WILLIAM B. CHANDLER III
CHANCELLOR

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: March 26, 2007
Decided: May 1, 2007

Jon E. Abramczyk
Morris, Nichols, Arsht & Tunnell LLP
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899

Daniel V. Folt
Gary W. Lipkin
Matt Neiderman
Duane Morris LLP
1100 N. Market St., Suite 1200
Wilmington, DE 19801

Re: *LaPoint, et al. v. AmerisourceBergen Corp.*
Civil Action No. 327-CC

Dear Counsel:

Before me is defendant's motion for summary judgment in a complex and factually-detailed case. Having carefully considered all arguments of both parties, I conclude that significant issues of material fact remain in this case, and summary judgment is appropriate on only relatively narrow issues. In order to help bring this matter to as swift a resolution as possible, however, I have endeavored to limit the matters that the parties need to present at trial, if the parties fail to resolve the dispute in the interim.

I. STATEMENT OF FACTS

A. Bridge and ABC negotiate and enter into a merger agreement

Plaintiffs are former shareholders of Bridge Medical, Inc., a company incorporated in Delaware in 1996. A technology startup, Bridge developed and

marketed MedPoint, a bar-code enabled bedside point-of-care ("BPOC") solution. Having failed to turn a profit in any year between 1996 and 2002, Bridge's directors began seeking an acquirer in early 2002. Although there is disagreement as to which party made the initial overtures, Bridge's search eventually led to the negotiating table with ABC. The two companies signed a letter of intent on August 27, 2002.

Under the terms of the letter of intent, and later the merger, ABC agreed to pay Bridge shareholders an initial $27 million dollars, and further consented to "earnout" payments to former Bridge shareholders contingent upon certain EBITA targets being met in 2003 and 2004. These payments could vary between $55 million, if Bridge achieved EBITA of more than $4.29 million in 2003 and $11.83 million in 2004, and zero, if Bridge failed to achieve $2.31 million in EBITA in 2003 and $5.46 million in 2004. Defendant asserts that it insisted upon the earnout provision due to concerns over the excessive optimism regarding Bridge's projected sales forecasts. Plaintiffs dispute this contention, and in any event the purpose behind this provision is not relevant to the present motion.

Both parties expected to benefit from the acquisition. ABC sought to diversify in order to develop and promote a "closed loop" offering, allowing it to combine lower-margin drug distribution activities with higher value added services throughout the hospital supply chain. Bridge shareholders, on the other hand, hoped to receive at least three benefits from the merger: an immediate cash payment, the possibility of additional earnout payments, and an increased market presence due to an alliance with a much larger firm. This last benefit is explicitly contemplated in the merger agreement, which states:

> [ABC] agrees to (and shall cause each of its subsidiaries to) *exclusively and actively* promote [Bridge's] current line of products and services for point of care medication safety. [ABC] shall not (and shall cause each of its subsidiaries to not) promote, market or acquire any products, services or companies that compete either directly or indirectly with [Bridge's] current line of products and services.[1]

In agreeing to a contingent earnout payment, Bridge shareholders explicitly contemplated and bargained for the receipt of exclusive and active promotional assistance from ABC. Further, the agreement clearly recognizes the risk that the

[1] Answering Br. in Opp'n to Def.'s Mot. for Summ. J. Ex. 9, Annex I, ¶ 25 (emphasis added) [hereinafter Merger Agreement].

surviving entity might exert its influence post-merger in order to avoid earnout payments:

> [ABC] will act in good faith during the Earnout Period and will not undertake any actions during the Earnout Period any purpose of which is to impede the ability of the [Bridge] Stockholders to earn the Earnout Payments.[2]

The merger agreement explicitly provides protection to former Bridge shareholders in the event that they are unable to achieve their EBITA targets, and thus receive their contemplated merger consideration, due to action or inaction on the part of ABC.

Complicating matters is the fact that the merger agreement itself is far from a model of clear legal craftsmanship. As described in detail below, plaintiffs and defendant vigorously contest the interpretation of two specific clauses of the agreement. In both cases, plaintiffs rely upon the plain language of the document, while defendant insists that, however clear the wording may be, the document must be construed by this Court to avoid the otherwise "absurd" results.[3]

B. Bridge fails to achieve its post-merger targets

Bridge's post-merger sales performance failed to live up to expectations. The parties vehemently disagree as to the cause of this failure, however. Plaintiffs lay blame at the feet of defendant, asserting not only that ABC's post-merger support was lackluster, but that ABC affirmatively promoted competing products by participating in various joint-bidding opportunities. To support their claims for breach of contract, plaintiffs point to press release policies allegedly designed to reduce Bridge's presence in the market, refusal on the part of ABC to credit Bridge for a "bundled sale," and four specific examples of instances in which defendant took part in joint bids with Bridge competitors. Defendant's motion for summary judgment, on the other hand, identifies failures of Bridge's own management, over-optimistic and possibly fraudulent sales projections, and normal changes in the business cycle as factors in Bridge's decline.

Although most of the transactions contained in the complaint need not be described in detail, one transaction merits close consideration. A sometime Bridge

---

[2] Merger Agreement, Annex I, ¶ 2.

[3] *See, e.g.*, Opening Br. in Supp. of Def.'s Mot. for Summ. J. at 71.

competitor, Cerner Software, entered into a general contractor relationship with the University of Pittsburg Medical Center ("UPMC") in the summer of 2003. As part of the eventual sale, Bridge sold its MedPoint software to Cerner, which then resold the product to UPMC. In order to sweeten the deal, however, Bridge offered to include a free engineering study to be conducted by AutoMed, another ABC subsidiary. Defendant insists that the decision to provide the study was made unilaterally by Bridge and without ABC's blessing. Plaintiffs maintain that ABC was provided with notice of the terms of the transaction and did not object. The parties dispute whether this transaction constituted a "bundled deal" under the terms of the merger agreement.

Plaintiffs also assert that ABC refused to enter into a subsequent strategic alliance with Cerner solely because it would have resulted in plaintiffs receiving the maximum earnout payment achievable under the ABC/Bridge merger agreement without Bridge having to make a sale. ABC did eventually sell Bridge to Cerner for $10 million in June 2005.

II. CONTENTIONS

In the process of briefing the motion for summary judgment, plaintiffs have indicated that they will withdraw two counts of their Amended Complaint.[4] Defendant's motion, as it applies to the only remaining count, principally argues that plaintiffs have failed to prove causation of damages with respect to any aspect of the Amended Complaint. Defendant also asserts that plaintiffs have failed to meet their burden to produce evidence sufficient to sustain their breach of contract claim with respect to a number of separate issues. First, defendant maintains that the merger agreement bars plaintiffs from contesting the calculation of their 2003 earnout payments because the challenge is untimely. Second, defendant argues that a sale to the University of Pittsburgh Medical Center cannot be considered a "bundled sale" under the terms of the merger agreement, and that plaintiffs are not entitled to a significant credit towards their EBITA calculations. Third, defendant asks this Court to find that plaintiffs put forward no evidence to suggest that ABC violated the merger agreement by refusing to enter into a business combination with Cerner. Fourth, defendant insists that all ABC subsidiaries are required to follow standard press release policies, and that plaintiffs have failed to show either breach or causation with regard to ABC refusals to allow Bridge to issue press releases. Finally, defendant maintains that plaintiffs cannot show that a paper

[4] Answering Br. in Opp'n to Def.'s Mot. for Summ. J. at 45.

reorganization of various ABC subsidiaries breached the merger agreement or caused any damages to Bridge.

Plaintiffs characterize the amended complaint somewhat differently. Weaving together a number of alleged violations of the merger agreement, they contend that ABC sought to undermine Bridge's ability to achieve its earnout payments, and that the sum total of these breaches, coupled with a breach of defendant's duty to act in good faith during the earnout period, denied them the opportunity to receive their rightful merger consideration. Plaintiffs' case is materially weakened by the fact that they were forced to withdraw the report of their expert witness shortly after briefing on this motion was concluded. Nevertheless, plaintiffs maintain that, even without their expert, they have put forward sufficient evidence to not only survive a motion for summary judgment, but to succeed at trial.

The first two issues raised by defendant are purely matters of contractual interpretation and are readily amenable to summary judgment. On both issues, not only is defendant's argument without merit, but summary judgment must be awarded to plaintiffs. On the other hand, only one of defendant's remaining issues is suitable for summary judgment.

III. STANDARD OF REVIEW

A motion for summary judgment may only be granted where "the pleadings, depositions, answer to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[5] The Court views the facts in the "light most favorable to the nonmoving party, and the moving party has the burden of demonstrating that there is no material question of fact."[6] The nonmoving party, however, may not rest on their pleadings, but "must set forth specific facts showing that there remains a genuine issue for trial."[7] In responding to a motion for summary judgment, all evidence is to be viewed in the light most favorable to the non-moving party,[8] but the non-moving party may not rest upon its pleadings. Instead, where the moving party has put in the record facts

[5] Ct. Ch. R. 56(c).
[6] *Elite Cleaning Co. v. Capel*, 2006 WL 1565161, at *3 (Del. Ch. June 2, 2006) (quoting *Judah v. Delaware Trust Co.*, 378 A.2d 624, 632 (Del. 1977)).
[7] *Id.*
[8] *Acro Extrusion Corp. v. Cunningham*, 801 A.2d 345, 347 (Del. 2002).

that would, if undisputed, entitle it to summary judgment, the burden shifts to the non-moving party to show, by affidavit or otherwise, that some material fact remains disputed.[9] "If a rational trier of fact could find any material fact that would favor the non-moving party in a determinative way . . . summary judgment is inappropriate."[10]

IV. ANALYSIS

With this familiar standard firmly in mind, I move to each issue defendant raises in its motion for summary judgment. These issues divide easily into three categories. First are arguments that involve only issues of contractual interpretation. Next, I consider defendant's assertion that plaintiffs have failed to meet its burden to show that defendant's alleged breaches of contract caused plaintiffs' harm. Finally, I analyze the remaining issues where defendant insists that plaintiffs have failed to show breach, causation, or damages.

A. Construction of contractual terms

1. Plaintiffs' 2003 EBITA claims are timely

Defendant's challenge to the timeliness of plaintiffs' challenge to the 2003 EBITA payments may be easily rejected. The merger agreement provides:

> [ABC']s Earnout Calculations will be deemed to be accepted by [Plaintiffs] and shall be conclusive for purposes of determining the final amount of the related Earnout Payment, if any, except to the extent, if any, that [Plaintiffs] shall have delivered to [ABC] *no less than* twenty (20) Business Days immediately following the applicable Earnout Payment Date a statement describing the objections of [Plaintiffs] thereto . . . .[11]

Both parties agree that ABC sent notice of the earnout calculation on February 12, 2004, and plaintiffs raised their objection on March 18, 2004. By the terms of the agreement, plaintiffs were obligated to raise an objection no less than twenty

---

[9] *State of Wisconsin Inv. Bd. v. Peerless Sys. Corp.*, 2000 WL 1805376, at *6 (Del. Ch. Dec. 4, 2000).
[10] *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (Del. 2002).
[11] Merger Agreement, § 2.6(g)(ii).

business days after, February 12, 2004. They did so twenty-six days later; twenty-six being no less than twenty, which would seem to be the end of the matter.

Defendant asserts that it is "absurd" to conclude that the term "no less than" means "more than or equal to" a given number.[12] Instead, ABC insists that "no less than" constitutes an ambiguous term, and then demands that this Court take up the judicial blue pencil to somehow make "more than" mean "less than." To defendant, the absurdity arises because, as written, § 2.6(g)(ii) would never give conclusive effect to the earnout calculations.

I am unconvinced. First, "no less than" is a term of mathematical precision, and it is difficult to imagine how "more" somehow means "less." Second, it is untrue as a matter of law that the clause provides no legally enforceable time limit. Where a contract is silent on the time given to a party to perform a condition, then this Court will assume that the parties contemplated a reasonable time.[13] Although determining reasonableness might pose a challenge in some hypothetical case, it is inconceivable that a twenty-six business day delay is unreasonable or imposed any hardship upon defendant. Finally, although the Court of Chancery possesses the equitable jurisdiction to reform a contract in a case of mutual mistake,[14] there is no reason to exercise that power in this case.

To see that granting defendant the relief it seeks would be the height of inequity, one has only to imagine the decision facing plaintiffs after the earnout payment date, when they presumably looked back at the merger agreement to determine how to respond. Assuming *arguendo* that defendant is right and that words "less than" are the result of mistake, plaintiffs were pierced on the horns of a dilemma: should they provide notice after twenty days, complying literally with the terms of the agreement, or should they provide notice on day nineteen, thus complying with what defendant now says "common sense"[15] clearly dictates but risking later accusations of breach of the clear language of the contract?

Defendant is a major international corporation and was assisted by qualified and professional counsel at the time it entered into the merger agreement. In many

---

[12] *See* Opening Br. in Supp. of Def.'s Mot. for Summ. J. at 71 (Plaintiffs' interpretation . . . is *absurd* and must be rejected.").

[13] *Gluckman v. Holzman*, 51 A.2d 487, 491 (Del. Ch. 1947).

[14] *See Waggoner v. Laster*, 581 A.2d 1127, 1135-36 (Del. 1990); *Douglas v. Thrasher*, 489 A.2d 422, 426 (Del. 1985).

[15] *See* Reply Br. in Supp. of Def.'s Mot. for Summ. J. at 34 ("Common sense dictates a different result.").

areas, it now appears that the merger agreement was unhappily drafted. Nevertheless, defendant faces no significant prejudice as a result of plaintiffs' actions, and there is no call for this Court to negate the clear language of the agreement. Plaintiffs are entitled to summary judgment on this issue.[16]

2. The UPMC sale constitutes a "bundled sale" for purposes of the merger agreement

Both parties seek summary judgment on the issue of whether the transaction between Bridge, Cerner, and UPMC constitutes a "bundled sale." The merger agreement provides, in relevant part:

> When [Bridge]'s products or services are bundled with other products or services of [ABC] or any of [ABC]'s other subsidiaries in a sale to a customer, [Bridge] will receive revenue credit for such bundled sale at [Bridge]'s list price for such products and services (less normal discounting of 20%; provided, however, that where products and services are discounted by more than 20%, the discount to be applied for purposes hereof shall be the average amount of the discount in the last five (5) unbundled contracts executed prior to the execution of the subject contract) for determining Adjusted EBITA attainment each year for comparison to the Earnout Payment objectives of each year. The credit for bundled sales will be added to revenues for determining Adjusted EBITA attainment in the year that the software is delivered to the customer and for services in the year in which the services are provided to the customer.[17]

Plaintiffs maintain that the application of this language is straightforward. Bridge's products were bundled—that is to say, sold together—with products and services of AutoMed. The products were sold to a customer, albeit through Cerner. Thus, plaintiffs are entitled to a credit for that sale equal to the list price minus whatever discount is appropriate.

Citing considerable extrinsic evidence, defendant insists that the purpose of this provision was to provide for a credit to Bridge if ABC were to bundle Bridge's

---

[16] *Reeder v. Delaware Dep't of Ins.*, 2006 WL 510067, at *6 (Del. Ch. Feb. 24, 2006) (noting that where it is clear that the non-moving party is entitled to summary judgment on a claim, the Court may grant such judgment).

[17] Merger Agreement, Annex I, ¶ 34.

products at a discount as part of a larger deal, and that applying the terms of ¶ 34 to the UPMC deal would be, again, absurd. ABC argues that the use of the passive voice in the phrase "when [Bridge]'s products or services are bundled" is ambiguous, and might suggest that Bridge is eligible for a credit only when ABC is the party doing the bundling. Similarly, defendant maintains that the phrase "in a sale" might be held to require all products bundled together to be traded for consideration, as opposed to one product being provided for free.

Language is not so malleable as defendant would have it. If anything is absurd, it is the assertion that the use of the passive voice—"when [Bridge]'s products or services are bundled"—somehow constitutes a restriction as to who will do the bundling. Use of the passive voice without the addition of a prepositional phrase implies precisely the opposite: that the performer of the action is unspecified.[18] Nor does the requirement for the Bridge product to be bundled "in a sale" somehow imply that either or both products must be sold instead of given away.[19] Defendant asks this Court to reform the merger agreement from the contract it actually signed into the contract that, in hindsight, it wishes it did.

When faced with a contract entered into by sophisticated parties, this Court engages in interpretation only in the face of ambiguity. By contrast, the terms by which plaintiffs are entitled to a bundled sale credit are clear on their face and subject to a single interpretation. The results may be unfortunate for defendant,

---

[18] *See* THE AMERICAN HERITAGE BOOK OF ENGLISH USAGE: A PRACTICAL AND AUTHORITATIVE GUIDE TO CONTEMPORARY ENGLISH 57 (1996), available at http://www.bartleby.com/64/pages/page57.html ("[The passive voice] is particularly useful when the performer of the action is unknown or irrelevant to the matter at hand.") Of course, "[One] can also use the passive voice to emphasize the performer of the action by putting the performer in a prepositional phrase using *by* at the end of the sentence: *The breakthrough was achieved by Burlingame and Evans, two researchers in the university's genetic engineering lab.*" *Id*. The merger agreement contains no such prepositional phrase.

[19] Even assuming the Court was to consider this phrase to be ambiguous, the extrinsic evidence cited by defendant would not lead to the conclusion that "a bundled deal involves the *sale* of two or more products or services." Reply Br. in Supp. of Def.'s Mot. for Summ. J. at 25. Defendant points to deposition testimony of Bridge executives to suggest that the purpose of Annex 1, ¶ 34 was to protect former Bridge shareholders from receiving reduced EBITA credits if Bridge products were priced at a discount by ABC in order to sell other products. This certainly seems to be a plausible purpose of ¶ 34. Nevertheless, under defendant's current interpretation of "in a sale," no EBITA credit would be forthcoming if ABC gave away MedPoint software as part of a larger bundle of ABC products. Such a result would be inconsistent with what defendant now insists was the sole purpose of ¶ 34.

and the terms of the merger agreement may now appear unwise, but that would not justify this Court weaving additional merger terms out of whole cloth.

On the other hand, neither party has moved for summary judgment on the issue of whether the UPMC transaction was authorized by ABC, and whether this authorization was necessary under the merger agreement. Here substantial issues of material fact remain. Plaintiffs put forward emails, copied to an employee of defendant, that included a copy of the proposed transaction clearly indicating that AutoMed's services would be given away. Indeed, AutoMed itself apparently insisted that payment for its survey come out of Bridge's accounts. Such facts tend to suggest that ABC did approve, or at least accept, the transaction. If defendant did so, or if such approval were not required, then Bridge is entitled to the credit provided for in Annex I, ¶ 34 of the merger agreement. Plaintiffs are entitled, however, to summary judgment on the sole issue of whether the UPMC transaction constitutes a bundled sale, as that term is defined in the merger agreement.

B. Questions of material fact relating to causation of damages

Defendant next concentrates upon the issue of causation. Specifically, defendant argues that the amended complaint at no point provides a causal link between ABC's actions (or inactions) and any damages suffered by plaintiffs. Starting with four transactions specifically mentioned in the amended complaint, in which ABC entered into joint-bidding processes with Bridge competitors, defendant cites to undisputed deposition testimony from ABC customers demonstrating that Bridge would not have succeeded in selling to them no matter what ABC had done. Strong record evidence suggests that in these four cases the customers involved were simply uninterested in purchasing BPOC systems.

Plaintiffs' causation arguments are not helped by the withdrawal of their key expert witness, Dr. Lauren J. Stiroh, whose report was meant to provide support for the contention that, but for a merger with ABC, Bridge was destined to remain the dominant force in the BPOC market. Virtually on the eve of trial, and after this motion had been fully briefed, plaintiffs discovered that the data on which Dr. Stiroh relied may not have been credibly gathered. Plaintiffs no longer rely upon the conclusions in this report.

Nevertheless, plaintiffs' case for causation, although much weakened, remains sufficiently sturdy to survive a motion for summary judgment. In order to prevail on a breach of contract claim, plaintiffs "must demonstrate with reasonable

certainty that defendant's breach caused the loss."[20] However, plaintiffs may satisfy this burden merely by taking the causation of damages out of the area of speculation, and it is not necessary to show with absolute certainty that defendant's action caused plaintiffs' harm.[21] Assuming *arguendo* that plaintiffs prove most, if not all, of their claims for breach of contract, sufficient evidence remains in the record for this Court to conclude that defendant's breach is the cause of plaintiffs' damages.

It is easiest to explain the Court's conclusion if one first takes a very broad view of the tumultuous relationship between ABC and Bridge. Examining all the evidence presented thus far, and observing it in the light most favorable to plaintiffs,[22] the overall narrative proceeds something like this: When ABC and Bridge first set out to merge, both parties believed that market conditions favored the transaction. ABC wanted to round out its product portfolio in order to provide a full compliment of services to customers, while Bridge craved access to the larger deals that an alliance with a major corporation could offer. As time passed, however, ABC seems to have become less convinced of the strategic rationale for a best-in-breed BPOC system, preferring instead to partner with Bridge competitors if their products proved a better fit. If defendant's long-term commitment to their subsidiary waned, the earnout payments suddenly transformed from an incentive to produce a valuable asset into a short-term risk. Under certain scenarios, if Bridge's EBITA increased by less than $2 million, ABC would face $17 million in additional payments. So long as ABC could achieve sales of their primary drug products with external alliances, promotion of Bridge (and the profits that would arise from such efforts) would have less appeal. Faced with such a threat, undermining Bridge's performance became a shrewd business tactic.

Assuming that plaintiffs can establish the narrative above, a few conclusions are immediately obvious. First, the fact that none of the four transactions specifically mentioned by plaintiffs were likely to result in a sale to Bridge is not fatal to plaintiffs' claims. ABC was under an affirmative duty both to promote Bridge products and to refrain from promoting those of creditors. A reasonable trier of fact could conclude from these allegations that ABC's alleged lack of commitment indeed led to a loss of unspecified sales that, in turn, resulted in a lower-than-optimal earnout payment. In essence, if ABC altered its strategy to the

---

[20] *Tanner v. Exxon Corp.*, 1981 WL 191389, at *2 (Del. Super. July 23, 1981).
[21] *Id*.
[22] It is important to emphasize that the unflattering portrait of ABC painted herein derives only from the requirement to consider all evidence in favor of the non-moving party.

detriment of Bridge, and thus refused to Bridge some of the strategic support that was a critical element of the transaction, it is reasonable to expect that this caused plaintiffs' damages. Second, even after the withdrawal of the Stiroh report, there is sufficient evidence in the record to conclude that defendant's breaches, if proven, caused the damages suffered. Testimony from former Bridge employees, considerable email traffic, and the financial statements taken on their own would be sufficient for a rational trier of fact to find causation, even without expert assistance. Finally, the Court might rely upon ABC's own internal estimates of Bridge's sales, made before the merger was completed, to conclude that ABC's actions were at least partially responsible for the decline in projected sales.

This is only to say, however, that serious questions of material fact on the issue of causation remain for trial. Defendant maintains that mismanagement, market pressures, and perhaps just plain poor luck prevented plaintiffs from meeting their EBITA targets. But plaintiffs have set forth a strong enough factual basis to prevent this Court from concluding that ABC's own actions may not have been responsible.

C. Summary judgment on all other grounds

Defendant moves for limited summary judgment on three other issues: the first, that plaintiffs cannot show that ABC's refusal to enter into a merger with Cerner constituted a breach of the merger agreement; second, that plaintiffs have not demonstrated that ABC's refusal to allow Bridge to issue certain press releases constituted a violation of the merger agreement; and finally, that a reorganization of Bridge within ABC violated the agreement or caused any harm. Only on the last of these is defendant entitled to summary judgment.

1. <u>The refusal to enter into an ABC/Cerner merger might violate the terms of the ABC/Bridge merger agreement under limited circumstances</u>

Much of the dispute between the parties on the issue of the failed strategic partnership between ABC, Bridge, and Cerner centers upon differing characterizations of the transaction. It is undisputed that ABC and Cerner were involved in negotiations for a potential strategic alliance that would involve Cerner purchasing and reselling MedPoint technology, and ABC in turn purchasing significant amounts of software, for resale, from Cerner. The transaction would have resulted in plaintiffs receiving the maximum possible earnout payment, despite the fact that they had not made a sale. Plaintiffs assert that the deal was part of a three-way transaction initially fostered by Bridge. Defendant considers

this transaction to have been an ABC/Cerner transaction in which Bridge played little or no strategic role.

Defendant objects that the failure to approve this transaction was not mentioned in plaintiffs' amended complaint, and that this is a new theory propounded upon the eve of trial. I cannot agree. Plaintiffs' amended complaint states:

> In 2003, Bridge approached ABC seeking consent for a proposed strategic partnership with Cerner—a partnership that would be extremely profitable for Bridge. The Merger Agreement specifically prohibits ABC from unreasonably withholding consent to Bridge's business opportunities. Despite this express prohibition, ABC withheld consent for more than six months. Several months later, it became readily apparent that ABC deliberately and maliciously withheld consent to prevent the Bridge stockholders from achieving any Earnout Payments. ABC's conduct also impaired Bridge's ability to negotiate business relationships with Cerner and other potential strategic partners.[23]

The amended complaint clearly put defendant on notice as to the transaction contemplated by plaintiffs, and nowhere specifies that the proposed strategic transaction was between Cerner and Bridge. Although the amended complaint does suggest that the breach of contract at issue would be a violation of Annex I, ¶ 24 (which requires ABC to consent to Bridge entering into any business opportunity) and not ¶ 2 (which forbids ABC from taking any action the purpose of which is to impede the ability for Bridge to achieve its earnout), such inexact drafting is not fatal to plaintiffs' claims. The language in the amended complaint is sufficient to put defendant on notice of the claim and its nature.

Although defendant correctly states that nothing in the merger agreement required defendant to enter into any transaction, ABC was under an obligation to refrain from action that would prevent plaintiffs from earning the earnout payments. Plaintiffs have put forward evidence that suggests that ABC's rejection of the proposed transaction, which was extensively negotiated between the parties, was simply a desire to avoid the earnout payments. Plaintiffs allege that Kurt Hilzinger, ABC's Chief Operating Officer, offered the former Bridge stockholders $5 million to waive the earnout that they would otherwise have received as part of

[23] Am. Compl. at ¶ 32.

the transaction, and ceased negotiating with Cerner when plaintiffs refused. Plaintiffs also provide an email from David Senior, an ABC employee, that suggests that avoiding an earnout payment was indeed the issue critical to defendant:

> With all this accounting detail, [the attached email] has Terry Kinninger's fingerprints all over it… Anyway, as I indicated today, I also could make and justify a similar case that a larger earnout payment works for us – but it still doesn't alleviate the fact that Bridge shareholders are taking our money because of value that ABC and Cerner will (be responsible) to create, *which I assume is where the rub will be.*
>
> I'm planning to shut the deal down tomorrow unless I'm told otherwise. *Another day, another time*.[24]

Read in the light most favorable to plaintiffs, this email suggests that ABC "shut down" an otherwise advantageous deal in order to prevent plaintiffs—who assert that this transaction was at least in part their doing—from receiving merger consideration. Further, there is evidence to suggest that the deal was rejected only after plaintiffs refused to reduce the amount to which they would otherwise be entitled. This would constitute a breach of defendant's contractual requirement to act in good faith and refrain from actions that would prevent plaintiffs from earning their merger consideration.

Defendant maintains that they rejected the deal due to Cerner's insistence that ABC purchase $70 million worth of Cerner software. This may be true. Nor was ABC required to enter into an agreement merely in provide Bridge shareholders the opportunity to receive an earnout. It was not, however, entitled to reject the transaction solely to deny Bridge shareholders the benefits of an earnout, deciding to delay the deal to "another day" when it would not be so encumbered. Plaintiffs have raised questions of material fact as to defendant's motivation sufficient to bring this issue to trial.

[24] Answering Br. in Opp'n to Def.'s Mot. for Summ. J. Ex. 42 (emphasis added).

2. A question of material fact exists as to whether ABC merely applied established press release policies to Bridge after the merger

Defendant moves for summary judgment on the question of whether ABC's refusal to allow Bridge to issue certain press releases constituted a breach of contract or caused harm to plaintiffs. Defendant's causation arguments fail for the same reason as discussed above: sufficient evidence exists—even without the Stiroh report—for a reasonable trier of fact to conclude that if ABC prevented Bridge from issuing press releases with intention of preventing former Bridge shareholders from receiving an earnout, this obstruction in turn caused harm to plaintiffs.

Plaintiffs have also put forward evidence sufficient to maintain that defendant's actions might have constituted a breach. It is undisputed that defendant had no written press release policy over the period in question. Defendant asserts that such policy was unwritten and consistently applied over its various subsidiaries. There is reason to question this assertion. First, plaintiffs maintain that Bridge was prevented from issuing press releases over the trade wire, although testimony by at least some of defendant's employees suggest that this would not have been in violation of the unwritten policy. Second, the unwritten policy appears to have changed after plaintiffs commenced this litigation. Finally, plaintiffs put much weight on a press release issued in relation to a sale at Sisters of Mercy Hospital. Although the initial draft of the press release, written by Bridge-competitor Omnicell, included specific reference to Bridge, defendant elected to remove that reference in the final draft.

Read in the light most favorable to plaintiffs, the sudden shift in policy after the lawsuit and the intentional removal of Bridge from the Sisters of Mercy press release could constitute part of a series of acts intended to prevent former Bridge shareholders from receiving their consideration under the merger agreement. Summary judgment is, thus, inappropriate on this issue.

3. Summary judgment is appropriate with respect to ¶¶ 40-41 of the amended complaint

Plaintiffs' amended complaint contains allegations that ABC failed to operate Bridge as an independent entity. Defendant has put forward evidence to suggest that the reorganization mentioned in the amended complaint constituted only a paper reorganization. Plaintiffs have not addressed this argument in their answering brief, and the Court is unable to find substantial evidence in the record to support this claim. Defendant is entitled to summary judgment on this issue.

V. CONCLUSION

Plaintiffs are entitled to summary judgment on the two issues of contractual interpretation raised in the motion. Defendant is entitled to summary judgment as to ¶¶ 40-41 of the amended complaint. All other issues remain, although the Court hopes that the discussion above will allow the parties to focus their arguments at trial, or to make good faith efforts to compromise or settle the remaining issues.

Counsel shall confer and submit a form of order consistent with this letter decision. In addition, counsel shall advise the Court as to the expected number of witnesses and length of trial in light of the above rulings, in the event a compromise is not attainable.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

WBCIII:aar