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IN THE SUPREME COURT OF THE STATE OF DELAWARE

RUSSELL E. PLANITZER and LTP FUND II, L.P., Defendants Below-Appellants, v. MARBEK REVOCABLE TRUST, HARVEST GROWTH CAPITAL LLC, HARVEST GROWTH CAPITAL II LLC, SATURN PARTNERS LP III and SPLP II OPPORTUNITY LP, Plaintiffs Below-Appellees.	No. 434, 2018 APPEAL FROM THE COURT OF CHANCERY OF THE STATE OF DELAWARE, C.A. NO. 11580-VCL

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Plaintiffs' Answering Brief (cited as "AB") confirms that this appeal presents a single issue for the Court to decide – whether Mr. Planitzer and LTP, former Good common stockholders who the Court of Chancery correctly held to be Class members, should be deemed to have waived their right to participate in a Class-wide recovery of settlement proceeds.[1] The only conduct from which the trial court inferred such a waiver related to the Bring-Along Action, which Good pursued against the named plaintiffs in this proceeding to enforce the plaintiffs' obligations to the Company pursuant to a Voting Agreement. Good's Board of Directors, which included Mr. Planitzer, unanimously authorized the Bring-Along Action based on their determination that plaintiffs challenged the Good-Blackberry merger for reasons unrelated (and contrary) to the best interests of the Company and its other stockholders.

At the time the claims in this action were settled, the merits of the Bring-Along Action were set to be tried by the Court of Chancery and, therefore, ultimately may have precluded plaintiffs from prevailing on their Class claims. Thus, while plaintiffs characterize the Bring-Along Action as an effort to "shut down" the Class action, they cannot legitimately question Mr. Planitzer's reasoned decision to

[1] Unless otherwise stated, capitalized terms shall have the meanings ascribed to them in Appellants' Opening Brief (cited as "OB").

authorize the Bring-Along Action given that the Company's contractual rights against plaintiffs were never finally adjudicated.

Plaintiffs also suggest that, at the time Mr. Planitzer authorized the Bring-Along Action as a Good director, his decision must have been motivated purely by his and LTP's interests as preferred stockholders in an escrow of merger proceeds. By criticizing Mr. Planitzer and LTP for taking a "united stance" with the other defendants in resisting plaintiffs' litigation efforts – even going so far as to challenge Mr. Planitzer's and LTP's filing of answers and affirmative defenses in this action – plaintiffs imply that their claims were so strong that Mr. Planitzer could not have rationally doubted the merits of those claims when authorizing the Bring-Along Action.[2] This argument, of course, is misplaced in the context of a settlement where plaintiffs agreed to resolve their claims without any adjudication or admission of defendants' liability. The argument is especially misplaced as to Mr. Planitzer, since

[2] In direct contrast to their claim of a "united front," plaintiffs also quote evidence from the discovery record describing a "dysfunctional" Good Board of Directors on which Mr. Planitzer and other directors disagreed on how to maximize the Company's value. *See* AB at 6-8. In his Opening Brief and the proceeding below, Mr. Planitzer offered additional record evidence demonstrating that, unlike other Good directors, he favored a sale of the Company well before the merger with Blackberry was agreed to. *See, e.g.*, OB at 10. Plaintiffs themselves recognized that Mr. Planitzer was not "united" with other defendants when they voluntarily dismissed their claims against him and LTP with prejudice and represented to the Court of Chancery that Mr. Planitzer's conduct was "unique" among Good's directors. *See id.* at 8-10. Nowhere in their Answering Brief do plaintiffs acknowledge their prior position, let alone refute it.

plaintiffs ***voluntarily dismissed their claims against Mr. Planitzer and LTP with prejudice before settling their claims against the remaining defendants***.

When plaintiffs' rhetoric is set aside, the facts demonstrate that Mr. Planitzer, by authorizing the Bring-Along Action, did not waive and could not have waived his or LTP's rights in a future settlement of litigation that was in its nascent stages. In support of their waiver argument, plaintiffs now also raise for the first time in this appeal additional facts – such as LTP's execution of a written consent to approve the merger – that were not considered by the Court of Chancery when it issued the order excluding Mr. Planitzer and LTP from the distribution of settlement proceeds. Even if those additional facts properly were before this Court, however, they still do not support the trial court's finding of waiver. In short, that finding should be reversed so that Mr. Planitzer and LTP may receive the benefits to which they properly are entitled as Class members.

ARGUMENT

I. AUTHORIZATION OF THE BRING-ALONG ACTION DID NOT WAIVE APPELLANTS' RIGHTS AS A MATTER OF LAW.

As plaintiffs acknowledge (*see* AB at 19-20), the legal elements required for waiver are settled and undisputed. This Court has stated repeatedly that waiver must reflect "the ***voluntary*** and ***intentional*** relinquishment of a ***known*** right." *Realty Growth Inv'rs v. Council of Unit Owners*, 453 A.2d 450, 456 (Del. 1982) (emphasis added). *Accord, e.g.*, *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 444 (Del. 2005); *Klein v. Am. Luggage Works, Inc.*, 158 A.2d 814, 818 (Del. 1960). Plaintiffs' Answering Brief, however, ignores the "quite exacting" standard that must be satisfied before the Court will conclude that a party knowingly and intentionally waived known rights. *AeroGlobal Capital Mgmt., LLC*, 871 A.2d at 444. Under this test, waiver will be found only where "(1) there is a requirement or condition to be waived, (2) the waiving party must know of the requirement or condition, and (3) the waiving party must intend to waive that requirement or condition." *Id.* Thus, "[i]ntention forms the foundation of the doctrine of waiver, and ***an intention to waive must appear clear from the record evidence***." *Id.* at 445 (emphasis added). *Accord George v. Frank A. Robino, Inc.*, 334 A.2d 223, 224 (Del. 1975).

A party cannot intend to waive rights, however, without knowledge of those rights. Recognizing this, the Court has held that "the right alleged to have been

waived must have been known to the person to be charged therewith and his waiver thereof must have been intentional." *Vechery v. Hartford Acc. & Indem. Ins. Co.*, 121 A.2d 681, 685 (Del. 1956). Therefore, "[i]t must generally be shown by the party claiming a waiver that the person against whom the waiver is asserted had knowledge of the existence of his or her rights or of all the material facts upon which they depended." *State v. Jock*, 404 A.2d 518, 522-23 (Del. Super. 1979). While a party may waive rights by "conduct such as to warrant an inference to that effect," the evidence still must show "knowledge of all material facts and of one's rights, together with a willingness to refrain from enforcing those rights." *Klein*, 158 A.2d at 818. *See also Nathan Miller, Inc. v. N. Ins. Co. of New York*, 39 A.2d 23, 25 (Del. Super. 1944) (waiver requires "such conduct as clearly indicates an intention to renounce a known privilege or power"). Intent to knowingly waive rights "will not be implied from slight circumstances." *Vechery*, 121 A.2d at 685.

In this case, while plaintiffs claim the "operative facts are unequivocal" (AB at 20), those facts do not reflect an ***unequivocal intent*** to waive future, as yet undetermined rights at the time the Company filed the Bring-Along Action. "The test for ascertaining the knowledge possessed by a party is what the party knew or by the exercise of reasonable diligence could have known at the time of the purported waiver." *Rose v. Cadillac Fairview Shopping Ctr. Properties (Delaware) Inc.*, 668 A.2d 782, 786 (Del. Super. 1995), *aff'd sub nom. Rose v. Sears, Roebuck & Co.*, 676

A.2d 906 (Del. 1996). Plaintiffs contend that Mr. Planitzer, when considering whether to authorize the Bring-Along Action as a Good director, faced a binary choice to "act with the objective of shutting down the class action or not." AB at 20. This, however, presumes erroneously that there were no other factors that informed Mr. Planitzer's and the other directors' decision-making – namely, Good's interests in enforcing its legitimate contractual rights against the named plaintiffs.

To infer that Mr. Planitzer acted with an improper motive to "shut down" this action would require the Court to conclude that Mr. Planitzer knew definitively, at the time, that (1) plaintiffs did not owe the Company an obligation to comply with the Voting Agreement, (2) plaintiffs had no personal interests that made them unsuitable Class representatives, and (3) plaintiffs' claims had merit. It is impossible to draw these conclusions from the record, however, since (1) whether plaintiffs breached the Voting Agreement was an issue to be tried before this action was settled, (2) plaintiffs' fitness as Class representatives was fiercely litigated, and (3) ultimately, plaintiffs voluntarily dismissed their claims against Mr. Planitzer and LTP with prejudice. Accepting plaintiffs' contention that Mr. Planitzer and the Company had no rational basis to determine that plaintiffs breached the Voting Agreement would effectively write plaintiffs' obligations out of the contract in contravention of fundamental Delaware law. *See Nemec v. Shrader*, 991 A.2d 1120,

1126 (Del. 2010) (the Court "must … not rewrite the contract to appease a party who later wishes to rewrite a contract he now believes to have been a bad deal").

According to plaintiffs, Mr. Planitzer also should be charged with knowledge, when he was considering the Bring-Along Action, that J.P. Morgan and the other defendants would settle plaintiffs' claims nearly two years later on terms that created a common fund for the Class. Plaintiffs' argument further requires Mr. Planitzer not only to have been aware of these future rights, but also to have knowingly intended to surrender those rights when deciding whether to authorize the Bring-Along Action. Naturally, the record does not reflect that Mr. Planitzer had such clairvoyance or intended to forego rights as a common stockholder that did not yet exist. At most, the record shows that Mr. Planitzer questioned the substantive merits of plaintiffs' claims, an opinion that was later proven correct when Mr. Planitzer and LTP were dismissed from the action. Whether other defendants would ultimately decide to settle those claims without admitting liability, however, was not foreseeable at the time the Bring-Along Action was authorized. Inferring knowledge and intent from these facts requires conjecture that, according to this Court's well-established precedent, simply cannot support waiver as a matter of law.

Plaintiffs also cannot establish that LTP, through Mr. Planitzer's conduct, knowingly and intentionally waived any rights. Plaintiffs do not directly dispute that Mr. Planitzer's acts as a Good director to authorize the Bring-Along Action should

not be imputed to LTP; instead, plaintiffs rely upon LTP's amendment of the Voting Agreement to extend plaintiffs' bring-along obligations following the merger (as undertaken by Mr. Planitzer as an LTP representative) to argue that LTP opposed plaintiffs' litigation and impliedly waived its rights as a common stockholder. *See* AB at 21-22. However, whatever improper intent plaintiffs seek to impute to LTP by reason of Mr. Planitzer's actions to execute a stockholder consent on LTP's behalf is irrelevant to determining whether LTP legally waived its rights. Long ago, this Court established that "[s]tockholders in Delaware corporations have a right to control and vote their shares in their own interest. … It is not objectionable that their motives may be for personal profit, or determined by whim or caprice, so long as they violate no duty owed other shareholders." *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840, 845 (Del. 1987). *Accord Ringling Bros.-Barnum & Bailey Combined Shows v. Ringling*, 53 A.2d 441, 447 (Del. 1947). Therefore, it would have been entirely proper for LTP to amend the Voting Agreement, to in turn facilitate the Bring-Along Action, solely to enhance its own position in the merger consideration as plaintiffs allege. In the absence of any record evidence demonstrating that LTP's amendment of the Voting Agreement reflected a knowing and intentional relinquishment of rights in a future settlement of Class claims, LTP cannot be found to have waived those rights under Delaware law.

II. PLAINTIFF'S NEWLY RAISED FACTS ALSO DO NOT ESTABLISH WAIVER.

In their Answering Brief, plaintiffs argue for the first time that Mr. Planitzer's and LTP's execution of written consents approving the Good-Blackberry merger and a Joinder Agreement also should be found to have waived Mr. Planitzer's and LTP's rights as common stockholders to participate in a future Class-wide settlement of claims alleged against ***other*** directors and investment entities. *See* AB at 8-11, 21. Plaintiffs also suggest for the first time in their Answering Brief that Mr. Planitzer's and LTP's interests in a post-merger escrow gave them different interests than common stockholders in opposing plaintiffs' litigation. *See id.* at 20-21. However, plaintiffs may not support their waiver argument with these facts because they did not do so when asking the Court of Chancery to exclude Mr. Planitzer and LTP from the Class-wide distribution of settlement proceeds. *See* Supr. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review ...."); *see also, e.g.*, *DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 363 (Del. 2017). For this reason alone, the Court should reject plaintiffs' reliance upon these documents.

Nonetheless, there also is no substantive merit to plaintiffs' new contentions. Like plaintiffs, LTP was a party to the Voting Agreement and executed the written consent and Joinder Agreement as required by that contract. Unlike plaintiffs, however, LTP complied with its obligations to the Company and should not now be

faulted for doing so. While the written consent and Joinder Agreement contain releases for claims against Good and Blackberry and covenants against asserting claims arising from the merger, there are no terms that can be reasonably construed as waiving all rights to share in Class consideration subsequently secured by other stockholders from J.P. Morgan or other parties. Indeed, materially identical language was contained in the Letter of Transmittal that Good's common stockholders were required to execute before receiving merger consideration. *See* A876-A879. Undoubtedly, there are Class members collectively holding thousands of common shares who executed the letter of transmittal but are nonetheless included in the distribution list approved by the Court of Chancery – under the argument now advanced by plaintiffs, however, those Class members would be deemed to have waived their right to participate in the Class-wide benefits created by the settlement. Plaintiffs offer no reason why Mr. Planitzer and LTP should be treated differently than those stockholders because they executed the written consent and Joinder Agreement, and no such reason exists.

In fact, the Court of Chancery previously rejected this argument when it certified the Class. As plaintiffs note, the remaining defendants opposed Class certification, *inter alia*, on the grounds that plaintiffs were bound by the Voting Agreement and, therefore, were subject to a unique defense that did not apply to a majority of common stockholders. *See* A499-A501. Defendants also argued that

common stockholders who signed the Voting Agreement and written consents were excluded from the Class. *See* A500. The Court of Chancery, however, did not disqualify plaintiffs as Class representatives and certified a Class of common stockholders regardless of whether they had executed the Voting Agreement or written consents. *See* A721-A722, A724. Plaintiffs cannot now claim that the written consent bars LTP's participation in the Class when they previously (and successfully) opposed efforts to narrow the Class on the same grounds.

Plaintiffs' argument concerning LTP's interest in the post-merger escrow fares no better. At the time Mr. Planitzer and the other Good directors authorized the Bring-Along Action, they were rightfully concerned that plaintiffs' claims, pursued to further plaintiffs' personal interests and in breach of the Voting Agreement, would unnecessarily and unfairly deplete the escrow through defense expenses without providing a concomitant benefit to all stockholders.

Indeed, Mr. Planitzer's concerns have been proven to be well-founded. Good's purchaser, Blackberry, agreed to fund the $35 million J.P. Morgan settlement and then made a claim against the escrow for indemnification of that amount. *See* A730, AR7-AR9, AR18-AR19. This led to a dispute between plaintiffs and defendants concerning whether Blackberry's claim against the escrow violated a settlement term sheet between plaintiffs and defendants. *See In re Good Tech. Corp. Stockholder Litig.*, 2017 WL 4857341 (Del. Ch. Oct. 27, 2017). That dispute

was then arbitrated until legal expenses, plus the $17 million settlement to which defendants and plaintiff had agreed, left little remaining in the escrow for disbursement to common stockholders. At the conclusion of this action, the remaining escrow, insurance and settlement proceeds will be insufficient to improve the common stockholders' lot meaningfully over their original share of the escrow. In short, the litigation has, since the Bring-Along Action was filed, drained the escrow of millions of dollars that ultimately were unavailable to contribute to a settlement fund. Given these events, plaintiffs cannot credibly argue that the Bring-Along Action was motivated purely by Mr. Planitzer's and LTP's interests in the escrow as preferred stockholders.

CONCLUSION

For the reasons set forth herein, and in Appellants' Opening Brief, Mr. Planitzer and LTP respectfully request that the Court reverse the trial court's judgment and hold that Mr. Planitzer and LTP shall receive distributions of their *pro rata* shares of all settlement proceeds paid to the Class of Good common stockholders.

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