IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ENCOMPASS SERVICES HOLDING CORPORATION,	)	
Petitioner,	)	
v.	)	Civil Action No. 578-N
PROSERO INCORPORATED f/k/a FACILITYPRO.COM CORPORATION,	)	
Respondent.	)	

MEMORANDUM OPINION

Submitted: October 19, 2004
Decided: February 3, 2005

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PARSONS, Vice Chancellor.

This is an action by Petitioner, Encompass Services Holding Corp. ("Encompass"), for appraisal of its 41,018,998 shares of FacilityPro.com Corp. ("FacilityPro"), a Delaware corporation. On January 12, 2004, FacilityPro merged with a merger subsidiary, creating the new entity Prosero Corp. ("Prosero"). Encompass was at that time, and continues to be, a debtor in possession in the U.S. Bankruptcy Court for the Southern District of Texas (the "Bankruptcy Court"). On January 21, 2004, Encompass made a written demand for appraisal pursuant to 8 *Del. C.* § 262, and on April 5, filed for appraisal in the Bankruptcy Court. On July 7, the Bankruptcy Court held that it did have subject matter jurisdiction, but chose to abstain from hearing the action. Encompass then filed for appraisal in this Court on July 16. Prosero moved to dismiss on the ground that Encompass did not file its appraisal action in this Court until more than 120 days after the effective date of the merger.

I find that Encompass' original filing for appraisal in the Bankruptcy Court was reasonable and that it diligently pursued its appraisal claim, that Prosero has not shown that Encompass proceeded in bad faith, and that Prosero received timely notice and suffered no prejudice. I therefore hold that the filing deadline was tolled, and will deny Prosero's motion to dismiss.

I. FACTS

On November 19, 2002, Encompass filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code. On May 28, 2003, Encompass obtained confirmation of its plan of reorganization (the "Plan"), which became effective on or

about June 9, 2003. Encompass' bankruptcy case remains open and the Plan is currently being administered.[1]

On January 8, 2004, Encompass received notice from FacilityPro of its proposed merger with FCP Merger Sub in order to create a new entity Prosero. The merger became effective January 9, 2004.[2] Encompass did not consent to the merger, and, on January 21, 2004, demanded appraisal of its shares under section 262 of the Delaware General Corporation Law. On April 4, 2004, acting as debtor in possession in its bankruptcy case, Encompass filed an adversary complaint with the Bankruptcy Court seeking appraisal pursuant to § 262. On May 17, Prosero filed a motion to dismiss or abstain, arguing that the Bankruptcy Court should dismiss for lack of subject matter jurisdiction or, alternatively, abstain under 28 U.S.C. § 1334(c)(1).

After hearing argument on July 7, 2004, Judge McGuire ruled that, although the Bankruptcy Court did have subject matter jurisdiction to appraise the shares, he would abstain.[3] Accordingly, the Bankruptcy Court entered an order dismissing the adversary

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1 Encompass' Brief in Opposition to Prosero's Motion to Dismiss ("Encompass' Ans. Br.") at 2.

2 At argument and in its brief, Encompass stated that the effective date of the merger was January 12, 2004. The record is unclear, however, because Encompass' Petition for Appraisal refers to the effective date as January 9, 2004. The Court's analysis is the same whichever date is correct.

3 Transcript of Proceeding ("Bankruptcy Tr."), Encompass Servs. Holding Corp. v. Prosero, Inc., No. 04-3274-H4-ADV at 3–4 (Bankr. S.D. Tex. July 7, 2004), attached to the Affidavit of Richard M. Donaldson ("Donaldson Aff."), Ex. B.

proceeding without prejudice.[4] On July 16, 2004, Encompass filed its Petition for Appraisal in this Court.

Prosero filed a Motion to Dismiss based on Encompass' failure to comply with § 262's 120-day filing deadline. Encompass admits that its filing with this Court occurred after the 120-day period for filing expired. Encompass argues, however, that it could not have filed its original appraisal action in this Court because the Bankruptcy Court had exclusive jurisdiction until it abstained. Encompass contends that it had no other option and that its good faith filing in another court of competent jurisdiction equitably tolled the filing deadline. Prosero disagrees, arguing that (1) § 262 of the DGCL has no tolling provision and equitable tolling is not applicable, (2) § 262 gives exclusive jurisdiction to the Court of Chancery, and (3) the Bankruptcy Court did not have jurisdiction because Encompass' appraisal claim was not "related to" the bankruptcy case.

II. ANALYSIS

When considering a motion to dismiss under Rule 12(b)(6), the court must assume the truthfulness of all well-pled allegations in the complaint and view those facts, and all reasonable inferences drawn from them, in a light most favorable to the plaintiff.[5] Dismissal is appropriate under Rule 12(b)(6) only when it appears with reasonable certainty that the plaintiff would not be entitled to relief under any set of facts that can be

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[4] Donaldson Aff. Ex. D.

[5] *Anglo American Sec. Fund, L.P. v. S.R. Global Int'l Fund, L.P.*, 829 A.2d 143, 148-49 (Del. Ch. 2003).

inferred from the pleadings.[6] Where a complaint itself alleges facts that show the complaint was filed too late, the matter is properly raised by a motion to dismiss.[7]

A. Section 262 and Tolling

Section 262(d)(2) of the DGCL sets forth the applicable procedures for perfecting appraisal rights stemming from mergers or consolidations approved pursuant to § 228 or § 253. Stockholders of record must be notified that appraisal rights are available either before the effective date of the merger or within 10 days thereafter.[8] Stockholders may demand appraisal of their shares in writing within 20 days from the date of mailing of notice.[9] A shareholder may then file a petition for appraisal with this Court within 120 days from the effective date of the merger.[10]

Section 262's purpose is to allow for "an expedient and certain appraisal of stock."[11] It is designed to protect the interest of stockholders and its requirements "are to be liberally construed for the protection of objecting stockholders, within the boundaries of orderly corporate procedures and the purpose of the requirement."[12] At the same time, it has been held that "strict adherence to formality is needed to enforce the statutory

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6 *See, e.g.*, *Solomon v. Pathe Communications Corp*., 672 A.2d 35, 38 (Del. 1996).

7 *Kahn v. Seaboard Corp.*, 625 A.2d 269, 271 (Del. Ch. 1993).

8 8 *Del. C.* § 262(d)(2).

9 *Id.*

10 8 *Del. C.* § 262(e).

11 *Enstar Corp. v. Senouf*, 535 A.2d 1351, 1356 (Del. 1987).

12 *Raab v. Villager Indus., Inc.*, 355 A.2d 888, 891 (Del. 1976).

requirements for making an appraisal demand, because the purpose of the demand is to inform the corporation of which shareholders are dissenting from the merger and the total number of shares demanding appraisal."[13]

Section 262 does not contain a tolling provision. Nevertheless, Encompass argues that the deadline should be *equitably* tolled because, according to Encompass, it was precluded from filing in the Court of Chancery. Prosero answers by citing precedent for the propositions that equitable tolling doctrines are not lightly invoked[14] and that the lack of any statutory tolling provision weighs heavily against a finding of equitable tolling.[15]

Encompass has not proffered, and the Court has not found, any Delaware case addressing the applicability vel non of equitable tolling in a similar circumstance. The United States Supreme Court, however, has "allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period …."[16] One example involved a plaintiff who filed an action under the Federal Employers' Liability Act in an Ohio state court.[17] Although

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13 *Weinstein v. Dolco Packaging Corp.*, 1997 WL 118399, at *11 (Del. Ch. Mar. 11, 1997). *See also Raab*, 355 A.2d at 891–93 (liberally construing pre-vote objections while strictly construing demand requirements).

14 *Ambase Corp. v. City Investing Co.*, 2001 WL 167698, at *6 (Del. Ch. Feb. 27, 2001).

15 *See Marie-Christine Pereyron v. Leon Constantin Consulting, Inc.*, 2004 WL 1043724, at *2 (Del. Ch. Apr. 29, 2004).

16 *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (declining to apply equitable tolling to plaintiff's claim of excusable neglect while acknowledging the doctrine's general applicability).

17 *Burnett v. New York Central R.R. Co.*, 380 U.S. 424 (1965).

jurisdiction was proper, the case was dismissed for improper venue. Eight days later, plaintiff brought an identical action in federal court. The district court dismissed the federal action because, although the original state court action had been timely under FELA's three-year time limitation, the federal action was not. Although the court of appeals affirmed the district court's ruling, the Supreme Court reversed, explaining that petitioner (1) did not sleep on his rights, (2) brought an action within the statutory period in a state court of competent jurisdiction, and (3) notified respondent of the cause of action through service of process. Therefore, the Court held:

> [S]ince petitioner brought a timely suit in the Ohio court, served defendant with process, and, after finding the state action dismissed for improper venue, filed his suit in the Federal District Court only eight days after the Ohio court dismissed his action, before his time for appealing from the Ohio order had expired, his federal court action was timely.[18]

In its decision, the Court explained that "[s]tatutes of limitations are primarily designed to assure fairness to defendants" and "promote justice by preventing [surprise]…."[19] The Court further explained, however, that "[t]his policy of repose, designed to protect defendants, is frequently outweighed … where the interests of justice require vindication of plaintiff's rights."[20]

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18 *Id.* at 436.

19 *Id.* at 428 (quoting *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944)).

20 *Id*.

Encompass also urges the Court to follow the United States Court of Appeals for the Third Circuit, which has stated:

> It should also be noted that, if plaintiff is entitled to greater relief based upon the claims which are raised [in the federal court proceeding], he may still obtain that relief after the conclusion of the state court proceedings. The attempt to raise these claims in the federal court, and a refusal on abstention grounds, should work as a tolling of any applicable statute of limitations.[21]

Delaware courts generally require strict adherence to § 262's statutory formalities.[22] Moreover, this Court has held that it is unnecessary to show prejudice to the resulting corporation to uphold the statutory filing period, because such a requirement would "defeat the 'orderly procedure' which the statute sets forth."[23] Still, the Court of Chancery has tolled the time period in a couple of instances. In one case, the Court allowed an appraisal claim to proceed notwithstanding the stockholder's failure to make a timely objection to the merger.[24] The stockholder missed the stockholder's meeting after

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21 *Gen. Glass Indus. Corp. v. Monsour Med. Found.*, 973 F.2d 197, 200 n.5 (3d Cir. 1992) (affirming an abstention ruling and citing with approval a Magistrate's report adopted by the district court).

22 *See, e.g.*, *Enstar Corp.*, 535 A.2d 1351 (demand for appraisal by beneficial owners of stock held invalid even though corporation had reasonable constructive notice that shares were held by a nominee); *Tabbi v. Pollution Control Indus., Inc.*, 508 A.2d 867 (Del. Ch. 1986) (finding, *inter alia*, that demand letter delivered only hours after the merger vote was untimely and could not be given effect); *Nelson v. Frank E. Best, Inc.*, 768 A.2d 473 (Del. Ch. 2000) (finding appraisal demand untimely because demand was made on Monday after expiration of the limitations period on Sunday).

23 *Schneyer v. Shenandoah Oil Corp.*, 316 A.2d 570, 573 (Del. Ch. 1974).

24 *Engel v. Magnavox Co.*, 1976 WL 1705, at *5–6 (Del. Ch. Apr. 22, 1976).

his commercial airline flight was delayed by mechanical problems. The Court explained that "[i]n view of his efforts, and the fact that he was prevented from making his objection known by reasons beyond his control, I do not feel that he should be deprived of his right to an appraisal…."[25] In another instance, a stockholder's demand letter was misdelivered by the U.S. Postal Service, causing her to miss the statutory deadline.[26] Noting that failure under the statute was not her fault, the Court held that the equities all favored the stockholder. Although the Court technically did not toll the applicable time period, it strictly interpreted the statute against the resulting corporation and thereby allowed the stockholder's claim to be heard.[27]

In sum, § 262's statutory formalities, particularly with regards to demand for appraisal, deserve strict enforcement. At the same time, the certainty and fairness offered by deadlines can be outweighed in appropriate circumstances, where the interests of justice require vindication of the plaintiff's rights. With these principles in mind, I turn to the facts of this case.

B. Encompass' Basis for Tolling

Encompass contends that it was forced to file the appraisal in the Bankruptcy Court because that court had exclusive jurisdiction over it.[28] Prosero essentially makes

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25 *Id.* at *6.

26 *Steinhart v. Southwest Realty & Dev. Co.*, 1978 WL 2494, at *3 (Del. Ch. May 31, 1978).

27 *Id.*

28 The Bankruptcy Court's abstention does not necessarily mean that it concluded that it did not have exclusive jurisdiction. Abstention may be proper even where

two arguments against tolling of the filing timelines. First, it argues that the Bankruptcy Court lacked subject matter jurisdiction because Encompass' appraisal claim is not "related" to the bankruptcy case. Prosero further contends that the Bankruptcy Court's prior confirmation of the Plan greatly diminishes the likelihood of the court having "related to" jurisdiction over ensuing actions. Second, it argues that the Court of Chancery has exclusive jurisdiction over appraisal cases filed under § 262. The gravamen of both arguments is that if Encompass wrongly filed the appraisal in the Bankruptcy Court, equity would not support tolling the filing deadlines.

1. The Bankruptcy Court's Exclusive Jurisdiction

Because § 262 does not contain a tolling provision, this Court must determine whether to allow this case to proceed under its equity powers. One factor to consider in balancing the equities in this case is the likelihood that the Bankruptcy Court had exclusive jurisdiction, "related to" jurisdiction, or no jurisdiction over the appraisal claim. The question of whether the prosecution of appraisal rights that vest in a Chapter 11 debtor comes under the bankruptcy court's exclusive jurisdiction appears to be one of first impression.

Section 1334(e) of the Bankruptcy Code grants the bankruptcy courts exclusive jurisdiction over all property, wherever located, of the debtor as of commencement of the

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the court has exclusive jurisdiction. *See Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 483 (1940).

case.[29] "Property" of the estate is defined by 11 U.S.C. § 541(a)(1) as "all legal or equitable interests of the debtor in property as of the commencement of the case," and also includes "[p]roceeds, product, offspring, rents, or profits of or from property of the estate"[30] and "[a]ny interest in property that the estate acquires after the commencement of the case."[31] For example, it has been held that proceedings to value a bankruptcy estate's real property necessarily involve assertion of *in rem* jurisdiction over that property and, therefore, may only be undertaken by the bankruptcy court.[32]

Under § 541 the Bankruptcy Court may well have had exclusive jurisdiction over Encompass' appraisal claim. Encompass views appraisal of its shares as a typical proceeding to value estate property. It argues that under § 541(a)(1) not only its shares, but also the right to seek appraisal of those shares, were property of the estate.[33] I find it unnecessary to determine the precise characterization of the appraisal rights because even if they were viewed as property separate from the shares, they still would come under § 541(a)(6) as either "proceeds" or "product" of estate property. Thus, Encompass

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29 28 U.S.C. § 1334(e). Although the statute specifically refers to the "district courts" and not the bankruptcy courts, § 1334's language has been read to refer to bankruptcy courts as a unit of the district courts. *See In re Wood*, 52 B.R. 513, 517 (Bankr. N.D. Ala. 1985).

30 11 U.S.C. § 541(a)(6).

31 11 U.S.C. § 541(a)(7).

32 *In re Collett*, 297 B.R. 321, 325 (S.D. Ga. 2003) (holding an appraisal of the fair market value of real property "is tantamount to exercising classic *in rem* jurisdiction over real property in the bankruptcy estate"). *See also In re Simon*, 153 F.3d 991, 996 (9th Cir. 1998).

33 Encompass' Ans. Br. at 6.

appears to have had a good faith basis for its stated belief that its appraisal rights fell within the exclusive jurisdiction of the Bankruptcy Court.

2. The Bankruptcy Court's "Related To" Jurisdiction

Even if the Bankruptcy Court did not have exclusive jurisdiction, it still may have had subject matter jurisdiction over the appraisal claim under its "related to" jurisdiction. Title 28 U.S.C. § 157(c) provides that "[a] bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11."[34] A civil proceeding is "related to" a bankruptcy case when the outcome of that proceeding could conceivably have an effect on the estate being administered.[35] The Supreme Court has held the grant of "related to" jurisdiction under § 1334(b) and § 157 to be "a grant of some breadth" and "comprehensive," but not "limitless."[36] Further, the Court has held that the jurisdiction of bankruptcy courts may extend more broadly under a Chapter 11 reorganization than a Chapter 7 liquidation.[37]

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34 *See also* 28 U.S.C. § 1334(b).

35 *Pacor v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984), overruled on other grounds by *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 134–35 (1995).

36 *Celetox Corp. v. Edwards*, 514 U.S. 300, 307–08 (1995). *See also Quality Tooling, Inc. v. U.S.*, 47 F.3d 1569, 1573 (11th Cir. 1995) ("when Congress passed the Bankruptcy Act, it anticipated that there would be claims involving a bankrupt's estate that, by statute, were assigned exclusively to some court other than a district court. Congress, wishing to give the district court sitting in bankruptcy plenary authority over the bankrupt's estate and all claims by or against it, expressly provided that the district court would have concurrent jurisdiction over all claims").

37 *Celetox Corp. v. Edwards*, 514 U.S. at 310.

As an initial matter, Prosero's argument that the Bankruptcy Court did not have jurisdiction is contradicted by the Bankruptcy Court's own ruling that it *did* have jurisdiction.[38] Consistent with the Bankruptcy Court's finding of "related to" jurisdiction, I consider the appraisal to be logically related to the bankruptcy case, because any costs associated with prosecuting Encompass' appraisal rights, and resulting benefits, are likely directly to affect the bankruptcy estate and Encompass' creditors.

3. The Court of Chancery's Exclusive Jurisdiction

Prosero criticizes Encompass' filing in the Bankruptcy Court, arguing that § 262 grants exclusive jurisdiction to the Court of Chancery. Yet, it has not cited any case to support this conclusion. Instead, Prosero relies solely on the language of the statute, which states that stockholders entitled to appraisal "may file a petition in the Court of Chancery."[39] I am not persuaded that the language of § 262 is necessarily meant to preclude presentation of an appraisal claim to any other court or tribunal.

First, the United States Supreme Court has held that Congress used its plenary power to regulate bankruptcy and has the power to "limit that jurisdiction which courts, State or Federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law."[40] Therefore, even if § 262 was intended to grant exclusive

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38 Bankruptcy Tr. at 3.

39 8 *Del. C.* § 262(e).

40 *Kalb v. Feuerstein*, 308 U.S. 433, 439 (1940). This Court also has recognized that federal law can preempt § 262. In *Bruno v. Western Pacific R.R. Co.*, stockholders dissented from a merger between two railroads that had been approved by the Interstate Commerce Commission as "just and reasonable." 498 A.2d 171, 171

jurisdiction to this Court within the Delaware judicial system, it is doubtful that it could prevent a federal court acting under the bankruptcy law from exercising jurisdiction over an appraisal claim.

Second, there is no reason to assume that other courts are not capable of adjudicating a § 262 appraisal. Courts regularly apply other jurisdictions' law. This is especially true for bankruptcy courts handling adversarial proceedings. Bankruptcy courts, for example, have often appraised stock holdings of insolvent debtors.[41]

C. The Court's Determination

Against this backdrop, the Court is presented with a unique factual circumstance. Encompass properly executed its demand for appraisal within 20 days of receiving notice of the merger. It then filed an adversary action for appraisal in the Bankruptcy Court well within the 120-day period mandated by § 262(e) and attempted to prosecute its claim up until the Court granted Prosero's motion for abstention.[42] Finally, only nine days later, Encompass filed the current action in this Court. Thus, the present situation is

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(Del. Ch. 1985), *aff'd*, 508 A.2d 72 (Del. 1986). Noting that the Interstate Commerce Act is "plenary" and "exclusive," the Court held that the Act preempted the stockholders' appraisal action. *Id.* at 172–74.

[41] *See, e.g.*, *In re Harper*, 157 B.R. 858 (E.D. Ark. 1993) (appraising stock in a closely held corporation); *In re Edwards*, 228 B.R. 552 (E.D. Pa. 1998) (approving expert's appraisal of debtor's equity interests*); In re Frezzo*, 217 B.R. 985 (E.D. Pa. 1998) (accepting appraiser's valuation of debtor's interest in closely held corporation); *cf. In re Tennessee Chem. Co.*, 143 B.R. 468 (E.D. Tenn. 1992) (court conducting its own appraisal of a chemical plant).

[42] Prosero did not file its motion for dismissal or abstention in the bankruptcy action until a few days after the 120-day period for filing an appraisal action in Delaware expired.

unlike cases where this Court has denied claims by strictly applying the statutory time constraints, because Encompass diligently followed § 262's timeline. On the other hand, it is also different from those cases, such as *Engel* or *Steinhart*, in which, based on unpredictable and uncontrollable events that precluded timely filing, the court invoked principles of equity to allow the claims.[43]

Generally speaking, I find Encompass to have acted reasonably. It abided by the statutory framework's "orderly procedure." Encompass' prompt demand for appraisal put Prosero on notice, thereby guaranteeing Prosero the certainty and expedience that are the primary goals of strict interpretation.[44] Encompass then filed its action for appraisal in a timely manner, again putting Prosero on notice of the ongoing appraisal case. Finally, Encompass did not waste time after the Bankruptcy Court's abstention, filing this action only nine days later. Thus, Encompass has effected the "orderly procedure" of § 262 without causing unnecessary delay.

I also find Encompass' decision to file in the Bankruptcy Court to be reasonable. There was, at the very least, an arguable basis for invoking the Bankruptcy Court's jurisdiction. The Bankruptcy Court's own determination that the appraisal was a related proceeding under § 157(c)(1) is strong evidence of jurisdiction. Moreover, it appears quite possible that the Bankruptcy Court had exclusive jurisdiction under § 1334(e). Lastly, I find Prosero's conclusory assertion that this Court necessarily has exclusive

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43 *See Engel*, 1976 WL 1705, at *5–6; *Steinhart*, 1978 WL 2494, at *3.

44 *Enstar Corp.*, 535 A.2d at 1356.

jurisdiction over appraisal cases under § 262 less than convincing, because it is not at all clear that is the case. Therefore, Encompass' belief that the Bankruptcy Court was the proper venue for its appraisal case was reasonable under the circumstances.

Moreover, the balance of the equities in this case clearly favors Encompass. Equity abhors a forfeiture and granting this motion to dismiss would cause forfeiture of Encompass' appraisal rights. Prosero has proffered no evidence of bad faith on the part of Encompass and Encompass has not slept on its rights or caused unnecessary delay. Conversely, allowing the appraisal to go forward will not place any unjust or unanticipated burden on Prosero. Although lack of prejudice alone is not sufficient to merit waiver or tolling, prejudice is a factor the Court may consider when balancing the equities in this case. The absence of evidence that Prosero has suffered any prejudice weighs in favor of equitably tolling the time period.

The Court recognizes the importance of strict adherence to the formal requirements of § 262. With that in mind, I do not lightly invoke the concept of equitable tolling to enable Encompass to pursue its appraisal rights. In particular, there is some appeal to Prosero's argument that Encompass could have avoided its current dilemma by the simple expedient of filing actions in both this Court and the Bankruptcy Court within the 120-day timeframe. That appeal is outweighed, however, by the Court's reluctance to hold that a lawyer's decision regarding a nebulous legal issue must work a forfeiture of her client's important rights. In addition, the simultaneous, protective filing of actions in each of the two jurisdictions undoubtedly would have resulted in procedural

maneuverings by both sides, wasteful of the time and resources of the courts, as well as the parties.

In summary, considering the totality of the circumstances before me, I conclude that the 120-day period for filing an appraisal action after the effective date of the merger was tolled by Encompass' filing of its claim for appraisal in the Bankruptcy Court. Because Encompass timely refiled its action in this Court after the Bankruptcy Court abstained, Prosero's motion to dismiss is not well-founded.

III. CONCLUSION

It is my opinion that because Encompass abided by all the technical requirements of § 262 and appears likely to have timely filed its action in a court of competent jurisdiction, equity supports tolling of the § 262 deadline. Encompass did not sleep on its rights. Furthermore, Prosero had actual and timely notice of the action at all times and was not prejudiced by the delay.

For the foregoing reasons, Respondent's motion to dismiss is denied. IT IS SO ORDERED.