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Re: *The Ravenswood Investment Company, L.P. v. Winmill*
C.A. No. 3730-VCN
Date Submitted: August 2, 2013

Dear Counsel:

In a procedurally awkward manner, Plaintiff The Ravenswood Investment Company, L.P. ("Ravenswood"), a shareholder of Defendant Winmill & Co. Incorporated ("Winmill"),[1] has moved for partial summary judgment on its claim that Winmill's issuance of options was improper because its incentive stock option plan was not adopted in compliance with the requirements of the Delaware General Corporation Law. Specifically, it contends that the shareholder consent approving the plan did not satisfy the requirement of 8 *Del. C.* § 228(c) that every consent

[1] The other Defendants are Thomas B. Winmill and Mark C. Winmill. Bassett N. Winmill was a Defendant until his death last year.

"shall bear the date of signature of each stockholder or member who signs the consent . . . ."

The motion is procedurally awkward because this claim cannot be found within Ravenswood's Complaint, no application to amend that complaint has been filed, and Court of Chancery Rule 15(aaa) might, at least arguably, preclude assertion of the claim in light of the dismissal of at least a part of Ravenswood's challenge to the issuance of options under the plan.[2] That said, the substance of the narrow pending motion has been fully briefed and Defendants acknowledge that the issue might as well be addressed now.

By written consent,[3] Winmill's three directors and its one stockholder with voting power (Bassett Winmill) approved the 2005 Performance Equity Plan (the "2005 PEP"), pursuant to which the Defendants purported to authorize issuance of the options which Ravenswood now challenges. The same signature pages—executed as counterparts—were used for approvals by the shareholder and the directors. Bassett Winmill signed the Consent only once, as a director and as the

[2] *Ravenswood Inv. Co., L.P. v. Winmill*, 2011 WL 2176478 (Del. Ch. May 31, 2011).
[3] Pl.'s Opening Br. in Supp. of its Mot. for Partial Summ. J. ("Pl.'s Opening Br."), Ex. A, Joint Unanimous Consent of Directors and Sole Holder of Class B Common Stock of Winmill & Co. Incorporated (the "Consent").

"sole holder of outstanding shares of Class B voting common stock," on the same page as Thomas B. Winmill, who signed as a director.[4] Only one date appears on the signature page, *i.e.*, each signature is not separately dated. "Dated: As of May 23, 2005" was typed off to the left side of the signature pages.

Ravenswood moved for partial summary judgment based "upon Defendants' judicial admission that all of these actions [including Bassett Winmill's signature as the sole voting stockholder and the Defendants' (including Bassett Winmill's) signatures as directors] took place on May 23, 2005 . . . ."[5] Thus, there is no argument that the Consent was signed by different signatories on different dates. Also, there is no dispute that Winmill's only voting stockholder signed the Consent on May 23, 2005.

Ravenswood asserts that Bassett Winmill's purported approval, as Winmill's only stockholder, of the 2005 PEP was ineffective because "[p]reprinted dates on forms are not acceptable."[6] It also argues that a "date 'as of' is not the same thing as a date on a particular day" because "as of" is a phrase used to specify an

[4] Consent at 3.
[5] Pl.'s Opening Br. at 3-4.
[6] *Id.* at 6.

effective date, not the date of actual signing.[7] In addition, Ravenswood observes that pre-typed dates cannot be tied to the execution of the Consent by any one individual.[8] If the approval of the Consent by Bassett Winmill was not effective for any reason, issuance of any incentive options under the 2005 PEP would not have been valid.[9] Ravenswood points to *H-M Wexford LLC v. Encorp, Inc.*, which provides: "First, Section 228(c) reads: 'every written consent shall *bear* . . .' the word 'shall' is a mandatory term. It denotes that such action must be taken in order to comply with the statute and thus to be valid."[10] In *Wexford*, as a prominent treatise summarizes, "consents were held invalid because they were not individually dated by the signers."[11] In *Wexford*, the shareholders' consents, which accounted for 94% of the necessary shareholders, all bore the same date, but it was alleged that the consents had not been executed on the same day. The problem of a single date appearing on the consent, even though the consent was executed on a

[7] Pl.'s Reply Br. in Supp. of its Mot. [sic] Partial Summ. J. at 12.
[8] *Id.* at 13-14.
[9] By § 12.1 of the 2005 PEP, stockholder approval was required within one year after the 2005 PEP's effective date, but, "if the Plan is not approved by the Company's stockholders, it will continue to be effective provided that no Incentive Stock Options will be issued under the Plan." Pl.'s Opening Br., Ex. B § 12.1.
[10] *H-M Wexford LLC v. Encorp, Inc.*, 832 A.2d 129, 152 (Del. Ch. 2003) (emphasis in original) (citation omitted).
[11] FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 228.4.2.

different date or dates, is not present here. Ravenswood agrees that the Consent was executed on the dates shown. There were not multiple shareholder signatories; there was only one shareholder whose approval was required.[12]

The Consent, in fact, bears the date—accurately—of the signature of the shareholder. Winmill did not have several stockholders signing a piece of paper with a single, preprinted date on separate dates. The Consent must bear the signature of each shareholder and there is no evidence that any shareholder signed on the date other than that set forth on the Consent. Indeed, the evidence is clearly to the contrary: the shareholder did execute the Consent on the date set forth.

That does not end the inquiry, however. First, there is the question of whether the use of "as of" invalidates the Consent. Ravenswood asks the Court to invalidate the Consent because the phrase "as of" "is frequently used to signify the effective legal date of a document . . . ."[13] The Court disagrees with Ravenswood that the persuasive authority it quotes must or even should be translated into a strict rule to disqualify the Consent in this case, where no factual dispute exists as to

[12] Consents signed by directors, as directors, are not subject to a comparable dating requirement. *See* 8 *Del. C.* § 141(f). Thus, the date on the Consent could be viewed as material only as to Bassett Winmill's execution as the shareholder.
[13] Pl.'s Opening Br. at 12-13 (citation and quotation omitted).

when the Consent was executed. Ravenswood's argument might have more merit if the factual circumstances underlying the Consent were also in dispute to make the present case more akin to *Wexford*.

The Court notes that certain persuasive authority may also be quoted which counters the persuasive authority cited by Plaintiff. A leading treatise provides a form for shareholder consent.[14] The last sentence of that form reads: "IN WITNESS WHEREOF, the undersigned stockholders have caused this Consent to be executed as of the date set forth below their respective names." Under that are blocks with a space for name and for date. Thus, the treatise writers recognize the desirability, if not the need, for each signing stockholder to have a date with his or her name. The "as of" language in the treatise does not serve any purpose different from that in the consent prepared for Winmill. This suggests the use of "as of" does not automatically disqualify a consent. More importantly, although there may be some uncertainty as to the meaning of "as of," it can mean the date of execution. As noted above, the facts here demonstrate that the date of the Consent was indeed the date of execution.

[14] BALOTTI & FINKELSTEIN'S DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS, Vol. 3, Form 7.4.

There was only one shareholder signature on the page with Basset Winmill's signature and no shareholder signature on the counterpart. The other signatures were for directors and did not require a date. Bassett Winmill's signature was the first one on the page. It was essentially opposite, perhaps slightly lower, than the "as of" date. Of course, the same typed end date appears on the second counterpart executed by another director. Yet, there is no debate that the Consent does, in fact, bear the date of Bassett Winmill's signature.

Thus, there was compliance in fact with the terms of Section 228(c). Case law, however, mandates that the date requirement of the provision be "strictly enforced."[15]

That leaves the technical questions: Can one date on a page serve more than one signature? Or, if there are two signatures on a page, must there be two dates? Or, if there is a date on a document signed by a shareholder and by a director, does that one date satisfy the needs of the shareholder and have no impact whatsoever with respect to the signature of the person whose status does not statutorily require

[15] *H-M Wexford LLC*, 832 A.2d at 152.

a date (even though the Consent reads as if the date applies to the other person's signature as well as that of the shareholder)?

Despite those questions, one reading of the Consent literally satisfies the technical requirements of Section 228(c). Ravenswood, in substance, argues that a consent, to be effective, cannot be susceptible to any interpretation that would be inconsistent with a statutory mandate. If there were a factual question as to what happened when the Consent was executed or any debate about when Bassett Winmill executed it, Ravenswood's argument might be persuasive. In this instance, however, there is no debate of fact. A fair reading—but not the only reading—of the Consent evidences compliance with the statutory requirements.

The parties agree that there was nothing about the dating of the document that would call into question literal compliance with the statutory requirement. Thus, the dispute concerns only the Consent's technical compliance with that requirement. The Court acknowledges that having a separate date for each shareholder signatory should be the practice, debates like this should not be necessary, and minor changes in the facts could have altered the outcome. But, where there is no debate that the statutory requirement was satisfied and where

there is no uncertainty as to compliance with the statutory mandate, a strained reading of the Consent serves no apparent purpose and in no way would advance the legislative purposes. The Court will not read it in such a manner to invalidate it when it can fairly be read to be technically compliant.

Thus, on the facts underlying Ravenswood's motion for partial summary judgment, Ravenswood's motion must be denied.

* * *

There also is a lingering discovery dispute that emanates from Ravenswood's understandable skepticism about Defendants' somewhat limited production. The Court has no basis to doubt the professional responsibility of Defendants' counsel in providing responsive documents. Production of that which does not exist is something of a challenge. In this context, testing Defendants' efforts to find responsive documents is best done through deposition. With a small company, such as Winmill, the responsive documents may be fewer but, even for a small company, one would ordinarily expect a larger harvest.

Ravenswood complains about Defendants' production of Bexil records. Those records might be relevant, but Bexil, even though it shares space and

ownership with Defendants, is a separate corporation. Seeking discovery directly from Bexil, which Ravenswood apparently has done, should be the solution.

Ravenswood also contends that it is entitled to electronically stored data in native format, without offering a particularized justification to support its contention. Ravenswood argues that the Court of Chancery Rules require such a result. Case law disproves its argument. For example, in *Kinexus*, the Court "decline[d] to hold that the Court of Chancery Rules governing document production in 2005 required an OCR format or native file format, including metadata, without a particularized showing of need."[16] *Kinexus*'s logic is still sound today. Ravenswood may have been entitled to compel documents in native format had it offered particularized arguments demonstrating its need. However, in the absence of such arguments, the Court denies Ravenswood's motion to compel electronic documents in native format.

Some redactions by the Defendants have generated controversy. That information—according to those who know, the Defendants—focuses on compensation of non-defendants. The relevance (or likelihood of its leading to

[16] *Kinexus Representative LLC v. Advent Software, Inc.*, 2008 WL 4379607 (Del. Ch. Sept. 22, 2008).

admissible evidence) of such information is not obvious. Similarly, a redaction log, something of a conceptual outlier, does not appear to be warranted, but an explanation of the redactions might avoid some of the seemingly unnecessary disputes between the parties. Ravenswood believes—not without some cause—that the Defendants' responses have not been complete. The Defendants may have fulfilled their responsibility, but providing Ravenswood with an explanation would serve a useful purpose. However, without a more specific focus, the Court will not order Defendants to produce such explanations, but it would entertain a more focused request.

The parties have focused on more specific discovery issues in their correspondence.[17] Some of the topics appear to overlap. The following paragraphs set forth the Court's resolution.

Items 1, 2, and 3 fall within the general category discussed above to the effect that Ravenswood would expect more documents, but, at this point, there is no basis for concluding that the Defendants' responses have not been adequate.

[17] Pl.'s Opening Br. in Supp. of its Mot. to Compel, Exs. E & F. Defs.' Answering Br. in Opp'n to Pl.'s Mot. to Compel, at 24-33, restates the issues and will be used as something of a reference for convenience.

Also, it is not clear if some of the sparseness may be attributed to the proper assertion of privilege.

With respect to Item 4, the available and responsive records have been produced. The Court need not speculate about the reasons for the delay.

The difficulties of Item 5 appear to be the product of a mislabeling; clarification should suffice.

As for Item 6, Defendants have committed to provide information responsive to the request set forth in this category.

Item 7 deals with options and debt forgiveness. Ravenswood may be skeptical about Defendants' assertion that they have produced the appropriate written consent, but the Court has no basis for ordering anything further at this point.

Item 8 appears to involve a search for records that have no direct linkage to this action, other than possibly relating to compensation paid to the Individual Defendants, but Defendants represent that they have produced documents that show all compensation that was paid to the Individual Defendants by Winmill and its related entities.

Following the filing of the motion to compel by Ravenswood, the Defendants, according to their representations, have produced the responsive compensation materials for Item 9.

Item 10 involves tax documents of the Individual Defendants. The information sought by Ravenswood has been provided in other documents; production of Individual Defendants' tax returns is not necessary yet because, first, production would be duplicative and, second, there is no reason to believe that the information which has been produced is not accurate.

Item 11 involves advisors' retention letters for compensation and stock option plans. The underlying purpose appears to be to check on what plans actually existed. Retention letters would be one path toward the information that would resolve that debate. Accordingly, the retention letters are to be produced.

Item 12 appears to involve a series of documents which should have been obtained from Bexil or another entity, Tuxis. Ravenswood is free to explain how the Court misunderstands, if it does, any further need in this category.

Item 13 is yet another category in which the Defendants assert that all responsive documents have been produced.

Item 14 complains about Defendants' decision to limit electronic searches to Winmill only. Ravenswood has not identified any third party over which Winmill has control that would have such electronically stored information. If this is primarily another effort to obtain information from Bexil through Winmill, the approach that should suffice (or should have sufficed) is to seek the information directly from Bexil.

Item 15 involves a debate over search terms. One would expect more emails to have been produced, but Winmill is a small entity, and thus, the volume of responsive emails may simply reflect its size. There is, one assumes, always another search term that just might be helpful. There is no reason to conclude that the efforts of Winmill to search for electronically stored information were inadequate or that yet another search term would be productive.

Item 16 is another example of a request as to which the Defendants assert that all responsive documents have been produced.

Reviewing a summary list of open discovery issues tends to be an imperfect process. If the Court has misunderstood Ravenswood's appropriate needs, it should feel free to inform the Court accordingly.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K