EFiled: Dec 23 2005 3:55PM EST
Transaction ID 7716978

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December 23, 2005

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Re: Crescent/Mach I Partnership, L.P., et al. v. Turner, et al.
C.A. No. 17455-NC
Date Submitted: December 12, 2005

Dear Counsel:

Plaintiffs are former shareholders of Dr. Pepper Bottling Holdings, Inc. (the "Company") which, in 1999, merged with an affiliate of Defendant Cadbury

Schweppes p.l.c. ("Cadbury") and Defendant The Carlyle Group, L.P. ("Carlyle"). The Company was controlled by Defendant Jim L. Turner, its majority (approximately 60%) shareholder, chief executive officer, and chairman of its three member board of directors. The Plaintiffs filed this action, one asserting claims of breach of fiduciary duty against Turner and others and claims of aiding and abetting against Defendants Cadbury and Carlyle. Turner, Cadbury, and Carlyle are the remaining defendants. All of the other defendants have been dismissed either by the Court's order on Defendants' motion to dismiss[1] or by Plaintiffs during the course of this proceeding.[2] The Plaintiffs also filed an appraisal action challenging the fair value of the merger consideration.[3] Both actions are scheduled for trial, beginning January 30, 2006. The remaining defendants have moved for summary judgment. For the reasons set forth below, the motion for summary

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[1] *Crescent/Mach I Partners, L.P. v. Turner*, 846 A.2d 963 (Del. Ch. 2000). There the setting for the present dispute is more fully developed.

[2] Most significant was the Plaintiffs' dismissal of Defendants William O. Hunt and J. Kent Sweezey, the other two directors serving on the Company's board. Implicit in their dismissal as defendants is resolution of any lingering claims regarding their loyalty to the Company and its shareholders. As the result of the Court's decision on the motion to dismiss, no doubt remained as to their "interestedness" or independence. The Court did not then dismiss the Plaintiffs' loyalty challenge because of concerns about alleged bad faith and indifference to their fiduciary duties.

[3] *Crescent/Mach I Partnership, L.P. v. Dr. Pepper Bottling Co. of Texas*, C.A. No. 17711.

judgment filed by Cadbury and Carlyle is granted. The motion for summary judgment filed by Turner is granted in part and denied in part.

I.

The Company was an independent bottler of beverages, including Dr. Pepper and Seven-Up. Cadbury owns and franchises those brands. The Company was the largest independent bottler of Dr. Pepper and the second largest independent bottler of Seven-Up. Carlyle and Cadbury also controlled ABC Bottling Holdings, Inc. ("ABC"), which was the Company's largest competitor. Cadbury and Carlyle saw opportunity in combining the Company with ABC. Turner reached an agreement, following prolonged negotiations, with Cadbury and Carlyle on the terms of the merger.

The Plaintiffs complained of numerous "side deals," allegedly negotiated by Turner as the price for his consent to the merger, including the right to invest in the post-merger entity and the right to participate in any public offering of stock in the post-merger entity; and Turner's continued employment at a base salary of $900,000 (which was his base salary with the Company) together with stock options.

II.

Summary judgment, governed in this jurisdiction by Court of Chancery Rule 56, may be granted when there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law.[4] This standard requires the Court to view the facts in "the light most favorable to the nonmoving party."[5] It is always the moving party's burden to demonstrate that no material question of fact exists. Indeed, even though the facts may not be in dispute, the nonmoving party is entitled to all reasonable inferences that can be drawn from the factual record.

III.

When this Court considered the Defendants' motion to dismiss, the surviving thrust of the Complaint was similar to that of *Parnes v. Bally Entertainment Corp*.[6] *Parnes* involved allegations that the acquired corporation's chief executive officer and key representative in the negotiation process had conditioned his consent to the merger upon the receipt of substantial special

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[4] *See, e.g.*, *Motorola, Inc. v. Amkor Tech., Inc.*, 849 A.2d 931, 935 (Del. 2004).
[5] *AeroGlobal Cap. Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005).
[6] 722 A.2d 1243, 1245 (Del. 1999).

payments. Thus, his conduct had a direct impact on the merger price to be received by the shareholders because the merger consideration was reduced in order to accommodate his demands, or so it was alleged. Here, the Plaintiffs allege that Turner extracted excess compensation for his benefit as the price of going along with the merger. In this context, the Plaintiffs have the ultimate burden of showing that Turner's conduct was "so egregious as to materially affect the price paid in [the] transaction."[7] The Plaintiffs' claims, patterned after *Parnes*, fail for two reasons. First, Turner did not condition his assent to the merger on any special consideration. Second, the "side deals" which he did receive did not materially affect the merger price.

Cadbury and Carlyle, as a condition of their proceeding with the merger, insisted that Turner remain with the surviving entity as a key executive. Although his job responsibilities expanded substantially, his salary following the merger was the same as his salary before the merger. The Plaintiffs complain that Turner was granted certain options by the surviving company. It may be that the options had value (even though it turns out that Turner never exercised them), but

[7] *Dieterich v. Harrer*, 857 A.2d 1017, 1027 (Del. Ch. 2004).

compensation of this nature to induce the continued the employment of a respected executive does not, without more, constitute the basis for any claim for breach of fiduciary duty. This simply is not the type of conduct which led to the decision in *Parnes*.[8]

Turner, because Cadbury and Carlyle required it, exchanged some of his stock in the Company for shares in the post-merger company. Although the Plaintiffs view this as Turner's taking advantage of an opportunity to preserve for himself an interest in the potential upside of the merged company, they were offered the same opportunity and declined. Moreover, it is clear that Turner did not seek out this opportunity to continue with an investment in the merged company, but, instead, he did so because of pressure placed upon him by Cadbury and Carlyle. Under these circumstances, no fiduciary duty claim has been demonstrated by the Plaintiffs, even under the standard of summary judgment, which requires the Court, of course, to view the facts in the light most favorable to them.

[8] The Plaintiffs' arguments either reach or approach the following unworkable rule: whenever a fiduciary of an acquired corporation takes employment with the surviving entity, she inevitably is burdened with the obligation of demonstrating the fairness of her new compensation package. Although fiduciaries are accountable for actions in their self-interest—even negotiating for continued employment, facts substantially beyond those offered by Plaintiffs are required in order to create a triable issue.

The final concern of the Plaintiffs regarding special consideration is that Turner was offered and obtained "registration rights" that would allow him to register and sell his shares in the merged company in the event of a public offering and that the Plaintiffs were never afforded the same opportunity. First, the Plaintiffs failed to demonstrate that this constitutes a fiduciary duty breach. Second, they could have sought the same opportunity as was granted Turner, but they did not do so. Indeed, they specifically rejected the opportunity to invest in the surviving entity. Thus, Turner, who invested in the surviving entity only because Cadbury and Carlyle insisted upon it, cannot be said to have breached his fiduciary duties.

IV.

Two other claims premised on additional benefits for Turner have surfaced during the course of these proceedings: one involving forgiveness near the time of the merger of a loan by the Company to Turner; the other involving the sale, also near the time of the merger, of several parcels of Company real estate to Turner at an allegedly substantial discount to market price.[9]

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[9] Turner argues, not without some cause, that the real estate claims, coming as late as they did, should not be considered by the Court. Public records evidencing the challenged transaction were not even produced until after briefing of the summary judgment motions.

Following approval of the merger, the board forgave a loan from the Company to Turner in the approximate (but disputed) amount of $400,000. This loan forgiveness was approved by the independent directors. One of those directors, in his deposition, expressed the view that the amount forgiven was approximately $300,000. That discrepancy does not undercut the directors' awareness of their actions. Forgiveness of a debt of this magnitude by a board, the majority of which is not subject to a challenge as to its loyalty, does not state, in this context, a viable breach of fiduciary duty claim. More importantly, although the board's action was substantially contemporaneous with the merger, the Plaintiffs have not shown that it had any impact on the merger consideration. Without a showing by the Plaintiffs that the loan forgiveness impacted the merger consideration, there is no direct claim here for the Plaintiffs to assert.[10]

Before the merger and at about the time the merger was approved by the Company's board, the Company transferred several parcels of real estate to Turner. The Plaintiffs, based on recently produced land records, contend that Turner

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[10] Recovery of any improperly forgiven loan would accrue to the benefit of the Company, not its shareholders. As such, the claim is derivative and, with the merger, the Plaintiffs, as former shareholders, lost standing. *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004).

acquired these parcels from the Company for between one-fifth and one-third their fair market value. The transfers, however, were approved by the two independent directors, and there has been no showing that they had any impact on the merger price. They, too, at most, only provide the basis for a derivative claim.

V.

The core of the dispute involves volume growth projections (3% versus 4%) for the Company on a standalone basis, which Turner supplied to his fellow directors, the investment banker providing the fairness opinion supporting the merger, and his fellow shareholders. The merger price was premised upon, and assessed against, a 3% projection which the Plaintiffs now assert was unduly pessimistic and inconsistent with the Company's management's view. If Turner and other members of the Company's management believed that the proper growth projection was 4% but Turner informed the parties relying upon him that it was 3% (a number that concededly would have materially altered the perception of fair price), then Turner did not act loyally and in the best interests of the Company and its shareholders. The question for summary judgment is whether the debate over which projection the Company's management (essentially Turner) believed can be

resolved as a matter where the material facts are not in dispute. I conclude that it cannot. There are enough references in the record to projections of 4% volume growth rate that, at least arguably, can be attributed to the Company's management's view of the Company's prospects that a factual issue exists, thereby precluding summary judgment.[11]

I acknowledge that this aspect (the competing volume projections) may not have been developed in the Complaint and may be better suited for analysis in the context of an appraisal action. The parties have fully developed the record on this issue and, as this case has evolved, it became a central topic in this litigation, one which Turner is fairly able to contest.[12] Moreover, simply because it may be more germane to the appraisal action does not require dismissal here.[13]

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[11] The Defendants fairly argue that the 4% projection reflected the acquirors' assessment of the added value that they could bring to the business. That may be, but that is a question for the finder of fact. It should also be reiterated that Turner held approximately 60% of the equity in the Company. Why he would act against his self-interest by selling out cheaply has not been convincingly answered by the Plaintiffs. They point to ego-satisfaction associated with the opportunity to run a larger business entity and to his desire to diversify his personal holdings because most of his net worth had been tied up in the Company's stock.

[12] The Defendants argue that the dispute over the volume projection involves fraud that was not pleaded in accordance with Court of Chancery Rule 9(b). Although one could view the Plaintiffs' claim as sounding in fraud (and, indeed, the Plaintiffs characterize it as such), it also fairly captures duty of loyalty concerns.

[13] *See Andra v. Blount*, 772 A.2d 183, 192-96 (Del. Ch. 2000), for a thorough analysis of the competing views on whether a fiduciary duty action should survive alongside an appraisal action when the appraisal action is likely to provide a full remedy. I acknowledge that the identity of

VI.

In September 1996, Turner formed a separate company, JLT Beverages, L.P. Although JLT Beverages has been dismissed as a defendant in this action, the Plaintiffs nonetheless assert that JLT Beverages was an artifice used by Turner to extract benefits from the Company that should have been shared by all shareholders. The diversion of the corporate opportunity alleged with respect to JLT Beverages[14] at most states a claim of injury directly to the Company. That injury, even though it may have been ongoing, was not associated with the merger. Thus, the claim is a derivative one and, upon the merger, the Plaintiffs lost

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the Plaintiffs in this action and in the companion appraisal action could readily lead to a conclusion that this fiduciary duty action serves no independently useful purpose and, thus, should not continue. There is one potentially significant difference—and the record here delivers no illumination. That is the issue of credit risk; if the respondent in the appraisal action is unable to pay, the defendant(s) in the fiduciary duty action may provide a source of at least some funding.

The Plaintiffs also assert a related disclosure claim based on the volume projections. The shareholders were informed of the 3% projection, not the 4% projection. That difference would have been material to them at the time. Whether in light of the appraisal action (and the identity of Plaintiffs in both actions), the Plaintiffs' ability to demonstrate any damages based on the disclosures is certainly in doubt. Because the disclosure claim is so closely intertwined with the debate about the proper volume projections, I decline to resolve this issue on summary judgment pending "a more solid basis of [making] findings." *AeroGlobal Cap. Mgmt., LLC*, 871 A.2d at 444.

[14] It is alleged that JLT Beverages was interposed as an intermediary (and collected a fee for little, if any, effort) between the Company and the franchisor of another beverage.

standing to assert it.[15] Accordingly, the claim involving the arrangement with JLT Beverages is dismissed.

VII.

The only claim against Carlyle and Cadbury is that they aided and abetted Turner in his breach of fiduciary duty. Initially, this claim focused on the "side deals" that Turner had allegedly insisted upon as a condition of the merger. The lack of substance to this claim has been addressed. Now, the Plaintiffs argue that Cadbury and Carlyle aided and abetted Turner's breach of fiduciary duty by remaining silent while Turner was disseminating pessimistic volume projections and they knew those projections were not accurate. Carlyle and Cadbury used both the 3% and 4% projections, but in different contexts: conservative projections for potential lenders; more aggressive projections for potential co-investors. Acquirors, of course, may have expectations different from those of the acquired company's management and, as a reflection of their confidence in their own abilities, may use higher projections than the acquired company's internal projections. In short, the use of different projections in different contexts cannot

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[15] *See, e.g.*, *In re Syncor Int'l Corp. S'holders Litig.*, 857 A.2d 994, 998 (Del. Ch. 2004).

alone demonstrate (or allow the drawing of a favorable inference to the effect) that the acquirors had the necessary knowledge of the actions (and views) of the fiduciary, in this instance, Turner, to sustain an aiding and abetting claim. There are no facts in the record that would allow the Court to hold Cadbury and Carlyle as knowledgeable participants[16] in any effort by Turner to abuse his fiduciary obligations with respect to the volume projections (or the so-called "side deals").[17]

Accordingly, the motion of Carlyle and Cadbury for summary judgment is granted.

VIII.

For the foregoing reasons, Turner's motion for summary judgment to the extent that it involves fiduciary duty claims relating to volume projections (including related disclosure claims) is denied. Otherwise, the balance of Turner's

[16] A critical element in establishing an aiding and abetting claim is the defendant's knowing participation in the fiduciary's breach. *See, e.g.*, *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 172 (Del. 2002); *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987).

[17] To be more specific, Cadbury and Carlyle considered 4% growth to be possible for the combined entity. Even if Turner believed that 4% was appropriate for the Company on a stand-alone basis, there is no basis for concluding that Carlyle and Cadbury shared that view or knew that Turner did not believe in the lower projections.

motion for summary judgment is granted, and the motion for summary judgment filed by Cadbury and Carlyle is granted.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-NC