COURT OF CHANCERY
OF THE
STATE OF DELAWARE

MYRON T. STEELE
VICE-CHANCELLOR

DOVER, DE 19901

Gregory P. Williams
Raymond J. DiCamillo
Richards, Layton & Finger
P.O. Box 551
Wilmington, DE 19899

Alan J. Stone
Morris, Nichols, Arsht & Tunnel1
P.O. Box 1347
Wilmington, DE 19899- 1347

Re: ***vonOpe1 v. Youbet.com***
C.A. No. 17200-NC

Submitted: October 28, 1999
Decided: January 26, 2000

Counsel:

This case seemingly turns on whether Plaintiff George von Opel knowingly and voluntarily waived his right to hold Defendant Youbet.com, Inc. to its promise to file SEC registration statements for Youbet warrants held by plaintiff. It is undisputed that defendant never filed for registration of the warrants. Plaintiff now moves for summary judgment, but defendant contends it cannot

adequately respond to that motion because it has not had the opportunity to conduct sufficient discovery.

After plaintiff filed its motion for summary judgment, defendant submitted an affidavit pursuant to Court of Chancery Rule 56(f). In that affidavit, defendant requests limited discovery because it is allegedly unable to respond to the plaintiffs assertion in his Opening Brief "that the February 24, 1998 letter [constituting the alleged waiver:] relates only to registration rights for shares of Youbet stock and not to warrants."[1]

Defendant chose to submit its Rule 56(f) affidavit rather than to file a response to plaintiffs summary judgment motion. Defendant asks that if I deny its request for limited discovery, I at least grant it reasonable time to tile an answering brief.

Defendant does acknowledge that it "could submit affidavits based only on its own perception of defendant's actions in waiving the registration requirement that would unquestionably raise disputed issue (sic) of material fact before discovery."[2] But, it argues allowing some limited discovery now would promote efficiency and avoid duplication.

---

[1] Aff. of Alan J. Stone Pursuant to Rule 56(f) ("Youbet's Rule 56(f) Affidavit"), at ¶ 4.

[2] Letter from Alan J. Stone to Vice Chancellor Myron T. Steele, at 4 (Nov. 24, 1999). Likewise, in Youbet's November 2, 1999 letter to plaintiffs attorney, Gregory Williams, Youbet states

A party opposing a summary judgement motion can, under Rule 56(f), request limited discovery if it is incapable of presenting "by affidavit facts essential to justify opposition to the summary judgment."[3] An applicant has a greater likelihood of success if the extent of the discovery sought is specifically stated.[4] Defendant's request, however, is somewhat vague: "to depose plaintiff and any of his agents, associates or representatives who had discussions relating to his warrants and putative registration rights and waiver."[5] Notwithstanding the language of defendant's request, if discovery is appropriate at all in this case, it should be very limited in scope.[6]

Even limited discovery in this case, however, is not appropriate at the present time. I reach this conclusion because defendant confidently proclaims it can indeed produce affidavits sufficient to defeat the summary judgment motion. In ***Avacus Partners,*** Chancellor Allen states, "[a] typical occasion for invocation

---

"we could submit affidavits from Youbet personnel that would unquestionably raise a disputed issue of material fact, and we could brief your motion now."

[3] ***Avacus Partners, L.P. v. Brian,*** Del. Ch., C.A. No. 11001, ltr. op., at 2, Allen, C. (Oct. 5, 1989).

[4] ***See Visa Int'l Service v. Bankcard Holders, 784*** F.2d ***1472,*** 1475-76 (9th Cir. 1986); ***Hancock v. Montgomery Ward Long Term Disability, 787*** F.2d 1302, 1306 n.1 (9" Cir. 1986).

[5] Letter from Alan J. Stone to Vice Chancellor Myron T. Steele, at 2 (Nov. 24, 1999). Plaintiff seemingly seeks discovery relating to plaintiffs state of mind when allegedly agreeing to the waiver.

[6] ***See Avacus Partners,*** *supra* (allowing deposition of the person whose affidavit was advanced in support of summary judgment motion).

of Rule 56(f) is when . . . the party opposing summary judgment cannot by affidavit state facts to overcome the summary judgment motion because the facts, if they exist, are known only by the party moving for summary judgment."[7] If I take defendant at its word, it possesses, if not controls, the very facts essential to defeat the plaintiffs motion. This can hardly be said to be the "typical occasion" described by Chancellor Allen.

Therefore, all that remains that could possibly justify allowing limited discovery is defendant's argument that discovery would conserve party and judicial resources. While that concern is admirable, it does not justify further discovery, however limited. Defendant claims it already has in hand all it needs to defeat plaintiffs summary judgment motion. Allowing discovery into plaintiffs subjective intent while agreeing to the alleged waiver would, as plaintiff claims, amount to a fishing expedition.'

Because defendant has claimed it could adequately respond to the pending summary judgment motion, I deny the request for additional discovery. I do,

---

[7] ***Avacus Partners,*** *supra*, at 2.

[8] Defendant's purpose in conducting discovery, I presume, would be to obtain information to support a cross summary judgment motion.

however, allow defendants thirty days to answer plaintiffs summary judgment motion.

IT IS SO ORDERED.

Vice Chancellor

MTS/rm
oc: Register in Chancery