STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: January 13, 2014]

CROSS LEDGE INVESTMENTS LLC, on Behalf of Itself and All Others Similarly Situated, **Plaintiffs,**	:	
v.	:	**C.A. No. PB 13-5770** ***(Consolidated With)***
COSTA INC., RUSSELL A. BOSS, BERNARD V. BUONANNO, JR., DAVID G. WHALEN, JACOB C. GAFFEY, DWAIN L. HAHS, HARLAN M. KENT, ANDREW J. PARSONS, FRANCES P. PHILIP, ESSILOR INTERNATIONAL SA, and GWH ACQUISITION SUB INC., **Defendants.**	:	

JAMES HARASIN, on Behalf of Himself and All Others Similarly Situated, **Plaintiffs,**	:	
v.	:	**C.A. No. PB 13-5872** **(*Consolidated)***
COSTA INC., DAVID G. WHALEN, RUSSELL A. BOSS, BERNARD V. BUONANNO, JR., DWAIN L. HAHS, JACOB C. GAFFEY, ANDREW J. PARSONS, HARLAN M. KENT, FRANCES P. PHILIP, ESSILOR INTERNATIONAL SA, and GWH ACQUISITION SUB INC., **Defendants.**	:	

EDWARD AND LYNN MARTINS, on Behalf of Themselves and All Others Similarly Situated,	:	
Plaintiffs,	:	
	:	
v.	:	**C.A. No. PC 13-5994**
	:	***(Consolidated)***
COSTA INC., GWH ACQUISITION SUB INC., RUSSELL A. BOSS, BERNARD V. BUONANNO, JR., JACOB C. GAFFEY, DWAIN L. HAHS, HARLAN M. KENT, ANDREW J. PARSONS, FRANCES P. PHILIP, DAVID G. WHALEN,	:	
Defendants.	:	

DECISION

SILVERSTEIN, J. Before the Court for decision is a motion seeking limited expedited discovery and setting a preliminary injunction hearing date in three putative class action suits brought on behalf of similarly situated shareholders of Costa, Inc. (Costa) to enjoin the acquisition of publicly owned shares of Costa by Essilor International SA. The three suits were consolidated as of January 10, 2013. All plaintiffs will be collectively referred to as "Plaintiffs."

I

Facts and Travel

This suit stems from the November 7, 2013 vote by the Costa Board of Directors (Costa Board) to approve a Merger Agreement with GWH Acquisition Sub Inc. (GWH)/Essilor International SA (Essilor). On November 8, 2013, a press release by Costa announced the proposed acquisition through which Essilor would acquire the outstanding shares of Costa for $21.50 a share, or an enterprise value of $270 million. Before delving into the details of the process, a brief review of the players is necessary.

Costa is a Rhode Island Corporation with its offices located in Lincoln, Rhode Island. Costa, which was formerly known as A.T. Cross, Inc., is in the business of designing, manufacturing, and marketing high quality, high performance polarized sunglasses. In fact, only recently has Costa turned solely to the polarized sunglass market. In July 2013, Costa (then A.T. Cross, Inc.) announced that it was selling its Cross Accessory Division (CAD). After the sale of its CAD was completed, it later changed its name to Costa in September 2013 to align the corporation's identity with its largest brand.

All individual named defendants are directors of Costa, including David Whalen (Whalen), the President and CEO of Costa. Essilor is a French company that is the world's leading ophthalmic optics company. GWH Acquisition Sub Inc. is, directly or indirectly, a wholly owned subsidiary of Essilor.

Growth of Costa Inc.

Costa has experienced tremendous growth since the start of 2013. From January 1, 2013 until November 7, 2013 (the day before the deal was announced), Costa's stock price went from $11.03 per share to $19.98 per share. Since the fourth quarter of 2012, Costa has continually experienced growth in its net sales, earnings per share, and operating income. This growth is exemplified by the 2013 third quarter reporting figures, which represents the time period after it was announced that Costa was shedding its CAD. In that quarter, Costa announced sales increase of 26.3% for the quarter, up to $24.6 million. In response to these figures, Whalen stated that: "our confidence in our business model and its growth potential is high."

Following the announcement of the third quarter figures in 2013, two analysts set revised target prices (target price is defined as "the price that an investor hopes a stock will reach in a

certain time period" according to NASDAQ.com). D.A. Davidson set a target of $29.00 per share on October 31, 2013, and Benchmark set a target of $27.00 per share.

Negotiations with Essilor

Between the February 2013 announcement that Costa was seeking ways to divest itself of its CAD and the November 8, 2013 announcement of the proposed acquisition, seven other potential buyers and Essilor reached various levels of negotiation in regards to acquiring Costa. Proxy at 32. On July 24, 2013, the Costa Board appointed a Special Committee (Special Committee) consisting of three outside, non-management, disinterested and independent directors to "supervise the negotiations of the principal terms of any acquisition proposal involving Essilor or any other potential acquiror [sic] of A.T. Cross, to oversee management's responses to due diligence requests related to any such potential acquisition, and to make recommendations to the Board of Directors regarding any such potential acquisition." Proxy at 30. The Special Committee authorized management to retain D.A. Davidson as financial advisor on August 13, 2013. Proxy at 30.

Between August 1, 2013 and August 21, 2013, Costa employees provided responses to due diligence requests made by Essilor. On August 29, 2013, Essilor informed Whalen of their intent to make an offer of $21.00 cash per Costa share, which also included the assumption of liabilities relating to the pending sale of the CAD.[1] The sale of the CAD was completed on September 6, 2013. On September 11, 2013, Essilor again contacted Whalen to reiterate that an offer letter would be forthcoming, which contained an offer price of $21.00 per share, plus an exclusivity/no shop provision. Whalen informed Costa that in his view the price per share was

[1] While much of the communication with Essilor was through Alec Taylor, a former CEO of an Essilor U.S. subsidiary company, all communication will be referred to as with Essilor generally, unless otherwise noted.

too low and that the "no shop" provision would not be viewed favorably by the Special Committee or the Costa Board. The non-binding offer was formally presented to Costa on September 20, 2013. Proxy at 31. On September 27, 2013, a written response was sent by the Costa Board to Essilor stating that the $21.00 per share undervalued Costa. Proxy at 33. On October 3, 2013, Essilor contacted Whalen to inform Whalen that Essilor was unwilling to increase its initial offer. Essilor also asked Whalen to respond with Costa's view of an appropriate price per share, but noted that Essilor believed that $22.00 per share was unrealistic. Proxy at 33. On October 6, 2013, the Special Committee met to discuss, among other things, the status of negotiations with Essilor. As a result of the meeting, the Special Committee instructed Whalen to inform Essilor that the Special Committee would favorably view a price of $21.50 per share but was not inclined to enter into any exclusivity agreement. Whalen communicated such information to Essilor. Proxy at 33. The next day, October 7, 2013, Essilor contacted Whalen to inform Whalen that Essilor could be agreeable to the $21.50 price per share, but that Essilor sought a commitment from Costa to negotiate exclusively with Essilor. Proxy at 34.

From October 14 to November 7, 2013, legal counsel for both Costa and Essilor exchanged numerous drafts of the Merger Agreement and negotiated terms of a potential transaction. On October 16, 2013, Costa received a revised indication of interest letter from Essilor that included a price of $21.50 per share. On October 17, 2013, the Special Committee recommended entering into the revised indication of interest letter provided by Essilor and the acceptance of the exclusivity provision that was requested "in light of the lack of firm indications of interest from other potential acquirors [sic], its short duration, the success of Costa in negotiating a fiduciary exception to the exclusivity provision, and the concern that Essilor would terminate negotiations without such a provision." Proxy at 34. On October 18, 2013, the Costa

Board approved the recommendations of the Special Committee. Proxy at 35. On October 26, 2013, the exclusivity period was extended from October 31 to November 11, 2013. Proxy at 35. On November 6, 2013, Whalen was instructed by the Special Committee to ask for a higher price in light of the recently announced third quarter numbers. On November 7, 2013, Essilor informed Whalen that it would not increase its purchase price above $21.50 per share. Whalen informed the Special Committee of Essilor's unwillingness to increase its price, and the Special Committee agreed to recommend the Merger Agreement and transaction at a price of $21.50 to the Costa Board.

Later, on November 7, 2013, the Costa Board met. At this meeting, D.A. Davidson made a presentation as to their financial analysis with respect to the proposed Essilor merger at $21.50 per share. D.A. Davidson provided its opinion that $21.50 was a fair price to be paid. After consideration, the Costa Board voted to adopt resolutions approving the Merger Agreement and transaction. Press releases were issued the next day announcing the transactions. Proxy at 35-36.

The Merger Agreement contains a "no-shop" provision with certain exceptions. Merger Agreement § 6.1. Costa describes the exceptions as the ability to waive any prohibition in any existing confidentiality agreement restricting a party from privately communicating a proposal to Costa. Proxy at 34. Plaintiffs characterize the exception as a mere "fiduciary out" provision that allows Costa to negotiate only if an unsolicited proposal is made which is superior to Essilor's proposal. Additionally, Essilor was granted a "matching rights" provision which allowed Essilor a four-day window to match any terms of a superior offer. Merger Agreement § 6.1(b). Also, § 8.3(c) of the Merger Agreement subjects Costa to an $8.97 million (3.2% of the total equity value of the proposed acquisition) termination fee, should a superior proposal be

accepted. Contemporaneous with the Merger Agreement, voting agreements were entered into by certain members of the Costa Board and other shareholders whereby approximately 34% of the Costa's outstanding shares will vote in favor of the prosed acquisition by Essilor. Proxy at 56.

The $21.50 price per share represents a 19% premium on the volume weighted average share per price over the six months prior to the announcement of the transaction. Proxy at 37. When the $21.50 price is compared to the October 16, 2013 trading price (the day Essilor increased its offer), the premium is 8.7%, and when compared to the November 7, 2013 trading price (the day the Merger Agreement was approved), it represents a 7.6% premium.

Developments Since Merger Announcement

Plaintiffs filed their respective actions in November 2013. Their motion and memorandum to expedite discovery was filed on December 18, 2013. Defendants responded on January 6, 2014. The Court held a conference on January 7, 2014, and at that conference scheduled a hearing on the discovery issue for January 10, 2014. At the January 10, 2014 hearing, the Court entered an Order consolidating the three cases filed in the Rhode Island Superior Court.

Costa has set December 17, 2013 as the record date for the special meeting of shareholders to consider and vote upon the proposed transaction. It was also disclosed in Costa's Form 8-K filing on December 30, 2013 that the special meeting is scheduled for January 30, 2014.

Proxy Statements

On December 9, 2013, Costa filed a Preliminary Proxy Statement with the SEC which recommends that Costa shareholders vote in favor of the proposed acquisition. On December 20, 2013, Costa filed a Definitive Proxy Statement with the SEC, which does not differ materially from the Preliminary Proxy (all cites are to the Preliminary Proxy). The Proxy Statement, inclusive of Annex's, is over 100 pages long and includes various disclosures regarding the process by which Costa came to the vote for the Merger Agreement and, as indicated above, is the basis for much of the factual recitations herein contained.

II

Discussion

As indicated at the inception of this Decision, the instant motion seeks limited expedited discovery in connection with Plaintiffs' desire to schedule a hearing on its request that preliminary injunctive relief is necessary, prior to the shareholders' vote now scheduled for January 30, 2014. As the Court indicated during hearing on this motion, it is not extraordinary for this Court to grant expedited but targeted discovery in connection with requests for preliminary equitable relief, neither is it standard operating procedure for this Court. Clearly, here, strict adherence to the rules would obviate the benefit to be obtained by such discovery because it could not be accomplished before the scheduled shareholders meeting.

Our jurisdiction is not rich, insofar as dealing with matters of this nature; that is to say, putative public shareholder class actions involving corporate mergers and/or acquisitions. As this Court has on other occasions, it believes here it appropriate to turn to "Delaware law and its interpretation by Delaware courts . . . acknowledged in Rhode Island as appropriate sources of legal analysis and corporate jurisprudence in the absence of controlling Rhode Island precedent."

Dunn v. Shannon, 2005 WL 1125315 (R.I. Super. Ct. May 11, 2005); see also Marsh v. Billington Farms, LLC, 2006 WL 2555911 (R.I. Super. Ct. Aug. 31, 2006).

There of course can be no argument with the proposition that the courts of Delaware, and particularly its Chancery Court, is a, or the leading, jurisdiction in our country with respect to corporate litigation involving publicly traded companies and mergers, acquisitions and shareholder suits. That is not to say that this Court will slavishly follow Delaware precedent. However, here, the Court will look to Delaware precedence because each side heavily relies on Delaware case law in their respective arguments and presentations to the Court.

The Court notes that Delaware courts, in connection with requests for expedited discovery and for preliminary injunctive relief in litigation of this nature, apparently require a showing of good cause why such, expedition is necessary although at the same time expressing ". . . a certain solicitude for plaintiffs in this procedural setting and thus (following) the practice of erring on the side of more hearings rather than fewer." (See Tr. of Court's ruling by Vice Chancellor Parsons at 7, Apr. 12, 2012 in the matter of In re Midas, Inc. Shareholder Litigation.) Apparently, the same solicitude is displayed by the Chancery Court with respect to requests for expedited discovery in such matters. Despite the feeling for plaintiffs expressed above, the court in that case denied the requested relief because of plaintiff's failure to state a "colorable claim that would justify expedition."

Here, the parties seem to agree that before the Court (in the face of a contest on the matter) should allow expedited discovery, Plaintiffs must demonstrate that it has a "colorable claim." See also In re BioClinica Inc. Shareholders Litigation, 2013 WL 673736 (Court of Chancery of Del., Feb. 25, 2013).

Defendants strongly urge upon the Court, in addition to the colorable claim requirement, the additional requirement of a showing by Plaintiffs of a threatened irreparable injury. Defendants argue that because the case at bar is all about an alleged inadequate price per share, it really is about money damages and accordingly, equitable relief would be inappropriate. Thus, expedited relief is unnecessary. In keeping with the solicitude shown to plaintiffs in these matters by Delaware courts, Vice Chancellor Glasscock observed in BioClinica that, "as a practical matter the merger once accomplished will represent an irremediable change in position which if wrongful will likely generate injury difficult to compensate in damages." Based upon that observation, with which this Court concurs, the In re BioClinica court focused on whether plaintiffs have asserted a colorable claim, as will this Court in the cases at bar.

Through their memoranda, at a preliminary conference on January 7, 2013, stenographically recorded by the official court reporter, and at hearing on January 10, 2013, Plaintiffs assert and Defendants counter three so-called colorable claims. Here the colorable claims allegedly deal with disclosure violations with respect to information imparted to or which should have been imparted to shareholders via the proxy statement. Generally, information known to the board of directors should be set forth in a proxy statement if such information would likely assume actual significance to a shareholder in deciding how to vote (see generally In re BioClinica II, 2013 WL 5631233 (Court of Chancery of Del., Oct. 16, 2013). Plaintiffs raise three disclosure claims. The first of which is standstill agreements. As indicated above, Costa, in its proxy statement, did indicate that it had had some discussions or negotiations with a number of other companies with respect to merger or acquisition—further, it indicated that it had entered into a so-called standstill agreement with one of those companies. The proxy is silent as to the existence or non-existence of any other standstill agreement according to Plaintiffs.

Plaintiffs suggest that such information likely would be of significance to a shareholder in determining how to cast that shareholder's vote with respect to the merger and the share price to be paid because such agreements would have a tendency to preclude potential bids from parties to such agreements. Defendants reply that because the proxy discloses that Costa was successful in negotiating exceptions to any such impediment to a better offer (page 34 of the proxy), there is no disclosure issue which would constitute a colorable claim for the purposes of this matter. While it is true that the exception as negotiated would still preclude an unfriendly tender offer from such parties, such possibility, in light of the lack of any approach from any of the other parties with whom discussions or negotiations took place, is so unlikely as to preclude this Court from according colorable claims status with respect to this issue.

The second disclosure issue asserted by Plaintiffs is with respect to the lack of information provided through the proxy as to the nature of any compensation paid to members of the Special Committee. Plaintiffs essentially assert that information at least as to whether compensation, if any, for the members of that Special Committee was contingent upon the deal closing and, if so, the magnitude of such compensation likely would be of significance to a shareholder in determining how to cast his, her or its votes. (The Court notes that Costa's financial advisor—D.A. Davidson & Co.—in rendering its fairness opinion, so-called, did indicate that it received a fee in connection with its services and ". . . may receive additional compensation that is contingent upon the closing of the transaction." See Preliminary Proxy Statement, Annex B, p. B-2).

Defendants retort that at this junction, Plaintiffs' alleged colorable claim represents nothing more than a fishing expedition because there is nothing in the complaint which suggests any issue as to compensation to the Special Committee members. This Court, however, holds

that a suggestion that this information would likely be of some significance in determining in the mind of a shareholder how he would vote is not frivolous. Accordingly, the Court is satisfied that a colorable, non-frivolous claim has been asserted.

With respect to the third disclosure issue, Plaintiffs assert that Defendants' banker, D.A. Davidson & Co., used four foreign companies in connection with its "comparable company analysis" (see Proxy, p. 42) and that the report does not disclose the results of the specific work that D.A. Davidson did. The Court is told that usually, because of the application of generally accepted accounting standards and SEC reporting requirements as to U.S. companies, certain statistically derived analysis would appear in this area of comparable proxy statements. Here, such statistics and analysis is missing because foreign companies are not subject to the same rules. Defendants refer the Court to other statements found on the same page of the proxy statement and indicate that sufficient information is set forth so as to enable a reader to find such information, if said reader desires to use it in determining how to cast his, her or its vote. The Court is satisfied that this disclosure does adequately describe what D.A. Davidson did. While shareholders may not agree that it was appropriate or that it was done properly, as the Court reads the cases, all that is required in this section is to accurately set forth that which the financial advisor-banker here did and the Court finds that that statement is appropriate.

III

Conclusion

The Court has found one of the claims asserted by Plaintiffs to be a so-called colorable claim for the purposes of determining whether to allow expedited discovery. Accordingly, the parties are directed to meet and confer, within the next twenty-four hours, on the scope of what the Court expects will be limited and targeted discovery. The Court will conduct a telephonic

conference on Wednesday, January 15, 2013 at 11:00 a.m. to discuss any issues with respect to discovery and tentatively set a date for any further hearings herein.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Cross Ledge Investments, LLC, et al v. Costa Inc., et al
CASE NO:	C.A. No. PB 13-5770 (**Consolidated With** PB 13-5872; C.A. No. PC 13-5994)
COURT:	Providence County Superior Court
DATE DECISION FILED:	January 13, 2014
JUSTICE/MAGISTRATE:	Silverstein, J.
ATTORNEYS:	
For Plaintiff:	*See Attached List
For Defendant:	*See Attached List