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Hennepin County, MN

State of Minnesota
County of Hennepin

District Court
Fourth Judicial District

Joseph J. Frustaci,

Plaintiff,

v.

Uroplasty Inc., Vision-Sciences Inc., Visor Merger Sub LLC, Robert Kill, Kevin Roche, James P. Stauner, Kenneth Paulus, and Sven A. Wehrein,

Defendants.

Judge Bruce D. Manning
Case Type: Civil Other

**Order Granting Defendants' Motion to Dismiss, Denying Plaintiff's Motion for a Preliminary Injunction, and Directing Entry of Judgment**

Case No. 27-CV-15-305

*Appearances:*

Cullin O'Brien, Cullin O'Brien Law, P.A., Garrett Dennis Blanchfield, Reinhardt, Wendorf & Blanchfield, & Meredith Matthews, Powers Taylor LLP, for Plaintiff Joseph Frustaci

Peter W. Carter & James K. Nichols, Dorsey & Whitney LLP, for Defendants Uroplasty Inc., Robert Kill, Kevin Roche, James Stauner, Kenneth Paulus, and Sven Wehrein

Mark L. Johnson, Green Espel PLLP, for Vision-Sciences Inc. and Visor Merger Sub LLC

The above-entitled matter came before Bruce D. Manning, Judge of District Court, on March 25, 2015 on (1) Defendants' motion to dismiss and (2) Plaintiffs' motion for a preliminary injunction. On March 27, 2015, the Court issued an order granting the motion to dismiss and denying the motion for a preliminary injunction. The Court now issues this order directing entry of judgment and briefly elaborating on its decision.

## I. Background

Plaintiff Joseph Frustaci owns 3,000 shares of common stock in Defendant Uroplasty, Inc., a Minnesota corporation.[1] Defendants Robert Kill, Kevin Roche,

[1] Am. Compl. at ¶¶ 6-7.

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James Stauner, Kenneth Paulus, and Sven Wehrein serve on Uroplasty's board of directors.[2] Frustaci's 3,000 shares represent 0.014 percent of Uroplasty's 22,139,353 outstanding shares. [3]

On December 21, 2014, Uroplasty and Defendant Vision-Sciences Inc., a Delaware corporation, entered into a merger agreement whereby Vision-Sciences would acquire Uroplasty and each share of common stock in Uroplasty would be converted into 3.6331 shares of common stock in Vision-Sciences.[4] The merger agreement is subject to approval by Uroplasty's shareholders.[5]

To obtain shareholder approval, Uroplasty and Vision-Sciences filed a proxy statement with the Securities and Exchange Commission.[6] The proxy statement, which exceeds 400 pages, was mailed to Uroplasty's shareholders on February 26, 2015.[7]

The proxy statement provided notice that the proposed merger would be subject to a vote at a special shareholder meeting to be held on March 30, 2015.[8] The proxy statement provides extensive information regarding the proposed merger, including a detailed summary of the events leading up to it[9] and a fairness opinion from two investment banks -- one by Piper Jaffray & Co,, which was retained by Uroplasty, and one prepared by Leerink Partners LLC, which was retained by Vision-Sciences.

In this action, Frustaci sought to enjoin the special shareholder meeting until further disclosures were provided to Uroplasty's shareholders, including prior work by the investment banks and the compensation for it, additional information regarding Uroplasty's investigation of strategic alternatives to the proposed merger, and greater detail regarding the investment banks' financial analysis.

The Amended Complaint contains three counts. Count I claims that the individual Defendants breached their fiduciary duties. Count II claims that Uroplasty and Vision-Sciences aided and abetted the breach. Count III seeks equitable relief under Minn. Stat. § 302A.467.

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[2] Am. Compl. at ¶¶ 8-12.
[3] Nichols Aff. Ex. A at 55.
[4] Blanchfield Aff. Ex. A at ¶ 2.08(a)(ii).
[5] *Id.*
[6] Nichols Aff. Ex. A.
[7] *Id.*
[8] *Id.*
[9] *Id.* at p. 63-73.

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## II. Motion to Dismiss

The Amended Complaint is dismissed for at least two reasons. First, all the claims set forth in the Amended Complaint are derivative in nature, and Frustaci has not complied with the requirements for pleading a derivative action. Second, even if Frustaci has asserted a direct claim, an appraisal is the exclusive remedy for his alleged injuries, and the pleadings do not present sufficient facts to support an allegation of "fraudulent" action that would render the appraisal a non-exclusive remedy.

### a. Frustaci has not complied with the requirements for pleading a derivative action.

A shareholder bringing a derivative action must comply with the pleading requirements set forth in Rule 23.09 of the Minnesota Rules of Civil Procedure. When a shareholder does not comply with those pleading requirements, the action is properly dismissed.[10]

Frustaci has not complied with the requirements for pleading a derivative action. Accordingly, if this action is derivative in nature, it is properly dismissed. Under Minnesota law, derivative claims are distinguished from direct claims by considering "whether the injury to the individual plaintiff is separate and distinct from the injury to other persons in a similar situation as the plaintiff."[11] Where the injury to the shareholder is not separate and distinct, the claim is derivative.[12]

Under that standard, this action is derivative in nature because none of Frustaci's alleged injuries are separate and distinct from the injury to other Uroplasty shareholders. If Frustaci suffered injury because additional detail regarding the proposed merger was not disclosed, the Uroplasty shares were undervalued, or the board of directors had a conflict of interest, the resultant injury was suffered by all or nearly all of Uroplasty's shareholders.

Frustaci contends that this action is not derivative because the individual Defendants serving on the board of directors are Uroplasty shareholders who did not suffer the alleged injury. Even if the individual Defendants did not suffer the alleged injury in their capacity as shareholders, the action is still derivative because the issue is not whether every single shareholder suffered the alleged injury. The issue is whether the injury to Frustaci is separate and distinct from the injury to

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[10] *See, e.g., Wessin v. Archives Corp.*, 592 N.W.2d 460, 467 (Minn. 1999).
[11] *Northwest Racquet Swim & Health Clubs, Inc. v. Deloitte & Touche*, 535 N.W.2d 612, 617 (Minn. 1995).
[12] *Id.* at 617-18.

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persons similarly situated.[13] Persons similarly situated include the many Uroplasty shareholders who did not engage in the challenged conduct.

Since Frustaci's alleged injury was not separate and distinct from any injury to other Uroplasty shareholders, his claims are derivative, and this action is properly dismissed.

**b. An appraisal is the exclusive remedy for Frustaci's alleged injuries.**

Under Minn. Stat. § 302A.471, subd. 1(c), a shareholder may dissent to a merger and obtain payment for the fair value of his shares. This right to an appraisal is an exclusive remedy "except when the corporate action is fraudulent with regard to the complaining shareholder or the corporation."[14] The exception for "fraudulent" action was construed in *Sifferle* to apply where "a complaint pleads with specificity that a merger was carried out through deception, misrepresentation, actual fraud, or in violation of applicable statutes or articles of incorporation, or in violation of a fiduciary duty."[15]

Frustaci has not alleged that the Defendants engaged in any outright fraud. He is claiming breach of fiduciary duty, but the Amended Complaint does not allege facts or plead breach of fiduciary duty with the sort of specificity that would warrant applying the exception as it was construed in *Sifferle*. Frustaci has pled nondisclosure with some specificity, but the exception would swallow the rule if a mere allegation of nondisclosure triggers the exception.

Since the statutory right to an appraisal is Frustaci's exclusive remedy, this action is properly dismissed even if some of the claims are direct rather than derivative.

**III. Motion for a preliminary injunction**

Frustaci moved for a preliminary injunction enjoining a shareholder vote on the proposed merger until further disclosures were made. Dismissal of this action naturally precludes injunctive relief. Injunctive relief is further unwarranted because, given his right to an appraisal, Frustaci has failed to show that he has no adequate remedy at law.[16]

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[13] *Id.* at 617.
[14] Minn. Stat. § 302A.471, subd. 4.
[15] *Sifferle v. Micom Corp.*, 384 N.W.2d 503, 507 (Minn. Ct. App. 1986).
[16] *See, e.g., Ecolab, Inc. v. Gartland*, 537 N.W.2d 291, 294 (Minn. Ct. App. 1995) (citing rule that "party seeking a temporary injunction must show it has no adequate remedy at law").

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Moreover, even if Frustaci had made that threshold showing, the *Dahlberg* factors do not warrant the injunctive relief requested by Frustaci.[17] The relationship between the parties does not favor injunctive relief because Frustaci does not hold a significant ownership interest in Uroplasty. The balance of harm does not favor injunctive relief because impeding the merger may result in significant financial harm to Uroplasty whereas allowing a vote on the merger is unlikely to result in significant financial harm to Frustaci given (1) his right to an appraisal and (2) the modest ownership interest held by Frustaci.

The likelihood of success on the merits does not favor injunctive relief for several reasons, including the lack of any evidentiary support for a finding that the nondisclosed information is material to Frustaci.[18] Public policy does not favor injunctive relief because the exclusivity of the appraisal remedy signals legislative disfavor for allowing a single shareholder to obstruct a merger. The administrative burden does not favor injunctive relief because the Court would be required to monitor the sufficiency of further disclosures as a prerequisite to any shareholder vote.

Since Frustaci has not met the threshold requirements for obtaining a preliminary injunction and the *Dahblerg* factors do not favor injunctive relief, Frustaci's motion for a preliminary injunction is denied.

## IV. Order for dismissal

For the reasons set forth above, this action should be dismissed as to all Defendants. Even though Frustaci may be able to rectify his noncompliance with the derivative pleading requirements, dismissal with prejudice is the appropriate course because an appraisal still remains his exclusive remedy. Moreover, the gravamen of this action is Frustaci's request for injunctive relief, and that request is now moot.

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[17] *Dahlberg Bros. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965) (identifying five factors to be considered in deciding whether issue a temporary injunction).
[18] Minn. R. Civ. Proc. 65.02(b) ("A temporary injunction may be granted if by affidavit, deposition testimony, or oral testimony in court, it appears that sufficient grounds exist therefor.")

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Accordingly, the Amended Complaint is hereby dismissed with prejudice.

**Let judgment be entered accordingly.**

By the Court:

June 16, 2015

Bruce D. Manning, Judge of District Court