Unreported Cases

INTRODUCTION

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To expedite the attorney's research, all cases are headnoted according to the National Reporter key number classification system.* Indices are provided for case names, statutes construed, rules of court, and key numbers and classifications for this issue.

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BARSKY v. FLAHERTY

No. 9132

Court of Chancery of the State of Delaware, New Castle

September 9, 1987

Plaintiff brought an action against defendant corporation, its affiliate, and their officers and directors seeking enforcement of a settlement agreement whereby (1) defendants would spin-off to their shareholders defendants' stock interest; and (2) after the spin-off, a public offering of defendants' shares would occur. As a result of various significant disagreements between plaintiff and the chief executive officer of the two companies, the spin-off was abandoned. Defendants stated as reasons that (1) plaintiff refused to exercise a Put Option prematurely therefore preventing defendants from obtaining IRS Revenue Rulings that the spin-off would not be a taxable event and (2) plaintiff opposed a management company proposal which supposedly would make reorganization unfeasible. As a result of plaintiff's suit, defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted.

The court of chancery, per Vice-Chancellor Jacobs, denied defendants' motion finding the settlement agreement to be ambiguous and the coexistence of plaintiff's and defendants' reasonable interpretations of the agreement were sufficient to overcome the motion to dismiss.

1. Pleading ⟹ 351

On a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, the well-pleaded factual allegations of the complaint are taken as admitted, with all legitimate inferences being construed in the plaintiff's favor.

2. Pleading ⟹ 352

On a motion to dismiss for failure to state a claim, it must appear with a reasonable certainty that a plaintiff would not be entitled to the relief sought under any set of facts which could be proven to support the action. DEL. CH. CT. R. 12(b)(6).

3. Pleading ⟹ 351

A complaint need only give general notice of the claim asserted and will not be dismissed unless it is clearly without merit, either as a matter of law or fact.

4. Contracts ⟹ 147(2)

A contract must be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed.

5. Contracts ⟹ 147, 169

Where a contract is unambiguous and plain on its face, then the parties' intent will be determined from the plain language of the contract within its four corners without regard to extrinsic evidence of intent.

6. Contracts ⟹ 143(4), 147(1), 169

Where the contract is ambiguous and requires interpretation, the court may give due consideration to the circumstances surrounding its execution and to the parties' purposes in making the agreement.

7. Contracts ⟹ 147(1)

A contract must be construed to give effect to the parties' actual intent.

8. Contracts ⟹ 143, 147(3), 153

All parts of a contract must be given meaning where possible.

9. Contracts ⟹ 147(2), 176(2)

The coexistence of two reasonable but different interpretations is sufficient to establish an ambiguity which cannot be resolved on a motion to dismiss.

10. Contracts ⟹ 147(2), 176(2)

The coexistence of two reasonable contract interpretations is sufficient to overcome a motion to dismiss.

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David A. Drexler, Esquire, and Paul P. Welsh, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware; and Jay Topkis, Esquire and Gerard E. Harper, Esquire, of Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York, for defendants.

JACOBS, *Vice-Chancellor*

On July 24, 1987, plaintiff Ira Barsky ("Barsky"), a shareholder of Horsehead Industries, Inc. ("Horsehead") and its affiliate Pony Industries, Inc. ("Pony"), brought this action against Horsehead, Pony, and their officers and directors. In his complaint Barsky seeks to enforce a Settlement Agreement entered into among Barsky, Horsehead, and Pony on December 11, 1986 ("the December Settlement Agreement"). Under challenge is a transaction whereby (i) Horsehead would spin-off to its shareholders, Horsehead's stock interest in a wholly owned subsidiary named Horsehead Resources Development, Inc. ("HRD"), and (ii) after that spin-off (the "HRD Spin-off"), there would occur an initial public offering of a portion of HRD's shares. In this action Barsky seeks an adjudication that under the December Settlement Agreement, no public offering of HRD stock can go forward unless the HRD Spin-off has first occurred. He also seeks an injunction against the public offering of HRD stock that the defendants propose to carry out without having first effected the HRD Spin-off.

On August 10, 1987 the defendants moved to dismiss the complaint for failure to state a claim upon which relief can be granted. This is the decision of the Court, following briefing and oral argument, on the defendants' dismissal motion.

I.

[1] On a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, the well-pleaded factual

allegations of the complaint are taken as admitted, with all legitimate inferences being construed in the plaintiff's favor. *Margolies v. Pope & Talbot, Inc.*, Del. Ch., C. A. No. 8244, Hartnett, V.C. (December 23, 1986); *In Re Sea-Land Corp. Shareholders' Litigation*, Del. Ch., C. A. No. 8453, Jacobs, V.C. (May 22, 1987). Applying that test to the complaint here, I find the pertinent facts to be as follows.

Plaintiff Barsky is one of the founders of Horsehead and Pony. As the owner of 13,500 shares (about 13%) of Horsehead's common stock and of 14,368 shares (about 14%) of Pony's common stock, Barsky is the largest investor in both corporations.

Horsehead and Pony are Delaware corporations that are headquartered in New York and involved primarily in the manufacture and sale of diversified industrial products. Horsehead and Pony each have 103,269 shares of common stock issued and outstanding. Those shares are not publicly traded and are owned by 37 and 20 shareholders of record, respectively. Horsehead and Pony have identical directors and officers.

Since 1981, Horsehead has grown significantly in revenues and profitability due, in large part, to its acquisition strategy. In early 1986, Horsehead adopted a plan to reorganize into several affiliated corporations (the "Reorganaization"), pursuant to which Horsehead was to spin-off its HRD stock to its (Horsehead's) shareholders, and thereafter HRD would make an initial public offering of a portion of its shares.

Also as part of the Reorganization, Pony was organized as a separate company to exploit an opportunity for Horsehead to acquire certain assets and businesses. Pony's stock was offered to Horsehead's stockholders on a *pro rata* basis in proportion to their holdings of Horsehead stock.

When Horsehead began to put the Reorganization into effect, Barsky's relationship with defendant William E. Flaherty (the Chief Executive Officer of both companies) had deteriorated significantly, due to certain various disagreements. Although Barsky had been a founder of Horsehead and had played a significant role in negotiating and structuring the acquisition of Pony's assets, he was unwilling to make a further financial commitment to an illiquid investment in Pony, since that would require his continued association with Mr. Flaherty.

Barsky's refusal to invest in Pony caused Horsehead difficulties in arranging financing to acquire the Pony assets. To induce Barsky to invest in Pony and to remain a director and officer of the Horsehead group, Horsehead and Barsky entered into an employment

agreement on October 14, 1986 (the "October Employment Agreement"). The October Employment Agreement reaffirmed the three-year term of an earlier employment contract and provided, among other things, that Barsky would subscribe *pro rata* to Pony's stock in proportion to his percentage ownership in Horsehead. In exchange, Barsky received an option to "put" a portion of his Horsehead stock to Horsehead on certain terms and conditions. The terms of the October Employment Agreement, including the "put" option it contained, were the inducement for Barsky's agreement to purchase 14% of Pony's outstanding shares.

On November 19, 1986, one month later, Horsehead allegedly breached the October Employment Agreement. Defendants Flaherty, Tinkham Veale II and David N. Judelson, in their respective capacities as members of Horsehead's senior management, informed Barsky that he had been fired and ordered him to vacate his office and the company's premises. Mr. Flaherty also allegedly threatened to "kill" several transactions favorable to Horsehead and its stockholders—including the HRD Spin-off—unless Barsky acceded to this arrangement. In response, Barsky sued Horsehead and certain of its directors for specific performance of the October Employment Agreement and for damages.

Confronted with this litigation, the defendants "backed down" and on December 11, 1986, caused Horsehead and Pony to enter into a new agreement with Barsky—the December Settlement Agreement. The December Settlement Agreement, which superseded the October Employment Agreement, provided that Barsky would: (a) dismiss his litigation, (b) resign as a director and officer of the Horsehead companies, (c) receive payment of certain expenses and employment benefits, and (d) have the right to "put" up to $4 million worth of his Horsehead stock to Horsehead at net book value, (as defined in the Agreement) subject to certain terms and conditions[1]

1. The December Settlement Agreement provides that if the Public Offering (as defined in that Agreement) is effectuated prior to February 1988, then the Put Option must be exercised, if at all, during the 30-day period beginning on February 14, 1988. If, however, the Public Offering has not occurred on or before February 14, 1988, then the Put Option must be exercised, if at all, during the period beginning February 14, 1988, and ending 30 days after the Public Offering but not later than February 15, 1993. If a Public Offering does not occur before February 15, 1993, then the Put Option, if not previously exercised, terminates on that date. As alleged by Mr. Barsky, "Public Offering" is defined in the December Settlement Agreement as "the offering or any initial public offering of HRD. . .[immediately prior to which]

(the "Put Option"). In addition, the contracting parties exchanged general releases.

Barsky alleges that the December Settlement Agreement explicitly contemplates both the HRD Spin-off and a public offering of HRD. He further alleges that a significant portion of the consideration flowing to him in that Agreement was the defendants' promise to effectuate the public offering of HRD after the HRD Spin-off to Horsehead's stockholders.

Immediately after Barsky resigned, the relationship among the parties deteriorated even further. The management directors of Horsehead imposed a "gag" rule, prohibiting all private communications on matters concerning the Horsehead companies between Board members and stockholders. A Horsehead director, Mr. Ray B. Mundt, told Barsky that the "gag" rule was specifically directed at him. Also, the individual defendants, allegedly in violation of 8 *Del. C.* §220, refused Barsky access to corporate books and records that he needed to solicit proxies in opposition to certain management proposals, thereby compelling him to obtain an order of this Court to enforce his statutory right of inspection.

Thereafter, in proxy statements dated June 8, 1987, the defendants announced that they proposed to submit to their shareholders for approval certain "transactions with a management company" at a joint stockholders meeting of Horsehead and Pony scheduled for July 7, 1987. The management company proposal would involve the formation of a new company, between 75% and 100% of the stock of which would be owned by the individual defendants and Mr. Mundt. The individual defendants were to be directors of the management company, and Messrs. Flaherty and Carpenter would be officers. The defendants would then cause the Horsehead companies to contract to pay alleged grossly inflated fees and charges to the management company for services currently being performed by Horsehead employees. It is alleged that this proposal amounted to a scheme to divert a substantial portion of the profits belonging to the Horsehead companies and their stockholders into the management company for the sole benefit of the individual defendants. Barsky

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all of the stock of HRD now held by Horsehead will be distributed to the stockholders of Horsehead."

To secure payment of the Put Option price, the December Settlement Agreement also required Horsehead to obtain an irrevocable stand-by letter of credit designating Mr. Barsky as the beneficiary.

concluded that that proposal was contrary to the best interests of the Horsehead companies and their stockholders.

Shortly after, the announcement of the management company proposal, Barsky met with Horsehead's representatives. At that meeting defendant Judelson advised Barsky that Horsehead's Board would not consummate the HRD Spin-off, unless the Board had first obtained a Revenue Ruling from the Internal Revenue Service ("IRS") that the HRD Spin-off would not be a taxable event. Mr. Judelson also informed Barsky that the IRS would not provide such a Revenue Ruling, unless Barsky either exercised his Put Option before any spin-off of HRD, or waived the Put Option altogether. As a further condition to effecting the HRD Spin-off, defendant Judelson demanded that Barsky agree not to sue any of the defendants for any reason for a period of seven years.

Barsky refused to accede to these demands, because of the financial injury to him if he were forced to "put" his shares before the HRD Spin-off. In such a situation, Barsky alleges, he would have to "put" substantially more Horsehead shares than would be the case if the Put Option were exercised after the HRD Spin-off, because (he claims) the net book value of those shares (net book value being the contractual basis for valuing the shares to be "put") would significantly increase as a result of the HRD Spin-off. By prematurely exercising the Put Option, Barsky would also lose any enhancement of book value that would result from Horsehead's accumulation of additional profits in the interim, as well as the HRD shares he would receive in the HRD Spin-off. Those potential injuries are said to be no less than $4 million dollars. Barsky advised Judelson that he would not prematurely exercise his Put Option, unless he were fairly compensated for the resulting losses, but the defendants refused to negotiate a premature exercise of the Put Option on that basis.

Barsky also told the defendants that he opposed the management company proposal and that he intended to communicate the basis for his opposition to Horsehead's stockholders. After hearing Barsky's objections to the management company proposal, Mr. Mundt later advised the Horsehead Board that he would no longer support that proposal. Barsky was later advised that the Board intended to withdraw the management company proposal, but also that the Board had decided that Horsehead would not spin off its HRD shares to its (Horsehead's) stockholders. Instead, Horsehead would cause a public offering of a minority interest in HRD (the "HRD Direct

Offering") to take place without any spin-off, and would retain for itself the majority stock interest in HRD.

On and after June 24, 1987, the defendants disclosed to Horsehead's stockholders in a revised and supplemented proxy statement that the Reorganization, including the HRD Spin-off, had been abandoned, for the stated reasons that (i) Barsky's refusal to exercise his Put Option prematurely (or waive it altogether) prevented the defendants from obtaining an IRS Revenue Ruling that the HRD Spin-off would not be a taxable event, and (ii) Barsky opposed the management company proposal, without which (defendants claimed) the Reorganization would not be feasible.

Barsky alleges that the defendants' claimed reasons for abandoning the HRD Spin-off are a sham: the Reorganization was approved approximately a year ago, yet only within the past few months did the defendants decide that they would not effectuate the Reorganization without first obtaining a Revenue Ruling, and not until June, 1987, did the defendants decide that the transaction would not be feasible without the management company. Also, the defendants rejected Barsky's offer to exercise the Put Option prematurely (which would have solved any supposed tax problem) if he were fairly compensated for any resulting losses. Barsky alleges that the true reason why the management company proposal was abandoned is that several stockholders, including Mr. Mundt, had opposed the scheme, and that the defendants' true motive in abandoning the Reorganization was to pressure him into forfeiting without compensation a substantial portion of the value created by the Put Option.

* * *

Based upon the foregoing pleaded facts, Barsky alleges that the defendants' abandonment of the HRD Spin-off constitutes a breach of the December Settlement Agreement. As a consequence, Barsky seeks an injunction prohibiting the HRD Direct Offering on the ground that under the December Settlement Agreement, no public offering of HRD can occur without the HRD Spin-off having first taken place. Barsky also seeks a declaratory judgment that the HRD Direct Offering is not a "Public Offering" within the meaning of the December Settlement Agreement, and that as a consequence, the HRD Direct Offering would not trigger Barsky's obligation to exercise the Put Option within 30 days under the "exercise" provisions of that Agreement. See FN 1, *supra*.

II.

[2-3] The standard on a motion to dismiss pursuant to Court of Chancery Rule 12b(6) is well-established. As the Supreme Court has stated in *Rabkin v. Philip A. Hunt Chemical Corp.*, Del. Supr., 498 A.2d 1099 (1985), at 1104:

> On a motion to dismiss for failure to state a claim it must appear with a reasonable certainty that a plaintiff would not be entitled to the relief sought under any set of facts which could be proven to support the action. *Harman v. Masoneilan International. Inc.*, Del. Supr., 442 A.2d 487, 502 (1982). A complaint need only give general notice of the claim asserted and will not be dismissed unless it is clearly without merit, either as a matter of law or fact. *Michelson v. Duncan*, Del. Supr., 407 A.2d 211, 217 (1979); *Delaware State Troopers Lodge, etc. v. O'Rourke*, Del. Ch., 403 A.2d 1109, 1110 (1979).

The pivotal issue presented is whether the complaint states a valid claim that defendants have breached the December Settlement Agreement by attempting a public offering of HRD stock without having first effected the HRD Spin-off. The parties agree that that question is governed by New York law.

The defendants' motion to dismiss rests upon their contention that the December Settlement Agreement explicitly provides that Horsehead is not obligated to effect the HRD Spin-off. The defendants' argument may be simply stated. They contend that the only provision in the December Settlement Agreement that arguably expresses a commitment to conduct the HRD Spin-off is the following language found in the Recitals:

> In May, 1986, Horsehead formed Horsehead Resource Development Company, Inc., a Delaware corporation ("HRD"), for the purpose of acquiring (the "HRD Acquisition") certain assets and the businesses of the Horsehead Resource Recovery Division of Horsehead and the Industrial Products Division of Horsehead's subsidiary GLC. *HRD is preparing to offer a portion of its common stock to the public, and immediately prior to the offering or any initial public offering of HRD (the "Public Offering"), all of the stock of HRD now held by Horsehead will be distributed to the stockholders of Horsehead (the "Spinoff").* (Emphasis added.)

The defendants then argue that to the extent that the above language suggests a contractual commitment, its legal force is expressly negated by Paragraph 16(a), which provides:

> (a) *Nothing in this Agreement shall be construed as a covenant that Horsehead or Pony will or will cause any proposed corporate transaction referred to in the Recitals or in Section to be effected, it being understood that the affairs of Pony and Horsehead shall be governed by their respective boards of directors and officers.* (Emphasis added.)

Since the "proposed corporate transactions referred to in the Recitals" include the HRD Spin-off and a public offering of HRD stock, defendants urge that the only logical meaning of Paragraph 16(a) is that they are not contractually obligated to conduct the HRD Spin-off in advance of any public offering of HRD stock. Accordingly, they conclude, Barsky has failed to state a cognizable claim under the December Settlement Agreement. In opposition, Barsky advances several arguments to the contrary.

Before addressing the parties' respective contentions, it is helpful first to discuss certain basic propositions of fact and law upon which my analysis of those contentions is premised.

[4-6] First, in New York, as elsewhere, a contract must "be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed." *Breed v. Ins. Co. of North America*, N.Y.Ct.App., 385 N.E.2d 1280, 1282 (1978) (quoting *Morlee Sales Corp. v. Manufacturers Trust Co.*, N.Y.Ct.App., 172 N.E.2d 280, 282 (1961)). Where the contract is unambiguous and plain on its face, then the parties' intent will be determined from the plain language of the contract within its four corners without regard to extrinsic evidence of intent. *Teitelbaum Holdings, Ltd. v. Gold*, N.Y.Ct.App. 396 N.E.2d 1029, 1032 (1979); *West, Weir & Bartel, Inc. v. Mary Carter Paint Co.*, N.Y.Ct.App. 255 N.E.2d 709, 711 (1969); *Bethlehem Steel Co. v. Turner Constr. Co.*, N.Y.Ct.App., 141 N.E.2d 590, 593 (1957). Where, however, the contract is ambiguous and requires interpretation, the Court may give due consideration to the circumstances surrounding its execution and to the parties' purposes in making the agreement. *Aron v. Gilman*, N.Y.Ct.App., 128 N.E.2d 284, 288 (1955); *Cromwell Towers Redevelopment Co. v. Yonkers*, N.Y.Ct.App., 359 N.E.2d 333, 337 (1976).

Second, the well-pleaded allegations of the complaint (which for present purposes must be taken as true) clearly indicate that the contracting parties intended that any public offering of HRD would

be preceded by the HRD Spin-off. The complaint so alleges, and the defendants' most recent proxy statement to Horsehead and Pony shareholders—which is incorporated into the complaint by reference—virtually admits as much.[2]

[7] Third, since a contract must be construed to give effect to the parties' actual intent and since the parties actually intended that the HRD Spin-off would precede any public offering of HRD, it follows that (i) if the December Settlement Agreement is ambiguous and therefore amenable to interpretation, that would require that the Agreement be construed (for present purposes) in plaintiff's favor, and (ii) only if that Agreement unambiguously precludes and negates the plaintiff's argued-for interpretation can the defendants' construction be adopted as a matter of law.

The specific legal question thus becomes whether the December Settlement Agreement so clearly and unambiguously negates any obligation on defendants' part to conduct the HRD Spin-off, that the Court is required as a matter of law to hold that the HRD Spin-off is not a condition precedent to a public offering of HRD. For the reasons now discussed, that question must be answered in the negative.

III.

A.

As a starting point, Barsky correctly points out that the Recital provisions of the December Settlement Agreement clearly evidence that the parties intended for the HRD Spin-off to be effected before any public offering of HRD takes place. The Recital language, standing alone, is unambiguous on that point.

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2. The proxy statement says:

Footnote N (last paragraph) of the enclosed financial statements references a Settlement Agreement dated December 11, 1986, with Mr. Barsky wherein the Company agreed to give Mr. Barsky the right to put up to $4 million of his Company Common Stock to the Company for payment by the Company of the book value of the shares tendered. *Mr. Barsky negotiated for an exercise that would follow the proposed spinoff to the Horsehead Shareholders of the common stock of Horsehead Resource Development Company, Inc. ("HRD") so that he would have already received 100% of his prorated allocation of HRD stock based upon his total holdings of the Company's Common Stock.* At that time he would have the right to put back to the Company the percentage of his Company Common Stock equal to the aggregate exercise price he elects to receive (up to $4 million) divided by the book value of the Company. (Emphasis added.)

However, the Recital language does not exist in isolation. As previously noted, Paragraph 16(a) of the December Settlement Agreement provides that:

> Nothing in this Agreement shall be construed as a covenant that Horsehead or Pony will or will cause any proposed corporate transaction referred to in the Recitals or in Section _____ to be effected, it being understood that the affairs of Pony and Horsehead shall be governed by their respective boards of directors and officers.

To reiterate, the defendants contend that Paragraph 16(a) unambiguously negates whatever obligation is arguably created by the Recital, and that all analysis must necessarily end at that point. In response, Barsky argues that the defendants' position claims too much for Paragraph 16(a) and ignores that Paragraph's critical qualifying language, *namely*, the following clause:

> ". . .it being understood that the affairs of Pony and Horsehead shall be governed by their respective boards of directors and officers."

That language, Barsky argues, expresses the parties' recognition that the directors of the Horsehead companies had fiduciary duties to their stockholders and could not absolutely covenant, consistent with those duties, to consummate the HRD Spin-off regardless of whatever circumstances might arise in the future. From this it does not follow, however, that Paragraph 16(a) can fairly be read to say that the parties intended that no obligation would exist at all or that the defendants were free capriciously to abandon the HRD Spin-off. Barsky contends that Paragraph 16(a) must be construed as a standard "fiduciary out" clause, *i.e.*, one that requires Horsehead's Board of Directors to consummate the HRD Spin-off, unless the Board determines, in a good faith exercise of its business judgment, that the transaction would be contrary to the best interests of Horsehead and its stockholders. Barsky contends that to accept the defendants' construction would deprive him of an essential item of consideration for which he bargained.

Barsky contends that Horsehead's Board bid not make any such good faith business judgment in this case. He claims that not only was the defendants' decision to abandon the Spin-off not the product of a good faith business judgment, but also it was purposefully intended to deprive Barsky of valuable rights for which he had contracted, under the pretext of supposed business reasons that were,

in fact, a sham. Those allegations form a valid basis, Barsky argues, for stating a valid legal claim under the December Settlement Agreement.

In response, the defendants argue that the "fiduciary out" interpretation of Paragraph 16(a) is an afterthought that is inconsistent with that Paragraph, the plain language of which disavows any duty to effect the HRD Spin-off. Defendants insist, moreover, that even if the "fiduciary out" interpretation were valid, the complaint nonetheless fails to state a claim, because it alleges (or fails to allege) facts that entitle Horsehead's board to the full presumption of the business judgment rule, *i.e.*, the absence of any averments that the Board will personally benefit from the decision to abandon the Spin-off, and the fact that the Board did have a business reason (the need for an IRS ruling that the transaction would be tax free) for its decision.

[8] Having considered the parties positions, I conclude that Paragraph 16(a) is ambiguous, and is therefore not a sufficient basis for adopting the defendants' interpretation of the December Settlement Agreement as a matter of law. To credit the defendants' construction of Paragraph 16(a) would require reading out of the Agreement altogether the language "it being understood that the affairs of Pony and Horsehead shall be governed by their respective boards of directors and officers." If the intent of paragraph 16(a) were to negate any legal obligation to effect the HRD Spin-off, then the quoted language adds nothing and indeed could have been left out altogether. An interpretation of that quoted language that necessarily reduces it to surplusage would, however, run counter to the rule of construction that all parts of a contract must be given meaning where possible. "That interpretation is favored which will make every part of a contract effective." *Rentways, Inc. v. O'Neill Milk & Cream Co.*, N.Y.Ct.App., 126 N.E.2d 271, 273 (1955), (quoting *Fleischman v. Furgueson*, 119 N.E. 400, 401). See also, *e.g.*, *Corhill Corp. v. S.D. Plants, Inc*, N.Y.Ct.App., 176 N.E.2d 37, 38 (1961).

[9] When the parties agreed that "the affairs of Pony and Horsehead will be governed by their respective boards of directors and officers," clearly they must have had something in mind. Otherwise, that language, if read literally, would state nothing more than a truism. Barsky's interpretation is a reasonable alternative explanation of what the parties might have intended. The coexistence of two reasonable but different interpretations is sufficient to establish the ambiguity of Paragraph 16(a). That ambiguity cannot be resolved on a motion to dismiss.

The defendants' interpretation of Paragraph 16(a) as being the only legally permissible construction must be rejected for another reason. The December Settlement Agreement is anything but a model of clear draftsmanship. It contains handwritten interlineations and changes on many of its pages. In one case practically an entire page was rewritten in handwriting. This suggests that the contracting parties were unhappy with the clarity of the draftsmanship and felt it necessary to make handwritten changes to what had apparently been presented to them as the final draft. That draft, as amended by the handwritten changes, was never reduced to a newly-revised typewritten final version. Instead, it was initialed and executed in its present form, handwriting and all. Given the magnitude of the dollar values involved, for the parties to act in that fashion suggests that they were in an extraordinary hurry to execute an agreement, even if the result was a writing that fell short of being a precise, clear expression of their intent. At the pleading stage it would be imprudent to accord to inartfully drafted contract language the precise legal meaning that the defendants ask the Court to attribute to it.

As previously indicated, the plaintiff's "fiduciary out" interpretation, although perhaps not the only possible meaning of Paragraph 16(a), is certainly a reasonable construction. That is all that need be established on a motion to dismiss. Under the "fiduciary out" interpretation, the Horsehead Board is free to abandon the HRD Spin-off only if it makes good faith business judgment that the Spin-off would not be in the best interests of HRD shareholders. Barsky has alleged that the Board did not make such a good faith business judgment, but, rather, acted intentionally to injure Barsky. While defendants vehemently deny that that was their purpose, Barsky's allegations are legally sufficient to overcome a motion to dismiss.

B.

Apart from and in addition to the Recitals, the December Settlement Agreement contains a second provision that independently supports Barsky's contract claim that no public offering can be effected without a prior HRD Spin-off, namely, Paragraph 8(c). Paragraph 8 sets forth the terms and conditions of Barsky's Put Option. It obligates Horsehead to purchase, at Barsky's election, up to $4 million of his shares at their adjusted net book value. If the Put Option is exercised after a "Public Offering" (a defined term in the Agreement), the "net book value" of Barsky's Horsehead

shares is determined by a formula specified in paragraph 8(c), which states that:

> (c) If the Option is exercised after a Public Offering, *net book value shall be net book value at December 31, 1987 adjusted for the net after-tax effect to the gain realized by Horsehead and its consolidated subsidiaries in the HRD Acquisition, the financial recognition of which is deferred until the Spinoff.* The net after-tax effect shall be established by a certificate of Horsehead's chief financial officer as confirmed by Horsehead's independent certified public accountants setting forth the applicable calculations and assumptions. (Emphasis added.)[3]

Barsky contends that paragraph 8(c) evidences that the HRD Spin-off is a precondition for the calculation of net book value where the Put Option is exercised after a Public Offering. Otherwise, he says, the prescribed method of calculation would not work, because adjusting December 31, 1987 book value for the net after-tax effect of the gain realized by Horsehead in the HRD Acquisition—"the financial recognition of which is deferred until the Spin-off"—is an essential element of the net book value computation.

The defendants argue that Barsky's reading of Paragraph 8(c) is incorrect, because net book value under Paragraph 8(c) can be computed even if no Spin-off actually occurs. The reason is that Paragraph 8(c) is intended to assure that in the event of a public offering, Barsky will receive the benefit of a net book value computation that includes the gain to Horsehead from the 1986 acquisition of HRD's assets. Because HRD was a wholly owned subsidiary of Horsehead when the gain was actually incurred in 1986, that gain could not be reflected on Horsehead's balance sheet and, hence, was not included in its book value. The Spin-off, by eliminating HRD as a subsidiary would enable Horsehead to recognize that gain.

Defendants insist that for Paragraph 8(c) to operate, it is not necessary that a Spin-off actually take place, because the amount of the deferred gain from the 1986 HRD Acquisition is already known and established. To "adjust" the December 31, 1987 book value by adding to it the deferred HRD gain requires little more than an arithmetic exercise that in no way depends upon the HRD Spin-off

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3. "The "HRD Acquisition" is defined in the December Settlement Agreement as the formation of HRD in May, 1986 for the purpose of acquiring certain assets and businesses owned and operated by Horsehead and its subsidiaries.

having actually occurred. Accordingly, defendants argue, Paragraph 8(c) cannot evidence a contractual intent that the Spin-off is a condition precedent to a public offering of HRD.

[10] Defendants' interpretation of Paragraph 8(c) is both cogent and reasonable. At a trial it is conceivable that that interpretation might carry the day. But the issue presented here, however, is whether at the pleading stage the defendants' proffered construction of the contract is the only reasonable construction as a matter of law. I conclude that it is not. At the very least, Paragraph 8(c) is ambiguous, and Barsky's proffered interpretation of that Paragraph (particularly in light of its less-than-precise draftsmanship) is also reasonable. Again, the coexistence of these two reasonable interpretations is sufficient to overcome a motion to dismiss.

* * *

Because the disputed contract has been found to be ambiguous in the respects previously discussed, it is unnecessary to address the plaintiff's remaining contentions. The defendants' motion to dismiss is denied. IT IS SO ORDERED.

BLINDER, ROBINSON & CO. v. BRUTON

No. 9096

Court of Chancery of the State of Delaware, New Castle

July 17, 1987

Plaintiff, a publicly-held national securities broker-dealer, sought judicial review of an order of the defendant, Delaware Securities Commissioner, suspending its registration for a period of two years. Plaintiff also sought a stay of the effectiveness of the commissioner's suspension order. Plaintiff alleged the notice for the suspension proceeding was materially deficient; the order by its commissioner was

deficient because public interest did not require the action be taken; there was no statutory basis for the discipline given; a detailed examination of the basis asserted for the order shows there was no statutory authority to enter the order. The court of chancery, per Chancellor Allen, held plaintiff established a reasonable likelihood of ultimate success; there was no support for the disciplinary action implemented by the commissioner; there was no statutory basis for the action taken; and plaintiff's application for a stay of the commissioner's suspension order will be granted.

1. Securities Regulation ⟹ 270

Commissioner is required to access not only the existence of an order from a sister state, but requires him, as well, to conclude that the facts underlying such order would constitute a basis for the order he proposes to enter had they occurred within his jurisdiction. DEL. CODE ANN. tit. 6, § 7316(a)(6)(ii) (1983).

2. Securities Regulation ⟹ 247, 260, 270

Interpretation of Del. Code Ann. § 7316(a)(6) does not hamper the operation of the securities commissioner or impair to any degree his ability to protect the public interest in Delaware. Commissioner is free to institute administrative proceedings to revoke or suspend a broker-dealer's registration upon proof, satisfactory to the commissioner, that grounds for such an action exist.

3. Securities Regulation ⟹ 270

Securities Commissioners may rely on administrative actions in other states rather than institute their own administrative action inquiring into the underlying facts, although they are required to wait until such an action is final under the other state's law.

4. Securities Regulation ⟹ 260, 272

All filings with the Securities Commissioner are required to be true and complete. DEL. CODE ANN. tit. 6, § 7316(a)(1) (1983).

5. Securities Regulation ⟹ 260, 272

The entry of an injunction against a registered broker-dealer which enjoins such person from engaging in or continuing any conduct or practice involving any aspect of the securities business is

a statutory basis for revocation or suspension. DEL. CODE ANN. tit. 6, § 7316(a)(4) (1983).

6. Securities Regulation ⟹ 260, 272

The Securities Commissioner may not institute a suspension or revocation proceeding on the basis of fact or transaction known to him when registration became effective unless the proceeding is instituted within the next 30 days. DEL. CODE ANN. tit. 6, § 7316(a) (1983).

7. Securities Regulation ⟹ 270

The Securities Commissioner is not required to defer revocation or suspension proceedings based solely upon the entry of an order in another state while that order is stayed in such other state. DEL. CODE ANN. tit. 6, § 7316(a)(4) (1983).

8. Securities Regulation ⟹ 270

In no case shall the Attorney General or the Commissioner, or any person designated by them, incur any official or personal liability by instituting an injunction or any judicial proceeding or administrative order or proceeding. DEL. CODE ANN. tit. 6, § 7328 (1983).

9. Securities Regulation ⟹ 270

Any damages that might be suffered by plaintiff as a result of a suspension order are irreparable injury as that concept is understood by the law.

10. Securities Regulation ⟹ 260, 270, 275

The interest of the public that securities transactions be carried out with compliance to the act is very important. Failure to comply with the act would be enough to deny a stay even where the plaintiff has shown a reasonable probability of ultimate success and imminent threat of irreparable injury.

11. Securities Regulation ⟹ 270, 275

When evaluating if the securities transaction is in compliance with the act, courts grant deference to the judgment of the Securities Commissioner to see if the public interest is served.

12. Securities Regulation ⟹ 270, 275

Deference is outweighed when the administrative action taken is solely predicated on judicial and administrative orders in other jurisdictions, some which are stayed for appeals purposes or others which are stale.

Samuel A. Nolen, Esquire, William W. Bowser, Esquire, and Robert W. Whetzel, Esquire, of Richards, Layton & Finger, Wilmington, Delaware, and Hugh H. Makens, Esquire, of Warner, Norcross & Judd, Grand Rapids, Michigan, of counsel, for plaintiff.

Michael F. Foster, Esquire, State Solicitor, Department of Justice, for defendant.

ALLEN, *Chancellor*

In this action plaintiff, a broker-dealer registered under the Delaware Securities Act ("the Act"), 6 *Del.C.* §7300 *et seq.*, seeks judicial review of an order of the Delaware Securities Commissioner suspending its registration for a period of two years. Without such registration, plaintiff would be precluded from brokering securities in this state. Defendant is the Securities Commissioner of the State of Delaware. Jurisdiction over this matter is conferred on this court by section 7324 of the Act.

Pending is an application by plaintiff for a stay of the effectiveness of the Commissioner's suspension order. Unless stayed, that order will be effective on July 18, 1987. Subsection (b) of section 7324 specifically recognizes the authority of the court to enter an order of the kind sought.

In deciding whether the provisional relief sought should be granted, I apply the test typically employed by this court in granting or withholding preliminary relief. That test requires the court to make a preliminary assessment of the likelihood that plaintiff will ultimately prevail on the merits of the complaint; to assess the harm likely to befall plaintiff in the interim if the relief sought is not

granted; and to weigh the likelihood and extent of injury that might befall, in this case, the public should the stay be improvidently granted. *Shields v. Shields*, Del.Ch., 498 A.2d 161 (1985). *See Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958)(applying such test to application to stay).[1] For the reasons that follow, I conclude that plaintiff has established a reasonable likelihood of ultimate success in this action, that it is likely to suffer irreparable injury should the current application be denied and that, on the record established before the Securities Commissioner and on this motion, no substantial threat to the relevant public interest is presented by the grant of the stay sought that outweighs the threat to plaintiff or otherwise counsels withholding the provisional remedy in these circumstances.

I.

Plaintiff, Blinder, Robinson & Co., Inc., is a publicly-held national securities broker-dealer with 61 offices throughout the United States, including an office in New Castle, Delaware. On January 23, 1987, defendant Bruton, in his capacity as Securities Commissioner, issued an order commencing proceedings to determine whether grounds existed to suspend or revoke the broker-dealer registration of plaintiff pursuant to section 7316 of the Act. The order, in effect, alleged that plaintiff had an extensive history of regulatory proceedings in various states of the United States. The gist of the order was to commence a proceeding to determine if those actions in other states constituted a basis authorizing and warranting the revocation or suspension of plaintiff's registration in Delaware. No conduct by plaintiff or its agents in Delaware nor any transactions with Delaware residents was alleged as violating Delaware law. The order set the matter down for a hearing on February 24, 1987.

The evidentiary hearing that commenced on February 24, 1987 was recessed at the end of that day and recommenced on March 24, 1987. At the hearing, the Commissioner heard evidence from three witnesses for the State and several for Blinder, Robinson. One of the State's witnesses, a former employee in plaintiff's New Jersey office, offered testimony concerning questionable practices custom-

1. In so stating the legal test, I reject plaintiff's invitation to employ the somewhat less demanding test set forth in the Delaware Administrative Procedure Act, 29 *Del.C.* §10144, as that act does not apply to proceedings before the Delaware State Securities Commissioner. *See* 29 *Del.C.* §10161.

arily engaged in by plaintiff's employees. Blinder, Robinson offered testimony tending to rebut these assertions and sought to portray that witness as a disgruntled former employee. An extensive documentary record relating to or disclosing administrative and judicial proceedings in other states was also compiled.

Following the close of the evidence, the Securities Commissioner, who under the Act is appointed by the Attorney General and holds the office of Deputy Attorney General, asked counsel for plaintiff and the Deputy Attorney General representing the State's interest to comment whether, on the evidence disclosed at the hearing, the Commissioner had authority under 6 *Del.C.* §7316 to revoke or suspend respondent's registration as a broker-dealer. The Deputy Attorney General who presented the case against plaintiff wrote to the Commissioner on April 6, 1987 and concluded that ". . .I find on the facts herein no statutory 'trigger' which allows discipline by suspension or revocation within the Securities Act. . . ."

The Securities Commissioner did not agree with this finding by the Deputy Attorney General and on May 19, 1987 issued an order suspending the broker-dealer registration of Blinder, Robinson. In so doing, he relied upon no act that Blinder, Robinson or any of its employees had done in Delaware or any transaction it had accomplished on behalf of any Delaware resident, but, rather, relied upon five instances in which plaintiff had been the subject of administrative or court action in other jurisdictions. Specifically, the Securities Commissioner relied upon a Colorado District Court injunction against plaintiff and against Mr. Meyer Blinder, a controlling person of plaintiff; an injunction consented to by plaintiff entered in the state of Wisconsin; an order of the State of Nebraska denying registration to Blinder, Robinson as a broker-dealer; and an order of the Securities Exchange Commission barring Meyer Blinder from participation in the work of plaintiff. The Commissioner concluded that the existence of these orders and the way in which several of them were reported in Delaware constituted a basis under various subparagraphs of section 7316(a) authorizing him to suspend the registration of plaintiff and he did so by order of May 19, 1987.

On July 2, 1987, plaintiff filed its complaint seeking, pursuant to section 7324 of the Act, judicial review of the suspension order. Promptly thereafter plaintiff sought a stay of the effectiveness of that order pursuant to subsection (b) of that section. That matter has now been fully briefed and argued.

On the pending motion, plaintiff advances four theories in support of its assertion that it has established a probability of ultimate

success in this litigation. First, plaintiff claims that the notice of the administrative proceeding with which it was furnished was materially deficient and enforcement of the order entered would, as a result, deprive it of due process of law. Specifically, it argues that the notice did not inform it that claimed violations of subsections (a)(1) and (a)(4) of section 7316 were involved. Secondly, plaintiff contends that the order entered is invalid because the Commissioner made no finding that the public interest required the action he took or, alternatively, that there was no competent evidence to support any such finding. Thirdly, it is argued that the Commissioner is bound by the determination of the Deputy Attorney General representing the State's interest in the hearing to the effect that there was no statutory basis for discipline shown at the hearing and that, in such circumstances, it would deprive plaintiff of due process of law to permit the order entered to stand. Lastly, plaintiff contends that, in all events, a detailed examination of the basis asserted for the entry of the order shows in each case that there is, as a matter of law, no statutory authority in this instance to enter the order that the Commissioner entered.

II.

I turn first to an assessment of the probability of the success of these theories asserted by plaintiff and, in doing so, pass over the first three theories and turn to the substantive theory relating to the correctness of the Deputy Attorney General's conclusion at the close of the hearing that the evidence does not establish the statutory predicate for the action taken. I conclude that it is more likely than not that that assessment was correct. In addressing this subject, I will treat each of the non-Delaware actions upon which the Delaware order rests in turn.

A.

The first of these is an order issued by the Nebraska Bureau of Securities denying to plaintiff broker-dealer registration. This order is said to provide a basis under section 7316(a)(6) for withdrawal of plaintiff's registration in Delaware. Evaluation of this claim, along with several of the other matters to be discussed, will require focusing upon the language of that subsection.

Section 7316(a)(6) provides in relevant part as follows:

> (a) The Commissioner may by order deny, suspend or revoke any registration if he finds that the order is in the

public interest and that the applicant or registrant. . .:

* * *

(6) is the subject of an order entered within the past five years by the securities administrator of any state or by the Securities Exchange Commission denying or revoking registration as a broker-dealer. . .or is suspended or expelled from a national securities exchange or national securities association. . ., the effect of which action has not been stayed by appeal or otherwise; but (i) the Commissioner may not institute a revocation or suspension proceeding under subsection (a)(6) more than one year from the date of the order or action relied on and (ii) he may not enter an order under subsection (a)(6) on the basis of an order under any other state act unless the order was based on facts which would currently constitute a ground for an order under this section.

With respect to the Nebraska order, plaintiff contends it provides no statutory basis for the action taken for several reasons. First, it is asserted that there was no competent evidence of the Nebraska order in the record created by the Commissioner. The only record of any such order was a computer printout of a summary of administrative action taken and, it is contended, that record provided no competent evidence upon which the Commissioner could make a determination that any such order was "based on facts which would currently constitute a ground for an order under this section." Second, plaintiff argues that the Nebraska order is currently on appeal and, under the language of (a)(6)("the effect of which action has not been stayed by appeal or otherwise"), that order may not properly be the ground for action in Delaware while that appeal is pending.

[1] As to each of these arguments, I conclude that the plaintiff is likely to prevail at final hearing. With respect to the first, the statute plainly requires the Commissioner to assess not only the existence of an order from a sister state, but requires him, as well, to conclude that the facts underlying such order would constitute a basis, had they occurred within his jurisdiction, for the order he proposes to enter. 6 *Del.C.* §7316(a)(6)(ii). Here, the single page report (PX 2) that apparently supplies the entire record with respect to the Nebraska order, supplies no such basis. Concluding so, I need not treat plaintiff's argument that that information was inadmissible

hearsay and could not alone constitute an acceptable basis for the action taken.

Moreover, there is apparently no dispute between the parties that the Nebraska order is currently on appeal. I cannot read the clause "the effect of which action has not been stayed by appeal or otherwise" to relate only to the clause "is suspended or expelled from National Securities Exchange or National Securities Association," as the Commissioner urges. I can find no basis either in grammar or in the policy that caused this statutory language to be engrafted upon the Uniform State Securities Act to limit its effect as the Securities Commissioner would have me do. Rather, I interpret that clause as relating to any order covered by the language of subsection (a)(6) which precedes it.

B.

This latter point with respect to the Nebraska order applies equally to the SEC order which forms the second administrative action upon which the Commissioner rests his order of suspension. That order, insofar as it goes to plaintiff, has been stayed by the Securities Exchange Commission itself and that aspect of the SEC order directed to Meyer Blinder has been stayed by the District of Columbia Circuit Court of Appeals. Both of these orders remain non-final and, thus, under the language of subsection (a)(6) as I read it, they do not yet provide a basis for the Delaware Commissioner to take administrative action.

[2-3] This interpretation of the meaning of subsection (a)(6) does not in any respect hamper the operation of the Securities Commissioner or impair to any degree his ability to protect the public interest in Delaware. If any action by a registered broker-dealer constitutes a ground to revoke or suspend registration in this state, the Commissioner is always free to institute administrative proceedings to revoke such registration and, upon proof satisfactory to him that such ground has been shown, to do so. If, however, he chooses to rely instead upon administrative actions in other states rather than to institute his own administrative action inquiring into the underlying facts, it hardly seems unfair to require him to wait until such action is final under that other state's laws. At least that appears to be the theory of subsection (a)(6).

C.

[4-7] The third action outside of Delaware relied upon by the Commissioner was the action of a federal district court in Colorado which issued in 1982 two injunctions, one against Meyer Blinder and the other against plaintiff. These orders will be treated together. With respect to them, the Commissioner found that plaintiff violated

subsections (a)(1) and (a)(4) of section 7316. Subsection (a)(1) requires, in essence, all filings with the Commissioner to be true and complete. This section was allegedly violated because plaintiff failed to timely note on its "B/D" filing that the Supreme Court of the United States had denied certiorari once the court of appeals had affirmed the district court's grant of an injunction. Subsection (a)(4) makes the entry of an injunction against a registered broker-dealer which enjoins such person "from engaging in or continuing any conduct or practice involving any aspect of the securities business" a statutory basis for revocation or suspension.

I conclude that it is likely that neither of these bases will be sustained ultimately as an appropriate statutory basis for the order entered. For the reasons that follow, I conclude that the non-disclosure asserted cannot be regarded as "material" in the circumstances and, thus, cannot be regarded as a violation of subsection (a)(1), and I conclude that it is unlikely that the Commissioner's order will be upheld under (a)(4) because the injunctions are too stale. I premise that characterization of the orders upon the following language of section 7316(a):

> The Commissioner may not institute a suspension or revocation proceeding on the basis of fact or transaction known to him when registration became effective unless the proceeding is instituted within the next 30 days.

The Colorado injunctions were entered in 1982. It is asserted by plaintiff and not contested by defendant that they were first reported in plaintiff's 1982 filing, but were not noticed or apprehended by the Commissioner or his staff. Thus, these orders would apparently clearly not provide a basis for any appropriate disciplinary action in Delaware in light of the above-quoted language. Defendant, however, contends that the above-quoted time limit has not been violated because certiorari was not denied by the Supreme Court of the United States until 1985; the denial of certiorari was not reported until 1986; the denial of certiorari was important and not "known by him" until 1986 and it was, therefore, not until January, 1987 (when plaintiff's registration for that year became effective) that the 30-day period provided for began to run. The denial of certiorari was thought material "because it could have a bearing on the Commissioner's decision whether to initiate action under subsection (a)(4)."

I conclude that on final hearing this determination is likely to be found to be legally incorrect. As to the materiality point, it strains credulity beyond reason to suggest that if the entry of an injunction

by a federal district court and its affirmance on appeal does not cause the Commissioner to institute proceedings under section 7316(a)(4), a denial of certiorari could itself add a *material* element to the mix of facts upon which judgment is to be exercised. *See State of Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950). As to the subsection (a)(4) point, that provision, unlike subsection (a)(6), contains no language requiring the Commissioner to defer revocation or suspension proceedings based solely upon the entry of an order in another state while that order is stayed in such other state. Thus, proceedings in Delaware predicated upon subsection (a)(4) may, and under the general provisions of paragraph (a) must, be instituted no later than 30 days after the first registration date following disclosure to the Commissioner of the entry of a court injunction of the kind specified in subsection (a)(4). This was not done with respect to the Colorado injunction and I again conclude that the Deputy Attorney General present at the hearing was probably correct when he concluded that those orders provide no valid statutory "trigger" for the revocation.

D.

The last action by another state upon which the Commissioner rested his order was an August 7, 1985 injunction entered by the Circuit Court of Dane County, Wisconsin. (PX 3.) That injunction, which was entered pursuant to a stipulation and agreement by plaintiff to rescind certain stock purchases made by customers of Blinder while it was unregistered in Wisconsin, enjoined plaintiff from violating specific sections of the Wisconsin Securities Law. Thereafter, the State of Wisconsin permitted Blinder to register as a broker-dealer in that state. Blinder disclosed the entry of this injunction in its September, 1985 B/D filing in Delaware (PX 14) as follows:

> "Order" "State of Wisconsin"
> "Blue Sky Law violation. Settlement has been reached and rescission is being made."

This filing was found to violate subsection (a)(1) on the theory that a description of an injunction as an "order" is false or misleading.[2]

2. The Commissioner concluded following the hearing that "this injunction was described as an 'Order' repeatedly by Blinder, Robinson *to conceal that Wisconsin had entered an injunction* (Hubbard Testimony, Page 107-112)." [Emphasis added.] Yet,

In order to evaluate this view, one must consider the B/D form in which the disclosure was made. The instructions for that form do not specify that an injunction order is to be specifically identified as such. Question 7(a)(ix) to which the response in question was given requires the broker-dealer to state whether it has "been, within the past ten years, the subject of any cease and desist, desist and refrain, prohibition or similar order issued by the United States or any jurisdiction."

It may be material for the Commissioner to know whether "any cease and desist. . .or similar order. . ." entered against a broker-dealer in another jurisdiction was entered by a court or by an administrative agency (and given the apparently different treatment of stays under subparagraphs (a)(4) and (a)(6), I suppose it is material) but, if so, the filing document should request information relevant to that distinction. The information provided in September, 1985 with respect to the Wisconsin proceeding was, in my opinion, a fair and accurate response to the question asked on the form. It was neither misleading nor false. It, therefore, cannot, in my opinion, support disciplinary action under subparagraph (a)(1). Nor do I think it likely that on final hearing the court will conclude that subsection (a)(4), when applied to the Wisconsin consent order, offers a sound basis for the Commissioner's action. Given that plaintiff fairly disclosed the information relevant to the matter in its first (September, 1985) B/D filing following the entry of the order, I conclude that it is unlikely that administrative action commenced in January, 1987 was timely in light of the statutory requirements.

III.

Having concluded that plaintiff has established reasonable probability of ultimate success in this matter, I turn then to an evaluation of the threat that implementation of the Commissioner's order poses to plaintiff and to an evaluation of the public interest in this matter.

[8-9] If the suspension is wrongful because not authorized by the Act, it is clear that there will be no opportunity for plaintiff to

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when one reviews the cited record, one finds no testimony to support this finding and finds, indeed, the following statement by Hubbard:

Q. Do you believe that the description by Blinder Robinson constituted [a] deliberate attempt to defraud the State of Delaware?

A. I have no idea.

collect any damages that it may sustain as a result. Section 7328 of the Act provides in pertinent part as follows:

> In no case shall the Attorney General or the Commissioner, or any person designated by them, in the administration of this Chapter incur any official or personal liability by instituting an injunction or any judicial proceeding or administrative order or proceeding.

In light of this provision, it is plain that any damages that might be suffered by plaintiff as a result of the suspension order are irreparable injury as that concept is understood by the law. *Formosa Plastics Corp. v. Wilson*, Del.Supr., 504 A.2d 1083, 1088 (1985). Moreover, I think it apparent that some injury will doubtlessly be incurred by plaintiff should the order of suspension be effective prior to final hearing. Plaintiff will have to close its Delaware office and dismiss or relocate the half dozen employees that it maintains at that location. *Cf. Formosa Plastics v. Wilson*, Del.Ch., C.A. No. 8216, Allen, C. (November 1, 1985). Plaintiff's ability to effectively service its Delaware customers may also be adversely affected as well. It is a truism that the forced closing of any ongoing business that is not losing money will necessarily result in financial loss. In addition to the financial injury that will necessarily be sustained, effectiveness of this order would no doubt have administrative consequences in states, if any there be, that have statutes like Delaware's subsection (a)(6).

Defendant counters that plaintiff is a very large enterprise, one of national or international scope, and that the closing of its small operations in Delaware would be of minimal impact upon it. That, of course, may be the case, but I do not regard it as any answer once a party sustaining some irreparable injury seeks judicial relief from that injury asserting that it is the result of unlawful action.

[10-11] Of more concern to the court, however, than the interest of the individual plaintiff alone is the interest of the public in being assured that securities transactions effectuated in this state are accomplished in full compliance with the Act. In a proper case, this factor alone might warrant the denial of the stay now sought even where plaintiff has shown a reasonable probability of ultimate success and an imminent threat of irreparable injury. Moreover, in evaluating this factor, it is appropriate for the court to give deference to the judgment of the Securities Commissioner that the public interest requires suspension.

[12] However, this deference is outweighed in this instance by the specific circumstances of the case. The administrative action here taken was predicated entirely upon administrative orders or judicial orders in other jurisdictions, some of which are stayed for appeal purposes (SEC and Nebraska), some of which are stale (Colorado) and some of which are in states in which plaintiff is currently permitted to do business (Wisconsin). No material violation of the Delaware law has been alleged, let alone proven to the Commissioner's satisfaction. In these circumstances, even the deference I am inclined to give the determination of the Commissioner is not sufficient to support a conclusion at this time that there has been a showing of an actual, current threat to the public in Delaware that will be occasioned by granting the stay sought. Therefore, I do not conclude that, on this record, the public interest overrides the considerations indicating that the stay should be granted.

Entry of the stay sought should not be interpreted as any implied criticism of the action of the Commissioner. He appears to have good grounds to be suspicious of plaintiff based upon a long record of regulatory problems in other states. Any such suspicion about the ethical character of plaintiff's operations would tend to be confirmed by the affidavit of plaintiff's employee Thorn, which evidences a willingness to dissemble. The Commissioner's apparent inclination to "nip in the bud" any problem in this state that plaintiff's operations here may occasion is certainly understandable. I conclude preliminarily, however, that he was premature in his action; the statutory basis for that action has not yet been established. For the foregoing reasons, plaintiff's application for a stay of the Commissioner's suspension order will be granted. The effectiveness of that order will be stayed pending further order of this court. IT IS SO ORDERED.