Unreported Cases

INTRODUCTION

UNREPORTED CASES is a continuing feature of THE DELAWARE JOURNAL OF CORPORATE LAW. All unreported cases of a corporate nature that have not been published by a reporter system will be included. The court's opinions are printed in their entirety, exactly as received.

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

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BIBLE v. EN ENTERPRISES, INC.

No. 12,397

Court of Chancery of the State of Delaware, New Castle

October 16, 1992

Former full-time salesmen of defendant brought suit alleging breach of contract and discrimination against minority shareholders for failure to issue common stock earned under their employment agreements. Plaintiffs further alleged that defendant completed a bulk sale of substantially all of its assets, and breached employment agreements by failing to pay commissions, reimburse expenses, and pay salaries. Plaintiffs sought specific performance of the stock issuance, an injunction against further discrimination, and distribution of proceeds from the bulk sale, appointment of a receiver, and money damages. Defendant moved to dismiss certain claims for failure to state a claim and moved to sever and dismiss the other claims on the ground of *forum non conveniens*

The court of chancery, per Vice-Chancellor Berger, held that the *forum non conveniens* argument was unpersuasive because plaintiffs had similar employment arrangements with defendant; and, therefore, litigation in one jurisdiction would reduce overall litigation expenses and conserve judicial resources. Nonetheless, the court dismissed the complaint because the equitable causes of action failed to state a claim and the court of chancery lacked subject matter jurisdiction over the remaining claims because plaintiffs had an adequate remedy at law.

1. Courts ⟹ 28

It is settled law that the trial court should consider six factors in the exercise of its discretion as to whether a case should be dismissed on the ground of *forum non conveniens*, the sixth of which is the practical considerations which would make the trial easy, expeditious and inexpensive.

2. Courts ⟹ 28

Dismissal on grounds of *forum non conveniens* may be denied where plaintiffs have similar, if not identical, employment arrangements

with defendant from which there will be common issues of fact and law, and decide to combine forces in one jurisdiction.

3. Courts ⟹162

Equity ⟹3, 138

Court of chancery does not have subject matter jurisdiction where counts of a complaint seek only money damages.

4. Equity ⟹3

When the alleged wrongful conduct is defendant's failure to honor its contractual obligations to former employees, employment contract claims cannot be converted into breach of fiduciary duty claims simply because plaintiffs may be entitled to stock as part of their compensation.

5. Corporations ⟹557(2)

Allegations of discriminatory and illegal conduct are insufficient to state a claim for the appointment of a receiver for a solvent corporation. Plaintiff must show fraud, gross mismanagement, or extreme circumstances causing imminent danger of great loss which cannot be otherwise prevented.

6. Equity ⟹45

When there is a contractual right to receive shares which can be purchased on the market, money damages are a complete and adequate remedy.

7. Equity ⟹138

Equitable prayers for relief do not necessarily determine whether the claim is one at law or in equity.

8. Equity ⟹43

Equity jurisdiction is not established where plaintiffs seek the value of stock rather than the shares themselves.

Thomas L. Ambro, Esquire, and Peter L. Frattarelli, Esquire, of Richards, Layton & Finger, Wilmington, Delaware; and Robert J. D'Agostino, Esquire, of Norton Law Firm, Atlanta, Georgia, of counsel, for plaintiffs.

Lawrence S. Drexler, Esquire, Mark L. Reardon, Esquire, Lynn T. Kammann, Esquire, and Myra V. Blasius, Esquire, of Elzufon, Austin & Drexler, Wilmington, Delaware, for defendant.

BERGER, *Vice-Chancellor*

This is an action brought by five former employees of defendant, EN Enterprises, Inc., formerly Fenem, Inc. ("Fenem"). Defendant, a Delaware corporation, produced a carbon dioxide detector used in medical procedures. Plaintiffs were full-time salesmen for Fenem from 1989 until the last of plaintiffs were terminated in September, 1991. At that time, Fenem made a bulk transfer of substantially all of its assets to Nellcor Incorporated. In connection with the bulk sale, Fenem sent notices to its creditors, including plaintiffs. Three of the plaintiffs, Messrs. Bible, Miser and Epstein, responded by submitting monetary claims. Mr. Goray submitted a claim for amounts allegedly due and 2500 shares of stock. Mr. Powell, by that time, had already obtained a default judgment against Fenem in the full amount of his claim, which did not include any claim for stock.

In late December, 1991, Fenem began filing suit against plaintiffs in jurisdictions around the country. Fenem filed suit against Bible in Richmond, Virginia, seeking damages for breach of contract, a declaratory judgment as to Bible's entitlement to common stock and other relief. Defendant filed similar suits against Miser, Goray and Epstein in California, Pennsylvania, and New York, respectively. In Kansas, where Powell had obtained a default judgment, defendant filed a motion for relief from that judgment.

Four days after Fenem filed the first of those suits, plaintiffs instituted this action. Their eight count Amended Complaint may be summarized as follows:

Count I is a breach of contract claim alleging that plaintiffs earned Fenem common stock under the terms of their employment agreements but that defendant has failed and refused to issue stock certificates to them. For relief, plaintiffs seek an order that the appropriate number of shares of Fenem common stock be issued or, alternatively, payment of the appraised value of those shares.

Count II alleges that Fenem and its directors "discriminated against minority shareholders of Fenem" by refusing to issue stock or distribute funds to plaintiffs. Amended Complaint ¶34. For relief, plaintiffs seek an order enjoining all discriminatory actions toward minority stockholders of Fenem.

Count III alleges that Fenem completed a bulk sale of substantially all of its assets; that it has "engaged in discriminatory and illegal conduct" in the past and at present; and that, as a result, this Court should enjoin defendant from distributing any proceeds from the bulk sale until the rights of minority stockholders and unsecured creditors are protected.

Counts IV, V and VI allege that defendant breached its employment agreements with plaintiffs by failing to pay commissions, reimburse expenses, or pay salaries, respectively. Each of these counts seeks monetary damages.

Count VII alleges, on information and belief, that defendant is insolvent or, if not, that it has engaged in "illegal and unethical conduct" thereby making it likely that defendant will dissipate the proceeds of its bulk sale. Amended Complaint ¶48. As relief, plaintiffs seek the appointment of a receiver.

Count VIII alleges that defendant has been acting "vexatiously and litigiously" and seeks, as relief, the award of attorneys' fees.

Defendant moved to dismiss Counts II, III, VII and VIII for failure to state a claim and moved to sever and dismiss Counts I, IV, V and VI on the ground of *forum non conveniens*. In addition, defendant argues that Powell's claim for compensation is barred by *res judicata* and/or collateral estoppel. For the reasons that follow, I find the *forum non conveniens* argument unpersuasive. Nonetheless, the motion to dismiss must be granted because I conclude that the equitable causes of action fail to state a claim and this Court lacks jurisdiction over the remaining claims because plaintiffs have an adequate remedy at law.

Defendant argues that plaintiffs' compensation claims should be heard in the various other jurisdictions where suits are pending. Fenem points out that, with respect to four of the five plaintiffs, the other actions were the first filed; the facts and law applicable to each plaintiff's claim will be different; and no witnesses or documents appear to be located in Delaware.

[1-2] It is settled law that the trial court should consider six factors in the exercise of its discretion as to whether a case should be dismissed on the ground of *forum non conveniens*. *Miller v. Phillips Petroleum Co. Norway*, Del. Supr., 537 A.2d 190, 202 (1988). In this

case, the sixth factor, "all other practical considerations which would make the trial easy, expeditious and inexpensive," *id.*, is controlling. Plaintiffs had similar, if not identical, employment arrangements with defendant and, undoubtedly, there will be common issues of fact and law. More importantly, however, plaintiffs' decision to combine forces in one jurisdiction will reduce overall litigation expenses and will conserve judicial resources by eliminating the need to litigate many of the same issues in five courtrooms around the country.

[3] Having determined that Delaware is an appropriate forum, this Court must determine whether it has subject matter jurisdiction. Counts IV, V, VI and VIII seek only money damages and, thus do not confer jurisdiction on this Court. Counts II, III and VII all seek equitable relief. However, they do not support the jurisdiction of this Court because the well pleaded facts in the Amended Complaint do not state a claim for such equitable relief.

[4] Count II alleges that Fenem has discriminated against its minority stockholders. The purported "discrimination" is that Fenem refuses to pay or issue stock allegedly due to plaintiffs under their employment contracts. In other words, the alleged wrongful conduct is defendant's failure to honor its contractual obligations to former employees. The Amended Complaint alleges no facts as to the treatment of Fenem's stockholders, and employment contract claims cannot be converted into breach of fiduciary duty claims simply because plaintiffs may be entitled to stock as part of their compensation. *See Simons v. Cogan*, Del. Supr., 549 A.2d 300 (1988). In short, Count II is nothing but a duplication of the breach of contract claim alleged in Count I. There is no equitable cause of action and no basis for the award of equitable relief. Count II, therefore, must be dismissed.

[5] Counts III and VII are so similar that they will be analyzed together. In Count III, plaintiffs seek injunctive relief to prevent Fenem from distributing its assets until plaintiffs' rights are determined. Count VII seeks the appointment of a receiver to preserve Fenem's assets for the same purpose. Plaintiffs base their request for an injunction in Count III and a receiver in Count VII on defendant's alleged discriminatory and illegal conduct.[1] "[I]n order to state a claim for the appointment of a receiver for a solvent corporation, plaintiff must show fraud, gross mismanagement or extreme circumstances causing imminent danger of great loss which

1. Count VII also alleges that Fenem is insolvent. However, plaintiffs concede for present purposes that Fenem is solvent.

cannot be otherwise prevented." *Vale v. Atlantic Coast & Inland Corp.*, Del. Ch., 99 A.2d 396, 400 (1953). The allegations in the Amended Complaint do not meet this standard. Moreover, plaintiffs concede that Fenem has escrowed funds in the full amount claimed by plaintiffs. Under these circumstances, Counts III and VII must be dismissed.

[6] The only remaining claim that might support this Court's subject matter jurisdiction is the request in Count I for the issuance of stock owed to plaintiffs under the terms of their employment agreements. There are two reasons the prayer for equitable relief in Count I does not establish jurisdiction in this Court. First, a contractual right to receive stock is not automatically subject to specific enforcement. *Francis v. Medill*, Del. Ch., 141 A. 697, 698 (1928) (ownership of stock must contain certain unique and particular features to warrant specific performance). For example, where the shares in question could be purchased on the market, money damages are a complete and adequate remedy. *U.S. Dimension Products v. Tassette, Inc.*, Del. Supr., 290 A.2d 634, 635 (1972). The Amended Complaint contains no allegations that the stock in question is of a nature that mandates specific performance.

[7-8] Second, in examining subject matter jurisdiction, this Court must consider the allegations of the Amended Complaint in light of what plaintiffs really seek to gain. Equitable prayers for relief do not necessarily determine whether the claim is one at law or in equity. *Hughes Tool Co. v. Fawcett Publications*, Del. Supr., 315 A.2d 577, 579 (1974). Here, it is apparent that what plaintiffs really seek is the value of the stock rather than the shares themselves. Plaintiffs couch the relevant prayers for relief in the alternative, thereby suggesting that plaintiffs would be equally satisfied with either cash or stock. This conclusion is supported by the fact that four of the five plaintiffs filed claims seeking the dollar value of their shares, rather than the stock itself. Accordingly, I conclude that Count I does not provide a basis for equity jurisdiction and the Amended Complaint, as a whole, must be dismissed.

IT IS SO ORDERED.

BLOMMER CHOCOLATE CO. v. BLOMMER

No. 12,693

Court of Chancery of the State of Delaware, New Castle

September 28, 1992

Plaintiff corporation, in an action brought on its behalf by three of its directors, sought a preliminary injunction enjoining or rescinding the sale of fifty percent of the voting power of the plaintiff corporation. Plaintiff alleged that confidential corporate information was disclosed to the purchaser, which was claimed to be a competitor of the plaintiff. Furthermore, plaintiffs claimed that this sale precluded an auction sale of the company.

The court of chancery, per Chancellor Allen, held that no sufficient threat of present irreparable injury existed to warrant issuance of an injunction because plaintiff (1) did not show a reasonable threat that defendant intended to use acquired confidential information to injure plaintiff competitively, (2) did not demonstrate that the competition between plaintiff and defendant would be materially affected, and (3) had no legal right to exclude defendant or its designees from its board even if useful business relationships were lost.

1. Injunction ⟹135

A court must exercise discretion informed by all of the particulars of the case to grant equitable relief, especially at a preliminary stage of the proceeding.

2. Injunction ⟹138.21

In analyzing whether to grant preliminary equitable relief, a court must evaluate whether there is a "reasonable" probability that the claim asserted will be proven at trial; the likelihood and severity of injury that might occur to plaintiff before trial; whether the plaintiff is confronted with threatened injury, which would be irreparable by an award of money or by later equitable relief; the effects of granting a preliminary remedy upon the defendant; and the public interest, if implicated.

3. Injunction ⟹138.24

Wrongful disclosure of information does not itself necessitate or justify equitable relief either preliminarily or after trial.

4. Injunction ⚷ 14

A threatened irreparable injury must be shown in order to justify an injunction.

5. Injunction ⚷ 14, 138.33

Threatened competitive injury, arising from a competitor having access to plaintiff's business information is the type of irreparable injury that could support preliminary injunction relief.

6. Injunction ⚷ 14, 138.33

Plaintiff failed to show sufficient threat of injury to warrant issuance of an injunction where he (1) did not show a reasonable threat that defendant intended to use acquired confidential information to injure plaintiff competitively, (2) did not demonstrate that the competition between plaintiff and defendant would be materially affected, and (3) had no legal right to exclude defendant or its designees from its board even if useful business relationships were lost.

7. Injunction ⚷ 38

An injunction barring exercise of the voting power of the stock held by the defendant *pendente lite* is inappropriate where the threat of competitive injury is in no articulated way connected to the exercise of the stockholders veto held by defendant corporation.

Edward P. Welch, Esquire, of Skadden, Arps, Slate, Meagher & Flom, Wilmington, Delaware; Reinhart, Boerner, Van Deuren, Norris & Rieselbach, S.C., Milwaukee, Wisconsin, of counsel, for plaintiff.

Robert K. Payson, Esquire, James F. Burnett, Esquire, Donald J. Wolfe, Jr., Esquire, and Michael B. Tumas, Esquire, of Potter Anderson & Corroon, Wilmington, Delaware, for individual defendants Robert Blommer, Suzann Blommer Love, and John Love.

Jesse A. Finkelstein, Esquire, Anne C. Foster, Esquire, Matthew J. Ferretti, Esquire, and Robert J. Stearn, Jr., Esquire, of Richards,

Layton & Finger, Wilmington, Delaware, for defendant Cargill, Inc.

ALLEN, *Chancellor*

Pending is an application for a preliminary injunction.

The action is one brought by three directors of Blommer Chocolate Company who represent 50% of the voting power of the corporation (the Henry Blommer heirs), purporting to act as the corporation itself (which is the named plaintiff), against the remaining three directors of the Company (the A.J. Blommer heirs), who also represent 50% of the voting power of the Company. The complaint seeks an order enjoining or rescinding the sale by the A.J. Blommer heirs (Robert Blommer and Suzann Blommer Love) of their ownership interest in the Company to defendant Cargill, Inc. It is not alleged that there exists any legal restriction on the ability of the defendants to sell their stock. There are no provisions in the certificate of incorporation to that effect, nor are there stockholder agreements of any kind that restrict the alienability of the defendants' shareholding.

Rather the complaint asserts that this is a situation in which a court of equity will impose a restriction on alienation, after the fact, in order to protect the fiduciary relationship between a corporation and its directors. Specifically, it is alleged that, in order to advance or promote the sale of their stock to Cargill, defendants have disclosed confidential corporate information to Cargill who is said, in some of its aspects, to be a competitor of the Company. This is a wrong, it is said, and, of course, the use of corporate information for private advantage, without the concurrence of the corporation's board is wrong. *See Penn Mart v. Becker*, Del. Ch., 298 A.2d 349 (1972).

This alleged wrong is said to have injured the company by exposing its confidential financial and operations information to a competitor. Perhaps more importantly to the Henry Blommer heirs, it is alleged that the acquisition by Cargill of 50% of the voting power of the Company effectively prevents the Company's board of directors from arranging an auction sale of the Company. It must be conceded by the Henry heirs that they do not possess a legal or equitable right, in the circumstances, to insist upon an auction sale.[1]

1. That is, as a practical matter in order for an auction sale of the Company to be feasible the defendants as beneficial owners of stock representing one-half of the voting power of the corporation must agree to it.

Moreover, it appears to be the case that the Henry heirs (who occupy the chief management positions of the firm) did not offer or suggest an auction sale to the A.J. heirs when the A.J. heirs sought, over the last several years, to liquidate their investment in the Company. Nevertheless, the Henry heirs, purporting to speak as the Company, now assert that the preclusion of the opportunity to auction the company constitutes a cognizable injury that flows from the Cargill sale, which itself is said to flow from the alleged breach of loyalty. This chain of causation is said to justify judicial interference with the legal power of the A.J. heirs to sell their stock to Cargill.

Following initiation of the suit, the sale by the A.J. heirs was closed. While this fact does not render this litigation moot,[2] it does require us to focus on the type of relief that might appropriately be ordered on the current motion for a preliminary injunction. Insofar as the litigation is directed to prevention, repair or compensation of a lost opportunity to auction the Company there would appear to be no provisional relief that can now address that subject, even if we assume final relief will ultimately be shown to be warranted. That theory calls for final relief. Preliminary equitable relief addressing competitive injury arising from the use by Cargill of information acquired either from defendants or in its new capacity as a shareholder might, however, be feasibly fashioned now, if facts justifying that relief have been shown. Such relief could, for example, limit *pendente lite* the ability of Cargill or any director nominated or elected by it to have access to specified types of information or, more narrowly, could restrict Cargill's use of any of the information learned by its representatives.

* * *

[1-2] The granting of equitable relief, particularly when that relief is fashioned at a preliminary stage of the proceeding, inevitably entails the exercise of discretion informed by all of the particulars of the case. The structure of the analysis is not controversial. First, the court must evaluate the probability that the claim asserted will be proven at trial and must find that probability "reasonable." Second, the court must assess the likelihood and severity of injury that might occur to plaintiff before trial. Third, plaintiff must be

2. The court has sufficient power to impose such equitable remedy as may be appropriate. Were the court to conclude that the facts alleged are proven and that equitable relief was called for, it could, for example, require defendant Cargill, Inc. to divest the Blommer Chocolate stock it has now acquired.

confronted with threatened injury, that is threatened injury that would be irreparable by an award of money or by later equitable relief. Fourth, the court must consider the effects of granting a preliminary remedy upon the defendant who may ultimately be shown to have been improvidently restrained. In that connection the ability of the court to protect against those risks by requiring a bond will, of course, be considered. Lastly, the public interest, if it is implicated, will be considered. *See Ivanhoe Partners v. Newmont Mining*, Del. Supr., 535 A.2d 1334 (1987). Before turning to an evaluation of these considerations in the light of the facts of this case as they appear at this time, it is well to lay out those facts. Much that is important here is not fully developed or is contested. Nevertheless, the following factual background appears to be largely non-controversial, except where noted otherwise.

I.

Blommer Chocolate Company is a family owned Delaware corporation which is engaged in the processing of cocoa beans for sale to manufacturers of food products, such as candy companies. Prior to 1988, voting control of the Company was evenly divided between two brothers who helped found the Company in 1939, Henry Blommer, Sr. ("Henry, Sr.") and A.J. Blommer ("A.J.").[3] Both men have since died, A.J. Blommer on September 13, 1987, and Henry Blommer, Sr., on July 16, 1992. Control of the company's voting stock has now passed to their respective children.[4]

Presently, and at least since A.J.'s death in 1988, control of the voting stock of the corporation has been divided evenly between the two brothers' families. Henry, Sr.'s side of the family ("Henry heirs"), which includes his sons Joseph, Peter, and Henry, Jr., controls 50% of the voting stock. A.J.'s children ("A.J. heirs"), his son Robert Blommer ("Robert"), and his daughter Suzann Blommer Love ("Suzann"), also control 50% of the voting stock.[5]

The Company's six person board of directors has also been evenly divided between the two branches of the family, with Robert,

3. Bernard Blommer, a third brother, also deceased, was also a founder of the Company.

4. The Company has two classes of common stock, Class A and Class B, of which only Class A has voting rights.

5. Each group of children controls its respective block of stock by virtue of that groups' control of the trusts which A.J. and Henry, Sr. each created for the benefit of their respective children. (Robert Dep. at 16; Joseph Dep. at 106).

Suzann and John Love, Suzann's husband, occupying three seats and members of Henry, Sr.'s family, including Henry, Sr. until his recent death, occupying the other three seats.[6] However, at least after A.J.'s death, it appears that Henry, Sr. controlled the management of the Company, serving as Chairman of the Board while his son Henry, Jr. served as the Company's President.

All parties agree that since the death of A.J. in 1988, there has been considerable friction between the two family groups and both sides have long realized that a transaction eliminating one or both groups of shareholders should be pursued in order to avoid damage to the enterprise and the financial interests both groups have in the Company. (John Dep. at 64; Henry, Jr. Dep. at 144). At a Board meeting, after A.J.'s death, Henry, Sr. suggested that the Company pursue such a transaction. (Robert Dep. at 22).

In late 1989 or early 1990, the Company retained American Appraisal Associates ("American Appraisal") to perform a valuation of the Company for the purpose of proposing a buy-out of the interests of Suzann and Robert. (Joseph Dep. at 78; John Dep. at 64-65; Suzann Dep. at 40). On May 31, 1990, American Appraisal reported its opinion that the fair market value of the entire Company was $43 million. (Hawthorne Dep. Ex. 4). On September 10, 1990, Suzann requested that the Company provide her with detailed financial data so she could determine the value of her shares of stock in the Company.[7] (John Dep. Ex. 1). The Company responded by supplying Suzann with substantial financial information.

On October 10, 1990, the Company proposed to buy the stock controlled by Suzann and Robert for $18.5 million. (John Dep. Ex. 1). On October 31, 1990, Suzann responded with a request for additional information regarding the Company and the terms of the offer, and stated that she was "working with some investment bankers in Denver." (John Dep. Ex. 1). On November 5, 1990, Henry. Sr. set a year end deadline for acceptance of the Company's proposal, and the offer eventually expired. (John Dep. Ex. 2). Information requested was provided. There appears to have been no mention of the need to keep this information confidential. (John Dep. Ex. 1).

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6. The Company's directors are elected by cumulative voting, thus each side has the power to elect half of the board.

7. The information provided by the Company included: Fiscal Year May 1991 financial statements, quarterly and monthly financial statements, stockholder records, accounts receivable information, tax and pension plan information, and capital expenditure projections. (John Dep. Ex. 1).

As the negotiations between the Company and Suzann and Robert were proceeding, in July of 1990, Grain Processing Corporation ("Grain"), a family owned food processing company, contacted Robert and Suzann through its representative, AVM Financial, and proposed the possible acquisition of all or part of the Company by Grain. (John Dep. Ex. 3).[8] Grain engaged in lengthy discussions with Robert and Suzann, but by June of 1991, Grain's President, Gage Kent, had concluded that he was not interested in acquiring less than all of the Company's stock, and terminated his negotiations with Suzann and Robert to purchase only the stock controlled by them. (John Dep. Ex. 8). Grain was interested in acquiring all of the Company's stock.

On July 9, 1991, Mr. Kent, met with Henry Blommer, Sr. and Joseph Blommer to discuss the possible sale of the Company in its entirety. (Henry Dep. Ex. 15). Henry, Sr. informed Mr. Kent that his family was not interested in disposing of its half of the stock of the Company. Grain's interest in buying the Company persisted and on November 5, 1991, Mr. Kent again contacted Henry, Sr. and proposed a purchase of all of the Company's stock or assets for $39,100,000. (Henry Dep. Ex. 16). Again, Henry, Sr. refused the offer, and reiterated his position that he and his family were not interested in selling their stock. (Henry Dep. Ex. 17).

Throughout 1991, negotiations continued between the two branches of the family. On September 23, 1991, Henry, Sr. proposed to have the Company redeem the stock of Robert and Suzann for approximately $14.5 million, of which $9.5 million was to be payable in cash, and the balance in deferred cash payments and unsecured debt obligations of the Company. (Henry Dep. Ex. 9). Robert and Suzann counter-offered to sell for a proposed package of $16 million in cash and $3.5 million in secured notes of the Company. (John Dep. Ex. 1; Joseph Dep. at 144). Henry, Sr.'s family rejected the proposal and argued that, in light of the offer made by Grain, their proposal was fair because it was merely 8% less than what the A.J. heirs would be entitled to under Grain's proposal, and the differential was justified as a "conservative minority discount." (Henry Dep. Ex. 18).

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8. AVM Financial had previously contacted Henry, Sr., on February 5, 1990, and suggested a possible acquisition of the Company, by Grain. At that time, Henry, Sr. rebuffed Grain's overtures. (Joseph Dep. Ex. 3).

In June 1991, Robert and Suzann, seeking alternatives to the redemption of their stock by the Company, and in light of the termination of their negotiations with Grain, decided to retain AVM Financial, to locate other qualified buyers for their stock. (John Dep. Ex. 8). In December of 1991, AVM approached Cargill, Inc., which is one of the largest privately owned business conglomerates in the United States, and is engaged in a wide variety of food processing industries. (Hawthorne Aff. at 1, 3). Cargill is involved in the cocoa bean business and also in the cocoa bean processing business. (Hawthorne Aff. at 14; Hawthorne Dep. at 141- 42). Cargill had previously approached Henry, Sr. regarding a purchase of the Company and had been rebuffed by him. (Hawthorne Aff. at 3). Cargill had remained interested in purchasing part of all of the stock of the Company. After obtaining, from AVM Financial, information concerning the Company's pricing strategy and the American Appraisal valuation (Hawthorne Dep. at 54, 58), Cargill sought to review in detail the Company's financial records, as well as physically inspect its production facilities, equipment, and operations.

On December 31, 1991, Cargill, and Robert and Suzann entered into a confidentiality agreement, which purports to protect sensitive information regarding the Company from misuse by Cargill.[9] Misuse of such information by Cargill to improve its position with regard to its competitors is stated to be a concern because the Company's suppliers of cocoa beans apparently view Cargill as a competitor and have allegedly indicated a reluctance to cooperate with the Company should Cargill become a part owner. (Joseph Dep. at 213). In addition, Cargill's pending acquisition of the Wilbur Chocolate Company may put it into direct competition with the Company, and Cargill's already existing cocoa processing operations allegedly compete with the Company in certain fields. (Pl. Brief 32-33).

Once the agreement was in place, Robert and Suzann began to disclose to Cargill information taken from the records of the Company.[10] Robert and Suzann did not disclose their negotiations with Cargill to the Company, or to other members of the Company's

9. AVM Financial signed the agreement for Robert and Suzann as their agent. (Hawthorne Dep. Ex. 3).

10. The defendant Cargill concedes that it received audited financial statements, tax returns, sales reports, select customer purchase orders, profit and loss figures, appraisals of the Company, production and capacity statistics, copies of the Company's by-laws and charter, minutes of the board and stockholder meetings, and a list of stockholders.

board. Indeed, Cargill and Robert took steps to conceal, from the Henry heirs, the fact that data was being released to Cargill. Robert personally removed copies of corporate records and documents (Robert Dep. at 107, 116-17) and, with Robert's assistance, Cargill employees visited the Company's production facilities to gather information through observation, using misleading identities so that Company personnel would not realize that they represented Cargill. (Robert Dep. at 183-85).

In February 1992, Henry, Sr. raised the offer to Robert and Suzann from $14.5 to $16 million (Suzann Dep. at 87), and Suzann replied with a counter-offer of $22 million, a price higher than she had demanded the previous fall. (Suzann Dep. at 93). On April 7, 1992, Henry, Sr. stated that the offer of $16 million would be revoked if not accepted by April 10, 1992. (John Dep. Ex. 1). Apparently Suzann and Robert never responded to the final proposal and allowed the deadline to pass.

On May 26, 1992, Cargill offered to buy the stock controlled by Suzann and Robert for a package of $16 million cash, five annual payments of $400,000 to be divided evenly between Robert and Suzann, and $405,000 in legal and brokerage fees, for a total consideration of $18,405,000. (John Dep. Ex. 12). After their efforts to secure a higher price from Cargill were unsuccessful, Suzann and Robert accepted this offer on May 29, 1992. (John Dep. Ex. 12). On July 2, 1992, Suzann, Robert and Cargill executed a stock purchase agreement, in which Cargill again promised not to misuse confidential information obtained from the Company. (Hawthorne Dep. Ex. 19).

On July 15, 1992, Cargill contacted Henry, Sr. and proposed the purchase of his family's stock by Cargill. Henry, Sr. stated that he was not interested in selling. (Hawthorne Aff. at 10). Henry, Sr. died the following day, July 16. Not knowing that Henry, Sr. had died, on July 17, Cargill contacted Henry, Sr.'s sons, Joseph and Henry, Jr., and arranged a meeting for July 18. On July 18, Cargill informed Joseph and Henry, Jr. that they had contracted to purchase the stock of their cousins Robert and Suzann. Joseph and Henry were surprised and upset to learn that Cargill was to be the half owner of their enterprise. (Hawthorne Aff. at 11). Joseph informed Cargill that he considered them to be an enemy, and a "thief who had come in the night," into the Company. He also stated his belief that Cargill's actions had unfairly deprived Henry, Sr.'s side of the family of the opportunity to sell their shares in a free and open market. (Joseph Dep. at 172-73).

Subsequently, acting by written consent, the Class A Common stockholders elected Peter Blommer, Henry, Sr.'s third son, to replace his father on the Board. The Board thus continues to be evenly divided between the two branches of the family. Acting by virtue of his authority as President, and without the approval of the Board, Henry, Jr. authorized the Company to bring this suit, which was filed on August 25, 1992. The sale of the stock controlled by Suzann and Robert to Cargill closed on September 15, 1992.

II.

For purposes of this motion I assume that Robert Blommer breached a duty he owed to Blommer Chocolate when, in order to arrange a personally advantageous transaction, he disclosed confidential information belonging to the corporation. This is factually not an uncontroversial assumption. It is here contested that the information disclosed really was confidential; much of it had been supplied to Suzann Blommer Love's investment banker arguably with Henry Blommer, Sr.'s assent; the same plant tours taken by Cargill representatives were frequently given to others without a continuing restriction on them.

Thus, I accept for purposes of this motion, that Mr. Blommer ought not have acted as he appears to have acted. A number of paths were open to him in order to pursue the transaction he and his sister sought to advance. He might have gone to the other directors, his cousins, to seek board authorization for the release of information and an agreement on the terms of restrictions on its use. Surely that might not have been the most pleasant session, but as holders of half of the voting power of the corporation, Robert and Suzann were not without power in the situation. Alternatively, they might have disclosed to Cargill only that which was already available to others and, in order to offer assurance to Cargill that due diligence inspection would not disclose a material problem, offer Cargill a put, exercisable within a stated period on stated conditions. Once the transaction closed, Cargill, as a 50% owner, could then enforce its right to an inspection of the Company's books and records. This would take time and would thus involve the sellers accepting some additional risks. But the avoidance of that risk does not justify the unauthorized disclosure of corporate information. I am sure expert counsel could have structured other arrangements that could have satisfied Cargill's reasonable demand for information before it became irrevocably committed to the payment of the purchase price but that

would not have required a director to impinge upon his obligations to others.

Thus, I do assume that Mr. Blommer's conduct was inappropriate. While in other circumstances stronger words might be used to characterize actions of this type, in the circumstances apparently present in this case I believe the terms ill-advised and inappropriate are probably fitting.

[3-4] But the assumption that a disclosure of information was wrongful does not itself necessitate or justify equitable relief either preliminarily or after trial. Equitable remedies are not so mechanical. What is the irreparable injury threatened here that would justify an injunction of any sort? Two injuries are put forth. But as stated above even if the loss of an opportunity to auction the firm were a cognizable injury that might be said to flow from the assumed wrong, there is no preliminary relief that can provide a remedy. The status quo at the time of the suit was that a binding legal contract of sale had been entered (subsequently closed). That contract of sale of a 50% voting interest precludes an auction sale and, if it constitutes a wrong, only final relief can remedy it.

[5-6] The second claim of irreparable injury is the threatened competitive injury that will arise from a competitor having access to Blommer's business information. This claim of injury is in principle of a type that could support preliminary injunction relief. But I am unpersuaded that plaintiff has shown a sufficient threat of injury to warrant the issuance of an injunction. Several factors support this view. First, the law already imposes upon Cargill an obligation not to use any Blommer confidential information in a way that will injure Blommer and benefit Cargill or its other affiliates. While the issuance of an injunction would sharpen the point of the law's lance by holding Cargill open to the possibility of a contempt citation were that duty to be violated, I see no sufficient record justification to assume that there is a reasonable threat that Cargill intends to use such information as it has acquired to injure Blommer competitively. If that had been its plan it had no need to close on its sale, since it already had the information that the Henry heirs seek to present as vital. Second, I am unpersuaded on this record that the competition between Blommer and Cargill affiliates would in fact be materially affected even if the Blommer information fell into the hands of its competitors. Plaintiff could point to no specific information made available to Cargill that would not be available from the market that appears at this stage to be critical or even significant to Blommer's operation. Third, Blommer has no legal right to exclude Cargill or

its designees from its board even if the presence of Cargill in Blommer's ownership structure results in the loss of useful business relationships. The principals of this family corporation could have elected to restrict the transfer of its stock. The law would enforce such arrangements. But they did not do so. Thus, even if one assumes that the sale to Cargill flows from the violation of loyalty by Robert Blommer in a but-for sense, and that the sale results in a loss of valuable business relationship, those assumptions make a weak case for the issuance of an injunction since the assumed loss or injury was itself one that the corporation never had a reasonable expectation of legally precluding.

[7] Beyond redundant restrictions on the use by Cargill of Blommer confidential information, it would be possible to go further and enjoin the exercise of the voting power of the A.J. heirs (now Cargill's) stock *pendente lite*. That would be strong medicine which, while available to a court of equity in appropriate circumstances, would be employed only with hesitation. It would plainly be inappropriate here since the threat of competitive injury is in no articulated way connected to the exercise of the stockholders veto now held by Cargill.

For these reasons, I conclude that even assuming that Robert Blommer engaged in inappropriate and ill-advised conduct in promoting a sale that he had every right to arrange, the corporation can show no threat of present irreparable injury that would justify the issuance of a preliminary injunction at this time. The plaintiff's motion therefore will be denied.

BRANSON v. EXIDE ELECTRONICS CORP.

No. 11,536

Court of Chancery of the State of Delaware, New Castle

September 14, 1992

Plaintiff brought an action charging violations of sections 11 and 12 of the Securities Act of 1933 in connection with an initial public offering of Exide Electronics Corporation stock. Plaintiff claimed that the prospectus accompanying the offering omitted or misstated

material facts concerning pending litigation against Exide. Specifically, plaintiff alleged that the disclosures were materially misleading because they: (1) misrepresented Exide's potential liability, (2) misrepresented the material adverse impact the litigation would have on the corporation in future years, and (3) failed to disclose that trial was imminent. Defendant moved to dismiss the complaint, maintaining the plaintiff had failed to state a claim upon which relief could be granted.

The court of chancery, per Vice-Chancellor Berger, held that plaintiff had failed to state a claim upon which relief could be granted. The court found (1) no misrepresentation with respect to potential liability, (2) no statements by the company concerning possible financial results in future years, and (3) failure to disclose an imminent trial date did not constitute an actionable omission.

1. Securities Regulation ⟹ 25.56, 60.27(1)

In determining liability under section 11 and Rule 10b-5 of the securities laws, allegations of material misrepresentations or omissions may not rest on readings of isolated portions of a disclosure; the purportedly misleading material must be viewed in the context in which it was actually made.

2. Securities Regulation ⟹ 60.27(2)

Failure to disclose in prospectus accompanying offering, either a trial date or the fact that trial was imminent, does not constitute an actionable omission.

Pamela Tikellis, Esquire, Carolyn D. Mack, Esquire, and Edward Seglias, Esquire, of Greenfield & Chimicles, Wilmington, Delaware; Daniel W. Krasner, Esquire, and Edward P. Dietrich, Esquire, of Wolf Haldenstein Adler Freeman & Herz, New York, New York, of counsel; and Charles J. Piven, Esquire, of Baltimore, Maryland, of counsel, for plaintiff.

R. Franklin Balotti, Esquire, Anne C. Foster, Esquire, and Frederick L. Cottrell, III, Esquire, of Richards, Layton & Finger, Wilmington, Delaware, for individual defendants, Exide Electronics Corporation and Inco Battery Holdings Corporation.

Donald J. Wolfe, Jr., Esquire, and William J. Marsden, Jr., Esquire, of Potter Anderson & Corroon, Wilmington, Delaware; David Clarke, Jr., Esquire, of Piper & Marbury, Baltimore, Maryland, of counsel, for defendants Alex. Brown & Sons Incorporated and Donaldson, Lufkin & Jenrette Securities Corporation.

BERGER, *Vice-Chancellor*

This is an action charging violations of the federal securities laws in connection with an initial public offering of Exide Electronics Corporation ("Exide") stock.[1] Plaintiff, a stockholder, claims that the prospectus accompanying the offering omitted or misstated material facts concerning certain litigation pending against Exide. The complaint names as defendants Exide and its directors; Alex. Brown & Sons, Inc. and Donaldson, Lufkin & Jenrette Securities Corporation, individually and as representatives of a defendant class of all underwriters involved in the offering; and Inco Battery Holdings Corporation, allegedly a controlling stockholder of Exide. This is the decision on defendants' motions to dismiss. For the reasons that follow, I conclude that the complaint fails to state a claim upon which relief may be granted.

The facts, as alleged in the complaint and the December 21, 1989 prospectus, may be summarized as follows. Exide, a Delaware corporation, designs, manufactures and sells a variety of products that protect computers and other electronic equipment against temporary power loss or distortion. In 1989, its net income was $5.5 million and its earnings per share were $1.30. In the public offering, 1.2 million shares of Exide common stock were sold at $12.50 per share.

The complaint challenges the accuracy and completeness of disclosures made in the prospectus concerning an action then pending in the United States District Court for the Northern District of California captioned *James Hendry d.b.a. Synergy Sales Engineering v. Exide Electronics Corporation* (the "Hendry litigation"). This litigation is described, at some length, both under the heading "Legal Proceedings" in the body of the prospectus and in the notes to Exide's Consolidated Financial Statements. The complaint quotes the description contained in the notes to the financial statements:

1. The complaint, as originally filed, also contained a claim for breach of the fiduciary duty of disclosure. The parties stipulated to the dismissal of that claim.

In 1989, a case was filed against the Company in which the plaintiff made various claims based on an alleged failure by the Company to pay commissions in connection with sales arising out of a government contract. In addition, the plaintiff has claimed entitlement to commission for sales under certain other sales agreements entered into by the Company during a period that the plaintiff was a manufacturers' sales representative of the Company. The lawsuit seeks the imposition of various types of relief, including actual damages which are stated to be approximately $62,100,000, representing 10% of the maximum potential value of the contract, and punitive and consequential damages. It is the Company's position that the manufacturers' sales representative agreement was terminated in 1987 by the Company pursuant to the agreement and that the plaintiff is not entitled to any commissions under the contract because, among other things, it was publicly announced for bid and awarded to the Company subsequent to the plaintiff's termination. In addition, even if the agreement with the plaintiff were found to be applicable to the contract, the claimed amount of actual damages could only be obtained in the event that the government places equipment orders over the life of the contract for the maximum potential value of approximately $621,000,000 and the Company were obligated to pay the plaintiff a full 10% commission on each item shipped. The contract is a "requirements" contract and the maximum potential value does not necessarily represent total orders that will be placed under the contract. In addition, the manufacturers' representative agreement entered into with the plaintiff, if it were found to be applicable to sales under the contract, provides for different percentage commissions depending upon the type and location of the purchase and the type of equipment purchased and for payment only after shipment of the product. As of September 30, 1989, the Company had shipped $15,400,000 in products under the contract. The Company has filed an answer denying the plaintiff's allegations and discovery is ongoing. The Company believes it has meritorious defenses to the alleged claims and has determined to defend the action vigorously.

The Company believes that any liability resulting from either of these lawsuits should not have a material adverse effect on its 1989 operations or financial condition.

Complaint at 8-9, quoting Prospectus at F-15.1.[2]

Four months after the offering, the Hendry jury returned a verdict against Exide for $14.9 million. Plaintiff allegedly sold his 1,000 shares of Exide stock immediately upon learning of the verdict and suffered a loss of approximately $5,000.

Plaintiff claims that the Hendry litigation disclosures in the prospectus were so inadequate and/or misleading that they violated Section 11 and 12 of the Securities Act of 1933 (15 U.S.C.A. §§ 77k and 77*l* (1981)).[3] He maintains that the disclosures were materially misleading because they (1) misrepresented Exide's potential liability as being limited to $1,540,000; (2) misrepresented the material adverse impact the litigation would have on the corporation in future years by stating that any potential liability would not affect Exide's financial condition in 1989; and (3) failed to disclose that trial was imminent.

With respect to the alleged misrepresentation as to Exide's potential liability, plaintiff concedes that the prospectus included no actual prediction of liability. He argues, however, that a reasonable

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2. A more detailed reference, providing the names of the parties involved, the court, jurisdiction and date the action was filed, and containing essentially the same substantive representations, is found on page 24 of the prospectus.

3. The statutes provide, in relevant part:

> Sec. 11 (a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such securities (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue —
>
> (1) every person who signed the registration statements;
>
> (2) every person who was a director of . . . the issuer at the time of the filing of the . . . registration statement;
>
> * * *
>
> (5) every underwriter with respect to such security.
>
> Sec. 12. Any person who —
>
> * * *
>
> (2) offers or sells a security . . . by means of a prospectus . . . which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him . . . for damages if he no longer owns the security.

investor would interpret the description of the Hendry litigation as including a limitation on potential liability. Plaintiff argues that, since the prospectus identified 10% as the maximum commission payable under the disputed agreement and also stated that the company had shipped $15.4 million in goods as of September 30, 1989, a reasonable person would conclude that the maximum potential liability for the company was 10% of $15.4 million, or $1.54 million. Plaintiff then goes on to argue that defendants knew or should have known that Exide's potential liability was significantly higher and, thus, the prospectus misrepresented a material fact.

[1] I find that plaintiff's argument fails at its premise. Allegations of material misrepresentations or omissions may not rest on readings of isolated portions of the disclosure; the purportedly misleading material must be viewed in the context in which it was actually made. *See Isquith v. Middle S. Utils.*, 847 F.2d 186 (5th Cir.), *cert. denied, Middle S. Utils. v. Isquith*, 488 U.S. 926 (1988) (context in which disclosures are made is significant when determining liability under Section 11 and Rule 10b-5); *see also Greenapple v. Detroit Edison Co.*, 618 F.2d 198 (2d Cir. 1980). The disclosure at issue, when read in its entirety, cannot be fairly read to suggest a cap on liability at $1.54 million.

Early in the description of the Hendry litigation, the prospectus identified the relief requested: "actual damages which are stated to be approximately $62,100,000, representing 10% of the maximum potential value of the contract, and punitive and consequential damages." Prospectus at 24. Later in the description, after setting forth the company's position with respect to the substantive claims made in the Hendry litigation, the prospectus explained that the contract at issue is a "requirements" contract and that the dollar amount sought as actual damages would only be obtainable if the maximum amount of goods were shipped at the maximum commission rate. Toward the end of the litigation description, the prospectus stated that $15.4 million in products had been shipped as of September 30, 1989.

The only way that a reasonable investor could conclude that damages were capped at $1.54 million would be if there were a suggestion that no more goods were going to be shipped after September 30, 1989, and if there were some reason to ignore the possibility of punitive and consequential damages. Nothing in the litigation description would lead a reasonable investor to make either of those assumptions. *Cf. Beecher v. Able*, 374 F. Supp. 341, 346 (S.D.N.Y. 1974) (disclosure that net income very likely "will be

nominal" implies that substantial losses were improbable). Thus, I find no misrepresentation, material or otherwise, with respect to potential liability.

Plaintiff also faults the statement that "any liability resulting from . . . lawsuits should not have a material adverse effect on [Exide's] 1989 operations or financial condition." Prospectus at F-15. This disclosure allegedly was inaccurate because it made no mention of, and therefore was materially misleading as to, the effect of the litigation on the company's operations and financial conditions in subsequent years. Again, I find that the context within which the disclosure was made defeats any claim that it implicitly addressed the future financial impact of the litigation. The disclosure is part of the notes to Exide's Consolidated Financial Statements. Those statements are historical; they reflect the financial status of the company as of September 30, 1989, and do not purport to address possible financial results in future years.

The last alleged disclosure violation concerns an omission rather than a purported misrepresentation. Plaintiff complains that the prospectus failed to disclose either the pending trial date or the fact that trial was imminent. Regulation S-K outlines the general disclosure guidelines to be followed when filing a prospectus under the Securities Acts of 1933 and 1934. Item 103 of Regulation S-K, 17 C.F.R. 229.103 (1992), addresses the information to be included in descriptions of material pending legal proceedings. It reads, in relevant part:

> Item 103 Legal Proceedings
>
> Describe briefly any material pending legal proceedings other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is subject. Include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought.

As can be seen, the regulation does not require disclosure of a trial date. It does, however, require that sufficient information be provided from which an interested reader could readily discover the scheduled trial date, if he were so inclined—the names of the parties, the date on which the action was filed and the court or other tribunal in which it is pending.

[2] In *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 517 (7th Cir. 1989), the court ruled that an omission in the description of a pending license application was not actionable because the defendant company disclosed all the information required by Item 103. The court noted that plaintiff was mistaken in viewing registration statements and related documents as guarantees of future events. "The securities acts do not have this *ex post* perspective. Their approach is *ex ante*. Issuers and underwriters must decide what information will be useful without burying investors under a blizzard of paper." *Id.* at 518. I find that the same analysis applies here. The fact that a trial date may have been set does not, as plaintiffs suggest, mean that the question of liability soon will be decided. Trials are postponed and verdicts appealed. The litigation process can continue for years after a trial date is set. Moreover, to the extent that anyone is particularly concerned about whether a trial is imminent, the court records are available to the public. Accordingly, I conclude that the failure to disclose either a trial date or the fact that trial was imminent does not constitute an actionable omission.

Based upon the foregoing, defendants' motions to dismiss for failure to state a claim are granted. IT IS SO ORDERED.

FRANK v. LIBCO CORP.

No. 12,412

Court of Chancery of the State of Delaware, Kent

December 8, 1992

Defendant moved to dismiss a complaint filed pursuant to section 220 of the Delaware Code seeking an inspection of defendant's stock ledger, list of stockholders, and other books and records.

The court of chancery, per Vice-Chancellor Hartnett, granted defendant's motion (without prejudice) because plaintiff failed to comply with the statutory requirements of section 220. Specifically, plaintiff's original complaint was not made "under oath" in accordance with the provisions of section 220(b), and plaintiff then failed to afford defendant the statutorily mandated five-day waiting period

by submitting his amendment to the original complaint prior to the lapse of this time.

1. Oath ⟹ 2

Under Delaware law, a notary is authorized to administer an oath or affirmation. DEL. CODE ANN. tit. 29, § 4321(3) (1991).

2. Oath ⟹ 5

A notary's verification upon oath or affirmation is sufficient if it includes the sentence, "Signed and sworn to (or affirmed) before me on (date) by (name(s) or person(s) making statement)." DEL. CODE ANN. tit. 29, § 4321(3) (1991).

3. Corporations ⟹ 181(5)

Plaintiff's demand which contains no language indicating either an oath or affirmation as to the truth of the statements therein will not be sufficient to satisfy the requirements of section 220(b). DEL. CODE ANN. tit. 8, § 220(b) (1991).

4. Corporations ⟹ 181(8)

Failure to comply with the requirement in section 220(b) that the demand be under oath requires dismissal of complaint. DEL. CODE ANN. tit. 8, § 220(b) (1991).

5. Corporations ⟹ 181(6)

Under section 220(c), a shareholder may apply to the court for an order to compel an inspection of corporate books and records if the corporation does not reply to a demand "within 5 business days after the demand has been made . . . ." DEL. CODE ANN. tit. 8, § 220(c) (1991).

6. Equity ⟹ 1

The court of chancery has the inherent power to do "equity," and the obligation to bring cases to a fair and prompt resolution and to brush aside non-prejudicial technical objections which are primarily tactical.

7. Corporations ⟹ 81(8)

A five business day waiting period does not apply if the corporation refuses the demand before the five days have passed. DEL. CODE ANN. tit. 8, § 220(c) (1991).

8. Corporations ⟹ 181(8)

Under certain circumstances, shareholder's failure to make a sworn demand prior to filing suit can be cured by amendment. DEL. CODE ANN. tit. 8, § 220(b) (1991).

Richard N. Frank, Ph.D., of Clearwater, Florida, *pro se.*

Jesse A. Finkelstein, Esquire, and David L. Finger, Esquire, of Richards, Layton & Finger, Wilmington, Delaware, for defendant.

HARTNETT, *Vice-Chancellor*

Defendant has moved to dismiss the complaint that, pursuant to 8 *Del. C.* § 220, seeks an inspection of defendant's stock ledger, its list of stockholders and other books and records. Because plaintiff has failed to comply with the statutorily mandated requirements of 8 *Del. C.* § 220, defendant's motion to dismiss must be granted.

I

The plaintiff, Dr. Frank, a shareholder of defendant Libco Corporation ("Libco"), a Delaware corporation, on April 6, 1990, requested by letter that he be given "permission to examine the Libco stock ledger, its list of stockholders and other germane books and records." Dr. Frank's request, while containing a purported notarization, did not state under oath that the contents were true or correct. Libco did not respond to Dr. Frank's request and on January 22, 1992, Dr. Frank, acting *pro se*, filed a complaint requesting that the Court order Libco to allow Dr. Frank to review and copy the requested records. The complaint was not signed by Dr. Frank.

On February 18, 1992, Libco filed this motion to dismiss. Libco claimed that the complaint failed to comply with Chancery Rule 11 that requires that all pleadings be signed. Libco also asserted that Dr. Frank failed to comply with 8 *Del. C.* § 220 because his demand

was not made under oath. Defendant further asserted that the stated purpose of Dr. Frank's demand, i.e., to learn the names of other shareholders so he could purchase additional shares and to learn the actual value of the corporation, was not a proper purpose under 8 *Del. C.* § 220.

In an attempt to cure the deficiencies cited by Libco in its motion to dismiss, Dr. Frank, on July 8, 1992, mailed a revised demand letter to Libco that was under oath. This demand letter was received by Libco on July 13, 1992. Two days later, Dr. Frank's reply brief was filed with this Court. In an apparent attempt to cure the Rule 11 signature requirement, that brief included a signed copy of Dr. Frank's original complaint.

II

8 *Del. C.* § 220 provides in relevant part:

> (b) Any stockholder, in person or by attorney or other agent, shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose the corporation's stock ledger, a list of its stockholders, and its other books and records, and to make copies or extracts therefrom . . . .
>
> (c) If the corporation, or an officer or agent thereof, refuses to permit an inspection sought by a stockholder or attorney or other agent acting for the stockholder pursuant to subsection (b) of this section or does not reply to the demand within 5 business days after the demand has been made, the stockholder may apply to the Court of Chancery for an order to compel such inspection . . . .

Libco claims that the original demand letter did not satisfy the statutory requirement that the demand be under oath because an oath is "an affirmation of truth of a statement which renders one willfully asserting untrue statements punishable for perjury," and Dr. Frank's original demand did not state that Dr. Frank swore or affirmed that the contents of the demand letter were true. *Black's Law Dictionary* 1071 (6th ed. 1990). *See also* 10 *Del. C.* §§ 5321 & 5323 (oath can be made only by the swearing upon the Holy Evangels of Almighty God or by affirming to the truth of the matter to be testified); 29 *Del. C.* § 4321(b) ("verification upon oath or affirmation" means statement by a person who asserts it to be true and makes statement under oath or affirmation); Delaware Rule of Ev-

idence 603 (oath requires declaration that witness will testify truthfully).

Dr. Frank contends that the affixing by a notary of his signature on the original demand for inspection of the corporate books and records was sufficient to satisfy the requirement that the demand be under oath.

[1-3] Under Delaware law, a notary is authorized to administer an oath or affirmation. 29 *Del. C.* § 4321(3). A notary's verification upon oath or affirmation is sufficient if it includes the sentence: "Signed and sworn to (or affirmed) before me on (date) by (name(s) or person(s) making statement)." 29 *Del. C.* §§ 4327(b)(1) & 4328(3). Perhaps something other than these precise words would be sufficient to satisfy the requirement in 8 *Del. C.* § 220(b) that the demand for inspection of corporate books and records be under oath. Because, however, Dr. Frank's original demand contained no language indicating either an oath or an affirmation as to the truth of the statements contained therein, it was not sufficient to satisfy the requirements of 8 *Del. C.* § 220(b). Dr. Frank cites various provisions of Florida law but none of those provisions suggests that his original demand would have been considered to have been "under oath" under Florida law.

[4] This Court has held that the failure to comply with the requirement in 8 *Del. C.* § 220(b) that the demand be under oath requires the dismissal of the complaint. *Haber v. Harnischfeger Corp.*, Del. Ch., C.A. No. 6930-NC, Hartnett, V.C. (Feb. 3, 1983). Therefore, unless Dr. Frank's attempt to cure the deficiencies of the original demand letter was successful, his complaint must be dismissed.

III

Dr. Frank's second demand letter was dated July 8, 1992, and was received by Libco on July 13, 1992.

[5] Under 8 *Del. C.* §220(c), a shareholder may apply to this Court for an order to compel an inspection of corporate books and records if the corporation does not reply to a demand "within 5 business days after the demand has been made . . . ." Defendant cites *Weisman v. Plains Resources, Inc.*, Del. Ch., C.A. Nos. 10,814 & 10,840, Berger, V.C. (June 1, 1989) for the proposition that a shareholder must wait a minimum of five business days after the corporation has received the letter before filing suit and that the waiting period is a "jurisdictional prerequisite." Therefore defendant claims any action that is filed before the five business days have passed must be dismissed as premature.

Defendant, however, ignores *Gay v. Cordon International Corp.*, Del. Ch., C.A. No. 5541-NC, Hartnett, V.C. (Mar. 31, 1978). In that case a shareholder, whose original demand to inspect a corporation's stock ledger was not submitted under oath, brought suit under 8 *Del. C.* § 220 to compel the corporation to permit him to inspect the stock ledger. The corporation moved to dismiss the complaint on the grounds that the demand was not under oath. The plaintiff then submitted a new sworn demand to the corporation and, *after five business days had passed*, moved pursuant to Chancery Rule 15(d) to supplement his complaint to incorporate the second, sworn demand that was made after the complaint had been filed.

[6] This Court granted plaintiff's motion to supplement his complaint to incorporate the sworn post-filing demand. The Court reasoned that the Court of Chancery Rules establish a policy of liberally permitting amendments. The Court also found that it had "the inherent power to do 'equity[,]' and the obligation to bring this case to a fair and prompt resolution and to brush aside non-prejudicial technical objections which are primarily tactical." *Id.*, slip op. at 4.

[7] Defendant also ignores the holding in *Odyssey Partners v. Trans World Corp.*, Del. Ch., C.A. No. 7125-NC, Hartnett, V.C. (Mar. 29, 1983), where this Court held that the five business day waiting period does not apply if the corporation refuses the demand before the five days have lapsed.

[8] The *Gay* and *Odyssey* opinions preclude a holding that the five business day waiting period is jurisdictional (in the sense that the Court does not have the power to hear a suit). *Gay* also shows that, under certain circumstances, a shareholder's failure to make a sworn demand prior to filing suit can be cured by amendment.

I V

In the present case, however, Dr. Frank has not properly cured the deficiencies in his original complaint and his complaint must therefore be dismissed. In *Gay*, the plaintiff-shareholder submitted a second, sworn demand to the defendant-corporation during the pendency of the litigation but waited until five business days after the corporation had received the demand before moving to supplement his complaint with the second, sworn demand. In so doing, he afforded the corporation the opportunity to determine whether it should accede to the demand that is the purpose for the five day waiting period provided by 8 *Del. C.* § 220(c).

Dr. Frank, in this case, however, submitted his purported amendment to his complaint prior to the lapse of the statutory waiting

period, thereby denying Libco the five-day opportunity granted it by 8 *Del. C.* § 220 to consider and respond to the demand. While Libco's response, based on its subsequent conduct in this litigation, might have been to deny Dr. Frank's request, this Court cannot eviscerate the statutory five business day waiting period by ignoring it.

The motion of defendant to dismiss is therefore granted, without prejudice to the plaintiff, however, to bring a new suit after a new demand.

IT IS SO ORDERED.

GREENFIELD v. FRANK B. HALL & CO.

No. 8480

Court of Chancery of the State of Delaware, New Castle

October 19, 1992

Plaintiff brought an action for attorneys' fees after his stockholder derivative suit was dismissed. Plaintiff contended that initiation of his suit contributed to the settlement of related derivative suits against the same defendant.

The court of chancery, per Vice-Chancellor Hartnett, held that plaintiff was not entitled to attorneys' fees on three grounds: (1) plaintiff's complaint was not meritorious when filed or amended, (2) litigation of plaintiff's derivative suit did not contribute to the success of the related actions, and (3) plaintiff's actions did not contribute any ascertainable benefits to the corporation or its stockholders.

1. Corporations ⟹ 214
   Costs ⟹ 194.16

The general rule that litigant in a shareholder derivative suit must, himself, defray the cost of being represented by counsel is well-settled in Delaware.

2. Corporations ⟹ 214

When litigation brought for the benefit of the stockholders of a corporation (whether as a stockholder derivative or class action) results in the conferring of a benefit to the corporation or its stockholders, plaintiff is entitled to an award of reasonable attorneys' fees.

3. Corporations ⟹ 214

Attorneys' fees may be awarded where a defendant corporation takes action that settles or moots the case if: (1) the suit was meritorious when filed, (2) action producing a benefit to the corporation was taken, and (3) the benefit to the corporation was causally related to the suit.

4. Corporations ⟹ 214

The court of chancery has broad discretion in awarding attorneys' fees and may deny them altogether if the court finds that the litigation did not result in any ascertainable benefit to the corporation.

5. Corporations ⟹ 214

Where shareholder derivative suit was meritorious when filed and thereafter corporation took action that resulted in a benefit to the corporation and the suit was settled or mooted, corporation bears the burden of showing that the benefit was not causally related to the bringing of the suit.

6. Corporations ⟹ 214

Court may award reduced attorneys' fees if it determines that the benefit was partially caused by the actions of others (such as an independent committee appointed by the corporation's directors).

7. Corporations ⟹ 214

Plaintiff is not entitled to an award of attorneys' fees for those claims in a shareholder suit which were not meritorious when filed, regardless of whether there was a causal connection between the suit and any benefit to the corporation, but the court may consider

awarding fees for those claims that were meritorious when filed.

8. Costs ⟹ 171

A claim is meritorious if it can withstand a motion to dismiss on the pleadings and, if at the same time, plaintiff possesses knowledge of provable facts which hold out some reasonable likelihood of ultimate success.

9. Costs ⟹ 171

The test of whether a suit was meritorious when filed is whether it could have withstood a vigorously pursued motion to dismiss under Chancery Rule 12(b) or Chancery Rule 23.1. DEL. CH. CT. R. 12(b), 23.1.

10. Corporations ⟹ 206(2), 206(4)

In shareholder suits, the court will dismiss plaintiff's complaint under Chancery Rule 23.1 if plaintiff fails to make a pre-suit demand on the corporation or if he fails to adequately plead the futility of making the demand. DEL. CH. CT. R. 23.1.

11. Corporations ⟹ 213

Where there has been a refusal to commence suit in response to a pre-suit demand, plaintiff must show that the board wrongfully refused his demand in order to be able to continue to prosecute a stockholder derivative suit.

12. Corporations ⟹ 320(8)

It is not sufficient to merely allege that a pre-suit demand would have been futile because the directors would be the defendants in the demanded litigation. DEL. CH. CT. R. 23.1.

13. Corporations ⟹ 211(5)

In a derivative suit, shareholder plaintiff must plead with particularity facts which, if true, would show that a majority of the board were not sufficiently disinterested or independent to consider

the demand or that the challenged transaction was not otherwise the product of a valid exercise of business judgment. DEL. CH. CT. R. 23.1.

14. Corporations ⟹ 214

Plaintiff will not be entitled to award of attorneys' fees if his action did not confer any benefit on corporation or its stockholders, even if the action was meritorious when filed.

15. Corporations ⟹ 214

The chronology of the filing of two competing actions is merely one element for the court to consider in evaluating whether an action brought by a plaintiff for the benefit of a corporation or its stockholders contributed to the creation of a benefit to the corporation or its stockholders.

16. Corporations ⟹ 214

Where plaintiff contributed nothing to the settlement of a similar derivative suit, other than an attempt to quash it, plaintiff is not entitled to an award of attorneys' fees.

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Lawrence A. Hamermesh, Esquire, and Alan J. Stone, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware; Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York, of counsel, for defendants Messrs. Tahmoush, McCaffrey, Pruitt, Bartholomay, Danielewski, Hewitt, Maloon, Topple, Carton, Froebel, Taubman, King, Keane and Reynolds.

R. Franklin Balotti, Esquire, of Richards, Layton & Finger, Wilmington, Delaware, for defendants Reliance Financial Services Corporation and Messrs. Steinberg, Bello, and Frieberg.

HARTNETT, *Vice-Chancellor*

After this stockholder derivative suit was dismissed, plaintiff moved for an award of attorneys' fees based on his alleged contribution to the settlement of a related action against defendants in the United States District Court for the Southern District of New York. Plaintiff's application must be denied because his complaint was not meritorious when filed and because the prosecution of this action did not contribute to the settlement agreement reached in the District Court Action. Nor did it result in any ascertainable benefit to the corporation or its stockholders.

I

On May 12, 1986, plaintiff Harvey Greenfield initiated this action ("Greenfield Action") against Frank B. Hall & Co., Inc. ("Hall"), the Hall Board of Directors, Reliance Financial Services Corporation ("Reliance") and others, alleging that the Hall directors had breached their fiduciary duties and wasted corporate assets by agreeing to sell Hall securities to defendants Saul Steinberg and Reliance at below the market price in order to receive awards under Hall's Executive Incentive Stock Ownership Plan. The complaint further alleged that the Hall directors issued materially false and misleading proxy solicitation materials in connection with the sale of those securities. Finally, the complaint alleged that the Hall directors violated federal securities law and breached their fiduciary duties by issuing false and misleading information about Hall's financial condition and thereby subjected Hall to a shareholder class action in the United States District Court. *In re Frank B. Hall Sec. Litig.*, 693 F. Supp. 1460 (S.D.N.Y. 1988).

Less than one week after this Greenfield Action was filed in this Court, a stockholder derivative action ("Polar Action") was filed in the United States District Court for the Southern District of New York by Polar International Brokerage Corporation ("Polar") against the same defendants. It is agreed that the allegations in the initial Polar Action complaint were substantively similar to those in the Greenfield Action in this Court.

A motion to dismiss the complaint in this Greenfield Action was filed on July 18, 1986, but no briefing occurred and no judicial action on the motion was ever requested.

Defendants, however, moved to dismiss the complaint in the Polar Action on November 14, 1986, and on January 6, 1987, Polar

responded by filing its first amended complaint, which added federal securities law claims. On March 9, 1987, defendants moved to dismiss the first amended complaint in the Polar Action, and the District Court subsequently granted that motion on the ground that the complaint failed to adequately plead reasons why making a pre-suit demand on the Hall Board would have been futile.

On March 10, 1987, the Superintendent of Insurance for the State of New York, as the liquidator of a Hall subsidiary, Union Indemnity Insurance Company ("Union"), brought an action ("Superintendent's Action") in the New York Supreme Court against the directors and certain officers of Hall, seeking to hold them liable for the insolvency of Union.

By letter dated October 20, 1987, Polar demanded that the Hall Board commence litigation against the directors and officers of Hall and others based on the causes of action alleged in the Polar complaint. The letter also demanded that suit be brought against the defendants in the Superintendent's Action for the alleged mismanagement of Union. The Hall Board appointed a Special Committee to investigate Polar's demands.

Before the Special Committee had completed its investigation, however, Polar filed a second amended complaint on October 4, 1988. The second amended complaint added allegations regarding the Superintendent's Action and added a defendant.

On December 1, 1988, the Special Committee informed Polar that its demand was refused because the Committee had "found no evidence to support or substantiate any of the allegations in the Demand Letter." Consequently, defendants moved to dismiss the second amended complaint on April 17, 1989.

Soon thereafter, on June 2, 1989, the Superintendent's Action was settled. Hall was negotiating at the same time with its directors' and officers' liability insurer, National Union Fire Insurance Company of Pittsburgh ("National Union"), for a contribution toward the settlement consideration in the Superintendent's Action. National Union subsequently agreed to contribute $20 million toward the amount to be paid in the settlement of the Superintendent's Action. In return, Hall agreed to release National Union from coverage of Hall's directors and officers in the Greenfield and Polar Actions, except for the claims in those actions that related to the directors' liability for exposing Hall to the Shareholder Litigation.

Roughly two weeks after the settlement agreement in the Superintendent's Action was announced, Mr. Greenfield requested leave to file an amended complaint in this Greenfield Action. His request

was granted and he amended his complaint on December 29, 1989, to include a cause of action based on the Superintendent's Action. Defendants moved to dismiss the amended complaint, but again no briefing or judicial action was requested.

Meanwhile in the Polar Action, Polar had moved for leave to file a third amended complaint. While that motion was pending, Polar engaged in discovery and the parties began conducting settlement negotiations. On March 11, 1991, the parties entered into a stipulation of settlement subject to the District Court's approval. The terms of the settlement provided that Hall would receive two benefits: (1) National Union agreed to pay Hall $750,000 (net of attorneys' fees and costs) on behalf of the director and officer defendants in the Polar Action and the Shareholders Litigation; and (2) structural changes would be made in the Hall Board which would increase the number of independent directors on the Board and would ensure that certain major transactions would require approval by a majority of the independent directors. The stipulation was expressly conditioned on the dismissal of the Shareholders Litigation and the Greenfield Action.

Although a settlement had been reached, Polar filed a comprehensive amended verified complaint in the Polar Action on March 13, 1991, adding federal securities law claims to those found in all the previous Polar complaints.

The following day, Mr. Greenfield, who was not a party to the Polar Action, submitted to the District Court a sworn affidavit in opposition to the settlement. The District Court declined to consider the affidavit absent a motion to intervene on behalf of Mr. Greenfield. No motion to intervene was ever filed.

After notification to all the Hall shareholders, including Mr. Greenfield, the District Court held a hearing on the Polar settlement on May 10, 1991. No shareholder (including Mr. Greenfield) appeared at the hearing to object and the settlement was approved by the District Court on June 26, 1991. A provision in the proposed settlement order requiring the dismissal of this Greenfield Action was deleted, however, because the District Court noted its concern over the "spectacle" of compelling the termination of an action in another court with concurrent jurisdiction over the same matter. The District Court did, however, enjoin Mr. Greenfield (or any other Hall shareholder) from pursuing any litigation on the claims covered by the Polar settlement.

Defendants then proposed to Mr. Greenfield that he execute a stipulation dismissing with prejudice this Greenfield Action, but Mr.

Greenfield refused. Defendants then filed a motion for summary judgment, based on the *res judicata* effect of the judgment and release entered in the Hall action in New York. Apparently after Mr. Greenfield unsuccessfully attempted to negotiate attorneys' fees, he consented to the stipulation of dismissal. Mr. Greenfield then filed his fee application in this Court, initially requesting $450,000. He subsequently revised the request, however, to "at least" what the District Court awarded the Polar counsel—$186,210.20 plus costs.

II

[1-2] The law governing an award of attorneys' fees in shareholder litigation is well settled in Delaware. The general rule is that a litigant must, himself, defray the cost of being represented by counsel. *Chrysler Corp. v. Dann*, Del. Supr., 223 A.2d 384, 386 (1966). The general rule is subject to an exception, however, when litigation brought for the benefit of the stockholders of a corporation (whether as a stockholder derivative or class action, or as an individual action), results in the conferring of a benefit to the corporation or its stockholders. In such a case, the plaintiff is entitled to the payment of reasonable attorneys' fees. *Tandycrafts, Inc. v. Initio Partners*, Del. Supr., 562 A.2d 1162, 1164-67 (1989).

[3] The entitlement to attorneys' fees is not necessarily predicated on a final adjudication after trial, however, because attorneys' fees may be awarded, in appropriate circumstances, where a defendant corporation takes action that settles or moots the case. *See Chrysler v. Dann, supra*; *Tandycrafts, Inc. v. Initio Partners, supra*; *Allied Artists Pictures Corp. v. Baron*, Del. Supr., 413 A.2d 876 (1980). When a suit is settled or mooted, counsel fees may be granted if: (1) the suit was meritorious when filed; (2) action producing a benefit to the corporation was taken; and (3) the benefit to the corporation was causally related to the suit. *Allied Artists Pictures Corp. v. Baron*, 413 A.2d at 878.

[4] The Court of Chancery has broad discretion in awarding attorneys' fees and may deny them altogether if the Court finds that the litigation did not result in any ascertainable benefit to the corporation. *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d at 1166-67.

[5] If, however, the suit was meritorious when filed and thereafter the corporation took action that resulted in a benefit to the corporation and the suit is settled or mooted, then the corporation bears the burden of showing that the benefit was not causally related to the bringing of the suit. *Allied Artists Pictures Corp. v. Baron*, 413 A.2d

at 801; *Maldonado v. Flynn*, Del. Ch., C.A. No. 4800-NC, Hartnett, V.C. (June 18, 1985) (holding that defendants had demonstrated lack of causal connection between the benefit and the suit).

[6] If the Court determines that the benefit was partly caused by the litigation and partly caused by the actions of others—such as an independent committee appointed by the corporation's directors—the Court may award reduced attorneys' fees. *Aaron v. Parsons*, Del. Supr., 144 A.2d 155 (1958); *Dow Jones & Co. v. Shields (In re Telerate, Inc. Shareholders Litig.)*, Del. Ch., C.A. No. 11,115-NC, Hartnett, V.C. (Mar. 4, 1992); *In re Josephson Int'l, Inc. Shareholders Litig.*, Del. Ch., C.A. No. 9456-NC, Hartnett, V.C. (Oct. 19, 1990); *In re Beatrice Cos., Litig.*, Del. Ch., C.A. No. 8248-NC, Allen, C. (Apr. 16, 1986); *In re Maxxam Group, Inc.*, Del. Ch., C.A. No. 8636-NC, Allen, C. (Apr. 16, 1987); *In re Anderson Clayton Shareholders Litig.*, Del. Ch., C.A. No. 8347-NC, Allen, C. (Sept. 19, 1988).

[7] Plaintiff's counsel is not entitled to any attorneys' fees, however, if the suit was not meritorious when filed regardless of whether there was a causal connection between the suit and any benefit to the corporation. *Allied Artists Picture Corp. v. Baron*, 413 A.2d at 879. If some of plaintiff's claims were meritorious when filed but not others, then the Court will consider that factor when awarding attorneys' fees. *Stroud v. Milliken Enterprises, Inc.*, Del. Ch., C.A. No. 8969-NC, Hartnett, V.C. (Oct. 6, 1989), *aff'd by Order*, Del. Supr., 583 A.2d 660 (1990).

In the recent case of *In re Kahn v. Occidental Petroleum Corp.*, Del. Ch., C.A. Nos. 10,808, 10,823, & 10,860-NC, Hartnett, V.C. (Jan. 10, 1992), this Court denied attorneys' fees to plaintiffs' counsel in two class action suits that were dismissed after a third class action suit was settled because, *inter alia*, the class actions that were dismissed neither created a benefit to the corporation or class nor did anything to contribute to the benefit received by the class from the efforts of plaintiffs' counsel in the third suit. *Id.*, slip op. at 6-7.

Therefore, if Mr. Greenfield is entitled to any attorneys' fees in this matter, his suit must have been meritorious when filed, action by the defendants must have been taken benefitting the corporation or its shareholders after this suit was filed, and this suit must have contributed to that benefit.

III

[8] The threshold determination in Mr. Greenfield's application for attorneys' fees, therefore, is whether his action was meritorious when

filed. The Delaware Supreme Court has held that "[a] claim is meritorious within the meaning of the rule if it can withstand a motion to dismiss on the pleadings if, at the same time, the plaintiff possesses knowledge of provable facts which hold out some reasonable likelihood of ultimate success." *Chrysler Corp. v. Dann*, Del. Supr., 223 A.2d 384, 387 (1966).

Mr. Greenfield contends that his action was meritorious when filed because, as he sees it, both his original complaint and his amended complaint withstood defendants' motions to dismiss. He, however, improperly equates defendants' failure to request briefing and judicial action on those motions with a concession by defendants that such motions would be denied. He, therefore, concludes that his action was meritorious when filed, as well as when amended.

[9] A failure to pursue a motion to dismiss is not, however, the test of whether a suit was meritorious when filed. Rather, the trial court must examine the complaint to determine whether it could have withstood a vigorously pursued motion to dismiss under Chancery Rule 12(b) or Chancery Rule 23.1, regardless of whether a motion was actually made and pursued. *See Chrysler Corp. v. Dann*, Del. Supr., 223 A.2d 384, 387 (1966); *Stern v. Day*, Del. Ch., C.A. Nos. 9411, 9480 & 9701-NC, Berger, V.C. (Aug. 3, 1989), slip op. at 8-9 (*Chrysler* standard applied where no motion to dismiss was pursued).

[10] Applying this test, it is clear that this Court would have dismissed Mr. Greenfield's original and amended complaints pursuant to Chancery Rule 23.1 because of his failure to have made a pre-suit demand on the corporation or his failure to have adequately pled the futility of the making of a demand. Chancery Rule 23.1; *Kaplan v. Peat, Marwick, Mitchell & Co.*, Del. Supr., 540 A.2d 726, 730 (1988).

[11] Of all Mr. Greenfield's claims against defendants, he made a pre-suit demand on the corporation only as to the claim in which he requested the nullification of the securities transfers to Reliance. Where there has been a refusal to commence suit in response to a pre-suit demand, the Delaware Supreme Court has held that in order to be able to continue to prosecute a stockholder derivative suit, the plaintiff must show that the Board wrongfully refused his demand. *Zapata Corp. v. Maldonado*, Del. Supr., 430 A.2d 779 (1981). Mr. Greenfield, however, failed to allege any facts which, if true, would show that the refusal was wrongful. In fact, he even failed to assert that the refusals were wrongful. He merely alleged that the Board "declined" to prosecute his asserted claims. He, therefore, did not

meet the mandate of Chancery Rule 23.1 as to this claim, and, therefore, it could not have withstood a motion to dismiss.

[12-13] As to the pre-suit demand requirement for his other claims, Mr. Greenfield was content to rely on allegations that a pre-suit demand would have been futile because the directors would be the defendants in the demanded litigation. For purposes of Chancery Rule 23.1, however, it is not sufficient to make such a conclusory allegation. *See Kaufman v. Belmont*, Del. Ch., 479 A.2d 282 (1984). Rather, the shareholder plaintiff must plead with particularity facts which, if true, would show that a majority of the board were not sufficiently disinterested or independent to consider the demand or that the challenged transaction was not otherwise the product of a valid exercise of business judgment. *Levine v. Smith*, Del. Supr., 591 A.2d 194 (1991); *Aronson v. Lewis*, Del. Supr., 473 A.2d 805 (1984). Mr. Greenfield's allegations, such as they are, do not satisfy this standard and could, therefore, not withstand a motion to dismiss.

It should also be noted that the first amended Polar complaint, which Mr. Greenfield contends was substantively "identical" to his original complaint, was dismissed by the District Court for the failure to have made a pre-suit demand or to have adequately pled its futility. *Polar Int'l Corp. v. McCaffrey*, S.D.N.Y., 86 Civ. 3912, Brieant, C.J., BENCH ORDER (Oct. 1, 1987).

Because both Mr. Greenfield's original and amended complaints did not adequately allege facts which, if true, would show that the refusal to comply with the request of a pre-suit demand as to the Reliance transactions was wrongful or that a pre-suit demand as to the other claims would have been futile, neither complaint could have withstood a motion to dismiss under Chancery Rule 23.1. Accordingly, the Greenfield Action cannot be deemed to have been meritorious when filed, and an award of attorneys' fees in this action is, therefore, precluded.

I V

[14] Even if the Greenfield Action had been meritorious when filed, Mr. Greenfield would still not be entitled to an award of attorneys' fees because his action did not confer any benefit on Hall or its stockholders. *Tandycrafts, Inc. v. Initio Partners*, Del. Supr., 562 A.2d 1162, 1166-67 (1989).

In support of his contention that he did confer a benefit, Mr. Greenfield relies heavily on the Insurance Release Agreement executed by National Union and Hall in connection with the settlement

of the Superintendent's Action. Because that document mentioned the pendency of the Greenfield Action in this Court, along with all other pending suits, Mr. Greenfield claims that his action brought substantial pressure to bear on the parties to the Superintendent's Action to settle that action. He further argues that the listing of his action in the Insurance Release Agreement means that part of the monetary benefit from that settlement was a payment due to the existence of his suit. Because Hall received a total of $20 million in payments from National Union under that agreement, Mr. Greenfield asserts that he is entitled to an award of attorneys' fees.

Mr. Greenfield has misconstrued the language of the Insurance Release Agreement. The terms of that agreement make it clear that the $20 million payments and the reciprocal release of National Union from any further coverage other than claims related to the Shareholder Litigation were the consideration for the settlement of a coverage dispute between Hall and National Union. That coverage dispute concerned National Union's contribution to the settlement of the Superintendent's Action—and that action alone. The only mention of the Greenfield Action in that agreement is in an introductory section reciting that Hall had put National Union on notice of the six listed actions against Hall, its subsidiaries, its Board of Directors, and its officers. One of these mentioned six actions was the Greenfield Action.

Mr. Greenfield's contention that his suit caused the Superintendent's settlement, at least in part, is also belied by the fact that his amended complaint, which added a cause of action based on the same subject matter of the Superintendent's Action (the alleged mismanagement of Union), was not filed until two weeks after that settlement was reached and announced to the public. The fact that Mr. Greenfield filed his suit after the Superintendent's Action settlement had been announced negates his claim that he contributed to that settlement and the related $20 million benefit to Hall.

V

Mr. Greenfield also claims that his action was a substantial contributing factor in the settlement of the Polar Action, pursuant to which Hall received $750,000 from National Union and agreed to restructure its Board. He makes much of the fact that his action was filed before the Polar Action, and even claims that his action was the more vigorously prosecuted of the two because he claims he was the first to amend his complaint to include a cause of action

regarding the alleged mismanagement of Union. Mr. Greenfield, therefore, concludes that he is entitled to "at least" the amount of fees awarded to the Polar class counsel—$186,210.20 plus costs.

[15] Mr. Greenfield correctly points out that his action was filed before the Polar Action, albeit by less than one week. The chronology of the filing of two competing actions is not necessarily a significant factor in an award of attorneys' fees, however. *Mutual Shares Corp. v. Texas Air Corp.*, Del. Ch., C.A. No. 8650-NC, Hartnett, V.C. (Sept. 30, 1987). If it is of importance at all, it is merely one element for the Court to consider in evaluating whether an action brought by a plaintiff for the benefit of a corporation or its stockholders contributed to the creation of a benefit to the corporation or its stockholder. *See Sugarland Indus., Inc. v. Thomas*, Del. Supr., 420 A.2d 142 (1980). In this case, the fact that the Greenfield Action was the "first- filed" is of no consequence, because there are other factors that clearly show that the Greenfield Action did not contribute to the settlement in the Polar Action.

Mr. Greenfield's contention that his action was more vigorously prosecuted because his amended complaint added the Union cause of action before it was added in the Polar Action is predicated on a false allegation. A review of the *three* Polar amended complaints and their filing dates shows that the Union claim first appeared in the Second Polar amended complaint more than one year before the same claim was added to the Greenfield action. In fact, as was noted, the Union cause of action was not asserted in the Greenfield Action until after the settlement of the Superintendent's Action was announced.

Mr. Greenfield's conduct before the District Court just prior to the Polar settlement also tends to show that his action could not have contributed to any benefit to the corporation.

As was noted, Mr. Greenfield submitted to the District Court a sworn affidavit in opposition to the proposed Polar settlement. The affidavit contains meritless and irrelevant accusations regarding the ability of attorneys involved in the Polar Action to advance within their respective law firms. It contains nothing of substance that would have shown that the Polar settlement was not fair and reasonable to the stockholders of Hall.

The Court, therefore, concludes that Mr. Greenfield contributed nothing to the settlement achieved in the Polar Action. Rather, his actions evidence an attempt to derail that settlement—an intent to which he readily admits. He claims he opposed the settlement, not because the settlement was unfair to Hall or that he desired to pursue

it, but only because he was "fraudulently" excluded from the negotiations in order to prevent him from receiving attorneys' fees. Mr. Greenfield's motive belies his claim of contributing to the achievement of the Polar settlement, and shows his willingness to delay Hall's receipt of the settlement benefits for no other reason than his own gain.

[16] Having contributed nothing to the settlement of the Polar Action other than an attempt to quash it because it did not provide a fee for him, Mr. Greenfield is not entitled to an award of attorneys' fees in this action.

V I

Although it is not necessary to consider it, another issue is troublesome. Obviously if Mr. Greenfield had contributed in any way to the benefit achieved in the New York District Court litigation, it was the New York Court that was in a better position to ascertain if he had made a contribution to the benefit and, if so, to what extent. The New York District Court declined to entertain Mr. Greenfield's request for attorneys' fees because he declined an invitation to move to intervene in that action.

V I I

In summary, Mr. Greenfield did nothing to merit any award of attorneys' fees in this action. This action was not meritorious when filed or when amended, because neither the original complaint nor the amended complaint could have withstood a motion to dismiss under Chancery Rule 23.1. Both complaints failed to plead the wrongfulness of the denial of the pre-suit demand as to one claim and failed to plead with the requisite particularity the futility of a pre-suit demand on the remaining claims.

This Greenfield Action did not contribute to the benefits Hall received in either the settlement of the Superintendent's Action or the settlement of the Polar Action. The $20 million insurance payment to Hall was expressly limited to a settlement of a coverage dispute over the Superintendent's Action. Nor did Mr. Greenfield contribute anything to the settlement of the Polar Action, but rather tried to defeat it for the purpose of his own gain.

Mr. Greenfield's petition for an award of attorneys' fees must, therefore, be denied.

IT IS SO ORDERED.