IN RE HOLLY FARMS CORP. SHAREHOLDERS LITIGATION

No. 10,350 (Consolidated)

Court of Chancery of the State of Delaware, New Castle

May 18, 1989
(Revised May 19, 1989)

Tender offeror sought injunction to enjoin target company from proceeding with an auction while litigation was pending on the validity of an asset option agreement held by a second suitor. Target company sought a restraining order to prohibit any settlement agreement between tender offeror and asset option holder.

The court of chancery, per Vice-Chancellor Hartnett, denied both motions holding that: (1) target company had not established any basis for the court to hold that the tender offeror must increase its bid or that it cannot reach a settlement agreement with the asset option holder, and (2) although it is obvious the auction places the tender offeror at a bidding disadvantage and may, therefore, result in future litigation, the mere possibility of such litigation cannot constitute irreparable harm.

1. Corporations ⟹ 510

Injunction ⟹ 11, 14, 134

A motion for preliminary injunction must be denied where a corporation fails to show it will suffer irreparable harm if the preliminary injunction is not granted and fails to show that the controversy is ripe for adjudication.

2. Corporations ⟹ 310(1)

In the sale of corporate control the responsibility of the directors is to get the highest value reasonably attainable for the shareholders.

3. Injunction ⟹ 12, 14, 136(3), 137(4)

Where auction guidelines place a bidder at a disadvantage and may, therefore, result in future litigation, the mere possibility of such litigation cannot constitute true irreparable harm.

4. Constitutional Law ⟹ 69

Injunction ⟹ 12

A court cannot render hypothetical opinions dependent on supposition.

R. Bruce McNew, Esquire, and Pamela S. Tikellis, Esquire, of Greenfield & Chimicles, Wilmington, Delaware; and Jules Brody, Esquire, of Stull, Stull & Brody, New York, New York, for shareholder plaintiffs.

Joseph A. Rosenthal, Esquire, and Norman M. Monhait, Esquire, of Morris, Rosenthal, Monhait & Gross, P.A., Wilmington, Delaware, for shareholder plaintiffs.

Rodman Ward, Jr., Esquire, Anthony W. Clark, Esquire, and Matthew F. Boyer, Esquire, of Skadden, Arps, Slate, Meagher & Flom, Wilmington, Delaware; George A. Zimmerman, Esquire, and Jonathan J. Lerner, Esquire, of Skadden, Arps, Slate, Meagher & Flom, New York, New York, for Tyson Foods, Inc. and Holly Acquisition Corp.; and James Blair, Esquire, general counsel for Tyson Foods.

Lawrence A. Hamermesh, Esquire, and Kenneth J. Nachbar, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware; and Steven M. Barna, Esquire, and Paul Vizcarrondo, Jr., Esquire, of Wachtell, Lipton, Rosen & Katz, New York, New York, for defendants Holly Farms Corporation and Holly Farms Corporation directors.

R. Franklin Balotti, Esquire, and Samuel A. Nolen, Esquire, of Richards, Layton & Finger, Wilmington, Delaware; and Gregory P. Joseph, Esquire, of Fried, Frank, Harris, Shriver & Jacobson, New York, New York; and Bruce C. Rohde, Esquire, Leo A. Knowles, Esquire, and John E. North, Esquire, of McGrath, North, Mullin & Kratz, Omaha, Nebraska, for ConAgra, Inc. and CAG Acquisition Corporation.

HARTNETT, *Vice-Chancellor*

In connection with this on-going litigation and the competing efforts of Tyson Foods, Inc. ("Tyson Foods") and ConAgra Cor-

poration ("ConAgra") to acquire Holly Farms Corporation ("Holly Farms"), two applications for preliminary injunctive relief have been presented. I find that both must be denied.

I

Much of the factual background of the on-going battle for Holly Farms is set forth in two prior opinions in this case: *In re HOLLY FARMS CORPORATION Shareholders Litigation*, Del. Ch., C.A. 10350-NC, Hartnett, V.C. (Dec. 30, 1988), and *In re HOLLY FARMS CORPORATION Shareholders Litigation*, Del. Ch., C.A. 10350-NC, Hartnett, V.C. (March 22, 1989).

The stockholders of Holly Farms recently rejected a Merger Agreement entered into by the directors of Holly Farms and ConAgra and there is pending a Tender Offer by Tyson Foods for the shares of Holly Farms but Tyson has refused to proceed with it because of the existence of an asset option agreement entered into by ConAgra and Holly Farms. A preliminary injunction against effectuation of that option is in effect and preparations for a trial on its validity are underway.

Last week the Board of Directors of Holly Farms learned that Tyson Foods and ConAgra had held discussions seeking to arrive at a settlement which, if it came into being, would eliminate the asset option and might eliminate any further bidding for Holly Farms by the only two known suitors.

On Friday, May 12th, after a meeting between Tyson Foods' attorneys and Holly Farms' attorneys had adjourned, the Holly Farms' Board of Directors advised ConAgra and Tyson Foods it would meet on Sunday, May 14, 1989, to consider any improved bids from ConAgra and Tyson Foods which were submitted prior to 3:00 p.m., Saturday, May 13th. The following formal bidding guidelines were also sent to both potential bidders:

> 1. Written proposals should be submitted to Holly Farms' Board of Directors, with copies to Morgan Stanley and Wachtell Lipton by 3:00 p.m., Eastern time, Saturday, May 13. Holly Farms' Board is scheduled to meet on Sunday, May 14, at 2:00 p.m. at the offices of Wachtell Lipton in New York to consider and act upon proposals.
>
> 2. Proposals should be accompanied by a form of contract to acquire Holly Farms which the bidder is prepared to execute. Such contract must include a "fiduciary out" termination provision and should contain as few conditions

as possible. The terms of the contracts will be taken into account in evaluating bids.

3. As a condition to its making a proposal, ConAgra would agree to terminate the Asset Option Agreement and to settle all claims in respect thereof and in respect of the termination fee and expense reimbursement provisions of the previous Merger Agreement. To the extent that such an agreement involves an agreement by Holly Farms to pay ConAgra for the settlement, it would be subject to approval by the Delaware Chancery Court.

4. Each bidder should submit its best and highest bid. Any bid from Tyson should assume that the settlement described in No. 3 above is without cost, and will be so evaluated by the Board. The terms of any agreement between Holly Farms and ConAgra with respect to settlement will be disclosed in full to Tyson. It is contemplated that Holly Farms' stockholders will bear the cost of settlement with ConAgra, *i.e.*, if accepted, Tyson's proposal would result in a transaction in which Holly Farms stockholders receive a per share amount equal to Tyson's proposed price minus the per share cost of the ConAgra settlement.

5. The Board may be prepared to grant the winning bidder a reasonable "topping fee." If granted, such a topping fee would only be payable in the event that the agreement is terminated (other than as a result of the purchaser's breach) and, within 6 months of such termination, Holly Farms is actually acquired by a third party at a per share price in excess of the per share value of the proposal submitted by the winning bidder in the auction, as determined at the time of the auction by the Board of Directors with the advice of its financial advisor.

6. Tyson would be requested to support any settlement with ConAgra in the Delaware Court. A similar request would also be made to the stockholder-plaintiffs.

7. A final determination will be made, and announced publicly, prior to the opening of business on Monday, May 15.

Tyson Foods sought an emergency hearing on Saturday to enjoin the holding of the auction. In response Holly Farms agreed to postpone new bidding until Saturday, May 20th on the same conditions.

Tyson Foods then filed a Motion for a Preliminary Injunction as follows:

> "Pursuant to Court of Chancery Rule 65, Tyson Foods, Inc. and Holly Acquisition Corp. (collectively "Tyson") hereby move the Court for an order temporarily restraining Holly Farms Corporation ("Holly"), ConAgra, Inc. and CAG Acquisition Corporation, their directors, officers, employees, agents, affiliates, attorneys and all persons acting in concert with them or on their behalf, from taking any action to effectuate a purported auction and sale of Holly . . . as described in the May 12, 1989" Guidelines for Holly Farms Auction Process", a copy of which is attached as Exhibit A to the accompanying Transmittal Affidavit of Andre G. Bouchard, or thereafter pending further order of the Court."

Not to be outdone, Holly Farms then filed a Motion For a Temporary Restraining Order stating:

> Pursuant to Court of Chancery Rule 65, Holly Farms Corporation and the individual defendants (collectively "Holly Farms") hereby move the Court for an order temporarily restraining Tyson Foods, Inc., Holly Acquisition Corp., ConAgra, Inc. and CAG Acquisition Corp., their directors, officers, employees, agents, affiliates, attorneys and all persons acting in concert with them or on their behalf, from entering into any agreement, formal or informal, to limit or refrain from submission of any bid to acquire Holly Farms.

II

HOLLY FARMS MOTION FOR A PRELIMINARY INJUNCTION

Although Holly Farms moved for a Temporary Restraining Order, because all parties appeared, filed briefs, and participated in oral argument, I shall consider the application as an Application for a Preliminary Injunction. Chancery Rule 65.

After considering Holly Farms' brief and its oral arguments, I can find no legal basis to enter the order sought. None of the cases relied upon by Holly Farms provide that the legal doctrines of judicial

estoppel or promissory estoppel could apply to the present facts. Holly Farms has not established any basis for the Court to hold that Tyson Foods must increase its bid or that it cannot settle with ConAgra. Holly Farms' Motion For Preliminary Injunctive Relief must, therefore, be denied.

III

TYSON FOODS' MOTION FOR A PRELIMINARY INJUNCTION

[1] Tyson Foods' application for preliminary injunctive relief presents more substance but because Tyson has failed to show that it will suffer irreparable harm if a preliminary injunction is not granted and has also failed to show that the controversy is ripe for an adjudication, its motion must be denied.

[2] In *Mills Acquisition Co. v. Macmillan, Inc.*, Del. Supr., ___ A.2d ___, Nos. 415 and 416, 1988 (Consolidated), Moore, J. (May 3, 1989) at p. 64 the Delaware Supreme Court again reiterated:

> ". . . that in a sale of corporate control the responsibility of the directors is to get the highest value reasonably attainable for the shareholders."

In my two prior opinions in this case, I have pointed out that the management of Holly Farms has consistently favored ConAgra as a suitor over Tyson Foods apparently because ConAgra, if successful, will merge with Holly Farms and continue to operate Holly Farms as a separate in place division whereas Tyson Foods has no such intention.

It is obvious that several of the Guidelines to be followed in the auction originally scheduled on a few hours' notice for last weekend and now rescheduled for this weekend will put Tyson Foods at a bidding disadvantage. For example, under Paragraph No. 4 of the Guidelines, Tyson's bid, if accepted by Holly Farms, would be used to pay off a settlement reached between the Holly Farms' Board and ConAgra. In effect therefore, if Tyson Foods is the successful bidder, Holly Farms' shareholders will receive the value of Tyson's bid, less any settlement consideration paid to ConAgra. On the other hand, if ConAgra is the successful bidder, the shareholders will receive the full value of ConAgra's offer.

Tyson Foods will, therefore, in effect, be financing part of ConAgra's bid because ConAgra will have the use of the settlement consideration which it can use to increase its bid.

Many of the provisions in the Guidelines were also ambiguous or contingent, thus making it difficult or impossible to submit a meaningful bid. ConAgra is therefore being given an unfair advantage in the auction process.

It also appears to be clear that the lack of adequate notice of the resumption of the bidding over last weekend was grossly unfair to Tyson Foods. Now, in an unusual display of arrogance, immediately after the hearing on the applications for a preliminary injunction, while this matter was *sub judice*, Holly Farms issued new Guidelines with a 5:00 p.m., Friday, May 19th deadline—a time which might have preceded the release of this opinion!

Nevertheless, it would be inappropriate for me to enter the preliminary injunction requested by Tyson Foods.

[3] Tyson Foods' only valid claim of true irreparable harm to it is that if the auction proceeds under its proposed format Tyson Foods will have to come back into Court and enjoin any merger agreement resulting from a successful bid from someone other than itself. It points out that in that event protracted litigation will result. Although I certainly favor the elimination of unnecessary litigation I cannot find that the mere possibility of further litigation can constitute true irreparable harm.

[4] Even if I could find that irreparable harm will likely result if Tyson Foods' application is not granted, I would be prevented from entering a preliminary injunction, at this time, by the rule of law set forth in *Stroud v. Milliken Enterprises, Inc.*, Del. Supr., 552 A.2d 476 (1989). A court cannot render hypothetical opinions dependent on supposition and "whenever a court examines a matter where facts are not fully developed it runs the risk of not only granting an incorrect judgment, but also of taking an inappropriate or premature step in the development of the law." *Stroud*, p. 480.

Here there is no assurance that the bid guidelines will not be changed or that there will be any bids submitted. In fact, after the hearing and while this opinion was being written, I was informed that Holly Farms had changed the auction guidelines. The controversy, under the *Stroud* rule of law is therefore not ripe.

IV

The class plaintiffs supported both requests for preliminary injunctive relief but proposed different forms of order. It is not necessary to address their position in view of my holding.

The pending applications for preliminary injunctive relief are therefore denied.

IT IS SO ORDERED.

RAINBOW NAVIGATION, INC. v. YONGE

No. 9432

Court of Chancery of the State of Delaware, New Castle

April 24, 1989

Plaintiffs, including a corporate stockholder of Rainbow Navigation, Inc., two individuals claiming to constitute the board of directors of Rainbow by a consent action, and Rainbow itself, brought a declaratory judgment action to determine the composition of Rainbow's board of directors. The defendants, three individuals who claimed to continue in office as directors of Rainbow, counterclaimed for a declaratory judgment that they should remain as directors. The individual defendants alleged that a shareholders agreement, signed by all shareholders, required the removal of directors by a unanimous vote and that the consent action taken by the plaintiffs was by a majority vote and, therefore, invalid under section 228 of Delaware General Corporation Law.

The court of chancery, per Chancellor Allen, held that the consent action taken by the plaintiffs was effective as the shareholders agreement did not clearly intend to require a unanimous vote in order to remove the directors.

1. Contracts ⟹ 142.5, 152

Unless the context in which the negotiation and contracting occurs otherwise requires, the words of a contract are to be accorded their ordinary meaning and that if, when so read, the contract as a whole supplies an answer to a disputed question, that is the answer.

2. Contracts ⟹ 143.5, 147(1), 152

Under the prevailing "objective" theory of contracts, it is the "objective" meaning of the words used and not a subjective understanding that, absent ambiguity, is controlling.

3. Contracts ⟹ 152, 175(2)

While parol evidence may be admissible to show how a reasonable person would interpret the words used in light of the known commercial practices and usages in the relevant field, the attempt to define the legal meaning and effect of a contractual document must start in each instance with the language used in the contract itself.

4. Corporations ⟹ 199, 295

A shareholder's agreement that is said to have the effect of depriving a majority of shareholders of power to elect directors at an annual meeting, or preventing such shareholders from exercising the power conferred by section 228 to act in lieu of a meeting is an unusual and potent document and, therefore, must quite clearly intend to have it. A court ought not to resolve doubts in favor of disenfranchisement. DEL. CODE ANN. tit. 8, § 228 (1980).

5. Corporations ⟹ 192, 199

Under the Delaware General Corporation Law, it is surely possible, by an appropriate technique, to confer upon a minority of the shares an effective veto power over the majority of the shares with respect to particular types of transactions.

6. Contracts ⟹ 143.5, 152

In construing a contract, a court need not determine what the subjective expectations of the signatories were when they signed the agreement.

7. Contracts ⟹ 143.5, 152, 154

It is the most reasonable meaning of the words used, when interpreted in the particular setting, including the course of negotiation and relevant commercial practices, to which courts look in order to define contractual rights and duties.

8. Corporations ⟹ 283(2)

A grant of consent, like a vote, is invalid if "purchased" or, in all events, invalid if the "sale" of a vote results in "fraud or disenfranchisement" of the remaining shareholders.

9. Interpleader ⟹ 7

Allocation of burdens in an interpleader action may sometimes be problematic since at least in some instances neither claimant may fairly be said to be in the position of a plaintiff yet both assert claims.

10. Corporations ⟹ 316(1)

A self-dealing transaction, at the instance of the corporation, must be shown to have been on terms that were entirely fair to it.

11. Corporations ⟹ 310(1), 316(1), 320(10)

In a self-dealing transaction, there must be sufficient evidence to permit the finding that the board of directors was fully informed and acting in the good faith pursuit of corporate interests when it approved the transaction, and the burden must be borne by those who would affirm the transaction to establish its fairness. DEL. CODE ANN. tit. 8, § 144(a)(1) (1980).

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Lewis H. Lazarus, Esquire, of Morris, James, Hitchens & Williams, Wilmington, Delaware, for defendant Mark W. Yonge.

John H. Benge, Jr., Esquire, of Allmond, Eastburn & Benge, Wilmington, Delaware; and David M. Sheehan, Esquire, of Blum, Yumkas, Mailman, Gutman & Denick, P.A., Baltimore, Maryland, for defendants and third party plaintiffs Theodore A. DeWitt and John R. Cullen.

Robert J. Katzenstein, Esquire, of Lassen, Smith, Katzenstein & Furlow, Wilmington, Delaware, for intervenor and third party defendant HTI Ships, Inc.

ALLEN, *Chancellor*

This is the decision after a five-day trial of a Section 225 action to determine the composition of the board of directors of Rainbow Navigation, Inc., a closely-held Delaware corporation, engaged primarily in the business of transporting supplies by sea to American forces stationed in Iceland.[1] At issue is whether sufficient consents were given on November 21, 1987 to render valid under Sections 228 and 141(k) of our corporation law the purported removal of the incumbent members of the board of Rainbow and the designation of successors.

This action has been brought by Pan Ocean Navigation, Inc., a Nevada corporation and a stockholder of Rainbow; by J. Kevin Murphy and Henry A. Downing, two individuals claiming to constitute the board of directors of Rainbow by reason of the purported consent action; and, purportedly, by Rainbow itself.[2]

During the pertinent period, Rainbow's stock was closely held among three interests. First, Pan Ocean Navigation, Inc. owned 30% of the Company's common stock. *See Pan Ocean Navigation, Inc. v. Rainbow Navigation*, Del. Ch., C.A. No. 8674, Allen, C. (July 7,

1. In the lengthy interval between filing of this action and the decision, the Company has been managed by plaintiffs pursuant to a stipulation between the parties permitting the ordinary business of the firm to go forward.

2. Section 225 does not identify the Company itself as a proper party plaintiff in an action to enforce the rights it creates. I need not, however, address the question whether the corporation itself may nevertheless institute such a proceeding. It has not been briefed, is not material here and, indeed, it is hard to imagine under what circumstances it would ever be a critical question.

1987), *aff'd*, 535 A.2d 1357 (1987). Second, HTI Ships, Inc., a corporation owned directly and indirectly by defendants Yonge, DeWitt and Cullen, owned 45% of Rainbow's stock and, lastly, Mr. Nickel Van Reesema, at the relevant times a Dutch national, owned 25% of Rainbow's common stock.[3] On November 21, 1987, Mr. Van Reesema apparently switched his loyalties from the HTI faction (Messrs. Yonge and DeWitt) to the Pan Ocean faction, by joining with Pan Ocean in the consent action, the effectiveness of which is here in issue. That action purported to remove the individual defendants as directors, amend the Company's bylaws and appoint the individual plaintiffs as directors.

This action was commenced by J. Kevin Murphy, an officer of Pan Ocean, who claims now to be president and a director of Rainbow, and by Henry Downing, who also claims to be a director pursuant to the November, 1987 consent. It seeks a declaratory judgment that they constitute the duly elected board of Rainbow. Defendants include Mark Yonge, Theodore DeWitt and John Cullen, who claim to continue in office as directors of Rainbow. HTI Ships was granted a right to intervene as a party defendant. Those individuals have counterclaimed for a declaratory judgment that they remain directors.

There is no dispute that the holders of 55% of the issued and outstanding stock of Rainbow complied with the provisions of Section 228 of the corporation statute in purporting to take shareholder action on November 21, 1987. Two fundamental challenges to the effectiveness of that action are raised, however. First, it is said that a March, 1985 Shareholders Agreement required unanimity for the removal of any director designated in that Agreement. It is argued that a shareholders agreement, signed by all shareholders, is as effective as a provision in a certificate of incorporation to require the removal of directors by a supermajority (or unanimous) vote. Accordingly, it is said that the consent action purportedly taken in this instance was not taken "by the holders of outstanding stock having . . . the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were presented and voted . . . ," as required by Section 228.

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3. After the events here in issue, Pan Ocean bought the 25% stock interest owned by Mr. Van Reesema. The complex terms of that sale have a tangential relevance and are touched upon below at p. 16.

This first issue thus involves the question, "what is the legal meaning and effect of the Shareholders Agreement?" Testimony was admitted at trial to give context to this contract. *See Klair v. Reese*, Del. Supr., 531 A.2d 219 (1987).

Should the court agree with the position urged by defendants that the Shareholders Agreement requires that power under Section 228 be exercised unanimously, it would be necessary to take up a number of subsidiary issues relating to plaintiffs' contention that the defendants have, in a number of instances, materially breached their Agreement and cannot now be heard to assert rights under it. As I conclude that the Agreement does not so restrict the power conferred by Section 228, these subsidiary issues need not be addressed. *See* pp. 5-12, *infra*.

The second major line of defense against the effectiveness of the consent action is that it constitutes an illegal vote buying transaction in which Mr. Van Reesema's consent was procured for pay. For the reasons set forth below (*see* pp. 13-23), I conclude that defendants have not established the factual premise for this claim.

The last major element of the case is an interpleader action brought by Messrs. DeWitt and Cullen. It concerns certain funds held by a Bermuda firm, Medway, controlled by HTI. Medway was paid these funds by Rainbow assertedly as compensation for services rendered. That matter is treated separately, at pp. 24-27 below.

I.

The first of the three principal issues presented by this case is whether the March, 1985 Shareholders Agreement signed by all of the stockholders of Rainbow requires unanimity in removing directors from office. Since the Agreement itself is explicit that vacancies "shall be filled by a majority of the shareholders," there is no basis to contend that that Agreement requires unanimity with respect to the *election* of directors.

[1-2] In answering this question, one must start with an elementary observation that has pertinence. It is this. Unless the context in which the negotiation and contracting occurs otherwise requires, the words of a contract are to be accorded their ordinary meaning and that if, when so read, the contract as a whole supplies an answer to a disputed question, that is the answer. In other words, under the prevailing "objective" theory of contracts (*see Western Natural Gas Co. v. Cities Service Gas Co.*, Del. Supr., 223 A.2d 379, 382-83 (1966), *cert. denied*, 386 U.S. 964 (1967); *Leeds v. First Allied*, Del. Ch., 521

A.2d 1095 (1986)), it is the "objective" meaning of the words used and not a subjective understanding that, absent ambiguity, is controlling. *See, e.g., Minmar Builders, Inc. v. Beltway Excavators, Inc.*, D.C. App., 246 A.2d 784 (1968).

[3] While parol evidence may be admissible to show how a reasonable person would interpret the words used in light of the known commercial practices and usages in the relevant field, the attempt to define the legal meaning and effect of a contractual document must start in each instance with the language used in the contract itself. Here, two paragraphs of the Shareholders Agreement are principally relevant. Paragraph 3 provides as follows:

> The Shareholders agree that RAINBOW shall be governed by a Board of Directors consisting of four members (of which 3 shall be required for a quorum) and that, as of the date of this Agreement, the Directors shall be:
>
> THEODORE A. DEWITT
> ANDREW A. LEVY
> One designee (U.S. citizen
> of VAN REESEMA)
> MARK YONGE
>
> In the event that there are vacancies on said Board of Directors, it is agreed that such vacancies shall be filled by a majority of the Shareholders.

Paragraph 9 provides:

> This Agreement shall be effective for one year commencing January 1, 1985 and continue in full force and effect unless and until terminated by the unanimous consent of the Shareholders.

(PX 13, ¶¶ 3, 9).

The argument of defendants is that the Agreement must be interpreted to mean that "unless and until terminated by unanimous consent, the individuals designated in paragraph 3 will continue as directors." I cannot read the language of the Agreement to so provide, however. Moreover, there is no sufficient basis in the background of the development of this Agreement (PX 13) to justify the conclusion that that was the intention of its signatories.

More specifically, from the outset, any two of the three shareholders of Rainbow unquestionably had the right under this Agreement to elect whomever they might agree upon to fill a vacancy

created by death or resignation of the "representative director" of the third shareholder. Indeed, the Agreement does not even create a continuing express right for each shareholder to designate one (or more) representative directors and any claim that such a right can be found by implication is inconsistent with the express provision to fill vacancies by majority vote.

How then can it be said that this Agreement, which provides no right to designate directors (excepting Van Reesema's right "as of the date of this Agreement"), would restrict the power of a majority of the stock from electing all of the members of the board at the annual meeting? And if a majority of the stock could do that, what would preclude such a majority of the corporation's voting power from exercising its statutory right under Section 228 to act without a meeting? The only language in the contract itself that arguably might have that effect is paragraph 3's designation of particular individual directors "as of the time of this Agreement." But that paragraph, particularly with that phrase in mind, is far too frail a support for a conclusion that the Agreement has the legal effect of restricting the voting power of a majority of the stock indefinitely.

First, paragraph 3, in designating the directors, does not state that "the directors of the corporation are and shall remain while this Agreement remains in effect," or even "the directors of the corporation are: . . . ." Rather, it inserts the phrase "as of the date of this Agreement" and it is a rudimentary rule of interpretation that that phrase must be accorded some meaning and given some effect. The phrase plainly implies that, as of some later date, the directors may be persons other than those identified.

Moreover, the phrase "as of the date of this Agreement" is used elsewhere in the Agreement, and its context there is somewhat parallel to its use in paragraph 3. In paragraph 1, the stockholdings of the interested parties are set out "as of the date of this Agreement." It cannot be contended that paragraph 9 means that those holdings may not thereafter be modified in all the ways typically available because the Agreement itself provides a mechanism for such transfers. Rather, the plain purpose of paragraph 1 is to set forth a clarifying benchmark "as of the date of this Agreement" of just who did own the Company's stock and in what proportion. Similarly, the purpose of paragraph 3, to my mind, clearly is to set forth a clarifying designation that, as of that date, the directors were as indicated. The testimony shows that there had been discussion as to whom should serve as the necessary fourth director and this document was used, in part, as a surrogate board resolution to designate who were

to serve "as of the time of the Agreement." Thus, I can find no express contractual right of a director designated in that Agreement to stay in office despite a vote of a majority of shares to exercise their Section 141 power to remove such a director from office.

Nor can I find by implication such a right, although I acknowledge that the obligation of good faith and fair dealing might well be thought to create such a right for a period immediately following execution of the Agreement. But to say that impliedly the parties must have all intended the designation of directors "as of the date of this Agreement" to include a promise not to immediately undo the board designations is not to say that the signatories must impliedly be understood to have intended the individuals designated to have the right to indefinite tenure unless it was unanimously otherwise agreed. *See Katz v. Oak Industries, Inc.*, Del. Ch., 508 A.2d 873 (1986) (applying a test for the "discovery" of implied obligations of "good faith" in contracts).

[4] A shareholders agreement that is said to have the effect of depriving a majority of shareholders of power to elect directors at an annual meeting, or preventing such shareholders from exercising the power conferred by Section 228 to act in lieu of a meeting, is an unusual and potent document. I need not now express an opinion as to whether a shareholders agreement may have such an effect when it is signed by all shareholders and the rights of no new shareholders without notice of it intervene. It is enough to note that an agreement, if it is to be given such an effect, must quite clearly intend to have it. A court ought not to resolve doubts in favor of disenfranchisement. *See, e.g.*, *Williams v. Sterling Oil of Oklahoma, Inc.*, Del. Supr., 273 A.2d 264 (1971); *Gow v. Consolidated Coppermines Corp.*, Del. Ch., 165 A. 136 (1933); *Investment Associates v. Standard Power & Light Corp.*, Del. Ch., 48 A.2d 501 (1948), *aff'd*, Del. Supr., 51 A.2d 572 (1947); *Schott v. Climax Molybdenum Company*, Del. Ch., 154 A.2d 221 (1959); *Blasius v. Atlas Corporation*, Del. Ch., C.A. No. 9720, Allen, C. (July 25, 1988), slip op. at 52.

[5] Delaware corporation law permits great flexibility in the construction of corporate governance mechanisms thought useful by private persons in the business situations they face. It is surely possible, by an appropriate technique, to confer upon a minority of the shares an effective veto power over the majority of the shares with respect to particular types of transactions (conventional supermajority provisions do precisely that). Unanimity, such as it is here contended is required, is an extreme example. Such a requirement constitutes a deep intrusion into the ordinary prerogative of a ma-

jority. It is commonsensical to observe that contractual obligations of the level of importance involved in this case ought to be defined in a writing and with clarity. This is especially true when a contractual obligation purports to limit or affect the ordinary prerogatives of a majority of a corporation's shareholders. The need for clarity becomes even more pressing, however, when a negotiated provision would impose a requirement of unanimity upon shareholders to take action. Such a provision approaches a form of disenfranchisement of a majority. It is appropriate to require that an agreement having that import be unambiguous. Here, the Agreement not only is not clear that it intends to disenfranchise a majority, but rather the most plausible interpretation of the language used is that it intended no such effect.

[6-7] I cannot say what the subjective expectations of the signatories were when they signed this Agreement. In construing a contract, a court need not do so. It is the most reasonable meaning of the words used, when interpreted in the particular setting, including the course of negotiation and relevant commercial practices, to which courts look in order to define contractual rights and duties. If one or more of the signatories subjectively thought that this Agreement created a continuing right in the hands of particular shareholders to keep the board designated in that Agreement in place despite the vote of a majority of the stock to remove them, they were, in my opinion, mistaken. Such an agreement would be easy to draw, but was not drawn in this instance.

So concluding, I need not consider the mass of evidence admitted in an attempt to prove (or to refute) the contention that this Agreement was breached by both sides to this litigation and, in law, is unenforceable in all events.

II.

I turn then to the second reason advanced by defendants for the invalidity of the act purporting to remove them from office. The contention is that Pan Ocean "bribed" Mr. Van Reesema to grant the consent by offering him various forms of consideration and that its conduct amounts to the purchase of votes which has been and should here be held to violate public policy. Thus, defendants ask that such purchased consents be declared ineffective. The result would be that the action sought to be taken would fail for want of a majority.

For the reasons that follow, I conclude that defendants have failed to establish by a preponderance of the credible evidence the factual predicate for their legal position.

* * *

The history of Rainbow from its formation in 1983 until the purported removal of two of its directors in November, 1987, entails a number of continuing disputes among its three shareholders. These disagreements have led to litigation in this court between Pan Ocean and the other Rainbow shareholders. *See Pan Ocean Navigation, Inc. v. Rainbow Navigation, Inc.*, Del. Ch., C.A. No. 8674, Allen, C. (February 18, 1987), *aff'd*, 524 A.2d 679 (1987); *Pan Ocean Navigation, Inc. v. Rainbow Navigation, Inc.*, Del. Ch., C.A. No. 8676 (July 8, 1987), *aff'd*, 535 A.2d 1357 (1987). In an effort to settle and resolve all issues among the shareholders, including but by no means limited to those in the earlier lawsuit, the parties had a series of meetings in November, 1987. Those discussions were unsuccessful and culminated in the November 21 consent action and a November 23 resolution of the newly designated board replacing defendant Mark Yonge as President of the Company.

As general background, it should be noted that the subjects of disagreement among the shareholders, as of early November, included the following: (1) whether Pan Ocean was a stockholder of Rainbow at all any longer given a purported foreclosure cancellation of its stock in connection with the failure to repay an advance made by the Company to it; (2) whether Van Reesema was entitled to a payment of some amount—$250,000 is the amount he sought—as his *pro rata* share of a $400,000 distribution made to HTI, the only other Rainbow shareholder at the time if the cancellation was valid; (3) whether the Company itself should buy a second ship, the *Rainbow Hope*, which Pan Ocean was asserting was unauthorized or improper; (4) whether certain payments made by Rainbow to a fuel broker (Medway) controlled by HTI were in fact valid corporate expenses or represented looting of the corporate treasury; and (5) whether other payments (including the $400,000 payment referred to above and some $800,000 paid out in 1984) made by Rainbow to HTI, Van Reesema and Tower Securities (the former representative of Pan Ocean's owner) constituted a breach of duty. Other issues were lively as well.

Van Reesema had for some time felt aggrieved by Yonge and DeWitt, in part because, in his view, they had taken an idea that he had had for a shipping route to Guam and had exploited it

through another entity (Island Shipping Lines) in which he had no interest. He was also concerned that he might be named as a defendant in a Pan Ocean initiated derivative suit.

The central factual contention of the defendants' second theory is the assertion that Mr. Van Reesema gave his consent on November 21, 1987 in exchange for consideration: the promise of a consulting agreement with Rainbow, which would provide a technique to justify a substantial cash payment to him, and the promise of a release of claims by Rainbow, among other things. Defendants' legal argument then is erected upon this foundation. It is that a consent, like a vote, is invalid if "purchased" (*see Macht v. Merchants Mortgage & Credit Co.*, Del. Ch., 194 A. 19 (1937); *Hall v. Isaacs*, Del. Ch., 163 A.2d 288 (1960); *Chew v. Inverness Management Corp.*, Del. Ch., 352 A.2d 426 (1976)) or, in all events, invalid if the "sale" of a vote results in "fraud or disenfranchisement" of the remaining shareholders (*Schreiber v. Carney*, Del. Ch., 447 A.2d 17 (1982)) as defendants assert is the case here.

The parties disagree actively on the truth of the foundational fact. Plaintiffs, supported by Van Reesema, assert that there was no promised consideration for the granting of the consent on the 21st of November; that a later December 10 "sale" of Van Reesema's stock to Pan Ocean at a price of $250,000 with the retention of a buy-back right, was not a transaction that was expressly or impliedly promised as payment for the consent; and that there was no consulting agreement promised, although one was discussed, and none ever given.

To defendants, the evidence establishes that Van Reesema granted his consent only after he was assured he would be paid $250,000 and would be released from potential liability. That payment then came in the form of a sham sale of stock transaction because plaintiffs realized that the "consulting agreement" might be attacked as a breach of fiduciary duty. Because the price of the stock in the "sale" was only $250,000 (when Van Reesema had been asking $800,000), because Van Reesema had a right to buy the stock back at the same price plus interest, and because there were provisions permitting him to maintain his proportional ownership in the event he exercised his option after Pan Ocean acquired any of HTI's stock in Rainbow, this December 10 sale is claimed to be no different than a secured loan (which seems largely true) and in fact to be simply an accommodation to Van Reesema in order to make good on the undertaking that elicited the consent earlier (which is a different matter).

Having heard the testimony, and having evaluated the credibility of the witnesses, I conclude that neither such prospect as there was on November 21 for Van Reesema to reach an enforceable agreement with Pan Ocean concerning his claim to entitlement to $250,000 from Rainbow, nor his hope of securing a release from potential liability, nor other matters, was the principal or even a substantial motivation for his granting of the consent. Rather, for the reasons set forth below, I conclude that by the end of the day on November 18, Mr. Van Reesema had become so thoroughly disenchanted with the management of Rainbow by Messrs. Yonge and DeWitt that he thought he would be better off individually if he threw his lot in with the other shareholder. The alliance that had up until that time evolved between HTI (or more accurately, its principals, Yonge and DeWitt) and Van Reesema, which had come to exclude the third shareholder, was not ordained by God or commanded by positive law or contract. Van Reesema maintained the freedom to alter his allegiance. There was a long history of his feeling put upon by Messrs. Yonge and DeWitt. I am in no position to, nor happily do I need to, evaluate whether those feelings were justified. I am convinced they existed. The list of perceived grievances is long. The major items would include (*see generally*, *e.g.*, Tr., Vol. II, pp. 25-35).

(1) The fact that he had felt himself maneuvered out of a majority interest in Rainbow which was built upon his idea;

(2) The fact that he felt himself denied access to information and, indeed, on two occasions sought legal help to get access to corporation books and records without satisfaction (Tr., Vol. II, p. 64);

(3) The fact that he could not get support for his wish to be named president of Rainbow in 1989 (Tr., Vol. II, p. 31);

(4) The fact that he felt that he was not treated fairly with respect to money taken out of the enterprise. For example, he was unsatisfied with his share of an $800,000 distribution agreed to in 1984 at the meeting on board the *Fin Fisher*. (*See* Tr., Vol. II, p. 38). Further, he thought Mr. Yonge was getting too much money from Rainbow. (*See* Tr., Vol. II, p. 187). Most importantly in this connection, he felt that a $400,000 "loan" to HTI was unauthorized and constituted a disguised dividend and he should, by reason of his proportional interest, have been paid $250,000 at the same time. (Tr., Vol. II, p. 60);

(5) He keenly felt that he had been badly treated by Yonge and DeWitt concerning a proposal to initiate a shipping venture

between the U.S. and Guam to carry military cargoes. This project ultimately was attempted through an HTI affiliate in which neither Van Reesema, Pan Ocean nor Rainbow had an interest. He was not persuaded of the necessity or fairness of this course. (Tr., Vol. II, pp. 25-35); and

(6) By the November 18 meeting he feared that another prospective venture—a shipping business to the Azores—would similarly by maneuvered to an entity in which he would have no interest. (Tr., Vol. II, p. 81).

The critical day with respect to the consent was November 18. That was the last meeting before Mr. Van Reesema came, on November 21, to the offices of Skadden Arps, the lawyers for Murphy and Pan Ocean, prepared to sign a consent. Affidavits and other documents had been prepared by the 21st. I am persuaded that by the end of the day on the 18th, Van Reesema had decided to throw his support to Murphy and to grant a consent or take whatever legal action he was told was the proper and necessary action to put Murphy in charge of Rainbow's affairs, if Murphy asked him to do so (which was done by telephone somewhat later). The testimony on this point, when evaluated in light of the many grievances that Mr. Van Reesema imagined himself to have, is utterly convincing:

> THE COURT: So that I may understand it a little better, and it hasn't come out very clearly in the testimony yet, what was the substantive state of affairs with respect to a proposed settlement at the conclusion of that meeting? [the meeting among all parties on the 18th]. I understand there was a document, I'm not sure exactly what it provided, but that it was gone over in some detail.
>
> Was there a general impression at the end of that meeting that has been called the third meeting as to where things stood?
>
> THE WITNESS: Well, no, Your Honor, because at the end of the third meeting the conversation got quite heated between me and Mr. Yonge and Mr. DeWitt regarding—primarily regarding the Azores project.
>
> They would not confirm to me that they themselves or any of their companies would not pursue that Azores project. Just like the Guam situation.
>
> I did make that comparison. And since they would not guarantee that they would not pursue it by themselves, the conversation got quite heated. And also Mr. Yonge at the

> end of that meeting, or during that third meeting was insisting on a seven year employment contract which we felt is not on at all. He started making statements, well—Up to the beginning of that third meeting I think we still would have been prepared to settle, but—
>
> THE COURT: When you say "we"—
>
> THE WITNESS: Well I should speak for myself, Your Honor. I was certainly prepared to settle, and I think Mr. Murphy gave that impression as well. But then—
>
> THE COURT: With essentially buying the—the essential settlement being a buy-out of Pan Ocean's interest?
>
> THE WITNESS: Not buying out Pan Ocean. Pan Ocean would be a shareholder, but to put all the differences behind us, make—exchange general releases, make payments to and from each other, and that everything was—
>
> That was during the beginning of the third meeting my impression of the state of affairs. Then it got all so heated, and at the end of the third meeting I for one didn't want to have anything to do with them any more businesswise. Privately, socially I didn't have anything to do with them anyway, but that was—My conclusion at the end of that meeting was look, I don't want to have anything to do with them any more.

(Tr., Vol. II, pp. 80-82).

For Mr. Murphy's part, I accept his testimony that he decided to try to replace the board on the 19th, after learning for the first time at some time on the 18th that Rainbow had taken title to the MV *Rainbow Hope*, despite his understanding that things would remain in *status quo* while the stockholders tried to resolve all questions concerning the past and the future management of Rainbow:

> We actually—the intent to meet [on the 21st] was really related to signing the shareholders consent agreements to remove the directors of Rainbow because they had taken title to the vessel which we had discovered by accident, but which we did not know until late the night of November 18th. We discovered that, and confirmed it the next day on November 19th.
>
> That's why the meeting took place on the 21st, because we discovered that Rainbow had taken title to the Rainbow Hope from MARAD notwithstanding the objection that

> had been filed by Pan Ocean until such time as proper controls over the vessel could be established.
>
> So we learned that, that's when Van Reesema and I communicated by phone. I called him and told him did he know this, and my recollection was he expressed surprise, and he was equally concerned that something might happen to the vessel. And we both agreed we should meet and remove the directors of the company, and arranged the meeting on the 21st at Skadden Arps.

(Tr., Vol. I, pp. 154-55.)

At the point that Van Reesema decided to cut his support of Yonge and DeWitt, whether it occurred at the end of the day on the 18th or during a telephone conversation with Murphy later, he was interested in trying to maximize his personal interests. That was his stance at all pertinent times. Such a motive, however, is not suspect; it is why people engage in business in the first place. How that might be accomplished in any situation is, of course, a question that does entail the observation of legal, and sometimes fiduciary, rules.

In this instance, it was left unresolved in conversation with Murphy at the end of that day on the 18th whether Pan Ocean would agree to a consulting contract or would explore some other way to cause some payment to be made to Van Reesema to allow him to feel he had been treated *pro rata* with HTI (who had gotten the $400,000 "loan"). But I cannot regard the prospect of any such payment to have been a substantial motivating factor for the granting of the consent on the 21st. Rather, I conclude that Van Reesema thought that he was unlikely ever to be treated fairly by Yonge and DeWitt and would, in all events, take his chances with Murphy. Thus, while I think Van Reesema had, when he granted the consent, the hope or even the expectation that a Pan Ocean regime would be better for him personally, I do not find that any such expectation was legally enforceable at that time (or later). Nor, more importantly, do I conclude that any hope for a specific benefit from a change in control (the hope for a $250,000 payment in some form, or a consulting agreement, or other specific benefit) was the principal motivating force for the granting of the consent.

[8] This conclusion is inconsistent with the factual premise for defendants' "sale" of vote theory and thus I need not go further and analyze whether, if Murphy had made promises of special treatment that elicited a consent that would not otherwise have been

granted, that fact constituted a fraud upon or disenfranchisement of the other stockholder in these circumstances.

III.

Lastly, I turn to the interpleader action. $65,692.31 has been deposited with this court's Register by Mr. DeWitt. That amount represents the remainder of a $100,690.31 fund accumulated by Medway Brokerage & Insurance Co., a Bermuda company and a wholly owned subsidiary of Transamerican Steamship Corporation, an entity controlled by Mr. DeWitt. That fund was created by payments from Rainbow calculated at 5% of the purchase price of shipping fuel acquired from time to time by Rainbow for its vessel, purportedly with the assistance (particularly the furnishing of credit) of Medway.

The claim of plaintiffs is that the funds belong to Rainbow. That the payments were not for value received but represented a siphoning off of Rainbow's cash flow.

Defendants contend that they have proven that the arrangement by which Medway accumulated these funds was (1) necessary for and beneficial to Rainbow—a start-up company with no credit history; (2) was conventional in the shipping business (plaintiff Downing's own company having pursued a similar arrangement on a wholly arm's-length basis); and (3) was on terms that were completely consistent with an arm's-length transaction.

[9-11] Allocation of burdens in an interpleader action may sometimes be problematic since at least in some instances neither claimant may fairly be said to be in the position of a plaintiff yet both assert claims. Here, however, it seems to me that our corporation law provides both an allocation of the burden and a definition of the burden assumed. That is, I regard the Medway transaction as a self-dealing transaction that, at the instance of the corporation, must be shown to have been on terms that were entirely fair to it. In so concluding, I note that Medway is a subsidiary of Transamerican Steamship Corp. which in turn is controlled by Mr. DeWitt, a director of Rainbow; that while there is record support for the assertion that the arrangement was approved by the individuals who constituted the board at the time, there is insufficient evidence to permit the finding that they were fully informed and acting in the good faith pursuit of corporate interests when they so acted, if they did. (*See* 8 *Del. C.* § 144(a)(1)). Thus, the burden must be borne by those who would affirm the transaction to establish its fairness. *Marciano v. Nakash*, Del. Supr., 535 A.2d 400 (1987).

This they have not done. The record may be said to establish that a commercial service that provides brokerage and credit services is not unheard of. (*See* Tr., Vol. IV, pp. 186, 191; Downing Dep. at 97.) But the terms of this arrangement do not seem established as entirely fair. I am content that Mr. Hamilton, a Transamerican employee, performed valuable services for Rainbow. But those services were performed for the early voyages (for which no Medway charge was made) as well as for later ones. The independent bill sent to Rainbow for Mr. DeWitt's services contemplated the services of Mr. Hamilton (*see* Tr., Vol. V, pp. 51-52; Defendants' Opening Post-Trial Brief, p. 33). Thus, as the testimony indicates, the additional services of Medway were only for the provision of credit, and not for Hamilton's services.

With respect to its provision of credit, I note that Medway never had to advance funds on Rainbow's account. Rather, it gave a guarantee. Rainbow itself paid the invoices for fuel that Hamilton had arranged. The fee paid Medway was 5%. It was testified that Medway charged others that amount for credit backup but those others were also companies in which DeWitt or Transamerican had an interest and thus have not been shown to be arm's-length. A fee of 5% per transaction (when the payment terms contemplate payment in 30 days) may be viewed as a 60% annual charge. And that high fee is not for the extension of credit but for the availability of credit. It is comparable to a bank's commitment fee for a revolving line of credit (rather than its interest charge) or, more closely, to the fee that a bank might charge for the issuance of a letter of credit. Moreover, the record shows that while Rainbow was a start-up company—from almost the beginning it had a substantial positive cash flow and net profits—it would be difficult to conclude that Rainbow would have been unable to arrange an alternative source of payment guarantee at a cheaper price. I therefore cannot conclude that the fee paid to Medway for the provision of a payment guarantee was entirely fair to Rainbow. I therefore conclude, based upon this record, that that transaction may be voided by Rainbow. Since I conclude that plaintiffs do have authority to speak for Rainbow, I necessarily conclude that Rainbow has now disaffirmed the transaction. As the case is an interpleader action, I need not be concerned with questions that might arise in a restitution case concerning placing defendants in their original positions (such concern would probably not be problematic on these facts in any case). Rather, it is sufficient for the court to direct the Register to pay over the amount held to Rainbow.

* * * *

An order in conformance with the foregoing may be submitted by plaintiffs on notice to all other parties.

IN RE REPUBLIC AMERICAN CORP. LITIGATION

No. 10,112 (Consolidated)

Court of Chancery of the State of Delaware, New Castle

April 4, 1989

These actions, provisionally certified as class actions on behalf of the public shareholders of Republic American Corporation, came before the court upon a motion for approval of the fairness and adequacy of a proposed settlement agreement.

The court of chancery, per Chancellor Allen, denied the motion, stating that the record contained insufficient information to allow the court to responsibly conclude that the consideration proposed to be paid in return for the settlement and release of the claims was fair and adequate.

1. Compromise and Settlement ⟹ 23(1)

The proponents of a settlement have the burden of persuading the court of the adequacy of a settlement.

2. Compromise and Settlement ⟹ 22

Corporations ⟹ 417

Evaluation of a motion for approval of a settlement agreement requires that the court (1) identify the claims to be settled, (2) identify the consideration to be paid in compromise of those claims,

and (3) weigh the strengths and weaknesses of the claims in light of the evidence, adduced through the discovery process the delay that litigation entails, and the value of the consideration offered.

3. Corporations ⟹ 310(1), 310(2)

The business judgment form of review is designed to prevent judicial interference where a change in control transaction is struck and there is good faith pursuit of legitimate corporate interests and due care.

4. Corporations ⟹ 310(1), 310(2)

The role of an independent committee, through which a self-interested board functions, that merely passes upon the fairness of the price offered, is too narrow to take the otherwise interested transaction out of the class of cases governed by the entire fairness rule.

Pamela S. Tikellis, Esquire, of Greenfield & Chimicles, Wilmington, Delaware, for plaintiff Three Bridges Investment Group shareholders.

Joseph A. Rosenthal, Esquire, of Morris, Rosenthal, Monhait & Gross, P.A., Wilmington, Delaware, for plaintiffs Robert Zersher and Leslie Abbey.

A. Gilchrist Sparks, III, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, for defendants Republic American Corporation, Richard H. Haverland, Gerald Kreger, Richards D. Barger, John L. Muething, and Jade Rappaport.

Rodman Ward, Jr., Esquire, of Skadden, Arps, Slate, Meagher & Flom, Wilmington, Delaware, for defendant Penn Central.

Henry N. Herndon, Jr., Esquire, of Morris, James, Hitchens & Williams, Wilmington, Delaware, for defendants American Financial Corporation, Ronald F. Walker, and Carl H. Lindner.

ALLEN, *Chancellor*

These consolidated actions, provisionally certified as class actions on behalf of the public shareholders of Republic American Corporation ("Republic"), are before the court on an application under Rule 23(e) for approval of the fairness and adequacy of a proposed settlement and the award of an agreed upon fee for the plaintiffs' lawyers of $800,000.

[1] Following notice to the class, a hearing was held on March 21. Decision was reserved at that time. I have now had an opportunity to read the transcripts of the six depositions taken in the case, and to consider the submissions, including the post-hearing submission, of counsel. For the reasons that follow, I decline to approve the proposed settlement as reasonable or fair or adequate to the absent class members. I reach this result not because I consider the proposed settlement, as I construe it, as inadequate, but because the record contains insufficient information to permit the court, or so far as I can see, counsel who purports to represent the class, to responsibly conclude that the consideration proposed to be paid in consideration of the claims to be settled and released, is fair and adequate. Since the proponents of a settlement have the burden to persuade the court of the adequacy of a settlement, the relatively uninformed state in which I find myself after review of the record requires me to decline to approve this settlement.

[2] A motion of this kind calls forth an exercise of judgment by the court of the same kind as a litigant is required to make when considering an offer to settle a claim in litigation. *Neponsit Investment Co. v. Abramson*, Del. Supr., 405 A.2d 97 (1979). The process, at its most rudimentary, requires an identification of the claims to be settled and an identification of the consideration to be paid in compromise of those claims. Classically, that aspect of the process is self-evident and the real process concerns a weighing of the strengths and weaknesses of the claims in light of the evidence adduced through the discovery process, the delay that litigation entails and the value of the consideration offered. In cases of this kind, the rudimentary analysis itself is problematic since the original complaint attacks a transaction that was proposed but not agreed upon and the transaction that was agreed upon is not attacked. Moreover, the "consideration" offered in settlement of the claims is necessarily unclear where, as here, negotiations on behalf of the corporation would clearly have proceeded without regard to filing of the original action.

In this instance, the record developed to date helps clarify the rudimentary elements of the equation. As to the consideration side

of the equation, I am satisfied in the tentative way that is necessary for such a motion that the consideration offered in settlement of (stated globally and not specifically) all claims that might be owned by the public shareholders of Republic is $8.25 per share. That is, it seems apparent that it was the condition that an investment banker give a fairness opinion to the directors of Republic concerning the consideration offered by Penn Central Corporation ("PCC"), and the fact that First Boston would not give such an opinion at a price below $15.50 per share, that accounted for the increase in the price offered per share to $15.50. Moreover, I am persuaded for these purposes that it was the belief of the PCC Special Committee that its stock was undervalued that accounted for the conversion of the consideration offered to cash. Thus, the remaining $.25 per share can fairly be identified as consideration added by the existence of the litigation and in settlement of it.

Is that amount fair consideration for the release of the "claims" being released? Again, the facts of this case permit some attempt to define the "claims" side of the equation despite the jumble that filing a premature suit entails. As I conclude, on the facts, that a deal of $15.50 cash would have eventuated without regard to these suits, I can construe the claim as one that a $15.50 per share cash deal constituted breach of the defendants' fiduciary duty. (This indeed would be the situation if the parties would have structured this settlement as a separate transaction and not rolled it into the merger). What would be the value of a claim that such a deal represented a breach of fiduciary duty?

[3] In evaluating such questions, the first and most critical question is who has what burden? Rarely can a plaintiff mount a strong attack upon the substance of a change in control transaction (*i.e.*, non-disclosure elements of the transaction) when the parties are true arm's-length adversaries. The business judgment form of review which is applicable in such cases is designed to prevent judicial interference where such a deal is struck and there is good faith pursuit of legitimate corporate interests and due care. Where an interested transaction is negotiated by a committee of truly independent directors who understand their role (*compare Trans World Airlines, Inc. Shareholders Litigation*, Del. Ch., Cons. C.A. No. 9844, Allen, C. (October 21, 1988)) a similar result may obtain. *In Re RJR Nabisco, Inc. Shareholders Litigation*, Del. Ch., Cons. C.A. No. 10389, Allen, C. (January 31, 1989).

[4] But here the committee through which Republic functioned, to the extent the self-interested board itself did not negotiate the

deal, had been assigned the job of merely passing upon the fairness of the price. This role, in my opinion, is too narrow to take this otherwise interested transaction out of the class of cases governed by the entire fairness rule. *Weinberger v. U.O.P., Inc.*, 426 A.2d 1333 (1981) had in mind a committee that acted like (and afforded public shareholders the protection of) an arm's-length negotiator. That appears not to have been the role of the Republic Committee here.

Thus, at trial defendants would bear the burden of establishing the fairness of this transaction or so it now appears. But the $15.50 deal may be entirely fair and thus the claim to be settled may be worth very little or nothing. But I cannot tell. The First Boston deposition was of a lawyer who gave little help with respect to evaluating the fairness of a $15.50 price. Plaintiffs apparently hired no expert of their own. Thus, I find myself unable to conclude that $15.50 was probably a fully fair price—the conclusion I would have to reach to approve a $.25 settlement.

So viewing the matter, I am required to deny the pending motion.

SIEGMAN v. TRI-STAR PICTURES, INC.

No. 9477

Court of Chancery of the State of Delaware, New Castle

May 5, 1989

(Revised May 30, 1989)

Plaintiff brought an action individually, derivatively, and on behalf of a class of shareholders of Tri-Star Pictures, Inc. against defendants claiming breach of fiduciary duty and requesting declaratory judgment as to the validity of certain amendments to Tri-Star's certificate of incorporation. Defendants moved to dismiss the breach of fiduciary duty claim for failure to state a claim under Delaware Chancery Court Rule 12(b)(6) and moved for dismissal of the declaratory judgment request for failure to satisfy the demand requirements of Rule 23.1.

The court of chancery, per Vice-Chancellor Jacobs, granted defendant HBO's Rule 12(b)(6) motion, holding that HBO was not a fiduciary of Tri-Star or its shareholders because it neither had majority stock control nor did it exercise actual domination or control over Tri-Star's business affairs. The court also granted dismissal of the plaintiff's claims questioning the validity of two of the three incorporation amendments. Finally, the court denied defendants' motion to dismiss pursuant to Rule 23.1, holding that plaintiff's complaint created reasonable doubt as to the ability of a majority of the board to impartially consider a shareholder derivative suit demand.

1. Pretrial Procedure ⟹ 532, 624, 644

On a Rule 12(b)(6) motion to dismiss for failure to state a claim, the movant must demonstrate with reasonable certainty that the nonmoving party cannot prevail and would not be entitled to the relief sought under any set of facts that could be proven to support his claim. DEL. CH. CT. R. 12(b)(6).

2. Pretrial Procedure ⟹ 532, 687

On a Rule 12(b)(6) motion to dismiss for failure to state a claim, all well pleaded factual allegations, as distinguished from legal conclusions, will be accepted as true and deemed admitted, and all well supported inferences will be construed in favor of the nonmoving party. DEL. CH. CT. R. 12(b)(6).

3. Corporations ⟹ 202, 307

For a shareholder to occupy the status of a fiduciary, it must either have majority stock control or exercise actual domination and control over the corporation's business affairs.

4. Corporations ⟹ 182.3

A stockholder who owns nine percent of a corporation prior to a business transaction and who owns three percent of the corporation after the transaction is manifestly not a majority stockholder.

5. Conspiracy ⟹ 1

To state a claim for aiding and abetting, a plaintiff must allege, in addition to resulting damage or harm: (1) the existence of a fiduciary relationship and duty, (2) a breach of that duty, and (3) a knowing participation in that breach by defendants who are not fiduciaries.

6. Conspiracy ⟹ 1

A claim for aiding and abetting has not been adequately pled where the complaint alleges no facts from which knowing participation can be inferred.

7. Declaratory Judgment ⟹ 61, 67

A critical requirement to properly invoke declaratory judgment jurisdiction is that the issue involved in the controversy must be ripe for judicial determination.

8. Declaratory Judgment ⟹ 61, 67

There are four prerequisites for invoking declaratory relief: (1) the action must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claims; (3) the controversy must be between the parties whose interests are real and adverse; and (4) the issue involved in the controversy must be ripe for judicial determination.

9. Declaratory Judgment ⟹ 62

In determining whether a given claim is ripe for determination, a practical evaluation of the legitimate interest of the plaintiff in a prompt resolution of the question presented and the hardship that further delay may threaten is a major concern. Other necessary considerations include the prospect of further factual development that might affect the determination to be made; the need to conserve

scarce resources; and a due respect for identifiable policies of the law touching upon the subject matter of the dispute.

10. Declaratory Judgment ⟹ 2, 96

A principal purpose of the Declaratory Judgment Act is to prevent harm before it actually occurs.

11. Declaratory Judgment ⟹ 2, 96

The preventive purpose of the Declaratory Judgment Act is not furthered by delayed adjudication.

12. Corporations ⟹ 281

Shareholders and directors are entitled to know which group will be empowered to fill board vacancies and newly created directorships. Where possible, that issue should be resolved before, not after, such directors are selected.

13. Corporations ⟹ 12, 310(1)

Under the Delaware General Corporation Law, section 102(b)(1) authorizes provisions in a certificate of incorporation creating, defining, limiting, and regulating the powers of the corporation, the directors, and the stockholders if such provisions are not contrary to the laws of Delaware. DEL. CODE ANN. tit. 8, § 223 (1983).

14. Corporations ⟹ 281, 283(1)

The permissive language of section 223 of the Delaware General Corporation Law, coupled with the more general authority of section 102(b)(1), is sufficient to authorize a certificate provision that vests exclusive power in the board to fill board vacancies and newly created directorships. DEL. CODE ANN. tit. 8, §§ 102(b)(1), 223 (1983).

15. Corporations ⟹ 12, 307, 314

Under the Delaware General Corporation Law, section 102(b)(7) explicitly authorizes a provision in the certificate of incorporation

eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, but the statute also admonishes that any such certificate provisions shall not eliminate or limit the liability of a director for any breach of the directors' duty of loyalty to the corporation or its stockholders. DEL. CODE ANN. tit. 8, § 102(b)(7) (1988).

16. Corporations ⟹ 189(7), 211(9), 269(1), 320(10)

The burden of satisfying the requirements for demand excusal rests upon the plaintiff.

17. Corporations ⟹ 189(7), 211(9), 268(5), 320(7)

To satisfy the requirements for demand excusal, the particularized allegations of the complaint must create a reasonable doubt as to (1) the directors' disinterest or independence, or (2) whether the directors exercised proper business judgment in approving the challenged transaction.

18. Corporations ⟹ 189(7), 268(5), 320(7)

When considering the allegations in a demand excusal setting, the disinterestedness and independence of the board are determined as of the time the complaint was filed.

19. Corporations ⟹ 189(7), 211(5), 310(1)

The entire question of demand futility is inextricably bound to issues of business judgment and the standards of that doctrine's applicability.

20. Corporations ⟹ 310(1)

The protection of the business judgment rule can only be claimed by disinterested directors whose conduct otherwise meets the test of business judgment.

21. Corporations ⟹ 189(7)

Pretrial Procedure ⟹ 532, 644, 683

In the limited procedural context of a Rule 23.1 motion to dismiss the question is simply whether there is a reasonable doubt, based solely upon the particularized allegations of the complaint, that the board was disinterested. DEL. CH. CT. R. 23.1.

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Allen M. Terrell, Jr., Esquire, and Michael J. Feinstein, Esquire, of Richards, Layton & Finger, Wilmington, Delaware; and Robert C. Myers, Esquire, and Rick Bodgan, Esquire, of Dewey, Ballantine, Bushby, Palmer & Wood, of counsel, for defendants Home Box Office, Inc., Michael J. Fuchs, E. Thayer Bigelow, Jr., and Joseph J. Collins.

JACOBS, *Vice-Chancellor*

Plaintiff brings this action individually, derivatively, and on behalf of a class of shareholders of Tri-Star Pictures, Inc. ("Tri-Star"). The subject of the complaint is a December, 1987 transaction (referred to as "the Combination") where Tri-Star acquired the entertainment business and related assets (the "Entertainment Sector") of The Coca-Cola Company ("Coca-Cola"). In exchange, Coca-Cola received common stock and other securities of Tri-Star. Named as defendants are Tri-Star, Coca-Cola, CPI Film Holdings, Inc., a subsidiary of Coca-Cola ("CPI"), Home Box Office, Inc. ("HBO"), and the directors of Tri-Star as of December 15, 1987.

The complaint was filed on December 15, 1987, and amended on April 5, 1988. On June 7, 1988, the defendants filed motions to dismiss for failure to claim upon which relief can be granted pursuant to Rule 12(b)(6) and for failure to satisfy the demand requirements of Rule 23.1. This is the Opinion of the Court on those motions.

I. *THE RELEVANT FACTS*

[1-2] On a Rule 12(b)(6) motion to dismiss for failure to state a claim, the movant must demonstrate with reasonable certainty that the non-moving party cannot prevail and would not be entitled to the relief sought under any set of facts that could be proven to support his claims. *Harman v. Masoneilan Int'l, Inc.*, Del. Supr., 442 A.2d 487, 502 (1982). All well pleaded factual allegations (as distinguished from legal conclusions) will be accepted as true and deemed admitted, and all well supported inferences will be construed in favor of the non-moving party. *Id.*; *Weinberger v. UOP, Inc.*, Del. Ch., 409 A.2d 1262, 1263-1264 (1979). What follows is a summary of the pertinent, well-pleaded facts alleged in the amended complaint.

Tri-Star was incorporated on April 8, 1985, and on June 3, 1985, it succeeded to the business of a joint venture formed in 1982 by CBS, Inc., Coca-Cola (CPI), and an affiliate of HBO. Tri-Star is principally engaged in the production, distribution, and exploitation of feature-length motion pictures and television programs. As of November 10, 1987, Tri-Star had 34,554,583 shares of common stock issued and outstanding.[1]

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1. Following the Combination, Tri-Star's name was changed to Columbia

Coca-Cola first became involved in the entertainment business in 1982, when it acquired Columbia Pictures Industries, Inc., the assets and operations of which became Coca-Cola's Entertainment Sector. For several years Coca-Cola was Tri-Star's largest single stockholder, owning 12,708,333 shares (36.8%) of Tri-Star's outstanding common stock.

HBO, a wholly owned subsidiary of Time Incorporated ("Time"), is engaged in programming and marketing pay-television services. HBO co-founded Tri-Star, together with Coca-Cola and CBS, Inc. From the outset, HBO has continued to have significant business relationships with Tri-Star and Coca-Cola. Before the Combination, HBO owned 3,125,000 shares (9%) of Tri-Star's common stock.

Tri-Star had two other major stockholders in addition to Coca-Cola and HBO: Technicolor, Inc. ("Technicolor"), which owned 7.2% of Tri-Star's stock, and Rank America, Inc. ("Rank"), which owned 3.6%. The combined holdings of those four shareholders was 56.6%.[2] The plaintiff alleges that by reason of that combined stock ownership, as well as certain contractual arrangements involving those stockholders, Coca-Cola and HBO controlled Tri-Star.

The contractual arrangements among Tri-Star, Technicolor, and Rank obligated Technicolor and Rank to vote their Tri-Star shares in favor of all recommendations made by Tri-Star's board of directors. The shareholders' agreement among Coca-Cola, Tri-Star, and HBO (i) allowed Coca-Cola and HBO (as "Principal Shareholders") each to designate four nominees to Tri-Star's ten director board, (ii) required Coca-Cola and HBO to vote for each other's director nominees, (iii) gave Coca-Cola and HBO a right of first refusal if either Principal Shareholder desired to sell its Tri-Star stock, (iv) prohibited Coca-Cola and HBO from soliciting proxies in opposition to any recommendation by Tri-Star's board, or from subjecting their Tri-Star shares to voting arrangements, such as a voting trust, and (v) prohibited Tri-Star from entering into certain transactions with a Principal Shareholder without the consent of all other Principal Shareholders.

Pictures Entertainment, Inc., but for purposes of clarity, it will be referred to as "Tri-Star."

2. Broken down as follows: Coca-Cola (36.8%), HBO (9%), Technicolor (7.2%), and Rank (3.6%).

The Combination originated at a meeting in August, 1987, at which Coca-Cola's President proposed to Tri-Star's Chief Executive Officer that the two companies explore a transaction to combine Tri-Star and Coca-Cola's Entertainment Sector. Further negotiations and discussions resulted in an agreement (the "Transfer Agreement") whereby Tri-Star would acquire certain of the assets comprising Coca-Cola's Entertainment Sector.[3] In exchange, Coca-Cola would receive shares of newly issued Tri-Star common stock that, when added to the Tri-Star shares it already owned, would increase Coca-Cola's equity interest in Tri-Star to 80%.[4] Shortly thereafter, and as part of the transaction, Coca-Cola would declare a dividend to its stockholders, consisting of 31,400,000 of the approximately 75,000,000 Tri-Star shares it would receive in the Combination. As a result, the total number of Tri-Star shares that Coca-Cola beneficially owned would be reduced to approximately 49% of Tri-Star's outstanding common stock.

The Transfer Agreement also provided that Tri-Star would amend its Certificate of Incorporation and by-laws in certain respects. Those Certificate amendments were to be an integral part of the Combination presented to shareholders for their approval. An important condition for shareholder approval was that Coca-Cola would not vote its Tri-Star shares in favor of the Combination, unless a majority of the shares not owned by Coca-Cola first voted in favor.

The Combination as described was unanimously approved by the seven directors who attended the Tri-Star Board meeting held on September 30, 1987. Not attending or voting at that meeting were directors Francis T. Vincent, Jr. and Ira C. Herbert, who were both senior officers of Coca-Cola, and Martin Fuchs, who was a senior officer of HBO. Shortly thereafter, Tri-Star and Coca-Cola executed the written Transfer Agreement embodying the terms of the Combination.

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3. Most, but not all, of the assets of the Entertainment Sector would be transferred to Tri-Star. Carved out of the transaction was a dividend that Coca-Cola declared to itself from the Entertainment Sector's assets, consisting of $300 million in cash plus an inter-company receivable of $240 million. Coca-Cola elected also to retain the stock of certain real estate companies, as well as certain real estate and data processing assets that were also part of the Entertainment Sector.

4. Coca-Cola would also (i) receive an additional 500,000 shares of Tri-Star common stock, (ii) the right to purchase $100 million of a newly created Tri-Star preferred stock that was superior to the common stock as to dividends and liquidation rights.

The Combination was submitted to Tri-Star shareholders for approval at a special stockholders meeting held on December 15, 1987. A proxy statement was sent to Tri-Star shareholders on November 24, 1987 in connection with that meeting. The Combination (including the Certificate amendments) was approved by the requisite number of stockholder votes at the December 15, 1987 meeting. The formal closing on the Combination occurred on January 27, 1988.

II. *MOTION TO DISMISS THE CLAIMS AGAINST HBO*

The first matter addressed is HBO's motion to dismiss all claims as to it. Those claims, which are found in Counts I, II, and VI,[5] are that (i) HBO breached its fiduciary duties to Tri-Star and its shareholders in connection with the Combination, and that (ii) HBO aided and abetted fiduciary duty breaches by Coca-Cola and Tri-Star's directors. For the reasons now discussed, neither claim alleged against HBO in the complaint is legally sufficient.

A. *Fiduciary Duty Claims*

[3-4] The fiduciary duty claims against HBO are insufficient, because the complaint, which incorporates the proxy statement by reference,[6] alleges no facts from which it can be inferred that HBO was a fiduciary of Tri-Star or its shareholders. For a shareholder to occupy the status of a fiduciary, it must either have majority stock control or exercise actual domination and control over the corporation's business affairs. *Aronson v. Lewis*, Del. Supr., 473

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5. The remaining Counts either do not allege a claim against HBO or do so in a facially invalid manner. Count III challenges the validity of the amendments to Tri-Star's Certificate of Incorporation, but does not charge HBO with culpability or seek relief against HBO. Count IV challenges certain disclosures made in the proxy statement, but its allegations do not fairly charge HBO with culpability therefor. Count V alleges that Coca-Cola and HBO manipulated Tri-Star's corporate machinery to the detriment of the public stockholders. However, the complaint does not specify what role HBO played in the alleged manipulation. Moreover, HBO was not a party to the Transfer Agreement, and the proxy statement clearly discloses that as a result of the Combination, HBO lost its right to nominate directors to the Tri-Star Board and to withhold its consent to certain transactions involving Tri-Star. Finally, HBO's ownership percentage declined from 9% to 3% of Tri-Star's outstanding shares. For those reasons, HBO's motion to dismiss Counts III, IV, and V as to it, is granted.

6. *Lewis v. Straetz*, Del. Ch., C.A. No. 7859, Hartnett, V.C. (February 12, 1986).

A.2d 805, 815 (1984); *In Re Sea-Land Corp. Shareholders Litig.*, Del. Ch., C.A. No. 8453, Jacobs, V.C. (May 22, 1987) at 9-10, ("*Sea-Land I*"). As a 9% stockholder before the Combination and a 3% stockholder thereafter, HBO was manifestly not a majority stockholder. The question becomes whether it is inferable from the complaint's well pleaded allegations that HBO actually exercised domination and control over Tri-Star's directors. *In Re Sea-Land Corp. Shareholders Litig.*, Del. Ch., C.A. No. 8453, Jacobs, V.C. (May 13, 1988), ("*Sea-Land II*"). That question must be answered in the negative.

Plaintiff argues that the actual exercise of control may be inferred from HBO's (a) participation in the negotiations leading up to the Transfer Agreement, (b) exercise of its voting power, and (c) grant of consent to the Combination. These arguments lack merit on several grounds. First, HBO had no power to exercise actual board control. It had only three designees on Tri-Star's ten person board, one of whom was absent from the meeting at which the Transfer Agreement was approved. Second, factually it cannot be inferred that HBO participated in the negotiations leading up to the Transfer Agreement: the proxy statement discloses that the negotiations were conducted solely between Tri-Star and Coca-Cola.[7] Third, the requirement that HBO's consent to the Combination under the Coca-Cola-HBO-Tri-Star shareholders' agreement does not, without more, create an inference that HBO dominated and controlled Tri-Star. *See Sea-Land I, supra*, at 10. Finally, HBO voting in favor of the transaction could not constitute the actual exercise of control. Even if HBO's votes were added to those owned by Technicolor, Rank, and Tri-Star's management, 3,523,126 additional shares were still needed to reach the required affirmative vote of 10,923,126 shares (a majority of the shares not owned by Coca-Cola) for Coca-Cola to be entitled to vote its shares.

B. *Aiding and Abetting Claims*

Alternatively, the plaintiff alleges that HBO aided and abetted breaches of fiduciary duty committed by Coca-Cola and Tri-Star directors. Those allegations also are legally insufficient.

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7. Even if HBO's representatives had participated in those negotiations, plaintiff cites no authority that would equate that participation with the actual exercise of board control. *See Gilbert v. El Paso Co.*, Del. Ch., 490 A.2d 1050, 1055 (1984).

[5-6] To state a claim for aiding and abetting, a plaintiff must allege (in addition to resulting damage or harm): (1) the existence of a fiduciary relationship and duty, (2) a breach of that duty, and (3) a knowing participation in that breach by defendants who are not fiduciaries. *Gilbert v. El Paso Co.*, 490 A.2d at 1057; *Weinberger v. Rio Grande Indus., Inc.*, Del. Ch., 519 A.2d 116, 131 (1986). Here, the third element, *i.e.*, "knowing participation," has not been adequately pled because the complaint alleges no facts from which knowing participation can be inferred. *See Sea-Land II, supra*, at 9; *Greenfield v. National Medical Care, Inc.*, Del. Ch., C.A. No. 7720, Berger, V.C. (June 6, 1986) at 10. It cannot be inferred that HBO or its representatives were aware of or conspired in any fiduciary breaches committed by Coca-Cola or Tri-Star's directors. HBO was not (to repeat) a party to the negotiations leading up to the Transfer Agreement. And, although three Tri-Star directors were HBO's designees, there is no particularized allegation that any of them was aware of any fiduciary duty breaches by Tri-Star's remaining directors or by Coca-Cola.

For these reasons, the plaintiff has not stated a claim against HBO upon which relief can be granted.

III. *MOTION TO DISMISS THE CERTIFICATE AMENDMENT CLAIMS*

The defendants also move for dismissal of Count III, which seeks a judicial declaration that Articles Fifth, Sixth, and Seventh of Tri-Star's Certificate of Incorporation are invalid under Delaware law. As previously stated, those amendments (the "Certificate amendments") were adopted by shareholders in connection with and as part of their approval of the Combination. The defendants argue that Count III should be dismissed in its entirety because it is not ripe for adjudication, and also because, in any event, the Certificate amendments are valid as a matter of law.

A. *Ripeness*

[7-8] A critical requirement to properly invoke declaratory judgment jurisdiction is that "the issue involved in the controversy must be ripe for judicial determination." *Stroud v. Milliken Enterprises, Inc.*, Del. Supr., 552 A.2d 476, 479 (1989); *Schick, Inc. v. Amalgamated Clothing and Textile Workers Union*, Del. Ch., 533 A.2d 1235,

1238 (1987).[8] The defendants argue that Count III is not ripe for determination, because no action under the Certificate amendments is presently being taken or alleged to be imminent, and because the plaintiff does not claim that the Certificate amendments infringe any right that he presently seeks to exercise.

[9]

In determining whether a given claim is ripe for determination:

> . . . a practical evaluation of the legitimate interest of the plaintiff in a prompt resolution of the question presented and the hardship that further delay may threaten is a major concern. Other necessary considerations include the prospect of future factual development that might affect the determination to be made; the need to conserve scarce resources; and a due respect for identifiable policies of the law touching upon the subject matter of the dispute.

Schick, 533 A.2d at 1239 (footnote omitted).

Applying those criteria, and weighing the reasons for not rendering a hypothetical opinion against the benefits to be derived from a declaratory judgment (*Stroud, supra*, 552 A.2d at 480), I conclude that the Certificate amendment claims are clearly ripe for determination.

At issue under Count III is the facial validity of Articles Fifth, Sixth, and Seventh of the newly adopted Certificate amendments. Article Fifth confers exclusive power upon the directors to fill board vacancies and newly created directorships. That delegation of exclusive power to directors is said to be proscribed by 8 *Del. C.* § 223. Article Sixth purports (*inter alia*) to eliminate the liability of Tri-Star's directors for breaches of fiduciary duty in specified circumstances involving the taking of corporate opportunities belonging to Tri-Star. That exemption from fiduciary liability is claimed to exceed the exemptive authority permitted by 8 *Del. C.* § 102(b)(7).

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8. Ripeness is one of four prerequisites for invoking declaratory relief:

> [The action]. . .(1). . .must be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) it must be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) the controversy must be between the parties whose interests are real and adverse; (4) the issue involved in the controversy must be ripe for judicial determination.

Stroud v. Milliken Enterprises, Inc., 552 A.2d at 479-480, quoting *Rollins Int'l, Inc. v. Int'l Hydronics Corp.*, Del. Supr., 303 A.2d 660 (1973).

Article Seventh also is claimed to violate § 102(b)(7), insofar as it incorporates all future amendments to the Delaware General Corporation Law ("DGCL") that would authorize corporate action further limiting or eliminating the personal liability of directors.

Given the nature of these declaratory claims, their determination would not be affected by "future factual developments," *Schick*, 533 A.2d at 1239. Moreover, the declaratory claims implicate fundamental policies, *i.e.*, the accountability of directors to shareholders for breaches of fiduciary duty and the shareholders' inherent power to elect directors. The importance of those policies and the practicalities of the situation, counsel that the Certificate amendment claims be decided promptly.

[10-12] Under Article Sixth, certain Tri-Star directors would arguably be free to engage in conduct (usurpation of a corporate opportunity) that would normally be proscribed, and that could financially harm the corporation. The very enactment of that Article creates a real (and present) possibility that such conduct would occur without prior notice to shareholders. A principal purpose of the Declaratory Judgment Act is to prevent harm before it actually occurs.[9] That preventive purpose would not be furthered by a delayed adjudication. Of importance also is the imperative that corporate fiduciaries be given clear notice of what conduct is and is not permitted. No beneficial purpose is served by continued uncertainty in that regard, or by the increased risk of harm occurring to the corporation because of a delayed determination of that issue. The same concerns are posed if an adjudication of the corporate governance issue posed by Article Fifth were delayed. Shareholders and directors are entitled to know which group will be empowered to fill board vacancies and newly created directorships. Where possible, that issue should be resolved before, not after, such directors are selected. To do otherwise risks disrupting the corporation's affairs as well as expensive, time-consuming litigation—a result that would run counter to the purposes of the Declaratory Judgment Act.[10]

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9. *Hampson v. State*, Del. Supr., 233 A.2d 155 (1967); *Clemente v. Greyhound Corp.*, Del. Super., 155 A.2d 316 (1959).

10. A similar "ripeness" argument was made and rejected in *Moran v. Household Int'l, Inc.*, Del. Ch., 490 A.2d 1059, 1072 (1985), *aff'd*, Del. Supr., 500 A.2d 1346 (1985). *Moran* involved a claim for a declaration that a "poison pill" rights plan, adopted as a preventive antitakeover measure (and not in the context of any

I now turn to the disputed Certificate amendment claims.

B. *The Certificate Amendments*

1. *Article Fifth*

Article Fifth, the first of the challenged Certificate amendments, pertinently states that:

> . . . Subject to the rights of the holders of any series of Preferred Stock, and unless the Board of Directors otherwise determines, all vacancies on the Board of Directors and newly created directorships resulting from any increase in the authorized number of directors shall be filled exclusively by a majority of the directors then in office, although less than a quorum, or by a sole remaining director, and shall not be filled by the stockholders.

The plaintiff contends that exclusive power to fill board vacancies and newly created directorships cannot validly be transferred to the board. He reasons that the inherent power to elect directors is vested in the shareholders, and is made subject only to the exceptions specified in 8 *Del. C.* § 223. Those statutory exceptions, plaintiff asserts, do not authorize a wholesale abdication of the shareholders' power to the directors.

The defendants concede that the shareholders have the inherent power to elect directors to fill vacancies and newly created directorships. Their position is that nothing in the DGCL prohibits shareholders from divesting themselves of that power by means of an appropriate certificate amendment. Defendants conclude that because Article Fifth does nothing more than that, it is valid as a matter of law. I concur.

[13] Title 8 *Del. C.* § 102(b)(1) authorizes provisions in a certificate of incorporation ". . .creating, defining, *limiting* and reg-

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specific hostile bid), was invalid under Delaware law. The defendants argued that the declaratory claims were not ripe because no event had occurred that would trigger the Rights Plan. In language applicable to this case, this Court held that the declaratory action had not been:

> . . . instituted to resolve the future effect of contingent events. [Here] the plaintiffs . . . are seeking a declaration that the Rights Plan, because of its deterrent features, presently affects shareholders' fundamental rights and is illegal under Delaware Law.

Moran, 490 A.2d at 1072.

ulating *the powers of* the corporation, the directors, and *the stockholders* . . . if such provisions are not contrary to the laws of this State." (emphasis added). No provision of the DGCL or case authority is cited that would prohibit shareholders from adopting a certificate amendment divesting themselves of the power to fill board vacancies and newly created directorships and vesting that power exclusively in the board. The statutory provision which bears relevantly on that subject is 8 *Del. C.* § 223(a), which reads:

> (a) Unless otherwise provided in the certificate of incorporation or by-laws:
>
> (1) vacancies and newly created directorships resulting from any increase in the authorized number of directors elected by all of the stockholders having the right to vote as a single class may be filled by a majority of the directors then in office, although less than a quorum, or by a sole remaining director.

[14] Plaintiff argues that while § 223 does not expressly prohibit a delegation of such power exclusively to the board, § 223 compels that result implicitly, because if the legislature had intended for directors to have that power exclusively, the statute would have so provided. That argument, however, finds no support in the statute or case authority, and amounts to *ipse dixit*. The permissive language of § 223,[11] coupled with the more general authority of § 102(b)(1), is sufficient to authorize a certificate provision that vests exclusive power in the board to fill board vacancies and newly created directorships. *See also Campbell v. Loew's, Inc.*, Del. Ch., 134 A.2d 852, 857 (1957) (where this Court observed that although § 223 did not specifically address whether stockholders could divest themselves of the power to fill newly created directorships, that result could be attained by appropriate "strong by-law language").[12]

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11. Section 223(a) provides that vacancies and newly created directorships ". . . *may* be filled by a majority of directors then in office . . . or by a sole remaining director . . ." (emphasis added).

12. In his Report to the 1967 Corporation Law Revision Committee, Professor Ernest L. Folk, III suggested that § 223 "could be clarified" to make it explicit that the shareholders' inherent power to fill board vacancies and newly created directorships can be vested in the board. Plaintiff asserts that the General Assembly's reenactment of § 223 without any such clarifying language means that that body did not intend to permit shareholders to divest themselves of that power. That argument also finds no support in legal precedent or rule of statutory construction of which this Court is aware.

The plaintiff's challenge to the validity of Article Fifth is found to be without legal merit.

2. *Article Sixth*

The plaintiff next challenges Article Sixth which, because of its length and complexity, must be described here in summary form.[13] Article Sixth contains three sections. Section A recites the Article's purposes, including:

> . . . *to regulate and define the* conduct of certain affairs of [Tri-Star] as they may involve [Coca-Cola and Time] and their respective officers and directors, and *the powers, rights, duties and liabilities of [Tri-Star] and its* officers, *directors* and stockholders in connection therewith. (emphasis added).

Section B, broadly speaking, describes circumstances where Coca-Cola and Time, in their capacity as Tri-Star shareholders, will not be deemed liable to Tri-Star or its stockholders for breach of fiduciary duty as a result of having engaged in the same line of business as Tri-Star or having pursued a corporate opportunity belonging to Tri-Star.

Finally, Section C specifies, (*inter alia*) circumstances where a Tri-Star director who is also a director of Coca-Cola or Time will not be deemed liable for breach of fiduciary duty to Tri-Star or its shareholders. Those circumstances generally include cases where Coca-Cola or Time acquires a corporate opportunity that would belong, but is not made available, to Tri-Star.

Plaintiff contends that Article Sixth is invalid as a matter of law, because it eliminates or restricts the directors' liability to the corporation or its shareholders for breaches of their fiduciary duty of loyalty, in violation of 8 *Del. C.* § 102(b)(7). The defendants respond that Article Sixth does not purport to exonerate Tri-Star directors from liability for breaching their fiduciary duty of loyalty. All Article Sixth does, defendants say, is define "those areas of business opportunity in which the corporation does and does not have an interest," and "those situations in which Tri-Star directors receiving an offer of a corporate opportunity will be deemed to have received such an [offer] in his capacity as a Tri-Star director." (Def. Reply Br. p.45). I cannot agree.

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13. The full text of Article Sixth is attached as an addendum to this Opinion.

As previously indicated, a motion to dismiss under Rule 12(b)(6) will not be granted unless it appears to a certainty that under no state of facts would the plaintiff be entitled to relief. *Harman v. Masoneilan Int'l, Inc.*, 442 A.2d at 502-503. That standard, as applied in this somewhat unique context, requires that the motion must be denied if under any plausible construction or operation, Article Sixth arguably would contravene 8 *Del. C.* § 102(b)(7).

[15] Section 102(b)(7) explicitly authorizes a provision in the certificate of incorporation ". . . eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director. . . ." But that statute also admonishes that any such certificate provision

> . . . shall not eliminate or limit the liability of a director (i) for any breach of the directors' duty of loyalty to the corporation or its stockholders. . . .

The question is whether under at least one plausible state of facts, Article Sixth would arguably operate to eliminate or limit the directors' liability for breach of their duty of loyalty to Tri-Star or its shareholders. I conclude that it would.

Section C of Article Sixth concerns Tri-Star directors who are also directors of Coca-Cola or Time and who learn of a transaction that would be a potential corporate opportunity both for Tri-Star and Coca-Cola or Time. Section C provides that if the opportunity is acquired by Coca-Cola or Time, or is not directed to Tri-Star, the Tri-Star director "shall not be liable to Tri-Star or its stockholders for breach of any fiduciary duty," so long as he acts in a manner consistent with the policies specified in subsections (i) through (iii). Subsection (ii) relevantly states that:

> . . . a corporate opportunity offered to any person who is a director but not an officer of [Tri-Star], and who is also a director or officer of [Coca-Cola or Time] shall belong to [Tri-Star] if such opportunity is expressly offered to such person in writing solely in his or her capacity as a director of [Tri-Star], and otherwise shall belong to [Coca-Cola or Time], respectively. . .

Under this intricately drafted provision, a case could possibly arise where a Tri-Star director who is also a director of Coca-Cola or Time (a) learns of a corporate opportunity that should otherwise be directed to Tri-Star, (b) causes that opportunity to be offered to himself, but not "in writing," (c) alternatively, causes the op-

portunity to be offered to himself in writing but not "solely in his . . . capacity as a [Tri-Star] director," and then (d) directs the opportunity to Coca-Cola or Time but not to Tri-Star. By negative implication, under Article Sixth that director would not be liable to Tri-Star or its shareholders "for breach of *any* fiduciary duty" arising out of that conduct.

Thus, at least one scenario (and perhaps others) could plausibly be constructed where Article Sixth would eliminate or limit the liability of Tri-Star directors for breach of their fiduciary duty of loyalty—a result proscribed by § 102(b)(7). That possibility alone is sufficient to warrant the denial of defendants' motion to dismiss. In this narrow procedural setting the Court need go no further. Any more comprehensive or definitive declaration of the validity of Article Sixth must await a later procedural stage where the merits may be explored in greater depth than was done here.

3. *Article Seventh*

Finally, plaintiff challenges the validity of a portion of Article Seventh. That Article, in full text, reads as follows:

> A director of the Corporation shall not be personally liable to [Tri-Star] or its stockholders for monetary damages for breach of fiduciary duty as a director, except for liability (i) for any breach of the director's duty of loyalty to [Tri-Star] or its stockholders, (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (iii) under Section 174 of the Delaware General Corporation Law or (iv) for any transaction from which the director derived any improper personal benefit. *If the Delaware General Corporation Law is amended to authorize corporate action further eliminating for limiting the personal liability of directors, then the liability of a director of [Tri-Star] shall be eliminated or limited to the fullest extent permitted by the Delaware General Corporation Law, as so amended.* Any repeal or modification of this Article SEVENTH by the stockholders of [Tri-Star] shall not adversely affect any right or protection of a director of [Tri-Star] existing at the time of such repeal or modification.

The plaintiff contends that the underscored language runs afoul of 8 *Del. C.* § 102(b)(7), because that statute "does not authorize an open ended and non-specific limitation or [sic] liability based

upon whatever additional authority the DGCL may confer at some unspecified point in the future." (Pl. Br., p. 64). Plaintiff further argues that Article Seventh is inconsistent with Article Eleventh, which requires a two thirds vote to amend the restated Certificate.

Plaintiff's position is not supported by § 102(b)(7) or any other authority cited to the Court. Neither the statute or its underlying policy forbids a corporation from exempting its directors from liability as may be authorized by future amendatory legislative enactments. Nor has plaintiff established a conflict between Article Seventh and Article Eleventh, which requires a two-thirds vote for amendment. Under Article Seventh, the authority permitting the corporation automatically to take advantage of future amendments to the DGCL is itself a part of the restated Certificate. Should the shareholders desire to amend that provision (or even to repeal Article Seventh), the two-thirds vote requirement would apply.

Accordingly, the plaintiff has failed to demonstrate any plausible application or operation of Article Seventh that would contravene the DGCL or other provision of Delaware law.

IV. *MOTION TO DISMISS UNDER RULE 23.1*

Finally, the defendants have moved to dismiss the complaint pursuant to Chancery Court Rule 23.1. The basis for the motion is that because certain claims alleged in the amended complaint are derivative, they are subject to dismissal for failure to make a demand upon the directors or to allege facts demonstrating why no demand was required. The plaintiff responds that the claims are not derivative and that, in any event, no demand was required in these circumstances.

These colliding positions frame two issues: (a) whether one or more of the plaintiff's claims is derivative in character, and (b) if so, whether the complaint adequately establishes that no demand was required under Delaware law. Those issues have engendered dozens of pages of learned debate in the briefs, devoted to such intricate and subtle questions as the derivative status of each of the seven counts in the complaint, and the merits of the plaintiff's multitudinous reasons why demand is excused. Having considered all these arguments, the Court has concluded, with gratitude, that the motion can be decided on narrow grounds, thereby avoiding further imposition upon the already prolific literature in this abstract and highly conceptual area of the law. Even assuming without deciding that the complaint alleges derivative claims, the facts pleaded here excuse the making of a demand.

Any derivative claims in the complaint are subject to Chancery Court Rule 23.1, which pertinently requires the plaintiff:

> . . . [to] allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and the reasons for his failure to obtain the action or for not making the effort.

[16-18] The plaintiff admits that he made no demand. He contends that no demand was required. The burden of satisfying the requirements for demand excusal rests upon the plaintiff. *Grobow v. Perot*, Del. Supr., 539 A.2d 180, 187 (1988). To satisfy those requirements on this motion, the particularized allegations of the complaint must create a reasonable doubt as to (i) the directors' disinterest or independence, or (ii) whether the directors exercised proper business judgment in approving the challenged transaction. *Grobow*, 539 A.2d at 186; *Aronson*, 473 A.2d at 812. The disinterestedness and independence of the board are determined as of the time the complaint was filed. *Pogostin v. Rice*, Del. Supr., 480 A.2d 619, 624 (1984). In this case no full-blown *Aronson* analysis is required, because the motion is determinable on the basis of director disinterestedness.

[19-20] The entire question of demand futility is inextricably bound to issues of business judgment and the standards of that doctrine's applicability. *Aronson*, 473 A.2d at 812. As the Supreme Court held in *Aronson*, the protection of the business judgment rule can only be claimed "by disinterested directors whose conduct otherwise meets the tests of business judgment." *Id.*

The *Aronson* Court also stated:

> . . . From the standpoint of interest, this means that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally. *Sinclair Oil Corp. v. Levien*, Del. Supr., 280 A.2d 717, 720 (1971); *Cheff v. Mathes*, Del. Supr., 199 A.2d 548, 554 (1964); *David J. Greene & Co. v. Dunhill International, Inc.*, Del. Ch., 249 A.2d 427, 430 (1968). *See also*, 8 *Del. C.* § 144. Thus, if such director interest is present, and the transaction is not approved by a majority consisting of the disinterested directors, then the business judgment rule has no application whatever in determining demand futility. *See* 8 *Del. C.* § 144(a)(1).

Id.

The Tri-Star board, at the time it approved the Combination (September 30, 1987) and at the time this action was filed (December 15, 1987), consisted of ten directors. Thus, for that board to be capable of functioning properly (*i.e.*, impartially) in considering a demand, six of those directors (a majority) must have been free of any disabling conflict of interest. The question is whether the particularized factual allegations of the complaint create a reasonable doubt that a majority of Tri-Star directors were disinterested. In my opinion, two circumstances create such a reasonable doubt.

The first is the fact that three of Tri-Star's directors, Messrs. Ira C. Herbert, Francis T. Vincent, Jr., and Patrick M. Williamson, were senior executives of either Coca-Cola or (in the case of Mr. Williamson) a Coca-Cola affiliate. Those relationships would cause one reasonably to question whether these directors were economically motivated to favor the interests of their employer, Coca-Cola, in considering a shareholder demand. That is because any such demand would be that the board take remedial action that could be adverse to Coca-Cola's interests. As persons arguably beholden to Coca-Cola, those Tri-Star directors would have been on both sides of a transaction where the interests of Tri-Star and Coca-Cola were in conflict.[14] *See Aronson, supra*; *Weinberger v. UOP, Inc.*, 457 A.2d at 710. Hence, those directors would have "divided loyalties" that would negate the presumption of disinterest that normally would protect their decision. *Pogostin*, 480 A.2d at 624.

There is a second, independent circumstance that creates a reasonable doubt as to the disinterestedness of Messrs. Herbert, Vincent, and Williamson, as well as three other Tri-Star directors, Judd A. Weinberg, Dan W. Lufkin, and David A. Matalon. These six directors owned substantial shares of Coca-Cola. As Coca-Cola stockholders, they would be receiving a *pro rata* share of the special (31,400,000 Tri-Star share) dividend that Coca-Cola would pay to

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14. In a similar vein, plaintiff argues that prior employment relationships of directors Kaufman, Matalon and Lufkin with Coca-Cola also created a disabling conflict. Those three persons were officers or directors of Columbia Pictures or its affiliates before Coca-Cola acquired Columbia Pictures in 1982. All three left Columbia Pictures shortly thereafter. At the time the Combination was approved in December, 1987, those directors were no longer officers or directors of any Coca-Cola subsidiary or affiliate. Plaintiff advances no cogent reason, and cites no authority, for his position that these past associations create a reasonable doubt as to the disinterest of Messrs. Kaufman, Matalon, and Lufkin.

its stockholders as part of the Combination. In that manner, those six directors stood to gain a personal financial benefit from the challenged transaction that would not be equally shared by Tri-Star's other stockholders. *Aronson*, 473 A.2d at 812; *Pogostin*, 480 A.2d at 624. On that basis, the complaint creates a reasonable doubt as to the ability of a majority of the board to consider impartially a demand.

In response, the defendants have interposed an array of arguments, all aimed towards their proffered conclusion that the special dividend did not create a disabling financial conflict of interest in these six recipients. The defendants argue that (i) Messrs. Williamson, Herbert, and Vincent owned only a *de minimis* equity interest in Coca-Cola, and directors Weinberg, Lufkin, and Matalon owned a proportionately greater equity interest in Tri-Star than in Coca-Cola;[15] (ii) the dividend did not add to those directors' personal wealth, because it did not increase the value of their Coca-Cola shares but ". . . merely redistributed assets between Coca-Cola and its shareholders," (Def. Reply Br., p. 34) and that therefore (iii) ". . . any injury allegedly suffered by Tri-Star as a result of the Combination allegedly affected recipients of the [dividend] as much as it allegedly affected plaintiff." *Id.*

These arguments labor under two infirmities. The first is that for the defendants' position to prevail, the Court must conclude as a matter of law that the dividend could not have increased the personal wealth of these six directors, and therefore could not have constituted a financial inducement capable of creating a conflict of interest. However, on this record such a legal conclusion would be pure *ipse dixit*. The defendants' proposition is not conceded by the complaint, nor is it compelled by the complaint's particularized factual allegations.

[21] That leads to the second, and conceptually more significant, infirmity, which is that at this procedural stage the defendants' arguments miss the mark. In reality they are affirmative evidentiary

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15. While in no way essential to this Court's ruling, it should be noted that the proxy statement discloses other facts that, in an evidentiary hearing, would arguably detract from the force of defendants' statement that these directors' holdings in Coca-Cola were *de minimis*. Although that is correct from a control standpoint, those directors' Coca-Cola shares did represent a substantial investment. With the exception of Mr. Lufkin, the dollar value of those directors' investment in Coca-Cola exceeded the value of their investment in Tri-Star. *See* Proxy Statement, pp. 41, 86-87, 96 and F-42.

contentions going to the merits of the entire "director disinterest" issue. As such they are inappropriate on a motion to dismiss the complaint under Rule 23.1. In this limited procedural context, the question is not whether the dividend was, as a matter of adjudicated fact, an inducement sufficient to impair these directors' impartiality in considering a demand. Rather, it is simply whether there is a *reasonable doubt*, based solely upon the particularized allegations of the complaint, that the board was disinterested. If such a reasonable doubt is found, that finding would authorize further exploration of that and other issues (including the merits of the derivative claim itself), by allowing the case to go forward into the discovery stage.

It follows that on a Rule 23.1 motion to dismiss, a finding that a reasonable doubt exists as to the directors' disinterest in the challenged transaction, has very limited significance. Such a tentative conclusion is not, nor could it represent, an adjudication that a majority of Tri-Star's directors were, in fact, interested in the challenged transaction because of the anticipated dividend. Indeed, and in fact, the opposite may be true. However, any such determination must be made at a later procedural stage, after the parties have been afforded an opportunity to develop a proper evidentiary record and to present their affirmative factual arguments on both sides of the question.[16] It is at that later stage that arguments of the kind defendants advance here will be entertained and appropriately weighed.

* * *

For the above reasons, I conclude that the plaintiff has alleged facts that excuse his failure to make a demand.

V. *CONCLUSION*

To summarize the rulings made herein: (1) HBO's motion to dismiss pursuant to Rule 12(b)(6) is granted; (2) the defendants' motion to dismiss Count III pursuant to Rule 12(b)(6) is granted with respect to Articles Fifth and Seventh of the Restated Certificate of Incorporation, and is denied with respect to Article Sixth; and

16. For example, the defendants' arguments in support of their position that the dividend could not have caused the Tri-Star directors to have a conflict of interest, could be presented on a motion for summary judgment pursuant to Rules 23.1 and 56. On such a motion the parties would be entitled to develop an evidentiary record in affidavit or other appropriate form.

(3) the defendants' motion to dismiss pursuant to Rule 23.1 is denied. IT IS SO ORDERED.

ADDENDUM

SIXTH: A. In anticipation that each of The Coca-Cola Company and Time Incorporated will remain a substantial stockholder of the Corporation, and in anticipation that the Corporation and The Coca-Cola Company or Time Incorporated may at some time in the future engage in the same or similar activities or lines of business and have an interest in the same areas of corporate opportunities, and in recognition of the benefits to be derived by the Corporation through its continued contractual, corporate and business relations with The Coca-Cola Company and Time Incorporated (including service of officers and directors of The Coca-Cola Company and Time Incorporated as officers and directors of the Corporation), the provisions of this Article SIXTH are set forth to regulate and define the conduct of certain affairs of the Corporation as they may involve The Coca-Cola Company and Time Incorporated and their respective officers and directors, and the powers, rights, duties and liabilities of the Corporation and its officers, directors and stockholders in connection therewith.

B. Neither The Coca-Cola Company nor Time Incorporated shall have any duty to refrain from engaging in the same or similar activities or lines of business as the Corporation, and neither The Coca-Cola Company or any officer or director thereof nor Time Incorporated or any officer or director thereof (except as provided in Paragraph C below) shall be liable to the Corporation or its stockholders for breach of any fiduciary duty by reason of any such activities of The Coca-Cola Company or Time Incorporated or of such person's participation therein. In the event that The Coca-Cola Company or Time Incorporated acquires knowledge of a potential transaction or matter which may be a corporate opportunity for both The Coca-Cola Company and the Corporation, or Time Incorporated and the Corporation, neither The Coca-Cola Company nor Time Incorporated, respectively, shall have any duty to communicate or offer such corporate opportunity to the Corporation and shall not be liable to the Corporation or its stockholders for breach of any fiduciary duty as a stockholder of the Corporation by reason of the fact that The Coca-Cola Company or Time Incorporated pursues or acquires such corporate opportunity for itself, directs such corporate opportunity to another person, or does not

communicate information regarding such corporate opportunity to the Corporation.

C. In the event that a director or officer of the Corporation who is also a director or officer of The Coca-Cola Company or a director or officer of Time Incorporated acquires knowledge of a potential transaction or matter which may be a corporate opportunity for both the Corporation and The Coca-Cola Company or Time Incorporated, such director or officer of the Corporation shall have fully satisfied and fulfilled the fiduciary duty of such director or officer to the Corporation and its stockholders with respect to such corporate opportunity and shall not be liable to the Corporation or its stockholders for breach of any fiduciary duty by reason of the fact that The Coca-Cola Company or Time Incorporated pursues or acquires such corporate opportunity for itself or directs such corporate opportunity to another person or does not communicate information regarding such corporate opportunity to the Corporation, if such director or officer acts in a manner consistent with the following policy:

(i) A corporate opportunity offered to any person who is an officer of the Corporation, and who is also a director but not an officer of The Coca-Cola Company or a director but not an officer of Time Incorporated, shall belong to the Corporation; (ii) a corporate opportunity offered to any person who is a director but not an officer of the Corporation, and who is also a director or officer of The Coca-Cola Company or a director or officer of Time Incorporated shall belong to the Corporation if such opportunity is expressly offered to such person in writing solely in his or her capacity as a director of the Corporation, and otherwise shall belong to The Coca-Cola Company or Time Incorporated, respectively; and (iii) a corporate opportunity offered to any person who is an officer of both the Corporation and The Coca-Cola Company or of both the Corporation and Time Incorporated shall belong to the Corporation.

D. For purposes of this Article SIXTH:

(1) A director of the Corporation who is chairman of the Board of Directors of the Corporation or of a committee thereof shall not be deemed to be an officer of the Corporation by reason of holding such position (without regard to whether such position is deemed an office of the Corporation under the by-laws of the Corporation), unless such person is a full-time employee of the Corporation; and