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Re: *In re Ness Technologies, Inc. Shareholders Litigation*
C.A. No. 6569-VCN
Date Submitted: July 22, 2011

Dear Counsel:

The Plaintiffs, shareholders of Defendant Ness Technologies, Inc. ("Ness"), have moved to expedite proceedings in this putative class action, which they filed to enjoin a proposed transaction through which Ness's largest shareholder, Defendant Citi Venture Capital International ("CVCI"), would, through a wholly owned subsidiary (Jersey Acquisition Corporation), acquire Ness in a cash

transaction at $7.75 per share (the "Proposed Transaction"). The Plaintiffs contend that the Proposed Transaction is the product of a flawed sales process and that the members of the Board, aided and abetted by CVCI, breached their fiduciary duties to the Plaintiffs and the Class by approving the transaction. The Plaintiffs assert both price and process claims and claims that the Board's disclosures regarding the Proposed Transaction are inadequate.

I. BACKGROUND[1]

On July 16, 2010, CVCI made an unsolicited indication of interest in acquiring Ness for between $5.50 and $5.75 per share. Because one member of the Board, Defendant Ajit Bhusan, had been appointed by CVCI, the Board formed a Special Committee (the "Special Committee"), comprised of four independent and disinterested directors, and directed it to respond to CVCI's offer.[2] The Special Committee engaged Ropes & Gray LLP as its legal advisor and Jefferies & Co.

[1] The facts are drawn from the allegations of the Verified Consolidated Amended Class Action Complaint (the "Complaint" or "Compl.") and from the Ness Technologies, Inc. Preliminary Proxy Statement (Schedule 14A) (the "Preliminary Proxy" or "Prelim. Proxy"), which is incorporated by reference into the Complaint.
[2] Compl. ¶¶ 41-43.

("Jefferies") as its financial advisor.[3] To date, Mr. Bhusan has not been present for any negotiations, presentations, or decisions regarding CVCI or any other strategic buyer throughout the Ness sale process.[4]

The Special Committee first tried to negotiate a higher price from CVCI. After negotiations with CVCI collapsed in September 2010, the Special Committee then contacted twenty-one potential strategic buyers and six potential financial buyers in October and November; three potential buyers entered confidentiality agreements as a result of these contacts.[5]

Also in October 2010, Ness received offers to acquire the company at prices ranging from $6.40 to $6.70 per share from three additional strategic bidders (described in the Prelim. Proxy as Bidders A, B, and C, respectively).[6] Once

[3] *Id.* at ¶ 45. The Preliminary Proxy discloses that Jefferies "in the past provided financial advisory and financing services to certain affiliates of CVCI and continues to do so . . . ." Prelim. Proxy at 41. Similarly, the Board's financial advisor, Bank of America Merrill Lynch, has provided and is currently providing "and in the future may provide investment banking, commercial banking and other financial services to Citigroup, Inc. . . . and certain of its affiliates and certain affiliates and portfolio companies of [CVCI]." *Id.* at C-3.
[4] Prelim. Proxy at 21.
[5] Compl. at ¶ 46.
[6] *Id.* at ¶¶ 48-51.

Ness's communications with these bidders were discussed in a December 10, 2010 Israeli newspaper article, Ness's stock price rose from $4.60 per share to $5.20 per share, and a fourth bidder ("Bidder D") emerged in January 2011 with an indication of interest in acquiring Ness for between $6.50 and $7.00 per share.[7]

Negotiations with Bidders A, B, and D continued through early March 2011, and these bidders submitted revised bids of $7.30, $7.00, and $7.30 per share, respectively.[8] Bidder D increased its bid to $7.40 per share, a price that the other bidders were unwilling to match, and Ness entered into an exclusivity agreement with Bidder D on March 16, 2011.[9]

On March 31, while this exclusivity agreement was in effect, CVCI submitted another unsolicited expression of interest in acquiring Ness, this time at $7.75 per share.[10] Ness continued exclusive negotiations with Bidder D through

[7] *Id.* at ¶¶ 52, 54; Prelim. Proxy at 24.
[8] Prelim. Proxy at 24-25.
[9] Prelim. Proxy at 25-26; Compl. ¶ 54.
[10] Compl. ¶ 55.

May 20, 2011, at which time the exclusivity agreement expired.[11] Bidder D then lowered its offer to $7.00 per share.[12]

CVCI then confirmed that it was willing to offer $7.75 per share, a price representing a 68% premium over Ness's trading price on the day before its discussions with potential buyers became public on December 10, 2010.[13] Ness and CVCI entered a confidentiality agreement on May 25, 2011. Ness and CVCI announced that they had entered the Merger Agreement on June 10, 2011.

II. DISCUSSION

A. *Legal Standard for Granting Expedition*

The Court acts regularly to grant requests to expedite proceedings: "A party's request to schedule an application for a preliminary injunction, and to expedite the discovery related thereto, is normally granted. Exceptions to that norm are rare."[14] Although the burden is not high, a plaintiff seeking expedition

[11] *Id.* at ¶ 56. The exclusivity agreement had been extended twice, for a total of more than two months, in response to concessions from Bidder D. Prelim. Proxy at 26.
[12] Prelim. Proxy at 30. Bidder D later increased its offer to $7.10 per share, but refused to move above that price. *Id.* at 32.
[13] *Id.* at 24, 31; Compl. ¶ 58.
[14] *In re Int'l Jensen Inc. S'holders Litig.*, 1996 WL 422345, at *1 (Del. Ch. July 16, 1996).

must have "articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury, as would justify imposing on the defendants and the public the extra (and sometimes substantial) costs of an expedited preliminary injunction proceeding."[15]

B. *The Plaintiffs' Motion for Expedited Proceedings*

1. The Price and Process Claims

The Plaintiffs "have concerns" regarding the sale process in which the Board and the Special Committee engaged.[16] In most cases, however, these concerns are not sufficiently specific to rise to the level of colorable claims.

For example, the Plaintiffs allege that Mr. Bhusan was conflicted, but do not dispute that a Special Committee was formed or that Mr. Bhusan was excluded from the sale process. The Plaintiffs allege that Bidder D has sent Ness a letter threatening legal action, but they have not alleged anything regarding the contents of that letter. They allege that CVCI gained an improper advantage in negotiations

[15] *Police & Fire Ret. Sys. of the City of Detroit v. Bernal*, 2009 WL 1873144, at *1 (Del. Ch. June 26, 2009).
[16] July 22, 2011 H'rg on Pl.'s Mot. to Expedite Tr. ("Tr.") at 4.

by staying out of the bidding until late March.[17] Given Bidder D's decision to drop its offer price after its exclusivity period expired, however, there seems to be little to support this notion. More importantly, it is difficult to see how CVCI's decision to offer a comparatively high bid late in the sales process indicates that the sale process was somehow deficient. Finally, the Plaintiffs complain that the Board agreed to accept deal protections—including a "no shop" provision, a "no talk" provision, a termination fee amounting to 2.72% of the sale price, and a fiduciary out that requires the Board to determine that a higher bid is a "superior offer" before it can engage in negotiations—that, together, are onerous and preclusive. The Plaintiffs offer no explanation as to how these relatively mundane deal protections would prevent a serious bidder from making a superior offer.[18]

This sale process lasted eleven months, involved approximately thirty potential bidders, and resulted in a sale price that is $2.00 per share higher than the price at which CVCI originally expressed its interest in acquiring Ness, higher by

[17] "It's possible that the price would have gone much higher, especially had they known that CVCI was involved." *Id.* at 11.

[18] "Delaware courts have repeatedly recognized 'that provisions such as these are standard merger terms, are not *per se* unreasonable, and do not alone constitute breaches of fiduciary duty." *In re 3Com S'holders Litig.*, 2009 WL 5173804, at *7 (Del. Ch. Dec. 18, 2009).

at least $0.65 per share than any other bidder was willing to pay, and 68% higher than Ness's stock price on day before potential acquirors' interest in Ness became public. There is little in the Plaintiffs' allegations to suggest that either the price of, or the process leading up to, the Proposed Transaction were unfair to Ness's shareholders.

Only in one instance have the Plaintiffs possibly stated a colorable claim. The Complaint alleges "potential conflicts of interest that would impair the financial advisors' ability to render an impartial fairness opinion on the $7.75 per share consideration to be received by Ness shareholders."[19] Further, the Plaintiffs

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[19] Compl. ¶ 70. *See id.* at ¶ 81:

> The Proxy Statement also fails to detail prior work Jefferies or BofA Merrill Lynch has provided any parties to the transaction or this litigation, or affiliates thereof, including:
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> a. Specific services Jefferies has provided to CVCI in the last two years, and compensation received and expected for those services;
> b. Compensation BofA Merrill Lynch has received from Citigroup, or any of its affiliates in the last two years; and
> c. Compensation BofA Merrill Lynch has received from Ness in the last two years.

See also id. at ¶ 45:

> On August 16, 2010, the Special Committee retained Ropes & Grey [sic], LLP as its legal advisor, which promptly advised the Special Committee to retain a financial advisor with no prior connections to the Company. Nonetheless, the Special Committee engaged Jefferies, despite the fact that in the two prior years, Jefferies had provided financial advisory and financing services to CVCI affiliates.

have worried that "Jefferies did not have the interest of the shareholders as its primary interest in performing its duties" for the Special Committee.[20]

The bases for these allegations are that the Preliminary Proxy discloses that:

> Jefferies in the past provided financial advisory and financing services to certain affiliates of CVCI and continues to do so and received, and may receive, fees for the rendering of such services, including, during the two-year period prior to the date of Jefferies' opinion, acting as financial advisor to an affiliate of CVCI in connection with a sale transaction,[21]

and that:

> [Bank of America Merrill Lynch] and [its] affiliates have in the past provided, currently are providing, and in the future may provide investment banking, commercial banking and other financial services to Citigroup, Inc. . . . and certain of its affiliate and affiliates of [CVCI] . . . , and have received or in the future may receive compensation for rendering these services . . . .[22]

These disclosures do not indicate how much business the financial advisors have done, are doing, or might expect to do in the future with CVCI or its affiliates; if the amount of business involved would be material to either of the advisors, the Plaintiffs might have a colorable claim. Therefore, because the Court acts "with a

[20] Tr. at 11.
[21] Prelim. Proxy at 41.
[22] *Id.* at C-3.

certain solicitude for plaintiffs in this procedural setting,"[23] the Court grants the Plaintiffs the right to engage in expedited to discovery to answer the narrow question of whether Special Committee's or the Board's financial advisor's past, present, or expected future dealings with CVCI or its affiliates created a conflict of interest for one or both of the financial advisors. The Plaintiffs' motion is denied with respect to their other price and process claims.

2. The Disclosure Claims

The Plaintiffs' claims regarding the financial advisors' potential conflicts of interest may give rise to related disclosure claims. If the amount of business that one of the financial advisors has done with CVCI or its affiliates is material, then the failure to disclose fully the extent of that business could violate the duty of disclosure.[24] By contrast, if the amount of business involved is not material to either financial advisor, then the existing disclosures would likely be adequate.

[23] *Giammargo v. Snapple Beverage Corp.*, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994).
[24] *See Del Monte Foods Co. S'holders Litig.*, 2011 WL 532014, at *16 (Del. Ch. Feb. 14, 2011) ("Because of the central role played by investment banks in the evaluation, exploration, selection, and implementation of strategic alternatives, this Court has required full disclosure of investment banker compensation and potential conflicts."); *In re Atheros Commc'ns, Inc. S'holder Litig.*, 2011 WL 1379815, at *8 (Del. Ch. Mar. 4, 2011).

The discovery necessary to pursue this potential claim, however, precisely overlaps with that needed to investigate the related price and process claim.

The Plaintiffs' other disclosure claims, which fall into three other general categories, are not colorable. First, the Plaintiffs seek additional detail regarding management's projections of Ness's continued performance as a standalone entity. The Preliminary Proxy provides a fair summary of these projections;[25] the Plaintiffs have not offered a theory as to how additional detail would be relevant to shareholders' decisions regarding the Proposed Transaction.[26]

Second, the Plaintiffs seek additional details regarding the financial advisors' analyses, such as the reasons why different companies were selected for each advisor's comparable company analysis or information regarding how the advisors arrived at the multiples they used for those comparable companies. Again, the Preliminary Proxy provides shareholders with fair summaries of the

[25] Prelim. Proxy at 48-49.
[26] *See In re 3Com S'holders Litig.*, 2009 WL 5173804, at *3.

financial advisors' work,[27] and the Plaintiffs have not shown that additional detail would be material to shareholders.

Third, the Plaintiffs seek a more detailed description of the sale process that led up to the announcement of the Proposed Transaction. The Preliminary Proxy describes, over fourteen pages, the eleven-month sale process in which the Special Committee and the Board engaged.[28] The Plaintiffs have not indicated how additional information regarding the contacts the Board had with over thirty potential buyers, the extensive negotiations with Bidder D and CVCI, or the role Jefferies played in these negotiations would affect shareholders' decisions regarding the Proposed transaction. "[S]hareholders are not entitled to a "play-by-play" description of merger negotiations," but, instead, to a fair summary of the

[27] *See In re CheckFree Corp. S'holders Litig.*, 2007 WL 3262188, at *2-*3 (Del. Ch. Nov. 1, 2007) (noting that "stockholders are entitled to a fair summary of the substantive work performed by the investment bankers upon whose advice the recommendations of their board as to how to vote on a merger or tender rely," but denying expedition where "the definitive proxy statement contains an adequate and fair summary of the work the [financial advisor] did to come to its fairness opinion.") (citing *In re Pure Resources, Inc. S'holders Litig.,* 808 A.2d 421 (Del. Ch. 2002); Prelim. Proxy at 36-47, B1-B3, C1-C4.
[28] Prelim. Proxy at 20-33.

sale process.[29] The Plaintiffs' allegations do not state a colorable claim that the Preliminary Proxy failed to provide such a fair summary.

III. CONCLUSION

For the foregoing reasons, the Plaintiffs' Motion for Expedited Proceedings is granted only to extent that they may take expedited, but necessarily limited and focused, discovery regarding the question of whether either the Board's or the Special Committee's financial advisors were conflicted because of their relationships with CVCI. The motion is denied in all other respects.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[29] *Skeen v. Jo-Ann Stores, Inc.*, 1999 WL 803974, at *7 (Del. Ch. Sept. 27, 1999), *aff'd*, 750 A.2d 1170 (Del. 2000).