman in its fairness analysis. Specifically, plaintiffs assert that the Management Plan and the Revised Management Plan exclude stock-based compensation expense while Goldman's DCF Analysis includes stock-based compensation expense. Plaintiffs argue that this is a disclosure violation akin to the violation in *Laborers Local 235 Benefit Funds v. Starent Networks Corporation*.[22] I disagree. In *Starent Networks* the financial advisor departed from the norm by treating stock-based compensation expense as a cash expense in its discounted cash flow analysis. Goldman did the same thing in this case. But in *Starent Networks* it was nowhere disclosed in the proxy that the financial advisor had embarked on this departure from the norm.[23] In contrast, in this case, it is plainly disclosed that Goldman treated stock-based compensation as a cash expense in its DCF Analysis.[24] Thus, shareholders can plainly determine from reading the proxy that Goldman made a departure from the norm in conducting its discounted cash flow analysis. There is no disclosure violation here, merely a disagreement with Goldman's methodology.[25]

Plaintiffs' complaint that Goldman's treatment of stock-based compensation as a cash expense differs from management's exclusion of stock-based compensation from the Management Plan and Revised Management Plan does not state a colorable claim that a disclosure violation has occurred. For starters, it is plainly evident from the Proxy that Goldman and management treated this expense item differently in their projections.[26] More fundamentally, however, is the fact that the projections plaintiffs compare are of a different character entirely. Goldman's projection—which treats stock-based compensation as a cash expense—is a discounted cash flow analysis. 3Com management's projections—which do not expense stock-based compensation—are the Management Plan and

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[22] 2009 WL 4725866 (Del. Ch. Nov. 18, 2009).

[23] *Id.* at *2 ("Though there may be a valid reason for the treatment of the stock-based compensation in the discounted cash flow analysis [as a cash expense], that this detour is not disclosed or otherwise highlighted in the relevant proxy statement section gives me pause.").

[24] *See* Proxy at 34 ("In the illustrative discounted cash flow analyses described in this paragraph and the following paragraph, Goldman . . . treated stock based compensation as a cash expense.").

[25] I discuss the significance of disagreements that shareholders may have with a financial advisor's methodology in the section below dealing with Goldman's alleged deviations from accepted valuation methodologies.

[26] *See* Proxy at 34 and 38.

the Revised Management Plan, which are modified forms of an income statement.[27] It is unclear to me how treating stock-based compensation differently in these projections is misleading. Income statements include all sorts of income and expense items that are not tied to cash flows. Thus, the disparate treatment of stock-based compensation that plaintiffs complain of here is only one of many different financial measures that are treated differently between the two types of projections involved.

Finally, plaintiffs complain that management committed a disclosure violation by failing to disclosure whether the Management Plan or the Revised Management Plan incorporate the value of VAT refunds that 3Com expects to receive from the Chinese government. Upon conducting a cursory review of the Proxy I noted this is not an accurate assertion and, therefore, it is not a colorable claim. The material portions of the Management Plan and the Revised Management Plan are disclosed in the "Projected Financial Information" section of the Proxy. Immediately following the disclosure of these two projections is a list of the significant assumptions that underlie the projections. One of the assumptions explicitly states the following:

> We benefit from the VAT Rebate, which is an operating subsidy from the Chinese tax authorities in the form of a partial refund of value-added taxes, or VAT, collected by H3C on the sales of our software. The VAT Rebate program is currently scheduled to end on December 31, 2010, is subject to the discretion of the Chinese authorities and may be discontinued, reduced or deferred at any time. *The prospective financial information nonetheless assumes that the program will be renewed or replaced with a similar program and we would enjoy its uninterrupted benefits for the entire planning period.*[28]

A fair reading of this statement indicates that the value of the VAT refunds *is* included in the Management Plan and the Revised Management Plan.[29]

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[27] By "modified" I mean they do not conform to Generally Accepted Accounting Principles. This is common with internally developed projections developed by management for business planning purposes.

[28] Proxy at 39 (emphasis added).

[29] Moreover, Goldman repeatedly discusses its treatment of the VAT Rebate throughout the "Opinion of Financial Advisor" section. In discussing the Implied Multiples Analysis the Proxy explains "Goldman Sachs calculated the EPS multiples both including and excluding the impact of an operating subsidy from the Chinese tax authorities in the form of a partial refund of value

The Revised Management Plan

Plaintiff asserts that management's failure to explain why a Revised Management Plan was created and used by the Board and Goldman in evaluating the Merger is a material omission. Plaintiff asserts that the Revised Management Plan appears to be designed to make HP's offer look more appealing because it projects a less optimistic outlook regarding 3Com's potential and was created after HP's offer.

I am not convinced that failing to describe the reasons for the development and use of the Revised Management Plan was a material omission. In the Proxy, 3Com explains that both the Management Plan and the Revised Management Plan were provided to Goldman for purposes of its fairness review and that both were discussed by the Board in connection with its consideration of the Merger.[30] In the "Opinion of Financial Advisor" section the Proxy reiterates that both the Management Plan and the Revised Management Plan were considered by Goldman in its review of 3Com. Specifically, in the "Implied Multiples Analysis" portion of this section Goldman provides data for both the Management Plan and the Revised Management Plan, demonstrating that both metrics were used in evaluating the fairness of the Merger and providing stockholders with a view of 3Com under both projections. I am aware of no rule that precludes management or its financial advisor from using alternative sets of financial projections in evaluating the advisability and fairness of a merger. Indeed, given the unpredictability of the

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added taxes expected to be collected by a subsidiary of 3Com in the People's Republic of China through calendar year 2010 (the 'VAT Rebate')." The Selected Transactions Analysis presents estimates that include and exclude the value of the VAT Rebate. The DCF Analysis explains: "In the illustrative discounted cash flow analyses described in this paragraph and the following paragraph, Goldman Sachs assumed that the VAT Rebate expires at the end of calendar year 2010 . . . ." The Illustrative Present Value of Future Stock Price Analysis explains: "Goldman Sachs used EPS estimates that excluded the VAT Rebate and assumed a present value of the VAT Rebate of $0.12 through the end of calendar year 2010." Finally, the last analysis performed by Goldman, entitled Illustrative Present Value per Share of VAT Rebate, was entirely dedicated to predicting the value of the VAT Rebate on a per share basis should it continue past 2010.

[30] *See* Proxy at 25 ("On November 10, 2009, the board of directors held a special meeting to consider the proposed acquisition by HP . . . Representatives of Goldman Sachs [] presented updated financial analyses of 3Com, based in part on the Management Long Range Plan and a sensitivity case provided by our management, which we refer to as the Management Sensitivity Case, and a financial analysis of the proposed acquisition by HP."). The Proxy refers to the Management Plan as the "Management Long Range Plan" and refers to the Revised Management Plan as the "Management Sensitivity Case."

future, it is common for companies to have multiple sets of projections based on different assumptions about what will transpire going forward. 3Com management disclosed both sets of projections in the Proxy and clearly explained that both were used. A further explanation regarding why the Revised Management Plan was developed, who asked for it, who authorized it, and so forth would not significantly alter the total mix of information available to stockholders.

The value of 3Com's three distinct operating units

Plaintiffs assert that management committed a disclosure violation by failing to provide information as to the value of 3Com's three distinct operating segments (3Com, H3C, and Tipping Point). Plaintiffs argue that this omission is material because Goldman did not conduct (or at least did not disclose) a sum-of-the-parts analysis. Under Delaware law, divisional information is material and must be disclosed where the purchaser utilizes such information in formulating its bid.[31] In this case, I find there is not a colorable claim that management's decision not to disclose divisional information is a disclosure violation because there is no allegation that HP used such information in formulating its bid.

As to Goldman's purported failure to conduct a sum-of-the-parts analysis, I am aware of no rule that requires financial advisors to perform such an analysis in preparing a fairness opinion. Whether such an analysis is appropriate is best left to the discretion of investment bankers and company management. Declining to perform such an analysis does not create an obligation on the part of management to disclose divisional information. Plaintiffs assertion that Goldman should have performed a sum-of-the-parts analysis is a mere disagreement with the fairness opinion that can be adequately addressed by an appraisal action as described below.

3Com's stand-alone plan and other strategic alternatives

Plaintiff asserts that management committed a disclosure violation by failing to inform stockholders of the other strategic initiatives it was considering at the time it considered HP's proposal. This is not a disclosure violation. Delaware law does not require management "to discuss the panoply of possible alternatives to the course of action it is proposing . . . ."[32] This is consistent with the principle that

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[31] *In re Envirodyne Indus., Inc. S'holders Litig.*, 1989 WL 40792, at *3 (Del. Ch. Apr. 20, 1989).
[32] *Seibert v. Harper & Row, Publishers, Inc.*, 1984 WL 21874, at *5 (Del. Ch. Dec. 5, 1984) (quoting *Umbriac v. Kaiser*, 467 F. Supp. 548, 553 (D. Nev. 1979).

too much information can be as misleading as too little. Moreover, under our law stockholders have a veto power over fundamental corporate changes (such as a merger) but entrust management with evaluating the alternatives and deciding which fundamental changes to propose.

Goldman's alleged deviations from accepted valuation practices

Plaintiffs assert that the analyses in Goldman's fairness opinion deviated from conventional practice. The target of plaintiffs' assertions is Goldman's DCF Analysis, which plaintiffs believe was avant-garde in three ways: (a) Goldman treated stock-based compensation as a cash expense in its DCF Analysis even though it is normally not treated as such, (b) Goldman selected a weighted average cost of capital that was higher than 3Com's cost of equity, (c) Goldman increased the discount rates it used in valuing 3Com for the Merger over the discount rates it used when valuing 3Com for the 2008 Attempted Buyout even though 3Com had substantially strengthened its balance sheet in the interim period. Plaintiffs claim that it was a disclosure violation for the Proxy not to disclose why Goldman deviated from accepted practices.

Under Delaware law, the valuation work performed by an investment banker must be accurately described and appropriately qualified.[33] So long as that is done, there is no need to disclose any discrepancy between the financial advisor's methodology and the Delaware fair value standard under Section 262 (or any other standard for that matter).[34] If shareholders believe the financial advisor undervalued the company after reading a summary of its work, they are free to exercise their appraisal rights under Section 262. Indeed, an appraisal action addresses this concern by subjecting the financial advisor's fairness opinion to scrutiny. Valuing a company as a going concern is a subjective and uncertain enterprise. There are limitless opportunities for disagreement on the appropriate valuation methodologies to employ, as well as the appropriate inputs to deploy

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[33] *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *20 (Del. Ch. Aug. 18, 2006); *see also In re Pure Resources, Inc. S'holders Litig.*, 808 A.2d 421, 449 (Del. Ch. 2002).

[34] *In re PNB Holding Co.*, 2006 WL 2403999, at *20 ("*Nebel* teaches that the discrepancy between [the financial advisor's] DCF and the Delaware fair value standard does not support a disclosure claim. To rule otherwise would turn proxy statements into law review surveys, with directors having to describe the twists and turns of § 262 jurisprudence-such as how to make a comparable company analysis comport with the fair value standard and relate that to the banker's work. Our law does not require that. So long as the valuation work is accurately described and appropriately qualified, that is sufficient.").

within those methodologies. Considering this reality, quibbles with a financial advisor's work simply cannot be the basis of a disclosure claim.

Goldman's analysis was accurately described and appropriately qualified in the "Opinion of Financial Advisor" section of the proxy. Over the course of nine pages, this section describes the sources of information Goldman relied on, significant assumptions that were made in generating estimates, and important limitations on the validity of Goldman's opinion that the Merger is fair to stockholders.[35] The material analyses Goldman performed and provided to management are also thoroughly summarized. These summaries include the final range of value estimates for each analysis. Most importantly, it is clear from these summaries that Goldman treated stock-based compensation as a cash expense and applied a weighted average cost of capital that was higher than 3Com's cost of equity. I conclude that this was a sufficient disclosure under Delaware law. Plaintiffs' quibbles with Goldman's methodologies (and inputs into those methodologies), if they are serious, can be resolved via an appraisal action.

The 2008 Attempted Buyout proxy

In their complaint and the brief supporting their motion for expedited proceedings, plaintiffs repeatedly compare the proxy issued by 3Com for the 2008 Attempted Buyout to the Proxy issued for the Merger. Plaintiffs point out inconsistencies in the valuation methodologies used by Goldman in connection with the two transactions. Plaintiffs allege that management's failure to explain why different valuation methodologies were used is a disclosure violation. It is not. There is no rule that requires a financial advisor to follow the same protocol every time it renders a fairness opinion. There may be valid reasons that Goldman used a different approach when valuing 3Com in connection with the Merger. It is plain from a comparison of the two proxies that an identical protocol was not followed. This simply amounts to a quibble with the manner in which Goldman performed its fairness opinion in connection with the Merger and can be remedied by the appraisal remedy as I have already described.

<u>Plaintiffs' Fiduciary Claims</u>

Plaintiffs allege that the 3Com directors breached their fiduciary duties by approving three actions in connection with the Merger: (a) including a no-solicitation and matching rights provision in the Merger agreement, (b) including a

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[35] *See* Proxy at 28-36.

$99 million termination fee that, along with a $10 million expense reimbursement fee, represents over 4% of the equity value of the Merger, and (c) failing to make an effort to solicit other buyers before entering the Merger agreement. I find that none of these allegations support a colorable claim that fiduciary duties were breached.

The provisions that plaintiffs attack have been repeatedly upheld by this Court. For instance, plaintiffs complain that the no solicitation provision, the matching rights provision, and the termination fee "effectively preclude any other bidders who might be interested in paying more than HP for the Company . . . ."[36] But this Court has repeatedly held that provisions such as these are standard merger terms, are not *per se* unreasonable, and do not alone constitute breaches of fiduciary duty.[37] Plaintiffs here fail to explain how these provisions would prevent another bidder from making a competing offer in this case. Indeed, plaintiffs ignore the notable absence of any other interested bidders.[38]

Conclusion

Because plaintiffs have failed to state colorable disclosure claims or claims for breach of fiduciary duty, and because an adequate remedy (appraisal) exists for any purported fiduciary breach, I deny their motion to expedite discovery.

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[36] Plaintiffs' Motion for Expedited Proceedings 8.

[37] *See In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1017 (Del. Ch. 2005) ("[N]either a termination fee nor a matching right is *per se* invalid. Each is a common contractual feature that, when assented to by a board fulfilling its fundamental duties of loyalty and care for the proper purpose of securing a high value bid for the stockholders, has legal legitimacy."); *State of Wisconsin Inv. Bd. v. Bartlett*, 2000 WL 238026, at *9 (Del. Ch. Feb. 24, 2000) (deal-protection provisions are permitted absent director interest or other breaches of fiduciary duty); *In re IXC Commc'n, Inc. S'holders Litig.*, 1999 WL 1009174, at *2, *6 (Del. Ch. Oct. 27, 1999) ("no solicitation" provisions "are common in merger agreements and do not imply some automatic breach of fiduciary duty"); *Golden Cycle, LLC v. Allan*, 1998 WL 892631, at *17 (Del. Ch. Dec. 10, 1998) ("Delaware law recognizes the propriety in appropriate circumstances of reasonable and proportionate termination fee/expense reimbursement . . . in merger agreements."); *In re JP Stevens & Co., Inc. S'holders Litig.*, 542 A.2d 770, 783 (Del. Ch. 1988) (deal-protective devices such as termination fees are "reasonably conventional").

[38] *See Int'l Jensen Inc. S'holders Litig.*, 1996 WL 422345, at *2 (Del. Ch. July 13, 1996) (denying request for expedited proceedings where plaintiffs failed to plead any facts or submit any evidence suggesting that another bidder would come forward and make offer higher than any of those already made).

IT IS SO ORDERED

Very truly yours,

William B. Chandler III

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