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OF THE
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Re: *Kinexus Representative LLC v. Advent Software, Inc.*
C.A. No. 1161-VCN
Date Submitted: March 29, 2011

Dear Counsel:

Defendant Advent Software, Inc. ("Advent") has moved to dismiss this action because of the Plaintiffs' failure to prosecute and argues that dismissal with prejudice is appropriate under Court of Chancery Rules 41(b) and 41(e). The Plaintiffs—former shareholders and the representative and attorney-in-fact for all shareholders of Kinexus Corporation ("Kinexus")—commenced this action on March 8, 2005. They assert claims against Advent for breach of contract and unjust enrichment arising out of a December 31, 2001 agreement entered into by

Advent to acquire Kinexus. The two periods of inactivity cited by Advent are January 2006 through February 2008 and January 2009 through November 2010; indeed, the docket shows that no filings were made during those months, except in February 2008 when the Plaintiffs filed a notice of substitution of counsel and two motions for admission *pro hac vice*.

Among the Court's inherent powers "to manage its docket to prevent unnecessary and wasteful delay"[1] are Court of Chancery Rule 41(b)—authorizing dismissal "[f]or failure of the plaintiff to prosecute or to comply with [Court of Chancery] Rules or any order of court"—and Rule 41(e)—authorizing dismissal of any "cause pending wherein no action has been taken for a period of 1 year" and where there has been no "good reason for the inaction . . . ." The decision to dismiss under these rules is committed to the Court's discretion.[2] In addition, "[b]ecause both Chancery Rules 41(b) and 41(e) deal with inexcusable delay, they overlap somewhat."[3]

In support of its motion to dismiss, Advent contends that the "Plaintiffs' unexplained and unjustifiable delay has prejudiced Advent's ability to

[1] *Tooley v. AXA Fin., Inc.*, 2009 WL 1220624, at *2 (Del. Ch. Apr. 29, 2009).
[2] *Id.*
[3] *Lane v. Cancer Treatment Ctrs. of Am., Inc.*, 2001 WL 432445, at *1 (Del. Ch. Apr. 11, 2001).

substantively defend against Plaintiffs' claims, and Plaintiffs have already demonstrated that monetary sanctions and admonitions from this Court have no impact on their conduct."[4] More specifically, the Plaintiffs' dilatory pace, according to Advent, has seriously impaired its ability to defend itself in this action because the key individuals involved in the acquisition are no longer employed by Advent and knowledge of important facts may have been forgotten because of the significant passage of time.[5] Advent also suggests that dismissal is warranted because the Plaintiffs have repeatedly delayed prosecuting this action and have previously disregarded Court of Chancery Rules and this Court's orders.[6]

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[4] Def.'s Opening Br. in Supp. of Mot. to Dismiss for Failure to Prosecute at 8.

[5] Advent also contends that the Plaintiffs' lack of diligence in prosecuting this matter has caused Advent to incur additional litigation costs; for example, increased attorneys' fees resulting from having to re-educate its lawyers about the litigation and ongoing data storage and preservation costs. For that reason, Advent requests that the Court impose sanctions in the amount of $252,623.47 to offset its storage and preservation costs if the Court does not grant the motion to dismiss for failure to prosecute. The Court considers this request below.

[6] In support of this contention, Advent points to the following: (1) the Plaintiffs only responded to Advent's discovery requests after a three-year delay and the entry of an order of this Court granting Advent's motion to compel; (2) in that order, the Court required the Plaintiffs to pay $6,500, which it found to be the reasonable expenses related to Advent's motion; (3) the Plaintiffs failed to comply with the Court's order to pay fees and costs until the Court issued a second order; and (4) although required by court order to produce all responsive documents to Advent's request in September 2008, the Plaintiffs supplemented their production in November 2010 with additional responsive documents.

In response, the Plaintiffs argue that dismissal is not warranted. They contend that they are now diligently prosecuting this action and have not violated any Court of Chancery Rules or court orders. Any prejudice to Advent, according to the Plaintiffs, is speculative and minimal. Although the Plaintiffs concede that the Court earlier concluded that they had unreasonably delayed in producing documents, they assert that the record does not show any other missed deadlines or noncompliance with this Court's orders. Because of their now active prosecution of this action, the Plaintiffs suggest that the Court should "impose a strict case schedule"[7] and deny Advent's motion to dismiss for failure to prosecute.

The Plaintiffs' inactivity has caused significant and excessive delay in preparing this action for trial. Their failure to move the case forward has resulted in piecemeal discovery with long and unnecessary gaps between those efforts. Perhaps more troubling is that the Plaintiffs appear to have ignored the clear message of a September 22, 2008 letter opinion where the Court admonished the Plaintiffs for their "beyond unreasonable" delay in responding to Advent's discovery request; remarkably, even after the Court granted Advent's motion to

[7] Pls.' Answering Br. in Opp'n to Def.'s Mot. to Dismiss for Failure to Prosecute at 17.

compel and awarded it fees and costs under Court of Chancery Rule 37(a)(4)(A), the Plaintiffs continued the sluggish pace of this litigation. Not only have they failed to diligently prosecute their claims, but they offer little, if any, good reason for their inaction.

Nevertheless, although Advent has likely suffered some adverse effects as a result of the Plaintiffs' delay and may bear some prejudice because the events giving rise to this action primarily occurred nearly a decade ago, the Court is not convinced that these circumstances necessitate dismissal. That conclusion is guided by the Court's preference for resolving cases on the merits and because the Plaintiffs appear to have renewed their efforts to diligently prosecute this matter[8]—notably, Advent did not file its motion to dismiss for failure to prosecute until after the Plaintiffs had resumed actively pursuing their claims.[9] Thus, although the Plaintiffs' inactivity tests the outer reaches of the Court's willingness to deny a motion to dismiss for failure to prosecute, the better course of action in this instance is for the Court to decline to exercise its discretion to dismiss.

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[8] *In re Cencom Cable Income P'rs, L.P.*, 2006 WL 452775, at *2 (Del. Ch. Feb. 16, 2006).

[9] Although the docket reflects no activity from January 2009 through November 2010, the Plaintiffs filed a series of motions for commission on December 6, 2010, validating their argument that they had renewed their discovery efforts. Shortly thereafter, on December 8th, Advent filed its motion to dismiss for failure to prosecute.

For the foregoing reasons, Advent's motion to dismiss for failure to prosecute is denied.[10] Counsel are requested to confer and to promptly submit a case scheduling order so that discovery may be completed[11] and a trial date may be established.[12]

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

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[10] The Court's denial of Advent's motion to dismiss for failure to prosecute renders moot the Plaintiffs' motion for leave to submit a supplemental affidavit.

[11] With its motion to dismiss, Advent simultaneously filed its opposition to the Plaintiffs' motions for commission to take out-of-state depositions. Because the Court will not dismiss this action for failure to prosecute, a response to the issues raised in the parties' briefs relating to the Plaintiffs' discovery motions is warranted. Despite their delay in prosecuting this matter, the Plaintiffs' discovery will likely include the taking of depositions. It does not appear that time is of the essence in conducting that discovery. Nonetheless, consistent with its ruling, the Court is hopeful that discovery will conclude in the near future. For that reason, in establishing a case scheduling order, the parties are expected to confer with regard to the scope and number of depositions needed by both sides so that discovery may be completed without further delay.

[12] Advent's request for sanctions in the form of the payment of data storage and preservation fees is also denied. Some of the $252,623.47 of storage fees claimed to have been incurred by Advent during the periods of inactivity (*see* Decl. of Robert Petrini ¶ 4) likely would have resulted even if the litigation had been diligently prosecuted. The Court is disinclined to speculate as to what portion of those costs should be attributed to that expected amount in contrast to the costs resulting solely from the delay and, as a result, it will not grant sanctions in the form requested by Advent.