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OF THE
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COURT OF CHANCERY COURTHOUSE
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Submitted: October 3, 2008
Decided: October 15, 2008

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Re: *Noe, et al. v. Kropf, et al.*
Civil Action No. 4050-CC

Dear Counsel:

Before me is a combined motion to intervene and to vacate the order to expedite proceedings submitted by Turnaround Advisors, LLC ("Turnaround"), a contested stockholder of AmeriStar Network, Inc. ("AmeriStar"). Court of Chancery Rule 24 provides two types of intervention–those obtained as a matter of right and those permissively granted. Turnaround argues that intervention is appropriate here under either of the two possibilities. I conclude that Turnaround's intervention is warranted as a matter of right under Rule 24(a) and grant its motion to intervene. I also grant the motion to vacate the order to expedite, but I direct counsel to confer regarding a stipulated Scheduling Order that will govern the future proceedings in this case.

I. FACTS AND PROCEDURAL HISTORY

Turnaround seeks to intervene because plaintiffs request a declaration that AmeriStar stock owned by Turnaround and issued by a contested board is void. Plaintiffs, William M. Noe ("Noe") and O. Russell Crandall ("Crandall"),[1] are stockholders of AmeriStar and allege to be the sole directors. Plaintiffs dispute the validity of the actions taken by James R. Herbert ("Herbert"), Tracy Gnagy ("Gnagy"), and Robert Kropf ("Kropf") [2] under the guise of directors or officers of AmeriStar and also contest the validity of AmeriStar stock issued under Kropf's direction (which Turnaround now owns). Plaintiffs' underlying complaint is brought under 8 *Del. C.* §§ 225 and 227. Section 225 provides for a determination by the Court of Chancery of whether an election of officers or directors was valid. Section 227 provides for a determination of the voting rights of individuals claiming to own stock. Specifically, as relief for their §§ 225 and 227 claims, the plaintiffs seek an order:

> (a) declaring Plaintiffs are the sole directors of AmeriStar, (b) declaring that Kropf, Herbert and Gnagy are not directors of AmeriStar, (c) declaring that Kropf is not the Chief Executive Officer of AmeriStar, (d) declaring that the shares of voting common stock of AmeriStar issued to entities indirectly controlled by Kropf [,i.e., Turnaround[3] and Corporate Restructuring, Inc ("CRI")[4]] were not validly issued, (e) declaring that all actions authorized by Kropf, Herbert and/or Gnagy as directors and/or officers of AmeriStar were void as a matter of law, and (f) awarding

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[1] The complaint states that Noe has been a director and the President of AmeriStar since August of 2000, owning three million shares of voting common stock. The complaint states that Crandall has been a director and Chairman of AmeriStar since incorporation in 1996, owning 625,000 shares of voting common stock.

[2] Kropf is a resident of Utah and purports to be the sole director and Chief Executive Officer of AmeriStar. Herbert is a former director of AmeriStar who purportedly resigned as a director of AmeriStar in April of 2002. Gnagy is the former Secretary of AmeriStar whose appointment as a corporate officer allegedly expired over seven years ago, one year after her appointment.

[3] As stated in the motion to intervene, David Hunt wholly owns Turnaround. He is also listed as the manager on the corporate registration. Pls.' Opp. to Mot. Ex. A. Plaintiffs allege that Hunt is Kropf's attorney.

[4] CRI is a Utah corporation and Kropf is listed as president. Pls.' Opp. to Mot. Ex. F. Kropf issued stock to CRI on April 16, 2008.

awarding attorneys' fees and costs in favor of Plaintiffs and against Kropf, Herbert and Gnagy, jointly and severally, in connection with the attorneys' fees and costs incurred by Plaintiffs in this action.[5]

Plaintiffs allege a combination of invalid events that led to Kropf's appointment and the issuance of 70 million shares of AmeriStar stock. In March 2008 plaintiff Crandall initially contacted an attorney, Nathan Drage ("Drage"), to discuss reactivating AmeriStar.[6] Allegedly Drage then contacted Kropf, unbeknownst to Crandall, and Kropf proceeded to reactivate and take control of AmeriStar.

The complaint indicates that Kropf contacted Herbert, a former director of AmeriStar, and Gnagy, the former Secretary of AmeriStar. Allegedly Kropf paid Herbert and Gnagy to represent that they were the sole directors of AmeriStar and then to appoint Kropf as a director of AmeriStar. Kropf was appointed as a director on April 16, 2008. Herbert and Gnagy both immediately resigned, leaving Kropf as the sole director. Kropf then appointed himself as CEO.

Plaintiffs argue that Herbert and Gnagy had no authority to act as directors because Herbert had previously resigned as a director in 2002 and Gnagy was only a corporate officer whose term ended over seven years ago. Plaintiffs assert they are the sole members of the AmeriStar board.

On April 18, 2008, Turnaround purchased 35 million shares of AmeriStar for $20,000 and another 35 million shares in May from CRI for $7,500 worth of services rendered. All of these shares were authorized for issuance by defendant Kropf as sole director and CEO of AmeriStar. Plaintiffs allege that the shares were issued to CRI and Turnaround because Kropf controls both entities, either directly or indirectly, and would thereby control the future of AmeriStar. Kropf is now seeking to sell AmeriStar as a "shell" corporation.

[5] Compl. ¶ 1.

[6] Although AmeriStar is a publicly-held corporation and has been listed on the "Pink Sheets" since approximately 2001, AmeriStar has failed to file the requisite documents with the SEC and the State of Delaware to remain in good standing as a public corporation. Compl. ¶ 11.

In August 2008 Turnaround received notice from AmeriStar's attorney that the disputed board created a defect in Turnaround's shares. Turnaround was unable to informally resolve the dispute.

Turnaround filed an action in Utah District Court on September 17, 2008.[7] Turnaround requested a declaration that the stock was validly issued under Delaware law and that Turnaround was a protected purchaser, having paid value and lacking notice of any defect in the stock.[8]

Plaintiffs brought this action on September 19, 2008. Plaintiffs did not serve Turnaround or name it as a party, even though plaintiffs seek a declaration that the 70 million shares of AmeriStar stock owned by Turnaround are void. Apparently Turnaround and plaintiffs both brought these cases unaware of the other's intention to file.[9]

Turnaround was apprised of plaintiffs' claims on September 22 and on September 25 filed the present motions to intervene and to vacate the order to expedite proceedings. Plaintiffs opposed the motions. Concurrently with plaintiffs' opposition brief, they also filed a motion for entry of default judgment based on defendants' failure to appear or to file an answer in this expedited case.

II. ANALYSIS

Under Rule 24(a), a party may intervene as a matter of right:

> "(1) When a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest,

[7] *Turnaround Advisors, LLC v. AmeriStar Network, Inc.*, C.A. No. 080920413 (Utah 3d. Dist. filed Sept. 17, 2008); Turnaround Mot. Ex. A at 4.
[8] *Id.*
[9] AmeriStar's registered agent was served on September 18, 2008, and sent a copy of the notice to plaintiffs on the same day, but the copy did not arrive until September 24, 2008. Pls.' Opp. to Mot. Ex. E.

unless the applicant's interest is adequately represented by existing parties."[10]

A less exacting standard is required for permissive intervention under Rule 24(b), allowing intervention "(1) [w]hen a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common."[11]

Both standards require, however, that the applicant present a plausible claim in order to demonstrate standing.[12] "Consideration of an intervener's standing is implicit in the court's analysis of the elements of Rule 24, and 'if the intervenor lacks standing to assert the claim, *ipso facto*, the intervener's interest cannot be recognized.'"[13] Plaintiffs oppose intervention, contending that Turnaround lacks standing to intervene in either the 8 *Del. C.* § 225 claim or the 8 *Del. C.* § 227 claim.

Plaintiffs assert lack of standing under § 225 because the contested "election" of Kropf occurred before the issuance of Turnaround's shares. The language of § 225 indicates standing exists for "any stockholder or director, or any officer whose title to office is contested, or any member of a corporation without capital stock." Nevertheless, whether a stockholder seeking intervention under § 225 also must have been a stockholder at the time of the disputed election of directors has not been the subject of intense analysis by Delaware courts.

Although *In re Banyan Mortgage Investment Fund Shareholders Litigation*[14] bears some resemblance to the current facts, it is not directly on point. In a footnote to the *Banyan* case, the Court indicated that a stockholder

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[10] Ct. Ch. R. 24(a); *see also United Rentals, Inc. v. RAM Holdings, Inc.*, C.A. No. 3360-CC, 2007 WL 4327770, at *1 (Del. Ch. Nov. 29, 2007).
[11] Ct. Ch. R. 24(b).
[12] *United Rentals*, 2007 WL 4327770, at *1 (citing *Franklin Balance Sheet Inv. Fund v. Crowley*, C.A. No. 888-N, 2006 WL 3095952, at *3 (Del. Ch. Oct. 19, 2006) ("Although the Delaware courts embrace a liberal policy of allowing intervention, mere incantations of equitable principles will not stave off denial of a motion to intervene if the intervenor lacks standing to bring the claim or otherwise makes a claim that is inherently flawed as a matter of law.")).
[13] *United Rentals*, 2007 WL 4327770, at *1 (quoting *Flynn v. Bachow*, C.A. No. 15885, 1998 WL 671273, at *4 n.15 (Del. Ch. Sept. 18, 1998)).
[14] No. 15287, 1997 WL 428584 (Del. Ch. July 23, 1997).

did not have standing to challenge the merger because it did not own stock until after the merger was approved.[15] The Court also reasoned that if the stockholder was unable to vote on the merger because it received stock after the approved merger, the stockholder should similarly be precluded from bringing a § 225 action.[16]

The facts in this case, however, are distinguishable from those in *Banyan*. Turnaround is not challenging the validity of the board of directors as was the stockholder in *Banyan*.[17] Rather, Turnaround (even though it hopes to limit its arguments to the validity of the issuance of stock) will be required to *defend* the validity of the contested AmeriStar board as a means of protecting its after-issued stock in AmeriStar.[18] While it seems inequitable for a stockholder benefiting from a disputed board's issuance of shares to be granted standing to commence a § 225 action against the same board, the converse is not necessarily true. A stockholder benefiting from a contested board's issuance of stock should not be denied standing to defend the validity of its stock by defending the validity of a contested board, especially when (as here) other parties do not adequately represent its interests.

Plaintiffs also assert that Turnaround has no standing to intervene under § 227 because Turnaround's stock in AmeriStar was not properly issued pursuant to § 151. Plaintiffs argue that if Kropf is not a valid director or if the required majority of board votes was not obtained, then any stock issued under Kropf's approval is void.[19] Plaintiffs contend there is no need to allow Turnaround to participate in the § 227 proceedings because void stock does not possess the voting rights that are at the heart of a § 227 claim.

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[15] *Banyan*, 1997 WL 428584, at *4 n.19.
[16] *Id.*
[17] *See id.*
[18] As is illustrated in the § 227 analysis below, allowing a disputed stockholder to participate in the § 225 review is necessary to allow the stockholder to defend its franchise right under § 227. Whether the issued shares are void or voidable and whether purchasers of defective shares can be protected by 6 *Del. C.* § 8-202 need only be argued by the parties in the event the Court determines that the issuing board was not validly constituted.
[19] As noted in the prior footnote, the issue of whether such stock would be void or voidable is still an undecided issue that will need to be addressed by the parties at some point in this litigation.

Even though plaintiffs present two alternative arguments to support their position,[20] their arguments are inapposite. Plaintiffs' arguments, asserting a lack of standing under § 227, beg the § 225 question of exactly which individuals lawfully constituted the board. It would be premature to exclude from a § 227 action an individual or entity claiming to own stock in a company simply because the directors issuing the stock *might* not have been properly elected. Section 227 was drafted precisely to determine existing stockholder voting rights, including when the validity of the board is in question. Therefore, I conclude that in the unusual circumstances of this case Turnaround has standing to intervene. In addition, because the § 227 question hinges on the outcome of the § 225 claim, and since Turnaround's interests in that action are not otherwise represented, Turnaround has standing to intervene generally in this proceeding.

Having concluded that standing exists for purposes of this case, I also conclude that Turnaround has a right to intervene under Rule 24(a). Turnaround has "claim[ed] an interest relating to the property or transaction which is the subject of the action."[21] Turnaround meets this requirement by being a presumptive stockholder for purposes of determining the right to vote under § 227 and possessing an interest that potentially would be undermined in a successful § 225 action.

In addition, Turnaround's situation is such "that the disposition of the action may as a practical matter impair or impede [Turnaround's] ability to

[20] Plaintiffs present two arguments, the second in the alternative. First, they argue that since the defendants Herbert and Gnagy were not legitimate directors when they appointed Kropf, Kropf was not properly appointed. Therefore, Kropf had no authority to issue the shares to Turnaround. Plaintiffs argue that Turnaround has no standing under § 227 to participate in the proceedings to determine the rights of shareholders because it was not a stockholder at the time of the improper "election." This argument fails to acknowledge that a conclusion must first be reached on the § 225 action.

Second, even assuming Kropf was properly elected, plaintiffs argue that the requisite majority of board members did not approve the issuance of shares. Plaintiffs argue that there were two other directors–*i.e.*, themselves–thereby creating a board consisting of three total directors. Any issuance of shares would have then required at least two out of three votes. Since only Kropf approved the stock issuance, the plaintiffs argue the stock was not validly issued for lack of a majority and is presumptively void. Therefore, Turnaround lacks standing to participate in the proceedings to determine the rights of shareholders under § 227. Again, this latter argument fails to acknowledge that the Court must first determine the § 225 action.

[21] Ct. Ch. R. 24(a).

protect that interest, unless [Turnaround's] interest is adequately represented by existing parties."[22] Failure to allow Turnaround to intervene would likely result in a default judgment against the defendants, who have (so far) failed to appear, which would then lead to a declaration that Turnaround's shares of AmeriStar are void.

I also grant the motion to vacate the earlier Order expediting these proceedings. Turnaround requires reasonable time to file its answer and conduct discovery, especially since it is unlikely Turnaround possesses facts relating to the board composition. Nevertheless, because a § 225 action is by nature a summary proceeding,[23] I direct Turnaround and plaintiffs to agree to an appropriate form of scheduling order.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

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[22] *Id.*
[23] *Box v. Box*, 697 A.2d 395, 398 (Del. 1997).