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Case No. 2020-0282-KSJM

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

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| SNOW PHIPPS GROUP, LLC,<br><br>Plaintiff,<br><br>v.<br><br>KCAKE ACQUISITION, INC., KOHLBERG INVESTORS VIII-B, L.P., KOHLBERG INVESTORS VIII-C, L.P., KOHLBERG TE INVESTORS VIII, L.P., KOHLBERG TE INVESTORS VIII-B, L.P., KOHLBERG INVESTORS VIII, L.P., AND KOHLBERG PARTNERS VIII, L.P.,<br><br>Defendants. | ) | C.A. No. 2020-0282-KSJM<br><br>PUBLIC VERSION FILED APRIL 17, 2020 |

**PLAINTIFF'S MOTION FOR EXPEDITED PROCEEDINGS**

Pursuant to Rule 173(b), Plaintiff Snow Phipps Group, LLC respectfully requests an order expediting proceedings, providing leave to file dispositive briefing by April 21st and setting this matter against Defendants KCAKE Acquisition, Inc. ("KCAKE"), Kohlberg Investors VIII-B, L.P., Kohlberg Investors VIII-C, L.P., Kohlberg TE Investors VIII, L.P., Kohlberg TE Investors VIII-B, L.P., Kohlberg Investors VIII, L.P., and Kohlberg Partners VIII, L.P. ("Kohlberg Funds," and, with KCAKE, "Kohlberg Parties") for an expedited one-day trial to commence on or before May 2, 2020.

## PRELIMINARY STATEMENT[1]

1. This action arises from the Kohlberg Parties' efforts to sabotage committed financing in order to avoid closing an acquisition to which they agreed a mere five weeks ago, with full knowledge of the risks presented by the coronavirus. On March 6, 2020, the Plaintiff and KCAKE signed a Stock Purchase Agreement ("SPA"), pursuant to which KCAKE, an acquisition vehicle acting on behalf of the Kohlberg Parties, agreed to acquire all of the stock of DecoPac Holdings, Inc. ("DecoPac"), from a group of Sellers represented by Plaintiff for [redacted] KCAKE provided Plaintiff with signed Debt and Equity Commitment Letters ensuring its ability to close. Since then, however, the Kohlberg Parties have made an abrupt about-face, citing their own failed attempt to renegotiate the terms of KCAKE's committed debt financing as a basis to escape the deal.

2. KCAKE has thus breached its obligations under the SPA to use reasonable best efforts to secure and maintain debt financing for Closing, and the Kohlberg Funds have anticipatorily breached their obligations to provide equity financing needed for Closing. Pursuant to its rights under the SPA and Equity Commitment Letter, Plaintiff seeks a declaratory judgment and a specific

[1] Plaintiff's Complaint sets forth the relevant facts, which are incorporated herein by reference. Lettered exhibits are attached hereto; numbered exhibits are attached to the Complaint.

performance order compelling the Kohlberg Funds to provide equity financing for Closing and KCAKE to Close the transaction, under the terms of Section 11.14(b) of the SPA.

3. Expedition is necessary because (i) KCAKE may seek to terminate the SPA after its May 5, 2020 Outside Termination Date (although KCAKE has no such right), and (ii) KCAKE's Debt Commitment Letter will expire on May 12, 2020. When the Debt Commitment Letter expires, existing third-party debt financing will vanish, and Plaintiff and other Sellers will be irreparably harmed. Expedition is also manageable because the factual issues are minimal and a one-day trial can be held quickly (and remotely), in time to provide Plaintiff with the relief sought. Alternatively, if KCAKE waives any right to terminate the SPA and can secure an extension of its debt financing, Plaintiff is amenable to an appropriately enlarged schedule.

## BACKGROUND

4. Plaintiff is an indirect major equity holder in DecoPac, the parent company of a cake decorations supplier based in Minnesota.[2] On March 6, 2020, Plaintiff and the other DecoPac equity holders ("Sellers"), DecoPac, and KCAKE signed the SPA, under which KCAKE agreed to pay a [redacted] base price to

[2] The SPA designates Plaintiff as the "Seller Representative" and grants it authority to bring claims on behalf of the Sellers. *See, e.g.*, Ex. 1 § 11.14(b).

acquire DepoPac's equity. Ex. 1 at 4, § 1.1. Concurrently, KCAKE supplied Plaintiff with a Debt Commitment Letter, by which five lenders agreed to loan funds to KCAKE to partially finance the deal, Ex. 2 at 1, and an Equity Commitment Letter, by which the Kohlberg Funds agreed to contribute equity to KCAKE. The Debt Commitment Letter presently remains available to KCAKE, Compl. ¶¶ 12, 69, 80, 97, but will expire on May 12, 2020, which may make it impossible for KCAKE to close the SPA absent an extension by KCAKE's lenders or alternate financing. Ex. 2 § 15.

5. The SPA requires KCAKE to perform certain covenants between signing and Closing. Section 6.15(a) requires KCAKE to use its "reasonable best efforts to arrange and obtain the Debt Financing[.]" Specifically, KCAKE must use "commercially reasonable efforts" to "maintain in effect the Debt Financing and the Debt Commitment Letter," and to "enter into definitive agreements with respect to the Debt Financing that are on terms and conditions no less favorable to Buyer than those contained in the Debt Commitment Letter[.]" Ex. 1 § 6.15(a)(i), (iii). Section 6.15(b) of the SPA further confirms that KCAKE's "reasonable best efforts" obligation requires accepting funding at least as advantageous as that offered in the Debt Commitment Letter by explicitly prohibiting KCAKE from agreeing to "any modification to … the Debt Commitment Letter … [that would] materially adversely

impact the ability of the Buyer to … consummate the transactions[.]" *Id.* § 6.15(b)(i)(y).

6. The SPA's Section 11.14(a) grants the parties the right to compel specific performance of covenants, including KCAKE's "reasonable best efforts" covenant, acknowledging that "the subject matter of this Agreement … is unique," "parties would be damaged irreparably" by a breach, and "remedies at law would not be adequate to compensate" the non-breaching party.

7. The SPA, together with the Equity Commitment Letter,[3] separately affords Plaintiff an independent specific performance right to compel KCAKE and the Kohlberg Funds to consummate closing, subject to only three conditions: (i) the conditions to KCAKE's performance have been or will be satisfied; (ii) a three-day notice period has elapsed following Plaintiff's written confirmation that the Sellers and the Company are ready, willing, and able to close, and (iii) "the full proceeds of the Debt Financing have been funded to Buyer on the terms set forth in the Debt Financing Commitment Letter … or would be funded at the Closing if the Equity Financing is substantially contemporaneously funded at the Closing." *Id.* § 11.14(b).

[3] The Equity Commitment Letter grants Plaintiff standing to compel specific performance of its terms if the conditions set forth in Section 11.14(b) of the SPA are met. Ex. 5 § 5(b).

8. Since the execution of the SPA, Sellers have moved diligently toward Closing, all material Closing conditions have been satisfied and the handful of mechanical steps remaining are being completed in the next day or so. DecoPac continues—unlike many other businesses in the wake of the coronavirus—to operate as an essential business, with its warehouse staff reporting for duty, and its office staff performing the same functions as always while working from home. While the Company has seen a short-term dip in sales during the past few weeks, its business is expected to rebound quickly and is poised to deliver solid performance in the medium-to-long term. Compl. ¶ 76.

9. The Kohlberg Parties, however, have suddenly refused to Close. On April 1, 2020, less than a month after signing the SPA, the Kohlberg Parties unexpectedly declared that debt financing was no longer available, and they would not proceed with the transaction. Compl. ¶¶ 9, 68. Plaintiff later learned—during concerted, earnest efforts to understand the purported financing issue and to convince the Kohlberg Parties to perform—that, in fact, the financing offered KCAKE in the Debt Commitment Letter remained available. Compl. ¶¶ 9, 69. Rather, the Kohlberg Parties had attempted to renegotiate this debt by seeking additional lender concessions. Compl. ¶ 69. When the lenders refused, KCAKE unilaterally declared that it had "failed to secure financing," and would terminate the SPA. Compl. ¶ 69. In reality, the Kohlberg Parties have developed buyer's remorse,

realize they have no justifiable basis to terminate the transaction, and have resorted to sabotaging KCAKE's committed financing. Compl. ¶ 75-77. While the Kohlberg Parties have repeatedly requested that Plaintiff delay any litigation, and Plaintiff has made a good faith effort to engage with the Kohlberg Parties, such efforts have failed and the Kohlberg Parties have unjustifiably refused to close the transaction.

10. Because the Kohlberg Parties refuse to proceed to Closing and KCAKE has breached its "reasonable best efforts" obligation, court intervention is required. Plaintiff has concurrently filed a Complaint that alleges breach of contract, declaratory judgment, and breach of the implied covenant of good faith and fair dealing and seeks specific performance of KCAKE's obligation to finalize its debt financing and Close the deal and the Kohlberg Funds' obligation to provide equity financing. Compl. ¶¶ 93-129. However, the Debt Commitment Letter will expire on May 12, 2020. Ex. 2 § 15. Accordingly, Plaintiff asks this Court to schedule proceedings so that the Kohlberg Parties cannot 'run out the clock' on this transaction and avoid complying with the SPA and Equity Commitment Letter.

## ARGUMENT

11. Delaware courts are receptive to expediting litigation "in the interests of affording justice to the parties," *Box v. Box*, 697 A.2d 395, 399 (Del. 1997), and the standard for expedition "is not a difficult one to meet." *Balch Hill Partners, L.P. v. Shocking Techs., Inc.*, 2013 WL 588964, at *2 (Del. Ch. Feb. 7, 2013). To obtain

expedition, a party need only "articulate[] a sufficiently colorable claim," and "show[] a sufficient possibility of a threatened irreparable injury." *Gaines v. Narachi*, 2011 WL 4822551, at *2 (Del. Ch. Oct. 6, 2011). Here, Plaintiff's claims—which rest on the SPA's plain meaning—are far more than colorable. Moreover, while Plaintiff recognizes that the burdens on the Court at this time are extraordinary, Defendants' actions have left no choice but to seek expedited treatment. Fortunately, the minimal factual issues, if any, presented here may be resolved swiftly to afford Plaintiff effective relief.

## I. PLAINTIFF HAS STATED MORE-THAN-COLORABLE CLAIMS

12. Establishing a colorable claim "is not an onerous burden[.]" *In re K-Sea Transp. Partners L.P.*, 2011 WL 2410395, at *5 & n.8 (Del. Ch. June 10, 2011). The Court need only conduct "an almost superficial factual assessment" of a plaintiff's claims, *Cty. of York Emps.' Ret. Plan v. Merrill Lynch & Co.*, 2008 WL 4824053, at *6 (Del. Ch. Oct. 28, 2008), accepting well-pled allegations as true. *See TCW Tech. Ltd. P'ship v. Intermedia Comm'ns, Inc.*, 2000 WL 1478537, at *2 (Del. Ch. Oct. 2, 2000).

13. Plaintiff more than adequately pleads entitlement to specific performance of the Kohlberg Parties' obligations to Close. The SPA and the Equity Commitment Letter impose only three conditions on Plaintiff's right to compel the Kohlberg Funds to supply Equity Financing and to compel KCAKE to Close. Those

three conditions are that (i) Sellers have satisfied the conditions to Closing or will do so at Closing; (ii) a three-day notice period has elapsed following Plaintiff's notification that Sellers and the Company are ready, willing, and able to Close, and (iii) "the full proceeds of the Debt Financing [would be funded at Closing] to Buyer on the terms set forth in the Debt Financing Commitment Letter … if the Equity Financing is substantially contemporaneously funded at the Closing." Plaintiff will satisfy all three conditions within days: (i) it will shortly meet its closing obligations, which are purely mechanical; (ii) it apprised KCAKE of its willingness and ability to perform, but KCAKE has already advised that it will not perform; and (iii) the debt financing offered in the Debt Commitment Letter remains available. *See* Compl. ¶¶ 75-76. Accordingly, Plaintiff's claim easily surpasses the low bar to establish a colorable claim.

14. Additionally, Plaintiff alleges that KCAKE has breached the SPA by failing to use "reasonable best efforts" to obtain financing, including through "commercially reasonable efforts" to "enter into definitive agreements with respect to the Debt Financing that are on terms and conditions ***no less favorable*** to Buyer than those contained in the Debt Commitment Letter." Ex. 1 § 6.15(a). This clause obliges KCAKE to "take all reasonable steps to solve problems and consummate a transaction," *Williams Cos. v. Energy Transfer Equity*, 159 A.3d 264, 272 (Del. 2017), and to take any action that is "both commercially reasonable and advisable to

enhance the likelihood of the consummation of financing." *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, 965 A.2d 715, 749 (Del. Ch. 2008).

15. KCAKE has failed to meet this standard, thus breaching Section 6.15. Far from taking "all reasonable steps" to consummate a transaction, KCAKE has actively undermined available financing by attempting to renegotiate more favorable terms, failing to do so, and then unilaterally deciding to walk away from its agreement. Compl. ¶¶ 69, 72, 77, 80. Such allegations easily satisfy the low bar for establishing a colorable claim. *See Trilogy Portfolio Co., LLC v. Brookfield Real Estate Fin. P'rs, LLC*, 2012 WL 120201, at *5 (Del. Ch. Jan. 13, 2012) (contract interpretation was colorable because it was not "frivolous or so lacking in merit as to make it impossible for Plaintiffs to prevail").

16. Similarly, Plaintiff's claim for declaratory relief, which largely mirrors its breach of contract claim against KCAKE, is also colorable. Plaintiff seeks a declaration that (a) KCAKE has breached its obligations under Section 6.15 of the SPA, and (b) the SPA requires KCAKE to finalize Debt Financing terms consistent with the Debt Commitment Letter and proceed to closing.[4] Compl. ¶¶ 123-129. As set forth above, KCAKE's refusal to proceed violates its "reasonable best efforts"

[4] An "Outside Termination Date" of May 5, 2020 governs when the parties may terminate the SPA, but is unavailable to a party that causes a condition to fail. Ex. 1 § 8.1(c).

obligation, which, under the circumstances, prohibits KCAKE from disregarding or destroying financing, which remains available on the terms in the Debt Commitment Letter.[5]

17. Finally, Plaintiff states a colorable claim for breach of the implied covenant, which "requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct" that prevents its counterparty from receiving the "fruits of the bargain." *Nemec v. Shrader*, 991 A.2d 1120, 1128 (Del. 2010). Here, Plaintiff pleads that KCAKE (i) attempted to renegotiate the terms of the Debt Commitment Letter, (ii) obscured its conduct, and (iii) refused to proceed with financing offered under the terms of the Debt Commitment Letter, Compl. ¶¶ 68-76. These facts, if proven, demonstrate that KCAKE has attempted to deprive Plaintiff of the "fruits of the bargain." Thus, to the extent that KCAKE has no express obligation to pursue such financing, Plaintiff plausibly pleads that the SPA contains an implied obligation to do so.

[5] Even if financing were withdrawn due to KCAKE's conduct, Section 11.14(b)(iii) affords no safe haven, as it is "black letter law that where a party's breach by nonperformance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused." *WaveDivision Hldgs., LLC v. Millennium Digital Media Sys., LLC*, 2010 WL 3706624, at *14 (Del. Ch. Sept. 17, 2010).

## II. PLAINTIFF AND SELLERS FACE IRREPARABLE HARM

18. Expedition is warranted here because Plaintiff and the other Sellers face irreparable injury and substituting compensatory damages for specific performance would be "a denial of justice." *AM Gen. Holdings LLC v. Renco Grp., Inc.*, 2012 WL 6681994, at *4 (Del. Ch. Dec. 21, 2012). Any damages award would be an imperfect substitute for closing the sale of DecoPac, which presents a unique opportunity.[6] The only adequate remedy is one that compels specific performance of the obligations set forth in the SPA and the Equity Commitment Letter. Without expedition, there may well be no opportunity for such a remedy, as the parties will not complete the transaction before the Debt Commitment Letter—which provides more than half of the financing for the transaction—lapses on May 12, 2020. Ex. 2 § 15; *see, e.g.*, *ACE Ltd. v. Capital Re Corp.*, 747 A.2d 95, 110 (Del. Ch. 1999) (plaintiff "made a sufficient showing to demonstrate that, absent a TRO, it may lose a unique opportunity to acquire Capital Re at a favorable price.").

[6] The loss of the ability to transfer a business constitutes irreparable harm. *See, e.g.*, *Conduent Business Servs., LLC v. Skyview Capital, LLC*, C.A. No. 2020-0232-JTL, at 35 (Del. Ch. Mar. 30, 2020) (TRANSCRIPT) (finding irreparable harm where a party sought to enforce an asset purchase agreement encompassed an "obligation to consummate [a] sale" by April 30) (Ex. A); *Anthem, Inc. v. Cigna Corp.*, C.A. 2017-0114-JTL, at 46 (Del. Ch. Feb. 15, 2017) (TRANSCRIPT) (citing loss of transaction to obtain equitable relief) (Ex. B); *see also Alere Inc. v. Abbott Labs.*, C.A. No. 12691-VCG (Del. Ch. Sept. 2, 2016) (TRANSCRIPT) Tr. at 28-29 (Ex. C).

19. The parties to the SPA expressly agreed that a covenant breach would result in irreparable harm, acknowledging that "the subject matter of this Agreement, . . . . is unique," "the other parties would be damaged irreparably" by a breach , and "remedies at law would not be adequate" for such breaches. Ex. 1 § 11.14(a). Such an acknowledgment strongly supports expedition. *See Martin Marietta Mat'ls, Inc. v. Vulcan Mat'ls Co.*, 68 A.3d 1208, 1226 (Del. 2012) ("contractual stipulations as to irreparable harm alone suffice to establish that element for the purpose of issuing … [equitable] relief").

## III. THE CIRCUMSTANCES WARRANT PROMPT ADJUDICATION

20. Plaintiff seeks an ambitious but achievable schedule. As set forth above, Plaintiff requests permission to file consolidated briefing by April 21st that (i) seeks summary judgment and (ii) serves as pre-trial briefing. The issues to be decided on summary judgment will be straightforward, as this Court may interpret the parties' unambiguous rights under the SPA promptly, as a matter of law. *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010). Meanwhile, the parties can complete limited, expedited document discovery and undertake four-hour video depositions of three witnesses each, in the event that this Court is unable to resolve the case through summary judgment. Following such discovery, Plaintiff proposes that an expedited one-day trial, limited to attorney argument and the

presentation of documents and witness deposition video, be held on or before May 2, 2020.

21. Given that the Debt Commitment Letter lapses on May 12, 2020, there is no reasonable alternative. Any longer schedule will result in a forfeiture of Sellers' right to complete this transaction. *Rohm & Haas Co. v. Dow Chem. Co.*, 2009 WL 445612, at *2 (Del. Ch. Feb. 6, 2009) (ordering an expedited trial on one month's notice where bank financing would become unavailable).

22. Accordingly, Plaintiff seeks an order expediting the proceedings.

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Words: 2,998

DATED: April 14, 2020

**CERTIFICATE OF SERVICE**

I hereby certify that on April 17, 2020 my firm served true and correct copies of the *Public Version of Plaintiff's Motion for Expedited Proceedings* upon the following counsel of record via File & Serve*Xpress*:

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