IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

PETER SCHOENFELD ASSET MANAGEMENT LLC, HUDSON VALLEY PARTNERS, L.P., THE MERGER FUND LTD., SPHINX MERGER ARBITRAGE (THE MERGER); THE MERGER FUND; WCM PARTNERS, L.P. and ZURICH INSTITUTIONAL BENCHMARKS MASTER FUND LIMITED, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
v.	)	C.A. No. 20087-NC
JACK A. SHAW, LARRY D. HUNTER, MICHAEL J. GAINES, EDDY W. HARTENSTEIN, ROXANNE S. AUSTIN, JOSEPH R. WRIGHT, PATRICK J. COSTELLO, STEPHEN R. KAHN, JAMES M. HOAK, DENNIS F. HIGHTOWER and HUGHES ELECTRONICS CORPORATION,	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: June 30, 2003
Decided: July 10, 2003

Norman M. Monhait, of ROSENTHAL MONHAIT GROSS & GODDESS, P.A., Wilmington, Delaware; OF COUNSEL: Arthur N. Abbey, James S. Notis and Richard B. Margolies, of ABBEY GARDY, LLP, New York, New York, Attorneys for Plaintiffs.

R. Franklin Balotti, Lisa A. Schmidt and Titania R. Mack, of RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware, Attorneys for Defendants Jack A. Shaw, Larry D. Hunter, Michael J. Gaines, Eddy W. Hartenstein, Roxanne S. Austin and Hughes Electronics Corporation.

Kenneth J. Nachbar, of MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware, Attorneys for Defendants Joseph R. Wright, Patrick J. Costello, Stephen R. Kahn, James M. Hoak and Dennis F. Hightower.

Chandler, Chancellor

The complaint in this class action was filed on December 18, 2002. Plaintiffs contend that Hughes Electronics Corporation and the directors of PanAmSat Corporation breached their fiduciary duties in connection with the failed merger of Hughes and EchoStar Communications Corporation.[1] Specifically, plaintiffs allege that Hughes breached its duties as a controlling shareholder of PanAmSat when EchoStar and Hughes terminated their merger agreement for a $600 million termination fee paid to Hughes. They also allege that the director defendants breached their duties by failing to take action to protect PanAmSat's public shareholders.

The defendants moved to dismiss all claims under Court of Chancery Rule 12(b)(6). After briefing, I have determined that oral argument is not necessary. Neither PanAmSat nor its shareholders were parties to the agreements between Hughes and EchoStar and, therefore, PanAmSat had no rights under those agreements on which its board could act. Furthermore, Hughes, as a controlling stockholder, had no duty to sell its PanAmSat shares. Defendants' motions to dismiss with prejudice are granted. Plaintiffs' motion for leave to amend the complaint is denied under Court of Chancery Rule 15(aaa).

[1] EchoStar is not a party to this suit.

I. INTRODUCTION[2]

Plaintiffs in this action were at all relevant times shareholders of PanAmSat Corporation, a subsidiary of Hughes Electronics Corporation,[3] which itself is a wholly-owned subsidiary of General Motors Corporation? PanAmSat is a commercial provider of satellite-based communications services. The individual director defendants are all directors of PanAmSat Corporation. Individually, they are: Jack A. Shaw;[5] Larry D. Hunter;[6] Michael J. Gaines;' Eddy W. Hartenstein;[8] Roxanne S. Austin;[9] Joseph R.

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[2] The Facts as set forth herein are taken from well-pled facts of the Class Action Complaint.

[3] Hughes owns or controls 120,8 12,175 PanAmSat shares, or approximately 80.6% of PanAmSat's outstanding common stock.

[4] GM has issued Class H common stock to track the performance of Hughes.

[5] Mr. Shaw is Chairman of PanAmSat's board and is also the President and CEO of defendant Hughes. He does not own any PanAmSat stock.

[6] Mr. Hunter is a Corporate Vice President of Hughes and a member of Hughes' management committee. He owns, beneficially or otherwise, 400 PanAmSat shares.

[7] Mr. Gaines is a Corporate Vice President and CFO of Hughes and a member of Hughes' executive and management committees. He does not own any PanAmSat stock.

[8] Mr. Hartenstein is the Corporate Senior Executive Vice President of Hughes and a member of Hughes' executive and management committees. He is also Chairman and CEO of DirecTV and DirecTV Global. He does not own any PanAmSat stock.

[9] Ms. Austin is a Corporate Executive Vice President of Hughes and a member of Hughes' executive and management committees. She is also President and Chief Operating Officer of DirecTV. She owns 11,850 PanAmSat shares.

Wright;" Patrick J. Costello;" Stephen R. Kahn;[12] James M. Hoak[13] and Dennis F. Hightower. [14]

One of Hughes' businesses is DirecTV, which provides digital satellite television services. DirecTV's primary competitor in this business is EchoStar's DISH network. On October 28, 2001, Hughes and EchoStar publicly announced various agreements that would lead to a spin-off of Hughes from GM and a merger of Hughes with EchoStar. Hughes and EchoStar together control 95% of the satellite television market. As a result, the parties were cognizant that the proposed merger would face significant regulatory scrutiny, and their agreements reflected that contingency. If the merger were consummated, EchoStar would step into Hughes' shoes with respect to its 80.6% holding in PanAmSat. A Stock Purchase Agreement between Hughes and EchoStar provided that EchoStar would still acquire PanAmSat under certain conditions if the merger was not consummated as of January 2 1, 2003 (the "Termination date"). The Merger Agreement also

[10] Mr. Wright is PanAmSat's President and CEO. He owns 6,407 PanAmSat shares.
[11] Mr. Costello owns 5,835 PanAmSat shares.
[12] Mr. Kahn owns 3,573 PanAmSat shares.
[13] Mr. Hoak owns 5,860 PanAmSat shares.
[14] Mr. Hightower owns 4,876 PanAmSat shares.

provided that Hughes would receive a $600 million breakup fee if the merger were not consummated.

True to the parties concerns, by late October 2002 both the Department of Justice and the Federal Communications Commission had publicly opposed the proposed merger on antitrust grounds. Hughes and EchoStar saw the "writing on the wall" and decided to not pursue the merger. They settled any claims among themselves by'mid-December 2002. The settlement included the immediate payment of the $600 million termination fee by EchoStar to Hughes but did not require EchoStar to purchase PanAmSat.

Plaintiffs have alleged that the directors of PanAmSat breached their fiduciary duties in failing to take action in connection with the termination of the merger agreement between EchoStar and Hughes. Plaintiffs further allege that Hughes, as the controlling stockholder of PanAmSat, breached its fiduciary duties by terminating the merger agreement because a result of the settlement between Hughes and EchoStar was that EchoStar was released of its potential obligation to purchase all PanAmSat's outstanding shares.

II. STANDARD OF REVIEW

The Court accepts as true all well-pled factual allegations contained in the complaint," but neither conclusory statements-those unsupported by well-pled factual allegations-nor allegations contradicted by documents on which the complaint is based, are accepted as true? The Court will draw all inferences logically flowing from the complaint in favor of the plaintiffs only if such inferences are reasonable.[17] The Court will not dismiss any claim under Rule 12(b)(6) unless it appears with reasonable certainty that the plaintiffs cannot prevail on any set of facts which might be proven to support the allegations in the complaint.'*

Matters outside the complaint should generally not be considered in ruling on a motion to dismiss under Rule 12(b)(6).[19] In certain circumstances, it is nevertheless proper for the Court to examine documents

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[15] *See Orman v. Cullman*, *794* A.2d 5, 15 (Del. Ch. 2002).

[16] *Grobow v. Perot, 539* A.2d 180, 187 (Del. 1988) (stating that "conclusionary allegations of fact or law not supported by allegations of specific fact may not be taken as true"); *In re Wheelabrator Techs., Inc. S'holders Litig.,* 1992 WL 212595 at *3 (Del. Ch.) ("the Court is hardly bound to accept as true a demonstrable mischaracterization and the erroneous allegation that flows from it").

[17] See *Grobow, 539* A.2d at 187 (stating that the Court "need not . . . draw all inferences from [the allegations] in plaintiffs' favor unless they are reasonable inferences").

[18] *See Rabkin v. Philip A. Hunt Chem. Corp., 498* A.2d 1099, 1104 (Del. 1985).

[19] *See In re Santa Fe Pac. Corp. S'holders Litig., 669* A.2d 59, 68 (Del. 1995); see *also Vanderbilt Income & Growth Assocs. v. Arvida/JMB Managers, Inc.,* 691 A.2d 609, 612–13 (Del. 1996); *Orman*, *794* A.2d at 15-16.

outside the complaint in deciding the motion to dismiss.[20] Without the ability to consider the document at issue, complaints that mischaracterize that document could not be dismissed on a 12(b)(6) motion even though they were doomed to failure.[21] When the document itself is not in dispute, the inefficiencies of a contrary rule are obvious.

III. ANALYSIS

As explained by the Delaware Supreme Court, "[c]learly, a stockholder is under no duty to sell its holdings in a corporation, even if it is a majority shareholder, merely because the sale would profit the minority."[22] A majority shareholder "has discretion as to when to sell his stock and to whom," a discretion that comes from the majority shareholder's rights ***qua*** shareholder.[23] This is true even when a proposed transaction would result in the minority sharing in a control premium.[24]

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[20] *In re Santa Fe Pac. Corp. S'holders Litig.,* 669 A.2d at 69-70 ("The Court of Chancery has considered documents referred to in complaints when ruling on motions to dismiss. In particular instances and for carefully limited purposes, this may be an appropriate practice on a motion to dismiss.. . . The exception has been used in cases in which the document is integral to a plaintiffs claim.. .") (citations omitted).

[21] *Id.* at 70 (quoting *Kramer v. Time Warner, Inc., 937* F.2d 767,774 (2d Cir. 1971)).

[22] *Bershad v. Curtiss- Wright Corp., 535* A.2d 840, 845 (Del. 1987).

[23] *Freedman v. Restaurant Assoc. Indus., Inc.,* 1990 Del. Ch. LEXIS 142 at *18 (Del. Ch.).

[24] *See Mendel v. Carroll, 65* 1 A.2d 297,306 (Del. 1994).

The complaint alleges that in the event the merger were terminated for failure to receive regulatory approval, EchoStar would be contractually bound to "buy all of the shares of PanAmSat (held **by Hughes** and the investing public) at $22.47.. . ."[25] Hughes argues in its brief that EchoStar's obligation to purchase the shares never accrued. Plaintiffs, contrary to the allegations set forth in their own complaint, concede the same in their brief by observing, "Termination of the Merger *on* or *after* the Termination date would trigger various provisions of the Merger Agreement and the Stock Purchase Agreement," including activating EchoStar's obligation to purchase all of PanAmSat's shares.[26] Thus, plaintiffs admit that Hughes' ability to require EchoStar to purchase the PanAmSat shares never accrued.

In considering the Stock Purchase Agreement, as it is integral to the complaint, I conclude that the parties' interpretation thereof is reasonable. Therefore, Hughes had no right to put its PanAmSat stock to EchoStar, and similarly, the contingent obligation of EchoStar to purchase the PanAmSat shares held by the public was never triggered because the merger was

[25] Class Action Compl. ¶ 27.
[26] Pls.' Br. In Opp'n to Defs.' Mots. to Dismiss at 3 (emphasis added).

mutually abandoned before the Termination date.[27] Hughes never had a duty to complete the announced transaction, either for itself or for the benefit of PanAmSat's minority shareholders. As a result, it is impossible to conclude that Hughes breached fiduciary duties to PanAmSat's shareholders when it released EchoStar from an obligation that did not exist. Accordingly, the complaint is dismissed as to Hughes.

Plaintiffs also attack the PanAmSat board's inaction because it allegedly failed to prevent Hughes from releasing EchoStar from its unmatured obligation to purchase the PanAmSat stock. Analogizing to *McMullin v. Beran*,[28] plaintiffs propose that the PanAmSat directors failed to "make an informed and deliberate judgment in response to Hughes' action, and to do so independently of Hughes."[29] Plaintiffs broadly construe *McMullin* and ignore subsequent case law regarding the fiduciary duties of subsidiary boards.[30] The Stock Purchase Agreement was between Hughes

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[27] It is also interesting to note, although defendants do not discuss it, that the Stock Purchase Agreement expressly provides in Section 4.2 for consensual termination prior to Closing (plaintiffs' brief takes notice of this possibility, but thinly argues that Hughes' availing itself of the provision would be inequitable). It would seem logical therefore that the settlement between Hughes and EchoStar terminated the Stock Purchase Agreement according to its terms.

[28] *McMullin v. Beran*, *765* A.2d 910 (Del. 2000).

[29] Pls.' Br. In Opp'n to Defs.' Mots. to Dismiss at 12.

[30] *See In re Siliconix, Inc. S'holders Litig.,* 2001 WL 716787 (Del. Ch.); *In re Digex, Inc. S'holders Litig., 789* A.2d 1176 (Del. Ch. 2000).

and EchoStar. Any action by PanAmSat's board would be irrelevant to that contract, as PanAmSat had no rights thereunder.[31] Neither PanAmSat nor its shareholders had any rights under the Stock Purchase Agreement. Therefore, it follows logically that under any set of facts plaintiffs may be able to prove regarding the potential lack of independence of PanAmSat's directors, a breach of fiduciary duty cannot be proven. The complaint must be dismissed as against the PanAmSat director defendants.

Finally, plaintiffs request leave to amend the complaint in the event this Court grants any part of defendants' motions.[32] Plaintiffs opposed the motions to dismiss and did not seek to amend the complaint before filing their opposition papers. The plain language of Rule 15(aaa), as well as Vice Chancellor Lamb's pointed decision in *Stern v. LF Capital Partners*,[33] preclude plaintiffs from doing so at this time. Plaintiffs request for leave to amend the complaint is denied.

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[31] Section 11.15 of the Stock Purchase Agreement contains the following clause relating to third-party rights: "The provisions of this Agreement are solely for the benefit of the parties [Hughes and EchoStar] and are not intended to confer upon any Person except the parties any rights or remedies hereunder and there are no third party beneficiaries of this Agreement and this Agreement shall not provide any third Person with any remedy, claim, liability, reimbursement, claim of action or other right in excess of those existing without reference to this Agreement."

[32] Plaintiffs' request, a small footnote to the conclusion in their opposition brief, is hardly the manner in which to bring such a motion before the Court.

[33] 820 A.2d 1143 (Del. Ch. 2003).

IV. CONCLUSION

Hughes did not have a duty to sell its stock or compel EchoStar to buy PanAmSat. The PanAmSat directors had no role whatsoever in the negotiations, execution, or termination of the Stock Purchase Agreement between Hughes and EchoStar. The complaint in its entirety is dismissed with prejudice for failure to state a claim upon which relief can be granted.

IT IS SO ORDERED.