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Re: *Gaines v. Narachi, et al.*
C.A. No. 6784-VCN
Date Submitted: September 27, 2011

Dear Counsel:

The Plaintiff is a stockholder of AMAG Pharmaceuticals, Inc. ("AMAG"), which has agreed to acquire Allos Therapeutics, Inc. ("Allos"). He challenges that widely-criticized merger[1] and has moved to expedite this action to facilitate his motion for a preliminary injunction to stop the transaction.[2]

[1] The Plaintiff reports that the press has called the AMAG-Allos merger the "worst bio-merger in history."

[2] Shareholders of Allos have also challenged the transaction. That action has been expedited, with a concurrence of all parties. *In re Allos Therapeutics, Inc. S'holders Litig.*, C.A. No. 6714-VCN.

The Plaintiff asserts three grounds for interim injunctive relief. First, under *Revlon*,[3] he asserts that AMAG's directors breached their fiduciary duties by failing to maximize shareholder value. Second, the Plaintiff alleges that AMAG's directors have run afoul of *Unocal*[4] by seeking to entrench themselves by entering into the merger agreement, agreeing to "extensive deal protection measures," and rejecting a solicitation from a third party interested in acquiring AMAG. Finally, the Plaintiff asserts that the disclosures accompanying the solicitation of AMAG's shareholders' approval of the transaction are inadequate, primarily because of the insufficiency of the cash flow information provided.

Although this Court has that "certain solicitude" for expediting corporate acquisition litigation, it remains the Plaintiff's burden to demonstrate a sufficiently colorable claim and a sufficient possibility of irreparable injury. The decision to expedite should not be made without recognizing the costs that accompany expedited proceedings.[5]

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[3] *Revlon v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).
[4] *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985); *see also In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59 (Del. 1995).
[5] *Giammargo v. Snapple Beverage Corp.*, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994).

The Defendants not only challenge each of the grounds asserted by the Plaintiff as justification for expedition but also raise a laches argument. The Defendants assert that Plaintiff simply waited too long to pursue his claims to be granted expedition.

Revlon establishes a critical theme running through this Court's mergers and acquisitions case law. It, however, only applies when, *inter alia*, the corporation seeks to sell itself or when the proposed transaction would result in a sale or change of control. Here, AMAG is the acquirer of Allos, or so the transaction anticipates. AMAG is not selling itself; there will be no change of control, even if the transaction is concluded. Whether the AMAG board acted reasonably in negotiating its deal with Allos is not an action for this Court to review with scrutiny, especially because a majority of the AMAG board is independent and disinterested. In any event, the Plaintiff has not shown that his reliance on *Revlon* has given rise to a sufficiently colorable claim.

Second, *Unocal* requires this Court to give "enhanced scrutiny" to defensive measures initiated by a board in response to some perceived threat. None of the actions taken to complete the merger which are now challenged by Plaintiff was

undertaken while any external threat was being considered. Because the third-party offeror was not involved as of the time of the merger agreement (or before), the deal protection terms were not in response to a takeover threat. As intended to protect the deal from intervention by others, the deal protections are, from AMAG's perspective, relatively routine. Also, the record before the Court, such as it is, offers no persuasive reason for questioning the Board's good faith in reaching its conclusion that the third-party acquirer's offer, with all the questions about whether it would be funded, was somehow superior to the choice to go through with the Allos Acquisition.

Finally, it frequently is not difficult to find facts that have been omitted from disclosures seeking approval by shareholders. In order to be actionable, however, those disclosures, as omitted or misstated, must have been material. The Plaintiff has been unable to identify any disclosures that might fall into that category except possibly with respect to certain cash flows. Although perhaps not entirely clear, it

appears that those cash flows were in fact discussed in the S-4.[6] Thus, there are no colorable disclosure claims.

With the conclusion that the Plaintiff has not set forth any grounds justifying expedited treatment, it is unnecessary to consider the Defendants' efforts to invoke the doctrine of laches.

Accordingly, for the foregoing reasons, the Plaintiff's motion to expedite is denied.[7]

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[6] The S-4, at 77-90, reviews the cash flows as used by the investment bankers although the disclosures related to Morgan Stanley's analysis seem to pay more attention to EBIT.

[7] The AMAG-Allos transaction can fairly be characterized as a "fluid" set of circumstances. Whether AMAG's continuing reaction to the potential third-party acquirer might later provide a basis for expedition is something which the Court, of course, cannot anticipate. Simply to be clear, it is not the Court's intent to preclude renewal of a motion to expedite if subsequent developments warrant.