IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ELLIOT WOLFSON, Plaintiff, v. SUPERMARKETS GENERAL HOLDINGS CORPORATION, SMG-II HOLDINGS CORPORATION, AHOLD ACQUISITION, INC., MATTHIAS BOWMAN, JOHN W. BOYLE, JAMES J. BURKE, JR., JAMES DONALD, U. PETER C. GUMMESON, STEPHEN M. McLEAN, ROBERT G. MILLER, ROBERT J. MYLOD, JERRY G. RUBENSTEIN, JAMES B. UPCHURCH, and STEVEN L. VOLLA, Defendants.	)	C.A. No. 17047

MEMORANDUM OPINION

Date Submitted: September 28, ~~1999~~ 2000
Date Decided: January 23, 2001

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JACOBS, VICE CHANCELLOR

Pending is a motion to enforce the settlement of this shareholder class action challenging the fairness of a merger. After this lawsuit was filed, the plaintiff, as the representative of a class of preferred shareholders, entered into a settlement agreement with the constituent corporations. The settlement reallocated the merger consideration between the preferred and common shareholders, to increase by two dollars ($2) per share the consideration payable to the preferred shareholders. After the settlement agreement was approved by the Court, the acquiror terminated the merger by exercising a "walk away" right under a provision of the underlying merger agreement. Thereafter, the plaintiff moved for specific enforcement of the settlement agreement, seeking an order directing the acquiring corporation to consummate the "first step" tender offer. That motion, if granted, would result in the preferred stockholders receiving the additional $2 per share. The core issue presented is whether the settlement agreement requires the consummation of the tender offer. I conclude that it does not, and that therefore the motion must be denied.

I. FACTS

On March 23, 1999, the plaintiff, a preferred shareholder of Supermarkets General Holdings Corporation ("SMG"), filed this class action challenging the allocation, as between the two classes of SMG shareholders

of the consideration proposed to be paid in a tender offer. The tender offer was the first step of a two-step transaction, and was to be followed by a merger between (on the one hand) Ahold Acquisition, Inc. and its parent company, Koninklijke Ahold N.V. ("Ahold"), and (on the other hand) SMG's parent company, SMG-II Holdings Corporation ("SMG II"). The challenged transactions had been authorized by an Agreement and Plan of Merger (the "Merger Agreement") under which Ahold would commence a tender offer to purchase the outstanding stock of SMG. Whatever stock was not tendered would be acquired in the second-step merger.

This action was brought against SMG, SMG II and Ahold. The complaint alleges that the per share tender offer price was the result of an unfair allocation, made by the SMG II board of directors, of the merger consideration as between SMG's preferred stockholders and SMG's sole common stockholder. Ahold, which was a nominal party to the action, was accused of aiding and abetting the directors' alleged breach of fiduciary duty by "permitting" SMG II to determine the allocation of consideration between the two classes of SMG shareholders.

Three months later, on June 9, 1999, the parties entered a Stipulation and Agreement of Compromise, Settlement and Release (the "Settlement Agreement"), under which the merger consideration would be reallocated by

revising the tender offer price made payable to the preferred. In the revised tender offer, the SMG preferred shareholders would receive $2 per share more, and SMG's sole common shareholder (SMG II) would receive $2 per share less, than the original tender offer price. That was the only revision made to the tender offer accomplished by the Settlement -Agreement. After notice and a hearing, this Court approved the settlement on July 22, 1999.

Ahold then commenced the tender offer contemplated by the Settlement and Merger Agreements. Unfortunately, however, Ahold was unable to gain United States Federal Trade Commission ("FTC") approval of the merger. As a result and for that reason, Ahold exercised a "walk away" right under Section 8.1 (c) of the Merger Agreement, on December 16, 1999, and thereby terminated both the tender offer and the contemplated second step merger.' One of the "covenants" the existence of which triggered the termination provisions, was Section 5.8(b) of the Merger Agreement, which required the parties to use their "best efforts" to gain regulatory approval of the merger. Contending that Ahold had violated the covenant to use its "best efforts" to gain regulatory approval of the

'Section 8.1(c) provided that either party may terminate the transaction "if the Closing shall not have occurred by December 15, 1999 unless the Closing shall not have occurred because of a material breach of any. .. covenant. .. on the part of the party seeking to terminate" the Merger Agreement. In addition, ¶14(l) of the tender offer allowed for termination of the tender offer if "the SMG II Merger Agreement shall have been terminated in accordance with its terms."

transaction, and thus had not validly terminated the tender offer, the plaintiff filed the pending Motion to Enforce the Settlement on Behalf of the Class on January 5, 2000.[2] That same claim—that Ahold did not use its "best efforts" to gain FTC approval—is the subject of pending litigation in a New York court between Ahold and SMG II concerning the validity of Ahold's termination of the Merger Agreement (the "New York action").

II. THE CONTENTIONS

The plaintiff claims that it is entitled to an Order requiring Ahold (i) to purchase the SMG preferred shares that had been tendered into the revised tender offer under the Settlement Agreement, and also (ii) to pay plaintiffs' counsel fees that the Court had awarded in connection with the settlement. The plaintiff advances five alternative arguments in support of its motion.

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[2] This decision was delayed by one year for the following reasons: at the oral argument on the motion, the Court requested that the parties file supplemental briefs on the issue of whether the settlement enlarged the obligations that existed before the settlement to close the tender offer. (Oral Arg't Tr. at 76.) After the supplemental briefing was completed, but before the Court could decide the matter, SMG II and SMG filed for Federal bankruptcy protection on July 12, 2000. All parties agreed that, in light of the bankruptcy filing, the Court should take the matter off its calendar. On September 7, 2000 a plan of reorganization was approved by the Bankruptcy Court and became effective on September 19, 2000. As part of the plan, SMG and SMG II merged with and into their former subsidiary, Pathmark Stores, Inc. which emerged from bankruptcy as the surviving public company. Only then did the parties request this Court to decide the pending motion to enforce the Settlement Agreement.

First, the plaintiff claims that Ahold breached the express terms of the Settlement Agreement by refusing to consummate the tender offer. Second, the plaintiff claims that Ahold's refusal to consummate the tender offer violated the implied terms of the Settlement Agreement. Third, the plaintiff argues that Ahold breached the Settlement Agreement because by terminating the tender offer, Ahold violated the termination provisions of the Merger Agreement which had been incorporated by reference into the Settlement Agreement. Fourth, the plaintiff claims that the revised tender offer and the SMG shareholders' tendering of their shares into that offer created an independent contract; and that by terminating the offer, Ahold breached the express provisions of that revised "tender offer contract." Finally, the plaintiff contends that Ahold breached implied obligations of the revised tender offer contract by terminating the offer in bad faith.

Ahold responds that the Settlement Agreement did not contain any provisions expressly and unconditionally requiring it to consummate the tender offer, and that no such obligation can be implied as a part of the covenant of good faith and fair dealing. Nor, Ahold argues, were the termination provisions of the Merger Agreement and the tender offer incorporated by reference into the Settlement Agreement. Finally, Ahold contends that even if a duty to consummate the tender offer could be implied

into the Merger Agreement, that contractual claim is currently being litigated in New York, and cannot be entertained in this proceeding.

I turn to these contentions.

III. ANALYSIS

A. The Claim that Ahold Breached the Settlement Agreement

1. The "Breach of-Exnress-Terms" Argument

The plaintiff argues that by failing to consummate the revised tender offer, Ahold breached the express terms of the Settlement Agreement. In support, the plaintiff contends that the Court must read the Settlement Agreement as a whole to determine the contracting parties' intent,[3] which was that the revised tender offer must in all events be consummated. The argument runs as follows: the term "Class period" in the Settlement Agreement is defined as continuing "through and including the consummation of the Transaction." This definition suggests that the parties must have intended for Ahold to make and then consummate the revised tender offer. Otherwise, if all the parties intended was that Ahold be required to make (but not consummate) the revised tender offer, the Class period would have been defined to conclude by a date earlier than "the consummation." Therefore, plaintiff urges, it must be concluded that the

[3] See Kaiser Aluminum Corp. v. Matheson, Del. Supr., 68 1 A.2d 392,395 (1996).

intent of the parties was to obligate Ahold to commence, and then consummate, the revised tender offer.

Ahold responds that the Settlement Agreement nowhere expressly requires that the revised tender offer be consummated unconditionally. An argument based on the "Class period" definition, Ahold insists, cannot override the critical, operative and express terms of the Settlement Agreement. Under those express terms, Ahold's sole relevant obligation was to revise the tender offer by reallocating the merger consideration in favor of the preferred shareholders. Ahold maintains that it makes no sense to argue that the parties intended to obligate Ahold unconditionally to close the tender offer, yet rather than draft a provision that clearly and straightforwardly expressed that intent, the parties instead chose to express their intent obliquely, by defining the "Class period" to extend through "the consummation" of the transaction. In short, Ahold argues, "[a]n obligation undertaken by one of the parties that is intended as a promise or agreement should be expressed as such, and not left to implication."[4]

Ahold's argument, in my view, is meritorious. Under Delaware law, where a contract is clear on its face, the court must apply the meaning a

[4] Schmidt v. Magnetic Head Corporation, 97 A.D.2d 151, 157,468 N.Y.S.2d 649, 654 (N.Y. App. Div. 1983).

reasonable third party would ascribe to the contract language.' The plaintiffs proffered construction is not reasonable because if the parties truly intended to obligate Ahold unconditionally to consummate the tender offer, they could have expressed that intent in clear, explicit language in the relevant substantive provision of the Settlement Agreement, rather than relying obliquely on the definition of "Class period." That the parties did not draft such an explicit provision leads to the reasonable-and opposite— conclusion that they did not intend to require Ahold unconditionally to consummate the tender offer.

That conclusion is the only sensible one for another reason: the tender offer was but one step of a larger merger transaction that was governed by the Merger Agreement. Under that Agreement, Ahold was not unconditionally required to close the transaction, because the contracting parties expressly provided for several conditions under which the merger could be lawfully terminated. After the FTC declined to approve the merger, Ahold took the position that one of those conditions had occurred, and it terminated the merger on that basis. It is not reasonable to conclude that Ahold negotiated conditions that permitted it to terminate the merger,

[5] True North Communications, Inc. v. Publicis, S.A., Del. Ch., 7 11 A.2d 34, aff'd, Del. Supr., 705 A.2d 244 (1997).

yet at the same time and in the same document agreed to bind itself unconditionally to close the tender offer-a predicate transaction that without the merger would not have been commenced. It is even less reasonable to argue that the Settlement Agreement, which nowhere explicitly so provides, must be read to compel that result.

2. The "Breach-of-Imnlied-Dutv" Argument

The plaintiff next argues, in the alternative, that Ahold breached the implied covenant of good faith and fair dealing in the Settlement Agreement. The breach is said to consist of Ahold terminating the revised tender offer in bad faith, by purporting to rely upon a condition that was created by its own wrongdoing.

Ahold responds, first, that the obligation upon which the plaintiff relies cannot be implied because none is expressed; and second, that if any implied obligation exists, its source would in the Merger Agreement, which is separate and apart from the Settlement Agreement. Lastly, the claim that the termination of the tender offer violated the Merger Agreement is currently being litigated in the New York action.

I find no basis in the Settlement Agreement to imply that Ahold was unconditionally obligated to consummate the tender offer. To imply such an obligation, the Court must find that it was "clear from what was expressly

agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith-had they thought to negotiate with respect to that matter."[6] Here, the parties agreed that Ahold would revise its tender offer solely to reallocate the merger consideration to benefit the preferred shareholder class, in return for the plaintiffs release of its claims against the defendants. Had the plaintiff sought to inject into the Settlement Agreement a term that would require Ahold to consummate the tender offer unconditionally, it strains credulity to argue that Ahold would have acceded to it. The plaintiff makes no convincing argument that Ahold would have.

To say it differently, under the Merger Agreement Ahold had conditional rights to terminate the entire transaction. Should it become necessary to exercise those rights, the first step of that transaction-the tender offer-would no longer have any economic utility for Ahold. Therefore, the parties to the Merger Agreement contemplated that the tender offer would close only if they could be assured that the merger to which the tender offer was inextricably linked could go forward. To imply an

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[6] Cincinnati SMSA Ltd. Partnershin v. Cincinnati Bell Cellular Sys. Co., Del. Supr., 708 A.2d 989,992 (1998); see also Moore Business Forms, Inc. v. Cordant Holdings Corn., Del. Ch., C.A. No. 13911, Jacobs, V.C., Mem. Op. at 17 (November 2, 1995) ("by parity of reasoning, 'courts will not readily imply a contractual obligation where the contract expressly addresses the subject of the alleged wrong,' yet does not provide for the obligation that is claimed to arise by implication.).

unconditional duty to consummate the tender offer under the rubric of the duty of good faith and fair dealing would defeat-not further-the contracting parties' intent.

B. The Claim that the Merger Agreement was Incorporated Into the Settlement Agreement By Reference.

The plaintiff next argues that even if the Settlement Agreement, standing alone, contained no express or implied requirement that the tender offer must close, Ahold nonetheless breached that Agreement, because: (i) Ahold violated the termination provisions of the Merger Agreement and (ii) those Merger Agreement provisions had been incorporated by reference into the Settlement Agreement. This incorporation-by-reference occurred, plaintiff contends, because the preferred shareholder class was a party to both the tender offer provisions and the Settlement Agreement, and because those two contracts were so interrelated that a breach of the tender offer would necessarily constitute a breach of the Settlement Agreement as well.

Ahold responds that as a matter of law, neither the Merger Agreement nor its tender offer termination provisions were incorporated by reference into the Settlement Agreement. Moreover, even if they were, the predicate issue-whether Ahold violated the tender offer termination provisions of the Merger Agreement-is being litigated in the New York action and cannot be litigated in this Court.

I agree, and conclude that the termination provisions of the Merger Agreement were not incorporated by reference into the Settlement Agreement. That latter Agreement contains no express language that clearly effects such an incorporation. A mere reference in one agreement to another agreement, without more, does not incorporate the latter agreement into the former by reference. To incorporate one document into another, an explicit manifestation of intent is required.[7] Here there is no such manifestation. The Settlement Agreement is narrowly tailored to require only that Ahold reallocate the merger consideration by increasing the consideration flowing to the preferred shareholders. Although the Settlement Agreement does make references to the Merger Agreement and to the tender offer, it does not incorporate the Merger Agreement into itself.

But, even if the Merger Agreement's termination provisions were incorporated by reference into the Settlement Agreement, the plaintiffs motion to Enforce the Settlement Agreement would not be granted, because the issue presented would be whether Ahold properly exercised its right to

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[7] Realty Growth Investors v. Council of Unit Owners, Del. Supr., 453 A.2d 450 (1982) ("a contract can be created by reference to the terms of another instrument if a reading of all documents together gives evidence of the parties' intention and the other terms are clearly identified"); Paulev Petroleum, Inc. v. Continental Oil Co., Del. Ch., 23 1 A.2d 450 (1967), aff'd, Del. Supr., 239 A.2d 629 (1968) (earlier agreement not incorporated by reference where terms of later agreement did not show an intent to so incorporate the earlier agreement).

terminate the Merger Agreement. Because that issue is being litigated in the New York action, the parties to this lawsuit would have to await the outcome of the New York action in all events, to ascertain whether any legal basis remains to proceed with the pending motion.

C. **The Claim that the Revised Tender Offer "Contract" Terms Were Breached**

1. The "Breach-of-Exnress-Dutv" Argument

Penultimately, the plaintiff argues that by refusing to consummate the transaction, Ahold breached the express terms of a separate contract that arose as a result of the revised tender offer. The argument runs as follows: the revised tender offer created a separate, independent contract between SMG's shareholders and Ahold, which came into effect when the shareholders "accepted" the offer by tendering their shares. Once that contract arose, absent a condition that permitted Ahold to terminate the tender offer, Ahold's failure to consummate operated as a breach.

Ahold responds that even if that argument were valid, no relief can flow from it, because only one agreement-the Settlement Agreement-is the subject of, and can be enforced, in this lawsuit. Because the plaintiffs theory is predicated on a contract that is unrelated to and distinct from the Settlement Agreement, that claim is not cognizable in this proceeding.

That argument is valid. The plaintiff has moved to enforce the Settlement Agreement. A claim that Ahold breached a separate contract is irrelevant to that motion. Moreover, the plaintiff cannot be permitted to sue for a breach of contract (the tender offer) using the vehicle of a motion to enforce the Settlement Agreement, because as part of that settlement, a final judgment was entered in this action. In those circumstances, the only cognizable claim the Court can entertain is a claim to enforce that judgment.* Because the plaintiff has not shown that the Settlement Agreement that embodies the terms of the judgment unconditionally required Ahold to consummate the tender offer, the motion must fail.

2. The Breach-of-Imnlied-Dutv Argument

The plaintiffs final argument is that even if Ahold was technically permitted to terminate the tender offer, the implied covenant of good faith and fair dealing prevented that termination in this case, because Ahold's reason for the termination was self-created. That is, the plaintiff contends that Ahold, by not using its "best efforts" to gain regulatory approval of the merger, intentionally and in bad faith created a situation that would enable it to claim that it had validly terminated the tender offer.

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[8] John Hancock Mutual Life Ins. Co. v. Olick, 151 F.3d 132, 135 (3d Cir. 1998) (a final judgment "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment").

The infirmity in the argument is (to repeat) that the issue of whether Ahold did or did not act in bad faith in terminating the transaction, is the subject of the New York action. No principled basis has been shown for this Court entertaining a controversy that another court of competent jurisdiction has already undertaken to decide. For that reason as well, this Court declines to entertain this motion.

IV. CONCLUSION

For the reasons set forth above, the motion to enforce the Settlement Agreement to require Ahold to consummate the revised tender offer is denied.[9] IT IS SO ORDERED.

[9] Because no controversy remains to be decided in this action, the Court does not reach the argument that it should stay these proceedings pending the outcome of the New York action.