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Re: Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas S.A.
C.A. No. 6179-VCN
Date Submitted: June 29, 2011

Dear Counsel:

Plaintiff Sagarra Inversiones, S.L. ("Sagarra") previously moved for the entry of a status quo order to preclude Defendant Corporación Uniland S.A. ("Uniland S.A.") and its subsidiaries from making an installment payment before the scheduled date of July 10, 2011 to Defendant Cementos Portland Valderrivas, S.A. ("CPV") without prior court approval. Before the Court had rendered a decision on that request, the parties executed an agreement in which CPV and its affiliates agreed that no payments would be made under a stock purchase agreement that is at the heart of this matter before July 10th, without first having provided seven days' advance notice (the "Letter Agreement"). Because the Letter Agreement expires on July 10, 2011, Sagarra has renewed its request for the entry of a status quo order "prohibiting the payment of any installment payment [by the Defendants] pending a final ruling on the merits" of the Complaint.[1]

CPV holds a majority stake in Uniland S.A., an entity formed under the laws of Spain. In December 2010, CPV sold Giant Cement Holding, Inc. ("Giant")—a company in which it also holds a majority interest—to Uniland S.A. for approximately $279 million, subject to post-closing adjustments. After the transaction, Giant became a subsidiary of Uniland Acquisition Corporation ("Uniland Delaware"), a Delaware corporation formed to effectuate the business combination. Uniland Delaware is a wholly owned subsidiary of Uniland International B.V.—a Netherlands holding company—which itself is wholly owned by Uniland S.A. Under the stock purchase agreement governing the

[1] June 24, 2011 Letter of Arthur L. Dent, Esq. at 3 (emphasis in original).

acquisition of Giant (the "SPA"), the merger consideration is to be paid in four approximately equal installments; the next payment is scheduled to occur on July 10, 2011.

Sagarra—a minority shareholder of Uniland S.A.—alleges that the acquisition of Giant was forced through by CPV's self-dealing because of its position as the majority shareholder on both sides of the transaction and resulted in an excessive acquisition price, one inflated somewhere between $128 million and $213 million. For that reason, the Complaint requests that the Court (1) prohibit the payment of any additional funds under the SPA and (2) rescind the SPA. With its filing of the Complaint, Sagarra also moved for expedited proceedings and for the entry of a status quo order. The Letter Agreement obviated the need for the Court to rule on either of those motions. Thereafter, the Defendants filed a motion to dismiss or to stay. In that motion, the Defendants contend that (1) dismissal is appropriate under Court of Chancery Rules 12(b)(1)-(7); (2) this matter should be stayed in favor of earlier-filed legal proceedings pending in Spain, which include an action filed by Sagarra in the Spanish Commercial Court and an arbitration proceeding commenced by Sagarra's affiliate Freixa Inversiones, S.L. to void

Uniland S.A.'s board resolution approving the Giant transaction; and (3) Sagarra lacks standing under Court of Chancery Rule 23.1 and failed to comply with the derivative suit requirements under Delaware and Spanish law.

* * *

In renewing its request for interim injunctive relief to prevent the payment of any additional monies under the SPA, Sagarra relies on its earlier-filed brief. There, it argued for the entry of a status quo order to prohibit the transfer of any Uniland Delaware assets or funds related to the Giant acquisition before the earlier of July 10th or the rendering of a decision on the merits of the Complaint. Sagarra characterized that request as one intended: "(1) to prevent the [D]efendants from conducting themselves differently on the timing and amount of payments provided for in the disputed SPA; and, (2) to allow Plaintiff the opportunity to present its case before [D]efendants engage in conduct which would irreparably injure Plaintiff."[2]

In its renewed application, however, Sagarra has shifted its request by seeking interim injunctive relief prohibiting the transfer of any additional funds

[2] Pl.'s Mem. in Supp. of Mot. for Status Quo Order ("Pl.'s Br.") at 7.

under the SPA until the Court has issued a final ruling on the merits of the claims raised in the Complaint. Although styled as a motion for a status quo order, the Defendants argue that the relief requested by Sagarra at this juncture is a preliminary injunction that would prevent Uniland S.A. and its subsidiaries from making any additional payments under the SPA until after adjudication on the merits. For that reason, the Defendants contend that Sagarra must satisfy the familiar standard for a preliminary injunction.[3] Because, according to the Defendants, Sagarra has failed to meet the requirements for that extraordinary remedy, they implore the Court to deny Sagarra's current request.

* * *

The well-established standard for a preliminary injunction requires the moving party to demonstrate: (1) a reasonable probability of success on the merits; (2) that absent injunctive relief, immediate and irreparable harm will occur; and (3) that the harm the moving party will suffer if the requested relief is denied

[3] Although in its earlier filings Sagarra had argued that a less demanding standard applied to its request for a status quo order, the parties' counsel seemingly agreed during argument that the requirements for a preliminary injunction are applicable to Sagarra's renewed request based on the remedy now sought.

outweighs the harm the opposing party will suffer if the relief is granted.[4] Because interim injunctive relief is an extraordinary remedy, "[t]he burden on the moving party is rigorous,"[5] and requires that party to demonstrate all three elements to succeed.[6]

Assuming that Sagarra has demonstrated a reasonable probability of success on the merits of its claims and that a balancing of the equities tips in its favor, it must still show irreparable harm before a preliminary injunction will issue. In the absence of irreparable harm, "there is no need for the Court to grant interim relief and the parties can fairly wait until final decision on the merits."[7] Irreparable harm is that "for which there can be no adequate recompense at law, *i.e.*, an award of

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[4] *L & W Ins., Inc. v. Harrington*, 2007 WL 2753006, at *7 (Del. Ch. Mar. 12, 2007); *see also Cardone v. State Dep't of Corr.*, 2008 WL 2447440, at *7 (Del. Ch. June 4, 2008).
[5] *Cardone*, 2008 WL 2447440, at *7.
[6] *L & W Ins.*, 2007 WL 2753006, at *7.
[7] *Flight Options Int'l, Inc. v. Flight Options, LLC*, 2005 WL 5756537, at *10 (Del. Ch. July 11, 2005); *see also Cox v. Crawford-Emery*, 2007 WL 4327775, at *3 (Del. Ch. Nov. 30, 2007) (internal quotations and citations omitted) ("The reason for departing from the usual rule that a decision on the merits must occur only in a rigorous merits-based procedural setting is that necessity mandates such a departure. Necessity in this context refers to the prevention of irreparable harm. Without necessity, without the risk of irreparable harm, a preliminary adjudication would have the characteristics of an advisory opinion. Where there is no threat of imminent, irreparable harm, preliminary adjudication of the merits would prove an unnecessary academic exercise.").

compensatory damages will not suffice."[8] Thus, Sagarra must demonstrate a genuine, non-speculative threat of irreparable harm.

Citing to *Kansas City Southern v. Grupo TMM, S.A.*,[9] Sagarra contends that a "defendant's poor financial condition may constitute irreparable harm because if an injunction does not issue, the defendant may be unable to satisfy a money judgment."[10] In *Kansas City Southern*, the Court—in granting an injunction to prevent a party from taking any action contrary to the terms of an acquisition agreement pending the outcome of an arbitration proceeding as to the enforceability of that agreement—expressed concerns that one of the parties might be near insolvency and, as a result, unable to satisfy a future money judgment.[11] Even if Sagarra is correct in its characterization of the Court's reasoning in *Kansas City Southern*, it has failed to demonstrate a genuine concern that at this stage CPV

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[8] *Horizon Pers. Commc'ns, Inc. v. Sprint Corp.*, 2006 WL 2337592, at *24 (Del. Ch. Aug. 4, 2006) (internal quotations omitted); *see also Chartis Warranty Guard, Inc. v. Nat'l Elecs. Warranty, LLC*, 2011 WL 336385, at *10 (Del. Ch. Jan. 28, 2011) (observing that irreparable harm requires the moving party to "demonstrate harm for which he has no adequate remedy at law and that a refusal to issue an injunction would be a denial of justice").

[9] 2003 WL 22659332, at *5 (Del. Ch. Nov. 4, 2003).

[10] Pl.'s Br. at 11. *But see Gradient OC Master, Ltd. v. NBC Universal, Inc.*, 930 A.2d 104, 131 (Del. Ch. 2007) (observing that "[t]here is no irreparable harm if money damages are adequate to compensate" a plaintiff or "if the equitable remedy of rescission is available as a reasonably practicable way to return the parties to their" pre-transaction position).

[11] *Kansas City S.*, 2003 WL 22659332, at *5-*6.

is near insolvency. Although the record indicates that both CPV and Giant are financially distressed and that CPV has had difficulty in satisfying its financial covenants, the record does not reflect any specific or imminent threat that CPV will be rendered insolvent. Indeed, although the Complaint was filed nearly five months ago, no additional evidence has emerged to indicate that CPV's financial condition has materially deteriorated since Sagarra first requested a status quo order.[12] Moreover, money or rescissory damages will likely suffice to remedy Sagarra's claims should it succeed on the merits.[13]

Thus, Sagarra has failed to demonstrate that imminent, irreparable harm would likely result from the payment of funds due under the SPA and, accordingly, the interim injunctive relief it seeks must be denied.

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[12] Sagarra specifically alleges that CPV's revenue and profits have considerably diminished in recent years. Moreover, its ratio of debt to EBITDA has risen dramatically during that same period and, as a result, CPV is in violation of certain financial covenants contained in its financing agreements. Compl. ¶ 22. Sagarra further contends that CPV's failure to comply with its financial covenants, along with its $419 million in debt, makes it unlikely that CPV would be able to repay the approximately $279 million paid for Giant or to satisfy a judgment awarding money damages. *Id.* ¶ 48. It may be worth noting, however, that only half of the purchase price for Giant will have been remitted to CPV through the July 10th payment.

[13] After argument on its renewed request for a status quo order, Sagarra supplemented the record to show that the Defendants may be soliciting interest in a further sale of Giant to a third-party purchaser. *See* July 5, 2011 Letter of Arthur L. Dent, Esq. Although this information may be relevant to the merits of Sagarra's claims, it does not—at what appears to be the early stages of a sales process—warrant a conclusion that Sagarra's possibility of rescission will be imminently impaired.

An implementing order will be entered.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K