IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STEVEN M. MIZEL	)	CIVIL ACTION NUMBER
	)	
Plaintiff	)	06C-02-145-JOH
	)	
v.	)	
	)	
XENONICS, INC.	)	
	)	
Defendant	)	

Submitted: December 19, 2007
Decided: January 11, 2008

MEMORANDUM OPINION

Upon Motion of the Defendant to Exclude the Testimony of Plaintiff's Expert - ***DENIED***

Norman M. Monhait, Esquire, of Rosenthal Monhait & Goddess, Wilmington, Delaware, attorney for plaintiff

William O. Lamotte, III, Esquire, of Morris Nichols Arsht & Tunnell, attorney for defendant

HERLIHY, Judge

This is a breach of contract case. A portion of the case turns on whether a conversation took place between plaintiff Steven Mizel and a principal of defendant Xenonics. The alleged conversation involved a desire by Mizel to exercise the power he had from warrants to purchase stock at a specified lower price. Mizel claims the principal said he could not. Xenonics denies the conversation took place at all.

Mizel contends that if he had exercised or had been permitted to exercise his stock purchase rights at the price he sought, a significant financial restructuring/recapitilation involving Xenonics may have been jeopardized. He asserts that by such an exercise, other new investors and/or potential investors would have to have been informed of his low purchase price and that information might cause those investors to back out. They had or were being offered the opportunity to purchase the stock at a price more than double what Mizel claims was his price.

This contention is supported, according to Mizel, by a security expert's opinion that if Mizel had purchased the stock at the lower price, such information would be material, under securities law, and would have to be passed along to the other persons, new investors, being approached to purchase stock.

Xenonics moves to exclude this expert's testimony. It argues that "materiality" is a central issue in the case which only the jury can decide. As such, it further contends the expert's testimony would invade the province of the jury. Xenonics does not challenge the competence of the expert to offer the opinion which it is challenging.

The Court finds the expert's proffered testimony does not go to an ultimate issue, which would thereby invade the role of the jury, What the expert's testimony does go directly to is an issue key in virtually every case: credibility. And that issue relates to Xenonics' denial the conversation even occurred. Xenonics' motion is **DENIED**.

Discussion

A more complete factual recitation for this case exists in this Court's earlier decision denying Xenonics' motion for summary judgment,[1] a portion of which is:

> As of 2003, Xenonics was a start-up company which had developed an advanced system, patented, for night vision binoculars that had good potential for the military and for commercial market. But in early 2003 Xenonics was struggling financially especially to get its product into the manufacturing phase.
>
> At that time, many of Xenonics shareholders and warrant holders were individuals who were acquaintances. One was Alan Magerman, who was Xenonics' CEO, and another was Mizel. Mizel held several Xenonics Warrant Certificates (Footnote omitted). These Warrants were in exchange for loans Mizel made to the corporation. As originally provided, he could purchase up to 135,000 shares at $1.00 each. Later the Xenonics board of director's reduced that per share cost to $0.27 1/2 cents. This was done at a time prior to the activities which prompted this lawsuit.
>
> Those activities began with contacts between Magerman and Lyn Dixon. Dixon owned a substantial portion of shares in a publicly traded corporation known as Digital Home Theater Systems (DHTS). An initial letter of intent between the parties was executed in March 2003 and several other versions were signed shortly thereafter. Xenonics described the proposal, in this way: "The concept was to effect a transaction between new investors, shareholders of DHTS and shareholders of Xenonics whereby Xenonics

[1] *Mizel v. Xenonics, Inc.*, 2007 WL 4662113 (Del. Super.).

would remain exactly the same but be the subsidiary of a public holding company, DHTS . . . ."(Footnote omitted).

Xenonics shareholders were to "voluntarily" exchange their shares on a one-to-one basis for DHTS shares. DHTS was, as part of this arrangement to change its name to Xenonics Holdings, Inc. (Holdings). Any new investors in Holdings would pay $0.87 1/2 cents per share. Dixon would make a capital contribution by giving up many of his shares. Xenonics became a subsidiary of Holdings and former Xenonics shareholders would become the majority shareholders in Holdings.

But as part of this proposed transaction, Magerman was told Xenonics had to reduce its outstanding debt to a specified amount. That debt was more than $2.8 million and it had to be reduced to no more than $1,250,000. To accomplish this reduction, lenders would be offered the chance to convert their loans to Xenonics stock at $.75 per share. However, due to the transaction agreement that there would be a limit of 8,750,000.00 Xenonics' shares exchanged for Holdings shares, this methodology could not be used for all of the loans.

* * * * *

Magerman's assistant Jill Pucci, sent a letter to Mizel dated June 27, 2003. It states:

> You presently hold Warrant(s) for **135,000** shares of Xenonics, Inc. stock with a conversion price of $0.27 1/2 cents per share. These Warrants were originally issued to you on **December 2, 1998 for 50,000 shares; November 16, 2000 for 37,500 shares; December 16, 2000 for 37,500 shares and October 24, 2001 for 10,000 shares all** at a conversion price of $1.00 per share. The Company subsequently notified you on January 28, 2002 in a letter that the Company was reducing the warrant conversion price from $1.00 per share to $0.27 1/2 cents per share. At that time you exchanged your original **Warrants as listed above** for new **Warrants #021, #022, #023 and #001 for those same amount of shares** dated October 24, 2001 with a conversion price of $0.27 1/2 cents per share which you now hold.
>
> However, as part of the current Reverse Merger, the Company has

agreed that a new Warrant would be issued by the new company, **Xenonics Holding**, to all of its current Warrant Holders. These new Warrants to be issued will have an adjusted conversion of **$0.60 center per share**. This new Warrant will be a Five (5) Year Warrant with the starting date being the time of the Closing of the Reverse Merger.

I have enclosed a **Warrantholder Consent Form** for your signature authorizing the exchange of your Five Year **Warrants as listed above for a total of 135,000 shares** of the new public company, **Xenonics Holding at $0.60 cents per share.**

* * * * *

Mizel and Magerman apparently had frequently met, with others, for lunch on Tuesdays. After receipt of the June 27th letter, Mizel took it to the next meeting of that group. Magerman was the only one there at the moment Mizel arrived. In his deposition, Mizel states:

Mizel: I had the letter with me and I asked Mr. Magerman why the exercise price went up. Mr. Magerman responded that the transaction had been heavily negotiated. These were the terms. I informed him I wanted exercise my warrants that I held at that time to into Inc.

He told me I wouldn't be able to because the negotiations called for an increase in the price. That it would blow the deal because of the limitation of 8,750,000 shares. That would be more than allowed under the terms of the agreement. At that time other people appeared at lunch, and the subject was dropped.

Counsel: Did you - - before others arrived, did you respond to him?

Mizel: I told him I wanted to exercise my warrants. He told me I couldn't, and I wanted to exercise them before the transaction was completed.

Counsel: Okay. Is that what you told him?

Mizel: Yes. (Footnote omitted).

Magerman denies this conversation ever occurred.

> Mizel asserts that between the luncheon conversation and the deal's closing on July 23, 2003, others tried to convince him to exercise his warrant rights but at $0.60 cents per share. He never did prior to the consummation of the transaction.

Xenonics relies upon *Hill v. Equitable Banks*[2] for the proposition that an expert cannot testify as to materiality.[3] The Court in *Hill* said, "[i]n short, the expert, if allowed to testify, will simply impose his judgment of what a reasonable investor should do given certain information; such a determination is precisely what a jury should make."[4]

The issue in *Hill*, however, was whether Equitable's alleged misrepresentations and omissions were material. In *Hill*, the parties agreed with the definition of material as it relates to securities cases: a fact "is material if it 'is one that a reasonable man would attach importance to in determining his choice of action in the transaction in question . . . [A] material fact is one that a reasonable man would deem important in determining whether or not to purchase a corporation's stock' (Citation omitted)."[5]

The materiality opinion offered by Mizel's expert is: (1) his purchase of stock at 27.5 cents per share is a material piece of information and (2) the other buyers at 60 cents

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[2] 1987 WL 8953 (D. Del. 1987).

[3] Xenonics is reminded this Court's motion practice does not permit an answering memo, without Court permission or one exceeding four pages, without Court permission.

[4] *Id.* at *1.

[5] *Id.*

per share would deem such information important in deciding whether to purchase stock in the corporation. If materiality were the core issue here, Xenonics' reliance on *Hill* would be correct.

But *Hill* is inapposite. Materiality is not the core issue in this case. The jury does not have to decide either of the above two issues as such. What the jury, in this breach of contract case, has to decide is whether Mizel was prevented from exercising his purchase rights. And allegedly that inability or prohibition to do so came from Magerman's comments. That is a conversation which Xenonics vehemently denies.

The jury will have to decide if it took place and whether it took place as Mizel contends. As framed now, Mizel and Magerman were the only participants. There is no dispute about the conversation's important role in resolution of this dispute. In short, credibility is, as it usually is, in trials, an important issue in this case. The jury will have to make that decision.[6]

The expert's opinions here will be of potential value to the jury in weighing the credibility of Magerman, primarily, and possibly other witnesses. It would be error for the Court to exclude it because of that purpose. A limiting instruction defining its limited role would be appropriate.

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[6] *Tyre v. State*, 412 A.2d 326, 330 (Del. 1980).

Conclusion

For the reasons stated herein, defendant's motion to exclude Mizel's expert's testimony is **DENIED**.

IT IS SO ORDERED.

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J.