EFiled: Oct 15 2010 2:44PM EDT
Transaction ID 33833551
Case No. 5780-VCP

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

DONALD F. PARSONS, JR.
VICE CHANCELLOR

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Date Submitted: October 12, 2010
Date Decided: October 15, 2010

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Re: In Re Cogent, Inc. Shareholder Litigation,
Consolidated Civil Action No. 5780-VCP

Dear Counsel:

In an Opinion dated October 5, 2010 (the "Opinion"), I denied the motion for a preliminary injunction by Plaintiffs, ST Nevan US Limited and Bryce B. Bell. In so doing, I held that Plaintiffs were unlikely to succeed in showing that Defendant members of the Cogent Board had acted in an unreasonable manner in coming to an agreement to

merge with Defendant 3M. I also concluded that Plaintiffs failed to demonstrate that they were likely to suffer irreparable harm.

On October 8, 2010, Plaintiffs applied for certification of an interlocutory appeal (the "Application") pursuant to Supreme Court Rule 42 from the portion of the Opinion concerning the validity of the Top-Up Option.[1] On October 12, Defendants filed an opposition to the Application. This Letter Opinion constitutes my ruling on Plaintiffs' Application. For the reasons stated, I conclude that the Opinion does not involve such exceptional circumstances that the challenged ruling can be said to have determined a substantial issue, established a legal right, or satisfied one of the criteria in Rule 42 (b)(i)-(v) sufficient to warrant an interlocutory appeal. Therefore, I deny Plaintiffs' Application to certify this matter for an interlocutory appeal.

I. Standard

Applications for interlocutory review are governed by Supreme Court Rule 42, which prohibits certification of an interlocutory appeal unless the order of the trial court to be appealed from (1) determines a substantial issue, (2) establishes a legal right, *and* (3) meets at least one of the criteria in Rule 42(b)(i)-(v).[2] "Those criteria include the reasons listed in Rule 41 for certification of questions of law, questions of the trial court's

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[1] Terms in initial capitals, unless otherwise noted, have the same meaning as in the Opinion.

[2] *In re Pure Res., Inc. S'holders Litig.*, 2002 WL 31357847, at *1 (Del. Ch. Oct. 9, 2002).

jurisdiction, instances where the trial court has set aside precedent, or instances where the trial court has ruled on a dispositive issue."[3] Applications for certification of an interlocutory appeal require the exercise of the trial court's discretion and are granted only in extraordinary or exceptional circumstances.[4]

II. Analysis

A. The Opinion did not determine a substantial issue or establish a legal right

The "substantial issue" requirement is met when an interlocutory order decides a main question of law which relates to the merits of the case, and not to collateral matters.[5] To be appealable, an interlocutory order also must establish a legal right.[6] A legal right is established when a court determines an issue essential to the positions of the parties

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[3] *Ryan v. Gifford*, 2008 WL 43699, at *4 (Del. Ch. Jan. 2, 2008); *see also Pure Res.*, 2002 WL 31357847, at *1 ("Applications for interlocutory appeal . . . balanc[e] the public interest in advancing appellate review of potentially case dispositive issues while avoiding fragmentation and delay when interlocutory review is unlikely to terminate the litigation or otherwise serve the administration of justice.") (internal citation and punctuation omitted).

[4] *See Gifford*, 2008 WL 43699, at *4; *Pure Res.*, 2002 WL 31357847, at *1.

[5] *Casteldo v. Pittsburgh-Des Moines Steel Co.*, 301 A.2d 87, 87 (Del. 1973).

[6] *Pepsico v. Pepsi-Cola Bottling Co. of Asbury Park*, 261 A.2d 520, 521 (Del. 1969).

regarding the merits of the case, *i.e.*, "where one of the parties' rights has been enhanced or diminished as a result of the order."[7]

Plaintiffs erroneously claim that the Opinion decided a substantive issue and established a legal right. Rather than definitively deciding that the terms and process relating to the Top-Up Option were reasonable, I concluded that (1) Plaintiffs had not established a likelihood of success on the merits on these issues;[8] and (2) "even assuming that the Top-Up Option claims were stronger, Plaintiffs failed to demonstrate they face irreparable harm in the absence of an injunction."[9]

Since the Opinion was issued, little has changed in the respective parties' positions that would strengthen Plaintiffs' bid for an interlocutory appeal. 3M's original tender offer closed at midnight on October 7, 2010 and a majority (52%) of outstanding shares were tendered. While it is true that 3M made available a "subsequent offering period"—a possibility explicitly provided for in the Merger Agreement[10]—nothing has been done to disadvantage the position of non-tendering stockholders.

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[7] Donald J. Wolfe, Jr. & Michael A. Pittenger, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 14-4(b) (2000).

[8] *See* Op. at 34 ("Accordingly, I find that Plaintiffs have not shown that they are likely to succeed on the merits of their claims based on the Top-Up Option.").

[9] *Id*. at 49.

[10] Merger Agreement § 1.1(a)(iii).

The purpose of the subsequent offering period is relatively benign and is consistent with promoting the rights of stockholders because it provides them with multiple options in a non-coercive manner. First, stockholders were given the option either to tender their shares in the original tender offer period or oppose the transaction by not tendering. Second, now that 3M controls a majority of the Company's shares—making a merger between the companies a *fait accompli*[11]—non-tendering stockholders again are being given the option to tender their shares for the same consideration paid to stockholders who tendered in the original tender offer. In view of the futility of opposing the merger, this follow-on offering period gives stockholders the option of receiving their consideration immediately rather than waiting until the end of a potentially drawn-out merger process. Third, stockholders still have the option of refusing to tender their shares and pursuing their appraisal rights, regardless of whether 3M effects the transaction via a long-form merger or, if it acquires 90% of shares outstanding, by a short-form merger.

As Plaintiffs emphasize, 3M now may exercise the Top-Up Option at its discretion. Exercising the option, however, will not enable 3M to effect a short-form

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[11] *See NECA-IBEW v. Prima Energy Corp.*, C.A. No. 522-N, Tr. at 8 (Del. Ch. June 30, 2004) ("Why [is the offerors' exercise of a top-up option] emasculating [of minority stockholders' voting rights], if instead [the offerors] took down the 88% and put the merger to a vote, they had been entitled to vote their 88 percent and they would all vote in favor of the merger and that would be the end of it."). Defendants acknowledged at oral argument that 3M has a contractual obligation to carry out a long-form merger even if they are unable to acquire the 90% of the outstanding Cogent shares necessary to effect a short-form merger. Tr. at 66, 83.

merger (*i.e.*, to acquire a 90% ownership interest) unless it succeeds in acquiring, approximately, an additional 23% of shares outstanding. In the original tender offer, apart from the shares affiliated with Defendants, 3M acquired only 13% of the outstanding shares. Thus, at this point, 3M would have to acquire, in effect, a majority (approximately 59%) of the minority shares that were outstanding when the original tender offer commenced to clear the way for a short-form merger. The Top-Up Option, therefore, presents little risk of any undue stockholder coercion. Accordingly, I again find that Plaintiffs have failed to show that they are likely to succeed in proving that the Top-Up Option is unreasonable or that its exercise would cause them irreparable harm.

B. Requirements of Rule 42(b)(i)-(v)

In addition to the legal right and substantial issue requirements, Plaintiffs also must show that they meet at least one of the factors in Supreme Court Rule 42(b)(i)-(v), which incorporates the factors listed in Rule 41(b). The only Rule 41(b) factors that Plaintiffs allege to be relevant are (i) and (ii), which concern original questions of law and unsettled questions. In addition, Plaintiffs claim that certifying their Application would satisfy Rule 42(b)(v), which allows for certification if interlocutory review may terminate the litigation or would "serve considerations of justice."

I find these arguments unpersuasive for two primary reasons. First, the Opinion did not definitively determine the question of the Top-Up Option's validity. Second, because 3M already has obtained a majority of Cogent's shares in the tender offer, making the completion of the merger a certainty, the interests of justice would be better

served by addressing the issue on a full record, rather than in a preliminary injunction context.[12]

Plaintiffs claim that the Opinion decides an original question of law concerning the validity of top-up options. Plaintiffs essentially argue that top-up options raise an original question because, to date, no Delaware court explicitly has validated their use. There is nothing new, however, about the analytical approach to be used in analyzing such arguably defensive deal protections: *Revlon* clearly states that the test is one of reasonableness.[13] Hence, while I have not reached a final conclusion about whether the challenged Top-Up Option is valid, I have ample guidance to support my preliminary conclusion that Plaintiffs are unlikely to show the Board to have acted unreasonably.

Plaintiffs also claim that the validity of the Top-Up Option presents unsettled questions in terms of the requirements of DGCL §§ 152, 153, 157 and 262(b). But, Plaintiffs overstate the gravity of my ruling on their motion for a preliminary injunction. Rather than making any definitive decision as to the applicability and construction of the statutes with regard to top-up options, the Opinion merely applied the plain meaning of the statutes as support for the conclusion that Plaintiffs are unlikely to succeed on the merits. Moreover, because no other Delaware court has applied these statutes in a

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[12] This same logic provides ample support for rejecting Plaintiffs' Rule 42(b)(v) contention that the interests of justice would be served by authorizing an interlocutory appeal as to the challenged Top-Up Option.

[13] *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 180 (Del. 1986).

contrary manner, Plaintiffs' claim does not present an unsettled question that requires resolution by the Supreme Court.

III. Conclusion

For the foregoing reasons, I deny Plaintiffs' Application to certify the Opinion for interlocutory appeal.

IT IS SO ORDERED.

Sincerely,

/s/Donald F. Parsons, Jr.

Donald F. Parsons, Jr.
Vice Chancellor