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Re: *In re HCA Inc. S'holders Litig.*
Civil Action No. 2307-N

Dear Counsel:

On October 26, 2006, in a letter opinion (the "Opinion"), I denied plaintiffs' motion to expedite this proceeding and granted a stay in favor of a parallel Tennessee Action[1] due to considerations of comity and the necessities of judicial economy. Plaintiffs request reargument pursuant to Court of Chancery Rule 59(f) on two bases: an inadvertent factual error in the Opinion and a legal issue affecting the timing of the filing of plaintiffs' motion. For the reasons set forth below, after careful consideration of all arguments, I deny plaintiffs' motion to reargue.

[1] *In re HCA, Inc. S'holder Litig.*, No. 06-1816-III, slip op. (Tenn. Ch. Oct. 26, 2006).

In the interest of justice, this Court may use its discretion to either grant or deny reargument under Rule 59(f). Relief under this rule requires the moving party to show that "the court has misapprehended a material fact or rule of law."[2] That is, plaintiffs must demonstrate that "I have either overlooked a decision or principle of law that would have a controlling effect on my decision [to stay the case], or demonstrate that I misapprehended the law or facts in such a way that affected the outcome of the decision."[3] Plaintiffs fail to meet this burden on both bases for reargument.

First, the inadvertent factual error upon which plaintiffs rely is not material and does not have a controlling affect on my analysis or decision. Plaintiffs correctly state that the Delaware class action was filed on July 28, 2006, instead of on October 17, 2006, as is stated in the Opinion. Although plaintiffs arguably filed the Tennessee and Delaware actions concurrently, the Tennessee action procedurally is far more advanced. By October 23, 2006, when plaintiffs filed their motion to expedite the Delaware action, discovery in the Tennessee Action was well underway, and more than one million pages of documents had been produced. Only two hours after oral arguments regarding plaintiffs' motion to expedite in the Delaware action, Chancellor Lyle had entered an order setting forth the full schedule for the Tennessee action.[4] Further, in the days since the issuance of the Opinion, the 59(f) filing, and the five day response period allowed to the non-moving party by rule, twelve witnesses have been deposed in Tennessee and a hearing on plaintiffs' motion for preliminary injunction in the Tennessee Chancery Court is set to occur on November 13, 2006. Thus, comity and the necessities of judicial economy still require me to stay the action in favor of the Tennessee action in order to avoid the "wasteful duplication of time, effort, and expense that occurs when judges, lawyers, parties, and witnesses are simultaneously engaged in adjudication of the same cause of action in two courts."[5]

Additionally, plaintiffs fail to demonstrate that this Court misapprehended any legal requirement that affects the outcome of the decision. Plaintiffs insist that recent critical treatment of disclosure claims premised on preliminary proxy statements under Delaware law affected the timing of their filing. That is,

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[2] *Miles, Inc. v. Cookson Am., Inc.*, 677 A.2d 505 (Del. Ch. 1995).
[3] *Lane v. Cancer Treatment Ctr. of Am., Inc.*, 2000 WL 364208, at *1 (Del. Ch. Mar. 16, 2000).
[4] *In re HCA, Inc. S'holder Litig.*, No. 06-1816-III, slip op. (Tenn. Ch. Oct. 26, 2006).
[5] *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng'g Co.*, 263 A.2d 281, 283 (Del. 1970).

plaintiffs contend they could not have filed any earlier because decisions by members of this Court have made it clear that filing claims based on preliminary proxy statements is not permissible in Delaware. This argument fails for two reasons. First, it simply rehashes arguments that I heard and considered before issuing the Opinion on October 26, 2006.[6] Second, plaintiffs acted under a complete misunderstanding of Delaware law.

Nothing in Delaware jurisprudence supports plaintiffs' contention that this Court is critical of disclosure claims based on preliminary proxy statements. In fact, "this court prefers that stockholder plaintiffs bring disclosure claims promptly, particularly in situations where the plaintiffs have access to preliminary proxy materials from the Securities and Exchange Commission in advance of the company's final materials."[7] That is, "the optimal time to bring a disclosure claim in connection with a proposed merger, or in a like context where the company requests shareholder action or approval, is *before* the stockholder vote is taken and the deal closes."[8] At that time "the court is best able to provide a full and adequate remedy to the class of stockholders if the likelihood of a material disclosure is shown—namely, requiring the company to correct its false or misleading disclosures."[9]

Plaintiffs attempt to support their misunderstanding of Delaware law by pointing to two Court of Chancery cases. Reliance on both, however, is misplaced. First, *Rosan v. Chicago Milwaukee Corp.*, addressed attorneys' fees.[10] Specifically, plaintiff Rosan moved to amend his complaint wherein he challenged the defendant's plan to convert itself from a closed-end to an open-end investment company. The defendant had completed a preliminary draft of a proxy statement but, before the conversion was completed, defendant modified its plan in a manner that mooted plaintiff's claim. Plaintiff, however, alleged that the amended complaint, for which leave to file had never actually been granted by the Court, prompted the defendant to modify the conversion plan resulting in a benefit to the defendant and its shareholders and entitling plaintiff to attorneys' fees.[11] *Rosan*, a

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[6] *Gentile v. Singlepoint Fin., Inc.*, 2001 WL 167728, at *1 (Del. Ch. Feb. 9, 2001) ("A motion that is 'a mere rehash of arguments already made' will fail.").
[7] *Turner v. Bernstein*, 776 A.2d 530, 549 (Del. Ch. 2000) (Strine, V.C.).
[8] *In re SunGard Data Sys., Inc. S'holder Litig.*, 2005 Del. Ch. LEXIS 105, at *5 (July 8, 2005) (Lamb, V.C.) (emphasis added).
[9] *Id.*
[10] *Rosan v. Chicago Milwaukee Corp.*, C.A. No. 10526, slip op. (Del. Ch. Jan. 10, 2004).
[11] *Id.*

case addressing whether a mooted claim provided a basis to award attorneys' fees, is simply not applicable in situations where a company requests shareholder approval of a transaction and there are *actual* disclosure claims. Second, the transcript in *In re Cardiac Science, Inc. Shareholders Litigation*, reveals that it is a scheduling conference, and Vice Chancellor Strine made no rulings on any substantive issues of law.[12] Thus, plaintiffs cannot contend they relied upon it for the proposition that Delaware courts will dismiss as unripe disclosure claims based on preliminary proxies. The cases cited earlier in this letter completely contradict such an argument.

Notwithstanding plaintiffs' faulty disclosure argument, I am confused as to why plaintiffs present this argument at all. While there is no question that plaintiffs misinterpreted Delaware law relating to the proper time to file disclosure claims, this analysis should not have been an issue for plaintiffs because plaintiffs' complaint also sets forth numerous substantive fairness issues related to the merger agreement. Where a merger agreement has been entered into, the alleged wrong, *i.e.*, the unfair terms, process, etc., has occurred. Plaintiffs may attack a merger agreement when it is entered and need not wait on a definitive proxy under Delaware law. The only time this Court has limited plaintiffs' use of a preliminary proxy to attack a merger agreement is when no agreement actually exists. That is, this Court may treat a claim as prematurely filed where it purports to challenge a transaction that is still fluid and subject to negotiations, as in cases where a proposed going private transaction is being considered by a special committee.[13] If there is no agreement, there is nothing to challenge. The facts here, however, do not present such a situation. Thus, I remain puzzled as to why plaintiffs persist in assuming that this Court would turn away a plaintiff who alleges unfairness in a merger agreement.

Plaintiffs also contend that this Court misinterpreted the effect that the treatment of preliminary proxies under federal law might have on plaintiffs' decision to delay filing. This Court, however, did not misinterpret the argument. The argument was not raised in the filings or in the October 26, 2006 oral arguments. It is a tad presumptuous, in my opinion, to critique the Court for not

[12] *In re Cardiac Sci., Inc. S'holder Litig.*, C.A. No 1138-N, slip op. (Del. Ch. May 23, 2005).
[13] *In re Cox Commc'n S'holder Litig.*, 879 A.2d 604 (Del. Ch. 2005).

considering an argument that was never made to it. In any event, plaintiffs are precluded from raising it now.[14]

I find nothing in plaintiffs' motion for reargument that leads me to believe that the Opinion rests on a material mistake of fact or a misapprehension of Delaware law. For these reasons, plaintiffs' motion for reargument is denied.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

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[14] *Lane*, 2000 WL 364208, at *2 ("Rule 59(f) bars the introduction of new issues on a motion for reargument.").