

ORIGINAL

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

SERGIO M. OLIVER, RONALD OLIVER,)
EMILY OLIVER, GREGORY O. GRUSE,)
ANN O. GRUSE, WILLIAM M)
STERRETT, BLACKSBURG TRANSFER)
& STORAGE, INC., DAVID MCDANIEL,)
WALLACE L. HUFF, DANIEL R)
CANADA, WILLIAM J. CUDMORE,)
DORBIN BAILEY, JOHN F. BOLAND,)
PHILIP FLARSHEIM, SIMONE POULAN,)
LUCY THOMPSON, JOHN & LORRAINE)
MORTIMER, JENNIFER L. JANELLE,)
RON & SUSAN ESTES, DR. GARY)
WAKE, and FIRST UNION NATIONAL)
BANK, FOR THE ESTATE OF MARY)
ELLEN DOBBINS, individually and on)
behalf of all others similarly situated,)

Plaintiffs,)

v.)

C.A. No. 16570

BOSTON UNIVERSITY, JOHN R.)
SILBER, LEON C. HIRSCH, TURI)
JOSEFSEN, REED R. PRIOR, GERALD)
S.J. CASSIDY, KENNETH G. CONDON,)
NORMAN A. JACOBS, JEAN C.)
NICHOLS, SERAGEN, INC., SERAGEN)
TECHNOLOGY, INC., MARATHON)
BIOPHARMACEUTICALS, LLC,)
LIGAND PHARMACEUTICALS, INC.,)
and KNIGHT ACQUISITION CORP.,)

Defendants.)

Submitted: April 10, 2000

Decided: July 18, 2000

Revised: July 25, 2000

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MEMORANDUM OPINION

Michael J. Maimone and Joseph C. Schoell of Morris, James, Hitchens & Williams, Wilmington, Delaware. OF COUNSEL: Kenneth J. Ashman of Ashman & Griffin, New York, New York; Thomas G. Griffin of Ashman & Griffin, Chicago, Illinois. Attorneys for Plaintiffs.

William O. LaMotte, III of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware. OF COUNSEL: R. Robert Popeo and John F. Sylvia of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Boston, Massachusetts. Attorneys for Defendants Boston University, John R. Silber, Leon C. Hirsch, Turi Josefsen, Gerald S.J. Cassidy, Kenneth G. Condon and Marathon Biopharmaceuticals, LLP.

Donald J. Wolfe, Jr. and Arthur L. Dent of Potter Anderson & Corroon, Wilmington, Delaware. OF COUNSEL: William F. Sullivan, Christopher H. McGrath and Sean T. Prosser of Brobeck, Phleger & Harrison LLP, San Diego, California. Attorneys for Defendants Ligand Pharmaceuticals Incorporated and Knight Acquisition Corp.

STEELE, V.C.

Plaintiffs bring this purported class action alleging that defendants who served as controlling shareholders, directors, and officers of a corporation, in which plaintiffs invested, unfairly took advantage of their controlling position to dilute the minority's interests, engaged in self-dealing, and effected a merger resulting in disproportionate consideration being paid to the controlling shareholders. According to plaintiffs, the defendant controlling shareholders, directors, and officers breached their fiduciary duties of care, loyalty and disclosure in executing the transactions that allegedly disenfranchised and financially "short-changed" the minority shareholders. Plaintiffs also allege that the acquiror and other shareholders aided and abetted these breaches of fiduciary duty. Defendants move to dismiss plaintiffs' complaint for failure to state a claim.

For the reasons articulated below, I dismiss several of the seven counts that plaintiffs assert in their Second Amended Complaint ("Complaint"). Other counts remain. Notably, I find that the non-director shareholders did not owe fiduciary duties to the purported plaintiff class because shareholders only owe fiduciary duties if they have a majority interest or control the corporation. I also find that plaintiffs fail to state a claim that the acquiror aided and abetted the alleged breaches because the Complaint fails to allege sufficiently the acquiror's knowing participation. I

do find the Complaint adequately alleges breaches of the duty of loyalty and disclosure against certain defendants.

I. LEGAL, STANDARD

In evaluating Defendants' Motion to Dismiss, I assume the truthfulness of all well-pleaded, nonconclusory allegations found in the Complaint and extend the benefit of all reasonable inferences that can be drawn from the pleading to the non-movant, plaintiff.¹ To dismiss a claim, I must find that plaintiff has either utterly failed to plead facts supporting an element of the claim or that under no reasonable interpretation of the facts alleged in the Complaint (including reasonable inferences) could plaintiff state a claim for which relief might be granted.² Notwithstanding Delaware's permissive pleading standard, I am free to disregard mere conclusory allegations made without specific allegations of fact to support them.³

¹ *Loudon v. Archer-Daniels-Midland Co.*, Del. Supr., 700 A.2d 135, 140 (1997).

² *Delaware State Troopers Lodge v. O'Rourke*, Del. Ch., 403 A.2d 1109, 1110 (1979) ("A complaint should not be dismissed upon such a motion unless it appears to a certainty that under no set of facts which could be proved to support the claim would the plaintiff be entitled to relief.")

Wolf v. Assaf, Del. Ch., C.A. No. 15339, mem. op., 1998 Del. Ch. LEXIS 101, at *3-4, Steele, V.C. (June 16, 1998).

II. BACKGROUND

A. Defendants

Seragen, Inc. (“Seragen”) was a Delaware corporation in the business of developing, manufacturing and marketing various biotechnology products. Seragen Technology Inc., (“STY”) is a Seragen subsidiary that served as a repository for Seragen’s patents and patent applications.

Boston University is a not-for-profit corporation that invested heavily in Seragen. Marathon Biopharmaceuticals, LLC is a Massachusetts limited liability company, created and owned by BU to consummate BU’s purchase of Seragen’s facilities.

Ligand Pharmaceuticals Inc. is a Delaware corporation primarily operating out of San Diego, California. Knight Acquisition Corp. is a Delaware corporation that Ligand created to effect the Seragen merger (“the Merger”).

Dr. John Silber is the Chancellor of BU and served as a Seragen director from 1987. Silber is also a director of United States Surgical Corporation – a corporation that was Seragen’s “strategic partner.”

Leon C. Hirsch is a member of BU's Board of Trustees and an "affiliate" of Seragen. Hirsch owns more than 5% of Seragen's capital stock, and is USSC's chairman.

Turi Josefsen is Hirsch's spouse. Various Seragen public filings referred to her as a BU "affiliate." Josefsen controls over 5% of Seragen's capital stock, is USSC's CEO, and owns 1.8% of USSC's common stock.

Reed R. Prior is the former Seragen Chairman of the Board, CEO and Treasurer. He remained in those positions through the date of the Merger. He held a substantial amount of Seragen stock.

Gerald S.J. Cassidy became a Seragen director in 1987. Cassidy acted as a paid political consultant on Silber's election campaigns, and held a substantial amount of Seragen stock.

Kenneth G. Condon served as a Seragen director at the time of the Merger, and is BU's Treasurer. Condon is also Marathon's Manager and Treasurer. He held a substantial amount of Seragen stock.

Norman A. Jacobs served as a Seragen director at the time of the Merger.

Jean C. Nichols has been a Seragen employee since the early 1980s, serving as President, Chief Technology Officer, a director, and Secretary. She had a substantial financial interest in Seragen. Defendants Silber,

Hirsch, Josefsen, Prior, Cassidy, Condon, Jacobs and Nichols constitute the “Insider Defendants.”

B. Facts

Plaintiffs purportedly bring this action on behalf of all common shareholders of Seragen who held their shares on or about July 1, 1996 through and including August 12, 1998. On August 12, 1998, Seragen merged into Knight, a wholly-owned Ligand subsidiary. Plaintiffs claim the merger benefited various officers, directors and controlling Seragen shareholders at plaintiffs’ expense. Plaintiffs allege that Defendants Ligand and Knight knowingly cooperated with and participated in this self-dealing in order to effect the merger at a favorable price.

Seragen allegedly developed a new class of therapeutic proteins known as “fusion proteins” which presumably have great profit potential, but have yet to generate much revenue. Defendant BU formerly held only a minority interest in Seragen. In 1987, however, BU purchased the controlling interest in Seragen.

Defendant Silber, BU’s Chancellor, had long been interested in Seragen’s technology and prospects. After BU became majority shareholder, Silber and others allegedly friendly to BU joined Seragen’s Board of Directors.

In 1992, Seragen conducted an initial public offering of common stock. Plaintiffs claim BU took Seragen public only to appease the Massachusetts Attorney General who had expressed concern about potential conflicts of interest arising from BU's control of Seragen. Plaintiffs maintain that despite the public offering BU still retained practical control of Seragen. The public offering did dilute BU's control, but plaintiffs assert that whenever Seragen needed cash BU and Silber entered into private placement offerings available only to Silber's cronies; -- including Defendants Hirsch, Josefsen, and Cassidy. Silber allegedly blocked Seragen's efforts to raise additional funds by any other means. Plaintiffs further allege that Seragen's majority stockholders, directors and officers (i.e., the Insider Defendants) engaged in several transactions purposely designed to dilute minority interest and voting power.

1. The Loan Guarantee Transaction

In June 1995, Seragen obtained \$23.8 million in bank financing guaranteed by BU, Hirsch, Josefsen and Cassidy. Plaintiffs allege that defendants intended that financing agreement to tighten defendants' control of Seragen. In exchange for their guarantees, BU, Hirsch, Josefsen and Cassidy received warrants valued at \$4,164,996. No independent committee

reviewed the transaction, and Seragen did not obtain an independent fairness opinion. Counsel for Seragen also served as counsel for BU.

2. Restructuring the Loan Guarantee Transaction-series B Preferred

In 1996, Seragen, BU, Hirsch, Josefsen and Cassidy restructured the just-described guaranty arrangements. Specifically, BU, Hirsch, Josefsen and Cassidy assumed Seragen's bank obligations. In exchange, those defendants allegedly received \$23.8 million in newly created Seragen Series B preferred stock and additional warrants valued at \$8.6 million. Plaintiffs allege that by assuming debt that they had previously guaranteed, these defendants received those shares and warrants for virtually no consideration because they took little, if any, additional risk. They could convert shares of the new Series B preferred at any time into a number of shares of Seragen common stock determined by dividing \$1,000 by the average of the closing sale price of the common stock – a feature known as an “exploding put” – which permits conversion into more and more shares as the price falls. According to plaintiffs, the exploding puts made it very likely that the select defendants would at the very least recoup the amount of their investment.

The Series B preferred holders had dividend and liquidation preferences and the power to cast 250 votes per Series B preferred share on any matter submitted to stockholder vote. The warrants could be converted

into common shares at a \$4.00 per share strike price. Plaintiffs argue that the restructuring creating the Series B preferred was not done at arm's length, did not receive independent review for fairness, and was not evaluated by independent legal counsel.

3. The BU Private Placement Transaction – Series C Preferred

In September 1996, BU invested \$5 million in Seragen in exchange for 5,000 shares of Seragen's Series C preferred stock at \$1,000 per share. BU had the right to convert within a limited time its Series C preferred shares into common stock at a discounted price equal to 73% of the price of the common stock. Series C preferred shareholders also had preferential liquidation rights. Plaintiffs claim that the transaction creating the Series C preferred shares was neither at arms-length, independently reviewed for fairness, nor evaluated by independent legal counsel.

4. The USSC Transaction

In 1997 Seragen granted USSC an option on certain rights related to Seragen Fusion Protein in exchange for \$5 million. Plaintiffs allege USSC bore no risk and paid no real consideration because it could convert its option back into \$5 million in Seragen stock at any time. Hirsch owns 7.8% of USSC's common stock, Josefsen is the CEO and a director of USSC, and Silber is a USSC director.

5. The Marathon Transaction

In 1997, Seragen agreed to sell its operating division to BU for \$5 million. BU created Marathon to effect the transaction. Plaintiffs allege that although the disinterested shareholders ratified this transaction, their ratification must be deemed fundamentally flawed because the related proxy failed to disclose material facts and contained misstatements. Allegedly, the proxy failed to disclose that Seragen's management had been engaged in extensive negotiations with Ligand for the sale or merger of Seragen that resulted in an agreement "in principle" just two months after the stockholder vote on the operating division sale to BU/Marathon. Plaintiffs; claim that BU turned around and sold Marathon, which was comprised entirely of Seragen's former operating division, to Ligand for a \$3 million profit.

The failure to mention the talks with Ligand was especially important, plaintiffs argue, because the same 1997 proxy statement explains that Seragen had a four-year right to repurchase its operating division. This right appeared to protect Seragen in the event that it determined later that its former operating division was worth more than the consideration paid for it. Plaintiffs, however, contend this protection was illusory because the defendants knew and had reason to believe that Seragen would itself be merged into Ligand only a few months later.

6. The Ligand-Seragen Merger

In mid-1997, Seragen and Ligand began negotiations concerning Ligand's desire to acquire Seragen. By February 20, 1998, Ligand and Seragen reached an agreement providing for Ligand to acquire Seragen and its operating assets (including BU's subsidiary, Marathon, which held Seragen's former operating division) for an aggregate consideration of approximately \$75 million. USSC also relinquished its rights in Seragen's technology in exchange for the return of the \$5 million that USSC previously paid for those rights.

The Insider Defendants possessed the controlling interest in Seragen's capital stock entitled to vote on the proposed merger. The Merger proceeds were allocated disproportionately in favor of the Insider Defendants. They argue that this allocation was fair because they settled "substantial" claims that they had against Seragen in exchange for a disproportionate piece of the Merger consideration. Plaintiffs state that the Insider Defendants had no viable claims against Seragen, but that Seragen failed to bring colorable claims of self-dealing, mismanagement, or corporate waste against them because the Insider Defendants would not permit it.

The proxy statement claims that the Insider Defendants who compromised their claims against Seragen agreed to discount their claims by

25-40%. Plaintiffs argue this statement is untrue and misleading. Plaintiffs describe the accord reached between Seragen and the Insider Defendants as one sided. Seragen released the Insider Defendants from liability for their earlier self-dealing, mismanagement and corporate waste, and provided the Insider Defendants with a premium of 60-75% over what they should have received from the Merger while the Insider Defendants provided little real value in return, according to plaintiffs.

Plaintiffs implicate Ligand by claiming that Ligand succumbed to the Insider Defendants' demand for a bribe to secure their cooperation and support of the merger. This bribe allegedly came out of the funds that otherwise would have been paid to plaintiffs and the rest of the purported class. Plaintiffs allege that both Ligand and Knight knew that the purported claims that the Insider Defendants supposedly "compromised" in the accord were meritless and that the accord resulted from unfair self-dealing. Allegedly, in the course of their due diligence review, Ligand and Knight reviewed the documents that "papered" these supposedly bogus obligations. Ligand and Knight also allegedly knew that Seragen made its decision to enter the merger agreement without the benefit of review by an independent committee.

The merger agreement between Seragen and Ligand provided that Ligand pay Seragen's capital stockholders the aggregate consideration of \$67 million in two installments: \$30 million upon closing of the Merger and \$37 million in "Milestone Consideration" to be paid on the six month anniversary of final FDA approval of Seragen's Interleukin-2 Fusion Protein. FDA approval was purportedly imminent at the time of the merger agreement. In a related agreement, Ligand agreed to pay \$8 million for Marathon, which held Seragen's former operating assets.

According to the proxy statement, the Insider Defendants were "deemed to be beneficial owners of approximately 57% by voting power of the outstanding Seragen Capital Stock." Apparently, the Insider Defendants obtained their majority position by way of the Series B preferred stock, which counted as 250 votes per share. But for these supervoting shares, the Insider Defendants would have had only 48% of the Seragen voting power, and allegedly could not have delivered the required vote to go forward with the merger.

Plaintiffs state that merger consideration paid to the minority was drastically inconsistent with their percentage of ownership. The minority stockholders purportedly received only about 14.38% of the merger proceeds. Even if they owned only 43% of Seragen, the minority still

should have received more than 14.38% of the merger proceeds, plaintiffs argue. Allegedly, the allocation of the merger proceeds was set without independent review.

7. The Proxy

Plaintiffs claim that the minority stockholders had the -power to upset the Merger because if 10% or more Seragen stockholders elected appraisal then Ligand had no obligation to consummate the merger. Seragen's shareholders, however, overwhelmingly approved the merger, and Ligand closed the transaction on or about August 12, 1998. Seragen's Board endorsed the merger stating that "Seragen was unlikely to identify an alternative business combination or other opportunity that would provide the same likelihood of return on investment to holders of Seragen Capital Stock as that offered by the Merger."⁴ Seragen was heavily in debt,⁵ and besides Ligand, there allegedly were no interested suitors,

Nonetheless, plaintiffs assert that many more minority shareholders would have voted against the merger if the proxy statement had not been replete with misrepresentations and omissions. Plaintiffs fault the Insider Defendants for: (1) failure to disclose that the Insider Defendants did not

⁴ Proxy Statement as 47.

⁵ As of September 9, 1997, Seragen Common Stock was delisted from trading on the Nasdaq National Market due to Seragen's failure to comply with Nasdaq's minimum net tangible assets requirement.

seek or obtain an expert opinion concerning the fairness of the allocation of the Merger proceeds; (2) failure to make full financial disclosures; (3) failure to disclose the Insider Defendants' purported self-dealing and conflicts of interest, (4) failure to disclose management's preliminary discussions with Ligand in the 1997 proxy regarding the Marathon transaction, and (5) failure to disclose material information regarding the Merger terms.

III. PLAINTIFF'S CLAIMS

Plaintiffs Complaint alleges that: (1) defendants breached their fiduciary duties of loyalty and care; (2) the Insider Defendants breached their fiduciary duty of disclosure; (3) Hirsch, Josefsen, and Marathon aided and abetted the breaches of the fiduciary duties by the Insider Defendants; (4) the Insider Defendants were unjustly enriched and a constructive trust should be imposed; (5) Ligand and Knight aided and abetted the breaches of fiduciary duties by the Insider Defendants; (6) the defendants engaged in common law fraud; and (7) the defendants made negligent misrepresentations and/or committed equitable fraud.

IV. STANDING

Are plaintiffs' claims direct or derivative? Plaintiffs are former Seragen common stockholders, and Seragen has been merged into Ligand. A later merger extinguishes derivative claims because those claims belong to the corporation.⁶ Plaintiffs, however, can maintain a direct claim if they suffered special injury "not suffered by all the stockholders generally or the wrong involves a contractual right of the stockholders, such as the right to vote."⁷ Defendants argue that plaintiffs' claims are derivative in nature. If that is true, plaintiffs lack standing as a result of the merger.

Defendants characterize plaintiffs' claims as mere allegations of corporate waste that can only be brought derivatively, but plaintiffs definitively allege that defendants engaged in self-dealing that resulted in reduced voting power and stock dilution. "[A]lthough it is true that claims of waste are derivative, a claim of stock dilution and a corresponding reduction in a stockholder's voting power is an individual claim." Plaintiffs plead that they suffered voting power dilution. Defendants dispute the

⁶ See, e.g. *Parnes v. Bally Entertainment Corp.*, 722 A.2d 1243, 1245 (1999) ("Since a stockholder suing derivatively is bringing a corporate claim, not a personal one, the stockholder must maintain his or her status as a stockholder in order to continue the litigation."); *Bokat v. Getty Oil Co.*, Del. Supr., 262 A.2d 246, 249 (1970); *Kramer v. Western Pac. Indus.*, Del. Supr., 546 A.2d 348,354 (1988).

⁷ *In re Tri-Star Pictures, Inc. Litig.*, Del. Supr., 634 A.2d 319,330 (1993).

⁸ *Id.*

veracity and general merits of those claims, but if I take the Complaint's allegations at face value, they do state a claim for dilution.

Plaintiffs' position that their claims attacking the Merger are direct is supported by the test articulated by the Delaware Supreme Court in *Parnes v. Bally Entertainment Corporation*⁹ stating, "[a] stockholder who directly attacks the fairness or validity of a merger alleges an injury to the stockholders, not the corporation, and may pursue such a claim even after the merger at issue has been consummated."¹⁰ This Court recently interpreted *Parnes* to allow a post-merger claim that alleges self-dealing resulting in an unfairly low price to the shareholder class." Plaintiffs make very similar allegations here. Accordingly, I find that plaintiffs adequately state direct claims.

⁹ Del. Supr., 722 A.2d 1243 (1999) (the *Parnes* complaint alleged that potential acquirors had been deterred by the chairman's allegedly improper demands from making a bid and that this self-dealing had infected the merger process and resulted in reduced merger consideration).

¹⁰ *Id.* at 1245 (citing *Lewis v. Anderson*, Del. Supr., 477 A.2d 1040 n.10 (1984))

¹¹ *See Chaffin v. GNI Group, Inc.*, Del. Ch., No. 1621 I-NC, 1999 WL 721569, Jacobs, V.C. (Sept. 3, 1999).

V. ANALYSIS

A. Breach of duty of care by “Insider Defendants” claim

Delaware courts presume that directors are informed and act in good faith.¹² The business judgment rule generally protects the actions of directors, affording them the presumption that directors act on an informed basis and in the honest belief they acted in the best interest of the corporation.¹³ To overcome the presumption of the business judgment rule, the burden is on the plaintiff to show the defendant directors failed to act (1) in good faith, (2) in the honest belief that the action taken was in the best interest of the company or (3) on an informed basis.¹⁴ Therefore to state a claim for a breach of the duty of care, plaintiffs must sufficiently plead facts which if true would take defendants’ actions outside the protection afforded by the business judgement rule.

Marathon, Hirsch and Josefsen argue that they never owed fiduciary duties to Seragen’s stockholders. Marathon never owned Seragen shares. Hirsch and Josefsen were never Seragen directors or majority stockholders. Plaintiffs argue that their respective relationships with BU and the other

¹² *Aronson v. Lewis*, Del. Supr., 473 A.2d 805, 812 (1984).

¹³ *Id.*

¹⁴ *Id.*

defendants warrant the extension of fiduciary duties by implication to these three defendants. I disagree and reaffirm commitment to the Supreme Court's declaration that "a shareholder owes a fiduciary duty only if it owns a majority interest in or exercises control over the business affairs of the corporation."¹⁵ It would be unwise to extend the application of those duties as it would undermine a primary benefit of the corporate form. I find that Marathon, Hirsch and Josefsen did not owe fiduciary duties to Seragen's stockholders. Accordingly, they are dismissed as to all of plaintiffs' breach of fiduciary duty claims (duty of care, duty of loyalty, and duty of disclosure).

I also find that plaintiffs fail to state a claim for breach of the duty of care. Plaintiffs question the motives and methods employed to effect the Merger, but never sufficiently allege that any defendant acted with the gross negligence needed to overcome the presumption the board met its duty of care.¹⁶ Plaintiffs' claim that defendants breached their duty of care is dismissed.¹⁷

¹⁵ *Ivanhoe Partners v. Newmont Mining Corp.*, Del. Supr., 535 A.2d 1334, 1344 (1987).

¹⁶ *Smith v. Van Gorkom*, Del. Supr., 488 A.2d 858 (1985).

¹⁷ Although I need not discuss it in detail, Seragen's Charter contained a § 102(b)(7) provision that would likely have warranted dismissal of the duty of care claim against any defendant who is being sued for actions taken as a Seragen director.

B. Breach of duty of loyalty by “Insider Defendants” claim

Directors have a duty of loyalty, and accordingly, can not place their interests above the interests of the stockholders.¹⁸ Plaintiffs allege that the Insider Defendants acted self-interestedly when they issued the Series B and Series C preferred shares, which resulted in dilution of plaintiffs’ interests. They allege that the Insider Defendants engaged in self-dealing when they permitted only Silber’s “inner circle” to participate in the private placement offerings. They allege that the Insider Defendants allocated the merger proceeds for their own benefit at plaintiffs’ expense. They allege that the Insider Defendants covered up these misdeeds by issuing misleading and incomplete proxy statements.

The Insider Defendants note that they, like plaintiffs, were not happy with Seragen’s performance. But the fact that the Insider Defendants may have lost money on their Seragen investments does not foreclose the possibility that they breached their fiduciary duties of loyalty owed to plaintiffs. Even if defendants lost money on Seragen, plaintiffs adequately state a claim that they lost a disproportionate share of money resulting from the Insider Defendants’ alleged breaches of their duty of loyalty.

¹⁸ *Guth v. Loft, Inc.*, Del. Supr., 5 A.2d 503 (1939).

C. Breach of duty of disclosure by “Insider Defendants” claim

To state a claim for breach by omission of the duty of disclosure, plaintiff must plead facts identifying (1) material (2) reasonably available (3) information that (4) was omitted from proxy materials and describe (5) how the omission caused injury.¹⁹ Corporate fiduciaries, including corporate directors, majority stockholders, and presumably minority controlling stockholders, have a duty to disclose all material facts when seeking stockholder action.²⁰ Material facts are those facts for which “there is a substantial likelihood that a reasonable person would consider them important in deciding how to vote.”²¹ Corporate fiduciaries can breach their duty of disclosure in several ways – by making a materially false statement, by omitting a material fact, or by making a materially misleading partial disclosure.²² Directors, however, “are not required to confess wrongdoing or engage in self-flagellation in proxy materials.”²³

By my count, plaintiffs cite nineteen different alleged omissions or misrepresentations. After evaluating those allegations, I find that plaintiffs adequately plead that the Insider Defendants were self-interested and that the

¹⁹ *Wolf, sup-a*, Del. Ch., C.A. No. 15339, mem. op., 1998 WL 326662 at *1, Steele, V.C. (June 16, 1998).

²⁰ *Malone v. Brincat*, Del. Supr., 722 A.2d 5, 11 & n.21 (1998).

²¹ *Rosenblatt v. Getty Oil Co.*, Del. Supr., 493 A.2d 929, 944 (1985).

²² *In re the Walt Disney Co. Derivative Litig.*, Del Ch., 731 A.2d 342, 376 (1998).

²³ *Citron v. E.I. DuPont de Nemours & Co.*, Del. Ch., 584 A.2d 490, 503 (1990).

alleged disclosures purportedly detailing that self-interest in the proxy statements fail to give a reasonable shareholder all material facts.

Plaintiffs argue that the proxy statement should have recounted the self-dealing transactions that enabled the Insider Defendants to maintain their controlling interest in Seragen before the Merger. Defendants respond that the language in the proxy statement that “certain members of Seragen’s management and the Seragen Board have interests in the Merger that are in addition to the interests of the Seragen stockholders in general”²⁴ constitutes sufficient disclosure of the self-interest. That purported “disclosure” is very narrow, and possibly incomplete and/or misleading. I find that that statement does not obviate plaintiffs’ claims of breaches of the duty of disclosure. Accordingly, plaintiffs sufficiently plead facts that if taken as true demonstrate the shareholder vote could not have been informed and that the Insider Defendants breached their duty of disclosure.²⁵

²⁴ Proxy Statement, at 57.

²⁵ Defendants note that Seragen’s exculpation provision in its Charter, pursuant to 8 Del. C. § 102(b)(7), protects its directors from personal liability arising from breach of the duty of care. They claim that this provision protects them from liability regarding the disclosures in the proxy statements because “[a] good faith erroneous judgment as to the proper scope or content of required disclosure implicates the duty of care rather than the duty of loyalty.”²⁵ In this case, however, plaintiffs adequately plead that the alleged misrepresentations and omissions were the product of self-dealing, not good faith errors in judgment. Seragen’s § 102(b)(7) provision therefore does protect the Insider Defendants against this particular count.

There are, however, specific allegations that fail to state a disclosure claim. I will discuss those allegations in detail below, and dismiss them to enable this litigation to focus only on the adequately stated disclosure claims.

Plaintiffs argue that defendants should have disclosed that their own extortionate motives were the reason behind the disproportionate allocation of the merger proceeds. If I were to require such disclosure, even if it were the reason, I would be requiring the Insider Defendants to engage in self-flagellation. Delaware law does not hold fiduciaries to that unrealistic standard.²⁶

I also agree with the defendants on the issue of whether the Insider Defendants manipulated the Lehman Brothers, Inc. opinion on the Merger. Plaintiffs claim that the Insider Defendants manipulated the opinion, which was attached to the proxy statement, by excluding from its scope any analysis or judgments regarding the fairness of the allocation of the aggregate consideration to be paid by Ligand if the Merger was consummated. I find that the proxy statement does contain language that effectively describes the scope of the opinion in a fair and straightforward

²⁶ See *Citron*, 584 A.2d at 503.

manner.²⁷ Accordingly, this aspect of plaintiffs' breach of the duty of disclosure claim is dismissed.

If no disclosure claim had survived, I could conclude that the directors' actions regarding the Merger were ratified by shareholder vote.²⁸ Since several disclosure claims do survive, however, ratification need not be addressed.

D. Aiding and abetting breach of fiduciary duties claim against Hirsch, Josefsen and Marathon

To state an actionable aiding and abetting claim, plaintiffs must plead: (1) the existence of a fiduciary relationship; (2) a breach of that relationship; and (3) knowing participation by the defendant in the fiduciary's breach.²⁹

I have already decided that a fiduciary relationship existed between the Insider Defendants and Seragen's shareholders. Plaintiffs have sufficiently alleged that Insider Defendants breached some of the fiduciary duties they owed plaintiffs.

Plaintiffs' Complaint offers a very detailed description of the alleged relationship between Hirsch and Josefsen. I find the Complaint sufficiently

²⁷ The proxy statement, at 49, states, "Lehman Brothers was not requested to opine to, and the opinion does not address . . . (ii) the fairness of the allocation of the aggregate consideration to be paid by Ligand among the common stockholders of Seragen and the other intended recipients."

²⁸ *Smith v. Van Gorkom*, 488 A.2d at 890.

²⁹ *Ivanhoe Partners v. Newmont Mining Corp.*, Del. Supr., 535 A.2d 1334, 1344 (1987).

alleges knowing participation by Hirsch and Josefsen in the breaches of fiduciary duty.

Likewise, the Complaint adequately describes the relationship between BU and Marathon. If the facts alleged in the Complaint are true, Marathon was created by BU solely to serve BU's interests and was completely dominated by BU. Knowledge of the relevant events giving rise to plaintiffs' claims is therefore imputed to Marathon. The motion to dismiss the aiding and abetting claim against Hirsch, Josefsen and Marathon is denied.

E. Aiding and abetting breach of fiduciary duties by defendants Ligand and Knight

In contrast to my ruling regarding the alleged aiding and abetting of Hirsch, Josefsen and Marathon, I find that plaintiffs have not alleged facts sufficient to state a claim against Ligand and Knight for aiding and abetting breaches of fiduciary duty. Plaintiffs failed to allege facts that if true would show that Ligand or Knight knowingly participated in a breach.

Plaintiffs fail to allege that Ligand or Knight took any action to effectuate the transfer of assets or funds, aside from paying the merger consideration. Plaintiffs imply that Ligand and Knight must have known that the Insider Defendants were engaging in self-dealing because they negotiated with Seragen for one year and conducted due diligence prior to

the Merger. To me, these allegations are conclusory and do not constitute a well-pleaded claim that Ligand or Knight “knowingly participated.”³⁰ Moreover, even if Ligand or Knight knew of the fiduciary duty breaches, that alone would not establish their complicity with the Insider Defendants’ alleged breaches.³¹ I dismiss the claim against Ligand and Knight for aiding and abetting the Insider Defendants’ alleged breaches of fiduciary duty.

F. Unjust enrichment claim against the “Insider Defendants”

Plaintiffs ask the Court to impose a constructive trust because the Insider Defendants allegedly bilked the minority shareholders while unjustly enriching themselves. The elements of a claim for unjust enrichment are: “(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification and (5) the absence of a remedy provided by law.”³²

According to plaintiffs, the Insider Defendants received preferential treatment at the expense of the plaintiffs who suffered interest dilution and

³⁰ See *Katell v. Morgan Stanley Group, Inc.*, Del. Ch., C.A. No. 12343, 1993 WL 106067, at * 1, Chandler, V.C. (Mar. 29, 1993).

³¹ *In re Lukens Inc. Shareholders Litig.*, Del. Ch., C.A. No. 16102, mem. op. at 29, 1999 WL 1135143, Lamb, V.C. (Dec. 1, 1999) (stating “[t]he fact that [the acquiror] chose not to challenge the validity of the [pre-existing] agreements clearly does not establish [the acquiror’s] complicity with the Director Defendants’ alleged breaches of duty”).

³² *Cantor Fitzgerald, L.P. v. Cantor*, Del. Ch., 724 A.2d 571, 585 (1998) (citing *Khoury Factory Outlets, Inc. v. Snyder*, Del. Ch., C.A. No. 11,568, Kiger, M. 1996 WL 74725, at *11 (Jan. 8, 1996)).

who received less than their fair share of the proceeds. Plaintiffs argue that the harm alleged in this case was only suffered by the purported class, not by all the shareholders generally. For those reasons, plaintiffs argue imposition of a constructive trust is appropriate in this case.

The constructive trust is an equitable remedy that is sometimes imposed after presentation of the merits when disgorgement is appropriate. Because I find that some of plaintiffs' claims are well-pleaded, I deny the motion to dismiss as to the constructive trust claim. Accordingly, I allow plaintiffs to present additional evidence relating to the surviving claims purportedly supporting imposition of a constructive trust.

G. Fraud claim

Plaintiffs make a common law fraud allegation against all defendants. The elements required to show fraud are: "(1) a false representation made by the defendant; (2) the defendant's knowledge or belief that the representation was false, or defendant's reckless indifference to the truth; (3) an intent to induce the plaintiff to act or refrain from acting; (4) the plaintiffs action or inaction taken in justifiable reliance upon the representation; and (5) damage to the plaintiff as a result of such reliance."³³

³³ *Gaffin v. Teledyne, Inc.*, Del. Supr., 611 A.2d 467,472 (1992).

Defendants argue that plaintiffs failed to plead their fraud-based claims with the particularity required under Court of Chancery Rule 9(b). Properly pleaded fraud allegations must include at least “the time, place and contents of the false representations . . . and what [was] obtained thereby.”³⁴ Plaintiffs argue they have met the particularity requirement because they set forth in detail the alleged misrepresentations and omissions in both relevant proxy statements. Plaintiffs allege that they justifiably relied on the representations in deciding whether to seek appraisal.

Defendants state that Delaware law prohibits a common law or equitable fraud claim from being brought by class action. It is true that the Supreme Court has stated that “a class action may not be maintained in a purely common law or equitable fraud case since individual questions of law or fact, particularly as to the element of justifiable reliance, will inevitably predominate over common questions of fact.”³⁵ Plaintiffs suggest this statement should be read to allow fraud claims in a class action as long as the fraud claim is not the only claim. After reviewing the applicable precedent, I disagree that the Supreme Court intended its holding to be

³⁴ *Smith v. Smitty McGee’s, Inc.*, Del. Ch., C.A. No. 15668, 1998 WL 246681, at *5 Steele, V.C. (1998).

³⁵ *Gaffin v. Teledyne, Inc.*, Del. Supr., 611 A.2d 467, 474 (1992).

interpreted in that manner. Support for my interpretation can be found in my decision in *Dieter v. Prime Computer, Inc.*,³⁶ in which the class claims alleging breach of fiduciary duty were certified but the fraud claims were not. Explaining my rationale, I wrote, “[l]ogic suggests that each individual shareholder would, given its unique personal circumstances, find a court examining its position differently in order to determine whether and to what extent it relied on the disclosures to reach a decision on the actions solicited. In light of the explicit language from the Supreme Court; I cannot certify [the fraud claims].”³⁷

Although it may be unnecessary to add this, I find that plaintiffs fail to allege specific facts that if true would show that Ligand or Knight knew of the alleged misrepresentations. As to Ligand and Knight, plaintiffs fail to state a fraud claim for that reason. I likewise dismiss the fraud claim against the other defendants because it is not properly brought as part of this class action.

H. Negligent misrepresentation and/or equitable fraud claim

To state a claim for negligent misrepresentation, plaintiffs must prove “(1) a pecuniary duty to provide accurate information, (2) the supplying of false information, (3) failure to exercise reasonable care in obtaining or

³⁶ Del. Ch., 681 A.2d 1068 (1996).

³⁷ Id. at 1076.

communicating information, and (4) a pecuniary loss caused by justifiable reliance upon false information.”³⁸ “Equitable fraud has the same elements [as common law fraud], but there is no scienter requirement.”³⁹

For the same reasons that I dismissed plaintiffs’ common law fraud claim I dismiss plaintiffs’ negligent misrepresentation and/or (equitable fraud claim. Even though equitable fraud does not include a scienter element, plaintiffs still must plead justifiable reliance. This purported class action is not the appropriate vehicle to advance such individually unique claims. Allowing these claims to proceed would frustrate the inherent practical benefits of a class action. Moreover, the plaintiffs reside in different states and to the extent that the quantum or nature of proof of reliance may differ from state to state, the application of different state law to each plaintiff regarding these claims would result in a very questionable use of limited judicial resources. Accordingly, I dismiss plaintiffs’ negligent misrepresentation and equitable fraud claims. Of course, any individual plaintiff is free to refile any of these claims in the appropriate forum, and in

³⁸ *Darnell v. Myers*, Del. Ch., C.A. No. 14859, 1998 WL 294012, at *5, Steele, V.C. (May 27, 1998).

³⁹ *HMG/Courtland Properties, Inc. v. Gray*, Del. Ch., C.A. No. 15789, 1999 WL 504781, at *24, Strine, V.C. (July 12, 1995) (citing *Zirn v. VLI Corp.*, Del. Supr., 681 A.2d 1050, 1061 (1996)).

so doing plead specific facts detailing individual justifiable reliance consistently with the law of that forum.

I. Personal Jurisdiction over Hirsch, Josefsen and Marathon

To determine if personal jurisdiction over a nonresident is proper, I must first consider if the nonresident's activities fall within any Delaware statute permitting personal jurisdiction.⁴⁰ Section 3104(c)(1) of Delaware's long-arm statute authorizes, *inter alia*, the exercise of jurisdiction over a nonresident "who in person or through an agent . . . [t]ransacts any business or performs any character of work or service" in Delaware. If defendants' actions fit within the parameters of Section 3104(c), I must then determine whether the exercise of jurisdiction over the non-resident defendant comports with the requirements of the due process clause of the Fourteenth Amendment.⁴¹ To meet this standard, the defendant must have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."⁴²

Hirsch and Josefsen were not Seragen directors and are not Delaware residents" Nonetheless, Plaintiffs argue that Hirsch and Josefsen are subject to personal jurisdiction in Delaware because they: (1) transacted business in

⁴⁰ *Hercules Inc. v. Leu Trust and Banking (Bahamas) Ltd.*, 611 A.2d 476, 480 (1992).

⁴¹ *Id.*

⁴² *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

Delaware within the meaning of Section 3104(c)(1) of Delaware's long-arm statute; and (2) have minimum contacts with Delaware. Plaintiffs argue that mere ownership of Seragen stock is not the only contact that Hirsch and Josefsen had with Delaware. Each owned over 5% of Seragen's capital stock. Hirsch owned 7,000 shares of Seragen Series B preferred stock and certain warrants and 7,000 shares of STI Class B common stock, while Josefsen owned 3,000 shares of Seragen Series B preferred stock and certain warrants and 3,000 shares of STI Class B common stock. They are both USSC board members, and Josefsen is USSC's chief executive officer. Plaintiffs contend that both were heavily involved in many of the transactions giving rise to plaintiffs' action, and that they both benefited handsomely from the alleged self-dealing. Josefsen and Hirsch were both formally deemed BU "affiliates." The acts that Josefsen and Hirsch are alleged to have committed were integral and essential to the underlying merger transaction using a Delaware vehicle and constitute transacting business in Delaware and necessarily imply the requisite "minimum contacts" with Delaware. Accordingly, this Court has personal jurisdiction over them pursuant to Section 3104(c)(1).


Marathon is a Massachusetts limited liability company. Plaintiffs maintain it is BU's "alter ego" and should therefore be subject to personal

jurisdiction in Delaware.⁴³ It likewise acted as a player integral to the underlying Delaware transaction complained of here. Assuming the Complaint's allegations to be true, it is indeed fair to characterize Marathon as BU's alter ego. Its alleged active role establishes the requisite "minimum contacts" with Delaware, and is fairly subject to the personal jurisdiction of this Court under Section 3104(c)(1).

VI. CONCLUSION

For the reasons stated above, defendants' motion to dismiss is ***granted in part*** and ***denied in part***.

IT IS SO ORDERED.



Vice Chancellor

⁴³ Plaintiffs cite *Gebelein v. Perma-Dry Waterproofing Co.*, Del. Ch., C.A. No. 6210, 1982 WL 8776, at *2, 7 Del. J. Corp. L. 309, 312, Brown, V.C. (1982) (stating "the test for 'piercing the corporate veil' for jurisdictional purposes requires a factual showing that the corporation has no independent reason for existence and that its sole purpose is to provide a means for doing the act and bidding of the individual").