

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

STEAMFITTERS LOCAL UNION 447, :
on Behalf of Itself and All :
Other Similarly Situated :
Shareholders of inVentiv :
Health, Inc., :
 :
Plaintiff, :
 :
vs. : Civil Action :
 : No. 5492-CC :
R. BLANE WALTER, ERAN BROSHY, :
TERRELL G. HERRING, MARK E. :
JENNINGS, PER H.G. LOFBERG, A. :
CLAYTON PERFALL, CRAIG SAXTON, :
INVENTIV HEALTH, INC., THOMAS :
H. LEE PARTNERS, L.P., :
PAPILLON HOLDINGS, INC. AND :
PAPILLON ACQUISITION, INC., :
 :
Defendants. :

- - -
Via telephone
New Castle County Courthouse
Wilmington, Delaware
Monday, June 21, 2010
3:34 p.m.
- - -

BEFORE: HON. WILLIAM B. CHANDLER, III, Chancellor.

- - -
RULING ON MOTION TO EXPEDITE
- - -

CHANCERY COURT REPORTERS
500 North King Street - Suite 11400
Wilmington, Delaware 19801-3759
(302) 255-0525

1 APPEARANCES:

2 SIDNEY S. LIEBESMAN, ESQ.
3 Labaton & Sucharow LLP
4 for Plaintiff Steamfitters Local Union 449
5 -and-

6 EDUARD KORSINSKY, ESQ.
7 SHANNON L. HOPKINS, ESQ.
8 of the New York Bar
9 Levi & Korsinsky, LLP
10 for Plaintiff Samuel Ramage

11 RAYMOND J. DiCAMILLO, ESQ.
12 KEVIN M. GALLAGHER, ESQ.
13 Richards, Layton & Finger, P.A.
14 -and-

15 BRIAN P. MILLER, ESQ.
16 of the Florida Bar
17 Akerman Senterfitt
18 for Defendants inVentive Health, Inc., Eran
19 Broshy, Terrell G. Herring, Mark E. Jennings,
20 Per G.H. Lofberg, A. Clayton Perfall, Craig
21 Saxton and R. Blane Walter

22 KEVIN G. ABRAMS, ESQ.
23 Abrams & Bayliss LLP
24 -and-

JOHN D. DONOVAN, JR., ESQ.
Of the Massachusetts Bar
Ropes & Gray LLP
for Defendants Thomas H. Lee Partners, L.P.,
Papillon Holdings, Inc. and Papillon
Acquisition, Inc.

18 - - -

1 THE COURT: Good afternoon, counsel.

2 MR. LIEBESMAN: Good afternoon, Your
3 Honor.

4 THE COURT: I have the list of, I
5 believe, everyone on the line. Most importantly I
6 want to confirm that the court reporter is on the line
7 with us.

8 (A brief discussion was held off the
9 record.)

10 THE COURT: Thank you, Mr. Dawson, for
11 being available. Thank you, counsel, for being
12 available, as well.

13 I had the chance over the weekend to
14 review the transcript of the argument from last week
15 on the motion to expedite. In addition, I am sorry I
16 imposed on your weekends, because I can tell that you
17 were working, because I read the letter from
18 Mr. DiCamillo and Mr. Abrams. And then,
19 Mr. Liebesman, I got your letter in response to that.

20 Although I really wasn't inviting
21 reargument, I didn't mind getting your letters, and I
22 appreciate the effort that went into doing that,
23 providing that extra help to me. And so what I wanted
24 to do now is just give you the benefit of my thinking

1 on what we should do.

2 There really are, for purposes of the
3 motion to expedite, I think, at least as I gather from
4 the latest written submissions, two principal grounds
5 for seeking expedited discovery and scheduling of a
6 preliminary injunction hearing before the July 21 vote
7 on this transaction. I recognize, Mr. Liebesman, you
8 are not conceding anything, or you are not waiving
9 anything or disclaiming anything.

10 Those two grounds are, first, what I
11 will call the relationships argument, the argument
12 that the nature of certain business relationships
13 between Mr. Broshy and Mr. Jennings and Mr. Perfall,
14 who are directors on the board -- and Mr. Perfall and
15 Mr. Jennings, of course, were the special committee
16 members -- and Mr. Broshy, and his role at Providence
17 Equity, and the relationships and connections with
18 certain transactions that those folks are involved in,
19 involving companies that Mr. Jennings works at, also
20 involving connections or relationships with Goldman
21 Sachs, which is performing advisory work, I guess, in
22 some other cases or other transactions or deals that
23 Mr. Broshy, Jennings and Perfall are involved in --
24 that all of those relationships somehow have

1 influenced the special committee's decision, and the
2 board of directors' decision, at inVentiv to recommend
3 and approve this going-private transaction proposed by
4 Thomas H. Lee, that is going to be voted on on
5 July 21.

6 Now, that argument, as I thought about
7 it over the weekend and as I looked and read the
8 definitive proxy statement and as I looked again and
9 read carefully the amended complaint in this matter --
10 it seems to me the more I read it, that that is --
11 although framed as a disclosure issue, it can be
12 understood differently. And for my purposes, I think
13 what it really is alleging is some type of conspiracy
14 amongst certain directors on the board of inVentiv to
15 recommend this transaction, perhaps because
16 consideration was being given in other transactions
17 that would compensate for whatever lack of
18 consideration was being put on the table by Thomas H.
19 Lee in this case.

20 And so the theory of this claim or
21 this argument seems to be that this web of
22 relationships between Broshy, Perfall, Jennings,
23 related entities, and Goldman Sachs resulted in the
24 inadequate offering price of \$26 a share in this case.

1 That is the claim or the theory.

2 I will say, in fairness to the
3 defendants, it's very thinly pled and thinly alleged,
4 but it's there. But to the extent that it is there, I
5 think it gives rise to a claim of breach of loyalty.
6 It's not a breach of due care on behalf of these
7 directors that is being alleged. It's really a breach
8 of the duty of loyalty. For that reason, there would
9 be no impediment to this Court after the fact awarding
10 monetary damages as a remedy, if that type of breach
11 and that type of conduct is actually proven by a
12 preponderance of the evidence and can be demonstrated.

13 So effectively, my decision is that
14 there is no threat of irreparable harm, because there
15 is the opportunity to remedy it after the fact. There
16 is a complaint. It's alleged in the complaint. And
17 if it's proven later, then there will be a way for the
18 Court to see to it that those who were guilty of that
19 conspiracy would pay damages in an amount sufficient
20 to compensate the shareholders for the loss that they
21 suffered.

22 So I don't believe there is a basis on
23 which I would accelerate or direct that there be
24 expedited proceedings based on that claim, which was

1 the one that Mr. Liebesman really argued to me
2 principally the last time. Over the weekend and
3 today, the argument has shifted a little bit -- or not
4 shifted, but has grown -- to include the argument that
5 the definitive proxy fails to include information
6 regarding free cash flows at inVentiv that would
7 enable stockholders to be able to better calculate
8 whether the company has a brighter future as a going
9 concern and they ought to vote against this
10 transaction, or whether in fact the company is worth a
11 lot more than the \$26 being offered by Thomas H. Lee,
12 and they ought to therefore seek appraisal.

13 And it is true, of course, that
14 disclosure claims are considered almost per se
15 irreparable, and therefore, if there is a colorable
16 claim of a disclosure violation, this Court will
17 almost always order expedited proceedings, so that it
18 might address that problem before the fact, and
19 provide a meaningful remedy for it by ordering
20 additional disclosure, if that is what the Court
21 ultimately concludes is proper to do.

22 The difficulty here is that I have
23 read the definitive proxy, and I have read the
24 arguments of counsel about the disclosures that are in

1 it regarding Goldman Sachs' valuation methodologies.
2 Having read those summaries of what Goldman Sachs did
3 here, and its recommendation, I would agree with
4 plaintiffs that free cash flow information would
5 certainly add to the total mix of information that is
6 available to stockholders in the definitive proxy
7 about how Goldman Sachs came to its ultimate
8 conclusion about this price, but I don't believe --
9 and on this score, I guess I agree with the
10 defendants -- that it would meaningfully alter the
11 total mix of information that is available through the
12 definitive proxy on that point.

13 The plaintiffs have argued to me that
14 this really is required or is necessary in order to
15 satisfy the holdings that this Court has issued in the
16 past about the importance of free cash flow
17 information in providing material information to
18 shareholders, so that they can understand the value of
19 their assets. And they point to Netsmart and the
20 recent Maric decision by Vice Chancellor Strine. And
21 there are other decisions by other members of the
22 Court that hold to the same effect.

23 But this isn't a case where free cash
24 flow estimates were deliberately removed or excised

1 from a proxy disclosure. Unlike in Maric, in this
2 case no free cash flow estimates were actually
3 provided to Goldman Sachs. The internal analyses that
4 were approved by management for Goldman's use in this
5 case didn't have a line item for free cash flow
6 estimates, and so unlike the Maric decision, there was
7 no deliberate excising of free cash flow numbers. And
8 in addition, this isn't like Netsmart, where
9 management undertook to disclose certain projections
10 but then disclosed projections that were actually
11 stale and not, therefore, meaningful. The proxy here
12 gave management's projections that were actually used
13 by Goldman, and those projections included net
14 revenue, net income, EPS and EBITDA estimates for five
15 years.

16 So based on all of that, there doesn't
17 appear to me to be a colorable claim of a
18 misrepresentation or omission of material information
19 that would alter the total mix of information already
20 available to the stockholders. And so for that
21 reason, I am not convinced that there is a colorable
22 claim of a disclosure violation that would warrant
23 expedition based on the particular facts that were
24 disclosed here, and that were used by Goldman Sachs in

1 arriving at its ultimate conclusions.

2 Now, having said all of that, and with
3 due respect to Mr. Liebesman, who I know disagrees
4 with me -- and I appreciate that, and respect his
5 point of view, and can understand his point of view,
6 frankly. And so I am quite willing, if Mr. Liebesman
7 believes that I have erred and that there are truly
8 reasons why in every case Delaware ought to require --
9 even if management hasn't produced it to the
10 investment advisor -- that Delaware law ought to
11 require as a per se rule that free cash flow estimates
12 going out into the future be provided, disclosed, I
13 would be, in the interests of clarification of
14 Delaware law, and in the interests of perhaps leading
15 to the creation of a bright-line rule in disclosure,
16 which I think would be a good thing in some ways -- I
17 would be happy, Mr. Liebesman, to sign, today, an
18 order certifying an interlocutory appeal to the
19 Delaware Supreme Court on this question. I would even
20 go so far as to include the other question or bases
21 for your request for expedition, on the alleged
22 conflict of interest and the interrelationships of the
23 various directors of inVentiv that you raised.

24 So if that would be of interest to

1 you, I can tell you I would be willing to sign an
2 order, and I would waive all of the time requirements
3 under the Supreme Court's rule with respect to
4 submission of argument on this point, and do that
5 today because of the expedited nature of this matter.
6 I realize you might want to think about that and not
7 give me an instant answer, so I'm not trying to put
8 you on the spot immediately. I'm just telegraphing to
9 you what my predisposition is on it, should you
10 conclude that you want to seek review of my ruling.

11 MR. LIEBESMAN: I appreciate that,
12 Your Honor. I think that it is something that I
13 should put some thought into, although I understand
14 the time restriction and would factor that in and tell
15 the Court that if I do not get back to Your Honor
16 before the end of the day today, I will certainly be
17 tomorrow morning.

18 THE COURT: That is fine with me,
19 Mr. Liebesman. I appreciate that and understand it.
20 So I won't do anything until I hear from you tomorrow,
21 but for the time being, at least, I hope you
22 understand my ruling, and that's my decision for
23 today.

24 MR. LIEBESMAN: Okay. Thank you, Your

1 Honor.

2 THE COURT: Thank you, very much,
3 counsel, for being available.

4 (Recess at 3:49 p.m.)

5 - - -

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

