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Re: *Platinum Partners Value Arbitrage Fund L.P. v. Echo Therapeutics, Inc.*
C.A. No. 10303-VCN
Date Submitted: November 10, 2014

Dear Counsel:

Plaintiff Platinum Partners Value Arbitrage Fund L.P. ("Platinum") has filed a verified complaint (the "Complaint") seeking a declaratory judgment and injunctive relief relating to its desire for a special meeting of stockholders of Defendant Echo Therapeutics, Inc. ("Echo"). Platinum's stated purpose for calling a meeting is to hold a stockholder vote on whether or not to remove three of Echo's five directors for cause. Along with the Complaint, Platinum filed a Motion to Expedite Proceedings (the "Motion"). Because Platinum has failed to

meet its burden to demonstrate a sufficient possibility of a threatened irreparable injury, the Motion is denied.

* * *

Platinum has held Echo stock since 2007.[1] Together with related entities, Platinum holds over 30% of Echo's issued and outstanding common stock, on an as-converted basis. Echo is a research-based medical device company, which requires an influx of capital to develop its technologies.

Echo's board (the "Board") consists of five directors. Three directors—William Grieco, James Smith, and Vincent Enright—are named as individual defendants in the Complaint (the "Defendant Directors"). According to Platinum, the Defendant Directors have excluded Echo's remaining directors—Michael Goldberg and Shepard Goldberg—from all Board-related activities. The Defendant Directors have allegedly failed to address business problems that have caused Echo's revenue to decline steadily over the last several years. They are supposedly running Echo for their own benefit, to the detriment of stockholders.

[1] The factual background is drawn from the Complaint.

Platinum accuses the Defendant Directors of taking actions demonstrating both their incompetence and misconduct.

Platinum thus argues that Echo's stockholders should be allowed to vote, as soon as possible, to remove the Director Defendants pursuant to 8 *Del. C.* § 141(k). Because Echo's Board is classified and its certificate of incorporation ("Certificate") fails to provide otherwise, the Director Defendants can only be removed for cause.[2] Platinum argues that "the holders of a majority of [Echo's] shares . . . entitled to vote at an election of directors" must be afforded a prompt opportunity to oust the Director Defendants for cause.[3]

However, the Certificate and Echo's by-laws ("By-Laws") create an allegedly insurmountable hurdle for Platinum.[4] The Certificate requires unanimous written stockholder consent in order to take action permitted at a stockholders'

[2] 8 *Del. C.* § 141(k)(1).
[3] 8 *Del. C.* § 141(k).
[4] Platinum argues, in part, that the Defendant Directors have breached their fiduciary duty of loyalty by not using their power to call a stockholders' meeting. In essence, the Defendant Directors are said to suffer from divided loyalties because of the risk that the meeting that they would call would provide the stockholders with the opportunity to remove them.

meeting, thus making action by written consent virtually impossible. Realistically, the stockholders can only remove the Defendant Directors pursuant to a vote at a stockholders' meeting. However, Section 1.3 of Echo's By-Laws provides,

> Special meetings of stockholders may be called for any purpose or purposes at any time by the Chairman of the Board, the Chief Executive Officer, a majority of the Board of Directors, or the request of stockholders owning a 75% majority of the voting power of the outstanding shares entitled to vote in the election of directors.

Echo's Chairman, its Chief Executive Officer, and its Board refuse to call a special stockholder meeting, despite Platinum's requests for one. Platinum asserts that the super-majority provision in Section 1.3, while not facially invalid, violates Delaware law as applied by indirectly conditioning the removal of the Defendant Directors for cause on obtaining super-majority support. This super-majority provision is allegedly virtually impossible to meet. Platinum's argument is as follows: (i) the right of stockholders to vote to remove directors for cause is a fundamental stockholder right; (ii) there must be a timely and effective mechanism for stockholders to assert their fundamental right; (iii) here, there is no such timely and effective mechanism because Echo's Charter and By-Laws interact to preclude

action by written consent or a special stockholder meeting; (iv) therefore, the Court must find Section 1.3's super-majority provision invalid as applied.

Platinum's argument makes at least two tacit assumptions—(i) a fundamental right is violated if it cannot be immediately enforced, and (ii) an annual meeting, months away, is not a timely and effective mechanism to assert a fundamental right.[5] Platinum requests that the Court compel a meeting of Echo's stockholders to vote on the removal of the Defendant Directors, require the Defendant Directors to call such a meeting, or allow Platinum to call the meeting.

Echo contends that its next annual meeting will provide an effective mechanism whereby stockholders can vote on whether to remove directors. Echo argues that Delaware law does not require a corporation to allow stockholders to call special meetings, and further, Platinum has not even attempted to call a special meeting in compliance with the By-Laws.[6]

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[5] Echo's most recent annual meeting was held on June 19, 2014.

[6] The Complaint also challenges the validity of Section 2.13 of the By-Laws, which provides, "[u]nless otherwise provided in the Certificate of Incorporation, any one or more or all of the directors may be removed, only for cause, by the holders of at least seventy-five percent (75%) of the shares then entitled to vote at

* * *

"This Court does not set matters for an expedited hearing or permit expedited discovery unless there is a showing of good cause why that is necessary."[7] The party seeking expedited treatment must establish both (i) a sufficiently colorable claim and (ii) "a sufficient possibility of a threatened irreparable injury" to justify imposing the extra costs of expedited proceedings on the opposing party and the public.[8]

"To grant a motion for expedited proceedings, the Court must find some imminent circumstance demanding immediate action."[9] Platinum has not sufficiently demonstrated a threatened irreparable harm that is "both imminent and

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an election of directors." The Court will not now consider this issue because Echo has stipulated that, for purposes of this action, it will not raise Section 2.13 as a defense against any proposal to remove any Echo director who is otherwise validly removed at a proper stockholder meeting. Echo's Nov. 10, 2014, Letter in Opp'n to the Mot. to Expedite 3.

[7] *Cnty. Of York Empls. Ret. Plan v. Merrill Lynch & Co.*, 2008 WL 4824053, at *5 (Del. Ch. Oct. 28, 2008) (quoting *Greenfield v. Caporella*, 1986 WL 13977, at *2 (Del. Ch. Dec. 3, 1986)).

[8] *Giammargo v. Snapple Beverage Corp.*, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994).

[9] *Casale v. Bare*, 2009 WL 296262, at *2 (Del. Ch. Jan. 27, 2009).

non-speculative."[10] The only potentially irreparable injury that can be inferred from the Complaint stems from the allegation that Echo is in dire financial straits and will possibly go into liquidation if current management is not soon replaced. Even if Platinum's fear is correct, the Complaint provides no concrete support for how imminently Echo will supposedly run out of money. Platinum suggests that it may already be too late; Echo has previously announced that it might not be able to fund its needs beyond September 2014. That date has passed, and Platinum provides no other facts from which the Court could infer an approximate timeline for Echo's alleged impending demise.

Echo's revenue has declined steadily since 2009. Platinum has now concluded that Echo may be liquidated before the Court could consider its claims in the course of typical proceedings. However, it may often be the case that a plaintiff can allege that a company's weak financial position and poor management pose the danger that delay will impair plaintiff's ability to obtain effective ultimate relief. Echo has suspended product research, has experienced manufacturing and

[10] *See* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, § 4.10[c][2], at 4-57 (2014).

clinical problems, and has terminated most of its employees. Platinum, however, has not identified the irreparable harm which could be avoided through expedition. It does not allege that it would be likely that a new board could obtain a reversal of fortune or suggest how a new board would be able to stem the downward decline. The fact that one stockholder plaintiff, such as Platinum, believes expedition is necessary does not establish an imminent and non-speculative irreparable harm. Because Platinum has failed to satisfy a necessary component of the test for expedition, the Motion to Expedite Proceedings is denied.[11]

Although expedition has not been justified, Echo is under financial duress, and its stockholders may have good reason to replace the Defendant Directors. The issues raised by Platinum can, at least from a preliminary review, be resolved both timely and in a relatively straightforward manner. Thus, counsel are asked to discuss and develop a case management schedule that would have this action ready for decision in approximately ninety days.

[11] Plaintiff also seeks damages for breach of fiduciary duty by the Defendant Directors. No reason for expedition of a damages claim has been offered.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K