IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MARVIN RAPAPORT, M.D., RICHARD GERBER and WIND POINT PARTNERS, Plaintiffs,	)	
v.	)	C. A. No. 18825
JOEL E. BERNSTEIN, M.D., Defendant.	)	

ORDER

After consideration of the submissions of the parties and the presentations of counsel at oral argument on February 13, 2002 and for the reasons set forth in the transcript of the Court's February 13, 2002 bench ruling, IT IS HEREBY ORDERED as follows:

1. Plaintiff Wind Point Partners' ("Wind Point") motion to dismiss the counterclaim asserted against it is GRANTED and the counterclaim is hereby dismissed with prejudice.

2. Plaintiff Richard Gerber's motion for partial summary judgment on liability is GRANTED in full. The Court hereby finds that defendant is liable to Richard Gerber for breach of the fiduciary duties of disclosure and care.

3. Plaintiff Marvin Rapaport's ("Rapaport") and plaintiff Wind Point's motions for partial summary judgment on liability are GRANTED IN PART AND

DENIED IN PART (without prejudice to plaintiffs' right to renew their motions) as follows:

(a). Defendant is barred by the doctrine of collateral estoppel from re-litigating the finding that he breached his fiduciary duties of disclosure and care in connection with the December 3, 1997 merger and, accordingly, the Court hereby finds that defendant breached his fiduciary duties of disclosure and care to plaintiffs Wind Point and Rapaport in connection with the December 3, 1997 merger.

(b). To the extent that the motion for partial summary judgment seeks a ruling that defendant is liable to Wind Point and Rapaport for defendant's breach of fiduciary duty, the motion for partial summary judgment is denied. Defendant is permitted to attempt to establish that the affirmative defenses plead in defendant's answer, to the extent not otherwise dismissed, preclude Wind Point and Rapaport from obtaining any recovery for defendant's breach of fiduciary duty.

4. Trial to resolve the remaining issues in this action is hereby scheduled for November 4 - 8, 2002.

Jack B. Jacobs
VICE CHANCELLOR JACOBS

Dated: March 12, 2002

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2 THE COURT: The Court is in a

3 position to make a ruling at this point.

4 Pending are cross-motions for summary

5 judgment in this action that is a sequel to Turner

6 versus Bernstein. This action was filed only because

7 the plaintiffs, Wind Point and Doctor Rapaport, were

8 carved out of the plaintiff class in the Turner case.

9 In Turner, Vice Chancellor Strine

10 held that Doctor Bernstein was liable to the

11 plaintiff class for violating his duty of disclosure

12 by failing to disclose all material facts to the

13 shareholder class in connection with the Medicis

14 merger. In this case, the plaintiffs made the

15 identical claim, and contend that they are entitled

16 to summary judgment on that claim, based upon the

17 undisputed facts of record.

18 The defendant, Doctor Bernstein,

opposes summary judgment on the ground that the undisputed facts show that the plaintiffs acquiesced in the terms of the merger. Indeed, he contends that the undisputed facts relating to acquiescence entitle him to summary judgment.

I conclude, for the following

reasons, that the plaintiffs' motion for summary judgment must be granted and that the defendant's cross-motion must be denied:

First, in Turner versus Bernstein, Vice Chancellor Strine found that the shareholders had not been furnished all material facts in connection with the merger. He found that the facts contained in the Seller's Report, and that had been furnished to Medicis, were highly material to the shareholders, and that those facts should have been -- but were not -- disclosed to the shareholders of GenDerm.

In this case, the two plaintiffs -- or at least Wind Point -- did receive some information in addition to the bare bones financial statement that had been furnished to the shareholder class in connection with the merger. But that additional information did not contain all the material facts, because certain of the facts

contained in the Seller's Report that were not disclosed to the shareholder class were not disclosed to these plaintiffs either. That conclusion -- that these plaintiffs were not furnished all material information -- is established by the Vice

Chancellor's findings and rulings in the Turner versus Bernstein case.

The defendant argues that he is entitled to relitigate the materiality ruling in Turner because that ruling did not constitute collateral estoppel. I disagree. The Turner case was settled, and a final judgment was entered approving the settlement. That judgment made final all intermediate rulings in that case. Those rulings bind the shareholder class, as even the defendant concedes. And although these plaintiffs are not bound by the Turner judgment, they are nonetheless entitled to use that judgment offensively in this case, because the materiality finding was fully and fairly litigated in Turner, it was necessary to the grant of judgment that preceded the settlement, and because the interest of these plaintiffs vis-a-vis the defendant are identical to the interests of the shareholder class in the Turner case.

The defendant argues that even if it is established that the defendant did not fully disclose all the material facts to these plaintiffs, no liability can result because these defendants had contractual arrangements that entitled them to both

inquire and obtain any material facts that they desired. The short response is that even if the plaintiffs had that information right, that right to inquire did not impose upon them an affirmative duty to seek out whatever facts the fiduciary failed to furnish them in connection with the merger, with the result that any facts that an inquiry might have revealed would be attributed (fictitiously) to the plaintiff shareholder.

I find nothing in the Marriott case that creates any such a duty of inquiry for duty of disclosure purposes. Nor does Marriott, or any other case of which I am aware, create an exception to the duty requiring full disclosure by a fiduciary of all material facts in connection with a transaction, that would deprive a shareholder, who has a contractual right to seek information, of its right to receive full disclosure by the fiduciary. Indeed, the cases in our jurisdiction hold the contrary.

As Vice Chancellor Strine held in the Turner case, that argument would turn the fiduciary duty of disclosure on its head and essentially emasculate it.

Moreover, independent of Turner, I

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find that view of the law to be sound. Therefore, Doctor Bernstein's argument that the plaintiffs had a contractual right to seek all information not otherwise disclosed to them in connection with the Medicis merger, and those shareholders' failure to exercise that right, can not be used as the basis for an acquiescence defense to a claim for breach of the fiduciary duty of disclosure.

Finally, there is no evidence, even apart from the dispositive ruling in Turner, that these plaintiffs had obtained through independent sources all material facts in connection with the merger transaction. Such a finding would be an essential basis for an acquiescence defense. The defendants have not shown that these plaintiffs did in fact obtain through independent sources all the material facts in connection with the merger transaction.

At most, all the defendant can argue

is that a contrary inference should be drawn because these plaintiffs disposed of their files, thereby spoliating relevant evidence that might have been disclosed from their files.

This argument fails for two reasons:

First, the record establishes that the files were not disposed of in circumstances where the plaintiffs knew or had reason to believe that they would need to retain the documents for later litigation. Therefore, the circumstances that normally would justify a spoliation inference are not present here.

Second, and independent of that, to allow a spoliation inference to defeat summary judgment and require a trial in these circumstances would again turn the fiduciary duty of disclosure on its head. It is the burden of the fiduciary to provide full disclosure of all material facts, and to document that it has done so. Not one document from the files of the defendant or the company shows that all the material facts were disclosed to the plaintiffs. The fact that the plaintiffs' files do not contain information that also is not contained in the defendant's files can not be used to defeat the clear inference that flows from the absence of those

documents in the defendant fiduciary's, as well as the company's, files. That clear inference -- as found by the Court in Turner v. Bernstein -- is that the plaintiffs were never furnished with all the material facts relating to the merger.

This ruling responds to the principal arguments advanced by the defendant. To the extent that the ruling does not address specifically other arguments raised by the defendants, the Court emphasizes that it has considered all those arguments and rejected them.

For these reasons, I will enter an order granting the plaintiff's motion for summary judgment and denying the defendant's cross motion for summary judgment. If counsel wish to submit a form of order, hopefully agreed to by both sides, I will enter it.

MR. BROWN: Thank you, Your Honor.

THE COURT: The Court stands in recess.

(Recess at 4:28 p.m.)

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