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Re: *Ginsburg v. Philadelphia Stock Exch., Inc., et al.*
Civil Action No. 2202-CC

Dear Counsel:

Before me is defendants' Motion for Partial Summary Judgment, which asks for a determination that rescission of the challenged transactions and rescissory damages may not be granted to the plaintiff class as a matter of law. The Exchange defendants have joined the Strategic Investor defendants in the motion. Asserting that plaintiff engaged in unreasonable delay in commencing this action,

defendants wish this Court to ensure that whatever harm may have been done to plaintiff, the transaction will not be set aside entirely. For the reasons explained below, such a decision would be premature.

I. STATEMENT OF FACTS

Plaintiff challenges a series of transactions by which defendants diluted the ownership interests of the plaintiff class in favor of the six Strategic Investor defendants, who as a result now own almost 90% of the exchange. On June 15, PHLX's board approved the sale to Citadel and Merrill Lynch, in exchange for $7.5 million, of 10% equity stakes, along with the issuance of warrants that would increase their ownership interest to 19.9% upon fulfillment of certain performance criteria based on the number of contracts brought to the PHLX over a proscribed period. These transactions were announced on June 16. Four further transactions, of similar nature, although varying slightly in size,[1] were announced by the board of directors on August 16, 2005. On the same day, PHLX also sent letters to all shareholders explaining the transactions. These announcements, however, failed to provide any specific details regarding the performance criteria that would need to be met by the purchasers in order to exercise their warrants. Nor did a share repurchase agreement, sent by PHLX to shareholders in late September 22, 2005, provide much more detail regarding the performance criteria.

After receiving the share repurchase agreement, plaintiff retained counsel and filed a books and records request under 8 *Del. C.* § 220 in November 2005. Plaintiff received no documents until January 18, 2006, and defendants did not complete their document production until February. Indeed, plaintiff asserts that negotiations as to the scope of document production extended to the end of March 2006.[2] After further independent investigation, plaintiff filed this complaint on June 6, 2006, moving to expedite proceedings three days later.

This Court denied the motion to expedite, noting that plaintiff had taken considerable time in bringing the complaint, and that plaintiff was unlikely to

[1] Morgan Stanley invested the same $7.5 million for substantially the same consideration as Citadel and Merrill Lynch. CSFB, Citigroup, and UBS each invested $3.75 million for a 5% equity stake and warrants that would increase their interests to 9.9% upon fulfillment of similar performance criteria. Notably, neither Citadel nor Merrill Lynch would be diluted by the later transactions.

[2] Answering Br. in Opp'n to Defs.' Mot for Partial Summ. J. at 8 ("By the end of March, 2006, it was clear that plaintiff had reached an impasse with defendants as to the additional documents plaintiff believed should be produced.").

suffer irreparable harm were the case to proceed at a normal pace. The Court agreed with defendants that the availability of rescission cut strongly against the necessity to expedite the case, as plaintiff could be made whole by voiding the challenged transactions.

II. CONTENTIONS

Defendants' argument rests on three uncontroverted assertions and one disputed point. Pointing to plaintiff's deposition testimony, defendants assert that (a) plaintiff was aware of his potential injuries by June 16, 2005, or at the latest August 16, when PHLX announced the last four transactions; (b) by such a date, plaintiff also knew that the Strategic Investor defendants would be eligible to purchase further shares if and when they met specified performance criteria; and (c) plaintiff waited until the Strategic Investor defendants were a handful of weeks away from fulfilling those criteria before filing this complaint. Defendants also suggest, however, that the delay is made meaningful because during this time period "the Strategic Investors were diligently working to satisfy the order flow requirements fundamental to their investment and PHLX's growth plans." Needless to say, plaintiff disputes the fact that Strategic Investors were "diligently working" on any such thing. According to defendants, plaintiff's timing suggests a desire to derail the deal through litigation only after PHLX had already received much of the benefit in increased order flow.

Plaintiff responds that any delay that has occurred in this litigation springs from defendants' recalcitrance in responding to plaintiff's books and records demand. Further, defendants relied upon the availability of rescission when they argued against expediting this case in June 2006, and plaintiff asks the Court to invoke the principles of judicial estoppel to prevent defendants from raising the matter now. Finally, plaintiff insists that defendants have suffered no prejudice from any delay.

III. ANALYSIS

The standard the Court uses on consideration of summary judgment is well settled. A motion for summary judgment may only be granted where "the pleadings, depositions, answer to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[3] In

[3] Ct. Ch. R. 56(c).

responding to a motion for summary judgment, all evidence is to be viewed in the light most favorable to the non-moving party,[4] but the non-moving party may not rest upon its pleadings. Instead, where the moving party has placed in the record facts that would, if undisputed, entitle it to summary judgment, the burden shifts to the non-moving party to show, by affidavit or otherwise, that some material fact remains disputed.[5] "If a rational trier of fact could find any material fact that would favor the non-moving party in a determinative way . . . summary judgment is inappropriate."[6]

A plaintiff who delays excessively and unnecessarily waives the right to seek rescission.[7] A plaintiff may not "sit back and 'test the waters,' waiting to assert a claim for rescission" until the most economically advantageous moment.[8] A court may find rescission inappropriate due to excessive delay even when a defendant shows no prejudice from the delay.[9]

Nevertheless, rescission is an equitable remedy, and delay is an equitable defense to rescission. A party who asserts that a claim for rescission has been tardily filed cannot at the same time bear considerable responsibility for the delay.[10] To find otherwise serves no interest of justice, and merely provides defendants with an incentive to run down the clock.

It is hard to view defendants as men burdened by a particular urgency, especially if one views the facts, as I must, in the light most favorable to plaintiff. By August 16, 2005, plaintiff was aware of the bare bones of his injuries, enough to allow the statute of limitations to begin to run. It is difficult to conclude, however, that the press releases were sufficiently detailed that, as a matter of law, it was unreasonable for plaintiff to wait and see what would develop before initiating his lawsuit. The letter PHLX sent to shareholders on August 16, 2006 specifically mentioned a forthcoming buyback offer of $900 per share, subject to

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[4] *Acro Extrusion Corp. v. Cunningham*, 801 A.2d 345, 347 (Del. 2002).
[5] *State of Wis. Inv. Bd. v. Peerless Sys. Corp.*, 2000 WL 1805376, at *6 (Del. Ch. Dec. 4, 2000).
[6] *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (Del. 2002).
[7] *Ryan v. Tad's Enters., Inc.*, 709 A.2d 682, 699 (Del. Ch. 1996).
[8] *Gaffin v. Teledyne, Inc.*, 1990 WL 195914, at *17 (Del. Ch. Dec. 4, 1990), *aff'd in part*, 611 A.2d 467 (Del 1992).
[9] *Id*. at *18.
[10] *See In re Fuqua Indus., Inc. S'holders Litig.*, 2005 WL 1128744, at *7 (Del. Ch. May 6, 2005) ("[A]ll parties are responsible for the amount of time this case has consumed. It would be unfair to force plaintiffs to shoulder that blame alone.")

"certain terms, conditions, and procedures."[11] If nothing else, plaintiff was entitled to wait to see what preconditions would be placed upon the buyback (and if, faced with criticism, defendants might sweeten the bargain in the interim) before rushing to the courthouse to begin a § 220 action.

Plaintiff's November 28, 2005 demand letter followed only two months after defendants provided information regarding the share repurchase on September 22, 2005. Although not a model of haste, this hardly constitutes an unreasonable delay, particularly in comparison with defendants. They did not complete their response to the § 220 request until February 2006, at the earliest. Plaintiff asserts that negotiations extended until the end of March. Thus, defendants ask this Court to find that a delay of a little over two months in filing a complaint justifies the exclusion of rescissory damages.

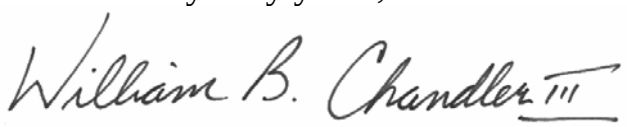
Defendants rely heavily upon this Court's conclusion, in considering a motion to expedite this case, that "by February of '06, the plaintiff was armed with information that should have brought him to the courthouse more promptly than June of '06."[12] Yet defendant ignores the context of the statement. A litigant seeking a motion to expedite asks this Court to accelerate its normal processes and, by extension, to postpone the consideration of other cases. It is only equitable to expect, on such a motion, the utmost reasonable celerity on the part of the moving party. But a complaint may include claims for rescissory damages even if it is filed too late to justify a move to the fast track.

Plaintiff has proceeded carefully and cautiously in complex litigation, meeting at every step equally cautious opponents who have felt little need to hurry the process along. Although I reserve the right to conclude, after trial, that plaintiff's delay was unreasonable and, thus, to deny rescission or rescissory damages at that time, the record at present does not suggest, as a matter of law, that plaintiff moved so slowly as to exclude the possibility of rescission as a remedy. Defendants' motion is denied.

[11] Opening Br. in Supp. of Defs.' Mot. for Partial Summ. J. Ex. D.
[12] Argument and Court's Ruling on Motion to Expedite at 33-34 (June 14, 2006).

IT IS SO ORDERED.

Very truly yours,



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