IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

In re DEL MONTE FOODS COMPANY SHAREHOLDER LITIGATION	Consolidated C.A. No.: 6027-VCL **REDACTED VERSION** **E-FILED ON February 8, 2011**

ANSWERING BRIEF OF THE SPONSOR DEFENDANTS IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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NATURE AND STAGE OF THE PROCEEDINGS

This is a consolidated putative class action that challenges a proposed merger (the "Merger") in which the Del Monte Foods Company ("Del Monte" or the "Company") will be merged with a company controlled by private equity funds affiliated with Kohlberg Kravis Roberts & Co. L.P. ("KKR"), Vestar Capital Partners ("Vestar") and Centerview Partners ("Centerview", collectively, the "Sponsors").

Following the November 25, 2010 public announcement of the Merger, two putative class actions were filed and consolidated by order dated December 8. On December 15, Del Monte filed with the U.S. Securities and Exchange Commission its Schedule 14A Preliminary Proxy Statement.[1] On the heels of that filing, five additional putative class actions were filed. On December 31, the court amended its December 8 consolidation order to add the five new actions. On January 11, 2011, the Lead Plaintiff, NECA-IBEW Pension Fund (the "Plaintiff"), filed an amended complaint. The parties have since concluded expedited discovery, and the Lead Plaintiff's Opening Brief in Support of its Motion for Preliminary Injunction was filed on February 2, 2010. This is the Sponsors' Answering Brief in Opposition to Plaintiff's Motion for Preliminary Injunction (the "Motion").

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[1] Del Monte filed its Definitive Proxy on January 12, 2011.

FACTS[2]

On November 24, 2010, by unanimous vote of the Del Monte board of directors, Del Monte entered into a merger agreement (the "Merger Agreement") with Blue Acquisition Group, Inc. and its merger subsidiary, Blue Merger Sub Inc. Blue Acquisition Group, Inc. is owned by private equity funds affiliated with KKR, Vestar and Centerview. A special meeting of the Del Monte stockholders to vote on the Merger is scheduled for February 15, 2011. If the Merger is approved, the Del Monte stockholders will be paid $19 in cash for each share of common stock they own. $19 per share represents a premium of approximately 40 percent over the average closing price of Del Monte's common stock for the three-month period ended on November 17, 2010. $19 per share is higher than any price at which Del Monte's common stock has ***ever*** traded.

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[2] The Sponsors hereby incorporate, as if fully stated in this brief, the facts as set forth in the Del Monte Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction ("Del Monte Brief").

ARGUMENT

I. PLAINTIFF MUST SATISFY ALL THREE PRONGS OF THE PRELIMINARY INJUNCTION STANDARD TO EARN AN INJUNCTION.

A preliminary injunction is an extraordinary form of relief that will be granted only where the moving party demonstrates each of the following three factors: "(1) a reasonable probability of success on the merits at a final hearing; (2) that the failure to issue a preliminary injunction will result in immediate and irreparable hardship; and (3) that, after balancing the equities, the harm to the plaintiff if relief is denied will outweigh the harm to the defendant if relief is granted." *L & W Ins., Inc. v. Harrington*, 2007 WL 809512, at *7 (Del. Ch. Mar. 12, 2007). If Plaintiff fails to show any one of these factors, an injunction should not be issued.

II. PLAINTIFF CANNOT PROVE A CLAIM FOR AIDING AND ABETTING BECAUSE THERE HAS BEEN NO BREACH OF FIDUCIARY DUTY.

The Sponsors join in the arguments put forth in the Del Monte Brief. As made clear in the Del Monte Brief, Plaintiff has not, among other things, demonstrated a reasonable probability of success on the merits with respect to its breach of fiduciary duty claims against the Del Monte Board of Directors. And on this record, Plaintiff cannot make such a showing:

- *Market Check*: There can be no question that the Del Monte Board canvassed the market. First, the Board conducted an auction process in the winter and spring of 2010. Second, there was a leak two weeks prior to the signing of the Merger Agreement. Third, after signing the Merger Agreement, the Board conducted an aggressive 45-day "go shop" process in which ***53*** potential acquirers, both financial and strategic, were contacted. *See, e.g., In re Formica Corp. S'holders Litig.*, 1989 WL 25812, at *12 (Del. Ch. Mar. 22, 1989); *In re Fort Howard Corp. S'holders Litig.*, 1988 WL 83147, at *13 (Del. Ch. Aug. 8, 1988).

- *No Alternative Bidder*: Despite the efforts of the Company and their advisors, both prior to reaching an agreement with the Sponsors and after announcement of the Merger, during the extensive go-shop, no alternative proposal exists.

- *Fiduciary Out and Reasonable Termination Fee*: The Del Monte Board also negotiated a fiduciary out provision and a termination fee (only 1.13% of the $5.3

billion total deal value during the go-shop and 2.26% post go-shop and still only 1.5% and 3.0% of the $4.0 billion equity value respectively) that ensured the Board would be able to act on a superior proposal if one was made—none was.[3] *See, e.g.*, *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 502 (Del. Ch. 2010) (a fiduciary out provision provides the target board the ability to engage with potential superior bidders and negates plaintiff's claim that other bidders were precluded by a no-shop provision in the merger agreement from successfully making a higher offer); *Energy Partners, Ltd. v. Stone Energy Corp.*, 2006 WL 2947483, at *16 (Del Ch. Oct. 11, 2006) (granting declaratory judgment that the inclusion of a fiduciary out in a merger agreement that also contained a no-shop provision allowed the target to explore overtures from potential new bidders); *see also In re 3Com S'holders Litig.*, 2009 WL 5173804, at *7 (Del. Ch. Dec. 18, 2009) (finding a 4% of equity breakup fee reasonable); *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1015, 1020-21 (Del. Ch. 2005) (holding that a termination fee of 3.75% equity value and 3.25% total transaction value was reasonable).

- *40% Premium*: The proposed transaction price represents a generous ***40%*** premium and is well above any price at which Del Monte has previously traded.

- *Fully informed shareholder vote*: To the extent Plaintiff's disclosure claims had merit (and they did not) they have been mooted by Del Monte's supplemental disclosure. Delaware Courts have long stated their reluctance to enjoin premium transactions where there is a fully-informed shareholder vote, particularly whereas here, there is no rival bidder. *See, e.g.*, *Cogent*, 7 A.3d at 516 ("Fully informed stockholders may voluntarily choose not to tender their shares and instead seek appraisal under DGCL § 262. As long as the stockholders' decision is informed, as I have found is likely here, the choice whether to tender will be voluntary and cannot in any legally meaningful sense be said to threaten irreparable harm.").

For these reasons and all other reasons cited in the Del Monte Brief, Plaintiff has failed to demonstrate a reasonable likelihood of success of establishing the board breached its fiduciary duties. Without an underlying breach of fiduciary duty any claim Plaintiff has against the

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[3] Plaintiff's claim that the Sponsors "locked up" a majority of the banks that could have provided financing for the proposed transaction, thereby dimming the prospect of a topping bid, is incorrect. Indeed the Merger Agreement prohibited the Sponsors, without the consent of Del Monte, from "engaging any bank or investment bank or other potential provider of debt financing on an exclusive basis (or otherwise on terms that prevent such provider from providing or seeking to provide such financing to any third party in connection with a transaction relating to the Company or its subsidiaries) . . . in connection with the Merger or the other transactions contemplated hereby." Affidavit of Rudy Koch in Support of Del Monte Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction ("Koch Aff."), Ex. 2 (Merger Agreement § 6.15(c)). Plaintiff's claim is also contradicted by the sworn deposition testimony of Regina Tarone, Director in the Leveraged Finance Group at

Sponsors for aiding and abetting must fail. *See Vichi v. Koninklijke Philips Elecs. N.V.*, 2009 WL 4345724, at *21 (Del. Ch. Dec. 1, 2009) ("One cannot aid and abet a breach of fiduciary duty, however, where no duty has been breached in the first place."); *Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *15 (Del. Ch. Nov. 30, 2007) ("As this Court has determined that the Complaint fails to state a claim for any underlying breach of fiduciary duty, BEA cannot be liable for aiding and abetting such a breach. Thus, Globis' aiding and abetting claim also must be dismissed.").

III. PLAINTIFF CANNOT ASSERT AIDING AND ABETTING AS A BASIS FOR AN INJUNCTION.

Even if Plaintiff could assert a claim for aiding and abetting against the Sponsors, and it cannot, it has waived that claim for purposes of the preliminary injunction motion. Plaintiff's 50-page brief is void of a single reference to a claim for aiding and abetting breach of fiduciary duty against the Sponsors, who are third parties and have no affiliation with the Del Monte directors. Plaintiff's failure to raise an aiding and abetting claim constitutes a waiver for purposes of its motion for preliminary injunction. *See Emerald Partners v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003) ("It is settled Delaware law that a party waives an argument by not including it in its brief.") (citations omitted); *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 62 (Del. Ch. 2001) (holding that a party waived an argument by not including it in its opening post-trial brief).

Barclays, who made clear that Barclays was free to provide financing to a rival bidder if one emerged. Plaintiff's Exhibit 36 (Deposition of Regina Tarone), at 215-16.

IV. THE HARM AN INJUNCTION WOULD CAUSE TO THE SPONSORS AND DEL MONTE'S STOCKHOLDERS WEIGHS AGAINST AN INJUNCTION.

For the reasons set forth in the Del Monte Defendants' Answering Brief, Plaintiff cannot establish a likelihood of success on the merits. Nor can Plaintiff show irreparable harm. Those failures alone are sufficient to deny the injunction, but there is still an additional basis to deny the injunction: the harm that would be caused by an injunction far outweighs the harm that may occur if an injunction is denied.

As this court stated in *Lennane v. Ask Computer Systems, Inc.*, 1990 WL 154150, at *6 (Del. Ch. Oct. 11, 1990):

> [A] court must be cautious that its injunctive order does not threaten more harm than good. That is, a court in exercising its discretion to issue or deny such a . . . remedy must consider all of the foreseeable consequences of its order and balance them. It cannot, in equity, risk greater harm to defendants, the public or other identified interests, in granting the injunction, than it seeks to prevent.

Accordingly, in balancing the hardships, this court has refused to issue an injunction if it would unduly infringe upon the legitimate interests of third parties and the stockholders. For example, in *In re CheckFree Corp. Shareholders Litigation*, the court noted that in ruling on a preliminary injunction, it must consider the interests of innocent third parties including the public and the company's stockholders whose interests would be threatened by an injunction. 2007 WL 3262188, at *1, 4 (Del. Ch. Nov. 1, 2007); *see also Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584, 600 (Del. Ch. 1986) ("I am sensitive to the interests of the public common stockholder and of Bally to have the proposed merger effectuated without judicial interference. While the complaint in conclusory language alleges that Bally knowingly participated in a breach of fiduciary duty, no specific facts are alleged—nor so far as the present record discloses have facts been uncovered in discovery—that would support that conclusion. In these circumstances,

Del Monte stockholders, who may lose the chance to accept a risk-free premium in cash. Plaintiff's Motion therefore should be denied.

The Sponsors would be harmed if their bargained-for rights were not enforced. First, as set forth in the Affidavit of Simon Brown (a member of KKR), the Del Monte transaction will be financed in part with $1.3 billion in high yield bonds. Brown Aff. ¶ 8. The Sponsors have priced the bond issuance and pursuant to their terms, the bonds will pay interest at 7.625% per annum. *Id.* The bond offering is scheduled to close on February 16, 2011.

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This risk of loss is significant and far outweighs any risk to Plaintiff if the transaction proceeds, particularly here because Plaintiff has not committed to posting a bond.[4]

[4] This Court has been troubled by the fact that without a bond requirement, "entrepreneurial plaintiffs" "have a free option to enjoin deals." *In re Art Tech. Group, Inc. S'holders' Litig.*, C.A. No. 5955-VCL, at 103 (Dec. 20, 2010) (TRANSCRIPT). When millions, and perhaps billions, of dollars are at stake in deal litigation, the Court should be particularly wary about granting plaintiffs a free option to enjoin the stockholders' ability to decide for themselves whether to accept an all-cash offer that provides a substantial, risk-free premium.

Second, with respect to the Merger Agreement itself, the Sponsors would be harmed if the deal they struck was enjoined in any way.[5] Under the Merger Agreement, the Sponsors have agreed to pay the Del Monte stockholders $19 per share in cash for each share of stock they own—a 40-percent premium on their investment. In coming to an agreement, both Del Monte and the Sponsors made concessions and both extracted benefits. The parties are entitled to have those contractual expectations enforced. *See NACCO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 19 (Del. Ch. 2009). This is particularly so here, given the high premium that is being paid, the committed financing in place, full disclosure of all material facts and absence of any competing bid despite widespread publicity surrounding the transaction and the thorough post-signing market check. *See TCG Secs., Inc. v. S. Union Co.*, 1990 WL 7525, at *11 (Del. Ch. Jan. 31, 1990). In sum, there is simply no reason why under the facts of this case, the Sponsors' contractual expectations should be upset through the issuance of an injunction, and the harm that would befall the Sponsors if an injunction were issued certainly weighs against granting Plaintiff the relief it seeks.

Finally, the Del Monte stockholders also stand to lose substantially if an injunction is granted. Any delay in closing necessarily increases the risk of changed economic circumstances, which in turn could result in a "Material Adverse Effect" under the terms of the Merger Agreement, thereby giving the Sponsors a right to terminate the deal. If the Merger does not close, the stockholders would lose over $1 billion, based on the spread between $19 per share

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granting plaintiffs a free option to enjoin the stockholders' ability to decide for themselves whether to accept an all-cash offer that provides a substantial, risk-free premium.

[5] *See In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1015, 1022-23 (Del. Ch. 2005) (refusing to preliminarily enjoin certain provisions of the parties' agreement because "[i]nvalidation" as a form of relief is not preliminary; it is permanent injunctive relief, akin to asking the Court to take out "the mighty judicial blue pencil," which is inappropriate without a full evidentiary record).

and the unaffected price of $13.60.[6] That is a tremendous loss of value compared to the non-existent harm Plaintiff faces if the stockholder vote proceeds, especially when, as is the case here, despite the Company's efforts no alternative proposal exists for the shareholders to fall back on. For this reason, in circumstances such as this, when there has been full disclosure, the court will not interfere with the stockholders' ability to decide for themselves whether to accept or reject an offer. *See, e.g.*, *Cogent*, 7 A.3d at 516 ("Fully informed stockholders may voluntarily choose not to tender their shares and instead seek appraisal under DGCL § 262. As long as the stockholders' decision is informed, as I have found is likely here, the choice whether to tender will be voluntary and cannot in any legally meaningful sense be said to threaten irreparable harm."); *see also Forgo v. Health Grades, Inc.,* C.A. Nos. 5716, 5732-VCS, at 174 (Sept. 3, 2010) (TRANSCRIPT) (notwithstanding the court's finding that plaintiff had shown a reasonable probability of success, the court refused to issue an injunction because "under the balance of the harms . . . that would be an act of arrogance in which [the court took] out of the hands of people who really have money at stake the ability to make [the] determination for themselves."); *accord In re IXC Commc'ns, S'holders Litig.*, 1999 WL 1009174, at *1 (Del. Ch. Oct. 27, 1999) ("Should the Court of Chancery intervene and enjoin a shareholder vote on a merger agreement submitted for their approval when that vote will be part of a democratic governance process: (1) in which shareholders are adequately informed; and, (2) in which shareholders will be free to exercise their judgment based upon their individual assessment of their own economic interests? No."). Because the Del Monte stockholders are fully informed, and are free to accept or reject the Merger consideration based on its economic merits, there is no

[6] Based on Del Monte's closing price on October 8, 2010, the last trading day before the Sponsors submitted their indication of interest to Del Monte, and the 199,372,722 outstanding shares as of December 2010. Koch Aff., Ex. 54.

basis why Del Monte's stockholders should shoulder the substantial risk of loss Plaintiff seeks to impose through an injunction.

For all of these reasons, the balance of equities tips decidedly against an injunction.

CONCLUSION

Third-party transactions that offer a 40-percent premium to stockholders are generally not the type thought of as unfair. Plaintiff has no basis to deprive the Del Monte stockholders of the ability to accept this immediate, risk-free and historic premium on their investment. For all of the reasons set forth in this brief, as well as the reasons set forth in the Del Monte Brief, Plaintiff's Motion should be denied.

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February 7, 2011
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 8, 2011, he caused a copy of the foregoing REDACTED VERSION OF ANSWERING BRIEF OF THE SPONSOR DEFENDANTS IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION to be served by LexisNexis File & Serve upon the following counsel of record:

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