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United States District Court,
W.D. Texas,
Austin Division.

FORGENT NETWORKS, INC. d/b/a Asure Software, Plaintiff,
v.
David SANDBERG;, Red Oak Partners, LLC; Pinnacle Partners, LLP; the Red Oak Fund, L.P.; Pinnacle Fund, LLP; Bear Market Opportunity Fund, L.P.; James Gladney; Robert Graham; Pat Goepel; Fenil Shah; Sarla Software LLC; Chimanlal Shah; Falguni Shah; Ruchir Shah; Snehal Shah; Vibha Shah; and Ushma § Shah, Defendants.

No. A–09–CA–499–LY. | Aug. 27, 2009.

West KeySummary

1 **Securities Regulation** Preliminary Injunction
Plaintiff failed to carry its burden of showing a substantial likelihood of success on the merits in request for a preliminary injunction to order the defendant to file full and corrective disclosure and delaying a shareholder vote. The plaintiff asserted that the defendants had participated in a plan to replace existing board of directors with a common slate of directors. Plaintiff further claimed that disclosures would not comply with requirements until the defendant disclosed the existence and purpose of their group. However, defendants had already disclosed their disagreement with the plaintiff, and the complaint further evidenced the disagreement in disseminated material showing that the shareholders had sufficient information as to the dispute. Securities Exchange Act of 1934, § 13(d), 15 U.S.C.A. § 78m(d).

Attorneys and Law Firms

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Robert Graham, Reno, NV, pro se.

Opinion

ORDER

LEE YEAKEL, District Judge.

*1 Before the Court are Forgent's Application for a Preliminary Injunction filed July 1, 2009 (Doc. # 3) and supporting memorandum filed August 20, 2009 (Doc. # 82); Pinnacle Defendants' Motion to Dismiss for Mootness filed July 22, 2009 (Doc. # 31); Special Appearance of Chimanlal Shah and Ruchir Shah to Challenge Jurisdiction and Motion to Dismiss filed July 28, 2009 (Doc. # 39); Defendant Robert Graham's Motion to Dismiss filed July 31, 2009 (Doc. # 44); Defendant James Gladney's Motion to Dismiss filed July 31, 2009 (Doc. # 45); Motion to Dismiss of Defendants Fenil Shah, Vibha Shah, and Sarla Software, LLC filed July 31, 2009 (Doc. # 48); and Defendant Pat Goepel's Motion to Dismiss for Mootness filed August 17, 2009 (Doc. # 68). A hearing was held on the motions before the Court on August 24, 2009, at which the Court admitted the parties' evidence and considered argument of counsel. At the conclusion of the hearing, the Court informed the parties that all motions were taken under advisement and that the Court would rule on Plaintiff's application for preliminary injunction first and render an order on the motions to dismiss at a later date. Accordingly, the Court renders the following order solely with regard to Plaintiff's Application for a Preliminary Injunction.

To obtain a preliminary injunction, the applicant must show: (1) a substantial likelihood that he will prevail on the merits; (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted; (3) that his threatened injury outweighs the threatened harm to the party whom he seeks to enjoin; and (4) that granting the preliminary injunction will not disserve the public interest. *See PCI Transp., Inc. v. Fort Worth & W. R.R. Co. .*, 418 F.3d 535, 545 (5th Cir.2005). The Fifth Circuit has repeatedly cautioned that a preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements. *See PCI Transp.*, 418 F.3d at 545.

Plaintiff Forgent Networks, Inc. ("Forgent") seeks a preliminary injunction order prior to the August 28, 2009 shareholder vote directing Defendants to comply with Section 13(d) by filing "full, corrective disclosures" and delaying the shareholder vote until the Court determines that Defendants have complied and an appropriate "cooling off" period for dissemination of information has passed. Forgent asserts that Defendants have made misleading and inadequate disclosures that violate Sections 13(d) and 14(a) of the Securities Exchange Act of 1934. *See* 15 U.S.C. §§ 78m(d), § 78n(a) (2009). Forgent asserts that (1) Defendants have formed a Section 13(d) group, as defined under the statute, by participating in ongoing, coordinated efforts and communications about plans for Forgent and by nominating a common slate of directors to replace the existing board of directors, (2) Defendants' communications on behalf of the group with shareholders contain false and misleading statements, and (3) Defendants' corrective disclosures are inadequate. Relying on a case from the District of Delaware, Forgent asserts that Section 13(d)'s disclosure requirements are not satisfied unless the existence of the group and its true purpose are disclosed. *See Warner Communications, Inc. v. Murdoch*, 581 F.Supp. 1482, 1501–02 (D.Del.1984).

*2 Defendants collectively argue that the dispute between Forgent and Defendants about the purported group have been fully and repeatedly disseminated to the investing public through numerous public filings with the Securities and Exchange Commission, including the attachment of Forgent's complaint in this cause, and through numerous press releases. Defendants assert that because there is no further material information to be provided to shareholders prior to the annual meeting of stockholders scheduled for August 28, 2009.

"The *sole* purpose of the Williams Act[1] is full and fair disclosure to investors, and in crafting that Act Congress was at extreme pains to avoid 'tipping the scales either in favor of management or in favor of the person making the takeover bids.' " *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 715 (5th Cir.1984) (emphasis in original) (quoting *Piper v. Chris–Craft Indus., Inc.*, 430 U.S. 1, 31, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977)). A claim of nondisclosure is only cognizable if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976). The threshold cannot be met when an alleged omission relates to subjective motives rather than objective facts. *See Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1096, 111 S.Ct. 2749, 115 L.Ed.2d 929 (1991).

Having considered all the evidence, the Court concludes that Forgent has failed to carry its necessary burden of showing a substantial likelihood that it will prevail on the merits or sufficient irreparable harm if the injunction is not granted. The Court cannot order Defendants to disclose anything more than what they have already disclosed because there is a disagreement between the parties regarding the matters at issue in this cause, and the Court finds that the disagreement and all the details regarding it, including Forgent's complaint in this cause, have been fully disclosed to the shareholders. Even assuming the original Section 13(d) and 14(a) filings contained false and misleading information, the inclusion of Forgent's complaint in Defendants' supplemental filings would appear to offset most if not all possible adverse consequences of any such misrepresentations. *See Sea Containers, Ltd. v. Stena AB*, 890 F.2d 1205, 1211 (D.C.Cir.1989). The shareholders have sufficient information as to the dispute between Forgent's managment and Defendants to draw their own conclusions as to the existence of a Section 13(d) group and what would likely result should t hey vote to replace Forgent's current board of directors.[2]

IT IS THEREFORE ORDERED that Forgent's Application for a Preliminary Injunction filed July 1, 2009 (Doc. # 3) is **DENIED.**

Pinnacle Defendants' Motion to Dismiss for Mootness filed July 22, 2009 (Doc. # 31); Special Appearance of Chimanlal Shah and Ruchir Shah to Challenge Jurisdiction and Motion to Dismiss filed July 28, 2009 (Doc. # 39); Defendant Robert Graham's Motion to Dismiss filed July 31, 2009 (Doc. # 44); Defendant James Gladney's Motion to Dismiss filed July 31, 2009 (Doc. # 45); Motion to Dismiss of Defendants Fenhil Shah, Vibha Shah, and Sarla Software, LLC filed July 31, 2009 (Doc. # 48); and Defendant Pat Goepel's Motion to Dismiss for Mootness filed August 17, 2009 (Doc. # 68) remaining pending before the Court at this time.

Footnotes

1 Section 13(d) and 14(a) of the Exchange Act of 1934 are part of the Williams Act.

2 The Court does not find Forgent's reliance on *Warner Communications* dispositive to the elements of a preliminary injunction determination in this cause. *See Warner Communications, Inc. v. Murdoch*, 581 F.Supp. 1482 (D.Del.1984) However, even if the Court were to agree that there remain issues alive in Forgent's case for a final determination on the merits, *Warner Communications* does infer that Defendants' disclosures are adequate to defeat Forgent's application for preliminary injunction.