IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RICHARD ERICKSON, Plaintiff, v. CENTENNIAL BEAUREGARD CELLULAR LLC, Defendant.	)	Civil Action No. 19974

MEMORANDUM OPINION

Date Submitted: March 26, 2003
Date Decided: April 11,2003

Ronald A. Brown, Jr., of PRICKETT, JONES & ELLIOTT, P.A., Wilmington, Delaware, Attorney for Plaintiff.

Raymond J. DiCamillo and Becky A. Hartshorn, of RICHARDS, LAYTON & FINGER, Wilrnington, Delaware; OF . COUNSEL: Zachary D. Rosenbaum and Deborah A. Silodor, of LOWENSTEIN SANDLER PC, Roseland, New Jersey, Attorneys for Defendant.

CHANDLER, Chancellor

Plaintiff Richard Erickson challenges the information provided to the stockholders of Alexandria Cellular License Corporation ("ACLC") in the company's short-form merger with and into Alexandria Corporation ("Alexandria"). His putative class action complaint, filed nearly three years after the close of this merger, alleges several non-disclosures, mainly related to the valuation materials provided in connection with the merger. Currently, three related motions are pending before the Court: 1) plaintiffs motion to certify the class; 2) plaintiffs motion for partial summary judgment; and 3) defendant's motion to dismiss the entire action. I previously stayed discovery in this matter until I decided the potentially case-dispositive motions.

I. FACTUAL BACKGROUND[1]

Erickson instituted this putative class action lawsuit alleging that Centennial[2] violated its duty of disclosure in connection with ACLC's short-form merger with and into Alexandria nearly three years ago. The fourteen ACLC minority stockholders were sent notice of this short-form merger in November 1999. The notice advised them that Alexandria intended to complete a short-form merger under § 253 of the Delaware General

[1] All facts are taken from plaintiff's complaint and the materials necessarily incorporated by reference in the complaint.

[2] Centennial Beauregard Cellular LLC ("Centennial") is the successor by merger of Alexandria, the former controlling stockholder of ACLC.

Corporation Law. The notice further informed the stockholders that they could elect to receive $1,650 cash per share for their shares or seek statutory appraisal in accordance with 8 *Del. C.* § *262.*

To support the $1,650 price per share, a one-and-a-half page document entitled "Valuation of Alexandria Cellular License Corp." (the "Valuation") was included. The Valuation contained little more than a brief description of the enclosed "Recent Transaction Analysis" and "Discounted Cash Flow Analysis" and two charts. One chart listed recent transactions completed by other cellular companies, their transaction values, and their "Multiple of Trailing 12 MO. EBITDA." The second chart listed ACLC's calculated current value based on the net present value of the company's future anticipated cash flows.

Both of these valuation methodologies were calculated by relying upon the one piece of financial data provided that was specific to ACLC—its calculated 1999 EBITDA. This figure, however, was for an unspecified period of time. Although the number purported to represent 1999 fmancials, the figure was provided to stockholders in October of 1999—*before* the year had ended. Additionally, the documents did not provide any financial statement. Nor did they contain any description of ACLC's business, even though ACLC was a private company with little publicly available information.

After receiving these disclosure materials, Erickson tendered his ACLC shares in November of 1999, and received almost $80,000 in cash. At the same time Erickson tendered his shares, he indicated his displeasure over the cash out merger by writing a letter to Alexandria's Vice President of Corporate Development. Erickson stated in his letter that he was tendering his shares "in protest without prejudice to my full legal rights in this matter."[3]

Erickson's threatened protest did not surface again until nearly three years later, in October 2002, when he filed a complaint against Centennial. Erickson alleges that Centennial, as successor to Alexandria, breached its duty of disclosure by providing little or no substantive information in connection with the merger. Specifically, Erickson contends that he and ACLC's other minority stockholders should have received, at a minimum: 1) ACLC's current and historical financial statements; 2) a description of the business and prospects of ACLC; 3) the population of the region covered by ACLC's license; and 4) other miscellaneous data related to the Valuation of ACLC.

[3] Wolk Aff., Ex. C.

Erickson later filed motions to certify the class. and for partial summary judgment as to paragraphs 5(c), (d), and (e) of his complaint. These three paragraphs of the complaint allege that defendant breached its fiduciary duty of disclosure. Defendant responded with a motion to dismiss the suit for failure to state a claim upon which relief can be granted. This memorandum opinion resolves all three pending motions.

II. ANALYSIS

A. Standardfor Summary Judgment and a Motion to Dismiss

Plaintiff has moved for partial summary judgment. The legal standard for summary judgment is well-settled. Court of Chancery Rule 56 provides that summary judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[4] When considering a motion for summary judgment, this Court must view the facts in a light most favorable to the non-moving party, and the moving party has the burden of demonstrating that no material issue of fact exists.’ Once the moving party meets this burden, the non-moving party may submit admissible evidence sufficient to establish that a material question of fact exists.[6]

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[4] CT. CH. R. 56.
[5] ***Tanzer v. Int 'l General Indus., Inc., 402*** A.2d 382,385 (Del. 1979).
[6] ***Id.***

In addition, defendant has moved to dismiss the entire complaint, pursuant to Rule 12(b)(6), alleging that plaintiff failed to state a claim upon which relief can be granted.[7] The complaint should be dismissed if plaintiff would not be entitled to relief under any set of facts that could be proven to support the claim, even when accepting all well-pleaded allegations as true and drawing all reasonable inferences in plaintiffs favor.[8] The Court may exclude allegations that are conclusory and lack factual support.[9] In sum, a court will dismiss a claim only when the plaintiff fails to plead facts supporting an element of the claim, or when the facts pled could not support a claim for relief under any reasonable interpretation of those facts.[10]

B. Certification of the Class

As a preliminary matter, class certification is denied. With only fourteen potential plaintiffs, the class fails to satisfy the numerosity requirement. Rule 23(a)(1) provides that "one or more members of the class may sue or be sued as representative parties on behalf of all only if (1) the class is so *numerous* that joinder of all members is *impracticable.. ..*"[11] *The*

[7] To the extent that defendant relies upon facts that are not contained strictly within the pleadings, or incorporated by reference in the pleadings, the Court will apply a summary judgment standard.
[8] ***Loudon v. Archer-Daniels-Midland Co., 700*** A.2d 135, 140 (Del. 1997).
[9] ***In re The Wait Disney Co. Derivative Litig.,*** 731 A.2d 342,353 (Del. Ch. 1998).
[10] ***Delaware State Troopers Lodge v. 0 'Rourke, 403*** A.2d 1109, 1110 (Del. Ch. 1979).
[11] CT. CH. R. 23(a)(l) (emphasis added).

putative class representative bears the burden of demonstrating that the class is so numerous that joinder is impracticable. Erickson cannot meet that burden in the circumstances presented here.

A prospective class size of fourteen members is simply too small to fulfill Rule 23(a)(1)'s numerosity requirement. Many other jurisdictions have held that class sizes of fewer than twenty-five members are generally not permitted unless there are special circumstances in favor of certifying the class.[12]

Erickson failed to demonstrate that there are special circumstances in this case that would justify certification of a class of fourteen plaintiffs. Although he contends that the thirteen other potential class members are too dispersed to be joined in this matter, dispersion is merely one factor for this Court to weigh when the class size is questionable.[13] Indeed, geographic dispersion is often not enough to certify a class size that is otherwise inadequate.[14] Other factors courts have examined in the past when

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[12] *See, e.g., State Security Ins. Co. Inc. v. Frank B. Hall & Co., Inc.*, 95 F.R.D. 496, 498 (N.D. Ill. 1982) (finding that a class size between twenty eight and forty is "at best" in the lower reaches of Rule 23 permissibility); *CL-Alexanders Laing & Cruickshank v. Goldfeld*, 127 F.R.D. 454, 455 (S.D.N.Y. 1989) (holding twenty-five prospective class members insufficient to meet munerosity requirement).

[13] *Ansari v. New York Univ.*, 179 F.R.D. 112, 115-16 (S.D.N.Y. 1998).

[14] *Id.* at 116 (denying class certification because geographic dispersion of small class of thirty-five plaintiffs was mitigated by the ease of identification and ability to contact these potential members).

determining whether special circumstances mitigate in favor of certifying a small class include: 1) the potential risk of multiple actions if the class is not certified; 2) the ease of identifying and locating potential members; 3) whether the size of the claims is so small that it would inhibit class members from pursuing their own claims; and 4) whether prospective relief is sought that might benefit future class members."[15] Here, all of these factors weigh against class certification.

First, there has been no indication that a risk of multiple lawsuits exists. Not one of the other thirteen former stockholders of ACLC have shown the slightest interest in pursuing this particular action in the three years since the merger. Further, there is no indication that they were ever interested in filing suit in any other jurisdiction during the statute of limitations period-a period that likely has now run in, most, if not all, other jurisdictions since the merger closed more than three years ago. Certification may be desirable even when there is no indication that other stockholders will file suit, due to a case's ***res judicata*** effect on the other stockholders?[16] I also recognize, however, that, under the facts of this case, there is very little risk of prejudicing any of the other stockholders since they

[15] **Id. at 114-15.**
[16] ***Wacht v. Continental Hosts, Ltd.*** **1994 WL 525222, at *10 (Del. Ch.).**

have remained silent for nearly three years following the ‘merger. During this time period, no stockholder filed an action purporting to represent the other stockholders until this lawsuit. Therefore, the other thirteen potential plaintiffs had no reason to believe that their interests were represented in any suit during this extensive period of time. Yet, all of them failed to bring suits challenging the short-form merger. [17]

Second, the other thirteen minority stockholders are readily identifiable. In fact, defendant provided Erickson with a list of the other stockholders' names and addresses. Nevertheless, he has not shown why it would have been impracticable to contact them, nor demonstrated that any attempt was ever made to contact them.

Third, even though there is scant evidence of the size of the claims, the fact that stockholders received $1650 per share at the time of the merger makes it unlikely that the claims are so small as to inhibit a stockholder from pursuing a claim. A reasonably large amount was at stake, even if a stockholder's share ownership was modest. Erickson received almost $80,000 for his stock. There is no evidence to suggest that the other minority stockholders owned so few shares as to make pursuing a quasi-

[17] *Cf.*, id. (finding that although no other stockholders expressed interest in the class action during its nine-year pendency, the stockholders could nevertheless still be certified as a class because these stockholders may have been aware of the action and believed that it was brought on their behalf and that they had no need for an individual suit).

appraisal action economically unfeasible. Fourth, no prospective relief is sought in this action. Instead, Erickson seeks a quasi-appraisal remedy three years after the close of the merger. This relief does not benefit future class members and, therefore, does not support class certification.

In some instances, such a small class has been certified. In those cases, however, the defendants failed to challenge the numerosity requirement.[18] Further, these classes were certified in the context of settlement approvals. In settlement approvals, the Court's principal (though not its only) task is to ensure that the class representative is not conflicted and that the class is not being "sold out" by its representatives wishing to obtain a quick fee.[19] That is not the situation here.

I conclude that plaintiff has not adequately established special circumstances justifying certification of a class consisting of only fourteen individuals for four reasons. First, he is apparently the only individual interested in asserting this belated claim. Second, he easily could have

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[18] For example, Erickson relies upon several cases that certified similar-sized classes in the context of settlement approvals, where the numerosity requirement went undisputed. ***See, e.g., Mayfield v. Western Wireless Corp.,*** Del. Ch., C.A. No. 18717, Strine, V.C. (Oct. 21, 2002) (Bench Ruling); ***Mayfield v. WWC License Holding LLC,*** Del. Ch., CA. No. 18743, Strine, V.C. (Oct. 21, 2002) (Bench Ruling); ***Erickson v. Amcell of Vineland Holdings, Inc.,*** Del. Ch., C.A. No. 19099, Jacobs, V.C. (Oct. 2, 2002); ***Erickson v. SBMS Cellular Telecommunications Central Illinois, Inc.,*** Del, Ch., C.A. No. 18856, Jacobs, V.C. (June 27, 2002).

[19] ***Prezant v. De Angelis,*** 636 A.2d 915,922 (Del. 1994).

communicated with the thirteen other minority stockholders. Third, the claims are potentially large enough that economically rational individuals could be expected to pursue them. And, finally, no prospective relief is sought.

C. The Standardfor Disclosure in a Short-Form Merger

Erickson alleges that, as a matter of law, Centennial breached its duty of disclosure by providing little or no substantive information in connection with the merger. Defendant counters that, as a matter of law, Erickson failed to allege sufficiently that Centennial breached its duty of disclosure in connection with the merger. Defendant contends that each non-disclosed item alleged was irnmaterial to the transaction.

The short-form merger context is special in that $253 of the Delaware General Corporation Law specifically authorizes a summary procedure that does not anticipate fair dealing. Short-form mergers are a unilateral act by a parent company to summarily extinguish the minority shareholdings of its 90% (or greater) owned subsidiary. Because this process is designed to be a summary one, Delaware courts do not entertain entire fairness claims or allegations of unfair dealing in relation to short-form mergers.[20] In fact,

[20] *Glassman v. Unocal Exploration Corp., 777* A.2d 242, 247-48 (Del. 2001). For example, issues frequently raised in entire fairness claims relating to unfair dealing cannot be litigated in an appraisal, including the timing or negotiation of a merger. Id.

shareholders do not vote upon such a merger, negotiation 'does not occur, and advance notice is not **required.**[21]

Assuming no fraud or illegality, the only decision a minority shareholder is asked to make in a short-form merger is whether to accept the merger consideration or to seek a statutory **appraisal.**[22] Yet, for the shareholders to make this decision, corporate fiduciaries must fully disclose all material information related to the merger. The Delaware Supreme Court has made it clear that the fiduciary duty of disclosure applies in a short-form merger, even though there is no necessity for entire fairness. In *Glassman v. Unocal Exploration Corp.,* Justice Berger explained that:

> Although fiduciaries are not required to establish entire fairness in a short-form merger, the duty of full disclosure remains, in the context of this request for stockholder action. Where the only choice for the minority stockholders is whether to accept the merger consideration or seek appraisal, they must be given all the factual information that is material to that **decision.**[23]

Thus, all information material to the decision whether to accept the merger consideration or to seek an appraisal must be disclosed, even in a short-form merger. Indeed, in such a context, stockholders may have an even greater

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[21] *Id.* at 247.
[22] *Id.* at 248 ("Thus, we again return to ***Stauffer*****,** and hold that, absent **fraud** or illegality, appraisal is the exclusive remedy available to a minority stockholder who objects to a short-form merger."); ***Stauffer*** *v. Standard Brands, Inc.,* 187 **A.2d** 78 (Del. 1962).
[23] *Glassman,* 777 **A.2d** at 248 (affirming Court of Chancery findings regarding disclosure claims) (citations omitted).

need for full disclosure precisely because elements of procedural fairness are missing. As recognized by this Court repeatedly, a forced seller with the exclusive options of accepting an offered price or seeking a higher price through an appraisal remedy is "if anything, . . . a more compelling case for the application of the recognized disclosure standards.“”

The standard for materiality in Delaware is the same as that delineated by the United States Supreme Court in *TSC Industries, Inc. v. Northway, Inc.*[25] Under this test,

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote . . . . It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.[26]

[24] *Wacht v. Continental Hosts. Ltd., 1986* WL *4492,* at *2 (Del. Ch.); see *also In re Radiology Assoc., Inc. Litig.,* 1990 *WL 67839,* at *10-1 1 (Del. Ch.); *Sealy Mattress Co. of New Jersey, Inc. v. Sealy, Inc., 532* A.2d 1324, 1338 (Del. Ch. 1987).
[25] 426 U.S. 438 (1976).
[26] *Rosenblatt v. Getty Oil Co., 493* A.2d *929,944 (Del.* 1985) (quoting *TSC Indus., Inc.,* 426 U.S. at 449 (citations omitted).

The materiality standard was further explained in *Skeen v. Jo-Ann Stores, Inc.*[27] There, the Delaware Supreme Court considered the materiality of disclosure violations alleged by minority stockholders in a related situation-a cash out merger approved by a majority stockholder. In that circumstance, the Court held that a parent corporation does not need to provide all of the information necessary for a stockholder to reach an *independent determination* of fair value,[28] noting that "[o]mitted facts are not material simply because they might be ***helpful***."[29] Since the plaintiffs in *Skeen* did not allege that any of the undisclosed information was *inconsistent with*, or *significantly **different** from*, the disclosed information, the Court upheld the Court of Chancery's earlier decision granting a motion to dismiss the claim.[30]

D. Materiality of the Alleged Disclosure Violations

In this case, Erickson has moved for partial summary judgment only as to paragraphs 5(a) and 5(b) of his complaint, which allege that the defendant breached its fiduciary duty of disclosure. Specifically, Erickson asserts that defendant breached this duty as a matter of law by failing to provide any of the following information to the ACLC minority stockholders

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27 *750* A.2d 1170, 1172-74 (Del. 2000).
28 *Id.* at 1174 (emphasis added).
29 ***Id.*** (emphasis added).
30 *Id.* (emphasis added).

about ACLC: 1) its current and historical financial statements; and 2) a description of its business and prospects. Erickson contends that he is entitled to partial summary judgment because this information was material to his decision whether to accept the short-form merger consideration or to seek an appraisal. Other information omitted by defendants (but not subject to the motion for partial summary judgment) includes: 1) the population of the region covered by its license; and 2) background data related to the Valuation.

Defendant denies that any of this information was material because: 1) it was not inconsistent with the Valuation materials presented to the minority shareholders; and 2) the level of detail requested by Erickson is not required to be disclosed in the context of a short-form merger. Thus, defendant asserts that all of these allegations fail to state a claim upon which relief can be granted.

For reasons set forth more fully below, I deny defendant's motion to dismiss. It is incredible, in my opinion, for defendant to assert that it satisfied its disclosure duty as to the value of the ACLC shares by providing plaintiff with nothing more than a one-and-a-half page "Valuation" based entirely upon the calculation of a single multiple lacking any supporting data. As will become clear in a moment, Erickson's motion for partial summary judgment has substantial merit. Nevertheless, I deny plaintiff's motion in light of defendant's assertion of a laches defense.[31] Since defenses based on laches or acquiescence require a more fully developed factual record, I must allow discovery on those issues before ruling.

1. Current and Historical Financial Statements

First, Erickson insists that he was entitled to at least three to five years of ACLC's financial statements. Defendant contends that this information is immaterial and that this portion of the complaint should be dismissed.

Defendant asserts that financial statements are not material to a plaintiffs decision whether to accept merger consideration or to seek a statutory appraisal in a short-form merger. It argues that a similar allegation was considered and rejected in *Skeen*[32] and should also be rejected here.

[31] During oral argument, counsel for defendant stated that he intends to-assert a laches defense when he files an auswer to the complaint. Erickson's counsel offered little in the way of au explanation for Erickson's almost three-year delay in bringing this lawsuit, instead insisting that it was filed within the three-year statute of limitations. Erickson must have understood the inadequacy of the valuation materials when he received them, as implied by his acceptance of the merger consideration "without prejudice" to his legal rights to challenge the merger. Nevertheless, for some unknown reason, he waited nearly three years, after accepting the $1,650 per share merger price (almost $80 thousand for Erickson), to challenge the adequacy of certain merger documents. Erickson thus seeks a quasi-appraisal remedy in a case where he could have demanded appraisal. By statute, however, Erickson would have been required to demand appraisal within two weeks of receipt of the merger notice. Mere delay in bringing a lawsuit, however, is not the only element of a laches defense. Defendant must also demonstrate prejudice to it based upon its reliance *on* Erickson's inaction. *See Brittingham v. Baker,* Del. Ch., C.A. No. 2056-S at 3-4, Chandler, C. (Feb. 21, 2003).

[32] *750* A.2d at 1170.

Defendant, however, has misread *Skeen.* In that case, the Delaware Supreme Court determined that a more current financial statement was not required in the disclosure materials. There, the company had already disclosed its audited and unaudited financial statements through January 3 1, 1998, for a merger that was completed on April 2 1, 1998—less than three months later. Here, in contrast, defendant did not include *any* financial statements or any comparable information for review or analysis by its minority stockholders. Therefore, ACLC shareholders were not provided with any basic financial material upon which they could make an informed judgement about ACLC's value. Furthermore, ACLC was not a public company, which means the stockholders had no objective market data upon which to measure the fairness of the proposed merger consideration.

In fact, the *only* item of financial information provided to ACLC stockholders specific to ACLC was the company's calculation of its earnings before interest, taxes, depreciation and amortization (EBITDA) over an unspecified period of time. Although defendant asserts that its disclosure was sufficient because it provided two generally accepted methods of valuation to the stockholders-a Recent Transaction Analysis and a Discounted Cash Flow Analysis—*both* methods were based upon this single EBITDA calculation. Importantly, no information was provided related to

ACLC's revenue streams, levels of working capital, or any other financial information that would permit a stockholder to perform even the most basic financial ratio analysis. Defendant's disclosures related to the Valuation analysis were so sparse that the disclosure of the company's recent or historical financial statements would surely have altered the total mix of information in a significant manner. Accordingly, Erickson has sufficiently stated facts that could entitle him to relief in this portion of his complaint. For this reason, I deny defendant's motion to dismiss related to this matter.

2. Description of ACLC's Business and Prospects

Second, Erickson alleges that defendant breached its disclosure duty by failing to disclose any information about ACLC's business, operations, plans and prospects. Defendant contends this information was immaterial to the valuation of ACLC. Alternatively, even if it were material, defendant asserts that the discounted cash flow analysis provided to the minority shareholders logically included projections of cash flow for the succeeding five years and cash flow growth rates.

This Court, in *Sealy Mattress Co. v. Sealy Inc.*,[33] held that challenged disclosure materials were insufficient in part because they contained no discussion of the corporation's future prospects, business plans, or projected

[33] 532 A.2d at 1339-40.

revenues or income. Although *Sealy* was decided under the analytical standard of entire fairness,[34] a concept irrelevant in the short-form merger context, some indication of business revenue projections is still necessary for shareholders to determine whether they are receiving a fair price for their shares. In keeping with this principle, a court making an independent determination of the company's value in an appraisal proceeding must consider information about the future business prospects of a company. This is because stockholders are entitled to be paid for their proportionate interest in the company as a going concern, rather than its liquidation value.[35]

Defendant asserts that even if this information was material, management's view of the company's prospects were necessarily disclosed in the discounted cash flow analysis provided to the shareholders. Because the analysis logically included management projections of cash flow for the

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[34] *Id.* at 1333.

[35] "The basic concept of value under the appraisal statute is that the stockholder is entitled to be paid for that which has been taken from him, viz., his proportionate interest in a going concern. By value of the stockholder's proportionate interest in the corporate enterprise is meant the true or intrinsic value of his stock that has been taken by the merger. In determining what figure represents this true or intrinsic value, the appraiser and the courts must take into consideration all factors and elements which reasonably might enter into the fixing of value. Thus, market value, asset value, dividends, earning prospects, ***the*** nature of ***the*** enterprise and ***any other facts*** which were known or which could be ascertained as of the date of merger and ***which throw any light on future prospects of the merged corporation*** are not only pertinent to an inquiry as to the value of the dissenting stockholders' interest, but must be considered by the agency fixing the value." ***Tri-Continental Corp. v. Battye,*** 74 A.2d 71, 72 (Del. 1950) (emphasis added). ***Accord Universal City Studios, Inc. v. Francis I. DuPont & Co.,*** 334 A.2d 216,218 (Del. 1975).

succeeding five years and cash flow growth rates, defendant argues, plaintiff was apprised of future projections. I cannot fully agree with this argument. The information provided may have given plaintiff an inkling of management's vision of the company's future if he were able to decipher the cash flow analysis without assistance. But, stockholders should not have to perform sophisticated financial calculations, derived from cash flow analyses provided without any underlying information, in order to figure out management's view of the company's future business. The meager information provided in this case was so devoid of substantive current and future data that it cannot realistically be said to have encompassed management's view of the future of the company. I conclude, therefore, that Erickson has sufficiently alleged that this omitted information could have been material to his decision and that such information would have altered the total mix of information available to him.

Erickson's additional concerns regarding the disclosure of ACLC's business and operations are legitimate as well. ACLC was a private company. The shareholders did not have access to the same level of information generally afforded to shareholders of public companies. ACLC stockholders had no way of knowing what the company's operations were and, as a result, may not have even had a rudimentary understanding of

ACLC's products or services. This information was readily available to defendant and could have been provided to minority stockholders.[36] Plaintiffs allegations concerning ACLC's non-disclosure of ACLC's business and future prospects state a claim upon which relief can be granted. Defendant's motion to dismiss them from the complaint is denied.

3. Population of Area Covered bv ACLC's License

Third, Erickson alleges that ACLC should have disclosed the population of the region covered by ACLC's cellular license because population base is a generally accepted way to determine the value of a cellular license. Defendant moved to dismiss this portion of the complaint, contending that this information was unnecessary as well as publicly available. Erickson did not move for partial summary judgment on this portion of his complaint, but argues that there are triable issues of fact that, if proven, would entitle him to relief.

Although minority shareholders in a short-form merger are not entitled to every conceivable methodology to value their shares, Erickson has alleged that this particular methodology, known as the "per-pop" valuation, is the industry standard for valuing cellular license businesses. He

[36] **I also note that plaintiff's repeated written requests for information about the company** *before* **the short-form merger were ignored.**

did not allege that ACLC should have provided the actual per-pop valuation-he simply asserted that ACLC had a duty to provide its shareholders with the population of the area covered by the cellular license. Armed with this information, shareholders could make their own calculation of the.per-pop value and determine whether they were receiving a fair price for their shares.

Defendant does not argue that a per-pop valuation is *not* the industry standard. Instead, it asserts that this information was not material because two other valuation methods were already provided to the stockholders. I conclude, however, that the complaint adequately alleges that this data would have altered the total mix of information, since it functions as perhaps the leading metric for cellular license businesses.

Defendant also argues that this information was publicly available and, therefore, ACLC did not have a duty to disclose it. In fact, this information was contained within a public document for another company, Centennial Cellular Corporation. ACLC stockholders, however, were not directed to this document and likely had no reason to know the information was available. Further, if the company possessed this information and had already "publicly" disseminated it, one must wonder why the company would not disseminate the same information to its own stockholders in a short-form merger, when the information was clearly in its possession.

In my opinion, Erickson has established that there exist genuine issues of material fact pertaining to the materiality of this information if the alleged facts are taken as true. At a minimum, a more fully developed record is required in order to assess the importance and relative availability of information that, arguably, is industry-sensitive.

4. Valuation Data

Erickson points to several other items missing from the valuation information presented to ACLC stockholders. Erickson, however, has not moved for summary judgment as to this paragraph of the complaint. Defendant insists this information is immaterial and moves to dismiss the claims based on this paragraph from the complaint.

I conclude that the valuation analysis presented to the ACLC stockholders was so bereft of actual information that, while *all* of the requested information may not have been required, defendants had a duty to provide at least *some* further indication of the company's value to its stockholders. A single number (EBITDA) purporting to encompass the value of ACLC that was not supported with any financial information whatsoever is simply not sufficient, as a matter of law. Further explanation of this number, including the derivation of revenues, allocation of expenses, basis for selecting the EBITDA multiple, and so on, could have been material to the stockholders of ACLC. Erickson has adequately stated a claim in this paragraph of his complaint. I deny defendant's motion to dismiss this portion of the complaint.

III. CONCLUSION

For the reasons set forth above, Erickson's motion to certify a class is denied. Erickson's motion for partial summary judgment is denied until a more complete record on the laches defense is developed. Defendant's motion to dismiss is denied.

IT IS SO ORDERED.