IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE CHECKFREE CORPORATION SHAREHOLDERS LITIGATION	)))	Consolidated Civil Action No. 3193-CC

MEMORANDUM OPINION

Date Submitted: October 18, 2007
Date Decided: November 1, 2007

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CHANDLER, Chancellor

Before me is plaintiffs' motion for preliminary relief enjoining a proposed merger between CheckFree Corporation and Fiserv, Inc. on account of alleged deficiencies in CheckFree's definitive proxy statement soliciting votes in favor of the merger. Because I have already determined that plaintiffs have failed to meet their burden to demonstrate the necessity of extraordinary relief, the motion is denied.[1]

I. FACTUAL AND PROCEDURAL BACKGROUND

CheckFree Corporation has had a busy year planning its future.[2] The company has made three strategic acquisitions of its own and began in the spring to consider the prospect of being acquired itself. The company retained Goldman Sachs to serve as its financial advisor, and Goldman in turn began to contact potential acquirers in June. Several parties expressed some interest, CheckFree rejected two specific indications of interest as inadequate, and the company also continued to consider its non-sale options. In mid-June, a derivative action was filed in federal court in Georgia against certain of Checkfree's officers and directors alleging insider trading.

[1] The Court heard oral argument on this motion on October 18, 2007 via teleconference and issued its decision immediately thereafter in a brief letter sent the same day. *See In re CheckFree Corp. S'holders Litig.*, C.A. No. 3193-CC (Del. Ch. Oct. 18, 2007). On October 23, 2007, CheckFree filed a Current Report (Form 8-K) with the SEC announcing that its stockholders had earlier that day approved the merger that was the subject of this dispute. Today's Opinion provides the explanation promised in the Court's earlier correspondence.

[2] The facts are generally not disputed and are taken from the parties' pleadings.

In late July, Fiserv submitted a firm indication of interest at a share price of $48, which was higher than any other offer. The CheckFree board met several times to consider the offer and considered the Goldman fairness opinion and legal advice from counsel. Ultimately, the board unanimously approved the merger agreement on August 2, 2007. The parties agree that this merger will likely have the effect of extinguishing the derivative claims against the company's officers and directors.

On August 22, 2007, CheckFree made available its preliminary proxy statement, and on September 19, 2007, it released its definitive proxy statement. The definitive proxy gives a two-page background of the merger, a seven-page summary of the Goldman fairness opinion, and a brief citation to the derivative suit pending in Georgia. It is this proxy statement and these portions in particular that plaintiffs challenge. Plaintiffs initiated this action by filing complaints on August 30, 2007 and October 1, 2007. The actions were consolidated by this Court's October 10, 2007 Order and, on the same day, the Court set an abbreviated briefing schedule for the plaintiffs' motion for a preliminary injunction. Briefing was complete on October 17, 2007, and the Court heard oral argument and issued its ruling the next day.

II. ANALYSIS

A. Standards for Issuing Preliminary Injunctions

A preliminary injunction is an extraordinary remedy.[3] Preliminary injunctions are called "extraordinary" because they require something more than the ordinary proof of one's claim. To earn the extraordinary remedy of a preliminary injunction, plaintiffs must persuade the court on four separate factors: (1) likelihood of *irreparable harm* to the plaintiffs in the absence of an injunction; (2) the *likelihood of plaintiffs' success* on the merits of the underlying claim; (3) a *balance of the harms* plaintiffs would suffer in the absence of an injunction against the harms defendant would suffer by the issuance of the injunction; and (4) the *public interest*.[4]

B. Standards Applied to Plaintiffs' Claims

Plaintiffs have alleged that CheckFree's definitive proxy fails to satisfy disclosure obligations in three ways: (1) the proxy does not disclose

[3] *Cirrus Holding Co. v. Cirrus Indus.*, 794 A.2d 1191, 1201 (Del. Ch. 2001).

[4] *See In re RJR Nabisco S'holders Litig.*, C.A. No. 10389, 1989 WL 7036, at *12 (Del. Ch. Jan. 30, 1989) ("The factors themselves are not controversial. They include first, a preliminary determination that a reasonable likelihood exists that plaintiffs will be able to prove their claims at trial. Secondly, plaintiffs must show that they are threatened with irreparable injury before final relief may be afforded to them. Should the court determine that both of these elements appear, it is necessary to consider what sort of injury, if any, may be visited upon defendants by the improvident granting of the remedy, how great that injury might be in relation to the injury with which plaintiffs are faced, and whether a bond may offer adequate protection against that risk or whether it might be avoided by the shaping of relief. Lastly, the court must be alert to the legitimate interests of the public or innocent third parties whose property rights or other legitimate interests might be affected by the issuance of the remedy. All of this, of course, is perfectly well settled.").

management's projections for the company and the Goldman fairness opinion relied on those projections; (2) the proxy does not disclose the nature or effect of the merger on the derivative action pending in Georgia; and (3) the proxy gives insufficient detail on the background of the merger.

Generally, directors have a duty to disclose all material information in their possession to shareholders when seeking shareholder approval for some corporate action.[5] This "duty of disclosure" is not a separate and distinct fiduciary duty, but it clearly does impose requirements on a corporation's board. Those requirements, however, are not boundless. Rather, directors need only disclose information that is material, and information is material only "if there is a substantial likelihood that a reasonable stockholder would consider it important in deciding how to vote."[6] It is not sufficient that information might prove helpful;[7] to be material, it must "significantly alter[] the total mix of information made available."[8] The burden of demonstrating a disclosure violation and of establishing the materiality of requested information lies with the plaintiffs.[9]

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[5] *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1172 (Del. 2000); *Arnold v. Soc'y for Savings Bancorp., Inc.*, 650 A.2d 1270, 1277 (Del. 1994).

[6] *Louden v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 142 (Del. 1997).

[7] *Skeen*, 750 A.2d at 1174 ("Omitted facts are not material simply because they might be helpful.").

[8] *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 199 (Del. Ch. 2007) (quoting *Zirn v. VLI Corp.*, 621 A.2d 773, 778–79 (Del. 1993)); *accord TSC Indus., Inc. v. Northway, Inc.*, 436 U.S. 438, 449 (1976).

[9] *In re Gen. Motors (Hughes) S'holder Litig.*, C.A. No. 20269, 2005 WL 1089021, at *13 (Del. Ch. May 4, 2005), *aff'd*, 897 A.2d 162 (Del. 2006).

1. Management's Raw Projections

Plaintiffs have alleged that the CheckFree board breached its duty to disclose by not including management's financial projections in the company's definitive proxy statement. They argue that the proxy otherwise indicates that management prepared certain financial projections, that these projections were shared with Fiserv, and that Goldman utilized these projections when analyzing the fairness of the merger price. Plaintiffs rely heavily on this Court's recent decision in *In re Netsmart Technologies, Inc. Shareholders Litigation*[10] and on the Court's appraisal jurisprudence for the proposition that CheckFree is required to disclose all of the data underlying the fairness opinion.

Plaintiffs' reliance is misplaced. As this Court has previously noted, "[a] disclosure that does not include all financial data needed to make an independent determination of fair value is not . . . *per se* misleading or omitting a material fact. The fact that the financial advisors may have considered certain non-disclosed information does not alter this analysis."[11] Moreover, the Supreme Court in *Skeen* rejected an argument similar to the one plaintiffs make here. Although agreeing that "a stockholder deciding whether to seek appraisal should be given financial information about the company that will be material to the decision," plaintiffs

[10] 924 A.2d 171 (Del. Ch. 2007).

[11] *In re Gen. Motors (Hughes) S'holder Litig.*, C.A. No. 20269, 2005 WL 1089021, at *16 (Del. Ch. May 4, 2005), *aff'd*, 897 A.2d 162 (Del. 2006).

must explain why receiving information in addition to the basic financial data already disclosed will significantly alter the total mix of information available.[12] The *In re Pure Resources* Court established the proper frame of analysis for disclosure of financial data in this situation: "[S]tockholders are entitled to a fair summary of the substantive work performed by the investment bankers upon whose advice the recommendations of their board as to how to vote on a merger or tender rely."[13]

Here, the definitive proxy statement contains an adequate and fair summary of the work Goldman did to come to its fairness opinion. Over the course of seven pages, the proxy statement details the various sources upon which Goldman relied in coming to its conclusions, explains some of the assumptions and calculations management made to come to its estimates, notes exactly the comparable transactions and companies Goldman used, and describes or otherwise discloses management's estimated earnings and estimated EBITDA for 2007 and 2008 and a range of earnings derived from management estimates for 2009.[14] The proxy statement also explains that, in tandem with conveying its estimates, management discussed the particular risks it foresaw that might undercut those estimates. While there is no "checklist" of the sorts of things that must be disclosed relating to an

[12] *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000).
[13] *In re Pure Resources, Inc. S'holders Litig.*, 808 A.2d 421 (Del. Ch. 2002).
[14] The actual fairness opinion itself is also attached to the definitive proxy statement as an exhibit.

investment bank fairness opinion, I conclude that the disclosure in this case satisfies the *Pure Resources* standard.

Netsmart[15] does not alter this analysis. There, the proxy at issue did not include a fair summary of all the valuation methods the investment bank used to reach its fairness opinion.[16] Although the *Netsmart* Court did indeed require additional disclosure of certain management projections used to generate the discounted cash flow analysis conducted by the investment bank, the proxy in that case affirmatively disclosed an early version of *some* of management's projections.[17] Because management must give materially complete information "[o]nce a board broaches a topic in its disclosures," the Court held that further disclosure was required.[18] Here, while a clever shareholder might be able to recalculate limited portions of management's projections by toying with some of the figures included in the proxy's charts, the proxy never purports to disclose these projections and in fact explicitly warns that Goldman had to interview members of senior management to ascertain the risks that threatened the accuracy of those projections. One must reasonably infer, therefore, that the projections given to Goldman did not take those risks into account on their own. These raw,

[15] 924 A.2d 171 (Del. Ch. 2007).
[16] *Id.* at 203.
[17] *Id.* at 201–02.
[18] *Id.* at 203.

admittedly incomplete projections are not material and may, in fact, be misleading.[19]

Because plaintiffs have failed to establish that management's projections constitute material omitted information, they have failed to demonstrate a likelihood of success on the merits of their claim and, therefore, I deny their motion for a preliminary injunction on this ground.

2. The Federal Derivative Action

Next, plaintiffs argue that the proxy omits material facts about the effects the proposed merger will have on a pending derivative suit in the Federal District Court for the Northern District of Georgia.[20] Plaintiffs believe that the proxy is deficient in its disclosure of this matter for two reasons: (1) the proxy does not state that the merger will likely extinguish the derivative claims; and (2) the proxy does not disclose that by extinguishing the claims, one of the CheckFree directors would apparently be free from potential liability (in that action) for insider trading. Defendants contend that those disclosures are unnecessary because they have no duty to provide legal advice to shareholders in a proxy statement.

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[19] *See In re PNB Holding Co. S'holders Litig.*, C.A. No. 28-N, 2006 WL 2403999, at *16 (Del. Ch. Aug. 18, 2006) ("Even in the cash-out merger context, though, it is not our law that every extant estimate of a company's future results, however stale or however prepared, is material. Rather, because of their essentially predictive nature, our law has refused to deem projections material unless the circumstances of their preparation support the conclusion that they are reliable enough to aid the stockholders in making an informed judgment.").

[20] *Borroni v. Kight*, No. 1:07-CV-1382-TWT (N.D. Ga. 2007).

Plaintiffs have demonstrated at best a very slim likelihood of success on this claim, and the balance of harms and public interest analyses strongly militate against the imposition of an injunction on this ground. To show success on the merits of this disclosure claim, plaintiffs would need to show that telling shareholders the merger might extinguish the derivative action and telling them that one of the directors could be thereby relieved of liability would have a significant likelihood of altering the total mix of information available. First, directors need not tell shareholders that a merger will extinguish pending derivative claims.[21] Second, only one director here may have an ulterior motive for approving the transaction. The directors, however, unanimously recommended approval of this merger. Shareholders might find these facts helpful in some abstract sense, but it is unlikely they alter the total mix of information available. Plaintiffs' likelihood of success on the disclosure claim, therefore, is far from strong.

A balance of the harms and a consideration of the public interest also lead me to deny the preliminary injunction. The theoretical harm to plaintiffs here is not particularly substantial. The federal court in Georgia has indicated that the claims in that action are weak and has denied plaintiffs' motion for a preliminary

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[21] *Kahn v. Caporella*, C.A. No. 13248, 1994 WL 89016, at *7 (Del. Ch. Mar. 10, 1994) ("[T]here is no obligation to supply investors with legal advice.").

injunction.[22] Moreover, while the derivative action would be extinguished, the merger would not extinguish a class action claim also currently pending in Georgia that likewise seeks disgorgement of funds obtained by insider trading. Significant harm would flow, however, from the imposition of the injunction. Enjoining this $4.4 billion merger would impose significant costs on the shareholders of CheckFree in the form of the lost time value of money and lost opportunity costs.[23] Moreover, the public interest requires an especially strong showing where a plaintiff seeks to enjoin a premium transaction in the absence of a competing bid.[24] Plaintiffs have not met this burden and I, therefore, decline to impose a preliminary injunction on this ground.

3. <u>Background of the Merger</u>

Plaintiffs' final claim is their weakest. Plaintiffs argue that the proxy statement's description of the merger's background lacks sufficient detail. In support of this contention, however, plaintiffs only note that the background section spans less than two full pages. This Court, however, does not evaluate the adequacy of disclosure by counting words. Plaintiffs cannot simply allege that the

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[22] *See Borroni*, No. 1:07-CV-1382-TWT (N.D. Ga. Oct. 18, 2007) (ORDER).

[23] *See Tsivelekidis v. On-Line Software Int'l, Inc.*, C.A. No. 12268, 1991 Del. Ch. LEXIS 138, at *3-5 (Del. Ch. Sept. 20, 1991).

[24] *See Abrons v. Marée*, 911 A.2d 805, 810–11 (Del. Ch. 2006) ("This court is particularly reticent when faced with a plaintiff seeking to enjoin a transaction that affords stockholders a premium in the absence of a competing offer. The plaintiff must make a particularly strong showing on the merits to enjoin a premium transaction without a competing offer because of the risk of significant injury to the stockholders." (footnote omitted)).

background section is lacking; they must explain *what* is lacking. Plaintiffs have manifestly failed to demonstrate any likelihood of success on the merits of this claim and I, therefore, deny the motion for a preliminary injunction on this ground.

III. CONCLUSION

On a motion for a preliminary injunction to block a merger due to insufficient disclosures in a company's proxy statement, plaintiffs bear the burden of satisfying this Court's four-factor test. Plaintiffs have failed to do so on each of their claims here. Therefore, I deny their motion for a preliminary injunction.

IT IS SO ORDERED.