COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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Submitted: June 25, 2008
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RE: Marie Raymond Revocable Trust and Richard and Sharon Brower v. MAT Five LLC, et al.
C.A. No. 3843-VCL

Dear Counsel:

This putative class action is before the court on a motion to expedite proceedings leading to a preliminary injunction hearing. For the following reasons, the motion is granted.

I.

On June 19, 2008, the plaintiffs, Marie Raymond Revocable Trust and Richard and Sharon Brower, stockholders of defendant MAT Five LLC ("MAT"), filed this purported class action suit. The suit claims that the defendants breached their fiduciary duties by omitting material information from an "Exchange Offer Memorandum" sent to investors on May 29, 2008 in advance of a tender offer.

MAT is a Delaware limited liability company operating as a private hedge fund. Substantially all of MAT's assets were invested in Municipal Opportunity Fund Five LLC ("Municipal Opportunity") which, according to MAT's initial private placement memorandum, is an affiliated fund that "makes economically leveraged investments in fixed-rate tax-exempt municipal bonds and seeks to mitigate the interest rate risks through proprietary hedging strategies."[1] Defendant Citigroup Alternative Investments LLC ("CAI"), an indirect subsidiary of Citigroup Inc., is a Delaware limited liability company that acts as MAT's investment manager. According to the complaint, Citigroup and its affiliates also manage Municipal Opportunity.

Defendant Reaz Islam allegedly served as the managing director and senior investment officer of CAI. Islam purportedly managed the day-to-day operations of MAT until May 2008, when he reportedly announced his resignation. Defendant Citigroup Fixed Income Alternatives LLC ("CFIA") operates as a business unit of CAI and, according to the complaint, assisted in the sale of MAT shares. Islam allegedly served as CFIA's managing director.

MAT was formed on June 10, 2005 and commenced operations in 2007, issuing unregistered shares in several series to "accredited investors" and "qualified

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[1] PPM at i.

investors," as those terms are defined by federal securities laws, for $1 per share. These investors began suffering losses in 2007 as volatility in global credit markets increased in the latter part of the year. By 2008, this volatility affected the market for municipal bonds, disrupting key assumptions upon which Municipal Opportunity's investment strategy was based, and dramatically reducing the value of its assets, as well as MAT's net asset value. On February 29, 2008, Municipal Opportunity's liabilities exceeded its capital value, rendering it unable to meet possible margin calls. MAT's net asset value had allegedly fallen to approximately $.02 per share.

In order to keep Municipal Opportunity, and affiliated funds such as MAT, solvent, Citigroup allegedly contributed a total of approximately $246 million to Municipal Opportunity on February 29 and March 3. In return for this cash infusion, Citigroup allegedly received Municipal Opportunity shares equaling approximately 97% of the interest in Municipal Opportunity. In the following weeks, the value of Municipal Opportunity's holdings allegedly appreciated.

According to the complaint and the exchange memorandum, Citigroup agreed that for the months of March and April, 75% of the gains normally allocable to the shares Citigroup received as part of its cash infusion would instead be allocated to Municipal Opportunity shares owned by MAT. This arrangement purportedly raised MAT's April 2008 net asset value to approximately $.23 a share. In addition, after April 30, 3008, investors would "receive an enhanced share of interest income of [Municipal Opportunity] corresponding to Citi's reduced share of interest income" with respect to its new Municipal Opportunity shares. Citigroup's reduced share of interest income was determined by a formula (the "special interest allocation") that is outlined in the exchange memorandum.[2] On March 20, 2008, CAI suspended redemptions and quarterly income distributions from MAT and Municipal Opportunity.

As noted, on May 29, 2008, MAT commenced a tender offer and sent the exchange memorandum to investors. Pursuant to the offer, these investors have two choices. Those who tender their shares will receive the net asset value of their shares as of April 30, 2008–approximately $.23–in cash, and a "participation share" entitling them to the interest payments their shares would have received (including the special interest allocation) and 75% of the future gains (if any) Citigroup's new shares would receive as a result of MAT's liquidation. The cash for the tender offer will come from Citigroup: for each share tendered, MAT will sell one share of a new class of stock for a purchase price equal to the payment made to the tendering investor, the proceeds of which will be used to pay the tendering investor.

[2] Exch. Mem. at 5.

By executing the exchange memorandum, tendering investors also agree to a release of legal claims. That release purports to release MAT, CAI, Citigroup and its subsidiaries, Municipal Opportunity, the selling broker of MAT shares, and employees, officers, directors, partners, past and present counsel, and agents of these parties, among others, from all claims directly or indirectly arising from, *inter alia*, the operation, management, supervision, or investment of any MAT's assets, or any actions taken by these parties in connection with the acquisition, ownership, or disposition of MAT shares, regardless of whether those claims are known or unknown at the time of tender.[3]

Non-tendering investors will retain their shares in MAT, share fully in any gain or loss realized through the liquidation of the portfolio, retain the right to interest payments, and retain all legal rights to sue. Unlike tendering investors, these investors do not receive any portion of future gains from liquidation (if any) attributable to Citigroup's new shares, although they will continue receiving the special interest allocation. The tender offer is set to expire on July 15, 2008.

II.

The plaintiffs seek expedited treatment of their request for preliminary injunctive relief. "This Court does not set matters for an expedited hearing or

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[3] *Id.* at 28.

permit expedited discovery unless there is a showing of good cause why that is necessary."[4] "To make the necessary showing, a plaintiff must articulate a sufficiently colorable claim and show a sufficient possibility of a threatened irreparable injury to justify imposing on the defendants and the public the extra (and sometimes substantial) costs of an expedited preliminary injunction proceeding."[5]

The plaintiffs premise their request for an injunction primarily on allegations that the exchange memorandum contains material omissions. Given the expedited nature of this decision, the court does not address every allegation the plaintiffs make, instead focusing on the most important allegations that justify granting the present motion. First, the plaintiffs argue that the memorandum does not disclose the manner in which MAT calculates net asset value, or the value of Municipal Opportunity's assets, and therefore they cannot understand the true value of the tender offer consideration.

Second, the plaintiffs maintain that the disclosures fail to provide information necessary to determine the nature of the claims they have been asked to release. For instance, the plaintiffs contend that the defendants disclosed that the SEC is conducting an inquiry into Citigroup's hedge funds and issued two document

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[4] *See, e.g.*, *In re SunGard Data Sys., Inc. S'holders Litig.*, 2005 WL 1653975 (Del. Ch. July 8, 2005) (citation omitted).
[5] *Id.* (citation omitted).

requests to Citigroup, but have not disclosed the nature or scope of that inquiry.[6] In addition, the plaintiffs argue that more information regarding Citigroup's February 29 and March 3 cash infusion is needed to make an informed decision whether to tender their shares. Specifically, they maintain that the exchange memorandum does not disclose the terms of the contribution, including how those terms were determined and negotiated, how Citigroup decided the manner in which they allocated March and April gains, or why the defendants elected a cash infusion rather than an alternative course of action, such as a non-dilutive loan.

In addition, the plaintiffs argue they will be irreparably harmed because they will be "forced to determine whether to tender their shares in the Tender Offer on the basis of the materially misleading statements and omissions of fact contained in the Memorandum . . . [and] will thus be required to make a determination of whether to relinquish much of their interest in the Company on the basis of inadequate information."[7] Further, the plaintiffs allege "[i]nvestors will also be irreparably harmed without disclosure of the omitted information because, as a condition of tendering their shares, they are required to accept the Release, which

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[6] Similarly, the plaintiffs allege the memorandum discloses that certain affiliates of MAT are the subject of Financial Industry Regulatory Authority arbitration proceedings relating to the company's sales practices without disclosing the nature, scope, or subject matter of those proceedings.

[7] Compl. ¶ 77.

purports to eliminate any legal claim members may have against any of the parties involved in operating the Company."[8]

The defendants respond with several arguments. First, they argue that the plaintiffs have filed a putative class action in the United States District Court for the Souther District of New York ("*Raymond I*")[9] that arises out of the same nucleus of facts as the this action and involves the same defendants.[10] Therefore, the defendants argue, the plaintiffs filed in this court simply to engage in impermissible forum-shopping, and that, under the *McWane* doctrine,[11] this court should defer to the first-filed New York action. Second, the defendants argue that the plaintiffs cannot demonstrate a colorable claim because the information they seek is not material.

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[8] *Id.* at ¶ 78.

[9] *Marie Raymond Revocable Trust v. MAT Five LLC, et al.*, No. 08 Civ. 4152 (S.D.N.Y. 2008).

[10] The plaintiffs' attorneys, representing other individuals invested in a different Citigroup hedge fund, have filed a separate putative class action in federal court seeking to enjoin a similar tender offer. That claim was premised on federal antifraud statutes and Delaware law. On June 17, 2008, that court denied the motion for preliminary injunction, holding that the plaintiffs' request was premised on claims that the exchange memorandum contained untrue or misleading statements, yet they had not identified any such statements. O'Brien Aff. Ex. I at 32 (Transcript of Oral Ruling, *Ferguson Family Trust v. Falcon Strategies Two LLC et al.*, No. 08 Civ. 4723 (S.D.N.Y. June 17, 2008)). That court did not render an opinion as to whether the memorandum contained material omissions. *Id.*

[11] That doctrine holds that "Delaware courts should liberally exercise their discretion in favor of a stay when (1) a first-filed prior pending action exists in another jurisdiction, (2) that action involves similar parties and issues, and (3) the court in the other jurisdiction is capable of rendering prompt and complete justice." *Enodis Corp. v. Amana Co.*, 2007 WL 1242193, at *2 (Del. Ch. Apr. 26, 2007); *see also McWane Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281 (Del. 1970).

Next, the defendants argue there is no threat of irreparable harm because those who choose not to tender will be in the exact same position as if there had been no tender offer. Further, they contend that any damages could be readily calculable based on the difference between the amount per share being offered and the value ultimately realized when MAT is liquidated. In addition, the defendants argue that the right to make an informed decision on a tender offer, in and of itself, does not constitute irreparable harm. In any event, the defendants argue, laches applies because the plaintiffs delayed in bringing this action. Finally, the defendants argue that the plaintiffs are not entitled to discovery because the discovery sought is additional disclosure equivalent to the relief they seek and are not entitled to, and contravenes the Congressional intent found in 15 U.S.C. § 78u-5(f).[12]

III.

As an initial matter, the record does not support a conclusion that the plaintiffs unduly delayed in making their application. Of course, the plaintiffs could have filed their application a few days earlier than they did, but that delay by itself is not fatal. This is especially so given that "the optimal time to bring a

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[12] 15 U.S.C. § 78u-5(f) provides that a court must stay discovery in actions arising under federal securities laws during the pendency of specific types of motions for summary judgment.

disclosure claim in connection with a proposed merger, or in a like context . . ., is before the [action] is taken and the deal closes."[13]

The court also declines to apply the *McWane* doctrine in this case. Under that doctrine, a duplicative action that "aris[es] from a common nucleus of operative facts" raised in an earlier-filed suit may be dismissed or stayed.[14] "To grant a stay, it is not required that the parties and issues in both actions be identical. Substantial or functional identity is sufficient."[15] In this case, that substantial or functional identity is lacking. *Raymond I* has nothing to do with the disclosures made in the exchange memorandum. Indeed, the *Raymond I* complaint was filed before the exchange memorandum was sent to investors. Although there are some overlapping facts between the two cases, this action centers on a very specific set of facts–the disclosures made in the exchange memorandum–that did not even exist at the time *Raymond I* was filed.[16]

Further, the court finds that the plaintiffs have articulated a colorable claim. As this court recently explained:

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[13] *In re SunGard*, 2005 WL 1653975 at *2.
[14] *Schnell v. Porta Sys. Corp.*, 1994 WL 148276, at *4 (Del. Ch. Apr. 12, 1994).
[15] *AT&T Corp. v. Prime Sec. Distribs., Inc.*, 1996 WL 633300, at *2 (Del. Ch. Oct. 24, 1996).
[16] For the same reasons, allowing discovery in this action does not constitute an "end run" around the PSLRA stay on discovery that the federal court imposed in *Raymond I*.

> The duty of disclosure is not an independent duty, but derives from the duties of care and loyalty. Corporate fiduciaries can breach their duty of disclosure under Delaware law . . . by making a materially false statement, by omitting a material fact, or by making a partial disclosure that is materially misleading . . . . To state a claim for breach by omission of any duty to disclose, a plaintiff must plead facts identifying (1) material, (2) reasonably available (3) information that (4) was omitted from the proxy materials. Omitted information is material if a reasonable stockholder would consider it important in deciding whether to tender his shares or would find that the information has altered the "total mix" of information available.[17]

First, a reasonable investor deciding whether to release all potential claims against a fund and its managers would consider it important to know how a manager of that fund came to obtain a substantial equity interest in that fund cheaply, and at a time the fund was vulnerable. Such an investor would also consider it important to know the scope and subject matter of an SEC investigation into similar funds or other pending litigation. Likewise, given that MAT is an unregistered company with no public filings, the method by which the April 30 net asset value was determined, as well as how the underlying assets were valued (and what their value was), is likely to alter the total mix of information available to an investor.[18]

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[17] *Pfeffer v. Redstone*, 2008 WL 308450, at *8-9 (Del. Ch. Feb. 1, 2008) (citations omitted); *see also Berger v. Pubco Corp.*, 2008 WL 2224107, at *2 (Del. Ch. May 30, 2008) ("An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.") (citing *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985)).

[18] *Cf. Berger*, 2008 WL 2224107 at *3 (Del. Ch. May 30, 2008) (noting that "where so little information is available about [an unregistered] company . . . a disclosure [as to how the price offered was set] would significantly change the landscape" of information).

In addition, the plaintiffs have shown a sufficient possibility of a threatened irreparable injury. As the defendants point out, where a tender offer does not involve assumption of control over the issuer or some other transaction that cannot be undone, "the remedy of rescission or money damages will give full relief."[19] Indeed, in this case if the plaintiffs are correct and tendering investors sell their stock for less than its fair value based on incomplete information, any damages could be readily calculable based on the difference between the amount per share being offered and the value ultimately realized when MAT is liquidated. Further, the fact that the plaintiffs must make a decision without being fully informed cannot in and of itself constitute irreparable harm if compensable by damages.[20] Rather, this harm must be coupled with some other form of irreparable harm.

Here, that irreparable harm can be found in the release that tendering investors must sign. In the event that the tender offer is later found defective after it is completed, tendering investors may be unable to bring claims seeking money damages due to this release. Thus, if the plaintiffs are ultimately found correct in this case and investors tender their shares with incomplete information, they will

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[19] *See Cottle v. Carr*, 1988 WL 10415, at *5 (Del. Ch. Feb. 9, 1988).
[20] *Id.* at *5; *see also Gilmartin v. Adobe Ress. Corp.*, 1992 WL 71510, at *13 (Del. Ch. Apr. 6, 1992) (finding irreparable harm where material information was withheld, and the merger could not be reversed because it involved the issuance of new securities that would be publicly traded on the national securities market).

suffer the irreparable harm of not being able to bring further litigation seeking money damages without first having to overcome the effect of the release. Moreover, as this court has previously held, after-the-fact damages are not a precise or efficient method to remedy disclosure deficiencies.[21] "Therefore, our cases recognize that it is appropriate for the court to address material disclosure problems through the issuance of a preliminary injunction that persists until the problems are corrected."[22]

The court will allow expedited discovery in this case. It is not true that the plaintiffs' "end game" in this action is simply gaining access to the information allegedly omitted from the exchange memorandum. Rather, the plaintiffs' ultimate goal is to enjoin the tender offer until this information is properly disclosed to MAT stockholders so that the stockholders may make an informed decision. Further, to the extent that the information is highly confidential or potentially damaging to MAT if widely distributed, the parties can negotiate an appropriate confidentiality agreement or, in the absence of agreement, ask for the court's assistance. Similarly, if this court ultimately orders disclosures that the defendants believe are potentially damaging, the defendants can request that any such disclosures be made subject to stockholders signing confidentiality agreements.

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[21] *In re Staples, Inc. S'holders Litig.*, 792 A.2d 934, 960 (Del. Ch. 2001).
[22] *Id.*

IV.

For these reasons, the motion to expedite proceedings is GRANTED. A hearing on the plaintiffs' motion for a preliminary injunction will be held on July 15, 2008 at 10 a.m. The parties are directed to submit a stipulated schedule. IT IS SO ORDERED.

/s/ Stephen P. Lamb
Vice Chancellor