IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE PLX TECHNOLOGY INC. STOCKHOLDERS LITIGATION	))	CONSOLIDATED C.A. No. 9880-VCL

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

1. The plaintiffs challenge the sale of PLX Technology, Inc. (the "Company") to Avago Wireless, Inc. The plaintiffs originally sued an array of defendants, including all of the members of the Company's board of directors (the "Board"). The plaintiffs have settled with all but one defendant. The sole remaining defendant is Potomac Capital Partners II, LP ("Potomac"), a hedge fund. The plaintiffs contend that Potomac aided and abetted breaches of fiduciary duty committed by members of the Board. Potomac has moved for summary judgment.

2. Under Court of Chancery Rule 56, summary judgment "shall be rendered forthwith" if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ct. Ch. R. 56(c). The moving party bears the initial burden of demonstrating that, even with the evidence construed in the light most favorable to the non-moving party, there are no genuine issues of material fact. *Brown v. Ocean Drilling & Expl. Co.*, 403 A.2d 1114, 1115 (Del. 1979). If the moving party meets this burden, then, to avoid summary judgment, the non-moving party must "adduce some evidence of a dispute of material fact." *Metcap Sec. LLC v. Pearl Senior Care, Inc.*, 2009 WL 513756, at *3 (Del. Ch. Feb. 27, 2009), *aff'd*, 977 A.2d 899 (Del. 2009) (TABLE); *accord Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

3. On an application for summary judgment, "the court must view the evidence in the light most favorable to the non-moving party." *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992). "Any application for such a judgment must be denied if there is any reasonable hypothesis by which the opposing party may recover, or if there is a dispute as to a material fact or the inferences to be drawn therefrom." *Vanaman v. Milford Mem'l Hosp., Inc.*, 272 A.2d 718, 720 (Del. 1970).

> [T]he function of the judge in passing on a motion for summary judgment is not to weigh evidence and to accept that which seems to him to have the greater weight. His function is rather to determine whether or not there is any evidence supporting a favorable conclusion to the nonmoving party. When that is the state of the record, it is improper to grant summary judgment.

Cont'l Oil Co. v. Pauley Petroleum, Inc., 251 A.2d 824, 826 (Del. 1969).

4. "The test is not whether the judge considering summary judgment is skeptical that [the non-movant] will ultimately prevail." *Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1150 (Del. 2002). "If the matter depends to any material extent upon a determination of credibility, summary judgment is inappropriate." *Id.* When a party's state of mind is at issue, a credibility determination is "often central to the case." *Johnson v. Shapiro*, 2002 WL 31438477, at *4 (Del. Ch. Oct. 18, 2002).

5. "There is no 'right' to a summary judgment." *Telxon Corp. v. Meyerson*, 802 A.2d 257, 262 (Del. 2002). When confronted with a Rule 56 motion, the court may, in its discretion, deny summary judgment if it decides, upon a preliminary examination of the facts presented, that it is desirable to inquire into and develop the facts more thoroughly at trial in order to clarify the law or its application. *See, e.g., Cerberus*, 794 A.2d at 1150;

Alexander Indus., Inc. v. Hill, 211 A.2d 917, 918-19 (Del. 1965); *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

6. Potomac argues that its motion should be granted because the business judgment rule is the operative standard of review for the underlying transaction.

a. First, Potomac contends that the business judgment rule governs because stockholders approved the underlying transaction after receiving all material information. *See Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304, 313 (Del. 2015). Disputes of fact exist as to whether the stockholders received all material information. The parties disagree about the proper interpretation of references to projections in various documents. The parties also disagree on the weight that should be given to the testimony of Art Whipple, the Company's CFO. Resolving these disputes requires a trial.

b. Second, Potomac contends that under *Corwin*, enhanced scrutiny only applies to applications for pre-closing injunctive relief and never to post-closing damages actions. *See Corwin*, 125 A.3d at 312. In *Citron*, the Delaware Supreme Court held that enhanced scrutiny was the proper standard of review in a post-closing damages action but affirmed the trial court's finding that the directors had carried their burden of proof. *See Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 64-65 (Del. 1989). In *Barkan*, the Delaware Supreme Court held that enhanced scrutiny would have been the proper standard of review in a post-closing damages action, if the case had not settled. *See Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989). The Delaware Supreme Court has applied enhanced scrutiny in post-closing damages actions when ruling on motions to dismiss and motions for summary judgment. *See, e.g.*, *Lyondell Chem. Co. v.*

Ryan, 970 A.2d 235, 242-44 (Del. 2009) (agreeing that enhanced scrutiny applied post-closing but granting summary judgment on grounds of exculpation); *McMullin v. Beran*, 765 A.2d 910, 918-20 (Del. 2000) (reversing dismissal of post-closing damages action because complaint sufficiently alleged that actions of defendant fiduciaries failed enhanced scrutiny); *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 71 (Del. 1995) (reversing dismissal of post-closing *Unocal* claim). In other decisions, the Delaware Supreme Court has analyzed whether enhanced scrutiny applied in a post-closing damages action using the same standards used to determine whether it applied during the pre-closing phase; the high court did not take what would have been the easier and doctrinally more expeditious route of saying enhanced scrutiny was inapplicable after closing. *See, e.g.*, *Williams v. Geier*, 671 A.2d 1368, 1377 (Del. 1996) (holding enhanced scrutiny did not apply because of absence of unilateral board action); *Santa Fe*, 669 A.2d at 71 (affirming dismissal of post-closing *Revlon* challenge to stock-for-stock transaction); *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1289-90 (Del. 1994) (same). The Delaware Supreme Court also has held that enhanced scrutiny could be deployed as the proper standard of review to evaluate a board's decision in a post-closing action for money damages for purposes of a claim for aiding and abetting. *See RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 852 (Del. 2015).

c. Since *Corwin*, the Court of Chancery has applied enhanced scrutiny in post-closing actions. *See, e.g.*, *In re Comverge, Inc. S'holders Litig.*, 2014 WL 6686570, at *9 (Del. Ch. Nov. 25, 2014); *Frank v. Elgamal*, 2014 WL 957550, at *20-21 (Del. Ch. Mar. 10, 2014); *In re Answers Corp. S'holders Litig.*, 2014 WL 463163, at *10-14 (Del. Ch. Feb. 3, 2014); *In re BioClinica, Inc. S'holder Litig.*, 2013 WL 5631233, *6-8 (Del. Ch.

Oct. 16, 2013); *Miramar Firefighters Pension Fund v. AboveNet, Inc.*, 2013 WL 4033905, at *4-8 (Del. Ch. July 31, 2014). Before *Corwin*, the Court of Chancery did so on far too many occasions to list, but two examples are *Goodwin v. Live Entertainment, Inc.*, 1999 WL 64265, at *22 (Del. Ch. Jan. 25, 1999) (Strine, V.C.) and *Yanow v. Scientific Leasing, Inc.*, 1991 WL 165304, at *7 (Del. Ch. July 31, 1991).

d. Deciding whether *Corwin* calls for applying the business judgment rule, even without a fully informed stockholder vote, would force a lone trial judge to attempt to harmonize arguably conflicting language in Delaware Supreme Court precedents spanning decades. Doing so correctly will require predicting accurately how the Delaware Supreme Court weighs important public policy issues, such as the proper ends of stockholder litigation, its relative effectiveness in achieving those ends, and the relative effectiveness of other checks on fiduciary behavior, such as market forces and stockholder voting. A lone trial judge should wade into these waters only if necessary.

e. This case may not demand consideration of those issues. The plaintiffs assert that enhanced scrutiny applies. When that standard of review governs, "courts will not substitute their business judgment for that of the directors, but will determine if the directors' decision was, on balance, within a range of reasonableness." *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 45-46 (Del. 1994). If Potomac proves that the Board's conduct fell within a range of reasonableness, then the plaintiffs' claims fail even under their chosen legal rubric. Potomac believes that it has a strong case; indeed, it has moved for summary judgment on this very issue.

f. Accordingly, principles of "sound judicial administration" warrant "withholding judgment until the whole factual structure stands upon a solid foundation following a plenary trial where proof can be fully developed, questions answered and issues clearly focused." *McCabe v. Wilson*, 1986 WL 8008, at *2 (Del. Super. June 26, 1986) (Chandler, J.).

7. As noted, Potomac contends that it is entitled to summary judgment, even if enhanced scrutiny applies. The plaintiffs have cited contrary evidence. Disputes of material fact exist regarding the reasonableness of the Board's actions that require a trial to resolve.

8. Potomac claims that there is no cognizable legal theory that could support holding it liable for the torts of others. One possibility is the blackletter doctrine of secondary liability. *See Restatement (Second) of Torts* § 876 (1979). As to breaches of duty committed by Eric Singer, another possible vehicle is the blackletter doctrine of *respondeat superior*. *See Restatement (Second) of Agency* § 219(1) (1958). Factual disputes prevent the court from concluding at this stage that neither theory is viable.

9. Trial is scheduled to begin on April 9, 2018. In this complex case, the better course is to hear the evidence, rather than risking the "treacherous shortcut" of a summary judgment ruling. *McCabe*, 1986 WL 8008, at *2.

10. Potomac's motion for summary judgment is DENIED.

Vice Chancellor J. Travis Laster
Dated: February 16, 2018