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OF THE
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Re: *Hamilton Partners, L.P. v. Highland Capital Management, L.P.*
C.A. No. 6547-VCN
Date Submitted: February 9, 2012

Dear Counsel:

This action arises out of the merger (the "Merger") of American HomePatient, Inc. ("AHP" or the "Company"), with an indirect wholly-owned subsidiary of Defendant Highland Capital Management, L.P. ("Highland"). Plaintiff Hamilton Partners, L.P. ("Hamilton") has challenged the Merger, filing a purported class action against Highland and Defendant Joseph F. Furlong, III, the

Chief Executive Officer ("CEO"), President, and a director of AHP. Hamilton's complaint (the "Complaint" or "Compl.") alleges that Highland and Furlong breached their fiduciary duties in connection with the Merger, and that Furlong aided and abetted Highland's breach of its fiduciary duties. Highland and Furlong have filed motions to dismiss. For the following reasons, the Court defers ruling on those motions.

I. BACKGROUND[1]

A. *The Parties*

Hamilton held AHP stock at all relevant times.

Highland, a Delaware limited partnership, is a credit-oriented hedge fund that specializes in loan-to-own transactions.

Furlong has served as a director of AHP since 1994; he has served as its President and CEO since 1998.

[1] Except where noted, the background facts are drawn from the well-pled allegations of the Complaint.

B. *Factual Background*

AHP was founded in 1983 and is one of the nation's largest home health care providers. From its founding until June 29, 2010, AHP was a Delaware corporation; on June 30, 2010, AHP reincorporated in Nevada.

By April 2007, Highland held 48% of AHP's outstanding common stock and 82% ($204 million) of the Company's secured debt, which was due to mature on August 1, 2009. In April 2009, Highland proposed that AHP engage in a restructuring transaction. AHP's board of directors (the "Board") established a special committee (the "Special Committee") to review the restructuring transaction proposed by Highland.

The Special Committee initially proposed that Highland purchase all of the AHP common stock that it did not own for $1.30 per share. Highland responded that it did not want to pay cash, and countered with a proposal that AHP commence a self-tender offer (the "Self-Tender Offer") to acquire all of its outstanding common stock, except the shares held by Highland, for $0.26 per share. A few weeks later, Highland suggested consideration of $0.67 per share, but continued to insist on the Self-Tender Offer. The Complaint alleges that "a matter

of weeks" after Highland initially proposed a restructuring transaction in April 2009, the Special Committee agreed to undertake the Self-Tender Offer at $0.67 per share.[2] Highland and AHP, however, did not actually execute an agreement (the "Restructuring Agreement") until April 27, 2010.

The Restructuring Agreement contemplated several steps, including: (1) that AHP would reincorporate in Nevada; (2) the Self-Tender Offer; (3) that, after the Self-Tender Offer, all of the members of the Board except Furlong would resign, and that those Board vacancies would be filled with Highland designees; and (4) the Merger, which would cash-out, at $0.67 per share, any AHP shareholder, other than Highland, who did not tender in the Self-Tender Offer.[3]

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[2] Compl. ¶ 34.

[3] *See* Opening Br. of Def. Highland Capital Mgmt., L.P., in Supp. of its Mot. to Dismiss Count I of Pl. Hamilton Partners, L.P.'s Compl., Ex. A ("Restructuring Agreement") §§ 2, 3. Although, as a general rule, the Court is limited to considering only the facts alleged in the complaint when deciding a motion to dismiss under Court of Chancery Rule 12(b)(6), the Court may consider documents both integral to and incorporated into the complaint, and documents not relied upon to prove the truth of their contents. *Orman v. Cullman,* 794 A.2d 5, 15-16 (Del. Ch. 2002). Consideration of the Restructuring Agreement is appropriate in this case, as it is integral to and incorporated into the Complaint.

Shortly after the reincorporation was completed, AHP commenced the Self-Tender Offer on July 7, 2010. The Self-Tender Offer closed on September 1, 2010; stockholders holding 6,917,314 shares of AHP common stock tendered into the Self-Tender Offer. After the Self-Tender Offer, Highland, which by then held more than 78% of AHP's outstanding common stock,[4] proposed to the Board, which was by then composed of Furlong and Highland designees, that AHP merge with Highland's subsidiary pursuant to 8 *Del. C.* § 251.

On September 1, 2010, the Board approved the Merger by unanimous written consent without a meeting.[5] The Board then submitted the Merger to a vote of the Company's stockholders, with a recommendation that they vote for it. On September 20, 2010, AHP filed a definitive proxy statement with the Securities and Exchange Commission in connection with the Merger. The Merger was consummated on October 12, 2010.[6]

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[4] Compl. ¶ 62.

[5] American HomePatient, Inc., Definitive Proxy Statement (Schedule 14A), at 16 (Sept. 20, 2010), *available at* http://www.sec.gov/Archives/edgar/data/879181/000095012310087514/g24680ddefm14a.htm. The Court only relies on AHP's September 20, 2010 Definitive Proxy Statement for the proposition that the Board approved the Merger on September 1, 2010.

[6] American HomePatient, Inc., Transaction Statement Amendment No. 6 (Schedule 13E-3) (Oct. 12, 2010), *available at* http://www.sec.gov/Archives/edgar/data/879181/000095012310092

II. CONTENTIONS

The Complaint consists of two counts. Count I alleges that Highland was a controlling stockholder that stood on both sides of the Merger, and that Highland breached its fiduciary duties in connection with the Merger because that transaction was not entirely fair to the AHP stockholders who were cashed out. Count II alleges that Furlong breached his fiduciary duties in connection with the Merger, and that he aided and abetted Highland's breach of its fiduciary duties because "[f]rom the time Furlong received millions of dollars in change-of-control payments Furlong knowingly participated and assisted Highland in freezing-out the Company's minority stockholders at an unfair price in the Merger."[7] Highland has filed a motion to dismiss Count I pursuant to Court of Chancery Rule 12(b)(6). Furlong has filed a motion to dismiss Count II pursuant to Court of Chancery Rule 12(b)(6).

786/g24860sc13e3za.htm. The Court only relies on AHP's Transaction Statement Amendment No. 6 for the proposition that the Merger was consummated on October 12, 2010.

[7] Compl. ¶ 70.

III. ANALYSIS

"[T]he governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'"[8]

> When considering a defendant's motion to dismiss, a trial court should accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as "well-pleaded" if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could not recover under any reasonably conceivable set of circumstances susceptible of proof.[9]

Although the Court "need not 'accept conclusory allegations unsupported by specific facts or . . . draw unreasonable inferences in favor of the non-moving party,'"[10] a motion to dismiss will be denied under Delaware's pleading standard as long as there is a reasonable possibility that a plaintiff could recover.[11]

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[8] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Hldgs. LLC*, 27 A.3d 531, 537 (Del. 2011) (citation omitted).
[9] *Id.* at 536 (citation omitted).
[10] *In re Alloy, Inc. S'holder Litig.*, 2011 WL 4863716, at *6 (Del. Ch. Oct. 13, 2011) (citing *Price v. E.I. duPont de Nemours & Co., Inc.*, 26 A.3d 162, 166 (Del. 2011)).
[11] *See id.* ("Delaware's reasonable 'conceivability' standard asks whether there is a 'possibility' of recovery.") (citing *Cent. Mortg.*, 27 A.3d at 537 n.13).

Moreover, Delaware's pleading standard applies to any claim brought in this Court regardless of which state's substantive law is used to adjudicate that claim.[12]

Highland and Furlong argue that the Merger was agreed to at the time the parties executed the Restructuring Agreement. If that is true, then the correct time to review the actions of Highland and Furlong with regard to the Merger is at the time the Restructuring Agreement was executed:

> [S]o long as the second step merger was effectuated on the terms negotiated by . . . [the] board and no fundamental change in the economics of the firm intervened, there can in my opinion be no liability of the acquiror arising out of the effectuation of the second leg of a single two step tender offer cash out/merger transaction.[13]

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[12] *See Caster v. Hennessey*, 781 F.2d 1569, 1570 (11th Cir. 1986) ("Although Florida substantive law applies to this diversity action, . . . federal procedural law governs. . . . While Florida requires, perhaps wisely, specific allegations of publication in the complaint, . . . a federal court need not adhere to a state's strict pleading requirements but should instead follow Fed. R. Civ. P. 8(a). . . . In contrast to Florida's strict pleading requirements, Fed. R. Civ. P. 8(a)(2), simply requires that a complaint must contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.' This requirement means the complaint need only 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'") (citations omitted); *West v. Houchin*, 2011 WL 6056875, at *1 (M.D.N.C. Dec. 6, 2011) ("Although the Court looks to North Carolina law in analyzing Plaintiff's substantive claims, 'pleading standards are a matter of procedural law governed in this Court by federal, not state, law.'") (quoting *McFadyen v. Duke Univ.*, 786 F. Supp. 2d 887, 920 (M.D.N.C. 2011)).

[13] *Shearin v. E.F. Hutton Group, Inc.*, 652 A.2d 578, 596 (Del. Ch. 1994) (citing *Cinerama, Inc. v. Technicolor, Inc.*, 1991 WL 111134 (Del. Ch. June 24, 1991) *rev'd on other grounds*, 634 A.2d 345 (Del. 1993)).

A review of the actions of Highland and Furlong at the time the Restructuring Agreement was executed would be subject to Delaware law because the Restructuring Agreement was executed on April 27, 2010, and prior to June 30, 2010, AHP was a Delaware corporation.[14]

Hamilton argues that AHP did not agree to the Merger at the time of the Restructuring Agreement, and therefore, that the correct time to review the actions of Highland and Furlong with regard to the Merger is in September 2010 when the Board approved the Merger and recommended that AHP's shareholders approve it. A review of the actions of Highland and Furlong in September 2010 would be subject to Nevada law because AHP reincorporated in Nevada on June 30, 2010.[15]

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[14] "[O]nly the law of the state of incorporation governs and determines issues relating to a corporation's internal affairs," *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005) (citation omitted), and "[s]uits such as this that seek to enforce the fiduciary duties of directors and controlling stockholders of Delaware corporations play an integral part in regulating the internal affairs of Delaware corporations." *In re AXA Fin., Inc.*, 2002 WL 1283674, at *5 (Del. Ch. May 22, 2002). Furthermore, "aiding and abetting claims are essentially civil conspiracy claims brought in the context of matters relating to the internal affairs of corporations." *In re Am. Int'l Group, Inc.*, 965 A.2d 763, 822 n.218 (Del. Ch. 2009) (citing *Allied Capital Corp. v. GC-Sun Hldgs., L.P.*, 910 A.2d 1020, 1038 (Del. Ch. 2006)).

[15] *See supra* note 14.

At this stage, the Court cannot determine whether the correct time to review the actions of Highland and Furlong with regard to the Merger is in April 2010 or September 2010 because the Restructuring Agreement is ambiguous. Therefore, the Court will defer ruling on the motions to dismiss.

"[A] contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[16] Section 3.8 of the Restructuring Agreement provides that after the completion of the Self-Tender Offer, "[Highland] shall take all action and shall cause . . . AHP . . . to promptly . . . take all actions to effectuate . . . [the Merger] pursuant to which the remaining Shares [of AHP] not held by . . . [Highland] and its affiliates will be cancelled in exchange for an amount equal to . . . [$0.67]." One reasonable interpretation of that language is that it bound Highland and AHP to consummate the Merger. Although the Restructuring Agreement does not require that the Board approve the Merger,[17] the Restructuring

[16] *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992) (citation omitted).
[17] *See, e.g.*, Restructuring Agreement § 3.6 ("AHP['s] . . . Board of Directors will recommend that . . . [AHP's] shareholders . . . accept the [Self-Tender] Offer and tender their shares (the

Agreement contemplates that, after the Self-Tender Offer, Highland would own a majority of AHP's common stock and that the Board would consist of Highland designees and Furlong. Thus, after the Self-Tender Offer, it is reasonable to describe obligations of AHP in terms of what Highland was required to make AHP do.

But that is not the only reasonable interpretation of Section 3.8. First, the drafters of the Restructuring Agreement knew how to bind the Board (AHP's decision-making body) to certain actions,[18] and thus, the lack of any language in Section 3.8 binding the Board suggests that that section does not address what AHP was required to do. Although, as noted above, the fact that Section 3.8 does not bind the Board can be explained by reference to the control Highland was anticipated to have over AHP at the time of the Merger, the fact that the Board is not bound in Section 3.8 but is bound in Sections 2.6 and 3.6 cannot be completely overlooked. Second, one of the concerns of target companies in two-step cash-out transactions is whether stockholders cashed-out in the second step will receive

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'Tender Recommendation') and will direct the officers of . . . AHP . . . to include the Tender Recommendation in the [Self-Tender] Offer documents.").

[18] *See supra* note 17.

consideration equivalent to that received by the stockholders cashed-out in the first step.[19] Thus, Section 3.8 could reasonably be interpreted as a provision that the Board bargained for, which would require Highland to attempt to undertake the Merger as quickly as possible, but which would leave intact the Board's right to decide whether or not to approve the Merger.[20]

"[A] determination of the legal sufficiency of . . . 'claim[s]', which . . . [are] not ripe for adjudication, would amount to an impermissible advisory opinion."[21] At this point, the Court cannot determine whether the proper time to review the

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[19] *See, e.g.*, *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 956 (Del. 1985) ("[T]he Unocal directors had concluded that the value of Unocal was substantially above the $54 per share offered in cash at the front end. Furthermore, they determined that the subordinated securities to be exchanged in Mesa's announced squeeze out of the remaining shareholders in the 'back-end' merger were 'junk bonds' worth far less than $54. It is now well recognized that such offers are a classic coercive measure designed to stampede shareholders into tendering at the first tier, even if the price is inadequate, out of fear of what they will receive at the back end of the transaction.") (citation omitted).

[20] At oral argument, Highland's counsel appeared to agree that this was a reasonable interpretation of Section 3.8, and thus, that Section 3.8 was ambiguous. *See* Oral Arg. Tr. at 48-49 ("THE COURT: . . . [Section 3.8] also could be read as language that requires Highland to complete the back end merger agreement, which has always been a concern with any of these cases because even if you get to 91 percent, well the 9 percent left over needed assurance that they are going to get taken out at the same price that everyone else got taken out. So it serves another purpose, and it says that Highland will cause, and it doesn't say, at least as I read it, that the company will complete the merger. MR. BONKOWSKI: I think that is an ambiguity, and that's a fair observation.").

[21] *eBay Domestic Hldgs., Inc. v. Newmark*, 2009 WL 3205674, at *2 (Del. Ch. Oct. 2, 2009) (quoting *Chrysogelos v. London*, 1992 WL 58516, at *2, 4 (Del. Ch. Mar. 25, 1992)).

Merger would be on September 1, 2010 or April 27, 2010. Moreover, the substantive state law that this Court must consider in order to decide this case will change depending on which date is correct.[22] The Court will not decide whether Counts I and II state a claim under varying assumptions, and thereby issue an opinion that is primarily advisory. Therefore, the parties shall coordinate discovery and briefing on the issue of whether Section 3.8 of the Restructuring Agreement legally bound AHP to consummate the Merger, and the Court will defer ruling on the motions to dismiss until discovery and briefing on that issue is completed.[23]

IV. CONCLUSION

For the foregoing reasons, the Court defers ruling on Highland's motion to dismiss and Furlong's motion to dismiss.

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[22] Ultimately, it may not matter which state's substantive law controls; the relevant laws of Delaware and Nevada may be comparable. Nonetheless, by determining, early on, which state's substantive law will govern the rights of the parties, the Court and the parties should be able, for the most part, to avoid the time consuming (and, possibly, duplicative) exercise of having to consider two states' laws.

[23] *See, e.g.*, *Kier Constr., Ltd. v. Raytheon Co.*, 2002 WL 31583266, at *2 (Del. Ch. Nov. 4, 2002) ("Because the SPA and PCA are ambiguous, extrinsic evidence that can only be obtained through discovery will be required to resolve the motion. Therefore, the plaintiff will be significantly prejudiced if the Court precludes it from conducting discovery.").

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K