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STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

IN RE MEDTRONIC, INC. SHAREHOLDER LITIGATION,

Lead File No. 27-CV-14-11452

This Document Relates To:

ALL ACTIONS

ORDER AND MEMORANDUM GRANTING DEFENDANTS' MOTION TO DISMISS CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

The above-entitled matter came on for hearing before the Honorable Frank J. Magill, Judge of District Court, on December 30, 2014, upon Defendants' Motion to Dismiss. Plaintiffs Lewis Merenstein and Kenneth Steiner were represented by Vernon Vander Weide, Esq. Defendants Medtronic, Inc., Richard H. Anderson, Scott C. Donnelly, Victor J. Dzau, Omar Ishrak, Governor Michael O. Leavitt, James T. Lenehan, Denise M. O'Leary, Kendall J. Powell, Robert C. Pozen, Preetha Reddy, New Medtronic, and New Medtronic Sub were represented by Peter Carter, Esq. The matter was taken under advisement on December 30, 2014.

Based upon the files, records and proceedings herein, and being fully informed in the premises, the Court makes the following:

ORDER

1. The Court GRANTS Defendants' Motion to Dismiss Consolidated Amended Class Action Complaint.

2. The attached Memorandum is incorporated herein.

LET JUDGMENT BE ENTERED ACCORDINGLY

March 20, 2015

Magill, Frank
Mar 20 2015 2:01 PM

The Honorable Frank J. Magill
Judge of District Court

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MEMORANDUM

Defendant Medtronic Inc., ("Medtronic") and Medtronic's Board of Directors ("Individual Defendants," "Medtronic Board," or the "Board") (collectively, "Defendants") move this Court to dismiss Plaintiff Lewis Merenstein's and Plaintiff Kenneth Steiner's (collectively, "Plaintiffs") Consolidated Amended Class Action Complaint (the "Complaint"). Defendants contend that the claims alleged in the Complaint are all derivative and that Plaintiffs failed to make a demand on the Medtronic Board consistent with Minnesota Rule of Civil Procedure 23.09. Defendants argue that such a failure merits dismissal of the Complaint. According to Defendants, even if Plaintiffs' claims were not derivative, all still merit dismissal because the Complaint does not allege facts that, if true, demonstrate the Individual Defendants breached any fiduciary duties, failed to disclose material facts in the S-4 or the Proxy Statement (the "Proxy"), violated the Minnesota Business Corporation Act ("MBCA"), or Minnesota Securities Act ("MSA").

In response, Plaintiffs assert that their claims are all direct because the injuries they suffered are individual to the shareholders and implicate statutes that provide individual causes of action to Plaintiffs. Thus, Minnesota Rule of Civil Procedure 23.09 does not apply here. Plaintiffs further contend that the Individual Defendants' decision to reimburse themselves for an excise tax to which they were subject (the "Excise Tax Reimbursement") constitutes a self-dealing transaction and is *ultra vires* making it either totally improper, or requiring shareholder ratification via a two-thirds binding vote. Plaintiffs also claim that the S-4 contains inadequate disclosures in violation of the MSA.

After reviewing the allegations in the Complaint, the Court finds that granting Defendants' motion to dismiss is appropriate. First, the Court finds that the allegations underlying Counts I through X are derivative claims. Plaintiffs' failure to follow the procedure in Minnesota Rule of Civil Procedure 23.09 results in dismissal of the claims. Second, Plaintiffs' allegations pursuant to

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the MSA are direct, but fail to state a claim because the information allegedly omitted from the S-4 and the Proxy is not material to making an informed vote on the Inversion.

BACKGROUND

I. The Inversion Between Medtronic and Covidien.

On June 15, 2014, Medtronic announced it had entered into an agreement to purchase Covidien, an Irish public limited company, which ultimately resulted in Medtronic becoming domiciled and incorporated in Ireland (the "Inversion"). (Compl, ¶¶ 2, 14). Merger discussion began when Covidien's Chief Executive Officer, Jose E. Almeida, contacted Omar Ishrak ("Ishrak"), Medtronic's Chief Executive Officer, to set up an in-person meeting to discuss a possible combination of the two companies. (*Id.* ¶ 43). The two executives met on April 2, 2014. (*Id.*) Over the ensuing two months, the two companies negotiated and reached a merger agreement, which Medtronic announced in mid-June. (*Id.* ¶¶ 44-58).

On May 22, 2014, the Individual Defendants had a phone conference with Covidien representatives to further discuss the potential Inversion. (Compl. ¶ 50). During that meeting, the participants discussed the financial value of Covidien, including the impact of the possible synergies. (*Id.*) Also discussed was Medtronic's potential tax-free access to Covidien's overseas cash, as well as Medtronic's own foreign cash reserves. (*Id.*) As part of the proposed Inversion, Medtronic agreed to pay Covidien $850 million if Medtronic shareholders failed to ratify the deal. (*Id.* ¶ 61). Medtronic also agreed to pay the Individual Defendants the Excise Tax Reimbursement. (*Id.* ¶ 81).

On May 30, 2014, Medtronic conveyed a non-binding proposal to Covidien to purchase the company at the price of $90 per share. (Compl. ¶ 54). Covidien proposed a counter-offer of $95 per share. (*Id.* ¶55). On June 2, 2014, Medtronic and Covidien representatives met and agreed that Medtronic would purchase Covidien at $92.50 per share. (*Id.* ¶ 56). The Medtronic Board

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approved this offer on June 3, 2014, and Covidien accepted it on that same day. (*Id.* ¶¶ 57-58). On June 15, 2014, the Medtronic Board obtained an opinion from Perella Weinberg that the consideration to be paid by Medtronic was fair. (*Id.* ¶ 59). Covidien obtained a similar opinion from its financial advisor, Goldman Sachs. (S-4 at 110). The Medtronic Board subsequently approved the Inversion. (*Id.* ¶ 59).

II. Plaintiffs' Objections to the Inversion.

It is apparent from the Complaint that Plaintiffs take issue with various aspects of the Inversion. These various issues can be distilled into three principle protests Plaintiffs have with the Inversion. First, the structure of the transaction as an inversion is problematic. They allege that Medtronic's reincorporation in Ireland and being subject to Irish law will negatively affect Medtronic and its shareholders. (Compl. ¶¶ 4,147). The structure of the transaction also leaves Plaintiffs and other Medtronic shareholders with a purportedly large capital gains tax liability. (*Id.* ¶¶ 76-78). Additionally, Plaintiffs allege that the Inversion does not take into account possible changes to the United States tax code that could prevent Medtronic from fully taking advantage of Ireland's lower corporate tax rate or making inversion-style transactions unlawful. (*Id.* ¶5 and 8). Finally, Plaintiffs claim that the Inversion is a windfall to Covidien's shareholders, who are receiving a 30% premium for their shares at Medtronic's expense. (*Id.* ¶9).

Second, Plaintiffs take issue with the Excise Tax Reimbursement. As a result of the structure of the merger, the Individual Defendants are subject to an excise tax pursuant to the United States tax code. (Compl. ¶¶ 7, 80-81). This one-time tax reimbursement will come from Medtronic itself. (*Id.* ¶¶ 80-81). Plaintiffs assert this is an unfair preference because Medtronic shareholders are not receiving relief from the capital gains taxes to which they are subject as a result of the Inversion. (*Id.* ¶ 82).

Third, Plaintiffs assert that the S-4 and Proxy Statement contain inadequate disclosures.

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Plaintiffs complain that they and other Medtronic shareholders are being asked to vote on whether to approve the Inversion with incomplete information. (Compl. ¶ 10). Specifically, Plaintiffs claim Defendants omitted the information on which Perella Weinberg relied in formulating its fairness analyses of the Inversion. (*Id.* ¶¶ 89-91).

III. Plaintiffs' Alleged Causes of Action.

The above described issues Plaintiffs have with the Inversion are voiced through a variety of different counts in the Complaint. In Count I Plaintiffs allege that the Individual Defendants placed their own personal interests ahead of Medtronic's shareholders by favoring an inversion structure, rather than one that was a non-taxable event. (Compl. ¶ 104). Likewise, in Count II, Plaintiffs allege that Medtronic, Covidien and Merger Sub (a.k.a. New Medtronic Sub) aided and abetted the Individual Defendants' breaches of fiduciary duties. (Compl. ¶ 116).

In Count III, Plaintiffs allege that the Medtronic Board "failed to adhere to the standard of conduct prescribed by Minn. Stat. § 302A.251 for directors." (Compl. ¶ 123). Similarly, in Count IV, Plaintiffs claim that Medtronic's officers failed to adhere to the standard of conduct outlined in Minn. Stat. § 302A.361. (Compl. ¶ 125).

Counts VI through X all relate to the Excise Tax Reimbursement. In Counts VI, VII, and VIII, Plaintiffs allege the Excise Tax Reimbursement is an improper conflicted transaction in violation of Minn. Stat. § 302A.255 (Compl. ¶ 129), an improper indemnification under Minn. § 302A.521 (Compl. ¶ 141), and an *ultra vires* act in violation of public policy (Compl. ¶ 148). In Counts IX and X, they also allege that the Excise Tax Reimbursement is an improper preferential dividend because it is not shared with all of Medtronic's shareholders (Compl. ¶ 153, 156) and that such a preferential dividend is an *ultra vires* act (Compl. ¶ 161).

Plaintiffs allege two other claims related to Medtronic's purported insufficient disclosure of

material information about the Inversion. In Count XI Plaintiffs claim that Medtronic and the Individual Defendants violated Minn. Stat. § 80A.68 because they both employed a "device, scheme, or artifice to defraud" Plaintiffs; made untrue statements of material fact or omitted material facts necessary to make statements made not misleading; and engaged in practices that operate as a fraud upon Medtronic's shareholders. (Compl. ¶ 165). In Count XII, Plaintiffs allege that Medtronic and the Individual Defendants qualify as financial advisors for compensation to Medtronic shareholders and, by virtue of the aforementioned alleged omissions and frauds, violated Minn. Stat. § 80A.69.

IV. Plaintiffs' Alleged Injuries As a Result of the Inversion.

Plaintiffs have alleged several injuries as a result of Defendants' purportedly unlawful actions. Plaintiffs assert they are harmed because: (1) they are not being reimbursed for the capital gains taxes to which they are subject; (2) they are not receiving cash for their current Medtronic shares, while Covidien shareholders are being paid cash for their current shares in addition to receiving shares in the New Medtronic; (3) Medtronic's directors and officers are receiving reimbursement for the excise tax to which they are subject as a result of the Inversion; (4) Defendants' actions violated the shareholders' rights under the MBCA; and (5) the Inversion diluted current Medtronic shareholders' interest in the New Medtronic. (Compl. ¶¶ 33(a) – (e)). Plaintiffs admit that the aforementioned injuries will affect all Medtronic shareholders. (*Id.* ¶ 34).

Plaintiffs' also assert that Defendants failed to disclose all the material information surrounding the Inversion in Medtronic's S-4 filing. (Compl. ¶¶ 86, 92). According to Plaintiffs, the S-4 and the Proxy omit numerous key facts about the Perella Weinberg fairness opinion about the Inversion. (*Id.* ¶¶ 86-92). For example, Plaintiffs claim that allegedly key information of "the applicable tax rates" for the companies used in one Perella Weinberg analysis was omitted. (*Id.* ¶ 89). Plaintiffs contend that such information is material because the Inversion's tax benefits for

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Medtronic were "a key factor in the Individual Defendants' decision to approve and recommend the Inversion." (*Id.*) Other key omissions in the S-4 and the Proxy include information regarding whether the comparator transactions used in another Perella Weinberg analysis were also inversions. (*Id.* ¶ 90). Plaintiffs allege that the omission of this information prevented them from casting an informed vote on the Inversion.

STANDARD OF REVIEW

On a motion to dismiss, courts will consider "only the facts alleged in the complaint, accepting those facts as true and . . . constru[ing] all reasonable inferences in favor of the non-moving party." *Herbert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008) (quoting *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003)). A claim is pled sufficiently if it is possible that some evidence could be produced, consistent with the pleader's theory, "to grant the relief demanded." *Walsh v. U.S. Bank, N.A.*, No. A13-0742 – N.W.2d –, 2014 WL 3844201, at *4 (Minn. Sup. Ct. Aug. 6, 2014). It is insufficient, however, for a party to plead mere legal conclusions; the party must plead facts. *Id.* at *3-4 (citing *Herbert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008) and *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010)).

A district court also must consider any documents that are attached to the complaint. *Hardin Cnty. Sav. Bank v. Housing & Redevelopment Auth. of City of Brainerd*, 821 N.W.2d 184, 192 (Minn. 2012) (citing Minn. R. Civ. P. 10.03). In addition, a district court should consider any documents that are referenced in a complaint but not attached to the complaint. *N. States Power Co. v. Metro. Council*, 684 N.W.2d 485, 490-91 (Minn. 2004). *See also*, *20/20 Group, Inc. v. Hydeaway II, LLC*, 27-CV-13-15977 (Minn. Ct. App. Feb. 23, 2015).

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ANALYSIS

I. Counts I Through X Fail to Comply with Minn. R. Civ. P. 23.09 and Are Ripe for Dismissal.

Counts I through X in the Complaint articulate various causes of action that Plaintiffs say harm them directly. Plaintiffs claim that the Individual Defendants breached their fiduciary duties of loyalty and care, committed an *ultra vires* action, and awarded a preferential dividend to a select group of shareholders. Thus, Plaintiffs contend that their claims are direct and are sufficiently pled to survive Defendants' motion to dismiss.

The Court disagrees with Plaintiffs' analysis. As discussed in depth below, the Court finds that Plaintiffs' claims do not cause direct harm to them as individuals. The harms alleged in Counts I through X relate the structure of the merger as an inversion and are manifest in the Excise Tax Reimbursement, Medtronic's alleged overpayment for Covidien shares, and Plaintiffs' assumed dilution of their shares. Any harms stemming from these actions are direct to Medtronic and derivative to Medtronic's shareholders, subjecting Plaintiffs' claims to the procedural requirements of Minnesota Rule of Civil Procedure 23.09. Therefore, Plaintiffs' failure to make a demand on the Medtronic Board or plead demand futility is fatal to their cause of action. As a result, Counts I through X of Plaintiffs' Complaint fail to state claims for relief.

a. Derivative Versus Direct Claims Under Minnesota Law.

The general rule under Minnesota law is that "an individual shareholder may not assert a cause of action that belongs to the corporation." *Northwest Racquet Swim & Health Clubs, Inc. v. Deloitte & Touche*, 535 N.W.2d 612, 617 (Minn. 1995). The rationale behind this rule is the decision to pursue a legal claim on behalf of a corporation involves "the weighing and balancing of legal, ethical, commercial, promotional, public relations, fiscal and other factors familiar to the resolution of many if not most corporate problems." *Janssen v. Best & Flanagan*, 662 N.W.2d

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876, 883 (Minn. 2003) (internal quotation marks and citations omitted). Such a task is best left to the board of directors, "which is familiar with the appropriate weight to attribute to each factor given the company's product and history." *Id.*

In order for an individual shareholder to assert a claim that belongs to the corporation, he or she must first make a demand on the corporation's board of directors. Minn. R. Civ. P. 23.09; *see also*, *Winter v. Farmers Educ. & Co-op. Union of Am.*, 107 N.W.2d 226, 233 (Minn. 1961). A plaintiff need not make a demand upon the board of directors, however, if the plaintiff demonstrates that it would be futile. *Id.* A demand is excused only if "it is plain from the circumstances that [the demand] would be futile." *Id.* at 234. Demonstrating demand futility is very difficult under Minnesota law because of Minn. Stat. § 302A.241. *See Louisiana Mun. Police Employees Retirement System v. Finkelstein, et al.*, No. 27-cv-11-23986, at *8 (Hennepin Cnty. Dist. Ct. May 29, 2012). Section 302A.241 permits a corporate board of directors to appoint a special litigation committee ("SLC") of independent persons to "consider legal rights or remedies of the corporation and whether those rights and remedies should be pursued." Minn. Stat. § 302A.241, subd. 1 (2014).

When determining whether a shareholder claim is derivative or direct, Minnesota courts examine the character of the alleged injury. *Northwest Racquet*, 535 N.W.2d at 617. If the alleged injury is separate and distinct from any injury to the corporation or similarly situated shareholders, the claim is direct. *Wessin v. Archives, Corp.*, 592 N.W.2d 460, 464 (Minn. 1999); *Erskine v. In Home Health, Inc.*, No. 00-9985, Order and Mem. at 8 (Minn. Dist. Ct., 4th Dist., Hennepin Cnty. Jan. 5, 2001) (Larson, J.). If the alleged injury affects all shareholders as a consequence of damage done to the corporation, the injury is derivative and any complaining shareholder must follow the procedural requirements of Minnesota Rule of Civil Procedure 23.09. *Wessin*, 592 N.W.2d at 464. Generally, a plaintiff must plead that he or she was singled out from other shareholders or that he

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or she suffered an injury distinct from the corporation and other shareholders to state a direct claim. *In re SHFL Entm't, Inc.* No. 27-cv-13-13529, Order and Mem. at 7 (Minn. Dist. Ct., 4th Dist., Hennepin Cnty. Oct. 2, 2013) (Dickstein, J).

b. Counts I Through X Allege Harms that Are Derivative.

The fundamental complaint underlying Counts I through X of Plaintiffs' Complaint is Defendants' choice to structure the merger as an inversion. According to Plaintiffs, this is harmful to their interests because it subjects all of Medtronic's shareholders to capital gains tax liabilities, provides the impetus for the Excise Tax Reimbursement, dilutes their ownership interest in the post-Inversion Medtronic, and results in an overpayment for Covidien shares. As a predicate to these allegations, Plaintiffs are asserting that the Individual Defendants breached their fiduciary duty to Medtronic and violated the MBCA by choosing to structure the merger as an inversion, rather than a non-inversion. If the Individual Defendants had used a non-inversion structure for the merger, Plaintiffs and other shareholders would not experience, for example the capital gains tax, nor would Medtronic insiders be subject to the 15% excise tax.[1] The fundamental issue is, therefore, Plaintiffs' assertion that the Inversion is a bad deal for Medtronic.

It cannot be disputed that such harm flows directly to Medtronic because directors and officers of a corporation have a clearly articulated duty to act in the best interest of the company. *See* Minn. Stat. § 302A.251, subd. 1. The multitude of harms about which Plaintiffs complain would not occur but for the Inversion. Thus, all of Plaintiffs' alleged harms result from the Inversion itself and are therefore derivative of an injury to Medtronic. Indeed, district courts in Minnesota that have considered shareholders' complaints of harm flowing from a board's decision to enter into a merger or acquisition have concluded that such claims are derivative and belong to

[1] To the extent Plaintiffs argue that their capital gains tax liability is an individual harm, the Court notes that all of the shareholders, including officer and director shareholders, are affected equally by that tax.

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the corporation. *See, e.g.*, *Kruglick v. MakeMusic, Inc.*, No. 27CV13-5508, Order and Mem. at 8-9, 12 (Minn. Dist. Ct., 4th Dist., Hennepin Cnty. May 1, 2013) (Wahl, J.) (finding that disclosure claims and allegations that a tender offer price is too low are derivative because "[a]ll shareholders . . . will suffer the same alleged injury."); *Murphy v. Milne, et al.*, No. 27-cv-07-26795, Order and Mem. at 5-6 (Minn. Dist. Ct., 4th Dist., Hennepin Cnty. Aug. 14, 2008) (McShane, J.) (determining that equity and voting dilution claims as a result of corporate transactions are derivative claims because all shareholders were affected equally); *Dreyer v. MGI Pharma, Inc.*, No. 27-CV-08-398, 2008 Minn. Dist. LEXIS 45, at *8 n.5 (Minn. Dist. Ct. Jan. 20, 2008) (Zimmerman, J.) (stating that a shareholder's claim is derivative because, even though the harm alleged was "separate and distinct from the company," her injury was common to all shareholders); *Gaither v. Hudson*, No. MC 05- 003129, Order and Mem. at 9 (Minn. Dist. Ct., 4th Dist., Hennepin Cnty. May 18, 2005) (McGunnigle, J.) (finding that a shareholder's claim that he will receive less value for his shares as a result of the corporation's transaction was derivative because any injury suffered was not unique to the shareholder).

Moreover, the funds for the Excise Tax Reimbursement and Covidien shares do not come from the shareholders, but from the corporate coffers. Thus, any direct harm resulting from the Excise Tax Reimbursement and overpayment for Covidien shares is to Medtronic, not to the shareholders. In both instances, Medtronic experiences this harm directly because payment of the Excise Tax Reimbursement and the overpayment for Covidien shares drains the company's funds. Conversely, there is no direct harm to Medtronic's shareholders. *Cf. Abbott v. McNeff,* 171 F.Supp.2d 935, 941(D. Minn. 2001) (under Minnesota law claims of waste and misappropriation of corporate assets are derivative); *Familienstiftung v. Askin*, 130 F.Supp.2d 450, 494 (S.D.N.Y. 2001) ("A claim for corporate mismanagement is derivative."); *Gagliardi v. TriFoods Int'l, Inc.*, 683 A.2d 1049, 1051 (Del. Ch. 1996) (shareholders brought derivative claim alleging excessive

compensation); *Mona v. Mona Elec. Grp., Inc.*, 934 A.2d 450, 469 (App. 2007) (finding that an excessive compensation allegation, couched in a breach of fiduciary claim, was a derivative, not direct claim); *Rubin v. Murray*, 943 N.E.2d 949, 963 (Mass. App. Ct. 2011) ("The law is clear . . . that an action is derivative rather than direct when the claim is for excessive compensation."); *Akins v. Cobb*, No. CIV.A. 18266, 2001 WL 1360038, at *5-6 (Del. Ch. Nov. 1, 2001) (finding that a plaintiff's claim regarding an executive's excessive compensation was "a garden-variety derivative claim").

Plaintiffs' claims of share dilution are also derivative. The predicate harm to Medtronic is the fact that the merger was structured as an inversion, which Plaintiffs assert is not in the best interest of the corporation. Additionally, under both Minnesota and Delaware law, dilution claims are generally derivative. *Murphy*, No. 27-cv-07-26795, Order and Mem. at *6 (finding that claims alleging "equity and voting dilution as a result of corporate transactions" are derivative claims "when it results . . . from the issuance of new equity to a third party" and the action has an equally diluting effect on all shares); *see also*, *In re J.P. Morgan Chase & Co. Shareholder Litig.*, 906 A.2d 808, 818 (Del. Ch. 2006) (noting that dilution claims are derivative under Delaware law), *aff'd*, 906 A.2d 766 (Del. 2006). As with the other harms described above, Plaintiffs' claims of dilution also affect all Medtronic shareholders equally. Any share dilution as a result of the Inversion will have an identical effect on all outstanding Medtronic shares.

Thus, Plaintiffs have failed to articulate a direct claim in Counts I through X because any alleged harm is derivative of harm to Medtronic and there is no unique harm to Plaintiffs or any other select group of shareholders that is unrelated to the Inversion.[2] While Plaintiffs craft and

[2] Plaintiffs do not argue that a demand on the Board is futile. Instead, they simply argue their claim is direct and not subject to the demand requirement. As such, the Court need not directly address demand futility. The Court does not believe demand is futile for the reasons set forth by Judge Susan Richard Nelson in *In re Medtronic, Inc. Derivative Litigation*, No. 14-cv-03540 (SRN-JJK), Memorandum Opinion and Order at 13, 23-24 (D. Minn. Dec. 22, 2014).

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define their claims as direct claims, this Court must "look not to the theory in which the claim is couched, but instead to the injury itself." *Wessin,* 592 N.W.2d at 464. When viewed in this light, Plaintiffs allegations are clearly derivative claims.

II. Plaintiffs' Material Omission Claims Are Direct Claims, but Ripe for Dismissal.

Plaintiffs' final two claims allege that Defendants violated Minn. Stat. §§ 80A.68 and 80A.69. Plaintiffs assert that the documents distributed to Medtronic shareholders in advance of the vote on the Inversion contained material omissions. Additionally, Plaintiffs claim that Defendants, acting as financial advisors, defrauded them and other Medtronic shareholders in advising of the favorability of exchanging their current Medtronic stock for stock in the post-Inversion Medtronic. Plaintiffs claim that the omitted material is essential for them and other shareholders to cast an informed vote on the Inversion. For the reasons discussed below, the Court finds that Counts XI and XII are direct, but fail to state a claim and are ripe for dismissal.

a. Plaintiffs' Material Omissions Claims Are Direct.

Plaintiffs' claims alleging material omissions from the S-4 and Proxy are direct shareholder claims. As discussed above, Minnesota courts look to the nature of the injury alleged by a plaintiff to determine whether a claim is direct or derivative. *Northwest Racquet*, 535 N.W.2d at 617. The injury alleged here is that Defendants misled Plaintiffs by providing incomplete disclosures in the filings related to the Inversion. As a result, Plaintiffs assert they and other shareholders were unable to cast an informed vote on the Inversion.

In *Blohm v. Kelly*, the Minnesota Court of Appeals determined that a claim related to a shareholder's statutory right to access corporate records was a direct claim. 765 N.W.2d at 157. The court explained that "the right of access to corporate records is personal to each shareholder," and is therefore an injury to the individual shareholder, not the corporation. *Id.* Here, Defendants have a duty imposed by statute and regulation to provide information material to the Inversion to

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Plaintiffs and other Medtronic shareholders. *See*, *e.g.*, 17 C.F.R. § 240.14a-9(a); Minn. Stat. § 80A.68; Minn. Stat. § 302A.463.

Similarly, the Plaintiffs have a corresponding right to receive accurate and truthful information from the corporation. *See Northwest Racquet*, 535 N.W.2d at 619 ("[A]lthough Northwest asserts that Touche's misrepresentation of the value of the FIR to Midwest indirectly affected Northwest, Northwest also alleges specific misrepresentations in the audit report that affected Northwest directly in its decision to purchase the debentures."). The purported material omissions alleged in Plaintiffs' complaint, if unlawful and true, would directly injure Plaintiffs by withholding information to which they were legally entitled. Based upon the legal duty Defendants have to provide accurate and material information to Plaintiffs and other shareholders, such alleged omissions (assuming the information was material), create a direct injury unique to Plaintiffs. Plaintiffs here have alleged a direct harm to themselves based on the allegedly inadequate disclosures in the S-4 and Proxy. This allegation only articulates an indirect injury to Medtronic. Unlike the claims in Counts I-X that are predicated on an injury to Medtronic from the board pursuing the inversion, these counts relate to whether accurate information has been provided to the shareholders to evaluate whether the merger should go forward, an injury unique to the shareholders and not derivative of an injury to Medtronic. As a result, Plaintiffs' claims cannot be derivative of Medtronic's possible indirect injury. Despite having a direct claim, as discussed below, the facts Plaintiffs alleged in the Complaint do not constitute a viable cause of action.

b. Plaintiffs Have Not Alleged that the Purported Omissions Render Other Statements in the S-4 or Proxy False or Misleading.

Plaintiffs have not alleged any claims pursuant to federal law, but rather claims under Minnesota state law that Medtronic made fraudulent statements in its S-4 disclosure and the

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accompanying Proxy issued in conjunction with the Inversion. Plaintiffs' allegations include claims under Minn. Stat. §§ 80A.68 and 80A.69. Minn. Stat. § 80A.68 provides that:

> It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:
>
> (1) to employ a device, scheme, or artifice to defraud;
>
> (2) to make an untrue statement of a material fact or to omit to state a material fact necessary in order to make a statement made, in the light of the circumstances under which it is made, not misleading; or
>
> (3) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

Minn. Stat. § 80A.68. Similarly, Minn. Stat. § 80A.69 makes it unlawful for a person providing investment advice for consideration, directly or indirectly, to "employ a device, scheme or artifice to defraud another person" or "to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person" in providing such advice. Minn. Stat. § 80A.69. Federal cases arising under the Securities Exchange Act are instructive in construing matters implicating Minn. Stat. § 80A.68. *See Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 538 (Minn. 1986); *Davis v. Midwest Discount Securities, Inc.*, 439 N.W.2d 383, 388-89 (Minn. Ct. App. 1989) (citing cases construing federal securities law when determining whether a plaintiff stated a claim under Minn. Stat. § 80A).

More specifically, Minnesota courts look to federal securities law when determining whether an alleged misrepresentation or omission is material. *See Berreman v. West Pub. Co.*, 615 N.W.2d 362, 371 (Minn. Ct. App. 2000) (applying probability-magnitude materiality standard from *Basic v. Levinson*, 485 U.S. 224, 231 (1988)). When addressing corporate law issues and no Minnesota case law is on point, Minnesota courts will also examine Delaware law. *See PJ Acquisition Corp. v. Skoglund*, 453 N.W.2d 1, 7 (Minn. 1990) (examining Delaware law on derivative claims when Minnesota law on the specific issue was undeveloped). As such, the Court

will refer to both federal securities and Delaware law to determine whether Plaintiffs have adequately alleged that Medtronic made material misstatements or omissions in the S-4 disclosures and the Proxy it distributed to its shareholders about the proposed Inversion.

When evaluating a plaintiff's claim of inadequate disclosures in a proxy statement, courts must determine whether the alleged omissions are material. *TSC Indus. v. Northway, Inc.*, 426 U.S. 438 (1976). An omission is material if there is a "substantial likelihood" the omitted information would have influenced a reasonable shareholder in deciding how to vote on the subject of the proxy statement. *Berreman*, 615 N.W.2d at 371; *Minzer v. Keegan*, 218 F.3d 144, 149 (2d Cir. 2000) (citing *TSC Indus.*, 426 U.S. at 449). Proxy statements need not disclose to shareholders all the information a board of directors has considered. Instead, proxy statements must only disclose information that, when viewed as a whole, fully explains the matter on which the shareholders are to vote. *Gottlieb v. Willis*, No. 12-CV-2637, 2012 WL 5439274, at 3-4 (D. Minn. Nov. 7, 2012); *see also* 17 C.F.R. § 240.14a-101. Once a board has fully explained the matter on which to be voted, an "omission or inclusion of a particular fact is generally left to management's business judgment." *Id.* at *4 (citing *In re 3Com S'holders Litig.*, 2009 WL 5173804, *1 (Del. Ch. Dec. 18, 2009)).

It is a plaintiff's responsibility to identify statements in an S-4 or proxy statement that are misleading or false as a result of an alleged material omission. *Gottlieb*, No. 12-CV-2637, 2012 WL 5439274 at *6-7. In *Gottlieb*, the court declined to grant a temporary injunction on the plaintiff's material omission claim, in part, because the plaintiff failed to "cite a single statement in the proxy statement" that was false or misleading as a result of the alleged omissions. *Id.* The court further explained that the materiality element for disclosure claims is separate and distinct from the false or misleading element. *Id.* at *6-7. Thus, a plaintiff making a material omission claim must allege both that the alleged omission was material *and* rendered other statements in the S-4 or

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proxy statement false or misleading. *See also Hysong v. Encore Energy Partners LP*, Fed. Sec. L. Rep. P 96,586 (D. Del 2011) ("the omission must be material, and . . . the omission must render some statement included in the proxy 'false or misleading,'") (citing *Tracinda Corp.v. DaimlerChrysler AG,* 502 F.3d 212, 230-33 (3d Cir. 2007)). Plaintiffs fail to state a claim that Defendants omitted material information from the S-4 and Proxy for several reasons.

i. The alleged omissions do not render any statement in the S-4 or Proxy false or misleading.

Plaintiffs do not identify a single statement in the six hundred plus page S-4 or corresponding Proxy that is actually false. Nor do they allege that specific statements are made false or misleading as a result of the purported omissions. Rather, Plaintiffs claim that the Perella Weinberg analyses do not tell the whole story. Specifically, Plaintiffs allege that Defendants ought to have disclosed information used by Perella Weinberg in its various analyses of the Inversion, including: (1) information about the companies and other business transactions used for comparison purposes; and (2) the analysis by Perella Weinberg regarding the value of obtaining an Irish corporate tax rate, the period over which that value would be realized, how the lower tax rate will affect share prices of the New Medtronic, the uncertainty of the projected benefits, and comparison of the value of the Inversion to the cost of the Inversion on Medtronic and its shareholders. (*See* Compl. ¶¶ 87-91).[3] However, despite the volume of information Defendants apparently omitted from the S-4 and Proxy, Plaintiffs have failed to allege specific facts that, if true, demonstrate the supposedly deficient Perella Weinberg analyses renders other information in

[3] One of the material omissions alleged by Plaintiffs is that the Individual Defendants failed to disclose the amount of the Excise Tax Reimbursement. (Compl. ¶ 87). Subsequent amendments to the S-4 and Proxy Statement disclosed that information with respect to directors, including non-employee directors. Accordingly, the Court finds this allegation of a material omission moot.

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the S-4 and Proxy misleading or false. Without making such a connection and allegation Plaintiffs have failed to state an adequate material omission claim.

ii. Plaintiffs have not established they are entitled to the omitted information.

Plaintiffs do not have a legal right to the omitted information. The alleged disclosures to which Plaintiffs assert they are entitled merely amount to a demand for Defendants to "tell [][them] more about the subject of those statements." *Gottlieb*, 2012 WL 5439274 at *3. The crux of the "more" they seek relates to the information relied upon by Perella Weinberg in its opinions regarding the fairness of the Inversion.

Neither federal proxy regulations nor Minnesota law require disclosure of all the information relied upon by a financial advisor providing a fairness opinion of a particular transaction. *See* 17 C.F.R. § 229.1015(b) (requiring only a summary of the "report, opinion, or appraisal" but not the information underlying the report); *see also,* 17 C.F.R. § 240.14a-101 (no requirement for a proxy statement to include underlying data from financial analysis of transaction); *Gottlieb*, 2012 WL 5439274 at *3. In *Gottlieb*, the court did not grant a temporary injunction, in part, because the plaintiff had no legal basis to request more detailed projections and data about a merger. *Id.* (acknowledging that Minnesota law does not mandate more stringent disclosures than federal law).

Delaware courts addressing this issue have also declined to require disclosure of the data underlying a financial fairness report. In *Skeen v. Jo-Ann Stores, Inc.*, the Delaware Supreme Court rejected the plaintiff's argument that the data underlying an appraisal opinion should have been disclosed to shareholders. 750 A.2d 1170, 1174 (Del. 2000). The court explained that such a claim would require articulating a new rule governing mandatory disclosures in proxy statements. *Id.* Further, no legal authority mandated that the information underlying an appraisal opinion needed to be disclosed. *Id.* The court concluded that "[o]mitted facts are not material simply because they might be helpful." *Id. See also*, *In re Best Lock Corp. S'holder Litig.*, 845 A.2d

1057, 1073 (Del. Ch. 2001) ("Delaware courts have held repeatedly that a board need not disclose specific details of the analysis underlying a financial advisor's opinion."); *Dent v. Ramtron Int'l Corp.*, No. CIV.A. 7950-VCP, 2014 WL 2931180, at *12 (Del. Ch. June 30, 2014) ("stockholders are entitled only to a fair summary of a financial advisor's work, not the data to make an independent determination of fair value."). Thus, a corporation need only provide a fair summary of a fairness opinion.

The information Plaintiffs' allege was omitted from the S-4 and the Proxy is information Perella Weinberg allegedly relied upon in constructing its financial fairness opinion of the Inversion. Plaintiffs' contend that they are entitled to the information once Defendants disclosed the Perella Weinberg analyses. For example, Plaintiffs claim that the applicable tax rates for each of the companies used in the Perella Weinberg analyses should have been disclosed. (Compl. ¶ 89). Additional data about the other companies and transactions used as a basis for Perella Weinberg's opinion may be helpful to Plaintiffs in determining whether to approve or disapprove the Inversion.[4] But, as the federal regulations and cases above illustrate, Plaintiff has no legal entitlement to the information underpinning the Perella Weinberg analyses. *See also Hysong, supra* (underlying methodologies, projections, key inputs and multiples relied upon by financial advisor need not be disclosed); *Louisiana Mun. Police Employees Retirement Sys. v. Cooper Indust.*, Fed. Sec. L. Rep. P 97,054 (N.D. Ohio 2012) (criteria to select companies and multiples for comparison purposes need not be disclosed).

Under the law, Plaintiffs are only entitled to a fair summary of the fairness opinion by Perella Weinberg. The S-4 fully complies with this requirement. The S-4 contains a summary of

[4] To the extent that Plaintiffs are seeking disclosure of information Perella Weinberg considered regarding the tax benefits to Medtronic, the record before the Court reveals that Perella Weinberg was not asked to, and did not, consider such information. (S-4 at E-3.) Accordingly, Plaintiffs cannot state a valid claim seeking disclosure of information that was not considered by Perella Weinberg.

the financial analyses performed by Perella Weinberg. The S-4 also describes Perella Weinberg's Historical Share Price Analysis, Equity Research Analyst Price Targets, Comparable Company Analysis, Public Trading Multiples Analysis, Precedent Transaction Analysis, Precedent Premium Paid Analysis, and Discounted Cash Flow Analysis. (S-4 at 94-104). Perella Weinberg's entire opinion is included as an exhibit to the S-4. (S-4 at Annex E, D-1). Medtronic need not disclose the vast amount of data necessary to "replicate" the financial advisor's work. *Gottlieb*, 2012 WL 5439274, at *6. Medtronic must simply disclose an adequate and fair summary of the work underlying the fairness opinion. *See Dreyer*, 2008 Minn. Dist. LEXIS 45, at *20 ("While it is always possible to include more information in a Schedule 14D-9 filing, a company is required to disclose the relevant facts, not every conceivable detail relating to a long and complicated process."). Medtronic has complied with this legal obligation. As such, Plaintiffs' material omission claim fails because the omitted information is not material.

c. Defendants Did Not Provide Fraudulent Financial Advice to Plaintiffs.

Plaintiffs' claim under Minn. Stat. § 80A.69 alleges that Defendants provided fraudulent financial advice to Plaintiffs and other Medtronic shareholders in advising them to exchange their current Medtronic shares for stock in the post-Inversion Medtronic. This claim is without merit. Plaintiffs fail to allege: (1) either that the omitted information caused other information in the S-4 or Proxy to be false or misleading; or, (2) that they were legally entitled to disclosure of that information. Further, Defendants, in the S-4, specifically state that if a shareholder has any doubt about the transaction the shareholder should consult an independent financial advisor. (S-4 at 1). Medtronic shareholders are also directed to consult personal tax advisors to determine whether the Inversion would cause them any adverse tax consequences. (S-4 at 143). Thus, Plaintiffs have failed to state a claim that Defendants provided them fraudulent financial advice. Accordingly, the

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Court finds that this claim is ripe for dismissal.[5]

CONCLUSION

For the reasons contained herein, this Court GRANTS Defendants' Motion to Dismiss Consolidated Amended Class Action Complaint.

FJM

[5] Count V of the Complaint seeks equitable relief pursuant to Minn. Stat. § 302A.467. Because this Court has determined all of Plaintiffs' other claims are ripe for dismissal, they are not entitled to equitable relief under the MBCA. Count V, therefore, is also ripe for dismissal.