COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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Re: *Police & Fire Ret. Sys. of The City of Detroit v. Bernal, et al.*
Civil Action No. 4663-CC

Dear Counsel:

Plaintiff, a shareholder of Data Domain, Inc., has moved for expedited proceedings in connection with its motion to enjoin certain provisions of the Agreement and Plan of Merger between Data Domain and NetApp, Inc (the "Merger Agreement"). In March 2009, the Data Domain board of directors began discussions with NetApp regarding a potential business combination. On May 11, at a meeting to continue discussing such a combination, the Data Domain board was informed of EMC Corporation's interest in meeting with Data Domain. A meeting was scheduled for May 27, 2009. On May 20, however, Data Domain and NetApp entered into the Merger Agreement whereby Data Domain would be merged into two NetApp subsidiaries, with the Data Domain shareholders receiving a combination of cash and NetApp stock worth approximately $25 for each Data Domain share.

According to plaintiff, the Merger Agreement contained a number of "deal protection mechanisms," including: (1) a "matching right" that gives NetApp five business days to revise its proposal in response to a proposal from a third party bidder; (2) a "no solicitation" clause that prevents Data Domain from soliciting the submission or

announcement of another offer to acquire Data Domain; and (3) a termination fee. The board and executive officers of Data Domain also entered into a voting agreement whereby they pledged to vote their shares, representing approximately 20% of Data Domain's outstanding shares, in favor of the NetApp merger. Plaintiff argues that these measures lock up the deal between Data Domain and NetApp and dissuade interested parties from making an offer for the company. Plaintiff further alleges that Data Domain's officers and directors will receive benefits separate and apart from Data Domain's shareholders, including: (1) assumption and conversion of their Data Domain options, (2) indemnification from liability for matters arising from the completion of the merger, and (3) for certain individuals, positions with the company after the merger.

On June 1, EMC launched an all cash tender offer for Data Domain at a tender price of $30 per share. Plaintiff contends that EMC was prepared to execute an agreement if Data Domain would terminate the NetApp agreement. On June 3, NetApp increased the cash component of the merger consideration by $5, raising the overall value of its offer to $30 per share. Data Domain's board agreed to this revised offer, and left all the deal protection measures in place. The Data Domain board has stated that it is unable to negotiate with EMC because of the deal protection provisions of the Merger Agreement, and that if it failed to reject the EMC bid, Data Domain would be at risk of losing the NetApp transaction.

In deciding whether to expedite proceedings, the Court must determine "whether in the circumstances the plaintiff has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury, as would justify imposing on the defendants and the public the extra (and sometimes substantial) costs of an expedited preliminary injunction proceeding."[1] At this procedural stage, I accept as true the well-pleaded factual allegations in the complaint.

Plaintiff contends that Data Domain's directors have violated their fiduciary duties in the context of a sale of control of the company, as those duties are described in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[2] and its progeny. Those cases counsel that when there will be a sale of control of the company, the "board must perform its fiduciary duties in the service of a specific objective: maximizing the sale price of the enterprise."[3] Plaintiff argues that the Data Domain directors have agreed to a deal that results in a change of control because the majority of the current Data Domain shareholders' equity stakes is being paid off with cash. Thus, plaintiff alleges that the Data Domain directors breached their fiduciary duties by failing to take any steps to secure the best price reasonably available, by granting preclusive deal protection measures that deter any other

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[1] *Giammargo v. Snapple Beverage Corp.*, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994).
[2] 506 A.2d 173 (Del. 1986).
[3] *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 239 (Del. 2009) (quoting *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001)).

bidders, and by failing to inform themselves about the possibilities for greater value to be obtained for Data Domain shareholders through the EMC bid.

Defendants, of course, contend that the board's process was reasonable, and will result in the highest reasonably available value for the Data Domain shareholders. Defendants argue that the deal protection measures are common, permissible features of merger agreements, and that the Merger Agreement advances Data Domain shareholders' interests, as evidenced by EMC's bid for Data Domain notwithstanding the deal protection measures.

While I have not done justice to the arguments presented in the parties' written submissions and during today's oral argument, I need only determine if plaintiff has stated a sufficiently *colorable* claim to justify proceeding on an expedited schedule. Here, plaintiff has stated such a colorable claim. It is well established that there is no blueprint that a board must follow to fulfill its duties in a change of control transaction. The board, however, must exercise its duties in service of obtaining the maximum price reasonably available for the company. Plaintiff has alleged facts that state a colorable claim that the Data Domain board is favoring one bidder over others, thereby deterring bids from third parties that could provide greater value to Data Domain shareholders. Moreover, on a motion for a preliminary injunction, the plaintiff does not have to overcome the hurdle of an exculpatory provision that, as permitted by 8 *Del. C.* § 102(b)(7), exculpates directors from personal liability for *monetary damages* for certain breaches of fiduciary duty.

Plaintiff has also established a sufficient likelihood of irreparable injury. Plaintiff alleges that the deal protection measures in the Merger Agreement are currently having an adverse impact on Data Domain shareholders by deterring potential bidders, including EMC. Harm resulting from such deterrence is incalculable. Moreover, it would be impossible to "unscramble the eggs" by attempting to unwind the merger once it has been completed. Defendants argue that plaintiff is not threatened with irreparable harm because the shareholders will have an opportunity to vote on the NetApp merger. The opportunity for a shareholder vote sometime in the future, however, does not address the alleged current deterrent effect of the deal protection measures.

Finally, I note that injunctive relief may be the only relief reasonably available to shareholders for certain breaches of fiduciary duty in connection with a sale of control transaction, particularly where the company has adopted a provision exculpating its directors from personal liability for monetary damages for breaches of the duty of care. As explained in *Lyondell Chemical Co. v. Ryan*, a plaintiff faces a significant burden in showing that a board acted in bad faith by failing to reasonably inform themselves or

otherwise carry out their fiduciary duties in a sale of control.[4] Thus, in cases such as this one, the shareholders' only realistic remedy for certain breaches of fiduciary duty in connection with a sale of control transaction may be injunctive relief.

For the reasons set forth above, plaintiff's motion for expedited proceedings is granted. A preliminary injunction hearing will be held at 10:00 a.m. on Thursday, August 13, 2009 in Georgetown.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

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WBCIII:jmb

[4] *Lyondell*, 970 A.2d at 243-44 ("[I]f the directors failed to do all that they should have under the circumstances, they breached their duty of care. Only if they knowingly and completely failed to undertake their responsibilities would they breach their duty of loyalty.").