IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

MICHAEL D. LESH M.D., individually and as authorized representative for certain former shareholders and option holders of Appriva Medical, Inc.,	)	
Plaintiff,	)	C.A. No. 05C-05-218
v.	)	
APPRIVA MEDICAL, INC., *et al.,*	)	
Defendants.	)	

Date Submitted: March 29, 2006
Date Decided: June 15, 2006

UPON CONSIDERATION OF DEFENDANTS' MOTION TO DISMISS
GRANTED.

OPINION AND ORDER

Jeffrey S. Goddess, Esquire, Rosenthal, Monhait, Gross & Goddess, P.A., Wilmington, Delaware; Of Counsel: Kirk B. Hulett, Stephanie L. Dieringer, and Bridget Fogarty Gramme, Esquires, of Hulett Harper Stewart LLP, San Diego, California; Robert A. Goodin and Francine T. Radford, Esquires, of Goodin, MacBride, Squeri, Ritchie & Day, LLP, San Francisco, California; Attorneys for Plaintiff.

Daniel V. Folt and Matt Neiderman, Esquires, of Duane Morris LLP, Wilmington, Delaware; Of Counsel: Matthew A. Taylor, James L. Beausoleil, Jr., and Seth A. Goldberg, Esquires, of Duane Morris LLP, Philadelphia, Pennsylvania; Jeffrey J. Bouslog, Esquire, Oppenheimer Wolff & Donnelly LLP, Minneapolis, MN; Attorneys for Defendants.

SCOTT, J.

I. INTRODUCTION

Defendants have jointly filed a Motion to Dismiss, seeking dismissal of all counts of Plaintiff's Complaint for failure to state a claim upon which relief can be granted and for lack of standing. Because the Court finds that the Plaintiff falls short of carrying his burden demonstrating that he has standing to sue either as a shareholder representative or in his individual capacity, Defendants' Motion to Dismiss is hereby **GRANTED**.

II. FACTS

In the 1990s, Appriva Medical, Inc. ("Appriva") developed a device for preventing strokes, known as PLAATO.[1] As of 2002, Appriva had conducted clinical trials of PLAATO in the United States and in Europe. As a result of the European trials, PLAATO was approved for commercialization in Europe. The next step in the FDA regulatory process in the United States was the filing of a supplemental application to the Investigative Device Exemption requesting the FDA to allow a study of both the safety and efficacy of PLAATO. "IDE Clinical Approval," as defined in the Merger Agreement meant authorization under FDA regulations to commence enrollment in a Phase III clinical study designed to support Pre-Market Approval.

[1] Percutaneous Left Atrial Appendage Transcatheter Occlusion.

On July 15, 2002, Appriva, Microvena, and Appriva Acquisitions Corp., entered into an Agreement and Plan of Merger ("Merger Agreement"). Pursuant to the Merger Agreement, Appriva Acquisition Corp., a California corporation and wholly owned subsidiary of Microvena, merged with and into Appriva, with Appriva being the "Surviving Corporation." Microvena agreed to pay the Appriva shareholders two hundred and twenty five million dollars ($225,000,000.00) in cash for their shares. The payment was structured so that the Appriva shareholders would receive an initial payment of fifty million dollars ($50,000,000.00), with the remaining consideration to be paid as Appriva achieved certain Milestones. Specifically, the schedule for future payments was as follows:

1) Milestone #1: Appriva would pay fifty million dollars ($50,000,000.00) upon the FDA's IDE Clinical Approval and achievement of certain "Acceptable Clinical Outcomes."
2) Milestone #2: Appriva would pay twenty five million dollars ($25,000,000.00) upon the International Registry Completion.
3) Milestone #3: Appriva would pay fifty million dollars ($50,000,000.00) upon the submission to the FDA of an application for Pre-Market Approval which would be made at the completion of a Phase III clinical trial.
4) Milestone #4: Appriva would pay fifty million dollars ($50,000,000.00) when the FDA granted Pre-Market Approval for commercial distribution of PLAATO.

Microvena/ev3, the Warburg Defendants, and the Vertical Defendants, guaranteed

the obligations of Appriva to make the Milestone payments. The parties also agreed on deadlines for achieving the Milestones. Specifically, the parties agreed to an outside date of January 1, 2005, after which the "Surviving Corporation" would no longer be obligated to make a payment to the shareholders for the achievement of Milestone #1.

Plaintiff Michael D. Lesh ("Lesh") formerly held stock in Appriva and was appointed as the attorney-in-fact and agent to represent all other persons that held and sold stock and options in Appriva prior to the consummation of the merger. On May 20, 2005, Lesh filed an eight-count Complaint individually and as an authorized representative for certain former shareholders and option holders of Appriva. He concedes that the Defendants did make the initial merger payment of fifty million dollars ($50,000,000.00), but have since failed to take reasonable steps to achieve Milestone #1. Lesh contends that the Acceptable Clinical Outcome criteria for Milestone #1 have been met and that with a reasonable amount of diligence and good faith effort the Defendants could have filed an application for IDE Clinical Approval before the January 2005 deadline. However, the Plaintiff alleges that the Defendants intentionally and willfully, failed to take the required steps to complete Milestone #1, and claimed, intentionally and willfully, that Acceptable Clinical Outcomes had

not been achieved, for the purpose and with the intent to avoid paying the first Milestone payment. Furthermore, without IDE Clinical Approval, Lesh alleges that Milestones #3 and #4 cannot be achieved because they depend on the Phase III clinical trial.

With respect to Milestone #2, the Plaintiff alleges that the Defendants have achieved International Registry Completion. He asserts that as of February 1, 2005, an estimated 333 patients, outside of the United States, have been treated with PLAATO therapy. Nonetheless, the Defendants have violated the Merger Agreement by refusing to make the Milestone #2 payment.

Lesh also alleges that the Defendants made material misrepresentations of fact and omitted material facts in order to induce the shareholders to enter into the Merger transaction and sell their Appriva common stock and options. He contends that Microvena executives and directors, including its president and CEO, Paul R. Buckman ("Buckman"), represented to the Appriva shareholders that Microvena/ev3 was adequately capitalized to pursue an IDE, Phase III trial and would be able to take advantage of its considerable financial backing by Warburg Pincus and The Vertical Group, its regulatory experience and network of sales, and its marketing and clinical support personnel to adequately finance and

aggressively pursue a pivotal Phase III trial of PLAATO in the United States, and to complete an International Registry in Europe. Buckman and other representatives of Microvena/ev3 promised a major rollout of PLAATO in Europe, by expanding the number of clinical sites from five at the time of the merger to forty, through aggressive marketing, designed to increase enrollment in the International Registry to 300 non-U.S. patients by December 2003. However, Microvena/ev3 was in substantial financial difficulty. It had weak net sales, exorbitant and ever increasing costs of operations, and large losses. The Plaintiff alleges that these facts were known by the Defendants as of July 2002, but were not disclosed. Instead, the shareholders were assured that Microvena/ev3 was financially secure. In addition, during the merger negotiations Buckman and other representatives of Microvena/ev3 emphasized the importance of retaining key Appriva employees in order to smooth the transition and maintain the momentum for FDA approval of PLAATO. Appriva's CEO, Lesh, and the existing Appriva clinical team, including its Vice President of Regulatory Affairs, Michael Kolber ("Kolber"), were to remain as key players, with Lesh to receive a consulting contract. After the merger, however, Lesh contends that he was never offered a consulting contract, and nearly all of the Appriva employees, including Kolber, were laid off. Furthermore, to induce the shareholders to

enter into the Merger, the Plaintiff alleges that the Defendants presented a timeline for achieving the Milestones and committed to devoting at least one million dollars ($1,000,000.00) per month to the operational expenses of Appriva. Buckman stated that he was strongly committed to continuing the EU rollout and U.S. approval pathway for PLAATO and that the only potential changes he anticipated would be those that would either make the process go faster or increase its chances of success. Despite these representations, the Plaintiff alleges that the Defendants sidelined PLAATO in the United States and prevented the attainment of the Milestones in order to avoid their obligations to make the payments.

III. STANDARD OF REVIEW

Delaware has clear standards for granting a Rule 12(b)(6) Motion to Dismiss. The Court must accept all well-pled allegations as true.[2] The Court must then apply a broad sufficiency test: whether a plaintiff may recover under any "reasonable conceivable set of circumstances susceptible of proof under the complaint."[3] Dismissal will not be granted if the complaint "gives general notice as to the nature of the claim asserted against the defendant."[4] Further, a complaint "will not be dismissed unless it is

[2] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).
[3] *Id*.
[4] *Diamond State Tel. Co. v. University of Delaware*, 269 A.2d 52, 58 (Del. 1970).

clearly without merit, which may be either a matter of law or fact."[5] "Vagueness or lack of detail," standing alone, is insufficient to dismiss a claim.[6] If there is a basis upon which the plaintiff may recover, the motion is denied.[7]

IV. DISCUSSION

A. STANDING

The Defendants allege that Lesh does not have standing, either as an individual or as a shareholder representative, to assert claims arising out of the July 15, 2002 Merger Agreement. Specifically, the Defendants contend that Lesh cannot bring this action individually because he agreed to "the irrevocable relinquishment of the right to act independently" when he was appointed as the shareholder representative.[8] The Defendants further contend that the plain and unambiguous language in Section 15.5 of the Merger Agreement and Section 2.3 of the SRA requires the shareholder representatives, Lesh and Erik van der Burg ("van der Burg") to act jointly as the agent for all shareholders. Section 15.5 of the Merger Agreement reads in pertinent part:

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[5] *Id*.
[6] *Id*.
[7] *Id*.; see also *Spence*, 396 A.2d at 968.
[8] *See* Shareholder Representative Agreement ("SRA"), at ¶1.1(c).

> By approving the Merger and adopting and approving this Agreement, each shareholder of the Company has designated, and approved the designation of Michael Lesh, M.D., and Erik van der Burg to jointly act as the agent for all shareholders of the Company and holders of Vested Options (the "Shareholders Agent") and as the attorney in fact and agent for the and on behalf of the company shareholders and holders of Vested Options with respect to the taking of any an[d] all actions and the making of any decisions required or permitted to be taken by the Shareholders' Agent under this Agreement and the Escrow Agreement…

Section 2.3 of the SRA provides:

> The Shareholder Representatives shall together have full power and authority to represent the Shareholders, and their successors and assigns, within the scope of their appointment pursuant to Section 1, and all action jointly taken by the Shareholder Representatives hereunder shall be binding upon the holders of Company Shares and Vested Options, and their successors and assigns, as if expressly confirmed and ratified in writing by each of them… Without limiting the generality of the foregoing, the Shareholder Representatives shall together have full power and authority on behalf of the holders of Company Shares and Vested Options to: (i) interpret all of the terms and provisions of this Agreement, the Merger Agreement and the Escrow Agreement…

The Plaintiff, as the party invoking the jurisdiction of a court, has the burden of proof and persuasion as to the existence of standing.[9] The Court finds that the Plaintiff in this case falls far short of carrying his burden demonstrating that he has standing to sue either as a shareholder representative or in his individual capacity. At the hearing on this Motion, Lesh essentially conceded that he did not have standing to sue as a

[9] *Dover Historical Society v. City of Dover Planning Commission*, 838 A.2d 1103, 1109 (Del. 2003)(citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

shareholder representative. He admitted that Section 15.5 of the Merger Agreement said "jointly" and never once addressed the issue as to why or how he could sue as a shareholder representative without van der Burg.[10] When questioned by the Court as to why van der Burg was not a party in this case, but is a party in a similar case pending before this Court with similar, if not exact, claims, Lesh responded that van der Burg chose to be represented by other people. Lesh again conceded that there was a problem in this lawsuit because van der Burg was not a party. He stated "if we consolidate these [two cases] all of these alleged evils that flow from this problem are not going to be here."[11] Lesh's argument, however, fails to address how consolidation cures the fact that the Merger Agreement requires the parties to act jointly. Even if the Court were to consolidate the cases, pursuant to Superior Court Civil Rule 42, the parties are still not acting "jointly" as required by the Merger Agreement. Upon reviewing the parties' arguments, the Court finds that Lesh has essentially conceded that the Merger Agreement does state "jointly" and that there is a problem in this lawsuit. The Court, however, does not find that consolidation of the cases solves the problem. The Merger Agreement, explicitly and unambiguously states that Lesh and van der Burg are to jointly act as the agent for all shareholders with

[10] Tr. Lesh, Mot. to Dismiss, at 11.
[11] Tr. Lesh, Mot. to Dismiss, at 14.

respect to the taking of any and all actions and the making of any decisions required or permitted to be taken by the Shareholders' Agent under the Merger Agreement. The claims asserted in this action arise under the Merger Agreement. Therefore, the Court finds that Lesh cannot sue as a shareholder representative without van der Burg.

Moreover, the Court finds that Lesh cannot sue in his individual capacity. At the hearing, Lesh never claimed that the Defendants fraudulently induced him to agree specifically to Section 1.1(c) of the SRA or Section 15.5 of the Merger Agreement. Rather, he claimed that the entire document was the product of fraudulent behavior and that but for the fraud the Agreements would not have been entered. In short, the Court finds that the claim of fraud actually bears upon the entire agreement and upon the activities of the Defendants' in general, not upon any particular clauses within the Merger Agreement or the SRA. Assuming that the Court was to find that but for the fraud, Lesh would not have entered into any of these Agreements, Lesh has one of two options. He can affirm the contract and sue in contract for breach or he can seek to rescind the contract and sue in tort for alleged fraud and deceit.[12] In the present case, Lesh has attempted to do both. He attempts to rescind the contract as voidable, thereby, making

[12] *Tam v. Spitzer*, 1995 WL 510043, at *10 (Del. Ch.).

the provisions of the contract, specifically Section 15.5 of the Merger Agreement and Section 1.1(c) of the SRA, non-binding. However, in the claims that follow Lesh attempts to affirm the contract and sue for breach. The basis of this entire lawsuit essentially stems from Lesh's attempt to enforce the Milestones contained within the Merger Agreement. Lesh's positions are inconsistent. He cannot seek enforcement of the Milestone requirements, yet ask the Court to disavow portions of the Merger Agreement which are not beneficial to himself. Thus, it is for these reasons that the Court finds that Lesh does not have standing to sue either individually or as a shareholder representative.

V. CONCLUSION

For all of the foregoing reasons, Defendants' Motion to Dismiss is **GRANTED**.

IT IS SO ORDERED.

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Judge Calvin L. Scott, Jr.