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Case No. 6465-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ROBERT S. GOGGIN, III,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. 6465-VCN**
	:	
VERMILLION, INC., GAIL S. PAGE, JAMES S. BURNS, PETER S. RODDY, CARL SEVERINGHAUS, WILLIAM C. WALLEN, and JOHN F. HAMILTON,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: June 1, 2011
Date Decided: June 3, 2011

Robert J. Kriner, Jr., Esquire and A. Zachary Naylor, Esquire of Chimicles & Tikellis LLP, Wilmington, Delaware, and Oliver D. Griffin, Esquire, Peter Kessler, Esquire, and Joseph L. Doherty, IV, Esquire of Spector Gadon & Rosen, P.C., Philadelphia, Pennsylvania, Attorneys for Plaintiff.

James L. Holzman, Esquire, J. Clayton Athey, Esquire, and Nicole M. Faries, Esquire of Prickett, Jones & Elliott, P.A., Wilmington, Delaware, and Peter M. Stone, Esquire and Kimberley A. Donohue, Esquire of Paul, Hastings, Janofsky & Walker LLP, Palo Alto, California, Attorneys for Defendants.

NOBLE, Vice Chancellor

I. BACKGROUND

Plaintiff Robert S. Goggin, III ("Goggin") has moved to enjoin the annual stockholders meeting of Defendant Vermillion, Inc. ("Vermillion" or the "Company"), which is currently scheduled for June 6, 2011 (the "2011 Meeting"). In addition, he seeks declaratory relief regarding the timeliness of shareholder proposals for the 2011 Meeting and the scope of the Company's rights plan (the "Poison Pill") as it relates to shareholder communications. Goggin ultimately requests that the Court: (1) delay the 2011 Meeting until at least July 2011; (2) determine that shareholder proposals made before any rescheduled meeting be considered and voted upon; and (3) enjoin any threatened use of the Poison Pill to restrict stockholders' ability to communicate with one another about Vermillion, including with regard to stockholder proposals and director nominations.

Vermillion is a publicly traded Delaware corporation in the business of developing diagnostic tests. The six individual defendants are members of the Company's board of directors (the "Board"). All are independent, outside directors with the exception of the Board's chairperson, Gail S. Page, the Company's chief executive officer. The Board is divided into three classes of directors with staggered three-year terms. The Company's bylaws (the "Bylaws") provide for an eight member board. Since commencement of this action, a seventh

director has been appointed; on May 17, 2011, the Board approved Bruce A. Huebner as a Class I director with his term expiring in 2013.

Vermillion, which was incorporated and went public in 2000, expended its cash developing the Company's diagnostic tests before it could obtain the necessary regulatory approval and filed for bankruptcy protection in March 2009. While in bankruptcy, its lead product, OVA1, received FDA approval and, as a result, after completing a plan of reorganization, Vermillion emerged from bankruptcy in January 2010. Sometime after the Company filed for bankruptcy, Goggin began purchasing shares of Vermillion common stock.

Vermillion did not hold an annual meeting in 2009 while it was in bankruptcy. It first held an annual meeting after emerging from bankruptcy on December 3, 2010; at that time, the Company's shareholders voted to elect Vermillion's Class III directors to a two-year term (Ms. Page and John F. Hamilton) and its Class I director to a three-year term (William C. Wallen). In the years before its bankruptcy filing, Vermillion traditionally held its annual meeting in June.[1]

[1] Before Vermillion's bankruptcy, the Company's annual meetings were held as follows: June 6, 2002; June 5, 2003; June 3, 2004; June 8, 2005; June 7, 2006; June 29, 2007; and June 11, 2008. In addition, Vermillion traditionally required that advance notice of shareholder proposals be provided by January 3rd—the exceptions being in 2002 where notice was required by February 15th and in 2008 and 2009 when notice was required by January 30th.

As part of the Company's proxy issued on October 20, 2010 notifying shareholders of the 2010 annual meeting, Vermillion included language requiring shareholders to submit proposals for the 2011 Meeting—including proposals for director nominees—by January 1, 2011. Vermillion later announced on February 28, 2011 (in its Annual Report, Form 10-K) that the 2011 Meeting would take place in June—approximately six months after the 2010 annual meeting. Subsequently, the Company issued its 2011 proxy and meeting notice on April 28, 2011, announcing June 6, 2011 as the annual meeting date.

In a January 26, 2011 email, Goggin first communicated to Vermillion his dissatisfaction with the Company's Board and management. On March 23rd, in a letter addressed to the Board, he requested an emergency shareholder meeting to consider Ms. Page's tenure as CEO, to adopt more shareholder-friendly bylaws, and to remove the Poison Pill.[2] The Board considered Goggin's communications and instructed the Company's outside counsel to respond to him by telephone. The Board decided to amend Vermillion's bylaws—which were subsequently adopted by the Board on May 6, 2011 (the "Amended Bylaws") and specifically include advance notice provisions for future annual meetings relating to shareholder proposals and director nominations. The Board, however, unanimously declined to remove the Poison Pill or undertake any other action requested by Goggin.

[2] In the period between Goggin's correspondence to the Company, Vermillion completed the sale of 4,000,000 shares of common stock in a public offering at a price of $5.45 per share.

Around this same time, the Company received correspondence from four other shareholders raising concerns similar to those expressed by Goggin. Vermillion responded in writing to one of those shareholders and directed its legal counsel to request in writing from those four shareholders and Goggin information relevant to the shareholders' communications with one another for purposes of the Poison Pill.[3] It does not appear that Goggin responded to Vermillion's letter. He filed his original complaint on May 9, 2011 and, later, filed an amended complaint and requested interim injunctive relief.

II. CONTENTIONS

Goggin contends that Vermillion and its Board have "erected significant and unreasonable barriers to shareholder action," and have used the Poison Pill "as a cudgel to chill intra-shareholder dialogue."[4] By scheduling the 2010 annual meeting and the 2011 Meeting only six months apart, according to Goggin, the Company is "violat[ing] the requirement of Delaware law that annual meetings of companies with staggered boards such as Vermillion occur approximately one year apart."[5] Moreover, Goggin argues that requiring advance notice of shareholder proposals for the 2011 Meeting by January 1, 2011 "is in fact unreasonably

[3] The letter sets forth a series of inquiries regarding contacts, relationships, and affiliations of Vermillion's shareholders in an effort by the Board "to understand and make a determination, as required" under the Poison Pill. *See* Aff. of A. Zachary Naylor, Esq. ("Naylor Aff."), Ex. 10 (Apr. 15, 2011 Letter from Robert Claassen, Esq. to Goggin).
[4] Pl.'s Opening Br. in Supp. of Mot. for Prelim. Inj. ("Pl.'s Br.") at 3, 6.
[5] *Id.* at 8.

defensive and entrenching."[6] Goggin characterizes this lawsuit as not merely about the timing of the 2011 Meeting but also about the efforts of the Board and Vermillion's management, assisted by outside counsel, "to entrench themselves . . . by ensuring that shareholders not be permitted a reasonable period in which to timely submit proposals for the 2011 [M]eeting, and by discouraging them, by threat, from discussing alternative slates (let alone shareholders proposals) with one another."[7]

In response, the Defendants argue that the Court should deny Goggin's request for interim injunctive relief because the independent and disinterested Board reasonably exercised its business judgment with respect to the measures challenged here. Moreover, the Defendants contend that Goggin cannot show irreparable harm or that the equities weigh in his favor because his "case for harm is entirely theoretical."[8] Because many of the Board's decisions at issue in this action "were made long before Goggin even became a shareholder," according to the Defendants, they are "the sort of business judgments regularly made by many companies every day . . . [and] could not possibly be viewed as corporate action intended to thwart effective exercise of Goggin's franchise."[9]

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[6] *Id.* at 10.
[7] Pl.'s Reply Br. in Further Supp. of Mot. for Prelim. Inj. ("Pl.'s Reply") at 1.
[8] Defs.' Answering Br. in Opp'n to Pl.'s Mot. for Prelim. Inj. at 2.
[9] *Id.* at 12.

III. ANALYSIS

A. *Preliminary Injunction Standard*

A preliminary injunction is an "extraordinary remedy" and, as a result, requires a plaintiff to show: first, a reasonable probability that she will be successful on the merits of her claims at trial; second, that she will suffer imminent, irreparable harm if an injunction is denied; and third, that the harm to the plaintiff, if her application is denied, will outweigh the harm to the defendant if an injunction is granted.[10]

B. *Probability of Success*

In support of his contention that the Board has implemented "unreasonable defensive measures calculated to entrench defective management and disenfranchise shareholders,"[11] Goggin primarily focuses the Court's attention on three issues: (1) the scheduling of the 2011 Meeting; (2) the advance notice requirement for shareholder proposals to be presented at the 2011 Meeting; and (3) the purportedly threatening, preclusive effect of the Poison Pill on shareholder communications. The Court considers in turn below Goggin's probability of success on the merits of these assertions.

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[10] *In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 532014, at *14 (Del. Ch. Feb. 14, 2011).

[11] Pl.'s Br. at 1.

1. The 2011 Meeting Date

Relying on the Supreme Court's recent opinion in *Airgas, Inc. v. Air Products and Chemicals, Inc.*,[12] Goggin contends that the proposed date for the 2011 Meeting violates Delaware law. He argues that the 2011 Meeting—scheduled for June 6, 2011, only six months after the 2010 annual meeting—does not comport with the holding in *Airgas* because it is not approximately twelve months after the 2010 annual meeting and future annual meetings held in June will truncate the terms of the Vermillion directors elected in 2010.

Under the Delaware General Corporation Law (the "DGCL"), corporations must "hold a stockholders meeting annually or risk the imposition of a court-ordered meeting under the special quorum rule of § 211(c)."[13] The annual meeting must be scheduled "on a date and at a time designated by or in the manner provided in the bylaws."[14] Vermillion's corporate charter (the "Charter") provides that "[n]o action shall be taken by the stockholders . . . except at an annual or special meeting . . . called in accordance with the [Company's b]ylaws . . . ."[15] The Bylaws state that "[t]he annual meeting of stockholders shall be held each year on a date and at a time designated by the board of directors. In the absence of such

[12] 8 A.3d 1182 (Del. 2010).
[13] *MFC Bancorp Ltd. v. Equidyne Corp.*, 844 A.2d 1015, 1021 (Del. Ch. 2003); *see also* 8 *Del. C.* § 211.
[14] 8 *Del. C.* § 211(b).
[15] Aff. of Nicole M. Faries, Esq. ("Faries Aff."), Ex. 11 (Charter) art. XI.

designation, the annual meeting of stockholders shall be held on the second Tuesday of May . . . ."[16]

The scheduling of the 2011 Meeting for June 6, 2011 is seemingly consistent with the DGCL and the Company's corporate documents and earlier practices before bankruptcy.[17] The Class II directors seeking election at the 2011 Meeting were last considered at a vote of the shareholders on June 11, 2008.[18] Thus, even if the Class II directors are not elected at the upcoming meeting, their terms will only be nominally shortened. For that reason, holding the 2011 Meeting in June does not run afoul of *Airgas*; there, the Supreme Court invalidated a shareholder bylaw that advanced the annual meeting with the effect of "so extremely truncat[ing] the directors' term as to constitute a *de facto* removal . . . ."[19] More importantly, in declining to "decide the parameters of an approximate term of three years," the Supreme Court observed that "a director's term may properly end at an annual meeting even though that director only served approximately three years rather

[16] Naylor Aff., Ex. 6 (Bylaws) § 2.2. The Charter specifies that each director's term expires at the "third succeeding annual meeting of stockholders after" her election. Charter, art. IX.
[17] Although the 2010 annual meeting occurred out of sequence because of Vermillion's emergence from bankruptcy, the Company had held its annual meeting in June for the years 2002 through 2008. Thus, although Goggin complains of Board manipulation in setting the annual meeting date, the record indicates good reason and historical precedent for scheduling the 2011 Meeting in June.
[18] Faries Aff., Ex. 9 (Apr. 24, 2008 Proxy).
[19] *Airgas*, 8 A.3d at 1194.

than exactly three years."[20] Accordingly, truncating a director's three-year term by a few days appears to be permitted under *Airgas*.[21]

To the extent that Goggin raises arguments regarding the potential for the terms of the directors elected in December 2010 to be truncated by future annual meetings, that issue is not before the Court and, in any event, is not ripe for adjudication.

Thus, because the scheduling of the 2011 Meeting appears to comport with Delaware law and Vermillion's corporate documents, Goggin has failed to demonstrate a reasonable probability of success as to his contention that the meeting has been inappropriately scheduled.

2. The Advance Notice Requirement for the 2011 Meeting

Goggin next asserts that the advance notice requirement for shareholder proposals to be presented at the 2011 Meeting "was not best practices"—as evidenced by the newly-enacted advance notice provisions in the Amended

[20] *Id.* at 1194 n.34.

[21] The Company originally intended to hold the 2011 Meeting in late June, but an investment conference sponsored by Lazard Capital Markets caused a conflict for Ms. Page. Accordingly, Vermillion decided to move the 2011 meeting from June 23rd to June 6th. *See* Naylor Aff., Ex. 1 ("Page Dep.") at 62-63. Goggin suggests that this rescheduling, which occurred after he expressed to the Board his dissatisfaction, indicates a plan to impede any shareholder suit such as the action brought here. Although he attempts to portray the rescheduling decision as a product of some nefarious purpose, the record clearly contradicts that inference; the Board scheduled the 2011 Meeting for an earlier date so that Ms. Page could attend the Lazard conference and solicit investment interest on behalf of the Company.

Bylaws—and caused him to be disenfranchised.[22] The required advance notice for the 2011 Meeting, he argues, was unreasonably early and represents unwarranted defensive and entrenching behavior by the Board.

Delaware law does not require that shareholders provide advance notice of proposals or of director nominations to be raised at an annual meeting, "unless the corporation has duly imposed such a requirement."[23] Advance notice requirements are "commonplace" and "are often construed and frequently upheld as valid by Delaware courts."[24] They are useful in permitting orderly shareholder meetings, but if notice requirements "unduly restrict the stockholder franchise or are applied inequitably, they will be struck down."[25]

Although not in the form of a bylaw, the Company set forth its notice requirement for the 2011 Meeting in the October 20, 2010 proxy. That provision required any stockholder seeking to make a proposal or to nominate a director candidate at that meeting to provide notice to Vermillion that "must be received by the Company no later than January 1, 2011."[26] With the meeting date later

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[22] Pl.'s Br. at 1.
[23] *Levitt Corp. v. Office Depot, Inc.*, 2008 WL 1724244, at *4 (Del. Ch. Apr. 14, 2008); *see also JANA Master Fund, Ltd. v. CNET Networks, Inc.*, 954 A.2d 335, 344 (Del. Ch. 2008) (citing 8 *Del. C.* § 222(a)).
[24] *Openwave Sys. Inc. v. Harbinger Capital Partners Master Fund I, Ltd.*, 924 A.2d 228, 238-39 (Del. Ch. 2007); *see also JANA Master Fund*, 954 A.2d at 344.
[25] *Openwave Sys.*, 924 A.2d at 239.
[26] Naylor Aff., Ex. 5 (Oct. 20, 2010 Proxy) at 3, 10.

scheduled for June 6, 2011, the notice requirement thus requires a little more than 150 days advance notice.

Because the Board established January 1st as the deadline for advance notice before Goggin appears to have expressed to the Company his dissatisfaction, the record does not support an entrenching or defensive motive on behalf of this disinterested Board—its decision was made on a proverbial "clear day." Thus, it is unlikely that at trial the Court would determine that the mandated advance notice was unreasonably long or unduly restrictive of Goggin's franchise rights. In the years before its bankruptcy, Vermillion's general practice was to require notice sometime in January for its June annual meeting; in many of those years, the advance notice required was nearly identical in duration to that which had been required for the 2011 Meeting.[27]

[27] Goggin also points to the Amended Bylaws—specifically, §§ 2.13(b) and 2.14(b) requiring advance notice of 120 days to 90 days before the one-year anniversary of the preceding year's annual meeting (and in some cases, an opportunity for shareholders to submit proposals within ten days of the announcement of the annual meeting date)—to further support his argument that the advance notice provision at issue here was not proper. *See* Naylor Aff., Ex. 12 (Amended Bylaws). Although this change, effectuated through the Amended Bylaws, may provide some evidence of a shift toward better corporate governance practices by Vermillion, it does not alter the Court's conclusion that Goggin is unlikely to prevail at trial on the merits of a challenge to the advance notice provision applicable to the 2011 Meeting for the reasons already stated.

3. The Poison Pill

In requesting that the Court "relax the operation of the Poison Pill for the limited purpose of permitting shareholders to confer without fear," Goggin contends that Vermillion has used the pill to bully and to stymie its shareholders.[28]

Delaware courts have repeatedly approved of the adoption of a rights plan.[29] Here, the Poison Pill dates back to 2002 and was authorized seemingly without a threat to the Company. It is triggered by an "acquiring person" who—along with her "affiliates" and "associates," as those terms are defined by Rule 12b-2 promulgated under the Securities Exchange Act of 1934—becomes a "beneficial owner" of 15% or more of the Company's common stock then outstanding.[30]

Goggin does not seek rescission of the Poison Pill; rather, he takes issue with the current purported use of the pill by the Board against Vermillion's shareholders. Specifically, he points to: (1) an April 15, 2011 letter from the Company's outside legal counsel to Goggin inquiring as to communications and interactions among Goggin and other Vermillion shareholders (the "April Letter"); and (2) Ms. Page's deposition testimony where she responded affirmatively when asked, if in dealing with the Company's dissatisfied shareholders, the Poison Pill

[28] Pl.'s Br. at 2.
[29] *See Versata Enters., Inc. v. Selectica, Inc.*, 5 A.3d 586, 599 (Del. 2010); *see also Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985).
[30] *See* Faries Aff., Ex. 12 (Poison Pill) §§ 1(a), (c), (d).

"would give [her] the leverage to negotiate . . . some kind of resolution . . . ."[31] The April Letter, according to Goggin, signaled a threat by the Company to utilize the Poison Pill to silence shareholders and chill intra-shareholder communications. He further contends that the Amended Bylaws strengthen the pill's ability to limit shareholder communication.

The April Letter appears to be a valid investigation on behalf of the Board into activities that it believed could implicate the Poison Pill, even if the letter was unnecessarily antagonistic. Had it not conducted any inquiry, the Board may have later faced accusations that it had breached its fiduciary duties. Moreover, despite Ms. Page's testimony, the record contains no indication of any improper action undertaken (or contemplated) by the Board or the Company related to the Poison Pill. Although "[e]nhanced scrutiny has been applied universally when stockholders challenge a board's use of a rights plan as a defensive device,"[32] it does not appear likely that Goggin would succeed at a trial on the merits in challenging the Poison Pill under these circumstances.

First, there is little evidence of the Board utilizing the pill as a defensive device against the Company's shareholders. Second, if applying enhanced scrutiny, there does not appear to be anything in the record to suggest that the

[31] Page Dep. 137.
[32] *eBay Domestic Holdings, Inc. v. Newmark*, 2010 WL 3516473, at *19 (Del. Ch. Sept. 9, 2010).

Board inappropriately exercised or maintained the pill. This disinterested and independent board's use of the Poison Pill would likely "fall within the range of reasonableness" based on what appears to be the directors' good faith effort to utilize the pill "to promote stockholder value."[33] Importantly, the Poison Pill does not "disenfranchise any stockholder in the sense of preventing them from freely voting and do[es] not prevent a stockholder from soliciting revocable proxies."[34]

Related to his request that the Court relax the limitations of the Poison Pill, Goggin argues that the Amended Bylaws "strengthen[ed]" and "defensively weaponized" the pill.[35] He points specifically to § 2.13(c)(iii) of the Amended Bylaws, adopting and defining the phrase "acting in concert," to suggest that this wording expands the application of the Poison Pill.[36] A full reading of that provision indicates, however, that whether a person is "acting in concert" is relevant only to the proper form of notice required by a stockholder giving advance notice of a meeting proposal or a director nomination. Indeed, counsel for the Defendants represented to the Court at oral argument that the phrase "acting in concert"—found only in the newly-established advanced notice bylaws—is not meant to, and does not, expand the scope of the Poison Pill as Goggin claims.

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[33] *Id.*
[34] *Yucaipa Am. Alliance Fund II, L.P. v. Riggio*, 1 A.3d 310, 335 (Del. Ch. 2010).
[35] Pl.'s Reply at 1 n.2.
[36] *See id.* at 5 ("[T]he expansion of the Poison Pill by the [Amended Bylaws] is a patent and improper threat."); *id.* at 6 (arguing that adoption of the Amended Bylaws "radically strengthen the [P]oison [P]ill"); *id.* at 9 (asserting that the pill has been "strengthened—outlandishly—in" the Amended Bylaws).

Instead, to determine whether the pill has been triggered by group activity, the Board would still have to reference the more traditional definitions of "affiliates" and/or "associates."[37] Accordingly, contrary to Goggin's assertions, it appears that the trigger for the Poison Pill remains unchanged from the original 2002 version of the pill and that the Amended Bylaws do not warrant further analysis in considering Goggin's contentions related to the pill.

4. The Cumulative Impact

Goggin suggests that when viewed together, the Defendants' conduct has "erected a wall of defensive mechanisms to ensure their control [continues] over Vermillion in violation of their fiduciary duties to Plaintiff."[38] He argues that the record reflects "a pattern of conduct in which Defendants manipulate Vermillion's corporate machinery to ensure that the incumbent Board and management are perpetuated in office indefinitely . . . ."[39]

Even when considered collectively, however, the record lacks evidence to suggest that the Board is selfishly motivated. If anything, the evidence shows that the Board has seriously considered its fiduciary duties and is working toward reestablishing the Company's corporate governance practices after emerging from bankruptcy a little more than a year ago. Accordingly, as with his individual

[37] *See* Poison Pill § 1(c).
[38] Pl.'s Br. at 23.
[39] Pl.'s Reply at 8.

arguments, even when viewed together, Goggin does not demonstrate a reasonable probability of success on the merits of his claims.

C. *Irreparable Harm/Balancing of the Equities*

Delaware courts "have consistently found that corporate management subjects shareholders to irreparable harm by denying them the right to vote their shares."[40] It is also true, however, that "[t]he alleged injury must be imminent and genuine, as opposed to speculative."[41] Here, the injury complained of is Goggin's inability to exercise his franchise rights. Nonetheless, he does not appear to be seeking to nominate himself or anyone else to Vermillion's board of directors. His counsel represented at oral argument that if he were to make a proposal, it would likely be limited to recommending a bylaw allowing for emergency shareholder meetings. There is no indication, however, that a proposal of that sort is of an exigent nature under these circumstances. As a result, because Goggin's ability to vote his shares at the 2011 Meeting has not been undermined or unlawfully interfered with, the irreparable harm prong counsels against granting Goggin interim injunctive relief.

Turning to a balancing of the equities, because Goggin has failed to demonstrate a reasonable probability of success on any of his claims and because

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[40] *Telcom-SNI Investors, L.L.C. v. Sorrento Networks, Inc.*, 2001 WL 1117505, at *9 (Del. Ch. Sept. 7, 2001) (internal quotation and alteration omitted).
[41] *Aquila, Inc. v. Quanta Servs., Inc.*, 805 A.2d 196, 208 (Del. Ch. 2002).

the injury he complains of appears to be minimal and, perhaps, largely theoretical, the balance tips in favor of the Defendants.

IV. CONCLUSION

For the foregoing reasons, Goggin's motion for a preliminary injunction is denied. An implementing order will be entered.