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COURT OF CHANCERY COURTHOUSE
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Submitted: July 8, 2005
Decided: July 8, 2005

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Re: *iXCore, S.A.S. v. Triton Imaging, Inc., et al.*
Civil Action No. 1135-N

Dear Counsel:

The Court is in receipt of defendants' motion for reargument of my decision to deny the defendants' motion to dismiss the amended complaint. For the reasons given below, the motion for reargument is denied.

The key issue at this time is whether the transaction challenged in this case, a reverse stock split, is subject to review under the business judgment rule, or whether the more demanding entire fairness standard applies. At this stage, where I must accept all the facts in the complaint as true and draw all reasonable inferences in favor of the plaintiff, entire fairness applies for three independent reasons,[1] and the motion to dismiss must be denied as to Counts I and IV.

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[1] *See In re RJR Nabisco, Inc. S'holders Litig.*, 1989 WL 7036, at *13 (Del. Ch. Jan. 31, 1989).

First, the presumption of the business judgment rule has been rebutted because plaintiff has adequately pled that a majority of the board is not independent as to defendants Newton, Bergensen, and Huff, whose employer would allegedly suffer economic harm if Huff did not accede to Newton's wishes.[2] It is important to understand that this action is direct, not derivative. The importance of that distinction is that plaintiff is not required to plead with particularity why demand should be excused, or more precisely, why a majority of the board was not disinterested and independent such that demand could properly be considered. Defendants' citations to *Delta and Pine Land Co. S'holders Litig.*[3] and *Beam v. Stewart*[4] are not controlling, as the analysis in both of those cases was dependent on the derivative claims asserted therein, where the pleading standard is higher and particularized facts are required, unlike here.

Second, the presumptions of the business judgment rule have been rebutted by the allegations that Triton's board approved the reverse split and the valuation of plaintiff's stock as part of that reverse split without adequate consideration.[5] Allegations such as these, that may indicate a violation of the fiduciary duty of care in considering all material information reasonably available before making a business decision, are sufficient to remove the presumption of business judgment. Third, and along those same lines, there are allegations in the complaint,[6] bolstered by the allegations outlined above regarding due care and independence, that the defendants did not act in good faith in approving the reverse stock split.

Additionally, the motion to dismiss as to Count II must be denied because there are sufficient allegations that Triton did not comply with 8 *Del. C.* § 155 by not paying the fair value of a fractional share to plaintiff because the business judgment rule does not apply to protect the board's determination of fair value. Furthermore, the motion to dismiss as to Count III must be denied because although I may properly take judicial notice of corporate documents filed with the Secretary of State, I elect not to in this

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[2] Am. Compl., ¶¶ 33-38, 48.
[3] 2000 Del. Ch. LEXIS 91 (Jun. 21, 2000).
[4] 845 A.2d 1040 (Del. 2004).
[5] Am. Compl., ¶¶ 26-27, 43-45.
[6] Am. Compl., ¶¶ 32, 41, 68-70.

instance. Although the accuracy of the document presented (the certificate of correction) is not in dispute, the accuracy of the contents of the document is disputed, and indeed contradicted by Newton's original affidavit, which she signed under oath.[7] Therefore, the date on which the Triton board approved the reverse stock split is not a fact that is "either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[8]

For all these reasons, the motion for reargument of my denial of the motion to dismiss must also be denied.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

WBCIII:amf

[7] Defendants' citation to *Belanger v. Fab Indus., Inc.*, 2005 WL 1076064 (Del. Ch. May 2, 2005), and argument that the reverse stock split was not "adopted" by the board until the filing of the certificate of amendment with the Secretary of State is not helpful because the board is statutorily required to approve the reverse stock split *before* it is submitted to the shareholders. 8 *Del. C.* § 242(b).

[8] D.R.E. 201(b).