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Re: Henkel Corporation v. Innovative Brands Holdings, LLC
C.A. No. 3663-VCN
Date Submitted: August 6, 2008

Dear Counsel:

Plaintiff Henkel Corporation ("Henkel") and Defendant Innovative Brands Holdings, LLC ("IBH") entered into the Asset Sale and Purchase Agreement (the "Agreement"), dated December 20, 2007, under which IBH would acquire certain assets and operations of Henkel. Henkel brought this action to compel IBH to complete its acquisition. IBH asserts that Henkel has failed to satisfy a condition precedent to IBH's performance: the absence of a Material Adverse Effect ("MAE"), and, therefore, it declines to close. IBH, if it is correct about the occurrence of an MAE, could elect to waive the condition or to terminate the

Agreement. Although IBH has neither terminated the Agreement nor closed under it, it contends that Henkel remains subject to the Agreement's no-shop clause that effectively precludes it from seeking other purchasers. IBH, accordingly, has counterclaimed for a declaratory judgment to the effect, *inter alia*, that it is under no obligation to close under the Agreement until all of the closing conditions have been satisfied and that Henkel remains subject to the no-shop clause. Before the Court is Henkel's motion to dismiss those portions of IBH's counterclaim.

* * *

This action ultimately requires the interpretation and application of certain portions of the Agreement. Accordingly, a brief review of its pertinent provisions is appropriate. IBH's performance is conditioned upon the absence of any "Material Adverse Change." By Section 12 of the Agreement:

> The obligations of [IBH] to consummate the transaction contemplated by this Agreement are subject to the fulfillment, at or before the closing date, of the following conditions, any one or more of which may be waived by [IBH] in its sole discretion: . . .
>
> Section 12.6 No Material Adverse Change. During the period from Execution Date [December 20, 2007] to the Closing Date, there shall not have occurred any Material Adverse Effect.

In turn, "Material Adverse Effect" is defined in pertinent part:

> With reference to [Henkel], a circumstance, state of facts, event, consequence or result that, individually or in the aggregate, materially and adversely affects the Purchased Assets or the Business, considered as a whole, . . . provided, however, that the term "Material Adverse Effect" shall not include any circumstance, state of facts, event, consequence or result that constitutes, relates to or arises out of general economic or regulatory conditions affecting [Henkel] or the industry in which the Business operates.[1]

The Agreement does not specify a date by which the transaction must close. Instead, Closing "shall take place on the date which is five (5) Business Days after satisfaction or waiver of all conditions precedent set forth in Sections 11 [Conditions Precedent to Performance by Henkel] and 12 [Conditions Precedent to Performance by IBH]."[2] The term "Closing Date" is helpfully defined as "the date on which such Closing takes place."[3]

Termination is governed by Section 13.1, which provides in pertinent part:

> Notwithstanding anything to the contrary contained herein, this Agreement may be terminated at any time before the Closing: (a) by mutual consent of [Henkel] and [IBH]; . . . or (c) by [IBH] if (i) there has been a material breach by [Henkel] of its representations and warranties or in the observance, or in the due and timely performance

[1] Agreement § 1.
[2] Agreement § 4.
[3] *Id.*

> of any of the covenants or agreements contained in this Agreement on [Henkel's] part to be performed, and such breach shall not have been cured within 10 days after written notice thereof, or (ii) as of March 31, 2008, any of the conditions set forth in Section 12 [Conditions Precedent to IBH's Performance] shall not have been met or waived (unless the failure of such conditions results primarily from [IBH] breaching any of its representations, warranties or covenants contained in this Agreement).

Finally, by Section 7.4 of the Agreement, entitled "No-Shop," "[f]rom and after the Execution Date [December 20, 2007] until the earlier of (a) the date of termination of this Agreement pursuant to Section 13.1 and (b) the Closing Date," Henkel is precluded, *inter alia*, from undertaking "the sale of all or any portion of the assets of the Business or any similar transaction involving the Business."

* * *

In assessing Henkel's motion to dismiss, the Court must accept as true all of IBH's well-pleaded allegations of fact, and it must draw all reasonable inferences from those allegations in favor of IBH.[4] Moreover, the Court may not grant a motion to dismiss unless it can conclude "with a 'reasonable certainty' that a plaintiff could prevail on no set of facts that can be inferred from the pleadings."[5]

[4] *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006).
[5] *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 38 (Del. 1996).

This matter raises a question of interpretation of a contract. In reviewing the language of the Agreement in the context of a motion to dismiss, the Court is called upon to attempt to ascertain if an objective third party reader could reasonably conclude that the contractual language is susceptible to more than one meaning.[6] Thus, the Court could only dismiss the counterclaim if it could conclude as a matter of law that the only reasonable interpretation of the Agreement is the one sponsored by Henkel.[7] In other words, unless there is no reasonable reading of the Agreement that could be consistent with IBH's position, the motion to dismiss must be denied.[8]

* * *

The source of Henkel's frustration with IBH is both obvious and understandable. IBH has not terminated the Agreement because of an MAE,[9] and it has not waived that condition. Because there is no definitive Closing Date and

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[6] *See, e.g., Dittrick v. Chalfant*, 948 A.2d 400, 406 (Del. Ch. 2007) (in interpreting disputed contract terms, the Court "stand[s] in the shoes of an objectively reasonable third-party observer . . . .").

[7] *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 615 (Del. 2003).

[8] *See, e.g., Vanderbilt Income & Growth Assocs., L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 613 (Del. 1996).

[9] Although Henkel disputes that an MAE has occurred, it acknowledges that the Court must, for purposes of the motion to dismiss, accept IBH's allegations to that effect.

Closing will not occur until all conditions (including the absence of an MAE) have been satisfied, Henkel fears that it will remain subject to the no-shop clause and be constrained indefinitely. According to Henkel, reasonable and sophisticated business entities would not have agreed to that.

The question, thus, becomes one of when, if ever, must IBH make a decision either to claim or to waive the MAE.[10] The Agreement does not expressly impose any such deadline, but Henkel points to the date of March 31, 2008, that appears in Section 13.1(c) of the Agreement. There, IBH "may" terminate the Agreement if "as of March 31, 2008, any of the conditions of Section 12 shall not have been met or waived." That date, however, merely establishes a date for determining whether conditions have been met. In essence, it serves as the first opportunity for IBH to terminate for Henkel's failure to satisfy the various conditions of the Agreement. Henkel argues that the "may" terminate language should be read as "must" either terminate or close. That would have been easy for the scrivener; however, the drafters of the Agreement did not include any such provision.

[10] IBH posits a third alternative—that the MAE can be cured, thereby avoiding the need to terminate the Agreement or waive the condition. The Court need not address whether a condition, such as an MAE can be cured. Even if Henkel's underlying business financial data were to improve, there still would have been an MAE, literally satisfying the terms of the Agreement.

In short, the Agreement does not set any time by which IBH must decide whether to claim that an MAE has occurred or to waive any such claim. It is, however, unreasonable, to believe that sophisticated parties would have agreed upon an open-ended, unlimited period for making such a decision. Accordingly, as with contracts lacking a time for performance generally, the Court will be required to determine a "reasonable" period for performance.[11]

With that conclusion, it remains an open question as to whether IBH's time for making such a decision has come and gone or when it may be in the future. The Court cannot conclude, as a matter of law from reading the Agreement, that IBH is not entitled to make its decision in the future. The reasonableness of a time period with which an act must occur is necessarily dependent upon the factual context and cannot be set with this case in its current procedural posture.

* * *

Accordingly, because the question of when IBH must decide whether to assert or waive its claim that an MAE has occurred remains open, the Court cannot

[11] *See, e.g.*, *LaPoint v. AmerisourceBergen Corp.* 2007 WL 1309398, at *5 (Del. Ch. May 1, 2007) ("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.").

conclude that those portions of IBH's counterclaim subject to the pending motion fail to state a claim. It follows that Henkel's motion to dismiss must be denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K