IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Philip A. Brimmer

Civil Action No. 17-cv-01097-PAB-NYW
(Consolidated with Civil Action Nos. 17-cv-01140-PAB-NYW, 17-cv-01159-PAB-NYW, 17-cv-01190-PAB-NYW, and 17-cv-01570-PAB-NYW)

Civil Action No. 17-cv-01097-PAB-NYW

GEORGE ASSAD, individually and on behalf of all others similarly situated,

Plaintiff,

v.

DIGITALGLOBE, INC., et al.,

Defendants.

Civil Action No. 17-cv-01140-PAB-NYW

JEWELTEX MANUFACTURING INC. RETIREMENT PLAN, on behalf of itself and all others similarly situated,

Plaintiff,

v.

DIGITALGLOBE, INC., et al.,

Defendants.

Civil Action No. 17-cv-01159-PAB-NYW

ROYCE BUSSEY, individually and on behalf of all others similarly situated,

Plaintiff,

v.

DIGITALGLOBE, INC., et al.,

Defendants.

Civil Action No. 17-cv-01190-PAB-NYW

DANE GUSSIN,

Plaintiff,

v.

DIGITALGLOBE, INC., et al.,

Defendants.

Civil Action No. 17-cv-01570-PAB-NYW

STUART ZAND, individually and on behalf of all others similarly situated,

Plaintiff,

v.

DIGITALGLOBE, INC., et al.,

Defendants.

ORDER

This matter is before the Court on Plaintiff's Motion for Preliminary Injunction filed by plaintiff Dane Gussin in *Gussin v. DigitalGlobe, Inc., et al.*, Case No. 17-cv-01190-PAB, Docket No. 19 ("*Gussin*"), and Plaintiff's Motion for Preliminary Injunction filed by plaintiff Stuart Zand in *Zand v. DigitalGlobe, Inc., et al.*, Case No. 17-cv-01570-PAB, Docket No. 14 ("*Zand*"). Movants ask the Court to preliminarily enjoin a shareholder vote by defendant DigitalGlobe, Inc. related to a proposed merger that is scheduled for July 27, 2017.

I. BACKGROUND[1]

This securities dispute arises out of the proposed merger of DigitalGlobe, Inc. and a subsidiary of MacDonald, Dettwiler and Associates Ltd. ("MDA"). Docket No. 25 at 2.[2] There are five consolidated cases pending before this Court. *Id*. at 4. All five cases assert claims under the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq., and Securities and Exchange Commission ("SEC") Rule 14a-9, 17 C.F.R. § 240.14a, related to the proposed merger of DigitalGlobe and MDA. *See* Docket No. 25 at 2-3.[3] Two of the cases include motions for a preliminary injunction. *Id*. These motions seek to enjoin DigitalGlobe's shareholder vote on the merger, which is set to be held on July 27, 2017. DigitalGlobe is a Delaware corporation with its headquarters in Westminster, Colorado that provides high-resolution satellite imagery of the Earth and related data and analysis to clients including the United States government. *Gussin*, Docket No. 29-4 at 34. MDA is a Canadian telecommunications and information services conglomerate. *Id*. at 33.

DigitalGlobe began seeking buyers of itself or some of its assets in 2015. *Gussin*, Docket No. 29-4 at 100. On November 20, 2016, MDA made a "non-binding

---

[1] These facts are generally taken from the amended registration statement at issue.

[2] Docket citations without a case name refer to the docket in the lead case, *Assad v. DigitalGlobe, Inc.*, No. 17-cv-01097-PAB-NYW, while citations to *Gussin* refer to the docket in *Gussin v. DigitalGlobe, Inc., et al.*, Case No. 17-cv-01190-PAB-NYW, and citations to *Zand* refer to the docket in *Zand v. DigitalGlobe, Inc., et al.*, Case No. 17-cv-01570-PAB-NYW.

[3] Four of the cases are putative class actions under the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), while Gussin has filed an individual claim. Docket No. 15 at 3; *Gussin*, Docket No. 1.

indication of interest to merge with DigitalGlobe in an all-stock transaction at no premium to the trading price of DigitalGlobe." *Id.* at 100-101. MDA and DigitalGlobe negotiated over the next several months. *Id*. at 101-07. DigitalGlobe also discussed potential transactions with other entities. *Id*. at 104-05. On December 6, 2016, DigitalGlobe's board of directors formed a transactions committee to explore potential offers. *Id*. at 102. On January 27, 2017, MDA offered a combination of $17.50 in cash and $17.50 worth of stock in MDA for each share of DigitalGlobe, which became the framework for the final deal. *Id*. at 107. On February 17, 2017, news of the proposed merger leaked out, and media reports were published that MDA was in discussions to acquire DigitalGlobe. *Id.* at 111.

On February 24, 2017, DigitalGlobe and MDA entered into and announced an agreement and plan of merger ("Merger Agreement"). *Gussin*, Docket No. 29-4 at 4. Pursuant to the terms of the Merger Agreement, DigitalGlobe will merge with a special-purpose subsidiary of MDA, with DigitialGlobe's shareholders receiving $17.50 in cash and 0.3132 shares of MDA for each share of DigitalGlobe that they own. *Id.* The day before news of the proposed merger broke, the market value of this consideration was approximately $35.00, representing a premium of approximately 18% over DigitalGlobe's closing price on that date. *Id*.

The transaction will result in DigitalGlobe shareholders owning approximately 37.1% of the combined company. *Gussin*, Docket No. 29-4 at 4-5. After the completion of the transaction, three members of DigitalGlobe's board will be appointed to positions on MDA's board of directors. *Id*. at 162. DigitalGlobe board member Nick

S. Cyprus, who served on DigitalGlobe's transactions committee, is one of the people set to be appointed to MDA's board. *Id*.

On April 27, 2017, DigitalGlobe and MDA filed an F-4 registration statement in relation to the proposed transaction. *Gussin*, Docket Nos. 29-2, 29-3. The SEC reviewed the filing and, on May 24, 2017, the SEC commented on the registration statement, requesting nine changes. *Gussin*, Docket No. 29-7. None of the requested changes is related to issues raised by movants in the present motions. In response to the SEC's comments, DigitalGlobe and MDA filed an amended F-4 registration statement on June 2, 2017. *Gussin*, Docket No. 29-4 at 2. References to the "registration statement" below refer to the amended version.

During the negotiations process, DigitalGlobe engaged PJT Partners LP and Barclays Capital, Inc. ("Barclays") to provide financial advice related to possible transactions. *Gussin*, Docket No. 29-4 at 36. Both financial advisors provided fairness opinions to the DigitalGlobe board on February 23, 2017, which were attached to the registration statement. *Id*.; *Gussin*, Docket No. 29-6. The registration statement also contains a summary of financial analyses performed by the financial advisors. *Gussin*, Docket No. 29-4 at 123-47.

The financial advisors' analyses were based, in part, on non-public information supplied by MDA and Digital Globe, some of which was later included in the registration statement. *Gussin*, Docket No. 29-4 at 123-24, 134-36. In particular, DigitalGlobe management's financial projections for fiscal years 2017-21 are included. *Id*. at 147-50. These projections are based on three similar scenarios regarding performance of the

company's divisions. *Id*. The projections are presented in terms of revenue; earnings before interest, taxes, depreciation, and amortization ("EBITDA") pre-stock based compensation; EBITDA post-stock based compensation; capital expenditures; levered free cash flow; and unlevered free cash flow. *Id*. at 150-51. The registration statement provides figures to reconcile the financial measures used in the projections that do not comply with generally accepted accounting principles ("non-GAAP") with financial measures that do comply with generally accepted accounting principles ("GAAP"), but only for fiscal year 2017. *Id*. at 154-56.

The first lawsuit related to the proposed transaction was filed in this district on May 3, 2017, four business days after the initial registration statement was filed. Docket No. 1. Three other cases related to the transaction were later filed in this district, including *Gussin*. The complaint in *Zand*, however, was filed on May 22, 2017 in the United States District Court for the District of Delaware. *Zand*, Docket No. 2. On June 5, 2017, Zand filed his motion for a preliminary injunction. *Zand*, Docket No. 14. On June 14, 2017, Gussin filed a similar motion. *Gussin*, Docket No. 19. The *Zand* case was transferred to this Court on June 27, 2017. *Zand*, Docket No. 1. On July 6, 2017, the Court ordered the five then-pending actions consolidated. Docket No. 25. The Court held a hearing on the preliminary injunction motions on July 14, 2017.

II. DISCUSSION

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. NRDC*, 555 U.S. 7, 24 (2008). "To obtain a preliminary injunction, the moving party must demonstrate four factors: (1) a likelihood of success on the merits; (2) a

likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the movant's favor; and (4) that the injunction is in the public interest." *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009) (citing *Winter*, 555 U.S. at 20). "Moreover, 'because a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal.'" *Beltronics USA, Inc. v. Midwest Inventory Distribution, LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009) (quoting *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1256 (10th Cir. 2003)) (internal quotation marks omitted).[4]

SEC Rule 14a-9(a) prohibits "solicitation . . . by means of any proxy statement . . . containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading." 17 C.F.R. § 240.14a-9(a). To state a claim under Rule 14a-9, a plaintiff must establish: "(1) that the proxy contained a material misrepresentation or omission; (2) that the defendant acted with the requisite state of mind [negligence], and (3) that the proxy was the essential link in completing the transaction in question." *In re Zagg Sec. Litig.*, 2014 WL 505152, at *7 (D. Utah Feb. 7, 2014) (internal quotation

[4] The Tenth Circuit disfavors three types of injunctions and requires movants to meet a heightened standard of proof before a preliminary injunction may issue when such an injunction is sought. *Fish v. Kobach*, 840 F.3d 710, 723-24 (10th Cir. 2016). "They are (1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." *Id*. (internal quotation marks omitted). Because the parties did not brief whether the heightened burden applies here, the Court will not address the issue. *See New Mexico Dep't of Game & Fish v. United States Dep't of the Interior*, 854 F.3d 1236, 1246 n.15 (10th Cir. 2017).

marks omitted). The parties do not dispute that the registration statement is an essential link in completing the merger and whether the defendants were negligent; instead, the parties focus on whether the omissions are material.

Movants do not identify any misrepresentations in the proxy statement. Instead, they identify several alleged omissions they claim make the proxy statement misleading and suggest supplemental information that should be provided. The Supreme Court addressed the standard to determine whether an omission is material under Rule 14a-9 in *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 445 (1976):

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. . . . It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.

Id. at 449.

A. Financial Analyses Omissions

First, movants argue that the registration statement is misleading under Rule 14a-9 because the financial analyses and projections do not provide a reconciliation to GAAP financial measures as required by SEC Regulation G, 17 C.F.R. § 244.100. *Zand*, Docket No. 17 at 15; *Gussin*, Docket No. 19 at 15.[5] Movants complain about

[5] Movants do not argue that the failure to include GAAP reconciliation information violated Section 14(a) of the Exchange Act by soliciting proxies "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15

defendants' use of EBITDA as a measure of the projected future performance of DigitalGlobe and MDA. *Gussin*, Docket No. 19 at 14-15. Movants also point to the proxy's discounted cash flow analysis, *id*. at 15, and free cash flow analysis. *Zand*, Docket No. 17 at 16. Second, movants argue that defendants misleadingly fail to provide an explanation for some of the assumptions used in the registration statement's financial analyses. *Zand*, Docket No. 17 at 17-19; *Gussin*, Docket No. 19 at 15-17. As a result of these issues, movants urge that DigitalGlobe should be required to provide GAAP reconciliation for DigitalGlobe's board of directors' financial projections for the years 2018-2021 and provide further explanations for financial analyses. *Zand*, Docket No. 17 at 24; *Gussin*, Docket No. 19 at 32.

Defendants argue that they are not required to disclose the GAAP reconciliation figures and that none of the information sought by movants is material. As to Regulation G, defendants argue that they are exempted from it because the registration statement, and the projections of which movants complain, relate to a "proposed business combination." 17 C.F.R. § 244.100(d) (exempting certain regulated

---

U.S.C. § 78n(a); *see also Resnik v. Swartz*, 303 F.3d 147, 151 (2d Cir. 2002) ("[O]mission of information from a proxy statement will violate [Section 14(a) if] the SEC regulations specifically require disclosure of the omitted information in a proxy statement."). Rather, movants argue that defendants' failure to disclose GAAP reconciliation information was a materially misleading omission under SEC Rule 14a-9. *Zand*, Docket No. 17 at 15 ("The failure to provide a GAAP reconciliation of these non-GAAP projections for only one of the five years of projections included in the Registration Statement renders it materially incomplete and misleading."); *Gussin*, Docket No. 19 at 14 ("The Registration Statement omits material information with respect to the Proposed Transaction and, therefore, is materially false and misleading."). Because movants did not make specific, substantive arguments on this issue, the Court will not address whether defendants' failure to provide GAAP reconciliation was a violation of Section 14(a), but rather will only address whether such failure was materially misleading under Rule 14a-9.

communications from Regulation G); *Zand*, Docket No. 19 at 17. Defendants do not, however, point to authority that 17 C.F.R. § 244.100(d) exempts defendants from their obligations under Rule 14a-9 not to submit materially misleading proxies. As to materiality, defendants argue that the reconciliations and explanations movants seek do not rise to the level of materiality in light of the large volume of information disclosed in the registration statement and the nearly 18% share price premium offered as part of the merger. *Zand*, Docket No. 19 at 19-22; *Gussin*, Docket No. 29 at 16-20.

The question before the Court is whether movants have shown a likelihood of proving that the financial analyses in the registration statement are materially misleading under Rule 14a-9 in its use of non-GAAP financial measures and in its omission of explanations for the financial analyses. Gussin's arguments consist of a laundry list of financial information that defendants could have provided in the proxy, but did not. *Gussin*, Docket No. 19 at 14-16. Gussin states in conclusory fashion that the omitted information would "provide[] stockholders with a basis to project the future financial performance of a company, and allow[] stockholders to better understand the financial analyses performed by the company's financial advisor in support of its fairness opinion," but he does not otherwise explain why any of the additional information would be material to a shareholder in making his or her determination about whether to vote for the merger, *id*. at 17, or how defendants' failure to provide the identified information renders the proxy materially misleading. *Id*. at 14 ("The Registration Statement omits material information with respect to the Proposed Transaction and, therefore, is materially false and misleading.").

Gussin cites a number of Delaware state law cases that generally indicate the

importance of financial projections. *Id*. at 24 ("It is well-settled that financial projections are among the most important information a shareholder can have when evaluating the proposed consideration in a merger.") (citing cases).[6] But these cases relate to determining directors' duties of disclosure under Delaware law in the context of cash-out mergers.[7] *E.g., In re Netsmart Techs., Inc. Shareholders Litig.*, 924 A.2d 171, 192 (Del. Ch. 2007). While these cases indicate that financial projections are particularly important in the context of a cash-out merger, they do not create a *per se* rule that financial projections and their underlying financial information are material or must be disclosed. *See Goldfinger v. Journal Commc'ns Inc.*, 2015 WL 2189752, at *4 (E.D. Wis. May 8, 2015) ("There is no 'per se' duty to disclose financial projections given to and relied on by a financial advisor." (citing *Dent v. Ramtron Int'l Corp.*, 2014 WL 2931180, at *11 (Del. Ch. June 30, 2014))); *see also Malon v. Franklin Fin. Corp.*, 2014 WL 6791611, at *6 (E.D. Va. Dec. 2, 2014) ("Courts have consistently held that the duty of disclosure does not extend to the provision of information so extensive and detailed as to permit stockholders to make an independent determination of fair value or recreate the analysis of a financial advisor."). Additionally, courts have recognized that such information is of less importance outside the cash-out merger context. *Gottlieb v. Willis*, 2012 WL 5439274, at *5 (D. Minn. Nov. 7, 2012). Here, approximately half of the merger compensation is cash, but DigitalGlobe's shareholders will retain a significant

[6] Zand makes a similar argument citing similar cases. *Zand*, Docket No. 17 at 13-14.

[7] In a cash-out merger, a company is sold for monetary compensation and the stockholders do not receive an ownership stake in the merged entity.

ownership stake in the merged entity. *Gussin*, Docket No. 29-4 at 5-6. Moreover, even if these cases showed the importance of the identified omissions, they do not show that any of the omitted information is "necessary in order to make the statements [in the registration statement] not false or misleading." 17 C.F.R. § 240.14a-9(a). Thus, the Court finds that Gussin's arguments fail to make a "showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder." *TSC Indus., Inc.*, 426 U.S. at 449.

Zand argues that the omitted information is "plainly material because stockholders would find it important to understand the Company's standalone prospects in deciding whether or not to approve the Proposed Transaction." *Zand*, Docket No. 17 at 14. Zand claims that the registration statement's non-GAAP financial measures are potentially misleading by pointing to various indicators that the SEC has "heightened its scrutiny" of unreconciled, non-GAAP projections. *Zand*, Docket No. 17 at 15-16 (citing, e.g., Keynote Address, International Corporate Governance Network Annual Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and Sustainability (June 27, 2016), www.sec.gov/news/speech/chair-white-icgn-speech.html#_ftnref38). However, the information Zand cites regarding the potentially misleading nature of non-GAAP financial measures also shows that such measures have been extensively used in financial disclosures even after Regulation G was finalized in 2003. *See, e.g.,* Gretchen Morgenson, *Fantasy Math Is Helping Companies Spin Losses Into Profits*,

N.Y. TIMES, Apr. 22, 2016 ("According to a recent study in The Analyst's Accounting Observer, 90 percent of companies in the Standard & Poor's 500-stock index reported non-GAAP results last year, up from 72 percent in 2009."), available at http://www.nytimes.com/2016/04/24/business/fantasy-math-is-helping-companies-spin-losses-into-profits.html?_r=0. Zand's burden is to show that there is a "substantial likelihood that the disclosure of the omitted fact[s] would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available" in making his decision. *TSC Indus., Inc.*, 426 U.S. at 449.

Zand's argument that non-GAAP measures are generally suspect fails to show that the specific omissions he identifies would take on actual significance to a shareholder in determining how to vote. For example, Zand argues that the lack of GAAP reconciliation for economic projections for 2018-21 renders the proxy "materially incomplete and misleading." *Zand*, Docket No. 17 at 15. But Zand acknowledges that defendants did provide a GAAP reconciliation for its projections for 2017. *Id*. at 14.[8] Zand does not explain why added reconciliation information for the omitted, later years would be expected to assume actual significance in a shareholder's determination about the present value of the company or why such information would be viewed as significantly altering the information available where defendants have already made similar disclosures. *See TSC Indus., Inc.*, 426 U.S. at 449; Gussin, Docket No. 29-4 at 154 ("DigitalGlobe has not provided reconciliations for fiscal years 2018 through 2021

[8] Likewise, Zand's arguments regarding the valuations provided by PJT Partners and Barclays, *id*. at 17-19, emphasize that the financial advisors' analysis is important, but Zand does not explain how or why the omitted information would be expected to significantly alter the information available to a shareholder if it were provided.

because, with the passage of time, it becomes increasingly difficult to estimate the reconciling items without unreasonable effort."). Additionally, it is clear that some of the non-GAAP financial measures Zand challenges are recognized and specifically defined such that they have less potential to be misleading. In particular, the SEC has provided a definition of EBITDA and allows its broader use than other non-GAAP financial measures in recognition that EBITDA is regularly used and well understood. *Non-GAAP Financial Measures*, Sec. Com. Discl. 5620589, Question 103.01, available at https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm (updated May 17, 2016) (requiring that variances from the SEC's definition of EBITDA be identified and discussing Exchange Act Release No. 47226, which defines and exempts EBITDA from certain requirements of Item 10 of Regulation S-K stating, "[w]e are exempting EBIT and EBITDA from this provision because of their wide and recognized existing use."). Although Zand is concerned that there is something lurking in the undisclosed reconciliation figures based on generalized information about the type of financial measures at issue, Zand does not provide any evidence that would support a conclusion that defendants made a materially misleading omission. *See In re CheckFree Corp. Shareholders Litig.*, 2007 WL 3262188, at *2 (Del. Ch. Nov. 1, 2007) ("It is not sufficient that information might prove helpful.").

By contrast, defendants identify a more objective measure against which the materiality of the omissions could be measured by pointing to the value of the compensation shareholders will receive. *Gussin*, Docket No. 29 at 4*; Zand*, Docket No. 19 at 8. The $35 per share value that DigitalGlobe shareholders would receive (representing an 18% premium over DigitalGlobe's share price at the time the

transaction was reported) represents a yardstick against which movants' arguments that the financial analysis undervalues DigitalGlobe can be measured to determine if movants are likely to show a material omission. As Zand acknowledges, the shareholders' choice is between the transaction price and maintaining DigitalGlobe as a separate entity. *See Zand*, Docket No. 17 at 14 ("This information is plainly material because stockholders would find it important to understand the Company's standalone prospects in deciding whether or not to approve the Proposed Transaction."). But movants make no attempt to show the potential impact of the identified omissions or challenged assumptions on the proper valuation of the company despite identifying some omissions and assumptions whose impact should be at least estimable, for example, the use of a 1.5% to 2.5% perpetuity growth rate instead of a higher value, which allegedly led to DigitalGlobe being undervalued. *See Zand*, Docket No. 20 at 9 (arguing that a 2% to 4% perpetuity growth rate would be more appropriate and that the "growth rates used in this transaction appear to be lower than reasonable and could have skewed these analyses towards a more favorable opinion of the Proposed Transaction.").[9] Zand's assertion, made without supporting evidence and analysis to show the materiality of the omissions, does not constitute a clear showing that Zand is likely to succeed on the merits.

Accordingly, the Court finds that movants have not shown that they are likely to

[9] At the hearing, Gussin argued that it is suspicious that all three scenarios provided by DigitalGlobe management project a drop in EBITDA for fiscal year 2021, leading to an undervaluation of DigitalGlobe. But Gussin did not explain how much impact this projected drop would have on the valuation of DigitalGlobe or why a shareholder would consider the omitted explanation for the drop in projected EBITDA for 2021 in determining how to vote on July 27, 2017.

succeed in showing the non-GAAP financial measures and omitted explanations are materially misleading.

B. Conflict of Interest Omissions

Movants further argue that the registration statement fails to disclose conflicts of interest by the financial advisors and board members. Although the registration statement provides general information about the investment advisors' past work for defendants and the compensation for that work, movants argue that the registration statement is misleading because it fails to disclose the "full scope of services performed by PJT Partners to [MDA] in the past and the compensation received, the amount of compensation paid to Barclays by DigitalGlobe for past services, and whether Barclays performed work for [MDA] in the past and the compensation paid for those services." *Zand*, Docket No. 17 at 19; *see also Gussin*, Docket No. 19 at 20. Movants argue that DigitalGlobe should disclose the specific amounts paid to the financial advisors during the past two years and disclose communications related to the determination that three directors of the merged entity would be DigitalGlobe directors who voted in favor of the transaction.[10]

Defendants respond that they have disclosed the financial advisors' contingent interest in the transaction, that they have nothing further to disclose, and that the registration statement's general description of the past work done by the financial

[10] Gussin argues that DigitalGlobe should be required to disclose why its board did not undertake an extensive investigation of the pre-announcement leak of the merger negotiations, but he fails to provide more than a conclusory statement that a shareholder would consider this important in deciding how to vote on the merger. *Gussin*, Docket No. 19 at 19.

advisors, and compensation they received, is sufficient to render the registration statement not misleading because it contains all information relevant to the financial advisors' "potential financial incentives." *Zand*, Docket No. 19 at 22. The Court finds that movants have not shown that they will likely succeed in showing that the registration statement contains a material omission regarding potential conflicts by the financial advisors. *See In re Micromet, Inc. Shareholders Litig.*, 2012 WL 681785, at *12 (Del. Ch. Feb. 29, 2012) (declining to require supplementation because the plaintiffs "fail[ed] to provide any persuasive explanation . . . as to why the actual amount of fees paid by [a company] to [a financial advisor] would be material to shareholders" where the company disclosed the financial advisor's contingent interest in the transaction and generally disclosed that the financial advisor had performed compensated services to both parties to the transaction in the past).

Gussin argues that defendants should be compelled to disclose communications that relate to the determination that three DigitalGlobe board members would join the board of the merged entity. *Gussin*, Docket No. 19 at 17-19. The Court finds that Gussin has failed to show a likelihood of success on his claim that the failure to disclose specific communications regarding the MDA board seats is misleading. To the extent that the promise of MDA board seats shows that the directors set to occupy those seats are interested in the transaction, the material facts underlying the potential conflict are disclosed. It is unclear how the failure to disclose the communications in relation to the board seats "omits to state any material fact necessary in order to make the statements therein not false or misleading." 17 C.F.R. § 240.14a-9(a).

The Court finds that movants have failed to show that they are likely to succeed

on the merits. Because a movant must succeed on all the factors to prevail, the Court will not address the remaining factors. *See Johnson & Johnson Vision Care, Inc. v. Reyes*, 665 F. App'x 736, 747 (10th Cir. 2016) (unpublished) ("Because we conclude that the district court didn't abuse its discretion in concluding that the Manufacturers are unlikely to succeed on the merits of their claims, it is unnecessary to address the remaining factors of the preliminary injunction standard." (citing *Winter*, 555 U.S. at 23-24)).

III. CONCLUSION

Accordingly, it is

ORDERED that Plaintiff's Motion for Preliminary Injunction filed by plaintiff Dane Gussin in *Gussin v. DigitalGlobe, Inc., et al.*, Case No. 17-cv-01190-PAB, Docket No. 19, is **DENIED**. It is further

ORDERED that Plaintiff's Motion for Preliminary Injunction filed by plaintiff Stuart Zand in *Zand v. DigitalGlobe, Inc., et al.*, Case No. 17-cv-01570-PAB, Docket No. 14, is **DENIED**.

DATED July 21, 2017.

BY THE COURT:

s/Philip A. Brimmer
PHILIP A. BRIMMER
United States District Judge