

may not make a recommendation to the board to consider any such options at the end of January 2008. Plaintiff's motion is novel – to our knowledge, no plaintiff has sought expedition solely to conclude litigation in advance of a potential merger transaction. There are four reasons why Plaintiff's motion should be denied:

First, the lawsuit is one seeking money damages in connection with a transaction that was consummated 2 ½ years ago. Plaintiff's delay in asserting his claim precludes him from now declaring that there is an emergency requiring a trial in three months.

Second, Plaintiff's central assertion – that the strategic review currently underway will lead to a merger that will deprive Plaintiff of derivative standing – is entirely speculative.

Third, Plaintiff has no standing to assert his claim in any event, and that claim is legally insufficient; and

Fourth, in any event, even if Plaintiff had derivative standing and lost it as a result of some to-be-negotiated merger, he would still have a remedy for the wrongdoing he alleges.

2. Any of these deficiencies would, by itself, be sufficient to defeat Plaintiff's motion to expedite. Together, they overwhelmingly mandate that the motion be denied.

ARGUMENT

3. A request to expedite proceedings is left to the sound discretion of the Court. *See Corporate Prop. Assocs. 8, L.P. v. AmerSig Graphics, Inc.*, 1993 WL 499005, at *1 (Del. Ch. Nov. 17, 1993).¹ Plaintiff has no automatic right to expedited proceedings simply

¹ Copies of unreported decisions are provided in the Compendium filed contemporaneously herewith.

because he seeks them. Indeed, this Court has repeatedly recognized that applications for preliminary injunctive relief “impos[e] upon [the] defendants and the public . . . extra and sometimes substantial costs.” *Sonet v. Plum Creek Timber Co.*, 1998 WL 749445, at *2 (Del. Ch. Sept. 23, 1998). Thus, expedited proceedings are the exception, not the rule.

4. It is the burden of the party seeking expedition to demonstrate why such a schedule is needed. *See Greenfield v. Caporella*, 1986 WL 13977, at *2 (Del. Ch. Dec. 3, 1986). In order to obtain expedited proceedings, a plaintiff must: (1) “articulate[] a sufficiently colorable claim;” and (2) demonstrate “a sufficient possibility of a threatened irreparable injury, as would justify imposing on the [non-movants] and the public the extra (and sometimes substantial) costs of an expedited preliminary injunction proceeding.” *Giammargo v. Snapple Beverage Corp.*, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994).² The alleged threatened irreparable harm must be “imminent.” *Steiner v. Puritan Bennett*, 1994 WL 1751699, at * 21 (Del. Ch. Dec. 6, 1994); *see also Madison Real Estate Immobilien-Anlagegesellschaft v. Geno One Financial Place L.P.*, 2006 WL 456779, * 2 (Del. Ch. Feb. 22, 2006) (denying expedited discovery where plaintiff “is not facing any imminent threat of irreparable injury.”)

5. Plaintiff has failed to satisfy his burden here.

² Notwithstanding dicta Plaintiff cites from *Box v. Box*, 697 A.2d 395, 399 (Del. 1997), that “Delaware courts are always receptive to expediting any type of litigation in the interest of affording justice to the parties,” Plaintiff concedes that he has the burden of showing cause for expedited proceedings. Motion, at 6. *Box*, furthermore, involved a “summary proceeding” under section 225 of the Delaware General Corporation Law, concerning a contested director election, and hence was required to be expedited. *Id.* at 398.

I. PLAINTIFF'S DELAY BARS EXPEDITION.

6. It is well-established that a litigant's delay in asserting his claim will bar expedited proceedings. *Wand Equity Portfolio II L.P. v. AMFM Internet Wand Equity Portfolio II L.P. v. AMFM Internet Holding Inc.*, 2001 WL 167720 (Del. Ch. Feb. 7, 2001); *Union Pacific Corp. v. Santa Fe Pacific Corp.*, 1995 WL 54428 (Del. Ch. Jan. 30, 1995) ("This Court has also declined to entertain applications for expedited injunctive relief where the applicant has delayed unreasonably in presenting the application."). Here, Plaintiff is seeking monetary damages as a result of a transaction that was consummated 2 ½ years ago. It is simply unfair for Plaintiff to now impose upon Defendants an aggressive schedule that will require a response to the complaint, adjudication of dispositive motions, full discovery and a trial, all within three months. Plaintiff's lassitude in pursuing his claim bars him from now obtaining expedited relief.

II. PLAINTIFF HAS FAILED TO DEMONSTRATE AN IMMINENT, NON-SPECULATIVE THREAT OF IRREPARABLE INJURY.

7. The Company's November 1, 2007 announcement discloses that the SRC will:

consider and evaluate the merits of various strategic options [including] changes to the Company's operations, actions or transactions intended to enhance the value or utilization of the Company's existing assets (including the Company's intellectual property and net operating loss carryforwards), joint ventures or strategic partnerships, selective acquisitions, dispositions or other capital transactions, and a merger, sale or other extraordinary business transaction involving the Company.

(Ex. A). The announcement notes that the SRC expects to report its "recommendations" (if any) to the Board "at the end of January 2008." The Company notes in the announcement that it does not intend to disclose further developments "unless and until the board of directors has approved a specific course of action," emphasizing that "there can be no assurance that the ongoing

exploration of strategic options will result in *any* new or different course of action” (Ex. A) (emphasis added).

8. To impose the severe burdens and disruptions of expedited proceedings, Plaintiff must demonstrate a threat of “imminent irreparable injury” – not speculation. *Steiner*, 1994 WL 1751699, at * 2 (“Expedited discovery and a hearing for preliminary injunctive relief should be ordered only when the prospect of *imminent* irreparable injury is not speculative.”).

9. Plainly, there is no “imminent” or “non-speculative” harm here, as a merger is one of innumerable possible business decisions – or none at all – the Company might eventually consider. Other possible decisions, none of which would impact derivative standing, include changes to operations, enhancing the value or utilization of the Company’s existing assets, joint ventures, strategic partnerships, selective acquisitions, dispositions of assets, spin-offs, stock repurchases or any number of other capital transactions (Ex. A). It bears repeating: “[t]he Company emphasized that there can be no assurance that the ongoing exploration of strategic options will result in any new or different course of action” (Ex. A).

10. But even *if* the SRC did return a recommendation to seek a merger partner (at the end of January 2008), the hypothetical merger would still be no more than a “distant maybe.” The board of directors would at that time need to consider the recommendation, along with whatever other recommendations the SRC might also make. Whether a merger recommendation might be adopted at all, and if so, when, is entirely impossible to determine. Of course, *if* the board at some undetermined time in the future decided to pursue a merger, there would be no assurance that the Company would be able to identify a suitable merger partner, no telling when (or if) an agreement might be reached, when (or if) i2’s shareholders would approve, or when (or if) the deal would close.

11. Plainly, at any given time, as to any company in existence, there is a “possibility” that the company might at some point merge with another. Affording Plaintiff an expedited trial based upon this remote “what if” scenario cannot possibly satisfy a showing of *imminent* irreparable harm.

12. In *In re H.F. Ahmanson & Co. v. Great Western Financial Corp.*, 1997 WL 225696, at *1 (Del. Ch. Apr. 25, 1997), Ahmanson, whose acquisition proposal had been rejected by the company in favor of a “white knight,” decided to wage a proxy contest to elect new directors to the board and sought expedited proceedings with respect to a yet-to-be scheduled shareholder meeting to consider the merger with the white knight. The Court denied expedition, finding the claim of harm to be speculative, “since no shareholders’ meeting to consider the Washington Mutual merger had been scheduled, and if and when that occurred, there would then exist a concrete, nonspeculative basis to consider any application for injunctive relief and expedited discovery.” The harm here is far more speculative than in *Ahmanson* – there, there was at least a proposed merger. Here, any merger that would eliminate Plaintiff’s standing is little more than a gleam in someone’s eye. *See also Union Pacific Corp. v. Santa Fe Pacific Corp.*, 1994 WL 586924 (Del Ch. Oct. 18, 1994) (rejecting request for expedited discovery where, “if the proposed merger agreement is approved by Santa Fe shareholders,” there will be “amply sufficient” time for the court to evaluate the merits of plaintiffs’ claims).

13. None of the cases cited by Plaintiff support expedited discovery in this case. Rather, Plaintiff’s cases involve motions for preliminary injunctions against *actual, proposed transactions*. *See Morton v. American Marketing Industries Holdings*, 1995 WL 1791090, * 2 (Del. Ch. Oct. 5, 1995) (“Plaintiff seeks a preliminary injunction against the *proposed merger*. . . .”) (emphasis added); *TCW Tech. Limited Partnership v. Intermedia*

Communications, 2000 WL 1478537, *1 (Del. Ch. Oct. 2, 2000) (plaintiff “seeks to enjoin a *proposed merger*”) (emphasis added).³ Indeed, these cases demonstrate the novelty of Plaintiff’s motion: Plaintiff does not seek any *prospective* relief (*i.e.*, an injunction) with respect to a *prospective* transaction. His Complaint seeks monetary damages arising out of a transaction that occurred more than two years ago, and that according to the Complaint was publicly-announced nearly two years before the Complaint was filed. Complaint, ¶ 62. *Cf. Cox Communications Inc. Shareholders Litig.*, 879 A.2d 604 (Del. Ch. 2005) (“The court largely denied the motion to expedite, for the obvious reason that there was as yet no transaction to enjoin.”).⁴

III. PLAINTIFF FAILS TO STATE A COLORABLE CLAIM.

14. As noted above, Plaintiff’s claims must be sufficiently “colorable” for the Court to order expedited proceedings. *See Greenfield*, 1986 WL 13977 at *2. Where pleadings are legally inadequate on their face, expedited discovery would “inflict[] an injustice upon the parties and waste[] the resources of the Court.” *In re Tri-Star Pictures Inc.*, 1989 WL 997177, at *1 (Del. Ch. Sept. 29, 1989).

15. Plaintiff’s derivative Complaint attacks i2’s sale of a wholly-owned subsidiary, Trade Services Corporation (“TSC”) in 2005 as having been made for inadequate consideration. Notably, the Complaint does *not* allege that the transaction was a product of self

³ These cases, therefore, involved expedited *hearings* on preliminary injunctions. In no case cited by the Plaintiff did the court order expedited full-blown discovery and trial, as Plaintiff now seeks.

⁴ Plaintiff’s reliance on *QVC Network Inc v. Paramount Communications Inc.*, 635 A.2d 1245 (Del. Ch. 1993) and *Hollinger Int’l v. Black*, 844 A.2d 1022 (Del. Ch. 2004), Motion at 7, is similarly unavailing. Those cases also involved injunctive relief against actual, proposed change of control transactions, where the change-of-control transaction itself was being challenged.

dealing or laden with conflicts of interest. Rather, the Complaint alleges that the Board – a majority of whose members were independent, outside directors who were not participating in the challenged transaction – approved the sale of the Company’s TSC division to a vice-president of the Company, who was not even on the Company’s Board, for an inadequate price. The Complaint faults the Director Defendants for not adequately shopping TSC (and particularly for not approaching a competitor with whom the Company had just concluded copyright infringement litigation), and for relying on a fairness opinion that was “flawed.” The Complaint concedes that:

- TSC was a “niche business” and was “unrelated to i2’s main line of business.” Complaint, ¶¶ 2, 52c. Four potential buyers of TSC were contacted before it was sold, and none of them offered a purchase price higher than what the Board ultimately approved. Complaint, ¶¶ 43, 45. (An entity called IHS allegedly offered \$4.3 million for TSC, but that offer was contingent upon the sale of additional assets that i2 did not want to sell, and IHS was “never interested in purchasing TSC by itself.” Complaint, ¶ 43d.
- One such potential buyer was Reed Elsevier – “one of the largest electronic content providers in the world” – and it made no offer to purchase TSC. Complaint, ¶ 43b. Neither did Boston Ventures, the company that had sold TSC to i2. Complaint, ¶ 45.
- The Board retained an independent investment banking firm, Sonenshine Partners, to assist with evaluating the potential sale of TSC. Complaint, ¶ 5. Sonenshine Partners prepared reports for the Board, including a fairness opinion, which the Board reviewed and relied on. *E.g.*, Complaint ¶¶ 59, 60.
- At the time of the transaction, the Board consisted of eight directors, seven of whom were outside directors when the TSC transaction was approved. Complaint, ¶¶ 8-15, 60.
- In connection with the TSC sale, the Board formed a Special Committee of six directors – all of them independent directors – to review the fairness of the TSC transaction. Complaint, ¶¶ 9-15, 59. The Special Committee reviewed information concerning the sale, including the Sonenshine Partners fairness opinion. Complaint, ¶¶ 59-60.

16. Defendants intend to move to dismiss the Complaint. As permitted by 8 *Del. C.* § 102(b)(7), i2’s Certificate of Incorporation exculpates the Board from liability for breaches of fiduciary duty, excepting claims of breach of the duty of loyalty and intentional

misconduct (*see* Restated Certificate of Incorporation of i2 Technologies, Inc., Article Ten, Ex. B). Delaware courts have held that, to the extent the plaintiff fails to plead a non-exculpated claim, the complaint may be dismissed at the pleading stage. *Emerald Partners v. Berlin*, 787 A.2d 85, 91-92 (Del. 2001) (“The Section 102(b)(7) bar may be raised on a Rule 12(b)(6) motion to dismiss.”); *McMillan v. Intercargo Corp.*, 768 A.2d 492, 501 n.40 (Del. Ch. 2000) (“The court may take judicial notice of an exculpatory charter provision in resolving a motion addressed to the pleadings.”).

17. Accordingly, “because the plaintiffs may not recover damages for a breach of the duty of care by the defendant directors,” the focus in this case is “necessarily upon whether the complaint alleges facts that, if true, would buttress a conclusion that the defendant directors breached their duty of loyalty or otherwise engaged in conduct not immunized by the exculpatory charter provision.” *McMillan*, 768 A.2d at 501.

18. At most, however, the Complaint purports to assert a claim for director negligence. There are no “particularized factual allegations” that any of i2’s directors acted in bad faith or were disloyal, or engaged in self dealing or subject to a conflict of interest in approving the sale of TSC. *In re Lukens Inc. Shareholders Litigation*, 757 A.2d 720, 729 (Del. Ch. 1999) (dismissing claim based on exculpatory provision where there was a “paucity of particularized factual allegations tending to show that a majority of the Director Defendants lacked independence”). The allegations of the Complaint – *e.g.*, that the company sought bids for TSC but allegedly not from the right sources (Complaint, ¶ 43); that the independent board of directors retained a financial advisor but its fairness opinion was “flawed,” (Complaint, ¶ 60); and that the process of finding a buyer for TSC was led by i2’s vice-president who had allegedly expressed interest in purchasing TSC (Complaint, ¶ 41) – are classic claims of negligence. Even

if one can find fault with the Board's actions, the Board members still do not face the threat of personal liability because they are protected by both the business judgment rule and the Company's 102(b)(7) charter provision. Under established Delaware law, presuit demand is not excused, and Plaintiff thus does not have standing to pursue its derivative claims. *E.g.*, *Desimone v. Barrows*, 924 A.2d 908 (Del. Ch. 2007); *Guttman v. Huang*, 823 A.2d 492, 502-04 (Del. Ch. 2003). Since Plaintiff does not have standing to pursue this action, he cannot complain that a potential merger would cause him to lose derivative standing.

IV. THE HYPOTHETICAL MERGER WOULD CAUSE NO INJURY TO THE PLAINTIFF – LET ALONE IRREPARABLE INJURY.

19. Plaintiff posits that, upon completion of the yet-to-be-even announced, let alone pursued, merger, his standing to pursue derivative claims will “evaporate.” Motion, at 2. As noted above, Plaintiff already lacks standing to pursue his derivative claims by failing to comply with the requirements of Rule 23.1, among other reasons.

20. In any event, even if Plaintiff did have standing to bring this action, his loss of standing would not constitute “irreparable injury.” The purported “injuries” in this derivative action are to the Company – not Plaintiff – and if a merger were completed, the *claims would survive*, belonging to the surviving entity. *See Ash v. McCall*, 2000 WL 1370341, at *12 (Del. Ch. Sept. 15, 2000) (rejecting argument that a merger extinguished a derivative claim, as opposed “plaintiff’s standing to assert derivative claims”); *Lewis v. Anderson*, 477 A.2d 1040, 1050-51 (Del. 1984) (“All such assets and liabilities clearly passed by virtue of the merger under § 259 to New Conoco. Such choses in action necessarily included the claim asserted by plaintiff in this action.”)

21. To the extent Plaintiff complains that he will suffer a loss through an undervaluation of his i2 shares, he may pursue appraisal remedies. *See Porter v. Texas*

Commerce Bankshares, Inc., 1989 WL 120358 at *5 (Del. Ch. Oct. 12, 1989). As this Court explained in *Porter*, if i2's assets include a derivative claim, the claim may be valued in an appraisal action:

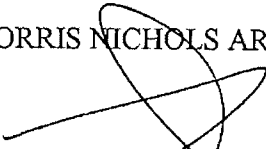
A merger in which a corporation's shareholders received stock in another corporation, other securities or cash, will always result in termination of the right of the pre-merger shareholders to sue on behalf of the company. **That fact does not mean that either those shareholders or the company may be injured as a consequence. If the company has substantial and valuable derivative claims, they, like any asset of the company, may be valued in an appraisal. Thus, shareholders are not, in theory, exposed to risk that they will be injured** by the timing of a merger with respect to the possible filing of derivative claims. Nor from the company's point of view does the occurrence of the merger affect the ability of the surviving or resulting corporation to bring suit against those who previously had been directors of a constituent corporation.

Id. (emphasis added); *see also Nagy v. Bistricher*, 770 A.2d 42, 55 n.23 (Del. Ch. 2000) (citing cases holding that fiduciary duty claims can be valued in an appraisal action).

CONCLUSION

In sum, there is no basis to order expedited proceedings, and a March trial, in this damages case challenging a 2 ½ year-old transaction. As shown above, Plaintiff's claim that he may lose standing is wholly speculative, and, in any event, Plaintiff's loss of standing does not give rise to an "irreparable injury." As important, Defendants' anticipated motion to dismiss will demonstrate that the Plaintiff has plainly failed to plead any non-exculpated claim, has not overcome the business judgment rule, nor has he satisfied Rule 23.1. For each of these reasons, Plaintiff's motion to expedite should be denied.

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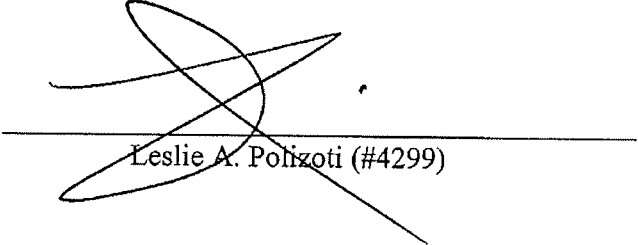
December 12, 2007

CERTIFICATE OF SERVICE

I certify that I caused to be served a copy of the OPPOSITION TO DERIVATIVE PLAINTIFF'S MOTION FOR EXPEDITED TRIAL upon the following in the manner indicated, on December 12, 2007:

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