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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware, New Castle County.

Jeff WIEGAND, Plaintiff,
v.
BERRY PETROLEUM COMPANY, Defendant.

Civ. A. No. 9316.
|
Submitted: Sept. 13, 1990.
|
Decided: March 27, 1991.

Attorneys and Law Firms

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MEMORANDUM OPINION

JACOBS, Vice Chancellor.

***1** Pending are cross-motions for summary judgment on the merits of this class action. The plaintiff, Jeff Wiegand, brought this action on October 2, 1987 on behalf of all former public stockholders of Norris Oil Company ("Norris"), a Nevada corporation, against Berry Petroleum Company ("Berry"). In his complaint the plaintiff alleges that Berry, which owned 80.6% of Norris' common shares, breached its fiduciary duties to the plaintiff shareholder class in connection with the merger of Norris into a wholly-owned subsidiary of Berry on June 26, 1987 ("the merger"). After this Court certified the shareholder class, Berry moved for summary judgment, contending that as a matter of law the merger was entirely fair and that the minority shareholders were adequately informed of all facts material to the merger. The plaintiff responded by cross-moving for partial summary judgment on the issue of liability, contending that as a matter of law Berry is unable to discharge its burden of establishing that the merger was entirely fair. This is the decision of the Court on the parties' cross-motions for summary judgment.

I. *THE FACTS*

Although many of the pertinent facts are undisputed, some are heavily controverted. Where factual conflicts exist they are noted. What follows is this Court's best effort at a coherent portrayal of the facts without the benefit of the assistance normally provided by the parties' briefs in matters of this kind.[1]

Berry is a large oil producer headquartered in California. Berry has made a profit every year since 1909, and for each of the last 80 years it has declared dividends. As of December 31, 1986, Berry's stock was not publicly held, but after the merger, Berry's stock became publicly traded. Norris was principally engaged in the development of oil and gas reserves in California and Colorado, and its shares were publicly traded over the counter. For several years Norris had experienced financial problems and had not paid a cash dividend since 1952.

On December 1, 1986, Berry purchased 80.6% of Norris (the "Norris Purchase") from ABEG Hydrocarbons, Inc. ("ABEG"). The Norris Purchase agreement called for Berry to pay ABEG $3,800,000, and to guarantee Norris' obligation to ABEG in the amount of $2,676,000, for the 80.6% Norris stock interest. Berry also agreed to purchase an option covering certain gas wells owned by an ABEG subsidiary for an option price of $1,200,000.[2]

Before Berry purchased its majority interest in Norris, Berry's board of directors met on October 6, 1986. The minutes of that meeting show that Mr. Harvey L. Bryant ("Bryant"), Berry's President and Chief Executive Officer, advised the board that Berry intended to acquire the remaining 19.4% of Norris in early 1987, thus making Norris a wholly-owned subsidiary. Pl.Ex. 259, p. 4. In his affidavit, Mr. Bryant states that the board made no

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decision at that point, but instead asked management to prepare an analysis of possible alternatives. Bryant Supp.Aff. at 10. In response to that request Mr. Bryant wrote a memorandum to the board on January 12, 1987, recommending that Berry acquire the remaining Norris shares as soon as possible. Mr. Bryant stated:

***2** As you know, the development of Norris reserves will require substantial capital. Management's plan is to finance such development by selling approximately 50% of the properties to another company who would become a partner in the development. Prior to such sale, [Berry] would complete certain preliminary work on the Norris properties (i.e. workovers, recompletions, etc.) to present the properties in the most favorable light. *Also, [Berry] needs to purchase the minority interest prior to any of the above to ensure that the Norris stock price does not accelerate.* Therefore, the reverse triangular merger should occur as quickly as possible.

Pl.Ex. 1, p. 5 (emphasis added).

A key "Norris property" was the Rincon oil field, which was located along the coast of Southern California. Management had a two-phased plan for Norris-to work over its existing wells (the "workovers") and then to develop the Rincon field's "deep" (undeveloped) zones.

At its January 30, 1987 meeting, Berry's board of directors authorized management to acquire 100% of Norris' stock through a merger that would involve an exchange of Norris' common stock for Berry's common stock. The merger ratio was to be based upon independent appraisals by petroleum engineers of the estimated fair market value of the oil and gas reserves and other properties of Berry and Norris, respectively.

On February 1, 1987, Berry and Norris issued a joint press release announcing the proposed merger. The following day, Wedbush Securities, Inc. ("Wedbush") was retained to render a fairness opinion concerning the merger consideration to be provided to Norris' minority shareholders. The ultimate merger exchange ratio was one share of Berry for thirty shares of Norris, based upon a valuation of Berry at $15 per share, and of Norris at $.50 per share. A prospectus ("Prospectus") seeking shareholder approval of the merger was issued on June 3, 1987. At a special meeting held on June 26, 1987, the shareholders of Norris approved the merger. Since Berry owned 80.6% of Norris' outstanding shares and the merger was not made subject to a "majority of the minority" shareholder vote, the outcome was a foregone conclusion.

The merger exchange ratio was "the result of an assessment by Berry Management". Prospectus, at 13. Although Berry's management recognized that it had a potential conflict of interest and disclosed that conflict in the Prospectus, Berry did not establish a special committee of independent directors to negotiate on behalf of the Norris minority. Nor did it furnish independent legal or financial advisors to the minority, or (as earlier noted) make the merger subject to a "majority of the minority" stockholder vote. Instead, Berry retained several petroleum engineering firms to value the assets of Norris and Berry for purposes of determining the merger exchange ratio. Berry's assets were valued by DeGolyer & MacNaughton, a petroleum engineering firm that had previously performed such valuations for Berry; Norris' California oil and gas properties were valued by Babson & Sheppard, a petroleum engineering firm that had previously valued those properties for Norris; and Norris' Colorado gas properties were valued by PSM Engineering, Inc.

***3** The merger exchange ratio resulting from these firms' valuations was based upon Babson & Sheppard's valuation of Norris' properties (including the Rincon oil reserves) at $2.2 million as of March 1, 1987. That $2.2 million valuation, in turn, was based upon Babson & Sheppard's determination that Norris had oil reserves of 67,000 barrels as of December 31, 1986. Babson & Sheppard's 67,000 barrel reserve estimate and its $2.2 million fair market valuation were disclosed in the Prospectus.

Thus far the facts are undisputed. From this point forward, however, they become heavily controverted. The plaintiffs contend, and have presented evidence, that both the amount of Norris' estimated reserves (67,000 barrels), and the fair market valuation of the Norris properties resulting therefrom ($2.2 million), were fundamentally flawed. Berry, and in particular Mr. Bryant, assert otherwise. What follows is a recital of the (conflicting) evidence relating to the fairness of the evaluation of Norris reserves, and of Norris itself, for purposes of the merger.

First, Berry initially announced that Norris had oil reserves of 67,000 barrels in its press release dated March 3, 1987. In that same release Berry disclosed that Norris' oil reserves had been reduced by 96%-from 1.576 million barrels as of December 31, 1985 to 67,000 barrels as of December 31, 1986. Pl.Ex. 62. However, in October, 1987-only four months after the merger-Babson & Sheppard increased its reserve estimate to 2.821 million barrels as of March 1, 1987-a date almost four months before the merger. Babson & Sheppard's revised reserve

figure was 42 times the amount of the estimated reserves that had been used to calculate the merger exchange ratio. Pl.Ex. 3, p. 25.

Second, there is evidence that before the merger Berry's management knew that Norris' oil reserves far exceeded 67,000 barrels and that Norris' properties were worth more than $2.2 million. That evidence is as follows: Berry had decided to develop the Rincon field with a joint-venture partner before it purchased the remaining 19.6% interest in Norris. Hoffman Aff., Pl.Ex. 4. Berry intended, however, to merge out the Norris minority before publicly disclosing (and commencing) that development program in any significant way. *See* Pl.Ex. 1, p. 5 (the January 12, 1987 Bryant Memorandum). The minutes of Berry's December 12, 1986 board meeting recite that:

Berry Petroleum Company intends to sell a working interest in the Norris properties to an outside party *after* the Norris reorganization is completed. Three outside parties have been identified and will be given presentations early in 1987.

Pl.Ex. 30, p. 3 (emphasis added). Between December, 1986 and June, 1987, Berry had Rincon joint-venture discussions with at least nine oil companies, including Exxon and Tenneco. During the course of those discussions, Berry's senior management made statements, and took actions evidencing their belief, that Norris' oil reserves were far greater than 67,000 barrels, and were worth considerably more than the $2.2 million at which those reserves had been estimated and valued for purposes of the merger.

***4** Specifically, in December, 1986, Mr. Bryant told an Exxon representative that Berry had purchased Norris' Rincon leases, and that Berry now wished to swap 50% of Rincon for a 50% interest in oil properties owned by Formax Oil Company ("Formax"), which Exxon was in the process of acquiring. Bryant Dep. II at 111. Since Formax had been purchased in January, 1986 for $85 million, a 50% interest was arguably worth approximately $42.5 million. In January, 1987, Mr. Bryant told a Wedbush representative that there were 50 million barrels of recoverable oil at Rincon[3] (Schauerman Dep. II at 64-65) and an Exxon document indicates Exxon's view that Rincon's "upside" reserves exceeded 50 million barrels. Courtney Dep. at 56-58; Pl.Ex. 285. And in April, 1987, Berry management invited several Tenneco representatives to meet and discuss a joint development of the Rincon field. Stevens Dep. at 12-13. At that meeting (according to a confidential Tenneco interoffice memorandum dated April 29, 1987), Tenneco's representatives were informed that Rincon had 97.6 million barrels of "risk adjusted remaining [oil] reserves."[4] Pl.Ex. 229; Stevens Dep. at 130.

There is also evidence that Berry management instructed these oil companies not to submit formal joint-venture proposals until after the Norris merger was accomplished. A Tenneco representative testified that Berry "did not want to receive any proposals until the merger was completed and all the SEC ... paper work ... was completed." Stevens Dep. at 17; *see also* Pl.Ex. 229 (Berry "cannot consider any *formal* proposals until the merger is completed in July, 1987...."). In April, 1987, Mr. Bryant told an Exxon representative that the Norris stockholders' meeting was scheduled for June 26, 1987 and suggested July 1, 1987 as a date for submitting an Exxon offer. Pl.Ex. 295.

That timetable was, in fact, followed. When an Exxon representative telephoned Mr. Bryant on May 11, 1987 to discuss making a proposal, Mr. Bryant responded that he "didn't want to hear about it until after the merger." Courtney Dep. at 114-120, 138; Pl.Ex. 285. Similarly, a Tenneco representative telephoned Berry on May 22, 1987 "to inquire what date the [Rincon) information would be available for [Tenneco] to investigate", and was told that Tenneco could not review the data because of "SEC meetings." Stevens Dep. at 43-45; Pl.Ex. 244. On June 4, 1987, the day after the merger Prospectus was issued, Tenneco was allowed to send a team to Berry to begin reviewing the Rincon oil field data. Stevens Dep. at 46-50. On July 1, 1987, two business days after the merger, Exxon made its joint-venture proposal that would otherwise have been submitted on May 11, 1987, two months earlier. Courtney Dep. at 120-125; Pl.Ex. 319. Tenneco submitted its proposal on August 14, 1987.

Whatever might have been Berry's motivation for timing the submission of joint-venture proposals in this fashion,[5] the result was to enable Berry to make seemingly skeletal Prospectus disclosure of its Rincon field development plans:

***5** Management believes that the rehabilitation of the Norris operations and properties will likely require outside financing. Although no arrangements or agreements that would provide such financing have as yet been made, various alternatives are being explored, including the use of venture partners to participate in the development of the Norris properties. Management has had preliminary discussions with several parties, including independent and major oil companies, to discuss the possibility of forming a joint venture for the exploration and development of Norris' Rincon leases.

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Norris shareholders should recognize that no assurances can be given that management will be able to find a joint venture partner or other outside financing or to develop the Norris properties as intended.

Prospectus, at 29.

Third, on August 28, 1987, only two months after the merger and after two weeks of negotiation, Berry accepted Tenneco's proposal to acquire a 50% working interest in the Rincon field. The Berry-Tenneco agreement consisted of a $28.5 million commitment by Tenneco, which included payment of $13 million in cash and Tenneco's undertaking to contribute $15.5 million towards the $62 million cost of developing the Rincon field. According to a Tenneco representative, that commitment was consistent with a fair market valuation of Norris' interest in the Rincon field of at least $57 million. Stevens Dep. at 87-89. Berry's agreement with Tenneco was expressly conditioned upon the approval by the California State Lands Commission ("SLC") of a permanent reduced royalty rate.[6] The magnitude of the contemplated investment in Rincon ($62 million) was disclosed to the SLC in the February, 1987 royalty application, but not to Norris' shareholders in the Prospectus.[7]

Fourth, there is evidence (also controverted) that Berry constricted the scope of the experts' valuations of Norris, and otherwise attempted to influence those valuations. One reason that Tenneco valued Rincon so highly were the favorable odds of finding oil in the "deep zones" of the Rincon field. The odds of successfully developing an exploratory field are usually one in ten, but Tenneco concluded that in this case they were one in two. Stevens Dep. at 23, 80-82. However, Babson & Sheppard was asked not to consider certain Rincon deep zones in its valuation, and therefore it did not do so. Sheppard Dep. at 13-14.[8] Moreover, although Wedbush was retained to render an independent fairness opinion with respect to the merger exchange ratio, Berry apparently furnished to Wedbush its methodology and calculations in setting the exchange ratio before Wedbush had developed its own. Bryant Dep. at 58-59. According to a Wedbush representative, there was generally no difference between Wedbush's valuation approach and that suggested by Berry's management. Schauerman Dep. II. at 139-43. Finally, John P. Schauerman, a Wedbush Vice President, knew that Berry intended to wait until after the merger was accomplished before formalizing any Rincon joint venture or making any substantial investment in Rincon. *See* Schauerman Dep. at 92. Nonetheless, Wedbush did not consider those joint-venture plans in arriving at its opinion that $2.2 million was a fair valuation of Norris' properties as of the merger date.

***6** On September 23, 1987, three months after the merger, the SLC granted Berry's application for a royalty rate reduction for the Rincon Field. Six days later, on September 29, 1987, Tenneco issued a press release announcing the Rincon joint venture agreement with Berry. This lawsuit followed.

II. *THE CONTENTIONS AND THE APPLICABLE STANDARD*

Both parties contend that on the basis of undisputed facts, summary judgment should be granted in their favor. The plaintiff seeks partial summary judgment on the issue of liability, contending that as a matter of law Berry cannot carry its burden of showing that the merger was entirely fair, because (i) Berry dealt unfairly with Norris' minority shareholders (including making improper Prospectus disclosures) and (ii) the merger consideration received by the minority was unfair.

Berry contends that it is entitled to a judgment of dismissal as a matter of law, because (i) it has established that Berry dealt fairly with the minority, (ii) the plaintiff has failed to adduce any competent evidence that the merger consideration was not fair, and (iii) the plaintiff, who voted in favor of the merger and accepted the consideration after full disclosure of all material facts, acquiesced in the transaction and is therefore equitably barred from attacking it.

For the reasons now discussed, I conclude that neither side's position is correct, and that both motions for summary judgment must be denied.

Summary judgment will be granted only where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Ch. Ct.R. 56(c). *Empire of America Relocation Services, Inc. v. Commercial Credit Co.,* Del.Supr., 551 A.2d 433, 435 (1988); *Bershad v. Curtiss-Wright Corp.,* Del.Supr., 535 A.2d 840, 844 (1987). The party seeking summary judgment has the burden to establish the absence of any genuine issue of fact that would affect the result. *Brown v. Ocean Drilling & Exploration Co.,* Del.Supr., 403 A.2d 1114, 1115 (1979); *Tomczak v. Morton Thiokol, Inc.,* Del. Ch., C.A. No. 7861, Hartnett, V.C. (April 5, 1990), Mem.Op. at 18. In deciding a summary judgment motion, the Court must view all facts in the light most favorable to

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the non-moving party, and must resolve all ambiguities and reasonable inferences against the moving party. The Court may not weigh the evidence, nor may it grant summary judgment merely because it believes the movant might prevail at trial. *Gilbert v. The El Paso Co.,* Del.Supr., 575 A.2d 1131, 1142 (1990).

III. *THE ENTIRE FAIRNESS CLAIMS*

Berry concedes that because it owned 80.6% of Norris' shares and stood on both sides of the merger and fixed its terms, the entire fairness standard of review governs all of the plaintiff's claims, other than disclosure. *Bershad,* 535 A.2d at 845; *Weinberger v. UOP, Inc.,* Del.Supr., 457 A.2d 701, 710 (1983). That exacting standard requires the defendant fiduciary to prove, after careful scrutiny by the Court, that the challenged transaction was entirely fair to the minority stockholders. *Weinberger v. UOP, Inc.,* 457 A.2d at 710; *Citron v. E.I. Du Pont de Nemours & Co.,* Del. Ch., 584 A.2d 490 (1990).[9] Fairness for this purpose means fair dealing as well as fair price. *Weinberger,* 457 A.2d at 711. Because in this case there are genuine issues of material fact going to both the fairness of the price and Berry's treatment of the Norris minority, a grant of summary judgment on these claims would be inappropriate.

***7** A. *Fair Dealing*

With respect to fair dealing, the plaintiff advances two arguments.[10] The first is that Berry furnished no procedural protections for the minority, such as independent negotiators, legal and financial advisors, or a "majority of the minority" veto. These facts are undisputed and constitute evidence of unfair dealing. They do not, however, necessarily establish unfair dealing as a matter of law. *Sealy Mattress Co. of N.J., Inc. v. Sealy, Inc.,* Del. Ch., 532 A.2d 1324, 1336 (1987); *Jedwab v. M.G.M. Grand Hotels, Inc.,* Del. Ch., 509 A.2d 584, 599 (1986).

Second, the plaintiff contends that Berry unfairly timed the merger in relation to the joint-venture development of the Rincon field, with the result that the values inherent in Rincon were not recognized, and were therefore not fully credited, in determining the merger exchange ratio. If such improper timing is found to have occurred and benefitted the fiduciary (Berry) at the expense of the minority shareholders, that circumstance may establish unfair dealing. *See Sealy Mattress Co. of N.J., Inc.,* 532 A.2d at 1336; *Jedwab,* 509 A.2d at 599. In this case the evidence clearly establishes a fact dispute as to whether Berry purposefully postponed its joint venture negotiations with Tenneco and Exxon, and delayed its Rincon development plans, until after the merger, with resulting benefit to Berry and commensurate detriment to the Norris minority. *See* pp. 6-9, *supra,* of this Opinion.

Berry responds by first contesting the factual basis of the plaintiff's argument. Berry contends that it did not deliberately delay joint-venture negotiations, but suggests that its personnel were simply too busy to meet with Tenneco because of the merger. Berry further claims the Exxon talks were deferred in order to induce Exxon and Tenneco to bid against each other. Thus, Berry argues, the plaintiff's unfair dealing claims fail at this stage because of material factual disputes.

Berry also contends that none of the plaintiff's arguments are valid, because they rest upon two legally invalid premises: (i) the plaintiff's timing claim erroneously assumes that Berry was obligated to develop the Rincon field before the merger, and (ii) that claim represents an improper attempt by the minority shareholders to garner for themselves post-merger synergistic benefits to which they were not legally entitled. Berry's contentions, however, miss the mark. The thrust of the unfair dealing claim is that the merger and the Rincon field development were timed in relation to each other so that the minority was deprived of its proportionate share of Norris *pre-merger* value to which they were legally entitled. As thus understood, that claim can be resolved only after a full evidentiary trial.

B. *Fair Price*

That same conclusion applies in equal measure both to plaintiff's claim that the merger price was unfair and to Berry's contrary position that the price was entirely fair. Based upon several expert affidavits which opine that the Norris minority received fair value,[11] Berry assiduously contends that summary judgment in its favor is mandated. Specifically, Berry argues that fair value must be determined on the basis of expert testimony, and that because Berry submitted such evidence but the plaintiff has countered with none, the plaintiff cannot defeat summary judgment on the fair price claim. Alternatively, Berry argues that the plaintiff's "unfair price" claim rests at bottom upon the post-merger Berry-Tenneco joint-venture agreement, which cannot be considered because it was not known or ascertainable as of the merger date. *See Weinberger,* 457 A.2d at 713. These arguments misapprehend the thrust of the plaintiff's position, and are insufficient to warrant granting summary

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judgment.

***8** At this procedural stage, the plaintiff is not asking this Court to determine a specific fair value for Norris as of the merger date. Were that the case, expert testimony might well be essential. Rather, the plaintiff seeks to persuade this Court that Berry is not entitled to judgment in its favor as a matter of law, because it cannot prove that its own valuation of Norris was entirely fair. For that purpose, expert testimony may not be essential. Expert valuation testimony is, by definition, opinion evidence, and such evidence is only as reliable as the assumptions underlying it. *Alabama By-Products Corp. v. Neal,* Del.Supr., No. 298, 1990 (March 8, 1991), Slip.Op. at 6-7; *Draper Communications, Inc. v. Delaware Valley Broadcasters Limited Partners,* Del. Ch., 505 A.2d 1283, 1293 (1985). In this case, the plaintiff has submitted evidence that significantly challenges the reliability of the assumptions underlying Berry's $2.2 million merger valuation of Norris' properties.

Thus, Mr. Bryant's December, 1986 proposal to swap the Rincon field for 50% of Formax's oil properties suggested a value for Rincon of $42.5 million. Babson & Sheppard's $2.2 million valuation of the Norris properties for purposes of the merger assumed oil reserves of 67,000 barrels, yet only four months after the merger, the estimate of those reserves was increased to over 2.8 million barrels as of a date four months before the merger. In April, 1986, an outside petroleum engineer told Norris' then-management that Rincon had 39 million barrels of recoverable oil; in January, 1987, Mr. Bryant told Exxon that Rincon had 50 million barrels of recoverable oil; and an April 29, 1987 Tenneco memorandum states that Berry representatives told Tenneco that Rincon had 97 million barrels of risk-adjusted reserves. Thus, even without regard to the Berry-Tenneco joint-venture agreement, there is evidence-all existing before the merger date-sufficient to create a triable issue of fact as to the validity of the assumptions underlying the opinions of Berry's expert witnesses. Accordingly, those opinions are not conclusive on the fair price issue at this stage.

Similarly deficient is Berry's argument that the August, 1987 Berry-Tenneco joint-venture agreement cannot be considered in assessing the fairness of the merger exchange ratio. First, the contention ignores plaintiff's claim that Berry purposefully timed that agreement to post-date the merger, in order to conceal, and deprive the minority of, values of Norris existing at the time of the merger. Should plaintiff prevail on that position at trial, the joint-venture arrangement would be probative evidence of Norris' value as of the merger date. Second, in any event, the joint-venture agreement might constitute admissible evidence on the alternative ground that it reflects values of Rincon that were independently ascertainable as of the merger date.[12] *See Weinberger,* 457 A.2d at 713.

Because these issues of material fact cannot be resolved at this stage, summary judgment on the question of "fair price" must be denied to both sides.

IV. *THE DISCLOSURE CLAIMS*

***9** Finally, the defendant claims entitlement to summary judgment on the ground that the plaintiff voted for the merger and did not assert his appraisal rights. If at the time of his vote the plaintiff was adequately informed of all material facts, that would constitute a valid defense. An informed minority shareholder who either votes in favor of a merger or accepts its benefits cannot thereafter attack the fairness of the merger price. *Bershad,* 535 A.2d at 848. In response, the plaintiff contends that his favorable vote has no legal significance, because he and his fellow minority shareholders were deceived into voting in favor of the merger by materially misleading Prospectus disclosures. To that argument Berry responds that all disclosures in its Prospectus were accurate and in full compliance with its fiduciary duties.

Berry's defense of acquiescence thus turns upon the validity of the disclosures in the Prospectus. In attacking those disclosures, the plaintiff appears to advance three claims.[13] Berry responds by arguing that the facts that plaintiff contends were wrongfully omitted from the Prospectus were not material. An omitted fact is material if it would have been "viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Rosenblatt v. Getty Oil Co.,* Del.Supr., 493 A.2d 929, 944 (1985) (quoting *TSC Indus., Inc. v. Northway, Inc.,* 426 U.S. 438, 449 (1976)).

First, the plaintiff attacks the Prospectus for omitting to disclose (i) Berry's informal proposal to Exxon in December, 1986 to swap a 50% interest in Rincon for certain Formax properties, (ii) Berry's discussions with Tenneco in April, 1987, and (iii) Berry's instructions to potential joint-venture partners not to submit "formal" proposals until after the merger. The defendant contends, in reliance upon *Bershad,* 535 A.2d at 847, that that information, all generated during the negotiating stage, was immaterial as a matter of law because as of the Prospectus date no agreement had been reached as to the

price or structure of the joint venture transaction.

The Prospectus disclosure to which these claims relate, states as follows:

Management believes that the rehabilitation of the Norris operations and properties will likely require outside financing. Although no arrangements or agreements that would provide such financing have as yet been made, various alternatives are being explored, including the use of venture partners to participate in the development of the Norris properties. Management has had preliminary discussions with several parties, including independent and major oil companies, to discuss the possibility of forming a joint venture for the exploration and development of Norris's Rincon leases. Norris shareholders should recognize that no assurances can be given that management will be able to find a joint venture partner or other outside financing or to develop the Norris properties as intended. Declines in the price of crude oil could have a substantial adverse impact on Norris' ability to obtain financing for its operations.

***10** Prospectus, at 29 (emphasis added).

On the present record, the Court is not prepared to conclude that the *Bershad* "bright line" rule forecloses plaintiff's claims as a matter of law. Unlike *Bershad,* this case does not involve a negotiated merger. The negotiations were not between the parent and subsidiary corporations. Rather, they were between the parent corporation and third parties relating to a corporate asset of the subsidiary in whose value the subsidiary's unrepresented minority stockholders had a significant interest. Here, unlike *Bershad,* it is claimed that the sole reason that no agreement as to price and structure had been reached as of the Prospectus date is that Berry deliberately manipulated events to achieve that result, in order to avoid having to disclose any value-related facts that the negotiations might generate. Those factual circumstances preclude dismissal of this disclosure claim on the basis of the *Bershad* rule.

Moreover, these disclosure claims rest upon substantive factual propositions that themselves are heavily disputed. Thus, if the plaintiff's entire fairness claims are resolved in plaintiff's favor, the quoted Prospectus disclosure could be found to have been in certain respects misleading for omitting to disclose all material facts. *See Lynch v. Vickers Energy Corp.,* Del.Supr., 383 A.2d 278, 281 (1977). Whether or not that was the case (and if so, in what specific respects the disclosure was materially misleading) cannot be decided until the underlying facts relating to the entire fairness are determined after trial. To put it differently, because the factual context needs to be developed in order to clarify the legal analysis, the disclosure claims cannot be decided in this summary judgment context. *Frazer v. Worldwide Energy Corp.,* Del. Ch., C.A. No. 8822, Jacobs, V.C. (May 3, 1990), Mem.Op. at 11-12.

The plaintiff next challenges the adequacy of the following Prospectus disclosure:

Management anticipates that to fully develop the Norris reserves a substantial influx of capital into Norris will be required.... Many of the existing wells on the Norris properties must be abandoned or redrilled, and additional capital and qualified technical personnel will be required for the exploration and appraisal drilling needed to fully determine the development potential of the Norris properties.... Based on reports by engineers and geologists employed by Norris, management believes that significant production increases will require a major long term capital investment program.

Prospectus, at 29, 70. Plaintiff argues that that disclosure is materially misleading because it does not fully reflect the extent that Berry's development plans for Rincon had already been defined and pursued. The plaintiff contends that Berry should have disclosed the accurate status of its development plans as of the Prospectus date, because those facts would have altered the total mix of information made available to Norris' shareholders who were deciding how to cast their vote. The Rincon field reserves and their resulting value, plaintiff argues, were of such a high order of magnitude that accurate disclosure of the precise status of Berry's development plans for Rincon would have alerted the minority shareholders to the inadequacy of the proposed merger price.

***11** Third, the plaintiff asserts that the Prospectus should have disclosed Rincon's probable and possible oil reserves and the fact that Babson & Sheppard was asked to exclude those reserves from its Rincon valuation. Again, it is urged that those disclosures would have alerted the minority shareholders to certain values of Norris not reflected in the merger exchange ratio.

Berry, not surprisingly, disagrees with the factual premises of all these arguments, and asks the Court to conclude that its Prospectus fully complied with its fiduciary duties as a matter of law. While Berry's factual position may ultimately prevail after a trial, it cannot be accepted as a matter of law at this stage. If one or more of the underlying substantive factual issues are decided against Berry, there are potentially several scenarios under which these Prospectus disclosures might be found

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to have been materially misleading.

Thus, based on the present record, the defendant's disclosure claims and contentions cannot be resolved as a summary judgment matter.

V. *CONCLUSION*

For the foregoing reasons, the defendant's motion for summary judgment is denied, except as to plaintiff's disclosure claims which have been abandoned and are thus dismissed. The plaintiff's cross-motion for summary judgment is also denied. IT IS SO ORDERED.

All Citations

Not Reported in A.2d, 1991 WL 45361

Footnotes

1 The defendant's brief contains a chronological factual presentation, but that presentation was slanted (quite understandably) to favor the defendant's version of the facts. The plaintiff made no chronological factual presentation at all. Instead, he chose to balkanize the "facts" by organizing them under discrete topical headings relating to each separate claim.

2 Although the basic terms of the Norris Purchase transaction are not in dispute, the parties disagree as to which payments or guarantees should be considered a part of the purchase price. Berry contends that the purchase price was $.37 per share, while the plaintiff contends that it was $.75 per share.

3 Mr. Bryant characterizes his 50 million barrel representation as "puffing" and as an informal, highly optimistic, best-case scenario in order to interest Exxon in Rincon. Bryant Supp.Aff. at 45-46. Those characterizations merely underscore a material fact dispute as to Norris' recoverable reserves-a dispute further highlighted by the fact that in April, 1986, Howard Stark, an outside petroleum engineer, informed Norris' then-management that Rincon had 39 million barrels of recoverable reserves. Pl.Ex. 160.

4 Those reserves are risk-adjusted downward by 25% in the proved areas and by 75% in the probable areas.

5 Mr. Bryant denies that he or other members of Berry management deliberately planned to defer the submission of joint venture proposals until after the merger. He explains that the Berry people were simply too busy to meet with Tenneco due to the time being spent on the merger and in preparing the Prospectus. Likewise, Exxon discussions were delayed since it would be better for the Norris shareholders if Exxon and Tenneco were bidding against each other. Bryant Supp.Aff. at 20, 23-24. Those denials again serve only to frame a material fact dispute that must be resolved after trial.

6 The State of California, through the SLC, is the owner and lessor of the tideland property on which Rincon is located. Pursuant to its authority, the SLC is empowered to grant leases to third parties for permission to drill on such properties, subject to royalty agreements.

7 Mr. Bryant explains in his affidavit that as of the date of the merger, there was no assurance that the SLC would favorably respond to Berry's application. If it did not, Rincon (it is said) would have little or no value, because it would be uneconomical to develop the field. However, there is evidence that in May, 1987, two months before the merger, Berry told Tenneco that it believed that the SLC would grant its application. Stevens Dep. at 47. Pl.Ex. 244. Mr. Bryant explains that that statement was made only because Berry felt it was critical to the joint-venture discussions that Berry outwardly display confidence, but that in truth, Berry had no idea how the SLC would respond. Bryant Supp.Aff. at 25-26. That explanation again highlights the existence of a fact dispute as to whether it was likely, as of the merger date, that Berry would obtain the requisite regulatory approval.

8 The Babson & Sheppard report states:

> At your request, this report does not include any estimates of the quantities of proved undeveloped, probable, or possible oil and gas reserves which might be added or obtained through the drilling of new wells or the deepening of existing wells. The evaluation has been limited to estimates of those reserves which may be anticipated to be recovered through the continued production, repair, stimulation, or recompletion of existing wells and the development of behind-pipe reserves.

Pl.Ex. 210, p. 3. Berry responds to these factual contentions in two ways. First, it submitted the affidavit of Mr. Sheppard of Babson & Sheppard, stating that his firm did consider the potential of the Rincon deep zones, but that

because of market conditions, the oil located in those zones were not economically recoverable and therefore could not be characterized as "reserves". Sheppard Supp.Aff. at 11-12. Second, Berry submitted the affidavit of Evans, Carey and Crozier, a consulting engineering firm subsequently hired by Berry, which concluded that Rincon was worth $2.365 million and that Babson & Sheppard's valuation analysis was reasonable. Crozier Aff. at 4-5. These explanations do not conclude the issue as a summary judgment matter, but do further evidence the need for a factual hearing.

9 Because Norris was a Nevada corporation, Delaware law would not, strictly speaking, apply in determining the propriety of Berry's conduct as Norris' majority stockholder. However, because both parties rely upon Delaware law in support of their positions, the Court has applied Delaware law on the basis that all parties concede its application.

10 The plaintiff also contends that Berry dealt unfairly with the minority by making materially misleading Prospectus disclosures. That claim is addressed in Part IV, *infra,* of this Opinion.

11 The Wedbush fairness opinion so concluded. That Opinion was based upon Babson & Sheppard's valuation of Norris' oil reserves, which another firm, Evans, Carey & Crozier confirmed in an affidavit prepared and submitted for purposes of this litigation.

12 The Court also has found that there is a triable fact issue as to whether Berry dealt fairly with the minority shareholders in the merger. If it is determined that Berry did not deal fairly, that fact may be taken into account in assessing the credibility of Berry's positions concerning Norris' value, and of the testimony of its witnesses in support of that position. *Alabama By-Products v. Neal, supra,* Slip Op. at 7.

13 In his complaint, the plaintiff alludes to many claimed disclosure violations, but in his briefs he articulates only the disclosure claims addressed in Part IV of this Opinion. Since the plaintiff has made no effort to articulate or defend any other disclosure claims (including those attacked by the defendant in its briefs), all disclosure claims other than those addressed in this Opinion must be deemed to have been abandoned and, therefore, will be dismissed.

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