WILLIAM B. CHANDLER III
CHANCELLOR

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: October 8, 2009
Decided: October 13, 2009

Michael Hanrahan
Paul A. Fioravanti, Jr.
Laina M. Herbert
Prickett, Jones & Elliott, P.A.
1310 King Street
Wilmington, DE 19801

William M. Lafferty
Morris, Nichols, Arsht & Tunnell, LLP
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899

Re: *Retirement Board of Allegheny County v. Rothblatt, et al.*
Civil Action No. 4946-CC

Dear Counsel:

I have carefully reviewed the briefs in support of and in opposition to plaintiff's motion to expedite. I have also thoroughly considered the contentions raised by counsel during oral argument. Because I find that the issue of irreparable harm is dispositive, and because plaintiff has failed to demonstrate a sufficient threat of irreparable harm, the motion for expedited proceedings is denied. Following is the analysis underlying my ruling.

I. BACKGROUND

In November 2008 the defendants approved an option exchange plan to "reprice" outstanding options on United Therapeutics ("UTC") stock. The plan allowed UTC directors and employees to exchange their existing options for new

options with an exercise price of $61.50.[1] This plan was approved shortly after UTC experienced a substantial decline in its stock price. Plaintiff asserts that the share exchange violated UTC's existing stock option plan as well as CEO Martine Rothblatt's employment agreement with UTC. Plaintiff also asserts that the defendants' approval of the "repricing" was a violation of their fiduciary duties.

Rothblatt exchanged 582,607 options pursuant to the exchange plan. Rothblatt received these options in December 2007[2] as compensation under her employment agreement with UTC, which entitles her to an award of stock options each December that is tied to the increase in UTC's stock price during the year. Plaintiff asserts that Rothblatt has been permitted to circumvent the spirit of her employment agreement because the exchange plan ensured that her 2007 options remained in-the-money despite the precipitous decline in UTC's stock price during 2008. Since the exchange plan was approved, UTC's stock price has recovered. Accordingly, it is possible that Rothblatt will receive additional options in December 2009. Plaintiff asserts that Rothblatt is being treated in a "heads she wins, tails the company loses" manner that is inconsistent with her employment agreement.[3]

As described below, plaintiff has asked the Court to preliminarily enjoin the exercise of options issued under the option exchange as well as the issuance of any stock underlying those options. Plaintiff has also asked the Court to preliminarily enjoin UTC from issuing Rothblatt any new options in December 2009. Plaintiff has filed a motion for expedited proceedings to consider its request for a preliminary injunction.

II. LEGAL STANDARD FOR A MOTION TO EXPEDITE

Expedited proceedings impose a substantial burden on the Court and the parties.[4] The Court will not accept this burden without good cause.[5] The *sine qua*

---

[1] Exercise prices on the original options varied, but were mostly above $80.

[2] Plaintiff challenges the propriety of Rothblatt's receipt of these shares in 2007. For purposes of ruling on this motion to expedite, the Court need not address this contention.

[3] Pl.'s Mem. in Supp. of its Mot. for Expedited Proceedings 8.

[4] *In re Yahoo! Inc. S'holders Litig.*, 2008 WL 2627851, at *1 (Del. Ch. June 16, 2008).

[5] *In re SunGard Data Sys., Inc. S'holders Litig.*, 2005 WL 1653975, at *1 (Del. Ch. July 8, 2005).

non to establishing good cause for an expedited preliminary injunction proceeding is a showing of irreparable injury.[6]

Where an award of money damages would be sufficient to fully compensate the plaintiff for any injury it might suffer, an expedited preliminary injunction proceeding will not be ordered.[7] Money damages are generally an appropriate remedy in cases where the plaintiff challenges stock option grants.[8]

III. PLAINTIFF HAS FAILED TO DEMONSTRATE IRREPARABLE HARM

Plaintiff asks the Court to preliminarily enjoin defendants and UTC employees from (1) exercising any UTC stock options issued pursuant to the option exchange, (2) issuing or selling the UTC stock necessary to fulfill the exercise of options issued in the option exchange, and (3) issuing UTC stock options to Rothblatt in December 2009. Plaintiff argues that such an injunction will protect it from irreparable harm.

Plaintiff argues that without an injunction it will be irreparably injured in three ways. First, plaintiff asserts that the cash inflows from option exercises at the lower strike price of the exchanged options would be less than inflows at the original strike price. Second, plaintiff asserts that approximately 150 employees were given "repriced" options in the exchange and plaintiff will not be able to recover from those employees once they have exercised their options and sold their shares into the market. Third, plaintiff asserts that the number of shares underlying the "repriced" options amounts to approximately 5.5% of UTC's public float and that exercise of the options and resale of the underlying shares will flood the market, thereby diluting the value of existing UTC shares. I find that none of these assertions demonstrates a showing of irreparable injury.

As to plaintiff's first assertion, it is true that the cash inflows from the lower strike price on the "repriced" options will be less than cash inflows would have been if the options were exercised at their original price. But if the option exchange was invalid, plaintiff's damages are easily calculable. Indeed, plaintiff demonstrates in its own complaint that damages could be calculated simply by multiplying the number of exercised options by the difference between the original

---

[6] *Id.*
[7] *Giammargo v. Snapple Beverage Corp.*, 1994 WL 672698, at *3 (Del. Ch. Nov. 15, 1994).
[8] *Ryan v. Gifford*, 918 A.2d 341, 361 (Del. Ch. 2007).

strike price and the new strike price.[9] A monetary remedy to compensate plaintiff for these damages would be adequate.[10] Accordingly, if the Court ultimately finds that an injury has occurred, it is not irreparable.

It must also be noted here that should the Court ultimately determine Rothblatt is not entitled to any shares she might receive in December 2009, the damages UTC would suffer from the issuance of those shares is also easily calculable. Rothblatt would simply be required to return unexercised options and disgorge any profits realized on the sale of shares received on exercised options. Accordingly, there is no threat of irreparable harm should Rothblatt be awarded options in December 2009.

Plaintiff's second assertion that it will not be able to pursue a judgment against non-party UTC employees who exercise the "repriced" options is somewhat difficult to understand. Plaintiff has sued the UTC directors in their individual capacities for breach of fiduciary duty in approving the option exchange. Plaintiff correctly asserts in its brief that the directors face liability for the "repriced" options they personally received as well as those given to employees.[11] Thus, the source of recovery for the inappropriate or excessive compensation realized by UTC employees in the option exchange is the directors who approved the transaction, not the employees. Moreover, damages to UTC caused by the exercise of employee-held options can easily be calculated as just described.

Plaintiff's third assertion, that substantial dilution of UTC stock will occur when the "repriced" options are exercised, does not demonstrate the type of

---

[9] Pl.'s Compl. ¶¶ 77, 95.

[10] Plaintiff cites *Sealy Mattress Co. of New Jersey, Inc. v. Sealy, Inc.*, 532 A.2d 1324 (Del. Ch. 1987) and *T. Rowe Price Recovery Fund, L.P. v. Rubin*, 770 A.2d 536 (Del. Ch. 2000) to support its proposition that monetary remedies are not always adequate to repair the injury incurred by the exercise of illegitimate stock options and that a preliminary injunction is therefore appropriate. But none of these cases involved a "repricing" of existing stock options via an option exchange where damages per share could be calculated simply as the difference between the original and the new strike price. Moreover, these cases enjoined harms that were far more likely to be irreparable, such as a "squeeze-out" merger (*Sealy Mattress*) or a material (and dubious) contract with an unstable business partner (*T. Rowe Price*). These cases teach that where money damages are theoretically calculable, but are nevertheless "highly difficult to calculate," a preliminary injunction is appropriate. *See T. Rowe Price*, 770 A.2d at 557-58. The facts of this case are inapposite. Here, money damages are easy to calculate.

[11] Pl.'s Mem. in Supp. of its Mot. for Expedited Proceedings 15.

irreparable injury for which a preliminary injunction can be granted.[12] Moreover, the options that plaintiff challenges are not additional options, but rather replacement options. No additional UTC shares need be earmarked to honor the exercise of the "repriced" options as these shares have presumably already been set aside to honor the original options. Accordingly, the challenged option exchange and the resale of shares acquired via that exchange is not creating any greater dilution in the market than the exercise of the original options and resale of those shares would have.

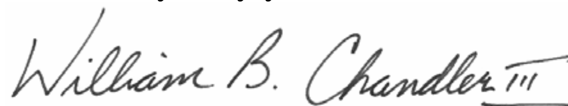
In closing, it must be stressed that today's finding that no irreparable harm exists is fact-specific, not a general proposition to be applied whenever an option grant or exchange is being challenged. In some circumstances exercise of challenged option grants could subject a company to harm other than foregone cash inflows (e.g., a change in control could be realized by the exercise of grants). In those cases a preliminary injunction might well be appropriate because the harm incurred could be irreversible. But that is not this case.

IV. CONCLUSION

For the foregoing reasons, plaintiff's motion for expedited proceedings is denied.

IT IS SO ORDERED.

Very truly yours,



William B. Chandler III

WBCIII:arh

[12] *See Klein v. Panic*, 1986 WL 438, at *2 (Del. Ch. Nov. 20, 1986) ("Plaintiff argues that the dilutive effect of the additional outstanding stock [issued upon exercise of the challenged options] would, of itself, constitute irreparable injury. However, he cites to no authority and the Court is aware of none, at least in these circumstances where there is no claim that the additional stock will impact on the voting control of the company.").