

**SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA**

Department 1, Honorable James P. Kleinberg Presiding

_____, Courtroom Clerk

_____, Court Reporter

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COMPLEX CIVIL LITIGATION TENTATIVE RULINGS

DATE: FEBRUARY 22, 2013 TIME: 9 A.M.

PREVAILING PARTY SHALL PREPARE THE ORDER

(SEE [RULE OF COURT 3.1312](#))

LINE #	CASE #	CASE TITLE	RULING
LINE 1	110CV164041	Rondone v. Orchard Supply Hardware Stores Corporation	Click on LINE 1 for ruling
LINE 2	112CV222008	Parc Place HOA v. Western Pacific Housing	Continued to April 12, 2013 at 9:00 A.M.
LINE 3	112CV223170	Hummel v. Castle Principles, LLC, et al.	Click on LINE 3 for ruling
LINE 4	112CV231541	Gordon v. Symantec Corporation	Click on LINE 4 for ruling
LINE 5	112CV233338	Gillespie v. Svale Del Grande, Inc., et al.	Click on LINE 5 for ruling

Calendar line 4

Case Name: *Natalie Gordon vs. Symantec Corporation, et al.*

Case No.: 1-12-CV-231541

This is a shareholder class action brought by plaintiff Natalie Gordon (“Plaintiff”) individually and on behalf of shareholders of Symantec Corporation (“Symantec”) against Symantec and individual Symantec directors Stephen M. Bennett, Michael A. Brown, Frank E. Dangeard, Stephen E. Gillett, Geraldine B. Laybourne, David L. Mahoney, Robert S. Miller, Daniel H. Schulman, and V. Paul Unruh (the “Individual Defendants”) (collectively “Defendants”) for allegedly disseminating materially misleading and incomplete materials in an August 30, 2012 Proxy Statement filed with the SEC in connection with “Proposal 3” – an advisory vote to approve executive compensation. Plaintiff alleges the Proxy was deficient in its disclosures regarding Proposal 3 as follows:

- a. The Proxy fails to disclose a fair summary of the Competitive Market Assessment analysis performed by Mercer.
- b. The Proxy fails to disclose what other consulting and business services Mercer performed for the Company’s management, for which the Company paid Mercer \$1.98 million in fiscal 2012.
- c. The Proxy fails to disclose the criteria used to select the Symantec Peer Group that the Board and/or the Board’s Compensation Committee used to target the Company’s executive compensation, as well as a fair summary of the executive compensation data for the Symantec Peer Group.
- d. The Proxy fails to disclose what survey data the Board and/or the Board’s Compensation Committee used to target the Company’s executive compensation, as well as (i) the criteria for selecting that survey as a data source, and (ii) the base salary, short-term cash incentive bonus, long-term equity incentive, and total direct compensation data for each of the companies in the survey(s), or even the median, mean, and range for the data set in the survey.
- e. The Proxy fails to disclose how the Company’s gross burn rate, net burn rate, and overhang for fiscal 2012 compared to the Symantec Peer Group or the survey data analyzed by the Board and/or the Board’s Compensation Committee.
- f. The Proxy fails to disclose how the Board and/or the Board’s Compensation Committee determined to shift the Company’s target pay positioning for its executive officers from the 65th percentile to the 50th percentile of the relevant market composite for salary.
- g. The Proxy fails to disclose how the Board and/or the Board’s Compensation Committee determined to shift the Company’s target pay positioning for its executive officers from the 65th percentile to the 50th percentile of the relevant market composite for the variable, performance-based pay elements.
- h. The Proxy fails to disclose how the Board and/or the Board’s Compensation Committee determined to increase the Company’s stock ownership guidelines for its executive officers to 5x base salary for the CEO, 3x base salary for the CFO, and 3x base salary for Group

Presidents and Executive Vice Presidents, and to implement a holding requirement of 50% of all net (after-tax) equity grants.⁷

The Class Action Complaint (“CAC”) asserts two causes of action for: (1) breaches of fiduciary duty against the Individual Defendants; and (2) aiding and abetting the Individual Defendants’ breach of fiduciary duties against Symantec. The CAC prays for class certification, injunctive relief enjoining the Defendants from consummating the shareholder vote on Proposal 3 unless the Company provides adequate disclosures, and declaratory relief that the Proxy was issued in breach of the fiduciary duties of the Individual Defendants and is therefore unlawful, and that Symantec aided and abetted the Individual Defendants in connection with the issuance of a materially misleading and incomplete Proxy.⁸ The CAC further prays for damages and costs and other appropriate relief.⁹

On October 10, 2012, Plaintiff moved for a preliminary injunction to enjoin the October 23, 2012 shareholder vote on Proposal 3. On October 17, 2012, the motion for preliminary injunction was denied.

Defendants now demur to the CAC on the grounds that it fails to state sufficient facts to constitute a cause of action because: (1) even if Plaintiff could demonstrate harm flowing from an advisory shareholder vote, the harm would be to Symantec, and thus, the claims are derivative, but Plaintiff fails to allege demand or demand futility; (2) Plaintiff cannot state a direct claim for nondisclosure because the shareholder vote on Proposal 3 has occurred; (3) even if Plaintiff could allege a direct claim, claims for breach of the duty of care are barred by Article 7 of Symantec’s Amended and Restated Certificate of Incorporation, pursuant to 8 Del. C. § 102(b)(7); and (4) Plaintiff fails to allege facts showing the information omitted from the Proxy was material for purposes of her disclosure claim.

Plaintiff argues: (1) her claims are direct because she alleges Symantec’s shareholders were deprived of their right to full disclosure of all material information before deciding whether to vote; (2) the advisory nature of the vote is irrelevant because the Board has a duty to disclose material information; (3) the information regarding non-compensation work performed by Mercer is material to the shareholders’ determination of how much weight to put into the analysis; (4) the information is not immaterial simply because it is publicly available; and (5) 8 Del. C. § 102(b)(7) does not bar Plaintiff’s claims against the Individual Defendants because she seeks injunctive or declaratory relief, not monetary damages.

Judicial Notice

Defendants request judicial notice of: (1) Symantec’s Proxy, filed August 30, 2012 as referred to in the Complaint; (2) Symantec’s Form 8-K, filed October 24, 2012; (3) Nov. 2, 2012 Order in *In re McAfee, Inc. S’holder Litig.*, Case No. 1-10-CV-180413; (4) Symantec’s Amended and Restated Certificate of Incorporation, filed with the Delaware Secretary of State on July 31, 2009. Copies of the records are attached to the Declaration of Kevin P. Muck.

⁷ Class Action Compl. (“CAC”) ¶ 31.

⁸ CAC ¶ 43A-D.

⁹ CAC ¶ 43E-G.

The request is **GRANTED** as to items 1, 2 (Evid. Code, § 452, subd. (c); *StorMedia Inc. v. Sup. Ct.* (1999) 20 Cal.4th 449, 456-457) and 3 (Evid. Code, § 452, subd. (c); *Cody F. v. Faletti* (2001) 92 Cal.App.4th 1232, 1236, fn. 2). The request and supplemental request for judicial notice of filings in unrelated cases (item 3 of original request and supplemental request filed February 8, 2012) is **DENIED**.

Discussion¹⁰

“[A] board of directors is under a fiduciary duty to disclose material information when seeking shareholder action: [¶] It is well-established that the duty of disclosure represents nothing more than the well-recognized proposition that directors of, Delaware corporations are under a fiduciary duty to disclose fully and fairly all material information within the board’s control when it seeks shareholder action.” (*Malone v. Brincat* (Del. 1999) 722 A.2d 5, 9, footnotes and quotation marks omitted.)

“[W]here it is claimed that a duty of disclosure violation impaired the stockholders’ right to cast an informed vote, that claim is direct.” (*In re J.P. Morgan Chase & Co. S’holder Litig. v. Harrison* (Del. 2006) 906 A.2d 766, 772.)

Here, Plaintiff alleges a violation of the duty of disclosure affecting the Symantec shareholders’ right to an informed vote on Proposal 3. The Court sees no basis to conclude as a matter of law that the advisory nature of the vote nullifies the Individual Defendants’ duty to communicate information about the corporation’s affairs with due care, loyalty and in good faith, particularly given the Proxy’s statement that the Compensation Committee and Board “will consider the outcome of the vote in establishing compensation philosophy and making future compensation decisions”¹¹

However, Plaintiff’s motion to enjoin the shareholder vote was denied, and judicially-noticed documents show the shareholders approved the advisory “say-on-pay” proposal on October 23, 2012. Thus, it appears there is no longer any direct disclosure claim available to the Symantec shareholders. “[A] breach of the disclosure duty leads to *irreparable harm*. . . . [O]nce this irreparable harm has occurred--*i.e.*, when shareholders *have* voted without complete and accurate information--it is, by definition, too late to remedy the harm.” (*In re Transkaryotic Therapies, Inc.* (Del. Ch. 2008) 954 A.2d 346, 360-361.) Plaintiff points out that she also seeks declaratory relief, but Plaintiff fails to articulate how declaratory relief could remedy the alleged disclosure violations. The only suggestion of monetary harm in the CAC pertains to the Individual Defendants’ self-dealing and unjust enrichment from the executive compensation practices approved under Proposal 3, but that harm would seem to flow to Symantec, not the shareholders (in which case, the claim is derivative, not direct).

Furthermore, Plaintiff fails to adequately plead a sufficient disclosure claim. “The duty of disclosure is a specific formulation of those general duties that applies when the corporation is seeking stockholder action. It requires that directors ‘disclose fully and fairly all material information within the board’s control. . . .’ Omitted facts are material ‘if there is a substantial

¹⁰ The parties agree that Delaware law applies. Disputes regarding the internal affairs of a corporation are governed by the state of incorporation. (*State Farm Mutual Automobile Ins. Co. v. Superior Court* (2003) 114 Cal.App.4th 434, 442.) Symantec is a Delaware corporation. (CAC ¶ 9.)

¹¹ Proxy at p. 25, Exh. 2 to Decl. Muck.

likelihood that a reasonable stockholder would consider [them] important in deciding how to vote.’ Stated another way, there must be ‘a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable stockholder as having significantly altered the “total mix” of information made available.’” (*Skeen v. Jo-Ann Stores, Inc.* (Del. 2000) 750 A.2d 1170, 1172, footnotes omitted.)

“To state a disclosure claim, [plaintiffs] ‘must provide some basis for a court to infer that the alleged violations were material. . . . [They] must allege that facts are missing from the [information] statement, identify those facts, state why they meet the materiality standard and how the omission caused injury.’ Unsupported conclusions and speculation are not a substitute for facts.” (*Skeen, supra*, 750 A.2d at p. 1173.) “Omitted facts are not material simply because they might be helpful.” (*Id.* at p. 1174.)

“[W]hile a corporation must adequately inform share-holders as to matters under consideration, the requirement of full disclosure does not mean that a proxy statement must satisfy unreasonable or absolute standards. Many people may disagree as to what should or should not be in such a statement to share-holders, and as to alleged omissions the simple test (sometimes difficult of application) is whether the omitted fact is material. [Citation.] There is obviously no requirement to include insignificant information. [Citations.] Provided that the proxy statement viewed in its entirety sufficiently discloses the matter to be voted upon, the omission or inclusion of a particular item is within the area of management judgment. [Citation.]” (*Kaplan v. Goldsamt* (Del. Ch. 1979) 380 A.2d 556, 565.)

The CAC alleges the Proxy failed to provide a fair summary of the Competitive Market Assessment analysis performed by Mercer. However, Plaintiff fails to allege how the omission of this information would have altered the total mix of information available to the Symantec shareholders through the Proxy. The judicially-noticed Proxy discusses competitive market factors considered by the Compensation Committee and Mercer in determining the compensation program.¹²

The CAC further alleges that the Proxy failed to disclose other non-compensation consulting and business services that Mercer performed for which Symantec paid Mercer \$1.98 million in fiscal 2012. Again, however, Plaintiff fails to allege how the details of Mercer’s non-compensation work would be considered material by a shareholder or alter the total mix of information. Plaintiff argues the specific information would be material to the shareholders’ determination of how much weight to put into the analyses performed, but the Proxy already discloses the fact of Mercer’s non-compensation work as well as the amount for which Mercer was compensated. It is not clear how disclosing the minute details of this work would give a shareholder greater (or lesser) confidence in Mercer’s analysis.

The CAC alleges the Proxy failed to disclose the criteria used to select the Symantec Peer Group and did not provide a fair summary of the executive compensation data for the Symantec Peer Group. The Proxy does discuss how the Compensation Committee used “a peer group that consists of a broader group of high technology companies in different market segments that are of a comparable size to us” because Symantec competes for leadership talent with these types of companies in the broad information technology industry.¹³ The Proxy

¹² Proxy at 38-39.

¹³ Proxy at 39.

further states that the Compensation Committee “reviews our peer group on an annual basis, and the group may be adjusted from time to time based on a comparison of market capitalization, industry and peer group performance.” Thus, the selection criteria appears to be adequately disclosed. Plaintiff does not allege how the omission of executive compensation data for the Symantec Peer Group would have been viewed as significantly altering the total mix of information already made available.

The CAC alleges the Proxy failed to disclose the survey data used to target the executive compensation as well as the criteria for selecting that survey, and various information (base salary, short-term cash incentive bonus, long-term equity incentive, and total direct compensation data) for each company in the survey. The Proxy provides a comprehensive discussion about the specific compensation components and targets for individual Symantec officers, the process by which those targets were set, the factors considered, and how actual performance compares. Plaintiff fails to allege how omission of the survey data would alter this total mix of information.

The CAC alleges the Proxy failed to disclose Symantec’s gross burn rate, net burn rate, and overhang for fiscal 2012 compared to the Symantec Peer Group or the survey data. However, Plaintiff fails to allege how the omission of this information, which Defendants contend is publicly available, significantly altered the total mix of information made available in the Proxy.

The CAC alleges the Proxy failed to disclose how the Board or Compensation Committee determined to shift the Company’s target pay positioning for its executive officers from the 65th percentile to the 50th percentile of the relevant market composite for salary and variable, performance-based pay elements, and also how they determined to increase Symantec’s stock ownership guidelines for its executive officers. However, the Proxy contains a detailed discussion on the factors and components of the compensation program.¹⁴ “Asking ‘why’ does not state a meritorious disclosure claim.” (*In re Sauer-Danfoss Inc. S’holders Litig.*, 2011 Del. Ch. LEXIS 64, at *38.)

Because Plaintiff fails to state an underlying claim for breach of fiduciary duty against the Individual Defendants, the claim against Symantec for aiding and abetting also fails. (See *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.* (Del. Ch. 2006) 906 A.2d 168, 215.)

For these reasons, Defendants’ demurrer to the CAC is **SUSTAINED with 10 days’ leave to amend.**

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¹⁴ Proxy at 38-47.