IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ASHER E. FOGEL, Plaintiff, v. U.S. ENERGY SYSTEMS, INC., JACOB FEINSTEIN, RONNY STRAUSS, AND ROBERT SCHNEIDER, Defendants.	)	Civil Action No. 3271-CC

MEMORANDUM OPINION

Date Submitted: January 15, 2008
Date Decided: January 15, 2008

Raymond J. DiCamillo and Meghan M. Dougherty, of RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware; OF COUNSEL: James Nespole, Andrew C. Freedman, and Edward P. Dolido, of FULBRIGHT & JAWORSKI L.L.P., New York, New York, Attorneys for Plaintiff.

Michael G. Busenkell and Margaret F. England, of ECKERT, SEAMANS, CHERIN & MELLOTT, LLC, Wilmington, Delaware, Attorneys for Defendants.

CHANDLER, Chancellor

This Memorandum Opinion confirms the ruling I delivered earlier today during our teleconference. On December 13, 2007, this Court issued a post-trial decision directing defendant company U.S. Energy Systems, Inc. ("U.S. Energy" or the "Company") to hold a shareholder meeting.[1] In that decision, the Court directed the parties to submit an implementing order within twenty days to set a date for the meeting. Instead of simply doing so, plaintiff filed a motion to modify the Court's ruling and for reargument on December 20. Plaintiff was concerned that the defendants were taking steps to evade the December 13th ruling and requested the Court to order the shareholder meeting to be held on January 7, 2008. The parties, however, did not complete briefing on plaintiff's motion until the 7th, and on January 9, U.S. Energy filed for bankruptcy in the Southern District of New York.[2]

Section 362 of Chapter 11 of the Federal Bankruptcy Code acts as an automatic stay to proceedings pending outside the bankruptcy court against the debtor.[3] Defendants now argue that this Court is barred by the automatic stay from scheduling the shareholder meeting I have already ruled must be held. Plaintiff contends that scheduling the meeting constitutes merely a ministerial act that is not barred by the stay and that this Court may order a shareholder meeting because

[1] *See Fogel v. U.S. Energy Sys., Inc.*, C.A. No. 3271-CC, 2007 WL 4438978 (Del. Ch. Dec. 13, 2007).
[2] *In re U.S. Energy Sys., Inc.*, BP No. 08-10054-rdd (Bankr. S.D.N.Y. 2008).
[3] 11 U.S.C. § 362(a)(1) (2006).

corporate governance continues notwithstanding the bankruptcy of a corporation. Defendants suggest that even if I conclude plaintiff is correct, I should allow the bankruptcy court in New York to resolve this matter. For the reasons I articulated on the phone and that I reiterate below, I disagree. As I indicated earlier today, I will order the company to hold a shareholder meeting by January 29, 2008.

I am not convinced that scheduling a shareholder meeting date constitutes a merely ministerial act. The ministerial act exception to the automatic stay in bankruptcy is "the common-sense principle that a judicial 'proceeding' within the meaning of section 362(a) ends once a decision on the merits has been rendered. Ministerial acts or automatic occurrences that entail no deliberation, discretion, or judicial involvement do not constitute continuations of such a proceeding."[4] This exception is most frequently used where some clerical action is taken after a bankruptcy petition has been filed.[5] Picking a precise date for a shareholder meeting does require that I exercise some discretion and is probably more than merely clerical.

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[4] *In re Pettit*, 217 F.3d 1072, 1080 (9th Cir. 2000).

[5] *See, e.g., id.* (holding that issuance of check by clerk of court after judge had already signed "release of funds" order was ministerial because "the judicial act concluded when Judge Illston signed the order, which occurred hours before the bankruptcy filings"); *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522 (2d Cir. 1994) (holding that entry of a judgment by the court clerk does not constitute the continuation of a judicial proceeding under section 362(a)(1)); *Heikkila v. Carver (In re Carver)*, 828 F.2d 463 (8th Cir. 1987) (holding that a "routine certification" by the clerk, entered post-petition, did not transgress the automatic stay); *In re Capgro Leasing Assocs.*, 169 B.R. 305 (Bankr. E.D.N.Y. 1994) (stating that "entry of a judgment will constitute a 'ministerial act' where the judicial function has been completed and the clerk has merely to perform the rote function of entering the judgment upon the court's docket").

Nevertheless, the automatic stay does not bar this Court from scheduling a shareholder meeting in this case. This Court is the proper forum for resolving the issue. Indeed, I have already resolved the question of whether a meeting should be held and need now only to set a date. Moreover, this Court, the Delaware Supreme Court, and federal bankruptcy courts have held that corporate governance does not cease when a company files a petition under Chapter 11 and that issues of corporate governance are best left to the courts of the state of incorporation. In *NKFW Partners v. Saxon Industries, Inc.*, then-Vice Chancellor Berger held that "a proceeding in bankruptcy ordinarily will not impair the right of a shareholder to compel an annual meeting."[6] She applied the "clear abuse" test first developed by the Court of Appeals for the Second Circuit under which shareholders' rights to vote for directors "and thus to control corporate policy . . . will not be disturbed unless a clear case of abuse is made out."[7] Her decision was affirmed and her reasoning was adopted by the Delaware Supreme Court, which noted that "absent other compelling legal or equitable factors, insolvency alone, irrespective of degree, does not divest the stockholders of a Delaware corporation of their right to exercise the powers of corporate democracy."[8]

[6] C.A. No. 7468, 1984 WL 8234, at *2 (Del. Ch. Aug. 8, 1984).
[7] *In re J.P. Linahan, Inc.*, 111 F.2d 590, 592 (2d Cir. 1940).
[8] *Saxon Indus., Inc. v. NKFW Parnters*, 488 A.2d 1298, 1300 (Del. 1985).

In addition, several bankruptcy courts, including those of the Southern District of New York, have deferred to state court proceedings on issues of corporate governance like the scheduling of a shareholder meeting.[9] In fact, the Court of Appeals for the Second Circuit has implicitly approved the Delaware Supreme Court's holding in *Saxon*. In *In re Johns-Manville Corp.*, the Second Circuit reversed the District Court for the Southern District of New York when it attempted to distinguish and avoid *Saxon*, warning that a "bankruptcy court should not lightly employ its equitable power to block an election of a new board of directors."[10] The *Johns-Manville* decision reaffirms and reiterates "the well-settled rule that the right to compel a shareholders' meeting for the purpose of electing a new board subsists during reorganization proceedings."[11] To interfere with this right, a challenger must show that a shareholder is "guilty of clear abuse," a determination that turns on "whether rehabilitation [of the debtor] will be seriously threatened, rather than merely delayed."[12]

Here, defendants have made no showing whatsoever that Fogel is guilty of clear abuse in seeking a shareholder meeting. The United States Supreme Court has made it clear that a corporation in Chapter 11 reorganization continues to owe

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[9] *See, e.g.*, *In re Lionel Corp.*, 30 B.R. 327, 329–30 (Bankr. S.D.N.Y. 1983) (refusing to enjoin proceeding in New York state court to schedule shareholder meeting).
[10] 801 F.2d 60, 64 (2d Cir. 1986) (quoting *In re Potter Instrument Co.*, 593 F.2d 470, 475 (2d Cir. 1979)).
[11] *Johns-Manville*, 801 F.2d at 64.
[12] *Id.* at 66.

duties to its shareholders and that "the passage into bankruptcy does not sound the death knell for the shareholders' role in corporate governance."[13] If the primary purpose of Chapter 11 is the rehabilitation of debtor corporations,[14] there is no reason to disenfranchise equity holders so long as their exercise of voting rights does not impair such rehabilitation. Defendants have neither shown nor even suggested that scheduling a shareholder meeting for January 29, 2008, will somehow impair the rehabilitation process. U.S. Energy has not held a shareholder meeting since November 2006, and this Court has already held that one must be held under section 211 of the Delaware General Corporation Law. Today's ruling merely ensures that the shareholders will have that meeting by the end of this month.

IT IS SO ORDERED.

[13] Mark E. Budnitz, *Chapter 11 Business Reorganizations and Shareholder Meetings: Will the Meeting Please Come to Order, or Should the Meeting Be Cancelled Altogether?* 58 GEO. WASH. L. REV. 1214, 1236 (1990).

[14] *See* H.R. REP. NO. 95-595, at 220 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6179 ("The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors and produce a return for its stockholders.").