IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

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	:	CONSOLIDATED
IN RE COMVERGE INC.	:	Civil Action
SHAREHOLDERS LITIGATION	:	No. 7368-VCP
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Chambers
New Castle County Courthouse
500 North King Street
Wilmington, Delaware
Tuesday, May 8, 2012
10:00 a.m.

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BEFORE: HON. DONALD F. PARSONS, JR., Vice Chancellor.

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UNREDACTED COURT'S RULING
ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

APPEARANCES: (via telephone)

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THE COURT: Good morning.

MR. DELEEUW: Good morning, Your Honor.

THE COURT: I apologize for the delay, but I am ready to make the ruling. So if we could have a roll call, please.

MR. DELEEUW: Good morning, Your Honor. Brad deLeeuw of Rosenthal, Monhait & Goddess. I note on the line with me today is Juan Monteverde and Emily Komlossy of Faruqi & Faruqi; and also my co-liaison counsel, Gina Serra of Rigrodsky & Long; and also Kira German of Gardy & Notis. They're all on the phone for plaintiffs.

If there is anyone else that I've omitted, would you announce yourself?

MS. HOPKINS: This is Shannon Hopkins --

THE COURT: Go ahead with the plaintiffs.

MR. McEVILLY: Good morning. This is Jim McEvilly from Faruqi & Faruqi also on the line.

MS. HOPKINS: Good morning, Your Honor. This is Shannon Hopkins with Levi & Korsinsky on the line.

MR. NOTIS: Good morning, Judge. It's James Notis also from Gardy & Notis.

THE COURT: Okay. All right. And then for defendants?

MR. KOCH: Good morning, Your Honor. It's Rudy Koch from Richards Layton & Finger on behalf of the Comverge defendants. Kevin Gallagher is with me. We also have on the line John Latham and Robert Long from Alston & Bird, and I believe that Matt Smith, Comverge's general counsel, is also on the line.

THE COURT: All right.

MR. BAYLISS: Your Honor, it's Tom Bayliss on behalf of the HIG defendants.

THE COURT: Okay. Is that everybody?

I appreciate the argument yesterday, and will proceed to give a ruling orally. I regret that I don't have the time, given the midnight this evening cutoff for the tender offer, to issue a written opinion, so I'll apologize in advance for the length of these remarks.

This is a putative class action brought on behalf of the public shareholders of Comverge, Inc., challenging the pending acquisition of the company by HIG Capital LLC and certain of its affiliates, which I refer to collectively as "HIG."

Pursuant to a merger agreement dated March 26th, 2012, the acquisition is structured in two tiers. First, a tender offer by HIG for any and all Comverge shares at a price of $1.75 per share, followed by, second, a back-end squeeze-out merger at the same price. The $1.75 price per share equates to a total transaction size of approximately $49 million.

Additionally, the company has granted HIG a top-up option, which will permit HIG to effect the back-end merger under 8 Del. C., Section 253, without a shareholder vote. The front-end tender offer commenced on April 11th and is scheduled to expire tonight, May 8th, at midnight.

Before me now is plaintiffs' motion for a preliminary injunction temporarily enjoining the merger. Having considered the arguments made yesterday and in the parties' extensive briefs as well as the preliminary record developed over the past two weeks, I conclude that although plaintiffs' motion raises legitimate concerns, their request for preliminary injunctive relief should be denied for the reasons I state in this ruling.

A preliminary injunction may be granted where the movants demonstrate: One, a reasonable probability of success on the merits at a final hearing; two, an imminent threat of irreparable injury; and three, a balance of the equities that tips in favor of the issuance of the requested relief.

The moving party bears a considerable burden in establishing each of these necessary elements. Plaintiffs may not merely show that a dispute exists and that plaintiffs might be injured; rather, plaintiffs must establish clearly each element because injunctive relief will never be granted unless earned.

That said, there is no steadfast formula for the relative weight each element deserves. Accordingly, a strong demonstration as to one element may serve to overcome a marginal demonstration of another.

The plaintiffs have advanced three principal claims: First, that the individual directors of Comverge breached their fiduciary duties in approving the merger agreement; second, that HIG and certain of its affiliates aided and abetted those breaches; and third, that the board authorized materially incomplete or misleading disclosure statements in connection with their recommendation that shareholders tender to HIG. I address the probability of success of each of these claims in turn.

As to the Revlon claims against the board, plaintiffs challenge the proposed sale of Comverge for cash, which is subject to enhanced scrutiny under Revlon Inc. versus MacAndrews and Forbes Holdings, Inc., from the Delaware Supreme Court in 1986, and the progeny of that case.

When directors have commenced a transaction process that will result in a change of control, a reviewing court will examine whether the board has reasonably performed its fiduciary duties in the service of a specific objective: Maximizing the sale price of the enterprise.

This enhanced scrutiny has both subjective and objective components. Subjectively, the directors must have tried in good faith to get the best available price, and those good faith efforts must have been objectively reasonable.

Many decisions and actions, however, may be reasonable ones; there is no single blueprint that a board must follow to fulfill its duties under Revlon. Thus, while Revlon review is more searching than Business Judgment Rule deference, a court may not second-guess reasonable but debatable tactical choices that directors have made in good faith.

At the outset, I note that at all reasonable times, all but one of the Comverge directors were independent and disinterested. The one inside director, R. Blake Young, Comverge's president and CEO, ultimately abstained from the vote to approve the merger agreement, and the transaction committee, later denominated "the strategy committee," which I will refer to simply as "the committee," comprised only outside and disinterested directors.

There is no indication in the available record that any of these directors harbored subjective motives inimical to the best interests of the company or its public shareholders. To the contrary, the board and committee meeting minutes, along with the deposition testimony of Director Lawrence Jones who became the committee chair in February of 2012, indicate that the directors subjectively believed that their decisions regarding the negotiation and transaction process at the time each decision was made would maximize the sales price of the enterprise.

The objective reasonableness of the directors' decisions is less clear. In hindsight, several of their decisions did not achieve the results for which the board had hoped. Delaware law, however, does not evaluate a fiduciary's conduct in hindsight, but in light of the circumstances as they existed when the challenged conduct occurred. Thus, even when Revlon duties attach, corporate directors are not insurers of the enterprise. Their Revlon duties are to attempt to get the best price reasonably available, not to achieve the best possible price.

With the relevant inquiry thus framed, it does not appear from the available record that plaintiffs are likely to succeed in showing that the directors' conduct in auctioning the company between late 2011 and April 2012 in fact was objectively unreasonable.

For example, there was no question that the company conducted a lengthy robust market canvass before entering into the merger agreement. With the assistance from qualified expert financial advisors over an 18-month period, the board initially contacted at least 25 financial and strategic parties about a potential equity investment for a 100 percent sale of the company.

The committee negotiated aggressively with HIG, which increased its offer twice in December 2011 and January 2012 from an initial bid of $1.75 per share to $2.15 per share. Each of those offers also included a $12 million bridge loan to ease Comverge's mounting liquidity concerns.

During that same period, the committee repeatedly rejected HIG's request for an exclusivity agreement. Indeed, the committee agreed to a 20-day exclusivity agreement, ten days shorter than HIG had been requesting, only after receiving advice from its financial advisor that, one, HIG's then latest bid of $2.15 was near the upper range of what HIG realistically would offer; and two, a competing suitor, Company X, was not prepared to make an offer.

To a degree, the exclusivity agreement worked as planned. HIG increased its offer to $2.25 on February 14, the day before the exclusivity agreement expired. Somewhat more unexpectedly, Company X ultimately gave a competitive, albeit preliminary, indication of interest during the exclusivity period of $4 to $6 per share.

But faced with a firm offer from HIG of $2.25 and a preliminary offer perhaps more than twice as much from Company X, there was nothing unreasonable about the board's decision to allow the exclusivity agreement to expire and to continue further discussions with Company X in hopes of a more lucrative deal for the company's shareholders. In retrospect, of course, accepting $2.25 per share on February 14 or 15 may have been a preferable course.

This brings us to HIG's purchase of the PFG loan. Despite having signed a nondisclosure agreement, which I'll refer to as the NDA, which contained a standstill provision, and despite HIG's receipt of confidential company information in late 2011 and early 2012, HIG, through an affiliate, acquired a relatively large amount of the company's debt in February and March 2012, including a convertible note evidencing that indebtedness and all related contract rights.

The financially distressed condition of Comverge at that time and HIG's threats to enforce those contractual rights undoubtedly increased HIG's bargaining power vis-a-vis the company. Arguably, HIG's acquisition of the PFG loan and note breached the terms of the NDA either by violating the standstill provision, Section 9, or because HIG used confidential information in violation of federal securities laws, thereby vitiating any safe harbor it otherwise might have possessed under Section 14 of the NDA.

Plaintiffs' strongest claim of objectively unreasonable conduct by the Comverge directors is that without adequate information, the board refused to take legal action against HIG for this alleged breach of the NDA, and thus acquiesced to economic leverage HIG may have obtained improperly.

Relieved of HIG's threats of amortization of the loan, foreclosure, and acceleration of repayment of principal, Comverge conceivably would have been in a better position to negotiate with HIG, Company X, or other suitors for a more favorable price. Plaintiffs assert, therefore, that defendants breached their fiduciary duties under Revlon by failing to enforce the company's rights under the NDA against HIG.

Plaintiffs legitimately question the propriety of HIG's purchase of the PFG loan and note in the circumstances of this case.

As the Chancellor's recent Martin Marietta versus Vulcan opinion makes clear, this Court takes seriously allegations of breach of nondisclosure agreements, especially when the breaching party does so to gain advantage in a contest for control of a Delaware corporation.

Furthermore, I am inclined to agree with plaintiffs that HIG's access to confidential information provides reason for concern about possible violations of federal securities law.

Plaintiffs' arguments on these issues are less persuasive than they might be, however, because this is not an action for breach of a confidentiality agreement, nor am I a federal court with subject matter jurisdiction to adjudicate alleged violations of federal securities laws. Rather, these issues are before me only to the extent that plaintiffs contend the Comverge directors' business decision not to instigate a separate suit on the company's behalf evidences objectively unreasonable efforts to maximize the sale price of Comverge.

Regarding that issue, the record indicates that both the board and the committee inquired on several occasions into whether HIG acquired the PFG loan in breach of the NDA or in violation of the federal securities laws.

In the end, they determined that while HIG's conduct was suspicious and the company had viable claims against HIG, the company's claims were not so strong that success in court would have been an absolute certainty. Based on what has been presented to me in this action, I cannot conclude that that determination was objectively unreasonable, especially when I take into account the fact that the board also reasonably, in my view, considered what the practical effects of even a victory in a suit against HIG would have been.

At argument yesterday, Mr. Monteverde on behalf of plaintiffs asserted that the board could not have been fully informed when it decided on February 27, 2012 not to bring suit because the board appreciated only later some of the most salient provisions of the PFG note, including, in particular, that the holder of that note could block sales transactions pertaining to Comverge.

I am dubious about the importance of that information to the issues before me. That is, what seems not to have been appreciated was, at the time the PFG note was entered into, the board may not have appreciated fully the extent of some of the blocking provisions that worked in favor of PFG. Nevertheless, I assume for purposes of this opinion that the information was important and was not fully appreciated by the board as of February 27th.

In any case, however, as I just mentioned, the board and the committee revisited whether to file suit on more than one occasion, including during a committee meeting on March 1 and during board meetings on March 5 and 7. Rather than make a rash decision, the directors appear to have considered their options afresh as circumstances continued to develop. Moreover, the board and committee solicited legal advice from counsel at most if not all of the meetings I just referenced.

Although Jones acknowledged that counsel did not provide a formal report or conduct an exhaustive investigation regarding whether the NDA had been breached, the absence of such a report does not necessarily indicate that the board was uninformed or acted unreasonably under the circumstances.

On March 1, the committee met with

management to evaluate the company's current cash crunch and consider whether to begin preparation of a bankruptcy filing, among other things. Indeed, by March 5, management believed the company's resources were so low that bankruptcy might be as imminent as 30 to 45 days away.

With both time and money in short supply, plaintiffs will have a difficult time proving that the decision not to instruct counsel to conduct a formal investigation or to file a claim against HIG but, instead, to allocate limited resources elsewhere was unreasonable.

Thus, ultimately, the board was able to reach fully informed conclusions that: First, HIG possessed a viable argument that its purchase fell within the safe harbor of Section 14 of the NDA; and, second, that there was enough publicly available information about the PFG note and the company's liquidity problems that it could be difficult to prove HIG necessarily violated federal securities laws.

But even though the board decided again on March 7 not to sue, it attempted to use the threat of litigation to enhance its bargaining position. HIG's March 7 offer was at $1.50 per share and did not include a go-shop provision. On March 8th, HIG increased its offer to $1.75 and agreed to a go-shop.

At the March 8 board meeting, Jones "noted that as the Company's liquidity situation worsened, the available options were diminishing." On that basis, that is, running out of options, he and other members of "the Committee believed that it was in the best interests of the Company and its shareholders to accept the HIG offer at $1.75 and its accompanying terms."

Accordingly, based on the available record at this early stage in the proceedings, plaintiffs have not demonstrated that they are likely to succeed in showing that the board did not conduct a reasonable, informed, and loyal cost/benefit analysis of whether pressing its contract claims in uncertain litigation against HIG was in the best interests of the company and its shareholders.

Essentially, the directors had to decide whether shareholders would be better off if the company fought to the end and even won in the legal arena if doing so exposed them to an increased risk of bankruptcy, or if it salvaged whatever value it could, however disappointing, for at least some shareholder return by avoiding litigation and proceeding to get the best deal that it could.

I am not envious of the need to make such choices, and reasonable people can debate the tactical advantages of either option, which is precisely why this Court eschews second-guessing the decisions that directors ultimately make, generally; and I conclude that that same reasoning applies here, that I should not second-guess the independent disinterested board's decision in the circumstances here where there were arguments in both directions.

This brings us to the reasonableness of the board's reliance on Houlihan Lokey's fairness opinion. Initially, the company was using two investment banking firms: J.P. Morgan to conduct the auction process, among other services, and UBS to evaluate any potential strategic transaction J.P. Morgan had procured.

The situation confronting the board changed drastically after it rejected HIG's $2.25 offer, HIG's exclusivity period expired, and then HIG acquired the PFG loan and note. Thereafter, all of the discussions effectively were under the specter of

HIG calling for immediate amortization of the PFG loan.

In that context, UBS declined to provide a fairness opinion not because it affirmatively determined that $1.75 was unfair, but because it generally will not provide any opinion under the distressed circumstances that Comverge was then facing. Moreover, J.P. Morgan advised the committee that such a policy is relatively common practice among large investment banks.

Houlihan Lokey's opinion, thus, was not a second-best alternative about which the board should have been dubious from the outset, but the only opinion it received from a qualified expert willing to provide its services. Nor does the record reflect, as plaintiffs claim, that Houlihan Lokey concluded by rote that $1.75 obviously is preferable to an alternative of taking nothing.

Rather, Houlihan Lokey conducted a DCF analysis based on revised management projections of the company's cash flows assuming it filed for bankruptcy. Those cash flows, even though less than previous projections, supported a valuation in the range of $1.23 to $1.43 per share even in the context of a bankruptcy. Thus, in Houlihan Lokey's expert opinion, $1.75 per share was fair consideration for the implied share value derived from those projections.

Finally, plaintiffs challenge the reasonableness of the board's agreement to certain deal protection devices in the merger agreement; that is, whether any or all of those terms are preclusive under the Unocal doctrine. Most troubling in this regard is the variable termination fee of 1.2 million to 3.4 million, or between approximately 2.5 percent and 6.8 percent of the deal's equity value.

On numerous occasions reflected in past precedents, termination fees below 4 percent of equity value without reference to enterprise value have withstood judicial scrutiny. Plaintiffs argue that the termination fee here materially exceeds that range and is, therefore, unreasonable. Defendants respond that I should evaluate the preclusiveness of the termination fee at issue in light of the company's enterprise value and its microcap status.

Without relying on any single factor or parameter as being dispositive, I have considered all the relevant circumstances and concluded that plaintiffs are not likely to prevail on their contention that the termination fee in the merger agreement is preclusive and reflects a breach of defendants' fiduciary duties.

First, so long as bidders remained involved, the go-shop period could extend through all but the last two days of the tender offer. For that reason, I agree with defendants that the termination fee applicable during the go-shop period is the appropriate metric against which to gauge the termination fee's preclusiveness. That was a lower termination fee than the one that would apply after the go-shop period. Still, even if we consider only the fee applicable during the go-shop period, the termination fee, $1.2 million, plus up to another $1.5 million in reimbursement of expenses, could have amounted to about 5.5 percent of the $49 million equity value of the pending transaction.

Defendants also note that the $2.7 million fee represented 5.2 percent of Comverge's enterprise value.

In evaluating the termination fee here, I am mindful of the following observation of Chancellor Chandler in LAMPERS versus Crawford. This is a quote, a fairly lengthy one.

"Our courts do not presume that all business circumstances are identical or that there is any naturally occurring rate of deal protection, the deficit or excess of which will be less than economically optimal. Rather, a court focuses upon the real world risks and prospects confronting directors when they agree to the deal protections. That analysis will, by necessity, require the Court to consider a number of factors, including without limitation: The overall size of the termination fee, as well as its percentage value; the benefit to shareholders, including a premium (if any) that directors seek to protect; the absolute size of the transaction, as well as the relative size of the partners to the merger; the degree to which a counterparty found such protections to be crucial to the deal, bearing in mind differences in bargaining power; and the preclusive or coercive power of *all* deal protections included in a transaction, taken as a whole. The inquiry, by its very nature fact intensive, cannot be reduced to a mathematical equation." That's the end of the quote.

And considering this proposed

transaction as a whole, I cannot ignore that the relatively high termination fee to which the board agreed is only part of the total package of deal terms that includes the obligations undertaken by HIG in the forbearance agreement. Among other things, the forbearance agreement waives HIG's contractual right to block prospective sales transactions. It also defers any amortization or acceleration of the loan until a sales transaction is complete. And it permits any acquirer of the company to prepay what had been the PFG loan. Absent these concessions, no alternative transaction would have been possible at all, most likely.

Indeed, a realistic assessment of the economics of this transaction cautions against finding that the termination fee, although its size might be deemed unreasonable in a different context involving another microcap company, is preclusive of superior offers to acquire Comverge, especially in light of the relative bargaining power of the parties.

Ultimately, the preclusive effect of the admittedly high 5.5 percent or $2.7 million termination fee is overshadowed in the circumstance of this case by any alternative acquirer's need to assume and immediately refinance the $15 million PFG note that is now held by HIG.

As to plaintiffs' remaining challenges to the deal protection devices involved in this transaction, top-up options have become relatively frequent features of merger agreements in recent years, and there are more than a few precedents upholding their use, including Olson versus ev3, Inc. and Cogent. As a general matter, top-up options are lawful and not preclusive so long as the acquirer first obtains one share more than voting control of the target company via the front-end tender offer.

Under the merger agreement at issue here, Section 2.3(b) conditions HIG's ability to exercise its top-up option on satisfaction of the Minimum Condition, and that's a defined term, defined in Section 2.1(b) as one share more than voting control.

Furthermore, although it appears, as plaintiffs emphasize, that HIG can waive the Minimum Condition for purposes of accepting tendered shares, the merger agreement does not seem to permit HIG to waive satisfaction of the merger condition as an independent prerequisite to exercise of the top-up option.

Moreover, to whatever extent HIG arguably could waive the Minimum Condition in connection with the top-up option, defendants represented at the argument yesterday that they do not intend to do so. My ruling today relies on that representation, among other things.

Accordingly, plaintiffs are unlikely to prove that the top-up option is preclusive or otherwise unreasonable.

Lastly, as already implied, it appears that the go-shop period was effectual and that the company took full advantage of it. During the go-shop period, J.P. Morgan contacted 44 parties, four of whom engaged in meaningful due diligence and indicated their interest in dollar-specific terms. For that reason, the board, in fact, extended the go-shop period beyond the initial 30-day period. Most go-shop periods are neither as lengthy nor as productive.

Unfortunately for the public shareholders of Comverge, none of the parties that displayed interest ultimately made a superior offer for the company. That does not mean, however, that the go-shop period failed to provide the company shareholders a meaningful opportunity to receive such an offer.

In reaching that conclusion, I disagree with plaintiffs' assertions yesterday that, to be meaningful, the go-shop period should have lasted until at least May 2012. I believe the go-shop period started in March, so that would have been several months. And May 2012 was when Company X, the company that had indicated that it might make a bid for $4 to $6 a share, was scheduled to hold its next board meeting.

Given the financial distress facing Comverge, however, regardless of whether HIG had acquired the PFG note, I find it unrealistic that the company could have waited until May to accommodate one prospective suitor, at least not without interim financing, which arguably is why Comverge accepted HIG's offer in the first place.

Therefore, I find nothing objectively unreasonable about the go-shop period negotiated for here or the manner in which it was employed by the board.

In the final analysis, if the board erred at all during this auction process, it was by not accepting HIG's $2.25 offer when it had the chance on February 14 and, perhaps also, in failing to recognize sooner than it did the possibility that HIG or any prospective acquirer might attempt to acquire the PFG loan and exercise the forceful blocking provisions that were attendant to that loan. But these errors are business errors, and I hesitate to call them errors, and they probably shouldn't be called errors at all. In hindsight, they might be considered errors, but these are decisions that are made in realtime, and the fact that they might be considered by someone at a later time as an error is apparent only in retrospect; and the plaintiffs have not shown a probability of success on the merits that the Comverge directors failed in their fiduciary duty to try, subjectively and objectively, to obtain the best price reasonably available.

Turning to the aiding and abetting claims against the HIG defendants, having determined that plaintiffs failed to show a probability of success on the merits of their claim that the Comverge defendants breached their fiduciary duties, I conclude in turn that plaintiffs cannot show a probability of success that the HIG defendants aided and abetted the alleged breach. One cannot aid and abet a breach of fiduciary duty where no duty has been breached in the first place. Accordingly, I consider the merits of that claim to add nothing as far as the chance for a preliminary injunction.

Plaintiffs' final substantive claim is that the board authorized materially incomplete or misleading disclosure statements in connection with the pending transaction.

Directors of Delaware corporations are under a fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action. A fact is "material" and must be disclosed if there is a substantial likelihood that its disclosure would have been viewed by the reasonable stockholder as having significantly altered the total mix of information made available.

Stated differently, the central question in determining whether an omitted fact is material is whether a reasonable stockholder would consider it important in a decision pertaining to his or her stock.

As I noted at the motion to expedite

teleconference, my primary concern regarding the adequacy of the Recommendation Statement filed on April 12 was that it omitted the management-prepared cash flow projections upon which Houlihan Lokey based its fairness opinion. That concern has been mooted, however, by defendants' disclosure of those projections in their third amendment to the Recommendation Statement, which was filed on May 1st.

Plaintiffs' remaining disclosure claim is that the Recommendation Statement still does not disclose the services Houlihan Lokey is currently providing for HIG or the amount of compensation Houlihan Lokey will receive.

But the initial Recommendation Statement states clearly that -- and here I'm quoting from the Recommendation Statement at some length -- "Houlihan Lokey and certain of its affiliates have in the past provided and are currently providing investment banking, financial advisory and other financial services to HIG ... including, among other things, having provided certain valuation advisory and financial opinion services ....

"Furthermore, in connection with bankruptcies, restructurings, and similar matters, Houlihan Lokey and certain of its affiliates may have in the past acted, may currently be acting and may in the future act as financial advisor to debtors, creditors, equity holders, trustees and other interested parties ... [that] may include or represent, directly or indirectly, or may be or have been adverse to, the Company, the H.I.G. Group, other participants in the transaction or certain of their respective affiliates or security holders, for which advice and services Houlihan Lokey and its affiliates have received and may receive compensation." End of quote.

Similarly, while the May 1 amendment to the Recommendation Statement does not disclose Houlihan Lokey's current and future fee arrangements, it does state that "during the four-year period prior to March 26, 2012, Houlihan Lokey has received aggregate compensation of $412,247.35 in connection with providing services to H.I.G. Capital Management, Inc." And that's the end of the quote.

These statements disclose the nature of services that Houlihan Lokey provides to, and the extent to which it may be interested in, the parties to the merger agreement.

In addition to the approximately $400,000 or just over $400,000 that HIG itself has paid to Houlihan Lokey in the past four years, plaintiffs' counsel noted at yesterday's hearing that HIG's portfolio companies have paid Houlihan Lokey an additional $2.6 million or so.

Relying on the case In re Art Technology Group, Inc. Shareholder Litigation from Vice Chancellor Laster in 2010, plaintiffs asserted that this entire $3 million of aggregate compensation should have been disclosed. HIG's portfolio companies, however, include entities in which HIG merely holds an interest, not necessarily a controlling interest.

In Art Technology, by contrast, the court ordered supplemental disclosure of only the fees that the acquirer, Oracle, alone had paid to the financial advisor, Morgan Stanley, during the time period discussed in the original disclosure statement. That would be comparable to the disclosure that, in fact, was made in the supplement here pertaining to payments by HIG to Houlihan Lokey.

Moreover, in many instances, HIG acquired its interest in the listed portfolio companies only after the entity had engaged Houlihan Lokey's services. As Mr. Bayliss noted for HIG, the total fees paid by HIG portfolio companies to Houlihan Lokey on engagements after HIG invested in the portfolio companies is approximately $225,000. This latter $225,000 amount is significantly less than both the fees paid by HIG directly in the past four years and fees Houlihan Lokey received to prepare a fairness opinion on behalf of Comverge in this matter.

I do not read Art Technology to stand for the proposition that fees paid by all affiliates of an acquirer to the target's financial advisor, including fees paid before the acquirer invested in those affiliates and no matter the relative amounts of those payments, necessarily are material and must be disclosed.

Rather, as I said in the Midas case recently, "the mere fact that some issues may have proven material in a past case cannot endow that issue with talismanic properties or reduce it to a magic word forever after. That is, the materiality of any fact, projection, or figure cannot be divorced from the particular circumstances facing the defendant company and the challenged transaction."

Plaintiffs have not shown why, in the context of this case, the fees paid to Houlihan Lokey by HIG portfolio companies are material. Thus, the Recommendation Statement as amended offers shareholders enough information to evaluate any potential bias in Houlihan Lokey's fairness opinion, and any additional information on this topic, though perhaps helpful, would not significantly alter the total mix of information already available.

Accordingly, plaintiffs have failed to show a probability of success on the merits of their claim that the Comverge directors authorized materially incomplete or misleading disclosures.

Having concluded that plaintiffs have not shown a probability of success on the merits, I discuss only briefly the remaining two elements that must be demonstrated to obtain a preliminary injunction. Those are an imminent threat of irreparable injury and a balance of the equities favoring the moving party.

As to irreparable injury, as I said in ruling on plaintiffs' motion to expedite, I do not believe this is a case where post-closing damages would provide an adequate remedy. Post-closing remedies involve great cost, time, and, unavoidably, a large degree of imprecision and speculation.

Those burdens may be unavoidable in some deal litigation, especially where there is reason to think a temporary injunction would be a fruitless exercise. But where, as here, several bidders made themselves known and there is reason to believe that, absent HIG's threats to enforce its contractual rights as Comverge's lender, a better deal could have been obtained, the most complete form of relief would have been to allow the market for control to run its course by permitting an untainted auction to proceed.

Because I have concluded that plaintiffs have failed to show that they are likely to succeed in proving that the process here, in fact, was tainted, however, the predicate for such a threat of irreparable harm is missing. Thus, this case is distinguishable from cases such as Del Monte in which the Court held that the threat that "stockholders will be deprived forever of the opportunity to receive a ... topping bid in a process free of taint ... constitutes irreparable injury."

It also is not clear that the balance of the equities in this case favors granting a preliminary injunction. Comverge is in a precarious position, and the pending transaction with HIG is no panacea.

For example, on March 22, the committee advised the board to prepare for bankruptcy if the first-step tender offer fails. Even if I had concluded that the board improperly acquiesced to HIG's threats regarding the PFG note and, therefore, enabled the go-shop to be run under artificial constraints, I would have wanted some assurance that, at the very least, Comverge could remain a going concern throughout the term of the injunction.

In that sense, the relevant balancing here from the shareholders' perspective involves more than the risk that they would lose a chance for a higher price; an injunction equally could have exposed them to the risk of losing their investment altogether. In the absence of an injunction, the shareholders could decide their own fate. They could take the $1.75 per share offered by HIG or defeat the tender offer or, at a minimum, pursue their appraisal rights. Thus, I am not convinced that the balancing of the equities here favors plaintiffs' request for preliminary injunctive relief.

For all of these reasons, I hereby deny plaintiffs' motion for a preliminary injunction.

All right, counsel, I appreciate your patience. That concludes the ruling. Thank you.

(Conference adjourned at 10:54 a.m.)

CERTIFICATE

I, JEANNE CAHILL, Official Court Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 36 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand this 8th day of May, 2012.

/s/ Jeanne Cahill

Official Court Reporter
of the Chancery Court
State of Delaware

Certificate Number: 160-PS
Expiration: Permanent