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Case No. 7197-VCP

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE MICROMET, INC. SHAREHOLDERS LITIGATION

C.A. No. 7197-VCP

MEMORANDUM OPINION

Submitted: February 27, 2012
Decided: February 29, 2012

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PARSONS, Vice Chancellor.

This action is before the Court on a motion to preliminarily enjoin an all-cash negotiated tender offer for all of the shares of a biopharmaceutical company. The tender offer commenced on February 2, 2012 and is set to close on March 1, 2012. Plaintiffs, shareholders of the target company, claim that the offer is for an unfair price and is the result of an unfair and flawed sales process. Plaintiffs also claim that the solicitation materials recommending the tender offer contain materially false and misleading information. As a result, Plaintiffs seek to have the tender offer enjoined before its consummation.

In deciding whether a preliminary injunction should issue, this Court must determine whether Plaintiffs have shown a reasonable likelihood of success on the merits of their fiduciary duty claims, the shareholders would face irreparable harm if the transaction is not enjoined, and in terms of awarding injunctive relief, where the balance of the equities would lie. For the reasons stated in this Memorandum Opinion, I conclude that Plaintiffs have failed to show a reasonable likelihood that they will succeed in proving that the challenged transaction is unfair or that the directors breached their fiduciary duties of care or loyalty, including their disclosure obligations, in approving the transaction. Therefore, I deny Plaintiffs' motion to preliminarily enjoin the tender offer.

I. BACKGROUND

A. The Parties

Plaintiffs are various shareholders of nominal Defendant Micromet, Inc. ("Micromet" or the "Company"), a Delaware corporation headquartered in Rockville, Maryland. Micromet is a biopharmaceutical company engaged in the discovery,

development, and commercialization of antibody-based therapies for the treatment of cancer.

Defendant Amgen, Inc. is a Delaware corporation and the largest independent biotechnology medicines company in the world.

Defendant Armstrong Acquisition Corp. ("Armstrong") is a Delaware corporation and a wholly-owned subsidiary of Amgen. Armstrong was created solely for the purpose of acquiring Micromet.

Individual Defendants, David Hale, John Berriman, Michael Carter, Kapil Dhingra, Christian Itin, Peter Johann, and Joseph Slattery, are all members of Micromet's board of directors (the "Board").

B. Facts

1. Micromet and Amgen negotiate a proposed merger

As an early-stage pharmaceutical research and development company, Micromet's primary business strategy involves partnering with larger pharmaceutical companies with more capital and expertise to aid in the commercialization and distribution of drugs in Micromet's pipeline. As part of this strategy, Micromet entered into a confidentiality agreement with Amgen on June 15, 2010, to begin discussing a potential collaboration between the companies related to certain "BiTE antibodies" owned by Micromet.[1] At the time, Micromet already was involved in multiple collaborations with other major pharmaceutical companies regarding its BiTE technology.

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[1] BiTE technology is used for the treatment of solid cancer tumors.

Over the next few months, the companies discussed the potential structure of a collaboration on the BiTE antibodies. By January 2011, Amgen's interest in Micromet had expanded beyond the BiTE antibodies covered by the confidentiality agreement to MT103,[2] Micromet's lead product candidate. On April 5, 2011, Amgen introduced for the first time the possibility of a strategic transaction between the companies. Micromet's stock then was trading around $5.28 per share. The Board declined to discuss an acquisition at that time because it believed the Company was undervalued in the market. The Board also indicated that it was not interested in discussing a partnership as to MT103 with Amgen.[3]

Collaboration discussions continued between the parties related to the BiTE antibodies. On May 18, 2011, Amgen reiterated its interest in a possible acquisition to Defendant Carter, a member of Micromet's Board. Carter indicated that Micromet would be more receptive to a possible acquisition and, on July 18, 2011, Amgen submitted a proposal to acquire Micromet at $9 per share. Following receipt of the Amgen offer, the Board met twice to consider the offer and receive updated analyses from its financial advisor, Goldman Sachs. In light of upcoming milestone events relating to its development of MT103, the Board decided to reject Amgen's offer and continue to pursue a strategy of partnering for the development of MT103 while remaining an independent company.

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[2] MT103 is also known as blinatumomab.

[3] Itin Dep. 48, 50.

Undaunted by the rejection of its offer, Amgen continued to express interest in Micromet and, on August 18, 2011, representatives from both companies met to conduct a limited due diligence session to enable Amgen to understand more fully the value of the Company and possibly increase its offer. In relation to the due diligence session, the parties also entered into confidentiality and standstill agreements.

The next day, the Board met to discuss the Amgen offer and the possibility of contacting other strategic acquirers. Concerned that news of Micromet's contemplation of a sale might disrupt its partnering efforts, the Board decided to contact and gauge the interest of only one other potential acquirer, Company A, with whom Micromet had an existing relationship. Company A responded on September 28, 2011 that it was not interested in an acquisition.

Despite the August 18 due diligence session, Amgen refused to increase its offer for the Company and reiterated its $9 per share offer on September 1, 2011. The Board again rejected this offer as inadequate and decided to pursue alternative strategies that would allow the Company to develop MT103 as a stand-alone entity. Over the course of the next month, Micromet contacted twenty-one select companies who might be interested in partnering for the development of MT103. Micromet held face-to-face meetings with eleven of these potential collaborators and entered into due diligence related to MT103 with ten of them. Micromet did not invite Amgen to participate in the partnering process.

While Micromet was pursuing its partnering process, Amgen again offered to buy the Company for $9 per share on September 19. At a three-day meeting from October 4

to October 6, the Board reconsidered the Amgen proposal, reviewed the partnering process, and discussed other strategic alternatives for the development of MT103. Unsurprisingly, the Board again rejected the Amgen offer as inadequate and indicated that it would only consider entering into negotiations if Amgen came up with a much higher price.

On October 28, Amgen informed the Board that it was willing to increase its offer to $9 per share plus contingent earn outs that could pay up to an additional $3 per share. The Board considered this offer at a meeting on October 30, at which time Goldman Sachs advised that the contingent component of the offer had a discounted value of less than a dollar per share. Consequently, the Board again rejected Amgen's offer.

On November 22, 2011, Goldman Sachs informed Amgen that the Board might consider an all-cash offer below $12 per share. Then, on November 28, Micromet announced that MT103 had entered into Phase II of clinical trials. Two weeks later, Micromet announced that initial results from its clinical trials indicated that MT103 more than doubled the complete remission rates produced by standard therapies used to treat adult patients with relapsed or refractory B-precursor acute lymphoblastic leukemia.[4]

On December 21, 2011, Amgen advised Defendant Hale that it was willing to increase its offer to $10.75 per share. The Board held a meeting on December 23, where it considered this substantially increased offer. The Board also discussed contacting other potential acquirers and requested that management and Goldman update their

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[4] Pls.' Ex. ("PX") 19.

projections and financial analyses for the Company. Then, at a regularly scheduled Board meeting on January 2, 2012, the Board again reviewed the Company's updated projections and financial analyses and resolved to enter into serious negotiations with Amgen concerning the sale of the Company. The Board also discussed contacting other potential bidders to do a market check. Because Micromet still was involved in the partnering process, the Board instructed Goldman to contact "the company that had done the most extensive due diligence to date in the partnering process" as well as "other large pharmaceutical companies that have either expressed interest in the partnering process or that have a potential strategic fit."[5] The Board further instructed Goldman not to contact certain parties that had expressed a lack of interest in MT103 during the partnering process.[6]

The next day, on January 3, 2012, the Board informed Amgen that it would work with Amgen on its due diligence if it was willing to increase its offer to $11 per share. Two days later, on January 5, the parties verbally agreed to that price and, on January 7, Micromet gave Amgen access to an online data room to conduct further due diligence. After approximately three weeks of negotiations, on January 25, 2012, the Board met to consider the finalized Agreement and Plan of Merger (the "Merger Agreement"). The Board's legal advisors reviewed the key terms of the Merger Agreement and Goldman made a presentation to the Board regarding the $11 offer and the value of the Company.

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5 PX 31 at 2.

6 *Id.*

After considering the merits of the transaction and the advice of its legal and financial advisors, the Board approved the Merger Agreement. The Merger was publicly announced on January 26.

2. Micromet's market check activities

At the same time the Board actively began negotiating with Amgen, on January 3, 2012, Goldman contacted seven large pharmaceutical companies that the Board determined might be interested in and capable of acquiring Micromet. All of the companies had experience in oncology and had been contacted during Micromet's partnering process. Notably, six of the seven conducted due diligence on MT103 during the partnering process and Company D[7] had even completed its due diligence. Furthermore, two of the companies had existing collaborations with Micromet and Company B and another company both had performed due diligence on the Company in recent years. Of the seven companies contacted, three expressed interest in an acquisition.

Beginning on January 13, Micromet held due diligence sessions with Company B, Company C, and Company D. Each company was given access to Micromet's online data room and draft merger agreements later were sent to Company B and Company C. By January 24, 2012, however, all three companies had indicated they were not interested in an acquisition.

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[7] For confidentiality reasons, several companies with which Micromet communicated are identified in coded form.

3. The Merger Agreement

The Merger Agreement provides that Amgen will acquire Micromet through Armstrong by a tender offer at $11 per share, followed by a second-step cash out merger. The offer commenced on February 2, 2012 and will conclude on March 1, 2012. Total consideration for the proposed transaction is $1.16 billion. When the deal was announced, the $11 per share price offered a 37% premium to the one-month volume weighted average stock price for Micromet. The Company's investment advisor, Goldman Sachs, provided a fairness opinion with a valuation range of $7.09 to $11.44 per share for Micromet stock.

The Merger Agreement includes several deal protection measures. Specifically, it contains: (1) a no-solicitation provision; (2) information and matching rights; (3) a termination fee of $40 million;[8] and (4) an amendment to Micromet's Rights Agreement that excludes Amgen from the Company's poison pill, but leaves the pill in place as to all other potential bidders.

C. Procedural History

The Merger Agreement was announced on January 26, 2012 and the tender offer commenced on February 2. Following announcement of the merger, six different Plaintiffs filed complaints challenging the transaction. After two groups of shareholders moved to expedite the proceedings, I granted expedition on February 13. The

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[8] This fee is 3.4% of the overall equity value of the deal and 4.9% of its enterprise value.

shareholder groups were consolidated on February 15 and the parties proceeded with discovery and briefing on the motion for a preliminary injunction. I heard argument on that motion on February 27, 2012.

D. Parties' Contentions

Plaintiffs argue that the tender offer is being conducted at an unfair price that resulted from a flawed sales process conducted by the Board. Specifically, Plaintiffs assert that the Board breached its fiduciary duties by favoring Amgen as a bidder and failing to do any meaningful market check until immediately before the announcement of the proposed transaction. Plaintiffs also claim that the deal protections agreed to under the Merger Agreement unreasonably have shortened the tender offer period and collectively have precluded other competing bids from emerging. Additionally, Plaintiffs assert that the Board breached its fiduciary duties of disclosure by making materially incomplete and misleading statements in the Recommendation Statement[9] it disseminated to shareholders.

Defendants deny each of Plaintiffs' claims and argue that the deal is a premium, all-cash offer that was arrived at through a reasonable and informed process by an independent and disinterested Board. Defendants also defend the pre-signing market check as being based on the Board's familiarity with the potential acquirers in the industry and being reasonably designed to give each potential acquirer a sufficient

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[9] The Recommendation Statement sometimes is referred to as the "Solicitation Statement" in the parties' briefs. For purposes of clarity, I refer to it solely as the Recommendation Statement herein.

opportunity to make a competing bid. In addition, Defendants argue that the deal terms agreed to by the Board are standard "middle of the road" deal terms and that their overall effect was not preclusive. Finally, Defendants urge the Court to find that all of Plaintiffs' disclosure claims are meritless.

II. ANALYSIS

A. Preliminary Injunction Standard

"This Court has broad discretion in granting or denying a preliminary injunction."[10] "A preliminary injunction may be granted where the movants demonstrate: (1) a reasonable probability of success on the merits at a final hearing; (2) an imminent threat of irreparable injury; and (3) a balance of the equities that tips in favor of issuance of the requested relief."[11] "The moving party bears a considerable burden in establishing each of these necessary elements. Plaintiffs may not merely show that a dispute exists and that plaintiffs might be injured; rather, plaintiffs must establish clearly each element because injunctive relief will never be granted unless earned."[12] However, "there is no steadfast formula for the relative weight each deserves. Accordingly, a strong

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10 *Data Gen. Corp. v. Digital Computer Controls, Inc.*, 297 A.2d 437, 439 (Del. 1972) (citing *Richard Paul, Inc. v. Union Improvement Co.*, 91 A.2d 49, 54 (Del. 1952)).

11 *Nutzz.com, LLC v. Vertrue, Inc.*, 2005 WL 1653974, at *6 (Del. Ch. July 6, 2005) (internal citations omitted); *Concord Steel, Inc. v. Wilmington Steel Processing Co.*, 2008 WL 902406, at *3 (Del. Ch. Apr. 3, 2008).

12 *La. Mun. Police Empls.' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1185 (Del. Ch. 2007) (internal citations omitted).

demonstration as to one element may serve to overcome a marginal demonstration of another."[13]

B. Reasonable Likelihood of Success on the Merits

1. *Revlon* claims

When a corporation "embarks on a transaction-on its own initiative or in response to an unsolicited offer-that will result in a change of control,"[14] the primary objective of its directors, as first set forth in this Court's seminal ruling in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,[15] becomes to maximize the value of the sale of the company for the benefit of its shareholders.[16] In considering whether the Board has fulfilled its *Revlon* duties, "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."[17] There is "no single blueprint" that a board must follow in maximizing

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13 *Alpha Builders, Inc. v. Sullivan*, 2004 WL 2694917, at *3 (Nov. 5, 2004) (citing *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998)).

14 *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 242 (Del. 2009).

15 506 A.2d 173 (Del. 1986).

16 *See id.*; *see also Paramount Commnc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 44 (Del. 1993) ("In the sale of control context, the directors must focus on one primary objective—to secure the transaction offering the best value reasonably available for the stockholders—and they must exercise their fiduciary duties to further that end.").

17 *In re Orchid Cellmark, Inc. S'holders Litig.*, 2011 WL 1938253, at *4 (Del. Ch. May 12, 2011).

shareholder value,[18] but instead, "[t]he duty to act reasonably is just that, a duty to take a reasonable course of action under the circumstances presented."[19]

a. When did the Board's *Revlon* duties attach?

Before discussing whether the Board fulfilled its *Revlon* duties in conducting the sale of the Company, it is worth discussing briefly when the Board's *Revlon* duties arose. Although neither party identifies a specific date on which the sale of the Company became inevitable, their briefing suggests that the parties have different views as to the relevant period for which the Board's actions should be subjected to enhanced scrutiny. Plaintiffs appear to contend that the Board began the sales process as early as the summer of 2011, when Amgen made its first formal offer and the companies engaged in a due diligence session together. From there, Plaintiffs attempt to characterize the interactions between Micromet and Amgen throughout the fall of 2011 as "continuous negotiations, due diligence and posturing over a potential acquisition . . . ." culminating in the execution of the Merger Agreement on January 25, 2012.[20]

Defendants, on the other hand, characterize differently what transpired between Amgen and Micromet in the summer and fall of 2011. According to Defendants, although the Board did consider a possible transaction with Amgen beginning in the summer of 2011, the Company also aggressively pursued partnering opportunities

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18 *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989).

19 *In re Lear Corp. S'holders Litig.*, 926 A.2d 94, 115 (Del. Ch. 2007).

20 Pls.' Reply Br. 6.

throughout the fall that would have allowed it to develop MT103 while remaining independent. Defendants argue that Plaintiffs' allegation that "continuous negotiations" occurred between the companies is misleading and that the limited communications between Amgen and Micromet amounted to little more than a consistent rebuke by the Board of Amgen's inadequate offers. Instead, Defendants assert that it was not until the Board's reaction to Amgen's December 21 offer that the Board seriously contemplated the sale of the Company and entered into negotiations to accomplish that end.

Having carefully considered the parties' briefing and the record relating to the interactions between Amgen and Micromet during the relevant period, I agree with Defendants that the Board did not seriously contemplate a sale of the Company sufficient to trigger its *Revlon* duties until late December 2011 or the January 2, 2012 meeting, where it resolved to enter into serious merger negotiations with Amgen and instructed Goldman to conduct a market check of other potential acquirers. Before that point, Micromet actively was exploring a partnering process that would allow it to remain a stand-alone company and the sale of the Company remained only one possible strategic alternative to a potential collaboration. Indeed, it was only after Amgen increased its offer to $10.75 on December 21 that it became apparent that Amgen was serious about an acquisition. The Board then promptly set out to update itself on the financial condition and value of the Company, instruct its financial advisor to prepare to perform a formal market check, and engage in negotiations with Amgen that would result in the Merger Agreement. Therefore, I find that the relevant period for analyzing the Board's actions in

conducting the sale of the Company began on January 2, 2012, or at most a week or two earlier.

b. The pre-signing market check

After January 2, 2012, the Board's duties shifted from "the preservation of [Micromet] as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit."[21] Because it was presented with only a single acquisition offer, the Board decided to undertake a market check to test the adequacy of Amgen's offer and see if it could obtain a higher price from another potential acquirer.[22] To this end, the Board instructed Goldman to contact seven potential strategic acquirers that had expressed interest in Micromet during the on-going partnering process and who were also capable of undertaking an acquisition of Micromet's size.

1. The scope of the market check

Plaintiffs first challenge the scope of the Board's market check. Plaintiffs claim that the Board inappropriately limited its scope to potential acquirers who would be able to move quickly in making a competing offer. Plaintiffs also decry the market check as unreasonable because the Board failed to contact any private equity buyers even though,

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21 *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 182 (Del. 1986).

22 *See Barkan*, 567 A.2d at 1287 ("When the board is considering a single offer and has no reliable grounds upon which to judge its adequacy . . . fairness demands a canvas of the market to determine if higher bids may be elicited.") (internal citation omitted).

as Plaintiffs allege, private equity buyers have been active in the pharmaceutical and clinical research space in recent years.

In considering these arguments, I find that the scope of the market check was adequate and consistent with the Board's well-informed understanding of the industry and Micromet's needs. In instructing Goldman on the types of companies to contact about a potential acquisition, the Board sought those companies that were familiar with Micromet, had indicated an interest in partnering over MT103, and were large enough to undertake a billion dollar transaction. Based on the overwhelming importance of MT103 to Micromet's potential and, thus, its valuation, the Board's focus on contacting acquirers that could benefit from and further develop MT103 was reasonable, as those companies would be most likely to be able to make synergistic topping bids for the Company. Moreover, six of the seven companies contacted during the market check had engaged in due diligence with Micromet during the partnering process during the fall and two already were engaged in active collaborations with Micromet over other drugs in its pipeline. Thus, these companies knew about and were interested in Micromet and presumably understood the potential of MT103 for purposes of any offer they might make.

For similar reasons, Micromet's decision to eschew contacting any private equity buyers also seems reasonable. Micromet's primary business strategy involved collaborating with larger pharmaceutical companies in the commercialization and distribution of its drugs. Moreover, Micromet needed not only capital, but technical expertise, to realize the full potential value of its product pipeline. In light of these facts

and Micromet's near-term negative cash flow projections, the Board reasonably could have concluded that financial buyers would perceive less synergies than a strategic buyer and be less likely to make a topping bid in a billion-dollar deal for the Company.[23]

2. The timing of the pre-signing market check

Plaintiffs also challenge the timing of the pre-signing market check conducted by the Board as being unreasonably short. According to Plaintiffs, the week-long diligence period provided during the market check was insufficient to allow the potential acquirers other than Amgen to conduct a meaningful due diligence process and make a competing bid. In contrast, according to Plaintiffs, Amgen had been given months to conduct due diligence on the Company. As a result, Plaintiffs contend that the limited market check period provided Amgen with an unfair advantage in securing the deal.

As an initial matter, Plaintiffs' allegation that Amgen had been given "access to the Company both in terms of due diligence and negotiations"[24] for months is overstated. Amgen participated in one day-long due diligence session with Micromet in August 2011. In contrast, six of the seven potential acquirers had conducted due diligence on Micromet related to MT103, its lead product, during the fall of 2011 and one of the potential acquirers, Company D, had even completed its due diligence during that time. Micromet did not invite Amgen to participate in the MT103 partnering process, so Amgen was not able to conduct due diligence on MT103 until after the January 2

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[23] Van der Goes Dep. 79-80.

[24] Pls.' Opening Br. 23.

meeting. Therefore, Plaintiffs are not likely to succeed in proving that Amgen enjoyed the informational advantages they claim.

Moreover, based on the prior access that six of the seven potential acquirers had to Micromet immediately before the market check, I do not consider it unreasonable for the Board to have limited the due diligence period to one week. Of the three potential acquirers who conducted due diligence during the market check, each was given access to the Company's online data room, as well as to Micromet's management. Furthermore, when Company B expressed concerns about being able to complete its due diligence within the given timeframe, Goldman responded that potential acquirers only needed to submit a "preliminary indication of their interest," not a definitive proposal, by the end of the diligence period. Likewise, while Company C originally expressed doubt about its ability to conduct sufficient due diligence during that period, the management of Micromet worked to provide Company C with the information it required and Company C responded on January 24, 2012, that although it had "reviewed all the pertinent facts" related to Micromet, it was not interested in an acquisition.[25] Indeed, every one of the companies contacted during the market check advised Micromet before it signed the Merger Agreement that they were not interested or were unable to reach the valuation range necessary to make a competing offer.[26]

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25 Ct.'s Ex. A, Bates No. 0000709-10.

26 *See* Carter Dep. at 85-86 (testifying that Company B decided that it "could not get into double figures" in valuing the company; Company C did an "incomplete analysis because it didn't feel that they could get to the value that they had

Therefore, based on the Board's prior knowledge of the industry, the other potential acquirers' familiarity with Micromet and its lead product, MT103, and the fact that each of the potential acquirers declined to pursue acquiring the Company for reasons other than the inability to conduct sufficient due diligence in the time allotted, I find that the market check was reasonable.

c. The post-signing market check

As part of the Merger Agreement, the Board agreed to various deal protection measures in favor of Amgen. Plaintiffs claim that these protections unreasonably shortened the post-signing market check period and precluded other bidders from emerging and making competing bids. In particular, Plaintiffs argue that the no-shop, matching rights, information rights, and change of recommendation provisions in the Merger Agreement effectively imposed a delay of a total of ten business days and potentially fifteen calendar days before the Board could embrace a competing offer and recommend it to shareholders.[27] Thus, according to Plaintiffs, these provisions, in conjunction with the other deal protections devices in the Merger Agreement, make it virtually impossible for a competing bidder to make a competing bid for Micromet.

Among the sources of the problem Plaintiffs perceive are the provisions of § 1.2(c) of the Merger Agreement regarding matching rights and adverse recommendation notice.

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probably assumed, and [because] it probably didn't fit . . . into their portfolio;" and Company D, at the time, "was locked away and had been for a week or two with another company").

[27] Pls.' Reply Br. 14.

Plaintiffs have failed to show, however, that § 1.2(c) operates in the obstructive manner they allege. Section 1.2(c) provides, in relevant part:

> Parent shall have received from the Company prior written notice of the Company's intention to make an Adverse Change Recommendation at least four (4) business days prior to making any Adverse Change Recommendation . . . if the decision to make an Adverse Change Recommendation is in connection with an Acquisition Proposal, then the Company shall comply with clauses (A) through (D) as follows: (A) prior to giving effect to clauses (B) through (D), the Company's Board of Directors shall have determined, in good faith, that such Acquisition Proposal is a Superior Offer, (B) the Company shall have provided to Parent the material terms and conditions of such Acquisition Proposal and copies of all material documents relating to such Acquisition Proposal in accordance with Section 5.4, (C) the Company shall have given Parent four (4) business days after Parent's receipt of the Change of Recommendation Notice to propose revisions to the terms of [the Merger Agreement] or make other proposals and shall have negotiated in good faith with Parent . . . with respect to such proposed revisions or other proposals, if any, so that the Acquisition Proposal would no longer constitute a Superior Offer and (D) after considering the results of negotiations with Parent and taking into account proposals made by Parent, if any, after consultation with its outside legal counsel, the Company's Board of Directors shall have determined, in good faith, that such Acquisition Proposal remains a Superior Offer and that the failure to make the Adverse Change Recommendation would constitute a breach of fiduciary duties of the Board . . . .[28]

"Superior Offer" is defined under the Merger Agreement as an unsolicited bid for more than 80% of the voting power of the Company that the Board determines, in its good faith

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[28] PX 24 at 5.

judgment, to be more favorable than the terms of the Amgen offer and reasonably capable of being completed on the terms proposed.[29]

Under § 1.2(c), if the Board determines that it has received a Superior Offer, it must notify Amgen in a Change of Recommendation Notice of the offer and provide it with all relevant materials relating thereto. Amgen is then given four business days to negotiate with Micromet's Board and decide whether to match the Superior Offer, after which the Board must determine whether its fiduciary duties require it to change its recommendation in favor of the new bid.[30] Contrary to Plaintiffs' interpretation of this section, the so-called "blackout" period for recommendations and the matching rights period are intended to run concurrently. If, after the four-day matching rights period, the Board determines to make an Adverse Change Recommendation, it evidently can do so immediately. Therefore, the maximum period during which the Board can be restricted from changing its recommendation following notice of receipt of a Superior Offer is shorter than Plaintiffs suggest.

Moreover, I disagree with Plaintiffs' characterization of the recommendation provision here as being "nearly identical"[31] to the recommendation provision in *In re*

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29 *Id.* at A-13.

30 I also note that if Amgen decides to increase its offer in response to a competing bid, Rule 14e-1 of the Securities and Exchange Act of 1934 would require that the tender offer period be extended for an additional ten business days. 17 C.F.R. § 240.14e-1(c) (1985).

31 Feb. 27, 2012 Hr'g Tr. ("Tr.") 8-9.

Compellent Technologies, Inc. Shareholders Litigation,[32] which Vice Chancellor Laster found to be problematic. The relevant language in *Compellent* was less clear than in this case and could be read to mean that upon the Board's having determined that it had a fiduciary duty to change its recommendation, it still would have had to wait four business days before satisfying those duties by, e.g., notifying its shareholders.[33]

Here, however, § 1.2(c) explicitly requires the Board to wait until Amgen has been given the opportunity to respond to a Superior Offer before undertaking to determine whether its fiduciary obligations require the Board to change its recommendation. As a result, unlike *Compellent*, the recommendation provision here does not restrict the Board's ability to fulfill known fiduciary duties in a timely fashion. Therefore, the potential problems identified in *Compellent* do not exist here.

As to the other deal terms challenged by Plaintiffs, including the exemption of Amgen from the Company's Rights Agreement, these terms appear to be relatively standard and they do not raise serious concerns of preclusion. Indeed, as Defendants point out, a similar combination of deal terms, including a no-shop provision, matching and information rights, a termination fee of roughly 3% of equity value, a top-up option, and a poison pill exemption, recently were approved by this Court in *In re Orchid Cellmark, Inc. Shareholder Litigation*.[34] I further note that *In re Orchid* involved only a

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[32] 2011 WL 6382523 (Del. Ch. Dec. 9, 2011).

[33] *See id.* at *11.

[34] 2011 WL 1938253 (Del. Ch. May 12, 2011).

slightly longer post-signing period of forty-two days, six more days than the post-signing period in this case.

For all of these reasons, I find that Plaintiffs have not shown that they are likely to succeed on their claims that the pre-signing market check was unreasonable and the deal protections agreed to under the Merger Agreement, at least collectively, were preclusive.

C. The Disclosure Claims[35]

"The duty of disclosure is a judicially imposed fiduciary duty"[36] that "serves the ultimate goal of informed stockholder decision making."[37] It is not, however, "a full-blown disclosure regime like the one that exists under federal law."[38] The duty is a "specific application of the general fiduciary duty owed by directors," and accordingly, is concomitant with the duty of care, loyalty, or both.[39] Thus "[w]hen stockholder action is requested, directors are required to provide shareholders with all information that is

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35 Plaintiffs have made numerous disclosure claims in their Complaint and in the briefing. Having read and considered each of those claims, I find that Plaintiffs have not shown a likelihood of success on any of their disclosure claims. For the purposes of this Memorandum Opinion, however, I discuss only those claims that were highlighted in the briefing.

36 *Arnold v. Soc'y for Sav. Bancorp, Inc*., 678 A.2d 533, 537 (Del. 1996).

37 2 Steven A. Radin et al., The Business Judgment Rule 1712 (6th ed. 2009) (quoting *Clements v. Rogers*, 790 A.2d 1222, 1236 (Del. Ch. 2001)).

38 *Id.*

39 *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998).

material to the action being requested and 'to provide a balanced, truthful account of all matters disclosed in the communications with shareholders.'"[40]

Here, Plaintiffs claim that the Board breached its fiduciary duty of disclosure by failing to disclose material information related to the financial projections and analyses of the Company on which the Board relied in determining that the Amgen offer was fair. Plaintiffs also claim that the Board breached its duty of disclosure by failing to disclose pertinent details regarding potential conflicts faced by Goldman Sachs arising from its relationships with Micromet and Amgen.

The central question in determining whether an omitted fact is material is whether "a reasonable stockholder would consider it important in a decision pertaining to his or her stock."[41] An omitted fact is not material "simply because [it] might be helpful."[42] Instead, the inclusion of the missing fact must "significantly alter the total mix of information available to stockholders."[43] Moreover, "[s]o long as the proxy statement, viewed in its entirety, sufficiently discloses and explains the matter to be voted on, the

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40 The Business Judgment Rule 1714 (quoting *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1223 (Del. 1999)).

41 *In re 3Com S'holders Litig.*, 2009 WL 5173804, at *1 (Del. Ch. Dec. 18, 2009).

42 *Globis P'rs, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *12 (Del. Ch. Nov. 30, 2007) (quoting *Sheen v. Jo-Ann Stores, Inc.,* 750 A.2d 1170, 1174 (Del. 2000)).

43 *In re 3Com*, 2009 WL 5173804, at *1.

omission or inclusion of a particular fact is generally left to management's business judgment."[44]

Having considered Plaintiffs' arguments and reviewed the Recommendation Statement, I find that Plaintiffs have failed to show that any of the omitted information complained of significantly would have altered the "total mix" of information available to shareholders in deciding whether to tender their shares.

1. The Board's failure to disclose the basis and criteria for the selection of the probability of success rates supplied to Goldman Sachs for their financial analysis

Plaintiffs argue that the Board breached its fiduciary duties by failing to disclose its basis for applying probability of success rates for its clinical trial drugs that were below reported industry norms. According to Plaintiffs, the probability of success rates the Company provided to Goldman were "unusually low" and, therefore, resulted in lower valuation ranges for the Company. As a result, Plaintiffs argue that the Board's basis for selecting the success rates was material information that should have been disclosed to shareholders to help them better assess the accuracy of the fairness opinion provided by Goldman Sachs.

In considering these claims, I begin by noting that the nature of the information sought by Plaintiffs is highly technical and concerns assumptions made by the Board relating to the viability of the specific drugs being developed by Micromet for the treatment of cancer. These drugs are unique products and, on the preliminary record

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[44] *Id.*

before me, Plaintiffs have not shown that the industry averages observed by the Pharmaceutical Research and Manufacturers of America ("PhRMA") or *State of the Art*, on which Plaintiffs rely, are applicable to Micromet's specific drugs or drug pipeline. In fact, the wide disparity in success rates reported by PhRMA and *State of the Art* calls into question the applicability of any industry-wide standard for judging whether the rates applied by Micromet to the drugs it is attempting to develop are "unusually low."

Furthermore, even assuming that the success rates applied by Micromet are lower than industry standards, I am not convinced that the Board was required to disclose additional information beyond the actual rates provided to Goldman. The duty to disclose "is not a mandate for prolixity."[45] Instead, "[b]alanced against the requirement of complete disclosure is the pragmatic consideration that creating a lenient standard for materiality poses the risk that the corporation will 'bury the shareholders in an avalanche of trivial information, a result that is hardly conducive to informed decisionmaking."[46] Stockholders are entitled to "a fair summary of the substantive work performed by the investment bankers,"[47] but "Delaware courts have repeatedly held that a board need not disclose specific details of the analysis underlying a financial advisor's opinion."[48]

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45 *Ryan v. Lyondell Chem. Co.*, 2008 WL 2923427, at *19 n.115 (Del. Ch. July 29, 2008), *rev'd on other grounds*, 970 A.2d 235 (Del. 2009).

46 *Id.*

47 *In re Pure Res., Inc. S'holders Litig.,* 808 A.2d 421, 449 (Del. Ch. 2002).

48 *In re Best Lock Corp. S'holder Litig.*, 845 A.2d 1057, 1073 (Del. Ch. 2001).

In this case, what matters is that investors received a summary that adequately described management's well-informed projections as to the viability of its drug pipeline. To require additional disclosures of the assumptions underlying these projections would require substantial discussion of the scientific basis for management's assumptions relating, most likely, to each drug in its pipeline. It is unlikely that the disclosure of such additional information would significantly alter the total mix of available information.

2. The Board's failure to disclose the fees paid by Micromet to Goldman Sachs and Goldman Sachs' holdings of Amgen and Micromet stock

Equally unavailing are Plaintiffs' claims that the Board breached its fiduciary duties by failing to disclose the fees paid by Micromet to Goldman Sachs over the past two years, as well as Goldman's interest in Amgen stock. Goldman holds approximately $336 million in Amgen stock, most of which it holds on behalf of its clients. Even considering its total position, Goldman's Amgen holdings equal approximately 0.16% of its overall investment holdings and 3.8% of its healthcare sector investments.[49] Moreover, Goldman owns a substantially larger stake in Company B and a similar stake in another company that was contacted by Goldman as a potential acquirer during the market check.[50]

Furthermore, the Recommendation Statement discloses that Goldman and its affiliates "may at any time make or hold long or short positions and investments, as well

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[49] Letter from Danielle Gibbs, Esq. to V.C. Parsons (Feb. 13, 2012), at 2, Docket Item No. 19, C.A. No. 7232-VCP.

[50] *Id.* at 2-3.

as actively trade or effect transactions, in the equity, debt and other securities" of both Micromet and Amgen.[51] Given this notice, any investor who desired to know the size of Goldman's position in Micromet or Amgen as of the last reporting period could find this information in Goldman's publicly-filed Form 13F.[52] More importantly, Plaintiffs did not present any more detailed evidence from which the Court reasonably could infer that the size and nature of Goldman's Amgen holdings in this case would be likely to impede its ability effectively and loyally to perform its assignment for Micromet.

As for Plaintiffs' argument for disclosure of the fees paid to Goldman by the target, Micromet, over the past two years, I note that the Recommendation Statement does disclose Goldman's contingent interest in the transaction, as well as the fees paid by Amgen to Goldman over the past two years. The Recommendation Statement also discloses that Goldman has performed certain services for Micromet in the past and received compensation for those services. Nevertheless, Plaintiffs claim that this partial disclosure requires supplementation to provide the actual amounts received by Goldman. They fail to provide any persuasive explanation, however, as to why the actual amount of fees paid by Micromet to Goldman would be material to shareholders or to cite any

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51 PX 2 at 33.

52 *See In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *17 (Del. Ch. May 4, 2005), *aff'd*, 897 A.2d 162 (Del. 2006) ("First, PanAm Sat's current stock price was information publicly available-a fact making it unlikely that additional disclosures would have altered the total mix of information already available.").

Delaware case law mandating such disclosures. This is not a situation in which Micromet, apart from Amgen, would be a potential source of future business.

3. The Board's failure to disclose the net operating loss projections

Plaintiffs further claim that Defendants were required to disclose more regarding the projected effect of the Company's net operating loss balances. The Recommendation Statement discloses that the Company possesses net operating loss balances of $102 and $209 million in the United States and Europe, respectively. Plaintiffs argue, however, that the Company separately should have disclosed the Company's projections of how it expected net operating loss carry-forwards to be used in future periods.

In requesting the separate disclosure of net operating loss carry-forwards, however, Plaintiffs are requesting a level of granular disclosure not required under our law.[53] Therefore, I find that the Company's disclosure regarding its net operating loss balances in the Recommendation Statement was sufficient.

4. The Board's failure to disclose the "Sum of the Parts" analysis

Plaintiffs also complain that the Company should have disclosed Goldman's "Sum of the Parts" discounted cash flow ("DCF") analysis. The Sum of the Parts analysis was not relied on by Goldman in providing its fairness opinion. There is no dispute that Goldman did prepare such analyses at the request of the Board, but not all analyses

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[53] *See In re Answers Corp. S'holders Litig.*, 2011 WL 1366780, at *7 (Del. Ch. Apr. 11, 2011) ("Although all of this granular information might be of interest to Answers' shareholders, the information regarding revenue, EBITDA, and cash-on-hand already provided in the Proxy Materials is sufficient to allow shareholders to evaluate the Proposed Transaction in light of these factors.").

produced by financial advisors and given to the Board are required to be disclosed under Delaware law.[54] Instead, "[i]n Delaware only that information that is material must be disclosed."[55]

Here, the total value range reported under the Sum of the Parts analysis was $7.74 to $10.42 and the ex-corporate valuation range, which excluded the costs of running Micromet, was $8.92 to $11.60. Although the high-end of the ex-corporate range under this Sum of the Parts DCF analysis is slightly higher than the high-end of Goldman's DCF analysis, the latter analysis yielded a substantially similar valuation range of $7.09 to $11.44. Therefore, I find it unlikely that disclosure of the Sum of the Parts DCF analysis materially would have altered the total mix of information available to shareholders. Accordingly, it did not need to be disclosed.

5. The Board's failure to disclose the "Upside Case" projections

Similarly, I find that Micromet was not required to disclose the "Upside Case" projections that Micromet's management provided to Goldman. Again, these projections were not relied upon by Goldman in its fairness opinion and at least some of the directors found the projections to be unreliable and overly optimistic. For example, Defendant Itin, Micromet's President and CEO, testified that these projections were "very, very

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54 *In re Genentech, Inc. S'holders Litigation*, 1990 WL 78829, at *8 (Del. Ch. June 6, 1990) ("Plaintiffs first assert that those analyses produced by the financial advisors and given to the board must be given to the shareholders. Such a requirement is not, however, the law of Delaware.").

55 *Id.*; *see also Wayne Cty. Empls.' Ret. Sys. v. Corti*, 954 A.2d 319, 334 (Del. Ch. 2008) ("[N]ot every document reviewed by the board is material . . . .").

optimistic and, in fact, not realistic."[56] Likewise, Defendant Carter described the Upside Case projections as "highly subjective."[57]

In determining what information must be disclosed to shareholders, directors must perform "a careful balancing of the potential benefits of disclosure against the possibility of resultant harm."[58] In that regard, "Delaware law does not require disclosure of inherently unreliable or speculative information which would tend to confuse stockholders or inundate them with an overload of information."[59] Here, I find that the Upside Case projections were intended by management solely as an internal tool. Moreover, the scenarios presented in the Upside Case projections appear to have been overly optimistic "what-ifs." Therefore, Plaintiffs have failed to show that they were material and needed to be disclosed.[60]

6. The Board's failure to disclose the Ibbotson premium

Finally, Plaintiffs' claim regarding Goldman's use of an historical Ibbotson equity risk premium, rather than a supply-side equity risk premium, is not a disclosure claim.

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56 Itin Dep. 157.

57 Carter Dep. 64.

58 *Goodwin v. Live Enters., Inc.*, 1999 WL 64265, at *12 (Del. Ch. Jan. 25, 1999) (citing *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1279 (Del. 1994)).

59 *Globis P'rs, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *10 (Del. Ch. Nov. 30, 2007).

60 *See Goldman v. Pogo.com Inc.*, 2002 WL 1824910, at *2 n.8 (Del. Ch. July 16, 2002) ("[T]his Court has held that the duty of disclosure does not carry a duty to disseminate speculative or uncertain information.").

Instead, it is a challenge to the methodology employed by Goldman in conducting its illustrative DCF analysis. Under Delaware law, "a complaint about the accuracy or methodology of a financial advisor's report is not a disclosure claim."[61] Plaintiffs claim amounts to nothing more than a "quibble[] with a financial advisor's work" arguing that Goldman applied an inappropriate equity risk premium in its analysis.[62] This does not state a valid disclosure claim.

D. Irreparable Harm and the Balance of the Equities

Preliminary injunctive relief is an extraordinary remedy that should not be issued in the absence of a clear showing of imminent irreparable harm to the moving party.[63] Here, because I have found that Plaintiffs have failed to show a reasonable likelihood that they will succeed on the merits of their claims, I also find that the shareholders will not suffer irreparable harm if the tender offer is not enjoined. Moreover, the proposed transaction offers Micromet's shareholders a significant premium over the pre-announcement price of Micromet's stock, was negotiated by an independent and

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61 *In re MONY Gp. Inc. S'holder Litig.*, 852 A.2d 9, 28 (Del. Ch. 2004), *judgment entered sub nom. In re The Mony Gp. Inc. S'holder Litig.*, 2004 WL 5389603 (Del. Ch. Mar. 1, 2004).

62 *In re 3Com S'holders Litig.*, 2009 WL 5173804, at *6 (Del. Ch. Dec. 18, 2009).

63 *See Baxter Pharm. Prods., Inc. v. ESI Lederle Inc.*, 1999 WL 160148, at *4 (Del. Ch. Mar. 11, 1999) (noting that a preliminary injunction should be issued only with the full conviction on the part of the court of its urgent necessity).

disinterested Board,[64] and was the result of a reasonable sales process. Because no other bidder has emerged during what I have found to be a reasonable sales process, the proposed transaction may represent the shareholders' only and best opportunity to receive a substantial premium for their shares. Therefore, I also find that the balance of the equities weighs against enjoining the proposed transaction

III. CONCLUSION

For all of these reasons, I deny Plaintiffs' motion for a preliminary injunction.

IT IS SO ORDERED.

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[64] Plaintiffs contend that the Board had a conflict of interest in favor of the transaction because the directors collectively will receive approximately $50 million from the accelerated vesting of stock options as a result of the transaction. These stock options would vest, however, in any change of control transaction. Furthermore, the directors' interests would be aligned with the shareholders in seeking the highest price for their shares reasonably available. As a result, I disagree with Plaintiffs' conclusion that the options somehow biased the Board in favor of an acquisition by Amgen.