TELENOR EAST INVEST AS v. ECO TELECOM LIMITED

2005 | Cited 0 times | S.D. New York | September 7, 2005

OPINION AND ORDER

This matter began with an order to show cause filed on August26, 2005. Both parties are minority shareholders of a Russiancorporation OAO Vimpel-Communications ("VimpelCom"). Theplaintiff, Telenor East Invest AS ("Telenor"), owns 26.6% of thevoting stock of VimpelCom, while the defendant, Eco TelecomLimited ("Eco Telecom"), owns 32.9%. Eco Telecom is related tothe other defendants in this action through a series ofparent-subsidiary relationships that do not bear on the currentmatter.

As minority stockholders of VimpelCom, Telenor and Eco Telecomhave engaged in a proxy fight in connection with the proposedacquisition by VimpelCom of Ukrainian Radiosystems ("WellCom"), a Ukrainian telecommunications company.In connection with the proposed transaction, Eco Telecom has madevarious representations both via the internet and through aSchedule 13D and various amendments thereto filed with the SEC.These representations give rise to Telenor's complaint.

As is common in fast-moving proxy fights, the factualsituation, and the plaintiff's demands for relief, have evolvedeven in the short time the matter has been pending. At a hearingon September 6, 2005, and in a Proposed Order, Telenor hasrequested the following relief: (1) that Eco Telecom remove awebsite (the "Website") that contains statements andrepresentations encouraging VimpelCom shareholders to vote infavor of the WellCom transaction; (2) that Eco Telecom remove anadvertisement supporting the WellCom transaction from the Yahoo!Finance website; (3) that all proxies submitted through theWebsite be enjoined from voting in connection with the WellComtransaction; and (4) that Eco Telecom be enjoined from voting itsshares in connection with the WellCom transaction unless anduntil certain additional disclosures are made through furtheramendments to Eco Telecom's Schedule 13D, namely (a) that AlexeiReznikovich, the CEO of defendant Alfa Telecom Limited, has abusiness relationship with a prospective seller in the WellComtransaction, (b) that Reznikovich had previously valued WellComat $145,000,000, an amount much lower than Eco Telecom's currentstated valuation of WellCom, $296,000,000, and (c) the identitiesof any persons who will receive any payment if the WellComtransaction is completed. For the following reasons theplaintiff's requests for injunctive relief are denied.

To obtain a preliminary injunction the plaintiff must make twoshowings: "(1) that the injunction is necessary to preventirreparable harm, and (2) there is a `clear' or `substantial' likelihood that it will prevail on the merits." SunwardElectronics, Inc. v. McDonald, 362 F.3d 17, 24-25 (2d Cir.2004). For purposes of this Opinion and Order it will be assumedthat Telenor has satisfied the "irreparable

harm" requirement,since if the WellCom transaction is approved on September 14,2005, then the horse is out of the barn and any negative impacton plaintiff's investment in VimpelCom could not be easilyremedied. Nevertheless, plaintiff's motion must be denied becauseit has not shown a likelihood that it would prevail on the meritsin any of its claims.

Section 13(d) of the Securities Exchange Act of 1934 requiresthat specified parties make certain disclosures in connectionwith certain purchases of stock.[1] Among the requireddisclosures are (a) the identity of and information about thepurchasers; (b) the source of the funds used in connection withthe purchase; (c) whether or not the purpose of the purchase isto take control of the issuing corporation; (d) the number ofshares to be owned by the purchasers; and (e) informationregarding "contracts, arrangements, or understandings with anyperson with respect to any securities of the issuer."15 U.S.C. § 78m(d) (2005). As is evident from the text of the statute, ratherthan requiring the disclosure of all material information,section 13(d) only requires that specified information bedisclosed to shareholders. But the statute's requirements do notsit in isolation. Rather, they are informed by regulations suchas 17 C.F.R. § 240.12b-20 (2005), which states that "[i]naddition to the information expressly required to be included [bysection 13(d)], there shall be added such further materialinformation, if any, as may be necessary to make the required statements, in the light of thecircumstances under which they are made, not misleading."

Rule 12b-20, while certainly expanding on the disclosurerequirements of section 13(d), has sensibly not been interpretedto swallow section 13(d)'s limited disclosure obligations. Asthis court stated in Kaufman & Broad, Inc. v. Belzberg,522 F. Supp. 35, 42 (S.D.N.Y. 1981), "By its plain language, Rule 12b-20requires the disclosure of additional material informationnecessary to make the required Section 13(d) disclosures notmisleading. The rule does not . . . convert Section 13(d) into amandate to disclose any and all material information. . . ."

Despite Kaufman, plaintiff attempts to support its claim foradditional disclosure by relying on a more recent decision ofthis court, Horsehead Resource Development Co. v. B.U.S.Environmental Services, Inc., 916 F. Supp. 305 (S.D.N.Y. 1996).In Horsehead a corporation was required to disclose informationrelating to the existence of criminal charges that directlyrelated to the acquisition there at issue, even though pendingcriminal matters are not specified as a required disclosure undersection 13(d). However, the Horsehead Court took care to limitits holding, stating that "shareholders of an environmental wastecontrol company would find material the knowledge that thecompany's largest shareholders are being tried for environmentallaw violations. For this reason, and this reason only, suchinformation is considered `material.'" Id. at 313 (emphasisadded). Plaintiff has not alleged that there exist relevantcriminal charges against any party or shareholder related to thismatter, so Horsehead is not applicable. Therefore, the generalrule of Kaufman applies, and this Court must determine whetherTelenor has established that it is likely to succeed in showingthat Eco Telecom's Schedule 13D disclosures are materially misleading, either because they are inaccurate inthemselves or because they omit information necessary to preventthe statements made from being misleading.

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Plaintiff's requests for injunctive relief with respect to theWebsite must be denied. Telenor's principal objection to theWebsite is the claim that Eco Telecom grossly exaggerates thevalue of WellCom, and suppresses facts that would undermine itsvaluation. But as discussed more fully below, ascribing value toa proposed corporate acquisition is largely a matter of opinion.Telenor has not identified significant factual inaccuracies onthe Website regarding objective facts about WellCom, and thisCourt cannot conclude, on the limited record before it, that afactfinder at trial would likely find Eco Telecom's allegedmisrepresentations material. In any event, since Telenor itselfhas vigorously disputed Eco Telecom's claims with its owncommunications to VimpelCom's shareholders, there can be no claimthat the shareholders are not fully informed about the factsrelevant to the valuation dispute. Moreover, the information onthe Website regarding valuation with which the plaintiff takesissue has already been removed.

Plaintiff also claims that the Website is, or at one time was,designed to appear to be a VimpelCom website instead of what itactually is, a website owned and operated by defendants. However,it has since been made clear that the Website is operated bydefendants, and any confusion brought about by previous versionsof the Website can hardly be material. A shareholder whomistakenly believed that the Website was put up by VimpelComwould get the impression that VimpelCom management supports theWellCom transaction. But any confusion would not be materiallymisleading; plaintiff concedes that VimpelCom management does infact support the transaction. Therefore, plaintiff's requeststhat defendants be enjoined from operating the Website, that all proxies submitted through thewebsite be enjoined from voting, and that the Yahoo! Financeadvertisement that links to the Website be removed are alldenied.

Plaintiff's requests for corrected or additional disclosure inan amendment to their Schedule 13D must also be denied. Plaintiffhas essentially two complaints with regard to the Schedule 13D:The valuation of WellCom is inflated, and the possibility ofself-dealing is not adequately disclosed. The valuation of acorporation is not a fact, but rather is a debatable mattersubject to different opinions and interpretations. When a mattersuch as the valuation of a corporation is in dispute, "the lawrequires only that the disputed facts . . . be disclosed."Avnet, Inc. v. Scope Indus., 499 F. Supp. 1121, 1125 (S.D.N.Y.1980). Defendants have obtained a valuation of WellCom; plaintiffdisputes that valuation. As this Court stated in Avnet, theremedy for this disagreement is simply that the disputed facts bedisclosed to the shareholders. That is exactly what has happenedhere. In response to Telenor's complaint, Eco Telecom includedthe substance of the complaint in an amendment to its Schedule13D, and appended a copy of the complaint itself, which detailsat length plaintiff's objections to the defendants' valuation.(Rolfe Decl. Ex. B at 7, 15). Additionally, plaintiff seeks aspecific disclosure in connection with a previous and allegedlyinconsistent valuation made by defendant Alfa Telecom Limited'sCEO Alexei Reznikovich. It is unclear what relevance thisdisclosure would have. The previous valuation was made in June of2004 and it would not be surprising if the Ukrainiantelecommunications market had experienced some changes since thattime. Regardless of possible market changes, Reznikovich was notdefendant's CEO at the time of the previous transaction, andthere are numerous possible reasons for why individuals indifferent

roles would come to different valuations for the samecompany. In any case, the failure of Eco Telecom to disclose Mr. Reznikovich's previous valuation of WellCom does notrise to the level of a violation of section 13(d). Eco Telecomdisclosed its valuation and fully disclosed Telenor's complaintregarding that valuation. With claims by both sides before theshareholders, Eco Telecom's disclosure is not misleading.Finally, with regard to the valuation claims, this Court'sdiscussion in Condec Corp. v. Farley, 573 F. Supp. 1382(S.D.N.Y. 1983) would seem to apply here with equal force. TheCondec Court stated, in rejecting a request for additionaldisclosure, "Central to our holding is the fact that we believethe additional information which would be furnished by therequested `corrective disclosures' would add little to the fundof information available to the stockholders and themarketplace. . . . [T]he net consequences of the filings in factmade, which include a full recitation of the issues raised byplaintiff in this litigation, is that all interested parties nowhave access to all of the facts." Id. at 1386.

Turning finally to the plaintiff's complaint regarding thepossibility of undisclosed self-dealing, here too Telenor's claimfalls short. In an amendment to its Schedule 13D in response toTelenor's initial complaint, Eco Telecom states, "For theavoidance of doubt, the Reporting Persons hereby confirm that noReporting Person, nor any of their officers, directors,subsidiaries, shareholders, beneficial owners or affiliates. . ., nor, to the best knowledge of the Reporting Persons, anyemployee of the Reporting Persons, their subsidiaries oraffiliates, has any financial interest in the sellers ofWellCom." (Rolfe Decl. Ex. B at 7). Plaintiff notes that thebroad language in Eco Telecom's disclosure nevertheless does notdisclaim the possibility that someone related to the defendantscould have some sort of fee agreement under which he or she,while not having a financial interest in the sellers of WellCom,would still have a financial interest in the transaction itself.However, the mere logical possibility of such an arrangement cannot, by itself, be the basis for an order requiring thedefendants to deny that such an arrangement exists. Section 13(d)and Rule 12b-20 serve to prohibit misleading statements, butwithout evidence to the contrary there is nothing to suggest thatEco Telecom's statement is misleading in any way. The statementwould arguably be misleading if a fee agreement of the typeplaintiff suggests did in fact exist, but plaintiff candidlyacknowledges that it has produced no such evidence. Withoutevidence of a misleading statement there is nothing to correct,and therefore corrective disclosure cannot be ordered.

For the foregoing reasons plaintiff has not shown a likelihoodof success on the merits of any of its claims for injunctiverelief. Accordingly, plaintiff's motion for preliminaryinjunction is DENIED.

SO ORDERED.