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Delaware court refuses to enjoin stockholder vote on company sale

In an analysis of a recent Delaware Chancery Court ruling, Robert Reder, David Schwartz and Aaron Stine of Milbank, Tweed, Hadley & McCloy say the judge found the "unique characteristics" of Answers Corp.'s business made its directors' decision to sell — and the disclosures they made about the sale — reasonable. SEE PAGE 3

Former Hewlett-Packard CEO Mark Hurd REUTERS/Robert Galbraith

BOOKS & RECORDS

Public curiosity no reason to unseal confidential letter, ex-HP CEO says

In his appeal to Delaware's highest court, former Hewlett-Packard CEO Mark Hurd has argued that shareholders and a "curious" public have no right to see a "confidential" letter concerning his purported sexual relationship with a company contractor that led to his ouster.

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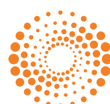

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Delaware court refuses to enjoin stockholder vote on company sale

By Robert S. Reder, Esq., David Schwartz, Esq., and Aaron Stine, Esq.
Milbank, Tweed, Hadley & McCloy

Recently, in *In re Answers Corp. Shareholders Litigation*, No. 6170, 2011 WL 1366780 (Del. Ch. Apr. 11, 2011), the Delaware Court of Chancery cited a company's "unique characteristics" — arising from its challenging position within its industry — in assessing whether its board of directors satisfied its fiduciary duties in approving the sale of the company. The court denied a request by stockholders to preliminarily enjoin the sale, finding no fault with the board's "reasonable decision" to approve the sale or the related disclosures made in its proxy materials.

BACKGROUND

Answers Corp. provides its clientele with "answer-based search services in six languages" through Answers.com. Answers' revenues are quite sensitive to changes made to the algorithms "employed by the various search engines, especially Google, that direct users to Answers' content." Because these algorithms "change unpredictably and for reasons outside of Answers' control," valuing Answers is "extremely difficult."

AFCV Holdings LLC, a private equity firm, approached Answers March 12, 2010, about a possible buyout transaction. After "months of exploratory discussions," and following a disappointing earnings report that depressed Answers' stock price to $4.58 per share, AFCV communicated an initial offer to purchase Answers for between $7.50 and $8.25 per share. The Answers board rejected this offer but retained UBS as its financial adviser in anticipation of future negotiations.

On Oct. 19 AFCV increased its offer to $9 per share. Answers responded by providing AFCV with diligence materials, including projections and strategic plans for the remainder of fiscal years 2010 and 2011.

While AFCV conducted its due diligence, Answers received an "unsolicited expression of interest from a private equity firm." This in turn led AFCV to increase its offer to $10 per share, coupled with a request for exclusivity. The board declined to grant exclusivity but allowed the negotiations with AFCV to continue.

A SUNNIER FORECAST

Undeterred, AFCV raised its offer, this time to $10.25 per share, again on the "condition of exclusivity." On Nov. 15 the two parties "agreed to move forward at $10.25 without an exclusivity agreement, but on the condition that Answers would reimburse AFCV's expenses if Answers agreed to a sale to a different entity at a higher price." With this agreement in hand, Answers reached out to 10 other entities identified as potential purchasers. Of these, three entered into confidentiality agreements but none made an offer.

After Answers' management provided it with "new and more optimistic" 2011 forecasts, the board asked AFCV to once again increase its offer while discussing the possibility of remaining independent. AFCV agreed to increase its offer to $10.50 per share, which UBS said was fair to Answers' stockholders.

The board accepted this sweetened offer, citing "the uncertainty of the 2011 forecasts, the investments required to remain a stand-alone company, the possibility of increased competition from companies such as Google and Facebook, the UBS fairness opinion, and the lack of interest from other companies" in support of its conclusion that the sale was in the best interests of Answer stockholders. Answers subsequently scheduled a stockholders meeting and distributed proxy materials seeking approval of the sale.

As often is the case with corporate buyouts, a group of Answers stockholders brought a class-action lawsuit seeking to preliminarily enjoin the transaction. In support of their motion, these stockholders claimed that the Board breached its fiduciary duties by "implementing an unfair sales process … characterized by an unfair price" and failing to provide adequate disclosures in the proxy materials.

THE COURT'S ANALYSIS

The court explained that, to obtain the "'extraordinary remedy' of a preliminary injunction," the stockholders bear the burden of demonstrating, among other things, a "reasonable probability" of success on the merits. Because the stockholders were unable to satisfy this requirement, the court refused to enjoin the transaction and allowed the stockholder vote to proceed.

Price and process claims

Because the transaction involved an all-cash bid that would result in a change in control of Answers, the court analyzed the stockholders' attack on the adequacy of the board's sales process under the familiar *Revlon* standard. *Revlon Inc. v. MacAndrews & Forbes Holdings*, 506 A.2d 173 (Del. 1986).

Under *Revlon*, a court must "(1) make a determination as to whether the information relied upon in the decision-making process was adequate and (2) examine the reasonableness of the directors' decision viewed from the point in time during which the directors acted."

> Delaware courts will closely examine the record before them in addressing attacks on a board of directors' process for selling a company and the accompanying public disclosures.

The court noted that, in this regard, "there is no single sale-process blueprint to follow." Rather, the question is whether the directors "made a reasonable decision, not a perfect decision."

Against this backdrop, the court considered the stockholders' four specific challenges to the process followed by the board and the results of its negotiations with AFCV.

Alleged directorial conflicts of interest

The stockholders argued that two of the directors, who served on the Answers board as "representatives" of a 30 percent stockholder, Redpoint Ventures, tainted the

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negotiating process" because they "were motivated by Redpoint's desire to exit its investment." Further, the stockholders contended that these two directors warned the CEO, who also served on the board, "to complete a sale or risk being replaced as CEO."

The court dismissed this argument, noting that the Redpoint representatives "did not direct the negotiations with AFCV. Rather, the board was actively engaged in the sales process, and [the CEO] and [UBS] primarily led the negotiations." Further, there was insufficient evidence to suggest that the CEO "knew [his] job was on the line unless he could do a deal with an acquirer that would retain him."

And "[m]ore importantly," in the court's opinion, "the process and the proposed transaction have been approved by a disinterested and independent board." On this basis, the Court determined that the stockholders failed to establish a reasonable probability of success in demonstrating a conflict of interest on the board that "calls into question the integrity of the process."

Market check and consideration of strategic alternatives

The stockholders also objected to the board's market check, claiming that it was "insufficient and limited as a result of [AFCV's] demands and against the advice of [UBS]." The court felt otherwise, concluding that "[a]lthough the board could have conducted a more robust market check, its efforts here … were adequate."

Not only did the board not favor AFCV over other potential bidders, but "it rejected multiple offers from AFCV and its repeated demands for exclusivity." Moreover, the board worked with UBS to identify "a list of priority potential buyers" and eventually contacted 10, though none made an offer "despite the company's efforts to pursue alternative transactions with other suitors."

The court also characterized the board's decision "to solicit the market discretely 'so as not to disrupt the business or hurt [it] if no transaction took place'" as a "reasonable judgment."

Further, the court noted, "the board deliberated at some level on whether or not to pursue a business combination," but ultimately "decided that selling the company was a better option for shareholders than continuing as a stand-alone enterprise."

> The courts will not lightly challenge disclosures made by boards, putting the burden on plaintiffs to demonstrate that the alleged flaws are indeed material, rather than "quibbles."

The court also observed that the proxy materials listed "nine distinct reasons" for the board's decision that, according to the court, "support the conclusion that the board, with a majority of independent and disinterested directors, acted reasonably in deciding to sell and throughout the sales process."

Deal-protection measures

The stockholders also challenged a number of the deal-protection measures agreed to by the board in the acquisition agreement with AFCV, including voting agreements "locking up approximately 27 percent of the vote in favor of the proposed transaction," "a termination fee plus expense reimbursement of 4.4 percent of the proposed transaction's equity value, a no solicitation clause, a 'no-talk' provision limiting the board's ability to discuss an alternative transaction with an unsolicited bidder, a matching rights provision, and a force-the-vote requirement."

The court, however, characterized these measures as "standard merger terms" that are not "per se unreasonable." Moreover, the court observed that "voting agreements, of course, are perfectly legal," and the defensive measures did not, viewed collectively, make the sale a "*fait accompli*."

UBS fairness opinion

Finally, the court rejected the stockholders' contention that the UBS fairness opinion was flawed because it was "not based on a discounted cash flow analysis of Answers' value as a going concern" and its "comparable company analysis … failed to use companies that were actually comparable to Answers."

The court disagreed, emphasizing that "UBS' independence and qualifications are not seriously challenged here, and it made seemingly sensible judgments in the methodologies it utilized in view of the limited data the board was able to provide given its inability to generate reliable long-term financial projections."

Answers' uncommon business characteristics factored prominently in the court's discussion of the fairness opinion. In particular, the court referenced UBS' testimony that it was "unusual, particularly for a public company to have such challenging fundamentals in their business that they have an inability to forecast financial performance beyond the next fiscal year."

In the absence of reliable long-term projections, UBS could not generate "a reliable discounted cash flow analysis of Answers' value." Moreover, in light of Answers' "unique characteristics" — "in particular its dependence on Google" — UBS was unable to find any "pure comparables" and therefore turned to "a group of publicly traded companies which [it] believe[s] are most comparable to Answers.com" Even so, the court found no fault with the board's reliance on UBS' "sensibly crafted" fairness opinion.

Disclosure claims

The court explained that "[w]hen soliciting stockholder action, the directors of a Delaware corporation are bound by their fiduciary duties of care and loyalty to 'disclose fully and fairly all material information within the board's control.'"

> When the process is not flawed and the disclosures are reasonably detailed, the courts tend to allow stockholders to make their own decisions rather than risk imposing an injunction.

Further, "[n]on-material facts need not be disclosed, and additional details underlying financial projections are not necessarily material, especially where they 'would tend to confuse stockholders or inundate them with an overload of information.'"

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In challenging the propriety of the proxy materials, the stockholders demanded six additional disclosures. These included four graphs given by UBS to the board and AFCV, two line items in the summary financial data chart, and specific changes and additions to the disclosures concerning Answers' belief that its dependence on Google will decline over time.

The court rejected all these demanded disclosures, concluding that the disclosures already contained in the proxy materials would enable stockholders to make "an informed decision" regarding the transaction. Some of the stockholders' suggested disclosures were characterized by the court as "not material to the shareholders' vote" because the proxy materials already disclosed the information in other formats.

Further, others, although potentially "interesting to shareholders," could present "a level of detail that might tend to confuse shareholders without contributing materially to their decision."

Finally, as for the stockholders' demand for "the specific percentage of Answers' revenue that is projected to come from Google in 2011," the court was "satisfied that the existing disclosures adequately apprise shareholders of the risks arising out of Answers' dependency on Google … while also informing them that such dependency is now less than it was during the first three quarters of 2010."

CONCLUSION

The *Answers Corp.* decision again demonstrates that Delaware courts will closely examine the record before them in addressing attacks on a board of directors' process for selling a company and the accompanying public disclosures.

Because boards "are generally free to select the path to value maximization, so long as they choose a reasonable route to get there," the courts generally are unwilling to second-guess apparently reasonable decisions made by a board with a majority of disinterested directors who are well-advised and informed.

Similarly, the courts will not lightly challenge disclosures made by such boards, putting the burden on plaintiffs to demonstrate that the alleged flaws are indeed material, rather than "quibbles" that do not add to the total mix of information. When the process is not flawed and the disclosures are reasonably detailed, the courts tend to allow stockholders to make their own decisions rather than risk imposing an injunction that could risk loss of the deal. WJ

Bob Reder (left) is serving as a consulting attorney for **Milbank, Tweed, Hadley & McCloy** in New York since his retirement as a partner with the firm in March. **David Schwartz** (center) is of counsel with Milbank, and **Aaron Stine** (right) is an associate, in the global corporate group in New York.

HP

CONTINUED FROM PAGE 1

Hurd v. Espinoza et al.., No. 167-2011, redacted opening brief filed (Del. June 1, 2011).

Hurd wants the state Supreme Court to overturn Vice Chancellor Donald Parsons' March 17 decision that an HP shareholder could examine the letter and other documents in an attempt to confirm suspicions that the directors should have fired Hurd instead of giving him a $30 million "going-away present."

That decision to make the letter public is on hold while the Supreme Court considers combined appeals by Hurd and shareholder Ernesto Espinoza of different parts of the Chancery Court judge's ruling.

Espinoza is appealing the judge's determination that he is not entitled to see some interim reports to the HP board.

'CONFIDENTIAL' TO WHOM?

Hurd and contractor Jodie Fisher contend that the letter, in which Fisher's lawyer requests a settlement of possible sexual harassment charges against Hurd, is confidential. They argue that the mere act of bringing the letter to the board of directors did not make it part of HP's corporate documents.

Vice Chancellor Parsons found that not just Espinoza, but all HP shareholders and the general public, had a right to see all court documents — including the letter — unless the parties would be injured by the revelation of sensitive information. *Espinoza v. Hewlett-Packard Co.*, 2011 WL 941464 (Del. Ch. Mar. 17, 2011).

Hurd had intervened in Espinoza's records-inspection action, which claims that HP has denied him his right as a shareholder of a Delaware-chartered corporation to inspect the company's books and records to investigate potential wrongdoing by officers and directors.

> Ex-CEO Mark Hurd and contractor Jodie Fisher say the letter, in which Fisher's lawyer requests a settlement of possible sexual harassment charges against Hurd, is confidential.

'A GOING-AWAY PRESENT'

Hurd left HP August 2010 after the computer maker conducted an internal investigation of Fisher's allegations. The company found no evidence of harassment but said Hurd abused his expense account and exercised poor judgment in hiding the alleged affair, the suit says.

After the board determined that Hurd should step down, it gave him $12 million in cash and more than $16 million in stock options. He left and immediately signed on as the co-president of Oracle Corp.

FAIR GAME?

Espinoza filed his records-inspection action to get ammunition for a possible shareholder suit against the HP directors for allegedly wasting the company's assets.

However, the battle soon shifted to the revelation of the Fisher letter, with Fisher and Hurd contending that it was always designated as confidential, and Espinoza arguing that it was fair game as soon as it became the basis for Hurd's resignation and severance package.

In his ruling, Vice Chancellor Parsons said the fact that a document may contain information that is embarrassing to a party is not enough reason to seal it.

In an opening brief in support of his appeal, Hurd argues that the disclosure of the letter:

- Violates his right of privacy under the Constitution.
- Is barred because it is the subject of mediation in California.
- Is improper because the letter is already available to the parties in the Espinoza action.
- Serves no investigative purpose in the books-and-records action.
- Serves no legitimate public interest.

"In a [books-and-records] action there is no public access to a document already produced," Hurd contends. "Access is denied to stockholders and third parties that merely have a 'curiosity' interest."

Hurd also says there are issues of California law regarding the right of confidentiality that should be submitted to that state's high court.

Espinoza filed his opening brief under seal June 10. **WJ**

Attorneys:

Appellant (Espinoza): Norman Monhait, Rosenthal, Monhait & Goddess, Wilmington, Del.

Appellee (HP): Peter Walsh Jr., Potter Anderson & Corroon, Wilmington

Appellant (Hurd): Rolin Bissell, Young Conaway Stargatt & Taylor, Wilmington

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Fraud, asset shell game suspected at another Chinese company

As a wave of investor actions against China-based companies builds, another shareholder has asked a Delaware court to force China MediaExpress Holdings to let him examine company records to investigate suspicions of "substantial fraud."

Paul v. China MediaExpress Holdings Inc., No. 6570, complaint filed (Del. Ch. June 16, 2011).

Plaintiff Marc Paul's action in the Chancery Court claims that CME has refused to respond to his legitimate requests as a shareholder to inspect company books and records in the wake of financial analysts' reports that the firm's management has engaged in mismanagement.

Shareholders of Delaware-chartered companies, which include CME even though it is based in China, have a right to inspect company records if they have a "proper purpose" such as valuing their stock or investigating wrongdoing.

A suspicion of wrongdoing based on nothing more than reports by "anonymous bloggers" is not a sufficient purpose for a books-and-records action, CME says.

Paul says CME's officers and directors have engaged in mismanagement and breached their fiduciary duties, citing reports by research companies that "CME is a substantial fraud" and that "management is engaging in a cover-up with … fraudulent information."

He says CEO Zheng Cheng posted a denial of that report on the company's website, but a second online analyst supported those claims and there have been massive resignations at the company, including its CFO, three directors and independent auditor Deloitte Touche Tohmatsu.

The reports were posted by online financial analyst firms Citron Research and Muddy Waters LLC, both of which concluded "CME is engaged in a massive 'pump and dump' scheme" in which it inflated revenue and profit to enrich management through stock sales.

REUTERS/Brendan McDermid

A recent wave of shareholder suits has charged that numerous Chinese holding companies have "backed into" the American stock market by merging with U.S.-chartered shell companies.

Another CME shareholder, Starr Investments Cayman II Inc., voiced similar concerns in a books-and-records action it filed in the Chancery Court one month earlier. *Starr Inv. v. China MediaExpress Holdings*, No. 6484, *complaint filed* (Del. Ch. May 13, 2011).

A recent wave of shareholder suits has charged that numerous Chinese holding companies have "backed into" the American stock market by merging with U.S.-chartered shell companies and sold stock at inflated prices even as their officers emptied out their operating firms back home, rendering the holding companies worthless.

Paul notes that auditor Deloitte Touche's letter of resignation said it "was no longer able to rely on the representations of management" and that it "lost confidence in the commitment of the board and audit committee to good governance and reliable financial reporting."

Trading was halted by Nasdaq March 11, the same day the auditor submitted its resignation letter, and delisted May 19, Paul says.

CME filed a motion dismiss the Starr complaint and argued in a June 6 supporting brief that Starr lacks a proper purpose because it admitted it is seeking information to support breach-of-duty allegations in a related suit in the U.S. District Court for the District of Delaware.

A suspicion of wrongdoing based on nothing more than reports by "anonymous bloggers" is not a sufficient purpose for a books-and-records action, CME's brief says. WJ

Attorneys:

Plaintiff (Paul): Michael Hanrahan, Prickett, Jones & Elliott, Wilmington, Del.

Plaintiff (Starr): Andre Bouchard, Bouchard Margules & Friedlander, Wilmington

Defendant (Starr action): James McMillan III, Pepper Hamilton LLP, Wilmington

Court Related Documents:

Starr brief in support of motion to dismiss: 2011 WL 2308644

See Document Section A (P. 23) for the motion to dismiss in Starr.

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Court: Restrictions not an 'unreasonable barrier' to dissidents

Vermillion Inc.'s decision to keep its poison pill, hold an annual meeting less than a year after the previous one and require advance notice of director nominations did not disenfranchise the diagnostic testing company's shareholders, the Delaware Chancery Court has ruled.

Goggin v. Vermillion Inc. et al., No. 6465-VCN, 2011 WL 2347704 (Del. Ch. June 3, 2011).

Even viewed collectively, the effect of those three actions did not significantly deter dissidents from pressing Vermillion for greater shareholder communication and accountability, Vice Chancellor John Noble said in a decision denying the dissidents' request for an injunction barring the company from using those measures.

Plaintiff Robert Goggin III claimed the Vermillion board used those three tactics to make it tougher for him and other discontented shareholders to seek changes at the company.

AT ARM'S LENGTH

The plaintiff asserted that the Vermillion management and directors were inattentive to shareholder concerns and used the poison pill and other defensive measures to shield themselves from dissident investors.

The poison pill is primarily a takeover defense that explodes into thousands of new discount-priced shares when any investor or group of investors acquires more than a set percentage of the company's stock. The new stock makes it too expensive for the hostile suitor to acquire a controlling share of the company.

Delaware Chancery Court building REUTERS/Tim Shaffer

> The plaintiff said there was not enough time to organize a competing slate of directors and meet the company's advance notification requirements for the June 2011 meeting.

However, dissident shareholders have sometimes charged, as here, that the pill has been used to suppress their efforts to join forces by treating their group as a single hostile suitor because it collectively owns enough stock to trigger the poison pill's maximum ownership limit.

UNSATISFACTORY RESPONSES

Goggin also objected to the board's decision to move up the meeting date so that only six months elapsed between the 2010 annual meeting and the 2011 meeting.

He said there was not enough time to organize a competing slate of directors and meet the company's advance notification requirements.

Goggin and other dissatisfied shareholders had contacted Vermillion's management about those issues but were unsatisfied with the company's responses, and Goggin filed this suit.

The company and its directors argued that Goggin's request for an injunction against its requirements should be denied because the Vermillion board was made up of independent and disinterested directors when it enacted the challenged measures.

Moreover, the company said, Goggin cannot show that he will suffer irreparable harm or that the evidence tips in his favor.

Goggin says the Delaware Supreme Court ruled, in *Airgas Inc. v. Air Products & Chemicals Inc*., 8 A.3d 1182 (Del. 2010), that any meeting scheduled less than one year from the previous one would wrongly truncate the terms of the directors whose terms expire that year.

However, Vice Chancellor Noble found that the Vermillion meeting schedule had been thrown off because it resumed its annual meetings immediately after emerging from bankruptcy in December 2010.

The company normally held annual meetings in June, so it did not cause a hardship on shareholders to hold the 2011 meeting six months later in order to get back on schedule, the judge said.

Besides, he said, the terms of the directors who were up for re-election that year would only be shortened by a nominal amount.

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COMMONPLACE REQUIREMENTS

Vice Chancellor Noble also allowed Vermillion to continue to use the poison pill because it was not employed to suppress Goggin's rights as a shareholder.

Even if the CEO said she would use it as leverage to silence dissidents, she never actually used it for that purpose, the judge said.

Finally, the vice chancellor allowed Vermillion to keep its advance notice requirement. That requirement mandated notice of director nominations by January 2011 for any nominations for director candidates who hoped to be elected at the June meeting.

However, the judge said that requirement did not disenfranchise shareholders because "advancement notice requirements are commonplace and are often construed and frequently upheld by Delaware courts." WJ

Attorneys:
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Defendant: James Holzman, Prickett, Jones & Elliott, Wilmington

Related Court Document:
Opinion: 2011 WL 2347704

See Document Section B (P. 32) for the opinion.

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Liberty Media Chairman John Malone REUTERS/Mario Anzuoni

BONDHOLDER ACTION

Bondholders: Malone took too many liberties with Liberty Media assets

Liberty Media's bondholders have asked Delaware's highest court to overturn a ruling that billionaire chairman John Malone did not violate a "successor obligor" agreement with them in his planned split-off of several of the telecom giant's most valuable assets.

Bank of New York Mellon Trust Co. v. Liberty Media Corp. et al., No. 284-11, motion to expedite granted (Del. June 13, 2011).

The state Supreme Court granted Liberty Media's motion to fast-track the appeal by bondholder trustee Bank of New York Mellon Trust so that Liberty can complete the split-off by the transaction's Sept. 23 deadline.

The appeal turns on whether Malone's plan to split off his Liberty Capital and Liberty Starz units can be aggregated with previous spinoffs and viewed as a single plan.

Spinoffs and split-offs take subsidiaries and units out of one company and either put them in another corporation or make them into a separate company.

In this case, the split-off would make Liberty Capital and Liberty Starz part of a different company that is not available to the bondholders as collateral.

According to the plaintiffs, such a move would effectively empty out most of the assets from the Liberty entity the bondholders were entitled to hold as security.

The bondholders say the transactions violated the "successor obligor" provision of their indenture pact. A successor obligor provision prevents companies from transferring major assets without their accompanying liabilities.

In this case, the bondholders say Liberty and Starz's plan to transfer substantially all the assets they hold as security without an agreement to also transfer liabilities to the receiving entity.

If the bondholders' rights were triggered by the transaction, they could demand accelerated payment from Liberty of $4 billion in outstanding debt.

In an April 29 decision Vice Chancellor J. Travis Laster decided the split-offs could not be aggregated into one big one and therefore did not trigger a default clause that would have allowed the bondholders to demand immediate payment. *Liberty Media Corp. et al. v. Bank of N.Y. Mellon Trust Co. et al.*, No. 5702, 2011 WL 1632333 (Del. Ch. Apr. 29, 2011).

He said the transactions did not involve "substantially all" of the assets as defined in the indenture agreement because that term could not be interpreted differently from its meaning in corporate governance situations.

Using the corporate meaning, the judge found that the challenged transactions, which included deals completed within the past seven years, were not so interdependent or linked in time or place to be considered part of a single plan.

Vice Chancellor Laster also noted that Malone had no motivation to structure a transaction to avoid possible future claims by the bondholders because the bonds would not be due any time in the near future.

The appeal turns on whether Malone's plan to split off his Liberty Capital and Liberty Starz units can be aggregated with previous spinoffs and viewed as a single plan.

"Following a consistent business strategy and deploying signature M&A tactics does not transmogrify seven years of discrete, context-specific business decisions into a single transaction" that would trigger the bondholders' rights, the judge wrote.

The vice chancellor ruled that Liberty was entitled to a declaratory judgment that the transactions did not violate the agreement with the bondholders.

Bank of New York Mellon appealed the ruling just before the end of its one-month time limit.

Liberty filed a motion to expedite the appeal, explaining that if it could not complete the deals by Sept. 23, it would have to start over and bear the substantial costs of another special shareholder meeting, printing and mailing new proxies, and more transaction expenses.

The state high court granted the motion June 13 and ordered opening briefs to be filed by July 1. Oral argument is scheduled for Sept. 14. WJ

Attorneys:

Appellant: Joel Friedlander, Bouchard Margules & Friedlander, Wilmington, Del.

Appellee: Donald Wolfe Jr., Potter Anderson & Corroon, Wilmington

Related Court Document:
Chancery Court opinion: 2011 WL 1632333

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ThoughtWorks owes more than 'whatever it can spare,' investors say

ThoughtWorks must use all legally available resources, not just whatever the company can spare, to pay back investors who financed its expansion, preferred shareholders of the IT solutions firm argue in support of their appeal to the Delaware Supreme Court.

SV Investment Partners LLC et al. v. ThoughtWorks Inc., No. 107-2011, reply brief filed (Del. June 2, 2011).

SV Investment Partners LLC, the leader of a group of investors who hold ThoughtWorks preferred shares, is appealing a November Delaware Chancery Court decision that said ThoughtWorks is not obligated to pay them back by repurchasing those shares if doing so would leave the company short of cash.

ThoughtWorks has no duty to pay the preferred shareholders simply because it may temporarily have a surplus of cash, the company argued in its answering brief in opposition to the appeal.

Preferred shareholders have special contract rights that sometimes put them ahead of creditors when the firm's funds are limited, but differences over the interpretation of those rights can spawn thorny questions concerning the duty of directors to various investors and creditors.

Since ThoughtWorks is chartered in Delaware, SV and other preferred shareholders filed suit in the Chancery Court there, seeking a ruling that even though the company had enough assets to redeem the preferred shares it wrongly chose to pay other expenses instead.

The plaintiffs allege ThoughtWorks used several excuses over the years to avoid paying them back as the contract governing the preferred shares required.

The document allowed the preferred holders to demand repayment one year after the 2000 investment.

According to the preferred shareholders, in its latest excuse, the company used a misinterpretation of a "funds legally available" provision that required ThoughtWorks to redeem the shares unless it lacked the assets to do so without pushing the company into insolvency.

The plaintiffs say the Chancery Court wrongly accepted ThoughtWorks' over-stretched definition of "funds legally available."

In a bench ruling, the Chancery Court said ThoughtWorks' directors were within their rights to decline to redeem the shares because it would make it difficult for the company to meet its bills going forward.

The plaintiffs appealed that ruling to the state Supreme Court, claiming that the Chancery Court wrongly accepted ThoughtWorks' over-stretched definition of "funds legally available."

In its answering brief, ThoughtWorks argued that SV lost in the Chancery Court because it could not prove that the board of directors used bad judgment in deciding to hold on to some cash to pay later bills rather than redeem the preferred shares right away.

In addition, the Chancery Court selected the right definition for "funds legally available," which was the guideline for deciding what money could be used to pay back the preferred shareholders, ThoughtWorks said.

In its reply brief, SV argues it is not enough for ThoughtWorks to claim that its fears of future financial difficulties excuse it from its obligation to redeem the preferred shares now.

ThoughtWorks cannot take the position that it has no duty to SV "in excess of whatever amount the ThoughtWorks board determines the company can spare," the plaintiff argues.

Because experts on both sides have opined that ThoughtWorks has a surplus large enough to pay back the preferred shareholders, the appellant says, this shows that the Chancery Court erred by letting the company use the excuse that it must save that money for a rainy day.

Moreover, the court improperly went outside Delaware corporate law to find justification for ThoughtWorks' position, SV adds. WJ

Attorneys:
Appellants: Martin Lessner, Young Conaway Stargatt & Taylor, Wilmington, Del.

Appellees: Kenneth Nachbar, Morris, Nichols, Arsht & Tunnell, Wilmington

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WESTLAW JOURNAL

BANKRUPTCY

This reporter offers comprehensive coverage of significant issues in both business and consumer bankruptcy proceedings. The editors track dockets, summarizing recent developments and their implications for the debtor, its creditors, officers and directors, employees, and other parties. This reporter covers a wide range of topics regarding business and consumer bankruptcies and includes analysis of the most noteworthy case law and legislation. Important litigation documents are also included.

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BANKRUPTCY ISSUES/AUTOMATIC STAY

Nortel pension trustee says stay not applicable to U.K. regulator

The trustee of the pension plan covering employees of Nortel Networks' U.K. unit is seeking to overturn a series of rulings holding that the automatic bankruptcy stay bars the United Kingdom's chief pension regulator from taking action against several Nortel companies.

Nortel Networks Inc. et al. v. Trustee of Nortel Networks UK Pension Plan, No. 11-1895, appellants' brief filed (3d Cir. May 24, 2011).

"Courts should tread lightly in issuing orders that declare 'null and void' a regulatory process established under foreign statutory law," the trustee says in a brief filed with the 3rd U.S. Circuit Court of Appeals.

Nortel Networks Inc. and several related companies filed voluntary Chapter 11 petitions in January 2009 in the U.S. Bankruptcy Court for the District of Delaware as part of a global restructuring process.

According to the brief, the U.K. Pensions Regulator issued a warning notice to certain Nortel companies in January 2010 after an investigation into the financial position of the Nortel Networks U.K. Pension Plan.

The Pensions Regulator is the U.K.'s governmental agency that polices the administration of employment-based pension schemes.

The purpose of the foreign proceeding is to determine whether under U.K. law any of the Nortel debtors should be required to submit a proposal to the Pensions Regulator to cure a $3 billion funding deficit in the plan, the brief says.

A month after the warning was issued, the Nortel debtors filed a motion in Bankruptcy Court seeking to enforce the automatic stay.

The court granted the motion in March 2010, and a federal District Court judge affirmed that ruling a year later.

The trustee argues in an appeal to the 3rd Circuit that 11 U.S.C. § 362(b)(4) makes the automatic stay inapplicable to any proceeding by a governmental unit. The trustee says the lower courts erred in concluding that the Pensions Regulator proceeding is not a regulatory process.

"The Pensions Regulator is a governmental agency charged with regulating the operations and administration of pension schemes in the U.K.," the brief says.

The trustee says that in place of the U.K. regulatory scheme, the Bankruptcy Court plans to establish its own procedure for determining any liability under U.K. law.

"The Bankruptcy Court's expansive view of its powers and cavalier dismissal of the need to defer to the U.K. regulatory procedure … undermines … the public policy in favor of international coordination and stability," the trustee's brief says. WJ

Attorneys:
Appellants: Marc Abrams, Brian E. O'Connor and Sameer Advani, Willkie Farr & Gallagher, New York; Charlene D. Davis and Justin R. Alberto, Bayard PA, Wilmington, Del.

Related Court Document:
Appellants' brief: 2011 WL 2115375

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No jurisdiction over pre-petition TILA violation claim, bankruptcy judge says

A federal bankruptcy judge in Delaware has ruled that his court lacks subject matter jurisdiction over homeowners' Truth in Lending Act claim because the lender sold the mortgage before filing for Chapter 11 protection.

In re New Century TRS Holdings Inc. et al., No. 07-10416; White et al. v. New Century TRS Holdings Inc. et al., Adv. No. 10-55357, 2011 WL 2259743 (Bankr. D. Del. June 7, 2011).

Judge Kevin J. Carey of the U.S. Bankruptcy Court for the District of Delaware said that because New Century Mortgage Corp. transferred its interest in the mortgage pre-petition, it does not have any interest in the mortgage now, nor did it at the time of the bankruptcy filing.

According to the opinion, Molly and Ralph White obtained a $275,000 loan in July 2006 to buy a home in Volusia County, Fla. The loan was secured by a mortgage in favor of New Century.

In March 2007 New Century sold the mortgage to NC Capital Corp. The next month, it filed a Chapter 11 petition, and the Bankruptcy Court set Aug. 31, 2007, as the deadline for filing proofs of claim.

More than a year after the deadline, the Whites filed a $272,500 claim for rescission of the mortgage in the bankruptcy case. They also filed an adversary complaint claiming New Century had failed to provide timely preliminary disclosures during the mortgage process in violation of the Truth in Lending Act, 15 U.S.C. § 1601; the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601; and Florida's Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201.

They also raised common-law claims for fraud and civil conspiracy.

> "The debtors had no interest in the mortgage loan as of the petition date and the mortgage loan was not property of the estate," the court said.

The Bankruptcy Court consolidated the proof of claim and the complaint, and New Century filed a motion to dismiss. It argued that the plaintiffs missed the claims deadline and that the TILA claim failed because the mortgage had been sold before the bankruptcy filing.

Judge Carey granted the motion in part.

He struck the plaintiffs' TILA claim because the court lacked subject matter jurisdiction.

The Whites could not prosecute their rescission claim for the alleged violation, the judge said, because New Century had transferred its interest in the mortgage before filing its Chapter 11 petition.

"The debtors had no interest in the mortgage loan as of the petition date and the mortgage loan was not property of the estate," he said.

Judge Carey left standing, however, the plaintiffs' claims under RESPA and Florida law because an issue of fact remains as to whether the notice used by New Century to advise potential claimants of the bar date was sufficient.

At the time New Century gave notice of the bar date, the plaintiffs were unknown creditors, the judge said. As such, they were entitled only to notice by publication.

Judge Carey said New Century published the bar date in the Wall Street Journal and the Orange County (Calif.) Register.

While this notice "arguably complied" with the court's minimum publication requirements, Judge Carey said "without a more fully developed factual record, I am unable to determine whether the publication notice was reasonably calculated to provide notice to consumer mortgagors like the Whites." WJ

Attorneys:
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Related Court Document:
Opinion: 2011 WL 2259743

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WaMu wins bankruptcy fight over employee compensation funds

Washington Mutual Inc. has won an ownership battle over funds in deferred employee compensation plans after a bankruptcy judge in Delaware refused to impose a constructive trust on the funds.

In re Washington Mutual Inc. et al., No. 08-12229, 2011 WL 2162917 (Bankr. D. Del. June 1, 2011).

Although certain employees of WaMu's predecessors-in-interest contended they are entitled to the funds, Judge Mary F. Walrath of the U.S. Bankruptcy Court for the District of Delaware said the employees are entitled only to general unsecured claims because they do not have a right to the funds that is superior to the rights of the other general unsecured creditors.

WaMu is the successor to Home Savings of America FSB, which was the successor of H.F. Ahmanson & Co.

WaMu's predecessors created trusts to hold money for various deferred employee compensation plans.

In order to qualify for deferred tax benefits, the plans had to be "unfunded," meaning any distributions to the employees would come only from the general assets of the company, Judge Walrath said.

When WaMu acquired Home Savings, the plan participants became employees of Washington Mutual Bank.

WaMu later filed a Chapter 11 petition in 2008 after the Office of Thrift Supervision seized WMB. The company sought permission from the Bankruptcy Court to terminate the plans and exercise ownership rights in the trust assets. As of February 2009 the assets totaled about $69 million, the opinion said.

"ERISA itself expressly permits equitable relief and does not preclude a court from fashioning the appropriate remedy for its violation," the judge said.

Several plan participants opposed WaMu's request. They argued that a constructive trust should be imposed on the assets because WaMu had refused prior to its bankruptcy filing to grant their withdraw requests.

WaMu responded that the participants' claim to the trust funds is preempted by the Employee Retirement Income Security Act.

Judge Walrath rejected that argument.

"ERISA itself expressly permits equitable relief and does not preclude a court from fashioning the appropriate remedy for its violation," she wrote.

The judge also found that WaMu did not have the authority to deny the participants' pre-petition withdraw demands.

"There is nothing in the … plans themselves that gave [WaMu] the discretion to deny a distribution to the plan participants," Judge Walrath said.

Nevertheless, she concluded the court could not impose a constructive trust because the money allegedly owed to the participants can no longer be clearly traced to funds or property in their possession.

Because the plans were unfunded, and the funds were identified as property of WaMu, no such tracing is possible, the judge said.

She therefore held WaMu is entitled to use the funds from the plans to pay creditors according to the priorities established by the Bankruptcy Code and any reorganization plan. WJ

Attorneys:
WaMu: Andrew C. Irgens, Richards Layton & Finger, Wilmington, Del.; David B. Hird, Weil Gotshal & Manges, Washington; David L. Permut, Goodwin Procter LLP, Washington

Related Court Document:
Opinion: 2011 WL 2162917

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Halliburton securities fraud lawsuit reinstated

WASHINGTON, June 6 (Reuters) – Halliburton Co. suffered a setback when the U.S. Supreme Court made it easier for shareholders to proceed with some class-action securities-fraud lawsuits against publicly traded companies.

Erica P. John Fund Inc. v. Halliburton Co. et al., No. 09-1403, 2011 WL 2175208 (U.S. June 6, 2011).

The justices unanimously ruled that a federal appeals court erred in rejecting class certification in a securities fraud lawsuit filed in 2002 on behalf of all buyers of Halliburton stock between June 1999 and December 2001.

The high court reinstated a lawsuit by a group of mutual and pension fund investors who claimed Halliburton understated its asbestos liabilities while overstating revenues in its engineering and construction business and the benefits of its merger with Dresser Industries.

The alleged misstatements artificially pumped up Halliburton's stock price, the lawsuit said, adding that the Houston-based company eventually made corrective disclosures that caused its stock price to fall.

Halliburton said it looked forward to presenting its arguments when the case goes back to the appeals court.

"Halliburton has not accrued any amounts related to this matter because it does not believe that a loss is probable. Further, an estimate of possible loss or range of loss related to this matter cannot be made," it said in a statement.

Dick Cheney, vice president during the Bush administration, served as Halliburton's chairman and chief executive officer during part of the period at issue in the lawsuit. Cheney was not named as a defendant in the lawsuit.

Dave Lesar, the current chairman, president and chief executive, is the only defendant other than the company itself.

"The Supreme Court's unanimous opinion sends a strong signal that lower courts cannot use class certification as a procedural device to block investors from vindicating their statutory rights," said Pace Law School professor Jill Gross.

A federal judge in Texas threw out the lawsuit, ruling that the investors had failed to prove their losses were tied to a particular statement made by the company or its officers, a concept known as loss causation.

> The Supreme Court resolved a conflict among the appeals courts over whether a showing of "loss causation" is a prerequisite to a viable securities fraud class action.

The 5th U.S. Circuit Court of Appeals agreed, and ruled that, for the lawsuit to proceed as a class action, the plaintiffs would have to first prove at the outset, by a preponderance of the evidence, that the alleged misrepresentations caused the stock price to fall, resulting in investor losses.

The appeals court agreed with Halliburton's arguments that the evidence failed to show the alleged misrepresentations had any impact on the stock price and ruled the lawsuit could not proceed as a class action.

LOSS CAUSATION NOT REQUIRED FOR CLASS CERTIFICATION

The Supreme Court, in a 10-page opinion written by Chief Justice John Roberts, disagreed, and reinstated the lawsuit.

"The question presented in this case is whether securities fraud plaintiffs must also prove loss causation in order to obtain class certification. We hold that they need not," he concluded.

The Supreme Court only ruled that the lawsuit can proceed as a class action, not on the merits of the lawsuit.

To prevail on the merits in a private securities fraud lawsuit, investors must prove that the defendant's deceptive conduct caused their claimed economic loss, Roberts said.

The ruling was a victory not only for the investors, but also for the Justice Department. Attorneys for the investors and the government said the appeals court erred in requiring the plaintiffs prove a significant part of their case at such an early stage of the litigation.

The Supreme Court's decision resolved a conflict among the appeals courts created by the Halliburton ruling. At least three other appeals courts had taken the same position as the one adopted by the justices.

Roberts sent the case back to the appeals court for further proceedings, including to address any further arguments by Halliburton against class certification.

An array of industry trade groups, including the Securities Industry and Financial Markets Association and U.S. Chamber of Commerce, supported Halliburton, while groups representing public pension funds and investors supported the plaintiffs.

Attorneys who represent businesses said the Supreme Court made its decision on the narrowest possible grounds. WJ

(Reporting by James Vicini; editing by Gerald E. McCormick, Dave Zimmerman, Gary Hill)

Attorneys:
Plaintiff: David Boies, Boies, Schiller & Flexner, Armonk, N.Y.; Nicole Saharsky, assistant to the solicitor general, Washington

Defendant: Aaron Streett, Baker Botts LLP, Houston

Related Court Document:
Opinion: 2011 WL 2175208

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Supreme Court limits liability of investment advisers for prospectus content

A divided U.S. Supreme Court has ruled that an investment adviser is not liable under federal securities laws for false statements included in a mutual fund prospectus when the fund, and not the adviser, actually "makes" the statements.

Janus Capital Group Inc. et al. v. First Derivative Traders, No. 09-525, 2011 WL 2297762 (U.S. June 13, 2011).

In a 5-4 vote, the high court reversed a 4th U.S. Circuit Court of Appeals decision allowing shareholders to sue the investment adviser, Janus Capital Management LLC, for making false statements in violation of Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5(b). *In re Mut. Funds Inv. Litig.*, 566 F.3d 111 (4th Cir. 2009).

Under Rule 10b-5, it is illegal for "any person, directly or indirectly, … to make any untrue statement of a material fact" in connection with the purchase or sale of securities.

The 4th Circuit ruled that JCM and its parent, Janus Capital Group, could be held liable for helping to produce a misleading prospectus for their mutual fund, Janus Investment Fund.

The prospectus said JIF did not permit "market timing" investments.

Market timing is the practice of rapidly trading shares in and out of a mutual fund to take advantage of market inefficiencies, or lags in the timing of a fund's daily valuation.

While not illegal, market timing harms other investors because it siphons off short-term profits and increases a fund's overall transaction costs.

Plaintiff First Derivative Traders, a Janus Capital Group investor, sued the Janus companies for losses in the value of its shares when the truth came out that the fund did permit market timing.

The Supreme Court majority, in an opinion written by Justice Clarence Thomas, held that neither JCM nor JCG was liable for the statements in the prospectus because they were made by the fund, a distinct corporate entity.

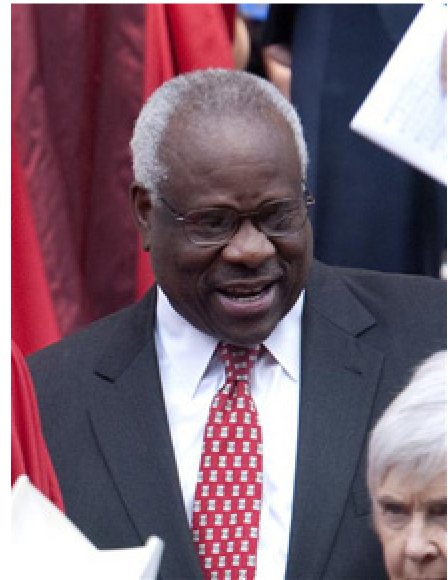
"What this ruling says is that as long as there are separate legal entities, even if management totally dominates all aspects, there's no liability," William Birdthistle, an associate professor at the Chicago-Kent College of Law, told Reuters.

> Justice Clarence Thomas wrote for the Supreme Court majority that neither Janus Capital Management nor Janus Capital Group was liable for the statements in the prospectus because they were made by Janus Investment Fund, a distinct corporate entity.

"This is going to open the eyes of those not in the funds industry who are going to say: 'Wow, those guys are bulletproof,'" he said.

In a brief to the high court, First Derivative argued that an investment adviser "makes" statements in a mutual fund prospectus, just as a playwright composes lines delivered by an actor.

The majority acknowledged that investment advisers exercise "significant influence" over their client funds, but rejected the playwright analogy.



REUTERS/Joshua Roberts

Justice Clarence Thomas wrote the Supreme Court majority opinion.

"We decline this invitation to disregard the corporate form," Justice Thomas wrote.

"Any reapportionment of liability in the securities industry in light of the close relationship between investment advisers and mutual funds is properly the responsibility of Congress and not the courts," he said.

In a dissenting opinion, Justice Stephen Breyer said the majority interpreted Rule 10b-5 too narrowly.

"[B]oth language and case law indicate that, depending upon the circumstances, a management company, a board of trustees, individual company officers, or others, separately or together, might 'make' statements contained in a firm's prospectus," he said.

Justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan joined in the dissent.

Chief Justice John Roberts and Justices Antonin Scalia, Anthony Kennedy and Samuel Alito concurred in the majority opinion. WJ

Related Court Document:
Opinion: 2011 WL 2297762

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Conrad Black likely headed back to prison after Supreme Court denies review

The temporary freedom enjoyed by former media mogul Conrad Black while his appeal of his fraud conviction bounced around the trial and appellate courts may soon come to an end now that the U.S. Supreme Court has rejected his case for a second time.

United States v. Black et al., No. 10-1038, cert. denied (U.S. May 31, 2011).

The justices denied Black's petition for *certiorari* without comment May 31, a decision that may put the ex-newspaper magnate back in federal prison.

Black, who had been convicted at trial of three counts of mail fraud and one count of attempted obstruction of justice, appealed to the high court last year with moderate success.

The Supreme Court overturned two of Black's mail fraud convictions. However, because the obstruction charge carried the longest prison term, the reversal did not reduce his six-and-a-half-year prison sentence.

That landmark ruling narrowed the applicability of "honest services fraud" to plots involving bribes or kickbacks, which were not present in Black's alleged scheme to defraud his company, Hollinger International, of over $6 million. *Black et al. v. United States*, 130 S. Ct. 2963 (U.S. June 24, 2010).

Honest-services fraud is the hotly debated theory that corporate officers or politicians "steal" from those they represent when they fail to furnish their best efforts.

Prior to the Supreme Court's ruling in Black's case, prosecutors had stretched the honest-services law, 18 U.S.C. § 1346, to criminalize any act deemed not in the best interest of constituents. The law is now limited to politicians and corporate officers who have engaged in bribe or kickback schemes.

After the Supreme Court's 2010 decision, Black's case was remanded to the 7th U.S. Circuit Court of Appeals to decide which of his four convictions were based on "honest services fraud."

Although the 7th Circuit determined that two of Black's mail fraud convictions were based on honest services and overturned them, the appellate court found alternative grounds for upholding the remaining mail fraud and obstruction convictions.

Black argued in the remand proceedings that the jury instructions at trial required juror unanimity only as to whether a scheme to defraud existed, not whether the scheme was based on honest-services fraud or theft. There was no way to know for certain, Black maintained, whether the jury convicted him on the theory of honest-services fraud.

In upholding the two convictions, however, the 7th Circuit concluded that a jury would have easily found Black guilty of ordinary financial fraud even if the prosecution had not charged honest-services fraud.

Black took that 7th Circuit ruling back to the Supreme Court, seeking a retrial on the remaining convictions for mail fraud and obstruction.

He argued in his petition for review that he should get a new trial on the two charges because the Supreme Court found in its 2010 ruling that the jury instructions wrongfully allowed him to be convicted of honest-services fraud.

A new trial to revisit the mail fraud and obstruction charges, Black argued, was the only way to be certain the honest-services jury instructions did not taint his convictions.

The government argued in an opposition brief that even if Black had not been charged with honest-services fraud, the evidence presented for the remaining charges was so "overwhelming" that no reasonable jury could have returned a verdict other than guilty.

This year's denial of review by the Supreme Court brings to an end Black's criminal trial that began in late 2005.

Black siphoned off $6 million from Hollinger International between 1998 and 2000 when the company sold off many of its newspapers, disguising the money as "management fees." Prosecutors said Black's receipt of the unwarranted fees deprived Hollinger's shareholders of his honest services.

Black, who has been free on $2 million bail since the Supreme Court's July 2010 decision, is scheduled for resentencing June 24 in the U.S. District Court for the Northern District of Illinois. A court document filed by Black's attorney asks Judge Amy J. St. Eve to sentence Black to the two years in prison he has already served. WJ

Attorneys:

Plaintiff: Principal Deputy Solicitor General Neal Katyal, Assistant Attorney General Lanny A. Breuer and Joel M. Gershowitz, Department of Justice, Washington

Defendant: Miguel A. Estrada, David Debold and Scott P. Martin, Gibson, Dunn & Crutcher, Washington

Related Court Document:

Government's opposition brief: 2011 WL 1594656

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NEWS IN BRIEF

PERKINS OPERATOR FILES CHAPTER 11 PETITION, RESTRUCTURES

The operator of chain restaurants Perkins & Marie Callender's has filed a "prepackaged" Chapter 11 bankruptcy after reaching an agreement with certain holders of senior secured notes to restructure its debt. Perkins & Marie Callender's Inc. filed the voluntary Chapter 11 petition in the U.S. District Court for the District of Delaware. P&MC says in its petition that it has $290 million in assets and $441 million in liabilities. It said in a June 13 statement that under the agreement it will turn over control of the company to the holders of its unsecured debt, led by Minnesota-based private equity firm Wayzata Investment Partners LLC. P&MC also plans to close 58 of its nearly 550 company-owned and franchised restaurants. The company further said Wells Fargo Capital Finance has agreed to provide it with a $21 million debtor-in-possession financing facility to keep the company operating during its bankruptcy.

In re Perkins & Marie Callender's Inc. No. 11-11795, voluntary petition filed (Bankr. D. Del. June 13, 2011)

CHINESE AD FIRM BILKED AMERICAN INVESTORS, SUIT SAYS

A suit filed by a shareholder of China Century Dragon Media, a China-based television advertising company, claims directors and officers breached their duty by disseminating false financial information to American investors. The derivative action, brought on behalf of the company in the Delaware Chancery Court, says Chairman HuiHua Li, CEO HaiMing Fu, CFO Dapeng Duan and other officers and directors intentionally misrepresented the company's fiscal health in order to pump up the firm's stock price and unjustly enrich themselves. The plaintiff asks the court to force the individual defendants to disgorge all profits, benefits and other improperly gained compensation.

Radhakrishnan et al. v. Li et al., No. 6575, complaint filed (Del. Ch. June 17, 2011).

SUIT: IT FIRM TOOK LOWBALL BID DESPITE RECORD REVENUES

Shareholder Alexis Scuta charges that the directors of Ness Technologies Inc. should have gotten a much better price than $307 million for the Israel-based company from Citi Venture Capital International. The plaintiff seeks an injunction to prevent the consummation of the deal, which will pay $7.75 per share in cash. The suit claims the officers and directors breached their fiduciary duties by colluding with Citi Venture to accept less than the company is worth and then agreeing to various deal-protection devices that will deter competing bidders. A termination fee of $8.35 million will make other suitors shy away, the suit says.

Scuta v. Ness Technologies Inc. et al., No. 6582, complaint filed (Del. Ch. June 17, 2011).

CHANCERY COURT CASES FILED

	CAPTION	CASE NO.	NATURE OF ACTION	DATE	ATTORNEY
1.	Israni v. Ness Technologies	6569	Breach of duty	June 15, 2011	Blake Bennett
2.	Paul v. China MediaExpress	6570	Books & records	June 16, 2011	Michael Hanrahan
3.	Israni v. M&F Worldwide	6571	Breach of duty	June 16, 2011	Blake Bennett
4.	Ivers v. Transatlantic	6574	Breach of duty	June 17, 2011	Carmella Keener
5.	Radhakrishnan v. China Century	6575	Breach of duty	June 17, 2011	Seth Rigrodsky
6.	Shaev v. Timberland Co.	6577	Breach of duty	June 17, 2011	Carmella Keener
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10.	Pentwater Capital v. Chapple	6583	Breach of duty	June 20, 2011	Andre Bouchard
11.	Baker Street Capital v. TIX	6584	Books & records	June 20, 2011	John Seaman
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14.	Mehra v. Li	6590	Breach of duty	June 20, 2011	Seth Rigrodsky
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