

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

**JOHN J. GORMAN, et al.,** )  
 )  
 **Plaintiffs** )  
 )  
 v. )  
 )  
 **H. WILLIAM COOGAN, JR., et al. ,** )  
 )  
 **Defendants** )  
 )  
 **and** )  
 )  
 **FIRSTMARK CORPORATION,** )  
 )  
 **Nominal Defendant** )  
 )

**Docket No. 03-173-P-H**

**MEMORANDUM DECISION ON DEFENDANTS’  
MOTION FOR HEARING AND RECOMMENDED DECISION  
ON DEFENDANTS’ MOTIONS TO DISMISS**

The eight defendants named in this case – Firstmark Corporation (“Firstmark”), John T. Wyand, Robert R. Kaplan, John D. McCown, H. William Coogan, Jr., Susan C. Coogan, Donald V. Cruickshanks and R. Brian Ball (collectively, “Defendants”) – move pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss all counts against them in this action alleging a mix of federal-securities-law and state-law violations. *See* Defendants’ Motion To Dismiss, etc. (“Firstmark Motion”) (Docket No. 43) at 1; Motion To Dismiss of Defendants William and Susan Coogan, etc. (“Coogan Motion”) (Docket No. 39) at 1; Motion To Dismiss of Defendant Donald Cruickshanks, etc. (“Cruickshanks Motion”) (Docket No. 40) at 1; Motion To Dismiss of Defendant R. Brian Ball, etc. (“Ball Motion”) (Docket No. 41) at 1 (collectively,

“Motions To Dismiss”).<sup>1</sup> Ancillary thereto, the Defendants move pursuant to Local Rule 7(f) for oral argument. *See* Defendants’ Request for Oral Argument (“Hearing Motion”) (Docket No. 60). I deny the Hearing Motion on the ground that the parties’ papers provide a sufficient basis on which to decide the Motions To Dismiss and recommend that the Motions To Dismiss be granted.<sup>2</sup>

### I. Applicable Legal Standards

“In ruling on a motion to dismiss [under Rule 12(b)(6)], a court must accept as true all the factual allegations in the complaint and construe all reasonable inferences in favor of the plaintiffs.” *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). The defendants are entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any set of facts.” *State St. Bank & Trust Co. v. Denman Tire Corp.*, 240 F.3d 83, 87 (1st Cir. 2001); *see also Wall v. Dion*, 257 F. Supp.2d 316, 318 (D. Me. 2003).

Ordinarily, in weighing a Rule 12(b)(6) motion, “a court may not consider any documents that are outside of the complaint, or not expressly incorporated therein, unless the motion is converted into one for summary judgment.” *Alternative Energy*, 267 F.3d at 33. “There is, however, a narrow exception for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs’ claim; or for documents sufficiently referred to in the complaint.” *Id.* (citation and internal quotation marks omitted); *see also, e.g., Young v. Lepone*, 305 F.3d 1, 11 (1st Cir. 2002) (“When the factual allegations of a complaint revolve around a document whose authenticity is unchallenged,

---

<sup>1</sup> The Defendants alternatively ask that the court dismiss the federal securities-law claims pursuant to Rule 12(b)(6) and decline to exercise its supplemental jurisdiction over the remaining state-law claims. *See* Firstmark Motion at 1-2.

<sup>2</sup> On January 6, 2004 I granted a second ancillary motion, filed by the plaintiffs (John J. Gorman, individually and derivatively on behalf of Firstmark, Kurt J. Rechner, individually and derivatively on behalf of Firstmark, and Phil A. Whitney and Karin Whitney, on behalf of themselves and all others similarly situated and derivatively on behalf of Firstmark (collectively, “Plaintiffs”)), for leave to file a surreply. *See* Order Granting [Docket No.] 57 Motion for Leave To (*continued on next page*)

that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6).”) (citations and internal quotation marks omitted).

The parties rely on a number documents expressly incorporated within, or central to, the Plaintiffs’ complaint. *See, e.g.*, Firstmark Motion at 2 n.2; Plaintiffs’ Opposition to Defendants’ Motions To Dismiss (“Opposition”) (Docket No. 45) at 3, 47 n.20. To the extent that I find excerpts from these documents appropriate for consideration in the context of a Rule 12(b)(6) motion and material to disposition of this recommended decision, I weave them into my recitation of the facts.

## II. Factual Context

For purposes of the Motions To Dismiss I accept the following well-pleaded facts as true.<sup>3</sup>

Plaintiff Gorman, a resident of Austin, Texas, has owned varying amounts of Firstmark common stock since approximately December 1998. Complaint ¶ 12. As of July 1, 2003 he was the beneficial owner of 1,286,788 shares of Firstmark common stock. *Id.* Plaintiff Rechner, a resident of Austin, Texas, has been the joint beneficial owner, with his wife, of 20,000 shares of Firstmark common stock since May 29, 2002. *Id.* ¶ 13. Plaintiffs Phil A. Whitney and Karin Whitney (together, “Whitneys”), residents of Cranberry Island, Maine, are the record owners of 3,289 shares of Firstmark common stock. *Id.* ¶ 14. The Whitneys’ shareholder status devolved to them by operation of law through an inheritance from Mr. Whitney’s parents in the mid- to late 1990s. *Id.* Mr. Whitney’s parents owned the shares beginning prior to January 1, 1996. *Id.*

---

File (Docket No. 62).

<sup>3</sup> Although courts “construe all well-pleaded allegations liberally at this stage in the proceedings, we do not credit conclusory assertions, subjective characterizations or outright vituperation.” *Barrington Cove Ltd. P’ship v. Rhode Island Hous. & Mortgage Fin. Corp.*, 246 F.3d 1, 5 (1st Cir. 2001) (citations and internal quotation marks omitted). As the Defendants suggest, *see, e.g.*, Firstmark Motion at 17, the complaint in this case is replete with such non-cognizable allegations, *see, e.g.*, Plaintiffs’ Verified Complaint, Including Derivative Claims (“Complaint”) (Docket No. 1) ¶ 50 (“With *continued on next page*)

Nominal defendant Firstmark is a corporation organized under the laws of the State of Maine, with a principal place of business at 921 Holloway Street, Durham, North Carolina. *Id.* ¶ 15. Defendant H. William Coogan, Jr., upon information and belief a resident of Richmond, Virginia, previously served as an officer and director of Firstmark and currently holds himself out as its chairman and chief executive officer. *Id.* ¶ 16.<sup>4</sup> Defendant Susan Coogan, Coogan’s wife and upon information and belief a resident of Richmond, Virginia, served as a director of Firstmark from June 1996 through 1999 and again in August and September 2002. *Id.* ¶ 17. Defendant Ball, upon information and belief a resident of Richmond, Virginia, previously served as a director of Firstmark and as its counsel. *Id.* ¶ 18. Defendant Cruickshanks, upon information and belief a resident of Richmond, Virginia, previously served as a director and chief executive officer of Firstmark. *Id.* ¶ 19. Defendant Kaplan, upon information and belief a resident of Richmond, Virginia, previously served as Firstmark’s secretary and as its counsel. *Id.* ¶ 20. Defendants McCown, upon information and belief a resident of Pound Ridge, New York, and Wyand, upon information and belief a resident of Sarasota, Florida, currently hold themselves out as directors of Firstmark. *Id.* ¶¶ 21-22.

Prior to Coogan’s involvement with the company, Firstmark was principally engaged through several subsidiaries in the financial-services business. *Id.* ¶ 28. As of May 1, 1996 Firstmark had 5,000,000 duly authorized shares of twenty-cent par-value common stock, with approximately 2,080,634 shares validly issued and outstanding as of March 31, 1996. *Id.* Firstmark also had duly authorized 250,000 shares of preferred stock. *Id.* Upon information and belief, as of May 1, 1996 57,000 shares of

---

Firstmark and its Board under his thumb, Coogan then launched a two-prong assault on the Company and its shareholders.”), which I omit from my recitation of facts.

<sup>4</sup> For ease of reference, I shall refer to H. William Coogan, Jr. as “Coogan,” Susan C. Coogan as “Susan Coogan” and both as “the Coogans.”

preferred stock were validly issued and outstanding. *Id.* As of May 1, 1996 Firstmark's common stock was registered with the Securities and Exchange Commission ("SEC") pursuant to section 12(g) of the Exchange Act and was listed on the NASDAQ Small Cap market. *Id.* ¶ 29.

In or about the spring of 1996 Coogan negotiated a deal to sell Firstmark a title-insurance company, a subsidiary of Southern Capital Corp. ("SCC"), that he owned along with Susan Coogan and Cruickshanks. *Id.* ¶ 30. On or about April 30, 1996 Firstmark and SCC entered into an agreement ("Merger Agreement") pursuant to which Firstmark would acquire SCC and would issue 40,000 shares of series B preferred stock to the Coogans and Cruickshanks. *Id.* ¶ 31. Pursuant to section 1.2 of the Merger Agreement, the Coogans, Ball and Cruickshanks were to be elected and appointed to serve on the Firstmark board of directors ("Board") "on the Effective Date." *Id.* Section 5.2 provided that, subject to shareholder approval of amendments to the Articles of Incorporation increasing the common stock and opting out of section 910 of the Business Corporation Act, the Board would vote to convert the preferred stock no later than January 1, 1997. *Id.* In connection with the merger, Ball became counsel to Firstmark and continued in that capacity through approximately March 2001. *Id.* ¶ 32.<sup>5</sup>

According to the records of the Secretary of State of the State of Maine, on May 7, 1996 Firstmark filed, as a purported amendment to its Articles of Incorporation, an April 29, 1996 director resolution purporting to authorize the issuance of series B preferred stock upon closing of the Merger Agreement. *Id.* ¶ 35. According to the minute book and a consent action dated May 22, 1996, the Board resolved to increase its size from three to seven directors, elected and appointed the Coogans,

---

<sup>5</sup> The Plaintiffs assert that the economic terms of the merger transaction are unconscionable on several bases, the details of which are immaterial for these purposes. *See* Complaint ¶ 33.

Cruickshanks and Ball as directors, and resolved to recommend that shareholders, at their next annual meeting, elect the Coogans, Cruickshanks and Ball as directors. *Id.* ¶ 43.<sup>6</sup>

On June 7, 1996 the Coogans, Cruickshanks and Ball merged SCC into a newly created Firstmark subsidiary, Southern Capital Acquisition Corp. (“SCAC”), in return for 40,000 shares of series B preferred stock in Firstmark. *Id.* ¶ 45.<sup>7</sup> The terms of the Merger Agreement required that Coogan and his co-conspirators propose to Firstmark shareholders two amendments to the company’s Articles of Organization [sic] to (i) increase the authorized common stock to 30 million shares and (ii) opt out of 13-A M.R.S.A. § 910, which provides shareholders of a Maine corporation with appraisal rights when, as in June 1996, there is a twenty-five percent or more control transaction. *Id.* ¶ 51. In October 1996, on January 17 and 31, 1997 and on February 5, 1997 Coogan and his co-conspirators issued proxy statements in connection with a special meeting of shareholders called to vote on the two proposed amendments. *Id.* ¶ 52. On February 25, 1997, according to the co-conspirators and subsequent SEC disclosures, Firstmark common-stock holders approved the two amendments. *Id.* ¶ 64.<sup>8</sup>

On March 12, 1997 the Board purported to authorize the conversion of the series B preferred into shares of Firstmark common stock effective April 2, 1997, subject to Federal Communications Commission approval. *Id.* ¶ 85. Pursuant to the terms of the series B preferred, the conversion ratio was to be based upon the average of the closing prices for twenty consecutive trading days commencing twenty-five days before the conversion date. *Id.* The conversion price factor was \$2.525, yielding to the Coogans and

---

<sup>6</sup> The Plaintiffs assert that these actions are void or voidable on several bases, the details of which are immaterial for these purposes. *See* Complaint ¶¶ 34-44.

<sup>7</sup> The Plaintiffs allege that the issuance of the preferred stock to the Coogans and Cruickshanks is void or voidable for several reasons, the details of which are immaterial for these purposes. *See* Complaint ¶¶ 46-49.

<sup>8</sup> The Plaintiffs allege that the proxy solicitations were false and materially misleading and that the purported Board approval is void or voidable for a number of reasons, the details of which are immaterial for these purposes. *See (continued on next page)*

Cruickshanks a total of 3,230,287 shares of common stock, representing in excess of sixty percent of the common stock. *Id.* ¶ 88.<sup>9</sup>

Coogan advised stockholders he wanted to expand the title-insurance business and hence in February 1997 sought shareholder approval to increase capital sixfold to 30 million shares. *Id.* ¶106. But instead of selling stock to grow the business he had just merged into Firstmark, even before converting his preferred, he set out to sell the business and as of August 1997 formally commenced the sale process. *Id.* In September 1998 the NASDAQ Small Cap Market notified the Coogans, Cruickshank and Ball that, unless they took some action, the Firstmark stock would be delisted for failure to maintain an average bid price of \$1.00 per share. *Id.* ¶ 108. Instead of taking action, they set out to sell Firstmark’s operating assets, delay the delisting process until after the sale was concluded and falsely represent to stockholders that the company would take all steps necessary to maintain the listing. *Id.*<sup>10</sup>

On or about December 2, 1998 the co-conspirators, acting primarily through Cruickshanks, caused Firstmark to enter into a stock purchase agreement to sell Firstmark’s title-insurance subsidiary to Old Guard Group, Inc. (“Old Guard”). *Id.* ¶ 113. Pursuant to a preliminary proxy statement dated December 31, 1998 the Board called a special meeting of shareholders for February 17, 1999 for the sole stated purposes of electing three directors for Firstmark and approving the sale of its title-insurance subsidiary to Old Guard. *Id.* ¶ 116.<sup>11</sup> According to Ball’s March 5, 1999 minutes, Cruickshanks declared the presence

---

Complaint ¶¶ 53-63, 56-66.

<sup>9</sup> The Plaintiffs allege that Coogan intentionally delayed a shareholder meeting and manipulated the stock price downward so that he could obtain a larger number of shares via the conversion. *See* Complaint ¶¶ 67-96. The details of these allegations are immaterial for these purposes.

<sup>10</sup> The Plaintiffs allege that as part of Coogan’s “scheme to loot Firstmark, delist its common stock and eventually take the Company private” he filed a false Form 13D with the SEC and failed to amend it from at least August 1997 through March 1999 to reveal his intent to sell the title-insurance business, delist the stock and reduce the number of shareholders below three hundred. *See* Complaint ¶ 105.

<sup>11</sup> The Plaintiffs assert that the co-conspirators structured the Old Guard transaction to benefit themselves at the expense  
(continued on next page)

of a quorum based on the presence of 3,795,164 shares. *Id.* ¶ 132. According to those minutes, Cruickshanks reported that a majority of the outstanding shares of the corporation’s common stock entitled to vote for the sale had voted in favor of the sale. *Id.* ¶ 133.<sup>12</sup>

After Coogan caused Firstmark to sell off its operating assets, Coogan and Cruickshanks, the controlling stockholders, knew that the company needed to acquire an operating company or face a probable liquidation in view of the substantial complications of status as a holding company pursuant to the Investment Company Act of 1940 (“1940 Act”). *Id.* ¶ 138. After contracting with Old Guard in December 1998 Coogan, who knew Gorman from prior business dealings, convinced Gorman that investing in Firstmark was an attractive opportunity. *Id.* After announcement of the Old Guard sale in December 1998 Gorman, in good faith and without notice of any of the allegations of the Complaint, purchased a handful of shares on the market. *Id.* At the end of March 2000 Gorman purchased another 300,000 shares on the market as Firstmark requested at least a one-year exemption from the 1940 Act. *Id.* ¶ 140. In the face of a possible liquidation, Coogan and Cruickshanks disagreed about the next step for the company. *Id.* ¶ 141. In or about late 2000 or early 2001, Coogan convinced Gorman to help keep Firstmark alive as a public company and to help Coogan buy out Cruickshanks. *Id.* ¶ 142. Gorman presented the opportunity to his friend Arch Aplin III, and agreed to loan Aplin a substantial portion of the funds necessary to make the investment. *Id.* ¶ 143.

On or about February 9, 2001 Aplin, acting in good faith and without notice of the defects in the stock set forth in the Complaint, bought 1,000,000 shares of Firstmark’s common stock from Cruickshanks

---

of Firstmark and that the December 31, 1998 preliminary proxy statement and a January 29, 1999 definitive proxy statement were false and misleading for a number of reasons. *See* Complaint ¶¶ 114-30. The details are immaterial for these purposes.

<sup>12</sup> The Plaintiffs allege, *inter alia*, that the declaration of a quorum for purposes of the Old Guard sale was invalid (*continued on next page*)

and 60,000 shares from Firstmark directors Settlage and Morison. *Id.* ¶¶ 144-45. In connection with Aplin's investment in the company, and concurrent with the resignations of Settlage and Morison as directors, Aplin and Robert Ellis, a mutual friend of Gorman's and Aplin's, joined the Board. *Id.* ¶ 145. Coogan arranged to be reappointed to a new five-person board, concealing from the new directors the extent of his prior involvement with Firstmark from 1996 through the sale to Old Guard in March 1999. *Id.* ¶ 149. He induced them to hire him as chief executive officer to act as an investment banker to locate, acquire and close an acquisition by October 2002. *Id.* In November 2001 the SEC imposed a one-year deadline for Firstmark to acquire an operating company, failing which the SEC would force it to liquidate. *Id.* ¶ 154. In or about November 2001, Firstmark hired Coogan as chief executive officer and chairman, pursuant to a written contract for a one-year term at compensation of \$300,000 per year. *Id.* ¶ 155.

At a Board meeting in late February 2002, with time to find a suitable acquisition target and close an acquisition deal running short, Coogan proposed that the company consider acquiring Tecstar Electro Systems, Inc. ("Tecstar") in Durham, North Carolina. *Id.* ¶ 156. In making this proposal Coogan performed substantial due diligence and disseminated to the Board economic projections. *Id.* Coogan withheld from the Board the material information that Tecstar's orders from its primary client, Honeywell Aerospace ("Honeywell"), would drop sharply within months. *Id.* ¶¶ 158, 160. On or about April 25, 2002 the Board decided to proceed with the acquisition. *Id.* ¶ 164. While Firstmark directors were aware that the continuation of a supplier relationship with Honeywell was uncertain, Coogan did not inform them of the steep downturn in Honeywell business commencing in the third quarter of 2002. *Id.* On or about May 24, 2002, in reliance upon the information provided by Coogan, the Board approved the Tecstar acquisition

---

inasmuch as it included the 3,280,286 shares held by the Coogans and Cruickshanks. *See* Complaint ¶¶ 132-36.

and entered into an asset purchase agreement with Tecstar. *Id.* ¶ 169. On July 8, 2002 Firstmark and Tecstar closed the asset purchase. *Id.* ¶ 172.

By Coogan's own admission at his deposition on August 14, 2002, he began investigating the purchase of additional shares of Firstmark stock in June 2002, before the Tecstar asset purchase agreement had even closed. *Id.* ¶ 174. His goal was to acquire enough shares to take control of the Board. *Id.* By the end of June 2002 he had retained counsel (Kaplan) to assist him in obtaining the shares. *Id.* He admitted under oath that between the middle of June and the July 8, 2002 closing he told a "number of our shareholders": "[L]ook, you know, if we're – if this Board is going to be changed and this deal is going to get done, I guess I'm going to have to buy some shares and try to change the Board." *Id.* ¶ 176. According to Coogan's own deposition testimony, he decided to buy more shares to gain control in material part because Ali Ezami, who was Tecstar's general manager of the aerospace business and hoped to secure a job with Firstmark as president of the acquired business, "had great concerns that the Board . . . wasn't dealing with him honestly . . . and that if . . . the Board was allowed to stay in place, that – they would ruin the business." *Id.* ¶¶ 167, 175. Coogan further testified that Ezami had serious doubts that he would be willing to sign his contract, which was a major precondition to closing the Tecstar deal. *Id.* ¶ 175.<sup>13</sup>

Upon information and belief, in May and/or June 2002 Coogan met with third parties, including outside investors and investment bankers, to seek financing or other means, such as a merger, by which to achieve his takeover. *Id.* ¶ 178. Upon information and belief, based on contemporaneously made notes dated July 10, 2002 and signed by Mark W. Harry on July 10, 2002, between May 29, 2002 and June 20,

---

<sup>13</sup> Coogan's statement to shareholders regarding the need to change the Board to effectuate the Tecstar deal is alleged to have been false and misleading because Firstmark was not bound to hire Ezami, the Tecstar deal did not depend on hiring him and, upon information and belief, Ezami never asked Coogan to change the Board or indicated he was unwilling to sign a contract unless the Board was changed. *See* Complaint ¶ 177.

2002, Harry purchased on the open market 32,000 shares of Firstmark common stock; on July 9, 2002 he received a printed postcard from Firstmark announcing the acquisition, with a handwritten note from Coogan; and on July 10, 2002 Coogan called him and spoke to him for approximately forty-five minutes. *Id.* ¶ 180. During that conversation Coogan represented, *inter alia*, that (i) there was a need to increase the number of shareholders from the approximately one hundred and fifty to more than three hundred to maintain the stock-exchange listing, (ii) the current Board was a weakness, (iii) one large shareholder who owned a securities firm in Texas was causing problems by buying up all available shares and reducing the number of shareholders, making it more difficult to maintain the minimum number required for listing, and (iv) Coogan felt something should be done about this Texas investor. *Id.* Coogan also purported to disclose inside financial information to Harry during the call, telling him that Firstmark was in better financial shape than its public filings revealed. *Id.*

The representations to Harry, which upon information and belief were made to numerous shareholders, were materially misleading and deceptive because, *inter alia*, Coogan and no one else was the large shareholder who as of July 10, 2002 was in the process of purchasing shares and reducing the number of stockholders, and it was Coogan who intended to take over the company, entrench himself and deregister the stock. *Id.* ¶ 181. Coogan admitted under oath at his 2002 deposition that his intention in buying additional shares of Firstmark common stock was to take control of the company. *Id.* ¶ 182.

At the time Coogan began seeking to acquire a controlling interest in Firstmark, his Form 13D, which had been filed with the SEC in May 1997, expressly represented that his purpose in owning shares of Firstmark was “for investment . . . only” and disclaimed any intention to take control of the company, to sell substantially all of its assets, to cause the delisting of its stock or to take any action to reduce the number of shareholders below three hundred. *Id.* ¶ 183. Prior to what the Plaintiffs characterize as Coogan’s “secret

power grab,” the Coogans beneficially owned 40.8 percent of Firstmark’s issued and outstanding common stock. Opposition at 3; [Form] Securities Purchase Agreement and Option To Acquire Shares (“Form Share-Purchase Agreement”), attached as Exh. B to Form 13D/A dated July 19, 2002 (“July 19 Amendment”), attached as Exh. 8 to Appendix of Documentary Materials Cited in Support of Plaintiffs’ Motion for a Temporary Restraining Order and Preliminary Injunction (“Plaintiffs’ Appendix”), at [3] ¶ 2.

Coogan did not amend his Form 13D until July 19, 2002, after he had secured a controlling interest in the company. Complaint ¶ 184. The July 19 Amendment disclosed that Coogan had purchased additional shares of Firstmark; that as of that date he beneficially owned, within the meaning of the applicable SEC rule, approximately 28.7 percent of the outstanding shares of common stock of Firstmark; and that as of that date the H. William Coogan Irrevocable Trust, of which Susan Coogan is trustee, beneficially owned approximately 21.8 percent of the outstanding shares of common stock of Firstmark. July 19 Amendment, Items 4-5 at [12]-[15]. It further stated that the purpose of the Coogans’ purchase of additional shares was “to enable [the Coogans] to have the power to vote and to direct the vote of a majority of the issued and outstanding shares of Common Stock and to thereby enable [them] to elect all of the members of the Board[.]” *Id.*, Item 4 at [13].

The July 19 Amendment also disclosed that on various dates from July 11, 2002 through July 17, 2002 Coogan had entered into twenty-six securities-purchase and share-option agreements with certain holders of Firstmark’s common stock for the purchase of a total of 477,701 shares at a per-share price of \$1.00, and that during that time frame he also had purchased an aggregate of 55,000 shares of common stock in the open market for an aggregate price of \$83,620.91. *Id.*, Item 3 at [11]-[12]. The securities-purchase and share-option contracts were represented to be in the form attached thereto as Exhibit B. *Id.* at [12]. The form contract attached as Exhibit B included, *inter alia*, language in which sellers

acknowledged that the Coogans beneficially owned 40.8 percent of the issued and outstanding common stock – representing in the aggregate the largest existing block of shares in the company – and that the closing of the transaction might result in the Coogans controlling more than a majority of the common stock, with the power among other things to elect the Board. Form Share Purchase Agreement at [3] ¶ 2. The form contract also provided for the grant of an irrevocable proxy to Coogan. *Id.* at [5]-[6] ¶ 5.

On information and belief, in the July 19 Amendment Coogan again made a false and deceptive statement when he represented that he had “no present plans or proposals that relate to or would result in any actions or events required to be described in Item 4 of Schedule 13D.” Complaint ¶ 187. This statement was false and deceptive because, upon information and belief, at that time Coogan already intended to cause the company to terminate its public filings with the SEC, which is an action or event required to be described in Item 4 of Schedule 13D. *Id.*

On or about August 5, 2002, the Board removed Coogan from his position as chairman and chief executive officer of the company. *Id.* ¶ 189. Coogan responded by calling for a shareholders’ meeting to replace the Board and filing a lawsuit against Board members. *Id.* In his August 20, 2002 proxy Coogan admitted that on or about August 6, 2002 his November 2001 contract had been terminated upon his receipt of a written notice of its termination. *Id.* ¶ 190.

On August 23, 2002, after a brief but intense period of litigation, Gorman, Aplin, Mayer and Ellis resigned as directors, believing that an amicable resolution of the dispute was in the best interest of the company; however, they were then unaware that (as alleged in the Complaint) Coogan’s stock was void, he had engaged in past looting and had made material omissions about the company’s short-term cash needs.

*Id.* ¶ 191. On August 26, 2002 Susan Coogan was appointed director and Coogan was reinstated as chairman of the Board, president and chief executive officer. *Id.* ¶ 192.<sup>14</sup>

While the shareholder contest was ongoing, Coogan testified under oath that his proffered July 2002 offers to purchase coupled with a proxy were unconditional and that he would accept and close the agreements with all accepting shareholders. *Id.* ¶ 210. However, after securing his takeover, Coogan refused to close on his contracts with five shareholders. *Id.* In his August 20 proxy statement, three days before the resignations of the Texas directors, Coogan represented that he possessed Phil Whitney's proxy under a contract dated or effective August 5, 2002. *Id.* ¶ 211. But the previous day (on August 19, 2002) Keith Jones, Esq., as counsel to Coogan, had written Whitney and apprised him that the share-purchase contract had expired on July 31, 2002 and would have to be extended. *Id.* While, as requested, Whitney signed and transmitted the agreement to Coogan's attorney, more than seven months later Coogan refused to close. *Id.*

In the proxy materials for the October 2002 election, Coogan, aided and abetted by Kaplan, intentionally misrepresented how the voting for the special meeting of stockholders would be determined for purposes of a quorum and the election of directors. *Id.* ¶ 219. In his initial proxy statements on August 8, August 20 and August 23 – before the Texas directors had resigned – Coogan had declared that shares held in “street name” would not be voted without specific instructions from the beneficial owner. *Id.* ¶ 220.<sup>15</sup> On September 5 and again on September 13, Firstmark issued proxy statements for the special

---

<sup>14</sup> The Plaintiffs allege that a proxy statement filed by Coogan on August 8, 2002 in connection with his call for a shareholders' meeting on September 6, as amended on August 20 and 23, 2002, was replete with fraudulent misrepresentations and omissions. *See* Complaint ¶¶ 197-205. Those details are not material for these purposes.

<sup>15</sup> “Shares of publicly traded corporations are often held in the name of brokers or fiduciaries (commonly called ‘street name’) for the account of the beneficial owners. The brokers or fiduciaries are the stockholders of record.” *Berlin v. Emerald Partners*, 552 A.2d 482, 494 (Del. 1989).

meeting (“September Proxies”), which Coogan had caused to be adjourned until October 4, 2002. *Id.* In each of the September Proxies, Coogan advised stockholders that the prior proxy cards – which had specified that the brokers would not vote shares held in “street name” without instructions – would not be accepted, and that the only proxy sheet that would be accepted would be an accompanying blue proxy sheet. *Id.* In both of the September Proxies, when describing the required vote and rules for a quorum, Coogan stated:

If a quorum is present, new directors will be elected by a plurality of the votes cast. This means that the director-nominees receiving the highest number of votes will be elected as directors. Accordingly, abstentions and broker non-votes do not have the effect of a vote against the election of any director-nominees. Brokers will not have discretion to vote shares held in street name without instructions from the beneficial owner of the shares with respect to the proposals under this proxy statement at the Annual Meeting.

*Id.* ¶ 221. With respect to election of directors, the September Proxies afforded two voting options: “FOR all Nominees listed below (except as marked to the contrary below)” and “WITHHOLD AUTHORITY TO VOTE FOR THOSE INDICATED BELOW.” Form PRER14A dated September 5, 2002 (“September 5 Proxy”), attached as Exh. 17 to Plaintiffs’ Appendix, at 23; Form DEF 14A dated September 13, 2002 (“September 13 Proxy”), attached as Exh. 18 to Plaintiffs’ Appendix, at 24.

According to the minute book, on October 4, 2002 the shareholders set the number of directors at seven and ratified the appointment of Ernst & Young. *Id.* ¶ 222. According to the certificate of Keith C. Jones, Esq., as voting inspector on October 4, 2002, proxies from the holders of 5,183,217 shares were present, constituted a quorum and, by vote of 5,182,692 of those proxies, purportedly elected Coogan’s slate of seven directors. *Id.* ¶ 223. There was no valid quorum for election of directors because the 2,180,286 shares presented by the Coogans and Cruickshanks were void as a matter of law and because no less than 1,941,788 proxies had been fraudulently voted by Coogan. *Id.* ¶ 224. The beneficial owners

of 1,941,788 shares withheld their proxies and, in reliance on the proxy representations, gave no instruction to the nominee title holder clearinghouse for proposal number 2 – the election of directors – and did not vote for Coogan’s slate in the October 4, 2002 election. *Id.* ¶ 225. Accordingly, Coogan fraudulently presented no less than 1,941,788 false proxies to attorney Jones. *Id.*<sup>16</sup>

A quorum was absent at the October 4, 2002 meeting because the 2,180,286 shares held of record by the Coogans and Cruickshanks were void as a matter of law, leaving 3,161,757 shares validly outstanding and eligible to vote. *Id.* ¶ 226. Under article IV, section 1 of the company’s bylaws, a quorum for election of directors required the presence in person or by proxy of 1,580,879 shares. *Id.* Because Aplin, Ellis, Mayer, Gorman, Rechner, John Garber and Mark Harry collectively withheld their proxies for 1,941,788 shares, they cannot be counted for the director proposal. *Id.* Therefore, there could only have been present and eligible to vote for directors a total of 1,219,969 proxies. *Id.* In the absence of a quorum, the purported vote to elect the seven directors is null and void. *Id.* The Coogans and Cruickshanks committed proxy fraud when, *inter alia*, in September 2002, they falsely represented that street-name shares would not be voted for election of directors and then sent out proxy cards by which the clearinghouse would exercise its discretion, voting with management, if the owner provided no instructions. *Id.* ¶ 228.

From December 23, 2002 through March 14, 2003 four Board members resigned. *Id.* ¶¶ 236-39. On or about March 21, 2003 the three remaining purported Board members – Coogan, Wyand and McCown – purported to approve Coogan’s plan to cause Firstmark to file a Form 15, certifying the company’s intention to terminate its registration as a publicly reporting company with the SEC. *Id.* ¶ 242.

---

<sup>16</sup> The Plaintiffs also allege that Coogan improperly voted 24,953 shares formerly owned by Alliance Medical USA during (continued on next page)

On or about March 26, 2003 Coogan caused the Form 15 to be filed with the SEC. *Id.* ¶ 245. Immediately upon filing the Form 15, Firstmark’s obligation to file public disclosures with the SEC was suspended. *Id.* ¶ 247. On June 24, 2003 the termination of registration became final, and Firstmark no longer files public disclosures with the SEC. *Id.*<sup>17</sup>

### III. Analysis

The Plaintiffs’ 19-count complaint asserts a mix of federal and state-law claims. *See id.* ¶¶ 262-359. The Defendants ask the court (i) to find, on any of several alternative grounds, that the federal causes of action (Counts VIII, X, XI, XII and XIII) fail to state a claim pursuant to Rule 12(b)(6) and (ii) then to decline to exercise its supplemental jurisdiction over the remaining state-law-based claims (Counts I-VII, IX and XIV-XIX) or, alternatively, adjudge them barred by the applicable statute of limitations. *See* Firstmark Motion at 5, 18.<sup>18</sup> I am persuaded that the court should dismiss the five federal securities-law counts for failure to state a claim and then decline to exercise its supplemental jurisdiction over the remaining state-law-based counts.<sup>19</sup>

---

the October 4 election and entered into a secret agreement with Wyand concerning the vote and/or purchase of Wyand’s 30,549 shares. *See* Complaint ¶¶ 212-28. Those details are not material for these purposes.

<sup>17</sup> The Plaintiffs contend that the deregistration is void or voidable. *See* Complaint ¶¶ 242-46. The details of that allegation are not material for these purposes.

<sup>18</sup> The Coogan, Cruickshanks and Ball motions and reply briefs incorporate by reference the arguments made in the Firstmark Motion and reply brief. *See* Coogan Motion at 1; Cruickshanks Motion at 1; Ball Motion at 1; Reply Brief in Support of Motion To Dismiss of Defendants H. William Coogan, Jr. and Susan Coogan (Docket No. 52) at 1; Reply Brief in Support of Motion To Dismiss of Defendant Donald Cruickshanks (Docket No. 53) at 1; Reply Brief in Support of Motion To Dismiss of Defendant R. Brian Ball (Docket No. 51) at 1.

<sup>19</sup> The Defendants contend, among other things, that the Plaintiffs’ federal securities-law claims are moot inasmuch as the relief sought – the “disenfranchisement” of 477,701 shares Coogan acquired as a result of what the Plaintiffs have characterized as his “secret power grab” during the summer of 2002 – would not alter the outcome of the October 2002 election. *See* Defendants’ Reply to Plaintiffs’ Opposition to Defendants’ Motion To Dismiss (“Firstmark Reply”) (Docket No. 55) (“Firstmark Reply”) at 15-16. Were the claims moot, the court would have no power to hear them. *See, e.g., Cruz v. Farquharson*, 252 F.3d 530, 536 (1st Cir. 2001) (observing that “mootness goes to the federal courts’ jurisdiction”). However, as the Defendants acknowledge, the Plaintiffs seek to undo the October 2002 election. *See* Firstmark Reply at 15 n.10; *see also* Plaintiffs’ Surreply to Defendants’ Replies in Support of Their Motions To Dismiss (“Surreply”) (Docket No. 63) at 4. Relief of that nature has been held available to redress a violation of the SEC’s proxy rules (a type of violation alleged in Count X of the Complaint). *See* Complaint ¶¶ 302-06; *see also, e.g., Morris v. Bush*, No. CIV.A.3:98- (continued on next page)

### A. Counts VIII & XIII: Section 13(d) of Williams Act

In Counts VIII and XIII of the Complaint, the Plaintiffs (derivatively on behalf of Firstmark in Count VIII and directly in Count XIII) contend that Coogan violated section 13(d) of the Williams Act, 15 U.S.C. § 78m(d), inasmuch as, although he was obliged to amend his Form 13D at such time as he determined he would seek to buy sufficient shares to take control of the company (no later than mid-June 2002), he failed to amend it until after he had purchased those shares, to the detriment of Firstmark and the Plaintiffs. *See* Complaint ¶¶ 291-95, 321-25; *see also, e.g., Calvary Holdings, Inc. v. Chandler*, 948 F.2d 59, 62 (1st Cir. 1991) (noting that section 13(d) of Williams Act “was designed to alert investors in securities markets to potential changes in corporate control and to provide them with an opportunity to evaluate the effect of these potential changes.”) (citations and internal quotation marks omitted).

The Defendants assert that (i) to the extent the Plaintiffs seek injunctive relief, the Complaint falls short of demonstrating the requisite irreparable harm, and (ii) to the extent they seek damages, no such

---

CV-2452-G, 1999 WL 58857, at \*4 (N.D. Tex. Jan. 28, 1999) (“when a violation of proxy rules has been established, the court has equitable power to void the results of a shareholders’ vote”) (citation omitted); *Bertoglio v. Texas Int’l Co.*, 472 F. Supp. 1017, 1021 (D. Del. 1979) (“The case law of this District teaches that when a violation of the Commission’s proxy rules has been established, it is well within the equitable power of the Court to void the results of a shareholders’ vote and require both a new solicitation of proxies and a second shareholder vote.”). The request to disenfranchise the voting shares (*i.e.*, to bar Coogan from voting them) must be placed in the broader context of the bid to undo the October 2002 election. While (for reasons discussed hereafter) I agree that the outcome of the October 2002 election would not have been affected had the 477,701 shares then been disenfranchised, that fact bears on whether the Plaintiffs state a claim for relief, not on whether they present a live controversy. Three directors elected in October 2002 remain on the Board. The Defendants do not contend, and I am not willing to speculate, that if an election rematch were held today, the outcome would be a foregone conclusion. Nor do the Defendants contend, or am I willing to speculate, that in such a rematch the disenfranchisement of the 477,701 shares would be meaningless. Thus, the Defendants fall short of making a persuasive case that the federal securities-law claims are moot. *See, e.g., Mangual v. Rotger-Sabat*, 317 F.3d 45, 60 (1st Cir. 2003) (“The doctrine of mootness enforces the mandate that an actual controversy must be extant at all stages of the review, not merely at the time the complaint is filed. Thus, mootness can be viewed as the doctrine of standing set in a time frame. If events have transpired to render a court opinion merely advisory, Article III considerations require dismissal of the case. The burden of establishing mootness rests squarely on the party raising it, and the burden is a heavy one.”) (citations and internal punctuation omitted).

private right of action exists pursuant to section 13(d) of the Williams Act. *See* Firstmark Motion at 5-8; Firstmark Reply at 9-15.<sup>20</sup>

The Plaintiffs clarify that they seek no damages – only injunctive relief – for the asserted section 13(d) violation. *See* Opposition at 11 n.3. However, they vigorously contest the proposition that the Complaint fails to allege irreparable harm to themselves or to the corporation. *See id.* at 2-12.

As a general matter, a grant of permanent injunctive relief is appropriate upon a finding that the following four elements are met:

(1) plaintiffs prevail on the merits; (2) plaintiffs would suffer irreparable injury without an injunction; (3) the harm to plaintiffs would exceed the harm to defendants from the imposition of an injunction; and (4) the public interest would not be adversely affected by an injunction.

*Aponte v. Calderón*, 284 F.3d 184, 191 (1st Cir. 2002). These precepts apply in this context. *See, e.g., General Aircraft Corp. v. Lampert*, 556 F.2d 90, 96 (1st Cir. 1977) (“[T]he Supreme Court explicitly rejected the argument that a violation of the Williams Act, without more, justifies the issuance of an injunction; in accordance with traditional equitable principles a showing of irreparable harm must be made.”).

According to the Complaint, the Plaintiffs seek, by way of permanent injunctive relief, “judgment declaring the October 4, 2002 election void, permanently enjoining Coogan, McCown and Wyand from purporting to act as Board members based upon that election, and ordering a special meeting of the shareholders at the earliest opportunity lawfully to elect a new Board.” Complaint ¶ 359. Relatedly, in the context of their section 13(d) claim, they ask the court to bar Coogan from voting the shares he allegedly

---

<sup>20</sup> The Defendants also argue, in the alternative, that all of the Plaintiffs’ federal securities-law claims should be dismissed for failure to plead fraud with particularity, as required by Federal Rule of Civil Procedure 9(b) and relevant federal securities laws. *See* Firstmark Motion at 17; Firstmark Reply at 17-19. I do not reach this argument with respect to Counts (*continued on next page*)

acquired in violation of that provision – the so-called remedy of “disenfranchisement,” or “sterilization,” of voting shares. See Opposition at 5-11; see also, e.g., *Lampert*, 556 F.2d at 93-94, 97 (discussing concept of “disenfranchisement,” or “sterilization,” of voting shares as remedy for securities-law violations).<sup>21</sup>

Section 13(d), enacted in 1968 as part of the Williams Act amendments to the Securities and Exchange Act of 1934 (“Exchange Act”), “requires any person who acquires more than five percent of a class of any equity security registered under the [Exchange] Act to send a statement containing certain information to the issuer, to each stock exchange where the security is traded, and to the Securities and Exchange Commission.” *Jacobs v. Pabst Brewing Co.*, 549 F. Supp. 1050, 1057 (D. Del. 1982); see also 15 U.S.C. § 78m(d)(1). Reportable information includes the following: “[I]f the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure[.]” 15 U.S.C. § 78m(d)(1)(C).

As the First Circuit has observed:

Congress enacted the Williams Act to provide for adequate disclosure of information to stockholders and investors, in connection with cash tender offers and other acquisitions of large blocks of stock in publicly held companies. Section 13(d) of the Act . . . was enacted to deal with after-the-fact disclosures of large acquisitions of stock within a short time

---

VIII and XIII.

<sup>21</sup> The Plaintiffs also sought a temporary restraining order (“TRO”) and a preliminary injunction “(i) restraining the Board from manipulating the corporate machinery for entrenchment or self dealing; (ii) prohibiting the destruction or concealment of any corporate records; and (iii) prohibiting Coogan, Susan Coogan (individually and as Trustee), and Cruikshanks [sic] from selling any of their void shares of Firstmark stock to any third party.” Complaint ¶ 358. On July 11, 2003 the court issued a TRO enjoining the Board from using company funds to pay legal expenses of the director defendants in this lawsuit. See Limited Ex Parte Temporary Restraining Order (Docket No. 17). On July 28, 2003, following hearing, the court dissolved the TRO and denied the Plaintiffs’ motion for a preliminary injunction. See Order on Plaintiffs’ Motion for Preliminary Injunction and Request for Temporary Restraining Order (Docket No. 32).

period. The underlying purpose of Section 13(d) is to provide investors and the market in general with accurate information about potential changes in corporate control, so as to permit the market to value the shares accordingly, but without using the medium of federal regulation to tip the balance in favor of either management, or those attempting a change in corporate control.

*Hibernia Sav. Bank v. Ballarino*, 891 F.2d 370, 372 (1st Cir. 1989) (citations and internal quotation marks omitted). Against this backdrop, the First Circuit has held that a plaintiff fails to satisfy the irreparable-harm prong of the injunctive-relief test “where the alleged violator has complied with the notice requirements. Curing any alleged defects precludes a showing of irreparable harm.” *Id.* at 373. *See also, e.g., Brunswick Techs., Inc. v. Vetrotex Certainteed Corp.*, No. CIV. 00-124-P-H, 2000 WL 761004, at \*1 (D. Me. May 2, 2000) (no irreparable harm shown when defendant had filed accurate amendment to SEC disclosure form).

The Defendants argue that inasmuch as (i) the First Circuit and this court have signaled that the only appropriate injunctive relief for a violation such as that in issue is a curative filing, and (ii) Coogan made such a curative filing on July 19, 2002, the Complaint fails to state a claim for relief. *See* Firstmark Motion at 5-6 (citing *Hibernia* and *Vetrotex*). Beyond that, the Defendants contend that several factors militate against an award of the injunctive relief sought, including the tardiness of the request, the fact that the stock purchases in issue were made in the context of an open and notorious battle for control of Firstmark in which Gorman was a principal actor and the fact that the Plaintiffs concede that Coogan revealed to shareholders from whom he offered to buy stock in the summer of 2002 that he intended to try to take control of the company. *See id.* at 5-6, 8; Firstmark Reply at 12-15.

I agree with the Plaintiffs that, in the circumstances of this case, the July 19 Amendment cannot fairly be characterized as a “curative” filing in the sense contemplated in *Hibernia* and *Vetrotex*. *See* Opposition at 10-11. Critically, in both *Hibernia* and *Vetrotex*, the offending party had not yet acquired sufficient

shares to take control of the target company at the time the curative amendment was filed. *See Hibernia*, 891 F.2d at 371 & n.1 (acquirer had accumulated 6.7 percent of issuer's stock as of date of curative filing); *Vetrotex*, 2000 WL 761004, at \*1 (acquirer had accumulated about 14 percent of issuer's stock as of date of curative filing). Thus, in those cases the filing of an amendment could yet effectuate a "cure" – that is, fulfill the basic purposes of the Williams Act – by apprising shareholders, at least from the point in time of the curative amendment forward, that a takeover was contemplated. *See Vetrotex*, 2000 WL 761004, at \*1 (holding that plaintiff had not shown irreparable injury "where the corrective amendments have been filed and Saint-Gobain has not yet increased its stock ownership"); *see also, e.g., Treadway Cos. v. Care Corp.*, 638 F.2d 357, 380 (2d Cir. 1980) (distinguishing case before court, in which shareholders had ample time to digest information contained in curative section 13(d) filing, from cases in which takeover attempt follows on heels of belated curative filing). In this case, by contrast, by July 19, 2002 the deed had been done, and the company effectively taken over by the Coogan interests. No useful section 13(d) purpose remained to be served.

Nonetheless, despite the failure of the purportedly curative amendment to effectuate a cure, there is good reason to find that Counts VIII and XIII (as supplemented by integral documents on which the Complaint relies) fail to state a claim for injunctive relief. The First Circuit has signaled in dictum that the severe sanction of share sterilization is unavailable even when section 13(d) disclosure requirements are unmet. *See Hibernia*, 891 F.2d at 373 n.3. Other courts also have shown reluctance to grant this "very extraordinary form of relief." *Edelman v. Salomon*, 559 F. Supp. 1178, 1189 (D. Del. 1983). Even assuming *arguendo* that in this circuit there is some set of facts in which such a remedy is warranted to redress a section 13(d) violation, this is not the case.

Although the Plaintiffs characterize Coogan as having made a “secret, illegal takeover,” *see* Complaint ¶ 214, the well-pleaded facts reveal that in the summer of 2002, in the context of negotiating purchases of shares, he told a number of Firstmark shareholders that he intended to try to seize control of the company, *see id.* ¶ 176; *see also, e.g.*, Opposition at 4 (“Coogan pressured shareholders to sell to him by conveying the false impression that unless he took control of the Company, it would founder.”). In addition, Coogan’s form share-purchase agreement, appended as Exhibit B to the July 19 Amendment, includes language disclosing the Coogans’ ownership of the largest single block of Firstmark common stock and the possibility of a change in control. *See* Form Share-Purchase Agreement at [3] ¶ 2. According to the July 19 Amendment, between July 11 and 17, 2002, this form of contract was used to effectuate twenty-six transactions representing 477,701 shares of stock. July 19 Amendment, Item 3 at [11]-[12].

Form 13D filings aside, one cannot draw a reasonable inference from the well-pleaded facts of the Complaint, combined with documents integral thereto, that Firstmark shareholders with whom Coogan negotiated in the summer of 2002 were in the dark as to his intent to seize control of the company. Irreparable harm justifying share sterilization accordingly is not shown. *See, e.g., Ludlow Corp. v. Tyco Labs., Inc.*, 529 F. Supp. 62, 66 (D. Mass. 1981) (noting that interests protected by section 13(d) “are fully satisfied when the shareholders receive the information required to be filed.”) (citations and internal quotation marks omitted).<sup>22</sup>

Finally, as the Defendants argue, *see* Firstmark Reply at 13, the Plaintiffs’ delay cuts against a finding of irreparable harm. The instant suit was filed on July 10, 2003, *see* Complaint at 1 – approximately

---

<sup>22</sup> The Complaint alleges that, while the July 19 Amendment belatedly disclosed the takeover plan, it was misleading in omitting to reveal Coogan’s alleged plan to deregister Firstmark. *See* Complaint ¶¶ 105, 187-88. However, the gravamen of the Plaintiffs’ section 13(d) claims is that Coogan seized control of the company without disclosing his intent to do so. *See id.* ¶¶ 291-95, 321-25; *see also* Opposition at 4.

a year after the belated Schedule 13D filing, nine months after the contested director election and in the wake of settlement of a prior lawsuit arising from the same takeover battle. As the Defendants note, “delay belies the claim of pressing need for [injunctive] relief.” Firstmark Reply at 13 (quoting *Securities & Exch. Comm’n v. Parklane Hosiery Co.*, 422 F. Supp. 477, 486 (S.D.N.Y. 1976), *aff’d*, 558 F.2d 1083 (2d Cir. 1977)). While the Plaintiffs explain that they were unaware of the extent of Coogan’s alleged wrongdoings (as a result of which they previously were willing to concede his victory in taking over Firstmark), *see* Opposition at 11-12, they knew or should have known of the nature of the alleged section 13(d) violations at least nine months before filing the instant complaint. That they later came to appreciate the full strategic significance of those alleged violations does not counsel in favor of a finding of irreparable harm.

For these reasons, the Defendants are entitled to dismissal of Counts VIII and XIII for failure to state a claim as to which relief can be granted.

#### **B. Count X: Section 14(a) of Williams Act**

In Count X of the Complaint, the Plaintiffs allege that Coogan violated section 14(a) of the Williams Act, 15 U.S.C. § 78n(a), by making “affirmative, material, fraudulent, deceptive and manipulative representations and omissions in his proxy statements[,]” as a result of which he was able “to undermine the Company’s shareholder democracy, deny shareholders their right to vote their shares knowledgeably, secure more than 50% of the outstanding shares of the Company, and unlawfully take control of it.” Complaint ¶¶ 303-04.

Pursuant to section 14(a) of the Williams Act, the SEC has promulgated proxy-solicitation rules “designed to secure reliable and fair disclosure so that shareholders may freely exercise their voting rights on an informed basis.” *Pridgen v. Andresen*, Civil Action No. 3:94CV851(DFM), 1995 U.S. Dist. LEXIS

21987, at \*27 (D. Conn. Mar. 13, 1996). “Section 14a and the rules and regulations promulgated thereunder were enacted to prevent abuses in the proxy solicitation process, including the dissemination of untruths, half-truths, and otherwise misleading information to security holders and the general public, and to ensure full and complete disclosure when proxies are solicited from shareholders.” *Id.*<sup>23</sup>

The Defendants correctly observe that to state a claim pursuant to section 14(a), a plaintiff must allege not only that proxy materials were materially misleading but also that they constituted an “essential link” in the accomplishment of a transaction (so-called “transaction causation”). *See* Firstmark Motion at 8; *see also, e.g., Shaev v. Saper*, 320 F.3d 373, 379 (3d Cir. 2003) (“To state a claim under § 14(a), a plaintiff must allege that (1) a proxy statement contained a material misrepresentation or omission which (2) caused the plaintiff injury and (3) that the proxy solicitation itself, rather than the particular defect in the solicitation materials, was an essential link in the accomplishment of the transaction.”) (citation and internal quotation marks omitted); *Royal Bus. Group, Inc. v. Realist, Inc.*, 933 F.2d 1056, 1063 (1st Cir. 1991) (noting, with respect to section 14(a) claim, that plaintiffs’ complaint failed “to establish a causal nexus between their alleged injury and some corporate transaction authorized (or defeated) as a result of the allegedly false and misleading proxy statements. The need to plead and prove a transactional nexus in a proxy solicitation case is not legitimately in doubt.”). They assert that the Complaint fails to set forth such causation. *See* Firstmark Motion at 8. I agree.

For purposes of the Plaintiffs’ federal securities-law claims, the challenged “transaction” is the October 2002 election. *See* Opposition at 13-14. The Plaintiffs’ section 14(a) argument (as ultimately

---

<sup>23</sup> “A proxy is the power or authority to act for another person.” *Pridgen*, 1995 U.S. Dist. LEXIS 21987, at \*26. “In the securities context it refers to a document by which a person gives authority to another to act on his or her behalf.” *Id.* at \*26-\*27.

refined in their surreply brief) is that Coogan’s misrepresentations in the September Proxies constituted an essential link in the effectuation of that election inasmuch as:

1. In the absence of the allegedly void 2,180,286 Coogan-related shares, the total number of shares issued and outstanding at the time of the election would have been 3,161,757, as a result of which 1,580,879 shares would have constituted a quorum. *See* Surreply at 1-2; *see also* Opposition at 13.

2. Coogan needed the 1.9 million-plus proxies of Gorman, *et al.*, either solely for quorum purposes or to vote for his slate inasmuch as, if the Gorman proxies were present for quorum purposes but did not vote, “even a handful of votes would carry the day,” Surreply at 2 – *i.e.*, the Coogan interests would win the election.<sup>24</sup>

3. In his September Proxies, Coogan falsely stated that unless a shareholder whose shares were held in street name returned a signed proxy, such shares would not be counted for quorum purposes. *See id.*

4. In reliance on the proxy representations, the beneficial owners of 1,941,788 shares withheld their proxies and gave no instructions to the nominee title holder clearinghouse regarding proposal number 2 (election of directors) and did not vote for Coogan’s slate in the October 4, 2002 election. Complaint ¶¶

---

<sup>24</sup> This was so because, as the Defendants explain, *see* Firstmark Motion at 10 n.4; Firstmark Reply at 2-8, (i) the only voting options for purposes of the contested election were to vote in favor of, or to withhold one’s vote with respect to, particular director-nominees, *see* September 5 Proxy at 23; September 13 Proxy at 24; (ii) per Maine law as then in effect, director-nominees needed only a plurality (not a majority) vote to win, as a result of which one vote could suffice to elect a director, *see* 13-A M.R.S.A. § 611(1)(B) (repealed July 1, 2003); *North Fork Bancorp. v. Toal*, 825 A.2d 860, 869 n.23 (Del. Ch. 2000), *aff’d sub nom. Dime Bancorp v. North Fork Bancorp.*, No. 545,2000, 2001 WL 118004 (Del. Jan. 31, 2001) (“[M]ost corporate votes typically require a plurality (and not a majority as was required by Dime’s bylaws) . . . . The possibility of voting ‘against’ a slate running for election would connote the possibility of defeating the slate. Typically, however, a slate running unopposed need only to receive a plurality of the vote (i.e., the unopposed slate needs only receive one favorable vote to win). Rather than mandating the inclusion of an ‘against’ vote on proxy cards which could lead to further shareholder cynicism, the SEC compromised, offering shareholders the opportunity to express dissatisfaction by withholding authority to vote for all or specific nominees.”); and (iii) even with the allegedly void Coogan block of shares deleted, the votes of the Gorman block withheld for lack of instructions to the broker, and the shares Coogan allegedly obtained illegally in the summer of 2002 disenfranchised, more than one vote still would have  
*(continued on next page)*

225. Inasmuch as Aplin, Ellis, Mayer, Gorman, Rechner, John Garber and Mark Harry, collectively, withheld their proxies for 1,941,788 shares, they cannot be counted for the director proposal. *Id.* ¶ 226. Therefore, only a total of 1,219,969 proxies were present and eligible to vote – short of a quorum. *Id.*

This facially appealing argument does not withstand close scrutiny. As an initial matter, the linchpin misrepresentation – the alleged statement that unless a shareholder whose shares were held in street name returned a signed proxy, such shares would not be counted for quorum purposes – is not expressly pleaded in the Complaint. *See* Complaint ¶¶ 219-28. Count X, as its contours are clarified in the Surreply, thus falls short of meeting the pleading requirements of the Private Securities Litigation Reform Act (“PSLRA”). *See, e.g., In re Cabletron Sys., Inc.*, 311 F.3d 11, 27 (1st Cir. 2002) (“Under the PSLRA, a securities fraud complaint must specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.”) (citation and internal quotation marks omitted).

Nor is the linchpin misrepresentation expressly set forth in either of the September Proxies. *See generally* September 5 Proxy; September 13 Proxy. In the absence of such an express statement, the Plaintiffs argue that the relevant proxy language should be construed as misleading inasmuch as:

The solicitation urged stockholders to “sign and return” proxies. In both his introductory explanation preceding his description of the required vote and his subsequent description of the proposal to elect directors, Coogan stated without explanation that a quorum required “the presence in person or by proxy” of a majority of the shares entitled to vote. The definitive proxy solicitation did not explain or define how a quorum would be constituted but did clearly represent that only signed and returned proxies would be counted. Contextually, the proxy solicitation leads the reader inexorably to conclude that only signed

---

been cast in favor of the Coogan slate of director-nominees, *see* Firstmark Reply at 3.

and returned proxies for shares, whether held in street name or not, could be present and count toward a quorum, hence eligible to vote.

Surreply at 2 n.2. This argument is without merit. The underlying documents themselves can only reasonably be construed as conveying the opposite intentment: that only the presence in person or by proxy of record owners of shares held in street name – not beneficial owners – counted toward a quorum. The September Proxies provided, in relevant part:

Only holders of record of the Company's common stock at the close of business on August 9, 2002, the record date, are entitled to notice of and to vote at the Annual Meeting. On the record date, there were 5,342,043 outstanding shares of common stock . . . , each of which is entitled to one vote on all matters properly submitted at the Annual Meeting.

The presence, in person or by proxy, of the holders of a majority of the votes entitled to be cast at the Annual Meeting is necessary to constitute a quorum. . . .

If a quorum is present, new directors will be elected by a plurality of the votes cast. This means that the director-nominees receiving the highest number of votes will be elected as directors. Accordingly, abstentions and broker non-votes do not have the effect of a vote against the election of any director-nominees. Brokers will not have discretion to vote shares held in street name in connection with the election of directors without instructions from the beneficial owner of the shares with respect to the proposals under this proxy statement at the Annual Meeting.

September 5 Proxy at 6; September 13 Proxy at 5-6.

As the Defendants note, see Firstmark Reply at 6-7, the proxy solicitations provided, consistent with relevant Maine law and Firstmark's bylaws as then in effect, that only "holders of record" (*e.g.*, in the case of shares held in street name, brokers rather than beneficial owners) were entitled to vote, and that the presence in person or in proxy of the holders of a majority of the votes entitled to be cast at the meeting would constitute a quorum, *see* 13-A M.R.S.A. § 102(17) (repealed July 1, 2003) (defining "shareholder" as "one who is a holder of record of shares in a corporation"); *id.* § 608(1)(A) (repealed July 1, 2003) ("Unless otherwise provided in the bylaws, a majority of the shares entitled to vote thereat shall constitute a

quorum at a meeting of shareholders[.]”); Amended and Restated Bylaws of Firstmark Corp. adopted March 1999, attached as Exh. 6 to Plaintiffs’ Appendix, art. XI, § 2 (entitling corporation to recognize “the person or persons shown on its stock transfer books as the owner of its shares as the exclusive and only owner thereof for all purposes,” including voting).

Further, the presence in person or by proxy of a “holder of record” (in the case of shares held in street name, the broker) counted toward a quorum even if the broker had received no instructions from the beneficial owner with respect to the election of director-nominees (and thus possessed no discretion to vote shares with respect to the election). *See, e.g., Berlin*, 552 A.2d at 491, 493-95 (holding, in face of materially similar bylaws language requiring, for purposes of a quorum, the “presence in person or by proxy of the holders of not less than 80% of the voting securities of the Corporation,” that brokers’ presence counted toward quorum even though, by reason of absence of instructions from beneficial owners, they lacked discretion to vote on particular proposal advanced at meeting; reasoning, “Just as the quorum, once established, will not be defeated by a stockholder who participates in part of the meeting but does not vote or leaves the meeting, it also will not be defeated merely because the stockholder who is present by proxy did not provide authority for his representative to vote on all proposals.”).<sup>25</sup>

---

<sup>25</sup> The case of *Committee for New Mgmt. of Guaranty Bancshares Corp. v. Dimeling*, 772 F. Supp. 230 (E.D. Pa. 1991), cited by the Plaintiffs in part for the proposition that the Gorman block should not be included in the calculation of shares present for a quorum, *see* Surreply at 3, is distinguishable in that the relevant bylaws language in *Dimeling* specified that “the presence, in person or by proxy, of shareholders entitled to cast at least a majority of the votes which all shareholders are entitled to cast on the particular matter shall constitute a quorum for purposes of considering such matter,” *Dimeling*, 772 F. Supp. at 240 (citation and internal punctuation omitted). The Plaintiffs also suggest that the Gorman share block should not be counted toward a quorum pursuant to former 13-A M.R.S.A. § 608(4) (repealed July 1, 2003), which provided: “Shares shall not be counted towards a quorum for a meeting of shareholders if voting of such shares has been enjoined or if for any reason they may not lawfully be voted at such meeting.” Opposition at 13. The Complaint does not allege that voting of the Gorman block of shares was enjoined. Nor do the Plaintiffs explain how the Gorman block could not lawfully have been voted. *See id.* I find no caselaw elucidating the meaning of section 608(4); however, I find persuasive the Defendants’ rejoinder that “[t]he fact that a beneficial owner has withheld instructions from the record owner to vote for a director or directors obviously does not mean that his shares ‘may not lawfully be voted.’” Firstmark Reply at 6; *see also, e.g., North Fork*, 825 A.2d at 866 (noting that “broker non-votes,” which occur (continued on next page)

In short, the Complaint identifies no materially misleading misrepresentation that served as an essential link to the challenged October 2002 election. The Defendants accordingly are entitled to dismissal of Count X for failure to state a claim as to which relief can be granted.<sup>26</sup>

### **C. Counts XI & XII: Sections 14(d) & 14(e) of Williams Act**

In Count XI of the Complaint, the Plaintiffs assert that (i) beginning no later than mid-June 2002 Coogan secretly approached numerous Firstmark shareholders and solicited the purchase of shares of Firstmark common stock; (ii) pursuant to those solicitations he purchased 477,702 shares – nearly ten percent of Firstmark’s outstanding shares, and (iii) in the circumstances, including but not limited to the secrecy of Coogan’s offers, his deceptive high-pressure tactics, his failure to disclose to all shareholders his intention to seek control of the company, the solicitation of a substantial percentage of stock and the firm and non-negotiable terms of the offer, this solicitation constituted an unlawful tender offer pursuant to section 14 of the Williams Act, 15 U.S.C. § 78n. Complaint ¶¶ 308-09. Coogan assertedly failed to comply with (i) the filing requirements of section 14 inasmuch as he did not file notice, or amend any existing notice, with

---

“when a registered broker-dealer holding securities in street name has not received voting instructions from the customer, the beneficial owner of such securities[.]” count toward quorum requirements because shares represented by those proxies are “present” at the meeting).

<sup>26</sup> The Complaint also alleges that the September Proxies were materially misleading with respect to the manner in which shares would be voted. See Complaint ¶¶ 219-28. As the Defendants assert, see Firstmark Motion at 10 n.4; Firstmark Reply at 2-8, the Complaint fails to state a section 14(a) claim based on this asserted misrepresentation inasmuch as the votes allegedly wrongfully cast in favor of the director slate by Coogan were not essential to the outcome. Transaction causation accordingly is lacking. See *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1087 (1991) (holding transaction causation absent, for purposes of section 14(a) claim, when minority shareholders’ votes not required by law or corporate bylaw to authorize the corporate action subject to the proxy solicitation); *Gilliam v. Hobert*, 952 F.Supp.319, 324 n.4 (W.D. Va. 1997) (citing *Virginia Bankshares* for proposition that plaintiffs failed to state section 14(a) claim in challenge to election of directors when, *inter alia*, votes of potentially misled stockholders were unnecessary to install directors); *Dominick v. Marcove*, 809 F. Supp. 805, 808 (D. Colo. 1992) (citing *Virginia Bankshares* for proposition that the “objecting shareholders did not have votes sufficient to affect the outcome. Thus, their votes were not required by law. As plaintiffs’ votes were not required by law the proxy solicitation was not an essential link in bringing about the asset sale.”) (citations omitted). While some courts have analyzed absence of transaction causation as a matter of lack of standing, see, e.g., *Thouret v. Hudner*, No. 95 Civ. 1793 (JSM), 1996 WL 38824, at \*2-\*3 (S.D.N.Y. Feb. 1, 1996), this court has analyzed it as a matter of stating the requisite elements of a section 14(a) claim. See *Giarraputo v. UNUMProvident Corp.*, No. Civ. 99-301-PC, 2000 WL 1701294, at \*10-\*11 (D. Me. Nov. 8, 2000) (rec. dec., *aff’d* Jan. 8, 2001).

the SEC as required by statute prior to making the alleged tender offer and (ii) the “All Holders Rule,” in that he offered to purchase shares only from certain shareholders. *Id.* ¶¶ 310-11.

In Count XII of the Complaint, the Plaintiffs allege that Coogan’s failure to file notice pursuant to section 14(d) constituted an omission of material fact in connection with the making of a tender offer, in violation of section 14(e) of the Williams Act, 15 U.S.C. § 78n(e). *Id.* ¶ 316. They further assert that Coogan made additional material misrepresentations and omissions to recipients of the tender offer in violation of section 14(e) and that they were injured, *inter alia*, by those misrepresentations in that Coogan has been able to undermine the company’s shareholder democracy, deny shareholders their right to vote their shares knowledgeably, secure more than fifty percent of the company’s outstanding shares and unlawfully take control of the company. *Id.* ¶¶ 317-18.

The Defendants argue that Counts XI and XII fail to state a claim for violation of sections 14(d) and 14(e) of the Williams Act in that (i) even accepting as true the facts pleaded, there was no tender offer, and (ii) even assuming *arguendo* that there was a tender offer, the Plaintiffs do not plead that Coogan’s violations of the tender-offer provisions directly caused the injuries of which they complain. *See* Firstmark Motion at 13. I agree, and therefore do not reach the Defendants’ overarching assertion of failure to plead fraud with particularity as it pertains to these counts.

Section 14(d) of the Williams Act “prohibits a tender offer unless shareholders are provided with certain procedural and substantive protections including: full disclosure; time in which to make an investment decision; withdrawal rights; and pro rata purchase of shares accepted in the event the offer is oversubscribed.” *Securities & Exch. Comm’n v. Carter Hawley Hale Stores, Inc.*, 760 F.2d 945, 948 (9th Cir. 1985); *see also* 15 U.S.C. § 78n(d).

Section 14(e) of the Williams Act provides, in relevant part:

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

15 U.S.C. § 78n(e).

Sections 14(d) and (e) of the Williams Act, like sections 13(d) and 14(a), aim to protect investors through adequate, timely disclosure of information. *See, e.g., Calvary Holdings*, 948 F.2d at 62 (“In 1968 Congress amended the Securities and Exchange Act of 1934 to combat a perceived problem in the area of transfers of corporate control. Individuals were accumulating large blocks of stock in corporations in a short period of time and/or making cash tender offers without any public disclosure. Other investors were unaware of these possible changes in corporate control. Such investors were therefore forced to invest blindly without the information necessary for rational decision-making. The amendment, called the Williams Act, was intended to alleviate this problem by requiring those in the position to alter control of a company to disclose to the SEC and the corporation their ownership.”) (citations omitted).

As the Defendants suggest, the protections of sections 14(d) and (e) are triggered only if share solicitations amount, as a matter of law, to a “tender offer.” *See* Firstmark Motion at 13; *see also, e.g., University Bank & Trust Co. v. Gladstone*, 574 F. Supp. 1006, 1010-11 (D. Mass. 1983) (denying injunction under sections 14(d) and (e) where plaintiffs unlikely to succeed in establishing existence of tender offer).

Several tests of the existence of such an offer exist, including the so-called eight-factor *Wellman* test, named for *Wellman v. Dickinson*, 475 F. Supp. 783, 823-24 (S.D.N.Y. 1979), *aff’d*, 682 F.2d 355 (2d Cir. 1982), and the so-called *S-G Securities* test, set forth in *S-G Sec., Inc. v. Fuqua Inv. Co.*, 466

F. Supp. 1114, 1126-27 (D. Mass. 1978). See *Pin v. Texaco, Inc.*, 793 F.2d 1448, 1453-54 (5th Cir. 1986) (summarizing tests; noting that the “Williams Act amendments do not define the term ‘tender offer,’ and the SEC has steadfastly refused to supply a definition, since the dynamic nature of tender offers requires administrative and judicial flexibility in determining what types of transactions should be subject to the Act and these regulations.”) (citations and internal quotation marks omitted).

Application of the *Wellman* test entails consideration of whether the following factors exist:

(1) Active and widespread solicitation of public shareholders for the shares of an issuer; (2) solicitation made for a substantial percentage of the issuer’s stock; (3) offer to purchase made at a premium over the prevailing market price; (4) terms of the offer are firm rather than negotiable; (5) offer contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased; (6) offer open only for a limited period of time; (7) offeree subjected to pressure to sell his stock; and (8) public announcements of a purchasing program concerning the target company precede or accompany rapid accumulation of a large amount of target company’s securities.

*Carter Hawley Hale*, 760 F.2d at 950 (quoting *Wellman*, 475 F.Supp. at 823-24) (internal punctuation omitted).

Pursuant to the *S-G Securities* test, a tender offer exists “where there is: 1) a publicly announced intention by the purchaser to acquire a substantial block of the stock of the target company for purposes of acquiring control thereof, and 2) a subsequent rapid acquisition by the purchaser of large blocks of stock through open market and privately negotiated purchases[.]” *S-G Securities*, 466 F. Supp. at 1126-27. The *S-G Securities* formulation was designed to detect atypical tender offers that pose the same potential dangers that section 14(d) of the Williams Act was designed to alleviate. See *id.* at 1124.<sup>27</sup>

---

<sup>27</sup> The *S-G Securities* court noted that “[i]n conventional tender offers the offeror typically offers to purchase all or a portion of a company’s shares at a premium price, the offer to remain open for a limited time. Frequently, the obligation to purchase on the part of the offeror is conditioned on the aggregate number of shares tendered: if more than a certain number are tendered, the offeror need not purchase the excess; if less than a certain number are tendered, the offeror need not purchase any. The shareholder responding to the offer generally must relinquish control of the shares he desires to (continued on next page)

The Plaintiffs advocate for adoption of the *S-G Securities* test but contend that even under the *Wellman* test their complaint states a claim for relief. *See* Opposition at 5-20. I agree with the Defendants, *see* Firstmark Motion at 13-15; Firstmark Reply at 16-17, that under either formulation, the Complaint fails to state a claim for relief.

With respect to the *S-G Securities* test, the well-pleaded facts fail to disclose that Coogan preceded his open-market and privately negotiated purchases with a publicly announced intention to acquire a substantial block of stock in the target company. The Coogan solicitations, as alleged in the Complaint, accordingly do not amount to a tender offer pursuant to *S-G Securities*. *Compare S-G Securities*, 466 F. Supp. at 1126 (noting that pre-purchase publicity “created a risk of the pressure on sellers that the disclosure and remedial tender offer provisions of the Williams Act were designed to prevent.”).

The outcome is the same pursuant to the *Wellman* test. The Plaintiffs argue that the Complaint reveals that Coogan met the following *Wellman* elements: (i) active and widespread solicitation of Firstmark shareholders, (ii) making of an offer at a set price (\$1.00 per share), (iii) subjection of offerees to selling pressures, and (iv) rapid accumulation of shares, sufficient to take an apparent majority stock-ownership position. *See* Opposition at 20 n.7. The Plaintiffs do not assert, and the Complaint does not allege, that Coogan offered a premium over market price; that any of his offers during the relevant time were contingent on the tender of a fixed minimum number of shares or subject to the ceiling of a fixed maximum number to be purchased; that his offers were open for only a limited period of time; or that any public announcements of a purchasing program preceded them.

---

tender until the response of others is determined.” *S-G Securities*, 466 F. Supp. at 1124 n.6 (citation and internal quotation marks omitted).

While, as the Court of Appeals for the Ninth Circuit noted in *Carter Hawley Hale*, a plaintiff need not demonstrate the existence of all eight *Wellman* elements, the Coogan purchases as alleged lack the combination of offer of premium price and deadline pressure that other courts have found critical to establishment of the existence of a tender offer pursuant to *Wellman*. See *Carter Hawley Hale*, 760 F.2d at 950, 952.

In any event, even assuming *arguendo* the existence of a tender offer, the Complaint falls short of establishing the requisite “loss causation.” See *Valente v. PepsiCo*, 454 F. Supp. 1228, 1246 (D. Del. 1978) (“In the case of a tender offer, the concept of causation is somewhat complex. A plaintiff must prove not only that a defendant’s misstatements or omissions caused shareholders to accept the tender offer (‘transaction causation’), but also that the violations caused the injuries of which the plaintiff complains (‘loss causation’).”).

The Plaintiffs allege in Count XII that “Coogan, through misstatements and omissions in his tender offer, has been able to usurp and manipulate the Company’s corporate machinery and engage in unlawful and self-dealing corporate transactions.” Complaint ¶ 319. They clarify in their opposing brief that the “wrongful October 2002 Election is the corporate transaction that [they] challenge in their federal securities claims.” Opposition at 13. Although they assert that Coogan’s “post-election wrongdoing is not . . . the gravamen of the federal securities claims,” they seem to concede as much in the next breath, stating: “Rather, Coogan’s violation of federal securities laws allowed him to take control of the corporation and positioned him to wage his recent campaign of self dealing and corporate looting.” *Id.* at 15 n.5. In effect, the harm alleged is that the tender-offer violations positioned Coogan to take control of Firstmark, which in turn positioned him to win the October 2002 election, which in turn positioned him to continue a pattern of looting and mismanagement.

As the Defendants observe, *see* Firstmark Motion at 15, such a chain of harm does not satisfy the “loss causation” element of sections 14(d) and 14(e) of the Williams Act, *see, e.g., Bloor v. Carro, Spanbock, Londin, Rodman & Fass*, 754 F.2d 57, 61-62 (2d Cir. 1985) (noting, in context of claim pursuant to section 10(b) of Exchange Act, that loss was caused not by misrepresentations in various documents used to attract investments but by looting and mismanagement of these funds by controlling stockholders); *Rediker v. Geon Indus., Inc.*, 464 F. Supp. 73, 82 (S.D.N.Y. 1978) (noting, in context of motion to dismiss section 14(a) claim, “The facts as alleged herein do not establish that the Geon shareholders’ reliance on the alleged misrepresentation was the cause of the shareholders’ injury. Misdeeds by the defendants may have caused Burmah to abort the deal, and this, in turn, may have caused the market price of Geon to plummet and may have thereby injured plaintiffs. Thus, the alleged injury was caused by the aborting of the deal and not by the shareholders’ reliance on defendants’ alleged misrepresentations. Plaintiff’s remedies, if any, lie in state court for common law claims.”).

The Defendants accordingly are entitled to dismissal of Counts XI and XII for failure to state a claim.

#### **D. State-Law Claims**

As a final matter, the Defendants argue, *inter alia*, that if the Plaintiffs’ federal securities-law claims are dismissed for failure to state a claim (as I have recommended they should be), the court should decline to exercise its supplemental jurisdiction over the remaining, state-law-based claims and dismiss them on that basis. *See* Firstmark Motion at 18.

The court’s general practice is indeed to decline to exercise supplemental jurisdiction over a pendent state claim when a plaintiff’s foundational federal claims are dismissed before trial. *See United*

*Mine Workers of Am. v. Gibb*, 383 U.S. 715, 726 (1966) (“Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.”) (footnotes omitted); *Camelio v. American Fed’n*, 137 F.3d 666, 672 (1st Cir. 1998) (“[T]he balance of competing factors ordinarily will weigh strongly in favor of declining jurisdiction over state law claims where the foundational federal claims have been dismissed at an early stage in the litigation.”).

At this early stage in the instant litigation, I discern no reason to make an exception to this general rule, and the Plaintiffs identify none. *See generally* Opposition. Accordingly, I recommend that the court decline to exercise its supplemental jurisdiction over the remaining state-law-based claims.

#### **IV. Conclusion**

For the foregoing reasons, I **DENY** the Hearing Motion and recommend that the court **GRANT** the Motions To Dismiss and **DISMISS** the Complaint.

#### **NOTICE**

*A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.*

Dated this 13th day of January, 2004.

/s/ David M. Cohen  
David M. Cohen  
United States Magistrate Judge

**Plaintiff**

-----

**JOHN J GORMAN, individually  
and derivatively on behalf of  
FIRSTMARK CORPORATION**

represented by **RICHARD A. GOREN**  
RUBIN, HAY & GOULD, P.C.  
205 NEWBURY STREET  
FRAMINGHAM, MA 01701  
508-875-5222  
Email: rgoren@rhglaw.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**SEAN T. CARNATHAN**  
RUBIN, HAY & GOULD, P.C.  
205 NEWBURY STREET  
FRAMINGHAM, MA 01701  
508-875-5222  
Email: scarnathan@rhglaw.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**KURT J RECHNER, individually  
and derivatively on behalf of  
FIRSTMARK CORPORATION**

represented by **RICHARD A. GOREN**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**SEAN T. CARNATHAN**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**PHIL A WHITNEY, individually**

represented by **RICHARD A. GOREN**

*and on behalf of all others similarly situated and derivatively on behalf of FIRSTMARK CORPORATION*

(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**SEAN T. CARNATHAN**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**KARIN WHITNEY, individually and on behalf of all others similarly situated and derivatively on behalf of FIRSTMARK CORPORATION**

represented by **RICHARD A. GOREN**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**SEAN T. CARNATHAN**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

V.

**Defendant**

-----

**H WILLIAM COOGAN, JR**

represented by **DEIRDRE M. SMITH**  
DRUMMOND, WOODSUM &  
MACMAHON  
245 COMMERCIAL ST.  
P.O. BOX 9781  
PORTLAND, ME 04101  
207-772-1941  
Email: dsmithecf@dwmlaw.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**SUSAN C COOGAN**

represented by **DEIRDRE M. SMITH**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**ROBERT R KAPLAN, SR**

represented by **DYLAN SMITH**  
VERRILL & DANA  
1 PORTLAND SQUARE  
P.O. BOX 586  
PORTLAND, ME 04112  
(207) 774-4000  
Email: dsmith@verrilldana.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**JACQUELINE RIDER**  
VERRILL & DANA  
1 PORTLAND SQUARE  
P.O. BOX 586  
PORTLAND, ME 04112  
(207) 774-4000  
Email: jrider@verrilldana.com  
*ATTORNEY TO BE NOTICED*

**JOHN T WYAND**

represented by **DYLAN SMITH**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**JAMES T. KILBRETH**  
VERRILL & DANA  
1 PORTLAND SQUARE  
P.O. BOX 586  
PORTLAND, ME 04112  
(207) 774-4000  
Email: jkilbreth@verrilldana.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**JACQUELINE RIDER**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**DONALD V CRUIKSHANKS**

represented by **DEIRDRE M. SMITH**

(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**JOHN MCCOWN**

represented by **DYLAN SMITH**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**JAMES T. KILBRETH**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**JACQUELINE RIDER**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**R BRIAN BALL**

represented by **DEIRDRE M. SMITH**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**FIRSTMARK CORPORATION**

represented by **DYLAN SMITH**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**JAMES T. KILBRETH**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**JACQUELINE RIDER**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

