EFiled: Feb 05 2016 01:41PM EST
Transaction ID 58530148
Case No. 10629-VCN

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JEFFREY L. DOPPELT and NEIL A. DOLGIN,	:	
Plaintiffs,	:	
v.	:	**C.A. No. 10629-VCN**
WINDSTREAM HOLDINGS, INC., CAROL B. ARMITAGE, SAMUEL E. BEALL, III, DENNIS E. FOSTER, FRANCIS X. FRANTZ, JEFFREY R. GARDNER, JEFFREY T. HINSON, JUDY K. JONES, WILLIAM A. MONTGOMERY, ALAN L. WELLS, ANTHONY W. THOMAS, WILLIAM LAPERCH, MICHAEL STOLTZ,	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: October 28, 2015
Date Decided: February 5, 2016

Carmella P. Keener, Esquire of Rosenthal, Monhait & Goddess, P.A., Wilmington, Delaware, and Carol S. Shahmoon, Esquire of Shahmoon & Ellisen LLP, New York, New York, Attorneys for Plaintiffs.

Robert S. Saunders, Esquire, Ronald N. Brown, III, Esquire, and Arthur R. Bookout, Esquire of Skadden, Arps, Slate, Meagher & Flom LLP, Wilmington, Delaware, Attorneys for Defendants.

NOBLE, Vice Chancellor

I. INTRODUCTION

Plaintiffs Jeffrey L. Doppelt ("Doppelt") and Neil A. Dolgin (together, the "Plaintiffs") bring this action on behalf of themselves and all other similarly situated stockholders against Windstream Holdings, Inc. ("Windstream" or the "Company") and Windstream's board of directors (the "Board," and together with Windstream, the "Defendants").[1] Plaintiffs seek monetary damages resulting from the Board's alleged breach of fiduciary duties, a declaration that the Windstream stockholders' approval at the Special Meeting held on February 20, 2015 (the "Special Meeting") of certain Board proposals was void and obtained in violation of the Board's disclosure duties, and an injunction preventing the Board from further violating such duties.[2]

[1] Two named defendants, Dennis E. Foster ("Foster," former Board Chairman) and Jeffrey R. Gardner ("Gardner," former Windstream Director, President, and Chief Executive Officer), are no longer members of the Board. They resigned on February 1, 2015, after the approval and issuance of the Proxy Statement (defined below). Am. Shareholder Class Action Compl. ("Compl." or "Complaint") ¶¶ 12, 14.

[2] *Id.* Wherefore clause.

II. BACKGROUND

Plaintiffs have been Windstream stockholders at all relevant times.[3] Windstream is a Delaware corporation headquartered in Little Rock, Arkansas, and provides, through its operating subsidiary Windstream Corporation ("Windstream Corp."), advanced network communications to enterprise business customers and broadband, voice, and video services to consumers.[4] The Company had over six hundred million shares of common stock outstanding, all traded on the NASDAQ Global Select Market,[5] and had paid dividends of $1 per share per year since 2007.[6] On more than one occasion, Gardner, Windstream's former President and Chief Executive Officer, "indicated that maintaining the dividend was a . . . key component of [Windstream's] investment thesis," and was the "best way to provide returns to [Windstream] shareholders."[7] In fact, a February 2013 press release quoted Gardner as stating that Windstream produces sufficient free cash flow not only to pay the $1 per share dividend, but also to invest in the business and reduce its debt.[8] Gardner reaffirmed his confidence in these statements even

[3] *Id.* ¶¶ 7-8.
[4] *Id.* ¶¶ 9, 22-23. Windstream was created in 2013 as a holding company for Windstream Corp. Prior to the creation of Windstream, Windstream Corp. operated without the holding company structure. *Id.* ¶ 9.
[5] *Id.* ¶ 9.
[6] *Id.* ¶ 24.
[7] *Id.* ¶ 25 (internal quotation marks omitted).
[8] *Id.* ¶ 26.

among concerns posed by a Reuters report questioning the telecom sector and the Company's ability maintain its dividend given recent share price reductions.[9]

On July 29, 2014, the Company announced a plan (the "July Plan") to spin off certain assets (the "Spin-Off"), "including fiber and copper networks and other real estate, into an independent, publicly traded real estate investment trust" (a "REIT") named Communications Sales & Leasing, Inc. ("CS&L").[10] Windstream could then lease those assets for an estimated $650 million per year.[11] The tax-free Spin-Off contemplated by the July Plan would, the Company maintained, allow for a $3.2 billion debt reduction, an increase in free cash flow, and attractive dividends provided by the REIT.[12] The July Plan, however, was never presented to Company stockholders. Instead, on December 18, 2014, Windstream announced a new plan (the "December Plan"), under which Windstream would "spin-off assets into a publicly-traded REIT, but retain 19.9% of the newly-formed REIT and distribute" the remainder to Windstream stockholders.[13] This structure, Windstream announced, was expected to reduce Company debt by $4 billion, and in order to avoid a $600-$800 million tax burden, Windstream Corp. would be converted to a limited liability company (requiring a

[9] *Id.* ¶ 27.
[10] *Id.* ¶ 29.
[11] *Id.*
[12] *Id.* Windstream stockholders were to be given shares in the REIT at a one-to-one ratio with their Windstream shares. *Id.*
[13] *Id.* ¶ 30.

charter amendment).[14] Following the transaction, Windstream would undergo a one-for-six reverse stock split to increase the post-transaction per-share trading price.[15] The December Plan announcement was preceded by the departure of Windstream's Chief Operating Officer on August 19, 2014 (effective September 1, 2014), and Foster and Gardner on December 11, 2014 (effective February 1, 2015).[16] Plaintiffs express concern regarding Gardner's departure in particular given his prior statements regarding Windstream's policy to maintain its dividend.[17]

Plaintiffs allege that the Board's proposal to effect the one-for-six reverse stock split (the "Reclassification Proposal," and together with the Proposal to Eliminate Voting Rights, the "Proposals") and the Proposal to Eliminate Voting Rights were "part and parcel" of the Spin-Off as "demonstrated by the fact that all of the reasons that management provide[d] to shareholders to convince them to

[14] *Id.* To effect the conversion, Windstream stockholders were asked to approve a Board proposal "remov[ing] valuable voting rights of Company stockholders" ("Proposal to Eliminate Voting Rights"). *Id.* ¶ 2. Specifically, the Proposal to Eliminate Voting Rights sought to remove from Windstream Corp.'s Amended and Restated Certificate of Incorporation a provision requiring that any act or transaction involving Windstream Corp. requiring a stockholder vote (other than election or removal of directors) be approved not only by Windstream Corp.'s stockholders, but also by Windstream's stockholders. *Id.* ¶ 35.

[15] *Id.* ¶ 37 (quoting Windstream's Definitive Proxy Statement mailed to Stockholders "on or about" January 9, 2015 (the "Proxy Statement"), attached as Exhibit A to Plaintiffs' Shareholder Class Action Compl. (the "Initial Complaint")).

[16] *Id.* ¶ 31.

[17] *Id.* ¶ 32.

vote for the Proposals relate to the benefits that would be provided by the Spin-Off, not to any benefit arising from the two proposals standing alone."[18] On January 9, 2015, the Board issued the Proxy Statement soliciting votes for the Reclassification Proposal and the Proposal to Eliminate Voting Rights. The vote was to be conducted at the Special Meeting.[19]

Plaintiffs, however, allege that the Proxy Statement was materially misleading in violation of the Board's disclosure duties. Specifically, Plaintiffs allege that the Proxy Statement omitted:

> pro forma financials; basic balance sheet information of CS&L or Windstream as stripped of its real estate; a discussion of funding; an explanation or plan for the retained 19.9% ownership of CS&L by Windstream; a statement about the effect of the lease payments on Windstream; a discussion of the expected dividend or trading values of either company; an identification of each company's management team.[20]

Plaintiffs further allege that the Proxy Statement should have included the fact that the Proposal to Eliminate Voting Rights was the exact proposal offered at the 2014

[18] *Id.* ¶ 40. Specifically, Plaintiffs allege that the sole purpose of the Proposal to Eliminate Voting Rights was to effect the conversion, which would not occur absent the Spin-Off, and that the sole purpose of the Reclassification Proposal was to increase the post-Spin-Off per-share trading price of the Company's stock to a "more appropriate range for a NASDAQ listed company." *Id.* ¶¶ 38-39 (quoting the Proxy Statement at 12).
[19] *Id.* ¶ 33.
[20] *Id.* ¶ 42.

annual meeting to accomplish the stated purpose of efficiency, and the fact that the proposal was not adopted at that time.[21]

Despite these alleged omissions, the Proxy Statement suggested various potential benefits of the proposed transaction, including to

> [a]llow Windstream Holdings to realize significant financial flexibility by retiring approximately $4.0 billion in debt as part of the Spin-Off and to de-lever upfront; [g]enerate additional free cash flow that can be used to fund incremental growth opportunities in our business . . .; [and] Provide Windstream Holdings with greater financial and strategic flexibility by allowing CS&L's real property business to optimize its leverage and enhance the credit profile of the Windstream Holdings business.[22]

The Proxy Statement, however, contained no information explaining how the Spin-Off would accomplish such objectives or the source of the $4 billion debt reduction and increased free cash flow.[23] Importantly, Plaintiffs allege that the Board withheld information about a planned 42% cut in the target post-transaction dividend, "while at the same time holding out an 'attractive' dividend as a reason

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[21] *Id.* ¶ 45. Defendants note, however, that though the Proposal to Eliminate Voting Rights was not approved at the prior vote, "more than 72% of the shares voted supported the Charter Amendment." Windstream Defs.' Opening Br. in Supp. of Their Mot. to Dismiss Pls.' Am. Shareholder Class Action Compl. ("Defs.' Opening Br.") 38. "The shortcoming was that the majority of shares was not obtained." Tr. of Prelim. Inj. Hr'g and Ruling of the Ct. 62.

[22] Proxy Statement at 9. A supplement to the Proxy Statement (filed with the Court as Exhibit B to the Initial Complaint) touted additional benefits of the Spin-Off but still, Plaintiffs allege, contained misleading statements and material omissions. Compl. ¶¶ 46-47.

[23] Compl. ¶ 44.

to vote for the Proposals."[24] According to Plaintiffs, the Board publicly indicated, outside the Proxy Statement, that the post-transaction dividend target would be $0.70 per current Windstream share while the actual target was in fact no more than $0.58 per current Windstream share.[25] Finally, Plaintiffs allege that the Proxy Statement's indication that the transaction would result in a $4 billion debt reduction was materially misleading because it failed to include the fact that a portion of that benefit "is derived from a planned reduction in dividends . . . and/or substitution of the debt with risky high yield debt of CS&L."[26]

Following the Special Meeting, Windstream issued a press release announcing that the Proposals were adopted and revealed that "CS&L expects to pay an annual dividend of $2.40 per share post-spinoff," and that Windstream plans to "pay an annual dividend of $0.60 per post-Spin-Off share."[27] Accounting for the conversion rate of .20 CS&L shares per Windstream share and the reverse stock split, the total post-Spin-Off dividend amounts to $0.58 per pre-transaction Windstream share.[28] Plaintiffs attribute the decrease in the Company's post-Spin-Off share price to the unexpected dividend reduction.[29]

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[24] *Id.* ¶ 47.
[25] *Id.* ¶ 48.
[26] *Id.* ¶ 49.
[27] *Id.* ¶ 51.
[28] *Id.* ¶ 52.
[29] *Id.* ¶ 53. As of July 29, 2014, the date Windstream announced the July Plan, its shares traded at $13.30. "By February 19, 2015, the day before the [Special

III. PROCEDURAL POSTURE

Doppelt filed the Initial Complaint, accompanied by a motion for a preliminary injunction, on February 9, 2015. The Court, ruling from the bench on February 19, 2015—the day before the Special Meeting—denied Plaintiffs' motion for a preliminary injunction, reasoning that much of the information sought by Plaintiffs had been disclosed in public filings available on the United States Securities and Exchange Commission's ("SEC's") website, the Board was in no way conflicted, and while approval of the Proposals would "facilitate the spinoff," it is not necessary to effect the Spin-Off.[30] On March 16, 2015, Plaintiffs filed the Complaint, to which Defendants responded with the Motion to Dismiss considered here.

IV. CONTENTIONS

Defendants argue that the Proxy Statement contained all facts material to the vote on the Reclassification Proposal and the Proposal to Eliminate Voting Rights,

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Meeting], [Windstream shares] traded at $8.67, and by February 24, 2015, [they were] down to $7.86 (a 9% drop) and [have] not recovered as of the close on March 11, 2015." *Id.*

[30] Tr. of Prelim. Inj. Hr'g and Ruling of the Ct. 59, 64; *Id.* at 65 ("The more detailed information which shareholders would need regarding a spinoff if they were being asked to approve a spinoff need not be provided to them in these circumstances. That information is not material to what they're being asked to vote upon."). Prior to the Court's ruling on Doppelt's request for a preliminary injunction, Defendants disclosed, among other information, "detailed information about anticipated debt reduction from the Spin Off, . . . [and] pro forma expected dividends." Windstream Defs.' Br. in Opp'n to Pl.'s Mot. for Prelim. Inj. 34-35.

and that, in any case, Windstream disclosed all information sought by Plaintiffs.[31] Defendants further contend that the exculpatory provision in Windstream's Certificate of Incorporation (the "Exculpation Provision"), authorized by 8 *Del. C.* § 102(b)(7), compels dismissal of Plaintiffs' claims for money damages.[32] Plaintiffs contend that Defendants breached their duty of candor by intentionally misrepresenting a planned dividend cut, a $4 billion debt reduction, and other benefits of the proposed Spin-Off transaction.[33] They also argue that the omitted information was material to the vote on the Proposals because the Spin-Off transaction would not have occurred absent stockholder approval of the Proposals.[34]

V. ANALYSIS

A. *Legal Standard*

On a motion to dismiss, the Court accepts as true all well-pleaded factual allegations in the complaint.[35] Facts are "well pleaded" if they "give the opposing party notice of the claim."[36] The Court may also draw reasonable inferences from such facts, but is not obligated to "accept every strained interpretation proposed by

[31] Defs.' Opening Br. 26, 30.
[32] *Id.* at 42.
[33] Pls.' Br. in Opp'n to Defs.' Mot. to Dismiss Pls.' Am. Shareholder Class Action Compl. ("Pls.' Answering Br.") 14, 19, 22.
[34] *Id.* at 21.
[35] *Precision Air, Inc. v. Standard Chlorine of Delaware, Inc.*, 654 A.2d 403, 406 (Del. 1995).
[36] *RBC Capital Mkts., LLC v. Educ. Loan Trust IV*, 87 A.3d 632, 639 (Del. 2014).

the plaintiff."[37] Under this standard, the Court will not dismiss a claim unless "the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances."[38]

B. *Analysis*

Defendants urge the Court to dismiss Plaintiffs' claims on three grounds: (1) the Proxy Statement contained all material facts, and in any event, all facts requested by Plaintiffs were publicly disclosed at the time of the Special Meeting, (2) the Exculpation Provision compels dismissal of Plaintiffs' claims, and (3) Plaintiffs are not entitled to post-closing equitable relief. Defendants' Motion to Dismiss also separately seeks dismissal of all claims against Windstream specifically. The Court addresses each argument in turn.

1. Defendants' Pre-Special Meeting Disclosures Do Not Justify Dismissal

Defendants argue that the Proxy Statement and certain non-Proxy Statement disclosures were sufficient to warrant dismissal of Plaintiffs' claims. First, Defendants contend that information pertaining to the Spin-Off and the dividend policy was not material to the vote on the Proposals, and that the Proxy Statement disclosed all material facts pertaining to the Proposals themselves.[39] This contention is rooted in the argument that stockholder adoption of the Proposals was

[37] *Caspian Alpha Long Credit Fund, L.P. v. GS Mezzanine P'rs 2006, L.P.*, 93 A.3d 1203, 1205 (Del. 2014).
[38] *RBC Capital Mkts.*, 87 A.3d at 639.
[39] Defs.' Opening Br. 28.

not a condition precedent to the Spin-Off, but was requested solely to avoid tax burdens, and therefore constituted an independent transaction, separate and distinct from the Spin-Off.[40] Because the Proposals were separate from the Spin-Off and no stockholder vote was required to effectuate the Spin-Off itself, Defendants conclude, information pertaining to the Spin-Off was irrelevant to the vote on the Proposals at the Special Meeting.[41]

The Court, in hearing Plaintiffs' February 19, 2015 motion for a preliminary injunction, agreed with Defendants that stockholder adoption of the Proposals was a separate transaction from the Spin-Off.[42] The Court reasoned that because no stockholder vote was required to implement the Spin-Off itself, "[t]he more detailed information which shareholders would need regarding a spinoff [requiring their vote] need not be provided."[43] This conclusion was, however, subject to a "likelihood of success on the merits" standard.[44] On a motion to dismiss, the Court considers a complaint's factual allegations under a more lenient "reasonably conceivable" standard. Given Plaintiffs' allegations that "all of the reasons that management provide[d] to shareholders to convince them to vote for the Proposals relate[d] to the benefits that would be provided by the Spin-Off, not to any benefit

[40] *Id.* at 28-29.
[41] *Id.*; Tr. of Oral Arg. Defs.' Mot. to Dismiss 6-8.
[42] Tr. of Prelim. Inj. Hr'g and Ruling of the Ct. 65.
[43] *Id.*
[44] *Wayne Cnty. Empls.' Ret. Sys. v. Corti*, 954 A.2d 319, 330 (Del. Ch. 2008).

arising from the two Proposals standing alone without the Spin-Off,"[45] and the fact that the Proxy Statement included, in a section titled "Background to the Proposals," a subsection listing the rationale for and benefits of the Spin-Off,[46] it is reasonably conceivable that the Proposals and the Spin-Off constituted a single transaction, entitling Windstream stockholders to all material information regarding the Spin-Off prior to voting on the Proposals.[47]

Defendants cite *In re Novell, Inc. Shareholder Litigation*[48] to support the proposition that the duty of candor does not extend to matters that might be related to proposals subject to a stockholder vote.[49] There, the Court dismissed the plaintiffs' disclosure claims as irrelevant to the extent they apply to a transaction not subject to stockholder approval.[50] The Novell board of directors considered whether to sell the company as a whole or to carve out and sell separately its patent portfolio.[51] The Novell board eventually sold Novell separately from the patents,

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[45] Compl. ¶ 40.
[46] Proxy Statement at 9.
[47] Though the Company executed the Spin-Off and the vote on the Proposals separately, the fact that the Board linked the two in the Proxy Statement supports a reasonable inference that the two constituted a single transaction. While trial subjects Plaintiffs to a burden greater even than that imposed at the preliminary injunction stage, the Court is unwilling, considering the alleged facts pursuant to a "reasonably conceivable" standard, to preclude Plaintiffs from taking discovery regarding the relatedness of the two transactions.
[48] 2013 WL 322560 (Del. Ch. Jan. 3, 2013).
[49] Defs.' Opening Br. 27-28.
[50] *Novell*, 2013 WL 322560, at *13.
[51] *Id.* at *2.

with the merger subject to a stockholder vote and the sale of patents not.[52] Importantly, the "Patent Purchase Agreement provided that, subject to certain conditions, [the purchase] could proceed . . . even if the Merger Agreement was terminated," and the acquiring company conditioned its purchase on the attendant patent sale.[53] In *Novell*, therefore, the merger and the patent sale each held value independent of the other, and the information the plaintiffs sought regarded a transaction separate and distinct from, though negotiated in conjunction with, the merger. Here, however, Plaintiffs allege the Proposals were of no value other than in connection with the Spin-Off, and that therefore the two constituted the same transaction.[54] For purposes of this Motion to Dismiss, therefore, *Novell* is not controlling. As such, the Court concludes that the Complaint properly alleges that the Spin-Off was relevant and material to the Windstream stockholders' vote on the Proposals.[55]

Defendants further argue that, even if the Spin-Off and Proposals constitute the same transaction, the information Plaintiffs sought was, in fact, fully

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[52] *Id.* at *13.
[53] *Id.* at *1, *3.
[54] Compl. ¶¶ 39-40.
[55] Defendants also rely on *Herd v. Major Realty Corp.*, 1990 WL 212307, at *10 n.2 (Del. Ch. Dec. 21, 1990) to support the proposition that "the duty of candor requires disclosure of all material facts only in connection with a transaction on which shareholders are asked to vote." As stated, however, disclosure regarding the Spin-Off (which does not require stockholder approval) was conceivably material to a stockholder vote on the Proposals.

disclosed.[56] Specifically, Defendants note that Windstream disclosed (1) information regarding expected post-transaction dividends in various press releases and investor presentations, (2) detailed information regarding the anticipated $4 billion debt reduction in various investor presentations and information statements, (3) all requested information regarding the Proposals, and (4) other specific financial information regarding the Spin-Off including pro forma financials of CS&L and Windstream, December updates to the Spin-Off terms, benefits flowing to Windstream stockholders from the Spin-Off, and the management team following the Spin-Off.[57]

The Court is unwilling, at least at this stage in the proceeding, to hold that such alleged disclosures sufficiently moot Plaintiffs' claims. First, while Delaware law recognizes that "[p]roxy statements need not disclose 'facts known or reasonably available to the stockholders,'"[58] misrepresentations or omissions are not "cured by reason that [they] could be uncovered by an energetic shareholder

[56] Defs.' Opening Br. 30.

[57] *Id.* at 33-42. *See In re Rural Metro Corp. Shareholders Litig.*, 2013 WL 6634009, at *7 (Del. Ch. Dec. 17, 2013) (noting that Delaware courts take judicial notice of public documents required to be and actually filed with government officials, but that "judicial notice of the same disclosures could not be used 'to establish the truth of the statements therein'" (quoting *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995)).

[58] *In re MONY Gp., Inc. S'holder Litig.*, 853 A.2d 661, 683 (Del. Ch. 2004), *as revised* (Apr. 14, 2004).

reading an SEC filing."[59] In *MONY*, the Court found no violation from the board's alleged failure to disclose divergent interests between stockholder factions because (1) the allegedly withheld information was irrelevant, and (2) the company's disclosures[60] were both publicly available and communicated to the stockholders.[61] Here, however, Defendants' alleged disclosure violations were at least conceivably material, were excluded from the Company's direct communication to its stockholders (the Proxy Statement), and involved not only omissions, but also arguably misleading statements.[62] Accepting as true the allegations in the Complaint, while Windstream may have publicly disclosed some of the allegedly withheld information prior to the Special Meeting, the Court cannot find that such

[59] *ODS Techs., L.P. v. Marshall*, 832 A.2d 1254, 1262 (Del. Ch. 2003).

[60] Including news articles describing the diverging interests, a letter describing the same filed publicly with the court, and notation of the circumstances on the company's website encouraging one faction to seek appraisal. *In re MONY Gp., Inc.*, 853 A.2d at 683.

[61] *Id.*

[62] Tr. of Prelim. Inj. Hr'g and Ruling of the Ct. 63 ("That the information is not secret or hidden from public view is important because the public, including the shareholders, has had the opportunity to review it. But posting information on a government website is not necessarily a viable substitute for having it in the written proxy."). Were the Court to consider the Spin-Off a transaction distinct from the stockholders' approval of the Proposals, placing relevant Spin-Off information on the SEC's website may have sufficiently informed the vote on the Proposals—if the stockholders desired such information, it was readily available. Where the two are considered a single transaction, however, arguing that the allegedly omitted or misrepresented information is otherwise available on a government website is not a valid substitute for including such information in the Proxy Statement sent to the stockholders.

information was "reasonably available" to the Windstream stockholders at that time.

Finally, Windstream's public disclosures contained apparent inaccuracies sufficient to potentially mislead and misinform stockholders with regard to the vote on the Proposals. For example, in its July 29 press release, Windstream reported that "[f]ollowing the spinoff, the expected annual dividend per share in the aggregate for the two companies will be $0.70 per current Windstream share."[63] Plaintiffs allege Defendants intentionally misrepresented the $0.12 discrepancy between the published and actual target post-Spin-Off dividend.[64] It is therefore at least reasonably conceivable that Plaintiffs' alleged disclosure violations were material,[65] relevant to the requested stockholder action,[66] and not adequately disclosed at the time of the Special Meeting.

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[63] Transmittal Aff. of Ronald N. Brown, III in Supp. of Windstream Defs.' Opening Br. in Supp. of Their Mot. to Dismiss Pls.' Am. Shareholder Class Action Compl. Ex. 2 at Ex. 99.1. Windstream made this representation in sundry additional disclosures. Pls.' Answering Br. 18 n.5. Defendants note, however, that certain other pre-Spin-Off disclosures accurately represented the $0.42 dividend cut. Windstream Defs.' Reply Br. in Further Supp. of Their Mot. to Dismiss Pls.' Am. Shareholder Class Action Compl. 11.

[64] Compl. ¶ 4.

[65] *Cf. Zirn v. VLI Corp.*, 621 A.2d 773, 777 (Del. 1993) ("Whether disclosures are adequate is a mixed question of law and fact.").

[66] Generally, disclosure claims "require the challenged disclosure to have a connection to the request for shareholder action." *Malone v. Brincat*, 722 A.2d 5, 12 (Del. 1998).

2. The Exculpation Provision Does Not Compel Dismissal of Plaintiffs' Claims at This Stage in the Proceeding

Defendants argue that the Exculpation Provision, contained in Windstream's Certificate of Incorporation, precludes Board liability because the "Complaint is devoid of any allegation that the Board was disloyal or acted in bad faith."[67] While the Complaint does not allege director conflicts, it does allege facts from which the Court may reasonably infer that the Board made the alleged misrepresentations knowingly and in bad faith.[68] Most notably, the Complaint alleges that the Board's omission from the Proxy Statement of the planned dividend reduction was "deliberate, as evidenced by repeated statements in Windstream's public filings . . . that pro forma annual dividends would be targeted at $0.70 per pre-Transaction Windstream share, when in actuality that number was $0.58."[69] Under these circumstances, the Court can reasonably infer knowledge or bad faith in connection with other allegedly material Proxy Statement omissions, including details regarding the touted debt reduction and generation of additional free cash

[67] Defs.' Opening Br. 44; *see also In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 360 (Del. Ch. 2008), *as revised* (June 24, 2008) ("[W]here a breach of the disclosure duty does not implicate bad faith or self-interest, both legal and equitable monetary remedies (such as rescissory damages) are barred on account of the exculpatory provision authorized by 8 *Del. C.* § 102(b)(7).").

[68] *In re Cornerstone Therapeutics Inc, S'holder Litig.*, 115 A.3d 1173, 1179-80 (Del. 2015) ("When a director is protected by an exculpatory charter provision, a plaintiff can survive a motion to dismiss by that director defendant by pleading facts supporting a rational inference that the director . . . acted in bad faith.").

[69] Compl. ¶ 4.

flow.[70] Accordingly, Defendants' Motion to Dismiss is denied to the extent it relies on the Exculpation Provision.[71]

3. Equitable Restructuring is No Longer Available

Delaware courts have "expressed a 'preference for having [disclosure claims] brought as [motions] for a preliminary injunction before the shareholder vote, as opposed to many months after."[72] Such a preference exists due to the "irreparable harm" resulting from an uninformed stockholder vote.[73] Once

[70] *Id.* ¶¶ 43-44. *See Cornerstone*, 115 A.3d at 1186-87 ("[W]hen a complaint pleads facts creating an inference that seemingly independent directors approved a conflicted transaction for improper reasons, . . . the pro-plaintiff inferences that must be drawn on a motion to dismiss counsels for resolution of that question of fact only after discovery."). Plaintiffs do not allege that the Board was in any way conflicted or improperly interested in this transaction. Tr. of Oral Arg. Defs.' Mot. to Dismiss 44; Tr. of Prelim. Inj. Hr'g and Ruling of the Ct. 59. Why an independent board would engaged in bad faith is, however, a question the Court need not address at this stage in the proceeding; Plaintiffs need only plead facts from which the Court can reasonably infer that the Board conceivably acted in bad faith.

[71] Defendants also argue that Plaintiffs' alleged damages are not "logically and reasonably related" to the alleged violation. Defs.' Opening Br. 43-44 (quoting *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 773 (Del. 2006)). The Court cannot hold, on Defendants' Motion to Dismiss, that the dividend reduction and post-closing reduction in share price were not, at least conceivably, reasonably related to Plaintiffs' alleged disclosure violations. Other than challenging the relatedness of the relief sought to the alleged violations, Defendants do not allege a failure to plead causation or quantifiable damages—only that "Plaintiffs do not allege any particularized damages related to the purported omissions," and that the "only conceivable harm is the alleged drop in the stock price." *Id.* at 44.

[72] *Transkaryotic Therapies*, 954 A.2d at 360 (alterations in original).

[73] *Id.* at 361.

"shareholders have voted without complete and accurate information[,] it is, by definition, too late to remedy the harm.[74]

Plaintiffs argue that because the Spin-Off was not a merger, and because Defendants had time to address the issues raised in the Complaint before effecting the Spin-Off, this transaction is amenable to unscrambling. As Defendants note, however, Plaintiffs moved for a preliminary injunction eleven days before the Special Meeting, which the Court denied. The fact that the Board, upon stockholder approval of the Proposals, effectuated the Spin-Off has no bearing on whether the Court is capable of undoing the transaction. Further, unraveling the Spin-Off would present substantial difficulties. First, on April 24, 2015, upon completion of the Spin-Off, Windstream distributed 120,442,150 shares of CS&L common stock to Windstream stockholders.[75] On April 27, 2015, CS&L stock began trading on the NASDAQ, and much stockholder turnover has since occurred.[76] Also as part of the Spinoff, Windstream filed an amendment to its Certificate of Incorporation, effective April 26, 2015, "whereby Windstream completed the one-for-six Reverse Stock Split."[77] Finally, Windstream Corp., the operating subsidiary, was converted to a limited liability company following the

[74] *Id.* (emphasis omitted).
[75] Defs.' Opening Br. 46; Tr. of Oral Arg. Defs.' Mot. to Dismiss 17.
[76] Defs.' Opening Br. 46; Tr. of Oral Arg. Defs.' Mot. to Dismiss 17.
[77] Defs.' Opening Br. 46.

stockholders' adoption of the Proposal to Eliminate Voting Rights.[78] In these circumstances, the Court is satisfied that Spin-Off has scrambled the proverbial eggs beyond extrication.

4. Windstream is Entitled to Dismissal

Finally, Defendants' Motion to Dismiss seeks dismissal of all claims against Windstream, arguing that a corporation itself owes its stockholders no duty and cannot be held liable for director breaches on a theory of *respondeat superior*.[79] Where rescission is no longer a remedy, and the only remaining claims are for breach of fiduciary duty, a complaint does not state a claim against a defendant corporation.[80] Because Plaintiffs are not entitled to equitable rescission, the sole remaining claim is breach of fiduciary duty. Therefore, the Motion to Dismiss is granted to the extent that it alleges claims against Windstream.

[78] Tr. of Oral Arg. Defs.' Mot. to Dismiss 17.

[79] Defs.' Opening Br. 47-48 (citing *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 1995 WL 376919, at *8 (Del. Ch. June 15, 1995) ("The corporation and, therefore, any of its agents acting on its behalf, owe no fiduciary duties to the stockholders. The directors and officers of a corporation independently owe fiduciary duties directly to the stockholders." (citation omitted)), *aff'd and remanded*, 678 A.2d 533 (Del. 1996)).

[80] *Alessi v. Beracha*, 849 A.2d 939, 950 (Del. Ch. 2004) (dismissing claims against a corporation where the complaint does not plead rescission as a remedy and "the only cognizable claim pled in the complaint is for breach of fiduciary duty").

VI. CONCLUSION

Defendants' Motion to Dismiss is granted with respect to (1) Plaintiffs' claim for equitable rescission of the Spin-Off, and (2) Plaintiffs' claims for breach of fiduciary duty against Windstream. The Motion is denied with respect to Plaintiffs' remaining claims.[81]

An implementing order will be entered.

[81] Considering the Board's pre-transaction disclosures, that approval of the Proposals was not a formal prerequisite to the Spin-Off, and that the Board was disinterested and independent, this case tests the limits of the "reasonably conceivable" standard.