

\$3.5B Auspex-Teva Merger Challenge Axed By Chancery

By **Matthew Perlman**

Law360, Wilmington (August 25, 2016, 7:43 PM ET) -- A Delaware Chancery Court threw out a complaint from shareholders challenging the \$3.5 billion Auspex Pharmaceuticals Inc. all-cash merger with Teva Pharmaceuticals Industries Ltd., finding Thursday that the investors failed to show the deal was steered by self-interested Auspex officers.

In a memorandum opinion, Vice Chancellor Joseph R. Slight III dismissed the complaint brought by Auspex shareholders Timothy Larkin and Ellen Hoke against the company's board of directors for failure to state a claim. He said the investors had not shown that the transaction was unduly influenced, and also said that the directors were protected by Delaware rules that give deference to their business judgment.

"Even accepting plaintiffs' well-pled facts as true, I am satisfied that the defendants are entitled to invoke the irrebuttable business judgment rule," the opinion said. "Plaintiffs have not pled facts that would allow a reasonable inference that the merger involved a controlling stockholder, much less that a controlling stockholder pushed Auspex into a conflicted transaction in which the controller received nonratable benefits."

Israeli-based Teva had struck a deal to buy Auspex in March 2015, agreeing to pay \$101 per share for the early-stage company in an effort to bolster Teva's central nervous system drug pipeline. Auspex's primary product candidate is a treatment used for patients with Huntington's disease and Tourette syndrome.

The shareholders alleged in their complaint, filed shortly after the agreement was reached, that Auspex directors who were aligned with venture capital investors were more interested in cashing out of the pharmaceutical company than finding the best deal for all its shareholders, according to the opinion. This led Auspex CEO and Director Pratik Shah, who also served as a partner with venture capital firm Thomas McNerney & Partners, to push the Teva offer even though competing bids were superior, and tried to get it done ahead of an expected positive development in Auspex's drug pipeline.

The directors hit back, saying the board was fully informed about the potential transactions. They also argued that deference to their business judgment is further supported by the successful tender offer that completed the merger.

Vice Chancellor Slight wrote in his opinion Thursday that the business judgment presumption does apply in the instant case, and that Delaware courts overturn board decisions only where they "cannot be

attributed to any rational business purpose.”

“This broadly permissive standard reflects Delaware’s traditional reluctance to second-guess the business judgment of disinterested fiduciaries absent some independent cause for doubt,” the opinion said.

The opinion noted that there was no controlling stockholder involved in the merger, saying that the venture capital holdings of Auspex amounted to only 23.1 percent of the company and that there was no evidence to show that the majority of the directors were aligned with the venture capital investors. Vice Chancellor Slight also found that there was no conflict, saying there was no evidence showing that the venture capital investors faced a unique liquidity need that “would prompt them to seek a fire sale.”

“The Auspex public disclosures describe a robust shopping period that ultimately secured stockholders the highest available offer for their Auspex stock,” the opinion said. “And far from pleading a unique liquidity problem, the complaint simply asserts, without any specific factual support, that the [venture capital] stockholders’ holdings were ‘illiquid.’”

An attorney for the directors, Koji Fukumura of Cooley LP, praised the decision in an email to Law360 Thursday.

“We are tremendously pleased with this decision,” Fukumura said. “The Chancery Court’s consistent and predictable application of the law is a fundamental reason why companies flock to Delaware.”

Attorneys for the shareholders did not immediately respond to a request for comment Thursday.

The shareholders are represented by Derrick B. Farrell, James R. Banko, Juan E. Monteverde and Miles D. Schreiner of Faruqi & Faruqi LLP.

The Auspex directors are represented by William M. Lafferty, D. McKinley Measley and Richard Li of Morris Nichols Arsht & Tunnell LLP and Koji Fukumura, Peter Adams, Blake Zollar and Nicolas Echevestre of Cooley LLP.

The case is Larkin et al. v. Shah et al., case number 10918, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery and Tom Zanki. Editing by Edrienne Su.