IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

PATRICK TOOLEY and KEVIN LEWIS,)
)
Plaintiffs,)
)
v.) CONSOLIDATED
) C.A. No. 18414-NC
DONALDSON, LUFKIN & JENRETTE,)
INC., JOHN STEELE CHALSTY,)
HENRI DE CASTRIES, MICHAEL)
HEGARTY, EDWARD D. MILLER,)
STANLEY B. TULIN, DENIS DUVERNE,)
HENRI G. HOTTINGUER, W. EDWIN)
JARMAIN, JOE L. ROBY, HAMILTON)
E. JAMES, ANTHONY F. DADDINO,)
DAVID F. DELUCIA, STUART M.)
ROBBINS, HAMILTON E. JAMES,)
FRANCIS JUNGERS, W.J. SANDERS)
III, LOUIS HARRIS, JANE MACK)
GOULD and JOHN C. WEST,)
)
Defendants.)

MEMORANDUMOPINION

Date Submitted: December 2, 2002
Date Decided: January 2 1, 2003

Joseph A. Rosenthal and Herbert W. Mondros, of ROSENTHAL, MONHAIT, GROSS & GODDESS, P.A., Wilmington, Delaware; OF COUNSEL: ABBEY GARDY, LLP, New York, New York, and SCHIFFRIN & BARROWAY, LLP, Bala Cynwyd, Pennsylvania, Attorneys for Plaintiffs.

David C. McBride and John J. Paschetto, of YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington, Delaware; OF COUNSEL: Alan S. Goudiss, of SHEARMAN & STERLING, New York, New York, Attorneys for Defendant Donaldson, Lufkin & Jenrette, Inc.

Robert K. Payson and Donald J. Wolfe, Jr., of POTTER ANDERSON & CORROON, Wilmington, Delaware; OF COUNSEL: Paul K. Rowe, of WACHTELL, LIPTON, ROSEN & KATZ, New York, New York, Attorneys for Individual Defendants.

CHANDLER, Chancellor

Plaintiff stockholders originally brought this class action suit to enjoin a delay in the closing of a tender offer in the proposed merger between Donaldson, Lufkin & Jenrette, Inc. ("DLJ") and Credit Suisse Group. They planned to tender their shares and alleged that the DLJ board members breached their fiduciary duties by wrongfully agreeing to a 22-day delay in the closing. Plaintiffs further alleged that they were harmed by this delay because of the lost time value of the consideration paid for their shares at the close of the tender offer.

The tender offer closed and plaintiffs' shares were cashed out on November 2, 2000. The merger has been consummated and plaintiffs continue to seek damages for the lost time value of their $90 per share that was occasioned by the postponed closing. Defendants have now moved to dismiss the complaint for lack of standing.

I. STATEMENT OF FACTS[1]

Plaintiffs are former stockholders of DLJ, a Delaware corporation that provides various investment and banking services to institutional, governmental and individual clients. Before its acquisition by Credit Suisse Group, DLJ's largest stockholder was AXA Financial, Inc., owning

[1] All facts are taken as alleged in the Class Action Complaint and the documents upon which the Complaint relies.

approximately 71% of DLJ. AXA Financial, in turn, is 'majority-owned (approximately 60%) by its parent, AXA. All the individual defendants are former directors of DLJ.

On August 30, 2000, AXA Financial announced that Credit Suisse Group and DLJ had entered into a $13.4 billion merger agreement. The merger agreement was between Credit Suisse Group, Diamond Acquisition Corporation,[2] and DLJ, and expressly disavowed any third-party beneficiaries to the contract. According to this agreement, DLJ's public minority would receive $90 cash per DLJ share in a first-step tender offer to the DLJ public stockholders, and AXA Financial would subsequently receive the cash and stock combination equivalent of $90 per share. The first-step tender offer was intended to expire 20 days after its commencement, unless the offer was extended.

The merger agreement provided for two main types of extensions for the tender offer period. The first, a five-day extension, could be invoked without DLJ's consent if payment obligations were not satisfied, or as required by the SEC, or if more than 10% but less than 20% of all outstanding DLJ shares were tendered. The second type of extension

[2] Diamond Acquisition Corporation was a wholly owned subsidiary of Credit Suisse Group, formed to effect the merger. For purposes of this opinion, I treat Diamond Acquisition the same as Credit Suisse Group.

allowed Credit Suisse Group to extend the offer under various enumerated conditions, one of which included an agreement between DLJ and Credit Suisse Group to postpone acceptance of DLJ stock for payment. Credit Suisse Group used both of these options to extend its tender offer.

Credit Suisse Group began its Tender Offer on September 8, 2000. This offer was set to expire on October $2000. Credit Suisse then invoked a five-day extension of the offer, announced on October 6, 2000. At the end of this first extension, the parties agreed upon a second extension of the offer in a letter agreement. This letter agreement amended various terms of the merger agreement and extended the tender offer until November 2, 2000, a date 22 days later than the first extension date. In the letter agreement, Credit Suisse Group also removed several contingencies set forth in the merger agreement, such as material adverse changes and representations and warranties, by deeming them satisfied by DLJ. The tender offer closed on November 2, 2002, and the public minority shareholders were cashed out for $90 per share.

Plaintiffs filed this class action complaint, alleging that the second extension was not authorized by the merger agreement, lacked consideration, and was wrongfully approved "solely to accommodate the administrative needs of AXA Financial." Plaintiffs contend this was a breach of the DLJ

board members' fiduciary duties, namely a breach of their duty of loyalty, because the board had a duty to proceed with the tender offer so that the DLJ shareholders would receive cash for their shares as soon as possible. Instead, the closing of the tender offer was delayed by 22 days. Plaintiffs contend they were injured because they lost the time value of the cash paid for their shares. In essence, plaintiffs' entire complaint[3] rests upon the assertion not that the merger consideration was unfair, but that it was received 22 days later than initially agreed because of a wrongfully granted extension.

II. DIRECT OR DERIVATIVE NATURE OF THE CLAIM

Defendants move to dismiss the complaint for lack of standing. They argue that, even if there was a breach of fiduciary duty by the board members, the complaint alleges, at most, a derivative claim. Therefore, plaintiffs lost standing to pursue the claim, pursuant to Chancery Court Rule 23.1, when their shares were cashed out.[4] Once DLJ shareholders were cashed out, they would lose standing to sue on behalf of the corporation. Additionally, defendants assert that plaintiffs suffered no special injury

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[3] Plaintiffs additionally alleged harm based upon the failure of the board to declare a quarterly dividend and for corporate waste, but both these claims were abandoned in plaintiffs' Opposition Brief.

[4] Rule 23.1 governs derivative actions and generally requires a plaintiff to be a shareholder of a corporation in order to bring suit on behalf of the corporation.

resulting from the 22-day delay because this delay fell equally upon all shareholders and did not injure any contractual right of the shareholder separate from the corporation. Thus, because defendants contend that the complaint fails to allege a direct claim, they assert that plaintiffs' standing to bring this suit was extinguished when plaintiffs were cashed out. Thus, the complaint (they argue) should be dismissed.

Plaintiffs disagree and assert that the complaint alleges special injury, because only the tendered minority shares were subject to the 22-day delay in the closing of the tender offer. Plaintiffs reason that although the extension had a direct adverse economic impact on the class, the extension of the tender offer actually benefited AXA Financial, the majority shareholder, by accommodating its administrative needs. Thus, plaintiffs conclude, they have alleged the requisite special injury required to bring a direct suit, and the complaint cannot be dismissed for lack of standing.

Because plaintiffs are no longer DLJ stockholders, their standing to bring this suit depends upon whether it is direct or derivative in nature. A direct action seeks compensation for a special injury different from injury to the corporation or other shareholders. A derivative action seeks compensation for injury to the corporation.

According to Rule 23.1, derivative actions may only be maintained by shareholders of a corporation. Thus, standing to bring a derivative action is extinguished when a shareholder sells its shares in the corporation, even if the shareholder initially had standing to bring the suit. In such situations, the derivative suit can no longer be maintained by the shareholder, and the suit is traditionally dismissed.

In order to bring a *direct* claim, a plaintiff must have experienced some "special injury."[5] A special injury is a wrong that "is separate and distinct from that suffered by other shareholders, . . . or a wrong involving a contractual right of a shareholder, such as the right to vote, or to assert majority control, which exists independently of any right of the corporation."[6] Suits alleging special injuries may be maintained as a direct action, even though the same wrong injures the corporation as well.[7] Additionally, shareholders do not lose standing to bring suit to recover for special injuries when their shares in the corporation are sold.

The Court will independently examine the nature of the wrong alleged and any potential relief to make its own determination of the suit's

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[5] *Lipton v. News Int'l.*, 514 A.2d 1075, 1079 (Del. 1986).
[6] *Moran v. Household Int'l, Inc., 490* A.2d 1059, 1070 (Del. Ch. 1985), *aff'd, 500* A.2d 1346 (Del. 1986).
[7] *Id.* at 1079.

classification? This determination is for the Court to make based upon the body of the complaint; plaintiffs' designation of the suit is not binding.[9]

Here, it is clear that plaintiffs have no separate contractual right to bring a direct claim, and they do not assert contractual rights under the merger agreement. First, the merger agreement specifically disclaims any persons as being third party beneficiaries to the contract. Second, any contractual shareholder right to payment of the merger consideration did not ripen until the conditions of the agreement were met. The agreement stated that Credit Suisse Group was not required to accept any shares for tender, or could extend the offer, under certain conditions-one condition of which included an extension or termination by agreement between Credit Suisse Group and DLJ. Because Credit Suisse Group and DLJ *did* in fact agree to extend the tender offer period, any right to payment plaintiffs could have did not ripen until this newly negotiated period was over. The merger agreement only became binding and mutually enforceable at the time the tendered shares ultimately were accepted for payment by Credit Suisse Group." It is at that moment in time, November 3, 2000, that the company

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'*Kramer v. Western Pacific Indus., Inc., 546* A.2d 348,352 (Del. 1988).
[9] *Id.*
[10] *Johnson v. Shapiro, 2002* WL 3 1438477 at *5 (Del. Ch.) (finding that tender offer was mutually binding when the tendered shares were *accepted* while the fiduciary relationship extended until the time the payment was actually made for those shares).

became bound to purchase the tendered shares, making the contract mutually enforceable. DLJ stockholders had no individual contractual right to payment until November 3, 2000, when their tendered shares were accepted for payment. Thus, they have no contractual basis to challenge a delay in the closing of the tender offer up until November 3.[11] Because this is the date the tendered shares were accepted for payment, the contract was not breached and plaintiffs do not have a contractual basis to bring a direct suit.

The only other type of special injury that would provide the stockholder plaintiffs with a basis to bring a direct claim is one that is separate and distinct from the injury suffered by the other shareholders or the corporation. Here, plaintiffs, as a class, allege that their injury is the lost time value of their $90 per share caused by the 22-day extension. They allege that this injury is different from both the non-tendering shareholders and the majority DLJ shareholder (i.e., AXA Financial). As the argument goes, the injury is different from the non-tendering shareholders for the

[11] Aside from this, it is notable that the merger agreement contained a much later termination date of March 3 1, 2001. This is the date on which the merger agreement would expire by its own terms, if the merger had not yet been consummated. The agreement anticipated various contingencies that could lead to delays in the consummation of the merger. Thus, it should not have surprised plaintiffs that a delay could have occurred, as it did here. Further, as compared to the final March 3 1, 2001, termination date contained in the merger agreement-a date over four months after the tender offer period actually closed-a delay of only 22 days hardly seems unexpected or unreasonable.

simple reason that the non-tendering shareholders did not tender their shares in the offer, so any delay in its closing was irrelevant to them. Similarly, the majority stockowner, AXA Financial, allegedly did not lose the time value of its money when the tender offer was extended because it was not subject to the tender offer either. Further, they allege, AXA Financial actually benefited from this extension because it was agreed upon solely to accommodate its administrative needs.

This argument is logically flawed, however. A delay in one step of the merger must logically lead to a delay in the subsequent steps of the staged merger because of the domino effect of the steps leading up to its closing. Although neither the non-tendering stockholders nor AXA Financial tendered their shares in the tender offer, it is not plausible that they did not suffer a similar delay in receiving the consideration paid for their shares. Neither the non-tendering stockholders nor AXA Financial could be cashed out until the tendering shareholders were cashed out. Thus, any 22-day delay occasioned by an extension of the tender offer would also result in a similar delay for the second step of the merger-the step that included both the minority stockholders and AXA Financial. Because this delay affected all DLJ shareholders equally, plaintiffs' injury was not a special injury, and

this action is, thus, a derivative action at most, Accordingly, plaintiffs no longer have standing to bring this suit and it must be dismissed.

III. CONCLUSION

For the foregoing reasons, defendants' motion to dismiss the complaint for lack of standing is GRANTED. An Order has been entered in accordance with this Memorandum Opinion.

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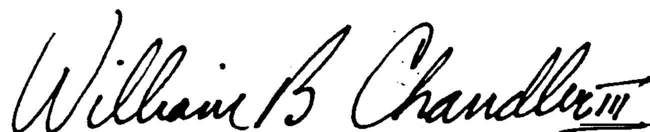
Defendants.)

ORDER

For the reasons assigned in this Court's Memorandum Opinion entered in this case on this date, it is

ORDERED that the complaint in these consolidated proceedings is dismissed because the plaintiffs. lack standing to bring the claims asserted therein.



Chancellor

Dated: January 21, 2003