IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

PRIZM GROUP, INC., a Delaware corporation, Plaintiff, v. MARK E. ANDERSON, Defendant.	))))))))))	Civil Action No. 4060-VCP

MEMORANDUM OPINION

Submitted: January 19, 2010
Decided: May 10, 2010

Berton W. Ashman, Jr., Esquire, POTTER ANDERSON & CORROON LLP, Wilmington, Delaware; Vineet Bhatia, Esquire, Anne E. Mullins, Esquire, SUSMAN GODFREY LLP, Houston, Texas; *Attorneys for Plaintiff Prizm Group, Inc.*

Mark E. Anderson, Atlanta, Georgia; *Pro Se Defendant*

PARSONS, Vice Chancellor.

In this action, Prizm Group, Inc. ("Prizm" or the "Company") seeks a declaration that Mark E. Anderson, a former director of Prizm, failed to provide valid consideration for shares of common stock in Prizm he received (the "Shares") and that such stock was, thus, either void *ab initio* or voidable at the election of Prizm.[1] In the alternative, Prizm asks the Court to cancel that stock based on Anderson's failure to pay any consideration for it and the lack of an equitable basis to prevent cancellation.

Under the versions of 8 *Del. C.* § 152 and Section 3 of Article 9 of the Delaware Constitution of 1897 in effect when Anderson purported to purchase his Shares, an unsecured promissory note legally could not be used as consideration for the purchase of newly-issued shares in a Delaware corporation. Typically, shares of stock issued in return for such improper consideration are considered void *ab initio*, absent equitable considerations affecting the interests of purported shareholders and third parties. If such equitable considerations exist, stock purchased with invalid consideration often is deemed voidable at the election of the corporation.

Here, Anderson purported to pay for a one-third equity interest in Prizm with an unsecured promissory note. Despite a formal request for payment nearly eleven months after the note came due, Anderson never paid any portion of that note. Following Anderson's failure to pay, Prizm's board of directors met in April 2006 and voted to cancel Anderson's shares. Though Anderson knew of this meeting and its effect on his

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[1] If the stock is found to be voidable, Prizm further seeks a declaration that it was properly cancelled by the Prizm board of directors at a meeting held in 2006.

purported ownership of shares in Prizm, he never challenged the board's action. Anderson thus waived any right to dispute whether Prizm properly cancelled his shares after he failed to pay the promissory note.

Under these circumstances, the distinction between void and voidable matters little because, whether I find the stock issued by Prizm in return for Anderson's note void *ab initio* or voidable at the election of the Company, the result is the same. Consequently, I grant Prizm's request for declaratory judgment and hold that Anderson does not own any shares of Prizm's common stock.[2]

I. BACKGROUND

A. The Parties

Plaintiff, Prizm, is a closely-held Delaware corporation headquartered in Denver, Colorado. The company administers warranty claims on RVs and automobiles.[3] Prizm's current board of directors consists of two members, Marc D. Vivori and Suresh Chadalavada (the "Board").

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[2] As discussed *infra* Part I.C, Anderson failed to submit any post-trial briefing, thereby waiving any claims against Prizm or defenses to its arguments. I, therefore, reach this conclusion based on the factual record before me and the pre- and post-trial briefs submitted by Prizm.

[3] June Tr. 28 (Chadalavada). Citations in this form are to the trial transcript from June 9, 2009. Citations to the "Oct. Tr." are to the transcript of the October 17, 2009 session of the trial. Additionally, where, as here, the identity of the testifying witness is not clear from the text, it is noted parenthetically.

Defendant, Anderson, is a resident of Atlanta, Georgia. He served as a director of Prizm until his removal on April 21, 2006.[4]

B. Facts

On May 3, 2004, Anderson, Vivori, and Chadalavada purchased Prizm[5] from Yasar Samarah.[6] Initially, the three intended to share equally in the ownership of Prizm.[7] Each person, therefore, agreed to make an initial equity contribution of $7000 and a $100,000 loan to provide start-up working capital.[8] Vivori and Chadalavada both followed through on this agreement.[9] Shortly before the May 3 closing, however, Anderson informed Chadalavada and Vivori that he could not contribute cash or property

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4 PX 64.

5 At the time Anderson, Vivori, and Chadalavada acquired it, the Company was known as PSA Holding, Inc. June Tr. 31-32 (Chadalavada). On September 18, 2006, the name was changed to Prizm. Pretrial Order ¶ 17. For convenience, I refer to the Company both before and after the name change as Prizm.

6 Samarah incorporated Prizm in January 2004 for the purpose of acquiring certain subsidiaries of Prizm Solutions, Inc. ("Prizm Solutions"), a warranty claims administration company. June Tr. 32 (Chadalavada). These subsidiaries included Prizm Administrative Solutions, Inc. and National Warranty of Florida. After deciding not to pursue the acquisition, however, Samarah offered to sell Prizm and all of the due diligence work he performed to acquire Prizm Solutions' subsidiaries to Anderson, Vivori, and Chadalavada.

In exchange for the Company, Samarah received $2000 for his due diligence work and had the purchasers pay for the legal services performed for him by Lee Summers during the acquisition process. PX 14; June Tr. 32-33 (Chadalavada).

7 June Tr. 33 (Chadalavada).

8 *Id*. at 19, 34 (Chadalavada), 139 (Vivori).

9 PX 13, 15, 20, 21, 22; June Tr. 35 (Chadalavada), 139 (Vivori).

and, instead, executed a $107,000 promissory note dated May 3, 2004, which was due in full on May 2, 2005 (the "May 2004 Note" or the "Note").[10] This Note purportedly represented both Anderson's $7,000 equity contribution and his $100,000 loan to the Company.[11] In exchange for Anderson's unsecured promissory note and the equity contributions of Chadalavada and Vivori, Prizm issued to each of them 333 shares of common stock with a par value of $1 per share and allocated $6667 as additional paid-in capital.[12]

In connection with their purchase of Prizm, Vivori, Chadalavada, and Anderson signed a shareholder agreement that became effective May 3, 2004 (the "Shareholder Agreement").[13] Among other things, this Agreement established certain restrictions on all issued and outstanding Shares. Specifically, Paragraph 12 states, in pertinent part:

> In the event of the voluntary or involuntary termination of the service of a Shareholder (including disability, employment with an unaffiliated corporation, or resignation), such

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10 PX 19. Each party was to loan the Company $100,000 and contribute $7,000 in equity because, at the time, Prizm badly needed an infusion of capital. Even though Anderson did not have cash to contribute to the new venture, Vivori and Chadalavada allowed Anderson to make his contribution in the form of a promissory note because they "thought that [Anderson] brought a certain skill set that would be beneficial to [Prizm] and wanted him as part of the group." June Tr. 37, 53 (Chadalavada), 140 (Vivori).

11 PX 19; June Tr. 37, 53 (Chadalavada), 140 (Vivori).

12 PX 21, 22, 38; June Tr. 35 (Chadalavada), 139-40 (Vivori).

13 PX 18.

> Shareholder shall immediately sell his shares to the Corporation at a price equal to the book value of the shares.[14]

Soon after Prizm's formation, tensions arose among its directors due to financial and other difficulties at the Company.[15] Vivori and Chadalavada largely blamed Anderson for Prizm's financial woes. Specifically, they believed that Anderson was spending Company money on non-business-related expenses, failing to follow through on Prizm's professional commitments, and creating troubled relationships with the Company's senior management.[16] These tensions soon escalated and, in February 2006, Vivori and Chadalavada attempted to call a Board meeting to resolve the difficulties among the parties.[17] Frustrated that Vivori had removed his name from certain corporate bank accounts, however, Anderson objected to this meeting and threatened legal action if it was held.[18]

In an effort to resolve this conflict, the parties asked Robert Kaufman, an attorney, and Royal Lee, Anderson's religious advisor, to help mediate an agreement between the

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[14] PX 18 at 5. Paragraph 18 also provides that the Agreement "shall terminate upon the occurrence of any of the following events: (i) cessation of the Corporation's business; (ii) bankruptcy or dissolution of the Corporation; (iii) the voluntary agreement of all parties who are then bound by the terms hereof."

[15] June Tr. 35, 46-47 (Chadalavada).

[16] *Id*. at 49, 53, 113 (Chadalavada), 150, 155, 196 (Vivori).

[17] *Id*. at 151 (Vivori).

[18] PX 41; June Tr. 49-50 (Chadalavada), 151 (Vivori).

parties.[19] After much discussion, the parties signed an agreement on February 26, 2006 in which they undertook, among other things, to implement better controls over Prizm's finances and to communicate more effectively.[20] Unfortunately, the February settlement agreement did not conclusively resolve the disputes among the parties, and Anderson's relations with Vivori and Chadalavada continued to disintegrate.[21]

After the Company's financial situation deteriorated further, Vivori sent Anderson a letter on behalf of Prizm demanding that Anderson completely repay the May 2004 Note, including principal and interest, by April 18, 2006.[22] The letter indicated that the

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19 June Tr. 51 (Chadalavada), 150-51 (Vivori).

20 PX 43-46; June Tr. 51-52 (Chadalavada).

21 For instance, Anderson failed to attend numerous Company meetings or participate meaningfully in running the Company. PX 51.

22 This letter was sent on April 11, 2006. PX 52. The May 2004 Note originally was due on May 2, 2005. Though Anderson claims to have paid the Note at some point, he failed to provide any evidence of repayment other than his own testimony. June Tr. 255-57 (Anderson).

In general, I did not find Anderson's testimony credible, reliable, or consistent with the evidentiary record. Indeed, Anderson made internally conflicting statements, became evasive and uncooperative in response to opposing counsel's questioning, and based a significant amount of his testimony on documents that were never produced. *See*, *e.g.*, June Tr. 245-46, 251, 255, 258-60 (Anderson); Oct. Tr. 139-52; 155 (Anderson). Anderson claimed the documents were with his materials in Denver, but never provided a satisfactory explanation for his failure to obtain those documents through discovery or otherwise or to introduce them into evidence at trial.

Additionally, Anderson's testimony on the alleged repayment is inconsistent with the fact that, after he received the April 11 letter from Vivori asking him to repay the Note immediately, Anderson did nothing to inform Vivori or Chadalavada that he had already paid any portion of the Note, nor did he take any other action to

balance due was $140,092.96 and that Prizm needed the additional capital to pay its outstanding debts.[23] After Anderson failed to pay any portion of the Note, or even acknowledge the letter, the Board held a special meeting on April 19, 2006 and voted to cancel Anderson's Shares for failure to pay any consideration (the "April 19 Meeting").[24] The next day, Prizm sent Anderson a letter informing him of the Board's action.[25] Again, Anderson did not respond. Indeed, in communications with a third party shortly after these events, Anderson expressly disclaimed any intention of objecting to the actions taken at the April 19 Meeting.[26]

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correct Prizm's belief that the Note remained unpaid. June Tr. 258-60 (Anderson); Oct. Tr. 256-57 (Anderson). Additionally, Anderson provided no documentary evidence that he ever paid the Note. For these reasons, I find that Anderson did not pay the Note.

23 PX 52.

24 PX 62.

25 PX 63.

26 In a May 11, 2006 email to Scott MacIntosh, a partner at Titan Dealer Services ("Titan"), a company unaffiliated with Prizm, Anderson wrote:

> My attorneys in Denver told me that I would probably prevail, however, they were very realistic about money spent and value gained! From my perspective it was going to be a huge waste of time. Every minute that I spent fighting with [Vivori] was simply a waste of time. If I prevailed in the end, how much would I spend plus huge opportunities to be delayed.
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> From what I understand, the deal flow had dried up! The deals I was working on . . . have decided not to proceed with me not there! Mentally, I have moved on. We have so much more opportunity. . . .

In May 2006, Anderson created a new corporation, Warranty Administration Services Corporation ("WASCOR"), which engaged in the same line of business as Prizm.[27] During this same period, Anderson misappropriated and released certain of Prizm's confidential information to its industry competitors.[28] Anderson also began using this confidential information to assist Prizm's customers in attempting to gain more favorable deals with Prizm.[29] Such misappropriation, disclosure, and use of Prizm's confidential information injured Prizm by providing competitors with pricing and service contact information Prizm painstakingly had developed over many years.[30] Indeed,

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> The beauty of it is that what I spent a huge amount of my time on . . . is exactly what we are undertaking at Titan. Timing could not have been better! . . . Count our lucky stars!

PX 67. The record does not provide much more information regarding either the nature of Titan's business or Anderson's affiliation with Titan. June Tr. 279-81 (Anderson). It is clear, however, that Anderson sent the above email from an address in his name on the Titan email server and that, sometime between May and June 2006, Anderson held himself out as a Titan partner. *Id*.

27 PX 91; June Tr. 158-60 (Vivori). Anderson served as WASCOR's president and its sole shareholder and director. Anderson dissolved the company on January 2, 2009. PX 91.

28 PX 68, 69, 74, 75; Oct. Tr. 147 (Anderson). Among other things, Anderson took a program he spent a significant amount of time developing at Prizm with him to WASCOR. June Tr. 221-24 (Vivori). He also remotely accessed the Prizm server and erased all of his files after downloading a copy for himself. PX 67. Anderson later gave the information he obtained from Prizm's server to one of Prizm's competitors, who in turn gave it to "someone [who] is using it against [Prizm] right now." June Tr. 160 (Vivori).

29 PX 68, 69.

30 June Tr. 159-60 (Vivori).

Anderson's distribution of Prizm's proprietary and confidential information forced Prizm to reduce fees to maintain its relationship with at least one client.[31]

After Anderson's departure, Prizm's business improved to the point that, in July 2008, Protective Life Corporation ("Protective Life") offered to purchase Prizm for approximately $15 million.[32] This offer was never consummated, however, because Protective Life halted all negotiations on September 23, 2008—the eve of the transaction's closing. Protective Life decided not to proceed with that transaction because, after more than two years of complete silence, Anderson had emerged from the shadows, writing a letter directly to Protective Life in which he claimed to be a shareholder of Prizm and asked to be kept abreast of the negotiations.[33] Fearing a dispute over share ownership, Protective Life demanded assurance from Prizm that Anderson would not sue Protective Life following the purchase.[34] After numerous unsuccessful attempts to work out a deal with Protective Life that would assuage its concerns—including an offer to place one-third of the proceeds from the sale of Prizm in escrow pending resolution of Anderson's disputed share ownership, which Protective Life rejected when Anderson withheld his consent—Prizm ultimately did negotiate a deal with

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31 *Id*.

32 *Id*. at 160-61 (Vivori).

33 PX 79; June Tr. 160-61 (Vivori). Specifically, in Anderson's September 5, 2008 letter to Brent Griggs, Senior Vice President of Protective Life, he indicated that, because Anderson was a Prizm shareholder, Griggs needed to keep him in the loop about the impending transaction. PX 79.

34 June Tr. 162-63 (Vivori).

Protective Life, consummated in or around October 2009.[35] By that point, however, the value of the transaction had declined significantly.[36]

C. Procedural History

On September 24, 2008, the day after Protective Life halted negotiations, Prizm filed a complaint against Anderson seeking a declaratory judgment rejecting Anderson's assertion of ownership of the Prizm Shares. Prizm amended that complaint on February 12, 2009 (the "Amended Complaint") to correct certain information and add an alternative theory as to why Anderson's Shares should be considered void or cancelled. Anderson answered the Amended Complaint on March 4, 2009.[37]

A two day-trial was scheduled to begin on June 8, 2009, but Anderson failed to appear that morning, claiming he was too ill to travel.[38] Anderson did appear the next day, however, and, after experiencing some difficulty rescheduling, the parties ultimately agreed to proceed with the second day of trial on October 19, 2009.

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35 *Id*.

36 Indeed, in comparison to the original transaction that contemplated a price of $15 million, Prizm was sold to Protective Life on far less favorable terms for $3.5 million up front and an uncertain payout over five years depending on Prizm's performance. PX 88; June Tr. 162-63 (Vivori).

37 On April 7, 2009, I granted the motion of Anderson's counsel to withdraw from representing him. Docket Item ("D.I.") 38. Since then, Anderson has proceeded *pro se*.

38 To evidence this illness, Anderson submitted (1) a "Return to Work/School Statement" from Piedmont Hospital in Atlanta Georgia indicating that he was in the emergency room for four hours on June 8, 2009 and (2) a copy of his airline ticket receipt, purchased on June 7, 2009. *See* Def.'s Emergency Mot. for Continuance of Trial (filed June 10, 2009), D.I. 61.

Prizm filed its post-trial brief on December 14, 2009. Anderson's post-trial brief was due on January 13, 2010, but he never filed that brief nor sought an extension of its due date.[39] Under the rule established in *Emerald Partners*, therefore, I will decide Prizm's claims solely on the basis of Prizm's briefs and the record.[40]

D. Parties' Contentions

Prizm advances three theories in support of its position that Anderson's Shares in the Company are void or cancelled. First, Prizm contends that, under 8 *Del. C.* § 152, payment of an unsecured promissory note does not constitute valid consideration for stock and, consequently, Anderson's Shares were void *ab initio.*[41] Second, Prizm argues

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[39] Although Anderson failed to file a formal pretrial brief, he did file a "Request for Motion for Order Compelling Discovery, Delay in Scheduled Date of Trial and Permission for Counterclaims or Separate Claims as Part of C.A. No. 4060-VCP" after Plaintiff submitted its pretrial brief. D.I. 59. Because Anderson's filing did address certain issues raised in Prizm's pretrial brief, I have taken this document into consideration in reaching my conclusions in this case.

I do note, however, that, besides failing to file a formal pretrial brief or any form of post-trial brief, Anderson consistently has ignored deadlines in this action and has not filed any documents with the Court since June 10, 2009.

[40] *Emerald P'rs v. Berlin*, 2003 WL 21003437, at *43 (Del. Ch. Apr. 28, 2003) ("It is settled Delaware law that a party waives an argument by not including it in its brief."), *aff'd*, 840 A.2d 641 (Del. 2003); *see also Taylor v. Forrester*, 903 A.2d 323 (Table) (Del. 2006) ("Because the petitioner-appellee . . . did not submit an answering brief, this Court ordered that the appeal would be decided solely on the basis of the appellant's opening brief and the Family Court record."); *Floyd v. Atl. Aviation*, 1999 WL 33217938, at *2 (Del. Super. Oct. 4, 1999) ("The [defendant] did not submit an answering brief, and as such, the Court will rely upon only those submissions made to the Court and the record below.").

[41] Specifically, Prizm avers that, because the sole consideration Anderson provided to purchase his Shares was the May 2004 Note, the issuance of the Shares was void *ab initio*.

that, even if Anderson's Shares were not void when issued, the Board validly cancelled those Shares at the April 19 Meeting due to Anderson's failure to pay any consideration for the Shares, proper or otherwise. Third, Prizm claims that, even if Anderson was not properly notified of the April 19 Meeting, as he alleges, Anderson no longer owns any Shares of Prizm because the Shareholder's Agreement required him to sell those Shares back to Prizm in May 2006 when he created and started working for WASCOR, an unaffiliated corporation.[42]

II. ANALYSIS

A. Standard of Review

Prizm bears the burden of proof in this case and, to prevail on its claims, must show by a preponderance of the evidence that it is entitled to recovery.[43] "Proof by a preponderance of the evidence means proof that something is more likely than not. It means that certain evidence, when compared to the evidence opposed to it, has the more convincing force and makes you believe that something is more likely true than not."[44]

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[42] Prizm further argues that the book value of its shares in May 2006 was zero and, thus, Prizm did not need to pay Anderson any consideration in return for the Shares. Having decided the issues presented here based on Prizm's first two arguments, I find it unnecessary to address its third argument.

[43] *Estate of Osborn v. Kemp*, 2009 WL 2586783, at *4 (Del. Ch. Aug. 20, 2009) ("Typically, in a post-trial opinion, the court evaluates the parties' claims using a preponderance of the evidence standard."), *aff'd*, 2010 WL 1112373 (Del. Mar. 25, 2010).

[44] *Agilent Techs., Inc. v. Kirkland*, 2010 WL 610725, at *13 (Del. Ch. Feb. 18, 2010) (quoting *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *17 (Del. Ch. Oct. 23, 2002)).

As noted *supra* Part I.C, Anderson failed to submit any briefing in this matter and, thus, waived any defenses to or arguments against Prizm's claims.[45] Thus, in making these post-trial findings of fact and conclusions of law, I examined the record to determine if Prizm has shown, by a preponderance of the evidence, that Anderson's Shares were void *ab initio* or properly cancelled at the April 19 Meeting.

B. Whether an Unsecured Promissory Note May Be Used to Purchase Stock in a Delaware Corporation

The record indicates that Anderson attempted to purchase his shares in Prizm by executing the May 2004 Note. Thus, the first issue is whether an unsecured promissory note constitutes valid consideration for the issuance of stock in a Delaware corporation.

Preliminarily, I note that there is a factual dispute as to whether the parties intended the May 2004 Note to serve as consideration for Anderson's stock in Prizm. Anderson claims that he contributed computer equipment to Prizm in August 2004 in exchange for the Shares. I find Anderson's factual allegations unpersuasive for several reasons.

First, the computer equipment, which Anderson told Chadalavada he was "just contributing," was given to Prizm Risk Services, Inc., not Prizm, on August 29, 2004—more than three months after the May 2004 Note was signed.[46] Anderson also

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45 *Emerald P'rs*, 2003 WL 21003437, at *43.

46 PX 23; June Tr. 38-39 (Chadalavada).

acknowledged receiving partial payment for these items and provided no evidence indicating that he provided the equipment in exchange for an equity interest in Prizm.[47]

Second, Anderson admitted in a sworn pleading in connection with his divorce proceedings in 2005 that he owed $107,000 on the May 2004 Note, which Anderson categorized as being used to purchase "stock of [Prizm]."[48] This admission post-dated both the contribution of computer equipment and his signing of the May 2004 Note.

Third, circumstantial evidence confirms that Anderson used the May 2004 Note as consideration for the Shares. On May 3, 2004, Prizm closed on the purchase of Prizm and the assets of Prizm Solutions. That same day, Anderson executed the May 2004 Note, and Prizm issued $100,000 demand notes to Vivori and Chadalavada in exchange for loans they both made to the Company.[49] I infer from these facts that, just as Chadalavada and Vivori had agreed to front start-up capital on the day that Prizm was purchased, the third principal, Anderson, agreed to undertake a similar obligation in the form of a promissory note.

Also, as stated above, I did not find Anderson's testimony particularly credible or reliable.[50] The record is devoid of any evidence supporting Anderson's claim that the computer equipment, and not the May 2004 Note, was intended to serve as consideration

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47 PX 29.

48 PX 26, 90.

49 Vivori and Chadalavada each made $7,000 equity contributions within a few weeks of the May 3 closing. PX 15, 22.

50 *See supra* note 22.

for Anderson's equity investment. Thus, I find that Anderson executed the May 2004 Note, at least in part, as consideration for his shares in Prizm.

Turning to whether, as a matter of law, an unsecured promissory note could provide valid consideration for the issuance of stock in a Delaware corporation, I begin by noting that, before certain amendments went into effect on August 1, 2004, the Delaware Constitution provided that "[n]o corporation shall issue stock, except for money paid, labor done, or personal property, or real estate or leases thereof actually acquired by such corporation."[51] Similarly, at the time Anderson executed the May 2004 Note, 8 *Del. C.* § 152 stated in relevant part:

> The consideration . . . for subscriptions to, or the purchase of, the capital stock to be issued by a corporation shall be paid in such form and in such manner as the board of directors shall determine. In the absence of actual fraud in the transaction, the judgment of the directors as to the value of such consideration shall be conclusive. The capital stock so issued shall be deemed to be fully paid and nonassessable stock, if: (1) The entire amount of such consideration has been received by the corporation in the form of *cash, services rendered, personal property, real property, leases of real property or a combination thereof*; or (2) not less than the amount of the consideration determined to be capital pursuant to § 154 of this title has been received by the corporation in such form and the corporation has received a binding obligation of the subscriber or purchaser to pay the balance of the subscription or purchase price.[52]

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51 Del. Const. Art. 9, § 3 (repealed 2004); *see also infra* note 52.

52 (Emphasis added). On August 1, 2004, a statute enacted by the Delaware Legislature deleting Section 3 of Article 9 of the Delaware Constitution and amending 8 *Del. C.* § 152 went into effect. Among other things, that statute "eliminate[d] the requirement that the consideration paid for newly issued stock

These then-applicable provisions of the DGCL and the Delaware Constitution thus required that consideration for the purchase of newly issued stock must be in the form of some combination of (1) money paid, (2) labor performed, or (3) property (both real and personal) actually acquired.[53] The unifying characteristic of each of these categories is that they are forms of *current*, not future, consideration. One explanation for such a requirement is that the framers of the Delaware Constitution intended that all consideration exchanged for stock should be "readily capable of being applied to the debts of the corporation."[54]

In *Lofland v. Cahall* and *Sohland v. Baker*, the Supreme Court examined Section 3 of Article 9 of the Delaware Constitution and addressed the issue currently before me, *i.e.*, "whether unsecured promissory notes . . . constituted either 'money paid' or 'personal property actually acquired,' so as to constitute valid consideration for the

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consist, either entirely or in part, of consideration in the form required by Section 3 of Article [9] of the Constitution of the State of Delaware of 1897, as amended." Del. S.B. 272 syn., 142d Gen. Assem. (2004). As a result of these amendments, newly issued stock in a Delaware corporation may now be obtained for "cash, any tangible or intangible property or any benefit to the corporation, or any combination thereof." 8 *Del. C.* § 152.

53 *See Sohland v. Baker*, 141 A. 277, 286 (Del. 1927) ("Section 3 of article 9 [of the Delaware Constitution] was enacted for the protection of both creditors and stockholders; for the purpose of preventing the issuance of stock without any consideration, or upon an insufficient consideration, whereby the actual capital would be much less than the amount represented by the shares issued and sold by the corporation."); *Lofland v. Cahall*, 118 A. 1, 6 (Del. 1922).

54 *Lofland*, 118 A. at 6.

issuance of stock."[55] In response to this question, *Lofland* held, first, that an unsecured promissory note "is not payment of money within the meaning of [the] Constitution" because it is nothing more than a promise to pay and, second, that, although an unsecured promissory note may be considered property in one sense, "the framers of the Constitution never intended that property of that nature should constitute the capital of a corporation."[56]

Thus, at the time Anderson attempted to purchase the Prizm Shares using the May 2004 Note, an unsecured promissory note did not constitute valid consideration for the issuance of stock.

C. Whether Anderson's Shares Are Void *Ab Initio* or Voidable

Though the distinction between treating shares issued for improper or inadequate consideration as void *ab initio* rather than voidable at the election of the issuing corporation is nuanced and "not as clear as it could be,"[57] I need not delve into that distinction here. Even assuming the Shares were voidable—the best case scenario for Anderson—the Board properly voted to cancel Anderson's stock at the April 19 Meeting. Thus, whether the Shares were void *ab initio* or voided at Prizm's Board meeting, Prizm

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55 *Sohland*, 141 A. at 284; *Lofland*, 118 A. at 6.

56 *Lofland*, 118 A. at 6. Though *Lofland* was decided in 1922 and *Sohland* in 1927, the pertinent holdings in these cases have not been questioned or criticized in the subsequent decades.

57 *See MBKS Co. v. Reddy*, 924 A.2d 965, 973 (Del. Ch. 2007).

has shown, by a preponderance of the evidence, that Anderson did not own such Shares when he sent his letter to Protective Life in September 2008.

There was some dispute at trial regarding whether the Board gave Anderson proper notice before voiding the Shares. Even if Anderson had preserved his arguments regarding the validity of the Board's action by briefing those issues—which he did not—those arguments would fail because Anderson waived his right to challenge the Board's cancellation of his Shares by knowingly and intentionally failing to pursue such a challenge.

"Waiver is the voluntary and intentional relinquishment of a known right."[58] Generally, waiver requires proof that a person (1) had knowledge of all material facts relating to his rights and (2) intended to relinquish such rights voluntarily.[59] Though both elements must be shown, intention is "the foundation of the doctrine of waiver" and "must clearly appear from the evidence."[60]

Here, sufficient facts were adduced to warrant a finding that Anderson waived his right to challenge the Board's action. Though not in attendance at the April 19 Meeting, Anderson learned of that Meeting and its effect on his purported ownership of the Shares by at least April 20, 2006, when he received a letter from the Board informing him that

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58 *Realty Growth Inv. v. Council of Unit Owners*, 453 A.2d 450, 456 (Del. 1982).

59 *See id.*; *Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc.*, 297 A.2d 28, 32-33 (Del. 1972).

60 *George v. Frank A. Robino, Inc.*, 334 A.2d 223, 224 (Del. 1975).

his Shares had been cancelled.[61] Yet, despite receiving this letter, discussing the issue with his lawyers, and believing he "would likely prevail" in a claim against the Board, Anderson consciously chose not to pursue any action because (1) he felt that doing so would be a "waste of time," (2) he thought the "deal flow [at Prizm] had dried up" (thus making any equity stake in the Company worthless), and (3) he had "moved on."[62] After his decision not to pursue his claimed ownership of the Shares or otherwise challenge the Board's action—either through informal talks with the Board or formal legal action—Anderson disappeared entirely, returning nearly two and a half years later only after hearing rumors about Prizm's impending multi-million dollar sale to Protective Life.

Under these circumstances, I find that Anderson knew the material facts relating to his right to challenge the Board's action at the April 19 Meeting and voluntarily and intentionally relinquished that right. Thus, Anderson has waived any right to challenge the Board's decision to void his Shares.

III. CONCLUSION

For the foregoing reasons, I grant Prizm's request and declare that Anderson failed to provide valid consideration for his Shares. Consequently, Anderson owns no Shares of Prizm stock, either because those Shares were void *ab initio* or because they were voidable and the Board properly exercised its right to void the Shares at the April 19

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61 PX 63.

62 *See supra* note 26.

Meeting. Plaintiff's counsel shall submit, on notice to Anderson, a proposed form of final judgment in accordance with this Memorandum Opinion within ten days.