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OF THE
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November 19, 2014

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Re: *Smollar v. Potarazu*
C.A. No. 10287-VCN
Date Submitted: November 7, 2014

Dear Counsel:

Plaintiff Marvin Smollar (“Smollar” or the “Plaintiff”) has filed a verified shareholder derivative complaint (the “Complaint”) on behalf of Nominal Defendant VitalSpring Technologies, Inc. (“VitalSpring” or the “Company”) against Defendant Sreedhar V. Potarazu (“Potarazu” or the “Defendant”). Potarazu is VitalSpring’s chief executive officer (“CEO”) and only director.

Plaintiff brought his action in connection with the alleged impending sale of VitalSpring (the “Buyout”). On September 19, 2014, Potarazu caused an email to

be sent to VitalSpring's shareholders, informing them that the Company had reached an agreement to be sold, pending the Federal Trade Commission's ("FTC") approval. Shareholders were provided with little further detail regarding the Buyout. The deal was projected to be completed around October 19, 2014; however, on October 20, Potarazu informed VitalSpring's shareholders that the Buyout would be delayed pending further FTC guidance.

Plaintiff questions whether a buyer for VitalSpring actually exists, or instead, Potarazu is misleading the Company's shareholders. Potarazu has allegedly misinformed the shareholders in the past and has disseminated false Company financial information. Further, he has purportedly failed to provide shareholders with financial information prepared in accordance with Generally Accepted Accounting Principles, as required by the Company's Share Purchase Agreement. VitalSpring has not held required annual meetings and Plaintiff is troubled by what he perceives as a complete lack of corporate transparency.

Plaintiff wants the Buyout enjoined until VitalSpring releases audited financial statements and holds an annual meeting of shareholders. Along with the Complaint, Plaintiff filed a Motion to Expedite (the "Motion"). Plaintiff argues

that because the transaction, which was supposed to close on or before October 19, 2014, could potentially close at any time, expedited treatment is necessary so that the Court can hear his claims before the Buyout is completed. Plaintiff asks the Court to appoint a temporary receiver to ensure that VitalSpring releases audited financial statements and holds an annual meeting.

* * *

The Court only expedites proceedings when a plaintiff makes “a showing of good cause why that is necessary.”¹ To make this showing, a plaintiff must “articulate a sufficiently colorable claim and show a sufficient possibility of a threatened irreparable injury.”² Further, the Court will deny a motion to expedite unless it can find some “imminent circumstance demanding immediate action.”³

Plaintiff requests that the Court preliminarily and permanently enjoin the Buyout. However, Plaintiff has not moved for a preliminary injunction. Further, a threatened harm must be “both imminent and non-speculative” to justify

¹ *In re SunGard Data Sys., Inc. S’Holders Litig.*, 2005 WL 1653975, at *1 (Del. Ch. July 8, 2005).

² *Id.*

³ *Casale v. Bare*, 2009 WL 296262, at *2 (Del. Ch. Jan. 27, 2009).

expedition.⁴ The Court has no detail of the transaction that Plaintiff wants enjoined; in fact, Plaintiff appears skeptical that the deal will ever be negotiated. The Buyout has not been publicly announced and there is no indication of when it might close. At this juncture, any harm posed by the Buyout is too speculative and remote to support expedition.

* * *

Plaintiff also asks the Court to appoint a temporary receiver to ensure that an annual meeting is held and appropriate financial disclosures are made to VitalSpring's shareholders before the Buyout can occur. However, Defendant has represented to the Court, and provided some concrete evidence, that VitalSpring will hold such a shareholder meeting on January 9, 2015.⁵

Further, there is an insufficient basis for the Court to infer that VitalSpring shareholders will suffer an imminent irreparable harm if Defendant does not immediately make more complete financial disclosures. Plaintiff argues that the

⁴ See Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, § 4.10[c][2], at 4-57 (2014).

⁵ Def.'s Nov. 10, 2014, Letter to the Court Ex. A, demonstrating steps taken to hold a stockholders meeting in January 2015.

shareholders cannot adequately assess the merits of the Buyout without information on the buyer, price, and process undertaken by Potarazu. However, there is no basis to conclude that the Buyout will be announced and close before shareholders receive Company information. It is premature to expedite proceedings on this basis.⁶

* * *

Additionally, the Court will not expedite based on Plaintiff's request for damages when the Complaint contains no non-conclusory allegations of insolvency or imminent financial harm to VitalSpring. Plaintiff believes that delay in this action places the ultimate ability to collect on any judgment at risk. However, he does not demonstrate that expedition would effectively protect those interests. This action may already be too late, *i.e.*, the Company's funds have already been misappropriated. Alternatively, the Company may be in no imminent danger of

⁶ VitalSpring has also apparently formed a special committee to advise Potarazu, communicate with shareholders regarding the Buyout, and investigate Plaintiff's claims.

being plundered.⁷ Plaintiff's suspicion—a not unreasonable apprehension—that Defendant is engaging in nefarious activities does not establish an imminent, irreparable, and non-speculative harm.

* * *

Therefore, Plaintiff's Motion to Expedite is denied.⁸

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap

cc: Register in Chancery-K

⁷ To return to an analogy raised during argument on this Motion, the Complaint provides no basis to conclude that the “train is leaving the station” instead of that (i) it has already left the station or (ii) the conductor has not yet made his way to the platform. If the harm that Plaintiff fears has already occurred or may only occur at some vague time in the future, then there is no justification for expedition.

⁸ Upon the development of a more specific and detailed factual basis for expediting, the Plaintiff may renew the Motion.