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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

16 DEAN DRULIAS, on Behalf of Himself and)
17 All Others Similarly Situated,)

18 Plaintiff,)

19 v.)

20 1st CENTURY BANCSHARES, INC.,)
21 ALAN I. ROTHENBERG, WILLIAM W.)
22 BRIEN, M.D., DAVE BROOKES, JASON P.)
23 DINAPOLI, ERIC M. GEORGE, ALAN D.)
24 LEVY, BARRY D. PRESSMAN, ROBERT)
A. MOORE, LEWIS N. WOLFF, NADINE)
WATT, and STANLEY R. ZAX,)

25 Defendants.)

CASE NO. 16CV294673

CLASS ACTION

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S APPLICATION FOR A
PRELIMINARY INJUNCTION**

DATE: June 17, 2016

TIME: 2:00 p.m.

JUDGE: Honorable Peter H. Kirwan

DEPT: 1C

Date Action Filed: May 3, 2016

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1 Defendants 1st Century Bancshares, Inc. (“1st Century”), Alan I. Rothenberg, William W. Brien,
2 M.D., Dave Brooks, Jason P. DiNapoli, Eric M. George, Alan D. Levy, Barry D. Pressman, Robert A.
3 Moore, Lewis N. Wolff, Nadine Watt, and Stanley R. Zax respectfully submit this Opposition to
4 Plaintiff’s Application for a Preliminary Injunction.

5 **PRELIMINARY STATEMENT**

6 In March, Midland Financial Co. (“Midland”) agreed to acquire 1st Century for \$11.22 per share
7 – a premium of 36.3 percent over 1st Century’s closing stock price immediately before the proposed
8 transaction was announced. Plaintiff, a purported 1st Century shareholder, now seeks to hold the
9 transaction hostage, and prevent shareholders from voting on the merger, for no good reason. In seeking
10 to enjoin the proposed transaction, Plaintiff threatens the right of the shareholders he purports to
11 represent to realize a substantial premium on their investment, based on hollow complaints about
12 disclosure – complaints that have not been made by any other shareholder, including investors with far
13 more at stake. While this type of litigation is now filed in approximately 94% of all public company
14 mergers, this case represents an extreme example of the frivolity of such challenges.

15 At the outset, Plaintiff’s claims cannot be maintained in California. 1st Century’s bylaws require
16 that all claims relating to the types of breaches of duty alleged here must be brought in the Delaware
17 Court of Chancery. Plaintiff flouted this requirement, presumably because Plaintiff has been sanctioned
18 by the Delaware Chancery Court for prior litigation misconduct.¹

19 Plaintiff’s claims also fail on the merits no matter where they are litigated. The alleged
20 omissions from 1st Century’s 216-page Proxy Statement range from the immaterial to the nonsensical:

21 *First*, Plaintiff claims that 1st Century should have disclosed various details about the future
22 employment of certain 1st Century executives and the value of shares held by the 1st Century directors.
23 The Proxy Statement includes extensive disclosure on the negotiations of the executive’s employment
24 agreements, including a description of the compensation they are due to receive – disclosure that is

25 ¹ In *In re SS & C Techs, Inc. S’holders Litig.*, 948 A.2d 1140, 1144-45 (Del. Ch. 2008), the Court
26 found that Drulias and an associate had “made a number of false statements in documents filed
27 with [the] court,” and awarded sanctions to Defendants’ counsel. *Id.* at 1145, 1152. While the
28 Court declined to bar Drulias from serving as a representative plaintiff in future cases, it found
that there were “very disturbing questions” that “may well disqualify [Drulias and certain entities
he controls] from serving in a representative capacity in the future.” *Id.* at 1151.

1 quoted in the Motion. (Mot. at 5-6.) The Proxy Statement likewise discloses the amount and value of
2 1st Century restricted shares held by each executive officer and by non-employee directors as a group.

3 *Second*, while these types of strike suits often center on criticism of the disclosures regarding the
4 analysis of the seller's financial advisor, Plaintiff can muster only three empty critiques of 1st Century's
5 financial advisor, Sandler O'Neill + Partners ("Sandler"). Plaintiff's demand that 1st Century disclose
6 the fees "Sandler has an expectation" of receiving from Midland at some point in the future requires 1st
7 Century and Midland somehow to predict the work Sandler might perform for Midland at a later date.
8 Delaware law does not require this type of speculation. The Proxy Statement discloses the fees that
9 Sandler has received from Midland in the past and nothing more is required. Plaintiff next complains
10 that the precise amount of the fee owed to Sandler in connection with the proposed transaction must be
11 disclosed, even though the anticipated fee is based on a fixed percentage of the purchase price which is
12 disclosed in the Proxy Statement, allowing any shareholder to easily calculate the total fee. Finally,
13 Plaintiff's complaint that the Proxy Statement does not disclose the "value of the positions Sandler held
14 in the securities of Midland or its affiliates at relevant times" makes no sense because Midland is a
15 privately-held company. Accordingly, Sandler does not, and could not, hold any securities in Midland.

16 *Third*, Plaintiff's complaints about the disclosures regarding the sales process are not supported
17 by Delaware law. The Proxy Statement includes sixteen single-spaced pages describing the process
18 followed by 1st Century's Board and the Special Transaction Committee in considering the proposed
19 transaction. The details provided are far in excess of what Delaware law requires, and Plaintiff cites no
20 authority that could possibly support his claims. Rather, the cases cited in the Motion uniformly
21 demonstrate that 1st Century's disclosure is in full compliance with Delaware law. Plaintiff cites no
22 authority that requires 1st Century to disclose anything more about the standstill provisions included in
23 the confidentiality agreements with seven bidders beyond what is in the Proxy Statement. Nor is 1st
24 Century required to disclose the qualifications of the members of the Special Transaction Committee
25 since relevant biographical information about these directors is already publicly available.

26 Finally, whatever his gripes may be with the standstill agreements 1st Century entered into, there
27 is no authority to support Plaintiff's request for an injunction until those other standstill agreements are
28 waived and there is not a stitch of evidence that their waiver would impact the June 20 shareholder vote.

1 Even if Plaintiff's claims were viable – and they are not – Plaintiff cannot demonstrate that he
2 would be irreparably harmed absent an injunction. Plaintiff admits that he can pursue claims for
3 damages or rescission after the transaction closes (assuming they survive dismissal, which they will not).
4 And, Plaintiff may seek appraisal should he wish to have an independent assessment of the substantial,
5 36% premium Midland agreed to pay. Balancing the equities, the Court should decline to endorse
6 Plaintiff's decision to file a baseless complaint in the wrong forum in the hopes of extracting a merger
7 tax from 1st Century. The rights of all the other shareholders who have not challenged the transaction
8 should not be impeded, and the operations of 1st Century should not be disrupted, by delaying a
9 transaction that – if approved – would provide a significant premium to 1st Century's shareholders.

10 BACKGROUND

11 **A. The Merger.**

12 1st Century is a community bank incorporated in Delaware and headquartered in Los Angeles.
13 None of its directors reside in Santa Clara County. On March 10, 2016, 1st Century and Midland
14 announced that they had entered into a merger agreement whereby Midland would acquire 1st Century
15 for \$11.22 per share. (Oswell Decl. Ex. A² (Press release, as filed publicly with 1st Century Form 14A
16 (Mar. 11, 2016)).) 1st Century shareholders stand to receive an approximately 36.3% premium over the
17 closing price of 1st Century's stock on March 10, 2016, and an approximately 37.4% premium over 1st
18 Century's volume-weighted average trading price for the 30-day trading period ending March 10, 2016.
19 (Ex. B (Definitive Proxy Statement) at 1, 11, 18, 98.)

20 On April 8, 2016, 1st Century filed with the SEC a Preliminary Proxy Statement, and on May 18,
21 2016, filed a Definitive Proxy Statement (the "Proxy Statement"). The 216-page Proxy Statement
22 attaches as exhibits the Merger Agreement and Sandler's fairness opinion of Sandler. (*Id.* at Annex A,
23 Annex D.) The Proxy Statement includes over sixteen, single-spaced pages describing the "Background
24 of the Merger" and the factors the 1st Century Board considered in recommending that shareholders
25 approve the proposed merger. (*Id.* at 34-49.) The Proxy Statement discusses in detail Sander's
26 solicitation of 15 potential bidders, and the process Sandler followed with the potential bidders,

27 _____
28 ² "Ex. ___" refers to exhibits to the accompanying Declaration of Laura Kabler Oswell (the
"Oswell Decl.").

1 including Midland. (*Id.* at 35.) The Proxy Statement further describes the process followed by the
2 company, including the appointment of a Special Transaction Committee comprised of disinterested
3 directors to evaluate potential transactions. (*Id.* at 36-37.) The Proxy Statement further discloses that
4 Midland’s offer – which provided the most certain total return to 1st Century shareholders – was
5 conditioned on the continued employment of particular 1st Century executives, and describes how that
6 condition led to the negotiation of employment agreements with those executives and others whom
7 Midland later insisted must remain employed by 1st Century after the acquisition. (*Id.* at 36-45.)

8 The Proxy Statement details Sandler’s fairness opinion, including an additional eight-page
9 description of Sandler’s financial analysis and the fairness opinion itself. (*Id.* at 49-56, Annex D.)

10 The shareholder vote on the proposed merger is scheduled for Monday, June 20, 2016. (Mot.
11 at 1). Although Plaintiff has been on notice of the alleged disclosure deficiencies that are the subject of
12 the Motion since the preliminary proxy was filed on April 8, Plaintiff waited more than six weeks to file
13 the Motion, and noticed the injunction hearing for the last possible day before the vote.

14 **B. 1st Century’s Forum By-Law Provision.**

15 1st Century’s certificate of incorporation provides that “the Board of Directors shall have the
16 power to adopt, alter, amend or repeal the Bylaws of the Corporation.” (Ex. C (Certificate of
17 Incorporation, filed Jan. 11, 2008) at Art. 8.1.) Pursuant to that authority, 1st Century’s Board adopted a
18 bylaw designating the Court of Chancery of the State of Delaware as the exclusive forum for the
19 resolution of, among other things, fiduciary duty claims and claims governed by the internal affairs
20 doctrine. (Ex. D (Bylaws, filed Mar. 11, 2016) at Art. VII, § 5.)

21 **C. Litigation Relating to the Merger.**

22 Plaintiff waited over twelve weeks after 1st Century announced the proposed merger to file this
23 case, despite the forum bylaw and despite the fact that neither Plaintiff nor this case has any connection
24 with Santa Clara County. No other cases have been filed challenging the merger. Plaintiff has provided
25 no information regarding his supposed shareholdings in 1st Century.

26 **ARGUMENT**

27 “In deciding whether to issue a preliminary injunction, a trial court must evaluate two
28 interrelated factors: (i) the likelihood that the party seeking the injunction will ultimately prevail on the

1 merits of his claim, and (ii) the balance of harm presented, *i.e.*, the comparative consequences of the
2 issuance and nonissuance of the injunction.” *Common Cause v. Bd. of Supervisors*, 49 Cal. 3d 432, 441-
3 42 (1989). If Plaintiff cannot establish that there is at least some possibility that he will ultimately
4 prevail on the merits – regardless of the balance of interim harm – an injunction may not issue. *Butt v.*
5 *State of Cal.*, 4 Cal. 4th 668, 678 (1992). Likewise, an injunction may not issue if Plaintiff cannot
6 demonstrate irreparable injury. *Loder v. City of Glendale*, 216 Cal. App. 3d 777, 782 (1989), modified
7 (Jan. 4, 1990). “The power to issue preliminary injunctions is an extraordinary one and should be
8 exercised with great caution and only where it appears that sufficient cause for hasty action exists.” *W.*
9 *v. Lind*, 186 Cal. App. 2d 563, 565 (1960).

10 **I. PLAINTIFF CANNOT SHOW ANY POSSIBILITY HE WILL SUCCEED ON THE**
11 **MERITS OF HIS BASELESS DISCLOSURE CLAIMS**

12 **A. This Case Was Filed in the Wrong Forum and the Wrong Venue.**

13 Plaintiff cannot prevail on the merits of his claims because he may not litigate them in this Court.
14 1st Century’s forum selection bylaw requires Plaintiff to file any claims for breach of fiduciary duty
15 related to the proposed transaction in Delaware.³ (Ex. D at Art. VII, § 5.) This bylaw “is presumed
16 valid and will be enforced unless the plaintiff shows that enforcement of the clause would be
17 unreasonable under the circumstances of the case.” *Intershop Commc’ns v. Sup. Ct.*, 104 Cal. App. 4th
18 191, 198 (2002).

19 Under Delaware law, forum selection bylaws duly adopted by a board are valid.⁴ Del. Code
20 Ann. tit. 8, § 115 (expressly authorizing forum bylaws in cases, like this one, which involve claims of

21 ³ Santa Clara County is also not the proper venue for this litigation. 1st Century is located in Los
22 Angeles, where all of its directors reside and where all relevant board meetings were held, and
23 where the shareholder vote will take place. Plaintiff’s venue allegations are incorrect. (*Compare*
24 *Compl. ¶ 6 with DiNapoli Decl. ¶¶ 4-5 and Wolff Decl. ¶¶ 3-4; Cal. Civ. Code. § 395(a)* (“the
25 superior court in the county where the defendants or some of them reside at the commencement
26 of the action is the proper court for the trial of the action”); *see also Walker v. Wells Fargo Bank*
27 *& Union Trust Co.*, 24 Cal. App. 2d 220, 222 (1937) (venue improper where neither principal
28 place of business of corporation nor residence of joined defendants); *Cal. Prac. Guide Civ. Pro.*
Before Trial Ch. 3-D (“If a corporation is joined as a codefendant, venue is proper either in the
county where the individual defendant resides or at the corporation’s headquarters.”)).

29 ⁴ Delaware law governs the validity of the bylaw because 1st Century is a Delaware corporation.
California courts look to the law of the state of incorporation in deciding matters that involve a
corporation’s internal governance, including the validity of the forum selection bylaw. *See*
Lidow v. Super. Ct., 206 Cal. App. 4th 351, 359 (2012); *Garfield v. RealD Inc.*, No. BC608309,

1 breach of fiduciary duty by directors); *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d
2 934, 955-56 (Del. Ch. 2013) (holding a forum-selection bylaw valid under Delaware law and should be
3 enforced “in the same way [a court] enforces any other forum selection clause”); *United Techs. Corp. v.*
4 *Treppel*, 109 A.3d 553, 561 & n.41 (Del. 2014) (affirming *Chevron*). Because 1st Century’s certificate
5 of incorporation gives the Board the authority to enact the company’s bylaws (*see* Ex. C at Art. 8.1.),
6 1st Century’s “[s]tockholders are on notice that, as to those subjects that are subject of regulation by
7 bylaw under 8 Del. C. § 109(b), the board itself may act unilaterally to adopt bylaws addressing those
8 subjects.”⁵ *Chevron*, 73 A.3d at 955-56. It makes no difference that the forum bylaw was adopted
9 alongside the challenged merger. *See Roberts v. TriQuint Semiconductors, Inc.*, 358 Or. 413, 416
10 (2015); *Oplink*, No. RG14-750111, slip op. at 2-3; *RealD*, No. BC608309, slip op. at 1-2; *see also In re*
11 *CytRX Corp. Stockholder Derivative Litig.*, 2015 WL 9871275, at *5 (C.D. Cal. Oct. 30, 2015) (“the
12 timing of a forum-selection clause’s adoption does not dictate the clause’s validity.”); *City of*
13 *Providence v. First Citizens BancShares*, 99 A.3d 229, 241 (Del. Ch. 2014). California courts similarly
14 recognize the validity forum selection clauses. *See Groen*, 2014 WL 3405752, at *1-2 (granting
15 dismissal based on forum selection clause and holding “Plaintiffs [were] contractually obligated to bring
16 their [fiduciary duty] claims against Defendants only in the Delaware [Chancery] Court.”); *Brewerton*,
17 No. RG14-750111, slip op. at 4 (same); *Garfield*, No. BC608309, slip op. at 1-2 (same).

18 Plaintiff cites no authority that would allow this Court to ignore 1st Century’s forum bylaw.
19 Indeed, enforcement of the bylaw would be required even under the more liberal standard applicable to
20 contractual forum selection clauses, under which a Plaintiff has the “heavy burden” of “demonstrat[ing]
21 that enforcement of the clause would be unreasonable under the circumstances.” *Lu v. Dryclean-U.S.A.*
22 *of Cal., Inc.*, 11 Cal. App. 4th 1490, 1493 (1992). Enforcement of a forum-selection provision is

23 slip op. at 1 (Cal. Super. Ct. Feb. 29, 2016) (Ex. E) (same); *Brewerton v. Oplink Comme’ns Inc.*,
24 No. RG14-750111, slip op. at 4 (Cal. Super. Ct. Dec. 14, 2014) (Ex. F) (same); *Groen v.*
25 *Safeway, Inc.*, No. RG14-716651, 2014 WL 3405752, at *2 (Cal. Super. Ct. May 14, 2014) (Ex.
26 G) (same).

26 ⁵ 1st Century’s forum bylaw was enacted pursuant to this clear grant of authority by designating
27 the Delaware Court of Chancery as “the sole and exclusive forum” for, like this case, “any action
28 asserting a claim of breach of a fiduciary duty owed by any director, officer . . . or stockholder of
the Corporation to the Corporation or the Corporation’s stockholders” or “any action asserting a
claim governed by the internal affairs doctrine.” (Ex. D at Art. VII, § 5; *see also* Compl. ¶7.)

1 “unreasonable” only if the “forum selected would be unavailable or unable to accomplish substantial
2 justice,” or if the choice of forum lacks “some rational basis in light of the facts underlying the
3 transaction.” *Cal-State Bus. Prods. & Servs., Inc. v. Ricoh*, 12 Cal. App. 4th 1666, 1679 (1993). None
4 of these exceptions apply. The Delaware Court of Chancery is available to assess Plaintiff’s claims and
5 able to accomplish substantial justice. And there is an obvious “rational basis” for 1st Century’s
6 selection of the Delaware forum for the litigation of fiduciary duty claims: not only does Delaware law
7 govern such claims – demonstrated by Plaintiff’s near-uniform citation to Delaware authorities – but
8 under both California and Delaware choice-of-law principles, “[t]he internal affairs doctrine requires
9 that the law of the state of incorporation should determine issues relating to internal corporate affairs.”
10 *McDermott Inc. v. Lewis*, 531 A.2d 206, 215 (Del. 1987); *Lidow*, 206 Cal. App. 4th at 359.

11 **B. Plaintiff’s Disclosure Claims Are Meritless.**

12 Plaintiff’s disclosure claims demonstrate perfectly the principle that “it is always possible to
13 request just one more piece of information.” *In re Cogent, Inc. S’holder Litig.*, 7 A.3d 487, 551 (Del.
14 Ch. 2010). Such nitpicking does not give rise to a cognizable disclosure claim. The obligation to
15 disclose “is a judicially imposed fiduciary duty that serves the ultimate goal of informed stockholder
16 decision making,” and is not “a fullblown disclosure regime like the one that exists under federal law.”
17 *In re Micromet, Inc. S’holders Litig.*, 2012 WL 681785, at *10 (Del. Ch. Feb. 29, 2012). To
18 demonstrate a breach of a fiduciary duty based on allegedly deficient disclosure, Plaintiff must show that
19 there is “a substantial likelihood that, under all the circumstances, the omitted fact would have assumed
20 actual significance in the deliberations of the reasonable shareholder” when deciding whether to vote for
21 the proposed transaction. *Next Level Commc’ns, Inc. v. Motorola, Inc.*, 834 A.2d 828, 848 (Del. Ch.
22 2003). A fact is not material “simply because [it] might be helpful.” *Skeen v. Jo-Ann Stores, Inc.*, 750
23 A.2d 1170, 1174 (Del. 2000). Rather, the fact must “significantly alter the total mix of information”
24 available to the voting shareholders. *Id.*

25 Plaintiff does not claim that Defendants have failed to disclose any material of information
26 relating to the proposed transaction. Plaintiff instead seeks certain details about subjects thoroughly
27 disclosed in the Proxy Statement, including: future employment of 1st Century directors with Midland;
28 directors’ holdings in 1st Century securities; compensation and business relationships with Sandler; and

1 the process used to assemble the Special Transaction Committee. These alleged omissions – either
2 alone or in combination – are insufficient to support any claim for breach of fiduciary duty, and Plaintiff
3 offers no authority that would support a contrary conclusion.

4 1. Claims Relating to Disclosures About Director and Officer Economic Interests.

5 The Proxy Statement discloses that “executive officers and directors of 1st Century have certain
6 interests in the merger that are different from, or in addition to, the interests of 1st Century stockholders
7 generally,” and describes each of the potential conflicts. (*See, e.g.*, Ex. B at 59; *see also id.* at 48.) 1st
8 Century disclosed that, in submitting its preliminary indication of interest on Dec. 16, 2015, Midland
9 told 1st Century that it would require that certain key employees, including Messrs. Rothenberg and
10 DiNapoli, enter into employment agreements with Midland. (*Id.* at 36.) The Proxy Statement details the
11 evolution of this condition and the process by which the continued employment arrangements were
12 negotiated. (*Id.* at 36-45.) The Proxy Statement further discloses the terms of those employment
13 agreements and the amount of compensation that Messrs. Rothenberg and DiNapoli are expected to
14 receive in connection with those agreements. (*Id.* at 59-64.) 1st Century further disclosed for each
15 executive officer, and for the non-employee directors as a group, the amount and value of 1st Century
16 restricted shares that will vest upon the closing. (*Id.* at 59-60.)

17 Nevertheless, Plaintiff argues that the Proxy Statement is deficient because it does not disclose
18 (1) the specific date on which Midland first indicated its intent to retain Messrs. Rothenberg and
19 DiNapoli, (2) the “positions/roles” that Messrs. Rothenberg and DiNapoli will have at MidFirst, and
20 (3) the value of the cash payment each 1st Century director will receive for his or her unvested restricted
21 shares that will vest. (Mot. at 8-9.) Plaintiff offers no plausible explanation for why these details must
22 be disclosed given the already extensive disclosure found in the Proxy Statement. (*See* Mot. at 8-9.)
23 The cases Plaintiff cites do not support the addition of such details. Those cases criticize the total
24 absence of disclosures concerning potential economic motivations and/or conflicts of interest—the
25 opposite of the disclosures found in the Proxy Statement. *See In re Lear Corp. S’holder Litig.*, 926 A.2d
26 94, 114 (Del. Ch. 2007) (failure to disclose that CEO approached the Board for advice concerning
27 conflict between desire to maximize his “retirement nut” (*i.e.*, cash out) and continue as CEO);
28 *Lichtenberg v. Besicorp Group, Inc.*, 43 F. Supp. 2d 376, 388 (S.D.N.Y. 1999) (one-sentence suggestion

1 that officers “may benefit” inadequate to disclose relief from more than \$45.5 million dollars of
2 liability); *Eisenberg v. Chi. Milwaukee Corp.*, 537 A.2d 1051, 1058 (Del. Ch. 1987) (“The Preferred
3 shareholders were entitled to know that certain of their fiduciaries had a self-interest that was arguably
4 in conflict with their own”); *Vernazza v. SEC*, 327 F.3d 851, 859 (9th Cir. 2003) (materially false
5 statements that partners “claimed not to recommend securities in which they had an ownership or sales
6 interest, not to receive economic benefits in connection with giving advice to clients, and not to
7 recommend securities in which they had a financial interest”). No further disclosure is required here.

8 2. Claims Relating to Disclosures About 1st Century’s Financial Advisor.

9 The Proxy Statement discloses that 1st Century paid Sandler a fee for providing the Fairness
10 Opinion, a portion of which is contingent on the merger’s closing. (Ex. B at 56.) The Proxy Statement
11 further discloses the scope of any potential conflicts unrelated to fees, and explains that Sandler has
12 provided investment banking services to Midland in the past; may provide, and receive compensation
13 for, investment banking services to Midland in the future; and is in theory capable of trading in
14 Midland’s or its affiliate’s securities or purchasing securities from or selling securities to Midland as
15 part of its broker-dealer business. (*Id.*) Nevertheless, Plaintiff argues that the Proxy Statement is
16 insufficient because it does not include (1) the *dollar amount* of the fee payable to Sandler by 1st
17 Century, (2) the precise amount of fees that Sandler has an “expectation” of receiving from Midland in
18 the future, including during pendency of the merger, and (3) the precise amount and value of the
19 securities Sandler holds in Midland or its affiliates. (Mot. at 9.) Plaintiff’s claims are untenable.

20 *First*, all of the information necessary to calculate the dollar amount of Sandler’s fee appears in
21 the Proxy Statement, which discloses that “Sandler will receive a fee in an amount equal to 1.375% of
22 the aggregate purchase price,” and that the fee will “become due and payable to Sandler upon the
23 closing.” (Ex. B at 56.) The \$250,000 1st Century already paid to Sandler for rendering the fairness
24 opinion will be credited toward the fee. (*Id.*) Any shareholder can calculate the fee using basic math.

25 *Second*, Sandler cannot know, and hence 1st Century cannot disclose, the precise amount of fees
26 that Sandler might receive from Midland at some undetermined point in the future. *See Openwave Sys.*
27 *Inc. v. Harbinger Capital Partners Master Fund I, Ltd.*, 924 A.2d 228, 245 (Del. Ch. 2007) (“[T]he
28 proxy material was not false or misleading for failing to disclose information about the company’s

1 dealings with McGowan. That situation was far too unsettled and uncertain to require disclosure under
2 Delaware law.”) And, Sandler does not and could not hold securities in Midland because Midland is not
3 a publicly-traded entity and does not otherwise have securities available to be held by investors. All that
4 is required is that 1st Century disclose any potential conflicts (*e.g.*, that Sandler may seek to do work for
5 Midland in the future),⁶ which it has done. (*See, e.g.*, Ex. B at 56.)

6 3. Claims Relating to Standstill Provisions.

7 The Proxy Statement discloses that seven potential bidders entered into confidentiality
8 agreements and that “[e]ach of the these seven confidentiality agreements include a one year standstill
9 provision pursuant to which the applicable counterparty is prohibited from taking certain actions with
10 respect to 1st Century during such period, including requesting that 1st Century waive the standstill
11 (subject to certain exceptions in the case of the confidentiality agreement with Midland).” (Ex. B at 35.)
12 Plaintiff argues that the Proxy Statement is insufficient because it should disclose the differences
13 between the standstill provision entered into with Midland and the standstill provisions entered into with
14 six other potential bidders. No such disclosure is required.

15 Plaintiff mischaracterizes both the law concerning standstill provisions and the disclosures at
16 issue in the Proxy Statement. Plaintiff cites two bench rulings and one opinion, purportedly for the
17 proposition that “don’t ask, don’t waive” standstill provisions “have often been found to be
18 impermissible by Delaware courts.” (Mot. at 11.) Yet these citations do not support Plaintiff’s position,
19 much less his request for an injunction.

20 In *Ancestry*, the Court of Chancery did not issue an injunction for the purpose of requiring the
21 target to compare and contrast the “don’t ask, don’t waive” provisions in different agreements, as
22 Plaintiff argues the Court should do here. The court concluded that further disclosure was required
23 because the proxy failed to inform shareholders that “don’t ask, don’t waive” provisions in standstill
24 agreements with certain parties prohibited the signatories from asking for a waiver that would permit
25 them to make superior proposals. (Pl.’s Compendium, Tab 4, Transcript at 228:20-229:2, *In re*

26 _____
27 ⁶ *See, e.g., Cty. of York Employees Ret. Plan v. Merrill Lynch & Co.*, 2008 WL 4824053, at *11
28 (Del. Ch. Oct. 28, 2008) (“It is true that compensation contingent on consummation of the
 transaction has the potential to influence a financial advisor. However, that fact was disclosed in
 the proxy.”).

1 *Ancestry.com, Inc. S'holder Litig.*, C.A. No. 7988-CS (Del. Ch. Dec. 17, 2012); *see also* Final Order and
2 Judgment, *In re Ancestry.com Inc.*, 2013 WL 6516186 (Del. Ch. Dec. 12, 2013) (“the Court held that the
3 Stockholder Vote would be enjoined until such time as Ancestry disclosed to its stockholders . . . the
4 *existence* and waiver of the Don’t Ask, Don’t Waive Standstills” (emphasis added)). Here, by contrast,
5 the proxy discloses that the standstill agreements with six other parties who participated in the sales
6 process prohibit them “from taking certain actions with respect to 1st Century . . . , including requesting
7 that 1st Century waive the standstill” to permit them to make proposals superior to Midland’s. It thus
8 makes precisely the disclosure the court found lacking in *Ancestry*.

9 Just as the cases Plaintiff cites do not support his claims of inadequate disclosure, they also do
10 not support his assertion that “don’t ask, don’t waive” provisions are impermissible. To the contrary, in
11 *Ancestry*, the Court of Chancery acknowledged that “don’t ask, don’t waive” provisions can serve the
12 “value-maximizing” purpose of ensuring that parties in an auction process put their best offers on the
13 table (Pl.’s Compendium, Tab 4, Transcript at 225:10-12), and stated that it “kn[e]w of nothing[] that
14 says that these provisions are *per se* invalid.” (*Id.* at 224:6-8.) While the court noted that “don’t ask,
15 don’t waive” provisions could be “potent,” it emphasized that they should be assessed in light of the
16 “factual circumstances” at hand. (*See, e.g., id.* at 67:15-22, 225:10-22, 227:4-12, 228:1-2.)

17 In *Genomics*, the Delaware Court of Chancery enjoined enforcement of a “don’t ask, don’t
18 waive” provision in a confidentiality agreement where the Court found that the Board might have
19 willfully blinded itself to potential higher bids in the future. (*See, e.g., Pl.’s Compendium, Tab 5,*
20 Transcript at 17:19-18:6, *In re Complete Genomics S'holder Litig.*, Consol. C.A. No. 7888-VCL (Del.
21 Ch. Nov. 27, 2012).) That is not a concern here, as the Proxy Statement discloses that 1st Century’s
22 board on multiple occasions revisited the prospect of re-engaging alternative bidders before agreeing to
23 proceed with Midland’s proposal. (*See, e.g., Ex. B at 44, 45.*) Plaintiff offers not one iota of evidence
24 suggesting that the board acted to willfully blind itself to superior offers from other bidders. Nor is there
25 any evidence that such a superior offer might exist.

26 For similar reasons, Plaintiff’s reliance on *In re Topps Co. S'holders Litig.*, 926 A.2d 58 (Del.
27 Ch. 2007) is misplaced—as to both its disclosure request *and its waiver request*. (Mot. at 11, 14.) In
28 *Topps*, the court enjoined a shareholder vote pending waiver of a standstill provision because the target

1 board “abuse[d]” a standstill provision which would have otherwise “serve[d] legitimate purposes” by
2 denying a bidder’s request for release from the standstill to make a higher all-cash tender offer, and to
3 communicate with Topps shareholders, even as the board made “misrepresentations” to the public
4 concerning the competing bidder’s offer. *Id.* at 91. The court explained that the board’s “*decision to*
5 *foreclose its stockholders from receiving an offer . . .* seems likely, after trial, to be found a breach of
6 fiduciary duty.” *Id.* at 92 (emphasis added). Plaintiff, however, fails to allege any facts that the 1st
7 Century board “abuse[d]” the otherwise “legitimate” standstills. Of course, no request was made here to
8 waive the standstill, nor was such a request denied by the board; nor has the board been accused of
9 making factual misrepresentations about a competing proposal. *Topps* thus lends no support to
10 Plaintiff’s motion, which should be denied.

11 Delaware “case law makes clear that there is no single path that a board must follow in order to
12 reach the required destination of maximizing stockholder value. Rather, directors must follow a path of
13 reasonableness which leads toward that end.” *Cogent*, 7 A.3d at 497. None of Plaintiff’s various
14 allegations call into question whether 1st Century’s board chose a reasonable path to maximize
15 shareholder value, and the record demonstrates the opposite: that the board ran a robust auction process
16 that solicited bids from multiple parties and resulted in a superior proposal from Midland that will
17 deliver a substantial 36% premium to shareholders.

18 4. Claims Relating to the Special Transaction Committee.

19 The Proxy Statement discloses that 1st Century “determined to form a special transaction
20 committee . . . consisting of three independent and disinterested directors: Dave Brooks, Eric George
21 and Alan Levy,” and that “the special transaction committee elected Eric George to serve as the chair of
22 the special transaction committee.” (Ex. B at 37.) Plaintiff argues that the Proxy Statement is
23 insufficient because it should disclose the specific qualifications of the three Board members “which
24 caused them to be chosen [to] serve as members of the Special Transaction Committee,” and “the
25 criteria used to elect . . . the chair of the special committee.” (Mot. at 11.) No such requirement exists
26 under Delaware law particularly since Plaintiff does not challenge the capabilities or suitability of
27 transaction committee members. The cases cited by Plaintiff (*Nagy* and *Matador*) only stand for the
28 proposition that information regarding the process used in arriving at a decision to support a merger

1 must be disclosed—which 1st Century has more than adequately done. 1st Century disclosed that the
2 special committee members were “independent and disinterested,” and, over the course of 16 pages,
3 catalogued in detail the process used in arriving at a decision to support a merger. (*See, e.g.*, Ex. B at
4 34-49.) Furthermore, Messrs. Brooks, George, and Levy’s qualifications are publicly available. (*See*
5 *id.*, Ex. H at 9-10; Exs. I-K.) Plaintiff fails to demonstrate how the “masochistic litany of management
6 minutiae” he seeks would change the total mix of material information. *Wolf v. Assaf*, 1998 WL
7 326662, at *5 (Del. Ch. June 16, 1998) (Delaware law “only requires a summary of his credentials and
8 his qualifications to serve on the board as well as a description of any conflicts of interest”).

9 **II. PLAINTIFF CANNOT SHOW HE WILL SUFFER IRREPARABLE HARM**

10 Plaintiff fails to show that he will suffer irreparable harm absent an injunction. Although he
11 bears the burden of proof (*see, e.g.*, 38 Cal. Jur. 3d Injunctions § 100), Plaintiff does nothing more than
12 assert, in a conclusory fashion and devoid of any factual allegations, that he and other shareholders “will
13 be irreparably harmed because they will be forced to vote their shares or exercise their appraisal rights,
14 without full disclosure of all the material information.” (Mot. at 12.)

15 *First*, Plaintiff claims that he will seek monetary damages and/or rescission of the transaction if it
16 is consummated. (*See* Compl. at 18 (“demand[ing] judgment . . . awarding Plaintiff and the Class
17 compensatory and/or rescissory damages as allowed by law”); *see also id.* (“demand[ing] judgment . . .
18 enjoining the Sale Agreement and if the Sale Agreement is consummated, rescinding it”). The
19 availability of monetary relief negates any claim of irreparable harm. *See Intel Corp. v. Hamidi*, 30 Cal.
20 4th 1342, 1352 (2003) (“irreparable injuries . . . cannot be adequately compensated in damages”);
21 *Gradient OC Master, Ltd. v. NBC Universal, Inc.*, 930 A.2d 104, 131 (Del. Ch. 2007) (“There is no
22 irreparable harm if money damages are adequate to compensate”); *Orlando v. CFS Bancorp, Inc.*,
23 2013 WL 5797624, at *5 (N.D. Ind. Oct. 28, 2013) (“[B]ecause the court could later undo the damage
24 caused by any alleged (but not adequately specified) illegal proxy statement by providing monetary
25 damages—which typically constitutes an adequate remedy at law—an adequate alternative exists.”);
26 *Calleros v. FSI Int’l, Inc.*, 892 F. Supp. 2d 1163, 1173 (D. Minn. 2012) (“There is no apparent reason
27 why a stockholder who tenders his shares when he should not have—that is, someone who wrongly sells
28 his shares for too little, due to misinformation from the company’s officers or directors—could not have

1 that ‘error’ compensated with money damages.”); *see also In re Toys “R” Us, Inc. S’holder Litig.*, 877
2 A.2d 975, 1022 (Del. Ch. 2005) (denying injunctive relief where plaintiffs merely faced the “theoretical
3 probability” of losing a higher bid which could be “rectified adequately in a later appraisal proceeding”).

4 *Second*, if Plaintiff believes that the 36% premium he is being offered for his 1st Century shares
5 is inadequate, he can seek appraisal under Section 262 of the Delaware General Corporation Law. (*See*,
6 *e.g.*, Ex. B at 12 (“Stockholders are entitled to appraisal rights under the DGCL in connection with the
7 merger. This means that you are entitled to have the fair value of your 1st Century shares determined by
8 the Delaware Court of Chancery and to receive payment based on that valuation in lieu of the per share
9 merger consideration if you follow exactly the procedures specified under Section 262 of the DGCL, the
10 Delaware appraisal rights statute.”), 22, 33, 72, 100-104.) The availability of appraisal negates any
11 claim of irreparable harm. *Herring v. Rite Aid Corp.*, 2016 WL 401026, at *4 (M.D. Pa. Jan. 28, 2016)
12 (“Plaintiff can pursue the statutory right to an appraisal proceeding to determine the fair value of the
13 shares, which demonstrates access to a remedy aside from injunctive relief.”).

14 **III. THE BALANCE OF THE EQUITIES WEIGHS AGAINST ENJOINING THE** 15 **SHAREHOLDERS SCHEDULED VOTE ON THE PROPOSED TRANSACTION**

16 The potential harm to 1st Century and its shareholders from an injunction far outweighs any
17 potential harm to Plaintiff if his motion is denied. Midland’s offer represents a tremendous opportunity
18 for 1st Century’s shareholders. It provides a substantial premium. There is also no competing offer, and
19 thus no other means by which 1st Century’s shareholders could achieve \$11.22 in cash for their shares.
20 Courts are “particularly reticent” to grant a preliminary injunction “when faced with a plaintiff seeking
21 to enjoin a transaction that affords stockholders a premium in the absence of a competing offer,” *Abrons*
22 *v. Maree*, 911 A.2d 805, 810 (Del. Ch. 2006), because an injunction “would deprive [the] shareholders
23 of the benefits of the merger transaction without offering them any realistic prospect of a superior
24 alternative.” *In re Wheelabrator Techs. Inc. S’holders Litig.*, 1990 WL 131351, at *9 (Del. Ch. Sept. 6,
25 1990); *see also In re Pennaco Energy, Inc.*, 787 A.2d 691, 704 (Del. Ch. 2001) (noting that Delaware
26 courts are “cautious about using [preliminary injunctions] where it might endanger or delay
27 stockholders’ receipt of a control premium in a situation where no competing bid has emerged”);
28 *Cogent*, 7 A.3d at 515 (recognizing at the preliminary injunction stage that “where a selling Board’s

1 alleged Revlon violations occur in the absence of another viable bid, this Court often finds injunctive
2 relief to be inappropriate because it would be imprudent to terminate the only deal available, when the
3 stockholders can make that decision for themselves”). An injunction would not merely delay the
4 shareholder vote, but risk derailing the transaction entirely, by creating the possibility that conditions to
5 closing before a vote can be taken. The opportunity for 1st Century’s shareholders to decide whether to
6 approve this transaction should not be usurped in this manner by a single shareholder, particularly a
7 shareholder with Plaintiff’s checkered litigation history.

8 Finally, 1st Century would incur substantial costs if it is required to reschedule the shareholder
9 vote on the proposed merger. 1st Century has invested a substantial amount of resources and time in
10 negotiating potential merger arrangements with Midland and others, and the Board has determined, in
11 the exercise of its business judgment, that the best way forward is to consummate the agreement with
12 Midland. All of the time and energy devoted to that decision-making process may be for naught if the
13 merger is enjoined, literally, on the eve of the shareholder vote. All of this will be to the detriment of 1st
14 Century and its shareholders, which substantially outweighs plaintiff’s claimed potential harm, and thus
15 tips the equities in favor of 1st Century. *See Angelo, Gordon & Co., L.P. v. Allied Riser Commc’ns*
16 *Corp.*, 805 A.2d 221, 231 (Del. Ch. 2002) (“By contrast, there is a clear threat of irreparable harm to
17 ARC and its stockholders in the event the transaction is enjoined and Cogent terminates the merger
18 agreement. ARC and Cogent both have devoted considerable time and effort to the proposed Merger, all
19 of which would be wasted should an injunction result in the abandonment of the transaction.”).

20 **IV. PLAINTIFF MUST POST A SUBSTANTIAL BOND**

21 If the Court were to grant the Motion, Plaintiff should be required to post a substantial bond
22 under California Code of Civil Procedure § 529 sufficient to compensate 1st Century for the time and
23 expense associated with rescheduling the shareholder vote at this late date—after many shareholders
24 have already submitted their proxies. Given the size of the transaction Plaintiff proposes to enjoin, and
25 the substantial costs and risks Defendants will be forced to incur if the shareholder vote is enjoined,
26 Plaintiff should be required to post a bond in the amount of at least \$2 million.

1 Dated: June 6, 2016

2 Respectfully submitted,

3 /s/ Laura Kabler Oswell

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1 **PROOF OF SERVICE**

2 I am a citizen of the United States and employed in Los Angeles County California. I am
3 over the age of eighteen years and not a party to the within-entitled action. My business address is
4 Sullivan & Cromwell LLP, 1888 Century Park East, Los Angeles, California 90067-1725.

5 Pursuant to the parties' agreement to accept service electronically, I served the
6 document(s) described as **DEFENDANTS' OPPOSITION TO PLAINTIFF'S APPLICATION FOR**
7 **A PRELIMINARY INJUNCTION** on June 6, 2016, on all other parties in this action by causing said
8 documents to be transmitted electronically to the following email addresses:

9 bmh@hulettharper.com

10 rbualdi@brualdilawfirm.com

11 I declare under penalty of perjury under the laws of the State of California that the
12 foregoing is true and correct.

13 Executed on June 6, 2016 at Los Angeles, California

14
15 /s/ Jackson S. Trugman
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