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January 18, 2013

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Re: *The Renco Group, Inc. v. MacAndrews AMG Holdings LLC*
C.A. No. 7668-VCN
Date Submitted: January 15, 2013

Dear Counsel:

Plaintiff, The Renco Group, Inc. ("Renco"), seeks an order for expedited discovery and the scheduling of a hearing on its motion for a preliminary injunction, based on claims related to certain allegations in its Amended Verified Complaint (the "Complaint").[1] Defendant MacAndrews AMG Holdings, LLC ("MacAndrews AMG"), the managing member of AM General Holdings LLC

[1] *See* Renco's Am. Verified Compl. ¶¶ 54-62.

("Holdco"), opposes Renco's request for expedited proceedings.[2] Renco's request directly followed this Court's December 21, 2012 decision granting Holdco a preliminary injunction (the "Holdco Opinion")[3] and Holdco's tax distribution to MacAndrews AMG on December 28, 2012. An interested reader may obtain additional background information concerning the parties' ongoing disputes in the Holdco Opinion. Having considered the arguments made by counsel at a teleconference and in their numerous letters filed with the Court,[4] the Court will grant Renco's request for expedited proceedings.[5]

Renco asserts that MacAndrews AMG has violated and continues to violate the limited liability company agreement of Holdco (the "Holdco Agreement"),

[2] The Complaint alleges facts' concerning Renco's right to future distributions under the limited liability company agreement of Holdco and MacAndrews AMG's alleged proclivity for violating that agreement and inappropriately extracting funds from Holdco.
[3] *AM Gen. Hldgs. LLC v. The Renco Gp., Inc.*, 2012 WL 6681994 (Del. Ch. Dec. 21, 2012).
[4] As Renco's counsel alludes to in its most recent letter to the Court, the parties' extensive letter writing campaign to the Court is perhaps not the most efficient means to consider whether Renco's motion for a preliminary injunction should be heard by the Court.
[5] Renco's preliminary injunction application seeks an order: (1) requiring MacAndrews AMG to return all distributions or loans to it from Holdco since October 12, 2012, and (2) enjoining Holdco and MacAndrews AMG from making any future distributions or loans to MacAndrews AMG pending the determination of the parties' Revalued Capital Accounts pursuant to the express procedures for making those determinations under the Holdco Agreement.

resulting in irreparable harm to Renco.[6] Most recently, Renco alleges that MacAndrews AMG caused Holdco, on December 28, 2012, to make an improper quarterly tax distribution solely to MacAndrews AMG.[7] With respect to this distribution, Renco raises primarily two issues: first, whether MacAndrews AMG complied with its express obligations under the Holdco Agreement to "reasonably determine" the value of the Members' Revalued Capital Accounts in advance of the tax distribution; and second, whether the Holdco Agreement prohibits the distribution of funds once Renco has invoked the appraisal procedures in Sections 4.4 and 15.12 of that agreement.[8]

The burden on a plaintiff in seeking an expedited proceeding is not high.[9] "A party's request to schedule an application for a preliminary injunction, and to expedite the discovery related thereto, is normally routinely granted. Exceptions to

[6] Letter from Kevin G. Abrams, Esquire, to the Court, December 31, 2012 ("Renco's Dec. 31 Letter"), at 1.
[7] *Id*. at 1-2.
[8] *Id*. During the teleconference held on January 8, 2013, the parties narrowed the issues presented in their respective letters to these two issues. *See* Oral Arg. Tr. 5-6, 22-24, Jan. 8, 2013.
[9] *In re Ness Technologies, Inc.*, 2011 WL 3444573, at *2 (Del. Ch. Aug. 3, 2011).

that norm are rare."[10] A plaintiff need only articulate a "sufficiently colorable claim and show[] a sufficient possibility of a threatened irreparable injury, as would justify imposing on the defendants and the public the extra (and sometimes substantial) costs of an expedited preliminary injunction proceeding."[11]

Renco argues that it has stated two colorable claims against MacAndrews AMG. First, Section 9.4(c) of the Holdco Agreement prohibits Holdco from making distributions to MacAndrews AMG if the value of its Revalued Capital Account in Holdco is equal to or less than 20% of the aggregate value of the Members' Revalued Capital Accounts in Holdco.[12] Section 4.4 requires that MacAndrews AMG, as the managing member, "reasonably determine[]" the value of the Revalued Capital Accounts.[13] Renco alleges that MacAndrews AMG failed—before authorizing the tax distribution—to make any determination, let

[10] *In re Int'l Jensen Inc. S'holders Litig.*, 1996 WL 422345, at *1 (Del. Ch. July 13, 1996); *Giammargo v. Snapple Beverage Corp*., 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994) ("This court traditionally has acted with a certain solicitude for plaintiffs in this procedural setting and thus has followed the practice of erring on the side of more hearings rather than fewer.").
[11] *In re Ness Technologies, Inc.*, 2011 WL 3444573, at *2 (quoting *Police & Fire Ret. Sys. of City of Detroit v. Bernal*, 2009 WL 1873144, at *1 (Del. Ch. June 26, 2009)).
[12] Letter from Kevin G. Abrams, Esquire, to the Court, January 8, 2013 ("Renco's Jan. 8 Letter"), at 2. Aff. of Edward A. Taibi in Supp. of Pl.'s [AM General Holdings LLC] Mem. of Law in Supp. of Mot. for a Prelim. Inj. (filed in Civil Action No. 7639-VCN) Ex. A (the Holdco Agreement) ("Ex. A") § 9.4(c).
[13] Ex. A § 4.4.

alone a reasonable one, of the value of the Revalued Capital Accounts.[14] MacAndrews AMG does not dispute its obligation to make a reasonable determination. It only asserts that it has done so.

Second, Renco contends that its invocation of the appraisal process (an alternative dispute resolution mechanism) in Section 4.4 prohibits Holdco from making future distributions until the appraisal is completed pursuant to Section 15.12.[15] Renco invoked the appraisal process on December 27, 2012, one day before MacAndrews AMG caused Holdco to make the tax distribution to itself. As a result, Renco argues that MacAndrews AMG violated the Holdco Agreement when it caused Holdco to make that distribution on December 28, 2012. Renco asserts that the appraisal process, once invoked and completed pursuant to Section 15.12, "supersedes" MacAndrews AMG's determination of the Revalued Capital Accounts.[16] Thus, when Renco invoked the appraisal process, MacAndrews AMG no longer had the contractual right to direct Holdco to make a distribution pursuant to its "reasonable" determination. Instead, Renco argues that

[14] Renco's Jan. 8 Letter, at 2-3; Renco's Dec. 31 Letter, at 4; Ex. A § 15.12.
[15] Renco's Jan. 8 Letter, at 4.
[16] Letter from Kevin G. Abrams, Esquire, to the Court, January 10, 2013 ("Renco's Jan. 10 Letter"), at 2.

no distributions may be made until an appraisal is obtained. To buttress that argument, Renco cites Section 8.3(b) and reminds the Court that it must read the Holdco Agreement as a whole and give effect to each provision "so as not to render any part of the contract mere surplusage."[17] That section provides that if MacAndrews AMG's Revalued Capital Account is less than 20% (as Renco asserts) and Renco so elects (as it purportedly has done), Holdco "shall distribute any Cash Available for Distribution to Renco" and those distributions "shall be made prior to any distributions or Company Loans pursuant to Article IX."[18]

In response, MacAndrews AMG points out that there are no provisions in the Holdco Agreement (including Section 9.4(c) and Section 4.4) that expressly provide that distributions under the Holdco Agreement are prohibited while an appraisal is obtained. MacAndrews AMG further argues that Section 9.4(c) was intended to protect MacAndrews AMG, not Renco, from the adverse financial consequences that would result if AM General, the operating company owned by

[17] *Kuhn Constr., Inc. v. Diamond State Port Corp.*, 990 A.2d 393, 397 (Del. 2010).
[18] Renco's Jan. 10 Letter, at 2-3; Ex. A § 8.3(b).

Holdco, was exposed to the pension liabilities of Renco's businesses.[19] As evidence, it references Section 9.4(c), which states that Holdco "shall not make such distribution to [MacAndrews AMG] unless [MacAndrews AMG] notifies [Holdco] of its determination that [Holdco] may make such distribution."[20] As for Section 8.3(b), MacAndrews AMG argues that this provision only comes into play if Renco's Revalued Capital Account is 80% or more, which has not happened.[21] Thus, the Holdco Agreement, when read as a whole, MacAndrews AMG argues, does not provide for any circumstances under which the appraisal process would temporarily stop the distribution of funds.

The burden to establish a colorable claim is not high. In light of this low pleading threshold and its Complaint, Renco has pleaded a colorable claim as to whether MacAndrews AMG "reasonably determined" the parties' Revalued Capital Accounts. Although MacAndrews AMG has assured the Court that it has done so, no other facts have been provided to Renco or the Court showing that a determination was made. This determination is an important step preceding the

[19] Letter from Stephen P. Lamb, Esquire, to the Court, January 7, 2013 (the "MacAndrews AMG Letter"), at 4-6.
[20] *Id.*; Ex. A § 9.4(c).
[21] MacAndrews AMG Letter, at 4-6.

distribution of funds under the Holdco Agreement. The failure to comply with this step could lead to the improper transfer of funds to MacAndrews AMG and could, under certain circumstances, threaten Renco with irreparable harm.

Whether Renco's second claim is colorable is less certain. Although perhaps a more thorough exposition of the Holdco Agreement might shed more light on the matter, the Court has significant doubts that the appraisal process, once invoked, prohibits any future distributions. Whether such an implied term exists is especially doubtful where Section 9.4(c) seems to condition the distribution of funds exclusively with MacAndrews AMG. As the Court reads it, Section 9.4(c) is consistent with Section 8.3(b) and can be read together without rendering any term superfluous. Nonetheless, Renco's second claim is sufficiently colorable given that, absent such an implied term, MacAndrews AMG would, theoretically, be able to plunder Holdco without constraint until the appraisal was completed. That possibility raises at least a colorable question as to whether the parties purposefully decided not to protect against such an outcome.

As noted previously, Renco must also show a sufficient possibility of threatened irreparable harm. Renco has made that minimal showing. For starters,

the Holdco Agreement contains the exact same provision that the Court construed in the Holdco Opinion as "reasonably contemplate[ing] . . . a waiver of the irreparable harm requirement" for purposes of a preliminary injunction.[22] Moreover, to the extent that there is an implied term that prohibits the distribution of funds once the appraisal process is invoked, the deprivation of that right raises a possibility of irreparable harm. Thus, Renco has shown a sufficient possibility of threatened irreparable harm.

In conclusion, Renco has satisfied the minimal burden necessary for an order directing limited expedited discovery and a hearing on its motion for a preliminary injunction. Renco's discovery requests 1-4 and 6 are sufficiently related to the issues pertinent to its motion. Those requests might also be helpful in determining whether Renco has a reasonable probability of success on the merits of its claims.[23] However, the Court will deny Renco's discovery request 5, which seeks the production of documents and communications relating to the bond required by the

[22] *AM Gen. Hldgs. LLC*, 2012 WL 6681994, at *5.
[23] Indeed, the discovery aimed at learning about MacAndrews AMG's "determination" of the Revalued Capital Accounts should go a long way toward determining whether that claim has any merit. What constitutes a "reasonable determination" is likely not that difficult of a standard to meet.

Court's Holdco Opinion. That request is not relevant to (or likely to lead to admissible evidence regarding) the two claims at issue.

Accordingly, an order expediting this matter will be entered.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Andre G. Bouchard, Esquire
Thad J. Bracegirdle, Esquire
Register in Chancery-K