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Re: *In re Orchid Cellmark Inc. Shareholder Litigation*
C.A. No. 6373-VCN
Date Submitted: May 12, 2011

Dear Counsel:

As presaged at the conclusion of today's hearing, given the fact that the tender offer at the center of this litigation will expire on May 17, 2011, and the fact that the Court did not want to impose upon counsel the burden of listening to an extended bench ruling, this letter opinion, originally conceived as a bench ruling, is issued in response to Plaintiffs' Motion for Preliminary Injunction.

I. BACKGROUND

The proposed transaction is a cash tender offer by which Laboratory Corporation of America Holdings, Inc., through its wholly owned subsidiary OCM Acquisition Corp., proposes to acquire all of the shares of Orchid Cellmark Inc. for $2.80 per share under the Agreement and Plan of Merger, dated April 5, 2011. The Plaintiffs seek to enjoin this $85.4 million transaction on the grounds that it was the result of a flawed and inadequate process and that Orchid's shareholders have been provided with a materially misleading and incomplete recommendation statement on SEC Form 14D-9. The Tender Offer is set to expire on May 17, 2011.

Orchid is a Delaware corporation in the business of genetic testing services. It has facilities in the United States and the United Kingdom, with most of its clients located in those two countries. The Individual Defendants comprise Orchid's six-member board of directors. Five of the six directors are independent—Orchid's Chief Executive Officer, Thomas Bologna, is the only insider on the Board. He argued against the transaction, although he abstained from voting on it. It is worth noting that at $2.80 per share, his options in the

Company were underwater, and that may have—although it is not clear—influenced his views.

LabCorp, a Delaware corporation, is one of the largest clinical laboratory testing companies in the Unites States. It offers a wide range of testing services used by medical professionals.

In the fall of 2008, LabCorp expressed its unsolicited interest in acquiring Orchid. The Board formed a strategic committee that, with the assistance of financial and legal advisors, negotiated with LabCorp into 2009. In May 2009, LabCorp submitted its final indication of interest to acquire all of Orchid's shares for cash at $2.50 per share. The strategic committee and the Board determined that a transaction at that price was less likely to maximize shareholder value than the alternative of continuing as a stand-alone company. Orchid informed LabCorp of its decision not to pursue a transaction and negotiations subsequently ceased.

In August 2010, LabCorp contacted the then-chairman of Orchid's Board to express an interest in reopening acquisition discussions, proposing a price between $2 and $2.25 per share in cash. The Board, in consultation with its legal advisor, rebuffed LabCorp's offer and informed it that Orchid would only pursue the

transaction if the premium offered was significantly higher. In response, LabCorp increased its proposed range to $2.25 to $2.55 per share in cash. Mr. Bologna expressed his reservations to independent board member Mr. Dalziel about pursuing a sale of the Company. Mr. Dalziel, however, indicated that the Board had to consider proposals representing a significant premium to the then-current market price in order to fulfill its fiduciary duties. The Board, meeting to discuss the increased price range, determined that it would not accept an offer in the higher range proposed by LabCorp but that it was sufficient for LabCorp to commence due diligence and for the parties to resume negotiations. As a result, Orchid entered into a confidentiality and standstill agreement with LabCorp on September 17, 2010, and shortly thereafter began sharing confidential information with LabCorp. At a September 28 meeting, the Board directed members of the nominating and governance committee (consisting of only independent directors) to act as an *ad hoc* committee responsible for evaluating the Proposed Transaction with LabCorp.

After conducting some due diligence, LabCorp submitted a non-binding indication of interest on October 19th to acquire all outstanding stock of Orchid for

$2.55 per share in cash. The proposal expired on November 19 and required Orchid to agree to a period of exclusivity. The Board—with its legal counsel present—met the next day and formed a special committee consisting of two outside directors. Mr. Bologna suggested at the meeting that any consideration of a special committee be delayed until after the annual shareholder meeting scheduled for November 9; all other directors, however, approved the formation of the Special Committee at that time. The Board met again on November 9 to discuss a possible transaction and also to revisit the Special Committee's composition. It named newly-elected director Mr. Loren—a director-nominee proposed by Orchid's largest shareholder Accipiter Capital Management—to the Special Committee in addition to the two earlier-appointed independent directors.

Having met with several investment bankers, the Special Committee presented its findings at a November 14 board meeting and recommended that Oppenheimer & Co. be engaged as its financial advisor. The Board approved that recommendation and Oppenheimer was formally retained a few days later. During this same time, the Special Committee requested that LabCorp extend its indication of interest at $2.55 per share until December 22, 2010, a request that was approved

by LabCorp but still subject to a period of exclusive dealings between the parties until the revised expiration date.

After being retained as the financial advisor, representatives of Oppenheimer met with Orchid's management, attended numerous Special Committee meetings, and contacted LabCorp at the Special Committee's direction. Among the topics discussed at the Special Committee meetings were the Company's financial outlook; the anticipated impact of the winding-down of Forensic Science Service—a government-owned competitor of Orchid in the U.K.; the process of forecasting the Company's financial performance; and a possible counter-proposal to LabCorp and the pursuit of other potential transactions.

At a December 22 meeting, the Board received an update from the Special Committee regarding the Proposed Transaction with LabCorp and heard from Oppenheimer on a financial analysis of the Company. The Board directed the Special Committee and Oppenheimer, first, to inform LabCorp that any transaction price should not be less than $3 per share and, second, to begin discussions with other entities regarding a possible transaction.

The next day, after the expiration of the December 22nd extension, Oppenheimer presented LabCorp with Orchid's $3 per share counterproposal. A few days later, Oppenheimer began soliciting the interest of six potential buyers. Of the entities contacted, three private equity firms and one strategic buyer expressed some interest in a potential transaction with Orchid.

After the New Year, LabCorp responded that it was not willing to consummate a transaction at $3 per share but that it might be prepared to increase its earlier offer by 5 or 10 cents per share and possibly add a contingent value right or warrant based on future operating results. Oppenheimer updated the Special Committee at a January 5, 2011 meeting regarding LabCorp's response and its progress in soliciting interest from other entities. Acting on Oppenheimer's advice, the Special Committee indicated its support for making another counterproposal to LabCorp of not less than $2.75 per share. The Board met on January 7th to consider these additional developments and instructed Oppenheimer to continue discussions with other potential bidders and to propose a transaction at $2.80 per share to LabCorp. Oppenheimer conveyed the revised counteroffer, indicating that it did not include a period of exclusivity.

On January 18, LabCorp stated that it was willing to pursue a transaction at $2.80 per share but that Orchid would first have to agree to exclusivity. The Special Committee met the next day to consider LabCorp's proposal and to assess the likelihood of completing a transaction with other potential bidders. It directed Oppenheimer to make additional contacts in an effort to seek a higher price than that proposed by LabCorp and to inform LabCorp that the Board would not meet to consider its revised offer until January 21. At that subsequent board meeting, Oppenheimer informed the Board that all but one of the strategic buyers had confirmed they were not interested in pursuing a transaction with Orchid. Additionally, although several private equity firms had expressed some interest in a possible transaction, they were all seeking to purchase only Orchid's U.K. business. Despite the possibility of selling the Company's U.K. business and retaining its U.S. business, Oppenheimer advised the Board that it did not believe the interest shown as of that point in time would materialize into a financially superior proposal than the $2.80 per share offer of LabCorp.

On January 31, LabCorp sent to the Special Committee a written indication of interest to acquire all of the outstanding shares of Orchid for $2.80 per share in

cash, subject to a 30-day exclusivity period. Negotiations ensued between the parties and on February 3, the Board met to consider LabCorp's latest offer. Oppenheimer advised the Board that it was unlikely that any third party would make a bid that would yield a result higher than the $2.80 per share cash offer of LabCorp, despite interest expressed for the U.K. operations and cash at between seven and eight times EBITDA of the Company's U.K. operations, which Oppenheimer estimated as equaling approximately $2.93 per share. At the conclusion of the Board's discussions—including deliberation on remaining as a stand-alone company—the Board authorized the execution of LabCorp's written indication of interest with a binding 30-day exclusivity period. Of the six-member board, the vote was 4 in favor and 1 opposed—Mr. Bologna voted against while Mr. Hart was not in attendance and did not vote. Mr. Hart had previously voted against negotiations with LabCorp.

During exclusivity, the parties negotiated the terms of the Merger Agreement and the Special Committee met, in conjunction with its advisors, multiple times to review the ongoing developments. On March 6, the parties entered into a revised non-binding written indication of interest that extended the

exclusivity period until March 18th. The Board met on April 5 to discuss the Proposed Transaction, the Merger Agreement, and Oppenheimer's opinion that $2.80 per share was a fair price to Orchid's shareholders. The Board—other than Mr. Bologna who abstained ostensibly for the reasons disclosed in the Recommendation Statement—voted to approve the Merger Agreement and recommended that Orchid's shareholders tender their shares to LabCorp. The $2.80 per share price represented an approximately 40% premium over the Company's trading price just before this transaction was announced.[1]

II. ANALYSIS

A. *Preliminary Injunction Standard*

A preliminary injunction is an "extraordinary remedy." Plaintiffs are called upon to show: first, a reasonable probability that they will be successful on the merits of their claims at trial; second, that they will suffer imminent, irreparable

[1] On a few occasions, the minutes appear to have been scrivened in error. The testimony supports that the disclosures—although, of course, inconsistent with the erroneous minutes—are substantially accurate. *See* Transmittal Aff. of P. Bradford deLeeuw, Esq. ("deLeeuw Aff."), Ex. 21 ("Colen Dep.") at 228-29.

harm if an injunction is denied; and third, that a balancing of the equities favors the entry of interim injunctive relief.[2]

B. *Probability of Success*

1. Price and process claims

When a board of directors decides to sell a company, it must secure the best value reasonably attainable for the company's shareholders.[3] Under *Revlon*[4] and its progeny, the Court is called upon, first, to determine whether the information relied upon by the Board in the decision-making process was adequate and, second, to examine the reasonableness of the directors' decision viewed from the point in time during which the directors acted.[5] Delaware courts recognize that there is no single blueprint to follow in reaching the ultimate goal of maximizing shareholder value.[6] The question to be answered by the Court is whether the directors made a reasonable decision, not a perfect decision.[7]

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[2] *See, e.g.*, *David P. Simonetti Rollover IRA v. Margolis*, 2008 WL 5048692, at *5 (Del. Ch. June 27, 2008).
[3] *In re Dollar Thrifty S'holder Litig.*, 2010 WL 5648895, at *17 (Del. Ch. Sept. 8, 2010).
[4] *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173 (Del. 1986).
[5] *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 497 (Del. Ch. 2010).
[6] *Simonetti*, 2008 WL 5048692, at *5.
[7] *Dollar Thrifty*, 2010 WL 5648895, at *17.

The Plaintiffs make five separate allegations in support of their contention that the record establishes a reasonable probability of success on their price and process claim because of the Board's failure to reasonably maximize shareholder value. They first allege that the Board failed to conduct a sufficient market check. Second, that the Board ignored the possibility that an alternative transaction involving only Orchid's U.K. operations could provide substantially superior value to Orchid's shareholders. Third, that the Board and Oppenheimer disregarded management input, resulting in financial projections that undervalued the Company. Fourth, that the Board ignored Mr. Bologna's dissent to the Proposed Transaction. And fifth, that the Board agreed to deal protection measures that cut short the market check and that were not reasonably calculated to increase shareholder value.

With respect to the questions raised about the market check, based on the record before the Court, there is no indication that Orchid favored LabCorp over any other potential bidder. Orchid repeatedly rejected LabCorp's earlier expressions of interest before agreeing to move forward at the $2.80 per share price and to enter into exclusivity. During its market check—which occurred

between late-December and early-February—Oppenheimer solicited the interest of six potential bidders. Of those six, three were U.K.-focused private equity firms and three were strategic acquirors. Other strategic bidders were not contacted out of concerns for the impact on the Company's business should it decide to continue as a stand-alone company. Oppenheimer informed the potential acquirors that Orchid "was not putting itself up for sale but, having received an unsolicited indication of interest, was checking the indication against the market."[8] Plaintiffs' quibbles with such a strategy are unfounded as the potential bidders seemingly understood that Oppenheimer's solicitations invited them to make a bid. None of the strategic acquirors presented an offer. The private equity firms appeared more interested; however, their interest was in acquiring Orchid's U.K. business only. More importantly, at the time Oppenheimer stated that the Company was not for sale, the statement was true because the Board had not formally decided to accept the LabCorp proposal.

Based on the financial buyers' expressions of interest in acquiring the U.K. operations, Oppenheimer advised the Special Committee that it believed Orchid

[8] deLeeuw Aff., Ex. 20 (Special Committee Meeting Minutes, Dec. 21, 2010) at ORCH0003533.

"could get a higher price from a U.K. buyer than the $2.80" offered by LabCorp but that "there would be attendant transactional execution risks."[9] The Special Committee—and later the Board as a whole—considered these expressions of interest from the private equity firms solicited by Oppenheimer—characterized by Oppenheimer as approximately $2.93 per share. Deliberation ensued—as evidenced in meeting minutes and deposition testimony—regarding the likelihood that the interest shown would materialize into a transaction offering superior value to Orchid's shareholder. More importantly, the Board discussed the risks associated with pursuing an alternative transaction where no offer had yet been made by any of these private equity firms. Because of the associated risks and uncertainties, the Board determined that in its judgment a transaction with a private equity firm for only the Company's U.K. business would not provide shareholders with a superior means of maximizing value when compared with the LabCorp offer.

Considering all these facts together, it does not appear that the market check was inadequate or that it failed to reasonably inform this independent board of the

[9] deLeeuw Aff., Ex. 25 (Special Committee Meeting Minutes, Jan. 19, 2011) at ORCH0003537.

possible paths to value maximization. For that reason, the Plaintiffs are unlikely to satisfy the preliminary injunction standard with respect to whether the Board acted reasonably in conducting the market check and in deciding not to pursue further a sale of Orchid's U.K. operations to a financial buyer. While it may be possible to hypothesize a complex, multi-part transaction involving the sale of Orchid's U.K. business to a private equity firm, there is no reason to second guess this Board's decision.

Turning to the Board's consideration of management's outlook, the Plaintiffs point specifically to how the Special Committee and Oppenheimer treated management's financial projections and to the Board's lack of consideration of Mr. Bologna's opposition to the Tender Offer.

After it was engaged by the Special Committee, Oppenheimer received from management its projections and corresponding assumptions. Oppenheimer subsequently circulated a financial summary that included those projections, first, as the "management case," before they later formed the basis for the "upside case."

Also included were a "base case" and a "downside case."[10] After receiving data on historical performance, Oppenheimer revised some of its figures downward to account for execution risk. After the announcement that FSS would wind-down its operations, Oppenheimer again revised its numbers for fiscal year 2011 but defaulted to the base case for fiscal years 2012 and 2013 due to uncertainty as to how this change in events would impact Orchid's business going forward.

Although the Plaintiffs suggest that Oppenheimer and the Board "massaged" its projections so that it could sign off on the Proposed Transaction, there is no basis to question the motivations of the Special Committee—comprised entirely of independent directors—or to doubt the independence and credentials of Oppenheimer. In evaluating the fairness and advisability of this tender offer, the Special Committee and its financial advisor are not precluded from considering various sets of financial projections before determining that one set reflects the best estimate of future performance.[11] Here, it was determined that the "base case"

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[10] *See* deLeeuw Aff., Ex. 11 (Oppenheimer First Overview of Scenarios) at OPP00745; Ex. 12 (Oppenheimer Second Overview of Scenarios) at OPP00752.

[11] *In re 3Com S'holders Litig.*, 2009 WL 5173804, at *5 (Del. Ch. Dec. 18, 2009) ("I am aware of no rule that precludes management or its financial advisor from using alternative sets of financial projections in evaluating the advisability and fairness of a merger. Indeed, given the

most accurately captured Orchid's future performance, which does not appear to be an unreasonable conclusion.

As to the Plaintiffs suggestion that the Board failed to consider Mr. Bologna's dissent to the Proposed Transaction, the Board simply disagreed with his optimism toward Orchid's remaining as a stand-alone company.[12] Moreover, his reservations were expressed via email to at least one board member[13] and his opposition, as documented in the recommendation statement, was raised before the Board such that the other directors appear to have been informed of his position on the proposed tender offer before voting in favor of the transaction.

The Court now turns to the deal protection devices, of which there are many. The Merger Agreement includes a top-up option, a no-shop clause, provisions guaranteeing LabCorp the right to match offers and to receive the same information the Company shares with other bidders, and a termination fee payable either where the Company pulls out of the deal or where shareholders fail to tender

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unpredictability of the future, it is common for companies to have multiple sets of projections based on different assumptions about what will transpire going forward.").

[12] Notably, Mr. Bologna does not intend to tender his shares. *See* Recommendation Statement at 34.

[13] deLeeuw Aff., Ex. 6 (Sept. 7, 2010 Email between Mr. Bologna and Mr. Dalziel).

a majority of shares. Finally, the Company has agreed to pull its poison pill with regard to LabCorp only. That is, the pill remains in place with respect to all other potential bidders, and, in fact, Section 5.2(a)(v) of the Merger Agreement prevents the Company from pulling the pill for other bidders without first terminating the Merger Agreement.

The Plaintiffs are chiefly concerned with the deterrent effect of the poison pill carve out, and the Court addresses it first.

The Defendants argue, correctly, that Delaware law approves of the use of the poison pill as a valid takeover defense.[14] It is clear however, that a board may refuse to redeem a poison pill only if that would be a reasonable action taken in response to a threat to the company.[15] This principle is established so that if a board retains the ability to pull the pill if presented with a superior offer, the mere presence of the pill would likely have little deterrent effect on a bidder desiring to make such an offer.

[14] *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 2011 WL 806417, at *28-*30 (Del. Ch. Feb. 15, 2011).
[15] *Id.* at *25.

Here, however, the Company has contracted not to "amend or waive the Rights Agreement, redeem the Rights or take any action which would allow" anyone other than LabCorp to obtain 20% of the Company without triggering the pill.[16] Although the Company is allowed to respond to a "Superior Offer" by furnishing the bidder with non-public information and by discussing and negotiating over such an offer, those provisions do not relieve the Company of its commitment not to pull the pill for any suitor other than LabCorp.

Thus, the Board would only be able to redeem the pill for a different bidder if it first terminated the Merger Agreement. Under Section 7.1 of the agreement, the Company may do just that if, after receiving a Superior Offer, it withdraws its recommendation that its shareholder tender into the LabCorp offer. In the event of such a termination, then under Section 7.2, most provisions of the Merger Agreement, including the prohibition against further amendments to the poison pill, would go away.

Although terminating the Merger Agreement for these purposes might require the Company to pay a termination fee to LabCorp, such a fee would

[16] deLeeuw Aff., Ex. 36 ("Merger Agreement") at § 5.2(a)(v).

necessarily be triggered by any decision of the Board to terminate the Merger Agreement in favor of a hypothetical superior offer. That is, redeeming the pill for a bidder making a Superior Offer would cost the Company no more than it would cost to accept a Superior Offer or terminate the Merger Agreement for some other reason. Further, a sophisticated and serious bidder would understand that the Board would likely eventually be required by Delaware law to pull the pill in response to a Superior Offer. Thus, the deterrent effect of these provisions is minimal.

Turning now to the remaining deal protection measures, the Plaintiffs seem to recognize that, taken individually, most of the other deal protections included in the Merger Agreement are unremarkable. For example, the no-shop provision at Section 5.2 of the agreement is balanced by a fiduciary out that allows the Board to negotiate and exchange confidential information with a bidder who presents what is, or is likely to become, a Superior Offer.

Similarly, although matching and informational rights granted by the Merger Agreement to LabCorp might have some deterrent effect on such a hypothetical bidder, they would not preclude a serious bidder from stepping forward. The

Plaintiffs describe the $2.5 million termination fee as 4.6% of the Company's enterprise value, that is, the Company's value after discounting its $19.8 million of cash on hand. Delaware's case law, however, teaches that such termination fees are generally measured according to a Company's equity value.[17] Measured on that basis, the termination fee represents less than 3% of the deal price and a termination fee of this size is generally deemed reasonable under Delaware law.[18] Finally, although top-up options have been challenged in the recent past, "[t]op-up options have become commonplace in two-step tender offer deals."[19]

The Plaintiffs, however, correctly argue that the cumulative deterrent effect of all the deal protection measures in the Merger Agreement is greater than simply the sum of the effects of the individual provisions, and thus I must evaluate the cumulative effect of the deal protection devices in light of all the circumstances of the Proposed Transaction.[20] In particular, the Plaintiffs contend that the collection of deal protection devices is unfair in light of what they characterize as a weak

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[17] *See, e.g.*, *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 503 (Del. Ch. 2010).
[18] *Id.*
[19] *Id.* at 505.
[20] *See In re Answers Corp. S'holders Litig.*, 2011 WL 1366780, at *4 (Del. Ch. Apr. 11, 2011); *In re Del Monte Foods Co. S'holder Litig.*, 2011 WL 532014, at *24 (Del. Ch. Feb. 14, 2011).

sales process and that the Board agreed to the deal protections without securing additional consideration from LabCorp. As stated, the Court is satisfied that, although a more robust sales process could have been employed, the process pursued here was adequate. Further, the Board understood that deal protection measures are commonplace and, indeed, expected and there is no requirement that the deal price be adjusted through a discrete increase in price solely attributable to agreement to certain deal protections.

Deal protection measures evolve. Not surprisingly, we do not have a bright line test to help us all understand when too much is recognized as too much. Moreover, it is not merely a matter of measuring one deal protection device; one must address the sum of all devices. Because of that, one of these days some judge is going to say "no more" and, when the drafting lawyer looks back, she will be challenged to figure out how or why the incremental enhancement mattered. It will be yet another instance of the straw and the poor camel's back. At some point, aggressive deal protection devices—amalgamated as they are—run the risk of being deemed so burdensome and costly as to render the "fiduciary out" illusory.

In any event, the line has not been crossed here: although a sophisticated bidder would have to overcome a roughly 3% termination fee and the matching and informational rights that would be enjoyed by LabCorp (which might result in a bidding war to the benefit of shareholders), and would have to negotiate its own poison pill carve out and, presumably, a top-up option, a sophisticated buyer could navigate those shoals if it wanted to make a serious bid. Accordingly, I am satisfied that the deal protection measures included in the Merger Agreement are reasonable under the circumstances.

In sum, this is an informed board, guided by competent legal and financial advisors. It is independent and disinterested. Its actions have been reasonable. Perhaps there was a better path, but that seems unlikely. When reviewed under the current *Revlon* standard, the Board and its actions pass muster. The Plaintiffs have not demonstrated a reasonable probability of success on their price and process claims.

2. Disclosure Claims

Next comes the challenge to the various disclosures. In their briefs, the Plaintiffs characterize certain disclosures regarding the Proposed Transaction as

inadequate or outright misleading. Although the Complaint does not expressly allege any disclosure claims or seek relief in the form of curative disclosures, the Court addresses the issues surrounding disclosure raised by the parties in the briefing.

"[D]irectors of Delaware corporations [have] a fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action."[21] Further, an omitted fact is deemed material if it "would have been viewed by a reasonable investor as having altered the 'total mix' of information available."[22]

The Plaintiffs challenge several categories of disclosures. First, they contend that disclosures surrounding several U.K. private equity firms' interest in purchasing only Orchid's U.K. operations were inadequate; related to this, although not framed as a disclosure claim by the Plaintiffs, is their contention that the terms of Oppenheimer's engagement biased it towards recommending the LabCorp tender offer and against a sale of only the Company's U.K. operations.

[21] *Gantler v. Stephens*, 965 A.2d 695, 710 (Del. 2009).
[22] *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (citations omitted).

Second, the Plaintiffs contend that projections by the Company's management regarding its prospects as a continuing stand-alone entity should have been disclosed. Third, they contend that shareholders were entitled to more information regarding the manner in which Oppenheimer conducted the market check, and fourth, that the Company should have disclosed the reasons why the Company's two largest shareholders decided not to enter tender agreements sought by LabCorp in conjunction with the Proposed Transaction. Fifth, the Plaintiffs contend that additional details regarding conflicts within the Board over whether to continue negotiating with LabCorp must be disclosed.

With regard to interest expressed by U.K. private equity companies in purchasing the Company's U.K. operations, the Recommendation Statement explains to shareholders that although a sale of only the U.K. operations to certain private equity firms was considered, Oppenheimer advised the Board that such a sale presented certain risks, including the availability of financing, that made that option unattractive and led the Board to reject it. Ultimately, Oppenheimer told the Board that "no third party would likely propose a bid for the company that would

yield a result for the stockholders that would be higher than LabCorp's current $2.80 per share indication of interest."[23]

In fact, Oppenheimer reported to the Board on March 15, 2011, that U.K. financial buyers had verbally expressed interest in purchasing the U.K. operations of the Company for amounts ranging from seven to eight times U.K. EBITDA, which Oppenheimer converted into a range of between $2.09 and $2.39. To compare this expression of interest directly to LabCorp's offer, Oppenheimer added the Company's approximately $0.65 per share of cash on hand, producing a range of $2.74 to $3.04 per share. Oppenheimer appears to have selected a reference point within that range to allow the Board to evaluate an expression of interest along side LabCorp's offer. Oppenheimer arrived at a price of "approximately $2.93" per share, inclusive of the Company's cash, again stating that this figure represented "seven to eight times U.K. EBITDA, the US business being regarded as having negative value."[24] It further told the Board that it viewed the figure as "comparable" to LabCorp's $2.80 per share tender offer, and that "the

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[23] Recommendation Statement at 19.
[24] *Id.* at Ex. 48 (Draft Minutes of Feb. 3, 2011 Board Meeting) at ORCH0003626.

UK private equity firms' interest is preliminary and entails significant uncertainties."[25]

In light of the caveats Oppenheimer placed on the private equity firm's expression of interest in purchasing the Company's U.K. operations at seven to eight times EBITDA, this information is not necessarily incompatible with the existing disclosures. LabCorp's offer price of $2.80 falls within the range of prices represented by the U.K. private equity firm's expression of interest. The Board could reasonably have judged that leaving shareholders with a somewhat riskier chance to end up with $2.93 per share plus an asset with negative value would not be a "result for the stockholders that would be higher than LabCorp's current $2.80 per share indication of interest" and that such an offer was unlikely to materialize. More importantly, disclosing the $2.93 per share price, without an accompanying and perhaps confusing modification to account for the likely potential negative value in the U.S. or the transaction costs associated with splitting up the Company, would have been misleading. Nonetheless, the question of whether the Plaintiffs have shown a reasonable probability that they will succeed in proving that

[25] *Id.*

knowledge of these facts would be material to the stockholders' decisions is a very close one.

The structure of Oppenheimer's fee arrangement presents another wrinkle with regard to this question. The Plaintiffs contend that Oppenheimer was engaged only to advise the Company with regard to a transaction involving the sale of "all or substantially all of the assets or outstanding securities of the Company. . . ,"[26] and that, thus, the engagement facially excluded a transaction involving only a sale of the Company's U.K. operations, since thirty-five to forty percent of the Company's revenue derives from its U.S. operations.

Oppenheimer, however, appears to have been engaged to consider a broader range of transactions than the Plaintiffs have identified. In addition to a single transaction involving a sale of all or substantially all of the Company's assets, the engagement also contemplates "one or a series of transactions" involving the sale of such assets, or "any extraordinary corporate transaction involving a change in control of the Company, regardless of the form or structure of such transaction. . . ." The sale of 65% of the Company's operations, plus its cash

[26] *Id.* at Ex. 38 (Oppenheimer Engagement letter).

assets, would at least arguably fall within this definition, and there is no indication in the record that the Company could have avoided or would have tried to avoid paying Oppenheimer's fee if it had recommended selling off only the U.K. business; unlike the terms of engagement in *Atheros*,[27] the terms of the financial advisor's engagement here do not create an unavoidable conflict of interest that requires a curative disclosure.

The Plaintiffs next contend that Orchid should be required to disclose its management's projections regarding the Company's prospects, which were prepared mainly by the Company's Chief Financial Officer and were supported by Mr. Bologna. The management projections are more optimistic than those employed by Oppenheimer in its fairness opinion and disclosed to shareholders in the Recommendation Statement. In presentations to the Board, Oppenheimer treated the management projections as the "upside case," and contrasted those projections with lower "base" and "downside" projections; ultimately, it used projections derived from the base case in its fairness opinion.[28]

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[27] *In re Atheros Commc'ns, Inc.*, 2011 WL 864928, at *8-*9 (Del. Ch. Mar. 4, 2011).
[28] *Id.* at Ex. 42 (Dec. 20, 2010 Oppenheimer Presentation to the Board) at OPP00635-36.

The Recommendation Statement discloses to shareholders that the Company did not prepare its financial projections "with a view toward public disclosure," and it cautions shareholders that the projections are not reliable: "The Company's stockholders are cautioned not to place undue, if any, reliance on the Financial Forecasts included in this Schedule 14D-9."[29]

The Plaintiffs advocate disclosure of the more optimistic projections in part because Mr. Bologna, whom they characterize as "the most knowledgeable person concerning the Company's operations, strongly believed that the management projections were more accurate and reliable than the 'base case' developed by Oppenheimer."[30]

Although the upside case projections are termed "management projections" by the Plaintiffs, under Section 141 of the Delaware General Corporation Law, the ultimate responsibility for managing the affairs of a Delaware corporation falls to the board of directors. Here, the Board, with the Special Committee and Oppenheimer, deemed the base case projections more reliable than the projections

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[29] Recommendation Statement at 26.
[30] Pls.' Reply Br. at 26.

advocated by Mr. Bologna. The independence of these bodies has not been, and cannot be, questioned. On the other hand, Mr. Bologna, who held a number of options to purchase Company stock at prices higher than $2.80, may have had an interest in showing that the Company was worth more than LabCorp is now offering.[31] In addition, Mr. Bologna, with major assistance from Orchid's Chief Financial Officer, prepared and submitted the management proposals in response to the LabCorp acquisition effort that Mr. Bologna opposed.[32] One obvious way to thwart a negotiated acquisition is to produce projections that would make the acquiror's proposed terms appear unattractive.

Because, first, an independent board has accepted its financial advisor's fairness opinion that was based on a particular set of projections; second, those

[31] Recommendation Statement at 20.

[32] deLeeuw Aff., Ex. 7 ("Dalziel Dep.") at 83-84, 86, 88, 91, 98. These circumstances justify a deviation from the general principle, set forth in cases such as *Maric Capital Master Fund, Ltd. v. Plato Learning, Inc.*, 2010 WL 5648896 (Del. Ch. May 13, 2010), that management's estimate of cash flow for purposes of assessing a cash merger is clearly material information. Management's outlook for the Company, as reflected in its projections, is clearly more optimistic than that of the Board and the Special Committee, both of which view the base case projections as a more accurate reflection of Orchid's financial state. As a result, there is an obvious tension between Mr. Bologna, who supports the management projections, and the rest of Orchid's directors. The Board, however, made a collective decision to move forward using the base case projections, and it is not for this Court to question that decision or to determine which set of projections better captures the Company's financial condition where the Board's decision appears to be reasonable.

projections have been disclosed to stockholders; and, third, stockholders have been cautioned that even *those* projections should not be deemed reliable or material to their decision, I find that, under the circumstances, the Plaintiffs have not shown a reasonable probability that they will succeed in showing that disclosure of the upside case projections would be material to a reasonable shareholder's decision.

Turning to whether stockholder materials adequately disclose the manner in which Oppenheimer conducted the market check, the Plaintiffs contend that Oppenheimer's statement to potential bidders that the Company was not putting itself up for sale—that is, that it was not conducting an auction—should be disclosed. Whether or not Oppenheimer actually advised potential bidders that the Company was putting itself up for sale, sophisticated buyers, such as the companies that Oppenheimer approached, would have understood exactly what was going on as Oppenheimer made its inquiries. Indeed, companies responded to the inquiries and the manner in which Oppenheimer had approached them did not dissuade several potential buyers from indicating at least some level of interest. Further disclosures on this point would not be material to the shareholders'

decision, especially since Oppenheimer's solicitations of interest were made before the Board had decided upon the sale of the Company.

The Plaintiffs also argue that Orchid should have disclosed the reasons why the Company's two largest shareholders decided not to enter tender agreements sought by LabCorp in conjunction with the Proposed Transaction. The Defendants report that one of those shareholders has since agreed to tender its shares into LabCorp's offer, and thus, the request for disclosures regarding that shareholder's actions is moot. With regard to the motivations of the other shareholder's decisions, Defendants' argument that they should not be held responsible for or otherwise be required to report on a third-party shareholder's thought process is persuasive.

Finally, the Plaintiffs contend that additional details regarding conflicts within the Board over whether to continue negotiating with LabCorp must be disclosed. Specifically, the Plaintiffs ask that the Court order disclosure of the facts that: (1) both Mr. Bologna and Mr. Hart voted against continuing negotiations with LabCorp during a January 21, 2011 Board meeting, with the other four board members voting in favor of continuing negotiations, and (2) Mr. Davis had

indicated, during an April 1, 2011 Board meeting, that he would resign from the Board if the Proposed Transaction was not approved quickly.

The Recommendation Statement does not disclose the four-to-two January 21, 2011 vote to continue negotiations with LabCorp.[33] By discussing Mr. Bologna's opposition to the Proposed Transaction and his abstention from the final vote, however, it puts shareholders on notice that there was disagreement within the Board over whether to proceed. Further, it reports that Mr. Hart voted in favor of the Proposed Transaction in the final vote.[34] The question is whether, in the face of the Board's final vote in favor of the Proposed Transaction, the vote count in a preliminary vote on whether to proceed with negotiations would alter the total mix of information available to shareholders. The Court concludes that it would not, and the proposed disclosure would, therefore, not be material to the shareholders.

Similarly, Mr. Davis's indication of his intention to resign as Chairman and as a member of the Board is also immaterial to the shareholders' decision because

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[33] Recommendation Statement at 19.
[34] *Id.* at 21.

it appears to have had nothing to do with the Proposed Transaction at all. Instead it seems to have been related to an agreement he reached with Institutional Shareholder Services/RiskMetrics regarding the number of public company boards on which he sat. This type of personal issue, which again, seems entirely unrelated to the Proposed Transaction, would not be material to the shareholders' decision regarding the Tender Offer.

Thus, the Plaintiffs have not demonstrated a reasonable probability of success on their disclosure claims, although the call is a close one with regard to their claim that the Board should have disclosed a private equity firm's expression of interest in acquiring the Company's U.K. operations and its cash at a projected $2.93 per share, and the upside or management projections.

In sum, the Plaintiffs have not demonstrated a reasonable probability of success on the merits of any of their claims.

C. *Irreparable Harm*

As to irreparable harm, in these cases if there is a probability of success on the merits, irreparable harm usually follows because, once consummated, rescinding the transaction is difficult, if not impossible. Moreover, in a case with

an independent, disinterested board, as here, and a § 102(b)(7) provision, monetary damages—even if they would be adequate—are not likely to be recovered. For present purposes, with the merits-based conclusion, this prong of the preliminary injunction standard counsels against relief.

D. *Balancing of the Equities*

As to the balancing of the equities, these too favor denial of the motion. The LabCorp acquisition is at a 40% premium to the Company's trading price before the Tender Offer became public. Maybe the Company, as its CEO seems to contend, should be valued more highly. That is something for appropriately-informed shareholders to decide. Tendering, of course, is a substitute for shareholder vote, and courts should be careful about depriving shareholders of their opportunity to make such a choice, especially with such a significant premium to prior market price. I also note that with regard to those close disclosure issues, this aspect of the preliminary injunction standard particularly tips the balance against an injunction.

III. CONCLUSION

For these reasons, the Plaintiffs' Motion for Preliminary Injunction is denied. An implementing order will be entered.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Blake A. Bennett, Esquire
Register in Chancery-K