COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

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Robert J. Katzenstein, Esquire
David A. Jenkins, Esquire
Smith Katzenstein & Furlow LLP
800 Delaware Avenue, Suite 1000
Wilmington, DE 19801

John L. Reed, Esquire
Edwards Angell Palmer & Dodge LLP
919 N. Market Street, #1500
Wilmington, DE 19801

Raymond J. DiCamillo, Esquire
Richards, Layton & Finger, P.A.
920 North King Street
Wilmington, DE 19801

Re: Gentile v. Rossette
C.A. No. 20213-VCN
Date Submitted: July 1, 2010

Dear Counsel:

The Court has concluded that Defendant P. David Rossette ("Rossette") is liable for his breach of his fiduciary duties owed to the Plaintiffs in the amount of $309,000.[1] That liability arose from a conversion of SinglePoint debt (the "Debt

[1] *Gentile v. Rossette*, 2010 WL 2171613 (Del. Ch. May 28, 2010). Familiarity with that memorandum opinion is presumed.

Conversion") orchestrated by Rossette that closed on March 27, 2000. Thus, as the effective date of the wrongdoing resulting in liability, March 27, 2000 is the date from which prejudgment interest will generally be calculated.[2] The lingering question is the appropriate rate of prejudgment interest. More particularly, the question is whether the rate was fixed in March 2000 or whether it should vary with the substantial fluctuations in interest rates over the ensuing years.

* * *

At the end of March 2000, the legal rate of interest was 10.5%.[3] Interest rates dropped not long after and have generally remained well below that initial rate.[4] The consequences of the spread between the initial rate and a rate that would vary with changes in the Discount Rate over time are substantial. For example, if prejudgment interest is calculated from March 2000 to March 2010, compounded quarterly, a fixed

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[2] *See, e.g.*, *Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403, 409 (Del. 1988) ("A successful plaintiff is entitled to interest on money damages as a matter of right from the date liability accrues.").

[3] The legal rate of interest is determined by adding 5% to the Federal Reserve Discount Rate (the "Discount Rate"). *See* 6 *Del. C.* § 2301(a).

[4] The Discount Rate in March 2000 was 5.5%. By November 2002, it was down to 0.75%. When this action was filed in March 2003, it stood at 2.25%. By December 2008, it had reached 0.5% and now is 0.75%.

rate of 10.5% would yield $562,135, but a variable rate would yield only $392,438, or a difference of $169,697.[5]

The Plaintiffs contend that well-settled principles dictate that the prejudgment interest rate should be the one in effect at the time of the wrongdoing and that such rate should be used until judgment is entered.[6] Rossette asserts that proper application of equitable principles would result in the use of a variable rate as a fairer and more accurate means of measuring both his benefit from not paying his liability sooner and the Plaintiffs' loss of use of the sum in question.[7]

* * *

As an initial matter, the Plaintiffs argue that Rossette did not join issue over the proper interest rate in the Joint Pretrial Order and Stipulation, in which they stated their intent to seek prejudgment interest at a rate of 10.5%, and, thus, Rossette waived

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[5] The variable rate would be determined by adjusting the interest rate at the beginning of each quarter. The total interest numbers are based on information provided by Rossette. *See* Letter of Raymond J. DiCamillo, Esq., dated June 30, 2010, Ex. B. The Court has neither reviewed the historical Discount Rate data nor calculated the accumulated interest. In the absence of dispute as to data or computational accuracy, it has accepted Rossette's submission.

[6] *See, e.g.*, *Smith v. Nu-West Indus.*, 2001 WL 50206, at *1 (Del. Ch. Jan. 12, 2001).

[7] Although very much a real debate, it carries something of an academic or technical tenor. Not long after the Debt Conversion, SinglePoint stock (or, more accurately, the stock of Cofiniti which, in the interim, had acquired SinglePoint) had become worthless.

any argument as to the appropriate rate of prejudgment interest.[8] However, the Plaintiffs minimize the Court's broad discretion to fashion the appropriate relief that a given case requires.[9] This includes discretion as to the type and amount of interest to be applied. As our Supreme Court has stated, "a court of equity has broad discretion, subject to principles of fairness, in fixing the rate [of prejudgment interest] to be applied. . . . In the Court of Chancery the legal rate is a mere guide, not an inflexible rule."[10] As such, the Court will look to principles of fairness in determining the appropriate interest rate to apply to the award.

In determining a fair rate of interest, it should be noted that "[a]n award of interest serves two purposes. It compensates the petitioner for the loss of use of its capital during the pendency of the [litigation] and causes the disgorgement of the benefit [the Defendant] has enjoyed during the same period."[11] Even though this is

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[8] In both the Joint Pretrial Order and Stipulation and in the Defendants' Post-Trial Brief, Rossette asked that the Plaintiffs be awarded nothing.

[9] *See, e.g.*, *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 176 (Del. 2002) ("[T]he Court of Chancery's 'powers are complete to fashion any form of equitable and monetary relief as may be appropriate.'") (quoting *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983)); *Weinberger*, 457 A.2d at 715 (noting "the broad discretion of the Chancellor to fashion such relief as the facts of a given case may dictate").

[10] *Summa Corp.*, 540 A.2d at 409.

[11] *Gholl v. eMachines, Inc.*, 2004 WL 2847865, at *18 (Del. Ch. Nov. 24, 2004) (citing *Gonsalves v. Straight Arrow Publ'rs, Inc.*, 793 A.2d 312, 327 (Del. Ch. 1998)).

not a statutory appraisal action, the equitable remedy conferred by the Court drew extensively from concepts developed in appraisal jurisprudence. Here, the objective of "making the Plaintiffs whole" forms the foundation for the Court's analysis. The Plaintiffs' shares were diluted as a consequence of the Debt Conversion, and the corresponding loss of use of capital is deserving of fair compensation; excessive interest, on the other hand, would constitute an inequitable windfall.

In departing from a legal rate of interest fixed at the time of the wrongdoing, our courts have considered concepts such as "the realities of the relationship" between the parties,[12] whether a particular party was the primary cause for a delay in the litigation,[13] as well as general "fundamental economic realit[ies]."[14] Often, courts have sought to award the plaintiff "the return a prudent investor would have realized during the relevant period."[15] Because it is so unlikely that the hypothetical prudent investor would have achieved a 10.5% rate of return over the past decade, during which the Discount Rate frequently stood near all-time lows and the equity markets

[12] *Brandin v. Gottlieb*, 2000 WL 1005954, at *29 (Del. Ch. July 13, 2000).
[13] *Henke v. Trilithic Inc.*, 2005 WL 2899677, at *13 (Del. Ch. Oct. 28, 2005).
[14] *Onti, Inc. v. Integra Bank*, 751 A.2d 904, 926 (Del. Ch. 1999).
[15] *See, e.g.*, *Henke*, 2005 WL 2899677, at *13.

encountered turbulence, the Court cannot conclude that granting the Plaintiffs interest at this rate would be fair.[16] Instead, a variable rate, which takes into account the economic realities of the time, is more appropriate.

Some guidance supporting this conclusion may also be found in 8 *Del. C.* § 262(h), which sets forth the appropriate remedy for prevailing former stockholders in an appraisal action. In such actions, the Court determines the fair value of the shares

> together with interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors. Unless the Court in its discretion determines otherwise for good cause shown, interest from the effective date of the merger through the date of payment of the judgment shall be compounded quarterly and shall accrue at 5% over the Federal Reserve discount rate . . . *as established from time to time during the period between the effective date of the merger and the date of payment of the judgment*.[17]

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[16] A prudent investor would typically not have restricted herself to interest-bearing obligations. During the period in question, however, the equity markets, in general, have not generated impressive returns. For example, on March 27, 2000, the Dow Jones Industrial Average was slightly over 11,000 and the NASDAQ Composite was slightly under 5,000. By March 27, 2010, the Dow Jones Industrial Average was approximately 10,800 while the NASDAQ Composite had fallen to approximately 2,400.

[17] 8 *Del. C.* § 262(h) (emphasis added).

The Plaintiffs correctly note that the share dilution claims in this action were not part of the Plaintiffs' appraisal action. Nevertheless, the remedy to which the Plaintiffs are entitled—a monetary award equal to the loss in value of their shares because of the Debt Conversion—required essentially the same fair value approach applied by courts in appraisal actions. Thus, statutory appraisal actions are helpful in guiding the Court's notions of fairness in this case.[18]

For these reasons, the Court adopts the variable rate approach proposed by Rossette for calculating his prejudgment interest obligation.

* * *

With respect to Rossette's request to shorten the period for calculating interest, he points out that the Court has, on certain occasions, exercised its discretion to reduce the term over which interest accrues on a damage award.[19] Adjustments of this nature have been prompted by extenuating factors such as a plaintiff's excessive delay in prosecuting the case or in bringing suit. Although this action was brought

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[18] *See also* Barry M. Wertheimer, *The Shareholders' Appraisal Remedy and How Courts Determine Fair Value*, 47 Duke L.J. 613, 709-10 (1998) (suggesting that the rate of interest applied in appraisal cases "must be fair, and able to respond to market conditions, rather than fixed at a level that becomes outdated").

[19] *See, e.g.*, *Boyer v. Wilmington Mat'ls, Inc.*, 754 A.2d 881, 909 (Del. Ch. 1999); *Ryan v. Tad's Enters., Inc.,* 709 A.2d 682, 705 (Del. Ch. 1996).

near the end of the time-bar period for bringing such claims, it was filed only weeks after the Court determined that the claim did not fall within the scope of the companion appraisal action.[20] Similarly, although the litigation has been protracted, this has not been caused by any undue delay on the part of the Plaintiffs.

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Accordingly, the Court will apply the variable rate of interest proposed by Rossette for the full prejudgment interest period. With this conclusion, counsel should be able to agree upon a form of order implementing the memorandum opinion.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[20] *Gentile v. SinglePoint Fin., Inc.*, 2003 WL 1240504, at *5 (Del. Ch. Mar. 5, 2003).