IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

EDOUARD STERN and MAINZ HOLDINGS LIMITED,	)	
Plaintiffs,	)	
	)	C.A. No. 19218
v.	)	
LF CAPITAL PARTNERS, LLC and LAZARD FRÈRES & CO., LLC,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Submitted: October 25, 2002
Decided: January 10, 2003
Revised: January 27, 2003

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LAMB, Vice Chancellor.

described in the rule, the party-plaintiff will have enough information from which to decide whether to stand on the complaint as alleged or, instead, to re-plead.

A. Adequacy Of A Motion To Amend At This Stage In The Litigation

Turning to the pending motion, the court concludes that plaintiffs' motion to amend is not now properly before the court. The reasons for this are easily stated. First, and most important, Rule 15(aaa) does not contemplate the possibility of filing a motion to amend after the responsive brief is filed and before a decision by the court dismissing the complaint. In this regard, Rule 15(aaa) must be read as a limit on the otherwise broad rights and powers of amendment plaintiffs enjoy under Rule 15(a); indeed, the language of the rule states that it is to operate "notwithstanding subsection (a)" of Rule 15. For example, before the due date for plaintiffs' answering brief, these plaintiffs had an absolute right to file an amended complaint, without even seeking leave of court. There is no question, however, that they surrendered that right when they chose to file their opposition to the motion to dismiss. The same would doubtless be true in the case of a plaintiff required to move for leave to amend under Rule 15(a).

Second, because the instant motion is not contemplated by the rules, there is no set standard by which to judge it. Under Rule 15(a), leave to amend is to be "freely given when, justice so requires. " Under Rule 15(aaa), by contrast, a dismissal is to be "with prejudice," ***i.e.*** without leave to amend, "unless the Court

for good cause shown shall find that dismissal with prejudice would not be just under all the circumstances." These standards are quite different and should lead to different outcomes in many cases. To apply the more liberal standard of Rule 15(a) to the pending motion in the proceeding would surely undermine the policy embodied in the more stringent rule.

Although perhaps less obvious, it would also undermine the policy of Rule 15(aaa) if the court were to apply the stringent "good cause" standard of Rule 15(aaa) at this time. The reason for this is that neither the court nor the litigants should now be concerned with any pleading other than the original pleading. Indeed, if the Court denies the motion to dismiss, it may never be necessary to consider the sufficiency of the proposed amended complaint. If, on the contrary, the motion to dismiss is granted, the court's ability to apply the "good cause" standard will be informed by its consideration of the motion to dismiss.

B. Adequacy Of Voluntary Dismissal Pursuant To Rule 41 (a)

As mentioned earlier in this opinion, an underlying premise of the plaintiffs' motion to amend is the ineffectuality of the Rule 41(a)(l) dismissal notice they filed on April 2, 2002. The court agrees that the April 2, 2002 notice did not result in the voluntary dismissal of this action. This is true for two reasons. First, the action appears to be derivative in nature and the plaintiffs' notice did not meet the requirements for dismissal found in Rule 23.1. Second, the court concludes that