

**IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE  
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III**

**IN RE HCA, INC.  
SHAREHOLDER LITIGATION,**

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**Master Docket No. 06-1816-III**

**MEMORANDUM AND ORDER**

This is a lawsuit filed by a group of shareholders of a public corporation to halt a buy-out of the corporation by the founder of the company and investment partners. The plaintiff shareholders claim that the Board's representation that the buy-out is in the best interest of the shareholders is false and that the transaction is designed to benefit the founder and his buy-out group. Citing to a number of measures such as the appointment of a Special Committee, independent of the buy-out group, to investigate and study the transaction, the HCA defendants assert that they have dealt fairly with and fulfilled their legal obligations to the shareholders.

Having received the required approval on October 13, 2006 from the SEC of their third amended preliminary proxy statement, the defendants have set for November 16, 2006, the vote by the shareholders on whether to accept the buy-out offer. Before that date, the shareholders who filed this lawsuit plan to apply to this Court to halt the vote based on their claim that the deal is unfair to shareholders. The plaintiff shareholders, however, have run into a timing problem. They have applied to this Court for relief,

including a postponement of the shareholder vote scheduled for November 16, 2006. That is the issue presently before the Court.

The plaintiff shareholders' timing problem is that to obtain proof to support their case for the Court to halt the vote on the sale, they agreed with the defendants, to fit in before the vote, review of corporate documents, questioning the defendants and their agents under oath (depositions), and a court hearing. The parties have not been able to adhere to those deadlines. Only as of yesterday, October 25, 2006, did the plaintiffs receive substantially all the documents they requested. The problem is that the plaintiffs need time to study the documents and then more time to question the defendants and their agents under oath to gather proof to apply to the Court to halt the vote. With the vote set for November 16, 2006, the plaintiffs assert that they do not have sufficient time. They apply to the Court to postpone the vote for 30 days.

At stake in postponing the vote is millions of dollars per day in interest. Additionally, even if the shareholders approve the sale, it is contingent upon the buyers obtaining financing. A postponement of the vote by the Court could cloud the sale and make financing more difficult and/or more costly. Further, the delay of the vote increases the risk of adverse market changes or changes to the company which could cause the merger not to close and the shareholders to lose the cash out of \$51 per share.

After studying the papers filed by counsel, reviewing Delaware law on shareholders' rights to corporate information and the obligation of management to provide such information and Tennessee law on discovery procedure, and considering the

arguments of counsel, the Court grants the plaintiff shareholders some of the relief they have requested but not all. The Court vacates the present deadlines for completion of document production and depositions and provides the plaintiff shareholders some extensions on those, but the Court denies the plaintiff shareholders' motion to postpone the vote on November 16, 2006.

The Court's decision is based on the plaintiffs' failure to provide the Court with any proof, such as an affidavit of an accountant or other expert witness or documents damaging to the HCA defendants, to backup the plaintiff shareholders' allegations that the buy-out is unfair. The plaintiffs claim that they have unearthed damaging information but have made no showing of that to the Court. Faced at this time with mere allegations of unfairness but sworn proof from the HCA defendants detailing a number of measures the Board has taken to independently verify and assure fairness<sup>1</sup>, the Court concludes that the plaintiffs have failed to justify subjecting the company and its shareholders to the cost and market and industry risks of postponing the shareholder vote. Additionally, the

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<sup>1</sup>According to the affidavit of Mr. Gluck, some of the measures taken to assure and verify fairness are that a special committee of the Board (the "Special Committee") was formed to review, evaluate and, if appropriate, negotiate a possible acquisition of HCA and any alternative thereto. The Special Committee, according to Mr. Gluck, was comprised only of outside, independent directors, and the Special Committee retained independent financial and legal advisors to assist in its evaluation of the proposed transaction. Mr. Gluck asserts that the Special Committee reviewed the merger agreement and negotiated the \$51 per share price with the buy-out group in addition to the other terms of the merger. Mr. Gluck asserts that the Special Committee unanimously determined that the merger agreement and the transactions contemplated thereby, including the merger, were fair to and in the best interest of HCA's shareholder and recommended to the Board that they be approved. Additionally, for 50 days the Special Committee initiated, solicited and encouraged alternative buyers for the company in an attempt to obtain a superior proposal to the merger agreement and to obtain a higher per share price from a different buyer. Finally, Mr. Gluck testifies that the average price of the stock at the time the buy-out was announced was \$44 per share.

Court concludes that with the schedule ordered below, the plaintiff shareholders are provided an adequate time and just procedure to complete investigation of their claims and apply to the Court to halt the shareholder vote on the sale.

The Court, therefore, ORDERS:

1. The plaintiff shareholders are provided the rest of this week, through October 29, 2006, to analyze documents.

2. Plaintiffs' counsel shall review the deposition schedule proposed by defendants' counsel in its October 24, 2006 letter, and deliver to defendants' counsel, on or before noon on Friday, October 27, 2006, a revamped deposition schedule with depositions to commence on Monday, October 30, 2006, and proceeding through Friday, November 3, 2006, at noon.

3. Defendants' counsel shall have defendants and their agents reschedule other obligations and be flexible and make themselves available for these depositions all through the week of October 30, 2006, as their first priority.

4. Additionally, defendants' counsel shall make the core defendants available for their depositions sequentially, not simultaneously, so that the plaintiffs' counsel can build upon the depositions of different individuals in securing proof.

5. The plaintiffs shall file their application for an injunction on or before 3:00 p.m. Wednesday, November 8, 2006.

6. The defendants shall file their opposition at 4:00 p.m. on Friday, November 10, 2006. On that day, the courthouse is closed in observance of Armistice Day, but the

Court shall make arrangements with the Davidson County Clerk and Master for the defendants' filings to be received and marked of record.

7. The hearing on plaintiffs' application to enjoin the vote shall be held on Monday, November 13, 2006, at 9:30 a.m. As per the Local Rules of Davidson County, the hearing shall be conducted on affidavits and deposition testimony; no testimony shall be allowed at the hearing. Each side is allotted three hours, which includes plaintiffs' reply.

8. Finally, for efficient use of time, the Court shall not conduct oral argument on *The Tennessean's* motion to intervene, scheduled for November 3, 2006, but shall decide the motion on the papers.

The findings of fact and conclusions of law on which the Court bases its decision are as follows.

### **Law Applied by the Court**

The legal standard the Court has used to decide this motion is Rule 26 of the Tennessee Rules of Civil Procedure. Although section 10.7 of the Agreement and Plan of Merger states that the Agreement shall be governed by and construed in accordance with the laws of the State of Delaware, the Court notes that discovery issues and disputes are procedural matters and, as such, are governed by the law of the forum state: "Discovery in state court actions is governed by state statutes and rules." 23 Am.Jur.2d *Depositions and Discovery* § 2 (2006). As stated by a Delaware court, "regardless of which state's substantive law is used, procedural matters are generally controlled by the law of the

forum state. Pretrial discovery rules are generally procedural issues, and the law of the forum state is typically applied.” *Chubb Custom Ins. Co. v. Nutri/System, L.P.*, No. 98C-12-021-JTV, 1999 WL 743258 (Del. Super. Ct. May 19, 1999) at \*1. *See also Lutz v. Boas*, 176 A.2d 853, 857 (Del. Ch. 1961) (“It is well-established that the law of the forum governs questions of remedial or procedural law.”) *and* Restatement (First) of Conflict of Laws § 585 (1934) (“All matters of procedure are governed by the law of the forum.”). In determining the scope of such pre-trial discovery, the trial court is vested with broad discretion, and “[i]t may . . . control, limit, or prevent discovery that will not promote the administration of justice in the particular case.” 23 Am.Jur.2d *Depositions and Discovery* § 5.

Turning, then, to Tennessee rules on discovery, specifically Rule 26.02, the Court notes that the rule vests in the Court the authority to limit the frequency or extent of use of discovery methods if the Court determines that “the party seeking discovery has had an ample opportunity by discovering the action to obtain the information sought” or “that the discovery is unduly burdensome . . . taking into account the needs of the case, the amount in controversy, limitations on parties’ resources, and the importance of the issues at stake in the litigation.”

### **Findings of Fact**

By denying the plaintiffs’ motion for postponement of the shareholder vote, the Court is limiting the plaintiffs’ opportunity for discovery as permitted by Rule 26.02. In

doing so, the Court has concluded under Rule 26 that the plaintiffs have had ample opportunity to obtain the information sought.

In arriving at that conclusion, the Court has taken into account that the law requires the plaintiffs to have a case and proof of unfairness at the time they file the lawsuit, even before they obtain information from the other side. Since the additional time requested and delay of the vote pertain to information from the defendants to potentially supplement and bolster foundation proof the plaintiffs presumably already have, it is not justified.

Additionally, the plaintiffs claim in a summary document the Court required them to file that discovery has yielded documents demonstrating that the HCA Board of directors was shown overly pessimistic projections to convince the Board to recommend the buy-out, that McKinsey's evaluation was not independent, that Merrill Lynch stands on all side of the transaction and is not independent, and that Kohlberg Kravis manipulated projections to establish a lower share value. This testament by plaintiffs of uncovering documents supporting their claims indicates ample opportunity to obtain documentary information.

Further, in applying the legal standard of Rule 26, the Court finds that allowing time for discovery to postpone the November 16, 2006 vote is unduly burdensome taking into account the needs of the case, the amount in controversy, the limitations of time, and the matters at stake. According to the affidavit of Frederick W. Gluck<sup>2</sup>, if the shareholder

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<sup>2</sup>Mr. Gluck has been a member of the board of directors of HCA since 1998 and is currently the presiding director. He is not employed by HCA nor does he receive any

meeting is not allowed to go forward as currently scheduled on November 16, 2006, HCA's shareholders could be harmed both by the loss of the time-value of their \$51 in cash per share during the period of any delay and the risk that HCA's business operations and prospects could be materially harmed in the interim:

If the shareholder meeting is delayed by even as little as three business days, the closing of the merger (and HCA shareholders' receipt of their \$51 per share) could be delayed by up to two months. The merger agreement provides the buy-out group with the right to market the debt being sold to finance the transaction for twenty consecutive business days prior to closing. There is a holiday blackout period from December 19 through January 2, and the buy-out group is not required to exercise this right until after the shareholder meeting. Therefore, delaying the shareholder meeting for three days could push back the closing of the merger until January 29, 2007 (to allow the buy-out group twenty consecutive business days after the conclusion of the blackout period). There could be a corresponding two-month delay in the shareholders' receipt of the \$51 per share in cash without compensation. If the merger agreement is approved, HCA's shareholders, in the aggregate, will receive over \$20 billion in cash. A two-month delay in disbursing of those funds could result in an estimated loss to HCA's shareholders of at least \$100 million.

Delaying the closing of the transaction creates the separate risk to the shareholders that the merger may never close and that HCA shareholders may never be able to recoup more than \$51 per share on their investment. For example, certain adverse external events, adverse market developments, or material adverse changes specific to HCA could arise during the course of any delay. These events could significantly and irreparably decrease the long-term value of HCA. The average price of HCA stock at a third days prior to the announcement of the merger was less than \$44 per share.

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compensation from HCA other than what he receives in connection with his duties as a member of the Board and as a shareholder of HCA. He is the chairman of the Special Committee who investigated and recommended the buy-out.

Additional evidence that postponing the vote to allow additional time to plaintiffs to investigate their claims is unduly burdensome is the affidavit of Peter Stavros, a principal at Kohlberg Kravis Roberts & Co. He testifies that a delay in the shareholder meeting will have a significant impact on the financing of the transaction which would lead to serious harm to the HCA shareholders, the company and the buy-out group:

[U]nder the merger agreement and in summarizing the proxy statement, the buy-out group is obligated to use its reasonable best efforts to obtain necessary debt financing for the transaction as promptly as practicable. The HCA transaction will be financed with \$20.4 billion of new debt facilities, including \$5.7 billion of high yield bonds and \$16.8 billion of secured credit facilities. The Merger Agreement specifically contemplates a “marketing” in which representatives of the buy-out group, HCA management and the lead lenders meet with potential purchasers of the debt in an attempt to get committees to participate in the credit facilities or purchase the bonds. The method and timing of this marketing is critically important to obtaining the debt financing and doing so at pricing terms that are not disadvantageous to the company. Especially in the largest transactions that include very significant amounts of debt such as the HCA transaction, the debt marketing occurs over a several week time period and near the completion of the transaction. This is the case because both the Company and potential purchasers of the debt will not want the pricing of the debt to be finalized unless the underlying transaction is certain to close very soon thereafter. As a result, based on the stability and certainty provided by the setting of the shareholder meeting for November 16, 2006, the debt marketing has already commenced with meetings with potential lenders having begun on October 23, 2006, even though the Merger Agreement does not require the debt marketing to begin until after the shareholder meeting. The current marketing schedule assumes the debt will be priced and finalized shortly after the November 16 shareholder meeting and the HCA transaction will close shortly thereafter.

If the shareholder meeting is delayed until December 16, 2006, the marketing efforts will have to be suspended immediately and likely could not restart until a time period close to year-end, when marketing debt is typically more difficult. This is why under the terms of the Merger Agreement the debt marketing can be delayed until January 2007 in the event that the marketing period contemplated by the Merger Agreement is not completed by December 19, 2006. In short, if the shareholder meeting

is delayed, there is a substantial risk that the debt marketing will not be finalized until mid- to late-January 2007, if at all. This will significantly delay the closing of the HCA transaction at the very least, and increase the risk that the transaction is not consummated before the January 31, 2007 date for the transaction.

If the debt marketing has to be suspended shortly after it begins (which will be the case if the Court grants plaintiffs' motion) then the marketing effort shall be compromised. Successful marketing of such a significant amount of debt requires making a strong and lasting impression on potential purchasers of the debt, such that the best pricing terms can be achieved. A court-ordered delay in the shareholder meeting will not only result in direct costs to the Company as a result of having to start the financing process over again at a later date but, more importantly, will lead to confusion in the financial markets regarding the timing and certainty of the HCA transaction. As a result, potential purchasers of the debt will focus on this uncertainty during the marketing period rather than solely on the merits of the HCA transaction and the specifics of the debt being offered.

A delayed shareholder meeting could result in significant additional costs to the Company related to the debt financing of the transaction. If the marketing and closing of the debt financing were to be delayed, the confusion in the marketing process or any potential adverse change in the financial markets or the condition of the company can make the debt financing more difficult and expensive to obtain. The interest rates that the company would be required to pay on the credit facilities and the bonds in order to successfully place such debt in the financial markets as a result of such confusion could be, or after any such adverse changes likely would be, higher than the rates that the company expects to obtain on the current schedule.

The plaintiffs have provided no proof to counter or undermine the defendants' proof of substantial costs and risks to shareholders if the vote is delayed. The Court therefore concludes that it is unduly burdensome to change the date of the vote to accommodate additional investigation by plaintiffs.

The final part of the Court's analysis is that in using Rule 26 of the Tennessee Rules of Civil Procedure, the Court has rejected both legal models proposed by the plaintiffs and the defendants for deciding this motion, and the Court has made factual findings to support that rejection.

The plaintiffs asserted that the Court should grant their motion to postpone the shareholder vote to vindicate the authority of the Court in the face of the parties not having complied with their agreed order concerning the timing of document production and scheduling depositions. The Court has rejected this analysis because it has concluded that HCA has substantially complied with the parties' agreed order, based on production of 360 boxes, 1,100,000,000 pages of documents including:

1. Preliminary Proxy Statement and Rule 13e-3 Statement (publicly filed);
2. "Core documents" specifically requested by Plaintiffs (about 1,700 pages);
3. Documents from the electronic data room (about 11,000 pages) and documents from the paper data room (Plaintiffs reviewed these documents and flagged about 9,200 pages for copying) made available to the buyer group in connection with the transaction;
4. Paper documents from HCA employees deeply involved in the transaction, emails from HCA senior management and Dr. Frist, electronic and paper documents from the six non-Special Committee directors, and the minutes from Special Committee meetings (about 48,000 pages);
5. The total productions for non-parties Credit Suisse (about 86,000 pages) and Morgan Stanley (about 36,000 pages);
6. All of the buyer group's hardcopy documents (about 144,000 pages) and about 29,000 emails relating to the transaction;

7. All documents from the Special Committee relating to the transaction (about 1,500 pages, the majority of which were produced on 9/30);
8. All final documents delivered by McKinsey to HCA, emails, and financial forecasts outside the scope of the subpoena (about 40,000 pages).

The Court finds that imperfect compliance was not due to bad faith, malice or deliberate delay but factors over which neither side had control—the timing of SEC approval of the proxy statement and the apparently unanticipated volume of electronic communications attendant to the buy out. Both sides have worked hard and diligently, and that there has been no bad faith or malicious delay in providing documents. Instead, in the legal profession and justice system, methods of discovery, which must adhere to demanding court schedules, have not been developed to process the volume of communications generated by corporations through blast fax, emails and electronic data.

Having found that the HCA defendants have acted diligently and that they are not in contempt of the court order and have not ignored the order, the Court concludes a vindication of its authority, by postponing the vote, is not warranted.

The Court has rejected, as well, the defendants' analysis that the plaintiffs' motion is, in essence, an application for an injunction to prevent the November 16, 2006 vote from proceeding. The Court rejects the defendants' analysis because the plaintiffs have demonstrated a genuine problem with the timing of discovery, and for that the Court has provided scheduling relief. Under Tennessee law, the timing of discovery disputes is

governed by Rule 26 of the Tennessee Rules of Civil Procedure and not Rule 56 concerning applications for an injunction.

Therefore, based upon the foregoing findings and conclusions of law, the Court, under the authority of Rule 26.02 of the Tennessee Rules of Civil Procedure, directs that plaintiffs' remaining discovery preparatory to filing an application for injunction shall proceed as ordered above and the motion to postpone the shareholder vote is denied.

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ELLEN HOBBS LYLE  
CHANCELLOR

cc: George E. Barrett  
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