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Re: *Tooley, et al. v. AXA Financial, Inc., et al.*
Civil Action No. 18414

Dear Counsel:

Pending before the Court is defendants' motion to dismiss, which together with the amended complaint implicates this question: when do stockholders who have tendered their stock pursuant to an ongoing tender offer obtain an enforceable expectancy interest in the sale proceeds? Based on the unusual circumstances here, I conclude that stockholders do not obtain an enforceable expectancy interest in the proceeds of a tender offer until the offer closes on its own terms. But, I also conclude that, in the circumstances of this case, the stockholders who tendered their stock had a right to be treated equally by their board of directors, and that the board may

have breached its fiduciary duty by causing a postponement of the tender offer's closing so as to benefit a controlling stockholder and, concomitantly (if incidentally), to disadvantage the minority stockholders.

I. BACKGROUND FACTS

Plaintiffs are former stockholders of Donaldson, Lufkin & Jenrette, Inc. ("DLJ"), a Delaware corporation that provides various investment and banking services to institutional, governmental and individual clients. Before its acquisition by Credit Suisse Group ("CSG"), DLJ's largest stockholder was AXA Financial, Inc., owning approximately 71% of DLJ. AXA Financial, in turn, was majority owned (approximately 60%) by its parent, AXA. All the individual defendants are former directors of DLJ. In addition to being former DLJ directors, defendants Chalstry, Castries, Hegarty, Miller, Tulin, Duverne, Hottinguer and Jarmain were all either directors or executives of AXA or its affiliates.

On August 30, 2000, AXA Financial announced that CSG and DLJ had entered into a $13.4 billion merger agreement. The merger agreement was between CSG, Diamond Acquisition Corporation,[1] and DLJ, and expressly disavowed any third-party beneficiaries to the contract. Credit

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[1] Diamond Acquisition Corporation was a wholly owned subsidiary of CSG, formed to effect the merger. For purposes of this Opinion, I treat Diamond Acquisition the same as CSG.

Suisse agreed to acquire the publicly owned shares of DLJ for $90 cash per share through a tender offer followed by a merger for any untendered shares. Simultaneously, AXA entered into a separate stock purchase agreement with Credit Suisse providing for the sale of AXA's stake in DLJ to Credit Suisse for a combination of approximately 70% in Credit Suisse stock and 30% in cash, which was equivalent to the $90 cash the public stockholders would receive. The tender offer was intended to expire twenty days after its commencement, unless the offer was extended.

The merger agreement provided for two types of extensions for the tender offer period. The first, a five-day extension, could be invoked without DLJ's consent if payment obligations were not satisfied, as required by the SEC, or if more than 10% but less than 20% of all outstanding DLJ shares were tendered.[2] The second type of extension allowed CSG to extend the offer under various enumerated conditions, one of which included an agreement between DLJ and CSG to postpone acceptance of DLJ stock for payment.[3] CSG exercised both of these extensions.

CSG began its tender offer on September 8, 2000, which was set to expire on October 5, 2000. CSG then invoked the five-day extension of the

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[2] *See* Merger Agreement, § 2.01(a).
[3] *Id.* at Annex A.

offer as contemplated by section 2.01(a)(iii) of the merger agreement. At the end of the five-day extension, the parties (CSG and DLJ) agreed to a second extension of the offer in a letter agreement. Plaintiffs allege that the second extension was entered into because AXA wanted the second extension for its own benefit, and the AXA dominated DLJ board therefore agreed to the second extension. The letter agreement amended various terms of the merger agreement and extended the tender offer until November 2, 2000, twenty-two days after the expiration of the first extension. In the letter agreement, CSG also removed several contingencies set forth in the merger agreement—including a material adverse change contingency, and representations and warranties—deeming them satisfied by DLJ. The tender offer closed on November 2, 2000, and the public minority stockholders were cashed out for $90 per share shortly thereafter.

Plaintiffs' original complaint, which was grounded in identical facts as the current complaint, alleged that the second extension was not authorized by the merger agreement, lacked consideration, and was wrongfully approved by an interested board solely to accommodate the administrative needs of AXA Financial. Plaintiffs contended that this was a breach of the DLJ board members' duty of loyalty, because the board had a duty to proceed with the tender offer so that the DLJ stockholders would

receive cash for their shares as soon as legally possible. Plaintiffs contended that they were injured because they lost the time value of the consideration paid for their shares.[4] This Court dismissed the original complaint, holding that plaintiffs lacked standing to bring a derivative claim, as they were no longer DLJ stockholders at the time of the lawsuit.[5] In addition, plaintiffs had not alleged a specific injury and, therefore, had failed to allege a direct claim.[6]

In determining whether plaintiffs had standing to bring a direct claim, I applied the "special injury" test which required that a plaintiff demonstrate a wrong that "is separate and distinct from that suffered by other shareholders, … or a wrong involving a contractual right of a shareholder."[7] I concluded that because all stockholders received the same consideration for their shares, and because all were equally delayed as a result of the

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[4] *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 2003 WL 203060, at *2 (Del. Ch. Jan. 21, 2003).

[5] *Id*. at *2. Court of Chancery Rule 23.1 requires that a derivative action may only be maintained by stockholders of a corporation. Thus, standing to bring a derivative action is extinguished when a stockholder sells its shares in the corporation, even if the stockholder initially had standing to bring the suit.

[6] *Tooley*, 2003 WL 203060, at *3-4.

[7] *Id*. at *3 (*quoting Moran v. Household Int'l Inc.,* 490 A.2d 1059, 1070 (Del. Ch. 1985)). The special injury test is no longer the method for determining whether a party has a direct or derivative claim. A new analytical method was announced by the Supreme Court in this case. *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2003).

second extension, that all stockholders were treated equally and, therefore, plaintiffs suffered no special injury.[8]

Turning to the plaintiffs' contract claim, I found that not only did the merger agreement specifically disclaim any persons as being third party beneficiaries to the contract, but also that any contractual stockholder right to payment of the merger consideration did not ripen until all the conditions of the agreement were met.[9] Because the merger agreement stated that CSG and DLJ were entitled to extend the tender offer period (and in fact did so), the merger agreement only became binding at the time the shares were accepted for payment, and the stockholders had no enforceable individual *contract* right to payment before that date.[10] Therefore, the stockholders had no contractual basis to challenge the twenty-two day delay in the closing of, or for payment on, the tender offer before its official closing on November 2, 2000. Because the plaintiffs lacked standing to bring a derivative claim and because the plaintiffs did not have a valid contract claim, I dismissed their claims.

On appeal, the Supreme Court agreed that the plaintiffs failed to state a derivative claim but its finding in this regard was based on its

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[8] *Tooley,* 2003 WL 203060, at *4.
[9] *Id.* at *3.
[10] *Id.* (emphasis added).

determination that there was no potential relief that would go to the corporation and no injury to the corporation was alleged.[11] Turning to the contract claim, the Supreme Court then stated the following:

> [t]he trial court analyzed the complaint and correctly concluded that it does not claim that the plaintiffs have any rights that have been injured. Their rights have not yet ripened. The contractual claim is nonexistent until it is ripe, and that claim will not be ripe until the terms of the merger are fulfilled, including the extensions of the closing at issue here. Therefore, there is no direct claim stated in the complaint before us.[12]

Finally, the Supreme Court determined that the interests of justice would best be served if plaintiffs were permitted to replead their contract claim.

Plaintiffs' current complaint asserts that as a result of CSG's October 6, 2000 five-day extension of the tender offer, plaintiffs had a valid expectancy interest in the proceeds of the tender offer that became ripe as of October 11, 2000, and that they were subsequently denied these proceeds because the closing of the tender offer was delayed by another extension agreed to by CSG and DLJ. Plaintiffs note the terms of CSG's five-day extension state that such an extension can be exercised only when "all of the conditions to Purchaser's obligations to accept for payment Shares are satisfied or waived." By exercising this extension, plaintiffs argue, CSG

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[11] *Tooley,* 845 A.2d at 1039.
[12] *Id.*

implicitly stated that all stockholders could expect payment at the end of the five-day extension, on October 11, 2000, because there were no conditions left to be fulfilled. Plaintiffs insist that because of these terms, they had a valid expectancy interest in the proceeds of the tender offer, and that the AXA Financial and DLJ directors breached their duty of loyalty to DLJ's public stockholders by agreeing to the extension with CSG for the sole purpose of providing an "administrative benefit" to AXA Financial. This is the claim that defendants have now moved to dismiss.

II. ANALYSIS

When considering a motion to dismiss under Rule 12(b)(6), the Court must assume the truthfulness of all well-pled allegations in the complaint and view those facts, and all reasonable inferences drawn from them, in the light most favorable to the plaintiff.[13] Dismissal is appropriate under Rule 12(b)(6) only when it appears with reasonable certainty that the plaintiff would not be entitled to relief under any set of facts that can be inferred from the pleadings.[14]

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[13] *See Anglo Am. Sec. Fund, L.P. v. S.R. Global*, 829 A.2d 143, 148-9 (Del. Ch. 2003).
[14] *See Leonard Loventhal Account v. Hilton Hotels Corp.,* 2000 WL 1528909, at *3 (Del. Ch. Oct. 10, 2000); *Solomon v. Pathe Communications Corp*., 672 A.2d 35, 38 (Del. 1996).

A. Expectancy Interest

The merger agreement itself specifically disclaims any persons as being third party beneficiaries to the contract. Additionally, it is the law of the case that plaintiffs cannot bring a valid contract claim under the merger agreement because their right to payment under the tender offer would not ripen until all the terms of the merger agreement were fulfilled, including the extensions provided for in the merger agreement.[15] Therefore, plaintiffs could not bring a valid contract claim for payment on the shares tendered before the closing of the tender offer, the end of the agreed upon CSG/DLJ extension. In order to state a non-contract claim for the time value of the money allegedly lost as a result of the delay in payment from October 11 to November 2, plaintiffs have taken a novel route, an expectancy interest theory.

Plaintiffs argue that, while section 2.01(a)(iii) gave CSG the right to a five-day extension, when such an extension was taken CSG implicitly agreed that all conditions to its obligation to pay for the tendered shares were either met or waived. Therefore, when CSG took the five-day extension,

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[15] *See Tooley*, 845 A.2d at 1039 ("Their rights have not yet ripened. The contractual claim is nonexistent until it is ripe, and that claim will not be ripe until the terms of the merger are fulfilled, including the extensions of the closing at issue here."); *Tooley*, 2003 WL 203060, at *3-4.

CSG also implicitly agreed to purchase the tendered shares at the end of that extension, entitling the plaintiffs to payment. Plaintiffs further assert that CSG and DLJ directors had a fiduciary duty to protect the plaintiffs' interest in the proceeds from the tender offer and that they breached their fiduciary duty of loyalty to plaintiffs by extending the close of the tender offer for another twenty-two days, solely to benefit AXA Financial, at plaintiffs' expense.

Basic principles of contract interpretation hold that when a contract is clear on its face, the Court should rely solely on the clear, literal meaning of the words contained in the contract.[16] Plaintiffs would have the Court read the merger agreement so that implied in the section 2.01(a)(iii) extension is an agreement by CSG that they would pay on the tendered shares at the close of the five-day extension, thereby entitling plaintiffs to relief if in fact the directors did breach their duty of loyalty. Having thoroughly examined the merger agreement, however, I cannot reasonably reach this conclusion; nor can I find any construction of the merger agreement (when taken as a whole) that could reasonably support this conclusion.

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[16] *See Myers v. Myers*, 408 A.2d 279, 281 (Del. 1979); *Aspen Advisors LLC v. United Artists Theatre Co.*, 843 A.2d 697, 704-05 (Del. Ch. 2004).

Annex A of the merger agreement states that:

> [*n*]*othwithstanding any other provision of the Offer,* [CSG] shall not be required to accept for payment any shares tendered pursuant to the Offer, and may extend, terminate or amend the Offer, if … (ii) at any time on or after the date of this Agreement and prior to the expiration of the Offer, any of the following conditions shall exist: … (f) *[CSG] and [DLJ] shall have agreed that [CSG] the shall terminate Offer or postpone the acceptance for payment of Shares thereunder*.[17]

This language, especially the "notwithstanding any other provision of the Offer" caveat, clearly contemplates that regardless of other extensions the parties may have already taken advantage of, the parties have an unobstructed right to enter into an extension under this clause. There are no exceptions carved out for an extension taken under section 2.01(a)(iii). The plain language clearly states and, in fact, the only reasonable reading of the merger agreement indicates that the extension contracted for in Annex A is independent of the extension in section 2.01(a)(iii), and both parties had the ability to enter into an extension under Annex A at any point in the agreement, even after the section 2.01(a)(iii) extension was taken. Under no construction of the merger agreement, therefore, could plaintiffs reasonably have held an expectancy interest in the proceeds from the merger agreement

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[17] Merger Agreement, Annex A (emphasis added).

at the conclusion of the five-day extension solely because such extension was taken.

Based upon a far simpler theory than plaintiffs have heretofore presented, however, I conclude that plaintiffs have asserted adequately (albeit barely) a claim arising from the DLJ board's agreement to extend the tender offer. Plaintiffs' contention is that the majority stockholder, AXA Financial, was treated *differently* by DLJ's board of directors and that that differential treatment negatively affected the minority stockholders (by delaying their payment). The DLJ board, as do the boards of all Delaware corporations, had a fiduciary duty, all other things being equal, to ensure that all stockholders were treated alike and that no one stockholder received a benefit at the cost of another. Likewise, even though plaintiffs had no right to payment under the contract until the conditions precedent to closing had been met, they did have the right to be treated fairly by the board of directors in making decisions that would affect the closing date. I conclude, therefore, that plaintiffs have a right that can be asserted in connection with this transaction without resorting to contract or expectancy interest theories. Broadly speaking, the plaintiffs' claim arises from the DLJ board's duty not

to treat one stockholder more generously at the expense of another stockholder.[18]

B. Breach of Duty of Loyalty

Next, I must consider whether plaintiffs have overcome the business judgment rule because, although plaintiffs have a right to be treated fairly, they are challenging the actions of DLJ's board and to do so they must allege facts sufficient to rebut the business judgment rule. The business judgment rule provides that "[a] board of directors enjoys a presumption of sound business judgment, and its decisions will not be disturbed if they can be attributed to any rational business purpose."[19] Plaintiffs meet their burden through well-pled allegations that adequately allege that the director defendants breached their duties of loyalty or due care.[20] At this juncture, I

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[18] The idea that all stockholders should be treated equally does not apply in every circumstance, and there are occasions where boards of directors are permitted to treat different groups of stockholders differently, as long as it is in accordance with their fiduciary duties. *See Unocal Corp. v. Mesa Petroleum Corp.*, 493 A.2d 946, 956-957 (Del. 1985)(holding that a discriminatory selective exchange offer was valid "[i]f the board of directors is disinterested, has acted in good faith and with due care, its decision in the absence of an abuse of discretion will be upheld as a proper exercise of business judgment."); *Nixon v. Blackwell*, 626 A.2d 1366, 1377 (Del. 1993)("It is well established in our jurisprudence that stockholders need not always be treated equally for all purposes."); *Cheff v. Mathes*, 199 A.2d 548, 554-56 (Del. 1964). These cases demonstrate that a board of directors, in certain circumstances, may treat different classes of stockholders unequally. In doing so, however, they must satisfy the full import of their fiduciary duties.

[19] *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971).

[20] *Citron v. Fairchild Camera & Instrument*, 569 A.2d 53, 64 (Del. 1989).

conclude that plaintiffs have (barely) alleged sufficient facts to rebut the presumption of the business judgment rule.

The only facts that plaintiffs have asserted to rebut the presumption of the business judgment rule are that the defendant directors agreed to the second extension because AXA Financial dominated the DLJ board and because AXA Financial determined it would benefit from the extension because of administrative needs.[21] Unfortunately for defendants, this fact alone is, in my opinion, barely sufficient to rebut the business judgment rule. Plaintiffs allege that AXA Financial benefited from the extension by gaining extra time for their administrative needs and perhaps saving money on administrative fees. AXA Financial thus received a benefit that the other stockholders did not receive, and at the expense of the other stockholders who lost the time value of the proceeds of the tender offer. Additionally, plaintiffs assert that AXA, whose payout was 70% equity and 30% cash, was harmed proportionately less by the delay than the plaintiffs whose payout was 100% cash, because only 30% of AXA's payout was affected by the second extension. Plaintiffs assert that, because the defendants took action

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[21] Plaintiffs allege no specific facts to support this conclusion. Nevertheless, as the Court is charged under Rule 12(b)(6) with viewing all facts in the light most favorable to the nonmoving party, the plaintiffs get the benefit of the doubt that the extension was in fact motivated because AXA Financial needed extra time to cope with administrative needs.

that favored the interests of the majority stockholder over those of the minority stockholders, they have adequately alleged that the defendants breached their duty of loyalty by engaging in self-dealing and their actions should not be protected by the business judgment rule. Plaintiffs believe that the entire fairness test is the appropriate measure of review for defendants' actions.

Predictably arriving at different conclusions, both sides have made efforts to interpret the facts and holding of *Sinclair Oil v. Levien*,[22] a case with similar facts. In *Sinclair Oil*, the plaintiff, a minority stockholder in Sinven, challenged Sinven's payment of large dividends.[23] The plaintiff alleged that Sinven had paid the large dividend because Sinclair Oil, Sinven's majority stockholder, had a dire need for cash at that time and, therefore, Sinclair Oil had engaged in self-dealing.[24] The Supreme Court first stated that "[s]elf-dealing occurs when the parent, by virtue of its domination of the subsidiary, causes the subsidiary to act in such a way that the parent receives something from the subsidiary to the exclusion of, and

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[22] 280 A.2d 717.
[23] *Id.* at 720-21.
[24] *Id.* at 721.

detriment to, the minority stockholders of the subsidiary."[25] The Supreme Court then held that:

> The dividends [that Sinven paid out] resulted in great sums of money being transferred from Sinven to Sinclair. However, a proportionate share of this money was received by the minority shareholders of Sinven. Sinclair received nothing from Sinven to the exclusion of its minority stockholders. As such, these dividends were not self-dealing. We hold therefore that … the business judgment standard should have been applied.[26]

The facts alleged in this case are in many ways similar to those in *Sinclair Oil*. Plaintiffs allege that AXA Financial (the parent), needing additional time for administrative reasons, caused DLJ (the subsidiary) and CSG to enter into an extension of the tender offer pursuant to Annex A of the merger agreement, thereby delaying the closing of the tender offer for twenty-two days. It is not alleged that the amount of consideration being paid to AXA Financial and the minority stockholders was different. All stockholders, both majority and minority, received the same consideration for their shares and all stockholders, both majority and minority, were equally delayed in receiving the proceeds of the tender offer. Like the plaintiff in *Sinclair Oil*, the plaintiffs in this case received the same consideration at the same time as the defendants. Plaintiffs contend that the extra time for administrative

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[25] *Id.* at 720.
[26] *Id.* at 721-22.

needs and potential cost savings on administrative fees coupled with the delay in the payment to the minority stockholders is sufficient to show that AXA Financial, as a result of self-dealing, may have received a benefit from DLJ to plaintiffs' exclusion and detriment.

Sinclair teaches that when a stockholder asserts differential treatment, the motivations of the board are not relevant in determining whether differential treatment occurred, but rather, the end result of the board action is what is relevant.[27] Assuming for the moment that AXA Financial did cause DLJ to extend the tender offer so that AXA Financial could have more time to meet its administrative needs and perhaps avoid certain administrative costs, AXA Financial then in fact did receive something from DLJ *to the exclusion of its minority stockholders*. It is true that AXA Financial did not extract additional money in any explicit form from DLJ's treasury. It is also true that the merger agreement fully authorized the extension at issue. Nevertheless, the claim that the extension enabled AXA Financial to avoid certain administrative costs while at the same time delaying payment of the tender offer proceeds—in which the minority

[27] *Id.* at 721-722. It should be noted, however, that the board's motivations are taken into consideration when reviewing board action that resulted in differential treatment.

stockholders had an immediately realizable interest in light of their cash nature—is sufficient at this stage to survive a motion to dismiss.

What presents itself in this case is an allegation that a majority stockholder caused a board to act so the majority stockholder could obtain additional time to handle administrative duties, with an unknown amount of money saved in the process. This time and cost savings came at the alleged expense of the minority stockholders, whose consideration was all cash and thus liquid. Unlike the plaintiff in Sinclair Oil—who received the exact same benefit as the defendants (a pro rata cash dividend)—AXA Financial allegedly received more than the minority stockholders and, in fact, did so at their expense. I conclude, therefore, that the plaintiffs' pleadings are sufficient, if barely so, to withstand a motion to dismiss.

III. CONCLUSION

For the reasons set forth above, I deny defendants' motion to dismiss plaintiffs' claims. Plaintiffs did not have an enforceable expectancy interest to the sale proceeds based upon a reasonable reading of the merger agreement, but plaintiffs do have the right to be treated fairly by the board of directors in connection with the CSG merger. To the extent plaintiffs allege that one stockholder was improperly benefited at the expense of another, the plaintiffs may pursue that claim. Plaintiffs have overcome the presumption

of the business judgment rule, as they have presented facts suggesting (barely) that the defendants received an unjustified benefit to the exclusion and detriment of plaintiffs. Although there may well be circumstances where the board is justified in treating one class of stockholders differently than another, it is not apparent at this early stage of the litigation that such circumstances exist here. Defendants' motion to dismiss is denied.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

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