IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

BROADWAY CAPITAL, on behalf of Itself and All Others Similarly Situated,	)	
Plaintiff,	)	
v.	)	CIVIL ACTION
LARRY G. GERDES, JOSEPH G. BLESER, JOSEPH P. CLAYTON, JAMES D. EDWARDS, WALTER S. HUFF JR., CHARLES E. THOELE, TRANSCEND, SERVICES, INC., TOWNSEND MERGER CORP., and NUANCE COMMUNICATIONS, INC.,	)	FILE NO. 2012CV213119
Defendants.	)	

ORDER DENYING PLAINTIFF'S MOTION FOR INTERLOCUTORY INJUNCTION

Plaintiff's motion for interlocutory injunction came before this Court for a hearing on April 13, 2012. The tender offer that plaintiff seeks to enjoin is currently set to close on Monday April 16, 2012. After consideration of the arguments by counsel at the hearing as well as the briefs and other materials submitted into the record, the Court denies plaintiff's motion. The Court finds as follows:

BACKGROUND

On March 7, 2012, Nuance Communications, Inc. ("Nuance"), and its subsidiary Townsend Merger Corporation ("TMC") announced an agreement to merge with Transcend. Pursuant to the terms of the Merger Agreement, Nuance commenced a tender offer for all shares of Transcend Services, Inc. ("Transcend") stock on March 20, 2012. The tender offer price of $29.50, per share represented a 36.1% premium over the weighted average of the previous

month's market price. Under the terms of the tender offer, shareholders have until April 16, 2012 to tender their shares and to receive the consideration.

The Merger Agreement contains other standard provisions, including a "top-up" option, a termination fee, and a "fiduciary out." The board of directors was advised by its financial advisor, Lazard Frères & Co., LLC, who issued a fairness opinion to the Board. The analysis supporting the fairness opinion is disclosed in the Schedule 14D-9.

Beginning on March 23, 2012, three sets of shareholders filed lawsuits in Georgia. All three lawsuits included as defendants Transcend and its board of directors, Messrs. Gerdes, Bleser, Clayton, Edwards, Huff, and Thoele (collectively, the "Individual Defendants"), as well as Nuance and TMS. Plaintiffs jointly requested an interlocutory injunction, focusing on the disclosures made by Transcend but also requesting that the Court enjoin the tender offer and merger because of alleged defects in the terms of the transaction.

DISCUSSION

In deciding whether to issue an interlocutory injunction, this Court must consider whether:

> (1) there is a substantial threat that the moving party will suffer irreparable injury if the injunction is not granted; (2) the threatened injury to the moving party outweighs the threatened harm that the injunction may do to the party being enjoined; (3) there is a substantial likelihood that the moving party will prevail on the merits of her claims at trial; and (4) granting the interlocutory injunction will not disserve the public interest.

SRB Inv. Servs. LLLP v. Branch Banking & Trust Co., 289 Ga. 1, 5, 709 S.E.2d 267, 271 (2011). Plaintiff bears the burden of establishing that these factors weigh in favor of an injunction. *See Bernocchi v. Forucci*, 279 Ga. 460, 461, 614 S.E.2d 775, 777 (2005) (observing that the "burden is on the party seeking injunctive relief to demonstrate entitlement to the relief"). As discussed herein, plaintiff has failed to meet its burden.

The standard for issuing an injunction first requires the Court to consider whether plaintiff will suffer irreparable harm if the injunction is not granted. To the extent plaintiff's claims are based on an entitlement to money damages, it is precluded from receiving an injunction. *SRB Inv. Servs.*, 289 Ga. at 5, 709 S.E.2d at 271.

Plaintiff has also failed to carry its burden of showing that the harm imposed without an injunction outweighs the harm imposed by an injunction. Plaintiff has failed to carry its burden of showing that there is a sufficient risk of harm from allowing the offer and merger to proceed to warrant issuing an injunction, thereby possibly denying the benefits that the transaction presents to Transcend's shareholders.

On the merits of its disclosure claim, plaintiff has failed to come forward with evidence of a material fact that was not disclosed to Transcend's shareholders. Under Delaware law, a fact is material if it would alter the "total mix" of information available to Transcend's shareholders. *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1172, 1174 (Del. 2000). On the record presented to the Court, none of plaintiff's alleged disclosure violations meets this standard.

As stated at oral argument, plaintiff's principal argument for an injunction relates to Transcend's financial advisor, Lazard Freres & Co., LLC. Plaintiff contends that the number of shares that Lazard owns and may trade is a material fact. Under Delaware law, Transcend has met its obligations by disclosing that Lazard may trade the securities of Transcend and Nuance in the normal course of its business. *In re Micromet, Inc., Shareholder Litig.*, 2012 Del. Ch. LEXIS 41, at *36–37 (Del. Ch. Feb. 29, 2012).

Finally, plaintiff argued that the recommendation statement does not adequately disclose the process by which Transcend entered into its merger agreement with Nuance. Delaware law requires a summary of the events leading to the tender-offer recommendation. *In re Cogent, Inc.*

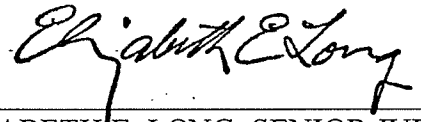
Shareholder Litig., 7 A.3d 487, 511–12 (Del. Ch. 2010). Here, Transcend's recommendation statement devotes eight pages to a summary of the timeline involved in the transaction, including numerous board meetings and discussions between the management of the two companies. Upon review of the recommendation statement and the plaintiff's argument, the Court finds that Transcend provided an adequate summary of the events leading up to its recommendation of the tender offer and that plaintiff has failed its burden of showing that additional information would alter the total mix available to shareholders.

Given the plaintiff's failure to establish the first three requirements for injunctive relief, the Court finds that issuing the requested injunction is not in the public interest.

CONCLUSION

Plaintiff's motion for interlocutory injunction is denied.

SO ORDERED this 16th day of April, 2012.



ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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